

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,

v.

BRIAN WEGNER, PAUL LORENTZ,  
BARRY STALDINE, AND PROTIVITI  
INC.,

Defendants.

No. 1 SHP 2022

**DEFENDANT  
PROTIVITI, INC.’S  
REPLY TO  
PLAINTIFF’S BRIEF IN  
SUPPORT OF HIS  
PRELIMINARY  
OBJECTION TO  
PROTIVITI’S  
PRELIMINARY  
OBJECTION 1**

Counsel of Record for  
Defendant Protiviti, Inc.:

Perry A. Napolitano  
PA I.D. No. 56789  
Justin J. Kontul  
PA I.D. No. 26026

REED SMITH LLP  
Firm No. 234  
225 Fifth Avenue, Suite  
1200  
Pittsburgh, PA 15222  
T: (412) 288-3131  
F: (412) 288-3063  
pnapolitano@reedsmith.com  
jkontul@reedsmith.com

**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,

v.

BRIAN WEGNER, PAUL LORENTZ,  
BARRY STALDINE, AND PROTIVITI  
INC.,

Defendants.

No. 1 SHP 2022

**DEFENDANT PROTIVITI, INC.’S REPLY TO PLAINTIFF’S BRIEF IN  
SUPPORT OF HIS PRELIMINARY OBJECTION TO PROTIVITI’S  
PRELIMINARY OBJECTION 1**

Defendant Protiviti, Inc.’s (“Protiviti”) Preliminary Objections established that Plaintiff’s claims are barred by the applicable statutes of limitations. Plaintiff, however, asks this Court to forestall resolution for no sound reason. Plaintiff offers ineffectual procedural obstacles and unsupported arguments, only confirming that dismissal is appropriate. Accordingly, “no purpose would be served by a delay in ruling” on Protiviti’s preliminary objections. *See Feldman v. Hoffman*, 107 A.3d 821, 832 (Pa. Commw. Ct. 2014).

## **I. Plaintiff Effectively Concedes that His Claims are Time-Barred**

Plaintiff does not contest that Pennsylvania's two-year statute of limitations applicable to his breach of fiduciary duty, negligence, and conspiracy claims and four-year statute applicable to its breach of contract claim would bar his claims against Protiviti if the statutes began to run *seven years* ago when Protiviti delivered the at-issue February 2015 report ("Report"). See Protiviti Opening Br. at 7.

Nor does Plaintiff have any answer for the fact that the Amended Complaint unequivocally asserts that the Report reached the "appropriate" SHIP personnel by November 2016, resolving any doubt as to the latest date on which the statute of limitations could have run. Am. Compl. ¶ 60. The pleading could not be clearer. By November 2016, SHIP was keenly aware of the problems with the Beechwood Re transaction, as to which Plaintiff now seeks to hold Protiviti responsible. Protiviti Opening Br. at 14-17; Am. Compl. ¶¶ 60, 63, 65-70, 72, 127, 131, 133. This admitted and repeated awareness triggered SHIP's duty to investigate potential legal claims stemming from the Beechwood transaction. Protiviti Opening Br. at 16-17 & n.10. Therefore, the clock was running by no later than November 2016.

To avoid dismissal, Plaintiff now attempts to rewrite his pleading through briefing. Plaintiff now falsely asserts that, "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 [SHIP’s]<sup>1</sup> 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.” Pl. Br. at 25. Review of the Plaintiff’s allegations in the complaint, including that the “Protiviti report was . . . delivered to *appropriate committees or individuals at SHIP* [at] a SHOT executive session *in November 2016*,” precludes Plaintiff’s attempted recasting. Am. Compl. ¶ 60 (emphasis added). So too is it belied by SHIP’s own assertion in another litigation that “[t]he truth was . . . revealed . . . in the summer and fall of 2016” regarding “the nature and extent of Beechwood’s involvement with and control by Platinum.” *In Re Platinum-Beechwood Litigation*, No. 1:18-cv-6658-JSR (S.D.N.Y.), SHIP’s Compl. ECF No. 1, ¶ 197. Plaintiff is estopped from arguing otherwise—an argument that he fails to contest and, thus, concedes. *See* Protiviti Opening Br. at 15-16; *Barton v. Lowe’s Home Ctrs., Inc.*, 124 A.3d 349, 356 n.4 (Pa. Super. Ct. 2015); *Ulmer v. L.F. Driscoll Co.*, No. 2841 EDA 2013, 2015 Pa. Super. Unpub. LEXIS 2968, \*10 (Pa. Super. 2015).<sup>2</sup>

---

<sup>1</sup> Plaintiff mistakenly said “Protiviti’s” in its brief; however, the cited allegation clearly relates to SHIP’s management, not Protiviti’s. Am. Compl. ¶ 183.

<sup>2</sup> It is well-settled that a plaintiff “may not amend his complaint through arguments in a brief in opposition[.]” *See, e.g., Hayden v. Westfield Ins. Co.*, Case No. GD-13-014064, 2014 Pa. Dist. & Cnty. Dec. LEXIS 14928, at \*110-11 (C.P. Allegheny Cty. Oct. 31, 2014) (citing *Shanahan v. City of Chicago*, 82 F.3d 776, 781 (7th Cir. 1996) and *Grayson v. Mayview State Hosp.*, 293 F.3d 103, 109 n.9 (3d Cir. 2002)).

Nevertheless, even if Plaintiff were correct in suggesting a delay of the statute of limitations until April 2018, the claims are *still* time-barred. The two-year tort limitations period would have expired long before Plaintiff filed suit on January 28, 2022. As for the breach of contract claim, that too cannot be saved. As previously explained, controlling law holds that the clock runs “upon the occurrence of the [contractual] breach” so the discovery rule cannot push back the February 2015 date of the alleged breach. *See* Protiviti Opening Br. at 11-12.

## **II. Plaintiff’s New Legal Theories and Misrepresentations Fail to Save the Amended Complaint from its Untimeliness**

### **a. Settled Law Permits Adjudication of Protiviti’s Statute of Limitations Defense at the Preliminary Objection Stage**

As Plaintiff concedes, this Court’s most recent pronouncement “permitted [a decision on a statute of limitation defense] on preliminary objections over the objection of the plaintiff.” Pl. Br. at 19 ([citing \*Baney v. Fisher, Pa. Commw. Unpub. LEXIS 433 at \\*10 n.16 \(Pa. Commw. Ct. 2020\) \(per curiam\)\*](#)). *Baney*’s well-reasoned analysis controls and should be followed—“the complaint and the attachments thereto expressly acknowledge[] facts disproving the plaintiff’s two tolling theories, fraudulent concealment and the discovery rule.” Pl. Br. at 20; *see* Protiviti Opening Br. at 11-17.

Moreover, the rule permitting adjudication at the preliminary objection stage is not cast aside simply because a plaintiff objects. *See* Pl. Br. at 4-6. Indeed, this

Court already considered that very argument a decade ago and did “not agree” with the “rigid rule” that Plaintiff advances. *Feldman*, 107 A.3d at 830, 832. Rather, controlling law permits adjudication where a defense is apparent on the face of the complaint, regardless of objection. *See id.* at 835 (holding that “it would serve no purpose to summarily reverse the trial court’s order which sustained [defendant’s] preliminary objections on the sole, procedural ground that [plaintiff] filed preliminary objections to [defendant’s] preliminary objections”).<sup>3</sup>

Plaintiff’s attempt to distinguish others in this line of cases simply because they decided different substantive defenses than Protiviti’s—immunity, litigation privilege, and defamation defenses—is likewise unavailing. Rule 1030(a) does not differentiate between defenses. *See* Pa. R.C.P. 1030(a). Indeed, because the rule upon which Protiviti relies has been readily applied in a variety of contexts, Plaintiff’s contention that it is limited to sovereign immunity is hollow.

**b. Protiviti’s Statute of Limitations Defenses are Clear and Apparent as a Matter of Law**

---

<sup>3</sup> Contrary to Plaintiff’s selective quoting of *Feldman*, this Court did not adopt “three different rules depending on the defense asserted” and whether plaintiff objected. Pl. Br. at 9-10. Rather, after reviewing the “conflicting lines of cases [that] evolved,” *Feldman* decisively adopted “as the more sound approach” the rule permitting adjudication of defenses which are apparent on the face of the complaint regardless of objection or type of defense. *Id.* at 830, 835. To deviate from *Feldman* would, “in effect be overruling other panels of this Court.” *Id.* at 835 n.14.

Plaintiff's argument that SHIP was unable to "bring suit until after the rehabilitation order" – by resort to the discovery rule and fraudulent concealment doctrine – fails as a matter of law. Pl. Br. at 11.

*The discovery rule does not save Plaintiff's untimely claims.* Recognizing that the rule does not apply to a breach of contract claim, Plaintiff raises a new legal theory based on the "continuing contract doctrine." *Id.* at 15. Plaintiff posits that if a contract does not fix a certain time for payment or termination of services, the contract is treated as continuous, and the statute of limitations does not begin to run until termination of the parties' contractual relationship. *Id.* at 15.

This argument fails. Plaintiff's claim that neither the Agreement nor Amended Complaint include a fixed time for the termination of Protiviti's services is incorrect. The at-issue Statement of Work specifically provides an "Estimated End Date" of "April 30, 2015 unless otherwise modified or terminated in accordance with the terms of the Agreement." Am. Compl. Ex. B § 6. The Amended Complaint contains no allegation that this date was "modified," and Protiviti delivered its report in February 2015, as the pleading concedes. Am. Compl. ¶ 60.<sup>4</sup>

---

<sup>4</sup> Faced with these facts, Plaintiff resorts to summarily arguing that "[b]ased 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." Pl. Br. at 16. That *ipse dixit* finds no basis in any case Plaintiff cited, nor in any allegations in the Amended Complaint.

As for the tort claims, Plaintiff's contention that the discovery rule delayed the running of the statute of limitations "[u]ntil the Rehabilitator took control of the company," Pl. Br. at 14, is yet another attempt to rewrite Pennsylvania law. *See* Protiviti Opening Br. at 17-20. And as previously explained, Plaintiff's misplaced reliance on the discovery rule fails as a matter of law.<sup>5</sup> *Id.* at 11-17.

*The fraudulent concealment doctrine cannot save Plaintiff's claims.* Plaintiff vaguely argues that he "has alleged facts showing that Protiviti engaged in fraud and concealed the truth from SHIP and the Rehabilitator, tolling any applicable statute of limitations." Pl. Br. at 17. But he fails to identify a single factual allegation in the Amended Complaint that supports application of the fraudulent concealment doctrine as to Protiviti. *See id.* at 17-18. As discussed in Protiviti's opening brief, nowhere does Plaintiff allege "specifics as to exactly what act of concealment the

---

<sup>5</sup> Plaintiff's handling of *Rice* and *Nicolaou* also fails. Pl. Br. at 12-14. Here, like in *Rice v. Diocese of Altoona-Johnstown*, 255 A.3d 237, 255 (Pa. 2021), the Amended Complaint clearly shows that SHIP had "actual or constructive knowledge of at least some form of significant harm" by no later than November 2016, *id.*, when the Report reached appropriate SHIP personnel and when the Beechwood transaction's "glaring problems" were admittedly known. *See supra* Section I. As for *Nicolaou*, the unique circumstances of that medical malpractice case necessitated a fact-intensive inquiry into the "untrained layperson" plaintiff's condition and involved a "lengthy history of attempted contradictory diagnosis and treatment." *Rice*, 255 A.3d at 251; *Nicolaou v. Martin*, 195 A.3d 880, 895-96 (Pa. 2018)). SHIP, on the other hand, was armed with a sophisticated board that was required to exercise due diligence in investigating potential claims. And that included in November 2016, when the Board had the Report in hand and when the Board was already investigating the SHIP managers who commissioned and previously received the Report, as Plaintiff concedes. *See* Am. Compl. ¶¶ 131, 133.



defendant performed.” *Gorski v. Colton*, No. 10-6656, 2005 Pa. Dist. & Cnty. Dec. LEXIS 809, at \*23 (C.P. Delaware Cty. Nov. 4, 2005); *see* Protiviti Opening Br. at 13-15.

### **III. Plaintiff’s Theory that “Public Policy” Justifies a Reset of the Statutes of Limitations is Foreclosed by Controlling Law**

As a matter of law, statutes of limitations apply to claims brought by an insurance rehabilitator just as they do to any other plaintiff. *See* Protiviti Opening Br. at 17-20. This Plaintiff is no exception. In response, Plaintiff attempts to manufacture a factual issue by pointing to the public policies underlying insurance rehabilitation. Pl. Br. at 25-26. But the question of whether public policy can delay the running of the statute of limitations is purely a legal question that the Pennsylvania legislature and courts already have decided against Plaintiff’s position. Protiviti Opening Br. at 17-18.

Finally, as a last-ditch effort, Plaintiff passes off the holding and analysis of *Foster v. Alexander & Alexander Servs.*, No. 91-1179, 1995 U.S. Dist. LEXIS 711 (E.D. Pa. Jan. 20, 1995), as if it were the Pennsylvania Supreme Court’s decision in *Foster v. Mutual Fire Insurance Co.*, 614 A.2d 1086 (Pa. 1992). *See* Pl. Br. at 26-27. But as previously explained, *see* Protiviti Opening Br. at 19 n.11, the Pennsylvania Supreme Court’s decision in *Foster* never addressed the issue at hand and Plaintiff’s reliance on a non-precedential district court decision that happens to

bear the same *Foster* name cannot overcome controlling precedent. *See id.* at 19-20.

#### **IV. Conclusion**

Defendant Protiviti respectfully requests that this Court enter an order sustaining Protiviti's Preliminary Objections and dismissing claims against Protiviti in Plaintiff's Amended Complaint with prejudice.

Dated: February 24, 2023

REED SMITH LLP

/s/ Perry A. Napolitano

Perry A. Napolitano

PA I.D. No. 56789

Justin J. Kontul

PA I.D. No. 26026

225 Fifth Avenue, Suite 1200

Pittsburgh, PA 15222

T: (412) 288-3131

F: (412) 288-3063

pnapolitano@reedsmith.com

jkontul@reedsmith.com

*Counsel for Protiviti Inc.*

## **CERTIFICATE OF COMPLIANCE**

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by: Perry A. Napolitano

Signature: /s/ Perry A. Napolitano

Attorney No.: 26026

**PROOF OF SERVICE**

I hereby certify that on this 24th day of February, 2023, I am serving the foregoing document upon the persons and in the manner indicated below, which service satisfies the requirements of Pa.R.A.P. 121:

Via PACFile:

COZEN O'CONNOR  
Michael J. Broadbent, PA I.D. 309798  
Dexter R. Hamilton, PA I.D. 50225  
Eric D. Freed, PA I.D. 39252  
Matthew J. Siegel, PA I.D. 82406  
1650 Market Street, Suite 2800  
Philadelphia, PA 19103  
(215) 665-4732

TUCKER LAW GROUP  
Leslie Miller Greenspan, PA I.D.  
91639  
Ten Penn Center  
1801 Market Street, Suite 2500  
Philadelphia, PA 19103  
(215) 875-0609

*Counsel for Michael Humphreys,  
Insurance Commissioner of the  
Commonwealth of Pennsylvania, as  
Statutory Rehabilitator of Senior  
Health Insurance Company of  
Pennsylvania*

POST & SCHELL, P.C.  
James J. Kutz, PA I.D. No. 21589  
Erin R. Kawa, PA I.D. No. 308302  
17 N. Second Street, 12<sup>th</sup> Floor  
Harrisburg, PA 17101

*Counsel for Defendant Brian Wenger*

ECKERT SEAMANS CHERIN &  
MELLOTT, LLC  
Casey Alan Coyle, PA I.D. No. 307712  
213 Market Street, 8<sup>th</sup> Floor  
Harrisburg, PA 17101

*Counsel for Defendant Paul Lorentz*

BLACK & GERNGROSS, P.C.  
James J. Black, III, PA I.D. No. 41895  
Jeffrey B. Miceli, PA I.D. No. 57475  
Mark W. Drasnin, PA I.D. No. 65328  
Nicola F. Serianni, PA I.D. No. 203803  
1617 John F. Kennedy Boulevard,  
Suite 1575  
Philadelphia, PA 19103

*Counsel for Defendant Barry Staldine*

/s/ Perry A. Napolitano  
Perry A. Napolitano