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. 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.	)	No: 2013-2082

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OPINION AND ORDER

Presently before the Court are the following outstanding matters:

1) Defendant Dr. Mark Emmert's and Defendant Dr. Edward Ray's Preliminary Objections; filed on July 23, 2013

    a. Memorandum in Support of Dr. Mark Emmert's Supplemental Preliminary Objections; filed on April 29, 2016

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b. Defendant Dr. Edward J. Ray's Supplemental Brief in Support of Preliminary Objections; filed on May 2, 2016

c. Plaintiffs' Combined Response to Dr. Mark Emmert's and Dr. Edward J. Ray's Preliminary Objections to Personal Jurisdiction

2) Plaintiffs' Motion to Compel Production of Documents Related to Repeal of Consent Decree by Defendant National Collegiate Athletic Association; filed on May 23, 2016

a. NCAA's Brief in Opposition to Plaintiffs' Motion to Compel Production of Documents Related to Repeal of Consent Decree; filed on June 9, 2016

b. Reply in Support of Plaintiffs' Motion to Compel Production of Documents; June 30, 2016

3) NCAA's Motion for Leave to Amend Answer with New Matter and Set Briefing Schedule for Motion for Judgment on the Pleadings; filed on May 3, 2016

a. Plaintiffs' Memorandum in Opposition to Defendant NCAA's Motion for Leave to Amend Answer with New Matter and Set Briefing Schedule for Motion for Judgment on the Pleadings; filed on May 23, 2016

b. NCAA's Reply in Support of its Motion for Leave to Amend Answer with New Matter and Set Briefing Schedule for Motion for Judgment on the Pleadings; filed on June 2, 2016

A hearing on these matters was held on August 19, 2016. The Court has reviewed the record in this case, and is now ready to render a decision on these matters.

DISCUSSION

I. Preliminary Objections to Personal Jurisdiction

Pennsylvania's long-arm statute authorizes the exercise of jurisdiction over a non-resident "to the fullest extent allowed under the Constitution of the United States." 42 Pa.C.S.A. § 5322(b); see also O'Connor v. Sandy Lane Hotel, 496 F.3d 312, 316 (3d Cir. 2007) (Pennsylvania's long-arm statute "provides for jurisdiction based on the most minimum contact with the Commonwealth allowed under the Constitution of the United States" That is, as long as the requirements of the Due Process Clause of the Fourteenth Amendment to the United States

Constitution have been satisfied, jurisdiction will lie over non-resident defendants in Pennsylvania. Pennzoil Prods. Co. v. Colelli & Assocs., 149 F.3d 197, 200 (3d Cir. 1998). However, "[w]e cannot presume that jurisdiction is proper simply because the requirements of a long-arm statute have been met... [A] court must engage in due process analysis after it concludes that a state's long-arm statute extends jurisdiction to a defendant." Id. at 202–203. Since Pennsylvania's long-arm statute "is co-extensive with the dictates of the Constitution," the court's jurisdictional inquiry therefore "turns exclusively on whether the exercise of personal jurisdiction would conform with the Due Process Clause." Poole v. Sasson, 122 F.Supp.2d 556, 558 (E.D. Pa. 2000).

"Under the due process clause, a court may not exercise personal jurisdiction over a non-resident defendant unless there are certain minimum contacts between the defendant and the forum state." Time Share Vacation Club v. Atlantic Resorts, Ltd., 735 F.2d 61, 63 (3d Cir. 1984) (citing World–Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980)). The minimum contacts with the forum state must be "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). Having minimum contacts, i.e., having purposefully directed his activities toward the residents of the state, provides "fair warning" to a defendant that he may be subject to suit in that forum. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985). In evaluating whether personal jurisdiction exists, the Court may only consider the actions taken by the defendant individually. See Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 417 (1984) ("Unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum state to justify an assertion of jurisdiction.").

The basic principles of due process are reflected in the two (2) recognized types of personal jurisdiction. See Marten v. Godwin, 499 F.3d 290, 296 (3d Cir. 2007). A plaintiff may establish personal jurisdiction either by suing under a cause of action arising from minimum contacts of the defendant with the forum state (specific jurisdiction), 42 PaC.S.A. § 5322, or by showing that the defendant has 'continuous and systematic' contacts with the forum state, in which case the cause of action need not arise from those contacts (general jurisdiction), 42 Pa.C.S.A. § 5301. Provident Nat'l Bank v. California Fed. Sav. & Loan Ass'n, 819 F.2d 434, 437 (3d Cir. 1987).

a. General Jurisduction

General and specific jurisdiction are "analytically distinct categories, not two points on a sliding scale." O'Connor, supra at 321. In determining whether it has either general or specific jurisdiction over the non-resident defendant, a court must take "specific analytical steps." Pennzoil Prods., supra at 200. The court first determines whether the defendant's contacts with the forum state are "systematic and continuous," i.e., sufficient to support general personal jurisdiction. Id.; see also Helicopteros, supra at 414–415. The threshold for establishing general jurisdiction is very high, and requires a showing of "extensive and pervasive" facts demonstrating connections with the forum state. Reliance Steel Prods. Co. v. Watson, Ess, Marshall & Enggas, 675 F.2d 587, 589 (3d Cir. 1982); see also Provident Nat'l Bank, supra at 437 ("[T]he plaintiff must show significantly more than mere minimum contacts to establish general jurisdiction.") Ultimately, general jurisdiction demands contacts with the forum which approximate physical presence. William Rosenstein & Sons Co. v. BBI Produce, Inc., 123 F.Supp.2d 268, 274 (M.D. Pa. 2000).

b. Specific Jurisdiction

In the absence of general jurisdiction, a court must determine whether the requirements of specific personal jurisdiction have been met. Remick v. Manfredy, 238 F.3d 248, 255 (3d Cir. 2001). Specific jurisdiction arises when the plaintiff's claim is related to or arises out of the defendant's contacts with the forum." Mellon Bank (East) PSFS, Nat'l Ass'n v. Farino, 960 F.2d 1217, 1221 (3d Cir. 1992). This involves a three-part inquiry:

1) first, the defendant must have "purposefully directed" his activities at the forum;

2) second, the plaintiff's claim must "arise out of or relate to" at least one of those specific activities; and

3) third, assuming the first two have been met, the court should consider additional factors "to ensure that the assertion of jurisdiction otherwise comports with principles of fair play and substantial justice."

O'Connor, supra at 317. The conclusion that a court has specific jurisdiction over a defendant as to one (1) of several claims does not necessarily mean it has specific jurisdiction over all the claims. Remick v. Manfredy, 238 F.3d 248, 255 (3d Cir. 2001). Since the specific jurisdiction analysis "depends on the relationship between the claims and contacts ... [a court] generally evaluate[s] specific jurisdiction on a claim-by-claim basis." Marten, supra at 296.

i. Calder Effects Test

As noted above, Pennsylvania's long-arm statute "is co-extensive with the dictates of the Constitution," and so the court's jurisdictional inquiry "turns exclusively on whether the exercise of personal jurisdiction would conform with the Due Process Clause. Poole, supra. Due to the claims in the instant case consisting of intentional torts, the appropriate analysis is the Calder effects test. See Calder v. Jones, 465 U.S. 783 (1984); Wellness Publ'g v. Barefoot, 128 Fed.Appx. 266, 270 (3d Cir. 2005) (the allegation of tortious interference with contract "calls for

an application of the 'effects' test set forth in Calder "); O'Connor, supra at 317, n. 2 (the Calder test, "a slightly refined version" of the traditional test for specific jurisdiction, applies to intentional tort claims.)

In Calder, the movie and stage entertainer, Shirley Jones, brought suit for defamation and libel against the author and editor of an article in the National Enquirer, a weekly magazine with nationwide distribution. Distribution of the magazine was skewed, however, toward California where Jones lived and worked in that about 11% of the magazine issue which contained the allegedly libelous article was sold in California alone, more than twice the amount sold in any other state. Both defendants lived and worked in Florida and had few if any of the traditional contacts with California which would impose jurisdiction. The Supreme Court found, however, that the defendants could "reasonably anticipate being haled into court" there, noting that the story concerned the California activities of a California resident whose career was centered in California; the article relied on California sources; and "the brunt of the harm, in terms both of [Jones's] emotional distress and the injury to her professional reputation, was suffered in California. In sum, California is the focal point both of the story and of the harm suffered." Calder, supra at 788–789. The Court found the defendants had expressly aimed their intentional tortious activity at California, that is, they knew the article "would have a potentially devastating impact" on Jones and "they knew that the brunt of that injury would be felt ... in the State in which she lives and works and in which the National Enquirer has its largest circulation." Id. at 789–790.

After Calder, the Third Circuit Court of Appeals analyzed its holding in the context of intentional business torts, including tortious interference with contracts. See IMO Indus. v. Kiekert AG, 155 F.3d 254 (3d Cir. 1998). In IMO Indus., the Court of Appeals reviewed cases

from other circuits addressing this issue and concluded they had adopted a narrow construction of Calder. Id. at 261–263 (citing Noonan v. Winston Co., 135 F.3d 85, 90–91 (1st Cir. 1998); ESAB Group, Inc. v. Centricut, Inc., 126 F.3d 617 (4th Cir. 1997), cert. denied, 523 U.S. 1048 (1998); Southmark Corp. v. Life Investors, Inc., 851 F.2d 763 (5th Cir. 1988); Janmark, Inc. v. Reidy, 132 F.3d 1200 (7th Cir. 1997); General Electric Capital Corp. v. Grossman, 991 F.2d 1376, 1387–88 (8th Cir. 1993); Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414 (9th Cir. 1997); Far West Capital, Inc. v. Towne, 46 F.3d 1071 (10th Cir. 1995)). In each of those cases, the Third Circuit concluded the critical issue had been whether "the defendants had targeted (or 'expressly aimed') their conduct at the forum and thereby showed that the forum was the focal point of the tortious activity." IMO Indus., supra at 263. The Court of Appeals determined, pursuant to Calder, that a plaintiff can show specific jurisdiction over the defendant by establishing:

1) The defendant committed an intentional tort;

2) The plaintiff felt the brunt of the harm in the forum such that the forum can be said to be the focal point of the harm suffered by the plaintiff as a result of that tort; and

3) The defendant expressly aimed his tortious conduct at the forum such that the forum can be said to be the focal point of the tortious activity.

IMO Indus., supra at 265–266; see also Remick, supra at 258; Marten, supra at 297.

1. Focal Point of the Tortious Activity

The first two (2) elements of the Calder effects test can only be considered if the third, "expressly aimed" element is first met. Marten, supra at 297. To satisfy this element, "the plaintiff has to demonstrate 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." Id. at 298 (simply knowing that

the plaintiff's principal place of business is located in the forum is insufficient). The defendant must manifest behavior intentionally targeted at and focused on the forum, a requirement which will typically "require some type of entry" into the forum state. IMO Indus., supra at 265.

Due to the fact specific nature of a Calder inquiry, the Court finds an examination of cases in which out-of-state defendants were found to have expressly aimed tortious conduct at Pennsylvania to be instructive in resolving this matter.

In Waimberg v. Medical Transp. of Am., Inc., 52 F.Supp.2d 511 (E.D. Pa. 1999), the plaintiff, a Pennsylvania resident, was offered a new job by a company being formed in California. After two (2) months of negotiation, he accepted a written offer of employment and resigned from his current job, only to learn ten (10) days later that the offer was being rescinded because principals from an investment group which was funding the new company questioned his ability to do the job. Id. at 514. The plaintiff alleged tortious interference with a contract against the investor-group defendants, residents of Illinois, who challenged the jurisdiction of a Pennsylvania-based court. The court noted that the defendants had satisfied the third prong of the Calder effects test because they sent letters by fax to the plaintiff assuring him that the investment group would provide financial backing for the newly formed company and directed several telephone calls to him in Pennsylvania. Thus, they had to know the plaintiff was a Pennsylvania resident and, consequently, their subsequent interference with the contract was expressly directed at Pennsylvania. Id. at 516 and n. 4.

In Fetter v. No. Am. Alcohols, Inc., 2007 WL 551512, 2007 U.S. Dist. LEXIS 11470 (E.D. Pa. 2007), two (2) of the three (3) non-resident individual defendants who allegedly defamed the Pennsylvania plaintiff or interfered with his prospective employment contract with the corporate defendant had visited the plaintiff in Philadelphia on one (1) or more occasions,

negotiated the first draft of the contract in Philadelphia, exchanged multiple drafts of the employment contract from their location in Florida with the plaintiff in Pennsylvania, and made the alleged defamatory statements in Radnor, Pennsylvania. Further, the contract with which the defendants allegedly interfered was to be carried out in Pennsylvania. Id. at *8-*9. Thus, the court held that the individual defendants had knowingly aimed their tortious activities at Pennsylvania. See also Vector Security, Inc. v. Corum, 2003 WL 21293767, *3–*4, 2003 U.S. Dist. LEXIS 6573, *10–*12 (E.D. Pa. 2003) (holding that where the defendant knew from having sent 25 e-mail messages to the plaintiff's staff that its corporate headquarters was situated in the forum, defendant had expressly aimed its tortious actions at the forum).

In Bank Express v. Kang, 265 F.Supp.2d 497 (E.D. Pa. 2003), the Pennsylvania plaintiff alleged that the defendant, a California resident, induced customers to cancel their automatic teller machine ("ATM") servicing contracts with the plaintiff, primarily as the result of two (2) former Bank Express employees having formed a business relationship with the defendant. Id. at 500–501. The court concluded that because the plaintiff had averred it performed all of its services for its clients from its Pennsylvania offices, the alleged interference with its contracts was "expressly aimed" at Pennsylvania. Further, the two (2) former employees who had aided in the interference knew the plaintiff was based in Pennsylvania. Id. at 504–505.

If a defendant circulates a statement nationally, "the defendant can be said to have expressly aimed the statement at a particular state where there is a unique relationship between the state and the plaintiff's industry or business." Id. at 506 (citing IMO Indus., supra at 264 and n. 7; Remick, supra at 259).

In the case at bar, 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. The Consent Decree was imposed on the Pennsylvania State University, the largest higher education institution in Pennsylvania. The sources of information upon which the Consent Decree was based were gathered from sources primarily within Pennsylvania. The Consent Decree was intended to have a substantial effect on the Pennsylvania State University and its culture. It is undeniable that the focal point of the Consent Decree was the Pennsylvania State University and its employees who were deemed to have acted in an uncouth manner.

The courts in Waimberg, Fetter, Vector Security, and Bank Express place significant stock in finding a defendant had actual knowledge of the forum in which a plaintiff is situated and where their actions will have an effect. 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. Thus, Defendants had to know Plaintiffs would suffer the effects of the allegedly disparaging and false statements contained in the Consent Decree in Pennsylvania.

Therefore, the Court finds Defendants' allegedly tortious activities were expressly aimed at Pennsylvania and the third prong of the Calder effects test is satisfied.

2. Defendants Allegedly Committed Intentional Torts

The Court previously found that Plaintiffs have sufficiently plead intentional tort claims against Defendants. See January 7, 2014 Opinion and Order. Therefore, the Court finds the first prong of the Calder effects test is satisfied.

3. Focal Point of Plaintiffs' Harm

"[I]ndividuals endure the bulk of harm from torts like defamation in their home states." Remick, supra at 258-259 (citing Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 780 (1984)).

In the case at bar, the alleged harm to Plaintiffs' reputations has spread across a national, and most likely, international scale. The Court must consider, however, where the brunt of the harm occurred. There are alumni and fans of the Pennsylvania State University across the world, but the Court would be remiss to not find that a great number, if not a majority, of said individuals reside within Pennsylvania. Further, at the time of Defendants' alleged tortious conduct, Plaintiffs were all residents of Pennsylvania. Even though Plaintiffs' reputations may have been harmed outside of Pennsylvania, the focal point of their alleged harm is within their home state of Pennsylvania where they worked in visible roles for arguably the most prominent and popular college football program in Pennsylvania at the Pennsylvania State University, the largest higher education institution in Pennsylvania.

Therefore, the Court finds the focal point of Plaintiffs' harm is within Pennsylvania and the second prong of the Calder effects test is satisfied.

c. Conclusion

The Court finds Defendants are subject to the specific jurisdiction of this Court under the Calder effects test.

Therefore, Defendant Dr. Mark Emmert's and Defendant Dr. Edward Ray's Preliminary Objections to Personal Jurisdiction are **DENIED**.

II. Motion to Compel

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).

Plaintiffs contend their request for documents related to the repeal of the Consent Decree is relevant to the claims in the instant case. Defendants contend Plaintiffs' request for documents related to the repeal of the Consent Decree is untimely filed, irrelevant to the claims in the instant case, and that any responsive documents would be privileged. The Court finds Plaintiffs' request for documents related to the repeal of the Consent Decree is timely filed and relevant to the claims in the instant case, so long as said documents contain communications between the NCAA's board members and administrators and communications between the NCAA and the Pennsylvania State University. Further, the Court finds that Defendants shall produce a privilege log citing any documents they believe are protected by privilege.

a. Timeliness

Discovery in the instant case was ordered to have a deadline of April 29, 2016. Plaintiffs served Defendants with the request for production of documents presently at issue on March 28, 2016. Plaintiffs' documents request was therefore timely.

b. Relevance

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 its falsity or with reckless disregard of its truth or falsity).

Plaintiffs' claims for defamation require a finding of malice. Integral to the issue of malice is that Plaintiffs must prove Defendants had knowledge of, or acted in reckless disregard of, the falsity of the statements made in the Consent Decree. Defendants continue to affirm the validity of the Consent Decree and the statements made therein. Information related to the reasoning behind the repeal of the Consent Decree is therefore reasonably calculated to lead to discovery of admissible evidence. Additionally, the Court previously held in its March 29, 2016 Opinion and Order that third party subpoenas could be served on members of the NCAA's Committee on Infractions for "any documents that relate in any way to the repeal, dissolution, modification, and/or superseding of the Consent Decree." Logic dictates that a finding of relevancy in said context extends to a party directly involved in the action.

The Court finds Plaintiffs' request for production of documents related to the repeal of the Consent Decree is relevant to the claims in the instant case, so long as said documents contain communications between the NCAA's board members and administrators and communications between the NCAA and the Pennsylvania State University. Further, the Court finds that Defendants shall produce a privilege log citing any documents they believe are protected by privilege.

Therefore, Plaintiffs' Motion to Compel Production of Documents Related to Repeal of Consent Decree by Defendant National Collegiate Athletic Association is **GRANTED** in part.

III. Motion for Leave to Amend Answer and Set Briefing Schedule

a. Motion for Leave to Amend

Pennsylvania Rule of Civil Procedure 1033 provides as follows:

> A party, either by filed consent of the adverse party or by leave of court, may at any time change the form of action, correct the name of a party or amend his pleading. The amended pleading may aver transactions or occurrences which have happened before or after the filing of the original pleading, even though they give rise to a new cause of action or defense. An amendment may be made to conform the pleading to the evidence offered or admitted.

Pa.R.C.P. 1033; Somerset Community Hospital v. Mitchell & Associates, 685 A.2d 141 (Pa. Super. 1996); Ecksel v. Orleans Construction Company, 519 A.2d 1021 (Pa. Super. 1987). Whether an amendment is or is not allowed is a matter of judicial discretion. Tanner v. Allstate Ins. Co., 467 A.2d 1164 (Pa. Super. 1983). Amendments should be liberally granted unless prejudice to the adverse party or an error of law would result. Sands v. Forrest, 434 A.2d 122 (Pa. Super. 1981). The prejudice to the adverse party must stem from the delay in raising the defense causing prejudice to the substantive position of the adverse party. James A. Mann, Inc. v. Upper Darby Sch. Dist., 513 A.2d 528 (Pa. Cmwlth. 1986).

The doctrine of "collateral estoppel" or issue preclusion prevents a question of law or an issue of fact that has been litigated and fully adjudicated in a court of competent jurisdiction from being re-litigated in a subsequent suit. Shaffer v. Smith, 648 A.2d 26, 28 (Pa. Super. 1994), affirmed, 673 A.2d 872 (Pa. 1996); Meridian Oil and Gas Enterprises, Inc. v. Penn Central Corp., 614 A.2d 246, 250 (Pa. Super. 1992). Collateral estoppel applies if there was a final judgment on the merits. Id.[1]

When a court is asked to grant a party leave to assert a defense of collateral estoppel which arose after their initial answer had been filed, the court should not decide whether or not the matters sought to be pleaded can ultimately be sustained. Hughes v. Pron, 429 A.2d 9, 11–12 (Pa. Super. 1981) (citing McShain, Inc. v. Cessna Aircraft Company, 364 A.2d 951, 952 (Pa. Super. 1976)). See also Shaffer v. Pullman Trailmobile, Div. of M.W. Kellogg Co., 533 A.2d 1023, 1028 (Pa. 1987) (claim of collateral estoppel could have been raised even though not asserted in answer in new matter where collateral estoppel was based on worker's compensation award made two years after suit was filed).

In the case at bar, Defendants seek leave to amend their answer to assert collateral estoppel as an affirmative defense due to the dismissal of the federal district court action brought by Jay Paterno and William Kenney against the Pennsylvania State University. Plaintiffs contend granting leave to amend would be prejudicial to Plaintiffs and that the federal decision was on a different basis and did not purport to address Pennsylvania causes of action. Defendants contend

[1] Collateral estoppel applies if (1) the issue decided in the prior case is identical to one presented in the later case; (2) there was a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party in the prior case; (4) the party or person privy to the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding and (5) the determination in the prior proceeding was essential to the judgment. Collateral estoppel, sometimes referred to as issue preclusion, operates to prevent a question of law or an issue of fact which has once been litigated and adjudicated finally in a court of competent jurisdiction from being relitigated in a subsequent suit. Westfield Ins. Co. v. Astra Foods Inc., 134 A.3d 1045, 1049 (Pa. Super. 2016) (citing Kituskie v. Corbman, 682 A.2d 378, 382 (Pa. Super. 1996).

granting leave to amend would not be prejudicial because no further discovery would be required and issues could be resolved prior to summary judgment briefs. The Court finds granting Defendants leave to amend their answer to assert collateral estoppel as an affirmative defense will not result in prejudice to Plaintiffs.

The federal district court decision in question was handed down by the U.S. District Court for the Eastern District of Pennsylvania on February 25, 2016. See Paterno v. Pennsylvania State University, 149 F.Supp.3d 530 (E.D. Pa. 2016). By letter dated March 8, 2016, counsel for Defendant NCAA advised the Court of the belief that said decision made the affirmative defense of collateral estoppel viable in the instant case, and requested a briefing schedule for resolution of the issue. The Court stated at the March 11, 2016 motions hearing that a motion would need to be filed for the Court to address the issue. On May 3, 2016, Defendants filed a Motion for Leave to Amend Answer with New Matter and Set Briefing Schedule for Motion for Judgment on the Pleadings.

Defendants were unable to plead the affirmative defense of collateral estoppel at any time prior to the federal district court's February 25, 2016 decision. Thus, Defendants did not delay in seeking to raise said defense once the basis of said defense was made available. Accordingly, no prejudice to the substantive position of Plaintiffs will occur if Defendants are granted leave to amend their answer to include said defense. See Mann, Inc., supra. The Court will not address the merits of any amendment Defendants wish to make to their answer, as this is outside the scope of the present matter. Since the Court has determined no prejudice to Plaintiffs will result from granting Defendants leave to amend their answer, the liberal granting of amendments applies. See Sands, supra.

Therefore, Defendants' Motion for Leave to Amend Answer is **GRANTED**.

b. Motion to Set Briefing Schedule

A resolution of Defendants' affirmative defense claim of collateral estoppel prior to the filing and briefing of summary judgment motions would not be wholly dispositive of the instant case. Defendants will be able to present their affirmative defense argument within their summary judgment brief. The Court finds the briefing schedule currently in place for summary judgment motions is adequate to address Defendants' proposed affirmative defense of collateral estoppel.

Therefore, Defendants' Motion to Set Briefing Schedule for Motion for Judgment on the Pleadings is **DENIED**.

Accordingly, the Court enters the following Order:

ORDER

AND NOW, this 14 day of September, 2016, the Court hereby ORDERS:

1) Defendant Dr. Mark Emmert's and Defendant Dr. Edward Ray's Preliminary Objections to Personal Jurisdiction are **DENIED**.

2) Plaintiffs' Motion to Compel Production of Documents Related to Repeal of Consent Decree by Defendant National Collegiate Athletic Association is **GRANTED** in part.

    a. The NCAA shall produce the following:

        i. All communications regarding the repeal of the Consent Decree made between the NCAA's board members and administrators; and

        ii. All communications regarding the repeal of the Consent Decree made between the NCAA and the Pennsylvania State University.

    b. The NCAA shall provide a privilege log delineating any documents which are withheld on grounds of privilege.

3) Defendants' Motion for Leave to Amend Answer is **GRANTED**.

4) Defendants' Motion to Set Briefing Schedule for Motion for Judgment on the Pleadings is **DENIED**.

BY THE COURT:

John B. Leete, Senior Judge
Specially Presiding