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

GRAHAM B. SPANIER, Plaintiff	:	
vs.	:	No. 2013-2707
LOUIS J. FREEH and FREEH SPORKIN & SULLIVAN, LLP, AND FREEH GROUP INTERNATIONAL SOLUTIONS LLC, Defendants	:	

TYPE OF MATTER:
Defamation

TYPE OF PLEADING:
Brief in Support of Answer to Defendants' Preliminary Objections to Plaintiff's Defamation Claims

FILED ON BEHALF OF:
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GRAHAM B. SPANIER, Plaintiff, v. LOUIS J. FREEH, FREEH SPORKIN & SULLIVAN, LLP, AND FREEH GROUP INTERNATIONAL SOLUTIONS, LLC, Defendants.	:	COURT OF COMMON PLEAS OF CENTRE COUNTY No. 2013-2707

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS LOUIS J. FREEH AND FREEH SPORKIN & SULLIVAN, LLP'S PRELIMINARY OBJECTIONS TO PLAINTIFF'S DEFAMATION CLAIMS

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INTRODUCTION

Defendants' preliminary objections should be overruled in their entirety as Defendants have failed to meet their burden of showing that "it appears with certainty that the law permits no recovery under the allegations pleaded." *Green v. Mizner*, 692 A.2d 169, 172 (Pa. Super. 1997). Plaintiff's well-pleaded Complaint sets forth in great detail factual allegations supporting all elements of Plaintiff's defamation claims against Defendants Louis J. Freeh ("Freeh") and his law firm, Freeh Sporkin & Sullivan LLP ("FSS"). Taken as true as they must be at this stage, these facts are more than sufficient to establish Plaintiff's right to relief on his defamation claims.

Defendants' claim that the statements Freeh and FSS made in the Freeh Report and subsequent media appearances were "pure expressions of opinion" finds no support in the law, in the context in which the statements were made, or through evaluation of the statements themselves. Defendants' statements were made in the context of a fact-finding investigative report, Defendants repeatedly and emphatically touted their accusations about Dr. Spanier as being impartial, objective statements of fact, and the statements themselves are not expressed with any qualifying language indicating they are opinion. Similarly, Defendants' argument that Dr. Spanier cannot allege actual malice because he was criminally charged long after the publication of the Freeh Report is unsupported by any

applicable authority, relies on documents outside the pleadings, and ignores the fact that Dr. Spanier plainly alleges that he was charged as a result of the public furor created by Defendants' defamatory statements. Defendants' argument ignores Dr. Spanier's presumption of innocence, the damages caused by Defendants' own conduct, and the fact that most of the charges against Dr. Spanier have already been quashed.

Plaintiff respectfully submits that Defendants' preliminary objections should be overruled in their entirety, and this action should proceed to discovery and trial.

COUNTERSTATEMENT OF FACTS

I. The Sandusky Indictment Causes a Public Relations Crisis at Penn State.[1]

In the fall of 2008, the Pennsylvania Attorney General's Office began investigating allegations that former Penn State assistant football coach Jerry Sandusky had sexually abused boys whom he had supervised as an employee of The Second Mile, a youth charity organization that Sandusky founded and managed. (Compl. ¶¶ 68-69, 74.) In November 2011, Sandusky was indicted on multiple charges of sexually abusing minors. (*Id.* ¶ 75.) Also indicted in November 2011 were former Penn State administrators Tim Curley and Gary Schultz, who were alleged to have failed to report a 2001 incident in which Sandusky was allegedly seen sexually abusing an underage boy in the showers at a Penn State athletic facility. (*Id.* ¶ 76.) Although the investigation into Sandusky's activities had spanned multiple years, the Attorney General found no evidence to bring charges against Dr. Spanier in 2011. (*Id.* ¶ 77.)

On November 9, 2011, Dr. Spanier resigned from his position as President of Penn State under the "termination without cause" provisions of his contract. (*Id.*

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[1] The counterstatement of facts herein is a summary of relevant factual allegations from Dr. Spanier's Complaint against Freeh and FSS, as well as the exhibits thereto and documents referenced therein. Dr. Spanier's allegations are set forth in full in the Complaint. As Defendants acknowledge, all factual allegations in the Complaint must be accepted as true for purposes of resolving Defendants' Preliminary Objections. (*See* Mar. 28, 2016 Defs.' Mem. of Law In Support of Preliminary Objections to Pl.'s Defamation Claims by Defs. Louis J. Freeh and Freeh Sporkin & Sullivan LLP at 4. ("Defs.' Mem."))

¶ 82.) The same day, the Penn State Board of Trustees fired Joe Paterno, the revered, longtime head coach of Penn State's football team. (*Id.* ¶ 84.) The premature and haphazard firing of Coach Paterno created a full-scale media and public relations disaster for Penn State, with riots erupting on the edge of campus. (*Id.* ¶¶ 84-85.) The Penn State Board of Trustees knew that it needed to do something to address the growing media frenzy and to vindicate its hasty decision to fire Coach Paterno. (*Id.* ¶ 86)

II. Freeh and FSS are Hired Specifically to Issue a Biased *Fact-Finding* Report that Scapegoats Penn State Administrators.

In November 2011, the Penn State Board of Trustees began considering multiple candidates to conduct an investigation of Penn State's administrators' supposed lack of inaction regarding allegations that Sandusky was sexually abusing young boys. (Compl. ¶¶ 86.) Ultimately, Freeh and his law firm were chosen specifically because the Board knew Freeh would focus on shaping the media narrative as his "#1 priority." (*Id.* ¶ 89.) Defendant Louis Freeh, a former FBI Special Agent, Deputy United States Attorney, United States District Court Judge, and Director of the FBI, had for years marketed FSS and its related consulting firm, Freeh Group International Solutions, as able to provide "crisis management solutions" to clients. (*Id.* ¶¶ 55-57.) Freeh's business model relied on conducting highly publicized internal "investigations" that were sold to the media as "independent," but in reality were designed to further his clients' aims by

pointing the blame at specific wrongdoers in order to absolve the corporate client of blame. (*Id.* ¶¶ 57-62.) Even before his work on the much-maligned Penn State "investigation," Freeh's prior investigations had repeatedly been criticized for being incomplete, biased, and advocacy-driven. (*Id.* ¶¶ 63-67.)

In November 2011, Freeh and FSS entered into an engagement letter with the Penn State Board of Trustees. (*Id.* ¶ 86.) The letter specifically set forth Penn State's directive that FSS was to conduct a fact-investigation that would result in the release of a public report blaming certain administrators at Penn State for failing to properly respond to reports of Sandusky's activities. (*See id.*) Specifically, FSS agreed to "perform an independent, full and complete investigation of the recently publicized allegations of sexual abuse at the facilities and the alleged failure of [Penn State] personnel to report such sexual abuse to appropriate police and government authorities." FSS further agreed to publicize ***factual*** "findings" identifying "who had knowledge of the allegations of sexual abuse" and criticizing "how those allegations were handled" by Penn State administrators and coaches. (*Id.* ¶ 86; *see also* Nov. 18, 2011 Letter re Engagement to Perform Legal Services ("Engagement Letter") (attached hereto as Exhibit A).)

While performing his "investigation," Freeh was aware that his client, the Board of Trustees, expected him to ultimately finger Dr. Spanier as being involved

in a supposed "cover-up" of Sandusky's crimes. (Compl. ¶¶ 201-204.) Freeh knew that he needed to vindicate the resignation of Dr. Spanier and the firing of Joe Paterno in a way that justified the Board's actions and furthered a media narrative that scapegoated a discrete set of individuals, including Dr. Spanier, for the public relations crisis that Penn State found itself in. (*Id.* ¶ 205.) Through ongoing discussions and meetings with the Board of Trustees and the National Collegiate Athletics Association ("NCAA"), Freeh also knew that the Board and the NCAA expected him to blame the Sandusky scandal on high-level Penn State administrators in order to justify the NCAA's jurisdiction to punish Penn State — as well as to help Penn State avoid the so-called "death penalty" that could result in the obliteration of Penn State's revenue-essential football program. (*Id.* ¶¶ 206, 92-102.)

III. Freeh and FSS Publish Purportedly *Factual* Statements Defaming Dr. Spanier.

On July 12, 2012 Freeh and FSS issued their "Report of the Special Investigative Counsel Regarding the Actions of the Pennsylvania State University Related to the Child Sexual Abuse Committed by Gerald A. Sandusky" ("Freeh Report" or "the Report"). (Compl. ¶ 3; *see also* Compl. at Ex. A.) Freeh and FSS took great pains in the Report to insist that its "essential findings" were the result of an "investigation" conducted with "independence" by "men and women with extensive legal, law enforcement, and child protection backgrounds who were

experienced in conducting independent, complex and unbiased investigations." (Compl. Ex. A at 10-11.) Freeh and FSS also insisted that the Freeh Report contained objective factual findings — not subjective opinions — stating, "the findings contained in this report represent a fair, objective and comprehensive analysis of ***facts***." (*Id.* at 12) (emphasis added.)

The Freeh Report contained numerous defamatory statements concerning Dr. Spanier, all of which were presented as objective fact rather than opinion. Specifically, the Report falsely claimed that Dr. Spanier ignored allegations of sexual abuse against Sandusky in 1998 and 2001, and that Dr. Spanier engaged in an ongoing effort to cover up Sandusky's crimes in order to protect Penn State's reputation. The Report asserted that:

- Dr. Spanier exhibited "total and consistent disregard ... for the safety and welfare of Sandusky's child victims."
- Dr. Spanier "failed to protect against a child predator harming children for over a decade."
- Dr. Spanier "concealed Sandusky's activities from the Board of Trustees, the University community and authorities."
- Dr. Spanier "exhibited a striking lack of empathy for Sandusky's victims by failing to inquire as to their safety and well-being, especially by not attempting to determine the identity of the child who Sandusky assaulted in the Lasch Building in 2001."
- Dr. Spanier "empowered Sandusky to attract potential victims to the campus and football events by allowing him to have continued, unrestricted and unsupervised access to the University's facilities and affiliation with the University's prominent football program."
- "[I]n order to avoid the consequences of bad publicity, the most powerful leaders at the University — Spanier, Schultz, Paterno, and Curley — repeatedly concealed critical facts relating to Sandusky's child abuse from the authorities, the University's Board of Trustees, the Penn State community, and the public at large. The avoidance of the consequences of

bad publicity is the most significant, but not the only, cause for this failure to protect child victims and report to the authorities."

- Dr. Spanier "fail[ed] ... to adequately report and respond to the actions of a serial sexual predator."
- "The investigation also revealed: [] A striking lack of empathy for child abuse victims by the most senior leaders at the University."
- Dr. Spanier made "[a] decision ... to allow Sandusky to retire in 1999, not as a suspected child predator, but as a valued member of the Penn State football legacy ... essentially granting him license to bring boys to campus facilities for 'grooming' as targets for his assaults."
- "Despite their knowledge of the criminal investigation of Sandusky [in 1998], Spanier, Schultz, Paterno and Curley took no action to limit Sandusky's access to Penn State facilities or took any measure to protect children on their campuses."
- "The investigation also revealed ... [a] president who discouraged discussion and dissent."
- "After the February 2001 incident, Sandusky engaged in improper conduct with at least two children in the Lasch Building. Those assaults may well have been prevented if Spanier, Schultz, Paterno, and Curley had taken additional actions to safeguard children on University facilities."

(Compl. ¶ 256; *see also* Freeh Report (Compl. at Ex. A).) Freeh made similar factual statements at a press conference announcing the release of the Report. During that press conference, and in written remarks circulated at the press conference, Freeh and FSS stated:

- "Our most saddening and sobering finding is the total disregard for the safety and welfare of Sandusky's child victims by the most senior leaders at Penn State."
- "The most powerful men at Penn State failed to take any steps for 14 years to protect the children who Sandusky victimized."
- "Messrs. Spanier, Schultz, Paterno, and Curley never demonstrated, through actions or words, any concern for the safety and well-being of Sandusky's victims until after Sandusky's arrest."
- "[I]n order to avoid the consequences of bad publicity, the most powerful leaders at Penn State University — Messrs. Spanier, Schultz, Paterno, and Curley — repeatedly concealed

> critical facts relating to Sandusky's child abuse from the authorities, the University's Board of Trustees, the Penn State community, and the public at large."

(Compl. ¶¶ 274, 291; *see also* (Compl. at Ex. B).) After the Freeh Report had come under scrutiny, Freeh and FSS then issued a press release that both doubled down on the statements in the Report and press conference, and reiterated that the defamatory statements were factual findings, not mere opinions. (Compl. ¶ 309; *see also* (Compl. at Ex. C).) Importantly, the Freeh Report is written in the third-person, repeatedly claims to be an objective and impartial recitation of facts, and contains no language whatsoever indicating that its factual conclusions were intended to be presented as subjective statements of opinion. (*See generally* (Compl. at Ex. A).)

IV. Freeh and FSS Intentionally and Recklessly Disregard Ample Evidence that their Defamatory Statements Were False.

Plaintiff's 334-paragraph Complaint sets forth in great detail how Freeh and FSS acted with actual knowledge of falsity and reckless disregard for the falsity of the statements they made concerning Dr. Spanier. The Complaint alleges that Freeh and FSS's "investigation" had a preconceived outcome based on the instructions of the Board of Trustees, which explicitly directed its client — FSS — to find that Penn State administrators were aware of, and covered up, Sandusky's criminal activities. (Compl. ¶¶ 86, 198-205.) The Complaint further alleges that Freeh and FSS had multiple meetings with members of the Board of Trustees and the NCAA, in which it was determined that the NCAA would agree not to conduct

its own investigation of Penn State — as long as Freeh and FSS targeted high-level Penn State administrators in the Report. (*Id.* ¶¶ 92-102, 206.) The Complaint further alleges that Freeh and FSS had drafted their defamatory statements about Dr. Spanier well before they even interviewed Dr. Spanier for the Report — an interview they belatedly and reluctantly conducted only at Dr. Spanier's insistence. (*Id.* ¶¶ 110-121.)

With respect to the claims that Dr. Spanier knowingly engaged in a cover-up of a supposed sexual assault by Sandusky in 1998, the Complaint sets forth voluminous evidence that Freeh and FSS knew these claims to be completely false. The Complaint details evidence that the 1998 investigation into an allegation of abuse of a minor by Sandusky was conducted by the Penn State Police Department, the Pennsylvania Department of Public Welfare, Centre County Children and Youth Services, and the Centre County District Attorney's Office. (*Id.* ¶ 127.) The investigation concluded with a CYS counselor who interviewed the alleged victim determining that nothing improper occurred between Sandusky and the boy, a police detective and a Department of Public Welfare caseworker similarly determining that no sexual assault had occurred, and the District Attorney's Office declining to press any charges against Sandusky. (*Id.* ¶ 131.) In fact, the records of the investigation were expunged from Pennsylvania's statewide "ChildLine" database pursuant to Pennsylvania law because the 1998 abuse report

was classified as "*unfounded.*" (*Id.* ¶ 133.) On June 1, 1998, the University Police Chief informed Penn State administrator Gary Schultz that the police had informed Sandusky that the investigation was closed and that no criminal behavior had been discovered. (*Id.* ¶ 134.)

The only evidence that Dr. Spanier had any awareness of the 1998 investigation and exoneration of Sandusky were two emails on which Dr. Spanier was merely copied. (*Id.* ¶ 135.) The first made no mention of Sandusky and simply referred to an unspecified interview of an unidentified individual by "the Public Welfare people." (*Id.*) The second was a 1998 email from Schultz to Curley, on which Dr. Spanier was copied, that said investigators "met with Jerry on Monday and concluded there was *no criminal behavior and the matter was closed as an investigation*...." (*Id.* ¶ 136.) Moreover, Freeh and FSS reviewed Dr. Spanier's calendars and thus were aware that Dr. Spanier was travelling abroad at the time he was copied on these emails — during a time period when blackberry-type devices were unavailable and Dr. Spanier received some 25,000 emails a year. (*Id.* ¶ 137.) There is no record that Dr. Spanier ever responded to or acknowledged receipt of these emails. (*Id.*) Thus, at the time they published the Report, Freeh and FSS were aware that Dr. Spanier likely never even saw these emails — which did not specifically reference Jerry Sandusky or the subject matter of the

investigation — and that, even if he did, Dr. Spanier was informed only that the subject of an unspecified investigation ***had been exonerated***. (*Id.* ¶ 139.)

In accusing Dr. Spanier of knowingly covering up a 2001 incident of sexual abuse by Sandusky, Freeh and FSS again purposefully ignored and recklessly disregarded the fact that Dr. Spanier had no knowledge whatsoever that Sandusky had been accused of a sexual assault. (*Id.* ¶¶ 144-178.) Dr. Spanier told Freeh and FSS that all that was reported to him by administrators Tim Curley and Gary Schultz was that Sandusky had been seen in a Penn State athletic facility "horsing around" with a young male — which Dr. Spanier imagined to mean playfully splashing water or snapping towels. (*Id.* ¶¶ 149, 161.) Dr. Spanier testified unequivocally before a Grand Jury that "what was reported was not a report of any activity that was sexual in nature," and told the same to FSS investigators. (*Id.* ¶ 161.) Both Curley and Schultz — the individuals who made the report to Dr. Spanier, and thus the only two individuals who can attest to what Dr. Spanier did or did not know — confirmed that Dr. Spanier was told only that Sandusky had been seen "horsing around" and that Dr. Spanier was not told that there was a report of sexual abuse. (*Id.* ¶ 166.) Tim Curley — again, the individual who informed Dr. Spanier of the supposed incident — also spoke to the Executive Director of Sandusky's charity, The Second Mile, and did not tell him sexual misconduct had been alleged. (*See id.* ¶ 169.)

Freeh and FSS knew of or recklessly disregarded all of this evidence demonstrating that Dr. Spanier was never told that Sandusky had been seen engaging in sexual misconduct with a minor. (*See generally id.*) Freeh and FSS were also in possession of emails that confirmed what Dr. Spanier, Curley, and Schultz all said — that Dr. Spanier was informed only of an account that Sandusky had brought a male into a shower facility. (*Id.* ¶ 150-151.) The emails further confirmed exactly what Dr. Spanier told Freeh and FSS, which is that he agreed to Tim Curley's proposal to meet with Sandusky and tell him it was not appropriate to bring non-students into the Penn State facilities, and to inform officials of The Second Mile — Sandusky's employer — of the account. (*Id.*)

The Complaint further details how, in addition to disregarding the evidence that Dr. Spanier knew nothing about any alleged sexual assault, Freeh and FSS made their defamatory condemnations of Dr. Spanier without having interviewed many of the witnesses that they knew would have provided information further demonstrating Dr. Spanier's innocence. (*Id.* ¶¶ 158-163.) Freeh and FSS also disregarded the results of a contemporary investigation by a federal agency examining Dr. Spanier's fitness to continue holding a Top Secret security clearance. (*Id.* ¶ 179.) This investigation was in many ways more comprehensive than Freeh's, and Freeh and FSS knew that federal investigators had been able to interview several key witnesses that Freeh and FSS did not interview for the

Report. (*Id.* ¶ 181-182.) These individuals confirmed to federal investigators that Dr. Spanier was never told of a report of Sandusky sexually abusing a minor in 2001, and the federal report ultimately concluded that "[t]he circumstances surrounding [Dr. Spanier's] departure from his position as PSU president do not cast doubt on [Dr. Spanier's] current reliability, trustworthiness, or good judgment..." (*Id.* ¶ 186-190.) The Complaint further alleges that after the publication of the Freeh Report, Dr. Spanier sent a letter to the Board of Trustees and Penn State's General Counsel detailing the many factual errors in the Freeh Report, particularly with respect to its false claims regarding Dr. Spanier's conduct. (*Id.* ¶ 216-219.) Although this document was shared with Defendants, they refused to correct, retract, or even acknowledge the many errors in the Freeh Report. (*Id.*)

V. Dr. Spanier is Indicted on Trumped-Up Charges *Because of* Freeh and FSS's Defamatory Statements.

The Complaint alleges that although Commonwealth officials found no cause to indict Dr. Spanier in 2011, he was later criminally charged ***after the publication, and as a direct result of***, Freeh and FSS's defamatory statements. (Compl. ¶ 13.) The Complaint alleges that the Attorney General caved to the pressure created by the media firestorm Freeh and FSS's defamatory statements engendered (*Id.* ¶ 13.) The Complaint further alleges that "[a]s a direct and proximate result of Freeh's false, malicious and defamatory statements, Dr.

Spanier has been forced to defend himself from criminal charges, brought by prosecutors who worked closely with Freeh." (*Id.* ¶ 239.) In fact, most of the charges against Dr. Spanier have already been quashed, and the Superior Court expressly called out the conduct of Deputy Attorney General Frank Fina, calling his actions in pursing charges against Dr. Spanier "highly improper." (*Id.*)[2]

COUNTERSTATEMENT OF THE QUESTIONS INVOLVED

Have Defendants Freeh and FSS established as a matter of law that all of their statements concerning Plaintiff alleged in the Complaint are pure "opinion" where the statements themselves are part of an investigative fact-finding report, are expressed as objective fact with no language whatsoever indicating that they constitute mere opinion, and where Defendants themselves have repeatedly asserted that the statements at issue are findings of fact and not subjective opinion?

Suggested response: No.

Have Defendants Freeh and FSS established as a matter of law that they did not act with actual malice at the time of publication solely based on the fact that Dr. Spanier was criminally charged for certain conduct ***after*** the publication of the statements, where no Pennsylvania authority supports this argument, and where the

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[2] The Office of the Attorney General recently announced that it will not appeal the Superior Court's ruling quashing these charges. Karen Langley, *State will not appeal ruling dropping some criminal charges against former PSU administrators,* Pittsburgh Post-Gazette (April 30, 2016, 12:00 AM) http://www.post-gazette.com/news/state/2016/04/30/Pennsylvania-will-not-appeal-ruling-dropping-some-criminal-charges-against-former-PSU-administrators-Graham-Spanier-Gary-Schultz-Timothy-Curley/stories/201604300098.

Complaint itself alleges that Dr. Spanier was charged ***as a result*** of Defendants' defamatory statements?

Suggested response: No.

STANDARD OF REVIEW

On review of preliminary objections, the Court must regard the allegations in the complaint as true and accord the plaintiff all the inferences reasonably deduced therefrom. *Green*, 692 A.2d at 172. Preliminary objections testing the legal sufficiency of a complaint can only be sustained if the plaintiff's complaint indicates on its face "that his claim cannot be sustained, and the law will not permit recovery." *Smith v. Wagner*. 588 A.2d 1308, 1311 (Super. Ct. 1991). If there is any doubt whether preliminary objections in the nature of a demurrer should be sustained, all doubt must be resolved in favor of overruling the preliminary objections. *Green*, 692 A.2d at 172

ARGUMENT

Defendants present only two arguments in support of their preliminary objections to Plaintiff's defamation claims. First, Defendants assert that the challenged statements in the Freeh Report are "expressions of opinion" that are not actionable. (Defs.' Mem. at 23-24.) Next, Defendants argue that Plaintiff cannot demonstrate actual malice as a matter of law because Dr. Spanier was criminally charged after the publication of the Freeh Report. Because neither argument is

remotely sufficient to meet Defendants' heavy burden of demonstrating that it is "clear and free from doubt that the law will not permit recovery under the alleged facts," (*see* Defs.' Mem. at 23 (quoting *Africa v. Horn*, 701 A.2d 273, 274 (Pa. Commw. Ct. 1997)), Defendants' preliminary objections must be overruled.

First, Defendants wholly fail to demonstrate that any of the statements at issue are "'pure' expressions of opinion," as Defendants claim — much less all of the statements alleged in the Complaint. (*See* Defs.' Mem. at 25.) The facts alleged in the Complaint, as well as Defendants' own repeated and emphatic statements, demonstrate that Defendants' defamatory statements about Plaintiff were intended as, and were understood to be, objective statements of fact. Moreover, the statements are not couched in language in any way suggesting that they are opinion. Because it is plausible — and, in fact, certain — that Defendants' statements can be interpreted as statements of fact rather than subjective opinion, Defendants' Preliminary Objections must be overruled. *See Green*. 692 A.2d at 172.

Next, Defendants assert that Dr. Spanier cannot prove actual malice as a matter of law because he was criminally charged with certain crimes months after the Freeh Report was released. (Defs.' Mem. at 33.) There are several flaws in this argument. First, Defendants ignore the multitude of allegations in the Complaint — which must be accepted as true — demonstrating that Defendants

were determined to defame Dr. Spanier regardless of the evidence, and that Defendants acted with actual knowledge of falsity and reckless disregard for the truth at the time of publication. Second, Defendants' argument relies wholly on facts outside of the Complaint that may not be considered in resolving Defendants' preliminary objections. Third, Defendants do not cite to a single authority — from Pennsylvania or elsewhere — holding that a post-publication criminal charge against the Plaintiff forecloses a civil defamation claim as a matter of law. And finally, Defendants ignore both that the Complaint alleges that Dr. Spanier was criminally charged as a direct result of the furor created by Freeh's defamatory statements, and that most of the charges in question have since been quashed.

I. Defendants Fail to Show that the Statements at Issue Constitute Pure Expressions of Opinion as a Matter of Law.

Defendants' first argue that Freeh and FSS's statements about Dr. Spanier are not actionable because they are "expression[s] of opinion" regarding Dr. Spanier. (Defs.' Mem. at 24.) This argument fails for the simple reason that Defendants cannot demonstrate that the statements at issue constitute opinion as a matter of law. Rather, both the statements themselves, and Defendants' contemporary claims about the purposes of the Freeh Report, make abundantly clear that Defendants' "findings" regarding Dr. Spanier were expressly intended to be interpreted as objective statements of fact.

"It is the function of the trial court to determine whether a challenged publication is capable of a defamatory meaning." *Green*, 692 A.2d at 172. "When making such an assessment, the court must consider the effect of the entire [publication] and the impression it would engender in the minds of the average reader among whom it is circulated." *Id.* Moreover, "in cases where a plausible innocent interpretation of the communication coexists with an alternative defamatory interpretation, the issue must proceed to a jury." *Id.* at 174.

Defendants cannot carry their burden of demonstrating that the statements at issue can only be plausibly interpreted as statements of opinion. As set forth in the Complaint and the Counterstatement of Facts above, Freeh and FSS repeatedly and emphatically claimed that the "findings" of the Freeh Report were impartial and objective findings of fact, not subjective opinions. *See* Freeh Report (Compl. at Ex. A) at p. 12 ("the findings contained in this report represent a fair, objective and comprehensive analysis of facts."). The engagement letter Freeh and FSS entered into with Penn State also expressly contemplated that Defendants would reach and publish factual findings, not "pure expressions of opinion." (*See* Engagement Letter, Ex. A). It defies logic to argue that Penn State paid Freeh and FSS more than $8 million for an opinion piece; rather, Penn State paid in excess of $8 million for a fact-finding Report that would have the imprimatur of a former federal

prosecutor, federal judge, and FBI Director whose conclusions would be believed and accepted as fact by the media and the public.

Nor are any of the statements at issue couched in the language of opinion. Under Pennsylvania law, a fact issue can exist as to whether statements are mere opinions or assertions of fact ***even when*** the statements are in the first-person and include opinion-like disclaimers such as "we believe..." *Hemispherx Biopharma, Inc. v. Asensio*, No. 3970, 2001 WL 1807641, *9 (Pa. Com. Pl. Sept. 6, 2001).[3] But the Freeh Report is written in the third-person and Freeh and FSS presented it to the public as an objective recitation of definitive facts. None of the statements at issue contain language such as "we think," or "we believe," or "in our opinion." Instead, the Report squarely accuses Dr. Spanier of reprehensible and criminal conduct, such as the assertions that "[Dr. Spanier] concealed Sandusky's activities from the Board of Trustees, the University community, and authorities," that Dr. Spanier made "[a] decision ... to allow Sandusky to retire in 1999, not as a suspected child predator, but as a valued member of the Penn State football legacy ... granting him license to bring boys to campus facilities for 'grooming' as targets for his assaults," and that "[I]n order to avoid the consequences of bad publicity ... Spanier ... repeatedly concealed critical facts relating to Sandusky's child abuse from the authorities, the University's Board of Trustees, the Penn State

[3] Copies of all unpublished cases cited herein are attached as Exhibit B.

community, and the public at large. The avoidance of the consequences of bad publicity is the most significant, but not the only, cause for this failure to protect child victims and report to authorities." (Compl. ¶ 256.)

The question for the Court at this stage is not whether the statements at issue could ***possibly*** be interpreted as opinion; rather, the "inquiry is limited solely to the question of whether the statements[s] are '***not capable***' of a defamatory meaning." *Reed v. Pray*, 53 A.3d 134, 141 (Pa. Commw. Ct. 2012) (declining to dismiss a defamation claim because "[w]e ... cannot say that a claim that an elected official 'took' money is incapable of a defamatory meaning.") (emphasis added); *see also Smith*, 588 A.2d at 1311 (Pa. Super. 1991) (affirmative statements that the plaintiff is a liar or a crook are capable of defamatory meaning as a matter of law); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 2, 21 (1990) (a statement is not nonactionable opinion if it is "sufficiently factual that it is susceptible of being proved true or false," and holding "the connotation that petitioner committed perjury is sufficiently factual to be susceptible of being proved true or false.").

In context, the inescapable conclusion is that "the impression [the Freeh Report] would engender in the minds of the average reader among whom it [was] circulated" is that Freeh and FSS were claiming to be publicizing impartial, objective, factual findings about Dr. Spanier's conduct. *See Green*, 692 A.2d at

172. The statements at issue are thus capable of a defamatory meaning as a matter of law. *Id.* Defendants' preliminary objections must be overruled.

II. Defendants Fail to Demonstrate that Dr. Spanier Cannot Allege Actual Malice as a Matter of Law.

Defendants' argument with respect to actual malice boils down to the claim that despite the innumerable allegations in the Complaint demonstrating that Freeh and FSS acted with actual knowledge of falsity and reckless disregard for the falsity of their statements at the time of publication, Dr. Spanier's claims fail as a matter of law because Dr. Spanier was criminally charged — though not convicted of any crime — months later and as a direct result of the false claims Defendants levied against Dr. Spanier. (*See* Defs.' Mem. at 32-34.) Tellingly, Defendants do not cite a single authority from Pennsylvania or any other jurisdiction supporting this argument; instead, they cite an 1886 case that is inapposite. The fact that Freeh and FSS's false claims led to Dr. Spanier being charged for crimes he did not commit is hardly evidence of a lack of malice; rather, it is further evidence ***supporting*** Dr. Spanier's claim and ***confirming*** the incredible harm Defendants' actions have caused to Dr. Spanier.

To begin with, Defendants make the bald claim that "[t]here is not a shred of evidence supporting" the allegation that Freeh and FSS acted with "actual knowledge of falsity" or with "reckless disregard for the truth." (Defs.' Mem. at 33.) This is a demonstrably incorrect statement disproved by reference to the

Complaint. As set forth in part in the Counterstatement of Facts above, Plaintiff has pled in great detail facts showing that Defendants had a preconceived plan to defame Dr. Spanier, that Defendants were aware that Dr. Spanier never had any knowledge that Jerry Sandusky was a sexual predator, and that Freeh and FSS intentionally and recklessly disregarded reams of exculpatory evidence knowing that it did not support their defamatory conclusions. (*See, e.g.*, Compl. ¶¶ 84-89, 92-120, 125-215.) The fact that Defendants may disagree with or dispute these allegations is not relevant for purposes of their preliminary objections. *Twp. of Derry v. Pa. Dep't of Labor & Indus.*, 940 A.2d 1265, 1268 (Pa. Commw. Ct. 2008) (in reviewing preliminary objections, the Court must treat as true all well-pleaded allegations in a complaint).

Moreover, nearly all of Defendants' actual malice arguments are based on documents wholly outside the pleadings that may not be considered in ruling on Defendants' preliminary objections. *See Cardella v. Pub. Sch. Employee's Ret. Bd.*, 827 A.2d 1277, 1282 (Pa. Commw. Ct. 2003) ("It is well-settled that in Pennsylvania civil practice, preliminary objections in the nature of a demurrer require the court to resolve the issues solely on the basis of the pleadings. Thus, no testimony or other evidence outside of the complaint may be considered to dispose of the legal issues presented by a demurrer."); (*see also* Defs.' Mem. at 33 (citing Grand Jury testimony Dr. Spanier gave in April 2013 and a July 30, 2013

proceeding in a criminal case before Judge William Wenner). And even if the Court ***could*** consider these documents, Defendants fail to explain how a presentment from November 2012 or a court hearing from July 2013 are relevant to, let alone legally dispositive of, the question of Defendants' state-of-mind when they published the Freeh Report in July 2012. (*See* Defs.' Mem. at 32 (arguing that actual malice is a subjective standard based on Defendants' state of mind at the time of publication).)

The crux of Defendants' argument is that because Magisterial District Judge William Wenner ordered Dr. Spanier held over for trial on criminal charges in July 2013, Dr. Spanier cannot establish Freeh and FSS's actual malice on his defamation claims as a matter of law, even at the preliminary objections stage. (*See* Defs.' Mem. at 33.) Defendants cite no authority that supports this argument. Instead, Defendants cite to a Pennsylvania case from 1886 stating, "an action for libel is upon all fours with an action for malicious prosecution," and that "probable cause" is a defense to a libel claim just as it is a malicious prosecution claim. (Defs.' Mem. at 33-34 (quoting *Briggs v. Garrett*, 2 A. 513, 521 (Pa. 1886).) But Defendants completely misconstrue this 130-year-old case. The *Briggs* case was comparing the now-defunct conditional privilege defense of "reasonable or probable cause" in a defamation case to the existence of "probable cause" to bring a claim in a malicious prosecution case — not holding that a judge's decision to

hold a defendant over for trial in a criminal case negates a claim for defamation in a wholly separate civil case. *See Briggs*, 2 A. at 521. Indeed, as Defendants' Memorandum acknowledges elsewhere, actions for malicious prosecution and defamation are not "upon all fours" in 2016, where "probable cause" is not an element of, or a defense to, a defamation claim. (*See* Defs.' Mem. at 23 (identifying the elements of a defamation claim under Pennsylvania law)); *see also American Future Sys's, Inc. v. Better Business Bureau of E. Pa.*, 923 A.2d 389, 396 (Pa. 2007) (explaining that the old "reasonable and probable cause" defense to a defamation action was a "remnant of the pre-*New York Times* paradigm" focusing on legal malice — an improper motive or ill intent for publishing — and is distinct from the modern "actual malice" standard.) In other words, the *Briggs* case is addressing a long-abandoned legal standard that has no relevance or application to the question of whether Defendants published the Freeh Report with knowledge of falsity or reckless disregard for the truth.

Defendants compound their misunderstanding of *Briggs* by assuming that if Judge Wenner found reason to hold Dr. Spanier over for trial on criminal charges, then there must have been "probable cause" to try Dr. Spanier on those criminal charges, which in turn must mean Defendants acted with "probable cause" in publishing the Freeh Report, which in turn must mean Dr. Spanier cannot demonstrate actual malice as a matter of law. (Defs.' Mem. at 33.) Not only does

this syllogism assume that "probable cause" is a relevant issue in a modern defamation action (it is not), but it also assumes that "probable cause" in the civil context is equivalent to a probable cause determination by a judge in the criminal context. But this conclusion is incorrect as well. Even in the context of a civil claim for malicious prosecution, where acting with "probable cause" is a defense, the fact that the plaintiff was ***convicted*** in a criminal case is not alone sufficient to establish a defense of probable cause and foreclose a civil malicious prosecution claim as a matter of law. *See, e.g., Cap v. K-Mart Discount Stores, Inc.*, 515 A.2d 52, 54 (Pa. Super. 1986) (where the malicious prosecution plaintiff was initially found guilty of the offense but had his conviction overturned on appeal, the initial conviction was not sufficient proof of probable cause to defeat an action for malicious prosecution); *McDonald v. Schroeder*, 63 A. 1024, (Pa. 1906) (probable cause defense to a malicious prosecution action not established as a matter of law even where malicious prosecution plaintiff had been convicted in a jury trial then had his conviction overturned).

Finally, even in the malicious prosecution context, where presence or absence of "probable cause" is a relevant issue, the Superior Court has flatly held that the fact that a criminal defendant was held over for trial does not establish the existence of probable cause for the prosecution as a matter of law. *Cosmas v. Bloomingdales Bros., Inc.*, 660 A.2d 83, 86 (Pa. Super. 1995) ("While a conviction

may serve as conclusive evidence of the existence of probable cause, the action of a district court justice or magistrate in holding the plaintiff over to be tried in court is not similarly conclusive."). Thus, even if Freeh and FSS's "probable cause" for publishing was a relevant issue in this defamation case, probable cause would not be established as a matter of law solely based on the fact that Dr. Spanier was held over for trial on certain charges of which he has never been tried or convicted. Dr. Spanier is innocent of the criminal charges and remains entitled to a presumption of innocence on those charges. *See In re Hoffman's Estate*, 39 Pa. D. & C. 208, 209 (1940) ("No presumption of guilt arises simply because an indictment has been filed. On the contrary, a presumption of innocence exists."). The *Briggs* case in no way suggests otherwise.

Finally, Freeh and FSS's argument that actual malice is foreclosed as a matter of law by Dr. Spanier's unresolved criminal charges also ignores the fact that the Complaint squarely alleges that it was Defendants' defamation of Dr. Spanier that resulted in the Attorney General seeking charges against Dr. Spanier. (Compl. ¶¶ 13, 239.) Defendants' argument in effect asks that they be ***rewarded*** for tarring Dr. Spanier so egregiously that he has been forced to defend himself against unfounded criminal charges. In fact, not only has Dr. Spanier not been convicted of any crime, most of the charges against him have already been quashed by the Superior Court, which chided the prosecutor in the case for his improper

conduct. Because Defendants have not identified any authority suggesting that Dr. Spanier's claims are foreclosed as a matter of law, Defendants' preliminary objections must be overruled. *Green*, 692 A.2d at 172.

CONCLUSION

For all of the reasons set forth above, Defendants' preliminary objections should be overruled in their entirety, and Plaintiff's defamation claims should be permitted to proceed.

Dated: May 11, 2016

By: _____

Thomas A. Clare (pro hac vice)
Elizabeth M. Locke (pro hac vice)
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ATTORNEYS FOR PLAINTIFF GRAHAM B. SPANIER

Exhibit A

Freeh Sporkin & Sullivan, LLP

PRIVILEGED AND CONFIDENTIAL

November 18, 2011

Steve A. Garban
Chairman, Board of Trustees
and
Paula R. Ammerman
Director, Office of the Board of Trustees
The Pennsylvania State University
205 Old Main
University Park, PA 16802

Re: Engagement to Perform Legal Services

Dear Mr. Garban and Ms. Ammerman:

We are pleased that the Board of Trustees of The Pennsylvania State University ("Trustees", "you" or "your"), on behalf of the Special ~~Committee~~ established by the Trustees (the "~~Special Committee~~"), has engaged us to represent the ~~Special Committee~~. This is a new engagement for Freeh Sporkin & Sullivan, LLP ("FSS"). Accordingly, this is to set forth the basic terms upon which FSS has been engaged to represent the ~~Special Committee~~, including the anticipated scope of our services and billing policies and practices that will apply to the engagement. Although our services are limited at this time to the specific matter described herein, the general terms of this letter will apply to any other matters that FSS may hereafter undertake to handle for the Trustees or the ~~Special Committee~~.

1. Scope of Engagement. FSS has been engaged to serve as independent, external legal counsel to the ~~Special Committee~~ to perform an independent, full and complete investigation of the recently publicized allegations of sexual abuse at the facilities and the alleged failure of The Pennsylvania State University ("PSU") personnel to report such sexual abuse to appropriate police and government authorities. The results of FSS's investigation will be provided in a written report to the ~~Special Committee~~ and other parties as so directed by the ~~Special Committee~~. The report will contain FSS's findings concerning: i) failures that occurred in the reporting process; ii) the cause for those failures; iii) who had knowledge of the allegations of sexual abuse; and iv) how those allegations were handled by the Trustees, PSU administrators, coaches and other staff. FSS's report also will provide recommendations to the ~~Special Committee~~ and Trustees for actions to be taken to attempt to ensure that those and similar failures do not occur again.

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It is understood by FSS, the Trustees and the ~~Special Committee~~ Task Force that FSS will act under the sole direction of the ~~Special Committee~~ Task Force in performing the services hereunder. It also is understood by FSS, the Trustees and the ~~Special Committee~~ Task Force that FSS's investigation will be completed in parallel to, but indeprendent of, any other investigation that is conducted by any policy agencies, governmental authorities or agencies, or other organizations within or outside of (e.g., The Second Mile) PSU, and will not interfere with any such other investigations.

It also is understood by FSS, the Trustees and the ~~Special Committee~~ Task Force that during the course of FSS's independent investigation performed hereunder, FSS will immediately report any discovered evidence of criminality to the appropriate law enforcement authorities, and provide notice of such reporting to the ~~Special Committee~~ Task Force. If FSS's investigation identifies any victims of sexual crimes or exploitation, FSS will immediately report such information to the appropriate law enforcement authorities, and provide notice of such reporting to the ~~Special Committee~~ Task Force.

FSS also will communicate regarding its independent investigation performed hereunder with media, police agencies, governmental authorities and agencies, and any other parties, as directed by the ~~Special Committee~~ Task Force. However, it also is understood by FSS, the Trustees and the ~~Special Committee~~ Task Force that neither the Trustees nor the ~~Special Committee~~ Task Force will interfere with FSS's reporting of evidence of criminality or identities of any victims of sexual crimes or exploitation discovered throughout the course of FSS's independent investigation performed hereunder, as discussed in the paragraph immediately above.

The precise time frame in which FSS's services will be performed cannot presently be determined. However, FSS, the Trustees and the ~~Special Committee~~ Task Force all recognize that the investigation must be completed in a thorough manner, but also as expeditiously as possible.

2. Rates. It is anticipated that Louis J. Freeh will be the lead and billing attorney on this engagement. Other FSS, and other non-FSS professionals, will be assigned from time to time to assist in the representation. FSS will charge you for the services provided under the terms of this engagement letter based on the hourly rates of the professionals working on this matter, plus reasonable expenses as described below in the "Disbursements" section of this engagement letter. The hourly rates that will be charged in connection with this matter are as follows: Mr. Freeh -- [redacted] USD per hour; other FSS partners -- [redacted] USD per hour; investigators and FSS non-partner lawyers -- [redacted] USD per hour; and paraprofessional support staff -- [redacted] USD per hour. We reassess our hourly rates from time to time and adjustments are made when we believe such adjustments are appropriate. These adjustments may be reflected in the billing rates utilized to determine our charges to you during the course of our engagement. FSS bills in quarter of an hour increments.

3. Disbursements. In addition to fees for our services, we also charge separately for certain costs incurred on the ~~Special Committee~~'s behalf, such as travel related expenses. Our invoices also will include costs incurred on the ~~Special Committee~~'s behalf for services and materials provided by third-party vendors, including but not limited to courier and messenger service, airfreight service, outside copy service, shipping and express mail, filing fees, deposition transcripts, and court reporters. Under certain circumstances, for certain large disbursements, we may either bill you directly or ask you to advance funds outside our normal billing cycle. In addition to the third-party disbursements noted above, other charges that will be reflected on our invoices include the following:

   - International calling costs will be charged at the standard provider rates.
   - Computerized research costs will be charged at the standard provider rates.
   - Office supply costs are not passed on to a client unless a purchase is specifically required for a particular engagement.

   We make every effort to include disbursements in the invoice covering the month in which they are incurred. However, there may be occasions when disbursements may not be posted in the billing system until the following month. If the required payment of our invoices is based on the completion of a specific assignment, pursuant to any alternative timing arrangements that have been established and are described in the "Rates" section of this engagement letter, an estimate of unposted disbursements in addition to an estimate of unposted charges for services will be included in our invoice payable at completion.

4. Payment Terms. Generally, our invoices are prepared and forwarded to our clients monthly covering fees and costs incurred for the prior month. Any alternative timing arrangements for invoicing that have been established are described in the "Rates" section of this engagement letter.

   Unless stated differently in the "Rates" section of this engagement letter, our invoices for service are due and payable within thirty (30) days of receipt. Clients whose invoices are not paid within this period may have a late charge assessed on their unpaid balance at the rate of 1% per month. The intent of the late charge is to assess on an equitable basis additional costs incurred by FSS in carrying past-due balances.

   FSS requires payment at the conclusion of this engagment of all accrued and unpaid fees and disbursements to the extent invoiced, plus such additional amounts of fees and disbursements as shall constitute our reasonable estimate of fees and disbursements incurred or to be incurred by us through the conclusion of this engagement (though such estimate shall not thereafter preclude a final settling of accounts between us when final detailed billing information is available).

During this engagement, the Trustees and the ~~Special Committee~~ Task Force may request from us an estimate of fees and/or costs that we anticipate incurring on the ~~Special Committee~~ Task Force's behalf. While we may provide an estimate for your or the ~~Special Committee~~ Task Force's general planning purposes, our estimate is only a preliminary approximation based on facts that are currently available and the currently anticipated level of work required to complete the engagement. In no event is an estimate to be construed as a commitment of FSS to render services at a minimum or maximum cost.

Unless otherwise agreed, our invoice will be presented in our standard format. If this format is not sufficient for your needs, we will work with you to find one that is. FSS will review individually any requests to use a third party vendor for electronic billing. Depending on the vendor requested, we might provide alternative recommendations in order to insure that electronic billing through a third party is both practical and efficient. All charges related to using a third party vendor for this purpose, including initial start-up costs and maintenance fees, will be payable by the Trustees directly.

Where required, your billing statement may include applicable international taxes such as VAT, GST, and consumption tax, etc.

Upon request, we will forward our billing statements to a third party designated by you who is assuming payment responsibility for your or the ~~Special Committee~~ Task Force's legal expenses, e.g., an insurance carrier who holds your liability coverage. In the event that timely payment is not received from the third party, we will look to the Trustees for payment of our legal fees and costs and you agree that you are responsible for prompt payment in that event.

All payments should be sent directly to: 3711 Kennett Pike, Suit 130, Wilmington, Delaware 19807. If you choose to pay by wire transfer, wire transfer instructions are as follows:

Account Holder: Freeh Sporkin & Sullivan, LLP

Bank:

Account No.:

ABA/Routing No.:
(For Domestic Payments)

SWIFT Code:
(For International Payments)

The billing attorney assigned to this matter will review your billing statement before it is sent to you and make any adjustments he or she views as appropriate. If you have

any questions concerning any invoice item, please do not hesitate to contact the billing attorney.

5. Retention of Third Parties. We may determine that it is necessary to involve third parties to assist us in performing services in connection with this engagement. If that determination is made, we will notify the ~~Special Committee~~ Task Force promptly to discuss the proposed third parties, the expected scope of the services to be provided by the third parties and the related fees and costs expected to be charged by those third parties. FSS will consult with the ~~Special Committee~~ Task Force about any changes to the third parties' scope of services or related fees and costs that may occur throughout the course of this engagement.

   For the purpose of providing legal services to the ~~Special Committee~~ Task Force, FSS will retain Freeh Group International Solutions, LLC ("FGIS") to assist in this engagement. It should be noted that Louis J. Freeh is a partner and member in FSS and FGIS, respectively, and has a controlling interest in both. FSS is a law firm and FGIS is a separate investigative and consulting group.

   As described in the "Disbursements" section of this engagement letter, our invoices will include fees and costs incurred on the ~~Special Committee~~ Task Force's behalf for services and materials provided by third parties, unless stated otherwise in the "Rates" section of this engagement letter, or in a separate writing signed by FSS and the Trustees.

6. Confidentiality and Responding to Subpoenas and Other Requests for Information. The work and advice which is provided to the ~~Special Committee~~ Task Force under this enagagment by FSS, and any third party working on behalf of FSS to perform services in connection with this engagement, is subject to the confidentiality and privilege protection of the attorney-client and attorney work product privileges, unless appropriately waived by the parties or otherwise determined by law. In the event that FSS, or any third party working on behalf of FSS to perform services in connection with this engagement, is required to respond to a subponea or other formal request from a third party or a governmental agency for our records or other information relating to services we have performed for the ~~Special Committee~~ Task Force, or to testify by deposition or otherwise concerning such services, to the extent permitted by law, we will provide you and the ~~Special Committee~~ Task Force notice of such a request and give you and the ~~Special Committee~~ Task Force a reasonable opportunity to object to such disclosure or testimony. It is understood that you will reimburse us for our time and expense incurred in responding to any such demand, including, but not limited to, time and expense incurred in search and photocopying costs, reviewing documents, appearing at depositions or hearings, and otherwise litigating issues raised by the request.

7. General Responsibilities of Attorney and Client. FSS will provide the above-described legal services for the ~~Special Committee~~ Task Force's benefit, for which the Trustees will be billed in the manner set forth above. We will keep the ~~Special Committee~~ Task Force

apprised of developments as necessary to perform our services and will consult with the ~~Special Committee~~ Task Force as necessary to ensure the timely, effective and efficient completion of our work. However, although we will make every reasonable effort to do so, we cannot guarantee that we will be able to provide specific results and the Trustees and the ~~Special Committee~~ Task Force acknowlege that FSS does not promise any result.

We understand that the ~~Special Committee~~ Task Force will provide us with such factual information and documents as we require to perform the services, will make any business or technical decisions and determinations as are appropriate to facilitate the completion of our services, and will remit payment of our invoices when due, pursuant to the terms of this engagement letter.

Moreover in connection with any investigation, civil or criminal action, administrative proceeding or any other action arising out of this matter, the Trustees have agreed to indemnify FSS, it's partners, employees, agents and third-party vendors who have provided or are providing services in connection with this engagement, for all costs, expenses, attorney's fees (to be paid as accured and billed) and judgements, including any amounts paid in settlement of any claims. This obligation shall survive the termination of this engagement.

8. Waiver of Future Conflicts. Our agreement to represent the ~~Special Committee~~ Task Force is conditioned upon our mutual understanding that FSS is free to represent any clients (including your adversaries) and to take positions adverse to either you or an affiliate in any matters (whether involving the same substantive areas of law for which you have retained us on behalf of the ~~Special Committee~~ Task Force or some other unrelated areas, and whether involving business transactions, counseling, litigation or otherwise), which do not involve the same factual and legal issues as matters for which you have retained us on behalf of the ~~Special Committee~~ Task Force or may hereafter retain us. In this connection, you and the ~~Special Committee~~ Task Force should be aware that we provide services on a wide variety of legal subjects, to a number of clients, some of whom are or may in the future operate in the same areas of business in which you are operating or may operate. Subject to our ethical and professional obligations, we reserve the right to withdraw from representing the ~~Special Committee~~ Task Force should we determine that a conflict of interest has developed for us.

9. Engagement Limited to Identified Client. This will also confirm that, unless we otherwise agree in writing, our engagement is solely related to the ~~Special Committee~~ Task Force established by The Pennsylvania State University Board of Trustees and the specific matter described above. By entering into this engagement, we do not represent any individuals or entities not named as clients herein, nor do we represent any owner, officer, director, founder, manager, general or limited partner, employee, member, shareholder or other constituent of any entity named as a client in this letter, in their individual capacities or with respect to their individual affairs.

10. Termination. Our engagement may be terminated at any time by FSS or the ~~Special Committee~~ upon written notice and, with respect to FSS, subject to our ethical and professional obligations. In addition to other reasons, the Trustees and the ~~Special Committee~~ agree that FSS may terminate its legal sevices and withdraw from this engagement in the event our invoices are not paid in a timely manner, pursuant to the terms of this engagment letter. Upon termination, all fees and expenses due and owing shall be paid promptly. Your and the ~~Special Committee~~'s acceptance of this engagement letter constitutes your and the ~~Special Committee~~'s understanding of, and consent to, the particular terms, conditions, and disclosure herein.

11. Client Files. In the course of our representation of the ~~Special Committee~~, we will maintain a file containing, for example, correspondence, pleadings, agreements, deposition transcripts, exhibits, physical evidence, expert reports, and other items reasonably necessary for the ~~Special Committee~~'s representation ("Client File"). We may also place in such file documents containing our attorney work product, mental impressions or notes, drafts of documents, and internal accounting records ("Work Product"). The ~~Special Committee~~ is entitled upon written request to take possession of its Client File, subject to our right to make copies of any files delivered to the ~~Special Committee~~. The Trustees and the ~~Special Committee~~ agree that the Work Product is and shall remain our property. Under our document retention policy, we normally destroy files ten years after a matter is closed, unless other arrangements are made with the client.

FSS, of course, is delighted to be asked to provide legal services to the ~~Special Committee~~, and we are looking forward to working with the ~~Special Committee~~ on this engagement. While ordinarily we might prefer to choose a less formal method of confirming the terms of our engagement than a written statement such as this, it has been our experience that a letter such as this is useful both to FSS and to the client. Moreover, in certain instances, FSS is required by law to memorialize these matters in writing. In any event, we would request that the Trustees and the ~~Special Committee~~ review this letter and, if it comports with your and the ~~Special Committee~~'s understanding of our respective responsibilities, so indicate by returning a signed copy to me at your earliest convenience so as not to impede the commencement of work on behalf of the ~~Special Committee~~. If you or the ~~Special Committee~~ have any questions concerning this engagement letter, or should the ~~Special Committee~~ ever wish to discuss any matter relating to our legal representation, please do not hesitate to call me directly, or to speak to one of our other attorneys who is familiar with the engagement.

Again, we look forward to serving the ~~Special Committee~~ Task Force and thank the ~~Special Committee~~ Task Force and the Trustees for looking to FSS to assist the ~~Special Committee~~ Task Force in this matter.

Sincerely,

Louis J. Freeh*
Senior Managing Partner
Freeh Sporkin & Sullivan, LLP

APPROVED AND AGREED TO ON BEHALF OF
The Board of Trustees of The Pennsylvania State University:

By: _____
an authorized signatory of The Board of Trustees of The Pennsylvania State University

Printed Name: Steve A. Garban

Title: Chair, Board of Trustees
The Pennsylvania State University

Date: 12/2/11

Investigation Task Force

APPROVED AND AGREED TO ON BEHALF OF
The Special ~~Committee~~ established by
The Board of Trustees of The Pennsylvania State University:

By: _____
an authorized signatory of The Special ~~Committee~~ Investigation Task Force established by
The Board of Trustees of The Pennsylvania State University

Printed Name: K. C. Frazier

Title: Chair, Special Investigations Task Force

Date: 12/2/11

* Licensed to practice law in New York, New Jersey and Washington, DC only.

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Exhibit B

2001 WL 1807641
Pennsylvania Court of Common Pleas.

HEMISPHERX BIOPHARMA, INCORPORATED Plaintiff
v.
Manuel P. ASENSIO, Asensio & Company, Incorporated, and Asensio.com, Incorporated Defendants

No. 3970 JULY.TERM 2000, CONTROL 050537.
|
Sept. 6, 2001.

Opinion

SHEPPARD, J.

***1** Presently before this court is defendants' Motion for Summary Judgment, seeking to dismiss the action in its entirety. Defendants make several arguments in support of their motion. Certain arguments involve strict issues of law, while others involve issues of fact. This Opinion is limited to a discussion of the issues of law, because it is evident to the court that genuine issues of material fact exist which preclude granting summary judgment. Further, resolution of the legal issues also demonstrates that summary judgment is not appropriate.

BACKGROUND [1]

This action arises from defendants' alleged scheme to illegally manipulate the price of, and short-sell, plaintiff's common stock through defendants' publication of allegedly defamatory statements in a series of research reports and/or press releases regarding plaintiff and plaintiff's development of a certain anti-viral drug.

Plaintiff, Hemispherx Biopharma, Inc. ("HBI"), is a Delaware corporation with its principal place of business in Philadelphia, Pennsylvania. HBI is engaged in the business of researching, developing and testing experimental pharmaceutical compounds and drug technologies for regulatory approval and sale. Its primary focus has been the development and clinical testing of the anti-viral compound known as Ampligen for the possible treatment of viral afflictions such as chronic fatigue syndrome ("CFS") and chronic hepatitis. HBI's common stock is currently traded on the American Stock Exchange.

Defendant, Asensio & Company, Inc. ("ACI"), is a Delaware corporation with its principal place of business in New York, New York. It is a registered broker and investment banking firm that publishes and distributes to the investing public analytical research reports regarding publicly-traded companies and trades securities of those companies for its own account. Defendant, Asensio.Com, Inc. ("Asensio.Com") purportedly owns 100% of the shares of ACI, maintains ACI's accounts and provides the necessary capital for ACI to conduct its business, including proprietary trading and the short-selling alleged in this action. Manuel P. Asensio ("Asensio"), a citizen of New York, is the founder and chairman of ACI.

In August 1998, defendants purportedly began to accumulate short positions in HBI in order to realize a profit which would occur from the erosion in the price of HBI's common stock after the publication of the allegedly defamatory statements. On September 22, 1998, defendants produced and published, through means of interstate commerce including the Internet, a "research report" and accompanying press release, containing numerous statements about HBI and Ampligen. *See* Pl. Exhibit 33. [2] This research report was accompanied by a "strong sell recommendation" with respect to HBI's shares of common stock. *Id.* It was preceded by defendants' statements which appeared in an article in the September 28, 1998 issue of *Business Week* which had been distributed on the Internet on September 17, 1998. *See* Pl. Exhibit 32. The report and accompanying press release included the following initial statements:

***2** • Ampligen is "toxic";

• Ampligen has "no medical or economic value";

• Ampligen "is medically useless and an obsolete drug";

• Ampligen is "off patent";

• HBI has made "fraudulent misrepresentations about Ampligen's FDA filing status and CFS earnings claims";

• HBI's Phase II clinical trial of Ampligen for use as a possible treatment for CFS was "neither placebo-controlled nor double blind" and "failed";

- There is "no legitimate medical or business purpose for [HBI's] continuing attempts to test Ampligen for treatment of CFS and other diseases";

- HBI "is not and has never been engaged in any long term project to create a new drug";

- HBI has "purposefully cultivated" false claims regarding Ampligen "in order to defraud investors";

- HBI "is promoting futile projects simply in order to enable insiders to sell their otherwise worthless stock to the public."

See Pl. Exhibit 33. Defendants also published additional statements on ACI's website and to third parties such as the FDA, the American Stock Exchange, the Securities Exchange Commission and *Business Week* magazine which are allegedly defamatory. Some of defendants' statements also appeared in the September 23, 1998 issue of the *Philadelphia Inquirer. See* Pl. Exhibit 34. The publication of these statements allegedly caused the price of HBI's common stock to decline precipitously, reduce the value of the company, and impaired HBI's business relations with third parties.

This action originated in the federal court system over two years ago. It was transferred to this court on July 31, 2000, pursuant to 42 Pa.C.S.A. § 5103. Plaintiff asserts four counts against defendants: (1) defamation; (2) disparagement; (3) intentional interference with existing and prospective business relations; and (4) civil conspiracy. Defendants move for summary judgment, asserting, *inter alia,* that (1) the challenged statements are not actionable since they are mere opinions based on disclosed facts; (2) the statements are substantially true; (3) HBI is a public figure and cannot prove that the statements were made with actual malice; (4) HBI's damages are not recoverable for a loss in market capitalization; (5) HBI cannot show a causal connection between the statements and the losses it allegedly suffered; (6) HBI cannot make out a claim for tortious interference based on difficulty to work with third parties on account of defendants' statements; and (7) HBI fails to meet the plurality requirement to make out a claim for civil conspiracy where HBI does not identify the "John Doe" defendants which it alleges conspired with the named defendants to defame HBI.

For the reasons set forth, this court finds that defendants are not entitled to summary judgment as a matter of law.

DISCUSSION

Rule 1035.2 of the Pennsylvania Rules [Pa.R.C.P.] provides that a moving party is entitled to summary judgment if (1) there is no genuine issue of any a material fact as to a necessary element of the cause of action or defense that could be established by additional discovery or export report, or (2) after the completion of discovery, a party bearing the burden of proof on an issue has failed to produce evidence of facts essential to the cause of action or defense such that a jury could return a verdict in his favor. The moving party has the burden to prove that there is no genuine issue of material fact. *Hagans v. Constitution State Serv. Co.,* 455 Pa .Super. 231, 687 A.2d 1145, 1156 (1997). Once the moving party meets this burden, the non-moving party must set forth specific facts showing that there is a genuine issue for trial. *Id.* The trial court's function is to determine whether there are controverted issues of fact, not whether there is sufficient evidence to prove the particular facts. *Id.* at 1157. A motion for summary judgment must be viewed in the light most favorable to the non-moving party, and all doubts as the existence of a genuine issue of material fact must be resolved against the moving party. *Pennsylvania State University v. County of Centre,* 532 Pa. 142, 145, 615 A.2d 303, 304 (1992). Only where there is no genuine issue as to any material fact and it is clear that the moving party is entitled to judgment as a matter of law will summary judgment be entered. *Skipworth v. Lead Industries Ass'n., Inc.,* 547 Pa. 224, 230, 690 A.2d 169, 171 (1997).

I. *Pennsylvania Law Applies Because Pennsylvania Has the Greatest Interest in Protecting Plaintiff's Reputation Since Plaintiff is Domiciled in Pennsylvania*

***3** The threshold issue to decide is whether there is a choice of law issue, and if so, which law should the court apply. In any case, however, Pennsylvania conflict of law rules require that a Pennsylvania court apply Pennsylvania's evidentiary sufficiency standard to a claim regardless of which state's substantive law applies to the claim. *See, e.g., Foley v. Pittsburgh–Des Moines Co .,* 363 Pa. 1, 68 A.2d 517, 521 (1949) ("The law of the forum also controls all questions as to burden of proof and whether there is sufficient evidence of negligence and proximate causation to entitle the plaintiff to have the case submitted to the jury."); *Sudol v. Gorga,* 346 Pa. 463, 31 A.2d 119, 120 ("The law of the forum determines whether there is sufficient evidence on an issue of fact to warrant its submission to a jury."); *Crawford v. Manhattan Life Ins. Co. of N.Y.,* 208 Pa.Super. 150, 161 n. 2, 221 A.2d

877, 884 n. 2 (1966) ("The questions of presumption and burden of proof in this regard are, of course, procedural and to be determined by the law of the forum."); Restatement (Second) of Conflict of Laws § 135 ("The local law of the forum determines whether a party has introduced sufficient evidence to warrant a finding in his favor on an issue of fact ...").

Therefore, the Pennsylvania standard for summary judgment applies to the motion. *Smith v. Commonwealth Nat'l Bank,* 384 Pa.Super. 65, 557 A.2d 775, 771 (1989) (applying Pennsylvania standard for summary judgment where New York substantive law governed the plaintiff's claims).

Here, defendants assert that there may be a choice of law issue since they are headquartered and work in New York, which is the situs of the publication of the allegedly defamatory statements, while plaintiff's principal place of business is in Pennsylvania. Defs. Mem. of Law, at 19 n. 17. Defendants concede that no choice is necessary because summary judgment should be granted under either New York law or Pennsylvania law, but they also assert that New York law is "decidedly more protective" of statements of opinion than the U.S. Constitution. *Id.* Plaintiff, in turn, argues that Pennsylvania law must be applied since New York law is decidedly more favorable to defendants in defamation cases and since Pennsylvania's flexible choice of law rules dictate that Pennsylvania has the priority of interest in addressing the issues. Pl. Mem. of Law, at 23–26.

The first step in a choice of law analysis is to determine if the laws of the competing states actually differ. *Ratti v. Wheeling Pittsburgh Steel Corp.,* 758 A.2d 695, 702 (Pa.Super.Ct.2000) (citations omitted). If there is no difference, no further analysis is required. *Id.* If a conflict exists, the court must weigh "the governmental interests underlying the issue and determine which state has the greater interest in the application of its law." *Id. See also, Griffith v. United Airlines, Inc.,* 416 Pa. 1, 21, 203 A.2d 796, 805 (1964)(rejecting the strict *lex loci delicti* rule in favor of a more flexible approach which permits analysis of the policies and interests underlying the particular issue and determining which state has the most significant relationship to the issue).

***4** The central issue in this case is whether plaintiff was defamed by defendants' publication of its research report on September 22, 1998 and the subsequent publications of various statements deriving from that report.[3] A quick examination of New York and Pennsylvania cases shows that both states deem mere expressions of opinion as non-actionable to support a claim for defamation, but both states allow such claims to proceed if the statement of opinion implies undisclosed facts which are capable of a defamatory meaning. *See Constantino v. University of Pittsburgh,* 766 A.2d 1265, 1270 (Pa.Super.Ct.2001); *Green v. Mizner,* 692 A.2d 169, 172 (Pa.Super.Ct.1997); *Gross v. New York Times Co.,* 603 N.Y.S.2d 813, 82 N.Y.2d 146, 151–52 (1993). Both Pennsylvania and New York state courts apply the Restatement (Second) of Torts, § 566, in determining whether a statement is a non-actionable "pure" opinion or whether a statement is a "mixed" opinion capable of being understood by the reader or listener to be defamatory. *Green,* 692 A.2d at 174; *Gross,* 82 N.Y.2d at 153–54.

Further, both New York and Pennsylvania courts hold that a communication may be defamatory if it imputes to another conduct, character or condition that would adversely effect his fitness for the proper conduct of his business, trade or profession. *Constantino,* 766 A.2d at 1270; *Clemente v. Impastato,* 711 N.Y.S.2d 71, 73, 274 A.D.2d 771, 773 (2000). Under Pennsylvania law, "defamation is a communication which tends to harm an individual's reputation so as to lower him or her in the estimation of the community or deter third persons from associating or dealing with him or her." *Constantino,* 766 A.2d at 1270 (citations omitted). Similarly, New York courts have found defamatory meaning in "words which tend to expose one to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace, or to induce an evil opinion of one in the minds of right-thinking persons, and to deprive one of their confidence and friendly intercourse in society." *Fairly v. Peekskill Star Corp.,* 445 N.Y.S.2d 156, 83 A.D.2d 294, 296 (1986)(quoted in *Weinstein v. Friedman,* 1996 WL 137313, At *10 (S.D.N.Y. Mar. 26, 1996)).

Moreover, the United States Supreme Court has set forth that a public figure plaintiff, bringing a defamation suit, must show that the statement was made with "actual malice," i.e., with knowledge that it was false or with reckless disregard as to whether it was false or not. *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 327–28 (1974)(adopting standard set forth in *New York Times Co. v. Sullivan,* 376 U.S. 254, 279–80 (1964)). As to defamation suits brought by private figure plaintiffs, irrespective of whether the statements involved matters of purely private or public concern, the Court allows the States to define for themselves the appropriate standard of liability as long as they do not impose liability without fault. *Id.* at 347. No choice of law issue would therefore exist if HBI

was deemed a public figure plaintiff since both Pennsylvania and New York courts apply the "actual malice" standard as mandated by the U.S. Supreme Court. *See Disalle v. P.G. Publishing Co.*, 375 Pa.Super. 510, 548, 544 A.2d 1345, 1364 (1988); *Sweeney v. Prisoners' Legal Servs. of New York, Inc.*, 538 N.Y.S.2d 370, 373, 146 A.D.2d 1, 5 (1989).

*5 Rather, a choice of law issue would arise if this court concludes that plaintiff is a private figure plaintiff. In Pennsylvania, a private figure plaintiff, seeking to recover for harm inflicted as a result of the publication of defamatory statements, must prove that the defamatory matter was published with "want of reasonable care and diligence to ascertain the truth" or with negligence. *Rutt v. Bethlehems' Globe Publishing Co.*, 335 Pa.Super. 163, 186, 484 A.2d 72, 83 (1984). In contrast, New York law holds that a private plaintiff figure bringing a defamation suit for statements of public concern must prove that the publisher acted in a grossly irresponsible manner. *Chapadeau v. Utica Observer–Dispatch*, 38 N .Y.2d 196, 199, 379 N.Y.S.2d 61, 64 (1975). *See also, Jewell v. NYP Holdings, Inc.*, 23 F.Supp.2d 348, 391–92 (S.D.N.Y.1998)(adopting "incremental harm" defense to defamation and observing that New York law "broadly recognize[s] a series of different privileges in defamation cases, some qualified, others absolute."). As discussed below, this court finds that HBI is a private figure plaintiff. Therefore, a conflict does exist as to plaintiff's burden of proof.

This court finds that Pennsylvania law applies to plaintiff's substantive law claims since Pennsylvania has the greatest interest in protecting HBI's reputation. The purpose of a defamation suit is to compensate an individual for harm to one's reputation inflicted by the defamatory statement. *Pro Golf Manufacturing, Inc. v. Tribune Review Newspaper Co.*, 761 A.2d 553, 556 (Pa.Super.Ct.2000) (citations omitted).[4] *See also Wilson v. Slatalla*, 970 F.Supp. 405, 414 (E.D.Pa.1997); *Fitzpatrick v. Milky Way Productions, Inc.*, 537 F.Supp. 165, 171 (E.D.Pa.1982). Since the state of a plaintiff's domicile is generally the place where most of his reputational contacts are found, the state with the greatest interest in vindicating the plaintiff's good name and providing compensation for harm caused by the alleged defamation is that state. *Wilson*, 970 F.Supp. at 414. Additionally, section 150 of the Restatement (Second) of Conflicts of Laws, relating to multi-state defamation, states, in pertinent part, that: "[w]hen a corporation, or other legal person, claims that it has been defamed by an aggregate communication, the state of most significant relationship will usually be the state where the corporation, or other legal person, had its principal place of business at the time, if the matter complained of was published in that state." Restatement (Second) of Conflicts of Laws, § 150(3). *But see,* Restatement (Second) of Conflicts of Laws, § 149 (relating the general rule that in defamation action, "the local law of the state where the publication occurs determines the rights and liabilities of the parties, except as stated in § 150 ..."). *See also, La Luna Enterprises, Inc. v. CBS Corp.*, 74 F.Supp.2d 384, 385 (S.D.N.Y.1999)(under New York's choice of law rules, the state of the plaintiff's domicile in a defamation case usually has the most significant relationship to the case provided that the publication was in the plaintiff's state).

*6 Here, HBI is a Delaware corporation with its principal place of business in Philadelphia, Pennsylvania. Defendants, on the other hand, are New York residents. The alleged defamatory publications originated in the September 22, 1998 research report that appeared on defendants' website. The alleged defamatory statements also appeared in *Business Week* magazine and the *Philadelphia Inquirer*. Since the alleged defamatory statements appeared in more than one state, including Pennsylvania, the state with the most significant relationship appears to be Pennsylvania, the state of HBI's domicile. Restatement (Second) of Conflicts of Laws, § 150(3). Accordingly, this court will apply Pennsylvania law to plaintiff's substantive claims.

II. *HBI Is Not A General Public Figure Nor A Limited Purpose Public Figure Nor Is the Subject of the Alleged Defamatory Statements Necessarily A Matter of Public Controversy*

Pennsylvania law holds that the initial question whether a plaintiff is a public or private figure is an issue of law to be determined by the trial court. *Brown v. Philadelphia Tribune*, 447 Pa.Super. 52, 60, 668 A.2d 159, 163 (1995); *Iafrate v. Hedesty*, 423 Pa.Super. 619, 623, 621 A.2d 1005, 1007 (1993); *Wagstaff v. The Morning Call Inc.*, 41 Pa. D. & C.4th 431, 439–40 (C.P. Lehigh Cty.1999). In *Gertz*, the Supreme Court identified two classes of public figures:

> In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a

> public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.

418 U.S. at 351. *Accord Wolston v. Reader's Digest Assoc.*, 443 U.S. 157, 165 (1979). Whether a person is a limited purpose public figure depends upon the nature of the controversy and the extent of plaintiff's involvement with it. *Rutt v. Bethlehems' Globe Publishing Co.*, 335 Pa.Super. 163, 181, 484 A.2d 72, 81 (1984)(quoting *Gertz*, 418 U.S. at 352). A person may be considered a limited purpose public figure "if he is attempting to have, or realistically can be expected to have, a major impact on the resolution of a specific public dispute that has foreseeable and substantial ramifications for persons beyond its immediate participants." *Id.* at 180–81, 484 A.2d at 80 (quoting *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1292 (D .C.Cir.1980)). A person becomes a limited purpose public figure because he invites and merits "attention and comment." *Iafrate*, 423 Pa.Super. at 622, 621 A.2d at 1007 (quoting *Gertz*, 418 U.S. at 346). However, a private individual "is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention." *Id.* at 181, 484 A.2d at 81 (quoting *Wolston*, 443 U.S. at 167).

*7 Additionally, a public controversy must be a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way. *Iafrate*, 423 Pa.Super. at 623–24, 621 A.2d at 1007 (citations omitted). "[P]rivate concerns or disagreements do not become public controversies simply because they attract attention." *Id.* at 624, 621 A.2d at 1007. To determine whether such a controversy exists, the court must examine whether persons were actually discussing some specific question and if the press was covering the debate and reporting what people were saying; if the issue was being debated publicly and if it had foreseeable and substantial ramifications for non-participants. *Id.* at 624, 621 A.2d at 1008. However, "those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." *Brown*, 447 Pa.Super. at 59, 668 A.2d at 162 (quoting *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979)).

It is true that corporations may be public figures for purposes of defamation actions. *See Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 273 (3d Cir.1980); *Computer Aid Inc. v. Hewlett–Packard Co.*, 56 F.Supp.2d 526, 535 (E.D.Pa.1999); *Reliance Ins. Co. v. Barron's*, 442 F.Supp. 1341 1347–48 (S.D.NY.1977). This is so because a corporation has greater access to channels of communication which allow it to make an effective response in the public forum to counteract allegedly defamatory statements. *Steaks*, 623 F.2d at 273; *Computer Aid*, 56 F.Supp. at 536. However, this is merely one of the considerations in determining whether a particular plaintiff is a public figure, and absent other factors, a corporation should not be deemed a public figure. *Computer Aid*, 56 F.Supp. at 536. Rather, a more important factor is whether, a plaintiff, by injecting itself into the public arena and engaging the public's attention, has effectively assumed the risk of potentially unfair criticism. *Steaks*, 623 F.2d at 273.

In *Steaks*, the Court of Appeals for the Third Circuit deemed that Steaks is not a public figure in the general sense because there was no evidence of its fame or notoriety or that it is widely involved in public affairs. *Id.* However, the court did find that it was a limited purpose public figure for purposes of the controversy at issue on account of its intensive advertising campaign in the Pittsburgh area regarding its product, which included broadcasts over local radio stations, ads in local newspapers, large signs displayed at sales locations and handbills given to person's walking near Steaks Unlimited Sales locations. *Id.*

In contrast, in *Computer Aid*, the underlying transaction involved an agreement to develop a product and a subsequent merger by which Hewlett–Packard became the legal successor in interest of one of the parties to the agreement. 56 F.Supp. at 530. Hewlett–Packard's counterclaim, alleging defamation, arose from a press release regarding the plaintiff's claims and the underlying agreement to develop a product. *Id.* at 531. The district court did not find that Hewlett–Packard was a general purpose figure, despite the fact that it is one of the largest and most influential corporations in the world or that its stocks are one of the most actively traded on the New York Stock Exchange. *Id.* at 535. The court also found that Hewlett–Packard was not a limited purpose public plaintiff with respect to the subject matter of the publicity, despite its several press releases regarding the transaction at issue and its circulation of informational material to its staff and customers. *Id.* at 537. *But see, Reliance*, 442 F.Supp. at 1348 (holding that Reliance is a general purpose public figure where Reliance is a large corporation whose shares are traded on the New York Stock Exchange, its business is in a field subject to state regulation, it files periodic reports with the SEC and it is offering to sell its stock to the public which was the subject of the libel action against the financial magazine).

*8 Here, defendants contend that HBI is a public figure because it thrust itself into two public controversies: (1) the effectiveness of its drug Ampligen in the treatment of high-profile diseases and (2) the value of its publicly-traded common stock. In support of their position, defendants argue that HBI's stock is traded on the AMEX, HBI promotes Ampligen in press releases, HBI has released the results of clinical trials regarding Ampligen that has resulted in over two hundred peer-review publications and articles, and HBI has solicited research grants from the federal government. Plaintiff, in response, argues that it cannot be deemed a public figure simply because it received research grants for Ampligen. *See Hutchinson v.. Proxmire,* 443 U.S. 111, 135 (1979)(reversing an award of summary judgment against researcher who received government grants but could be deemed a public figure merely by such receipt). Plaintiff also contends that the effectiveness of Ampligen has not been the subject of public debate since it has been under clinical study by HBI for over ten years, has been subject to FDA regulations, and with the exception of private litigation, has remained uncontroversial except within the medical or scientific community.

In light of the decision in *Computer Aid,* which involved a more renown corporation, this court finds that HBI should not be deemed a general purpose or limited purpose public figure for purposes of this controversy. Further, it is not evident that a public controversy exists regarding the value of HBI's stock or the effectiveness of its drug, Ampligen. Rather, it may well be that defendants created this "controversy" by publishing its negative reports regarding HBI and its product, and such conduct may not constitute a defense. *See Brown,* 447 Pa.Super. at 59, 668 A.2d at 162. Therefore, this court finds that HBI should be considered a private plaintiff and HBI need only prove that the alleged defamatory statements were negligently published. [5]

III. *The Statements at Issue Constitute Either Assertions of Fact Or Opinions That Imply The Existence of Undisclosed Facts Capable of A Defamatory Meaning*

Pennsylvania courts hold that the trial court must determine, as a matter of law, whether a statement is one of fact or opinion, as well as determining whether the challenged statement is capable of having defamatory meaning. *Constantino,* 766 A.2d at 1269; *Green,* 692 A.2d at 174; *Brown v. Philadelphia Tribune,* 447 Pa.Super. at 60, 668 A.2d at 163. Communicated opinions are actionable when they can be reasonably understood to imply the existence of undisclosed defamatory facts. *Green,* 692 A.2d at 174. Further, in cases where a plausible innocent interpretation of the communication coexists with an alternative defamatory interpretation, the issue must proceed to a jury. *Id.*

First, in deciding whether a statement is an actionable opinion, the court may rely on Section 566 of the Restatement (Second) of Torts which states that:

> *9 A defamatory communication may consist of a statement in the form of an opinion but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.

Quoted in Green, 692 A.2d at 174. Comment (c) of section 566 clarifies the distinction where it states, in pertinent part, that:

> A simple expression of opinion based on disclosed or assumed nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is. But an expression of opinion that is not based on disclosed or assumed facts and therefore implies that there are undisclosed facts on which the opinion is based, is treated differently. The difference lies in the effect upon the recipient of the communication. In the first case, the communication itself indicates to him that there is no defamatory factual statement. In the second, it does not, and if the recipient draws the reasonable conclusion that the derogatory opinion expressed in the comment must have been based on undisclosed defamatory facts, the defendant is subject to liability.

Restatement (Second) of Conflicts of Laws, § 566, cmt (c). The court should consider the effect the statement would fairly produce or naturally engender in the minds of those average persons among whom it is intended to circulate. *Constantino,* 766 A.2d at 1270 (citations omitted).

Here, the sixteen statements at issue, taken from the *Business Week* article of 9/17/98, the September 22, 1998 three-part report and many post-report press releases are arguably either assertions of fact or opinions which can be reasonably construed as implying undisclosed facts which may have a derogatory meaning. Contrary to defendants' position, it is not clear that the statements are merely opinions simply because of the inclusion of the preceding language that "we believe...", or the fact that defendants are recommending the short sale. Genuine issues of fact exist regarding whether the statements were interpreted as defamatory by the readers of the statements and whether or not the statements were substantially true. Additionally, issues of fact exist regarding whether plaintiff's damages are calculable and whether they are directly attributable to defendants' statements.

Therefore, this court cannot grant summary judgment in favor of defendants on plaintiff's defamation claim. Similarly, issues of fact preclude this court from granting summary judgment on plaintiff's claims for commercial disparagement, tortious interference with existing and/or prospective business relations and civil conspiracy.

CONCLUSION

For the reasons set forth, this court denies defendants' Motion for Summary Judgment. A contemporaneous Order consistent with this Opinion will be issued.

ORDER

AND NOW, this 6th day of September 2001, upon consideration of defendants' Motion for Summary Judgment, plaintiff's response in opposition, the parties' respective memoranda, all other matters of record, and in accord with the Opinion being filed contemporaneously with this Order, it is ORDERED that defendants' Motion for Summary Judgment is Denied.

All Citations

Not Reported in A.2d, 2001 WL 1807641, 55 Pa. D. & C.4th 502

Footnotes

1 The facts presented here are intended as background in reviewing the nature of this action and the present motion. For more detail on the facts and procedural history of this case, please see this court's previous Opinion, *Hemispherx Biopharma, Inc. v. Asensio,* July 2000, No. 3970 (C.P.Phila.Feb. 14, 2001)(Sheppard, J.).

2 The term—"Exhibits" means those exhibits attached to the parties' respective memoranda of law pertinent to the present motion. Plaintiff's exhibits are designated by number as Exhibit P–1, P–2, P–3, etc. Defendants' exhibits are designated by letter as Exhibit D–A, D–B, D–C, etc.

3 Plaintiff's other claims for disparagement, tortious interference with existing and/or prospective business relations and civil conspiracy all depend on the viability of the defamation claim.

4 In contrast, the tort of commercial disparagement is to protect one's economic interest against pecuniary loss. *Pro Golf Manufacturing,* 761 A.2d at 556.

5 Defendants, in their reply brief, raised the issue that the statements are conditionally privileged since the safety and efficacy of a new experimental drug are of important interest to the public.

Our Superior Court describes the conditional privilege where it states that:

> "Communications made on a proper occasion, from a proper motive, in a proper manner, and based upon reasonable cause are privileged. An occasion is conditionally privileged when the circumstances are such as to lead any one of several persons having a common interest in a particular subject matter correctly or reasonably to believe that facts exist which another sharing such common interest is entitled to know."

Davis v. Resources for Human Development, 770 A.2d 353, 358 (Pa.Super.Ct.2001) (citations and internal quotations omitted). Once a communication's subject matter is deemed conditionally privileged, the plaintiff must establish that the privilege was abused by the defendant. *Id.* at 359. To prove that defendant abused the privilege, the plaintiff must show that "the publication is actuated by malice or negligence, is made for a purpose other than that for which the privilege is given, or to a person not reasonably believed to be necessary for the accomplishment of the purpose of the privilege, or included defamatory matter not reasonably believed to be necessary for the accomplishment of the purpose." *Id.*

Even assuming *arguendo* that a conditional privilege attached to defendants' statements, since the effectiveness of a drug in treating certain diseases is in the public interest and potential investors need to know the value of the company in which they are buying stock, plaintiff may show abuse of the privilege through either malice or negligence. These are issues of fact, relating to defendants' intent in publishing the statements and as to whether such abuse actually occurred, which precludes this court from granting summary judgment.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on the below counsel of record on May 11, 2016.

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