

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

MICHAEL J. MCQUEARY	:	No. 2012-1804
	:	
Plaintiff	:	
	:	
THE PENNSYLVANIA STATE UNIVERSITY	:	
	:	
Defendant	:	

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 DEBRA C. IMMEL
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 CENTRE COUNTY

Attorneys for Plaintiff:
Attorney for Defendant:

Elliot Strokoff, Esq., Timothy Fleming, Esq.
Nancy Conrad, Esq.

Gavin, J.

OPINION AND ORDER

Presently before this Court are the Preliminary Objections of Defendant, The Pennsylvania State University, filed on January 15, 2013. Both parties submitted briefs for the Court's consideration and oral argument was held on March 18, 2013. For the following reasons: the Preliminary Objections are OVERRULED.

Plaintiff, Michael J. McQueary, (hereinafter "McQueary") filed a Complaint on October 2, 2012 including claims for Whistleblower¹, Defamation and Misrepresentation.

In considering preliminary objections in the nature of a demurrer a court must regard all well-pleaded facts as true and resolve any doubt in favor of the non-moving party. *Ham v. Sulek*, 620 A.2d 5, 9, 422 Pa. Super 615, 622-23 (1993). The question presented by the demurrer is whether based on the

¹ In the instant Preliminary Objections, Penn State argued it is unclear whether McQueary was proceeding with a claim under the Whistleblower statute or a common law claim for wrongful discharge. At oral argument, counsel for McQueary stipulated the claim is based on the Whistleblower statute.

facts averred, the law says with certainty that no recovery is possible. *Id.* A demurrer should be sustained only where a plaintiff has clearly failed to state a claim under any theory of law. *Id.*

In considering preliminary objections for insufficient specificity in pleading under Pennsylvania Rules of Civil Procedure 1028(a)(3), the inquiry is "whether the complaint is sufficiently clear to enable the defendant to prepare his defense, or whether the plaintiff's complaint informs the defendant with accuracy and completeness of the specific basis on which recovery is sought so that he may know without question upon what grounds to make his defense." *Rambo v. Greene*, 906 A.2d 1232, 1236, 2006 Pa. Super. 231 (2006).

Discussion

I. Defamation

Defendant, The Pennsylvania State University, (hereinafter, "Penn State") raised a Preliminary Objection in the nature of a demurrer to dismiss McQueary's Defamation Claim at Count II of the Complaint for legal insufficiency. Penn State argues McQueary failed to set forth a viable defamation claim in failing to establish the defamatory nature of the statement either per se or by innuendo and in failing to relate the statement to himself.

The elements of a defamation claim are: 1) defamatory character of the communication, 2) publication by defendant, 3) application to plaintiff, 4) understanding by recipient of a defamatory meaning, 5) understanding by the recipient of the intended application to plaintiff, 6) special harm resulting to plaintiff from publication, and, 7) abuse of a conditionally privileged occasion. 42 Pa.C.S. § 8343 (a), *Agriss v. Roadway Exp., Inc.*, 324 Pa.Super. 295, 483 A.2d 456 (1984). Penn State argues this Court should sustain its Preliminary Objection based on McQueary's failure to aver elements one and three above.

McQueary bases his defamation claim on a statements made by Graham Spanier (hereinafter "Spanier"), former President of Penn State. The first statement was released on November 5, 2011 on Penn State Live:

The allegations about a former coach are troubling, and it is appropriate that they be investigated thoroughly. Protecting children requires the utmost vigilance.

With regard to the other presentments, I wish to say that Tim Curley and Gary Schultz have my unconditional support. I have known and worked with Tim and Gary for more than 16 years. I have complete confidence in how they have handled the allegations about a former university employee.

Tim Curley and Gary Schultz operate at the highest levels of honesty, integrity and compassion. I am confident the record will show that these charges are groundless and that they conducted themselves professionally and appropriately.

McQueary avers that Spanier made a second verbal statement on November 7, 2011, during a meeting with the athletic staff in which he reiterated the content of the press release via Penn State Live.

At the preliminary objection state, the court should consider whether the publication is "capable of the defamatory meaning" ascribed to it by the non-moving party. *MacElree v. Philadelphia Newspapers, Inc.*, 544 Pa. 117, 123, 674 A.2d 1050, 1053 (1996). In the present matter, the publication is capable of a defamatory meaning. Spanier stated that Timothy Curley (hereinafter "Curley") and Gary Schultz ("Schultz") operate at the highest levels of honesty and integrity and the charges against them relating to dishonesty in their testimony before the grand jury are "groundless." In reviewing the statements in proper context as this Court must, *see Agriss v. Roadway Express, Inc.*, 334 Pa. Super. 295, 308, 483 A.2d 456, 463 (1984), if the charges against Curley and Schultz for perjury in their testimony concerning McQueary's report to them regarding what he witnessed in a shower of the Lasch Football Building between Gerald Sandusky and a young boy are groundless, one cannot help but deduce that McQueary's contradictory testimony is untruthful. Dishonesty before a grand jury bears criminal

culpability and is obviously of a nature to "blacken a person's reputation or expose him to public hatred, contempt or ridicule." *See id.* at 304-305. The application to McQueary is especially understandable to the listener or reader because Spanier references the "presentments" of the grand jury which set forth a summary of the testimony of Curley, Schultz and McQueary and the grand jury's conclusions that Curley and Schultz were not honest in their testimony and recommended perjury charges. Based on these considerations, the application to Plaintiff, taken in context, is clearly averred in the Complaint. Therefore, Plaintiff has plead all of the necessary elements of a defamation claim and the Preliminary Objection is overruled.

II. Misrepresentation

Penn State also raised a Preliminary Objection in the nature of a demurrer to dismiss McQueary's Misrepresentation Claim at Count III of the Complaint for legal insufficiency. Penn State argues that McQueary's Misrepresentation claim is based on a non-actionable future promise and the alleged misrepresentation occurred too long ago to have proximately caused any of the alleged damages.

In order to successfully state a claim for intentional misrepresentation, a plaintiff must aver: 1) a representation, 2) which is material to the transaction at hand, 3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false, 4) with the intent of misleading another into relying on it, 5) justifiable reliance on the misrepresentation, and, 6) the resulting injury was proximately caused by the reliance. *Bortz v. Noon*, 556 Pa. 489, 498, 729 A.2d 555, 560 (1999). In their Preliminary Objections, Penn State questioned whether McQueary is proceeding under a claim of intentional or negligent misrepresentation. At oral argument, counsel for McQueary stipulated that he is proceeding under a theory of intentional misrepresentation.

The alleged misrepresentation at issue is the communication to McQueary that Curley and Schultz understood the incident McQueary observed in a shower in the Lasch Building was serious and they

would see the matter was properly investigated and appropriate action taken. Penn State argues this is a non-actionable promise to take future action. However, "a statement of present intention which is false when uttered may constitute a fraudulent misrepresentation of fact." *Brentwater Homes v. Weibly*, 471 Pa 17, 23, 369 A.2d 1172, 1175 (1977). McQueary averred that Curley and Schultz had decided to pursue a course of action to avoid investigation of the incident between Gerald Sandusky and the boy in the shower and to keep it a secret before they communicated to McQueary that they would take action. Secondly, Penn State argues the misrepresentation occurred too long ago to have proximately caused damages to McQueary. Appellate courts have not established any specific time frame limiting damages. This Court must consider whether it can with certainty conclude that the alleged misrepresentation could not have been a substantial factor in bringing about the alleged damages. *See Taylor v. Jackson*, 164 Pa.Cmwlth. 482, 643 A.2d 771, 776 (1994), quoting comment (f) of the Restatement (Second) of Torts § 433(c). At this stage, this court cannot so conclude and; therefore, the Preliminary Objection is overruled.

III. Insufficient Specificity in Pleadings

Penn State complains the claims contained in the Complaint are not plead with sufficient specificity. Upon review of the Complaint, this Court finds the pleadings are sufficiently specific to allow Penn State to formulate an Answer and prepare a defense. As discussed above, the facts underlying the defamation claim were plead with sufficient supporting factual averments. Also, McQueary stipulated he is not pursuing a common law claim for wrongful discharge or a negligent misrepresentation claim; although, this Court considered the nature of the Whistleblower and Misrepresentation quite obvious from the pleadings.

Penn State further argues the claim for Punitive Damages should be dismissed because McQueary failed to aver a factual basis to establish that Penn State acted with actual malice or reckless disregard to the rights of others. Punitive damages may be awarded,

... for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." As the name suggests, punitive damages are penal in nature and are proper only in cases where the defendant's actions are so outrageous as to demonstrate willful, wanton or reckless conduct.

Hutchison ex rel Hutchison v. Luddy, 582 Pa. 114, 121, 870 A.2d 766, 770 (2005) citing *Feld v. Merriam*, 506 Pa. 383, 485 A.2d 742, 747 (1984), *SHV Coal, Inc. v. Continental Grain Co.*, 526 Pa. 489, 587 A.2d 702, 704 (1991), Restatement (Second) of Torts § 908(2) (1979)) *see also Chambers v. Montgomery*, 411 Pa. 339, 192 A.2d 355, 358 (1963). Also, "[t]he state of mind of the actor is vital. The act, or the failure to act, must be intentional, reckless or malicious." *Hutchison* at 123, 771.


Upon review of the Complaint, McQueary has sufficiently plead facts of outrageous conduct on the part of Penn State. McQueary asserted that Spanier, in reckless disregard for the truth and in an outrageous effort to provide full and public support of the University to two criminal defendants (Curley and Schultz) and in an effort to assist in their exoneration, published the press release to Penn State Live. McQueary further averred that Spanier did so to preserve the reputation of Penn State and to make McQueary the scapegoat in this Gerald Sandusky scandal. Furthermore, McQueary averred Penn State treated him as a leper to be quarantined outside of State College. McQueary averred that acting Athletics Director Sherburne advised him that Penn State administration directed that McQueary leave State College for the weekend beginning November 11, 2011. He was also directed that all athletic facilities associated with the football programs were "off limit" to him. McQueary averred that in barring him from all facilities associated with the football program, he was ostracized and isolated from friends and colleagues he associated with for about 20 years. Based on these averments, this Court cannot with certainty conclude that a claim for punitive damages must fail and; therefore, the Preliminary Objection is overruled.

Accordingly, the following Order is entered:

ORDER

AND NOW, this 16th day of April, 2013, Defendant, The Pennsylvania State University's Preliminary Objections to the Complaint are hereby OVERRULED. Defendant shall file an Answer to the Complaint within twenty (20) days of the date above.

BY THE COURT:


Thomas G. Gavin, Judge, Specially Presiding