IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

The ESTATE of JOSEPH PATERNO;

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.

Civil Division

Docket No. 2013-2082

Plaintiffs' Memorandum in Opposition to Defendant NCAA's Motion for Leave to Amend Answer with New Matter and Set Briefing Schedule for Motion for Judgment on the Pleadings

Filed on Behalf of Plaintiffs

Counsel of Record:
Thomas J. Weber, Esquire
Kathryn E. Peters, Esquire
GOLDBERG KATZMAN, P.C.
4250 Crums Mill Road, Suite 301
P.O. Box 6991
Harrisburg, PA 17112
Telephone: (717) 34-4161
Email: tjw@goldbergkatzman.com

Wick Sollers (admitted *pro hac vice*)
L. Joseph Loveland (admitted *pro hac vice*)
Patricia L. Maher (admitted *pro hac vice*)
Ashley C. Parrish (admitted *pro hac vice*)
KING & SPALDING LLP
1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Telephone: (202) 737-0500
Email: wsollers@kslaw.com
jloveland@kslaw.com
pmaher@kslaw.com
aparrish@kslaw.com

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DEBRA C. IMMEL
PROTHONOTARY
CENTRE COUNTY, PA

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

ESTATE of JOSEPH PATERNO; 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.

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PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR LEAVE TO AMEND ANSWER WITH NEW MATTER AND SET BRIEFING SCHEDULE FOR MOTION FOR JUDGMENT ON THE PLEADINGS

The National Collegiate Athletic Association ("NCAA") Defendants seek leave to amend their answer for one reason alone: to revisit matters this Court has already resolved in Plaintiffs' favor. More than two years ago, this Court held in a carefully reasoned decision that, under Pennsylvania law, Plaintiffs have pleaded facts sufficient to show that Defendants published defamatory statements about them. The NCAA Defendants now seek to leverage an irrelevant ruling in the United States District Court for the Eastern District of Pennsylvania to take another swing at this Court's decision. Because the NCAA Defendants have not justified their request for reconsideration, this Court should deny their motion to amend. Moreover, even if this Court determines that the NCAA Defendants may amend their answer, it should not grant their motion for a separate briefing schedule. Briefing a collateral-estoppel argument separate and apart from

the issues to be addressed on summary judgment would increase the burdens on the parties and this Court without any appreciable benefit.

A. The Court Should Deny The NCAA Defendants' Motion To Amend Their Answer.

As the NCAA Defendants acknowledge, Pennsylvania courts "liberally permit[]" amendments "*except* where surprise or prejudice to the other party will result," *Burger v. Borough of Ingram*, 697 A.2d 1037, 1041 (Pa. Commw. Ct. 1997) (emphasis added), or where "there does not appear to be a reasonable possibility that amendment will be successful." *Spain v. Vicente*, 461 A.2d 833, 837 (Pa. Super. Ct. 1983). There's the rub: Defendants' assumption that Plaintiffs would not be prejudiced is wrong. Prejudice is guaranteed because Plaintiffs would be forced to re-litigate a question that they have already litigated once and that this Court has already decided. *See* Opinion & Order at 16 (Jan. 7, 2014) ("Demurrer Order"). Nor is there any reasonable possibility that Defendants' amendment will be successful. Should the Court require full briefing on Defendants' new collateral-estoppel theory, Plaintiffs will of course provide it. But even a cursory review shows that their new theory fails, for at least three reasons.

First, there is no indication that the federal district court was deciding the same issue this Court did — whether under Pennsylvania law the NCAA's statements identified plaintiffs sufficiently to render the statements defamatory. *See Rue v. K-Mart Corp.*, 713 A.2d 82, 84 (Pa. 1998) (collateral estoppel applies only when "[a]n issue decided in a prior action is identical to one presented in a later action"). This Court provided a thorough and careful analysis of that issue, with citations to multiple *Pennsylvania* authorities. Demurrer Order 14–16. The federal district court, in contrast, merely stated — without citing any legal authority, from Pennsylvania or anywhere else — that it was "not convinced there is any evidence that Penn State made stigmatizing statements specifically about the plaintiffs" sufficient to satisfy the "stigma"

requirement for a federal § 1983 claim for deprivation of a liberty interest in reputation. *Paterno v. Pa. State Univ.*, __ F. Supp. 3d __, 2016 WL 758305, at *8 (Feb. 25, 2016). The federal district court's opinion does not identify the standard it was applying. Nor did it purport to apply the Pennsylvania standard, which this Court conclusively showed answers the question in Plaintiffs' favor. *See* Demurrer Order 14–16 (citing cases).

Second, the federal district court's cursory conclusion about the stigmatizing nature of defamatory statements made in the Consent Decree was unnecessary to its judgment. At most, it was only one of several alternative grounds for the court's decision. Under Pennsylvania law, that forecloses collateral estoppel. The Pennsylvania Supreme Court has adopted Section 27 of the Restatement (Second) of Judgments (1982), which sets out the general rule concerning collateral estoppel (also called "issue preclusion") and describes in comments the circumstances for its application. *Pa. State Univ. v. County of Centre*, 615 A.2d 303, 306 (Pa. 1992) (stating that the Supreme Court had adopted § 27 and applying a rule from that section's Comment *c*); *see also McGill v. Southwark Realty Co.*, 828 A.2d 430, 434 (Pa. Commw. Ct. 2003) ("Our Supreme Court embraces the Restatement (Second) of Judgments § 27 (1982) definition of issue preclusion"). Comment *h* to Section 27 provides that "[i]f issues are determined but the judgment is not dependent upon the determinations, relitigation of those issues in a subsequent action between the parties is not precluded." Comment *i* further provides that "[i]f a judgment of a court of first instance is based on determinations of two issues, either of which standing independently would be sufficient to support the result, the judgment is not conclusive with respect to either issue standing alone." As that comment points out, an alternative ground "may not have been as carefully or rigorously considered as it would have if it had been necessary to the result." *Id.*

Just so here. The district court provided three separate alternative grounds to support a judgment that required only one. *Paterno*, 2016 WL 758305, at *7–*8 (concluding that Plaintiffs lacked a property interest in their employment); *id.* at *8–*9 (concluding, without citation to authority, that Plaintiffs had failed to satisfy the "stigma" prong of the "stigma-plus" test for a deprivation actionable under § 1983); *id.* at *9–*10 (concluding that Plaintiffs had failed to satisfy the "plus" prong). Plaintiffs do not concede the correctness of any of the three grounds and believe that the district court's ruling will be overturned on appeal. For present purposes, however, it is sufficient to note that each ground independently supported the district court's result, so none can be afforded collateral-estoppel effect standing alone.

Third, the district court gave significantly more attention to the property-interest issue and the "plus" prong than it gave to the "stigma" prong on which Defendants rely. In discussing those two grounds, the court at least cited legal authorities and offered reasoning based on those authorities. That is in stark contrast to the court's perfunctory treatment of the "stigma" prong, where the court offered only its own take on the Consent Decree's language without citing any authority or explaining why the stigmatizing effect of that language was not a jury question. *See id.* at *8–*9. The court's cursory and unpersuasive analysis of the "stigma" prong illustrates the reality, recognized in the Restatement, that alternate grounds do not always receive the careful consideration necessary to justify collateral estoppel. Indeed, although the federal court expressed its bare opinion that no reasonable person would interpret the Freeh Report and Consent Decree as including stigmatizing statements against plaintiffs Jay Paterno and William Kenney, one of the authors of the Freeh Report has testified just the opposite. *See* 2016-02-16 Dep. of G. Paw 380:23–381:4 (agreeing that the statement "could reasonably be read to include

Bill Kenney and Jay Paterno"); *see also* Dep. of J. Paterno 102:6–18 (testifying that the Consent Decree's statement "referred to a very, very narrow group of people").

In these circumstances, the NCAA Defendants' request is perplexing. They want to amend their answer to seek reconsideration of a matter this Court already decided under Pennsylvania law more than two years ago. Further, they base that request on the theory that this Court should defer to a federal-court ruling that (1) addresses a different legal issue and cites no authority tying the court's conclusions to Pennsylvania law; (2) was not necessary to the result reached by the federal court; and (3) is poorly explained and unpersuasive even on its own terms. The correct response to this perplexing request is to deny it.

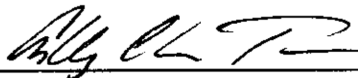
B. The Court Should Deny The NCAA Defendants' Request To Amend The Agreed-Upon Briefing Schedule.

Even if this Court were to allow the NCAA Defendants to amend their answer to revisit a question it has already resolved, it should not grant Defendants' request for a new briefing schedule. The parties have agreed to an orderly schedule for summary-judgment briefing. There is no reason the NCAA Defendants cannot comply with that schedule. Nor do Defendants offer any convincing reason why they cannot present their collateral-estoppel arguments in the course of that briefing. Adding a further round of briefing would do nothing but create more work for all involved — both the parties and the Court. Deciding Defendants' collateral estoppel argument will not resolve the case. Even if Defendants won that argument, it would apply only to the claims brought by plaintiffs Jay Paterno and William Kenney. The Estate's claims would still go forward, requiring summary-judgment briefing under the agreed schedule. Defendants have no basis for suggesting that more briefing now would result in less work later.

CONCLUSION

Plaintiffs request that this Court deny the Defendants' motion in its entirety, but at a minimum, Plaintiffs request that the Court deny the request for a new briefing schedule.

Respectfully submitted,



Thomas J. Weber
GOLDBERG KATZMAN, P.C.
4250 Crums Mill Road, Suite 301
P.O. Box 6991
Harrisburg, PA 17112
Telephone: (717) 234-4161

Wick Sollers
L. Joseph Loveland
Mark A. Jensen
Ashley C. Parrish
KING & SPALDING LLP
1700 Pennsylvania Ave N.W.
Washington, DC 20006
Telephone: (202) 737-0500

Counsel for Plaintiffs

May 20, 2016

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing MEMORANDUM IN OPPOSITION TO DEFENDANT NCAA'S MOTION FOR LEAVE TO AMEND ANSWER WITH NEW MATTER AND SET BRIEFING SCHEDULE FOR MOTION FOR JUDGMENT ON THE PLEADINGS was served the 23rd day of May, 2016 by email and first class mail upon:

Everett C. Johnson, Jr.
Brian Kowalski
Sarah Gragert
Latham & Watkins LLP
555 11th St. N.W.
Suite 1000
Washington, D.C. 20004-1304
everett.johnson@lw.com
brian.kowalski@lw.com
sarah.gragert@lw.com

Thomas W. Scott
Killian & Gephart
218 Pine Street
P.O. Box 886
Harrisburg, PA 17108-0886
tscott@killiangephart.com

Thomas J. Weber
GOLDBERG KATZMAN, P.C.
4250 Crums Mill Road, Suite 301
P.O. Box 6991
Harrisburg, PA 17112
Telephone: (717) 234-4161

Wick Sollers
L. Joseph Loveland
Mark A. Jensen
Ashley C. Parrish
KING & SPALDING LLP
1700 Pennsylvania Ave N.W.
Washington, DC 20006
Telephone: (202) 737-0500
Counsel for Plaintiffs