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## Introduction

This defamation lawsuit was initiated by writ of summons on July 11, 2013—a little over four years to the day. The crux of the case is the claim of Plaintiff Graham Spanier, the former President of The Pennsylvania State University (“Penn State” or “PSU”) that certain statements in the “Report of the Special Investigative Counsel Regarding the Actions of The Pennsylvania State University Related to the Child Sex Abuse Committed by Gerald A. Sandusky” (the “Report”) and related commentary are false and defamatory. The Report was issued by Louis J. Freeh, a former U.S. District Judge for the Southern District of New York and former Director of the Federal Bureau of Investigation, who was retained as Special Investigating Counsel by a Special Committee of the Board of Trustees of PSU after the revelation that former PSU football coach Gerald A. “Jerry” Sandusky was being investigated for sexually abusing multiple children over a period of years. As detailed in the Report, Judge Freeh and FSS conducted over 430 interviews of PSU personnel and other knowledgeable individuals, reviewed over 3.5 million pieces of electronic data and documents, and summarized their findings in a 162-page report supported by over 700 footnoted citations to the various pieces of evidence gathered.

In the face of this detailed factual investigation, Spanier asserts that statements made in the Report relating to him are false and made with actual

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malice—reckless disregard for the truth or falsity of those statements. In the Complaint Spanier filed in February 2016, he claimed that twelve statements in the Report, four statements made during a press conference announcing the release of the Report, and three statements made in a press release issued in February 2013 are false and defamatory. Following Defendants’ Preliminary Objections and oral argument thereon, the Court permitted twelve of these nineteen statements to move forward. At bottom, these statements claimed that Spanier:

- failed to protect against Sandusky or inquire into the victims’ safety (Statements 1, 3, 8, 9, 12, *infra* p. 18-20);
- permitted Sandusky to retire as a PSU football coach and to continue to use PSU facilities (Statements 4, 6, 7, *infra* p. 18-19); and
- failed to report Sandusky’s abuse to the Board of Trustees, the Department of Public Welfare (“DPW”), or the police (Statements 2, 5, 10, 11, *infra* p. 18-20).

Since the Court’s ruling on Defendants’ Preliminary Objections, several significant developments have taken place. Defendants filed an Answer to Plaintiff’s narrowed Second Amended Complaint, pleading New Matter in an attempt to elicit Plaintiff’s true position with respect to these assertions. Former PSU Senior Vice President for Finance and Business Gary Schultz and former PSU Athletic Director Timothy Curley each pled guilty to endangering the welfare of a minor. Spanier stood trial on claims of endangering the welfare of a minor and conspiracy to endanger the welfare of a minor and—without taking the stand to

testify on his own behalf—was convicted by a jury of his peers of one count of endangering the welfare of a minor, the very conduct that he has adamantly claimed for years did not occur. That conviction required the jury to find, beyond a reasonable doubt, that Spanier endangered the welfare of a child by violating a duty of care, protection, or support, and that Spanier did so knowingly. And that verdict—and that conduct—is inconsistent with Spanier’s assertion that the allegedly defamatory statements are false and made with reckless disregard for the truth.

Most recently, Spanier filed a Response to Defendants’ New Matter (the “Response”). In that Response, Spanier:

- admits that he did not report Graduate Assistant Football Coach Michael McQueary’s description of inappropriate behavior by Sandusky to DPW or to the police;<sup>1</sup>
- admits that he did not do anything to investigate the identity of the child McQueary saw being assaulted;<sup>2</sup>
- admits that he expressed no concern for Sandusky’s victims prior to Sandusky’s indictment in November 2011;<sup>3</sup>
- admits that he did not take any steps to ban Sandusky from the PSU campus, and that Sandusky continued to use the athletic facilities after McQueary’s report;<sup>4</sup> and

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<sup>1</sup> Response ¶¶ 290-93.

<sup>2</sup> *Id.* ¶¶ 302-03.

<sup>3</sup> *Id.* ¶ 311.

- admits that Sandusky was permitted to retire as a PSU football coach with emeritus status.<sup>5</sup>

Spanier's confessions are dispositive of his defamation claims. There simply is no way that Spanier can prove the falsity of the statements that he alleges are defamatory in light of such admissions. Spanier therefore cannot prove an essential element of each of his claims.

Even if Spanier were able in some way to advance a theory by which he could maintain the falsity of the statements at issue, both his Response and his conviction bar him from being able to establish another key element of his claim—actual malice, *i.e.*, that Defendants recklessly disregarded the truth or falsity of the statements at issue. As this Court observed in its Opinion granting in part Defendants' preliminary objections to Plaintiff's Complaint, the standard for proving actual malice is "a difficult, nearly impossible one. . . ." September 27, 2016 Opinion at 25. In light of the fact that Spanier himself cannot in good faith deny key facts underlying the statements of which he complains, as well as the fact that a jury found the evidence against Spanier sufficient to warrant finding him guilty beyond a reasonable doubt of endangering the welfare of a child, Spanier cannot possibly show that Defendants subjectively doubted the truth of the statements Spanier claims are defamatory. As a result, judgment should be entered

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<sup>4</sup> *Id.* ¶¶ 306-08.

<sup>5</sup> *Id.* ¶¶ 309-10.

on the pleadings in favor of Defendants Louis J. Freeh and Freeh Sporkin & Sullivan LLP (“FSS”).

### **Procedural History**

As the Court is familiar with the procedural history of this matter, Defendants will not elaborate on its complicated posture at length. In brief, this case was filed in July 2013 via writ of summons. The case was then stayed until January 2016. In February 2016, Plaintiff filed his Complaint, alleging that certain statements made in the Report were false and defamatory. Defendants filed preliminary objections, which were granted in part and denied in part in September 2016.

Plaintiff filed a First Amended Complaint in October 2016, and Defendants filed a second set of preliminary objections based on the fact that Plaintiff’s First Amended Complaint failed to comply with the Court’s directive that Plaintiff file a complaint in compliance with the Pennsylvania Rules of Civil Procedure rather than one for media consumption. Defendants’ preliminary objections were granted following oral argument in January 2017. Plaintiff filed a Second Amended Complaint in March 2017.

Defendants filed an Answer and New Matter in May 2017. On June 7, 2017, Plaintiff filed a Response to Defendants’ New Matter. As the pleadings are now closed, Defendants move for judgment on the pleadings.



## **Statement of Facts**

This case involves allegations that statements made regarding Spanier's response to reports of inappropriate conduct by Sandusky are false and defamatory. Those statements were made in a Report commissioned by a Special Committee of Penn State's Board of Trustees after the investigation of Jerry Sandusky for sexual abuse of children became public in the fall of 2011, and related spoken and written remarks issued during a July 12, 2012 conference and in a February 10, 2013 press release.

By way of background, in 2009, the Thirty-third Statewide Investigating Grand Jury (the "Grand Jury") was impaneled to investigate, among other things, allegations of misconduct by various individuals in connection with the handling of the Sandusky child abuse scandal. Following its investigation, the Grand Jury issued a summary of its findings of fact on November 4, 2011. The Grand Jury recommended criminal charges against PSU Athletic Director Timothy Curley and PSU Senior Vice President for Finance and Business Gary Schultz. Spanier was removed as President of Penn State several days thereafter.

On November 21, 2011, PSU announced that Louis Freeh and the law firm FSS had been retained as Special Investigative Counsel to conduct an independent inquiry into PSU's handling of the allegations against Sandusky. Over the next seven months, Freeh and FSS performed a detailed investigation of the facts

surrounding the allegations against Sandusky. As part of that investigation, FSS and law enforcement officials uncovered important documentary evidence—including emails from 1998 and 2001 involving Spanier, Schultz, and Curley, as well as handwritten notes authored by Gary Schultz documenting PSU’s response to the incidents—that had not been produced in response to the Grand Jury’s subpoenas to PSU and, in the case of Schultz’s notes, had been actively concealed from investigators. The investigation culminated in the Report, which was released on July 12, 2012, just a few weeks after Sandusky was convicted of 45 counts of sexual abuse of a minor. In the Report, Defendants set forth their findings regarding two incidents in which allegations of inappropriate conduct were made against Sandusky, one in 1998 and one in 2001, and PSU officials’ response (or lack thereof) to those allegations.

**A. The 1998 Report Against Sandusky.**

In May 1998, the mother of one of the children who participated in The Second Mile contacted PSU police with concerns about Sandusky’s behavior with her child on the evening of May 3, 1998. The mother stated that her son had told her that Sandusky had showered with him and had hugged him while in the shower in the Lasch Building on PSU’s campus.<sup>6</sup> A detective interviewed the boy and

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<sup>6</sup> Second Am. Compl. Ex. A at 42.

referred the matter to Centre County Children and Youth Services (“CYS”), who in turn referred it to DPW due to the involvement of CYS with The Second Mile.<sup>7</sup>

Gary Schultz became aware of the incident very shortly after it was reported. In handwritten notes of a meeting held at 5:00 PM on May 4, 1998, the day after the incident, Schultz observed that Sandusky’s “Behavior – at best inappropriate @ worst sexual improprieties,” and “Critical issue – contact w genitals? Assuming same experience w the second boy?”<sup>8</sup> Schultz questioned, “Is this opening of Pandora’s box? Other children?” Schultz told Timothy Curley, and on May 5, 1998, Curley emailed Schultz and Spanier, stating “I have touched base with the coach. Keep us posted.”<sup>9</sup> Schultz replied that DPW would interview “the individual” on Thursday, May 7. Also on May 5, Schultz learned that the PSU Police planned to “hold off” making a public crime log entry for the Sandusky allegations, which the PSU Director of Public Safety reported he could “justify” because there was no “clear evidence” of a crime.<sup>10</sup>

At the direction of police, the boy’s mother met with Sandusky in her home while officers from both the University and State College police departments

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<sup>7</sup> *Id.* at 43.

<sup>8</sup> *Id.* at 47-48, Ex. 2H.

<sup>9</sup> *Id.* at 48.

<sup>10</sup> *Id.*

listened from another room. During their conversation, Sandusky admitted to showering with and hugging her son while they were both in the shower naked, and admitted that he had told the boy that Sandusky loved him.<sup>11</sup> He also stated, “I was wrong. I wish I could get forgiveness. I know I won’t get it from you. I wish I were dead.”<sup>12</sup> PSU police conducted a separate interview of Sandusky in which Sandusky again admitted that he had showered with the child, and stated that he had showered with other boys as well. Sandusky stated that he had hugged the boy in the shower—while naked—but claimed that his actions were not sexual in nature.<sup>13</sup> No charges were brought, and the investigation was closed.<sup>14</sup>

Between May 4, 1998 and early June 1998, when the investigation into Sandusky’s conduct was terminated, Curley and Schultz corresponded several times regarding the state of the investigation. Finally, on June 9, 1998, Schultz updated Spanier and Curley on the matter, informing them that the PSU police “met with Jerry on Monday” and that he “was a little emotional and expressed concern as to how this might have adversely affected the child.”<sup>15</sup> Schultz stated

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<sup>11</sup> *Id.* at 41 (citing PSU Police Report 41-98-1609 at 23).

<sup>12</sup> *Id.* at 45 (citing PSU Police Report 41-98-1609, at 17).

<sup>13</sup> *Id.* at 46.

<sup>14</sup> *Id.* at 46-47.

<sup>15</sup> *Id.* at 50, Ex. 2E.

that the police nevertheless had closed the investigation. In his interview with the Special Investigative Counsel, as well as in his Response to Defendants' New Matter, Spanier admitted that no effort was made to limit Sandusky's access to PSU facilities following these events.<sup>16</sup>

**B. The 2001 Report Against Sandusky.**

Less than three years later, in February 2001, Graduate Assistant Football Coach Michael McQueary reported another incident involving Sandusky. McQueary stated that he was in the support staff locker room on a Friday night, and heard a noise from the shower.<sup>17</sup> McQueary found Sandusky with a minor boy in what he described as a "very sexual position."<sup>18</sup> McQueary slammed his locker shut and the two separated.

McQueary reported what he had seen to PSU Head Football Coach Joseph Paterno the next morning, a Saturday. Paterno testified to the Grand Jury that McQueary had told him that he saw Sandusky "fondling, whatever you might call it—I'm not sure what the term would be—a young boy," and that "[i]t was a sexual nature."<sup>19</sup> Paterno, Schultz and Curley met on Sunday. Paterno testified

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<sup>16</sup> *Id.* at 51; Response ¶¶ 306-07.

<sup>17</sup> Second Am. Compl. Ex. A at 66.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 67.

that he “explained the problem” to Curley and agreed that the information he had given Curley was “substantially the same information” that McQueary had given him.<sup>20</sup> That same day, Schultz had a conference call with PSU’s outside legal counsel regarding the “reporting of suspected child abuse.”<sup>21</sup>

On Monday, February 12, 2001, Schultz met with Curley. At Plaintiff’s criminal trial, Schultz testified that he believed Spanier attended this meeting as well. Schultz’s notes state that they “[r]eviewed 1998 history.”<sup>22</sup> Schultz testified that he believed that Spanier understood what he was talking about with respect to the 1998 occurrence.<sup>23</sup> Schultz further wrote that they had agreed that “[Curley] will discuss w JVP & advise we think [Curley] should meet w JS on Friday. Unless he ‘confesses’ to having a problem, TMC will indicate we need to have DPW review the matter as an independent agency concerned w child welfare.”<sup>24</sup> In his interview with the Special Investigative Counsel, Spanier stated that he attended a meeting with Schultz and Curley on February 12 and was given a “heads up” that Sandusky had showered with a boy from The Second Mile on

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<sup>20</sup> *Id.* at 68.

<sup>21</sup> *Id.* at 69.

<sup>22</sup> *Id.* at 70, Ex. 5C.

<sup>23</sup> Response ¶ 255.

<sup>24</sup> Second Am. Compl. Ex. A at 70, Ex. 5C.

PSU's campus, and that Sandusky and the youth were "horsing around" or "engaged in horseplay."<sup>25</sup> Spanier stated that he did not ask, nor did Schultz or Curley explain, what was meant by "horsing around" or "horseplay."<sup>26</sup> He said, however, that the three were "uncomfortable" with the situation, and that Spanier asked Curley to tell Sandusky that he could not bring children into the showers.<sup>27</sup> Although Spanier claimed that the incident was "unique," Schultz testified that he believed that Spanier was aware of the 1998 investigation at the time of the 2001 incident.<sup>28</sup>

On Thursday, February 22, 2001, Schultz emailed Spanier and Curley stating that "Graham, Tim and I will meet at 2:00 p.m. on Sunday in Tim's office."<sup>29</sup> Handwritten notes taken by Schultz dated February 25, 2001, the Sunday of their meeting, state, "3) Tell chair[] of Board of Second Mile 2) Report to Dept of Welfare 1) Tell JS to avoid bringing children alone into the Lasch

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<sup>25</sup> *Id.*; *see id.* Ex. 2J.

<sup>26</sup> *Id.* at 70; *see id.* Ex. 2J.

<sup>27</sup> *Id.* at 70; *see id.* Ex. 2J.

<sup>28</sup> Compare Second Am. Compl. Ex. A at 70 with Opinion at 17, *Com. v. Curley*, No. 3614 CR 2013 (Com. Pl. Dauphin Cnty. Jan. 14, 2015), available at <http://www.dauphincounty.org/government/Court-Departments/Curley-Schultz-Spanier/Pages/Curley.aspx>.

<sup>29</sup> Second Am. Compl. Ex. A at 72.

Bldg.”<sup>30</sup> The next day, Schultz sent an email to Curley indicating, “I’m assuming that you’ve got the ball to 1) talk with the subject ASAP regarding the future appropriate use of the University facility; 2) contacting the chair of the Charitable Organization; and 3) contacting the Dept of Welfare.”<sup>31</sup>

On Tuesday, February 27, 2001, Curley sent an email to Spanier and Schultz stating that rather than reporting Sandusky to the authorities, “I am having trouble with going to everyone, but the person involved. I think I would be more comfortable meeting with the person and tell him about the information we received.”<sup>32</sup> Curley proposed, “I would plan to tell him we are aware of the first situation. I would indicate we feel there is a problem and we want to assist the individual to get professional help.”<sup>33</sup> If Sandusky did not cooperate, “we feel a responsibility at some point soon to inform his organization and and [*sic*] maybe the other one about the situation.” Curley further stated, “I will let him know that his guests are not permitted to use our facilities.”<sup>34</sup> Thus, Curley proposed that (i) they refrain from reporting Sandusky’s suspected assault to law enforcement, (ii)

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<sup>30</sup> *Id.* at 72-73, Ex. 5E.

<sup>31</sup> *Id.* at 73, Ex. 5F.

<sup>32</sup> *Id.* at 74, Ex. 2F.

<sup>33</sup> *Id.* at 74, Ex. 2F.

<sup>34</sup> *Id.* at 75, Ex. 2F.



they merely ask Sandusky not to bring “his guests” to PSU facilities, (iii) and they at most use the *threat* of reporting Sandusky (in accordance with their legal duties) as leverage to persuade Sandusky to comply with Curley’s request. Curley did not suggest revoking Sandusky’s access to PSU facilities or doing anything to limit or chaperone his access to children in any way.

To Spanier, however, this approach was “acceptable.” Spanier stated:

It requires you to go a step further and means that your conversation will be all the more difficult, but *I admire your willingness to do that and I am supportive. The only downside for us is if the message isn’t ‘heard’ and acted upon, and we then become vulnerable for not having reported it. But that can be assessed down the road.* The approach you outline is humane and a reasonable way to proceed.<sup>35</sup>

Schultz sent an email the next day, agreeing with the proposed approach.<sup>36</sup>

No further action was taken with regard to Sandusky’s conduct. Sandusky was not reported to DPW or to the police and no further investigation occurred. No effort was made to identify the child or contact his parents. Tragically, according to the findings of the Grand Jury impaneled to investigate the allegations against Sandusky, at least four additional victims were assaulted between the time

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<sup>35</sup> *Id.* at 75 (emphases added), Ex. 2F.

<sup>36</sup> *Id.* at 76, Ex. 2F.

of this incident and the time when Sandusky was finally arrested and criminally charged in 2011.<sup>37</sup>

### **C. The Supplemental Presentment and Ensuing Proceedings**

Based on the newly discovered documentary evidence identified in the Report, the Investigating Grand Jury issued a supplemental presentment on November 1, 2012 in which it recommended charges of perjury, endangering the welfare of a minor, obstruction of justice and criminal conspiracy, and failure to report suspected child abuse against Spanier. Plaintiff subsequently was criminally prosecuted for perjury, endangering the welfare of children, obstructing the administration of law, conspiracy, and failure to report suspected child abuse. The perjury, obstruction, and conspiracy charges ultimately were dismissed due to an alleged violation of the right to counsel in connection with the Grand Jury proceedings, and the failure to report charge was dismissed as time-barred. Plaintiff proceeded to trial on charges of endangering the welfare of a minor and conspiracy to endanger the welfare of a minor.<sup>38</sup> As set forth in Defendants' Answer and New Matter, during Plaintiff's trial, both Gary Schultz and Timothy

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<sup>37</sup> Response ¶ 312.

<sup>38</sup> Plaintiff's trial and conviction followed guilty pleas by both Gary Schultz and Timothy Curley to the same charge.

Curley testified about the 1998 and 2001 reports.<sup>39</sup> Plaintiff did not provide any contrary evidence, nor did he testify in his own defense. On March 24, 2017, Plaintiff was convicted of endangering the welfare of a child.<sup>40</sup>

Despite his conviction, Spanier has chosen to continue with this litigation. On June 2, 2017, Spanier filed a Response to Defendants' Answer and New Matter in which he admitted several key facts underlying the statements he claims are defamatory. In light of those facts as well as Spanier's criminal conviction, it is apparent that he cannot maintain his defamation claims. Accordingly, Defendants move for judgment on the pleadings.

### **Statement of Questions Involved**

Should judgment on the pleadings be granted where Plaintiff either has admitted or is estopped from denying the key facts underlying the statements Plaintiff claims are false and defamatory?

*Suggested Answer: Yes.*

### **Argument**

In determining the propriety of a grant of judgment on the pleadings, the Court must accept as true all well pleaded statements of fact, admissions, and any

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<sup>39</sup> E.g., Answer ¶¶ 227-28, 255, 260-65, 267-69, 272, 277-79, 282-83, 285, 288-89; Response ¶¶ 227-28, 255, 260-65, 272, 277-79, 282-83, 285, 288.

<sup>40</sup> Response ¶ 339.

documents properly attached to the pleadings, and consider against the non-movant only the facts that were specifically admitted. *Beckman v. Dunn*, 419 A.2d 583, 585 (Pa. Super. 1980). Conclusory allegations, however, cannot withstand a motion for judgment on the pleadings. *Kilmer v. Com.*, 573 A.2d 659, 661 (Pa. Cmwlth. 1990). Judgment on the pleadings should be granted where it is apparent on the face of the pleadings that a trial would be a fruitless exercise. *Bata v. Cent.-Penn Nat'l Bank of Phila.*, 224 A.2d 174, 178 (Pa. 1966).

Here, an essential element of Plaintiff's claims is that the assertions that he alleges are defamatory contain false statements of fact. Plaintiff must show that the statements at issue are not substantially true—that is, that “the [alleged] libel as published would have a different effect on the mind of the reader from that which the pleaded truth would have produced.” *Dunlap v. Phila. Newspapers, Inc.*, 448 A.2d 6, 15 (Pa. Super. 1982) (citation omitted). Yet Plaintiff's admissions in his Response to Defendants' New Matter squarely contradict that assertion. Moreover, in light of Plaintiff's criminal conviction for child endangerment, he cannot deny that he engaged in the conduct forming the basis for that conviction, and the basis for certain of the statements he claims are defamatory. Finally, even if Plaintiff could possibly maintain the falsity of the statements he claims are defamatory, he would be unable to show actual malice in light of his admissions and his conviction. Because it is apparent on the face of the

pleadings that Spanier will be unable to sustain his claims, judgment should be granted in favor of Defendants.

### **I. Spanier Admits Key Facts Forming the Basis for the Statements He Claims Are Defamatory**

In this Court's October 27, 2016 Opinion on Defendants' Preliminary Objections, the Court narrowed the statements at issue in this case to the following:<sup>41</sup>

1. Dr. Spanier "failed to protect against a child sexual predator harming children for over a decade."
2. Dr. Spanier "concealed Sandusky's activities from the Board of Trustees, the University community and authorities."
3. 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.**"<sup>42</sup>
4. 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.**"
5. "[I]n order to avoid the consequences of bad publicity, **the most powerful leaders at the University—Spanier, Schultz,**

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<sup>41</sup> Statements containing bolded language are mixed statements of fact and opinion; Plaintiff may only proceed on the claim that the bolded factual portion of the statement is false.

<sup>42</sup> Count IV asserts a claim based on a statement included in a February 10, 2013 Press Release that is in relevant part substantially identical to Statement 3.

**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 authorities.”

6. **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.”
7. “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 measures to protect children on their campuses.”
8. “The most powerful men at Penn State failed to take any steps for 14 years to protect the children who Sandusky victimized.”
9. “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.”
10. “[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.**”
11. “As detailed in my report... four of the most powerful officials at Penn State agreed not to report Sandusky’s activity to public officials.”
12. “I stand by our conclusion that four of the most powerful people at Penn State failed to protect against a child sexual predator harming children for over a decade.”

These statements fall into three distinct buckets: (i) assertions that Spanier failed to protect against Sandusky or inquire into the victims' safety (Statements 1, 3, 8, 9, 12); (ii) statements that Spanier permitted Sandusky to retire as a PSU football coach and to continue to use PSU facilities (Statements 4, 6, 7); and (iii) statements claiming that Spanier failed to report Sandusky's abuse to the Board of Trustees, DPW, or the police (Statements 2, 5, 10, 11).

It well-established that substantial truth is a complete defense to a defamation claim. *Pelagatti v. Cohen*, 536 A.2d 1337, 1345-46 (Pa. Super. 1987). Accordingly, where a plaintiff admits the truth of the facts set forth in an allegedly defamatory statement, judgment on the pleadings is appropriate. *Sheaffer v. Shippensburg Chronicle*, 2 Pa. D. & C.3d 662, 664-65 (Com. Pl. Cumberland Cnty. 1977) (granting judgment on the pleadings where plaintiffs admitted the truth of allegedly defamatory statements).

As detailed *infra*, Spanier's admissions are dispositive of each of these issues. Accordingly, judgment should be granted to Defendants on his defamation claims.

**A. Spanier Admits that He Did Nothing to Curtail Sandusky's Access to Campus or Inquire into the Safety of Sandusky's Victims**

In Spanier's Response to Defendants' New Matter, Spanier admits that prior to November 2011, he expressed no concern for Sandusky's child victims.<sup>43</sup> He admits that he did not do anything to investigate the identity of the child McQueary witnessed in the showers with Sandusky in 2011.<sup>44</sup> He admits that he did nothing to keep Sandusky from continuing to use the PSU athletic facilities.<sup>45</sup> And Spanier points to no step he took to prevent Sandusky from continuing to abuse children on the PSU campus. In the face of such admissions, Spanier simply cannot show the falsity of Statements 1, 3, 8, 9 and 12. Each of those statements asserts that Spanier failed to investigate the safety of Sandusky's victims or to take steps to protect them from Spanier. Those facts now are essentially undisputed. Accordingly, his claims based on such statements should be dismissed.

**B. Spanier Admits that He Permitted Sandusky to Retire as a PSU Football Coach and to Use PSU Facilities**

Spanier's Response admits that "Sandusky retired and that, prior to his retirement, Sandusky was a Penn State football coach."<sup>46</sup> Nor does he dispute that Sandusky was permitted to retire with emeritus status.<sup>47</sup> Spanier's response to the assertion that Sandusky was permitted to retire as a valued member of the Penn State football legacy thus admits the truth of that statement: Sandusky did not

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<sup>43</sup> Response ¶ 311.

<sup>44</sup> *Id.* ¶¶ 302-03.

<sup>45</sup> *Id.* ¶¶ 306-308.



retire as a suspected child predator, but rather as an emeritus PSU football coach.

As such, Spanier is unable to establish that Statement 6 is false.

Nor can Spanier deny that Sandusky was permitted continued access to PSU facilities. Spanier admits that he did not ban Sandusky from campus, or direct anyone to ban Sandusky from campus.<sup>48</sup> He admits that Curley testified at his trial that there was no enforcement mechanism to prevent Sandusky from bringing children to PSU campus facilities.<sup>49</sup> He also admits that Sandusky continued to use PSU's athletic facilities even after McQueary's report of inappropriate conduct in February 2001.<sup>50</sup> Spanier's admissions establish the truth of Statements 4 and 7: that Sandusky was permitted to retain continued, unrestricted and unsupervised access to PSU's facilities, and that Spanier took no action to limit such access.

**C. Spanier Admits that He Did Not Report McQueary's Allegation of Inappropriate Conduct**

Spanier's Response admits outright that Spanier did not report McQueary's allegation of inappropriate conduct by Sandusky to either DPW or the police.<sup>51</sup>

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<sup>46</sup> *Id.* ¶ 309.

<sup>47</sup> *Id.* ¶ 310.

<sup>48</sup> *Id.* ¶¶ 306-308.

<sup>49</sup> *Id.* ¶ 285.

<sup>50</sup> *Id.* ¶ 308.

<sup>51</sup> *Id.* ¶¶ 290-293.

And it cannot be reasonably disputed that Spanier failed to inform the Board of Trustees of McQueary's report. Accordingly, he is unable as a matter of law to show that Statements 2, 5, 10, and 11, all of which assert that Spanier failed to report Sandusky's conduct, are substantially untrue. He therefore cannot prove that those statements are defamatory

## **II. Spanier's Criminal Conviction Renders His Claims Unavailing**

Spanier's case also should be dismissed in light of the fact that he was convicted of endangering the welfare of a child on March 24, 2017, a significant new development that was not available to the Court in considering Defendants' Preliminary Objections. "It is well established that a criminal conviction collaterally estops a [party] from denying his acts in a subsequent civil trial." *Shaffer v. Smith*, 673 A.2d 872, 874 (Pa. 1996) (citations omitted).

In order to convict, the jury necessarily found beyond a reasonable doubt that Spanier endangered the welfare of a child by violating a duty of care, protection, or support, and that he did so knowingly. In other words, Spanier *knowingly* violated a duty to Sandusky's child victim. As a result, the jury necessarily found that Spanier possessed sufficient information about Sandusky's conduct that he should have taken action to protect Sandusky's child victims, but did not do so. Spanier's conviction estops him from disputing that fact, yet that very fact forms the essential nub underlying each of the statements that Spanier

claims is defamatory. Spanier's conviction, and the findings necessary to the jury's verdict, mean that Spanier cannot prove the falsity of the statements of which he complains.<sup>52</sup> Accordingly, his case should be dismissed in its entirety.<sup>53</sup>

### **III. Even if Spanier Were Not Precluded from Challenging the Truth of the Statements at Issue, He Cannot Establish Actual Malice**

Finally, even if Spanier were not estopped from challenging the truth of the allegedly defamatory statements by his factual admissions in his Response to Defendants' New Matter or by his criminal conviction, there is no way that Spanier will be able to establish actual malice in light of his admissions. Because Spanier is a public figure, in order to prevail on his claims he must show by clear and convincing evidence that the statements at issue were made with actual malice—that is, that they were made “with knowledge that [they were] false or with reckless disregard of whether [they were] false. . . .” *Castellani v. Scranton Times, L.P.*, 124 A.3d 1229, 1241 (Pa. 2015); *see Tucker v. Phila. Daily News*, 848

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<sup>52</sup> Even if Spanier were to appeal his conviction, a criminal conviction has collateral estoppel effect unless or until the conviction is reversed. *Shaffer*, 673 A.2d at 875 (“[T]he pendency of an appeal of a criminal conviction does not deprive a party of the right to invoke collateral estoppel in a civil proceeding unless or until that conviction is reversed on appeal.”).

<sup>53</sup> At the very least, Spanier's conviction estops him from claiming the falsity of Statements 1, 3, 5, 7, 8 10, 11, and 12. All of these statements would require him to prove that the statements that he failed to protect against Sandusky or concealed facts relating to Sandusky are *not true*. The jury had to have found facts supporting the truth of those statements in order to find Spanier guilty of endangering the welfare of a minor.

A.2d 113, 127-128 (Pa. 2004) (public figure defamation claim requires proof the defendant “either knew [the statements] were false or recklessly disregarded their falsity”). This element “is not adjudged by an objective standard; rather, ‘actual malice’ must be proven applying a *subjective* standard by evidence ‘that *the defendant in fact entertained serious doubts as to the truth of his publication.*’” *Lewis v. Phila. Newspapers, Inc.*, 833 A.2d 185, 192 (Pa. Super. 2003) (quoting *Curran v. Phila. Newspapers, Inc.*, 546 A.2d 639, 642 (Pa. Super. 1988)) (internal citation omitted) (emphasis in original).

As this Court itself observed, showing actual malice is a standard that is “a difficult, nearly impossible one. . . .” September 27, 2016 Opinion at 25; *see Manning v. WXPI, Inc.*, 86 A.2d 1137, 1143 (Pa. Super. 2005) (actual malice is “a rigorous, if not impossible, burden to meet in most circumstances”). Even assuming that Spanier ever had been able to meet this high bar, a theoretical contention at best, Spanier’s admissions, as well as his criminal conviction, leave him with no possible way to prove that Defendants entertained serious doubts as to the truth of the statements at issue. Based on the same evidence, a jury of his peers convicted Spanier of endangering the welfare of a minor. And Spanier does not even dispute that he: (i) failed to report McQueary’s allegation of inappropriate conduct;<sup>54</sup> (ii) did nothing to investigate the identity of the child McQueary

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<sup>54</sup> Response ¶¶ 290-93.

witnessed with Sandusky;<sup>55</sup> (iii) expressed no concern for Sandusky's victims prior to November 2011;<sup>56</sup> (iv) took no steps to ban Sandusky from campus;<sup>57</sup> and (v) permitted Sandusky to retire with emeritus status.<sup>58</sup> How, then, could Defendants have acted with disregard for the truth in making statements setting forth those facts?

Spanier can put forth no viable theory by which he will be able to sustain the "rigorous, if not impossible, burden" of showing actual malice by clear and convincing evidence under such circumstances. *Bartlett v. Bradford Publ'g, Inc.*, 885 A.2d 562, 566 (Pa. Super. 2005) (citation and quotation omitted). For this additional reason, judgment should be granted in favor of Defendants and against Plaintiff.

### **Conclusion**

For the foregoing reasons, Defendants Louis J. Freeh and FSS respectfully request that this Court grant judgment on the pleadings to Defendants, and dismiss this case in its entirety with prejudice.

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<sup>55</sup> *Id.* ¶¶ 302-03.

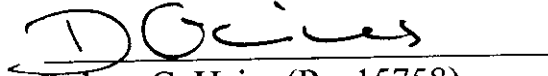
<sup>56</sup> *Id.* ¶ 311.

<sup>57</sup> *Id.* ¶¶ 306-08.

<sup>58</sup> *Id.* ¶¶ 309-10.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

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