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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael Humphreys, Acting Insurance Commissioner of the Commonwealth of Pennsylvania, in his capacity as the Statutory Rehabilitator of Senior Health Insurance Company of Pennsylvania, Plaintiff	:	
	:	DOCKET NO.: 1 SHP 2022
v.	:	
Brian Wegner, Paul Lorentz, Barry Staldine, and Protiviti Inc. Defendants.	:	

REHABILITATOR'S BRIEF IN SUPPORT OF HIS PRELIMINARY OBJECTION TO DEFENDANT PROTIVITI INC.'S PRELIMINARY OBJECTION 1

Filed February 1, 2023

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Michael Humphreys, Acting Insurance Commissioner of the Commonwealth of Pennsylvania, in his capacity as the Statutory Rehabilitator ("Rehabilitator") of Senior Health Insurance Company of Pennsylvania ("SHIP"), by and through his undersigned counsel, hereby submits this Brief in Support of his Preliminary Objection to Defendant Protiviti Inc.'s Preliminary Objection 1 ("Rehabilitator's Preliminary Objection") improperly asserting a statute of limitations defense by way of preliminary objections. As set forth herein and in the Rehabilitator's Preliminary Objection, this Court should grant the Rehabilitator's Preliminary Objection, overrule Protiviti's Preliminary Objection 1, and refuse to dismiss the Rehabilitator's Amended Complaint as to Protiviti on timeliness grounds.

I. RELEVANT BACKGROUND

SHIP is a Pennsylvania stock limited life insurance company that administers a closed block of long-term care insurance policies. (Am. Compl. ¶ 3.) SHIP is in rehabilitation under the supervision of this Court through rehabilitation proceedings docketed at *In re Senior Health Insurance Company of Pennsylvania in Rehabilitation*, 1 SHP 2020. At the time SHIP was ordered into rehabilitation, this Court appointed the Insurance Commissioner of Pennsylvania ("Commissioner") as SHIP's Statutory Rehabilitator (the "Rehabilitator").

Among the causes of SHIP's poor financial health are the problems arising out of substandard, misleading, and harmful advice and guidance from third-party

consultants. In an effort to marshal SHIP's assets for the benefit of its policyholders, the Rehabilitator is pursuing recovery from these consultants through litigation—including Defendant Protiviti. *See* 40 P.S. §§ 221.15, 221.16. Protiviti is a global consulting firm that provides consulting on a range of topics including internal audit, risk, and compliance, and the Rehabilitator seeks damages from Protiviti for its failure to perform its duties in accordance with the standards of conduct.

On January 28, 2022, the Rehabilitator initiated this action by filing a Complaint against Protiviti and three former officers of SHIP. On June 22, 2022, the Rehabilitator filed the operative Amended Complaint. On August 26, 2022, Protiviti filed the operative Preliminary Objections to the Amended Complaint, including an affirmative defense of statute of limitations as Preliminary Objection 1. On October 17, 2022, the Rehabilitator filed a Preliminary Objection to Protiviti's Preliminary Objection 1 because Protiviti improperly raised the statute of limitations defense as a preliminary objection.[1] Protiviti thereafter filed a single brief in support of its Preliminary Objections and in opposition to the Rehabilitator's Preliminary Objection. The Rehabilitator now submits this brief in support of his Preliminary Objection and in response to Protiviti's brief.[2]

[1] Also on October 17, 2022, the Rehabilitator filed a separate response and brief in opposition to Protiviti's Preliminary Objections to the Amended Complaint.

[2] Adversarial proceedings in receivership matters are governed by the Rules of Civil Procedure. Pa. R.A.P. 3783.

II. ARGUMENT

Pennsylvania Rule of Civil Procedure 1028(a)(2) authorizes a preliminary objection for "failure of a pleading to conform to law or rule of court." Here, Protiviti's Preliminary Objection 1 improperly asserts the affirmative defense of statute of limitations pursuant to Pennsylvania Rule of Civil Procedure 1030. Protiviti's Preliminary Objection 1 thus fails to conform to the rules governing these proceedings, and this Court must grant the Rehabilitator's Preliminary Objection and overrule Protiviti's Preliminary Objection 1 on statute of limitations grounds.

A. Rule 1030 precludes Protiviti's Preliminary Objection 1 on statute of limitations grounds.

The Pennsylvania Rules of Civil Procedure are clear: the affirmative defense of statute of limitations must be raised in a "New Matter" pleading, not preliminary objections. As stated in Rule 1030(a), "all affirmative defenses including but not limited to . . . statute of limitations . . . shall be pleaded in a responsive pleading under the heading 'New Matter.'" To the extent there could be any doubt, Rule 1028 provides that "[t]he defense of the bar of a statute of frauds or statute of limitations can be asserted only in a responsive pleading as new matter under Rule 1030" rather than by Preliminary Objection. Pa. R.C.P. 1028(a)(4), *Note*. Accordingly, Protiviti's Preliminary Objection 1 raising the affirmative defense of statute of limitations violates Rules 1028 and 1030, and it must be overruled.

B. Protiviti cannot establish an exception permitting consideration of a statute of limitations defense on preliminary objection despite the plaintiff's objections.

The Court can and should grant the Rehabilitator's Preliminary Objection based on Rules 1030 and 1028 alone. Even if the Court considered Protiviti's argument, however, Protiviti fails to offer any reason why it should be permitted by this Court to choose deliberately to make a procedural error rather than simply follow the Rules of Civil Procedure. In its Preliminary Objections and its brief, Protiviti tries to ignore the limitations set forth in Rule 1030 and Rule 1028, asserting that the Court can rely on the statute of limitations defense to dismiss this matter now because that result is apparent on the face of the Amended Complaint. (*See* Preliminary Objection 1 p.6 n.3; Preliminary Objection Brief p. 9-10.) Notably, Protiviti cites only one decision of the Supreme Court of Pennsylvania directly addressed to this issue, *Rufo v. Bastian-Blessing Co.*, 417 Pa. 107, 207 A.2d 823 (1965). It is true that, in *Rufo*, the Supreme Court affirmed dismissal arising out of the grant of a preliminary objection on statute of limitations grounds, but Protiviti ignores the key fact at the heart of *Rufo*: the plaintiffs failed to object. As the Supreme Court explained, however, the lack of objection was critical to its conclusion:

> Plaintiffs argue on appeal that the statute of limitations is an affirmative defense to be pleaded under new matter rather than by preliminary objection, and that they must be given an opportunity to overcome the pleading of such a defense. **It is true that we have held**

> **that ordinarily the statute of limitations must be pleaded as new matter pursuant to Pa.R.C.P. 1030.** *See Quaker City Chocolate and Confectionery Company v. Delhi-Warnock Building Association*, 357 Pa. 307, 314, 53 A.2d 597, 601 (1947). **But plaintiffs did not raise any question in the court below of whether defendant's pleading might be defective.** Plaintiffs could easily have filed a preliminary objection to defendant's preliminary objection in the nature of a motion to strike because of lack of conformity to law or rule of court under Pa.R.C.P. 1017(b)(2). 2 Anderson Pennsylvania Civil Practice § 1017.14. **Having failed to do so they may be deemed to have waived any objection to defendant's form of pleading.** Pa.R.C.P. 1032, 2A Anderson Pennsylvania Civil Practice § 1032.3.

Rufo, 417 Pa. at 114, 207 A.2d 823 (emphasis added).

Indeed, the plaintiffs in *Rufo* went even further in waiving their objection. In addition to failing to file a preliminary objection, the plaintiffs "answered and denied defendant's preliminary objection based on the statute of limitations. In effect, they treated defendant's objection as new matter and answered it. In so doing they did not raise any issues of fact that might have to be tried; they simply asserted that the original action was timely." *Rufo*, 417 Pa. at 114, 207 A.2d 823. As a result, Protiviti can rely on *Rufo* for nothing more than the proposition that a plaintiff can waive any right to rely on Rule 1030 if the plaintiff responds to a statute of limitations preliminary objection on the merits, fails to raise any issues of fact, and does not object to the Court considering the defendant's otherwise-improper defense.

Protiviti cites only one other potentially-binding decision addressed to the statute of limitations on preliminary objections, *Davis v. Commonwealth*, 660 A.2d 157 (Pa. Commw. Ct. 1995). As in *Rufo*, the *Davis* plaintiffs' failure to object was

fatal. In considering an appeal of a complaint filed against various Commonwealth entities, the court affirmed dismissal based on a statute of limitations defense raised by preliminary objections "because the defense appears on the face of the pleadings under attack and [plaintiffs] did not file preliminary objections to the Commonwealth's preliminary objections." *Davis*, 660 A.2d at 159 n.2. The court also noted that one of the Commonwealth defendants had asserted the statute of limitations defense in its Answer with New Matter, putting the question properly before the Court. *Id.* At most, *Rufo* and *Davis* give an appellate court discretion to ignore a trial court's erroneous disregard of Rule 1030, but only when the plaintiff fails to object to that error and the statute of limitations defense asserted is facially correct based on the allegations in the complaint. Neither is true here.

C. <u>This Court should not ignore Rule 1030 and Rule 1028 based on non-binding and unpersuasive authorities.</u>

The only binding and potentially on-point authority cited by Protiviti supports the Rehabilitator's view that this Court cannot consider the statute of limitations defense at the preliminary objections phase once the Rehabilitator objects to that procedure. *See Rufo*, 417 Pa. at 114 (defense permitted if plaintiff does not object and trial court actually considers the matter); *Davis*, 660 A.2d at 159 n.2 (defense permitted if plaintiff does not object, defense is obvious, and trial court actually considers the matter). To bolster its argument, Protiviti relies on two other unpublished and non-binding decisions, *Cooper v. Downingtown School District*,

238 Pa. Super. 404 (1976) and *Baney v. Fisher*, No. 752 M.D. 2018, 2020 WL 5033421 (Pa. Commw. Ct. Aug. 26, 2020) (unpublished) (per curiam), but neither one aids Protiviti in its argument for ignoring the applicable rules.

Cooper is a Superior Court decision not binding on this Court that *may* be followed only if it is persuasively analogous—which it is not. *See In re $300,000 in U.S. Currency*, 259 A.3d 1051, 1058 n.6 (Pa. Commw. Ct. 2021) (application of Superior Court cases in Commonwealth Court). *Cooper* was decided with reference to former Rule 1017, which, unlike Rule 1028 and Rule 1030, permitted some but not all statute of limitations defenses to be raised by preliminary objection. *Cooper*, 238 Pa. Super. at 407 n.2. Moreover, *Cooper* resolved questions arising under circumstances vastly different than the facts here. In 1966, the minor plaintiff in *Cooper* was injured on school district property; at the time, districts were immune from suit under the common law. *Id*. at 407. The plaintiff did not bring litigation before the expiration of the two-year statute of limitations applicable to personal injury matters. *Id*. In 1973, the Supreme Court of Pennsylvania abolished common law immunity. *See id.* (citing *Ayala v. Phila. Bd. of Pub. Educ.*, 453 Pa. 584, 305 A.2d 877 (1973)). The plaintiff filed suit soon thereafter, six years after his injury and four years after the limitations period expired. *Cooper*, 238 Pa. Super. at 407.[3]

[3] *Ayala* was later abrogated by statute. *Degliomini v. ESM Productions, Inc.*, 253 A.3d 226 (Pa. 2021)

Seeking to excuse his delay, plaintiff relied exclusively on legal arguments without a factual component, claiming that *Ayala* effectively revived his untimely claims and that statutes of limitations did not apply to minors. *Id.* at 407 and n.4. After rejecting plaintiff's immunity argument, the Superior Court addressed the statute of limitations, but only because it had been fully briefed, argued, and considered already, *and because the right to dismissal was clear as a matter of law*—unlike Protiviti's alleged right to dismissal, which depends on resolving questions of fact regarding knowledge and control rather than pure questions of law.

D. Protiviti cannot use sovereign immunity cases to rewrite the law governing the statute of limitations defense.

Lacking binding or persuasive authority on point, Protiviti cites cases in which appellate courts looked the other way to affirm a trial court's grant of preliminary objections raising the defense of sovereign immunity. (*See* Brief at 9-10.) The Court should reject this strategy. As noted, Rule 1030 requires all affirmative defenses to be raised by way of New Matter; Rule 1028 confirms that the statute of limitations defense cannot be asserted by preliminary objection, whereas sovereign immunity is not mentioned in the text or notes of Rule 1028. Protiviti may claim, as other defendants do, that there is no meaningful distinction between an immunity defense and a statute of limitations defense, but, unlike statute of limitations issues and related tolling arguments, the defense of sovereign immunity is primarily a question of law for which there is an extensive body of law

regarding its application on preliminary objections. This distinction is evident in *Feldman v. Hoffman*, 107 A.3d 821, 826 n.7, 830 (Pa. Commw. Ct. 2014), cited favorably by Protiviti. [4]

Feldman considered whether the trial court erred in relying on the defendant's sovereign immunity defense at the preliminary objection phase and focused its analysis on immunity cases. *See Feldman*, 107 A.3d at 830-836. In assessing the state of the law the court acknowledged the distinction between immunity cases and other affirmative defenses by its citation to and reliance on *Wurth by Wurth v. City of Philadelphia*, 136 Pa. Cmwlth. 629, 584 A.2d 403, 404–405 (1990). As the Commonwealth Court explained, *Wurth* "recognized a divergent line of cases" following *Rufo*, identifying three different rules depending on the defense asserted and the procedural history of the matter. *Feldman*, 107 A.3d at 830 n.10.

> The first allows immunity to be raised by preliminary objections where the immunity is clear on the face of the pleadings, notwithstanding Rule 1030. The second permits a court to review the merits of an immunity defense (and no doubt other affirmative defenses) raised by preliminary objections where the opposing party fails to object to the procedural defect, thereby waiving Rule 1030. The

[4] In a footnote, Protiviti invokes three other immaterial cases appearing in *Baney*, again ignoring critical distinctions precluding a decision in its favor. *See Greenberg v. Aetna Ins. Co.*, 427 Pa. 511, 515, 517-18 (1967) (litigation privilege defense permitted where complaint relied exclusively on absolutely-privileged statements); *Iudicello v. Com. Dep't of Transp.*, 34 Pa. Cmwlth. 361, 362-63 (1978) (immunity defense permitted where plaintiff admitted the case law supported defendant's position and immunity was "transparently clear" from allegations); *Pelagatti v. Cohen*, 370 Pa. Super. 422, 439-440 (1987) (truth defense to defamation permitted where statements "were discernibly true from the face of the complaint").

> third combines both approaches, stating that if the defense of immunity is apparent on the face of the challenged pleading, the immunity defense will be considered on preliminary objection unless the opposing party challenges this procedure by filing preliminary objections to the preliminary objections.

Feldman, 107 A.3d at 830 n.10 (citations omitted).

The logical distinction between different types of affirmative defenses is evidenced in *Feldman* itself, where the plaintiff asserted claims for intentional infliction of emotional distress and conversion against the county coroner. *Id.* at 835 There was "no question" that the immunity doctrine would bar plaintiff's claims, the question of whether a county coroner is entitled to immunity was a matter of law, and neither the plaintiff nor the court identified an issue of fact to determine the coroner's status. *Id.* In contrast, application of the statute of limitations in this case involves questions of fact—when did the claim accrue, when did the statutory period potentially run, and has the Rehabilitator alleged facts which—if accepted as true, as they must be—support his tolling defenses. *See, e.g., Fine v. Checcio*, 582 Pa. 253, 870 A.2d 850 (2005) (discovery rule tolling doctrine is fact-based, dependent upon the specific circumstances, and ordinarily to be decided at trial by the fact-finder).

E. Protiviti's statute of limitations defenses are not clear as a matter of law.

Protiviti contends that its statute of limitations defense can be asserted now despite the procedural defects in its approach and despite the Rehabilitator's reliance

on the fact-intensive tolling and concealment doctrines. These attacks are primarily challenges to the Rehabilitator's factual allegations, however, and thus demonstrate the very problem with Protiviti's approach to its statute of limitations argument. The Rehabilitator has alleged his inability to uncover the truth and bring suit until after the rehabilitation order, and Protiviti disagrees. As a result, there is no "clear" application of any statute of limitations defense here; Protiviti has merely raised factual disputes regarding the accrual of the Rehabilitator's claims, the running of any statute of limitations, and the applicable tolling doctrines, none of which can or should be decided on preliminary objections, particularly after the Rehabilitator has objected to such a procedure.

Protiviti does identify a handful of legal arguments that it believes would defeat the Rehabilitator's discovery and tolling arguments. To be clear, the Rehabilitator asserts as follows with respect to Protiviti's statute of limitations arguments, both that the discovery rule prevented accrual until after the Rehabilitator was appointed, and that Protiviti's fraudulent concealment prevented SHIP (and later the Rehabilitator) from uncovering the relevant facts, tolling any statute of limitations. Protiviti is wrong in its attacks on both of these.

1. The Court should not address Protiviti's attack on the discovery rule based on its Preliminary Objections because the doctrine is fact-dependent and properly resolved only at a later stage.

Protiviti alleges that SHIP discovered its injury far earlier than the filing of the instant litigation because SHIP was on notice prior to the Rehabilitator's appointment, citing *Rice v. Diocese of Altoona-Johnstown*, 255 A.3d 237 (Pa. 2021). Protiviti misapplies *Rice* and related Pennsylvania law on the discovery rule. In *Rice*, the plaintiff was sexually assaulted by a priest employed and supervised by the Diocese of Altoona-Johnstown and its bishops decades before filing her complaint. 255 A.3d at 237. Plaintiff conceded that her claim accrued at the time of the assaults because she could have brought suit against the priest at that time, challenging only the application of the statute of limitations as to the diocese. 255 A.3d at 244-45. Put differently, plaintiff admitted that she knew of her injury and knew the priest caused that injury, but, she argued, her claim against the diocese did not accrue until much later when she learned of its role in covering-up abuse allegations. *Id.* The Rehabilitator does not concede that SHIP or the Rehabilitator knew of SHIP's injuries or the causes of those injuries, as the Plaintiff did in *Rice*, and facts regarding what SHIP or the Rehabilitator knew or did not know must be decided at a later stage.

Rice does not announce the bright-line inquiry rule (implied by Protiviti's arguments) that would permit consideration of its statute of limitations defenses

now. Instead, *Rice* drew a distinction between cases where a plaintiff's knowledge can be decided as a matter of law and cases where a plaintiff's knowledge is a factual question that would ordinarily be decided by the jury. As set forth below, the facts alleged in the Amended Complaint show that the claims against Protiviti fall into the latter category. Notably, the Supreme Court in *Rice* did not overrule its prior decision in *Nicolaou v. Martin*, 649 Pa. 227, 195 A.3d 880 (2018), in which the Court agreed that "[t]he plaintiff's cause of action accrued when she knew or should have known that Lyme disease was not treated as a result of repeated misdiagnosis by her health care providers." *See Rice*, 255 A.3d at 251 (analyzing *Nicolaou* as distinguishable because plaintiff did not know injury and cause). The Court agreed that, as occurred in *Nicolaou*, a plaintiff may know that something is wrong without knowing of the relevant and cognizable injury as a matter of law. "Given the lengthy history of attempted contradictory diagnosis and treatment, the date of accrual could not be determined as matter of law by the court and a jury would decide when she knew of an injury redressable by a lawsuit." *See Rice*, 255 A.3d at 25 (analyzing *Nicolaou*).

Unlike the sexual assault in *Rice*, which involved a defined harm and a clear and singular bad actor, SHIP's financial collapse cannot be pinpointed to one or two events or one individual. Akin to the injury in *Nicolaou* or another long-dormant illness, SHIP's eventual receivership was the result of facts developing over time,

under circumstances that remained unclear for many years due to the actions of Protiviti, the individual defendants, and others; the individual symptoms and signs of SHIP's financial troubles did not establish conclusively a single injury or single cause or series of causes. Until the Rehabilitator took control of the company, neither SHIP nor the Rehabilitator knew or could know the injury (*i.e.*, a deficit deep enough to put the company into rehabilitation and place policyholders at significant risk) or the causes of that injury (*i.e.*, mismanagement and inadequate advice and services from certain third-parties).

Protiviti makes much of SHIP's knowledge that the Beechwood or Roebling Re transactions were problematic, or that specific members of management had engaged in misconduct, but Beechwood and Roebling Re are not the sole basis of the Rehabilitator's claims. Moreover, the individual losses suffered by SHIP are the potential symptoms of an injury or wrongdoing by others, but they are not the injury itself nor do they provide information regarding the cause of the injury. *Cf. Fine v. Checcio*, 582 Pa. 253, 870 A.2d 850, 861 (2005) (plaintiff could not have discovered cause of his pain immediately after surgery where pain could have been a standard post-operative symptom or a sign of something worse). Following *Rice*, the Supreme Court again addressed the discovery rule in *Reibenstein v. Barax*, 286 A.3d 222 (Pa. 2022), explaining that "[t]he discovery rule applies when critical information about an injury eludes detection through no lack of diligence on the plaintiff's part, and the

'discovery' of that information accordingly dictates when a claim accrues and the limitations period begins to run." *Reibenstein*, 286 A.3d at 234.

Even putting aside Protiviti's wrongdoing, there can be no doubt that the critical information regarding SHIP's financial collapse was difficult to understand and remained unavailable until after the Rehabilitator was appointed. For example, SHIP's balance sheet does not involve the mere tallying up of assets and liabilities to see which is greater; it is based on a complex actuarial analysis of projected premium payments, the submission of claims, policyholder morbidity and mortality, and other financial factors. Whether SHIP (or, later, the Rehabilitator) exercised reasonable diligence with respect to any efforts to understand SHIP's finances and determine the causes of any change in circumstances is a factual question.

With respect to the Rehabilitator's breach of contract claim, the Court can recognize an open issue of fact under the continuing contract doctrine. *See, e.g.*, *Pa. Pub. Util. Comm'n v. Delaware Valley Regional Econ. Dev. Fund*, 255 A.3d 602, 613 (Pa. Commw. Ct. 2012). "Although the statute of limitations for a contract claim generally begins to run on the date of the breach, if the agreement 'does not fix any certain time for payment or for the termination of the services, the contract will be treated as continuous, and the statute of limitations does not begin to run until the termination of the contractual relationship between the parties.'" *Id.* The Rehabilitator alleges that Protiviti served as SHIP's internal auditor from 2013

through 2016. (Am. Compl. ¶ 7.) Notably, the MSA between SHIP and the Rehabilitator does not include a fixed time for termination of the services, and the Amended Complaint does not identify a specific date of termination. Although Protiviti provided a report in February 2015 to Lorentz, the question of whether that report brought an end to Protiviti's engagement under the relevant SOW is a question of fact to be assessed throughout discovery. SHIP has alleged that the relevant SOW and the MSA are continuous at least through November 2016, when the February 2015 report was finally considered at a SHOT executive session. (Am. Comp. ¶ 60.) Based on the continuing nature of the SOW and MSA, the four-year statute of limitations for breach of contract actions could not have run at the time SHIP was placed in rehabilitation. At a minimum, as discussed below, the Rehabilitator's allegations create factual issues barring the premature consideration of the statute of limitations defense at the preliminary objection phase.

Protiviti's approach would have this Court conclude that an insurer suffers a cognizable injury on which it can immediately bring suit the moment it believes or suspects that its officers, directors, and independent advisors may not be performing their duties adequately. Protiviti's approach also would treat each and every loss by SHIP as a single injury, when, in fact, SHIP could have suffered losses as a result of misconduct by the Beechwood and Roebling Re transactions (which are themselves only part of the Rehabilitator's claim, and not the full extent of the allegations) *and*

suffered other losses as a result of Protiviti's misconduct with respect to those transactions or other transactions. Protiviti is free to argue for such a theory on a complete record, but to establish such a rule as a matter of law would go too far in eliminating the discovery rule altogether for injuries to business entities generally and insurers specifically.

2. Protiviti's narrow view of fraudulent concealment does not comport with Pennsylvania law.

Even if SHIP were injured at some earlier time, the fraudulent concealment doctrine would toll the running of the statutory period. *E.g.*, *Molineux v. Reed*, 516 Pa. 398, 532 A.3d 792 (1987). As argued herein, the Rehabilitator has alleged facts showing that Protiviti engaged in fraud and concealed the truth from SHIP and the Rehabilitator, tolling any applicable statute of limitations. Protiviti argues that the fraudulent concealment doctrine cannot apply because the Rehabilitator does not allege that Protiviti engaged in active fraud or concealment up until the moment of the rehabilitation order or thereafter.

This is not the test. Fraudulent concealment will toll the running of a statute of limitations if the defendant's actions "cause[s] the plaintiff to relax his vigilance or deviate from his right of inquiry," and thus "the defendant is estopped from invoking the bar of the statute of limitations." *Molineux*, 532 A.3d at 794. The "defendant's conduct need not rise to fraud or concealment in the strictest sense, that is, with an intent to deceive; unintentional fraud or concealment is sufficient." *Id.*

The Rehabilitator has alleged such facts here, and Protiviti does not identify any rule of law limiting the fraudulent concealment defense to cases in which the concealment continues up until the very moment of the plaintiff's discovery. To the contrary, the statute begins to run when the plaintiff reasonably could have discovered the injury and its causes under the circumstances, rather than as a calculated period from the last act of concealment. *Fine*, 870 A.2d at 861. For example, in *Fine*, once the court found that a doctor's statements regarding the causes of the plaintiff's pain following the surgery at issue could constitute sufficient concealment to toll the statute of limitations, it was a jury question as to when after that point the plaintiff had discovered the injury and its causes. *Id.* The same is true here: even if this Court ignores the procedural defects in Protiviti's approach, its statute of limitations defense cannot be "clear" on the face of the Amended Complaint where the Rehabilitator alleges concealment leading to relaxed vigilance.

F. Protiviti fails to follow the analysis of the cases on which it relies, and its fact-intensive argument also fails to establish a clear statute of limitations defense.

As noted, Protiviti cannot excuse itself from Rule 1030 based on any binding analogous authority, because both *Rufo* and *Davis* direct this Court to deny Protiviti's Preliminary Objection 1 once the Rehabilitator objects, and Protiviti's remaining cases address the assertion of other defenses, not limitations. As a result, Protiviti is left to rely on the approach taken in *Baney*, an unpublished Memorandum

Opinion without precedential value under Internal Operating Procedure 414, and the only case cited by Protiviti in which a statute of limitations defense was permitted on preliminary objections over the objection of the plaintiff. *Baney* is not persuasive because there are significant and meaningful distinctions between *Baney* and the facts and circumstances here. Even if a *Baney*-type analysis could be applied here, however, Protiviti could not meet that standard.

1. *Baney* is non-binding and not persuasive.

Baney is an unpublished Memorandum Opinion relying on inapposite authorities without precedential value under Internal Operating Procedure 414. *Baney*, 2020 WL 5033421. (*See infra* n.4 addressing *Baney* authorities.) *Baney* arose in a distinguishable procedural posture that further diminishes its potential value in this case. In *Baney*, the inmate-plaintiff filed a document styled as a "complaint" that was treated by the Commonwealth Court as a petition for review of government action within the Court's original jurisdiction under Chapter 15 of the Rules of Appellate Procedure. 2020 WL 5033421, at *1 n.1. Compared to adversarial proceedings arising out of insurance receiverships, the Commonwealth Court is afforded a greater degree of discretion with respect to following the Rules of Civil Procedure when faced with a Chapter 15 petition for review. *Compare* Pa. R.A.P. 3783 ("The Pennsylvania Rules of Civil Procedure shall apply to adversarial proceedings."), *with* Pa. R.A.P. 1517 ("Unless otherwise prescribed by these rules,

the practice and procedure under this chapter relating to pleadings in original jurisdiction petition for review practice shall be in accordance with the appropriate Pennsylvania Rules of Civil Procedure, so far as they may be applied."). This Court should not follow *Baney* for this reason alone.

Baney also arose on unique facts. In *Baney*, the inmate-plaintiff filed suit in 2018 for acts committed between 1998 and 2003, more than a decade beyond the two-year statute of limitations, citing information allegedly uncovered in 2014. 2020 WL 5033421, at *4. Fatally, the complaint and the attachments thereto expressly acknowledged facts disproving the plaintiff's two tolling theories, fraudulent concealment and the discovery rule. The plaintiff's fraudulent concealment theory could not succeed where he expressly acknowledged that the defendants had no disclosure duties and were barred by court order from disclosing the documents he alleged had been concealed. *See id.* at *6 (fraudulent concealment requires duty to speak and affirmative statements rather than mere silence). Similarly, the plaintiff's discovery rule argument could not succeed because he alleged that he discovered the relevant facts in 2014 and had filed suit against the very same defendants based on those facts, meaning the two-year statute of limitations expired in 2016, well before the plaintiff filed the operative pleading. *Id.* at *7. The Rehabilitator makes no similar admission here.

2. Protiviti cannot demonstrate that its statute of limitations defense is so clearly applicable based on the facts alleged in the Amended Complaint.

Even if the Court considered the statute of limitations defense now over the Rehabilitator's objection, Protiviti cannot point to any facts acknowledged by the Rehabilitator that would so clearly be fatal to any potential tolling doctrine as in *Baney*, nor can it point to any similarly-clear rules of law as in the sovereign immunity cases on which it relies.[5]

In its Preliminary Objections, Protiviti did not highlight any admissions of knowledge even remotely similar to the admissions in *Baney*, and certainly no admissions of the Rehabilitator himself. Instead, Protiviti asks this Court to piece together and draw negative inferences from a set of disparate allegations related to information that was potentially available to SHIP prior to the rehabilitation order, when—as the Rehabilitator alleges—Protiviti was still working with the co-defendants and concealing information from SHIP itself and from regulators. Protiviti's Preliminary Objection 1 is, essentially, a trial argument that ignores or mischaracterizes the allegations in the Amended Complaint, injuring the

[5] The Rehabilitator addresses the factual issues as evidence that Staldine and Lorentz's premature statute of limitations defense should not be considered now. In so doing, the Rehabilitator does not waive his objection to the use of preliminary objections to raise a statute of limitations defense.

Rehabilitator (as well as SHIP and its policyholders) should this Court resolve Protiviti's statute of limitations defense before the issue is ripe for decision.

SHIP has alleged facts and made arguments in reliance of the discovery rule, which tolls the statute of limitations "until a plaintiff could reasonably discover the cause of his action, including in circumstances where the connection between the injury and the conduct of another are not readily apparent." *In re Risperdal Litig.*, 665 Pa. 649, 661 (Pa. 2019) (citing *Wilson v. El-Daief*, 964 A.2d 354, 365 (Pa. 2009)).[6] Under the rule, a claim accrues only when the plaintiff would have discovered both the injury and its cause at the hands of the defendant through reasonable diligence. *Gleason v. Borough of Moosic*, 15 A.3d 479, 485 (Pa. 2011). Reasonable diligence is a question for the jury at trial, and not one for the Court to resolve at preliminary objections. *Id.* It is well settled that "under the law of Pennsylvania . . . if through fraud *or concealment* the defendant causes the plaintiff to relax vigilance or deviate from the right of inquiry, the defendant is estopped from invoking the bar of limitation of action." (emphasis added) (internal citations omitted). *See, e.g.*, *Ciccarelli v. Carey Canadian Mines, Ltd.*, 757 F.2d 548, 556 (3d Cir. 1985) (citing and summarizing state-law authorities).

[6] Protiviti observes that the Commonwealth Court has departed from the Superior Court's approach to the discovery rule, finding that it does not apply to breach of contract actions. *See Carulli v. N. Versailles Twp. Sanitary Auth.*, 216 A.3d 564 (Pa. Commw. Ct. 2019). If applied here, *Carulli* would not impact the Rehabilitator's remaining claims.

In its Amended Complaint, the Rehabilitator alleged that SHIP was prevented from discovering the claims against Protiviti until after the Rehabilitator was appointed on January 29, 2020, and these allegations must be accepted as true. The Amended Complaint avers in detail how each of the Defendants, and Protiviti in particular, concealed the true facts relating to the Beechwood Re investments in particular, but also relating to other areas of malfeasance by Wegner, Lorentz, and Staldine described in the Amended Complaint.

With regard to Protiviti, it had a fiduciary duty as SHIP's internal auditor to accurately provide its material findings to SHIP's Board and Audit Committee, particularly where those findings concerned improper conduct by SHIP's officers. Instead of complying with that duty, Protiviti concealed its findings. It did not provide the Protiviti memo to the Board or Audit Committee, but provided it only to Defendant Lorentz, whose own conduct and performance were at issue. Representatives of Protiviti attended quarterly meetings with SHIP's Audit Committee and met with the Audit Committee on several other occasions. SHIP's Audit Committee specifically organized some meetings to exclude Wegner, Lorentz, and Staldine to allow Protiviti to openly discuss its findings. Despite all of these meetings and opportunities, Protiviti never informed SHIP of its findings regarding Beechwood or other concerns it uncovered during its work. Instead, Protiviti aligned itself with Wegner, Lorentz, and Staldine, and agreed with them to conceal

Protiviti's findings and obtain approval for additional Beechwood investments based on misrepresentations. (Am. Compl., ¶ 182-183.)

Against this clear application of the discovery rule, Protiviti essentially alleges that SHIP failed to exercise reasonable diligence because it was aware of certain facts prior to January 29, 2020, including having knowledge in November 2016 of a report authored by Protiviti. This argument is not proper at the preliminary objection stage, which requires the Court to accept the facts pled as true and to make all reasonable inferences in favor of SHIP. Indeed, the Pennsylvania Supreme Court has instructed trial courts to avoid resolving the question of reasonable diligence at any stage and instead advised them to leave the question for the jury. *See Gleason*, 15 A.3d at 484-88 (reasonable awareness of injury and cause of injury are to be decided by jury unless "facts are so clear that reasonable minds cannot differ").

Thus, even if Protiviti properly invokes the purported exception to Rule 1030, this Court cannot consider Protiviti's statute of limitations argument regarding SHIP's knowledge or understanding because that argument relies heavily upon disputing or misreading (rather than accepting) the allegations in the Amended Complaint that SHIP had not discovered its claims.[7] Protiviti claims that SHIP's

[7] In the brief opposing Protiviti's preliminary objections, SHIP explains that its claims are also timely because, in this case, the public policy surrounding the rehabilitation process weighs heavily in favor of a finding that SHIP's claims did not accrue until the order of rehabilitation was entered on January 29, 2020.

allegations regarding its knowledge of a specific Protiviti report "cannot be squared," but, even if this were true, it is SHIP, not Protiviti, which is entitled to the benefit of all inferences in its favor. Moreover, Protiviti appears to be misreading and adopting less-than-favorable inferences from the Amended Complaint: SHIP did not allege that the report in question was circulated to the Board in 2016 or that the report was delivered to the right people in 2016; instead, SHIP alleges that the report was not provided to anyone other than Protiviti's co-conspiring management until November 2016 at the earliest, and that, more importantly, the report did not circulate amongst the Board members until April 2018. (Am. Compl. ¶ 184.) Questions of how the report was shared, who received it and when, the impact of receipt of the report, and SHIP's decisions related to that report are all factual issues for summary judgment or trial, not resolution at the preliminary objections phase based on an alleged inconsistency in the Amended Complaint. The statute of limitations defense simply cannot be resolved on the face of the Amended Complaint, even if the Court ignores the requirements of Rule 1030.

G. Protiviti's arguments must be read in light of the Rehabilitator's statutory obligations and the public policy surrounding receivership.

As SHIP argues in its brief opposing Protiviti's preliminary objections, SHIP's claims are also timely because, in this case, the public policy surrounding the rehabilitation process weighs heavily in favor of a finding that SHIP's claims did

not accrue until the order of rehabilitation was entered on January 29, 2020. SHIP's arguments invoke equitable analyses requiring the consideration of competing facts, and the Court should not resolve these public policy considerations at the preliminary objection stage, before SHIP has an opportunity to respond by way of Reply to New Matter or following discovery.

The purpose of Pennsylvania's insurance receivership statutory scheme "is to protect the general public against the substantial costs and exigencies related to a major commercial insolvency." *Foster v. Mut. Fire, Marine & Inland Ins. Co.*, 614 A.3d 1086, 1084 (Pa. 1992), *cert denied sub nom. Allstate Ins. Co. v. Maleski*, 113 S. Ct. 1047 (1993). Accordingly, the Commissioner is afforded broad powers to "effectuate equitably the intent of the Rehabilitation statutes, i.e., to minimize the harm to all affected parties." *Id.* The Commissioner has a fiduciary duty to "marshall [sic] and preserve all assets of the insolvent entity," and due to the exigent circumstances surrounding a major insolvency, it may be necessary to compromise "individual interests…to avoid greater harm to a broader spectrum of policyholders and the public." *Id.* at *19-20 (citing *Vickodil v. Commonwealth Ins. Dep't*, 559 A.2d 1010, 1013 (1989)).

Foster is on point. In materially identical circumstances, where the Pennsylvania insurance company plaintiff brought claims under the direction of the Rehabilitator, the *Foster* court found that the plaintiff's claims did not accrue until

it requested supervision from the PID and was further tolled until the Order of Rehabilitation pursuant to 40 P.S. § 221.17(b). In so doing, the court rejected the very same argument that Protiviti raises here—*i.e.*, that the plaintiff and the PID were aware of the losses resulting from the defendant's alleged misconduct prior to requesting supervision by PID. *Id.* The court noted that "indeed, [the insurer] must have been aware of its losses, as it sought supervision from the Insurance Department." *Id.* But the insurer did not know who was responsible for those losses, and reasonable diligence did not include discovering the defendants' wrongdoing because the defendants had fiduciary obligations to the plaintiff. *Id.*

Here, Protiviti (and the individual defendants) owed fiduciary duties to SHIP; they used those fiduciary duties to conceal their wrongdoing from SHIP, the Trustees and the PID; while SHIP (and, to a lesser extent, PID) had some indication that it had suffered financial losses, it did not know that those losses were caused by malfeasance and deception by Protiviti. Pursuant to *Foster*, public policy considerations dictate that Protiviti—an independent auditor—be precluded from avoiding liability for the extraordinary financial losses caused by its misconduct. Multiple Pennsylvania legal doctrines are designed specifically to avoid such an unjust result, particularly at the pleading stage.

SHIP and the Rehabilitator must be permitted to address the factual components of this argument; deciding the statute of limitations argument on

preliminary objections, rather than by way of Reply to New Matter or at summary judgment or trial, deprives SHIP and the Rehabilitator of that opportunity to their detriment. For these reasons, Protiviti fails to show that it would fall within the scope of the alleged exception to the prohibition on asserting a statute of limitations defense on preliminary objections, as set forth in Rule 1028 and 1030, even if that exception exists.

III. CONCLUSION

Thus, as set forth herein and in the Rehabilitator's Preliminary Objection to Defendant Protiviti, Inc.'s Preliminary Objection 1, the Court should grant the Rehabilitator's Preliminary Objection and deny Protiviti's Preliminary Objection 1.

Dated: February 1, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Michael J. Broadbent, hereby certify that on February 1, 2023, I caused to be filed the foregoing REHABILITATOR'S BRIEF IN SUPPORT OF HIS PRELIMINARY OBJECTION TO DEFENDANT PROTIVITI INC.'S PRELIMINARY OBJECTION 1 through the Court's PACFile system. Each of the parties associated with 1 SHP 2022 was served by electronic means through the Court's PACFile system. In addition, I hereby certify that electronic copies of the foregoing documents will be posted on SHIP's website at https://www.shipltc.com/courtdocuments.

By: /s/ Michael J. Broadbent
Michael J. Broadbent