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

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.

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CENTRE COUNTY, PA

Docket No.: 2013-2082

Type of Case:
Declaratory Judgment Injunction
Breach of Contract
Tortious Interference with Contract
Defamation
Commercial Disparagement
Conspiracy

Type of Pleading:
The NCAA's Reply in Support of its Motion for Leave to Amend Answer With New Matter and Set Briefing Schedule for Motion for Judgment on the Pleadings

Filed on Behalf of:
National Collegiate Athletic Association, Mark Emmert, Edward Ray

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ORIGINAL

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

ESTATE of JOSEPH PATERNO, et al., Plaintiffs,	)	Civil Division
v.	)	Docket No. 2013-2082
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al., Defendants.	)	

THE NCAA'S REPLY IN SUPPORT OF ITS MOTION FOR LEAVE TO AMEND ANSWER WITH NEW MATTER AND SET BRIEFING SCHEDULE FOR MOTION FOR JUDGMENT ON THE PLEADINGS

Plaintiffs' Opposition pays short shrift to the narrow issues presently before the Court; namely, whether the NCAA should be permitted to amend its answer and whether the Court should set a briefing schedule on the question of collateral estoppel. Instead, Plaintiffs' Opposition delves into the merits of the NCAA's collateral estoppel defense, the very issue they say that this Court should not consider. In focusing on the issues actually before the Court, there can be little doubt that the NCAA's motion should be granted. Pennsylvania law broadly permits litigants to amend their pleadings, unless the adverse party is prejudiced, and Plaintiffs are not in striking distance of demonstrating prejudice. Assuming the NCAA is permitted to amend its answer, the only question that remains is whether collateral estoppel should be briefed now, or during summary judgment.

As explained more below, logic dictates that the issue should be addressed now to potentially avoid the need for costly additional litigation of claims that are collaterally estopped.

ARGUMENT

A. Plaintiffs Have No Viable Argument To Prevent The NCAA From Amending Its Answer.

As Plaintiffs concede, "[t]he right to amend should be granted liberally, unless the adverse party is prejudiced." *Std. Pipeline Coating Co. v. Solomon & Teslovich, Inc.*, 344 Pa. Super. 367, 376, 496 A.2d 840, 844 (1985); *see* Pls.' Opp'n at 2. In their Opposition, Plaintiffs struggle to identify any prejudice at all, arguing only that the NCAA's proposed amendment would "force[]" Plaintiffs to "re-litigate" a question this Court has purportedly already decided—namely, whether the relevant statement in the Consent Decree referred to Plaintiffs Jay Paterno and Bill Kenney. Pls.' Opp'n at 2. Quite simply, that Plaintiffs might have to brief a legal issue cannot, under any reasonable meaning of the term, constitute prejudice.

In any event, Plaintiffs are wrong. The NCAA does not seek to re-litigate anything, nor is it asking for reconsideration of any decision by this Court. Indeed, this Court has *not* finally decided whether Paterno and Kenney were the targets of the relevant statement, but rather decided only that Paterno and Kenney had "sufficiently *alleged*" that they were. Op. & Order at 16 (Jan. 6, 2014)

(emphasis added). While that determination meant that Plaintiffs' claims survived the NCAA's preliminary objections, it did not constitute a final decision on the merits of Plaintiffs' theory. The federal court's decision, on the other hand, *was* a final decision—the federal court definitively decided that the relevant statement did not refer to Paterno or Kenney, and on that basis, dismissed their claims. *See Paterno v. Pa. State Univ.*, No. 2:14-cv-04365, __ F. Supp. 3d __, 2016 WL 758305, at *9-10 (E.D. Pa. Feb. 25, 2016).

In asserting its collateral estoppel defense, therefore, the NCAA in no way seeks reconsideration of any prior decision of this Court; instead, it simply seeks to prevent *Plaintiffs* from relitigating a question that the federal court has already finally decided. As the Pennsylvania Supreme Court has recognized, "it is axiomatic that fully litigated, final judgments are given preclusive effect." *In re Stevenson*, 615 Pa. 50, 67, 40 A.3d 1212, 1222, (2012) (collateral estoppel "conserve[s] judicial resources, ... prevent[s] inconsistent decisions, [and] encourage[s] reliance on adjudication" (citation omitted)).

Plaintiffs chose to litigate the same question simultaneously in two different fora, and now that their strategy has backfired, they should not be heard to argue that the consequences of that strategic choice somehow constitute "prejudice." *See Bata v. Central-Penn Nat'l Bank of Phila.*, 448 Pa. 355, 380, 293 A.2d 343,

357 (1972) (holding that prejudice is not established "from the fact that the opponent may lose his case on the merits if the pleading is allowed").

Likely recognizing that they cannot establish prejudice, Plaintiffs' instead concentrate most of their Opposition on attacking the NCAA's proposed collateral estoppel defense *on its merits*. But whether the NCAA's defense will ultimately be successful simply has no relevance to whether the NCAA should be permitted to *offer* the defense in the first place. Indeed, it is well established that, in assessing whether leave to amend should be granted, a court "need not and should not decide whether or not the matters sought to be pleaded can ultimately be sustained." *John McShain, Inc. v. Cessna Aircraft Co.*, 243 Pa. Super. 220, 222-23, 364 A.2d 951, 952(1976) (holding that lower court abused its discretion in denying leave to amend because "[t]he issue before the court was not whether the doctrine of collateral estoppel was valid at the pleading stage, but whether the appellants should be given the opportunity of attempting to prove its validity").

Of course, if granted leave to amend, the NCAA is fully prepared to demonstrate that collateral estoppel applies. A fulsome discussion of the merits is not appropriate at this stage, but suffice to say that the NCAA strongly disagrees with Plaintiffs' premature arguments and looks forward to the opportunity to properly brief the merits. For example, Plaintiffs argue that the federal decision did not pertain to the same issue because the court made it in the context of a

federal Section 1983 claim. Pls.' Opp'n at 2-3. But collateral estoppel still "prevents re-litigation of an *issue* in a later action, despite the fact that is based on a *cause of action* different from the one previously litigated." *Selective Way Ins. Co. v. Hosp. Grp. Servs., Inc.*, 2015 PA Super 146, 119 A.3d 1035, 1042 (2015) (emphases added) (citation omitted).

And contrary to Plaintiffs' argument (*see* Pls.' Opp'n at 3-4), Pennsylvania courts have expressly adopted the position that alternative grounds for a decision are *each* entitled to full preclusive effect, as articulated in the *First* Restatement of Judgments. *Cty. of Ctr. v. Pa. State Univ.*, 129 Pa. Commw. 184, 202-203, 565 A.2d 187, 195-96 (1989) ("adopt[ing] the First Restatement position" that each of two alternative grounds for a decision trigger collateral estoppel), *rev'd on other grounds sub nom., Pa State Univ. v. Cty. of Ctr.*, 532 Pa. 142, 615 A.2d 303 (1992); *see also* Restatement (First) of Judgments § 69 cmt. b.

For present purposes, however, the NCAA seeks only the *opportunity* to assert its collateral estoppel defense—whether now or at summary judgment. *See McShain*, 243 Pa. Super at 223, 364 A.2d at 952. Plaintiffs simply have no viable argument to overcome the broad latitude parties are given to amend their pleadings.

B. Briefing On Collateral Estoppel Should Occur Now.

If the Court does grant the NCAA leave to amend its Answer, the NCAA also requests that the Court establish a briefing schedule for a motion for judgment on the pleadings, limited to the narrow legal question of whether collateral estoppel bars Plaintiffs Paterno's and Kenney's claims. Assuming the NCAA is permitted to assert it collateral estoppel defense, that question must be briefed and decided *eventually*, and there are several compelling justifications for doing so sooner rather than later.

In particular, resolution of the collateral estoppel issue in favor of the NCAA would fully dispose of Plaintiffs Paterno's and Kenney's claims, significantly narrowing the issues that remain to be litigated. Given that those claims are likely to be a significant focus of the expert discovery phase—*a phase of this case that has not even begun*—dismissal of those claims in short order would save both parties substantial time and resources. Briefing collateral estoppel now would also avoid the need to add yet *another* issue to the parties' summary judgment briefs—briefs that are already likely to be lengthy and complex.

Moreover, contrary to Plaintiffs' protestations (Pls.' Opp'n at 5), briefing collateral estoppel through a motion for judgment on the pleadings would in no way interfere with any existing schedule. As the Court is well aware, it recently rescinded the scheduling order that was previously in effect in this case, so as to

allow for resolution of outstanding privilege issues and additional fact discovery. *See* Order (May 16, 2016). As a result of that order, ***there are no existing deadlines with which to interfere.***[1] Particularly in that posture—where other aspects of the litigation (such as expert discovery and summary judgment) have *already* been put off indefinitely—there is every incentive for the Court and the parties to at least proceed with resolving as soon as possible the issues that *can* be decided now. The NCAA's collateral estoppel defense is just such an issue.

Accordingly, the NCAA respectfully requests that its Motion for Leave to Amend Answer with New Matter and Set Briefing Schedule for Motion for Judgment on the Pleadings be granted.

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[1] In any event, Plaintiffs' suggestion that a motion for judgment on the pleadings would create substantial additional work rings particularly hollow in light of the nature of their Opposition. Indeed, by attempting to convert their Opposition into a brief about the *merits* of collateral estoppel, they reveal that they have already researched and developed their arguments on the issue.

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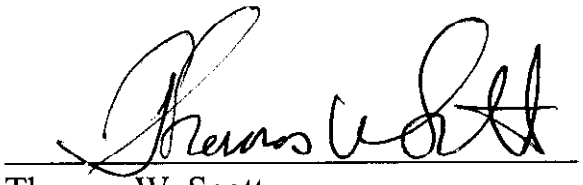
Respectfully submitted,



Dated: June 2, 2016

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CERTIFICATE OF SERVICE

I, Thomas W. Scott, hereby certify that I am serving a copy of the NCAA's *Reply in Support of Its Motion for Leave to Amend Answer With New Matter and Set Briefing Schedule for Motion for Judgment on the Pleadings* on the following by First Class Mail and email:

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