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 Type of Pleading: REPLY MEMORANDUM OF LAW IN SUPPORT OF PRELIMINARY OBJECTIONS TO PLAINTIFF'S DEFAMATION CLAIMS Filed on Behalf of: Defendants Counsel of Record: Robert C. Heim, Esquire Michael L. Kichline, Esquire Asha T. Mehrotra, Esquire William T. McEnroe, Esquire David S. Gaines, Esquire

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

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

Plaintiff's Opposition Brief distorts the facts, confuses the applicable legal standard, and largely fails to address to the arguments raised in Defendants' Opening Brief. As explained in the Opening Brief, the statements set forth in the Complaint are expressions of opinion that cannot form the basis of a defamation claim as a matter of law. Opening Br. at 24-31. Further, the probable cause supporting the criminal proceedings against him renders Plaintiff unable to show the existence of actual malice as a matter of law. *Id.* at 31-35. Spanier does not

and cannot refute these arguments—so he does not try. Instead, he relies on attempts to muddy the waters to distract the Court from these failings.

Plaintiff does not dispute that statements of opinion are inactionable as a matter of law. Instead, Spanier argues that the statements he claims are defamatory are not opinions because there are *other* statements in the Report that are "fact." This conclusion neither follows logically nor can it be drawn from a fair reading of the Report, which on its face contains both statements of fact based on the documents and testimony collected by Defendants, as well as opinions reached based on those facts. Plaintiff's argument that because the Report contains statements of fact, every single statement in the Report must be factual is a red herring that should not distract the Court from the necessity to analyze the specific statements that Plaintiff contends are defamatory as set forth in his Complaint.

As to Defendants' contention that Plaintiff's claims fail as a matter of law in light of the probable cause supporting the allegedly defamatory statements, Spanier dodges the central issue in favor of an extended discussion of often-irrelevant First Amendment law. He fails to explain how Defendants could possibly be shown to have acted with reckless disregard for the truth of their statements when the very same evidence supporting those statements has been found sufficient to support an ongoing criminal prosecution against Spanier. And the weight of authority reaching the same conclusion that Freeh did continues to grow, as yet another court

recently found, at a minimum, the evidence in the Report sufficient to support a finding—reached at summary judgment—that Spanier knew of the 1998 investigation of Sandusky and was aware of the acts of abuse by Sandusky in 2001, but failed to report those actions.[1] In the face of these judicial decisions supporting the opinions reached by Defendants, Spanier is unable, as a matter of law, to show that Defendants acted with "actual malice" in making the statements of which he complains.

At bottom, Plaintiff's defamation claim is no more than a too-clever gambit. At the request of PSU, Defendants conducted a full and complete investigation uncovering the facts—including the 1998 and 2001 emails received by Spanier—and developed an opinion about who was culpable. Based on their investigation, Defendants made recommendations to PSU regarding the policies and procedures that should be implemented to prevent anything like the Sandusky scandal from occurring again. Permitting this legally flawed action to proceed could very well discourage the performance of similar independent investigations in the future.

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[1] On May 4, 2016, Judge Glazer of the Philadelphia Court of Common Pleas, ruling in a case involving PSU's entitlement to insurance coverage for settlements reached with Jerry Sandusky's child victims, stated that Spanier had "knowledge of Sandusky's crimes and criminal proclivities," yet "apparently took no steps to prevent Sandusky from committing additional bad acts in the future, nor did [he] report what [he] knew to PSU's Risk Manager." Opinion at 10, *The Pennsylvania State University v. Pennsylvania Manufacturers' Association Insurance Co.*, Nov. Term 2013, No. 03195 (Com. Pl. Phila. Cnty.), attached as Ex. A.

Defendants' Preliminary Objections should be sustained, and Plaintiff's defamation claims should be dismissed.

ARGUMENT

A. Plaintiff Fails to Show That the Allegedly Defamatory Statements Are Anything Other than Opinion

Defendants' Opening Brief set forth in detail why the statements of which Spanier complains are inactionable opinion. In lieu of responding to Defendants' argument, Plaintiff seeks to sidestep the issue by contending that because the Report contained some factual findings, the allegedly defamatory statements are also factual. Opp. Br. at 5-6, 19, 21. Defendants do not argue, however, that the Report contained ***no*** facts.[2] Rather, the particular statements that Plaintiff claims to be defamatory are ***opinions*** *founded on* those facts.[3] Under Pennsylvania law, a court must analyze each defamatory statement to determine whether, taken in

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[2] In this vein, Plaintiff's contention that "[i]t defies logic to argue that Penn State paid Freeh and FSS more than $8 million for an opinion piece," (Opp. Br. at 19) similarly ignores that the Report did make factual findings (such as the emails discovered by Freeh and FSS implicating Spanier in the Sandusky scandal, which had not previously been produced by Penn State) in addition to drawing opinion-based conclusions founded on those facts. This charge is consistent with Defendants' engagement to "perform an independent, full and complete investigation" and reach "findings" as well as "recommendations." *See* Ex. A to Opp. Br.

[3] For example, Plaintiff does not contend that the Report's revelation of the emails he received in 1998 and 2001 is defamatory, nor does he dispute that he received them.

context, it is capable of defamatory meaning. *See, e.g.*, *Mallory v. S & S Publishers*, No. CV 14-5702, ___ F. Supp.3d _____, 2016 WL 909247, at *5 (E.D. Pa. Mar. 10, 2016) ("examin[ing] each of the allegedly defamatory statements" to determine whether they were fact or opinion). A "clearly factual" statement followed by a statement that is "purely the opinion" of the one uttering the statement is not capable of such meaning. *Mathias v. Carpenter*, 587 A.2d 1, 3 (Pa. Super. 1991). Spanier's claims fail as a result.

Spanier argues that the allegedly defamatory statements in the Report are not opinion because "the statements themselves . . . make abundantly clear that Defendants' 'findings' regarding Dr. Spanier were expressly intended to be interpreted as objective statements of fact." Opp. Br. at 18. But whether they were "intended" to be regarded as statements of fact (whatever that means) is irrelevant; a plain reading of the statements of which Plaintiff complains show that they cannot possibly be factual.

As Plaintiff acknowledges, if a statement is "sufficiently factual that it is susceptible of being proved true or false," it is not a statement of opinion. Opp. Br. at 21 (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990)). This test reveals Defendants' allegedly defamatory statements to be opinion. How could anyone prove at trial, for example, whether a third person exhibited a "total and

consistent disregard,"[4] a "striking lack of empathy,"[5] or a failure to "demonstrate[] . . . any concern"[6]? *See Goralski v. Pizzimenti*, 540 A.2d 595, 599 (Pa. Commw. Ct. 1988) (holding that trial court properly granted judgment as a matter of law to defendant where allegedly defamatory letter "clearly lays out the facts that [defendant] thinks constitute misconduct" and "did not imply the existence of any undisclosed facts, nor anything beyond his opinion that [plaintiff's acts] constituted misconduct"). The fact that Defendants' opinion might be considered especially persuasive by some, *see* Opp. Br. at 19-20, does not change its nature as an opinion or strip it of the protections accorded by the First Amendment to expressions of opinion. Spanier cannot recast these opinions as fact statements merely by referring to them as "conclusions." *Id.*[7]

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4 Opp. Br. at 7; Compl. ¶ 256.

5 Opp. Br. at 7; Compl. ¶¶ 256, 309.

6 Opp. Br. at 8; Compl. ¶ 274.

7 The cases cited by Plaintiff in support of the claim that Defendants' statements are capable of defamatory meaning, Opp. Br. at 21, are distinguishable. In *Reed v. Pray*, for example, the Commonwealth Court found the statement at issue capable of defamatory meaning because it "was made without elaboration or explanation," and expressly noted that "***if the charge was part and parcel of a larger dissertation*** on the dispute over the status of the Borough's sewer funds and disagreement over steps that Borough Council . . . took," the Court might find the statement non-defamatory. 53 A.3d 134, 142 n.4 (Pa. Commw. Ct. 2012) (emphasis added). Although the opinion in *Smith v. Wagner* does not provide much detail regarding the allegedly defamatory statements or their context, it appears that no party argued that the statements at issue were statements of opinion. 588 A.2d 1308, 1311 (Pa. Super. 1991). In *Milkovich*, the Supreme Court

Plaintiff contends, somewhat confusingly, that because even statements that contain the preface "we think" or "we believe," can nonetheless be defamatory, Defendants' statements ***must be*** defamatory since they do not contain any such disclaimer. Opp. Br. at 20. This argument confuses the law, which instead provides that it is the essence of the statement, not the form in which it is made, which governs whether a statement is capable of defamatory meaning. *See* Restatement (Second) of Torts § 566 cmt. b (1977) ("The statement of facts and the expression of opinion based on them are separate matters. . . . The opinion may be ostensibly in the form of a factual statement if it is clear from the context that the maker is not intending to assert another objective fact but only his personal comment on the facts which he has stated.").

The remainder of Plaintiff's argument boils down to the repeated assertion that Defendants' statements must be factual because Plaintiff alleges that must be so. But Plaintiff's own *ipse dixit* is not sufficient to withstand Defendants' Preliminary Objections. Because Defendants' allegedly defamatory statements are statements of opinion, Plaintiff's defamation claims should be dismissed.

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found that the statement at issue was capable of a defamatory meaning because it could be proven true or false, in contrast to the statements at issue here. *See Milkovich*, 497 U.S. at 21.

B. Plaintiff Is Unable to Show Actual Malice As a Matter of Law

1. Plaintiff's Actual Malice Allegations Are Foreclosed By the Judicial Proceedings Against Him

In response to the argument that Plaintiff is unable to show that Defendants acted with actual knowledge of falsity or a reckless disregard for the truth, Spanier argues that this statement is "disproved by reference to the Complaint." Opp. Br. at 22-23. But reference to the paragraphs of the Complaint cited by Plaintiff reveals that those paragraphs either involve facts irrelevant to the question of actual malice or contain no more than bare allegations of actual malice.[8] Even if such allegations were sufficient to meet the pleading standard, nothing in the Complaint explains how Plaintiff could possibly prove actual malice given the strong evidence of probable cause supporting the criminal proceedings against him.

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[8] Compl. ¶¶ 84-89 (allegations regarding Paterno's firing and the Board of Trustees' retention of Freeh and FSS); *id.* 92-120 (speculative allegations regarding, *inter alia*, various Penn State officials' and Freeh's state of mind); *id.* ¶¶ 125-143 (allegations relating to the 1998 investigation into allegations against Sandusky, including emails sent to Spanier informing him of the investigation, and the unsupported assertion that Freeh and FSS "knew it was likely" that Spanier did not read the emails in his inbox); *id.* ¶¶ 144-178 (allegations relating to the 2001 McQueary incident, including Spanier's meetings with various high-level PSU employees about the incident and Schultz's decision to consult an attorney regarding whether the incident needed to be reported to law enforcement); *id.* ¶¶ 179-192 (allegations relating to Spanier's decision to wait to be interviewed until the eleventh hour and his attempt to delay the release of the Report by proffering a federal background check); *id.* ¶¶ 193-215 (allegations relating to Spanier's tortious interference claim, unsupported allegations regarding what Freeh "knew," and statements by third parties relating either to Spanier or the Report).

As Defendants explained in the Opening Brief, the Supreme Court, in an old but still vital and pertinent case, held that the existence of probable cause renders a plaintiff unable to show actual malice, a required element of Spanier's claim. *See Briggs v. Garrett*, 2 A. 513 (Pa. 1886); Opening Br. at 31-35. Plaintiff contends that the case law cited by Defendants is "inapposite," and criticizes Defendants for "not cit[ing] a single authority from Pennsylvania or any other jurisdiction" to support their argument. Opp. Br. at 22. Yet at the same time, Plaintiff fails to cite any authority to the contrary. This case involves an uncommon fact situation, and it should not be surprising that there is little case law addressing the interplay between a criminal prosecution and a defamation claim in a situation such as this.

Plaintiff claims that *Briggs* is inapposite because it involves a conditional privilege, and spends four pages attempting to distinguish it. Opp. Br. at 24-27. Spanier avoids the key issue, however. *Briggs* involved, as Plaintiff acknowledges, a conditional privilege defense to a defamation claim.[9] *Briggs*, 2 A.

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[9] Plaintiff's contention that *Briggs* involved a "long-abandoned *legal standard*," Opp. Br. at 25 (emphasis added), is incorrect. Actual malice remains a necessary element of a public-figure defamation claim like that at issue here. Plaintiffs cite *American Future Systems, Inc. v. Better Business Bureau of Eastern Pennsylvania* in support of their argument. That case recognized, however, that the constitutionalization of defamation law rendered "the former concept of a conditionally privileged occasion ***embodying the negligence standard*** superfluous in the present era," because every defamation plaintiff must prove negligence at a minimum. *Am. Future Sys., Inc.*, 923 A.2d 389, 398 (Pa. 2007) (emphasis added). *Briggs*, on the other hand, involved an actual malice standard that remains legally relevant.

at 520. If a conditional privilege is established, the plaintiff must show that the defendant abused the privilege. Abuse of privilege may be shown by, among other things, proving that the defendant acted with actual malice—reckless disregard for the truth or falsity of the statement at issue. *Miketic v. Baron*, 675 A.2d 324, 329 (Pa. Super. 1996) ("Once a matter is deemed conditionally privileged, the plaintiff must establish that the conditional privilege was abused by the defendant" such as where "the publication is actuated by malice") (citation and quotation omitted). *Briggs* held that where probable cause exists, a defendant cannot be held to have abused the privilege. *Briggs*, 2 A. at 520-21. Necessarily, therefore, *Briggs* stands for the proposition that probable cause renders a plaintiff unable to show actual malice; otherwise, the path would remain open to a plaintiff to show abuse of privilege by actual malice. Because Plaintiff has the same burden to prove actual malice in this case,[10] the evidence of probable cause existing here renders him unable to carry that burden.

Spanier contends (inaccurately) that Defendants "assum[e] that" since Spanier was held over for trial, probable cause is established as a matter of law. Opp. Br. at 25. It may be that Judge Wenner's decision to hold Spanier over for

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[10] It is unclear whether Spanier contends that he is not a public figure. *See* Answer to Defendants' Preliminary Objections ¶ 20. Spanier seems to have conceded that he is a public figure by pleading actual malice in his Complaint, however. *See, e.g.,* Compl. ¶ 9. It would be hard to argue that he is not.

trial may not, by itself, establish probable cause as a matter of law. Opening Br. at 33-34. However, it is, at the least, strong evidence of probable cause, and the overwhelming evidence of such cause renders Plaintiffs' actual malice argument simply not tenable.

No fewer than ***four*** judicial bodies have found the evidence against Spanier (the same evidence on which the opinions in the Report were based) sufficient to support, at the least, a reasonable belief that Spanier knew of and failed to report suspected child abuse by Sandusky:

- The Investigating Grand Jury, which found that Spanier had "engaged in a repeated pattern of behavior that evidenced a willful disregard for the safety and well-being of minor children," Presentment (Ex. 1 to Opening Br.) at 33, had "engendered the welfare of children," *id.* at 34, and had "fail[ed] to report Sandusky to authorities." *Id.* at 35.

- Magisterial District Judge Wenner, who found the evidence sufficient to hold Spanier over for a criminal trial on charges for, *inter alia*, failure to report suspected child abuse and endangering the welfare of a minor;

- The Superior Court, which ***refused*** to quash the charges against Spanier for failure to report suspected child abuse, endangering the welfare of a minor, and conspiracy to commit those crimes, *see Com. v. Spanier*, 132 A.3d 481 (Pa. Super. 2016); and

- Most recently, Judge Glazer[11] of the Philadelphia Court of Common Pleas, who stated that Spanier was "aware of Sandusky's inappropriate acts with

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[11] Judge Glazer's findings are especially notable in light of the fact that he is a former Assistant United States Attorney. *See, e.g.*, John M. Baer, *U.S. Prosecutor Glazer Aims for Seat on Bench*, Phila. Daily News (May 10, 1998), *available at* http://articles.philly.com/1988-05-10/news/26261845_1_glazer-judicial-nominee-judicial-candidates.

children in the PSU showers," Op. at 11, "took no steps to prevent Sandusky from committing additional bad acts in the future," *id.* at 10, and "failed to take proper action." *Id.* at 12.

Despite the numerous authorities finding the evidence against Spanier sufficient to give rise to an opinion that Spanier knew about Sandusky's acts of abuse and failed to take appropriate action, Spanier persists in the claim that he can somehow show that Defendants acted with reckless disregard of the truth or falsity of their statements.[12] The actual malice standard is "a rigorous, if not impossible, burden to meet in most circumstances." *Manning v. WPXI, Inc.*, 886 A.2d 1137, 1143 (Pa. Super. 2005) (citation and quotation omitted). Spanier is unable to meet this standard as a matter of law in the face of the evidence of probable cause supporting the statements of which he complains.

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[12] Spanier contends that "Defendants fail to explain how a presentment from November 2012 or a court hearing from July 2013 are relevant to . . . the question of Defendants' state-of-mind when they published the Freeh Report in July 2012." Opp. Br. at 24. If Spanier would like to concede that the statements made in the Report were no longer defamatory in November 2012 or July 2013 and limit this dispute to whether the statements at issue were defamatory in July 2012, Defendants are amenable.

2. Plaintiff's Concurrent Criminal Proceedings Are Appropriate for Consideration on This Motion

Unable to sustain his arguments relating to the legal standard, Spanier retreats to the argument that "Defendants' actual malice arguments are based on documents wholly outside the pleadings that may not be considered in ruling on Defendants' preliminary objections." Opp. Br. at 23. But Spanier has conceded the relevance of the criminal prosecution to his claim, even referring to the prosecution in his complaint. Compl. ¶¶ 13, 239. It is "well-settled that a court may rely on documents forming in part the foundation of the suit even where a plaintiff does not attach such documents to its complaint." *Feldman v. Hoffman*, 107 A.3d 821, 836 (Pa. Commw. Ct. 2014), *appeal denied*, 121 A.3d 497 (Pa. 2015) (citing cases). Moreover, at the same time that Spanier argues that the criminal proceeding is not appropriate for consideration on this motion, he relies on the very same case in his Opposition, arguing that it is an element of the harm that he has suffered and stating that "most of the charges against Dr. Spanier have already been quashed."[13] Opp. Br. at 18, 27.

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[13] This statement ignores that these charges were quashed for reasons totally outside the merits of the charges. Rather, the Superior Court found that charges against Spanier founded on grand jury testimony offered by PSU's General Counsel Cynthia Baldwin should be quashed because an attorney-client relationship existed between Spanier and Baldwin and she was therefore incompetent to testify against him. *Spanier*, 132 A.3d at 498. Furthermore, Spanier ignores that the Superior Court ***refused*** to quash the remaining charges against him, instead sustaining their propriety. These are the charges relevant here.

The criminal proceedings against Spanier clearly are relevant to this action. The charges against Spanier are founded on the very same conduct that forms the basis for Defendants' opinion that Spanier showed a lack of empathy and failed to report suspected child abuse. If Spanier is convicted of those charges, he will be collaterally estopped from disputing the truth of the factual statements in the Report. At the least, the pendency of the criminal action certainly goes to whether Spanier could ever be able to prove actual malice. As the Supreme Court held in *Briggs*, he will not be able to do so.

CONCLUSION

For the foregoing reasons as well as those set forth in Defendants' Opening Brief, Defendants' Preliminary Objections should be sustained and Plaintiff's Complaint should be dismissed.

Respectfully submitted,

Dated: May 31, 2016

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Exhibit A

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION – CIVIL

THE PENNSYLVANIA STATE UNIVERSITY,	:	NOVEMBER TERM, 2013
	:	NO. 03195
Plaintiff,	:	
v.	:	COMMERCE PROGRAM
PENNSYLVANIA MANUFACTURERS' ASSOCIATION INSURANCE CO.	:	Control Nos.: 15111033, 15111034, 15111035
Defendant.	:	

ORDER

AND NOW, this 4th day of May, 2016, upon consideration of the Cross-Motions for Partial Summary Judgment of Penn State University ("PSU") and Pennsylvania Manufacturers' Association Insurance Company ("PMA"), the responses thereto, and all other matters of record, and in accord with the Opinion issued simultaneously, it is **ORDERED** as follows:

1. PMA's Motion for Partial Summary Judgment on Trigger of Coverage is **GRANTED in part** and **DENIED in part** as follows:
   a) With respect to any claims asserted against PSU by an alleged victim of sexual abuse by Gerald Sandusky, the PMA policy that is triggered, if any, is only the policy in place at the time that the first incident of sexual abuse occurred;
   b) With respect to any PMA policy year, the number of occurrences for the Sandusky-related claims is equal to the number of victims who were first abused that year; and
   c) With respect to any claims asserted by victims who allege they were first abused during the 2005-2006 policy year or any subsequent year containing the single perpetrator provision, there is only a single occurrence under the applicable

policy, regardless of the number of victims or the time period over which the alleged abuse took place.

2. PMA's Motion for Partial Summary Judgment Concerning the Sexual Abuse or Molestation Exclusion Policies is **GRANTED**, and PSU is not entitled to any coverage for the Sandusky-related claims under the seven insurance policies issued to PSU by PMA covering the period March 1, 1992 to March 1, 1999.

3. PSU's Motion for Partial Summary Judgment on Certain Coverage Defenses is **GRANTED in part** and **DENIED in part** as follows:

   a) The expected or intended injury exclusion does not bar coverage under any policy issued prior to May, 1998; and

   b) The failure to disclose defense does not apply with respect to any policy issued prior to May, 1998.

BY THE COURT:

GLAZER, J.

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION – CIVIL

THE PENNSYLVANIA STATE UNIVERSITY,	:	NOVEMBER TERM, 2013
	:	NO. 03195
Plaintiff,	:	
v.	:	COMMERCE PROGRAM
	:	
PENNSYLVANIA MANUFACTURERS' ASSOCIATION INSURANCE CO.	:	Control Nos.: 15111033, 15111034, 15111035
Defendant.	:	

OPINION

This case arises out of a series of heinous crimes perpetrated against a multitude of children over a 40 year period by the now convicted, serial sexual predator, Gerald A. Sandusky, who is currently incarcerated. Most of his victims, who opted to seek damages from the entities for which Sandusky worked, have been paid in settlement of their claims. The claims made in this litigation are focused solely on the question whether Sandusky's employer, Penn State University ("PSU"), should pay its portion of the settlement amounts itself, or if its commercial general liability ("CGL") insurer, Pennsylvania Manufacturers' Association Insurance Company ("PMA") should cover some or all of those settlement costs. Since this is obviously not a criminal matter, this court is not governed by the higher standards of proof required in criminal prosecutions; instead this court must apply the general civil rules of contract construction and interpretation.

PSU requests indemnification from PMA based on CGL policies issued for the period spanning from 1969 until 2011, when Sandusky was employed by PSU (the "Insuring Period"). The terms of the policies existing from 1976 through 2001, when Sandusky committed acts of child molestation for which there is some evidence of record, are of particular relevance here.

Even more specifically, the court must examine the policies for the years 1976, 1987, 1988, 1998, and 2001, when PSU agents allegedly learned of Sandusky's abusive acts ("Potential Notice Incidents"). The form of the PMA policies changed over time, and different definitions and exclusions applied throughout the Insuring Period. Of course, the facts of each Potential Notice Incident are different too.

I. The 1976, 1987, and 1988 Potential Notice Incidents and Applicable Policy Provisions.

Sandusky was employed by PSU as an Assistant Football Coach and Assistant Professor of Physical Education from 1969 until his retirement in 1999.[1] PMA claims Sandusky committed several acts of molestation early in his career at PSU: in 1976, a child allegedly reported to PSU's Head Football Coach Joseph Paterno, that he (the child) was sexually molested by Sandusky; in 1987, a PSU Assistant Coach is alleged to have witnessed inappropriate contact between Sandusky and a child at a PSU facility; in 1988, another PSU Assistant Coach reportedly witnessed sexual contact between Sandusky and a child; and also in 1988, a child's report of his molestation by Sandusky was allegedly referred to PSU's Athletic Director.[2] There is no evidence that reports of these incidents ever went further up the chain of command at PSU.

During this time period, PSU's Commercial General Liability policies contained the following provisions:

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[1] Sandusky continued to be associated with PSU after his retirement. From 1999 until his arrest and termination in 2011, he served as Assistant Professor and Coach Emeritus. *See* Freeh Sporkin & Sullivan, LLP, Report of Special Investigative Counsel, pp. 59-60 (the "Freeh Report"). The Freeh Report was commissioned by PSU, and accepted by PSU at least for purposes of the PSU-NCAA Consent Decree. However, PSU now appears to dispute its factual findings, so such facts may have to be determined at a trial in this action.

[2] These events are described in a number of the victims' depositions.

The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of . . . bodily injury . . . to which this insurance applies, caused by an occurrence . . ."[3]

"bodily injury" means "bodily injury, death, humiliation, mental injury, mental anguish, shock, sickness, disease or disability sustained by any person."[4]

"occurrence" means an accident,[5] including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured;"[6]

Each of the following is an "insured" under this insurance . . . if the named insured is designated in the declarations as other than an individual, partnership or joint venture, the organization so designated and any executive officer, director[7] or stockholder thereof while acting within the scope of his duties as such;[8]

As respects bodily injury . . . under the provision 'Persons Insured' the following are added as insureds . . . Any employee (other than executive officers) of the named insured while acting within the scope of his duties as such . . .[9]

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[3] 1987-1988 policy, Section I, p. J-07.

[4] 1987-1988 policy, Amendatory Endorsement, p. J-17. Original definition was "'bodily injury' means bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom." *Id.*, Definitions Section, p. J-02.

[5] "An 'accident' within accident insurance policies is an event happening without any human agency, or, if happening through such agency, an event which, under [the] circumstances, is unusual and not expected by the person to whom it happens." Black's Law Dictionary, p. 14 (5th ed 1979); Black's Law Dictionary, p. 15 (6th ed 1990).

[6] 1987-1988 policy, Definitions Section, p. J-02.

[7] In this context, *i.e.*, when mentioned in tandem with "officers" and "stockholders," the term "director" necessarily means a member of the board of the insured organization. *See* Daniel Adams Associates, Inc. v. Rimbach Pub., Inc., 519 A.2d 997, 1000 (Pa. Super. 1987) ("A corporation is a creature of legal fiction which can 'act' only through its officers, directors and other agents.") PSU does not have a board of directors, but rather has a Board of Trustees, so the word "trustee" must be substituted for "director" in this instance.

[8] 1987-1988 policy, Section II, Persons Insured, p. J-07.

[9] *Id.*, Broad Form CGL Endorsement, p. J-12.

Clearly, Sandusky's victims suffered "bodily injuries" as that term is used in the policies. As alleged in the actions filed against PSU by Sandusky's victims, such bodily injuries were caused by "an accident," namely PSU's negligent hiring, supervision, and retention of Sandusky.

The question is whether PSU was more than negligent, *i.e.*, did it expect or intend such bodily injuries to occur. PSU is defined to include only its officers, trustees and stockholders. The PSU employees with knowledge of these incidents, Paterno, the Assistant Coaches, and the Athletic Director, are not officers, trustees, or stockholders.

Under the additional insured provisions of the policies, Paterno and the Assistant Coaches could, if sued by the victims, be potentially covered insureds. However, coverage for their lapses is not at issue here. Since such employees are additional persons insured and are not included in the definition of the corporate insured PSU, their knowledge, expectations, and intentions are not imputed to PSU to bar coverage for PSU.[10]

In other words, coverage is afforded to "the insured" PSU unless the bodily injury was expected or intended by the same insured, PSU, its officers, directors and stockholders, and not by another insured, such as its employees.[11] Since there is no evidence that any such officers, directors, or stockholders knew of Sandusky's molestations in 1976, 1987 and 1988, they could not have expected or intended such abuses, and the resulting bodily injury to the victims, to

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[10] *See* 1987-1988 policy, Definitions, J-02 ("'insured' means any person or organization qualifying as an insured in the 'Persons Insured' provision of the applicable insurance coverage. The insurance afforded applies separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the company's liability.")

[11] Gen. Acc. Ins. Co. of Am. v. Allen, 708 A.2d 828 (Pa. Super. 1998) ("[T]he cases here, and elsewhere, dealing with the usage of the term 'the insured' have held that for coverage to be excluded under the 'intentional act' or 'intended or expected' exclusion, the damage or injury had to be intended by the insured in question, not another insured under the policy." Court distinguishes policies that use "an insured" or "any insured" instead of "the insured.")

occur. Therefore, PSU may be covered under the policies in place at the time those acts of abuse took place.

The policies also contained a notice provision requiring PSU to notify PMA of any occurrence that could result in coverage under the policies:

> In the event of an occurrence, notice containing particulars sufficient to identify the insured also reasonably obtainable information with respect to the time, place, and circumstances thereof, and the names and addresses of the injured and available witnesses shall be given by or for the insured to [PMA] or any of its authorized agents as soon as practicable after knowledge of same is had by the insured, if an individual, or by an executive officer, if a corporation.
>
> It is further agreed that knowledge of an occurrence by the agent, servant or employee of the insured shall not in itself constitute knowledge of the insured unless the risk manager shall have received such notice from his agents, servant and employee.[12]

Under the last of these provision, PSU did not have a duty to report an occurrence of child molestation to PMA unless one of its executive officers, or the Risk Manager, knew about it. Head Coach Paterno, the Assistant Coaches, and the Athletic Director were not executive officers, nor were they Risk Managers with a duty to report incidents to PMA. Since they apparently neglected to inform their superiors, including the Risk Manager, of the 1976, 1987 and 1988 incidents involving Sandusky, PSU cannot be charged with knowledge of Sandusky's molestations sufficient to require it to have notified its insurer, PMA.

II. The Abuse or Molestation Exclusion in the 1992-1999 Policies.

There is evidence of record that, during the 1990s, Sandusky abused at least four children in the PSU locker rooms, football buildings, and the pool, as well as at the PSU Rose Bowl game

[12] 1987-1988 policy, Condition 4(a) Amendment, p. J-29.

in California.[13] From March 1, 1992 through March 1, 1999,[14] a specific Abuse or Molestation Exclusion (the "AME") was included in the policies. The parties have asked the court to interpret and apply that exclusion to Sandusky's predatory practices. The AME provides that "[t]his insurance does not apply to 'bodily injury' . . . arising out of:"

a.) The actual or threatened abuse or molestation by anyone of any person while in the care, custody or control of any insured, or

b.) The negligent employment, investigation, supervision, reporting to the proper authorities, or failure to so report, or retention of a person for whom any insured is or ever was legally responsible and whose conduct would be excluded by paragraph (a) above.[15]

"Insured" is defined to include PSU's employees, "but only for acts within the scope of their employment by [PSU]" [16] "or while performing duties related to the conduct of [PSU's] business."[17]

Clearly, Sandusky fits the definition of "anyone" as used in Section (a), and he was convicted of committing "actual abuse or molestation." Furthermore, the children were in Sandusky's care, custody and control when he abused them.[18] The question then is whether he was also an "insured" at the time that he abused them.

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[13] Freeh Report, p. 41. *See also* discussion of 1998 incident below.

[14] It is an interesting, although apparently irrelevant, coincidence that the AME ceased to be employed in the PMA policies the same year that Sandusky retired from PSU.

[15] 1992-1993 policy, Abuse or Molestation Exclusion, p. L-60; 1993-1994 policy, Abuse or Molestation Exclusion, p. I-67; 1998-1999 policy, Abuse or Molestation Exclusion, CG 21 46 10 93.

[16] 1992-1993 policy, Endorsement 10, p. L-16; 1993-1994 policy, Endorsement 10, p. I-17;

[17] 1998-1999 policy, Section II – Who Is An Insured, CG 00 01 01 96, p. 7.

[18] When he abused children in PSU's locker room and at PSU events, those children were arguably also in the care, custody and control of the insured PSU.

From 1992-1999, Sandusky was employed as an Assistant Coach and Assistant Professor at PSU, so he was an "employee" of PSU's. When he brought the children on campus and abused them in the locker room, or took them with him to PSU football games and abused them in motel rooms, he was simultaneously enjoying the privileges and perquisites of his position as a PSU Assistant Coach. His concurrent, non-abusive, acts on campus and at games were "acts within the scope of his employment by [PSU]" or "duties related to the conduct of [PSU's] business."

Sandusky's acts of abuse were obviously not part of his job. To use an employee's job description to protect the insured from application of the AME would render the exclusion meaningless in every instance of abuse. The court will not do so.[19]

The next question is whether his abusive acts that occurred off-campus and away from PSU football games also fall within the purview of the AME. When he abused children in his own home or at Second Mile events,[20] he was still a PSU Assistant Coach and Professor, and clothed in the glory associated with those titles, particularly in the eyes of impressionable children.[21] By cloaking him with a title that enabled him to perpetrate his crimes, PSU must assume some responsibility for what he did both on and off campus.[22]

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[19] *See* Girard Trust Bank v. Life Ins. Co. of N.A., 364 A.2d 495, 498 (Pa. Super. 1976) ("It is true that contract terms will not be construed in such a manner so as to render them meaningless.")

[20] Second Mile was a charity founded by Sandusky in 1977 to help troubled youth. PSU "work[ed] collaboratively" with Second Mile even after Sandusky retired from PSU. Freeh Report, pp. 107-108.

[21] Many people, including priests, teachers, judges, and other government officials, hold positions of trust in the community and their job is indivisible from their identity in the eyes of others. Any illegal or improper act they perform outside their usual place of employment, *i.e.*, off the bench, away from the church, school, or government building, is enabled by, and thereby besmirches, the office and position of trust they hold.

[22] As pointed out in the Special Investigative Counsel's Report, PSU "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. Indeed, that continued access provided Sandusky with the very currency that enabled him to attract his victims." Freeh Report, p. 15.

As alleged in the underlying complaints filed by Sandusky's victims, PSU could be liable to those children for its negligent employment, investigation, and retention of Sandusky. Since the bodily injury suffered by all his victims arose out of such negligence by PSU, Section (b) of the AME bars insurance coverage for those claims. As a result, PSU has no coverage under the 1992-1999 Policies that contain the AME with respect to the injuries Sandusky inflicted on children during that time period.

III. The 1998 and 2001 Potential Notice Incidents and Applicable Policy Provisions.

In May, 1998, the mother of an 11 year old boy filed a PSU police report against Sandusky alleging he assaulted her son in a PSU shower on May 3rd. The campus police opened an investigation, contacted the County Children and Youth Services and the District Attorney's Office.[23] According to the Freeh Report, PSU's Senior Vice President-Finance and Business, Gary C. Schultz,[24] "was immediately informed of the investigation" and he in turn notified Graham B. Spanier, PSU's President.[25] Sandusky admitted to merely hugging his victim in the shower and the investigation was closed. The Special Investigative Counsel found no evidence that PSU's Office of Risk Management was alerted nor that it conducted any review.[26] In addition,

> [n]othing in the record indicates that Spanier, Schultz, Paterno or Curley spoke directly to 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.[27]

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[23] Freeh Report, pp. 42-43.

[24] As Senior VP for Finance and Business, Schultz oversaw the University Police and Public Safety, the Office of Internal Audit, and the Office of Human Resources, among others. *Id.*, p. 33.

[25] *Id.*, pp. 20, 47. Schultz apparently also talked to Athletic Director Timothy Curley about the incident, and Curley "touched base" with Paterno about it. *Id.*, p. 48.

[26] *Id.*, p. 51

[27] *Id.*

In 1999, Sandusky formally retired[28] but was granted emeritus rank,[29] which allowed him to continue using PSU locker rooms and other facilities.[30] Sandusky assaulted at least two more victims in 1999 and 2000; one in the PSU team hotel at the Alamo Bowl and one in the PSU showers.[31] In the Fall of 2000, two different PSU janitors saw Sandusky engage in inappropriate conduct with children in PSU's showers, but failed to report it.[32]

On February 9, 2001, Michael McQueary, a graduate assistant, witnessed Sandusky molesting a child in the shower room at PSU and he claims to have reported it to Paterno.[33] Paterno then apparently reported the assault to Curley and VP Schultz, who met with President Spanier regarding it.[34] They debated informing the Department of Public Welfare, but ultimately decided just to tell Sandusky not to bring children to PSU's athletic facilities and to inform the executive director of the Second Mile of the incident.[35] In response to this plan,

> Spanier noted in an email 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. But that can be assessed down the road. The approach you outline is humane and a reasonable way to proceed."[36]

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[28] He was apparently rehired on an emergency basis for the 1999 football season. *Id.*, p. 55.

[29] The Special Investigative Counsel found that "[w]hile the decision to grant Sandusky emeritus rank was unusual [because the positions he had held were not normally eligible for emeritus rank], [there was] no evidence to show that the emeritus rank was related to the [1998 Incident]." *Id.*, p. 61.

[30] *Id.*, p. 55.

[31] *Id.*, pp. 22, 54.

[32] *Id.*, p. 62.

[33] *Id.*, pp. 62, 66-67.

[34] *Id.*, pp. 23, 62.

[35] *Id.*, pp. 73-76.

[36] *Id.*, p. 75.

In August 2001, Sandusky assaulted another victim in PSU's shower and he molested yet another child in December, 2001.[37]

In both 1998 and 2001, Schultz and Spanier apparently took no steps to prevent Sandusky from committing additional bad acts in the future, nor did they report what they knew to PSU's Risk Manager, nor to PMA. The question is whether their knowledge of Sandusky's crimes and criminal proclivities could bar PSU from recovering under the PMA CGL polices from that point forward.

Under the general coverage provisions of the 1998-1999 and 2001-2002 policies, and as in prior years, PMA agreed to provide coverage to PSU for sums that PSU becomes legally obligated to pay as damages because of bodily injury caused by an accident, including continuous or repeated exposure to substantially the same general harmful conditions. [38]

The "insured" under the relevant policies includes PSU, its officers and directors, but only when performing their duties for PSU:

> If you are designated in the Declaration as . . . an organization other than a partnership, joint venture or limited liability company, you are an insured. Your "executive officers"[39] and directors are insureds but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.
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> * * *
>
> Each of the following is also an insured: Your "employees", other than your "executive officers" . . . but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business.[40]

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[37] Freeh Report, p.79.

[38] 1998-1999 policy, Section I (A), p. 1, and Section V - Definitions, p. 10; 2001-2002 policy, Section I (A), p. 1, and Section V – Definitions, pp. 10, 12.

[39] "'Executive officer' means a person holding any of the officer positions created by your charter, constitution, by-laws or any other similar governing document." 1998-1999 policy, Section V - Definitions, p. 11; 2001-2002 policy, Section V – Definitions, p. 11.

[40] 1998-1999 policy, Section II – Who Is An Insured, p. 7; 2001-2002 policy, Section II – Who Is An Insured, p. 7.

The 1998-99 policy also contained the AME, which is discussed above. The AME bars coverage under the 1998-1999 policy for Sandusky's abusive acts as a high profile employee of PSU. The 2001-2002 policy does not contain the AME.

The 1998-1999 policy, the 2001-2002 policy, and the policies for subsequent years contained an "Expected or Intended" exclusion ("EIE"): "This insurance does not apply to . . . 'bodily injury . . . expected or intended from the standpoint of the insured."[41] As Vice President and President of PSU, respectively, Spanier and Schultz are "officers" of PSU.[42] They allegedly learned of the report against Sandusky in the course of "their duties as officers for [PSU]." Therefore, they qualify as part of the insured, PSU, under the policy. The court must then examine Schultz and Spanier's expectations and intentions to see if the EIE may apply.

The question is whether they expected or intended Sandusky to commit bad acts in the future, once they learned that he had committed them in the past. In 1998 and 2001, it was common knowledge, unfortunately, that sexual predators are repeat offenders. The American public, of which Spanier and Schultz are members, had been exposed by the media to countless stories of priests, teachers, and others who repeatedly sexually abused many children over many years. It is highly unlikely that anyone at the turn of this current century could reasonably claim ignorance of the existence and practices of sexual predators like Sandusky.

Once Schultz and Spanier became aware of Sandusky's inappropriate acts with children in the PSU showers, they should have contacted the authorities, obtained help for the children he abused, and otherwise acted to prevent him from having future contact with children.[43] Instead,

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[41] 1998-1999 policy, Section I, Coverage A (2) - Exclusions, p. 1; 2001-2002 policy, Section I, Coverage A (2) - Exclusions, p. 1.

[42] Curley was Director of Athletics, not a Vice President, although he did report directly to the President. Freeh Report, p. 35.

[43] The Freeh Report outlines these failures to act in detail.

they apparently chose to sweep the problem under the rug. To the extent they failed to take proper action, they were acting as PSU's executive officers. Therefore, their knowledge of Sandusky's molestations and of predatory practices generally, and their failure to act, are necessarily imputed to PSU.

If the insured, PSU, knew about Sandusky's abusive acts in 1998 and 2001, and it knew that sexual predators are often repeat offenders, then PSU could well have expected[44] or intended[45] him to continue to molest children in the future, which he did.[46] It is an issue for trial whether PSU and its executive officers expected or intended future bodily injury to children once they became aware of Sandusky's molestations, and thereby whether coverage under each subsequent policy containing the EIE is barred.

The 1998-1999 and 2001-2002 policies also imposed certain reporting duties on PSU and its officers such as Schultz and Spanier:

> Duties in the Event of Occurrence, Offense[,] Claim or Suit.
>
> a. You must see to it that we are notified as soon as practicable after knowledge of the same is had . . . by an executive officer, if [insured is] a corporation, of an 'occurrence' which may result in a claim . . .
>
> b. It is further agreed that knowledge of an occurrence by the agent, servant or employees of the insured shall not in itself constitute knowledge of the insured unless the risk manager

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[44] "Expect" is defined as "1. a. To look forward to the probable occurrence or appearance of; . . . b. To consider likely or certain." American Heritage Dictionary, p. 644 (3d ed. 1992).

[45] "Intend" is defined as "1. To have in mind a fixed purpose to reach a desired objective; to have as one's purpose . . . 2. To contemplate that the usual consequences of one's act will probably or necessarily follow from the act, whether or not those consequences are desired for their own sake." Black's Law Dictionary, p. 813 (7th Ed. 1999). Under this second definition of "intend," PSU could be said to have intended that children would be abused due to its failure to act.

[46] Even courts that have read the EIE restrictively could find PSU's failure to act on its knowledge to have expected or intended consequences. *See* United Services Auto. Ass'n v. Elitzky, 517 A.2d 982, 989 (Pa. Super. 1986) ("We hold that such a clause excludes only injury and damage of the same general type which the insured intended to cause. An insured intends an injury if he desired to cause the consequences of his act or if he acted knowing that such consequences were substantially certain to result.")

> shall not in itself constitute knowledge of the insured unless the risk manager [sic] shall have received such notice from its agents, servants and employees.[47]

As executive officers, and not mere agents, servants or employees of PSU, Spanier's and Schultz's knowledge is imputed to PSU, and PSU had a duty to notify PMA of the allegations of assault against Sandusky or risk a breach of the 1998-1999 and 2001-2002 policies.

Furthermore, the policies contained the following language regarding failure to report material facts and hazards:

> This policy may also be cancelled from inception upon discovery that the policy was obtained through fraudulent statements, omissions or concealment of facts material to the acceptance of the risk or to the hazard assumed by us.[48]

> Your failure to disclose all hazards or prior "occurrences" existing as of the inception date of the policy shall not in itself prejudice the coverage otherwise afforded by this policy provided such failure to disclose all hazards or prior "occurrences" is not intentional.[49]

Failure of PSU and its officers to report to PMA that PSU had a sexual predator on staff when PSU applied for each subsequent year's policy could constitute an intentional omission by PSU of a material fact in its insurance application which renders such subsequent policies voidable at the option of PMA, at least with respect to the bodily harm caused by said sexual predator.

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[47] 1998-1999 policy, Amendment of Duties in Event of Occurrence Endorsement AP 27 GL 11; 2001-2002 policy, Amendment of Duties in Event of Occurrence Endorsement AP 27 GL 11. The duplication of the clause "shall not in itself constitute knowledge of the insured unless the risk manager" is contained in the policy, but that error does not change the meaning of the policy provision.

[48] 1998-1999 policy, Pennsylvania Changes – Cancellation and Nonrenewal IL 02 46 09 96, p. 1; 2001-2002 policy, Pennsylvania Changes – Cancellation and Nonrenewal IL 02 46 09 00, p. 1

[49] 2001-2002 policy, PMA Special Broadening Endorsement PGL 0010 09 96, p. 2. The copy of the 1998-1999 policy provided to the court does not include page 2 of the PMA Special Broadening Endorsement. The court will assume it is substantially the same as the 2001-2002 version.

IV. The Trigger of Coverage Issue

Many of Sandusky's young victims were molested by him many times over the course of several years, so their claims thereby implicate multiple policies. One could argue that each act of abuse was a separate "occurrence" causing additional harm to the victim, so that PSU would be entitled to coverage under multiple policies based on its liability for repeated acts of abuse to each child.[50] However, the policies all define an insurable "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

Continuous or repeated exposure to harmful conditions is most often considered in the context of environmental contamination or other similar property damage, where pollutants seep into and through the ground over multiple policy years. However, it has also been examined by our Superior Court in a coverage action involving the insured's potential liability for child sexual abuse.[51] In that case, the court found there was no coverage for the grandfather's repeated intentional acts of molestation, which are akin to Sandusky's acts, but there was some coverage for the grandmother's negligence in failing to prevent the abuse, which is akin to the allegations made against PSU in the underlying actions. The court held:

> The allegations of negligence of Elizabeth Allen were all directed to a failure of Mrs. Allen to prevent the abuse at the hands of her husband. Such failure persisted throughout the period of time the abuse occurred. Thus, at least as it relates to Mrs. Allen, the injury to the plaintiffs resulted from "continuous or repeated exposure to substantially the same general condition," *i.e.*, Mrs. Allen's negligent failure to prevent the sexual abuse, and, as such, was a single occurrence within the meaning of the policy.[52]

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[50] For instance, if there were 10 victims, and each of them was molested once a year from 1980-1985, there would be 50 insurable occurrences under this argument.

[51] Gen. Acc. Ins. Co. of Am. v. Allen, 708 A.2d 828 (Pa. Super. 1998).

[52] *Id.*, 708 A2d at 833.

Such negligence resulting in continuous exposure to a recurring harm is a single occurrence. That single occurrence triggers coverage during the first policy year in which it manifests and only during that first policy year.

> [S]ince 1986, in Pennsylvania the first manifestation rule has served as the test for determining coverage under commercial general liability policies, with the lone exception of asbestos bodily injury claims. When [PMA and PSU] drafted the [applicable CGL] policies, it is reasonable to believe that they intended to invoke the prevailing first manifestation rule with the requirement that [bodily injury] occur during the policy period. It is unlikely that the parties would have intended or expected a single occurrence, albeit with [bodily injury] continuing past the end of the respective policy period, to trigger coverage under multiple consecutive policies. At the very least, they should have anticipated its application to the [relevant CGL] policies, and drafted around the first manifestation rule if they preferred a different trigger of coverage. Accordingly, the better position is to construe the [relevant CGL] policies as providing for coverage only under the policy or policies in effect at the time an occurrence first arises. As we explained *supra*, an occurrence first arises when bodily injury or property damage first manifests in a way that becomes reasonably apparent.[53]

Unlike environmental pollution or asbestos damage, which can remain hidden for many years before it manifests, the physical violation (bodily injury) arising from child sexual abuse is experienced immediately by the victim, although the harm often continues to be felt long thereafter.[54] To the extent that PSU's negligence enabled Sandusky to abuse his victims, such bodily injury manifested when the first abuse of each victim occurred. With respect to each

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[53] Pennsylvania Nat. Mut. Cas. Ins. Co. v. St. John, 106 A.3d 1, 18 (Pa. 2014) ("the trial court found that property damage to Appellants' dairy herd became reasonably apparent in April 2004, which, in retrospect, we know was caused by LPH Plumbing's negligent installation of the plumbing system and the subsequent seepage of gray water into the dairy herd's freshwater drinking system. Coverage is therefore triggered under the Penn National policy in effect from July 1, 2003 to July 1, 2004, only.")

[54] This reasoning applies with respect to insurance coverage only. The court recognizes that children who suffer abuse may repress their memories, which repression is a manifestation of the immediate harm they suffer, and that they thereby may be entitled to longer statutes of limitations for their criminal and civil claims against their abusers. Such issues are not before this court.

victim, the policy in place at the time the first act of abuse occurred is the only one that potentially[55] provides coverage.

The parties also dispute whether the claims of multiple victims that occur during the same policy year should be lumped together as one claim under the "single perpetrator" theory. Under this theory, if Sandusky began abusing 3 of his victims in the same year, their claims would be a single occurrence subject to one per occurrence policy limit of $2 million rather than three separate limits of $2 million each.[56]

The 2005-2006 policy and subsequent policies contain an express statement of the single perpetrator theory: [57]

> "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions. Further, any covered incidents related to or arising out of Sexual Molestation, sexual or physical assault, or abuse, irrespective of the number of covered incidents or injuries or the time period or area over which such covered incidents or injuries occur, shall be treated as one "Occurrence" for each perpetrator.[58]

This Single Perpetrator Exclusion ("SPE") requires that harm to all victims who were first abused by Sandusky during the 2005-2006 coverage year be treated as a single occurrence under the 2005-2006 policy. The same holds true for all subsequent policies containing the SPE.

However, with respect to the earlier polices that do not contain the SPE, the court will not imply such a provision, and multiple victims of a single abuser will not be lumped together as a

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[55] "Potentially" because, as discussed previously, there may be other terms or exclusion in that policy which bar coverage for such occurrences.

[56] The total recoverable for all occurrences in any given year is $3 million, so this hypothetical would not, in reality, result in a total recovery of $6 million.

[57] In the 2005-2006 policy, sexual molestation was included in the definition of "personal injury" rather than "bodily injury", and coverage was precluded "when known to an Officer who did not engage in said activity but failed to report it to proper authorities when under a legal duty to do so." 2005-2006 policy, Personal Injury Redefined AP 27 GL 13.

[58] *Id.*, Occurrence Definition Modified AP27 GL 12.

single occurrence, absent language expressly requiring such a holding. Each of Sandusky's victims' claims gives rise to a separate "occurrence" under those earlier policies, as previously noted.

CONCLUSION

For all the foregoing reasons, PMA and PSU's summary judgment motions are granted in part and denied in part.

Dated: May 4, 2016

Glazer, J.

CERTIFICATE OF SERVICE

I, David S. Gaines, Jr., hereby certify that I caused to be served on May 31, 2016, a true and correct copy of the foregoing Memorandum by first-class mail upon the following:

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