

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

The ESTATE of JOSEPH PATERNO;

AL CLEMENS, member of the
Board of Trustees of Pennsylvania
State University; 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,

and

Pennsylvania State University,
Nominal Defendant

No. 2013-2082

DEBRA A. HARTZ
PROFESSOR OF LAW
CENTRE COUNTY, PA

2015 MAY -8 AM 10:03

FILED FOR RECORD

**OPINION AND ORDER ON PLAINTIFFS' MOTION
FOR ENFORCEMENT OF SUBPOENA**

Presently before the Court is Plaintiffs' Motion For Enforcement Of
Subpoena *Duces Tecum* Directed To Pepper Hamilton, LLP ("Pepper

Hamilton"). Briefs have been submitted by Plaintiffs; Nominal Defendant, The Pennsylvania State University ("Penn State"); and non-party, subject of the Subpoena, Pepper Hamilton. The Court has reviewed the briefs and issues the following Opinion and Order.

Pertinent Background

A detailed synopsis of this case can be found in the Court's Opinion and Order of January 6, 2014 (docketed on January 7, 2014). In short, this case is centered on sanctions, and the specific language used in the sanctions, imposed on Penn State University by Defendant National Collegiate Athletic Association ("NCAA") in the wake of the Gerald Sandusky child abuse scandal. The relevant procedural history for the instant issue is as follows:

1. On February 25, 2014, as part of discovery, Plaintiffs filed a Notice of Intent to Serve a Subpoena to Pepper Hamilton LLP To Produce Documents Pursuant to Rule 4009.21.
2. On March 14, 2014, Penn State filed Objections to the Discovery Request, claiming, *inter alia*, Attorney-Client and Work-Product Privileges.
3. On September 11, 2014, the Court issued an Opinion and Order in which it OVERRULED Penn State's Attorney-Client and Work-Product privileges.
4. On October 8, 2014, Penn State, timely filed a Notice of Appeal ("First Appeal"), in which it claims the Court erred when it overruled Penn

State's assertion of the attorney-client privilege and the attorney work product doctrine.

5. On October 13, 2014, Pepper Hamilton filed a Motion For Stay Pending Appeal And For Protective Order.
6. On October 22, 2014, Penn State filed a Joinder in Pepper Hamilton's Motion.
7. On November 20, 2014, the Court issued an Opinion and Order in which it DENIED Pepper Hamilton and Penn State's Motion for the stay pending appeal.
8. On December 19, 2014, Pepper Hamilton timely filed a Notice of Appeal ("Second Appeal"), in which it claims the Court erred when it denied the Motion for stay pending appeal.
9. On January 23, 2015, Plaintiffs filed the instant Motion for Enforcement of Subpoena *Duces Tecum* Filed on Behalf of the Plaintiffs.

Discussion

Pennsylvania's Rules of Appellate Procedure dictate what a trial court can and cannot do once an appeal is taken.

General rule. Except as otherwise prescribed by these rules, after an appeal is taken or review of a quasijudicial order is sought, the trial court or other government unit may no longer proceed further in the matter.

Pa.R.A.P. 1701(a). However, the rule allows the trial court to "[t]ake such action as may be necessary to preserve the status quo..." Pa.R.A.P.

1701(b)(1) and “[e]nforce any order entered in the matter, unless the effect of the order has been superseded as prescribed in this chapter.” Pa.R.A.P. 1701(b)(2).

In this case, the Court has overruled the discovery objections based upon attorney-client privilege and work-product doctrine. This ruling is the subject of the First Appeal. Further, this Court has denied the Motion for a stay pending the First Appeal. This denial is the subject of the Second Appeal.

In their Briefs, Both Penn State and Pepper Hamilton attempt to re-argue their Attorney-Client Privilege and Attorney Work Product Doctrine positions. This Court has already ruled on these arguments in its September 11, 2014 Opinion and Order. Further, these issues are the subject of the First Appeal; therefore, under 1701(a), the Court currently lacks jurisdiction to consider the matter, based on these positions.

The Second Appeal is based upon this Court denying a stay while the First Appeal is pending. However, the Court holds that this is not a proper procedure, and relies on the Court of Common Pleas of Wayne County.

that an order denying application for stay or supersedeas pending appeal is an inappropriate order from which to appeal. Pursuant to Pa.R.A.P. 1732(a), an application for stay or injunction [*sic*] pending appeal is ordinarily made in the first instance to the lower court. However in the event the lower court denies the application for stay or supersedeas pending appeal, the aggrieved parties next move is to apply for the stay, “... to the appellate court or to a judge thereof, but the application shall show that

application to the lower court for the relief sought is not practical, or that the lower court has denied an application, or has failed to afford the relief which the applicant requested...." Pa.R.A.P. 1732(b).

Swendsen v. Swendsen, 22 Pa. D. & C.4th 481, 482 (Com. Pl. 1994). It is true that the Wayne County Opinion is not binding on this Court; nevertheless, this Court has reached the same conclusion, based upon a reading of Rule 1732. In short, as a result of being procedurally deficient, the Second Appeal is a nullity.

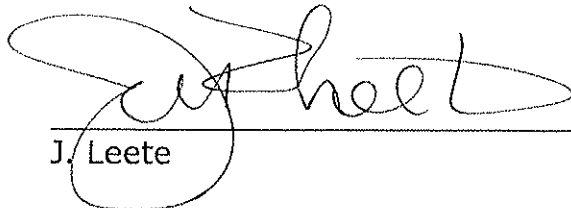
In conclusion, as a result of this Court lacking jurisdiction to rule on the Attorney Client Privilege and Work Product Doctrine arguments, and there being no stay granted from the Superior Court pursuant to Rule 1732(b), the status quo is to continue with the Discovery Process. Under Rule 1701(b)(1), this Court shall maintain the status quo by entering an Order directing Pepper Hamilton to comply with the Subpoena *Duces Tecum* at issue.

ORDER

AND NOW, this 5 day of May, 2015, Plaintiffs
Motion to Plaintiffs' Motion for Enforcement of Subpoena *Duces Tecum*
Directed To Pepper Hamilton is GRANTED.

Non-Party Pepper Hamilton is hereby directed to provide Plaintiffs with
all documents requested in their Subpoena *Duces Tecum* within 30 days of
this Order.

BY THE COURT



J. Leete