

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. HIRSH  
PROTHONOTARY  
CENTRE COUNTY, PA

2014 DEC -5 PM 12:02

**OPINION IN SUPPORT OF ORDER**

Presently before the Court is an appeal filed by nominal Defendants, Penn State University ("Penn State"). As per this Court's Order of October 14, 2014, Penn State timely filed a Concise Statement of Matter Complained of on Appeal, in

accordance with Pa.R.A.P. 1925(b). The following is the Court's Opinion in Support of Order, pursuant to Pa.R.A.P. 1925(a).

### **Pertinent Background**

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.

### **Discussion**

Penn State is alleging that the Court made four errs with respect to the issue of Attorney-Client privilege and three errs on the issue of Work Product Doctrine. The Court will address these allegations in the order in which they are presented in their Concise Statement of Matters Complained of on Appeal.

### **Attorney-Client**

Penn State did not seek an opinion of law, legal services, or assistance in a legal matter from the Freeh Firm

The Court relies on its September 19, 2014, Opinion at pages 19-21.

The Freeh Firm did not provide an opinion of law, legal services, or assistance in a legal matter to Penn State

The Court relies on its September 19, 2014, Opinion at pages 19-21.

Penn State waived the attorney-client privilege by producing (or authorizing the Freeh Firm or Freeh Group International to produce) protected communications to one or more third parties

The Court relies on its September 19, 2014, Opinion at page 21.

The appropriate scope of any subject-matter waiver of the attorney-client privilege that may have occurred are the four divisions outlined in the Scope of Engagement

The Court relies on its September 19, 2014, Opinion at pages 21-22.

### **Work-Product Doctrine**

Penn State lacks standing to assert the attorney work product doctrine

The Court addressed this issue in its September 19, 2014, Opinion at page 21-22. Specifically, the Court held that Penn State did not have standing to raise the objection, as the work-product doctrine cannot be asserted by the client.

*Rhone-Poulenc Rorer, Inc. v. Home Inc/em. Co.*, 32 F.3d 851, 866 (3d Cir. 1994).

In a subsequent filing<sup>1</sup>, Pepper Hamilton claimed that this issue is now moot, as they attempted to assert the protection post Order. This claim cannot succeed.

The appellate rules direct that an issue must be raised in the trial court in order to provide that court with the opportunity to consider the issue, rule upon it correctly, and obviate the need for appeal.

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<sup>1</sup> Motion for stay pending appeal and Memorandum of Law in Support of Motion, both filed on October 13, 2014.

*Gustine Uniontown Associates, Ltd. ex rel. Gustine Uniontown, Inc. v. Anthony Crane Rental, Inc.*, 892 A.2d 830, 835 (Pa.Super. 2006). There has been no testimony, evidence, or argument from Pepper Hamilton on this issue, and axiomatically, Plaintiffs have not had the opportunity to respond to any testimony, evidence, or arguments Pepper Hamilton might raise. Because Pepper Hamilton did not attempt to assert their work product doctrine privilege until after the instant appeal was filed, this Court has not had the opportunity to consider the issue, rule upon it correctly, and obviate the need for appeal.

The fact that Pepper Hamilton has attempted to assert the privilege post Order has no effect on the instant appeal.

In order to preserve an issue for appeal, a litigant must make a **timely**, specific objection at trial and must raise the issue on post-trial motions.

*Dennis v. Se. Pennsylvania Transp. Auth.*, 833 A.2d 348, 352 (Pa.Cmwlth. 2003)(**emphasis added**). Because Pepper Hamilton did not respond to the subpoena and did not present any testimony, exhibit, or argument at the hearing, their attempt to assert the work product doctrine is untimely.

In conclusion, with respect to Penn State's objection to the Court ruling that they do not have standing, the Court relies on its Order and Opinion of September 19, 2014. With respect to Pepper Hamilton's objection to the subpoena based on the work product doctrine, this issue is not properly before the Superior Court.

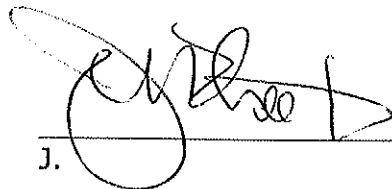
The protection of the attorney work product doctrine is not available unless the requests are made in connection with the litigation for which the material was prepared

The Court relies on its September 19, 2014, Opinion at page 22.

The Scope of Engagement did not contemplate legal advice or legal services in conjunction with the case at bar

The Court relies on its September 19, 2014, Opinion at page 22.

BY THE COURT

 11/29/14  
J.