

ORIGINAL

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



ESTATE of JOSEPH PATERNO;

and

WILLIAM KENNEY and JOSEPH V. (“JAY”) PATERNO, former football coaches at Pennsylvania State University,
Plaintiffs,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION (“NCAA”),

MARK EMMERT, individually and as President of the NCAA, and

EDWARD RAY, individually and as former Chairman of the Executive committee of the NCAA,

Defendants.

) **Docket No.:** 2013-2082

) **Type of Case:**

-) Declaratory Judgment
-) Injunction Breach of Contract
-) Tortious Interference with Contract
-) Defamation
-) Commercial Disparagement
-) Conspiracy

) **Type of Pleading:**

-) Dr. Edward J. Ray’s Motion to Amend the September 19, 2016 Order

) **Filed on Behalf of:**

) Dr. Edward J Ray

) **Counsel of Record for this Party:**

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PROthonary
CENTRE COUNTY, PA
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IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY,
PENNSYLVANIA

The ESTATE of JOSEPH PATERNO, et al.,)
 Plaintiffs,)
)
 v.)
 NATIONAL COLLEGIATE ATHLETIC)
 ASSOCIATION ("NCAA"), et al.,)
 Defendants,)

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 CENTRE COUNTY, PA
 11/10

Civil Division
 Docket No. 2013-2082

DR. EDWARD J. RAY'S MOTION TO AMEND THE SEPTEMBER 19, 2016 ORDER

Defendant Dr. Edward J. Ray respectfully requests that this Court amend its September 19, 2016 Order (the "Order") to include a statement authorized by Pennsylvania Rule of Appellate Procedure 311(b)(2) that a substantial issue of jurisdiction is presented. As grounds for this request to amend the Order, Dr. Ray states the following.

BACKGROUND

1. On May 30, 2013, Plaintiffs sued Defendants, including Dr. Ray, for claims arising out of the July 23, 2012 Consent Decree between the NCAA and Penn State. On July 23, 2013, Defendants asserted preliminary objections, including dismissal due to a lack of personal jurisdiction over Dr. Ray. The

Court and the parties agreed to reserve disposition of the personal jurisdiction objections until after the close of fact discovery. On October 13, 2014, Plaintiffs filed the Second Amended Complaint. On April 29, 2016, after the close of fact discovery, Dr. Ray filed his supplemental brief in support of his preliminary objections based on lack of personal jurisdiction. President Emmert filed a separate motion. On June 6, Plaintiffs filed a joint supplemental opposition to both President Emmert's and Dr. Ray's motions, and on June 20, Dr. Ray replied.

2. Only three counts remain against Dr. Ray: defamation, commercial disparagement, and intentional interference. These counts arise out of the specific language contained within the Consent Decree—not the imposition of the Consent Decree in general or the NCAA's authority to impose the Consent Decree.
3. On September 19, 2016, the Court issued its Order denying Dr. Ray's preliminary objections for lack of personal jurisdiction.

LEGAL STANDARDS

4. The Court has the authority to permit an appeal as of right from an order sustaining personal jurisdiction in a civil action "if the court states in the order that a substantial issue of venue or jurisdiction is presented." Pa. R. App. P. 311(b)(2). A party may move to amend an order dismissing preliminary

objections to state that the order raised a substantial issue of jurisdiction. *United Farm Bureau Mut. Ins. Co. v. U.S. Fid. & Guar. Co.*, 501 Pa. 646, 651 (1983).

5. The Court need not determine that its order was incorrect to find the existence of a substantial issue of jurisdiction. *See, e.g., Arnold v. Chenery Mgmt., Inc.*, 2010 WL 8756620, at n.1 (amending order denying Defendant’s preliminary objections for lack of personal jurisdiction to reflect Pa. R.A.P. 311(b)(2) language, but defending underlying opinion).
6. Courts have repeatedly held that an order overruling an out-of-state defendant’s preliminary objections that challenge personal jurisdiction “presents a substantial issue of jurisdiction” pursuant to Pennsylvania Rule of Appellate Procedure 311(b)(2).” *See, e.g., N.T. ex rel. K.R.T. v. F.F.*, 2015 PA Super 139, 118 A.3d 1130, 1131 n.2 (2015) (noting trial court amended order denying preliminary objections for lack of personal jurisdiction to reflect Rule 311(b)(2) language); *Gunite Specialist, Inc. v. Outdoor Spaces Design Grp.*, 2014 WL 10790348, at *1 (Pa. Super. Ct. Oct. 14, 2014) (same); *Patriot Commercial Leasing Co. v. Kremer Rest. Enterprises, LLC*, 2006 PA Super 371, ¶ 4, 915 A.2d 647, 650 (2006) (same); *Mar-Eco, Inc. v. T & R & Sons Towing & Recovery, Inc.*, 2003 PA Super 444, ¶ 3, 837 A.2d 512, 514 (2003) (same); *see also Doe v. The Pennsylvania State University*, 2014 WL

8073744 (Pa. Com. Pl. Apr. 22, 2014) (amending order to allow immediate appeal of venue challenge pursuant to Rule 311(b)(2)). Dr. Ray respectfully requests that the Court amend its order to allow for further review consistent with this precedent.

DR. RAY'S BRIEF AND THE COURT'S ORDER

7. Dr. Ray is the president of Oregon State University and the former volunteer Chairman of the NCAA Executive Committee. Dr. Ray contended that Pennsylvania and Supreme Court law requires Plaintiffs to show on a defendant-by-defendant, count-by-count basis that Dr. Ray took specific actions that made it foreseeable he would have to defend himself against each of Plaintiffs' claims in Pennsylvania, and that Plaintiffs could not meet this burden because Dr. Ray took no actions that targeted Plaintiffs in the forum.
8. On September 19, 2016, the Court denied Dr. Ray's preliminary objections for lack of personal jurisdiction. In denying Dr. Ray's motion, the Court found that "Defendants are alleged to have targeted tortious conduct at Plaintiffs, who are Pennsylvania residents. This alleged tortious conduct was in the form of precipitating, executing, and publicizing the Consent Decree without utilizing the customary investigative and enforcement procedures of the NCAA." Order, at *9-10. The Court continued, "It is beyond dispute that Defendants knew the Consent Decree, and the statements contained therein,

were specifically tailored towards the Pennsylvania State University and certain employees of the Pennsylvania State University.” *Id.* at *10. Based on these findings, “the Court [found] Defendants’ allegedly tortious activities were expressly aimed at Pennsylvania” thus satisfying a major element in the applicable jurisdictional test. *Id.*

9. The Court noted that it should evaluate specific jurisdiction on a claim-by-claim basis, *id.* at *5, but then determined jurisdiction on all three remaining counts under one piece of analysis. *See, e.g., id.* at *11 (discussing focal point of harm without mentioning intentional interference claim).
10. Similarly, the Court noted that “[i]n evaluating whether personal jurisdiction exists, the Court may only consider the actions taken by the defendant individually.” *Id.* at *3. But the Court analyzed President Emmert’s and Dr. Ray’s forum contacts as if they were one and the same. In doing so, the Court failed to identify which contacts constituted specific anchors for jurisdiction over Dr. Ray and did not differentiate between President Emmert’s contacts and Dr. Ray’s contacts.

ARGUMENT

11. “Each defendant’s contacts with the forum State must be assessed individually.” *Calder v. Jones*, 465 U.S. 783, 790 (1984). Personal jurisdiction “must be based on intentional conduct by the defendant that

creates the necessary contacts with the forum,” not third parties. *Walden v. Fiore*, 134 S. Ct. 1115, 1123 (2014). Further, it is not enough that a defendant could be forced to defend himself in the forum, it must be reasonable that the defendant would have to defend himself against specific plaintiffs for specific actions that caused them harm in the forum. “[T]he plaintiff must show that the defendant knew that the plaintiff would suffer the brunt of the harm caused by the tortious conduct in the forum, and point to specific activity indicating that the defendant expressly aimed its tortious conduct at the forum.” *IMO Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 266 (3d Cir. 1998).

12. It is undisputed that Dr. Ray did not (1) negotiate the Consent Decree with Penn State; (2) draft or review the language in the Consent Decree; and (3) take any action with Plaintiffs in mind (nor did he even know who Messrs. Kenney or Jay Paterno were). Yet by analyzing Dr. Ray’s contacts at the same time as President Emmert’s contacts, it is unclear on what specific actions the Court based jurisdiction over Dr. Ray. And though the Court allowed full discovery to develop jurisdictional facts during the pendency of this matter, it did not cite to any record evidence in the Order.
13. The Court denied Dr. Ray’s preliminary objections and stated that it “finds Defendants are subject to the specific jurisdiction of this Court.” *Id.* at 11. In doing so, the Court sustained personal jurisdiction over Dr. Ray.

14. Dr. Ray has a legitimate argument that the Court erred in finding he was subject to personal jurisdiction against these plaintiffs for these counts. Dr. Ray contends that the Court should have considered his jurisdictional objections on a defendant-by-defendant and claim-by-claim basis. By combining Dr. Ray and President Emmert's motions into one set of analysis, Dr. Ray's contacts were impermissibly based on the "unilateral activity of another party or a third person." Order, at *3. Dr. Ray also contends that the Court failed to identify specific actions that gave rise to jurisdiction in the forum for each count.
15. Amending the order would also allow for future guidance to trial courts wrestling with thorny issues of personal jurisdiction. Notably, the parties' briefing reflected that the majority of guidance on personal jurisdiction jurisprudence comes from federal courts. Indeed, the Court was one of few Pennsylvania opinions to apply the *Calder* effects test. It was also one of few courts to determine personal jurisdiction after allowing a full record to develop through discovery. Amending the Order to allow for appellate review would provide the opportunity for future guidance to courts of the Commonwealth.
16. Accordingly, Dr. Ray respectfully requests that the Court amend the Order to state that "a substantial issue of jurisdiction is presented." Pa. R.A.P.

311(b)(2). The Pennsylvania Rules of Appellate Procedure carve out a specific right of appeal for personal jurisdiction decisions just like the Order.

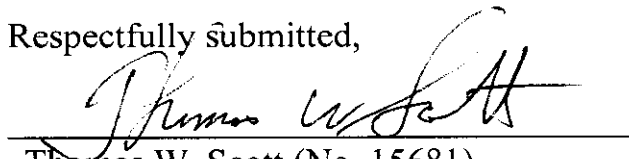
17. Given the case posture and indefinite schedule—through no fault of the parties or the Court—not only will allowing appellate review potentially advance the ultimate termination of the matter, but it also does not risk taking the case off schedule.
18. The Court need not accept Dr. Ray’s substantive arguments to amend its Order to allow for appellate review. But at minimum these concerns raise a substantial issue of jurisdiction that might materially advance the termination of this case. Dr. Ray respectfully moves for the Court to amend its Order.

CONCLUSION

For the foregoing reasons, Defendant Dr. Edward J. Ray respectfully requests that this Court amend the September 19, 2016 Order to allow for further appellate review by certifying a statement of substantial issue of jurisdiction.

Date: October 19, 2016

Respectfully submitted,



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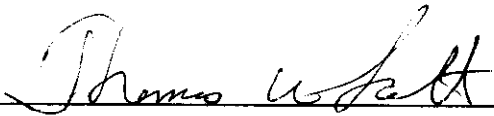
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)	
)	
)	

CERTIFICATE OF NON-CONCURRENCE

I, Thomas W. Scott, counsel for Defendant Edward J. Ray, hereby certify that I have discussed the contents of this Motion to Amend the September 19, 2016 Order with Patricia L. Maher, Esquire, counsel for Plaintiffs, who has indicated that she does not concur in the relief requested.

Date: October 19, 2016



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CERTIFICATE OF SERVICE

I, Thomas W. Scott, hereby certify that I am serving a copy *Dr. Edward J. Ray's Motion to Amend the September 19 Order* on the following by First Class Mail and email:

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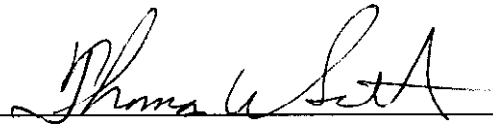
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Dated: October 19, 2016

A handwritten signature in black ink, appearing to read "Thomas W. Scott", is written over a horizontal line.

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