

IN THE COURT OF COMMON PLEAS FOR CENTRE COUNTY PENNSYLVANIA  
CIVIL DIVISION

ESTATE of JOSEPH PATERNO;

No. 2013-2082

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.

DEBRA C. HINEL  
PROthonotary  
CENTRE COUNTY, PA

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RECORDED

**OPINION AND ORDER REGARDING STAY DURING APPEAL**

Presently before the Court is a Motion For Stay Pending Appeal And For  
Protective Order By Non-Party Pepper Hamilton LLP, which was joined by Nominal  
Defendant Penn State University.

### **Relevant Procedural History**

1. On February 25, 2014, 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 privilege and Work Product Doctrine.
3. On September 11, 2014, this Court issued an Opinion and Order, overruling the aforementioned Objections.
4. On October 8, 2014, Penn State filed a Notice of Appeal, stating that it is appealing the Opinion and Order to the extent that it overruled Penn State's objections based on Attorney-Client privilege and Work Product Doctrine.
5. On October 13, 2014, non-party Pepper Hamilton filed the current Motion.
6. On October 22, 2014, Nominal Defendants Penn State filed a Joinder to the instant Motion.
7. On October 23, 2014, Plaintiffs filed their Response to the Motion.
8. On October 31, 2014, non-party Pepper Hamilton filed a Reply Memorandum in Support of the Motion.
9. On November 4, 2014, Plaintiffs filed a Supplemental Response to the Motion.

### **Opinion**

In Pennsylvania, the grant of stay is warranted if 1) the petitioner makes a strong showing that he is likely to prevail on the merits, 2) the petitioner has shown that without the requested relief, he will suffer irreparable injury, 3) the issuance of a stay will not substantially harm other interested parties in the proceedings, and

4) the issuance of a stay will not adversely affect the public interest. *Pennsylvania Pub. Util. Comm'n v. Process Gas Consumers Grp.*, 467 A.2d 805, 808-09 (Pa. 1983).

The Court has examined whether Defendants have made a strong showing that they are likely to prevail on the merits of their Appeal, and holds they have not.

#### Attorney-Client

Pepper Hamilton asserts that Penn State is likely to prevail in its appeal due to this Court's misinterpretation of the facts. Specifically, Pepper Hamilton argues that this Court erred when it held that services provided by Freeh Sporkin & Sullivan ("FSS") did not relate to "securing either an opinion of law, legal services or assistance in a legal matter", which is required for the Attorney-Client privilege. The Court originally made this determination based on the Scope of Engagement section of the Engagement Letter between Penn State and FSS. The Superior Court will be asked to determine whether language outside the Scope of Engagement section of the letter should be used to characterize FSS's services. Although this Court recognizes that Penn State's appeal of this issue is not frivolous, Pepper Hamilton has not made the strong showing that Penn State will prevail.

Even if Pepper Hamilton were able to make a strong showing that Penn State is likely to prevail on their claim that FSS was providing services in furtherance of securing either an opinion of law, legal services or assistance in a legal matter, it has not adequately addressed the issue of subject-matter waiver. This Court held that documents FSS shared with NCAA and/or the Big Ten, that may ordinarily be

subject to Attorney-Client privilege, are not protected.<sup>1</sup> This Court went on to hold that documents of the same subject matter as the documents shared are also discoverable, based on *Murray v. Gemplus Int'l, S.A.*, 217 F.R.D. 362, 367 (E.D. Pa. 2003). Pepper Hamilton proffers that Penn State will likely succeed on this issue as the facts in *Murray* are distinguishable from the facts at bar; specifically, in *Murray* the Court determined that the subject-matter waiver was appropriate because the party invoking the privilege was trying to use it as both a shield and sword, and Pepper Hamilton asserts that is not so with the case *sub judice*. However, as Plaintiffs correctly stated,

Penn State has done *precisely that*—by authorizing disclosure of the contents of the Report at a national press conference in an effort to demonstrate that Penn State addressed the problems that supposedly resulted in the Sandusky crimes, but denying access to the information underlying Report’s conclusions.

Because Penn State is attempting to invoke the Attorney-Client privilege as both a shield and sword, *Murray* is applicable; therefore, Pepper Hamilton has not made a strong showing that Penn State will succeed on this issue of their appeal.

#### Work Product

Penn State is also appealing this Court’s overruling their objection based on the Work Product Doctrine. This Court held that Penn State did not have standing to raise this objection, and Pepper Hamilton—which did have standing—did not do so.

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<sup>1</sup> In their Memorandum, Pepper Hamilton acknowledges that “the actual communications between FSS and a non-agent third party, such as the Big Ten or the NCAA, are discoverable.”

In their Motion, Pepper Hamilton has stated the Court's reasoning is now moot, as they are now attempting to assert the protection. This argument is flawed.

As Plaintiffs correctly state, Pepper Hamilton has not yet responded to the subpoena, and there has been no ruling on its work product objections. The Superior Court is tasked with determining whether or not this Court committed an error of law. Because there has been no ruling on Pepper Hamilton's objection, there is no issue for the Superior Court to decide. Therefore, Pepper Hamilton has not made the required strong showing that Penn State will succeed in its appeal for this issue.

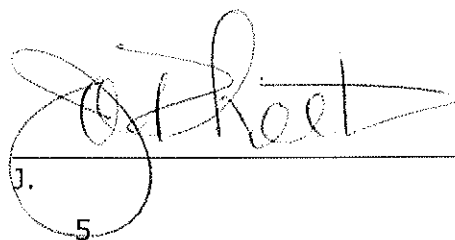
Conclusion

Because Pepper Hamilton has failed to make a strong showing that Penn State will succeed on its appeal, neither a stay nor a protective order is warranted. Because the first element required to warrant a stay has not been met, the Court does not need to address the remaining issues.

**ORDER**

AND NOW, this 14 day of November, 2014, non-party Pepper Hamilton's Motion For Stay Pending Appeal And For A Protective Order, in which Penn State has joined, is DENIED.

BY THE COURT

  
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