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Judge Grants Motion to Bring Penn State's Lawsuit to Phila

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In a two-paragraph order Tuesday, Judge Arnold L. New granted the request of Pennsylvania Manufacturers' Association Insurance Co., which moved in February to coordinate and transfer the lawsuit to Philadelphia to eschew the "unavoidable risk" of the courts issuing contradictory decisions in the two cases.

It was unclear if the decision was dispositive of a similar petition from Penn State, in which the university argues under a different rule that litigation should take place in Centre County Common Pleas Court.

PMA initially sued the university in Philadelphia in January, seeking a declaratory judgment limiting defense costs and indemnity for which the university could claim coverage in a case stemming from the former Penn State assistant football coach Jerry Sandusky sex-abuse scandal.

Penn State followed with its own legal action, alleging PMA breached its contract with the school and acted in bad faith by both initially denying coverage and then following with a lawsuit. It asked for a Centre County jury to decide all matters triable by jury.

The underlying civil case — Doe A v. Second Mile — was the first lawsuit filed in response to the allegations that Sandusky used his position within the university and his Second Mile charity to sexually assault young boys. The state has charged him with 52 counts of sex-related offenses.

The insurance company had argued that Pennsylvania Rule of Civil Procedure 213.1 allows for the Philadelphia court to move Penn State's action and coordinate it with the insurer's case because PMA filed first and because the two cases are "mirror images" of each other.

"Indeed, the two actions represent a single dispute over PMA's obligations to PSU," the company previously said. "Requiring the parties to litigate the same issues in two forums would be a waste of judicial and the parties' resources and would give rise to an unavoidable risk of inconsistent rulings."

Rule 213.1 gives discretion to the court where the first lawsuit was filed as to whether the matters in which there is a "common question of law or fact" should be coordinated.

PMA argued the facts and legal questions were identical.

"Putting wholly aside whether PSU's claims have any merit, which PMA vigorously denies, the claims asserted by PSU in the Centre County action are wholly dependent upon the issues raised by PMA in the Philadelphia action, as even a casual reading of PSU's complaint amply illustrates," PMA said in the motion.

In its own petition for change of venue of PMA's lawsuit, Penn State argued last month that transfer of venue was appropriate on forum non conveniens grounds under Pennsylvania Rule of Civil Procedure 1006(d)(1). It also filed a reply in support of PMA's motion to coordinate and transfer, but argued that proceedings should unfold in Centre County.

In a combined memorandum in support of both its filings, the university argued the majority of potential witnesses resided in Centre County, the underlying insurance policies were executed in Centre County and a majority of the allegations against Sandusky allegedly took place in

Centre County.

"As a result, litigation of this action in this (Philadelphia) court will result in clear inconvenience and hardship for the parties and the witnesses and impose an unnecessary burden on this court," the filing said. "Given the lack of connection between this insurance coverage dispute and Philadelphia, PMA appears to have filed suit in Philadelphia County for the purpose of harassing Penn State by making it exceedingly difficult on Penn State and its witnesses, even at the cost of PMA's own inconvenience."

The university also argued to distinguish its own lawsuit, the one filed in Centre County, from the Philadelphia matter, saying it sought "different relief and more comprehensive relief" for breach of contract and bad faith.

Penn State also disputed PMA's position that the "'first'" lawsuit controls jurisdiction.

In Tuesday's decision, however, the court granted PMA's transfer and coordinate motion, which was premised under Rule 213.1. With the university's separate forum non conveniens argument on the docket, Penn State appeared to have a window through which it could attempt to rope the proceedings to Centre County. It was unclear if that motion would be further litigated.

PMA, though, has responded to both Penn State's transfer petition and the university's response to the insurer's coordinate and transfer motion.

"In short, PSU agrees that the criteria for coordination under Rule 213.1 have been met; the only question it genuinely raises is not whether the actions should be coordinated but where," PMA argued in a filing addressing both the university's submissions. "PSU's response to the motion to coordinate and transfer and its petition to transfer are grounded solely in PSU's own convenience and its desire to litigate this dispute on its 'home field.'"

Following Tuesday's decision, PMA's attorney, Steven J. Engelmyer of Philadelphia firm Kleinbard Bell & Brecker, said he was "pleased" with the court's decision but declined to comment further.

Jerold Oshinsky, a California attorney with Jenner & Block, represents Penn State along with Joseph P. Green of Lee Green & Reiter in State College.

Oshinsky declined to comment on the court's decision.

In PMA's initial complaint, filed in late January in Philadelphia, the insurance company pointed to an abuse or molestation exclusion in the second of three consecutive general liability policies, arguing that such would excuse it from paying for the school's legal costs. There appeared to be a narrow, two-month window in which PMA acknowledged Penn State could be afforded coverage based on its policy.

However, that would come down to facts that have yet to be established in Doe A , namely whether the alleged abuse started before March 1, 1992, when the university's policy changed to incorporate the abuse and molestation exclusion. That case would likely stall until the prosecution of Sandusky is closed.

The Doe A complaint alleged Sandusky abused the accuser "more than 100 times" between 1992 and 1996.

The school, in its separate action, argued PMA breached its contract with the university by refusing to cover Penn State's defense costs and for refusing liability coverage for any damages stemming from Doe A . The university also pled an "anticipatory breach of contract" count to spell out that a breach had already taken place before Doe A has proceeded to litigation, and that the breach applies to any such claims against Penn State.

Philadelphia attorney [Thomas R. Kline](#), who is representing Doe A as an interested party in the insurance dispute, said his client's position is that the insurance matter would be best resolved in Philadelphia. This led to attorneys from Kline's firm — Kline & Specter — filing a joinder motion latching onto PMA's coordinate and transfer motion.

However, Kline said Doe A would weigh in on the underlying insurance matter, too. He would be joining Penn State, Kline said.

"You can expect that the position of Doe A will be that there will be insurance coverage applicable to the claims against Penn State," Kline said. "And that of course will be siding with Penn State."

"On the venue issue, we believed strongly that the proper venue is Philadelphia for the

insurance dispute as well as the individual claims which have been brought and which are anticipated," he added.