



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,

2013-2082

Plaintiffs,

vs.

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.

*Attorney for Plaintiffs:*

*Thomas J. Weber, Esq.  
Joseph Sedwick Sollers, III, Esq.  
Thomas W. Scott, Esq.  
Everett C. Johnson, Jr., Esq.  
Daniel Booker, Esq.  
Michael T. Scott, Esq.  
Joseph P. Green, Esq.  
Thomas E. Zemaitis, Esq.*

*Attorney for Defendants NCAA, Emmert & Ray:*

*Attorney for Nominal Defendant Penn State:*

*Attorney for Pepper Hamilton:*

**Leete, S.J.**

**OPINION AND ORDER**

Presently before this Court are Defendant the National Collegiate Athletic Association's (hereinafter "NCAA") Motion to Compel Production of Documents; Plaintiffs' Motion to File Documents under Seal and Enforce the Court's Earlier Privilege Determinations Pursuant to the Protective Order; and Plaintiffs' Motion to Strike the "Highly Confidential – Attorneys' Eyes Only" Blanket Designation. This Court reviewed

■ O □ RD □ S

2015 OCT -7 PM 4:27

the briefs submitted by the parties concerning these motions and heard oral argument on September 9, 2015.

**I. Defendants NCAA, Mark Emmert and Edward Ray's Motion to Compel Production of Documents from Plaintiffs Joseph (Jay) Paterno and William Kenney**

On July 10, 2015, Defendants NCAA, Mark Emmert, and Edward Ray filed a Motion to Compel Production of Documents and supporting Brief. On July 21, 2015, Plaintiffs Jay Paterno (hereinafter "Paterno") and William Kenney (hereinafter "Kenney") filed a Brief in Opposition to the Motion to Compel and Defendants filed a Reply Brief on August 3, 2015. Defendants complain that Plaintiffs Paterno and Kenny have objected to providing documents concerning: 1.) Paterno's book about his father and this litigation; 2.) their income from January 1, 2006 to December 31, 2010; and 3.) their attempts to secure employment as a football coach prior to 2011. Plaintiffs have agreed to provide documents concerning items two and three; however, Defendants maintain that Paterno and Kenney have not adequately responded. Defendants contend that Paterno and Kenney have spottily produced a smattering of documents responsive to the request for financial records and documents concerning efforts to obtain employment but Defendants are concerned that not all responsive documents have been produced. Plaintiffs assert they have provided all documents in existence. Therefore, Defendants' Motion to Compel is granted and Plaintiffs, Jay Paterno and William Kenney, shall produce any remaining responsive documents to the request for financial records concerning their income from January 1, 2006 to December 31, 2010 and documents concerning their attempts to secure employment as a football coach prior to 2011 within 30 days or to certify that they have conducted a good-faith,

reasonable search for such documents and have identified none in accordance with the Pennsylvania Rules of Civil Procedure.

Defendants have sought “all documents concerning” Jay Paterno’s book *Paterno Legacy: Enduring Lessons from the Life and Death of My Father*. Paterno maintains the book is a memoir and is irrelevant to this litigation because much of it pertains to his family, football at Penn State, and his memories concerning these issues that occurred long before the Sandusky scandal. Paterno further argues it would be unreasonably burdensome to produce every draft and note concerning his book and would be unlikely to lead to the discovery of admissible evidence. This Court agrees that Defendants have the final version of Paterno’s book and the request for “all documents concerning the book” is not reasonably calculated to lead to the discovery of admissible evidence pursuant to Rule 4003.1(b). Defendants contend that every draft of the book and communication about the book constitute a party admission that would be admissible under the Pennsylvania Rules of Evidence. Plaintiffs correctly state that Pa.R.E. 803 provides a hearsay exception for statements made by a party in an “individual or representative capacity” or when the party “manifested an adoption or belief in its truth.” *Harris v. Toys “R” Us-Penn, Inc.*, 880 A.2d 1270 (Pa. Super. 2005). However, drafts of the book or notes are not final thoughts which Jay Paterno adopted to be true. Therefore, the Motion to Compel production of all documents concerning Plaintiff Jay Paterno’s book is denied and Defendants are free to draft a more tailored request focused on the issues in the book that actually relate to this litigation.

Defendants seek information concerning Paterno’s consideration of whether to run for public office or withdraw from a political race. In connection with this, they seek

polls and surveys conducted and communications with political strategists, pollsters, public relations consultants, party leaders or politicians and their staff. Plaintiffs assert that no polling firm was retained and Jay Paterno has no polling data in his possession. They further note the run for political office was short-lived. Plaintiffs agree that communications encouraging Jay Paterno to run for public office would be discoverable. This Court agrees with Defendants that the documents concerning Jay Paterno's run for office or decision not to, are relevant to the averments made in Plaintiffs' pleadings and are discoverable. Plaintiffs shall produce any polls or survey information regarding Jay Paterno's run for political office or withdrawal from the race along with any documents concerning his favorability, popularity and status in the community concerning his employment or his name to the extent such documents are in Jay Paterno's possession or if none are available, Jay Paterno shall certify that a good-faith, reasonable effort was made to locate additional materials and there are none in accordance with the Pennsylvania Rules of Civil Procedure within 30 days.

Defendants also seek discovery of all communications with a public relations or media consultant or specialist. Defendants contend that Plaintiffs' response to this request has been incomplete and only a few documents concerning an HBO documentary and four e-mails concerning an award Joseph Paterno received in 2012 have been produced. Plaintiffs have produced the aforementioned items yet have also asserted the attorney-client privilege applies. This Court agrees with Defendants that Plaintiffs should produce a privilege log for all responsive documents for which Plaintiffs contend any privilege applies. Plaintiffs shall provide a response to this discovery

request and provide a privilege log including an explanation of why they assert the privilege within 30 days.

Defendants further complain that Plaintiffs have failed to adequately respond to other various requests for documents including: the Consent Decree, expert reports, Gerald Sandusky and the Second Mile, social media, and text messages. Plaintiffs respond that they have provided any responsive documents that exist. Plaintiffs shall provide any additional documents responsive to these requests or if none are available shall certify that a good-faith, reasonable effort was made to locate additional materials and there are none in accordance with the Pennsylvania Rules of Civil Procedure within 30 days.

**II. Plaintiffs' Motion for Leave to File Under Seal and Enforce the Court's Earlier Privilege Determinations Pursuant to the Protective Order**

Plaintiffs filed a Motion for Leave to File Under Seal and Enforce this Court's Earlier Privilege Determination Pursuant to the Protective Order on July 14, 2015 and a Supplement thereto on July 22, 2015. On September 8, 2015, The Pennsylvania State University (hereinafter "Penn State") and Pepper Hamilton LLP (hereinafter "Pepper Hamilton") filed a Brief in Opposition and Plaintiffs filed a Reply Brief on September 18, 2015.

Certain documents were inadvertently produced by Penn State in a discovery response on June 29, 2015 and Penn State sought to invoke the clawback provisions under Paragraph 14 of the Stipulated Confidentiality Agreement and Protective Order (hereinafter "Protective Order") entered on September 11, 2014. On July 7, 2015, Penn State notified counsel for Plaintiffs that 181 documents were inadvertently produced and asked Plaintiffs to return or destroy the documents. Plaintiffs refused to return or destroy

the documents and sought leave of Court to file the documents under seal and requested a determination of whether the documents were subject to privilege or protection contending that the documents were rightly produced.

Penn State maintains that 121 memos from interviews conducted by the Freeh Firm attorneys, which Penn State refers to as the "Category A" documents, should be clawed back because they were already produced by Pepper Hamilton and they are subject to the work-product doctrine. However, pursuant to the Protective Order, the fact that documents were produced by someone else is not a basis to invoke the clawback provisions. With regard to Penn State's argument that the interview memos are protected by the work-product doctrine, this Court has ruled that the privilege belongs to Pepper Hamilton and Penn State lacks standing to raise the privilege. According to Penn State, Pepper Hamilton has already produced the notes from interviews in accordance with this Court's prior orders. Furthermore, the applicability of the work-product doctrine is currently on appeal and this Court lacks jurisdiction to consider it. Therefore, Plaintiffs' request for leave of Court to file under seal the documents specified in Penn State's July 7, 2015 letter so that the Court can confirm that they are covered by earlier Orders regarding privilege is granted.

The approximately 52 other documents which Penn State seeks to have returned or destroyed, referred to as the "Category B" documents, are e-mails exchanged between various trustees and Frank Guadagnino, an attorney with Reed Smith LLP. Penn State argues that these documents are subject to clawback provision because they are protected by the attorney-client privilege or work-product doctrine and are not relevant. These documents likewise may be not be clawed back on the basis of

relevancy. If however, Penn State asserts the documents are privileged, Penn State shall identify the documents it is asserting are privileged, prepare a privilege log including an explanation regarding why the document is privileged, and request the return of those specific documents.

**III. Plaintiffs' Motion to Strike Blanket Designation of all Pepper Hamilton Documents as "Highly Confidential – Attorneys' Eyes Only" Information**

In their response to discovery requests on July 22, 2015, Pepper Hamilton marked all of the documents as "Highly Confidential – Attorneys' Eyes Only." On August 25, 2015, Plaintiffs filed a Motion to Strike the blanket designation with supporting Brief because most of the documents do not meet the more restrictive confidentially designation of the Protective Order. Pepper Hamilton filed a Brief in Opposition of the Motion to Strike on September 3, 2015 which Penn State joined on the same date. In their Brief, Plaintiffs noted that Pepper Hamilton produced 70,000 pages since July 22, 2015, for a total of 17,193 documents and all were marked with the "Highly Confidential" designation. Plaintiffs contend that Pepper Hamilton is misusing the designation and abusing the Protective Order. Plaintiffs' counsel contacted Pepper Hamilton seeking that they strike the blanket designation but Pepper Hamilton refused to change the designation of any of the documents asserting that every one of the 17,193 documents was properly designated as "Highly Confidential."

Pursuant to the Protective Order, the designation for "Highly Confidential – Attorney's Eyes Only Information" pursuant to Paragraph 2(b),

means non-public information the disclosure of which would create a substantial risk of serious irreparable injury to the designating Party or another that cannot be avoided by less restrictive means, including but not limited to non-public personally identifiable information (*i.e.*, social security

number, place of birth, or home address), confidential medical records or medical information, or other sensitive personal information. Information or documents that are otherwise available to the public may not be designated as Highly Confidential – Attorneys’ Eyes Only Information.

Stipulated Confidentiality Agreement and Protective Order, ¶ 2(b), 9/11/14.

This Court does not agree with Pepper Hamilton and Penn State that a “Highly Confidential” blanket designation on all documents produced is appropriate simply because the attorney-client privilege and work-product doctrine issues are on appeal. Certainly some of the documents may fall under the more restrictive designation but clearly all do not. Pepper Hamilton asks that Plaintiffs review all the documents and then request the “de-designation” of certain documents; however, it is the responsibility of the producing party to designate the documents which are subject to the “Confidential” or “Highly Confidential” designation. A blanket designation of “Confidential” for all documents would be appropriate with certain documents truly fitting the criteria set forth above being designated as “Highly Confidential.” Pepper Hamilton shall have the opportunity to review the documents with the direction that only certain documents fitting the criteria of the Protective Order are designated as “Highly Confidential” and the remaining documents are designated as “Confidential.” Plaintiffs’ Motion to Strike the Blanket Designation of all Pepper Hamilton documents is therefore granted in part and denied in part, Pepper Hamilton is directed to review the documents and designate the documents appropriately within 30 days. If Pepper Hamilton fails to do so, the blanket designation of “Highly Confidential” will be stricken and a blanket designation of “Confidential” will be applied to all documents produced.

Accordingly the following Order is entered:



**ORDER**

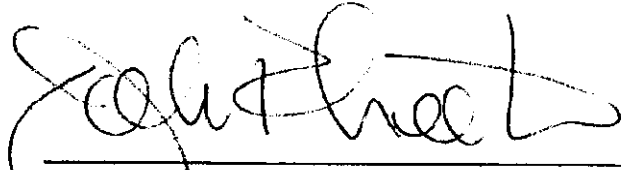
AND NOW, this 7 day of October, 2015, upon consideration of the motions

before this Court the following is ORDERED:

- I. Defendants' Motion to Compel the Production of Documents from Plaintiffs Jay Paterno and William Kenney is GRANTED IN PART AND DENIED in part as follows:
  - a. Plaintiffs Paterno and Kenney shall provide all responsive documents to the requests regarding their income from January 1, 2006 to December 31, 2010 to the extent they have not already responded or, if none are available, Plaintiffs shall certify that a good-faith, reasonable effort was made to locate additional materials and there are none, in accordance with the Pennsylvania Rules of Civil Procedure within 30 days;
  - b. Plaintiffs Paterno and Kenny shall provide complete responses concerning their attempts to secure employment as a football coach prior to 2011 or if none are available shall certify that a good-faith, reasonable effort was made to locate additional materials and there are none, in accordance with the Pennsylvania Rules of Civil Procedure within 30 days;
  - c. Defendants' Motion to Compel production of all documents concerning Jay Paterno's book is denied; Defendants may draft a more tailored request as set forth in the above Opinion;
  - d. Plaintiff Jay Paterno shall produce any polls or survey information regarding his run for political office or withdrawal from the race along with any documents concerning his favorability, popularity, and status in the community concerning his employment or his name to the extent such documents are in his possession or he shall certify that a good-faith, reasonable effort was made to locate materials and there are none, in accordance with the Pennsylvania Rules of Civil Procedure within 30 days;
  - e. Plaintiffs shall produce a privilege log concerning communications with a public relations or media consultant or specialist for all responsive documents for which Plaintiffs contends any privilege applies with explanation of why they assert the privilege within 30 days;
  - f. Plaintiffs shall produce all documents or additional documents responsive to Defendants' request for production of documents concerning the Consent Decree, expert reports, Gerald Sandusky and the Second Mile, social media, and text messages or if none are available, Plaintiffs shall certify that a good-faith, reasonable effort was made to locate materials and there are none, in accordance with the Pennsylvania Rules of Civil Procedure within 30 days.
  - g. Plaintiff William Kenney shall produce all documents or additional documents responsive to Defendants' requests for production of documents and where none are available he shall certify that a good-faith, reasonable effort was made to locate materials and there are none, in accordance with the Pennsylvania Rules of Civil Procedure within 30 days.

- II. Plaintiffs' Motion to file Documents Under Seal and Enforce the Court's Earlier Privilege Determinations Pursuant to the Protective Order is GRANTED as set forth above in the above Opinion.
- III. Plaintiffs' Motion to Strike the Blanket Designation of "Highly Confidential – Attorneys' Eyes Only" is GRANTED IN PART AND DENIED IN PART, Pepper Hamilton is directed to review the documents and designate the documents appropriately within 30 days as set forth in the above Opinion. If Pepper Hamilton fails to timely do so, the blanket designation of "Highly Confidential" will be stricken and a blanket designation of "Confidential" will be applied to all documents produced by Pepper Hamilton.

BY THE COURT:



---

John B. Leete, S.J.,  
Specially Presiding