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IN THE COURT OF COMMON PLEAS
OF CENTRE COUNTY, PENNSYLVANIA
CIVIL ACTION - LAW



ORIGINAL

MICHAEL J. MCQUEARY : NO. 2012-1804
: :
VS : :
THE PENNSYLVANIA STATE UNIVERSITY : :
: :

TRANSCRIPT OF PROCEEDINGS
(ON THE RECORD DISCUSSION IN CHAMBERS PRIOR TO START
OF TRIAL)

BEFORE: THOMAS G. GAVIN, SENIOR JUDGE
SPECIALLY PRESIDING
15TH JUDICIAL DISTRICT

DATE: OCTOBER 17, 2016

PLACE: CENTRE COUNTY COURTHOUSE ANNEX
ANNEX COURTROOM
108 SOUTH ALLEGHENY STREET
BELLEFONTE, PA 16823

APPEARANCES:

FOR THE PLAINTIFF:
ELLIOTT STROKOFF, ESQUIRE
WILLIAM T. FLEMING, ESQUIRE

FOR THE DEFENDANT:
NANCY CONRAD, ESQUIRE
GEORGE MORRISON, ESQUIRE

PROthonotary
CENTRE COUNTY, PA

2016-10-17 11:12:56



ORIGINAL

NOTES BY: JENNIFER AMENTLER
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THE COURT: I thought we would try and get a couple things squared away before openings so everyone knows what's going on. Let's address the whistleblower first. I take it, Ms. Conrad, you and Mr. Strokoff are in agreement that the Court decide the whistleblower.

MS. CONRAD: That is the law.

THE COURT: And the advisory verdict of the jury, we're not going to do that. The Court will decide without an advisory verdict. However, I think to keep everybody in the game, I'm not going to mention that they're not deciding the whistleblower claim. I think that way it will keep everything in context. And I can tell them at the conclusion of the case that as a matter of law the Court will decide that.

MS. CONRAD: Thank you.

THE COURT: Does anybody have any objection to that?

MR. STROKOFF: No, sir.

THE COURT: Now, as part of the opening instructions, we generally talk a little bit about the law. And I have learned that sometimes when I'm talking about the elements of the law, I'm saying

1 that the view of the parties is this, that, or the
2 other thing, only to learn out that's not really the
3 view of the parties at all. So, it seems to me that
4 what would make sense here is to give all of the
5 opening instructions with the exception of any
6 comment of the law until you've both had a chance to
7 open. And then once I know what your positions are,
8 then I can briefly talk about the law. And I don't
9 intend to talk about it to any great extent because
10 I think doing so really isn't going to be helpful.

11 I think, off the top of my head, on the
12 defamation, there's no question something got sent,
13 there's no question people read it, and the issue is
14 whether the person who read it took it in a manner
15 that was defamatory to Mr. McQueary or whether they
16 did not and whether it was a statement of fact or
17 statement of opinion.

18 And the same thing with regard to the
19 misrepresentation, that seems the easiest thing to
20 say is that, and I'm assuming you're going to say
21 it, the contention is I went and I told him X, Y,
22 and Z and they said they'd do A, B, and C and I
23 relied on it and they didn't. And the flip side is
24 going to be -- well, I don't know what the flip side
25 is going to be, that's why I want to be careful and

1 wait until I hear what the flip side is. So once I
2 hear that, maybe what we'll do is we'll just take a
3 sidebar conference and I'll tell you generically
4 what I would explain them the law to be. And then
5 that way I'm not sticking my foot in where it
6 doesn't belong, in the opening anyhow. So we can do
7 that.

8 MS. CONRAD: Judge, will you reference the
9 whistleblower so it's --

10 THE COURT: I am going to -- yeah.

11 MS. CONRAD: Thank you.

12 THE COURT: And I'm simply going to say to
13 them that, you know, again, his contention is
14 because he came forward he was dismissed, your
15 contention is he wasn't selected and his contract
16 was up.

17 MS. CONRAD: Thank you.

18 THE COURT: I don't think we need to say a
19 lot more than that. I'm assuming you're both going
20 to wax eloquent about that.

21 Okay. McQueary is a public figure. You both
22 have to commend you have wonderful secretaries who
23 would be in on Sunday to be working as diligently as
24 the lawyers on Sunday were working. I can tell you
25 that my wife was unhappy when I kept looking at my

1 cell phone during her dinner, but that's another
2 matter.

3 So I'll hear you on the whistleblower. I've
4 read both positions and if you want to any further
5 discussion, I'll hear it.

6 MR. STROKOFF: The whistleblower or the
7 public?

8 THE COURT: I'm sorry. On the public figure.
9 Public figure.

10 MS. CONRAD: And Your Honor, we certainly can
11 brief this issue. I don't know that this is an
12 issue that has to be decided at this stage if Your
13 Honor wanted to hear more of the evidence.

14 THE COURT: Well, I think I'm giving credit
15 to whoever bringing up the idea that he set the
16 passing record and was so famous 15 years ago. But
17 I think the issue really is, was he a public figure
18 on the day the email went out? And while there's no
19 question that Mr. Paterno was a public figure, the
20 guy's walking up and down the sideline. And unless
21 you were devoted as some of the prospective jurors
22 were to Penn State football, you'd have no idea who
23 that person was and could care less. And so, I
24 mean, I'll give you a chance to brief it further,
25 but I do not see any way that Mr. McQueary was a

1 public figure at the operative time. Clearly he's
2 one now, but that's not what's controlling the
3 issue.

4 MS. CONRAD: And we would request the
5 opportunity to further brief that he was a limited
6 public figure, purpose public figure at the time --

7 THE COURT: And again, limited -- a citizen
8 who comes forward and does their duty by reporting
9 something, and again, I'm just saying that's the
10 contention, is hardly a willing participant. No
11 person in their right mind willingly gets involved
12 in any kind of litigation, civil or criminal. So,
13 you know, to assert that by stepping forward he
14 somehow injected himself and became a willing
15 participant, I don't see it. But I'll give you the
16 chance to brief it.

17 MS. CONRAD: Thank you, sir.

18 THE COURT: I'm not going to make any comment
19 in my openings about the adverse inferences, Fifth
20 Amendment issues, any of that. We can wait until
21 all of that arises. And I will tell the jury as
22 regarding the law, and I will be instructing them on
23 various other matters. Did we resolve the motion in
24 limine about the characterization of the file? I
25 believe we did, but --

1 MR. STROKOFF: Confidential.

2 MS. CONRAD: And I believe we agreed no
3 reference to the victim settlements.

4 MR. STROKOFF: Like I said, I never imagined
5 it.

6 MS. CONRAD: Thank you.

7 THE COURT: Okay. So I think that sort of
8 covers what was on my checklist. If you folks have
9 something on your checklists, let's get to it.

10 MR. STROKOFF: Okay. With respect to the
11 adverse interest, I tendered a proposed stipulation
12 on how to deal with the Curley and Shultz to Ms.
13 Conrad, so I would hope some time within the next
14 day or so we can --

15 THE COURT: Did I get a copy of that?

16 MR. STROKOFF: No, because I wanted her to
17 weigh in before we bothered Your Honor.

18 MS. CONRAD: And when did you send that?

19 MR. STROKOFF: Friday.

20 MS. CONRAD: I have not been in the office.

21 MR. STROKOFF: George, you got it, right?

22 MR. MORRISON: I did see the email, yes.

23 MR. STROKOFF: I have copies of it somewhere,
24 Your Honor.

25 MS. CONRAD: We will make that a priority to

1 review.

2 MR. STROKOFF: Then the other thing has to do
3 with the depositions. We have three depositions,
4 Coach Bradley, Coach Wilson, and David Joyner. And
5 my original intent was to have Tim be the deponent,
6 but Nancy objected to that. What I frankly was
7 expecting is that with all the witnesses that we
8 have coming in and Murphy's Law being what it is,
9 these depositions could very well, if we're ready to
10 go with them, slide in so there's no down time. So
11 the question is, if it's not going to be Tim, then
12 we really have to have somebody standing by. But
13 sometimes, Your Honor, I just play both parts.

14 MS. CONRAD: We have readers available and
15 can be here tomorrow if -- now we just received the
16 two depositions transcripts of Bradley and Joyner
17 last night.

18 MR. STROKOFF: You need the designations.

19 MS. CONRAD: The designations last night. We
20 have not had an opportunity to produce our
21 designations to Elliot.

22 THE COURT: So are we that concerned that Mr.
23 Fleming is going to read like Shakespeare and hit
24 all the appropriate points that he wants
25 dramatically and then go flat on everything else?

1 MS. CONRAD: Your Honor, these are former
2 employees of Penn State. And to have Plaintiff's
3 counsel rise from his seat next to Plaintiff and go
4 up to the witness stand and read as a Penn State
5 witness is just too confusing to the jury and sends
6 a wrong message.

7 MR. STROKOFF: Well, if the readers are going
8 to be available on demand, then --

9 MS. CONRAD: I will have readers here
10 tomorrow morning.

11 MR. STROKOFF: Well, I don't think I need
12 them in the morning. Perhaps the afternoon.

13 MS. CONRAD: The afternoon? Okay.

14 THE COURT: So they're not going to be from
15 the theater department and read as you worry about
16 Mr. Fleming, right?

17 MS. CONRAD: I hadn't thought about the
18 theater department.

19 THE COURT: Well, there you go.

20 MS. CONRAD: Thank you, sir.

21 MR. STROKOFF: Just so you know, Meryl Streep
22 was not available.

23 THE COURT: Okay. What else?

24 MR. STROKOFF: On the adverse interest issue,
25 we've received, that is Nancy and I have received,

1 communications from the lawyers from Curley and
2 Schultz. And I don't know if Your Honor wants a
3 copy, but they seem to be agreeable to even reading
4 the depositions. But hopefully, we could come up
5 with a stipulation.

6 MS. CONRAD: As I've already indicated,
7 there's no reason to read the deposition because all
8 the deposition is the assertion of the Fifth
9 Amendment. The stipulation that we would propose is
10 that were Mr. Curley, Schultz, and I believe there's
11 a third witness, were to appear here today, they
12 would assert their Fifth Amendment rights and refuse
13 to answer any questions that relate to the claims
14 and the defenses in this matter.

15 THE COURT: Okay. And then from that, your
16 position is but there's no adverse interest because
17 they're not parties and we don't control them,
18 notwithstanding that Penn State is paying their
19 legal fees. And I need to be certain in my own
20 mind, what is the exact status? I thought one of
21 these gentlemen were still somehow on the University
22 faculty or something. They're completely gone?

23 MS. CONRAD: Mr. Schultz and Mr. Curley have
24 no relationship with the University except as former
25 employees.

1 THE COURT: And except that the University is
2 paying their legal defense.

3 MS. CONRAD: Per -- yes, they are.

4 THE COURT: Okay. So that might suggest that
5 you have some leverage over them since their legal
6 expenses are about to begin to get even bigger since
7 I understand the Attorney General withdrew the
8 perjury count.

9 MS. CONRAD: Yes, sir.

10 THE COURT: Well, I won't comment about that
11 on the record, we can discuss that off the record
12 later. But they're in for the failure to report
13 issue. Okay. And of course, that's the inference
14 that he wants drawn that Mr. McQueary told them and
15 they were supposed to do something and they didn't
16 do it, and they're invoking of the Fifth Amendment
17 would probably meet the adverse inference rule for a
18 witness.

19 MS. CONRAD: And Your Honor, if that trial
20 were over, one would assume that Mr. Curley and Mr.
21 Schultz would be here testifying. They have not
22 been convicted. We have not had access to their
23 testimony. They have not testified in their
24 proceedings.

25 THE COURT: Yeah, I understand that. And

1 that's why we're here today because if they go the
2 same way the Sandusky proceedings did, it will be
3 another four years before we're even close to
4 getting a resolution. All right. You can brief it
5 further as you want, but I think you know where I'm
6 aligned at the moment.

7 MR. STROKOFF: Does Your Honor have a
8 reference with respect to openings about leaving
9 counsel table or standing at a podium?

10 THE COURT: My general rule is you can stand
11 any place you want to question as long as you're not
12 blocking the other counsel's view of the jury, et
13 cetera. You don't have to ask my permission to
14 approach a witness, although with the high tech
15 courtroom, that's probably out. We don't have to do
16 that anymore. But no, you can stand wherever you
17 want. I am a stickler, if you address me you stand.
18 And, you know, if you object, I just want to hear
19 the legal basis, I don't want to hear your argument
20 until I ask you for it. And other than that, you've
21 both done this enough times.

22 MS. CONRAD: Elliot, do you have anything
23 else?

24 MR. STROKOFF: Not on my list.

25 MS. CONRAD: Your Honor, many of the

1 witnesses have personal counsel. And their personal
2 counsel appeared at the depositions, asserted
3 objections on behalf of their witnesses. The
4 question is, where are they to sit? And they need
5 to confirm procedures in your courtroom.

6 MR. STROKOFF: These are personal counsel I
7 believe, Your Honor, paid for by Penn State.

8 THE COURT: Well, we won't worry about who's
9 paying for them at the moment. But the question
10 becomes, if none of these witnesses have previously
11 invoked the Fifth Amendment, what right do they have
12 to counsel to advise them as to -- or to have
13 counsel object on their behalf?

14 MS. CONRAD: These witnesses have, in some
15 cases, appeared before the grand jury and are under
16 certain instructions from that proceeding. These
17 witnesses will be appearing in the upcoming criminal
18 proceedings.

19 MR. STROKOFF: Your Honor, unless there's
20 an --

21 THE COURT: Then we're going to have to talk
22 to them since I happen to sit as supervising judge
23 of the eastern state grand jury. I don't know what
24 instructions you could possibly give to a witness
25 that would preclude the witness from revealing

1 anything the witness wants to reveal. So -- and the
2 Attorney General has no objection about that. So --
3 but I think to avoid any problems, when we have such
4 a witness, we'll have to take a break and sit down
5 in a room and say this is the general gist of where
6 we're going, why do you think you have a dog in the
7 fight where you get to say something?

8 MS. CONRAD: And I don't know that they have
9 a dog in the fight, I'm only saying that they
10 appeared at depositions, and you'll agree with me.

11 MR. STROKOFF: Yes.

12 MS. CONRAD: They asserted objections on
13 behalf of their clients.

14 THE COURT: Okay.

15 MS. CONRAD: Your Honor, with the
16 electronics, it is our practice to, when we're
17 introducing an exhibit with the witness, it will
18 appear on the screen in front of her. We will then
19 have the witness authenticate it. And at that time,
20 move it into admission and ask for it to be
21 displayed to the jury. Is that acceptable?

22 THE COURT: Works for me.

23 MS. CONRAD: Thank you. And then finally,
24 following up on Elliot's questions with respect to
25 openings, we do have a demonstrative that we intend

1 to use during opening, which is nothing more than a
2 timeline that tracks the events as identified in the
3 complaint.

4 THE COURT: Okay.

5 MS. CONRAD: Thank you.

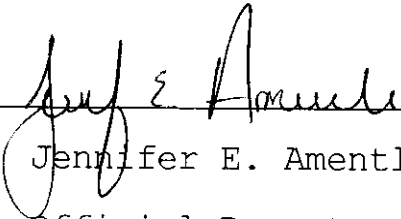
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C E R T I F I C A T E

I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me upon the hearing of the within matter and that this copy is a correct transcript of the same.

11/2/16

Date

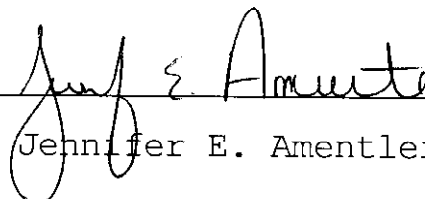

Jennifer E. Amentler
Official Reporter

C E R T I F I C A T E

I hereby certify that a copy of this transcript was made available counsel of record for the parties, advising they had until October 24, 2016, in which to file any objections or exceptions to the same. That time period having elapsed without recording of objections or exceptions, the transcript is therefore lodged with the Court for further action.

11/2/16

Date



Jennifer E. Amentler

Official Reporter

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ACCEPTANCE BY COURT

Upon counsel's opportunity to review and to offer objections to the record, the foregoing record of proceedings is hereby accepted and directed to be filed.

11-2-16



Date

Thomas G. Gavin
Senior Judge
Specially Presiding
15th Judicial District

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