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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' MOTION FOR JUDGMENT ON THE PLEADINGS

Plaintiff Graham B. Spanier, through his counsel, hereby files this Brief in Opposition to Defendants' July 19, 2017 Motion for Judgment on the Pleadings ("Motion" or "Mot."). Defendants' argument in their July 19, 2017 Memorandum of Law in Support of Motion for Judgment on the Pleadings ("Memorandum" or

"Mem.") that judgment in their favor should be granted based on the averments in Dr. Spanier's June 6, 2017 Response to Defendants' New Matter ("New Matter Responses") are meritless; in all of his pleadings, including the Second Amended Complaint and his New Matter Responses, Dr. Spanier has consistently asserted the falsity of Defendants' claims that Dr. Spanier actively concealed Sandusky's child abuse, that Dr. Spanier knowingly failed to act to prevent Sandusky's criminal activities, and that Dr. Spanier failed to show concern for the well-being of Sandusky's victims. These claims were and are false because Dr. Spanier did not know that Sandusky was abusing children, had no knowledge he was engaged in such criminal activities, and had no knowledge that children were being victimized. Both Dr. Spanier's Second Amended Complaint and New Matter Responses emphatically deny that Dr. Spanier ever had such knowledge, and the Court is required to credit all of Dr. Spanier's factual averments and denials at this stage.

Similarly, Defendants' argument that Dr. Spanier's recent misdemeanor conviction establishes Defendants' lack of actual malice as a matter of law is misguided. The actual malice element of a defamation claim focuses on the defamation defendant's state of mind and subjective knowledge ***at the time the statements at issue were published.*** A criminal trial held in 2017 has no bearing

on what Defendants' subjective knowledge and intent was at the time the Freeh Report and related statements were published in 2012.

Finally, Defendants' assertion that Dr. Spanier's recent misdemeanor conviction estops him from asserting the falsity of Defendants' statements is arguably correct as a matter of law, but with an important caveat. While a criminal conviction is considered final and conclusive as to an issue in the same party's civil case involving the same issue, regardless of the pendency of an appeal, the Pennsylvania Supreme Court has made clear that a civil judgment based on a criminal conviction is subject to being later set aside if the criminal conviction is overturned on appeal. Because Dr. Spanier will be appealing his misdemeanor conviction and fully expects that it will be overturned, Dr. Spanier reserves his right to move to set aside any judgment in this case if judgment is entered based on the fact of the criminal conviction.

ARGUMENT

I. Dr. Spanier Has Not Admitted That Any Of The Statements At Issue Are True But Rather Has Adamantly Denied That They Are True.

To begin with, Defendants' claim that Dr. Spanier admitted the truth of Defendants' defamatory statements in his response to Defendants' New Matter is preposterous and astoundingly misleading. In fact, Dr. Spanier explicitly and consistently denied the factual predicate underlying each of Defendants' defamatory statements — just as he alleged that those statements are false in his

Second Amended Complaint. All of Dr. Spanier's pleaded factual averments and denials must be credited as true and as a result, Defendants' request for judgment on the pleadings based on Dr. Spanier's New Matter responses must be rejected. *See Pfister v. City of Phila.,* 963 A.2d 593, 597 (Pa. Cmwlth. 2009) (noting that "the party moving for judgment on the pleadings must admit the truth of all the allegations of his adversary and the untruth of any of his own allegations that have been denied by the opposing party"); *Miami Nat'l Bank v. Willens,* 410 Pa. 505, 506 (1963) ("In order for a judgment on the pleadings to be granted, all relevant and material averments of fact made by the opposing party must be taken as true").

As Defendants note in their Memorandum, there are currently twelve allegedly defamatory statements at issue in this case:

1. Dr. Spanier "failed to protect against a child sexual predator harming children for over a decade."

2. Dr. Spanier "concealed Sandusky's activities from the Board of Trustees, the University community and authorities."

3. Dr. Spanier "exhibited a striking lack of empathy for Sandusky's victims **by failing to inquire as to their safety and well-being, especially by not attempting to determine the identity of the child who Sandusky assaulted in the Lasch Building in 2001.**"

4. Dr. Spanier "empowered Sandusky to attract potential victims to the campus and football events **by allowing him to have continued, unrestricted and unsupervised access to the University's facilities and affiliation with the University's prominent football program.**"

5. "[I]n order to avoid the consequences of bad publicity, **the most powerful leaders at the University — Spanier, Schultz, Paterno, and Curley — repeatedly concealed critical facts relating to Sandusky's child abuse from the authorities, the University's Board of Trustees, the Penn State community, and the public at large.** The avoidance of the consequences of bad publicity is the most significant, but not the only, cause for this failure to protect child victims and report to authorities."

6. **Dr. Spanier made "[a] decision . . . to allow Sandusky to retire in 1999, not as a suspected child predator, but as a valued member of the Penn State football legacy . . .** essentially granting him license to bring boys to campus facilities for 'grooming' as targets for his assaults."

7. "Despite their knowledge of the criminal investigation of Sandusky [in 1998], Spanier, Schultz, Paterno and Curley took no action to limit Sandusky's access to Penn State facilities or took any measures to protect children on their campuses."

8. "The most powerful men at Penn State failed to take any steps for 14 years to protect the children who Sandusky victimized."

9. Messrs. Spanier, Schultz, Paterno, and Curley never demonstrated, through actions or words, any concern for the safety and well-being of Sandusky's victims until after Sandusky's arrest."

10. "[I]n order to avoid the consequences of bad publicity, the most powerful leaders at Penn State University — Messrs. Spanier, Schultz, Paterno and Curley — **repeatedly concealed critical facts relating to Sandusky's child abuse from the authorities, the University's Board of Trustees, the Penn State community, and the public at large**."

11. As detailed in my report... four of the most powerful officials at Penn State agreed not to report Sandusky's activity to public officials."

12. "I stand by our conclusion that four of the most powerful people at Penn State failed to protect against a child sexual predator harming children for over a decade."

(*Id.* at 18-19 (emphasis in original); Mar. 17, 2017 2d. Am. Compl. ¶¶ 145, 160, 174; *see also* Sept. 27, 2016 Op. at 10-23.)

Defendants then claim that Dr. Spanier has admitted the truth of these statements because he admits that he did not inquire as to the safety of Sandusky's victims, because he admits that Sandusky did in fact retire after being a Penn State

football coach, and because he admits that he did not report Mike McQueary's allegations to authorities. (Mem. at 20-23.) But Defendants conveniently omit to set forth any of the specific language of the New Matter allegations and responses that they paraphrase and cite to generally, and the reason they fail to do so is obvious: because Dr. Spanier consistently and explicitly denied the factual underpinning of all of Defendants' defamatory statements about him, which is the claim that Dr. Spanier knew, suspected, or received a report indicating that Sandusky was abusing minors. Defendants themselves concede that this is the "very fact that forms the essential nub underlying each of the statements that Spanier claims is defamatory," (*Id.* at 23-24), but they fail to identify any admission in any pleading where Dr. Spanier concedes the truth of this fact. Because Dr. Spanier did not admit, but rather categorically denied, that he had any awareness of Sandusky's criminal activities, Defendants have utterly failed to demonstrate that his responses to Defendants' New Matter entitle them to judgment on the pleadings.

A simple review of the statements at issue and Dr. Spanier's New Matter responses conclusively show that Dr. Spanier did not admit the truth of Defendants' false and defamatory statements. For example, did Dr. Spanier admit, as Defendants claim, the truth of Statement No. 3, that he "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"; of Statement No. 9, that he "never demonstrated, through actions or words, any concern for the safety and well-being of Sandusky's victims until after Sandusky's arrest"; and of Statement No. 12, that he "failed to protect against a child sexual predator harming children for over a decade"? The answer is plainly no, because Dr. Spanier denied that he had any knowledge that Sandusky was victimizing children and thus he did not know that there were any victims to empathize with, inquire about, or protect. Defendants claim that Dr. Spanier "admits" the truth of these statements in his responses to the New Matter allegations at Paragraphs 302-303 and 311. Below is the actual text of those allegations and Dr. Spanier's New Matter Responses:

> 302. **Plaintiff did not do anything to investigate the identity of the child or the child's welfare.**
>
> **ANSWER: Plaintiff admits that he did not do anything personally to investigate the identity of the child. Plaintiff denies the implication that he was aware the child had been victimized or was a potential victim of criminal conduct by Sandusky, or that Plaintiff perceived that there was a need to investigate the child's welfare.**

303. Plaintiff did not direct anyone to do anything to investigate the identity of the child or the child's welfare.

ANSWER: Plaintiff admits that he did not direct anyone to do anything to investigate the identity of the child. Plaintiff denies the implication that he was aware the child had been victimized or was a potential victim of criminal conduct by Sandusky, or that Plaintiff perceived that there was a need to investigate the child's welfare.

311. Plaintiff did not express through actions or words concerns for Sandusky's victims prior to November 2011.

ANSWER: Plaintiff admits that he did not express concerns for Sandusky's victims prior to November 2011. Plaintiff denies the implication that prior to 2011 Plaintiff was aware that Sandusky had victimized anyone.

(New Matter Responses ¶¶ 302-302, 311.) These New Matter Responses show that, contrary to Defendants' claims, Dr. Spanier denied that he had any knowledge that Sandusky was a sexual predator or that any victims of Sandusky even existed. Thus, he necessarily and expressly denied the truth of Defendants' false statements that he knowingly failed to inquire about and protect the victims of Sandusky's abuse.

Similarly, Defendants claim that Dr. Spanier "admits outright that Spanier did not report McQueary's allegation of inappropriate conduct by Sandusky to either DPW or the police," and that this "admission" demonstrates as a matter of law the truth of Statement No. 2, that Dr. Spanier "concealed Sandusky's activities

from the Board of Trustees, the University community and authorities"; of Statements Nos. 5 and 10, that Dr. 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"; and of Statement No. 11, that Dr. Spanier "agreed not to report Sandusky's activity to public officials." (*See* Mem. at 22-23.) Nonsense. Again, a simple review of the allegations and responses that Defendants cite — New Matter allegations at Paragraphs 290-293 — demonstrates that Dr. Spanier denied having any knowledge of Sandusky's child abuse and criminal activity, and thus denied that he concealed Sandusky's child abuse or agreed not to report it:

> 290. Plaintiff did not contact the Department of Public Welfare about McQueary's report of Sandusky's conduct.
>
> **ANSWER**: Plaintiff admits that he did not contact the Department of Public Welfare. Plaintiff denies that he received a report from McQueary and denies that he received a report of alleged criminal conduct by Sandusky.
>
> 291. Plaintiff did not direct anyone to contact the Department of Public Welfare about McQueary's report of Sandusky's conduct.
>
> **ANSWER**: Plaintiff admits that he did not direct anyone to contact the Department of Public Welfare. Plaintiff denies that he received a report from McQueary and denies that he received a report of alleged criminal conduct by Sandusky.

292. Plaintiff did not report Sandusky's alleged conduct to the police.

ANSWER: Plaintiff admits that he did not report Sandusky to the police. Plaintiff denies the implication that he was aware of alleged criminal conduct by Sandusky.

293. Plaintiff did not direct anyone to report Sandusky's alleged conduct to the police.

ANSWER: Plaintiff admits that he did not direct anyone to report Sandusky to the police. Plaintiff denies the implication that he was aware of alleged criminal conduct by Sandusky.

(New Matter Responses ¶¶ 290-293.) Again, these responses do not remotely show that Dr. Spanier's pleading admits the truth of the challenged claims that he concealed knowledge of Sandusky's child abuse or that he agreed not to report it. Rather, they show that Dr. Spanier denied that he had knowledge of Sandusky's criminal activities and therefore that he necessarily and expressly denied that he attempted to conceal or failed to report those criminal activities.

Additionally, Defendants' claims that Dr. Spanier has admitted the truth of Statement's Nos. 4 and 6 because he admits that Sandusky did in fact retire and did continue to have access to the campus again miss the mark completely. The defamatory statements at issue accused Dr. Spanier of ***actively deciding*** to allow Sandusky to retire as a valued football coach ***rather than a child sexual predator***, and of failing to bar Sandusky from campus ***despite knowledge that Sandusky was a child sexual predator***. Obviously, the defamatory import of these statements is

not the undisputed fact that Sandusky retired from Penn State or that Sandusky continued to visit the campus afterwards, but rather the claim that Dr. Spanier knowingly allowed these things to happen despite having knowledge that Sandusky was a sexual predator. Dr. Spanier has consistently averred that he had no knowledge that Sandusky was a sexual predator, and his New Matter Responses repeatedly deny and reject Defendants' attempts to press him to impliedly admit that he did.

Finally, in addressing Defendants' Motion, the Court must consider not only Dr. Spanier's New Matter Response and the denials therein, but also the factual averments in Dr. Spanier's Second Amended Complaint — which must be taken as true for purposes of evaluating Defendants' Motion. *See Zelik v. Daily News Pub. Co.,* 288 Pa. Super. 277, 279 (1981) (in evaluating a motion for judgment on the pleadings, which is in the nature of a demurrer, a court must accept all of the opposing party's well-pleaded averments of fact as true). The factual averments in Dr. Spanier's Second Amended Complaint are perfectly consistent with the denials in Dr. Spanier's New Matter Response and foreclose entry of judgment based on the pleadings before the Court. For example, in his Second Amended Complaint, Dr. Spanier alleged that Defendants' claims that he knowingly failed to protect child abuse victims and affirmatively allowed Sandusky to retire without labeling him a suspected child predator are false. (Mar. 17, 2017 2d. Am. Compl. ¶ 78.)

Dr. Spanier alleged that he was never told of a report of Sandusky sexually abusing a child, that he did not fail to take action in response to such information because he never received such a report, and that he never attempted to conceal such information because he never received such a report. (*Id.* at ¶ 131.) Dr. Spanier further alleged that he never personally spoke to McQueary and was never told in 2001 that McQueary claimed to have seen Sandusky sexually abusing a child. (*Id.* at ¶¶ 89, 103.) These allegations must be taken as true for purposes of Defendants' Motion, and they are on all fours with Dr. Spanier's denials in his New Matter Response.

At bottom, Defendants do not, and cannot, point to any admission by Dr. Spanier in any pleading in this case that he was aware that Sandusky was abusing children prior to November 2011. Instead, Dr. Spanier's pleadings consistently and emphatically assert the falsity of this allegation, which Defendants admit is the "essential nub underlying each of the statements" alleged to be defamatory in this case. (Mem. at 23-24.) Accordingly, Defendants have failed to show any basis for judgment on the pleadings based on Dr. Spanier's New Matter responses. *See Miami Nat'l Bank*, 410 Pa. at 506 (holding that a motion for judgment on the pleadings must be denied where there are material issues of fact in dispute).

II. Neither The Criminal Conviction Nor Dr. Spanier's Responses To Defendants' New Matter Is Relevant To The Issue Of Actual Malice.

Next, Defendants argue that judgment on the pleadings should be granted because Dr. Spanier's New Matter Responses and his criminal conviction render him unable to establish actual malice as a matter of law. This argument fails, for two reasons. First, Defendants' argument rests on subsequent events that have no relevance to the actual malice inquiry. Second, Defendants' claims regarding Dr. Spanier's New Matter Responses are simply a rehashing of their misleading and inaccurate claim that Dr. Spanier admitted the truth of Defendants' defamatory statements.

First, Defendants' argument with respect to Dr. Spanier's criminal conviction rests on a misapprehension of the actual malice element. While Dr. Spanier's recent conviction may have some relevance to the element of falsity — until it is overturned on appeal, as explained below — it has no bearing on whether Defendants made the statements at issue with actual malice. As this Court noted in its previous opinion on Defendants' preliminary objections, the actual malice inquiry asks whether the defamation defendant acted with knowledge of falsity or reckless disregard for the truth when he published the statements at issue. (Sept. 27, 2016 Op. at 24.) Thus, the jury is tasked with determining the defendant's state of mind ***at the time of publication***. *See Joseph v. Scranton Times L.P.*, 129 A.3d 404, 437 (Pa. 2015). To the extent post-publication evidence is ever relevant to the

issue of actual malice, only state-of-mind evidence — such as subsequent acts and statements ***by the defendant*** — is relevant because it circumstantially bears on what the defendant's subjective state of mind was at the time of publication. *See Castellani v. Scranton Times, L.P.*, 124 A.3d 1229, 1241 (Pa. 2015). The criminal conviction in March 2017 has no bearing whatsoever on what Defendants' knowledge and state of mind was when they published the Freeh Report and related statements in July 2012, and therefore the conviction has no relevance to the actual malice element. Accordingly, Defendants' request for judgment on the pleadings on this basis must be denied.

Defendants' second argument is simply a rehashing of the misleading assertion that Dr. Spanier admitted the truth of Defendants' false statements. As set forth above, he did not, and Dr. Spanier's well-pleaded denials and factual averments must be taken as true for purposes of considering Defendants' Motion. In fact, the Court has already held at the preliminary objections stage that Dr. Spanier has alleged sufficient facts to plead actual malice, and nothing in Dr. Spanier's New Matter Response contradicts the factual assertions in the Second Amended Complaint. (*See* Sept. 27, 2016 Op. at 25.) As Defendants have not presented any factual averments by Dr. Spanier that contradict those pleaded in his Second Amended Complaint, the denial of Defendants' first demurrer on the actual malice issue compels the same result here. *See* Standard Pennsylvania Practice 2d

§ 31:18 ("The motion for judgment on the pleadings is in effect a demurrer, and, in considering the motion, the court should be guided by the same principles as would be applicable if it were disposing of a preliminary objection in the nature of a demurrer.").

III. Dr. Spanier's Misdemeanor Conviction May Bar His Claims For The Time Being — Until It Is Overturned On Appeal.

Next, Defendants argue that judgment on the pleadings should be granted as a result of Dr. Spanier's March 24, 2017 misdemeanor conviction for endangering the welfare of a child, because the fact of that the conviction estops Dr. Spanier from asserting that the allegedly defamatory statements at issue are false. Dr. Spanier does not dispute that the criminal conviction is legally conclusive as to the issue of falsity here — until it is overturned on appeal. Therefore, while Dr. Spanier does not dispute that the criminal conviction may support an entry of judgment in this case, Dr. Spanier expressly reserves his right to move to set aside such judgment if and when his criminal conviction is vacated.

As Defendants note, Pennsylvania law holds that "a criminal conviction collaterally estops a [party] from denying his acts in a subsequent civil trial." (Mem. at 23 (quoting *Shaffer v. Smith,* 673 A.2d 872, 874 (Pa. 1996).) Pennsylvania law further holds that for preclusion purposes, a criminal conviction is final despite the pendency of an appeal "unless or until that conviction is reversed on appeal." *Columbia Med. Grp., Inc. v. Herring & Roll, P.C.*, 829 A.2d

1184, 1193 (Pa. Super. 2003); (*see also* Mem. at 24 n.52). In *Shaffer*, the Supreme Court explained that while the pendency of a criminal appeal does not affect the preclusive effect of a criminal conviction in a civil proceeding, the party against whom preclusion is sought is not without a remedy in the event that the criminal conviction is ultimately overturned. *Shaffer*, 543 Pa. at 531. Instead, the Court held that despite entry of judgment in a civil case based on a criminal conviction, the party against whom judgment is entered is free to later seek to set aside the civil judgment in the event that the criminal conviction is reversed:

> Likewise, we reject Appellant's argument that should this Court fail to adopt his position, a defendant would receive no benefit with respect to the civil outcome even if the underlying criminal conviction should be reversed . . . . We recognize that the subsequent appellate reversal of a criminal conviction will nullify the evidentiary foundation upon which a civil judgment is predicated. This problem, however, is capable of being resolved in a fashion that would afford a defendant a remedy . . . . Although a criminal defendant may have to institute another proceeding to set aside a civil judgment which was predicated exclusively on his criminal conviction when it is later reversed, we find this result to be more desirable.

Id. The Court further cited to the Restatement (Second) of Judgments § 16 (1980), noting that it provides for the setting aside of a judgment "when the judgement is based on an earlier judgment that is subsequently reversed." *Id.* at 531 n.3; *see also State Farm Fire & Cas. Co. v. Bellina*, 264 F. Supp. 2d 198, 207 (E.D. Pa. 2003) ("Relying on the Second Restatement of Judgments, the Pennsylvania Supreme Court has recognized that a remedy could be fashioned should an appellate court reverse a criminal conviction, which, in turn, would work

to nullify the evidentiary foundation upon which a civil judgment is predicated[.]").

Thus, although Dr. Spanier does not dispute that the misdemeanor conviction is ***presently*** conclusive as to his claim that the statements at issue in this civil action are false, he intends to file an appeal of that criminal conviction after final resolution of his post-sentencing motion and fully expects that the conviction will be vacated on appeal. At that time, the current conviction will be a legal nullity with no preclusive effect or evidentiary value. Thus, Dr. Spanier expressly reserves his right to move to set aside a judgment in this action based on the criminal conviction when it is ultimately reversed.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court deny Defendants' Motion. If the Court grants judgment based on Dr. Spanier's recent misdemeanor conviction, Dr. Spanier reserves his right to later move to set aside such judgment if and when the criminal conviction is vacated.

Respectfully submitted,

Dated: August 25, 2017 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 August 25, 2017.

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