



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

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

THE PENNSYLVANIA STATE
UNIVERSITY,
Nominal Defendant.

No. 2013-2082

FILED
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CENTRE COUNTY, PA

Opinion and Order

Presently before the Court are Preliminary Objections to Plaintiff's
Second Amended Complaint, filed on behalf of Defendant NCAA; a Motion to

modify the Protective Order, filed on behalf of Plaintiffs; and Objections to the issuance of Plaintiffs' Subpoenas.

NCAA cites four issues in the Preliminary Objections: 1) Failure of a Pleading to Conform to Law or Rule of Court; 2) Incapacity to bring Count I and Demurrer to Count I; 3) Impertinent Material; and 4) Lack of personal jurisdiction over Dr. Emmert and Dr. Ray.

The Court must note that in reaching a settlement in the Commonwealth Court Case of Jake Corman et. al. v. NCAA v. PSU, docketed at 1 MD 2013 (hereinafter "Corman Case"), the NCAA has repealed the Consent Decree at issue in the case *sub judice*.

Preliminary Objections

Failure of a Pleading to Conform to Law or Rule of Court, Incapacity to Bring Count I and Demurrer to Count I, and Impertinent Material

A party, either by filed consent of the adverse party or by leave of court, may at any time change the form of action, add a person as a party, correct the name of a party, or otherwise amend the 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. No. 1033.

NCAA claims that in their Second Amended Complaint, Plaintiffs have "replead a breach of contract claim on behalf of the Paterno Estate that this Court has already dismissed." NCAA Defs.'s Prelim. Objections To Pls.'s

Second Am. Compl. ¶ 5. Further, as NCAA correctly states, although Plaintiffs were Ordered to file an Amended Complaint to cure specific deficiencies in their First Amended Complaint, this repleading was not included in that Order. While it is true that “the right to amend should be liberally granted at any stage of the proceedings unless there is an error of law or resulting prejudice to an adverse party,” *Werner v. Zazyczny*, 545 Pa. 570, 584, 681 A.2d 1331, 1338 (1996), in this case, Plaintiffs are not amending their Complaint to include a new cause of action or even a new theory of an existing cause of action; rather they are attempting to resurrect a claim on which this Court already dismissed. Therefore, the Court reasserts its position that

[a]s Coach Joe Paterno was not involved prior to his death, and he cannot, as a matter of law, be an “involved individual” after his death, he had no rights as an “involved individual” at any time, and as a result, his estate has no rights as an “involved individual” now.

Op. and Order, 9/11/14, p. 8.

Lack of Personal Jurisdiction

As per the Court’s August 16, 2013 Order, this issue has been set aside from the remaining issues, and the Court will set a separate schedule for the objections relating to personal jurisdiction as necessary.

Motion to Modify the Protective Order

Plaintiffs wish to modify a Protective Order which was disputed when the Court issued its September 11, 2014 Order. The disputed provision of the Protective Order is as follows:

General Protections. All pre-trial discovery materials in this litigation (including materials that are not designated as constituting Confidential Information or Highly Confidential – Attorneys’ Eyes Only Information) shall be used solely for the purpose of preparing and prosecuting the Parties’ respective cases, and shall not be used or disclosed for any other purpose. Nothing in this Order, however limits: (i) the Parties’ use of materials not designated as Confidential Information or Highly Confidential – Attorney’s Eyes Only – Information that the Parties, in good faith, have made part of the judicial record in this case; or (ii) the use of information a Party legitimately obtained through public sources.

In its Order of September 11, the Court made the following ruling:

Because there is no right for the public to have access to pre-trial documents, the risk to contaminate the potential jury pool is high, and the dissemination of pre-trial documents would be an abuse of the discovery process, the provision at issue shall be included in the protective order.

Op. and Order, 9/11/14, p. 33.

Plaintiffs are arguing that no such Order existed in the Corman Case and the NCAA is selectively releasing documents in an attempt to sway public opinion. While the Court has no reason to doubt this, it is insufficient to justify changing the Protective Order. Plaintiffs do not provide any authority to support the claim that disclosure in one case necessitates disclosure in another. Conversely, NCAA correctly argue that documents

which are public in one case may properly be subject to a protective order in another case. *See Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 534 (1st Cir. 1993). Therefore the Protective Order at issue shall remain in place undisturbed.

Objections to issuance of Plaintiff's Subpoenas

During oral argument, Defendants stated that they believed Plaintiffs should depose others before the subjects of the subpoenas. It was proffered that this claim is based upon the inconvenience and expense involved with deposing the subjects of the subpoenas; however, they offered no authority to support such a claim. Further, this Court is unaware of any legal maxim, case law, or statutory requirement that allows a Defendant to dictate in what order a Plaintiff may depose witnesses. Therefore, Plaintiff will be permitted to conduct depositions as they see fit—within the scope of Pennsylvania Discovery rules.

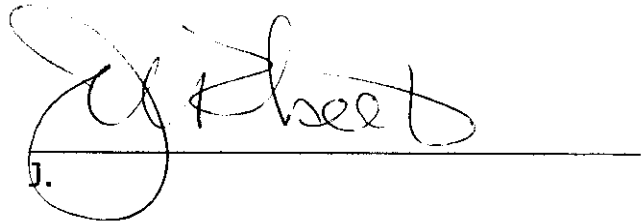
Order

AND NOW, this 24 day of March, 2015, it is hereby Ordered as follows:

1. NCAA's Preliminary Objection based on Failure of a Pleading to Conform to Law Or Rule of Court is SUSTAINED.
2. NCAA's Preliminary Objection based on the Estate of Joseph Paterno to Bring Count I and Demurrer to Count I is SUSTAINED.

3. NCAA's Preliminary Objection based on Impertinent Material is SUSTAINED.
4. No decision is made on NCAA's Preliminary Objection based on Lack of Personal Jurisdiction Over Dr. Emmert and Dr. Ray.
5. Plaintiff's Motion to Modify the Protective Order is DENIED.
6. NCAA's Objection to the Estate of Joseph Paterno's Proposed Subpoenas is OVERRULED.

BY THE COURT



A handwritten signature in cursive script, appearing to read "J. Sheet", is written over a horizontal line. The signature is written in black ink and is positioned to the left of the line's end.