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GRAHAM B. SPANIER, Plaintiff, v. LOUIS J. FREEH and FREEH SPORKIN & SULLIVAN, LLP, Defendants.	COURT OF COMMON PLEAS OF CENTRE COUNTY No. 2013-2707

PLAINTIFF'S BRIEF IN OPPOSITON TO DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF PRELIMINARY OBJECTION TO AMENDED COMPLAINT

None of the arguments advanced in Defendants' November 3, 2016 Memorandum of Law in Support of Preliminary Objection to Plaintiff's Amended Complaint (hereinafter, "Memorandum" or "Mem.") demonstrates that Plaintiff's

First Amended Complaint ("FAC") violates Pennsylvania rules or that there is any valid reason why Plaintiff should be required to file another amended complaint. ***First***, Plaintiff's First Amended Complaint properly sets forth the facts necessary to plead that the many statements at issue about Dr. Spanier are false and were made with actual malice. The length of Plaintiff's pleading is reasonable in light of the scope and breadth of Defendants' many defamatory statements, and in light of the method of pleading and proving the elements of a defamation claim involving the actual malice element. ***Second***, Plaintiff's First Amended Complaint does not contain any "scandalous" or "impertinent matter" as referenced in Pennsylvania Rule of Civil Procedure 1028(a)(2); rather, the allegations Defendants complain of are unremarkable, unadorned factual averments that are directly material to the key issue of actual malice. And ***third***, Plaintiff's First Amended Complaint fully complies with Pennsylvania Rule of Civil Procedure 1022, which does not, as Defendants suggest, rigidly require that every paragraph in a pleading must be limited to a single sentence or a single factual averment. Plaintiff respectfully submits that Defendants' preliminary objection should be overruled.

ARGUMENT

I. The First Amended Complaint Properly Sets Forth Material Facts Demonstrating Falsity and Actual Malice.

To begin with, Defendants complain that the First Amended Complaint is unnecessarily long. (Mem. at 2-3.) However, Defendants do not identify any portions of, or allegations in, the First Amended Complaint that they claim are irrelevant or extraneous. Defendants' preliminary objection based on the length of the First Amended Complaint should be overruled, for two reasons. First, the length and breadth of the First Amended Complaint is reasonable in light of the subject matter and legal questions at issue, which by their nature require more specific and voluminous pleading than a simpler case might. Second, Defendants failed to object on these grounds with respect to Plaintiff's (longer) Original Complaint; in fact, Defendants argued the Original Complaint did not contain ***enough*** factual allegations. Defendants' failure to assert this objection to the Original Complaint demonstrates that the true purpose of this second round of objections is further delay of this case, which should not be permitted.

Defendants first argue that Plaintiff should be required to again amend his complaint simply because the Defendants believe the First Amended Complaint is too long. (Mem. at 1-2.) But as Defendants acknowledge, Pennsylvania is a fact pleading jurisdiction, which requires that a complaint set forth the material facts relating to a cause of action. (*See id.*; Pa. R. Civ. P. 1019(a).) A pleader must also "define the issues and thus every act or performance essential to that end must be set forth in the complaint." *Estate of Swift v. Northeastern Hosp. of Philadelphia*,

690 A.2d 719, 723 (Pa. Super. 1997). In complaining about the length of the Amended Complaint in the abstract without any reference to the subject matter of this litigation, Defendants ignore the complexity and breadth of the issues in this case. For starters, the Freeh Report itself — which is the subject of only one of four Counts in the First Amended Complaint — is some ***267 pages*** long. The many accusations Defendants made about Dr. Spanier also relate to multiple different alleged acts or omissions by Dr. Spanier ***over a period of 13 years***. And Plaintiff's First Amended Complaint targets 16 different statements by Defendants, for ***each of which*** Plaintiff must plead and prove that the statement was published, that it is defamatory, that it is false, and that it was made with actual malice. *See Baker v. Lafayette College*, 516 Pa. 291, 296, 532 A.2d 399, 402 (1987) (setting forth the elements of a defamation claim).

The actual malice inquiry in particular requires detailed fact pleading because it is a subjective state-of-mind issue that is typically proven by presenting a variety of circumstantial evidence reflecting on the defendant's state of mind at the time of publication. *See Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 668 (1989) (because actual malice is a subjective standard, a defamation plaintiff is "entitled to prove the defendant's state of mind through circumstantial evidence"). Courts permit a wide variety of such circumstantial evidence to prove actual malice, including but not limited to insufficient

investigation, reliance on unreliable sources, failure to interview obvious sources, ill will or intent to injure, evidence of a preconceived storyline, conscious disregard of contradictory evidence, and post-publication statements and conduct by the defendant. *See Eramo v. Rolling Stone*, LLC, 2016 WL 5234688, *5-7 (W.D. Va. Sept. 22, 2016) (collecting cases on what constitutes relevant circumstantial evidence of actual malice). The vast majority of the factual allegations in Plaintiff's First Amended Complaint are directed at pleading precisely these kinds of evidence of malice. (*See, e.g.*, FAC ¶¶ 55-65 (preconceived storyline), ¶¶ 82-118 (preconceived storyline and intent to injure), ¶¶ 122-175 (conscious disregard of contradictory evidence), ¶¶ 159-172 (failure to interview obvious sources), ¶¶ 176-212 (inadequate investigation), ¶¶ 213-217 (post-publication conduct).) In light of the breadth of the accusations Defendants made about Dr. Spanier, and the need for Dr. Spanier to plead facts showing that each of those statements is false and was made with actual malice, the length of the First Amended Complaint is entirely reasonable.

Moreover, Defendants' preliminary objections are particularly not well taken in light of the fact that Defendants previously argued that Plaintiff's Original Complaint — which was significantly longer than the First Amended Complaint — was deficient for failure to plead ***enough*** facts to withstand preliminary objections. In particular, although the bulk of both the Original and First Amended Complaints

are dedicated to setting forth why Defendants' statements were false and why they were made with actual malice, Defendants argued that the Original Complaint did not set forth sufficient facts to do so, stating, "Spanier conclusorily [sic] alleges that Freeh" acted with actual malice, and "Spanier [does not] allege facts supporting this claim." (Mar. 28, 2016 Defs.' Mem. in Support of Preliminary Objections to Pl.'s Defamation Claims at 33.) The Court properly rejected this argument with respect to the majority of the statements at issue, and Defendants cannot now be heard to complain that Plaintiff offers ***too much*** evidence of falsity and malice.

Finally, Defendants' preliminary objections to the First Amended Complaint also run afoul of Pennsylvania Rule of Civil Procedure 1028(b), which requires that "[a]ll preliminary objections shall be raised at one time." As Defendants themselves acknowledge, their protests about the length of Plaintiff's pleading are not unique to the First Amended Complaint — which is shorter than the Original Complaint — and therefore these objections could have and should have been raised with Defendants' preliminary objections to the original complaint. (*See* Mem. at 3 (arguing that the First Amended Complaint is "hardly changed" and contains "the same extraneous subject matter" as the Original Complaint).) The fact that Defendants waited to assert this stale objection when it could have been raised in response to the Original Complaint suggests that Defendants true aim in

filing another round of preliminary objections is further delay of this case, which should not be permitted. In any event, because the length of Plaintiff's First Amended Complaint is reasonable under the circumstances present here, Defendants' preliminary objections should be denied.

II. The First Amended Complaint Does Not Contain "Impertinent" or "Combative" Allegations.

Next, Defendants argue that the First Amended Complaint contains "intemperate" and "combative" matter that is "far afield from the questions at issue in this case." (Mem. at 3-4.) But Defendants make no effort to demonstrate how any allegations in the First Amended Complaint run afoul of Pennsylvania Rule of Civil Procedure 1028(a)(2)'s proscription on "scandalous or impertinent matter." Instead, Defendants provide only a string cite of cases from ***other*** states and federal courts referring vaguely to pleadings containing "abusive language," "ad hominem attacks," and "derogatory attacks" on a party. (Mem. at 4-5.) Tellingly, Defendants do not even attempt to analogize the undescribed pleadings in those foreign cases to any of the actual language in the First Amended Complaint.

Instead, Defendants only include a footnote referencing seven paragraphs in the First Amended Complaint, without any description of what these paragraphs contain or how they violate Pennsylvania pleading rules. (*Id.* at 3 n. 5 (citing FAC ¶¶ 57, 61-66.) A simple review of these paragraphs demonstrates that far from being "scandalous" or "abusive," they contain rote, material factual allegations that

are plainly relevant to the issues in this case. Paragraph 57, for example, alleges that while Freeh and FSS publicly claim that they conduct their investigations independently, they are in fact, as in this case, retained and compensated by a specific client to achieve a desired objective. (FAC ¶ 57.) Similarly, paragraph 61 alleges that Freeh and FSS's investigations have been criticized for "being predetermined" and for reaching "sweeping conclusions not supported by the facts presented." (*Id.* ¶ 61.) Paragraphs 62-66 go on to identify specific past examples in which Freeh and FSS's investigations have been so criticized, in particular for being preordained and advocacy-driven, and for resulting in serious accusations that are unsupported by the facts. (*Id.* ¶¶ 61-66.) Plaintiff alleges that Freeh's Penn State investigation followed the same pattern and led to the same results as these prior criticized investigations. (*See, e.g.,* FAC ¶¶ 9-10.)

As noted above, Courts have repeatedly recognized that evidence that a defamation defendant started out with a "preconceived storyline" and ignored contrary evidence in order to make the facts fit this preordained story is competent, relevant evidence of actual malice. *See, e.g., Eramo*, 2016 WL 5234688, at *6 (denying defamation defendants' summary judgment motion where "plaintiff offers evidence that could lead a jury to determine that [defendant] had a preconceived storyline and may have consciously disregarded contradictory evidence"); *Harris v. City of Seattle*, 152 Fed. App'x 565, 568 (9th Cir. 2005)

("[e]vidence that a defendant conceived a storyline in advance of an investigation and then consciously set out to make the evidence conform to the preconceived story is evidence of actual malice, and may often prove to be quite powerful evidence."). Similarly, evidence that a defamation defendant made sweeping assertions about the plaintiff that were not supported by the facts known to the defendant is also competent evidence of actual malice. *Eramo*, 2016 WL 5234688, at *7 (citing *Bressler v. Fortune Magazine*, 971 F.2d 1226, 1252 (6th Cir. 1992) (Batchelder, J., dissenting).)

The only allegations identified by Defendants as supposedly being "intemperate" and "impertinent" fall squarely within the type of competent actual malice evidence discussed above. Evidence that Defendants' investigations — in this case and in others — are characterized by a desire to meet a client's expectations by seeking to fulfill a preconceived narrative and to reach sweeping, disparaging conclusions unsupported by the facts is highly relevant to the issue of whether Defendants acted with actual malice in defaming Dr. Spanier. As such, these allegations are plainly material to the issues in this case and Defendants' preliminary objection must be overruled.

III. The First Amended Complaint Does Not Violate Rule 1022.

Finally, Defendants claim generally that the First Amended Complaint combines multiple allegations in a single paragraph, in violation of Pa. R. Civ. P.

1022. (Mem. at 5.) Tellingly, Defendants fail to identify a single specific paragraph to which they object, nor do they explain how, if at all, they have been prejudiced by the supposed violation. *See Bethlehem Steel Corp. v. Litton Indus.*, Inc., 71 D. & C.2d 635, 643 (Pa. Com. Pl. 1974) (Rule 1022 "has been construed liberally; moreover, if no real prejudice to defendant is shown, technical violations generally have been ignored.")

Moreover, Defendants' insistence that Rule 1022 places strict form requirements on paragraph structure in a pleading is incorrect. Far from being a rigid requirement that each paragraph in a pleading contain only one short sentence, Rule 1022 is instead intended to allow a pleader substantial flexibility:

> Section 5 of the suspended Practice Act of 1915 provided that each paragraph 'shall contain but one material allegation.' Strict adherence to this command created practical difficulties. For example, an averment that a defendant 'executed and delivered' a promissory note would give rise to a question whether one material allegation had been pleaded or two. Rule 1022 rewrites this so that the requirement that each paragraph of a pleading contain one material allegation is followed only as far as practicable. Perhaps this qualification results in the section having no real meaning whatever, but in any event, the emphasis on form is removed, and the matter is left to the courts with ample room for intelligent and flexible treatment. If a clear statement and the requirements of good style necessitate the inclusion of two material allegations in one paragraph, this may be done without fear that there will be a formal violation of the Rules and that a plaintiff will be put to the burden of arguing a formal objection to his or her pleading.

Gary Lorenzon Contractors, Inc. v. Allstates Mechanical, Ltd., 2001 WL 1807395, *4 (Com. Pl. Phila. Cnty. 2001) (quoting Goodrich Amram 2d § 1022:2). Moreover, "[t]his [Rule 1022] standard must be applied with great flexibility, not only because of the express direction of the rule that, 'the standard be followed as

far as practicable,' but also because there is no set standard as to what constitutes a material allegation. Mere length, complexity, and verbosity do not in themselves violate Rule 1022 if the subsidiary facts averred fit together into a single allegation." *General State Authority v. Sutter Corp.*, 24 Pa. Commw. 391, 394, 356 A.2d 377, 380 (1976) (quoting 2A Pennsylvania Civil Practice § 1022.3); *see also Home Builders Ass'n of Metro. Pittsburgh v. Alleghany Cnty. Plumbing Bd.*, 50 Pa. D. & C.2d 275, 282 (Com. Pl. Allegheny Cnty. 1970) ("A lengthy and complex paragraph does not violate Rule 1022, if the subsidiary facts fit together into a single allegation.").

As noted above, the complexity and breadth of issues in this case required lengthy and detailed pleading to notify the Court and opposing parties of the context and nuance of Plaintiffs allegations. Moreover, even where the First Amended Complaint includes more than one sentence in a paragraph, it is not due to a random amalgamation of disparate averments, but rather for the proper purpose of grouping related, subsidiary facts into a single allegation. One such example is found in paragraph 183 of the First Amended Complaint:

> The thoroughly researched analysis conducted in the federal security clearance report, when later made available to Dr. Spanier, indeed included statements by Schultz, Curley, members of the University administration and trustees, former Penn State General Counsel Cynthia Baldwin, and many other witnesses with information relevant to Freeh's investigation. The inclusion of statements by Schultz and Curley in the federal security clearance report is especially significant because, as Freeh certainly knew when he issued his Report, Schultz and Curley were among the individuals who Freeh did not interview. Had Freeh waited for

> the federal report to be issued before finalizing or issuing his Report—as Dr. Spanier specifically requested—Freeh would have had this crucial information.

Though paragraph 183 is complex and contains three sentences, only one core allegation is present: Freeh did not consider the findings of the federal investigation, which contained interviews with crucial witnesses Freeh could not or did not speak to. The contents of paragraph 183 consist of one core material allegation and related "subsidiary facts" that Dr. Spanier "averred [to] fit together into a single allegation." *See General State Authority*, 24 Pa. Commw. at 394, 356 A.2d at 380 (1976). This style of pleading does not run afoul of Rule 1022, is perfectly in keeping with the spirit and intention of the rule, and is not grounds for objection. *See Gary Lorenzon Contractors, Inc.*, 2001 WL 1807395, at*4 (mere inclusion of multiple factual allegations in a single paragraph is not a violation of Rule 1022 or grounds for preliminary objection); *Bethlehem Steel Corp.*, 71 D. & C.2d at 643. Defendants' preliminary objection should be overruled.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court overrule Defendants' preliminary objection.

Respectfully submitted,

Dated: November 23, 2016 By: _____

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on the below counsel of record on November 23, 2016.

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