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

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

MEMORANDUM OF LAW IN SUPPORT OF PRELIMINARY OBJECTIONS TO PLAINTIFF'S DEFAMATION CLAIMS BY DEFENDANTS LOUIS J. FREEH AND FREEH SPORKIN & SULLIVAN LLP

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I. INTRODUCTION[1]

On a Friday night in 2001, a young boy who participated in The Second Mile, a charity organization for underprivileged children founded by Gerald A. "Jerry" Sandusky, was invited to "work out" with Sandusky at the Lasch Building on the campus of The Pennsylvania State University ("PSU" or "Penn State"). Sandusky had the ten-year-old boy shower with him, and sexually assaulted him while they were in the shower together. An assistant football coach at Penn State, Michael McQueary, witnessed the incident, and his report of misconduct that was, in Head Coach Joseph Paterno's words, of a "sexual nature" was quickly reported up the chain of command. Within 24 hours Athletic Director Timothy Curley and Vice President for Finance and Administration Gary Schultz were informed. Shortly thereafter, it reached Penn State's President Graham Spanier.

Spanier admits that he never asked for the name of the child, how old the boy was, or whether the child was harmed. He contended in his grand jury testimony that the encounter between Sandusky and the boy in the showers that Friday night consisted only of "horseplay." In any event, Spanier signed off on a

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[1] Unless otherwise indicated, the facts set forth in this Introduction are taken from the November 4, 2011 Presentment issued by Thirty-Third Statewide Investigating Grand Jury (the "Grand Jury"), the November 1, 2012 Supplemental Presentment issued by the Grand Jury, and the emails uncovered and interviews taken as a part of the investigation into the Sandusky child sex abuse scandal. Citations to the specific pages in these materials on which these facts may be found are set forth *infra* at 5-21.

plan to avoid reporting the incident to the police, to permit Sandusky continued access to the Penn State campus (but to "instruct" him not to bring "guests" with him to the athletic facility), and generally to enable Sandusky to continue his activities with the children in The Second Mile unimpeded. Spanier opined that this plan was "humane" and observed that, "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."

This was not the first time Spanier had been told about Sandusky's fondness for young boys. In 1998, while Sandusky was still an employee of PSU, a remarkably similar incident—also occurring in the evening in the showers of the Lasch Building—was reported by the mother of the child involved to the campus police. In an interview with PSU police, Sandusky admitted that he had showered with the boy and hugged him (while naked), and Sandusky told the boy's mother that he had told the child he loved him. Regardless of these facts, the police inexplicably closed the investigation. Spanier inquired no further, nor was the incident reported to PSU's human resources department.

Despite the great degree of similarity between the 1998 report and the events in 2001, Spanier, along with Schultz and Curley, again did nothing. Unchecked, Sandusky went on to assault four other young victims between 2001 and 2008. The damage done to those victims is incalculable. One testified that after

Sandusky's assaults, he contemplated suicide, and admitted that as a result of the assaults by Sandusky—who he referred to as "the monster"—he "lost a good portion of my childhood."[2] PSU has paid millions of dollars in settlements to Sandusky's victims in an attempt to provide some compensation for the irreparable harm they experienced at his hands. Spanier himself faces criminal charges as a result of his failure to take action to protect them.

Rather than grappling with the result of his inaction, however, Spanier seeks to paint ***himself*** as the victim of a renegade investigation by Louis J. Freeh and Freeh, Sporkin, & Sullivan LLP ("FSS"), who were asked by the Penn State Board of Trustees to a perform a full and complete investigation into the actions and inactions of senior Penn State officials and the Board of Trustees regarding Sandusky's criminal conduct. Notably, Spanier was effectively terminated by the Board of Trustees even before the Freeh investigation began. Now, to substantiate his victimhood, Spanier has launched this civil suit against Freeh, claiming that, despite the documentary evidence, he did not know that Sandusky's untoward activity with naked children in the showers at PSU was sexual in nature and contending that Spanier acted appropriately both in 1998 and in 2001. This last-

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[2] *See, e.g.*, Joseph Rhee, et al., *Sandusky Victim 1 Steps Out of Shadows, Says Justice Took Too Long*, ABC News (Oct. 19, 2012), http://abcnews.go.com/US/sandusky-victim-reveals-identity-justice-long/story?id=17511612.

ditch attempt to interpose a defamation claim in order to avoid responsibility for failing to protect the minor children who were assaulted due to the Penn State administration's sheltering of a serial sexual predator should be rejected.

Even if the Court were to assume that the factual statements in Spanier's Complaint were true, as it must at this stage, Spanier cannot state the legal elements of a defamation claim. *First*, the facts surrounding the Sandusky abuse scandal, as may be expected, have provoked strong opinions. But an expression of opinion may not form the subject of a defamation claim. The statements of which Spanier complains are pure statements of opinion regarding Spanier's actions, or failures to act, in the face of the information he was given, even if he "received approximately 25,000 emails a year," "was out of the country on an international trip," was only informed of "'horsing around' in the showers" of the Lasch Building, or only intended his expression of concern that he would "become vulnerable for not having reported" McQueary's discomfort with Sandusky's conduct to mean that informing The Second Mile, but not the police, "was acceptable and a reasonable way to proceed."[3] Even taking the facts as set forth in the Complaint as true, Freeh's and FSS's statements were expressions of opinion (regarding, for example, whether Spanier exhibited "empathy"), and Spanier legally cannot state a claim based on such statements.

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[3] Compl. ¶¶ 137, 149, 151.

Second, Spanier is unable to plausibly allege that Freeh or FSS acted with actual malice. As a conceded "public figure" for purposes of defamation law, Spanier must show that Freeh and FSS not only uttered false and defamatory statements, but that those statements were made not just with negligence, but with actual malice—that is, ***subjective*** disregard for the truth or falsity of those statements. Yet an Investigating Grand Jury found the same evidence on which those statements are based to be sufficient to recommend criminal charges against Spanier, and a judicial officer found that evidence strong enough to hold Spanier over for trial. In the face of such evidence of probable cause, Spanier is unable as a matter of law to show that Freeh or FSS harbored a subjective disregard for the truth or falsity of their statements.

Spanier's defamation claims should be dismissed.

II. STATEMENT OF FACTS

A. Improprieties Involving Sandusky Are Alleged in 1998 and 2001.

1. The 1998 Incident.

In 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,[4] stating that her son had told her that

[4] Nov. 1, 2012 Grand Jury Presentment at 6-7, attached as Ex. 1. In resolving preliminary objections, "[i]t is appropriate for a court to take notice of a fact which the parties have admitted or which is incorporated into the complaint by reference

Sandusky had showered with him and had hugged him while in the shower of the Lasch Building on PSU's campus.[5] A detective interviewed the boy and referred the matter to Centre County Children and Youth Services ("CYS"), who in turn referred it to the Department of Public Welfare ("DPW") due to the involvement of CYS with The Second Mile.[6]

PSU Vice President for Finance and Business 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?"[7] *See* Ex. 2. Schultz questioned, "Is this opening of Pandora's box? Other children?" *Id.*; *see* Report at 48 Schultz told PSU Athletic Director Timothy Curley, and on May 5, 1998, Curley emailed Schultz and Spanier, stating "I have touched base with the coach. Keep us posted."[8] Schultz replied that DPW would interview "the individual" on Thursday, May 7.

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to a prior court action." *Joyce v. Erie Ins. Exch.*, 74 A.3d 157, 165 (Pa. Super. 2013) (citation and quotation omitted).

5 Nov. 1, 2012 Grand Jury Presentment at 6.

6 *Id.* at 6-8.

7 *Id.* at 8-9.

8 Nov. 1, 2012 Grand Jury Presentment at 8-9.

From: Gary C. Schultz <gcs2@psu.edu>
Sent: Wednesday, May 06, 1998 2:06 PM
To: Tim Curley
Cc: Spanier-Graham (GBS)
Subject: Re: Joe Paterno

Will do. Since we talked tonight I've learned that the Public Welfare people will interview the individual Thursday.

At 05:24 PM 5/5/98 -0400, Tim Curley wrote:
>I have touched base with the coach. Keep us posted. Thanks.
>
>Tim Curley
>Tmc3@psu.edu
>
>
>

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.[9]

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 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.[10] He also stated, "I

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[9] "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"), Compl. Ex. A, at 48.

[10] Nov. 1, 2012 Grand Jury Presentment at 7; Report at 41 (citing PSU Police Report 41-98-1609 at 23).

was wrong. I wish I could get forgiveness. I know I won't get it from you. I wish I were dead."[11] 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.[12] No charges were brought, and the investigation was closed.[13]

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 interview of Sandusky conducted by PSU police. Schultz observed 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." Ex. 3. Schultz stated that the police nevertheless had closed the investigation. In his interview with the Special Investigative Counsel, Spanier admitted that no effort was made to limit Sandusky's access to PSU facilities following these events.[14]

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11 Report at 45 (citing PSU Police Report 41-98-1609, at 17).

12 Nov. 1, 2012 Grand Jury Presentment at 7-8.

13 *Id.* at 7, 10-11.

14 Report at 51.

2. The 2001 Incident.

Less than three years later, in February 2001, Graduate Assistant Football Coach Michael McQueary reported yet 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.[15] McQueary found Sandusky with a minor boy, and Sandusky and the child were in what he described as "sexual . . . positioning."[16] 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."[17] Paterno, Schultz and Curley met on Sunday. Paterno testified 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

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15 Nov. 1, 2012 Grand Jury Presentment at 12.

16 Preliminary Hearing Tr. at 19, *Com. v. Curley* (Com. Pl. Dauphin Cnty. July 29, 2013), *available at* http://www.dauphincounty.org/government/Court-Departments/Curley-Schultz-Spanier/Pages/Curley.aspx.

17 Report at 67 (quoting Preliminary Hearing Tr. at 176).

him.[18] That same day, Schultz had a conference call with PSU's outside legal counsel regarding the "reporting of suspected child abuse."[19]

On Monday, February 12, 2001, Schultz met with Curley. Schultz's notes state that they "[r]eviewed 1998 history." *See* Ex. 4. Schultz further wrote that Curley and Schultz 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."[20] *Id.* In his interview with the Special Investigative Counsel, Spanier stated that he also met with Schultz and Curley on February 12, when he was given a "heads up" that Sandusky had showered with a boy from The Second Mile on PSU's campus, and that Sandusky and the youth were "horsing around" or "engaged in horseplay."[21] Spanier stated that he did not ask, nor did Schultz or Curley explain, what was meant by "horsing around" or "horseplay."[22] He said, however, that the three were "uncomfortable" with the situation, and that Spanier asked Curley to tell Sandusky that he could not

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18 Report at 68 (quoting Preliminary Hearing Tr. at 177).

19 Nov. 1, 2012 Grand Jury Presentment at 14.

20 The initials "JVP" correspond to Paterno's initials. The initials "TMC" correspond to Curley's initials.

21 Report at 70.

22 *Id.*

bring children into the showers.[23] Although Spanier claimed that the incident was "unique," Schultz testified to the Grand Jury that he believed that Spanier was aware of the 1998 investigation at the time of the 2001 incident.[24]

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." 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 Bldg." *See* Ex. 5. 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." *See* Ex. 6.

On Tuesday, February 27, 2001, Curley sent an email to Spanier and Schultz stating that rather than reporting Sandusky to the authorities, "After giving it more thought and talking it over with Joe yesterday—I am having trouble with going to everyone, but the person involved. I think I would be more comfortable meeting

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23 *Id.*

24 *Compare* Report 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.

with the person and tell him about the information we received." Ex. 7. 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." *Id.* If Sandusky did not cooperate, "we feel a responsibility at some point soon to inform his organization and [*sic*] maybe the other one about the situation." *Id.* Curley further stated, "I will let him know that his guests are not permitted to use our facilities." *Id.* Thus, Curley proposed that (i) they **not** inform law enforcement authorities of Sandusky's suspected assault, (ii) 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.

Id. (emphasis added). Schultz sent an email the next day, agreeing with the proposed approach. *See id.*

From: Gary C. Schultz <gcs2@psu.edu>
Sent: Wednesday, February 28, 2001 2:13 PM
To: Graham Spanier; Tim Curley
Subject: Re: Meeting

<html>
Tim and Graham, this is a more humane and upfront way to handle this. I can support this approach, with the understanding that we will inform his organization, with or without his cooperation (I think that's what Tim proposed). We can play it by ear to decide about the other organization.

 At 10:18 PM 2/27/01 -0500, Graham Spanier wrote:
 <blockquote type=cite cite>Tim: This approach is acceptable to me. 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.

 At 08:10 PM 2/27/01 -0500, Tim Curley wrote:
 <blockquote type=cite cite>I had scheduled a meeting with you this afternoon about the subject we discussed on Sunday. After giving it more thought and talking it over with Joe yesterday-- I am uncomfortable with what we agreed were the next steps. 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. 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. Also, we feel a responsibility at some point soon to inform his organization and and maybe the other one about the situation. If he is cooperative we would work with him to handle informing the organization. If not, we co not have a choice and will inform the two groups. Additionally, I will let him know that his guests are not permitted to use our facilities.

 I need some help on this one. What do you think about this approach?</blockquote>

Graham B. Spanier
President
The Pennsylvania State University
201 Old Main
University Park, Pennsylvania 16802

 Phone: 814-865-7611
 email: gspanier@psu.edu
 </blockquote></html>

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.

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 of this incident and the time when Sandusky was finally arrested and criminally charged in 2011.[25]

B. A Grand Jury Investigates Allegations of Wrongdoing at PSU.

In 2009, the Grand Jury was impaneled to investigate allegations of misconduct by various individuals in connection with the handling of the Sandusky child abuse scandal. The Grand Jury inquiry stretched over two years and involved the testimony of at least 21 witnesses, including Spanier, as well as the review of a large volume of subpoenaed records. Following its investigation, the Grand Jury issued a 23-page summary of its findings of fact on November 4, 2011. The Grand Jury reported that both Curley and Schultz had testified that "Graham Spanier was apprised in [2001] that a report of an incident involving Sandusky and a child in the showers on campus had been reported by an employee," and that "Spanier approved the decision to ban Sandusky from bringing children into the football locker room and the decision to advise The Second Mile [charity organization] of the [2001] incident."[26] Spanier himself characterized the incident as "Jerry

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[25] Nov. 1, 2012 Grand Jury Presentment at 35. Sandusky was charged with Involuntary Deviate Sexual Intercourse, Indecent Assault, Unlawful Contact with a Minor, Corruption of Minors, Endangering the Welfare of Children, and Criminal Attempt to Commit Indecent Assault on November 4, 2011. On June 22, 2012, he was convicted on 45 of the 48 counts against him, and on October 9, 2012 he was sentenced to 30 to 60 years in prison. *See* Sentencing Order, *Commonwealth v. Sandusky*, No. CP-14-CR-2421-2011 (Oct. 9, 2012).

[26] Nov. 4, 2011 Grand Jury Presentment at 8-11, attached as Ex. 8.

Sandusky in the football building locker area in the shower [ ] with a younger child and that they were horsing around in the shower," yet denied that it was reported as an incident that was sexual in nature,[27] implicitly suggesting that a report of an adult male "horsing around" with a minor child naked in a PSU shower did not rise to the level of something PSU would investigate.

The Grand Jury found that this assault should have been reported, at the least, to the Pennsylvania Department of Welfare, to Centre County Children and Youth Services, and/or to a law enforcement agency.[28] Based on this testimony, the Grand Jury recommended charges against Curley and Schultz for failure to report suspected child abuse. At the time, the Grand Jury did not have access to the emails among Spanier, Curley, and Schultz cited above.

C. Louis Freeh and FSS Are Commissioned by PSU to Complete an Independent Investigation and Issue a Report.

The Grand Jury's presentment was issued on November 9, 2011. 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.

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27 *Id.* at 10.

28 *Id.* at 12.

Over the next seven months, Freeh and FSS performed a detailed investigation of the facts surrounding the allegations against Sandusky, culminating 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"), which was released on July 12, 2012.[29] As detailed in the Report, 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. As part of that investigation, FSS and law enforcement officials uncovered important documentary evidence—including the 1998 and 2001 emails as well as Gary Schultz's handwritten notes documenting PSU's response to the incidents—that had not been produced in response to the Grand Jury's subpoenas to PSU[30] and, in the case of Gary Schultz's notes, had been actively concealed from investigators.[31]

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29 *See* Compl. Ex. A.

30 The Grand Jury found that little effort was made to comply with those subpoenas. Nov. 1, 2012 Grand Jury Presentment at 23-24.

31 Schultz's notes originally had been withheld from the Special Investigating Counsel, and were only discovered in May 2012. Upon hearing that Schultz would be arrested, his administrative assistant removed them from a file drawer in his office and delivered them to Schultz's home. *Id.* at 24.

Consistent with the Grand Jury's initial findings, the Report stated, *inter alia*, that various PSU officials had been informed of inappropriate behavior by Sandusky on one or more occasions, but that no systematic investigation was undertaken and no report made to state authorities. The Report stated, among other things, that "[d]espite 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," Report at 39, that despite "having prior knowledge of the 1998 child sex abuse allegation against Sandusky," Spanier, Schultz, and Curley did not inform DPW about the allegation against Sandusky in 2001, *id.* at 63, and that "Spanier and senior University officials did not make thorough and forthright reports to the Board." *Id.* at 97.

D. Spanier Is Investigated and Criminally Charged.

Based on the newly discovered documentary evidence, the Investigating Grand Jury issued a supplemental presentment on November 1, 2012. The supplemental presentment came about as a result of the discovery of "significant emails from 1998 reflecting knowledge of, and involvement with, the investigation into Sandusky's showering with two young boys in May of 1998," as well as "significant emails . . . reflecting direct evidence of involvement by Graham Spanier, Gary Schultz, and Tim Curley in the failure of Penn State to report to

child welfare or law enforcement authorities the crimes reported by Michael McQueary in February of 2001."[32]

The Grand Jury concluded that Spanier had "engaged in a repeated pattern of behavior that evidenced a willful disregard for the safety and well-being of minor children on the Penn State campus."[33] It found that when the 2001 incident was reported, "the first response should have been an immediate report to law enforcement and a child protective services agency."[34] Instead, Spanier "endorsed the plan of action that involved circumventing any outside agency" even though he recognized "the potential consequences for their failure to report."[35] The Grand Jury found evidence of a "frightening lack of concern for the yet to be identified child (Victim 2), and an interest in shielding a man who Curley recognized needed 'professional help' and who Schultz indicated should 'confess to having a problem.'"[36] As the PSU Chief of Police pointed out, "the need to report should

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32 Nov. 1, 2012 Grand Jury Presentment at 32.

33 *Id.* at 33.

34 *Id.*

35 *Id.* at 18.

36 *Id.*

have been readily apparent given this was now the second episode, and . . . it would have likely led to a reexamination of the 1998 incident" as well.[37]

The Grand Jury further concluded that Spanier, Curly, and Schultz "endangered the welfare of children by failing to report the [2001] incident witnessed by Michael McQueary to any law enforcement or child welfare agency," and noted that "[t]here was never any effort made to locate, identify, or otherwise protect Victim 2 from foreseeable future harm."[38] In fact, the Grand Jury found, "by notifying Sandusky [that] they were aware of the incident and not informing the police or a child welfare agency, Spanier, Curley and Schultz placed Victim 2 in even greater danger," because "Sandusky was placed on notice that others had been informed of his abuse of Victim 2."[39] Indeed, the Grand Jury determined that "[t]he continued cover up of this incident and the ongoing failure to report placed every minor male child who would come into contact with Sandusky in the future in grave jeopardy of being abused." This failure "directly endangered" five

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37 *Id.* at 34.

38 *Id.*

39 *Id.*

victims and "allowed Sandusky to abuse them between 2001 and 2008."[40] The Grand Jury characterized the harm caused by this failure as "staggering."[41]

The Grand Jury further determined that Spanier had committed perjury by giving untruthful testimony to the Grand Jury,[42] had "engage[d] in many acts to obstruct justice,"[43] and failed to report an allegation of sexual assault that should have been reported to law enforcement.[44]

E. At the Preliminary Hearing on the Charges Against Spanier, the Court Finds Cause to Hold Spanier Over for Trial.

At a preliminary hearing on the charges recommended by the Grand Jury, which lasted for two days, the Office of the Pennsylvania Attorney General and counsel for Defendants Spanier, Schultz, and Curley presented evidence and argument on the charges, and conducted examinations of eight witnesses. Following this adversarial presentation, Magisterial District Judge William Wenner found the evidence sufficient to hold the defendants over for trial. Spanier was subsequently indicted on eight charges including perjury, endangering the welfare of children, obstruction of an investigation, failure to report child abuse and

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40 *Id.* at 35.

41 *Id.*

42 *Id.* at 36-37.

43 *Id.* at 38.

44 *Id.* at 39.

criminal conspiracy.[45] *Commonwealth v. Graham B. Spanier*, CP-22-CR-3615-2013 (Dauphin Cnty. Ct. Com Pl.). As of the date of this filing, a trial date has not been scheduled in the Criminal Proceeding.[46]

F. Spanier's Claim for Defamation.[47]

Spanier's Complaint seeks to deflect attention from his own role in the failure to halt Sandusky's abuse of children on the PSU campus, and instead criticizes the lengthy and detailed investigation performed by Freeh and FSS, lobbing *ad hominem* attacks at Freeh in particular. Despite the prolixity of these extraneous allegations, the essence of Spanier's claim consists of the statements listed in a single paragraph on pages 96 through 98 of the Complaint, which Spanier alleges are defamatory. Spanier alleges that the Report defamed him by

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[45] *See, e.g.*, Jenna Johnson, *Former Penn State President Charged in Connection with Sandusky Case*, Washington Post (Nov. 1, 2012), http://www.washingtonpost.com/local/education/former-penn-state-president-graham-spanier-charged-in-connection-with-jerry-sandusky-case/2012/11/01/d7cdd282-243e-11e2-ba29-238a6ac36a08_story.html.

[46] The Superior Court recently issued an opinion in an appeal of the criminal case based on the non-merits issue of whether the testimony of Cynthia Baldwin may be used against Spanier, Schultz, and Curley, holding that Baldwin's testimony was not admissible and any charges based on that testimony could not be sustained. The Office of the Attorney General recently requested that the Superior Court rehear the case en banc. *See Com. v. Spanier*, No. 304 MDA 2015 (Pa. Super.).

[47] The procedural background of this litigation is addressed in detail in Defendants' Memorandum in Support of Preliminary Objections as to Plaintiff's Tortious Interference Claim, which is being filed contemporaneously herewith.

finding that he "failed to protect against a child sexual predator harming children for over a decade," that he "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," and that he "fail[ed] . . . to adequately report and responds to the actions of a serial sexual predator." Compl. ¶ 256.

Spanier does not—and cannot—dispute that despite receiving notice of allegations of inappropriate conduct by Sandusky (as documented in contemporaneous records in writing), he did not restrict Sandusky's access to PSU facilities and did not report Sandusky to CYS, DPW, or the police.

III. STATEMENT OF THE QUESTIONS INVOLVED

1. Should Plaintiff's defamation claims be dismissed where Plaintiff is unable to establish that the allegedly defamatory statements are capable of defamatory meaning?

   Suggested Answer: Yes. The statements on which Plaintiff's claims are based are statements of opinion, and therefore are not capable of defamatory meaning. As a result, Plaintiff is unable to establish a necessary element of his claims.

2. Should Plaintiff's defamation claims be dismissed because he is unable to establish actual malice, an essential element of his claim?

   Suggested Answer: Yes. The statements of which Plaintiff complains are based on events at the center of the criminal indictment against Plaintiff, which is supported by probable cause. The existence of probable cause negates actual malice as a matter of law, and Plaintiff's claims therefore must fail.

IV. ARGUMENT

A preliminary objection in the nature of a demurrer tests the sufficiency of Plaintiff's complaint. Such a preliminary objection "must be sustained where it is clear and free from doubt that the law will not permit recovery under the alleged facts." *Africa v. Horn*, 701 A.2d 273, 274 (Pa. Commw. Ct. 1997).

To state a claim for defamation under Pennsylvania law, Spanier must allege (1) the defamatory character of the communication, (2) its publication by Defendants, (3) its application to the Plaintiff, (4) the understanding by the recipient of its defamatory meaning, (5) the understanding by the recipient of it as intended to be applied to the plaintiff, (6) special harm resulting from its publication, and (7) abuse of a conditionally privileged occasion. 42 Pa. Cons. Stat. Ann. § 8343(a). In addition, because Spanier is concededly a public figure, he must allege facts sufficient to support a finding of actual malice. *See infra* at 32.

Spanier's defamation claims must fail, because he cannot show either (i) the "defamatory character" of the statements of which he complains, or (ii) that those statements were made with actual malice.

A. Spanier's Defamation Case Is Premised on Inactionable Statements of Opinion.

"Generally, a statement that is merely an expression of opinion is not defamatory." *Balletta v. Spadoni*, 47 A.3d 183, 197 (Pa. Commw. Ct. 2012)

(citation omitted); *see Alston v. PW-Philadelphia Weekly*, 980 A.2d 215, 219 (Pa. Commw. Ct. 2009) (affirming order sustaining preliminary objections because statement was "protected opinion and, therefore, not actionable as a matter of law"). Pennsylvania courts have adopted Section 566 of the Restatement (Second) of Torts, which "states that a defamatory communication in the form of an opinion is only actionable if it implies the allegation of undisclosed defamatory facts as its basis." *Balletta*, 47 A.3d at 197.

Accordingly, a statement in the form of an opinion "is actionable ***only*** if it may reasonably be understood to imply the existence of undisclosed defamatory facts justifying the opinion." *Veno v. Meredith*, 515 A.2d 571, 575 (Pa. Super. 1986) (citation omitted). (quoting Restatement (Second) of Torts § 566 (1977)) (emphasis added). On the other hand, if "'the maker of the comment states the facts on which he bases his opinion of the plaintiff and then expresses a comment as to the plaintiff's conduct, qualifications or character," such a 'pure' expression of opinion "is not actionable 'no matter how unjustified and unreasonable the opinion may be or how derogatory it is.'" *Malia v. Monchak*, 543 A.2d 184, 190 (Pa. Commw. Ct. 1988) (citations omitted). In other words, a "clearly factual" statement followed by a statement that is "purely the opinion" of the one uttering the statement is not actionable. *Mathias v. Carpenter*, 587 A.2d 1, 3 (Pa. Super. 1991).

Here, the statements that Spanier claims are defamatory are "pure" expressions of opinion regarding Spanier's conduct, and the facts underlying those opinions are fully disclosed in the 162 pages of the Report. The majority of these statements set forth opinions regarding the state of mind evidenced by Spanier's actions (or lack thereof). Thus, in the Report, Freeh and FSS opined that:

- Spanier exhibited "total and consistent disregard . . . for the safety and welfare of Sandusky's child victims."[48]
- 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."[49]
- "The investigation also revealed: [] A striking lack of empathy for child abuse victims by the most senior leaders at the University."[50]
- "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."[51]
- Spanier "never demonstrated, through actions or words, any concern for the safety and well-being of Sandusky's victims until after Sandusky's arrest."[52]

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[48] Compl. ¶ 256. The full sentence contained in the Report reads as follows: "The most saddening finding by the Special Investigative Counsel is the total and consistent disregard by the most senior leaders at Penn state for the safety and welfare of Sandusky's child victims." Report at 14.

[49] Compl. ¶ 256; Report at 14.

[50] Compl. ¶ 256; Report at 16.

[51] Compl. ¶ 274.

[52] *Id.*

- 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 even attempting to determine the identity of the child who Sandusky assaulted in the Lasch Building in 2001."[53]

Spanier contends that these statements are false[54] and made with actual malice.

But these statements merely offer an opinion about the demeanor shown by Spanier's actions, and rely solely on the facts fully disclosed in the Report, such as:

- The 1998 email correspondence referenced *supra* at 6-8.[55]

- The fact that there was no evidence that Spanier "spoke directly with Sandusky about the allegation, monitored his activities, contacted the Office of Human Resources for guidance, or took, or documented, any personnel actions concerning this incident in any official University file."[56]

- Spanier's admission "that no effort was made to limit Sandusky's access to Penn State" in either 1998 or 2001.[57]

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53 *Id.*

54 It is not clear how the characterization that an individual exhibited a "lack of empathy" would be proven false.

55 *See* Report at 48, 50-51. The Report also relates Spanier's response to this claim, noting that "In an interview with the Special Investigative Counsel, Spanier said he did not recall this email, and pointed out that he received numerous emails everyday that provide him with updates on various issues." *Id.* at 48. The Report further notes that "In a written statement from Spanier, he characterized the May 5, 1998 email as a 'vague reference with no individual named.'" *Id.*

56 *Id.* at 51.

57 *Id.* at 51, 79. The Report also related Spanier's statement that "he was unaware that Sandusky continued to run camps at Penn State and have access to children sleeping in Penn State dormitories." *Id.* at 50-51.

- Spanier's testimony that Schultz and Curley informed him in 2001 that a member of the Athletic Department staff had reported seeing "Sandusky [] in an athletic locker room facility showering with one of his Second Mile youth after a workout," that Sandusky and the child "were 'horsing around' or 'engaged in horseplay,'" and that Spanier "did not ask, nor did Schultz or Curley define, what was meant by 'horsing around' or 'horseplay.'"[58]

- The absence of any evidence that Spanier made any effort to determine the identity of the child in the shower or whether the child had been harmed.[59]

- The 2001 email correspondence in which Spanier signed off on a plan to avoid reporting Sandusky to the authorities, including his statement that "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."[60]

Spanier may disagree with Freeh's and FSS's characterization of the state of mind shown by these facts, but he cannot show that the opinion that he exhibited a "lack of empathy" was false or defamatory. For the same reasons, the assertion that Spanier "discouraged discussion and dissent"[61] is an inactionable statement of opinion that is not capable of defamatory meaning.

Other statements of which Spanier complains are opinions regarding the adequacy of Spanier's actions and/or effect of Spanier's failure to report Sandusky

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58 *Id.* at 70-71.

59 *Id.* at 71.

60 *Id.* at 72-74.

61 Compl. ¶ 256.

in either 1998 or 2001. Thus, Freeh and FSS opined that 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."[62] Whether permitting Sandusky unrestricted access to PSU facilities resulted in "empower[ing]" Sandusky is a statement of opinion, supported by the disclosed fact that Sandusky's access was unrestricted. The statement that Spanier "fail[ed] . . . to adequately report and respond to the actions of a serial sexual predator,"[63] similarly constitutes an opinion as to whether or not Spanier's response to Sandusky's actions was "adequate." And the statement that Spanier "failed to protect against a child sexual predator harming children for over a

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[62] Compl. ¶ 256; Report at 15. The full text of this statement reads, "These individuals, unchecked by the Board of Trustees that did not perform its oversight duties, 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."

[63] Compl. ¶ 256; Report at 18. The full text of this statement reads, "One of the most challenging of the tasks confronting the Penn State community is transforming the culture that permitted Sandusky's behavior, as illustrated throughout this report, and which directly contributed to the failure of Penn State's most powerful leaders to adequately report and respond to the actions of a serial sexual predator."

decade"[64] sets forth Freeh's and FSS's opinion that Spanier's actions were insufficient to "protect" against a "child sexual predator."[65]

Likewise, the assertion 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,"[66] sets forth an opinion that permitting Sandusky to retire "as a valued member of the Penn State football legacy" resulted in "essentially granting him a license to bring boys to campus facilities" by giving him "ways 'to continue to work with young people through Penn State,'" and permitting him "unlimited access to University facilities until November 2011." Spanier may disagree with the opinion reached by Freeh and FSS, but that disagreement does not render that opinion defamatory.

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64 Compl. ¶ 256; Report at 14.

65 *See also* Compl. ¶ 256 (Spanier "took no action to limit Sandusky's access to Penn State facilities or took any measures to protect children on their campuses"); *id.* ¶ 291 (Spanier "failed to take any steps for 14 years to protect the children who Sandusky victimized").

66 Compl. ¶ 256; Report at 17. The full text of this statement reads, "The investigation also revealed: . . . A decision by Spanier, Schultz, Paterno and Curley to allow Sandusky to retire in 1999, not as a suspected child predator, but as a valued member of the Penn State football legacy, with future 'visibility' at Penn State and ways 'to continue to work with young people through Penn State,' essentially granting him license to bring boys to campus facilities for 'grooming' as targets for his assaults. Sandusky retained unlimited access to University facilities until November 2011."

Other allegedly defamatory statements state that Spanier "concealed" facts relating to Sandusky's abuse.[67] But whether Spanier's response rose to the level of "concealment" again is a statement of opinion. And, as to Spanier's claim that the statement that "four of the most powerful officials at Penn State agreed not to report Sandusky's activity to public officials," was false and defamatory, Spanier ignores that the facts on which that statement is based are set forth in full in the Report (yet conveniently omitted from Spanier's own Complaint).[68]

Finally, the report explained that "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."[69] Whether additional actions by Spanier "may [] have" prevented the continuing tragedy that occurred from 2001 to 2011 constitutes

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[67] Compl. ¶ 256 (Spanier "concealed Sandusky's activities from the Board of Trustees, the University community and authorities"); *id.* ¶¶ 256 & 274 ("[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 community, and the public at large").

[68] *Compare* Compl. ¶ 309 *with* Compl. Ex. C ("As detailed in my report, **the e-mails and contemporary documents from 2001 show that**, despite Mr. Paterno's knowledge and McQueary's observations, four of the most powerful officials at Penn State agreed not to report Sandusky's activity to public officials.") (emphasis added).

[69] Compl. ¶ 256; Report at 64.

Freeh's and FSS's opinion regarding what could have occurred in a counterfactual universe in which Spanier actually did report Sandusky to law enforcement officials. This statement is a pure statement of opinion, as evidenced by the fact that it cannot be proven false, and thus is not the proper subject of a defamation claim.

* * *

Freeh's and FSS's statements were opinion supported by disclosed facts. *See Sprague v. Porter*, 2013 WL 6143734, at *16 (Pa. Com. Pl. Phila. Cnty. Nov. 1, 2013), *aff'd*, 2014 WL 10803063 (Pa. Super. Aug. 26, 2014), attached as Ex. 9 (quoting subject's testimony "then pos[ing] questions about his actions" constitutes statements of "inferential opinions of the implications of his testimony" that do not sound in defamation). Accordingly, they cannot form the basis for a defamation claim.

B. Spanier Is Unable to Establish Actual Malice.

Spanier's defamation claims also fail for the independent reason that he is unable to establish actual malice as a matter of law. As he concedes, Spanier qualifies as a "public figure" for purposes of Pennsylvania defamation law.[70] To prevail on a defamation claim, therefore, Spanier bears the burden of proving, by "clear and convincing evidence," that Defendants acted with actual malice—that

[70] *See, e.g.*, Compl. ¶ 9.

is, that the allegedly defamatory statements 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 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 added).

In his Complaint, Spanier conclusorily alleges that Freeh "recklessly disregarded" purported evidence that allegedly supports Spanier's version of events, and that Freeh had "actual knowledge of falsity," or, at least, a "reckless disregard for the truth" in making the statements that allegedly defamed Spanier. *E.g.*, Compl. ¶¶ 143, 165, 169. There is not a shred of evidence supporting this allegation, nor does Spanier allege facts supporting this claim. Further, as shown by the events following the Report (not least of which is Spanier's criminal prosecution), Spanier cannot meet the standard required to show actual malice under Pennsylvania law.

Spanier testified before the Grand Jury on April 13, 2011, and the Grand Jury issued a presentment recommending charges against Spanier on November 1, 2012. On July 30, 2013, the Honorable William Wenner found the evidence against Spanier to be sufficient to hold him over for trial. Accordingly, Spanier was criminally charged with, *inter alia*, failure to report suspected child abuse, endangering the welfare of a child, and conspiracy to commit endangering the welfare of a child. The Court's ruling in holding him over for trial is strong evidence of probable cause, if it is not dispositive of that fact. *See, e.g.*, *Miller v. Pa. R. Co.*, 89 A.2d 809, 813 (Pa. 1952) (indictment by grand jury and holding over for trial "is everywhere held . . . [to be] affirmative evidence of probable cause.") (citation omitted); *De Salle v. Penn Cent. Transp. Co.*, 398 A.2d 680, 684 (Pa. Super. 1979) (holding over for trial "has long been held to be affirmative evidence of probable cause"). The existence of probable cause disposes of Spanier's actual malice claim as a matter of law.

As the Pennsylvania Supreme Court has observed, "[a]n action for libel is upon all fours with an action for a malicious prosecution." *Briggs v. Garrett*, 2 A. 513, 521 (Pa. 1886). This is so because a malicious prosecution claim "is but an aggravated form of an action for libel, as in it the libel is sworn to before a magistrate." *Id.* Necessarily, therefore, when "a man may charge another, under oath, before a magistrate, with a high crime, without responsibility therefor,

provided he acts upon probable cause, surely he may, upon probable cause," make a statement accusing another of criminal activity outside of court, "***and if probable cause exists in either case, the question of malice becomes of no importance.***" *Id.* (emphasis added).

Here, the statements made in the Report are supported by the same evidence that both the Grand Jury and Judge Wenner found sufficient to support the initiation of a criminal case against Spanier, with its attendant beyond-a-reasonable-doubt standard. Notably, the Grand Jury and Judge Wenner based this conclusion independently on the testimony and email evidence presented.

Stripped of its accusatory tone, Spanier's Complaint in essence asserts that Freeh acted with actual malice because he published the Report without taking the steps Spanier claims should have been taken to validate those findings. *See, e.g.*, Compl. ¶ 162. But as the Superior Court has observed, actionable conduct generally is measured "by what the defendant did, as opposed to what it refrained from doing or might have done but omitted to do." *Lewis*, 833 A.2d at 192 (citations omitted). A "[f]ailure to investigate, without more, will not support a finding of actual malice." *Fitzpatrick v. Phila. Newspapers, Inc.*, 567 A.2d 684, 688 (Pa. 1989) (citation omitted); *see St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) ("[R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must

be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.").

Because Spanier cannot establish that Freeh or FSS subjectively harbored a doubt as to the truth or falsity of the statements in the Report as required to support an allegation of actual malice, his defamation claims should be dismissed.

V. CONCLUSION

For the foregoing reasons, Defendants' Preliminary Objections should be sustained and Plaintiff's Complaint should be dismissed.

Respectfully submitted,

Dated: March 28, 2016

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CERTIFICATE OF SERVICE

I, David S. Gaines, Jr., hereby certify that I caused to be served on March 28, 2016, a true and correct copy of the foregoing Memorandum by first-class mail upon the following:

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EXHIBIT 1

FINDINGS OF FACT

This investigation commenced as a result of allegations of sexual assaults of minor male children by Gerald R. Sandusky ("Sandusky") over a period of years while Sandusky was a football coach with the Pennsylvania State University ("Penn State") football team and after he retired from coaching. The Thirty-Third Statewide Investigating Grand Jury issues this Presentment in furtherance of its ongoing investigation of this matter and hereby incorporates all of its previous findings from Presentments No. 12 and 13 herein as if fully set forth.

1998 Incident Involving Victim 6

In the spring of 1998, Sandusky was a very prominent defensive coordinator/assistant football coach at Penn State. Sandusky had garnered national acclaim for the quality of his coaching and was widely looked upon as the mastermind of defenses that led to two national championships in the 1980's. He was revered in much of the State College area not only for his coaching success, but also his work with youth through a non-profit organization he founded known as the Second Mile.

Sandusky started the Second Mile in the 1970's, principally as a foster home that would focus on assisting troubled boys. Over time, the Second Mile developed into a much broader-based regional charity that focused its efforts primarily on young boys between the ages of eight and sixteen. By 1998, Sandusky was clearly the established "name" behind the charity, utilizing his broad array of contacts both at Penn State and around the region to raise money and create highly recognized events for the charity.

On May 3, 1998, Sandusky contacted Victim 6, then eleven years old, about going to work out with him at Penn State facilities. Victim 6 met Sandusky about four weeks prior at a Second Mile youth activity. Sandusky picked the boy up around 7:00 p.m., and they went to the East Area Locker Room on campus. At the time, it contained workout facilities, showers, and football team locker room.

The "workout" session consisted of a brief wrestling episode in which Sandusky tried to pin Victim 6, followed by a short period of using exercise machines. Afterwards, Sandusky kissed Victim 6 on the head and told him he loved him. Sandusky then took the boy to a coach's locker room and suggested they shower together. Victim 6 testified that he found this odd because the workout was brief and he had not even begun sweating, and therefore he felt he did not need a shower. Despite feelings of embarrassment and discomfort, Victim 6 did enter the shower room with Sandusky.

Upon entering the showers, Victim 6 immediately went to the side of the room opposite where Sandusky was showering. Sandusky coaxed Victim 6 over to the shower next to him. Sandusky placed his hands around the boy and told him he was going to "squeeze his guts out." Victim 6 testified that this made him very uncomfortable. He then lifted Victim 6 up to "get soap out of his hair" and at that point the boy's face was right in Sandusky's chest.

Sandusky took the boy home at around 9:00 p.m. and left the area. Victim 6's mother noticed that his hair was wet and she inquired why. He informed her of the shower activity and she became quite concerned and upset. The next morning, she made a report to the University Park Police. Detective Ronald Schreffler was assigned

to the case and almost immediately began an investigation into Sandusky's contact with the boy.

Initially, Centre County Children and Youth Services (CYS) were also notified of the complaint made by Victim 6's mother. Centre County CYS referred the case, however, to the Pennsylvania Department of Public Welfare (DPW), citing a conflict of interest due to their heavy involvement in placement and foster care activities with Sandusky's Second Mile charity. Normally, the case would have been referred to a neighboring county child welfare agency but, due to Sandusky's high-profile status in the community, the case was sent directly to the state DPW in Harrisburg.

Detective Schreffler conducted the investigation over a four-week period in May and early June 1998. It included not only interviews of Victim 6 and his mother, but also of a second child, B.K., also 11, who described very similar contact with Sandusky in a shower on a different occasion. Schreffler testified that, twice in mid-May, he and University Police Detective Ralston listened in on two conversations Victim 6's mother had with Sandusky at her home. She confronted Sandusky about his conduct with her son in the shower and he admitted his private parts may have touched her son when he bear-hugged the boy. When informed that he was not to contact Victim 6 anymore, Sandusky responded, "I understand. I was wrong. I wish I could get forgiveness. I know I won't get it from you. I wish I were dead." Schreffler, Ralston, and Victim 6's mother all confirmed these conversations before the Grand Jury.

Sandusky was never interrogated about the incident or the statements made to Victim 6's mother. Then Centre County District Attorney Ray Gricar decided there would be no criminal charges. It was only after this decision was made that Schreffler

and Jerry Lauro, an investigator with DPW, interviewed Sandusky on June 1, 1998. Lauro testified that Sandusky admitted to showering with and hugging Victim 6. He acknowledged that it was wrong. Schreffler told him not to shower with children anymore and Sandusky assured Schreffler that he would not.

Tom Harmon was the Chief of Police of the University Police Department in 1998 and a thirty-year veteran of the University Police Department. Chief Harmon testified that he was concerned when the initial report regarding Sandusky came to his Department on May 4, 1998. Chief Harmon received a rather extensive briefing from Detective Schreffler regarding his interview with Victim 6. Chief Harmon then called Gary Schultz, the Senior Vice President for Business and Finance at Penn State. Schultz oversaw the University Police Department as a part of his position. Chief Harmon testified that it was not unusual for him to keep Schultz informed of the status of investigations that could prove embarrassing to, or generate public scrutiny of, Penn State. Chief Harmon spoke in detail with Schultz on the evenings of May 4 and May 5 about specifics of the investigation.

Schultz took notes during his conversations with Harmon.[1] Schultz not only wrote down very detailed information about Sandusky's contact with Victim 6, but he also made several observations about the import of Sandusky's conduct. At one point Schultz noted that Sandusky's behavior toward Victim 6 was "at best inappropriate @ worst sexual improprieties." He further noted that during the bear hug between Sandusky and Victim 6 there "had to be genital contact because of size difference." He also clearly understood that Victim 6 had a friend (B.K.) and "claim[ed] same thing went

[1] 4 pages of notes kept by Schultz on 5/4 and 5/5/98 are Attached as Exhibit 1. It will be discussed later in this Presentment why these notes were not discovered by authorities until April of 2012.

on with him." Schultz appeared to analyze what could ultimately be important areas for police and prosecutors when he observed "critical issue – contact w genitals?" Finally, at the conclusion of his notes, he pondered two chilling questions when he wrote, "is this opening of pandoras box? Other children?"

The investigation by police and child welfare authorities into this incident was clearly a matter of considerable interest among high-ranking Penn State administrators. Sandusky was in many ways at the pinnacle of his career, enjoying tremendous stature both for his coaching ability and his work within the Second Mile. The filing of criminal charges or other legal action against Sandusky for having sexual contact with a young boy could have proven troublesome and embarrassing for Penn State, particularly in light of the fact that the incident occurred on campus. The Grand Jury reviewed a number of electronic communications from May and June of 1998 that reflect the concern that several University officials shared over the course and direction of the investigation.[2] Schultz very quickly updated Athletic Director Tim Curley and University President Graham Spanier following his conversations with Chief Harmon. Curley in fact sent an e-mail on May 5, 1998 and alerted Schultz, "I have touched base with the coach. Keep us posted. Thanks." Schultz responded to Curley on May 6 and copied the e-mail to Spanier, indicating the following: "Will do. Since we talked tonight I've learned that the Public Welfare people will interview the individual Thursday."[3] In the first thirty-six hours after Victim 6's mother alerted the police, Schultz obtained detailed information from the Chief of Police about virtually every aspect of police contact with

[2] These electronic communications (e-mails) were not obtained by this Grand Jury until many months after the original Presentment on this matter in November of 2011, and therefore could not be considered or utilized in our evaluation at that time.
[3] E-mail attached as Exhibit 2

the boy, and he was in both phone and e-mail contact with the Athletic Director (while alerting the school President by, at a minimum, copying him on communications).

As the police and child welfare investigation progressed through the month of May, there were a number of documented communications by Penn State officials regarding this matter. Curley anxiously asked Schultz for status updates on at least three occasions with phrases like "anything new in this department?" and "any further update?"[4] The Grand Jury notes that these electronic communications clearly establish that Curley made a materially false statement under oath before the 30th Statewide Investigating Grand Jury when he testified he had no knowledge of this investigation or any recollection of his involvement.[5] Schultz responded several times to Curley, informing him of investigatory decisions to have a child psychologist meet with Victim 6 and that police and DPW caseworkers planned to meet with Sandusky to discuss his behavior. Finally, on June 9, 1998, Schultz sent Curley an e-mail on which he copied Spanier and Chief Harmon. Schultz informed Curley and Spanier of the decision not to pursue charges and to close the investigation and, at the conclusion, he noted, "I think the matter has been appropriately investigated and I hope it is now behind us."[6]

Chief Harmon testified he was personally relieved by the decision of the Centre County District Attorney not to pursue criminal charges against Sandusky. He also understood Gary Schultz to be relieved by this decision. Chief Harmon also indicated he kept Schultz very informed of the investigation throughout May and spoke with him by telephone on about five occasions. Chief Harmon expected, as would be consistent

[4] E-mail attached as Exhibit 3 and includes communication from Curley on 5/13, 5/18 and 5/30/98.
[5] The Grand Jury notes these false statements are the subject of a criminal trial in the Dauphin County Court of Common Pleas in *Commonwealth v. Timothy Curley*, docketed at No. CP-22-CR-5165-2011.
[6] See attached Exhibit 3

with his experience when there was an investigation of significant importance to both the Athletic Department and the University as a whole, that Schultz would inform both Spanier and Curley of what was happening. Numerous witnesses who were employed at Penn State testified that Schultz was a detailed, organized individual who adhered faithfully to the chain of command and the "no surprises" rule for his immediate boss, Graham Spanier.

Detective Schreffler testified that the ninety-eight page police report was not filed under a typical criminal investigation, but was instead assigned an Administrative number. This would make the report very difficult to locate unless someone specifically knew identifiers of the case. Detective Schreffler indicated that, in his experience, it was very unusual for a criminal investigation to be labeled in this manner within the University Police department. Chief Harmon agreed this was an unusual thing to do, and testified that it was done at his direction because there was a concern the media might make inquiries if the incident were placed on their regular police log.

Victim 6 testified along with Detective Schreffler at the criminal trial of Sandusky in Centre County. Victim 6 and Schreffler testified consistently with their appearance before this Grand Jury. As a result, Sandusky was convicted of Unlawful Contact with a Minor, Corrupting the Morals of a Minor, and Endangering the Welfare of a Child.[7]

[7] The verdict was returned on June 22, 2012, and included forty-five total convictions spanning ten separate victims. Sandusky was sentenced on October 9, 2012 and received an aggregate sentence of thirty to sixty years in prison.

February 9, 2001 Incident

In December of 2010, Michael McQueary testified before the Grand jury about events he observed in the Lasch Building, on a Friday evening, on the Penn State campus. McQueary detailed how he observed Sandusky sexually assault a young boy in the shower at that facility.[8]

In February of 2001, McQueary was a graduate assistant football coach. He was working for head football coach Joseph V. Paterno, for whom McQueary had played the position of quarterback from 1993 to 1997. McQueary testified that he was sitting at home on a Friday night watching a football movie, "Rudy."[9] He decided to go to the Lasch Building and do some work around nine o'clock in the evening. Earlier in the day, he had purchased a pair of sneakers and decided to bring them to place in his locker.

Upon entering the locker room, McQueary heard showers running and skin-on-skin smacking sounds. He became concerned about what he might be walking in on, and he proceeded quickly over to his locker. His initial view was through a mirror into the shower. He observed Jerry Sandusky, who had been an assistant football coach when McQueary played at Penn State, standing behind a pre-pubescent boy who was propped up against the shower. The boy's hands were up against the wall and he was naked, as was Sandusky. McQueary then stepped to the right and looked directly into the showers. Sandusky had his arms wrapped around the boy's midsection and

[8] Sandusky was tried and convicted for this incident of four (4) criminal counts of Indecent Assault, Unlawful Contact with a Minor, Endangering the Welfare of Children, and Corruption of Minors as a result of a jury trial and verdict on June 22, 2012. McQueary was the sole witness utilized to establish these crimes beyond a reasonable doubt.

[9] The original date of this incident was believed to have been in early March 2002. McQueary testified the incident happened in either 2001 or 2002. Subsequent evidence has confirmed the actual date of the incident as February 9, 2001.

was right up against the boy. There was no doubt in McQueary's mind that a sexual assault was taking place.

McQueary slammed his locker door shut and observed Sandusky and the boy separate from their original position. He was extremely shocked and alarmed. McQueary left the locker room area and went up to his office. He called his father, John McQueary, and provided him a brief description of what he had seen. His father asked him to drive over to his house, which McQueary did.

John McQueary testified that he had never seen his son as shaken and upset as he was that night. John McQueary also called a family friend, Dr. Jonathan Dranov, to come over to the house. Michael McQueary relayed some of what he had observed to his father and Dr. Dranov. They advised him to contact Coach Paterno early the next morning and report what he had seen.

Early on Saturday morning, February 10, 2001, Mike McQueary called his boss, Coach Paterno. McQueary made the phone call at approximately 7:00 a.m., and asked if he could come to meet with the coach. McQueary immediately went to Paterno's house, where he reported to Paterno what he witnessed between Sandusky and the boy the night before.

Joseph Paterno testified before a prior Grand Jury that he did in fact receive McQueary's information at his home on a Saturday morning.[10] Paterno recognized that McQueary was very upset and assured him he did the right thing by coming to Paterno. Paterno informed the Grand Jury that McQueary described Sandusky fondling or doing something of a sexual nature to a young boy in the Lasch Building showers. He told

[10] Joe Paterno unfortunately passed away on January 22, 2012.

McQueary he would pass the information along to his superiors. Paterno decided to provide the information to Tim Curley the very next day, Sunday, February 11, 2001.

February 11, 2001, was less than three years after the 1998 police investigation. Curley and Schultz both testified before the Thirtieth Statewide Investigating Grand Jury they met with Paterno on a Sunday. It would be at least another week before they decide to speak with McQueary about what he actually witnessed in the Lasch Building showers.[11] It is clear that the meeting with Paterno generated a flurry of activity. Paterno testified he relayed substantially the same information McQueary told to him to Curley and Schultz. Following their meeting with Paterno, Schultz almost immediately made contact with Wendell Courtney, an attorney with the law firm of McQuaide Blasko. McQuaide Blasko provided most of the outside counsel work to Penn State in 2001, with Courtney acting as one of the primary attorneys for the firm in their relationship with the University. Testimony from a number of sources before the Grand Jury suggested Schultz and Courtney had, and to this day have, a close personal friendship.

Schultz contacted Courtney that very Sunday regarding the information that Paterno provided. There was no delay or hesitation in seeking out Courtney. In fact, billing records from McQuaide Blasko show that Schultz and Courtney discussed the issue that Sunday, February 11. Courtney billed out 2.9 hours of time for what he described at the time as "Conference with G Schultz re reporting of suspected child abuse; Legal research re same; Conference with G Schultz."[12] Despite efforts by this Grand Jury, no Sandusky file containing information relevant to this inquiry was ever obtained from McQuaide Blasko.

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[11] The exact date of the meeting between McQueary, Schultz and Curley is unknown. Based on known electronic communications, it was not any later than February 25, 2001.

[12] Billing record is attached as Exhibit 4.

The similarities between the 1998 and 2001 incidents are rather striking. Both involve Sandusky showering naked alone with pre-pubescent boys and having close physical contact with the children (although the nature of the 2001 contact is more severe and extreme with regard to the sexual contact). Both incidents occurred in the showers at Penn State. Chief Harmon testified that he received a call from Gary Schultz on February 12, 2001, inquiring into the status of the paperwork from the 1998 investigation and whether it was available as a record. Chief Harmon responded by e-mail during the late afternoon of Monday, February 12, and stated, "Regarding the incident in 1998 involving the former coach, I checked and the incident is documented in our imaged archives."[13] At no point did Schultz inform Harmon, the Chief of Police at the University and a subordinate of Schultz, that there had been another report of shockingly similar behavior by Sandusky on campus. Schultz merely appeared to be concerned about the current existence of the 1998 investigatory files.

By the afternoon of Monday, February 12, 2001, Schultz and Curley formulate a plan (that was also communicated that afternoon to Graham Spanier) reflected in the handwritten notes of Gary Schultz.[14] Schultz dated the note 2/12/01 with the header "Confidential." He indicated that he had "talked with TMC [Curley]" and that the following steps were to take place or have taken place, "reviewed 1998 history—agreed TMC will discuss with JVP [Paterno] and advise we think TMC should meet w JS [Sandusky] 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 – TMC will keep me posted." The plan, formulated many days before Curley

[13] E-mail attached as Exhibit 5.
[14] The handwritten note is attached as Exhibit 6.

and Schultz would even speak to the actual eyewitness, involved using their legal requirement to report this information as a bargaining chip with Sandusky to get him to "confess" his problem. Thus, if Sandusky agreed to a particular course of action, they would not notify the proper authorities, including apparently the police department Schultz himself supervised.

Schultz and Curley scheduled a meeting with McQueary at the Bryce Jordan Center, approximately seven to ten days after receiving the report from Paterno. McQueary indicated that the meeting lasted approximately fifteen minutes. Schultz and Curley asked no questions. McQueary described the extremely sexual nature of the incident and they told him they would get back to him.

After speaking to McQueary directly about the incident, Schultz sent an email to Curley on Monday, February 26, 2001. There appears to have been a change from the February 12th plan regarding contacting an outside child welfare agency. The email reads as follows: "Tim, 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. As you know I'm out of the office for the next two weeks, but if you need anything from me, please let me know."[15] Schultz asked for confirmation from Curley about contacting DPW.

Curley responded on February 27, 2001, just after 8:00 p.m. Curley included Spanier on this communication.[16] It reads as follows:

> I had scheduled a meeting with you this afternoon about the subject we discussed on Sunday. After giving it more

[15] Email attached as Exhibit 7.
[16] Email attached as Exhibit 8.

> thought and talking it over with Joe yesterday—I am uncomfortable with what we agreed were the next steps. 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. 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. Also, we feel a responsibility at some point soon to inform his organization and and maybe the other one about the situation. If he is cooperative we would work with him to handle informing the organization. If not, we do not have a choice and will inform the two groups. Additionally, I will let him know that his guests are not permitted to use our facilities.
>
> I need some help on this one. What do you think about this approach?

Curley used coded words to try to mask the true nature of this topic. He referred to Sandusky as the "individual" or "person". He referred to the Second Mile as the "organization". In addition, he referred to the 1998 investigation as the "first situation". He then discussed a similar type of deal that had been discussed on February 12. This deal would keep Sandusky from being reported to outside authorities if he was "cooperative" and followed the suggestions Curley put forth. Curley also indicated that he would inform Sandusky that his "guests" are not permitted to use Penn State facilities. These "guests" were actually the young boys that Sandusky would routinely bring onto the Penn State campus, often at odd hours when very few people were around to witness his actions with the children. Curley was undoubtedly seeking the blessing of his boss, Spanier, when he indicated, "I need some help on this one."

Spanier responded a couple of hours later as follows:

> Tim: This approach is acceptable to me. 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.

Spanier did not question the existence of the "first situation" or inquire as to what Curley was referring to. He instead endorsed the plan of action that involved circumventing any outside agency. He did recognize the potential consequences for their failure to report by suggesting they will be "vulnerable" if "the message isn't 'heard' and acted upon."

Schultz also endorsed this plan by responding the following day:

> Tim and Graham, this is a more humane and upfront way to handle this. I can support this approach, with the understanding that we will inform his organization, with or without his cooperation (I think that's what Tim proposed). We can play it by ear to decide about the other organization.

The Grand Jury would note that evidence was presented showing that no report of what Michael McQueary witnessed was ever made to a children and youth agency, DPW, or any police agency. The Grand Jury notes that the above electronic communications and other evidence clearly establish that Schultz made a materially false statement under oath before the Thirtieth Statewide Investigating Grand Jury when he testified numerous times that the McQueary incident had been turned over to DPW or other child welfare entities.[17]

Curley did in fact implement part of the plan that he, Spanier, and Schultz agreed to follow. Curley met with Sandusky in early March and instructed him not to bring children on campus. This ban was completely unenforceable. In fact, since only Schultz and Spanier also knew of this plan, no other individuals at Penn State or entities

[17] The Grand Jury notes these false statements are the subject of a criminal trial in the Dauphin County Court of Common Pleas in *Commonwealth v. Gary Schultz*, docketed at CP-22-CR-5164-2011.

such as the police department would even be aware of the ban to try and enforce it. He also met with Dr. Jack Raykovitz, the Executive Director of the Second Mile, to advise him that Sandusky was prohibited from bringing youth onto the Penn State campus. Raykovitz testified before the Grand Jury he did not ask who the boy was in the shower or whether he was a Second Mile kid. He said Curley described the incident as mere horseplay that made someone uncomfortable.

There is no evidence that Curley, Spanier, or Schultz ever sought to get Sandusky the "professional help" to which Curley referred in the email. The only thing asked of Sandusky was that he not bring children on the campus anymore. This, of course, not only did not happen but evidence presented before this grand jury indicates Sandusky continued to have kids on campus with him with some regularity.

Curley did talk with McQueary several weeks after their initial meeting. McQueary was told that Sandusky's keys to the locker room had been taken away and the incident was reported to the Second Mile. No law enforcement investigators were notified to speak with McQueary about his observations until November of 2010.

John McQueary confronted Gary Schultz about what was being done regarding his son Mike's report. This took place several weeks later at the office building where McQueary worked. Dr. Dranov was also present during this meeting. Schultz assured McQueary he would look into the matter and that it was being investigated. McQueary, like his son Mike, was well aware of the fact that Schultz oversaw the police department. John McQueary never heard anything further from Gary Schultz about the matter.

Grand Jury Investigation and Attempts to Gather Evidence 2010-2012

After the disclosures by Michael McQueary to the Grand Jury, the investigation sought to: identify and encourage victims of abuse at the hands of Sandusky to reveal their ordeal to the Grand Jury; find events that supported and corroborated the testimony of Michael McQueary; reexamine the actions of Sandusky in May of 1998, and the investigation thereof, in light of the new evidence of Sandusky's criminal activities; search for evidence of Sandusky's known activities, and those potentially yet unknown, that may be in the possession of Penn State; and, determine whether or not any employees or officials at Penn State assisted Sandusky in his activities or sought to conceal or obscure these activities from the authorities and the public. Unfortunately, the Investigative Grand Jury's efforts to acquire pertinent and valuable evidence from Penn State were significantly thwarted and frustrated from 2010 to 2012.

Typical of this experience was Grand Jury Subpoena 1179. Subpoena 1179 was issued in December of 2010 yet would remain unfulfilled until April of 2012. This subpoena, authorized and signed by the Supervising Judge of the Investigating Grand Jury, required Penn State University to acquire and disclose to the Grand Jury: "Any and all records pertaining to Jerry Sandusky and incidents reported to have occurred on or about March 2002 and any other information concerning Jerry Sandusky in inappropriate contact with underage males on and off University property. Response shall include any and all correspondence directed to or regarding Jerry Sandusky." The University's response to this subpoena was due on January 10, 2011.

Upon service of this subpoena in December of 2010, Penn State's Legal Counsel, Cynthia Baldwin, immediately informed Spanier of the subpoena and the University's obligation to respond. At the same time, Curley, Schultz and Paterno had also been subpoenaed to appear before the Grand Jury scheduled in January of 2011. She informed Spanier about those subpoenas as well. Spanier told her that he would notify Curley and Schultz and that she was to contact Paterno. Soon thereafter, Legal Counsel Baldwin met with Spanier and with Athletic Director Tim Curley. At this meeting, Spanier directed, without discussion, that Baldwin would go with Curley and Shultz to their grand jury appearances. During this meeting, and at a number of other meetings, Baldwin sought to determine if any of the information required by Subpoena 1179 was known to Athletic Director Curley, Vice President Schultz, and President Spanier. Each personally and directly assured her that they knew of no information or documents involving alleged misconduct or inappropriate contact by Jerry Sandusky. They also assured her that they would look and see if they could find any such information or documentation. In the several weeks after the receipt of Subpoena 1179, all three individuals—Spanier, Shultz and Curley—assured Baldwin that they had investigated and determined that they possessed no information or documents that would be responsive to Subpoena 1179. She was specifically assured that they had searched through their emails and physical documents for any Sandusky-related materials. In addition, Athletic Director Curley informed Baldwin that the Athletic Department did not possess any applicable responsive materials.

The investigation also found that, contrary to what Schultz had told legal counsel Baldwin, Schultz had a file kept in his Penn State office containing notes and

documents directly related to the 1998 and 2001 sexual assault by Sandusky. These documents included hand-written notes prepared by Schultz from conversations he had with Penn State University Police Chief Thomas Harmon in 1998. Chief Harmon testified that, during the investigation of Sandusky from May and through part of June 1998, he provided frequent and detailed updates to Schultz. As part of this investigation, Chief Harmon reviewed the notes prepared by Schultz and identified them as reflective of their conversations at the time. Chief Harmon also detailed that the 1998 investigation of Sandusky was a "big deal" and clearly recognized as such. It was clear to Chief Harmon, from his extensive conversations with Schultz, that the University's hierarchy was extremely interested and concerned about this investigation. There was no question that it was recognized that this investigation had the potential to significantly damage and embarrass Penn State.

Also included in the notes kept in Schultz's office were notes that Schultz wrote regarding at least one conversation he had with Athletic Director Tim Curley about the McQueary observations in February of 2001. One note, recited above, written by Schultz and dated February 12, 2001, clearly stated that Schultz and Curley had "reviewed 1998 history" before discussing how to handle the latest allegations about Sandusky. In an email on that same date, February 12, 2001, Schultz was told by Chief Harmon that the 1998 investigative file still exists and "is documented in our imaged archives." Chief Harmon testified before the Grand Jury that he provided this response as a result of Schultz questioning him about whether the 1998 investigative file still existed. Chief Harmon stated that at no time during his contact with Schultz on this matter did Schultz reveal anything about a new allegation against Sandusky. Schultz,

despite being informed of McQueary's allegations within 48 hours of their occurrence on the night of February 9, 2001, and despite his having contact with the University Chief of Police about the 1998 investigation, never reported then, or at any other time, the new allegations of Sandusky assaults on a minor boy in a Penn State shower.

In January of 2011, only a handful of documents were provided in response to the subpoena. None of the documents provided were material or pertinent to the misconduct and crimes of Sandusky. Subsequent investigation into whether the University fully complied with the subpoena determined that no effort was made to search the Athletic Department, where Sandusky had been employed for over 30 years, or to search any of the electronically stored data at the University or emails or other documents pertinent to their responses to this subpoena.

It is also noteworthy that Penn State had in place a well-defined historical practice and procedure for responding to subpoenas. Subpoenas that might encompass electronically stored data (such as emails and documents stored on a computer or network drive) would routinely be sent to the specialized unit called the "SOS." These information technology professionals were trained and dedicated to assembling responsive electronically stored data in response to litigation needs or other legal process. None of the SOS professionals were ever shown subpoena 1179, nor were they directed to seek any of the information requested by subpoena 1179 before the arrests of Sandusky, Schultz and Curley. Likewise, investigators contacted the information technology employees of Penn State, who were not members of the SOS unit but had access to the electronically stored data likely to be searched to fulfill the requirements of subpoena 1179. These information technology employees likewise

stated that they were never requested to fulfill any requests for Sandusky related information. In addition, no independent efforts were made to search the paper files of the Athletic Director, Tim Curley, the Vice President of Finance and Business, Gary Schultz, or the President of the University, Graham Spanier.

The notes and documents concerning Sandusky's 1998 and 2001 crimes were in Schultz's Penn State office on November 5, 2011. The administrative assistant at the time, Kimberly Belcher, upon learning that Schultz was to be arrested and would not be returning to the office, removed these documents from a file drawer in Schultz's office and delivered them to his home.[18] Joan Coble, who served as Schultz's administrative assistant until her retirement in 2005, testified that she was instructed by Schultz to never "look in" the "Sandusky" file he kept in his bookcase file drawer. She said it was a very unusual request and was made in a "tone of voice" she had never heard him use before.

It should be noted that, throughout the Grand Jury's investigation, Spanier continuously wanted to know about the actions of the Grand Jury and law enforcement investigators. He required specific updates and regularly checked with Baldwin for any new information about the investigation. Legal Counsel Baldwin relayed all known information directly to Spanier. She fully informed him of all Grand Jury subpoenas and investigative requests.[19] Spanier also pressed Baldwin for information about Paterno's contacts with investigators and the Grand Jury. When she informed Spanier that

[18] Before giving the original documents to Schultz, Belcher made a copy for herself. Belcher then lied about the existence and whereabouts of these documents whenever she was subsequently questioned by University representatives.

[19] Legal Cousel Baldwin testified that it was not only her duty to inform the University President of such things, but that Spanier also specifically requested that she keep him informed of everything regarding this investigation. Spanier has repeatedly misrepresented the level of his knowledge about the investigation. He told Board members and others that he was ignorant of the investigation into the 1998 and 2001 crimes. Even after his termination as President, he sent a letter to the Board on July 23, 2012 reiterating these false claims.

Paterno had acquired his own lawyer, who was not affiliated with the University, Spanier seemed disturbed and questioned aloud why Paterno would not use the University's legal counsel. He also questioned Baldwin, on a number of occasions, about what she knew or could discover regarding the information Paterno was providing to authorities.

Legal counsel Baldwin testified before the Grand Jury that, by January of 2011, Spanier was well aware that the Grand Jury was investigating the May 1998 allegations against Sandusky and the McQueary allegations against Sandusky. In March of 2011, law enforcement investigators requested an interview with Spanier. Spanier agreed and directed Baldwin to accompany him to the interview. Baldwin testified that, before this interview, Spanier was well versed and prepared for questions about the May 1998 allegations, the McQueary allegations, and the allegations of a high school student in Clinton County. Baldwin specifically discussed all of these matters with Spanier before that interview. Baldwin also testified that it was absolutely clear from her discussion with Spanier that he had extensively discussed the substance of Curley and Schultz's grand jury testimonies from January 2011 with each of those individuals. Spanier was also knowledgeable on likely investigative topics due to the fact that Legal Counsel had been keeping him informed of all the information subpoenaed by the Grand Jury from the University.

On March 22, 2011, Spanier was interviewed by law enforcement authorities. Spanier was questioned extensively about his knowledge of, and involvement with, the May 1998 investigation of Sandusky and about his knowledge of the Michael McQueary allegations from early in the 2000's. Spanier stated that he was not aware of the 1998 incident involving Sandusky and allegations of inappropriate behavior, nor was he

aware of any police report involving that matter. Spanier repeatedly detailed that he was rarely informed of any Penn State University Police involvements or investigations. Spanier stated that sexual assault allegations would not be reported to him and that he only reviewed statistical summaries of the Penn State Police Department that did not contain case details. Spanier did say that, sometime between 2000 and 2002, although he was unsure of the date, he was informed that a staff member saw an incident involving Sandusky with a child in a Penn State shower. He stated that he was informed of this by Gary Shultz and Tim Curley, and then he was told that the staff member observed Sandusky "horse playing around" with a child in a Penn State locker room shower. He further explained that he was told the staff member only observed this from a distance and was not sure of what he saw and that the staff member may have misconstrued or misinterpreted what he observed. Spanier stated that he had never been told the name of the staff member and only learned it was McQueary a few weeks before Spanier's interview by law enforcement authorities. Spanier further stated that he told Curley that, if there were no other details of what was observed in the shower, then Curley should contact Sandusky and inform him that he should no longer bring children into the Penn State facilities. Spanier further stated that he, Schultz, and Curley also decided that the Second Mile should be contacted and told about the incident and Penn State's restriction. Spanier specifically stated that his only meeting with Curley and Schultz lasted five to fifteen minutes. Spanier also specifically stated that he never heard anything further about the matter or any other allegations of misconduct against Sandusky. Later in the interview, Spanier stated that he believed

Curley did inform him that he had successfully spoken with Sandusky and the Second Mile about the University's restrictions.

The Board of Trustees was never informed in 1998 or 2001 about the conduct of Jerry Sandusky. Likewise, Spanier failed to inform anyone on the Board of Trustees about: the Grand Jury investigation; the Grand Jury subpoenas issued to the University; or, the testimony before the Grand Jury of Curley, Schultz, Paterno, and other Penn State employees, until April of 2011. At that time, he was forced to address the matter when several members of the Board of Trustees contacted Spanier and the then-Chairman of the Board of Trustees, Steve Garban, in response to a news story about the Grand Jury investigation. When Garban and other members of the Board attempted to discuss the matter with Spanier, Spanier told them he could reveal very little because of the Grand Jury secrecy rules. Spanier would employ this excuse repeatedly to mask details of the investigation and the extent of his past involvement from the Board of Trustees. Legal counsel Baldwin testified that she repeatedly instructed Spanier that he was free to discuss the investigation and the substance of his testimony before the Grand Jury. Baldwin specifically related this to Spanier in April of 2011, in writing, when the Board requested information about the investigation.[20] Chairman of the Board Garban advised Spanier that he would need to advise the Board of Trustees, at least in executive session, about the newspaper story revealing a Grand Jury investigation of Sandusky. The next board meeting scheduled was in May 2011. Spanier directed Baldwin to speak to the Board in executive session about the structure, work, and

[20] When Spanier testified before the Investigating Grand Jury on April 13th of 2011, he was never instructed by the Grand Jury Judge that his testimony was secret or that he was prohibited from publically disclosing that testimony. In fact, he was specifically advised by the Supervising Judge of the Grand Jury that he was free to disclose his testimony.

procedures of an investigating grand jury. She believed, from her discussions with Spanier leading up to the May board meeting, that Spanier would inform the Board that the Grand Jury investigation not only involved allegations of sexual assault of a minor in Clinton County but also included the 1998 and 2001 incidents that had occurred in Penn State's facilities. Baldwin also believed that Spanier would inform the Board about the various Grand Jury subpoenas that had been issued to the University seeking testimony and evidence regarding Sandusky's acts of misconduct. Baldwin testified that Spanier was absolutely obligated to inform the Board of these matters and that he clearly understood this obligation.

At the executive session of the Board in May 2011, Legal Counsel Baldwin provided her report about Grand Jury practice and process to members of the Board. After she finished her presentation, she was stunned when Spanier immediately directed her to leave the room. In fact, she was so taken aback that, in gathering her papers and possessions to leave, she left her purse in the board room. She later had to ask someone to retrieve her personal possessions from the Board meeting. It was her understanding that Spanier was to address the Board members regarding the substance, known at that time, of the criminal investigation into Sandusky's activities. Members of the Board of Trustees who were in attendance at the executive session have all stated that Spanier never informed them of any connection between the Grand Jury investigation of Sandusky and Penn State. Quite to the contrary, Spanier specifically informed the Board that the investigation had nothing to do with Penn State and that the investigation was regarding a child in Clinton County without affiliation with Penn State. Spanier also told the Board that he could say little more about the matter

because of secrecy that had been imposed upon him by the Grand Jury. After the May 2011 executive session with the Board, Spanier provided no other information regarding the investigation, his involvement with 1998 and 2001 incidents, or Penn State's duties and responses to Grand Jury process. Spanier made no further mention of the matter to the Board until forced to address the issue when Sandusky, Curley, and Schultz were arrested in November 2011.

Numerous Board members testified that, when informed of the arrests, they were completely surprised and stunned. At a series of hastily called board meetings on Saturday and Sunday, November 5th & 6th, 2011, Spanier was still attempting to hide behind claims of grand jury secrecy when questioned about his knowledge of the investigation and his failure to disclose that knowledge to the Board.

The press release issued by Spanier on Saturday, November 5, 2011, read as follows:

> STATEMENT FROM PRESIDENT SPANIER:
> The allegations about a former coach are troubling, and it is appropriate that they be investigated thoroughly. Protecting children requires the utmost vigilance.
> With regard to the other presentments, I wish to say that Tim Curley and Gary Schultz have my unconditional support. I have known and work daily with Tim and Gary for more than 16 years. I have complete confidence in how they have handled the allegations about a former university employee.
> Tim Curley and Gary Schultz operate at the highest levels of honesty, integrity, and compassion. I am confident the record will show that these charges are groundless and that they conducted themselves professionally and appropriately.
> GRAHAM SPANIER
>
> _ _ _ _ _ _ _ _ _
> Penn State has heard from the attorneys representing both Tim Curley and Gary Schultz, they have released the following statements:
> ATTORNEY TOM FARRELL:

> "Gary Schultz is innocent of all charges. We believe in the legal system, and we believe that it will vindicate him. We will fight these charges in court, and Gary Schultz will be proven innocent of all of them."
> ATTORNEY CAROLINE ROBERTO:
> "Tim Curley is innocent of all charges against him. We will vigorously challenge the charges in court and we are confident he will be exonerated."

By Sunday, most members of the Board had copies of the Grand Jury Presentment. Members were completely stunned by the extent of Sandusky's crimes and the extent to which these crimes involved Penn State and its facilities. Many Board members were completely dismayed at Spanier's attempt to downplay the charges and vouch for the innocence of Gary Schultz and Tim Curley. On Sunday, in what was described as often contentious and angry exchanges, Spanier was directed—without qualification—to issue a press release on behalf of the University that specifically did not comment on the nature or veracity of the charges and that focused on concern for the victims and provided assurances that the University would fully cooperate and take whatever measures necessary to prevent this from ever happening again. The Secretary of the Board of Trustees, Paula Ammerman, also corroborated the Board members regarding the explicit directions related to Spanier about the press release.

On Sunday evening, November 6, 2011, Spanier called together Penn State press officers and other senior members of his staff. They met in his office, whereupon he provided them with a draft press release that he had prepared. The primary focus of this press release was upon the proclaimed innocence of Tim Curley and Gary Schultz and the University's pledge to support them through this process. There was no mention of the victims or the criminal activities of Sandusky. When it was suggested that he put in at least one line about the victims, Spanier acquiesced and added a

sentence. Some of those staff members present, including Paula Ammerman, knew what the Board had directed Spanier to do in this press release. They were surprised by Spanier's vehemence in supporting Curley and Schultz and his willingness to directly ignore the directives of the Board of Trustees. However, there were no protests or attempts to remind Spanier of his duty and obligation to the Board of Trustees.[21]

In the early hours of November 7, 2011, Spanier released a statement that again reiterated his support for Curley and Schultz. The statement largely ignored the nature of the charges and the harm to the victims.

Reaction from members of the Board of Trustees began almost immediately after publication of this press release. Members were astonished and infuriated. The contents of this press release not only largely contradicted the Board's instruction to Spanier, but it continued to demonstrate an affiliation by Spanier and the University, not only with Schultz and Curley, but with their criminal defense.

Several more meetings would occur between Spanier and Board members over the next two days. Again, Spanier never disclosed to the Board, or of any of its members, despite continuous conversations about the crimes charged, that he was knowledgeable about and had been involved in both the 1998 and 2001 episodes. Legal counsel Baldwin testified that Spanier repeatedly informed her and others that he knew nothing about the 1998 activities of Sandusky or the University police investigation of Sandusky. However, as time went on, she observed that Spanier's discussions about the 1998 episode seemed increasingly detailed and knowledgeable. She

[21] When asked why they remained silent, these senior staff members and Penn State officials all provided similar responses. They said that Graham Spanier was a controlling President who did not easily brook contrary advice or anything he might view as disloyalty.

eventually came to believe that Spanier not only had known of the 1998 episode but clearly recollected he had been involved with that matter.

On November 9, 2011, the Board of Trustees of Penn State terminated Graham Spanier as the President of the University. The Board of Trustees also directed that University personnel were to cooperate with the law enforcement investigation of Jerry Sandusky and Penn State. Almost immediately following those two events, actual compliance with the Grand Jury subpoenas (past and present) and cooperation with the investigation began to be realized. Law enforcement investigators, working in conjunction with Penn State IT staff, were able to access massive amounts of electronically stored data and began a lengthy process of review and analysis. For the first four months of 2012, large amounts of evidence and data—much of which had been sought and subpoenaed for more than a year prior—was uncovered and provided to investigators. This evidence included significant emails from 1998 reflecting knowledge of, and involvement with, the investigation into Sandusky's showering with two young boys in May of 1998. In addition, significant emails were discovered, reflecting direct evidence of involvement by Graham Spanier, Gary Schultz, and Tim Curley in the failure of Penn State to report to child welfare or law enforcement authorities the crimes reported by Michael McQueary in February of 2001. Additionally, searches conducted—*for the first time*—of the athletic facilities where Sandusky had had offices, revealed approximately 22 boxes of Sandusky documents, photographs, and other materials. Much of the evidence found in these stored boxes proved to be highly valuable and were utilized in the subsequent criminal trial of Sandusky. This evidence included copies of letters that Sandusky sent to a number of his victims, lists

of the children who attended the Second Mile camps with Sandusky's notations next to their names, and photographs of a number of Sandusky's victims.

Endangering the Welfare of Children

Graham Spanier, Tim Curley, and Gary Schultz engaged in a repeated pattern of behavior that evidenced a willful disregard for the safety and well-being of minor children on the Penn State campus. Jerry Sandusky utilized his unfettered access to Penn State facilities, both before his retirement in 1999 and after, to sexually abuse young boys. Spanier, Curley, and Schultz were all well aware of the extent to which Sandusky would use the campus in his connection with the Second Mile. This included Second Mile camps and other activities, as well as Sandusky's use of Penn State for his workout and shower sessions with young boys. The police investigation involving Victim 6 certainly provided an indication of the issues involved with Sandusky bringing children onto campus to use the facilities. When McQueary reported the assault in February of 2001, the first response should have been an immediate report to law enforcement and a child protective services agency. Instead, there was a frightening lack of concern for the yet to be identified child (Victim 2), and an interest in shielding a man who Curley recognized needed "professional help"[22] and who Schultz indicated should "confess to having a problem".[23] The plan of action undertaken by these three administrators, who formed the very apex of decision making and power at Penn State,

[22] See February 27, 2001 email marked as Exhibit 8.
[23] See handwritten notes of Schultz marked as Exhibit 6.

was created out of a desire to shield Sandusky from the criminal process and, perhaps most importantly, to spare the University tremendous negative publicity and embarrassment.

Chief Harmon testified that all Gary Schultz (or, for that matter, Tim Curley or Graham Spanier) need have done was to let him know an eyewitness observed Sandusky and a young boy in a shower together on campus and that there was observed physical contact (let alone the actual sexual assault McQueary described to them during the meeting). Chief Harmon pointed out in his testimony that the need to report should have been readily apparent given this was now the second episode, and he observed that it would have likely led to a reexamination of the 1998 incident.[24] Tragically, this did not happen. The conduct of the three administrators focused on only two things: not reporting this to any outside agency and taking steps (unenforceable as they may be) to limit Sandusky from bringing children onto the Penn State campus.

The Grand Jury concludes that Graham Spanier, Tim Curley and Gary Schultz endangered the welfare of children by failing to report the incident witnessed by Michael McQueary to any law enforcement or child welfare agency. There was never any effort made to locate, identify, or otherwise protect Victim 2 from foreseeable future harm. In fact, by notifying Sandusky they were aware of the incident and not informing the police or a child welfare agency, Spanier, Curley and Schultz placed Victim 2 in even greater danger. Sandusky was placed on notice that others had been informed of his abuse of Victim 2.

[24] This is in fact precisely what happened a decade later. Sandusky was convicted as a result of a fresh examination of the evidence in this case.

The continued cover up of this incident and the ongoing failure to report placed every minor male child who would come into contact with Sandusky in the future in grave jeopardy of being abused. The actual harm realized by this wanton failure is staggering. For example, a jury has convicted Sandusky of various sexual offenses for the following victims:

- Victim 1, between the years 2005 and 2008.
- Victim 2, for the 2001 assault witnessed by McQueary.
- Victim 3, who was abused between 1999 and December of 2001 (during the same time frame as the Victim 2 assault).
- Victim 5, who was abused in the Lasch Building in August of 2001, several months after Curley had supposedly "banned" Sandusky from bringing children on campus.
- Victim 9, between the years 2005 and 2008.

The depth of abuse and number of victims may never be fully realized. The Grand Jury witnessed firsthand the devastating effects of Sandusky's abuse on his victims. We find that Spanier, Curley, and Schultz had an ongoing duty to report this behavior and the overall supervisory responsibility for minor children they knew to frequent the campus with Sandusky. Their failure to report Sandusky to authorities from 2001 through 2011 directly endangered Victims 1, 2, 3, 5 and 9 and allowed Sandusky to abuse them between 2001 and 2008.

Spanier Perjury

Graham Spanier testified before this Grand Jury regarding his oversight of one of the largest and most complex universities in the United States. He testified that Curley and Schultz came to him around 2002 to report an incident in which a staff member of Curley's had witnessed Sandusky horsing around in the shower with a younger child. He stated the staff member was apparently a little uncomfortable with the activity, so he brought it to Curley's attention. Spanier stated Schultz and Curley never identified who made the report and Spanier still did not know who it was as of the date of his testimony. He testified that he told Schultz and Curley that, since that kind of behavior could be misconstrued, his advice would be they tell Sandusky not to bring kids into Penn State facilities and that they notify the Second Mile of the incident. Spanier testified this all occurred in a ten- to fifteen-minute meeting.

Spanier acknowledged there was no discussion about trying to locate the child. He also told the Grand Jury there was no discussion about reporting the matter to police or a child welfare agency. He also said he had no knowledge of the 1998 incident involving Victim 6 prior to 2011. He claimed the 1998 matter was never discussed between himself, Curley, and Schultz in deciding how to handle the incident reported by McQueary. Spanier denied he was ever given any indication the 2001 incident could have been sexual in nature.

The Grand Jury finds that Graham Spanier made materially false statements under oath in an official proceeding on April 13, 2011. Spanier claimed on multiple

occasions that he had no knowledge of the 1998 incident when it occurred, during the decision making process in 2001, or at any point up until 2011. We find this claim was made to mislead the Grand Jury. This claim conflicts with all of the evidence we received regarding how important matters were dealt with at Penn State. Gary Schultz would routinely keep Spanier apprised of significant police matters, particularly ones that involved the football team and generated media scrutiny. Spanier was obviously kept in the loop on this matter as Schultz copied him on emails that discussed the status and conclusion of the investigation. One need only look to the 2001 incident to see how Schultz would immediately seek out Spanier on an issue of importance. In 1998, Sandusky was arguably the most high profile individual on campus other than Joe Paterno. Sandusky was also a current employee being investigated by the police department for unlawful sexual contact with a minor in the football building. Schultz would have been negligent in his duties to not notify the Athletic Department and the President.

Spanier made a materially false statement when he denied that he, Curley, and Schultz ever discussed turning the 2001 incident over to a child protection agency. This was the course of action that was considered, at one point even suggested by Schultz, and ultimately rejected in an email exchange where Spanier extols the "humane" nature of an approach that did not include reporting Sandusky to outside authorities.

Spanier made a materially false statement when he described that he was only told by Curley and Schultz that the 2001 incident was horseplay and made someone uncomfortable. The previously discussed electronic communications between the three make clear they are discussing an event that involves the abuse of a child.

Obstruction of Justice and Criminal Conspiracy

Graham Spanier, Tim Curley, and Gary Schultz conspired among each other and did in fact engage in many acts to obstruct justice between 2001 and the present. The acts of obstruction and conspiracy include, but are not limited to the following:

- The actions taken by Spanier, Curley, and Schultz after the initial report is made by Joe Paterno on February 11, 2001, including plans to not tell DPW if Sandusky "confesses" to having a problem.
- The review and knowledge of the 1998 allegations.
- Schultz contacted Chief Harmon to determine the availability of the 1998 police report but never disclosed the information received by Paterno.
- The failure to report McQueary's eyewitness account of a sexual assault.
- Schultz informing John McQueary the matter was being investigated and looked into when it was not.
- The willful failure to alert anyone about Sandusky from February of 2001 through the course of this investigation.
- The numerous lies told by Spanier, Schultz, and Curley to this grand jury.
- The total lack of compliance with the Grand Jury's requests for information, such as Subpoena 1179.
- Schultz hid the existence of pertinent files and notes.

- Curley failed to conduct a search for pertinent documents and materials involving Sandusky.
- Spanier hid the existence of emails and other forms of communication.
- Spanier failed to disclose his role in the 2001 incident to the Board of Trustees.
- Spanier withheld key information from his senior staff charged with managing the Sandusky situation throughout 2011.[25]

Spanier's Failure to Report

The sexual assault of Victim 2 should have been reported to the Pennsylvania Department of Public Welfare and/or a law enforcement agency. Graham Spanier, by virtue of his position within the University, had a legal obligation and responsibility to report or to cause a report to be made within forty-eight hours to a child services agency.

[25] It should be noted that Spanier continues to mislead with numerous public statements that contain demonstrably false statements.

EXHIBIT 1

Witness

11½ yr old son 5/4/98 5:00pm

Nutting Gardens

In 2nd Mile

they picked up son & invited

to FB locker & others

Behavior - at best inappropriate

@ most sexual inappropriate

Police interviewed

- typed

- May be coming out themselves

- by themselves, wrestled

Grope him often clothes -

even though he was in shorts

2

- worked out on treadmill etc

- Jerry - to take a shower - undressed - ? no other shower? 4 in here.

Shampoo

Jerry came up behind & gave him a bear hug - and he would squeeze & get out - all

- Keep clothes - socks TUP's hat

- took home.

Mother concerned something more - Kel took another shower last night & this a.m.

Mother asked him what he gave him
had to be regarded as contact because of age difference
but when asked of boy he quickly said NO
- Friend Brandon, age 10, also @ N. Henry Gardens - claims same thing went on with him
- Mother also asked Brandon
- Children & Youth has been notified & will want to talk to Brandon - tonight

-4-

Matter are Moving - no

Seemingly Concerning

Alumni - Peer Judgement

Certified [illegible] - conflict

w [illegible]?

Assuming some explaining

w Brandon? not around

5/5

Tom Hellman

Last evening

- re interviews 11½ yr old
- only change: added what happened in shower demonstrated on chair how Jerry hugged from back hands around abdomen + down to thighs - picked him up + held him off shower head - rinsed soap out of hair

observed by PSU FS +

C.
m

psychologist

- Probably emotional problem but appropriate & believable
- Mother to psychologist & said she would call child abuse hotline & will generate an incident no - with Dept of Public Welfare
- Other Day - interviewed last night Sunday at

evening
kissed on head.

Hugging from behind in Shower

No allegation beyond that

Kids drew diagrams of shower rooms.

he initially went down to shower 3 yds stalls away & Jerry told him to come down to shower next to his.

- Local child abuse people mtg at PSU today to decide what to do.

-4-

Either way, case worker felt they would not leave Jerry

box?
Other children?

EXHIBIT 2

OAG

From: Gary C. Schultz <gcs2@psu.edu>
Sent: Wednesday, May 06, 1998 2:06 PM
To: Tim Curley
Cc: Spanier-Graham (GBS)
Subject: Re: Joe Paterno

Will do. Since we talked tonight I've learned that the Public Welfare people will interview the individual Thursday.

At 05:24 PM 5/5/98 -0400, Tim Curley wrote:
>I have touched base with the coach. Keep us posted. Thanks.
>_____
>Tim Curley
>Tmc3@psu.edu
>
>
>

EXHIBIT 3

OAG

From: Gary C. Schultz <gcs2@psu.edu>
Sent: Tuesday, June 09, 1998 2:09 AM
To: Curley-Tim (TMC)
Cc: Spanier-Graham (GBS); Harmon-Thomas (TRH)
Subject: Re: Jerry

They met with Jerry on Monday and concluded that there was no criminal behavior and the matter was closed as an investigation. He was a little emotional and expressed concern as to how this might have adversely affected the child. I think the matter has been appropriatedly investigated and I hope it is now behind us.

>Date: Mon, 08 Jun 1998 21:59:42 -0400
>To: Tim Curley <tmc3@psu.edu>
>From: "Gary C. Schultz" <gcs2@psu.edu>
>Subject: Re: Jerry
>
>Tim, I don't have an update at this point. Just before I left for vac, Tom told me that the DPW and Univ Police services were planning to meet with him. I'll see if this has happened and get back to you.
>
>At 10:27 AM 5/30/98 -0400, Tim Curley wrote:
>>Any further update?
>>
>>
>>
>>
>>At 09:46 AM 5/19/98 -0400, you wrote:
>>>No, but I don't expect we'll hear anything prior to the end of this week.
>>>
>>>At 09:37 PM 5/18/98 -0400, Tim Curley wrote:
>>>>Any update?
>>>>
>>>>
>>>>At 04:11 AM 5/14/98 -0400, you wrote:
>>>>>Tim, I understand that a DPW person was here last week; don't know
>>>>>for sure if they talked with Jerry. They decided to have a child
>>>>>psychologist talk to the boys sometime over the next week. We won't know anything before then.
>>>>>
>>>>>At 02:21 PM 5/13/98 -0400, Tim Curley wrote:
>>>>>>Anything new in this department? Coach is anxious to know where it stands.
>>>>>>_____
>>>>>>Tim Curley
>>>>>>Tmc3@psu.edu
>>>>>>
>>>>>>
>>>>>>
>>>>>Gary C. Schultz
>>>>>Sr. V.P. for Finance and Business/Treasurer
>>>>>208 Old Main
>>>>>Phone: 865-6574
>>>>>Fax: 863-8685
>>>>>
>>>>>
>>>>>

>>>>
>>>>Tim Curley
>>>>Tmc3@psu.edu
>>>>
>>>>
>>>>
>>>Gary C. Schultz
>>>Sr. V.P. for Finance and Business/Treasurer
>>>208 Old Main
>>>Phone: 865-6574
>>>Fax: 863-8685
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>>
>>Tim Curley
>>Tmc3@psu.edu
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>

EXHIBIT 4

Working Attorney(s): Select 9

Matter I.D.	Description	Task:Activity	Hours	
02-08-01				
4000-465063	PSU - Labor - Human Resources PS010		0.60	
	Conference with J Purdum re holiday pay issue; Conference with R Maney re same			
4000-490106	PSU - Personnel - Continuing & Distance Educat		0.50	
	Conference with J Elliott re J Marshall; Conference with G Schultz			
4000-490143	PSU - Personnel - Mont Alto Campus		2.20	
	Conference with J Leathers re D Goldenberg; Preparation of correspondence to G Spanier; Review of files; Preparation of correspondence to G Spanier et al; Conference with J Leathers			
4000-481582	PSU - Students - Student Affairs		2.90	
	Interoffice conference re camping policy; Legal research re same			
4000-481582	PSU - Students - Student Affairs		1.70	
	Study/analyze documents re LGB tenant; Interoffice conference re same; Legal research; Preparation of correspondence to G Spanier et al re same			
4000-490163	PSU - Personnel - Human Resources		0.30	
	Conference with R Maney re R Khalliq			
4000-465026	PSU - Labor - COM - General		1.50	
	Preparation of documents re HMC parking			
** Total for2/8/2001 **			9.70	0.00
02-09-01				
4000-490143	PSU - Personnel - Mont Alto Campus		1.60	
	Review of documents re D Goldenberg; Preparation of correspondence to G Spanier; Preparation of correspondence to J Leathers; Legal research			
4000-451558	PSU - Gifts & Grants - Develop and Alumni Rela		0.20	
	Review of files re Hagan estate			
4000-490117	PSU - Personnel - College of Liberal Arts		1.10	
	Conference with J Battista re R Echemendia; Interoffice conference			
4000-425562	PSU - Contracts - Hershey Medical Center		0.80	
	Review of documents re Purchase of Services Agreement; Interoffice conference re same			
4000-465026	PSU - Labor - COM - General		2.60	
	Conference with L Kushner re HMC parking fees; Preparation of correspondence to L Kushner re same; Preparation of documents; Legal research			
4000-465063	PSU - Labor - Human Resources PS010		0.70	
	Review Schaeffer brief			
** Total for2/9/2001 **			7.00	0.00
02-11-01				
4000-450061	PSU - General - Finance/Business - Central		2.90	
	Conference with G Schultz re reporting of suspected child abuse; Legal research re same; Conference with G Schultz			
02-12-01				

EXHIBIT 5

OAG

From: Thomas R. Harmon <HARMON@SAFETY-1.SAFETY.PSU.EDU>
Sent: Monday, February 12, 2001 4:57 PM
To: gcs2@psu.edu
Subject: Incident in 1998

Regarding the incident in 1998 involving the former coach, I checked and the incident is documented in our imaged achives.

Thomas R. Harmon
Director, University Police
The Pennsylvania State University
30-B Eisenhower Parking Deck
University Park, PA 16802
(814) 865-1864
harmon@police.psu.edu

EXHIBIT 6

PENNSTATE Confidential

Date: 2/12/09

From: Gary C. Schultz

To:

Talked w TMC
renewed 1998 listing
- agreed TMC will discuss w JVP + advise we think TMC should meet w JVP on Friday.
- unless he [redacted] for having a problem, TMC will indicate we need to have DPW review the matter as an independent agency concerned w Child welfare.
- TMC will keep me posted.

Senior Vice President for Finance and Business/Treasurer

The Pennsylvania State University
208 Old Main
University Park, PA 16802-1503
(814) 865-6574
Fax: (814) 863-7188

EXHIBIT 7

OAG

From: Gary C. Schultz <gcs2@psu.edu>
Sent: Monday, February 26, 2001 1:57 PM
To: TMC3@psu.edu
Cc: Coble-Joan (JLC)
Subject: Confidential

Tim, 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. As you know I'm out of the office for the next two weeks, but if you need anything from me, please let me know.

EXHIBIT 8

OAG

From: Gary C. Schultz <gcs2@psu.edu>
Sent: Wednesday, February 28, 2001 2:13 PM
To: Graham Spanier; Tim Curley
Subject: Re: Meeting

<html>
Tim and Graham, this is a more humane and upfront way to handle this. I can support this approach, with the understanding that we will inform his organization, with or without his cooperation (I think that's what Tim proposed). We can play it by ear to decide about the other organization.

 At 10:18 PM 2/27/01 -0500, Graham Spanier wrote:
 <blockquote type=cite cite>Tim: This approach is acceptable to me. 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.

 At 08:10 PM 2/27/01 -0500, Tim Curley wrote:
 <blockquote type=cite cite>I had scheduled a meeting with you this afternoon about the subject we discussed on Sunday. After giving it more thought and talking it over with Joe yesterday-- I am uncomfortable with what we agreed were the next steps. 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. 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. Also, we feel a responsibility at some point soon to inform his organization and and maybe the other one about the situation. If he is cooperative we would work with him to handle informing the organization. If not, we do not have a choice and will inform the two groups. Additionally, I will let him know that his guests are not permitted to use our facilities.

 I need some help on this one. What do you think about this approach?</blockquote>

Graham B. Spanier
President
The Pennsylvania State University
201 Old Main
University Park, Pennsylvania 16802

 Phone: 814-865-7611
 email: gspanier@psu.edu
 </blockquote></html>

EXHIBIT 2

Interview

11½ yr old Son 5/4/98 5:00pm

Nilly Guelos

Investigated in 2nd Office

- picked up son & wanted

to FB cabin others

Behavior - at best inappropriate

@ most sexual inappropriate

Police interviewed

- typed.

- May be leaving out the issue

- of themselves, undressed

Gave him other clothes -

even though he was in shorts

Z

- worked out on treadmill etc
- Jerry - to take a shower -
underwear - ? no other
shower? 4 in here.
Shampoo
Jerry came up behind &
[illegible] a bear hug -
said he would squeeze
[illegible] out - all
- Keep clothes - socks [illegible]'s
[illegible]
- took home.

Mother concerned something
more - [illegible] took all the
shower last night & the a.m.

Mother asked how about
to give hug
had to be careful about
because of age difference
but when asked if boy
he quickly said NO

- Friend Brandon, age 10,
also @ N. Hay Gardens -
claims same thing went
on with him

- Mother also asked Brandon
- Children & Youth has been
notified & will want to
talk to Brandon - tonight

-4-

Walker at Meeting - 10

genuinely concerning

Admin - Peer Judgment

Critical urgency - conflict

w gov'tally?

Assuming some explanation

w Bernardin? not assumed

5/5

Tom Hellman

Last evening

- re interviews 11½ yr old
- only change: added what happened in shower demonstrated on chair how Jerry hugged from back hands around abdomen + down to thighs - picked him up + held him at shower head - rinsed soap off legs

observed by BU FS +

C
m

psychologist

- Probably emotional problems but appropriate & believable
- Mother to psychologist & said she would call child abuse hotline & will generate an incident no - with Dept of Public Welfare
- Other boy - interviewed last night Similar act

watching
kissed on head

Hagan from behind
Shed
No allegation beyond that

Kids drew diagram of
shower room.
He initially went down to
shower 3 kids stuck
away & Gary told
him to come down
to shower next to his.
- Local child abuse phone
Mtg at 700 today to
decide what to do.

After wig, case worker felt they would release Jerry

box? " "

Other children?

EXHIBIT 3

From: Gary C. Schultz <gcs2@psu.edu>
Sent: Tuesday, June 09, 1998 2:09 AM
To: Curley-Tim (TMC)
Cc: Spanier-Graham (GBS); Harmon-Thomas (TRH)
Subject: Re: Jerry

They met with Jerry on Monday and concluded that there was no criminal behavior and the matter was closed as an investigation. He was a little emotional and expressed concern as to how this might have adversely affected the child. I think the matter has been appropriatedly investigated and I hope it is now behind us.

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>>>>>>Tim Curley
>>>>>>Tmc3@psu.edu
>>>>>>
>>>>>>
>>>>>>
>>>>>Gary C. Schultz
>>>>>Sr. V.P. for Finance and Business/Treasurer
>>>>>208 Old Main
>>>>>Phone: 865-6574

EXHIBIT 4

PENNSTATE Confidential

Date: 2/12/04

From: Gary C. Schultz

To:

Talked w TMC
reviewed 1998 history
- agreed TMC will discuss w JVP & advise we think TMC should meet w JVP 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.
- TMC will keep me posted.

Senior Vice President for Finance and Business/Treasurer

The Pennsylvania State University
208 Old Main
University Park, PA 16802-1503
(814) 865-6574
Fax: (814) 863-7188

EXHIBIT 5

2/25/01

(3). Tell chair* to move S of Second Mile.

(2). Report to Dept of Utilities.

(1). Tell G.S to avoid bringing children alone into Leach Bldg

* who's the chair ??

EXHIBIT 6

OAG

From: Gary C. Schultz <gcs2@psu.edu>
Sent: Monday, February 26, 2001 1:57 PM
To: TMC3@psu.edu
Cc: Coble-Joan (JLC)
Subject: Confidential

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EXHIBIT 7

OAG

From: Gary C. Schultz <gcs2@psu.edu>
Sent: Wednesday, February 28, 2001 2:13 PM
To: Graham Spanier; Tim Curley
Subject: Re: Meeting

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 I need some help on this one. What do you think about this approach?</blockquote>

Graham B. Spanier
President
The Pennsylvania State University
201 Old Main
University Park, Pennsylvania 16802

 Phone: 814-865-7611
 email: gspanier@psu.edu
 </blockquote></html>

EXHIBIT 8

INTRODUCTION

We, the members of the Thirty-Third Statewide Investigating Grand Jury, having received and reviewed evidence regarding violations of the Crimes Code occurring in Centre County, Pennsylvania, and elsewhere pursuant to Notice of Submission of Investigation No. 1, do hereby make the following findings of fact and recommendation of charges.

FINDINGS OF FACT

The Grand Jury conducted an investigation into reported sexual assaults of minor male children by Gerald A. Sandusky ("Sandusky") over a period of years, both while Sandusky was a football coach for the Pennsylvania State University ("Penn State") football team and after he retired from coaching. Widely known as Jerry Sandusky, the subject of this investigation founded The Second Mile, a charity initially devoted to helping troubled young boys. It was within The Second Mile program that Sandusky found his victims.

Sandusky was employed by Penn State for 23 years as the defensive coordinator of its Division I collegiate football program. Sandusky played football for four years at Penn State and coached a total of 32 years. While coaching, Sandusky started "The Second Mile" in State College, Pennsylvania, in 1977. It began as a group foster home dedicated to helping troubled boys. It grew into a charity dedicated to helping children with absent or dysfunctional families. It is now a statewide, three region charity and Sandusky has been its primary fundraiser.[1] The Second Mile raises millions of dollars through fundraising appeals and special events. The mission of the program is to "help children who need additional support and would benefit from positive human interaction." Through The Second Mile, Sandusky had access to hundreds of boys, many of whom were vulnerable due to their social situations.

[1] Sandusky retired from The Second Mile in September 2010.

VICTIM 1

The Grand Jury conducted an investigation into the reported sexual assault of a minor child, Victim 1, by Sandusky, when Victim 1, a Second Mile participant, was a houseguest at Sandusky's residence in College Township, Centre County, Pennsylvania. During the course of the multi-year investigation, the Grand Jury heard evidence that Sandusky indecently fondled Victim 1 on a number of occasions, performed oral sex on Victim 1 on a number of occasions and had Victim 1 perform oral sex on him on at least one occasion.

Victim 1 testified that he was 11 or 12 years old when he met Sandusky through The Second Mile program in 2005 or 2006. As with the remaining victims, Victim 1 only came to Sandusky's attention during his second year in the program, when the boy attended The Second Mile's camp on the Penn State University Park campus. During the 2007 track season, Sandusky began spending time with Victim 1 weekly, having the boy stay overnight at his residence in State College, Pennsylvania. Sandusky took Victim 1 to professional and college sporting events, such as Philadelphia Eagles games, or pre-season practices at Penn State. When Victim 1 slept at the Sandusky residence, he would sleep in a finished bedroom in the basement. Occasionally, other boys would also stay overnight at Sandusky's home but usually it was only Victim 1. Sandusky also encouraged Victim 1 to participate in The Second Mile as a volunteer. Sandusky gave Victim 1 a number of gifts, including golf clubs, a computer, gym clothes, dress clothes and cash. Sandusky took the boy to restaurants, swimming at a hotel near Sandusky's home, and to church.

Victim 1 testified that Sandusky had a practice of coming into the basement room after he told Victim 1 that it was time to go to bed. Victim 1 testified that Sandusky would "crack his back." He described this as Sandusky getting onto the bed on which Victim 1 was already lying

and rolling under the boy. With Victim 1 lying on top of him, face to face, Sandusky would run his arms up and down the boy's back and "crack" it. The back-cracking became a ritual at bedtime. Victim 1 said that after Sandusky had cracked his back a number of times, he progressed to rubbing Victim 1's backside while they lay face-to-face on the bed. Victim 1 testified that this began to occur during the summer of 2005 or 2006, before he entered sixth or seventh grade. Sandusky then began to blow on Victim 1's bare stomach. Eventually, Sandusky began to kiss Victim 1 on the mouth. Victim 1 was uncomfortable with the contact and would sometimes try to hide in the basement to avoid Sandusky. Victim 1 testified that ultimately Sandusky performed oral sex on him more than 20 times through 2007 and early 2008. Sandusky also had Victim 1 perform oral sex on him one time and also touched Victim 1's penis with his hands during the 2007-2008 time period. Victim 1 did not want to engage in sexual conduct with Sandusky and knew it was wrong. Victim 1 stopped taking Sandusky's phone calls and had his mother tell Sandusky he was not home when Sandusky called. This termination of contact with Sandusky occurred in the spring of 2008, when Victim 1 was a freshman in high school.

Before Victim 1 ceased contact with Sandusky, Sandusky routinely had contact with him at a Clinton County high school where the administration would call Victim 1 out of activity period/study hall in the late afternoon to meet with Sandusky in a conference room. No one monitored these visits. Sandusky assisted the school with coaching varsity football and had unfettered access to the school.

Victim 1 testified about an incident that occurred one evening at the high school when he and Sandusky were alone in the weight room where there was a rock climbing wall. After Victim 1 fell off the wall a few times, Sandusky lay down on top of him, face to face, and was

rolling around the floor with the boy. No one was able to see Victim 1 and Sandusky because of the configuration of the room. Sandusky was lying under Victim 1 with his eyes closed. Suddenly a wrestling coach, Joe Miller, unexpectedly entered the room and Sandusky jumped up very quickly and explained that they had just been wrestling.

Joseph Miller testified that he was head wrestling coach for the elementary wrestling program for that school district. He knew Victim 1, who had wrestled for him. Miller corroborated that one evening in 2006 or 2007, he returned to the high school to retrieve something he had forgotten. He saw a light on in the weight room which should have been turned off and when he went in, he discovered Victim 1 and Sandusky, lying on their sides, in physical contact, face to face on a mat. He said both Victim 1 and Sandusky were surprised to see him enter the room. He recalls that Sandusky jumped up and said, "Hey Coach, we're just working on wrestling moves." Sandusky was not a wrestling coach. Miller found the use of that secluded room odd for wrestling because the bigger wrestling room right outside the weight room had more room to wrestle and more mats. He had seen Victim 1 with Sandusky frequently before the weight room incident. He saw them together after school and before athletic practice time.

Steven Turchetta testified that he was an assistant principal and the head football coach at the high school attended by Victim 1. He testified that Sandusky was a volunteer assistant football coach. Sandusky also worked with children in the Second Mile program in that school district. Turchetta described the Second Mile as a very large charitable organization that helped children who are from economically underprivileged backgrounds and who may be living in single parent households. Turchetta first met Sandusky in 2002 when Sandusky attempted to assist some Second Mile members who were on Turchetta's football team. Sandusky's

involvement grew from there. In the 2008 season, Sandusky was a full-time volunteer coach. Turchetta said it was not unusual for him, as assistant principal, to call a Second Mile student out of activity period at the end of the day, at Sandusky's request, to see Sandusky. He knew of several students who were left alone with Sandusky, including Victim 1. Turchetta characterized Sandusky as very controlling within the mentoring relationships he established with Second Mile students. Sandusky would often want a greater time commitment than the teenagers were willing to give and Sandusky would have "shouting matches" with various youths, in which Turchetta would sometimes be the mediator. Turchetta would also end up being Sandusky's point of contact for a youth whom he had been unable to reach by phone the previous evening. Turchetta testified that Sandusky would be "clingy" and even "needy" when a young man broke off the relationship he had established with him and called the behavior "suspicious." Turchetta became aware of Victim 1's allegations regarding sexual assault by Sandusky when the boy's mother called the school to report it. Sandusky was barred from the school district attended by Victim 1 from that day forward and the matter was reported to authorities as mandated by law.

Office of Attorney General Narcotics Agent Anthony Sassano testified concerning phone records that establish 61 phone calls from Sandusky's home phone to Victim 1's home phone between January 2008 and July 2009. In that same time, there were 57 calls from Sandusky's cell phone to Victim 1's home phone. There were four calls made from Victim 1's home phone to Sandusky's cell phone and one call from Victim 1's mother's cell phone to Sandusky's cell phone. There were no calls made to Sandusky's home phone by Victim 1 during that time period.

Another youth, F.A., age fifteen, testified that Sandusky had taken him and Victim 1 to a Philadelphia Eagles football game and that Sandusky had driven. He witnessed Sandusky place

his right hand on Victim 1's knee; Sandusky had also done this to F.A. on more than one occasion when they were in Sandusky's car. F.A. was uncomfortable when Sandusky did this and moved his leg to try to avoid the contact. Sandusky would keep his hand on F.A.'s knee even after F.A. tried to move it. F.A. also testified that Sandusky would reach over, while driving, and lift his shirt and tickle his bare stomach. F.A. did not like this contact. F.A. also witnessed Sandusky tickling Victim 1 in similar fashion. Sandusky invited F.A. to stay over at his house but F.A. only stayed one time when he knew Victim 1 was also staying over, after returning from the Philadelphia Eagles game. F.A. confirmed that Victim 1 slept in Sandusky's basement room when F.A. stayed there. F.A. testified that he stayed away from Sandusky because he felt he didn't want to be alone with him for a long period of time, based on the tickling, knee touching and other physical contact. Victim 1 confirmed that Sandusky would drive with his hand on Victim 1's leg.

VICTIM 2

On March 1, 2002, a Penn State graduate assistant ("graduate assistant") who was then 28 years old, entered the locker room at the Lasch Football Building on the University Park Campus on a Friday night before the beginning of Spring Break. The graduate assistant, who was familiar with Sandusky, was going to put some newly purchased sneakers in his locker and get some recruiting tapes to watch. It was about 9:30 p.m. As the graduate assistant entered the locker room doors, he was surprised to find the lights and showers on. He then heard rhythmic, slapping sounds. He believed the sounds to be those of sexual activity. As the graduate assistant put the sneakers in his locker, he looked into the shower. He saw a naked boy, Victim 2, whose age he estimated to be ten years old, with his hands up against the wall, being subjected to anal

intercourse by a naked Sandusky. The graduate assistant was shocked but noticed that both Victim 2 and Sandusky saw him. The graduate assistant left immediately, distraught.

The graduate assistant went to his office and called his father, reporting to him what he had seen. His father told the graduate assistant to leave the building and come to his home. The graduate assistant and his father decided that the graduate assistant had to promptly report what he had seen to Coach Joe Paterno ("Paterno"), head football coach of Penn State. The next morning, a Saturday, the graduate assistant telephoned Paterno and went to Paterno's home, where he reported what he had seen.

Joseph V. Paterno testified to receiving the graduate assistant's report at his home on a Saturday morning. Paterno testified that the graduate assistant was very upset. Paterno called Tim Curley ("Curley"), Penn State Athletic Director and Paterno's immediate superior, to his home the very next day, a Sunday, and reported to him that the graduate assistant had seen Jerry Sandusky in the Lasch Building showers fondling or doing something of a sexual nature to a young boy.

Approximately one and a half weeks later, the graduate assistant was called to a meeting with Penn State Athletic Director Curley and Senior Vice President for Finance and Business Gary Schultz ("Schultz"). The graduate assistant reported to Curley and Schultz that he had witnessed what he believed to be Sandusky having anal sex with a boy in the Lasch Building showers. Curley and Schultz assured the graduate assistant that they would look into it and determine what further action they would take. Paterno was not present for this meeting.

The graduate assistant heard back from Curley a couple of weeks later. He was told that Sandusky's keys to the locker room were taken away and that the incident had been reported to The Second Mile. The graduate assistant was never questioned by University Police and no other

entity conducted an investigation until he testified in Grand Jury in December, 2010. The Grand Jury finds the graduate assistant's testimony to be extremely credible.

Curley testified that the graduate assistant reported to them that "inappropriate conduct" or activity that made him "uncomfortable" occurred in the Lasch Building shower in March 2002. Curley specifically denied that the graduate assistant reported anal sex or anything of a sexual nature whatsoever and termed the conduct as merely "horsing around". When asked whether the graduate assistant had reported "sexual conduct" "of any kind" by Sandusky, Curley answered, "No" twice. When asked if the graduate assistant had reported "anal sex between Jerry Sandusky and this child," Curley testified, "Absolutely not."

Curley testified that he informed Dr. Jack Raykovitz, Executive Director of the Second Mile of the conduct reported to him and met with Sandusky to advise Sandusky that he was prohibited from bringing youth onto the Penn State campus from that point forward. Curley testified that he met again with the graduate assistant and advised him that Sandusky had been directed not to use Penn State's athletic facilities with young people and "the information" had been given to director of The Second Mile. Curley testified that he also advised Penn State University President Graham Spanier of the information he had received from the graduate assistant and the steps he had taken as a result. Curley was not specific about the language he used in reporting the 2002 incident to Spanier. Spanier testified to his approval of the approach taken by Curley. Curley did not report the incident to the University Police, the police agency for the University Park campus or any other police agency.

Schultz testified that he was called to a meeting with Joe Paterno and Tim Curley, in which Paterno reported "disturbing" and "inappropriate" conduct in the shower by Sandusky upon a young boy, as reported to him by a student or graduate student. Schultz was present in a

subsequent meeting with Curley when the graduate assistant reported the incident in the shower involving Sandusky and a boy. Schultz was very unsure about what he remembered the graduate assistant telling him and Curley about the shower incident. He testified that he had the impression that Sandusky might have inappropriately grabbed the young boy's genitals while wrestling and agreed that such was inappropriate sexual conduct between a man and a boy. While equivocating on the definition of "sexual" in the context of Sandusky wrestling with and grabbing the genitals of the boy, Schultz conceded that the report the graduate assistant made was of inappropriate sexual conduct by Sandusky. However, Schultz testified that the allegations were "not that serious" and that he and Curley "had no indication that a crime had occurred." Schultz agreed that sodomy between Sandusky and a child would clearly be inappropriate sexual conduct. He denied having such conduct reported to him either by Paterno or the graduate assistant.

Schultz testified that he and Curley agreed that Sandusky was to be told not to bring any Second Mile children into the football building and he believed that he and Curley asked "the child protection agency" to look into the matter. Schultz testified that he knew about an investigation of Sandusky that occurred in 1998, that the "child protection agency" had done, and he testified that he believed this same agency was investigating the 2002 report by the graduate assistant. Schultz acknowledged that there were similarities between the 1998 and 2002 allegations, both of which involved minor boys in the football showers with Sandusky behaving in a sexually inappropriate manner. Schultz testified that the 1998 incident was reviewed by the University Police and "the child protection agency" with the blessing of then-University counsel Wendell Courtney. Courtney was then and remains counsel for The Second Mile. Schultz confirmed that University President Graham Spanier was apprised in 2002 that a report of an

incident involving Sandusky and a child in the showers on campus had been reported by an employee. Schultz testified that Spanier approved the decision to ban Sandusky from bringing children into the football locker room and the decision to advise The Second Mile of the 2002 incident.

Although Schultz oversaw the University Police as part of his position, he never reported the 2002 incident to the University Police or other police agency, never sought or reviewed a police report on the 1998 incident and never attempted to learn the identity of the child in the shower in 2002. No one from the University did so. Schultz did not ask the graduate assistant for specifics. No one ever did. Schultz expressed surprise upon learning that the 1998 investigation by University Police produced a lengthy police report. Schultz said there was never any discussion between himself and Curley about turning the 2002 incident over to any police agency. Schultz retired in June 2009 but currently holds the same position as a senior vice president with Penn State, on an interim basis.

Graham Spanier testified about his extensive responsibilities as President of Penn State and his educational background in sociology and marriage and family counseling. He confirmed Curley and Schultz's respective positions of authority with the University. He testified that Curley and Schultz came to him in 2002 to report an incident with Jerry Sandusky that made a member of Curley's staff "uncomfortable." Spanier described it as "Jerry Sandusky in the football building locker area in the shower [ ] with a younger child and that they were horsing around in the shower." Spanier testified that even in April, 2011, he did not know the identity of the staff member who had reported the behavior. Spanier denied that it was reported to him as an incident that was sexual in nature and acknowledged that Curley and Schultz had not indicated any plan to report the matter to any law enforcement authority, the Commonwealth of

Pennsylvania Department of Public Welfare or any appropriate county child protective services agency. Spanier also denied being aware of a 1998 University Police investigation of Sandusky for incidents with children in football building showers.

Department of Public Welfare and Children and Youth Services local and state records were subpoenaed by the Grand Jury; University Police records were also subpoenaed. The records reveal that the 2002 incident was never reported to any officials, in contravention of Pennsylvania law.

Sandusky holds emeritus status with Penn State. In addition to the regular privileges of a professor emeritus, he had an office and a telephone in the Lasch Building. The status allowed him access to all recreational facilities, a parking pass for a vehicle, access to a Penn State account for the internet, listing in the faculty directory, faculty discounts at the bookstore and educational privileges for himself and eligible dependents. These and other privileges were negotiated when Sandusky retired in 1999. Sandusky continued to use University facilities as per his retirement agreement. As a retired coach, Sandusky had unlimited access to the football facilities, including the locker rooms. Schultz testified that Sandusky retired when Paterno felt it was time to make a coaching change and also to take advantage of an enhanced retirement benefit under Sandusky's state pension.

Both the graduate assistant and Curley testified that Sandusky himself was not banned from any Penn State buildings and Curley admitted that the ban on bringing children to the campus was unenforceable.

The Grand Jury finds that portions of the testimony of Tim Curley and Gary Schultz are not credible.

The Grand Jury concludes that the sexual assault of a minor male in 2002 should have been reported to the Pennsylvania Department of Public Welfare and/or a law enforcement agency such as the University Police or the Pennsylvania State Police. The University, by its senior staff, Gary Schultz, Senior Vice President for Finance and Business and Tim Curley, Athletic Director, was notified by two different Penn State employees of the alleged sexual exploitation of that youth. Pennsylvania's mandatory reporting statute for suspected child abuse is located at 23 Pa.C.S. §6311 (Child Protective Services Law) and provides that when a staff member reports abuse, pursuant to statute, the person in charge of the school or institution has the responsibility and legal obligation to report or cause such a report to be made by telephone and in writing within 48 hours to the Department of Public Welfare of the Commonwealth of Pennsylvania. An oral report should have been made to Centre County Children and Youth Services but none was made. Nor was there any attempt to investigate, to identify Victim 2 or to protect that child or any others from similar conduct, except as related to preventing its re-occurrence on University property. The failure to report is a violation of the law which was graded a summary offense in 2002, pursuant to 23 Pa.C.S. §6319.[2]

The Grand Jury finds that Tim Curley made a materially false statement under oath in an official proceeding on January 12, 2011, when he testified before the 30th Statewide Investigating Grand Jury, relating to the 2002 incident, that he was not told by the graduate assistant that Sandusky was engaged in sexual conduct or anal sex with a boy in the Lasch Building showers.

Furthermore, the Grand jury finds that Gary Schultz made a materially false statement under oath in an official proceeding on January 12, 2011, when he testified before the 30rd Statewide Investigating Grand Jury, relating to the 2002 incident that the allegations made by the

[2] The grading of the failure to report offense was upgraded from a summary offense to a misdemeanor of the third degree in 2006, effective May 29, 2007.

graduate assistant were "not that serious" and that he and Curley "had no indication that a crime had occurred."

VICTIM 3

Victim 3, now age 24, met Sandusky through The Second Mile in the summer of 2000, when he was between seventh and eighth grade. The boy met Sandusky during his second year in the program. Sandusky began to invite Victim 3 to go places with him. Victim 3 was invited to Sandusky's home for dinner, to hang out, walk the family dogs and to go to Penn State football games and to Holuba Hall and the gym. When Victim 3 went to the gym with Sandusky, they would exercise and then shower. He recalls feeling uncomfortable and choosing a shower at a distance from Sandusky. Sandusky then made him feel bad about showering at a distance from him, so Victim 3 moved closer. Sandusky initiated physical contact in the shower with Victim 3 by patting him, rubbing his shoulders, washing his hair and giving him bear hugs. These hugs would be both face to face and with Sandusky's chest to Victim 3's back. Victim 3 said that on at least one occasion, Sandusky had an erection when he bear hugged Victim 3 from behind. He also recalled that when he slept over at Sandusky's residence, he slept in the basement bedroom. He testified that Sandusky would come into the bedroom where he was lying down. He sometimes said he was going to give Victim 3 a shoulder rub; sometimes he would blow on Victim 3's stomach; other times he tickled Victim 3. Sandusky would rub the inside of Victim 3's thigh when he tickled him. On two occasions Victim 3 recalls that Sandusky touched Victim 3's genitals through the athletic shorts Victim 3 wore to bed. Victim 3 would roll over on his stomach to prevent Sandusky from touching his genitals.

Victim 3 knew Victim 4 to spend a great deal of time with Sandusky.

VICTIM 4

The investigation revealed the existence of Victim 4, a boy who was repeatedly subjected to Involuntary Deviate Sexual Intercourse and Indecent Assault at the hands of Sandusky. The assaults took place on the Penn State University Park campus, in the football buildings, at Toftrees Golf Resort and Conference Center ("Toftrees") in Centre County, where the football team and staff stayed prior to home football games and at bowl games to which he traveled with Sandusky. Victim 4, now age 27, was a Second Mile participant who was singled out by Sandusky at the age of 12 or 13, while he was in his second year with The Second Mile program in 1996 or 1997. He was invited to a Sandusky family picnic at which there were several other non-family members and Sandusky's adopted children. Victim 4 described that on that first outing, Sandusky had physical contact with him while swimming, which Victim 4 described as testing "how [Victim 4] would respond to even the smallest physical contact." Sandusky engaged Victim 4 in workouts or sports and then showered with him at the old East locker rooms across from Holuba Hall, the football practice building. Sandusky initiated physical contact with Victim 4 by starting a "soap battle"--throwing a handful of soap at the boy and from there, the fight turned into wrestling in the shower. Victim 4 remembers indecent contact occurring many times, both in the shower and in hotel rooms at Toftrees.

Victim 4 became a fixture in the Sandusky household, sleeping overnight and accompanying Sandusky to charity functions and Penn State football games. Victim 4 was listed, along with Sandusky's wife, as a member of Sandusky's family party for the 1998 Outback Bowl and the 1999 Alamo Bowl. He traveled to and from both bowl games with the football team and other Penn State staff, coaches and their families, sharing the same accommodations. Victim 4 would frequently stay overnight at Toftrees with Sandusky and the football team prior to home

games; Sandusky's wife was never present at Toftrees when Victim 4 stayed with Sandusky. This was where the first indecent assaults of Victim 4 occurred. Victim 4 would attend the pre-game banquet and sit with Sandusky at the coaches' table. Victim 4 also accompanied Sandusky to various charity golf outings and would share a hotel room with him on those occasions.

Victim 4 stated that Sandusky would wrestle with him and maneuver him into a position in which Sandusky's head was at Victim 4's genitals and Victim 4's head was at Sandusky's genitals. Sandusky would kiss Victim 4's inner thighs and genitals. Victim 4 described Sandusky rubbing his genitals on Victim 4's face and inserting his erect penis in Victim 4's mouth. There were occasions when this would result in Sandusky ejaculating. He testified that Sandusky also attempted to penetrate Victim 4's anus with both a finger and his penis. There was slight penetration and Victim 4 resisted these attempts. Sandusky never asked to do these things but would simply see what Victim 4 would permit him to do. Sandusky did threaten to send him home from the Alamo Bowl in Texas when Victim 4 resisted his advances. Usually the persuasion Sandusky employed was accompanied by gifts and opportunities to attend sporting and charity events. He gave Victim 4 dozens of gifts, some purchased and some obtained from various sporting goods vendors such as Nike and Airwalk. Victim 4 received clothes, a snowboard, Nike shoes, golf clubs, ice hockey equipment and lessons, passes for various sporting events, football jerseys, and registration for soccer camp. Sandusky even guaranteed Victim 4 he could be a walk-on player at Penn State. Victim 4 was in a video made about linebackers that featured Sandusky, and he appeared with him in a photo accompanying an article about Sandusky in Sports Illustrated.

The Penn State football program relocated to the Lasch Football Building in 1999 and that facility had a sauna. Victim 4 reported that after the move, most of the sexual conduct that did not occur in a hotel room occurred in the sauna, as the area is more secluded.

Victim 4 remembers Sandusky being emotionally upset after having a meeting with Joe Paterno in which Paterno told Sandusky he would not be the next head coach at Penn State and which preceded Sandusky's retirement. Sandusky told Victim 4 not to tell anyone about the meeting. That meeting occurred in May, 1999.

Eventually, Victim 4 began to intentionally distance himself from Sandusky, not taking his phone calls and at times even hiding in closets when Sandusky showed up at Victim 4's home. Victim 4 had a girlfriend, of whom Sandusky did not approve. Sandusky tried to use guilt and bribery to regain time with Victim 4. Victim 4 had begun to smoke cigarettes and had Sandusky buy them for him. Victim 4 also said that Sandusky once gave him $50 to buy marijuana at a location known to Victim 4. Sandusky drove there at Victim 4's direction and Victim 4 smoked the marijuana in Sandusky's car on the ride home. This was when Victim 4 was trying to distance himself from Sandusky because he wanted no more sexual contact with him.

VICTIM 5

Victim 5, now age 22, met Sandusky through The Second Mile in 1995 or 1996, when he was a 7 or 8 year old boy, in second or third grade. Sometime after their initial meeting at a Second Mile camp at Penn State, Sandusky called to invite the boy to a Penn State football game. Victim 5 was thrilled to attend. Sandusky picked him up at home and then Sandusky drove to pick up Victim 6. There were a couple of other kids in the car. The boys were left at Holuba Hall by Sandusky. They attended the Sandusky family tailgate and the football game. This

became a pattern for Victim 5, who attended perhaps as many as 15 football games as Sandusky's guest. Victim 5 also traveled with Sandusky to watch other college football games. Victim 5 remembers that Sandusky would often put his hand on Victim 5's left leg when they were driving in Sandusky's car, any time Victim 5 was in the front seat.

Victim 5 was taken to the Penn State football locker rooms one time by Sandusky. Sandusky put his hand on Victim 5's leg during the ride to the locker room. To the best of his recollection, this occurred when he was 8 to 10 years old, sometime during 1996-1998. The locker room was the East Area Locker rooms, next to Holuba Hall. No one was present in the locker rooms. Victim 5 was sweaty from a brief period of exercise and then Sandusky took him in the sauna and "pushed" Victim 5 "around a little bit". Looking back on it as an adult, Victim 5 says it was inappropriate. Sandusky would press his chest and body up against Victim 5's back and then push him away. All the contact was initiated by Sandusky. Then Sandusky said they needed to shower. Victim 5 was uncomfortable because he had never been naked in front of anyone who wasn't a family member. So he turned his back to Sandusky and chose a shower that was a distance away from where Sandusky was showering. Victim 5 looked back over his shoulder and saw that Sandusky was looking at him and that Sandusky had an erection. Victim 5 did not understand the significance of this at the time but still averted his gaze because he was uncomfortable. The next thing he knew, Sandusky's body touched Victim 5 from behind and Sandusky was rubbing Victim 5's arms and shoulders. Victim 5 crept forward and so did Sandusky. Victim 5 then took another step, this time to the right, and Sandusky pinned Victim 5 up against a wall in the corner. Sandusky then took Victim 5's hand and placed it on his erect penis. Victim 5 was extremely uncomfortable and pulled his hand away and slid by Sandusky.

Victim 5 walked out of the shower and dried himself off and got dressed. Sandusky never touched him again. Victim 5 thinks that he did not get invited to any football games after that.

VICTIM 6

Victim 6, who is now 24 years old, was acquainted with Victim 5 and another young boy in The Second Mile program, B.K.; their interaction with Sandusky overlapped. Victim 6 was referred to the Second Mile program by a school counselor. He met Sandusky at a Second mile picnic at Spring Creek Park when he was seven or eight years old, in 1994 or 1995. After Sandusky interacted with Victim 6 after a skit at the picnic, Sandusky telephoned to invite Victim 6 to tailgate and attend a football game with some other boys. He was picked up by Sandusky. Victim 5, B.K., and other boys were present. They went to Holuba Hall, a football practice building on the Penn State campus, and were left there by Sandusky. They threw footballs around until it was time for them to walk to the tailgate hosted by Sandusky's family and then attended the football game. Victim 6 recalls this pattern repeating many times.

Victim 6 recalls being taken into the locker room next to Holuba Hall at Penn State by Sandusky when he was 11 years old, in 1998. Sandusky picked him up at his home, telling him he was going to be working out. As they were driving to the University, Sandusky put his right hand upon Victim 6's left thigh several times. When they arrived, Sandusky showed Victim 6 the locker rooms and gave him shorts to put on, even though he was already dressed in shorts. They then lifted weights for about 15 or 20 minutes. They played "Polish bowling" or "Polish soccer", a game Sandusky had invented, using a ball made out of tape and rolling it into cups. Then Sandusky began wrestling with Victim 6, who was much smaller than Sandusky. Then Sandusky said they needed to shower, even though Victim 6 was not sweaty. Victim 6 felt awkward and tried to go to a shower some distance away from Sandusky but Sandusky called him over, saying

he had already warmed up a shower for the boy. While in the shower, Sandusky approached the boy, grabbed him around the waist and said, "I'm going to squeeze your guts out." Sandusky lathered up the boy, soaping his back because, he said, the boy would not be able to reach it. Sandusky bear-hugged the boy from behind, holding the boy's back against his chest. Then he picked him up and put him under the showerhead to rinse soap out of his hair. Victim 6 testified that the entire shower episode felt very awkward. No one else was around when this occurred. Looking back on it as an adult, Victim 6 says Sandusky's behavior towards him as an 11 year old boy was very inappropriate.

When Victim 6 was dropped off at home, his hair was wet and his mother immediately questioned him about this and was upset to learn the boy had showered with Sandusky. She reported the incident to University Police who investigated. After a lengthy investigation by University Police Detective Ronald Shreffler, the investigation was closed after then-Centre County District Attorney Ray Gricar decided there would be no criminal charges. Shreffler testified that he was told to close the investigation by the director of the campus police, Thomas Harmon. That investigation included a second child, B.K., also 11, who was subjected to nearly identical treatment in the shower as Victim 6, according to Detective Schreffler.

Detective Schreffler testified that he and State College Police Department Detective Ralph Ralston, with the consent of the mother of Victim 6, eavesdropped on two conversations the mother of Victim 6 had with Sandusky on May 13, 1998, and May 19, 1998. The mother of Victim 6 confronted Sandusky about showering with her son, the effect it had on her son, whether Sandusky had sexual feelings when he hugged her naked son in the shower and where Victim 6's buttocks were when Sandusky hugged him. Sandusky said he had showered with other boys and Victim 6's mother tried to make Sandusky promise never to shower with a boy

again but he would not. She asked him if his "private parts" touched Victim 6 when he bear-hugged him. Sandusky replied, "I don't think so...maybe." At the conclusion of the second conversation, after Sandusky was told he could not see Victim 6 anymore, Sandusky said, "I understand. I was wrong. I wish I could get forgiveness. I know I won't get it from you. I wish I were dead." Detective Ralston and the mother of Victim 6 confirm these conversations.

Jerry Lauro, an investigator with the Pennsylvania Department of Public Welfare, testified that during the 1998 investigation, Sandusky was interviewed on June 1, 1998, by Lauro and Detective Schreffler. Sandusky admitted showering naked with Victim 6, admitted to hugging Victim 6 while in the shower and admitted that it was wrong. Detective Schreffler advised Sandusky not to shower with any child again and Sandusky said that he would not.

The Grand Jury was unable to subpoena B.K. because he is in the military and is stationed outside the United States.

VICTIM 7

Victim 7, now 26 years old, met Sandusky through the Second Mile program, to which he was referred by a school counselor at about the age of 10, in 1994. When Victim 7 had been in the program for a couple of years, Sandusky contacted Victim 7's mother and invited Victim 7 to a Penn State football game. He would also attend Sandusky's son's State College High School football games with Sandusky. Victim 7 enjoyed going on the field at Penn State games, interacting with players and eating in the dining hall with the athletes. Victim 7 would stay overnight at Sandusky's home on Friday nights before the home games and then go to the games with him. Sometimes they would go out for breakfast and would attend coaches meetings. Victim 6 was also a part of this group of boys. He knew B.K. and several other boys that were in Sandusky's circle.

Victim 7 testified that Sandusky made him uncomfortable when he was a young boy. He described Sandusky putting his hand on Victim 7's left thigh when they were driving in the car or when they would pull into his garage. Victim 7 eventually reacted to this by sitting as far away from Sandusky as he could in the front seat.

He also described more than one occasion on which Sandusky put his hands down the waistband of Victim 7's pants. Sandusky never touched any private parts of Victim 7. Victim 7 would always slide away because he was very uncomfortable with Sandusky's behavior. Victim 7 described Sandusky cuddling him when he stayed at his home, lying behind him with his arm around the boy. Sandusky also bear-hugged Victim 7 and cracked his back. He also took Victim 7 to Holuba Hall to work out and then to the East Area Locker rooms to shower. Victim 7 was very uncomfortable with this shared showering. Sandusky would tell Victim 7 to shower next to him even though there were multiple other showerheads in the locker room. Victim 7 testified that he has a "blurry memory" of some contact with Sandusky in the shower but is unable to recall it clearly. Victim 7 had not had contact with Sandusky for nearly two years but was contacted by Sandusky and separately by Sandusky's wife and another Sandusky friend in the weeks prior to Victim 7's appearance before the Grand Jury. The callers left messages saying the matter was very important. Victim 7 did not return these phone calls.

VICTIM 8

In the fall of 2000, a janitor named James "Jim" Calhoun ("Jim") observed Sandusky in the showers of the Lasch Building with a young boy pinned up against the wall, performing oral sex on the boy. He immediately made known to other janitorial staff what he had just witnessed.

Fellow Office of Physical Plant employee Ronald Petrosky was also working that evening and recalls that it was football season of 2000 and it was a Thursday or Friday evening,

because the football team was away for its game. Petrosky, whose job it was to clean the showers, first heard water running in the assistant coaches' shower room. He then saw that two people were in the assistant coaches' shower room. He could only see two pairs of feet; the upper bodies were blocked. Petrosky waited for the two persons to exit the shower so he could clean it. He later saw Jerry Sandusky exit the locker room with a boy, who he described as being between the ages of 11 and 13. They were carrying gym bags and their hair was wet. Petrosky said good evening and was acknowledged by Sandusky and the boy. He noted that the hallway in the Lasch building at that point is long and that Sandusky took the boy's hand and the two of them walked out hand in hand. Petrosky began to clean the shower that Sandusky and the boy had vacated. As he worked, Jim approached him. Petrosky described Jim as being upset and crying. Jim reported that he had seen Sandusky, whose name was not known to him, holding the boy up against the wall and licking on him. Jim said he had "fought in the [Korean] war....seen people with their guts blowed out, arms dismembered...I just witnessed something in there I'll never forget." And he described Sandusky performing oral sex on the boy. Petrosky testified that Jim was shaking and he and his fellow employees feared Jim might have a heart attack. Petrosky testified that all the employees working that night except Witherite were relatively new employees. In discussions held later that shift, the employees expressed concern that if they reported what Jim had seen, they might lose their jobs. Jim's fellow employees had him tell Jay Witherite what he had seen.

Jay Witherite was Jim's immediate supervisor. Witherite testified that Jim was "very emotionally upset", "very distraught", to the point that Witherite "was afraid the man was going to have a heart attack or something the way he was acting." Jim reported to Witherite that he had observed Sandusky performing oral sex on the boy in the showers. Witherite tried to calm Jim,

who was cursing and remained upset throughout the shift. Witherite told him to whom he should report the incident, if he chose to report it.

Witherite testified that later that same evening, Jim found him and told him that the man he had seen in the shower with the young boy was sitting in the Lasch building parking lot, in a car. Witherite confirmed visually that it was Sandusky who was sitting in his car in the parking lot. Witherite says that this was between 10:00 p.m. and 12:30 a.m. Petrosky also saw Sandusky drive very slowly through the parking lot about 2 to 3 hours after the incident was reported to him by Jim, at approximately 11:30 p.m. to 12:00 a.m. Petrosky recognized Sandusky in his vehicle. Petrosky testified that Sandusky drove by another time, about two hours later, again driving by very slowly but not stopping. The second drive-by was between 2:00 and 3:00 a.m. Petrosky testified that Sandusky did not enter the building either time. The area is well lit and the coaches' cars were known to Petrosky.

Jim was a temporary employee at the Lasch Building, working there for approximately 8 months. No report was ever made by Jim Calhoun. Jim presently suffers from dementia, resides in a nursing home and is incompetent to testify. Victim 8's identity is unknown.

EXHIBIT 9

2013 WL 6143734 (Pa.Com.Pl.) (Trial Order)
Court of Common Pleas of Pennsylvania.
First Judicial District
Civil Trial Division
Philadelphia County

Richard A. SPRAGUE, Esquire, Plaintiff,
v.
Jill PORTER; Philadelphia Media Holdings, LLC; Philly Online, LLC; Philadelphia Newspapers, LLC; and PMH Acquisition, LLC, Defendants.

No. 100102930.
November 1, 2013.

*1 January Term, 2010
1649 EDA 2013
As Long as the Reason of Man Continues Fallible, and he is at Liberty to Exercise it, Different Opinions will be Formed
James Madison [1]

Opinion

Lisa M. Rau, Judge.

I. *STATEMENT OF THE CASE*

Philadelphia attorney Richard A. Sprague (Appellant) represented his friend State Senator Vincent Fumo during a federal investigation and prosecution for public corruption and obstruction of justice. Senator Fumo was charged, among other things, with deleting emails and wiping computer hard drives during the federal investigation. On February 8, 2007, Mr. Sprague called a press conference and stated that his client had "sought advice from a lawyer—not me—on whether to change his policy" before deleting emails during the federal investigation. Sometime later, Mr. Sprague's personal and professional relationship with Senator

Fumo changed and they parted ways. In February 2009, Mr. Sprague was called by the prosecution at Senator Fumo's criminal trial. Mr. Sprague testified that notwithstanding what he said at the press conference two years earlier, he had never believed Senator Fumo's claim of having relied upon legal advice when he purged emails: "Did I believe it? Of course not."

Philadelphia Daily News reporter Jill Porter had been covering the public corruption trial in her weekly column from the beginning. She attended the earlier press conference and the trial. Two days after Mr. Sprague's trial testimony, Ms. Porter wrote, "Sprague, once Fumo's beloved mentor and best friend, labeled Fumo a liar when he testified at Fumo's trial this week. But he acknowledged that he was something of a liar, too." Ms. Porter quoted Mr. Sprague's statements two years earlier at the press conference when he said Senator Fumo had relied upon a lawyer's advice in deleting the emails. She then quoted his recent trial testimony when he admitted that he had never believed the story he told about Senator Fumo's defense at the press conference. Ms. Porter posed questions in her column about Mr. Sprague's conduct:

"So one of the most powerful attorneys in Philadelphia believes that it's acceptable to deliberately mislead the public on behalf of a client?

That it's appropriate to vigorously perpetrate an untruth, as part of his legal obligation?"

See Ct. Ex. A, Jill Porter, *The law, duty, and truth*, PHILA. DAILY NEWS, Feb. 20, 2009, at 6, 12, attached; Defs.' Mot. Summ. J. Ex. 4. Ms. Porter answered the questions by writing that "Sprague's posturing on Fumo's behalf may not be officially unethical" but "it sure *seems underhanded and immoral to me.*" *See* id. (emphasis provided).

In response, Mr. Sprague filed suit for defamation and false-light invasion of privacy against Ms. Porter and the *Daily News*' entities (Appellees) that published the column on January 26, 2010. After discovery was complete, the Appellees moved for summary judgment and argued that Mr. Sprague failed to produce the legally required evidence that the published statements were false or not opinion, that they were made with malice, and that he suffered any damages. On May 17, 2013, this Court granted summary judgment on all four grounds because there was not sufficient evidence under the law for the claim to proceed to trial. This appeal followed.

II. *UNDISPUTED FACTS*

***2** Mr. Sprague represented his longtime friend[2] State Senator Vincent Fumo during a federal investigation and after he was indicted on federal corruption charges. In January 2004, Mr. Sprague met with prosecutors at the U.S. Attorneys' Office and learned that there was a grand jury investigation of Senator Fumo and a nonprofit organization to which he was connected, Citizens Alliance for Better Neighborhoods. (PL's Answer in Opp'n to Defs.' Mot. Summ. J. Ex. I, Sprague Dep. 244:12-13, Oct. 10, 2012.) On February 6, 2007, Senator Fumo was indicted with, among other things, obstruction of justice and conspiracy to obstruct justice for allegedly conspiring with his staff to delete emails and destroy electronic evidence after he learned of the federal investigation in January 25, 2004, and before he received a subpoena in February 2005. (Defs.' Mot. Summ. J. Ex. 12 & PL's Answer in Opp'n to Defs.' Mot. Summ. J. Ex. F, U.S. Dep't of Justice press release relating to indictment; *See also* Superseding Indictment at 193-262, *United States v. Fumo*, 2009 WL 1688482 (E.D. Pa. 2009) (Criminal Action No. 06-319); Defs.' Mot. Summ. J. Ex. 8, *United States v. Fumo*, Gov. Ex. 1476, & Ex. 9, *United States v. Fumo* Gov. Ex. 1545, emails from Sen. Fumo staffer Leonard P. Luchko).

2 Mr. Sprague described his relationship with Mr. Fumo as follows:

> "I would say that we became very, very close friends. I believe we had a father/son relationship. It was a—not only a close friendship, I looked upon him as a son. I believe he looked upon me as a father figure. And we traveled together, we did many things together, we worked together. It was as close a relationship, I believe, as you could have."

(Defs.' Mot. Summ. J. Ex. 1, *United States v. Fumo* Trial Tr. vol. 8, 84:23-85:3, Feb. 18, 2009).

During his deposition, Mr. Sprague testified that he had never believed Senator Fumo's defense relating to deleting the emails:[3]

3 The relevant issue in this defamation case is whether Ms. Porter defamed Mr. Sprague when she said he "made statements to the public and to a congressional committee that he didn't believe were true." (*See* Defs.' Mot. Summ. J. Ex. 4, Ms. Porter's article, Feb. 20, 2009.). The issue is not the truth of Senator Fumo's defense and the surrounding circumstances. That dispute was a central focus at Senator Fumo's federal criminal trial where he was convicted on March 17, 2009, for obstruction of justice and conspiracy to obstruct justice related to deleting emails. (Defs.' Mot. Summ. J. Ex. 5, Sprague Dep. 211:9-24, Dec. 10, 2012; *see also* Judgment in Accordance with the Verdict of the Jury, *United States v. Fumo*, 2009 WL 1688482 (E.D. Pa. 2009) (Criminal Action No. 06-319).) That dispute is irrelevant to this case. This case focuses on whether Ms. Porter defamed Mr. Sprague when she said he made public statements he didn't believe were true.

Q. And you didn't believe it, I mean, right from the beginning because of the way the story evolved; correct?

A. Well, you have to understand, I personally did not believe it, because of the circumstance of Fumo picking up the phone and calling somebody, exiting the office for a very short period of time, coming back and making the statement that I have said ....

Q. Right. So the way this all happened did not make it seem very credible to you; correct?

A. That's correct.... But the circumstances and the way it happened led me to doubt its accuracy and truthfulness ....

(Defs.' Mot. Summ. J. Ex. 5, Sprague Dep. 87:8-19; 88:3-7; 88:17-19, Dec. 10, 2012.) Mr. Sprague admitted that he "did not personally believe Mr. Scandone [a lawyer] had advised Senator Fumo that it was permissible under federal law not to retain any document that was not under subpoena." (Compl. ¶ 24.)

Nevertheless, on February 8, 2007, two days after Senator Fumo was indicted, Mr. Sprague called a press conference. He began by explaining why he called the press conference:

"... I am a firm believer, professionally, that a lawyer representing a client speaks in court. I do not give press conferences. It is a very rare event. ... I believe a lawyer, his duty is to say what he has to say and to present it in a courtroom. ... So why do I do it today? I'm doing it because for a great number of years now, while I have represented Vince Fumo, I have observed what I call malicious leaks by the prosecutor's office to the press.

*3 ...

It reached its climax with the indictment and the press conference that we observed and you attended by the U.S. Attorney.

...

I am here because I firmly believe in fairness. I believe in fairness for any individual, whether in civil matters or criminal matters, that is brought into court.

And I feel very strongly that what has occurred has been an effort by this prosecutor's office to issue an indictment that I suggest to you is full of twists, distortions, venal and salacious entries, deliberately taking statements that the government knows they have taken out of context, all for the purpose of having an effective public relations campaign by the prosecutor's office, not for the trial of the case in court, but because they feel that they want to win their case in the court of public opinion before the senator ever gets his day in court. And that is why I am here to respond."

(*See* Defs.' Mot. Summ. J. Ex. 2, Sprague Press Conf. Tr. 2:10-17, 3:4-9, 3:15-4:11, Feb. 8, 2007.) Mr. Sprague addressed the charges of deleting emails during the federal investigation:

"[W]hen Citizens' was, in the papers, under investigation, Senator Fumo went and sought advice from a lawyer, not me, but a lawyer, whether he had to change his policy.

And this has been told to the government. And that lawyer told Senator Fumo, no, you don't have to change your policy since you haven't been subpoenaed."

(*Id.* at 26:11-18.) Mr. Sprague described the indictment as a "fraud." (*Id.* at 27:18-24.) Mr. Sprague asserted that "this government, and Mr. Meehan knows" that when Senator Fumo deleted the emails he had received advice from a lawyer who had been relying on the *Arthur Andersen* case in telling Senator Fumo he did not have to change his email retention policy. (*Id.* at 26:10-11.) Mr. Sprague did not say at the press conference that he did not believe the statements he made nor did he

qualify the statements as having been what Senator Fumo told him was his defense. Mr. Sprague did not mention that the *Arthur Andersen*[4] case was decided after the purported legal advice and the email deletion. Mr. Sprague's statements to the press were presented as facts.

4 On January 25, 2004, the *Philadelphia Inquirer* published a story about the FBI's investigation of a deal involving Sen. Fumo, Verizon Communications, and Citizens Alliance for Better Neighborhoods (Pl.'s Answer to Defs.' Mot. Summ. J. ¶¶ 22 & 23 & Ex. O), soon after which Sen. Fumo's office began deleting emails (id at ¶ 26; Defs.' Mot. Summ. J. Exs. 8 & 9, emails from Sen. Fumo staffer Leonard P. Luchko); Mr. Sprague accepted service of a search warrant on Sen. Fumo's State Senate Office on February 28, 2005 (Pl.'s Answer to Defs.' Mot. Summ. J. ¶ 26). *Arthur Andersen* was not decided until May 31, 2005, after these events. (*Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005). *See also* Defs.' Mot. Summ. J. Ex. 5, Sprague Dep. 301:19-302:20, Dec. 10, 2012).

Later in November 2007, Mr. Sprague's law firm submitted a memorandum, approved by Mr. Sprague, to a Congressional subcommittee. (Defs.' Mot. Summ. J. Ex. 5, Sprague Dep. 374:8, Dec. 10, 2012). The memorandum argued that the federal prosecution of Senator Fumo was improperly politically motivated. (*See* Defs.' Mot. Summ. J. Ex. 3 & PL's Answer in Opp'n to Defs.' Mot. Summ. J. Ex. H, Sprague & Sprague Mem. to House Subcommittee on Commercial and Administrative Law, Nov. 21, 2007; *see also* PL's Answer in Opp'n to Defs.' Mot. Summ. J. ¶ 62.) a footnote of that memorandum stated,

***4** "The last broad category of charges relates to allegations of conspiracy to obstruct justice. In this regard, Senator Fumo is alleged to have conspired to obstruct the investigation. In pursuing these charges, the government intentionally ignored documentary evidence of a long standing document retention policy (that the investigation) [sic] and was followed until a search warrant was served in the Senator's office. The government also ignored uncontroverted evidence of the Senator's reliance upon (albeit erroneous) legal advice for much of the relevant period."

(Defs,' Mot. Summ. J. Ex. 3 & PL's Answer in Opp'n to Defs.' Mot. Summ. J. Ex. H, Mem. at 10, n.12.)

Mr. Sprague and Senator Fumo's relationship subsequently deteriorated. Senator Fumo hired new counsel. (*See* Defs.' Mot. Summ. J. & PL's Answer in Opp'n to Defs.' Mot. Summ. J. ¶ 65.) Senator Fumo then claimed that he had relied on Mr. Sprague and other Sprague firm attorneys who advised him that it was permissible to destroy documents that were not under subpoena notwithstanding the existence of a federal investigation.[5] (Compl. ¶ 17; *see also* PL's Answer in Opp'n to Defs.' Mot. Summ. J. Ex. J, *United States v. Fumo* Trial Tr. vol. 7 13:17-14:4, Feb. 11,2009.)

5 Mr. Sprague claimed that he never advised Senator Fumo that it was permissible to delete emails:
Q. Did Senator Fumo ever ask you whether his defense should be that you gave him the advice?
A. I believe that at the meeting in my office on that Friday, before Fumo made that call, he asked whether it was possible that he could say that he got that advice from me. One, it was pointed out that he didn't get that advice from me. But, secondly, even if it was so and I was to become a witness, that would disqualify me from representing him. I believe that occurred.
Q. Okay. And what was his reaction to the two things that were pointed out to him?
A. That led to his saying, what if I had an attorney who gave me that advice?
(Defs.' Mot. Summ. J. Ex. 5, Sprague Dep. 110:1-20, Dec. 10, 2012.).
Again, the dispute between Senator Fumo and Mr. Sprague is irrelevant to this defamation action. This action instead focuses on the truth of whether Mr. Sprague "made statements to the public and to a congressional committee that he didn't believe were true." (*See* Defs.' Mot. Summ. J. Ex. 4, Ms. Porter's article, Feb. 20, 2009.)

During Senator Fumo's trial in February 2009, the prosecution called Mr. Sprague as a witness. (*See* Defs.' Mot. Summ. J. & PL's Answer in Opp'n to Defs.' Mot. Summ. J. ¶ 71.) Senator Fumo's defense lawyer cross-examined Mr. Sprague about whether he believed what he said at the press conference and to the Congressional Subcommittee:

Q. Now, after the indictment in February of 2007, do you remember holding a press conference talking about this case?

A. Yes, I do.

Q. Dealing with some of the same issues that you dealt with when you later wrote to Congress; is that right?

A. That's correct.

Q. And do you remember again before the media saying, "Here the government is taking a position that once Fumo knew that CABN had been subpoenaed (even though Fumo wasn't), he should've changed his policies, notwithstanding the government knows that when CABN was under investigation, Senator Fumo went and sought advice from a lawyer, not me, but a lawyer, whether he had to change his policy." That's what you said to the media; is that right?

A. Absolutely. I said that to the media. I said it to the committee in Congress, and I referred and sent it to the government here. My belief had nothing to do with it.... [M]y duty, in terms of my client, was to convey what my client was saying. Whether I believed him or not was not the issue.

***5** ...

Q. And when you said to the Committee, that... it was uncontroverted, you didn't believe it; is that right?

A. It was uncontroverted. There was no one else to dispute it. Did I believe it? Of course not.

(See Defs.' Mot. Summ. J. Ex. 1, *United States v. Fumo* Trial Tr. vol. 8, 162:11-163:2, 163:5-7, 164:4-8, Feb. 18, 2009.) When Mr. Sprague was asked whether his "concept of proper advocacy includes lying to the press," he answered:

"I wouldn't put it that broadly, but I would put it that speaking up for your client to the press is part of it, and I guess I took a little bit of license saying it was from me, because I wanted the press to feel that it wasn't my client who was pushing me. I was doing it on behalf of my client."

(*Id.* at 204:12-18.)

A few days after Mr. Sprague's trial testimony, Ms. Porter wrote in her weekly column about Mr. Sprague's statements to the public and the letter to the Congressional Committee, his trial testimony, and his approach to client advocacy.

The entire article read:

The law, duty & truth

JILL PORTER

LAWYER RICHARD Sprague may have reveled in plunging the blade into his now-enemy Vince Fumo this week.

But he didn't do himself any favors.

Sprague, once Fumo's beloved mentor and best friend, labeled Fumo a liar when he testified at Fumo's trial this week.

But he acknowledged that he was something of a liar, too.

Sprague admitted that after Fumo was indicted in 2007, he made statements to the public and to a congressional committee that he didn't believe were true.

"My duty in terms of my client was to convey what my client was saying," he testified this week.

"Whether I believed him or not was not the issue."

So one of the most powerful attorneys in Philadelphia believes that it's acceptable to deliberately mislead the public on behalf of a client?

That it's appropriate to vigorously perpetrate an untruth, as part of his legal obligation?

That's sure to enhance the credibility of lawyers—such as it is.

Sprague's posturing on Fumo's behalf may not be officially unethical under the code of legal conduct, which specifically prohibits misleading a court but not the public.

But it sure seems underhanded and immoral to me.

Fumo is charged with, among other things, obstruction of justice for deleting e-mails pertinent to a federal corruption investigation that he knew was under way.

Fumo claims that Sprague and another attorney told him that it was legal to purge the information, despite the investigation, because he hadn't personally been subpoenaed.

Sprague testified on Wednesday that he had told Fumo no such thing.

But he acknowledged having written a letter to a congressional investigating committee that there was "uncontroverted evidence" that another lawyer had given Fumo such advice.

And he insisted the same thing at a 2007 news conference he called on Fumo's behalf, which I attended.

"Senator Fumo went and sought advice from a lawyer—not me—on whether to change his policy" of routinely deleting e-mails, Sprague said at the news conference.

"That lawyer told Senator Fumo, 'No, you don't have to change your policy because you haven't been subpoenaed.'"

***6** In court this week, Sprague contemptuously dismissed the idea that Fumo had been given such legal advice.

"Did I believe it?" he said in response to a question from Fumo's attorney, Dennis Cogan.

"Of course not."

Cogan chided him for not acknowledging that he didn't believe Fumo.

"Mister Cogan," Sprague said indignantly, "are you suggesting to this jury that I speak up for my client and at the same time tell the public that I don't believe my client? No lawyer would do that, and you know it."

But not every lawyer—or so you'd hope—would deliberately sell the public a bill of goods.

Lawyers are clearly prohibited from lying in court and in sworn testimony before, say, a legislature.

But lying in public "is not so clear," said Robert Tuttle, a professor of law at George Washington University School of Law.

Still, it's not considered "honorable" behavior, said Tuttle, an expert on legal ethics.

"And," he said, "here's the important point: It's not something that lawyers are expected to do in defense of your client."

Lawyers have no obligation to violate "ordinary moral standards on behalf of a client," Tuttle said.

When faced with an "awkward question," he said, "there's a big difference between deferring and deflecting a question and affirmatively lying.

"Even if it's not illegal, it suggests something about overstepping this role from somebody offering a lawful service to somebody who feels that their job is to protect this person at all costs."

So while Sprague may feel triumphant this week about being able to inflict damage on Fumo, he didn't do himself any favors, either. ◆

Email porter@phillynews.com or call 215-854-5850. For recent columns: http:// go.philly.com/porter

* * *

Ct. Ex. A. (*See also* Defs.' Mot. Summ. J. Ex. 4, Porter's article, Feb. 20, 2009; Defs.' Mot. Summ. J. & Pl.'s Answer in Opp'n to Defs.' Mot. Summ. J. ¶ 79.)

Mr. Sprague admitted that he was a public figure. (PL's Answer in Opp'n to Defs.' Mot. Summ. J. ¶ 18). No evidence was produced that the quotes in the article were not accurate. No evidence was proffered that additional quotes were necessary to provide context. No evidence was shown that Ms. Porter wrote anything in the article that she knew or strongly suspected as being false. No evidence was presented that anything in the article was false.

No evidence was presented as to any disagreements, acrimony, comments, or tension between Mr. Sprague and either Ms. Porter or owners of the *Daily News*. Mr. Sprague testified that he does not know Ms. Porter, personally or professionally, at all: "I may be in error, but, to the best of my recollection, the first contact I ever had of Jill Porter was when Mr. Beasley was taking her deposition in this case.... And if she had lunch with me, as I say, that went over my head.... [I]f she walked in here right now, I would not recognize her. I could not pick her out." (Defs.' Mot. Summ. J. Ex. 7, Sprague Dep. 127:19-24; 128:5-6; 128:23-129:1, Oct. 10, 2012.) Ms. Porter testified at deposition, "I had great respect for Mr. Sprague as an attorney," "I don't dislike Mr. Sprague" and "I really have no personal feelings about Mr. Sprague." (Defs.' Mot. Summ. J. Ex. 15, Porter Dep. 213:6-7, 167:9, 181:6-7, Feb. 8, 2012.)

***7** Mr. Sprague testified that he was good friends with Brian P. Tierney, the head of the ownership group that controlled the *Daily News* at the time the column was published. Mr. Sprague occasionally visited Mr. Tierney at his offices and had lunch with him. (Defs.' Mot. Summ. J. Ex. 7, Sprague Dep. 68:7-69:20, Oct. 10, 2012.) No evidence was presented of an effort by any defendant to knowingly present false information.

On the issue of reputational damage or other damage to his business, Mr. Sprague testified that though he was "shocked" and "furious" about the article (PL's Answer in Opp'n to Defs.' Mot. Summ. J. Ex. I, Sprague Dep. 159:20, 160:18-19, Oct. 10, 2012), he experienced no decline in work. Mr. Sprague has expressly admitted that he is "not seeking damages for harm to his law practice or business interests." (Defs.' Mot. Summ. J. Ex. 28, Pl.'s Supplemental Objections & Resps. to Defs.' 1st Set of Interrogs., Nos. 4 & 25, May 12, 2012; Ex. 32, PL's Resp. to Req. for Admis. & Accompanying Interrogs. & Doc. Reqs.,

No. 1.) He claims that he continues to be inundated with work opportunities and consequently can be very discriminating in the work he accepts. (Defs.' Mot. Summ. J. Ex. 5, Sprague Dep. 457:1-3, Dec. 10, 2012, citing Defs.' Mot. Summ. J. Ex. 33, Fredda Sacharow, *Power Personified*, PENN L.J., Spring 2009, at 2.) Mr. Sprague also conceded that Ms. Porter's column did not negatively affect his personal or family activities or relationships. (Defs.' Mot. Summ. J. Ex. 32, PL's Resp. to Defs.' Reqs. for Admis. & Accompanying Interrogs. & Doc. Reqs. Nos. 3 & 4.) Mr. Sprague offered his friend, Lynne M. Abraham, as a witness on damages but she testified that the only way Mr. Sprague's reputation has "changed notably" since the publication of Ms. Porter's column is that it has "become greater." (Defs.' Mot. Summ. J. Ex. 21, Abraham Dep. 54:12-15, Jan. 16, 2013.) No evidence was presented of actual damage to Mr. Sprague's reputation including anyone who thought less of him as a result of the article.

III. *LEGAL ANALYSIS AND CONCLUSIONS*

The First Amendment guarantees of free speech and press form the necessary backdrop upon which every state law defamation claim must be examined. Federal constitutional protections of speech and press impose limits on state tort law protections to reputation in defamation claims. To ensure freedom of speech and press, courts must carefully scrutinize defamation claims particularly in cases involving public figures or issues. The First Amendment requires that summary judgment is "essential" in such cases where minimum legal requirements have not been met. *First Lehigh Bank v. Cowen*, 700 A.2d 498, 502 (Pa. Super. Ct. 1997). Otherwise, if people are not protected from the expense and "harassment" of fighting lawsuits without legally sufficient evidence, people will "self-censor" and "free debate" will be compromised. *Id. See also New York Times, Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (noting that litigation costs alone can chill protected speech). If the press is constrained to the point of timidity out of fear of constant litigation, and if courts fail to step in when the claims obviously lack a basis, then society and democracy suffer greatly. The First Amendment requires that a public figure litigant demonstrate by clear and convincing evidence that an allegedly defamatory statement is false, or not opinion, and that it was made with actual malice. The litigant must also show that damages were sustained

***8** Mr. Sprague claimed that he was defamed by the *Daily News* article, that it was published with malice, and that he suffered damages. The focus of Mr. Sprague's claim was that the article:

"falsely and maliciously accused Mr. Sprague of 'affirmatively lying,' falsely asserted that Sprague admitted to being 'a liar' and wrongly impugned Sprague's 'legal ethics,' 'honor,' and moral standards."

(Compl. ¶ 42).

Pennsylvania tort law defines libel as "a maliciously written or printed publication which tends to blacken a person's reputation or expose him to public hatred, contempt or ridicule, or injure him in his business or profession." *Brophy v. Phila. Newspapers Inc.*, 422 A.2d 625, 628 (Pa. Super. Ct. 1980) (internal quotation omitted). An action in defamation "is based on a violation of the fundamental right of an individual to enjoy a reputation unimpaired by false and defamatory attacks." *Berq v. Consol. Freightways, Inc.*, 421 A.2d 831, 833 (Pa. Super. Ct. 1980).

In addition to demonstrating that the allegedly defamatory statements are not protected by the First Amendment, in Pennsylvania a person bringing a defamation claim bears the burden of proving:

"(1) The defamatory character of the communication.

(2) Its publication by the defendant.

(3) Its application to the plaintiff.

(4) The understanding by the recipient of its defamatory meaning.

(5) The understanding by the recipient of it as intended to be applied to the plaintiff.

(6) Special harm resulting to the plaintiff from its publication.

(7) Abuse of a conditionally privileged occasion."

Weaver v. Lancaster Newspapers, Inc., 926 A.2d 899, 903 (Pa. 2007) (citing 42 PA. CONS. STAT. ANN. § 8343(a)).

Statements of opinion based on disclosed facts are not defamation. *Baker v. Lafayette College*, 532 A.2d 399, 402 (Pa. 1987). There is no defamation if the communication is true. *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1985); *Spain v. Vicente*. 461 A.2d 833, 836 (Pa. Super. Ct. 1983). In the case of a public figure or public issue, the communication must be shown by clear and convincing evidence to be substantially false and made with actual malice. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).

After discovery was completed, the *Daily News* and Ms. Porter argued that summary judgment was mandated under Pennsylvania Rule of Civil Procedure 1035.2(2)[6] because:

6 Pennsylvania Rule of Civil Procedure 1035.2(2) provides for summary judgment if after discovery has been completed,

> "an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury."

(1) Mr. Sprague did not show clear and convincing evidence that any statement in the column was materially false, as the First Amendment requires of a defamation claim;

(2) The publication was an opinion based on disclosed facts, which does not constitute defamation;

(3) Mr. Sprague, a public figure, failed to provide clear and convincing evidence that Ms. Porter acted with actual malice; and

(4) Mr. Sprague did not show evidence that he suffered recoverable damages.

To survive summary judgment, Mr. Sprague had the burden of producing "sufficient evidence on an issue essential to his case and on which he bears the burden of proof such that a jury could return a verdict in his favor." *Ertel v. Patriot-News Co.*, 674 A.2d 1038, 1041-42 (Pa. 1996) (affirming trial court grant of summary judgment where plaintiff presented no evidence that statement published was false). Allegations are insufficient at this stage; actual evidence must be produced. *ToDay's Hous. v. Times Shamrock Commc'ns, Inc.*, 21 A.3d 1209, 1213 (Pa. Super. Ct. 2011) (quoting *Shepard v. Temple Univ.*, 948 A.2d 852, 856 (Pa. Super. Ct. 2008) (citations omitted)). Mr. Sprague *asserted* many things but failed to offer *evidence* sufficient for this action to survive a motion for summary judgment.

***9** It is this Court's duty to determine whether, viewing the evidence in the light most favorable to Mr. Sprague, he "failed to produce evidence of facts essential to the cause of action." Ertel, 674 A.2d at 1042 n.3 (Pa. 1996); *see also Heppsv. Phila. Newspapers, Inc.*, 485 A.2d 374 (Pa. 1984) (while existence or absence of actual malice is question of fact for jury in libel action, whether there is sufficient evidence to warrant such finding by jury is question of law for court). Mr. Sprague failed to show that the allegedly defamatory statements were not opinion, nor did he show clear and convincing evidence that they were false and that the article was published with malice. Mr. Sprague also did not show any evidence entitling him to damages. The absence of sufficient evidence of any one of these four essential elements is fatal to his claims. Here, there was insufficient evidence of all four. Since Mr. Sprague did not provide the required evidence, the law required that this Court grant summary judgment.

A. Pennsylvanians played a major role in modern jurisprudence of speech, press and defamation.

Pennsylvania has deep roots, having played a critical role, in our nation's laws governing free speech and press and their interplay with defamation. Pennsylvanians set the tone in terms of both the architecture of constitutional protections and their ensuing interpretation.

1. Andrew Hamilton

The principles underlying contemporary defamation law as it is limited by First Amendment protections were first enunciated by Andrew Hamilton, the well-known Philadelphia lawyer who inspired the term "Philadelphia lawyer."[7] In 1735, Andrew Hamilton travelled from Philadelphia to New York to represent a publisher who had been jailed and charged with libel for publishing essays, letters, and cartoons critical of the governor in the landmark case of *The Crown v. John Peter Zenger*,[8] Libel law at that time forbade direct criticism of the executive even if the criticisms were true. Mr. Hamilton argued that since "falsehood makes the scandal," truth should be a complete defense to libel:

7 Andrew Hamilton's extraordinary legal abilities made "Philadelphia lawyer" a "byword for a lawyer of exceptional prominence and ability." Robert R. Bell, *Philadelphia Lawyer a History 1735-1945*, 36 (1992) (hereinafter *Philadelphia Lawyer*). Mr. Hamilton left a number of other indelible marks on the City of Philadelphia. He was one of the earliest members of the Philadelphia Bar. Notably, Mr. Hamilton also helped plan Pennsylvania's historic Independence Hall. *See* Andrew Hamilton, http://www.britannica.com/EBchecked/topic/253392/Andrew-Hamilton (last visited Jun. 4, 2013).

8 Mr. Hamilton's argument in Zenger's trial in 1735 has been referred to as "the game of American Freedom, the morning star of that liberty which subsequently revolutionized America." *Philadelphia Lawyer* 27, 31, & 35; Burton Alva Konkle, *The Life of Andrew Hamilton 1676-1741: The Day-Star of the American Revolution*, 2, 70 (1941); James Alexander, *A Brief Narrative of the Case and Trial of John Peter Zenger: Printer of the Weekly Journal*, (Stanley Katz ed., The Belknap Press of Harvard University Press 1963) 70 (hereinafter *Trial of Zenger*).

"I beg leave to insist that the right of complaining or remonstrating is natural; and the restraint upon this natural right is the law only, and those restraints can only extend to what is *false*: For as it is truth alone which can excuse or justify any man for complaining of a bad administration .... *Truth* ought to govern the whole affair of libels."

Trial of Zenger at 32, 84 (emphasis in original). He argued that the party alleging the libel should have the burden to demonstrate falsehood before the case could be actionable. *Id.* at 84. Mr. Hamilton emphasized the importance of citizens' freedom to voice their opinions and complaints especially about those in power and sought to "quench the flame ... of the government to deprive a people of the right of remonstrating (and complaining too) of the arbitrary attempts of men in power." *Id.* at 99. The jury acquitted the publisher so there was no appeal. Consequently, Mr. Hamilton's vision of what should be required to prove defamation without unduly limiting the "liberty" of speech was not enunciated in written precedent. *Id.* **2. The Pennsylvania Constitution of 1776**

***10** In 1776, several months after the Declaration of Independence was signed in Philadelphia, Pennsylvanians drafted a constitution which was the first state constitution to provide for free speech and press:

"[T]he people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained."[9]

9 Seth F. Kreimer, *Protection of Free Expression: Article I, Sections 7 and 20*, in THE PENNSYLVANIA CONSTITUTION: a TREATISE ON RIGHTS AND LIBERTIES 251 N.3 (Ken Gormley, et al., eds., 2004). *See also* John L. Gedid, *History of the Pennsylvania Constitution, in id* at 45.

The Pennsylvania Constitution of 1776 then served as a template for the United States Constitution, which incorporated free speech and press provisions into its First Amendment enacted over a decade later, in 1791. John L. Gedid, *History of the Pennsylvania Constitution*, in THE PENNSYLVANIA CONSTITUTION: A TREATISE ON RIGHTS AND LIBERTIES 44, 45, 50 (Ken Gormley, et al., eds., 2004).

Pennsylvania's inaugural constitutional guarantees of freedom of speech and press have only grown more robust with time, with the current provision holding:

Freedom of Press and Speech; Libels.

The printing press shall be free to every person who may undertake to examine the proceedings of the Legislature or any branch of government, and no law shall ever be made to restrain the right thereof.

The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty.

No conviction shall be had in any prosecution for the publication of papers relating to the official conduct of officers or men in public capacity, or to any other matter proper for public investigation or information, where the fact that such publication was not maliciously or negligently made shall be established to the satisfaction of the jury; and in all indictments for libels the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases.

PA. CONST, of 1968, § 7 (emphasis provided).

B. For public figures or matters of public concern, the First Amendment requires that a plaintiff bringing a defamation claim meet a higher evidentiary burden to survive summary judgment.

The United States Constitution echoed the protections of "expression" through speech and press that Pennsylvania's Constitution guaranteed, but in a more prime location, the First Amendment:

Freedom of religion, press and expression: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or **abridging the freedom of speech, or of the press**; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST, amend. I (emphasis provided). Though the First Amendment protected freedom of the press from 1791 on, Mr. Hamilton's 1735 argument to the jury about balancing the protections of an individual's reputation with those of a free press waited over two centuries before it was fully adopted by the United States Supreme Court. In *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-81 (1964), the United States Supreme Court held that, to avoid a chilling effect on important public speech, the First Amendment requires a higher standard of proof when it comes to defamation claims brought by public officials. In *Sullivan*, the Supreme Court held that a public official who brings a defamation action must prove by clear and convincing evidence that the statement is false and that the defendant made the statement with "actual malice." *Id. See also Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1985) ("[A]s one might expect given the language of the Court in New York Times, a public-figure plaintiff must show the falsity of the statements at issue in order to prevail in a suit for defamation.") (internal citations omitted).

***11** The Supreme Court has explained that the First Amendment strictly protects free speech and press from being stifled, even at the risk that some publications may be inaccurate:

"[T]he stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies.... [T]o insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as the true ones."

St. Amant v. Thompson, 390 U.S. 727, 731-32 (1968). The Supreme Court warned that "erroneous statement is inevitable in free debate," and "it must be protected if the freedoms of expression are to have the breathing space that they need to survive." *Sullivan*, 376 U.S. at 271-72 (internal citations and quotations omitted). Publications are not required to be flattering or approved by the person to whom they refer. Such censorship would deaden the public's interest and obstruct active, intelligent involvement in public issues and government. Honest efforts to inform the public are constitutionally protected whereas maliciously and recklessly publicized lies about public figures or topics are not. *Id.*

In first articulating the actual-malice standard in *Sullivan*, the Supreme Court outlined the significance of free speech and press to the fabric of our nation and culture:

"It is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions, and this opportunity is to be afforded for vigorous advocacy no less than abstract discussion. The First Amendment, said Judge Learned Hand, 'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.'"

376 U.S. at 269-70 (internal quotes and citations omitted). "Actual malice" is shown if the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *Sullivan*, 376 U.S. at 279-80. The actual-malice standard reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks." *Id.* at 270.

The Supreme Court later extended the actual-malice standard to "public figure" plaintiffs who are not government officials. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 336-37 (1974) (quoting *Curtis Publ'q Co. v. Butts*, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring)); *Tucker v. Phila. Daily News*. 848 A.2d 113, 130 (Pa. 2004). In *Gertz*, the Supreme Court explained why public figures should be held to the same standard as public officials:

"More important than the likelihood that private individuals will lack effective opportunities for rebuttal, there is a compelling normative consideration underlying the distinction between public and private defamation plaintiffs. An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case.... Those classed as public figures stand in a similar position. Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own .... More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment."

***12** 418 U.S. at 344-45. Thus, a private citizen who gets involved in public controversies assumes the risk of that involvement, and must prove actual malice and falsity by clear and convincing evidence.

The United States Supreme Court also has held that speech on matters of public concern "is at the heart of the First Amendment's protection" and that such speech is, accordingly, entitled to special protection. *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 776 (1978). The Supreme Court has described the importance of the role of the press in matters of public concern:

"The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment."

Thornhill v. Alabama, 310 U.S. 88, 101-02 (1940). Consequently, the same higher evidentiary standards apply to defamation claims against those who are addressing issues of public concern: litigants must demonstrate clear and convincing evidence that the statements were false and were made knowing it was false or with reckless disregard for the truth (actual malice). *Gertz*, 418 U.S. at 335-37 & n.7.

Mr. Sprague has admitted that he is a public figure. (PL's Answer in Opp'n to Defs.' Mot. Summ. J. ¶ 18). Additionally, the article was about Mr. Sprague's former representation of a public official, Senator Fumo, during a federal investigation and prosecution for public corruption, is an issue of clear public concern. On every level, Mr. Sprague was required to meet the First Amendment's higher burden of proof to succeed: he needed to prove by clear and convincing evidence that the statements were false and made with actual malice.

C. Did Mr. Sprague Produce Clear and Convincing Evidence that the Statements at Issue Are False?

Mr, Sprague's claims are directed at the following passage:

"Sprague, once Fumo's beloved mentor and best friend, labeled Fumo a liar when he testified at Fumo's trial this week.

But **he acknowledged that he was something of a liar, too**.

Sprague admitted that after Fumo was indicted in 2007, **he made statements to the public and to a congressional committee that he didn't believe were true**.

...

So one of the most powerful attorneys in Philadelphia believes that it's acceptable to deliberately mislead the public on behalf of a client?

That it's appropriate to vigorously perpetrate an untruth, as part of his legal obligation?"

Ct. Ex. a (emphasis provided). Mr. Sprague takes issue with the Ms. Porter's answer to those questions and her questions to a law professor about the ethics and morality of "lawyers" lying in defense of their clients.

The column included statements of fact and opinions. With respect to the statements of fact, Mr. Sprague has the burden of proving by clear and convincing evidence that the offending statement was false to sustain his defamation claim (Compl. ¶¶ 40-48). *Hepps v. Phila. Newspapers, Inc.*, 485 A.2d 374, 389 (Pa. 1984). *See also Tucker v. Phila. Daily News*. 848 A.2d 113, 127-28 (Pa. 2004); *Ertel v. Patriot-News Co.*, 674 A.2d 1038, 1041 (Pa. 1996); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 n.6 (1990); *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 779, n.4 (1986). a statement that is "*substantially* true" cannot be defamatory, *Kilian v. Doubleday & Co.*, 79 A.2d 657, 660 (Pa. 1951) (emphasis added). "If it cannot be conclusively determined whether the publication was true or false, the plaintiff's claim must fail." *ToDay's Hous. v. Times Shamrock Commc'ns, Inc.*, 21 A.3d 1209, 1213 (Pa. Super. Ct. 2011); *see also Milkovich*, 497 U.S. at 17. Moreover, "[t]he law does not require perfect truth, so long as any inaccuracies do not render the substance and 'gist' of the statements untrue." *Today's Hous.*, 21 A.3d at 1215. Whether Mr. Sprague has presented sufficient evidence of falsity is a question of law for the court. *See* Ertel, 674 A.2d at 1042 (defendant newspaper was entitled to summary judgment where public-figure plaintiff produced no evidence that the article at issue was false, an essential element of a plaintiff's claim).

***13** Mr. Sprague did not show any evidence that Ms. Porter wrote anything false. He does not contest the accuracy of her quotations of his statements to the press where he articulates Senator Fumo's defense. Mr. Sprague does not argue that Ms. Porter misquoted his trial testimony where he acknowledges that he never believed Senator Fumo's defense even when he presented the defense at a press conference. Mr. Sprague also does not argue that Ms. Porter failed to disclose other crucial facts.

As Ms. Porter quoted. Mr. Sprague testified that he did not believe his own words at the press conference. Mr. Sprague's statements at the press conference were presented as a factual account of what actually occurred:

"[W]hen Citizens' was, in the papers, under investigation, Senator Fumo went and sought advice from a lawyer, not me, but a lawyer, whether he had to change his policy .... And that lawyer told Senator Fumo, no, you don't have to change your policy since you haven't been subpoenaed."

(*See* Defs.' Mot. Summ. J. Ex. 2, Sprague Press Conf. Tr. 26:11-18, Feb. 8, 2007.) Mr. Sprague did not qualify his statements at the press conference with "My client tells me" or "It is my client's position." Mr. Sprague never disclosed at the press conference that he did not believe what he was saying: that a lawyer had advised Senator Fumo that he could destroy emails during a pending federal investigation. Mr. Sprague did not say at the press conference what he later testified to under oath, when he was no longer representing Senator Fumo, that he never believed the "accuracy and truthfulness" of Senator Fumo's defense based on "the circumstances and the way it happened." [10] (Defs.' Mot. Summ. J. Ex. 5, Sprague Dep. 88:17-19, Dec. 10, 2012.) Indeed, Mr. Sprague testified that he did not even believe Senator Fumo had received *any* legal advice from Mr. Scandone much less advice on whether he could destroy emails during a federal investigation that involved his conduct. (*See* PL's Answer in Opp'n to Defs.' Mot. Summ. J. Ex. K, *United States v. Fumo* Trial Tr. vol. 8, 156:25-157:4, Feb. 18, 2009.) At trial, when asked, in the context of whether it was Mr. Fumo's idea to hold the press conference or his own, and whether his concept of proper advocacy included lying to the press, Mr. Sprague said, "[S]peaking up for your client to the press is part of it and *I guess I took a little bit of license saying that it was from me*, because I wanted the press to feel that it wasn't my client who was pushing me, I was doing it on behalf of my client." (*See* Defs.' Mot. Summ. J. Ex. 1, *United States v. Fumo* Trial Tr. vol. 8, 204:11-18, Feb. 18, 2009 (emphasis provided)).

10 Mr. Sprague's version of what took place at meetings with Senator Fumo when they discussed his defense to charges of deleting email and wiping the computer hard drive is as follows:

"... Senator Fumo said, I thought that I would have to be subpoenaed myself to be involved in an obstruction of justice, there'd have to be a subpoena on me, and if there was no subpoena, I could do what I want.

...

And Senator Fumo, when he was asked by Sheppard, 'Where'd you get that crazy idea,' said, 'Well, that's what I thought, but it would help me if I had a lawyer who gave me that advice.' And we said, sure, it would help you if you had a lawyer who had given you that advice. That was really that part of that meeting.

...

We were having that meeting in my office, and Senator Fumo said again, what if I had a lawyer who gave me that advice that I would have to have been subpoenaed before anything would affect, would that help me, and I said, yes, it would. And he then took out his cell phone and he called somebody, and then he left my office, and I believe he went downstairs. I didn't see him go downstairs, but he came back up very quickly, and said, I have a lawyer who will say he gave me that advice. And I asked, who is that. And he said, it is Robert Scandone.

...

What he said was, was that Mr. Scandone will be the lawyer who will testify—will say he gave me that advice, and he's basing it on the *Arthur Andersen* case.

...

Q. Okay. Now, did you raise with him at that time, did it occur to you that the *Arthur Andersen* case was decided in May of 2005, after all the events of 2004?

A. I didn't raise a thing...."

(Defs.' Mot. Summ. J. Ex. 1. *United States v. Fumo* Trial Tr. vol. 8, 137:21-25; 138:12-17; 142:15-24; 144:9-11; 144:14-17, Feb. 18, 2009.) Again, the issue in this defamation case is not what happened that led Senator Fumo and his staff to delete emails, which was central to the federal criminal trial, but rather whether Ms. Porter's statement was substantially true that Mr. Sprague said things "to the public ... that he didn't believe were true." Ct. Ex. A.

***14** Ms. Porter commented that Mr. Sprague "acknowledged that he was something of a liar" when "he made statements to the public and to a congressional committee that he didn't believe were true." Mr. Sprague's testimony at Senator Fumo's trial shows that this is a true characterization of the facts: "Absolutely. I said that to the media. I said it to the committee in Congress, and I referred and sent it to the government here. My belief had nothing to do with it." He continued by saying, "Did I believe it? Of course not." (*See* Defs.' Mot. Summ. J. Ex. 1, *United States v. Fumo* Trial Tr. vol. 8, 162:25-163:2, 164:8, Feb. 18, 2009.) Indeed, Mr. Sprague testified about whether he had ever believed that Senator Fumo had received legal advice from Mr. Scandone: "I doubted the truth of it very much from the beginning." (*See* Pl.'s Answer in Opp'n to Defs.' Mot. Summ. J. Ex. K, *United States v. Fumo* Trial Tr. vol. 8, 157:4, Feb. 18, 2009.) Nevertheless, Mr. Sprague said at the press conference:

"Senator Fumo went and sought advice from a lawyer, not me, but a lawyer, whether he had to change his policy .... And that lawyer told Senator Fumo, no, you don't have to change your policy since you haven't been subpoenaed."

(*See* Defs.' Mot. Summ. J. Ex. 2, Sprague Press Conf. Tr. 26:11-18, Feb. 8, 2007.) Thus, Mr. Sprague admitted that he said things at a public press conference that he did not believe to be true.

In addition to not producing evidence of falsity, Mr. Sprague takes a puzzling stance in arguing that the Appellees knew that criminal defense counsel often say things on behalf of their clients that they do not believe to be true. His counsel argues that Ms. Porter's "branding Mr. Sprague as a self-confessed liar for doing what they knew was the customary advocacy of criminal defense counsel reeks of a deliberate avoidance of the truth." (Pl.'s Mem. of Law in Opp'n to Defs.' Mot. Summ. J. 18.)[11] Mr. Sprague seems to be making a tacit admission to what Ms. Porter said about him: that "he made statements to the public ... that he didn't believe were true." Ct. Ex. A. Mr. Sprague's counsel argues that lawyers often do this and it is part of "vigorously represent[ing]" a client. (Pl.'s Mem. of Law in Opp'n to Defs.' Mot. Summ. J. 25.) But in arguing that lawyers do this all the time as part of zealous advocacy, Mr. Sprague does nothing to disprove Ms. Porter's factual statements in her column: Mr. Sprague said things he didn't believe to be true at a press conference in the interest of his client. Indeed, Mr. Sprague's response is that what he did is frequently done by lawyers in representing their clients. Whether or not it is typical for lawyers to present statements to the public that they do not believe to be true on behalf of their clients—an assertion that is apt to incite heated debate within the legal community—has nothing to do with whether Ms. Porter's reporting that this is what Mr. Sprague did was false. Mr. Sprague's counsel seems to be arguing his opinion in defense of Mr. Sprague's conduct rather than proving by clear and convincing evidence that Ms. Porter reported something untrue about Mr. Sprague's conduct.

11 The bold assertion about what is "customary advocacy of criminal defense counsel" sidesteps the central issues in this case and is irrelevant. Consequently, the Court need dwell no further on this rather dubious and unsubstantiated assertion. Whether or not some other criminal defense counsel also do what Mr. Sprague did here does nothing to prove that Ms. Porter *incorrectly reported* anything about what Mr. Sprague said or did.

There was an absence of the requisite evidence that any portion of what Ms. Porter wrote was false. Mr. Sprague failed to demonstrate evidence that Ms. Porter's statement that he "admitted he was a bit of a liar" is not true. Even a statement that is only *substantially* true is not actionable defamation. *Kilian*, 79 A.2d at 660. Ms. Porter's statement that Mr. Sprague acknowledged he is something of a liar is an inference compelled by Mr. Sprague's own words. Mr. Sprague admitted that he did not believe what he represented to the public as the truth. It was Mr. Sprague's burden to show by clear and convincing evidence that what Ms. Porter wrote was false. He did not do that. He simply asserted that he did not admit that he was a liar. His trial testimony of "Did I believe it? Of course not." contradicts that assertion. At a minimum, he failed to meet the significant burden of showing clear and convincing evidence of falsity that the First Amendment attaches to allegedly defamatory statements.

D. Did Mr. Sprague Produce Evidence that the Statements at Issue Are Not Opinions Based on Disclosed Facts?

***15** Ms. Porter's weekly column disclosed facts as outlined above, and it also expressed her opinion about those facts. "If there is any rule established by universal assent, it is that words which impute an offence against morality, are not actionable

unless the offence be indictable, or induce some legal disability." *Harvey v. Boies*, 1 Pen. & W. 12, 13 (Pa. 1829). Ms. Porter's column simply commented that in her opinion Mr. Sprague's conduct seemed "underhanded and immoral to me." "Statements which represent differences of opinion or are annoying or embarrassing, are, without more, not libelous." *Bogash v. Elkins*, 176 A.2d 677, 679 (Pa. 1962).

Mr. Sprague believes that his statements were justified in pursuit of zealous advocacy for his client, while Ms. Porter believes that such false statements are unjustified. This is a difference of opinion, based on disclosed facts, about whether it is morally acceptable for a lawyer to publicly lie on behalf of a client. [12] Ms. Porter fairly characterizes Mr. Sprague's behavior in a certain way that he dislikes. However, personal judgments about whether an act is moral or immoral cannot be proved true or false, and are not defamation.

12 This Court notes that in *Greene v. Street*, Mr. Sprague, in representing former Mayor John Street, argued in preliminary objections that Mr. Street's claim that Mr. Greene, a public figure, "lied about everything" was non-defamatory opinion. (*See* Defs.' Mot. Summ. J. Ex. 22 at 2; *Greene v. Street*, (Court of Common Pleas, Philadelphia County, Case No. 1212-0303;Control No. 10122978). The trial court accepted Sprague's argument and granted the preliminary objections. Defs.' Mot. Summ. J. & PL's Answer in Opp'n to Defs.' Mot. Summ. J. ¶ 118; 2011 WL 10525400 (Pa. Com. Pl. Aug. 4, 2011), affd, 60 A.3d 855 (Pa. Super. Ct. 2012), *appeal denied*, 64 A.3d 632 (Pa. 2013). The trial court wrote, "this statement is a mere opinion based on already disclosed facts. Street was simply stating his personal subjective view and, as such, his statement is not capable of defamatory meaning. Moreover, this opinion was based on facts already in the public purview." *Id.* The Superior Court denied the appeal of the trial court's decision that saying a public figure "lied about everything" was opinion, not defamation. *Id.*

Ms. Porter's opinion column was focused precisely on her opinion about the propriety or morality of a lawyer who engages in such conduct. She asked the question of whether misleading the public on behalf of a client was right:

"So one of the most powerful attorneys in Philadelphia believes that it's acceptable to deliberately mislead the public on behalf of a client?

That it's appropriate to vigorously perpetrate an untruth, as part of his legal obligation?"

Ct. Ex. A. She then gave her opinion that even though it "may not be officially unethical under the code of legal conduct, which specifically prohibits misleading a court but not the public .... it sure seems underhanded and immoral" to her. *Id.* Indeed, her point was that she disagreed with lawyers' misleading the public by saying things they did not believe to be true. Mr. Sprague apparently disagrees with her opinion.

Difference of opinion is not legally actionable defamation. "[0]pinion without more does not create a cause of action in libel. Instead, the allegedly libeled party must demonstrate that the communicated opinion may reasonably be understood to imply the existence of undisclosed defamatory facts justifying the opinion." *Baker v. Lafayette College*, 532 A.2d 399, 402 (Pa. 1987) (internal citations and quotations omitted). Ms. Porter's statements in her weekly column were her opinion, and the facts upon which she based that opinion were fully disclosed. There is no dispute that she accurately quoted Mr. Sprague's testimony: "My duty in terms of my client was to convey what my client was saying. Whether I believed him or not was not the issue." Ms. Porter also accurately quoted Mr. Sprague's press conference, where he says that Mr. Fumo sought advice from another lawyer who gave him erroneous advice about whether he had to save documents during a federal investigation and his contention to Congress about "uncontroverted evidence" about this advice. Ms. Porter quoted Mr. Sprague's testimony: "Did I believe it? Of course not." Ms. Porter even quoted Mr. Sprague's rationale: "[A]re you suggesting to this jury that I speak up for my client and at the same time tell the public that I don't believe my client? No lawyer would do that, and you know it."

***16** At deposition, Mr. Sprague stated that he did not share Ms. Porter's view: he could not be a liar because "it is my duty, notwithstanding my own opinion, without personal knowledge, to present... my client's standpoint." (Defs.' Mot. Summ. J. Ex. 5, Sprague Dep. 397:16-20, Dec. 10, 2012.) Mr. Sprague also said at his deposition, "Well, you have to understand, I personally

did not believe it, because of the circumstance of Fumo picking up the phone and calling somebody, exiting the office for a very short period of time, coming back and making the statement that I have said." (*Id.* at 87:12-19.)

In Ms. Porter's opinion, according to her column, it is "underhanded and immoral" for a lawyer to present as fact to the public something the lawyer does not believe to be true—in other words, to lie. Whether and when it may be morally acceptable to deceive is a philosophical debate as old as humanity itself. [13] Ms. Porter's expression of an opinion different from Mr. Sprague's on this question of morality is not actionable defamation. Ms. Porter gives her readers the facts, so they can determine whether they agree that Mr. Sprague's approach to advocacy involved immoral lying. Ms. Porter quotes Mr. Sprague, and Mr. Sprague bristles at the way her opinions distill and characterize his words and deeds.

13 Immanuel Kant said that it is never acceptable to signal thoughts one does not have. By contrast, Socrates said that a lie that serves the greater good may be moral. (*See* Lectures on Ethics [Vorlesungen uber Ethik] at 27:700 [p. 426] (1924), trans. Peter Heath and ed. Peter Heath & J.B, Schneewind (Cambridge: Cambridge Univ. Press, 1997); Republic II 382b-382d.)

Ms. Porter's rhetorical questions represent inferential opinions based on disclosed facts. Ms. Porter's questions communicate not that Mr. Sprague came out and said those exact words but that those conclusions are fairly inferred from what Mr. Sprague did say. Opinion columns are often suffused with rhetorical questions that fairly arise from disclosed facts. This Court must determine whether a statement is capable of the defamatory meaning that the plaintiff claims it has; if it is not, this Court must dismiss a complaint rooted in such a statement. *Baker*, 532 A.2d at 402.

Mr. Sprague says that he did not actually utter the words, "I am something of a liar." (Compl. ¶¶ 27-28.) Of course he didn't; if he had, Ms. Porter presumably would have quoted those words in her column. Instead, Ms. Porter quotes his admission that he did not believe his words at the time he said them, and then draws the inference that he was "something of a liar." No fair reading of her column could conclude that Ms. Porter was misquoting Mr. Sprague as having said "I told a lie" or "I am a liar." Mr. Sprague further says that he did not actually utter the contents of Ms. Porter's rhetorical questions. (Compl. ¶¶ 29-30.) But, of course, the column does not say otherwise: Ms. Porter simply quotes Mr. Sprague's testimony, and then poses questions about his actions. Ms. Porter is offering her inferential opinions of the implications of his testimony.

Mr. Sprague further argues that Ms. Porter's quotations of Prof. Robert Tuttle—which are reported accurately—suggest that Prof. Tuttle was calling Mr. Sprague a liar. (Compl. ¶ 36.) This is not a fair reading, either. Ms. Porter first lays out the facts and expresses her inferential opinions about them. Then, after a break in the column signaled by white space and a line, she quotes Prof. Tuttle about *general* questions of truth, ethics, and the law. Prof. Tuttle refers not to Mr. Sprague but explicitly to "lawyers" generally and ethical requirements that govern them:

***17** [L]ying in public "is not so clear," said Robert Tuttle, a professor of law at George Washington University School of Law.

Still, it's not considered "honorable" behavior, said Tuttle, an expert on legal ethics.

"And," he said, "here's the important point: It's not something that lawyers are expected to do in defense of your client."

Lawyers have no obligation to violate "ordinary moral standards on behalf of a client," Tuttle said.

When faced with an "awkward question," he said, "there's a big difference between deferring and deflecting a question and affirmatively lying.

"Even if it's not illegal, it suggests something about overstepping this role from somebody offering a lawful service to somebody who feels that their job is to protect this person at all costs."

There is no evidence that Ms. Porter meant for Prof. Turtle's comments about ethical rules governing lawyers generally were to be understood to refer to Mr. Sprague specifically. The column itself, including the context in which Prof. Turtle's comments are placed, shows exactly the opposite. Ms. Porter reached her inferences and opinions about Mr. Sprague on her own, and she also presented an opinion on ethics and honor generally by an expert who does not even once refer to Mr. Sprague as an individual or the specific scenario at issue. Indeed, Ms. Porter concludes that it "may not be officially unethical" to "deliberately sell the public a bill of goods." Then she offers what is clearly her own opinion: "[I]t sure seems underhanded and immoral *to me*" (emphasis added).

In his claim, Mr. Sprague does not challenge Ms. Porter's verbatim quotations of his words or account of his actions. Instead, he disagrees with her opinion about the morality of his words and actions. Their public disagreement is not a *factual* dispute; it is a *philosophical* dispute. She disagreed with his approach to lawyering, just as he disagreed with her opinion about his approach. Defamation does not lie for disagreements over opinions or opinions that may not flatter the subject.

E. Did Mr. Sprague Demonstrate Sufficient Evidence of Actual Malice?

Mr. Sprague's defamation claim also fails because he offers no clear and convincing evidence of actual malice. To make a statement with actual malice is to make that statement "with knowledge that it was false or with reckless disregard of whether it was false or not." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). Falsity is a necessary precondition to actual malice. *See St. Amant v. Thompson*, 390 U.S. 727, 730 (1968) (defamation plaintiff has "the burden of proving that the *false* statements ... were made with actual malice as defined in *New York Times Co. v. Sullivan* and later cases" (emphasis added)). Because Mr. Sprague cannot show that anything that Ms. Porter wrote was false, he cannot possibly show actual malice. However, even if Mr. Sprague had shown evidence of falsity, he has not shown Ms. Porter wrote anything in the article knowing it was false or recklessly disregarding the truth.

The question of whether a plaintiff has produced clear and convincing evidence of actual malice is initially a question of law for the court:

***18** "The question whether the evidence in the record in a defamation case is of convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.'"

Curran v. Phila. Newspapers, Inc., 546 A.2d 639, 644 (Pa. Super. Ct. 1988) (quoting *Bose Corp. v. Consumers Union, 466 U.S. 485, 510-11 (1984))*; *see also Hepps v. Phila. Newspapers, Inc.*, 485 A,2d 374, 387 (Pa. 1984) (while existence or absence of actual malice is question of fact for jury in libel action, whether there is sufficient evidence in a case to warrant such finding by jury is question of law for court).

Demonstrating actual malice is a difficult burden because it "implies at a minimum that the speaker entertained serious doubts about the truth of his publication, ... or acted with a high degree of awareness of... probable falsity." *Am. Future Sys. Inc., v. Better Bus. Bureau*, 923 A.2d 389, 395 n.6 (Pa. 2007) (quotations omitted); *see also Garrison v. Louisiana*, 379 U.S. 64, 74 (1964); *Brophy v. Phila. Newspapers Inc.*, 422 A.2d 625, 629-34 (Pa. Super. Ct. 1980). The United States Supreme Court has emphasized that the actual-malice requirement is a subjective standard, not an objective standard: showing that a defendant *should have* seriously doubted the accuracy of her story is insufficient. *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989). The focus in determining actual malice is not whether the statement was false but whether the publisher knew that the statement was false or probably false when it was published. a plaintiff cannot prevail without clear and convincing evidence of such a "calculated falsehood." *Garrison*, 379 U.S. at 75. In "determining whether the constitutional standard has been satisfied ... the court must consider the factual record in full." *Harte-Hanks*, 491 U.S. at 688.

Furthermore, it is "worth emphasizing that the actual malice standard is not satisfied merely through a showing of ill will or 'malice' in the ordinary sense of the term." *Harte-Hanks*, 491 U.S. at 666. Indeed, "[t]he phrase 'actual malice' is unfortunately confusing in that it has nothing to do with bad motive or ill will." *Id.* at n.7. "Actual malice under the *New York Times* standard should not be confused with common-law malice or the concept of malice as an evil intent or a motive arising from spite or ill will." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991).[14] "Actual malice focuses on the defendant's attitude towards *the truth*, whereas common law malice focuses on a defendant's attitude towards *the plaintiff*." *DeMary v. Latrobe Printing & Publ'g Co.*, 762 A.2d 758, 764 (Pa. Super. Ct. 2000) (emphasis provided). Thus, in the absence of evidence of calculated falsity, evidence of ill will and animus (Compl. ¶ 32) are red herrings.

14 More specifically, "common law malice" involves conduct that is "outrageous, malicious, wanton, reckless, willful, oppressive, the result of bad motive, or reckless indifference to the rights of others." *DiSalle v. P.G. Publ'g Co.*, 544 A.2d 1345, 1369 (Pa. Super. Ct. 1988) (internal citation and quotations omitted). It also involves "a necessary degree of evil volition toward the plaintiff." Id.

***19** Although evidence of ill will may be considered in determining whether a defendant acted with knowledge or reckless disregard of falsity, *Weaver v. Lancaster Newspapers, Inc.*, 926 A.2d 899, 906 (Pa. 2007), ill will alone cannot meet the legal standard of actual malice. *Lewis v. Phila. Newspapers, Inc.*, 833 A.2d 185, 192 (Pa. Super. Ct. 2003). Writing true things with disapproval or even ill will is not actual malice in the legal sense applicable here. Actual malice must involve knowledge of falsity or reckless disregard of falsity: the subjective entertainment of serious doubts about the statement's truth. The utterance of something *true* with disapproval, or even ill will, therefore cannot be evidence of the "actual malice" legally necessary to support this defamation claim.

Here, however, evidence of any ill will is absent. Mr. Sprague said he was friends with Brian P. Tierney, the head of the ownership group that controlled the *Daily News* at the time the column was published. (Defs.' Mot. Summ. J. Ex. 7, Sprague Dep. Sprague Dep. 68:7-69:20, Oct. 10, 2012.) Mr. Sprague previously represented Mr. Tierney and continued a friendly relationship with him by visiting him at least four or five times since he took over the "running" of the paper. *Id.* Mr. Sprague claimed that he did not know Ms. Porter personally until her deposition in this case. (Defs.' Mot. Summ. J. Ex. 7, Sprague Dep. 127:19-24; 128:5-6; 128:23-129:1, Oct. 10, 2012.) For her part, Ms. Porter testified that "I don't dislike Mr. Sprague", and "I really have no personal feelings about Mr. Sprague" (Defs.' Mot. Summ. J. Ex. 15, Porter Dep. 167:9,181:6-9, Feb. 8, 2012). She also testified that she had written articles that were both favorable and unfavorable to him over the years, (*Id.* at 168:1-3, 134:1-6.) Mr. Sprague cited an email sent to Ms. Porter by her colleague, Dave Davies, after the column had been published: "I like that you led with a hard right to the jaw." (PL's Mem. of Law in Opp'n to Defs.' Mot. Summ. J. 46-47 & Ex. S, Davies Dep. 26:24-27:8, Oct. 16, 2012.) a compliment about an article by a colleague, who had no control over the content of the paper or its publication, made after the article was printed could not possibly be imputed as evidence of malice that Ms. Porter or the publisher published something knowing it was false or with reckless regard for whether it was false. Mr. Sprague's reliance on that comment speaks volumes about the dearth of evidence as to actual malice.

Even if Mr. Sprague were able to show that the statements were false and that Ms. Porter failed to investigate their truthfulness carefully (Pl.'s Mem. of Law in Opp'n to Defs.' Mot. Summ. J. 39-43), these would still be insufficient grounds upon which Mr. Sprague could bring a defamation claim. The United States Supreme Court and Pennsylvania courts have consistently held that mere negligence by a reporter in investigating a story does not amount to actual malice:

"Mere negligence or carelessness is not evidence of actual malice. a defendant's failure to verify his facts may constitute negligence, but does not rise to the level of actual malice. That is, while it arguably may be negligent not to check independently the veracity of information before publication, this fault does not rise to the level of actual malice."

Reiter v. Manna, 647 A.2d 562, 565 (Pa. Super. Ct. 1994) (internal citations and quotations omitted); *see also Bartlett v. Bradford Publ'g, Inc.*, 885 A.2d 562, 564 (Pa. 2005) (departure from journalistic ideals not actual malice); *Tucker v. Phila. Daily News*, 848 A.2d 113, 130 (Pa. 2004) (failure to interview plaintiff before publication insufficient evidence of actual malice); *Lewis v. Phila. Newspapers, Inc.*, 833 A.2d 185, 193 (Pa. Super. Ct. 2003) ("a failure to investigate will not alone support a finding of

actual malice") (internal citations omitted). The Pennsylvania Supreme Court emphasized this point in *Tucker*, when the public-figure plaintiffs sued two newspaper companies for reporting that plaintiffs were seeking ten million dollars in damages to their sex life in their lawsuit against members of the music industry. 848 A.2d at 119. The plaintiffs argued that the newspapers failed to investigate the story properly or interview the best sources, ignored a press release by the plaintiffs, and relied on a biased statement by an opposing attorney. The Pennsylvania Supreme Court held that such reporting, even if it was not ideal, failed to establish actual malice. *Id.* at 135-36. Thus, even if Ms. Porter's actions could be characterized as negligent, for which there has been no evidence, negligent reporting does not amount to actual malice.

***20** Likewise, the U.S. Supreme Court has expressly rejected an actual-malice standard predicated upon "a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 666 (1989) (quotations and citations omitted). Actual malice is a fault standard predicated on the need to protect public discourse from being muffled. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 288 (1964); *Tucker*, 848 A.2d at 130.

Mr. Sprague has provided no information that Ms. Porter did not investigate the facts behind her comments. Ms. Porter personally attended both events about which she reported, Mr. Sprague's press conference and his testimony at trial. She accurately quoted his statements in both places. He claimed no misquotes or omissions. Ms. Porter did not have to *seek* Mr. Sprague's comments on the matter because she already *quoted* his comments verbatim. Even if she had sought comment, received a denial, rejected the denial, and published the story anyway, that would not amount to actual malice. *Harte-Hanks*, 491 U.S. at 692 n.37. There was no lack of investigation, there was no falsity, and there was no actual malice.

This Court granted Defendants' summary judgment motion because Mr. Sprague failed to produce any evidence, much less clear and convincing evidence, that Ms. Porter published the comments contained in her column with actual malice—"with knowledge that it was false or with reckless disregard of whether it was false or not." *Sullivan*, 376 U.S. at 279-80. In addition to not showing that Ms. Porter wrote anything false, he has failed to show any careless or reckless conduct in her reporting nor has he proffered any evidence that Ms. Porter or her publishers harbored any ill will toward him. Ms. Porter's column included Mr. Sprague's own words and Ms. Porter's inferences from and opinions about the implications of Mr. Sprague's words.

F. Did Mr. Sprague Present Evidence of Recoverable Damages?

Mr. Sprague sought damages, including punitive damages, against Defendants, for reputational harm as well as emotional distress and mental anguish (Compl. ¶ 46). Federal constitutional law limits the ability of a public figure plaintiff to recover damages, including punitive damages, without clear and convincing evidence of falsity or actual malice. However, even if Mr. Sprague had presented sufficient evidence of falsity or actual malice, Pennsylvania law still requires that he provide evidence of actual damages that would entitle him to relief. *Walker v. Grand Cent. Sanitation, Inc.*, 634 A.2d 237, 244 (Pa. Super. Ct. 1993). The most evidence that Mr. Sprague proffered was that the article "upset" him and made him "furious." (Pl.'s Answer in Opp'n to Defs.' Mot. Summ. J. Ex. N, Podraza Dep. 71:3-4, 74:8-9, Oct. 9, 2012; Pl.'s Answer in Opp'n to Defs.' Mot. Summ. J. Ex. I, Sprague Dep. 160:18-19, Oct. 10, 2012.) Personal upset is insufficient evidence of damages under the law. Thus, the lack of evidence of damages alone supports summary judgment on Mr. Sprague's claims.

Under federal constitutional law, a public-figure plaintiff may not recover damages in a defamation action unless he proves actual malice. The United States Supreme Court in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, made clear that

"a public official cannot recover damages for a defamatory falsehood unless he proves that the false statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not. In later cases, all involving public issues, the Court extended this same constitutional protection to libels of public figures."

***21** 472 U.S. 749, 755 (1985) (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967) (internal citations omitted)). As discussed, Mr. Sprague did not submit evidence of falsity and consequently could not show actual malice, and thereby is precluded from any recovery for damages.

Even had Mr. Sprague met his burden of proving falsity and actual malice, he failed to show sufficient evidence of actual damages to entitle him to relief. He provided no evidence of reputational damage even from his own witnesses, one of whom described his reputation as being "greater" after the article. (Defs.' Mot. Summ. J. Ex. 21, Abraham Dep. 54:12-15, Jan. 16, 2013.) Not one witness was offered who claimed to think less of him after the article. Statements that the article was "capable" of damaging a person's reputation (PL's Answer to Defs.' Mot. Summ. J. Ex. A, Abraham Dep. 102:16-19, Jan. 16, 2013), without any evidence that it actually did, are insufficient to constitute evidence of reputational damage. *See Walker v. Grand Cent. Sanitation, Inc.*, 634 A.2d 237, 240 (Pa. Super. Ct. 1993) ("Any defamation action begins with the court's legal determination of whether the spoken words are capable of impugning the reputation of the person who alleges the defamation.").

Mr. Sprague assertions that he was "upset" and suffered "intense emotional turmoil" without more are insufficient evidence of damages under the law. (Pl.'s Answer in Opp'n to Defs.' Mot. Summ. J. ¶¶ 19 & 95; Defs.' Mot. Summ. J. Ex. 28, PL's Supplemental Objections & Resps. to Defs.' 1st Set of Interrogs., No. 28, May 12, 2012.) He lacked the requisite expert testimony to attest to his emotional harm. Whether an allegedly defamatory statement upsets one's friends has nothing to do with whether one has suffered actual damages. (PL's Answer in Opp'n to Defs.' Mot. Summ. J. Ex. I, Sprague Dep. 158:17-19, Oct. 10, 2012.) Mr. Sprague sought no damage to his business since he claimed that he currently had more cases than he could handle. (Defs.' Mot. Summ. J. Ex. 5, Sprague Dep. 457:1-3, Dec. 10, 2012.) His personal and family relationships were unchanged by the article. (Defs.' Mot. Summ. J. Ex. 32, Pl.'s Resp. to Defs.' Reqs. for Admis. & Accompanying Interrogs. & Doc. Reqs. Nos. 3 & 4.) Mr, Sprague's own evidence thus undermines the very inference of damages he demands,

In Pennsylvania, damages in defamation cases cannot be presumed. *Walker*, 634 A.2d at 244. "*Every* defamation plaintiff must *prove* 'actual harm.'" *Pilchesky v. Gatelli*, 12 A.3d 430, 444 (Pa. Super. Ct. 2011) (emphasis added). "It is not enough that the victim of the statements be embarrassed or annoyed, he must have suffered the kind of harm which has grievously fractured his standing in the community of respectable society." *Tucker v. Phila. Daily News*, 848 A.2d 113, 124 (Pa. 2004) (quotations and citations omitted). To show defamation, it must be proven that an allegedly defamatory statement "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third parties from associating or dealing with him." *Tucker*, 848 A.2d at 124. Quite simply, "the law does not protect a person from hurt feelings or individual negative reactions to a particular statement."[15] *Rybas v. Wapner*, 457 A.2d 108, 110 (Pa. Super. Ct. 1983). Moreover, even if Mr. Sprague were seeking damages for his emotional distress alone, Pennsylvania law requires expert testimony of such harm. *See, e.g., Kazatsky v. King David Mem'l Park, Inc.*, 527 A.2d 988, 995 (Pa. 1987). Mr. Sprague provided none. Mr. Sprague's claims of damages for his emotional distress are therefore unavailing.

15 Mr. Sprague points to *Time, Inc. v. Firestone*, 424 U.S. 448, 460 (1976), for the proposition that a libel plaintiff may recover for humiliation and mental anguish alone, but that case concerned Florida law, not Pennsylvania law.

***22** A defamation plaintiff cannot recover for reputational damage—real or imagined—or emotional anguish *if the statements that purportedly caused this damage are not false*. Since Mr. Sprague failed to produce sufficient evidence of falsity or actual malice—or, accordingly, damages—summary judgment on his damages claim was appropriate. Even had he met that heavy preliminary burden, evidence that Mr. Sprague was personally upset by the article is insufficient evidence under Pennsylvania law to warrant damages.

G. Did Mr. Sprague Present Sufficient Evidence on his False-light Claim?

Plaintiff also made a false-light invasion-of-privacy claim about the same statements in the article. (Compl. ¶¶ 49-54.) The tort of false light is based on "publicity that unreasonably places [the plaintiff] in a false light before the public" and involves a

major misrepresentation of a person's activities, history, or character that could reasonably be expected to offend a reasonable person seriously. *Strickland v. Univ. of Scranton*, 700 A.2d 979, 987 (Pa. Super. Ct. 1997) (internal citations omitted). "The elements to be proven are publicity, given to private facts, which would be highly offensive to a reasonable person and which are not of legitimate concern to the public." Id

Just as with claims for defamation, a false-light tort "incorporates the First Amendment's constitutional protections set forth in *New York Times Co. v. Sullivan* and its progeny." *Seale v. Gramercy Pictures*, 964 F. Supp. 918, 924 (E.D. Pa. 1997) (internal citation omitted); *see also Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967) (holding that "actual malice" applies to false-light claims). False light liability may not be predicated upon someone's expressed opinion "unless the alleged behavior upon which the opinion was based did not actually occur, or the opinion was far out of proportion with the facts." *Parano v. O'Connor*, 641 A.2d 607, 610 (Pa. Super. Ct. 1994). For all the reasons already discussed that the defamation claim does not meet constitutional requirements, the false-light claim likewise is deficient.

In addition, Mr. Sprague failed to meet the basic legally required elements for a false light claim because the article did not involve "publicity, given to *private* facts ... which are not of legitimate concern to the public." *Strickland*, 700 A.2d at 987 (emphasis added). The facts were not private. Mr. Sprague made the facts public in the first instance. He called a press conference and then later testified at the highly publicized trial. Ms. Porter simply recited word for word Mr. Sprague's public statements and testimony in her column, and then offered her own deductions and opinions based on those non-private facts. Not only did Ms. Porter's column deal with facts that were already public, the topic was of "legitimate concern to the public." Her column dealt with a lawyer's conduct when he represented a well-known state senator in a high-profile public corruption case. Ms. Porter reported accurately that Mr. Sprague admitted to making statements at a press conference about a public corruption case that he did not believe to be true. After that disclosure, Ms. Porter opined that even if the statements "may not be officially unethical under the code of legal conduct" Mr. Sprague's conduct "sure seems underhanded and immoral to me." Ct. Ex. A. Ms. Porter's column does not create a false impression: she reported what had already been said publicly about a public matter followed by her opinion.

***23** As already discussed, Mr. Sprague also did not show that he suffered any financial, reputational, or emotional damages, which are a prerequisite to recovery.

Ms. Porter did not disclose "private" facts: she fairly echoed facts that Mr. Sprague was the first to publicize in a public forum. a trial focused on allegations that an elected official engaged in corruption is a classic matter of public concern. Mr. Sprague did not show the necessary evidence nor did he overcome constitutional requirements for his false light claim, so summary judgment was mandated by the law.

V. *CONCLUSION*

Rather than defending a publisher from libel for comments critical of the governor like Philadelphia lawyer Andrew Hamilton, Richard Sprague charged a publisher for allegedly libelous comments about his own actions in representing a state senator. Libel law today has become what Andrew Hamilton advocated it ought to be during the historic John Peter Zenger trial. Truth is a complete defense, opinions are protected, and where public issues or figures are involved only comments accompanied by malice are compensable. Mr. Sprague's claims lacked sufficient evidence and failed on all of these grounds as well as his inability to show any actual damages.

United States and Pennsylvania courts have held that the Constitution requires that public figures satisfy a higher burden in state defamation claims. Mr. Sprague did not challenge Ms. Porter's verbatim quotations of his words or account of his actions: they were the truth. Instead, he disagreed with her opinion about the morality of his words and actions. Their public disagreement is permitted. Her opinion is not actionable any more than his is. People who are public figures or who speak about public issues may not always enjoy what they read about themselves. They are free to be unhappy. However, absent demonstrating evidence to overcome constitutional protections they cannot extract a penalty from the speaker or publisher.

Mr. Sprague failed to show any evidence, much less clear and convincing evidence, that the published statements were false, were made with actual malice, were actually damaging, or cast him in a false light. His claims are legally insufficient and must fail. Constitutional protections of press coverage of public figures and issues mandated that this Court grant summary judgment due to the absence of the legally required evidence.

Dated: November 1, 2013

BY THE COURT:

_____

Lisa M. Rau, J.

1 THE FEDERALIST NO. 10 (James Madison).

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