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

ESTATE of JOSEPH PATERNO; WILLIAM KENNEY and JOSEPH ("JAY") V. PATERNO, former football coaches at Pennsylvania State University,	)	
Plaintiffs,	)	
v.	)	No: 2013-2082
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,	)	
and	)	
THE PENNSYLVANIA STATE UNIVERSITY,	)	
Nominal Defendant.	)	

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CENTRE COUNTY, PA

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Attorney for Defendants:	*Thomas W. Scott, Esquire* *Everett C. Johnson, Jr., Esquire*
Attorney for Nominal Defendant:	*Daniel Booker, Esquire* *Michael T. Scott, Esquire* *Joseph P. Green, Esquire*

OPINION AND ORDER

Presently before the Court are the following outstanding matters: Objections by Plaintiff, Jay Paterno, to Subpoena Pursuant to Rule 4009.21; Defendant NCAA's Motion to Compel the Production of Documents from the Estate and Overrule the Estate's Objections to Related Third Party Subpoenas; Plaintiffs' Motion to Extend Discovery Cutoff and for Entry of Revised Scheduling Order; NCAA's Objections to Plaintiffs' Proposed Subpoena of Britton Banowsky;

Defendant NCAA's Motion to Compel Production of a Privilege Log from Plaintiffs; and Plaintiffs' Motion to Compel Discovery Responses and for Entry of Order Overruling Objection to Third Party Discovery.

The following outstanding matters have been rendered moot: Objections by Plaintiff, Jay Paterno, to Subpoena Pursuant to Rule 4009.21; Plaintiffs' Motion to Extend Discovery Cutoff and for Entry of Revised Scheduling Order; and Defendant NCAA's Motion to Compel Production of a Privilege Log from Plaintiffs.

The Court reviewed the briefs summited by the parties concerning the unresolved motions and heard oral argument on March 11, 2016. The Court is now ready to render a decision on these matters.

DISCUSSION

I. Defendant NCAA's Motion to Compel the Production of Documents from the Estate and Overrule the Estate's Objections to Related Third-Party Subpoenas

a. Documents Related to the *Critique* and its Independent Analyses

The attorney-client privilege protects disclosure of professional advice by an attorney to a client or of communications by a client to an attorney to enable the attorney to render sound professional advice. Gillard v. AIG Ins. Co., 15 A.3d 44, 47 (Pa. 2011). To successfully invoke the attorney-client privilege, the individual claiming it must demonstrate:

1) The asserted holder of the privilege is or sought to become a client;

2) The person to whom the communication was made is a member of the bar of a court, or his subordinate;

3) The communication relates to a fact of which the attorney was informed by his client, without the presence of strangers, for the purpose of securing either an opinion of law, legal services or assistance in a legal matter, and not for the purpose of committing a crime or tort; and

4) The privilege has been claimed and is not waived by the client.

Office of Governor v. Davis, 122 A.3d 1185, 1191-92 (Pa. Cmwlth. 2015). The party who has asserted the attorney-client privilege must initially set forth facts showing that the privilege has been properly invoked, then the burden shifts to the party seeking disclosure to set forth facts showing that disclosure will not violate the attorney-client privilege, e.g., because the privilege has been waived or because some exception applies. Carbis Walker, LLP v. Hill, Barth & King, LLC, 930 A.2d 573, 581 (Pa. Super. 2007).

The Pennsylvania Rules of Civil Procedure set forth the attorney work-product doctrine, which provides as follows:

> Subject to the provisions of Rules 4003.4 and 4003.5, a party may obtain discovery of any matter discoverable under Rule 4003.1 even though prepared in anticipation of litigation or trial by or for another party or by or for that other party's representative, including his or her attorney, consultant, surety, indemnitor, insurer or agent. The discovery shall not include disclosure of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories. With respect to the representative of a party other than the party's attorney, discovery shall not include disclosure of his or her mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics.

Pa.R.C.P. 4003.3. The underlying purpose of the work-product doctrine is to shield the mental processes of an attorney by providing a privileged area within which the attorney can analyze and prepare a client's case. T.M. v. Elwyn, Inc., 950 A.2d 1050, 1062 (Pa. Super. 2008); Gocial v. Independence Blue Cross, 827 A.2d 1216, 1222 (Pa. Super. 2003). Rule 4003.3 specifically "immunizes the lawyer's mental impressions, conclusions, opinions, memoranda, notes, summaries, legal research and legal theories, nothing more." Pa.R.C.P. 4003.3, Explanatory Comment at ¶ 3.

However, the work-product privilege is not absolute, and items may be deemed discoverable if the "product" sought becomes a relevant issue in the action. Saint Luke's Hosp. of

Bethlehem v. Vivian, 99 A.3d 534, 55051 (Pa. Super. 2014), appeal denied sub nom, Saint Luke's Hosp. of Bethlehem, Pa. v. Vivian, 114 A.3d 417 (Pa. 2015); Barrick v. Holy Spirit Hosp. of the Sisters of Christian Charity, 32 A.3d 800, 812 (Pa. Super. 2011), affirmed sub nom, Barrick v. Holy Spirit Hosp. of Sisters of Christian Charity, 91 A.3d 680 (Pa. 2014) (documents ordinarily protected by the attorney work-product doctrine may be discoverable if the work product itself is relevant to the underlying action); T.M., supra at 1062; Gocial, supra at 1222. The Explanatory Comment to Rule 4003.3 provides as follows:

> There are, however, situations under the Rule where the legal opinion of an attorney becomes a relevant issue in an action; for example, an action for malicious prosecution or abuse of process where the defense is based on a good faith reliance on a legal opinion of counsel. The opinion becomes a relevant piece of evidence for the defendant, upon which defendant will rely. The opinion, even though it may have been sought in anticipation of possible future litigation, is not protected against discovery. A defendant may not base his defense upon an opinion of counsel and at the same time claim that it is immune from pre-trial disclosure to the plaintiff.

Pa.R.C.P. 4003.3, Explanatory Comment at ¶ 4. The work-product privilege cannot be overcome by merely asserting that the protected documents reference relevant subject matter, rather, the attorney's mental impressions, conclusions, opinions, memoranda, notes, summaries, legal research or legal theories must be directly relevant to the action. Barrick, supra.

i. Privileged Material Relevant to Underlying Issue

The remaining claims in the case at bar require a showing of malice. Specifically, Plaintiff Estate has a claim under defamation for commercial disparagement and Plaintiffs Jay Paterno and Bill Kenney have claims under defamation for injurious falsehoods. Additionally, Plaintiffs seek redress in the form of punitive damages, which requires a finding of malice.

A claim for defamation can be proven by a plaintiff upon a showing that:

1) The statement is false;

2) The publisher either intended the publication to cause pecuniary loss or reasonably should have recognized that publication would result in pecuniary loss;

3) Pecuniary loss did in fact result; and

4) The publisher either knew that the statement was false or acted in reckless disregard of its truth or falsity.

Pro Golf Mfg. v. Tribune Review Newspaper Co., 809 A.2d 243, 246 (Pa. 2002); see also Commonwealth v. Armao, 286 A.2d 626, 629 (Pa. 1972) (if the plaintiff is a public figure, then the plaintiff must prove actual malice, that is, the publication was made with knowledge of or reckless disregard of its falsity).

Defendants contend the materials underlying the *Critique* and its Independent Analyses are highly-relevant to the case and thus Plaintiffs must disclose said materials. Plaintiffs contend said materials are privileged and are thus not discoverable. The Court finds Defendants are entitled to discovery of the materials underlying the *Critique* and its Independent Analyses.

Plaintiffs' claims for defamation require a finding of malice, which is defined as knowledge of or reckless disregard of falsity. Integral to the issue of malice in this case are the findings of the *Freeh Report* and Defendants' interaction with those findings. Likewise, the *Critique* is integral to the issue of malice in this case because it is an analysis of the findings of the *Freeh Report* and was trumpeted by Plaintiffs as a "comprehensive" and "factual" review with "complete transparency."

Plaintiffs previously argued against any privilege attaching to the *Freeh Report* materials. The Court agreed and ordered Defendants to disclose the *Freeh Report* materials because the materials are relevant to the issues of this case and any remaining privilege was waived by public disbursal of the report. Plaintiffs couch their remaining claims in this case in the alleged falsity

of the *Freeh Report* findings, and have held out the *Critique* as evidence that said findings were "unfounded," "incorrect," "unsubstantiated," "inaccurate," and "deeply flawed."

In essence, Plaintiffs rely on the underlying documents of the *Critique* and its Independent Analyses as a foundation to allege the falsity of the *Free Report* findings and Defendants' malice. However, Plaintiffs contend the underlying documents are irrelevant to any issues in this case. The Court finds this argument to be illogical as it would require Defendants to simply accept the *Critique*'s findings of falsity while Plaintiffs are granted free reign to dissect all of the *Freeh Report* materials to reach their own conclusions.

Plaintiffs bear the burden of proving malice, but this burden does not grant exclusive access to evidence relevant to the issue of malice. Defendants cannot be hindered in their defense to Plaintiffs' claims of malice simply because the burden rests with Plaintiffs. The Court cannot allow Plaintiffs to transform discovery into a unilateral affair in which Plaintiffs are granted greater latitude to bolster their claims while Defendants are left to speculate as to the basis of Plaintiffs' claims. Thus, the Court finds Defendants are entitled to discovery of the materials underlying the *Critique* and its Independent Analyses.

ii. Waiver of Privilege

Waiver is the voluntary and intentional abandonment of a known right. Brubacher Excavating, Inc. v. Commerce Bank/Harrisburg, N.A., 995 A.2d 362, 369 n.4 (Pa. Super. 2010). Waiver may be established by either a party's express declaration or conduct or action so inconsistent with an intention to stand on the party's right as to leave no opportunity for a reasonable inference to the contrary. Prime Medica Assocs. v. Valley Forge Ins. Co., 970 A.2d 1149, 1156-57 (Pa. Super. 2009); see also Nationwide Mut. Ins. Co. v. Fleming, 924 A.2d 1259 (Pa. Super. 2007), affirmed, 992 A.2d 65 (Pa. 2010) (client can waive the protection afforded by

attorney-client privilege by disclosing the communication at issue to a third party); Joe v. Prison Health Services, Inc., 782 A.2d 24 (Pa. Cmwlth. 2001) (once the attorney-client communications have been disclosed to a third party, the privilege is deemed waived). The critical concern for courts assessing the waiver of a privilege is whether a litigant is attempting to brandish the privilege as both a shield and a sword, and the following is instructive on this focus:

> A litigant attempting to use attorney-client privilege as an offensive weapon by selective disclosure of favorable privileged communications has misused the privilege; *waiver of the privilege for all communications on the same subject* has been deemed the appropriate response to such misuse.

Nationwide Mut. Ins. Co., supra at 1265 (emphasis added).

In the case at bar, Defendants contend any and all privilege Plaintiffs may have held in the documents related to the *Critique* and its Independent Analyses were waived by the publication of the *Critique* and the extensive public relations media campaign the Plaintiffs undertook to publicize the *Critique*'s findings. Plaintiffs contend there was never an express waiver of privilege and that the involvement of Plaintiffs' counsel in the creation of the *Critique* casts a veil of privilege over all related materials which Plaintiffs did not select for public disclosure. The Court finds Plaintiffs waived any and all privilege in the documents related to the *Critique* and its Independent Analyses.

Plaintiffs pursued their factual review of the *Freeh Report*, which became the *Critique*, through their counsel and experts retained by their counsel. Engagement letters for said review provided as follows:

> As part of King & Spalding's representation of the Paterno Family, we have determined that it is in the best interests of the Paterno Family to retain you for the provision of services set forth in this Agreement in *anticipation of possible litigation and in the preparation and defense* of the Paterno Family related to the findings set forth in the Freeh Report issued by Freeh, Sporkin & Sullivan ("Freeh Group") and the National Collegiate Athletic Association's ("NCAA") adoption of those findings in the form of a consent decree.

> . . .
>
> In sum, we request that you provide strategic guidance and advice on how best to educate the public and respond to any unfounded conclusions or interpretations in the Freeh [R]eport relating to Joe Paterno.
>
> . . .
>
> It is *understood that the attorney-client confidentiality privilege and attorney work-product doctrine will apply* to communications among King & Spalding, the communications expert we have retained, McGinn and Company ("McGinn"), and you, and it is agreed that you will provide services hereunder for King & Spalding.

Retainer Agreement for Dr. Fred S. Berlin (September 20, 2012) (emphasis added); Retainer Agreement for Jim Clemente (September 20, 2012) (emphasis added). At the inception of the review, which was approximately two (2) months after the release of the *Freeh Report*, Plaintiffs' counsel's words suggest confidential consulting was to be undertaken in furtherance of counsel's legal representation of Plaintiffs. However, any semblance of this intention was extinguished by Plaintiffs' public course of conduct. Plaintiffs made public statements indicating that their review of the *Freeh Report* was a transparent investigation conducted by independent experts. In addition to a media campaign to publicize the *Critique*, Plaintiffs published the *Critique* and other material related to the review on the website www.paterno.com. Now Plaintiffs seek to place a veil of privilege over any review material they did not choose to disclose to the public. The law does not condone this type of selective disclosure which would grant Plaintiffs discretion to use their review materials as a sword and a shield. Thus, the Court finds any and all privilege Plaintiffs held in the documents related to the *Critique* and its Independent Analyses have been waived.

b. Expert Subpoenas

Providing the rules for discovery as it relates to expert testimony, Pa.R.C.P. 4003.5 states the following in pertinent part:

> Rule 4003.5. Discovery of Expert Testimony. Trial Preparation Material
>
> a) Discovery of facts known and opinions held by an expert, otherwise discoverable under the provisions of Rule 4003.1 and acquired or developed in anticipation of litigation or for trial, may be obtained as follows:
>
> 1) A party may through interrogatories require
>
> A) any other party to identify each person whom the other party expects to call as an expert witness at trial and to state the subject matter on which the expert is expected to testify and
>
> B) the other party to have each expert so identified state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. The party answering the interrogatories may file as his or her answer a report of the expert or have the interrogatories answered by the expert. The answer or separate report shall be signed by the expert.
>
> 2) Upon cause shown, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions concerning fees and expenses as the court may deem appropriate.

Pa.R.C.P. 4003.5(a)(1)-(2). "[Pa.R.C.P.] 4003.5 should be read to restrict the scope of all discovery from non-party witnesses retained as experts in trial preparation." Cooper v. Schoffstall, 905 A.2d 482, 492 (Pa. 2006). Any request for discovery not covered under Pa.R.C.P. 4003.5(a)(1) shall be channeled through the Rule's "cause shown" criterion. Id. (adherence to the general standard pertaining to discovery, namely, the requirement that the request be reasonably calculated to lead to discovery of admissible evidence, is an essential prerequisite to establishing "cause shown"); Pa.R.C.P. 4003.5(a)(2). In the absence of

exceptional circumstances, a party cannot be compelled to disclose, in answer to interrogatories, the facts known or opinions held by non-witness experts whom it may have consulted. Philadelphia Elec. Co. v. Nuclear Energy Liability-Property Ins. Ass'n, 10 Pa. D. & C.3d 340 (C.P. 1979). However, Rule 4003.5 does not apply to experts who are not hired in anticipation of litigation, and does not shield discovery of facts or opinions acquired or developed independently of litigation. Miller v. The Brass Rail Tavern Inc., 664 A.2d 525, 530 (Pa. 1995); Shambach v. Fike, 82 Pa. D. & C.4th 535, 541 (C.P. 2006); Scott v. DeFeo, 46 Pa. D. & C.4th 353, 355 (C.P. 2000).

In the case at bar, Defendants contend the experts retained by Plaintiffs to reach the findings included in the *Critique* were not retained in anticipation of litigation and thus can be subpoenaed in this matter. Plaintiffs contend said experts were retained in anticipation of litigation as non-witness experts and thus cannot be subpoenaed. The Court finds the experts retained by Plaintiffs can be subpoenaed in this matter.

Plaintiffs waived any and all privilege Plaintiffs held in the documents related to the *Critique* and its Independent Analyses through the publication of the *Critique* and select underlying materials and the media campaign the Plaintiffs undertook to publicize the *Critique*'s findings. The Court will not undertake an analysis to determine whether Plaintiffs' experts were retained in anticipation of litigation as this issue is rendered moot by the Court's waiver analysis and finding in the previous section. Thus, the Court finds the experts retained by Plaintiffs in this matter can be subpoenaed.

Therefore, Defendant NCAA's Motion to Compel the Production of Documents from the Estate and Overrule the Estate's Objections to Related Third-Party Subpoenas is **GRANTED**.

II. Plaintiffs' Motion to Compel Discovery Responses and for Entry of Order Overruling Objection to Third Party Discovery

Discovery is confined to matters that are not privileged and to matters that are relevant to the subject matter involved in the pending action. District Council 33, Am. Fed'n of State v. Philadelphia, 511 A.2d 818 (Pa. Super. 1986), reversed by, District Council 33 v. Phila., 537 A.2d 1367 (Pa. 1988). Relevancy to the subject matter is not restricted to relevancy to the issues or to the materiality of what is sought to be discovered. See Bennett v. Graham, 714 A.2d 393 (Pa. 1998) (discovery is not subject to the same evidentiary rules as apply to admissibility at trial; discovery is meant to crystallize issues and therefore broader scope is permitted); Pa.R.C.P. 4003.1(b).

Proof of malice can be founded on circumstantial evidence. Dumont Television & Radio Corp. v. Franklin Elec. Co. of Phila., 154 A.2d 585, 588 (Pa. 1959); Johnson v. Land Title Bank & Trust Co., 198 A. 23 (Pa. 1938). Such circumstantial evidence can consist of deliberate efforts to avoid the truth and the taking of action to achieve a pre-determined outcome. See Harte-Hanks Comms., Inc. v. Connaughton, 491 U.S. 657, 684-85 (1989); Curran v. Philadelphia Newspapers, Inc., 546 A.2d 639, 642 (Pa. Super. 1988).

In the case at bar, Plaintiffs contend the discovery responses and third party discovery they seek are directly related to the issue of malice in the case. Defendants contend said discovery requests are irrelevant and unduly burdensome. The Court finds said discovery requests are relevant, so long as they remain narrowly tailored to the issue of malice.

The broad scope of discovery permits Plaintiffs to investigate the possibility of circumstantial evidence of Defendants' alleged malice. At this juncture, the Court would be abrogating Plaintiffs' right to build their case if it struck down their inquiry regarding a central issue. Plaintiffs have successfully argued that their requests are reasonably related to the issue of

malice, and requiring Plaintiffs to substantiate their requests to any greater degree would amount to imposing the impossible burden of proving the existence of material outside of their control. The Court will, however, require Plaintiffs' discovery requests to be narrowly tailored to the issue of Defendants' alleged malice. Thus, at this time the Court finds third party depositions to be an unduly burdensome means of discovery for the subject matter Plaintiffs' seek.

Therefore, Plaintiffs' Motion to Compel Discovery Responses and for Entry of Order Overruling Objection to Third Party Discovery is **GRANTED** in part and **DENIED** in part.

Accordingly, the Court enters the following Order:

ORDER

AND NOW, this 29 day of March, 2016, the Court hereby ORDERS:

1) Defendant NCAA's Motion to Compel the Production of Documents from the Estate and Overrule the Estate's Objections to Related Third-Party Subpoenas is **GRANTED**.
2) Plaintiffs' Motion to Compel Discovery Responses and for Entry of Order Overruling Objection to Third Party Discovery is **GRANTED** in part and **DENIED** in part.
    a. Defendant NCAA's objections to responding to Plaintiffs' discovery requests are **OVERRULED**.
        i. Defendant NCAA is **ORDERED** to provide, under seal, substantive responses to Plaintiffs' January 8, 2016 Interrogatories and to Plaintiffs' Second Set of Requests for Admissions to the NCAA.
    b. Defendant NCAA's objections to Plaintiffs' third party deposition subpoenas are **SUSTAINED**.

c. Defendant NCAA's objections to Plaintiffs' third party document subpoenas are **OVERRULED**. Plaintiffs' third party document subpoenas shall read as follows:

For the period January 1, 2011, through February 28, 2015, all documents, including, but not limited to, memoranda, notes of telephone conversations, handwritten notes, emails from any email account (including but not limited to non-work email account such as Gmail or Yahoo Mail) and text messages or short message service (SMS) messages, that evidence, reflect, or relate in any way to the following:

a) The Penn State football program and/or Penn State football coaches (including, but not limited to, Joseph Paterno, Jay Paterno, and William Kenney);

b) The NCAA Consent Decree, titled "Binding Consent Decree Imposed by the National Collegiate Athletic Association and Accepted by The Pennsylvania State University," dated July 23, 2012 including, but not limited to, drafts of the Consent Decree and any documents that relate in any way to the repeal, dissolution, modification, and/or superseding of the Consent Decree, such as the NCAA's January 2015 repeal of the Consent Decree and the superseding Athletics Integrity Agreement that the NCAA terminated in December 2015;

c) The decision-making, evaluation, assessment, basis for, and/or process relating to consideration, imposition, or acceptance of any penalty, sanction, violation, and/or infraction of the NCAA's rules,

bylaws, and/or Constitution by Penn State. This request includes, but is not limited to, documents related to disagreements, concerns, objections, questions, and/or discussions by the NCAA about the authority and/or jurisdiction of the NCAA to impose such penalty, sanction, violation, and/or infraction; as well as documents related to any repeal, dissolution, modification, and/or superseding treatment of such penalty, sanction, violation, and/or infraction; and

d) The Freeh Report, titled "Report of the Special Investigative Counsel Regarding the Actions of the Pennsylvania State University Related to the Child Sexual Abuse Committed by Gerald A. Sandusky," prepared by Freeh Sporkin & Sullivan, LLP, and any other actual or stated basis for the statements contained in the Consent Decree.

BY THE COURT:

John B. Leete, Senior Judge
Specially Presiding