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PLJ

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Opinions deemed appropriate for publication are not disqualified because of the identity, profession or community status of the litigant. The guide to publication is the helpfulness of the opinion to practitioners in the particular area of law. All opinions submitted to the PLJ are reviewed for publication and will only be disqualified or altered by Order of Court.

Opinions

The Pittsburgh Legal Journal provides the ACBA members with timely, precedent-setting, full text opinions, from various divisions of the Court of Common Pleas. Each opinion, which is published in this section, begins with a brief description or a "head-note" of the opinion that follows. These opinions can be viewed in a searchable format on the ACBA website, www.acba.org.

Allegheny Jury Verdict Reporter

The Pittsburgh Legal Journal provides the ACBA members with a quarterly report of jury verdicts from the Civil Division of the Court of Common Pleas of Allegheny County. The verdicts which appear in the Pittsburgh Legal Journal, a supplement of the Lawyers Journal, under the heading "Allegheny Jury Verdict Reporter" are provided by court staff from the assignment room.

Each jury verdict is then assigned for review of the pleadings and preparation of a brief summary of the case and identification of the parties, counsel, and witnesses.

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Nicholas A. Lettieri, Jr. v. The Locker Room Bar and Grille, LLC, Hines Ward, Korry Pitts and Kimberly Pitts, his wife

The Locker Room Bar and Grille, LLC v. Nicholas A. Lettieri, Jr.

Receivership—Injunction—Bond—Diversion of Company Assets

1. The Locker Room is a Pennsylvania limited liability company engaged primarily in the business of operating a restaurant and bar in the City of Pittsburgh. The members of the Locker Room are Hines Ward, Kimberly Pitts and Nicholas Lettieri, Jr., each owning an equal one-third share. WKN has title to the real estate in which the bar is located. Its members are Hines Ward, Korry Pitts and Nicholas Lettieri, Jr.

2. The Locker Room opened for business December 2005 with Nicholas Lettieri, Jr. serving as manager and business manager. In October 2006, Nicholas Lettieri, Jr. resigned and Kimberly Pitts was appointed as business manager. In February 2007, The Locker Room suffered severe flood damage, closed its doors and reopened in June 2007.

3. On September 14, 2007, The Locker Room filed a complaint against Nicholas Lettieri, Jr. alleging that he fraudulently withdrew $18,909.50 from The Locker Room's corporate accounts. On September 25, 2007, Nicholas Lettieri, Jr. filed a complaint against Defendants claiming the Pitts defendants diverted funds belonging to their personal bank accounts.

4. On September 17, 2007, The Locker Room filed a Petition for Special Relief seeking to have Nicholas Lettieri, Jr. return $18,909.50, which the court ordered him to do. On September 20, 2007, Nicholas Lettieri, Jr. filed a motion for special injunction demanding equitable relief. At the injunction hearings, an expert in the area of forensic accounting testified to a complicated pattern of deception perpetrated by the Pitts defendants resulting in substantial diversions of Locker Room funds for their personal benefit.

5. Pursuant to Lettieri's request, on November 20, 2007 the court directed the appointment of a receiver David K. Rudov, and ordered, *inter alia,* Ward to remit to the receiver the sum of $48,438 payable to The Locker Room and Pitts to remit to the receiver the sum of $121,994 payable to The Locker Room.

6. The Court found that injunctions are equitable orders necessary to forestall an immediate threat of harm. A preliminary injunction is a provisional remedy that may be granted before a hearing on the merits. The orders of November 20, 2007 and December 5, 2007 were entered to prevent imminent, irreparable harm to The Locker Room and to preserve the status quo and are not procedurally defective.

7. The bond required under Pa.R.C.P. No. 1533(d) is designed to protect all interested parties, and is left to the discretion of the court. In this case, it was reasonable to require a bond in the amount of $50,000.

(*William R. Friedman*)

Rudy A. Fabian for Nicholas A. Lettieri.
Guy C. Fustine for The Locker Room Bar and Grille.
Joseph L. Luvara for Hines Ward.
Lawrence G. Zurawsky for Korry and Kimberly Pitts.
David K. Rudov, Court Appointed Receiver.

No. GD 07-19687; 2188 WDA 2007; 2269 WDA 2007. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

Ward, J., March 5, 2008—Appellants, Korry Pitts and his wife, Kimberly Pitts ("the Pitts") appeal this Court's Order of November 20, 2007, as amended by the Order dated December 5, 2007.

Background

The Locker Room is a Pennsylvania limited liability company that is engaged primarily in the business of operating a restaurant and bar on Pittsburgh's South Side. The members of The Locker Room are Hines Ward, Kimberly Pitts, and Nicholas Lettieri, Jr. Under The Locker Room's Operating Agreement each member owns an equal one-third interest in the business. A second L.L.C., WKN, holds title to the real estate to the property in which the bar is located. The members of WKN are Hines Ward, Korry Pitts, and Nicholas Lettieri, Jr.

The Locker Room opened for business on or about December 15, 2005. Initially, Nicholas Lettieri, Jr. served both as the manager under the Operating Agreement and as the day-to-day business manager of the bar and restaurant. However, in October 2006, differences of opinion arose regarding the operation of the business among the members of The Locker Room/WKN and subsequently, Nicholas Lettieri, Jr. resigned as the business manager of The Locker Room. Thereafter, Kimberly Pitts was appointed as the business manager of The Locker Room.

On February 19, 2007, The Locker Room suffered severe flood damage due to a boiler explosion. At this time, The Locker Room closed its doors in order to repair the extensive damage to the property. After the repairs were completed, The Locker Room reopened for business on June 1, 2007.

The Lawsuits

On September 14, 2007, The Locker Room commenced an action at GD 07-019687 alleging that Nicholas Lettieri, Jr. fraudulently withdrew $18,909.50 from The Locker Room's corporate accounts in violation of the L.L.C.'s Operating Agreement. Subsequently, on September 25, 2007, Nicholas Lettieri, Jr. filed a Complaint against The Locker Room, Hines Ward, and the Pitts at GD 07-020456 claiming that the Pitts diverted funds belonging to The Locker Room to their own personal bank accounts for their personal benefit and that Hines Ward and the Pitts defrauded The Locker Room and Nicholas Lettieri, Jr. of insurance expenses in excess of $350,000. The actions were ultimately consolidated at case number GD 07-019687.

On September 17, 2007, The Locker Room filed a Petition for Special Relief seeking the return of $18,909.50 of Locker Room funds from Nicholas Letterri, Jr. as well as other equitable relief. Upon consideration of the Locker Room's Petition for Special Relief and after hearing, this Court entered an Order directing Nicholas A. Lettieri to return $18,909.50 to The Locker Room.[1]

Thereafter, on September 20, 2007, Nicholas Lettieri, Jr. filed a motion for special injunction demanding equitable relief. Hearings were held on Nicholas Lettieri, Jr.'s request for special injunctive relief on October 30, 2007 and November 5, 2007 (the "injunction hearings").

At the injunction hearings, David M. Duffus, an expert in

the area of forensic accounting, testified on behalf of Nicholas Lettieri Jr. The testimony of Mr. Duffus revealed a complicated web of deception and fraud perpetrated by the Pitts resulting in substantial diversions of Locker Room funds for the personal benefit of the Pitts.

According to Mr. Duffus, on April 6, 2007 Kimberly Pitts established a secret bank account at Dollar Bank in the name of The Locker Room. Mrs. Pitts did not inform the other members of The Locker Room or The Locker Room's accountant that she had established the Dollar Bank account. Furthermore, Mrs. Pitts designated the Pitts' home address as the mailing address for the Dollar Bank account rather than the business address of The Locker Room where its originally established bank account statements were received. It must also be noted that the Dollar Bank account was not recorded on the books of The Locker Room until October 2007, six months after the account was established and after the litigation was commenced.

Between the dates of February 28, 2007 and May 25, 2007, four checks from The Locker Room's insurance carrier totaling $500,721 were deposited into existing Locker Room accounts at PNC bank.[2] Kimberly Pitts made three withdraws from the PNC accounts totaling $278,834 and subsequently deposited said amount into the aforementioned secret Dollar Bank account. Kimberly Pitts then proceeded to make several disbursements out of the Dollar Bank account to Korry Pitts. The disbursements were not reflected on The Locker Room's August 31, 2007 accounting records. However, the disbursements were eventually recorded on The Locker Room's accounting books in October 2007. Mr. Schleis, The Locker Room's accountant placed the disbursements into the three following categories: (1) expense reimbursements for insurance-related restoration work; (2) transfers between bank accounts; and (3) general contracting fees.

Mr. Duffus analyzed The Locker Room's October 2007 accounting books and determined that the majority of the disbursements to Korry Pitts represented a diversion from the business for the Pitts' own personal gain.[3] Mr. Duffus concluded that $6,123 of the $24,123 characterized Mr. Schleis as insurance claim transactions represented an improper diversion to Mr. Pitts because The Locker Room could provide no documentation supporting the claim that $6,123 of these transactions was made on behalf of The Locker Room. Mr. Duffus also concluded that the entire $73,338 characterized by Mr. Schleis as Korry Pitts' general contracting fee for The Locker Room's restoration work represented an improper diversion of funds from The Locker Room.[4] Mr. Duffus determined that the entire $73,338 represented a diversion of funds from the company based primarily on the fact that the only construction agreement that exists with respect to The Locker Room restoration work is between Mark Brettschneider Construction and WKN, LLC. Further, it appeared to Mr. Duffus that Mr. Brettschneider provided all the services necessary for the restoration work and that a general contractor was unneeded on the project.[5] Mr. Duffus testified that according to The Locker Room's accounting records Mr. Pitts received a total $140,308 in shareholder distributions, yet the other members received significantly less. According to Mr. Duffus, even if Mr. Pitts was entitled to receive shareholder distributions,[6] he would only be entitled to the amount received in distributions by Nicholas Lettierri, Jr., $27,442. Mr. Duffus also determined that $8,133 was paid to American Express by The Locker Room for the personal benefit of the Pitts and $10,000 in other unsubstantiated expense reimbursements was diverted form The Locker Room. Taking into consideration the shareholder loans of $67,470 made on behalf of Korry Pitts to The Locker Room, Mr. Duffus concluded that the Pitts owed $142,990 to the business.

On November 20, 2007 this Court issued an order directing that:

> 1. The request for the appointment of a receiver by The Locker Room Bar & Grille, LLC member, Nicholas Lettieri is GRANTED pursuant to Pa.R.C.P. 1533;
>
> 2. This Court appoints David K. Rudov to act as a receiver for the conduct of the business affairs of The Locker Room Bar & Grille, LLC, under the provisions of and with the obligations imposed by Pa.R.C.P. 1533. The receiver shall file a report with the court in 45 days regarding the financial status of the business, in accordance with Pa.R.C.P. 1533(2);
>
> 3. Mr. Rudov's reasonable fees shall be paid by The Locker Room Bar & Grille, LLC;
>
> 4. As proposed by The Locker Room Bar & Grille, LLC. member, Hines Ward, Mr. Ward shall remit to the receiver to amount of $48,438.00 payable to The Locker Room Bar and Grille, LLC;
>
> 5. The Locker Room Bar & Grille, LLC member, Korry Pitts shall remit to the receiver appointed by this Court the amount of $121,994.00 payable to The Locker Room Bar & Grille, LLC;
>
> 6. Pursuant to Pa.R.C.P. 1533(d), the receiver shall file a bond in the amount of $50,000.00.

On November 29, 2007 Korry Pitts filed a Notice of Appeal from the November 20, 2007 Order of Court. Thereafter, this Court entered an amended Order on December 5, 2007 making Kimberly Pitts jointly responsible with Korry Pitts for the $121,994.00 payable to the receiver. Subsequently, in response to an Order of this Court dated November 30, 2007, Korry Pitts filed a Statement of Matters Complained of on Appeal. Thereafter, on December 13, 2007, both Kimberly and Korry Pitts jointly filed a notice of appeal to the December 5, 2007 Order of Court. The appeals were ultimately consolidated by the Superior Court. Although directed by this Court to do so, Korry and Kimberly Pitts did not file a joint statement of matters complained of on appeal.

Having discussed the procedural posture and background of this case we will now address the issues raised on appeal by Korry Pitts.

The first issue raised on appeal by Korry Pitts is that this Court erred in granting the request to appoint a receiver pursuant to Pa.R.C.P. 1533.

Although appointment of a receiver is not to be undertaken lightly, the decision to appoint is within the sound discretion of the trial court. *Abrams v. Uchitel*, 806 A.2d 1, 8 (Pa.Super. 2002). The court is authorized to appoint a receiver where there has been such gross mismanagement or fraud or similar circumstances that a receiver is clearly required. *Tate v. Philadelphia Transp. Co.*, 410 Pa. 490, 500-501, 190 A.2d 316, 321 (1963). Further, "receivers can be appointed to assure that assets will not be dissipated." *Abrams v. Uchitel*, 806 A.2d at 8-9.

The testimony of Mr. Duffus and other evidence presented during the hearings revealed that the that the Pitts fraudulently dissipated a substantial amount of Locker Room funds for their own benefit and Hines Ward's benefit and that assets of The Locker Room were being grossly mismanaged. Specifically, the evidence showed that there was an effort to conceal the diversions to the Pitts and entities that they con-

trol. The testimony and evidence further revealed that there was a lack of adherence to corporate formalities and a lack of records supporting corporate resolutions regarding critical actions taken by the members of The Locker Room. Thus, the appointment of a receiver was justified.

The second issue raised Korry Pitts on appeal is that the Court erred in ordering Hines Ward to remit to the receiver the amount of forty eight thousand four hundred and thirty eight dollars ($48,438.00).

The evidence introduced at the injunction hearings established that in the summer of 2007 Hines Ward asked Korry Pitts to purchase two vehicles on his behalf. Subsequently, in late July 2007, two checks were written from The Locker Room's Dollar Bank account totaling $48,438.00. The checks were written to Wright Automotive Group and Shultz Ford for the purchase of a Dodge Charger and a Ford Expedition. The vehicles were ultimately delivered to Hines Ward's childhood friends in Georgia.

Clearly, the funds taken from The Locker Room's Dollar Bank account and expended on the Dodge Charger and Ford Expedition were used to benefit Hines Ward personally and were not spent on behalf of The Locker Room. In fact, Mr. Ward and his counsel admitted that these funds should not have been taken from The Locker Room and agreed to remit them to the receiver. The funds rightfully belong to The Locker Room; Korry Pitts has no claim to these funds.[7] Thus, this issue is without merit.

Korry Pitts' third issue raised on appeal is that the Court erred in ordering Korry Pitts to remit to the receiver the amount of one hundred twenty one thousand nine hundred and ninety four dollars ($121,994.00).

This Court found Mr. Duffus testimony regarding the amount of diversions by the Pitts to be generally credible. However, this Court made two adjustments to Mr. Duffus' calculations. First, this Court directed Hines Ward to directly reimburse The Locker Room in the amount of $48,438.00 for the two vehicles purchased on his behalf, rather than reimburse Mr. Pitts for these funds. Therefore, Mr. Pitts was not responsible for returning that money to The Locker Room and consequently his liability to the company was reduced by $48,438.00. Second, this Court determined that because Korry Pitts was not a member under the Operating Agreement of The Locker Room, he was not entitled to shareholder distributions.[8] Thus, the court determined that Korry Pitts was obligated to return the entirety of the shareholder distributions he was remitted, adding $27, 442 to Mr. Duffus calculations.

The Pitts divested a substantial sum of money from The Locker Room. While The Locker Room was struggling to rebuild its business after the flood damage had stopped the business cold in its tracks, the Pitts hindered the business's attempt to rebuild itself by actively defrauding it of over a hundred thousand dollars. The business is entitled to the return of the funds that were wrongly taken from it. Thus, this Court's order compelling the Pitts to remit $121,994.00 to the receiver was not in error.

Korry Pitts' next issue raised on appeal is that the Court's Order of November 20, 2007, as amended by the Order dated December 5, 2007, was procedurally defective and deprived Defendant Korry Pitts of his right to litigate his claims at trial to the funds directed to be remitted by Korry Pitts and Hines Ward.

Injunctions, particularly preliminary injunctions, are equitable orders necessary to forestall a pending and immediate threat of harm. *Greco v. Hazleton City Authority*, 721 A.2d 399 (Pa.Commw. 1998). A preliminary injunction is a provisional remedy that may be granted before a hearing on the merits. Appeal of *Little Britain Tp. From Decision of Zoning Hearing Bd. of Little Britain Tp., Lancaster County, Pa.*, 651 A.2d 606, 611 (Pa.Cmwlth. 1994). Its purpose or function is generally to afford preventive relief by preserving the status quo, either as it presently exists or previously existed before the acts complained of, where there is an urgent necessity of preserving the status quo until the merits of the case can be heard and determined. *Id.*

The Orders of November 20, 2007 and December 5, 2007 were entered to prevent imminent, irreparable harm to The Locker Room and preserve the status quo. The Court ordered the remittance of funds to the receiver in order to restore the status quo thereby allowing the business to remain operational and solvent until a decision on the final merits could be made. At no point did this Court indicate that the Orders of November 20, 2007 and December 5, 2007 served as a decision on merits or as a basis for a final decree. The case goes forward and the Pitts may still yet prevail on the merits. Therefore the Orders of November 20, 2007 and December 5, 2007 are not procedurally defective and did not deprive Defendant Korry Pitts of his right to litigate his claims at trial.

The fifth issue raised by Korry Pitts on appeal is that the amount of the bond required to be posted by the receiver is inadequate to protect the right, title and property interest of Korry Pitts in the funds that the Court directed be remitted to the receiver by the Defendants.

Under Pa.R.C.P. No. 1533(d), "[e]xcept as otherwise provided by an Act of Assembly, a receiver, whether temporary or permanent, must give such security for the faithful performance of the receiver's duty as the court shall direct. A receiver shall not act until he or she has given the security required." The bond required by this subdivision of the Rule is designed to protect all interested parties in the event of embezzlement, conversion, waste or maladministration by the receiver. 5 GOODRICH § 1533(d):1

The Rule requiring security when a receiver is appointed does not specify the amount of security that should be required. Thus, except where a statute otherwise provides, it is left completely to the discretion of the court. *Levin v. Barish*, 505 Pa. 514, 481 A.2d 1183 (1984).

Instantly, the Court ordered the receiver to file a bond in the amount of $50,000.00.[9] Considering financial circumstances of The Locker Room and the temporary nature of the appointment, in this Court's opinion a bond of $50,000.00 bond was more than reasonable to protect against any potential embezzlement or waste on the part of the receiver. Thus, this issue is without merit.

The sixth and final issue raised by Korry Pitts is that the Court erred in refusing to direct Nicholas Lettieri, Jr. to replace the funds he admitted removing without any authority.

On September 17, 2007 this Court issued an Order directing Nicholas Lettieri, Jr. "to immediately return to [The Locker Room] all funds removed from [Locker Room bank accounts] in the amount of $18,909.50." The Court ordered The Locker Room to post bond in the amount of $18,000.00. No bond was ever posted by The Locker Room. The Court did in fact direct Nicholas Lettieri Jr. to replace the funds he admitted removing without authority, therefore the issue raised by the appellant is meritless.

Therefore, the findings and determinations of this Court should be sustained.[10]

BY THE COURT:
/s/Ward, J.

Dated: March 5, 2008

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[1] Further, the order enjoined Nicholas Lettieri, Jr. from inter-

fering with the operation of the Locker Room and from removing any further funds from the Company or otherwise wasting any of the Companies assets, and from otherwise violating his fiduciary duty to the Company.

[2] These funds were released to The Locker Room as a result of the insurance claim submitted by the Locker Room for the flood damage that occurred on February 19, 2007.

[3] According to Mr. Duffus payments made to on behalf of Mr. and Ms. Pitts, or entities they control totaled $135,461.00.

[4] This amount includes $48,438 removed from the Locker Room's Dollar Bank account to purchase two vehicles on behalf of Hines Ward. See *infra.*

[5] Mr. Brettschneider also credibly testified that Mr. Pitts did not act as the general contractor and that Brettschneider provided all the services necessary for the restoration work. Furthermore, Nicholas Lettieri Jr.'s testimony at the injunction hearings credibly confirmed the testimony of Mr. Duffus and Mr. Brettschneider on the issue of the general contractor fee.

[6] This Court found that Pitts was not entitled to any shareholder distributions from the Locker Room because he is not a member under the Operating Agreement of the Locker Room. See *infra*.

[7] Korry Pitts testified that they money taken from the Dollar Bank account paid on behalf of Hines Ward was money he had right to as a result of his employment as the general contractor. However, as noted *supra*, the Court found that Korry Pitts did not serve as general contractor on the Locker Room restoration and thus was not entitled to a fee for general contracting services.

[8] Mr. Duffus testified that there was an issue regarding whether Mr. Pitts was entitled to any shareholder distributions. Ultimately, however, he reduced the amount owed by the Pitts by $27,442.

[9] On November 20, 2007, the Receiver, David Rudov, posted bond in the amount of $50,000.

[10] Further, we wish to inform the Superior Court that on December 11, 2007, the Locker Room filed for Chapter 11 Bankruptcy. Thereafter, on January 21, 2008, the Locker Room filed a Notice of Removal of the above-captioned case to the United States Bankruptcy Court for the Western District of Pennsylvania. The case has not been remanded.

Fisher Scientific Company, L.L.C.; Fisher Scientific International, Inc.; Fisher Scientific Operating Company; and Fisher Hamilton, L.L.C. v. AIU Insurance Company; et al.,

Insurance Coverage—Breach of Contract—Declaratory Relief—Preliminary Objections

1. Fisher is a Pennsylvania-based manufacturer and distributor. Defendants are insurance companies that contracted with Fisher to provide primary, excess and/or umbrella coverage related to underlying asbestos claims filed against Fisher.

2. Fisher stated that after it exhausted its coverage with a non-party insurance company, it requested other insurance companies with whom it had policies to take over its obligations.

3. On May 10, 2007, prior to reaching agreement regarding coverage, Defendant First State Insurance filed suit against Fisher in Connecticut seeking declaratory relief. On May 23, 2007, two other Defendants filed suit in New Jersey also seeking declaratory relief. On May 31, 2007 Fisher filed this action against all Defendants seeking recovery for breach of contract. Fisher's complaint did not indicate whether each Defendant was to provide primary, excess or umbrella coverage.

4. Preliminary Objections were decided as follows:

a. Midstates Reinsurance Corporation argued that under the doctrine of *lis pendens* the court should dismiss Fisher's complaint or, in the alternative, stay the present action pending resolution of the related suits in New York and New Jersey. The doctrine of *lis pendens* is unavailable where the first-filed action was commenced in a foreign state and does not apply unless the first-filed action is pending in Pennsylvania courts. Further, it must be shown that the prior case is the same, the parties are the same and the relief requested is the same. The first-filed suits were brought in New York and New Jersey and the relief requested in this action (damages) is different from the relief requested in the out-of-state cases (declaratory relief) and the parties are not the same as those in the New York and New Jersey cases.

b. Midstates and other Defendants argued that if *lis pendens* does not apply, the Court should either dismiss or stay the present action in favor of the previously-filed actions to avoid the waste of judicial resources and duplication of effort. The Connecticut and New Jersey courts have demonstrated that they will consider what this Court does when deciding how to proceed in the actions pending in their respective courts. Under Pennsylvania law, declaratory relief would be unavailable in an action filed in anticipation of imminent breach of contract and, therefore, it would be inequitable for this Court to stay the breach of contract case in favor of an inappropriately filed declaratory judgment action.

c. Defendants argued that Fisher's failure to specifically plead conditions precedent to the triggering of coverage is fatal to Fisher's claims. Under Pa.R.C.P. No. 1019 (c), in pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred.

d. Several Defendants argued that Fisher's complaint failed to conform to law or rule of court since Fisher failed to attach relevant insurance policies to its complaint. Fisher provided copies of its policies to Defendants. When writings have been made available to the parties, the Court will not require documents of great bulk to be attached to the complaint.

e. Several Defendants argued that the claims lodged by Fisher are not ripe because Fisher failed to plead exhaustion of the underlying primary insurance policies. When reviewing the dismissal of a complaint based upon preliminary objections in the nature of a demurrer, as in this preliminary objection, the Court treats as true all well-pleaded material, factual averments and inferences fairly deducible therefrom. Any doubt should be resolved by a refusal to sustain the objections. In order for the excess insurer's policy to be "triggered," the directly underlying policy must first be exhausted. Fisher has failed to properly plead exhaustion of the directly underlying insurance and thus this preliminary objection must be sustained; however, Fisher will be granted

leave to amend to properly plead exhaustion.

f. The Pennsylvania Property and Casualty Guaranty Association raised two preliminary objections, one based on Fisher's alleged failure to plead exhaustion of other insurance and one regarding the residency requirements of the Pennsylvania Insurance Guaranty Association Act and the Pennsylvania Property and Casualty Insurance Guaranty Association Act (PPCIGA). The preliminary objection regarding failure to plead exhaustion will be scheduled for reargument. Because three of the Plaintiffs are not "residents" of Pennsylvania, the preliminary objections based on residency must be sustained and claims against the PPCIGA must be dismissed, but PPCIGA remains a party to this action since the claims made against the Association by Fisher Scientific Company, L.L.C., a Pennsylvania resident, are still outstanding.

(William R. Friedman)

Andrew M. Roman, Mary Ann Dilanni, Eric S. Newman, Seth A. Tucker, Deanna M. Wilcox and *John H. Fuson* for Fisher Scientific.
Jennifer M. Ellin and *J. Colin Knisely* for The American Insurance Company.
Robert P. Siegel and *C. Leon Sherman* for Associated International Insurance Company.
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Lise Luborsky for Pennsylvania Property & Casualty Insurance Guaranty Association.
Frank Maneri, C. Lawrence Holmes and *Kevin P. Lucas* for Westport Insurance Corporation f/k/a Puritan Insurance Company.

No. GD 07-011419. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

MEMORANDUM OPINION

Ward, J., January 17, 2008—This case arises from a dispute over insurance coverage for underlying asbestos-related bodily injury claims. Plaintiffs Fisher Scientific Company LLC, Fisher Scientific International Inc., Fisher Scientific Operating Company, and Fisher Hamilton LLC (collectively "Fisher") describe themselves as "a Pennsylvania-based manufacturer and distributor" that "has been the target of asbestos claims by plaintiffs alleging injury from long-term exposure to asbestos." Defendants are the Pennsylvania Property and Casualty Insurance Guaranty Association and numerous insurance companies that contracted with Fisher to provide primary, excess, and/or umbrella coverage for the funding and/or indemnification of defense and settlement costs relating to the underlying asbestos claims.

Fisher states that, after it had exhausted its coverage with a non-party insurance company, Fisher requested other insurance companies with whom it had policies to take over the obligation of the funding and/or indemnification of its defense and settlement costs relating to the underlying asbestos suits in which it had been named as a defendant. On May 10, 2007, before Fisher and any of the Defendant insurers could reach an agreement regarding coverage, Defendant First State Insurance Company filed suit against Fisher in Connecticut, seeking declaratory relief. *See First State Ins. Co. v. Fisher Scientific Co. LLC, et al.*, No. HHD-CV-07-4030045-S (Conn. Super. Ct., Judicial Dist. of Hartford). Similarly, on May 23, 2007, Defendants Century Indemnity Company, also known as Insurance Company of North America, and Westchester Fire Insurance Company filed a related suit in New Jersey, also seeking declaratory relief.[1] *See Honeywell v. Travelers Casualty & Surety*, MRS-L-1498-06, (Morris Cty., N.J. Sup. Ct., Law Division). On May 31, 2007, Fisher filed this action against all Defendants, seeking recovery for breach of contract.

In its complaint, Fisher lists the Defendant insurers, but does not indicate whether each was to provide primary, excess, or umbrella coverage. Additionally, rather than attach the policies to the complaint, Fisher attached "Appendix B," which identifies each policy number, as well as the dates on which the coverage under each policy began and ended. According to the complaint, "[u]nder the Policies, and as provided by law, Fisher may select the policy or policies under which it is to be indemnified for the Asbestos Claims, including defense costs." Complaint at ¶52 (parenthetical omitted).

I. Preliminary Objections

Several of the Defendants have filed preliminary objections challenging Fisher's Complaint on various grounds. Each of the Defendants' arguments is discussed below.

A. *Lis Pendens*

In one of its preliminary objections, Defendant Midstates Reinsurance Corporation argues that, under the doctrine of *lis pendens*, this Court should dismiss Fisher's complaint or, alternatively, stay the present action pending resolution of the related suits filed in New York and New Jersey.

Initially, we note that the doctrine of *lis pendens* is unavailable where the first-filed action was commenced in foreign state. *Singer v. Dong Sup Cha*, 379 Pa.Super. 556, 558, 550 A.2d 791, 792 (1988). In order for the doctrine to be applicable the first-filed action must be pending in a Pennsylvania court. *Snider v. Fellheimer*, 139 P.L.J. 186, 190 (1991). Further, "[i]n order to plead successfully the defense of *lis pendens, i.e.*, the pendency of a prior action, it must be shown that the prior case is the same, the parties are the same, and the relief requested is the same." *Penox Technologies, Inc. v. Foster Medical Corp.,* 376 Pa.Super. 450, 453, 546 A.2d 114, 115 (1988). Where a party seeks dismissal under the doctrine of *lis pendens*, this test is to be strictly applied. *Norristown Auto. Co., Inc. v. Hand*, 386 Pa.Super. 269, 274, 562 A.2d 902, 904 (1989).

Midstates cannot seek dismissal or stay of the present action pursuant to the doctrine of *lis pendens* because the doctrine does not apply unless the first action is pending in Pennsylvania courts. Here, the first-filed suits were brought in New York and New Jersey. Furthermore, we note that the relief requested in this action (damages for breach of contract) differs from the relief requested in the out-of-state cases (declaratory relief). *See Penox Technologies*, 376 Pa.Super. at 453, 546 A.2d at 115. Additionally, the parties in this suit are not identical to those in the New York or New Jersey cases. The present action involves 30 insurers, whereas 22 insurers are parties in the New York case and 17 insurers are parties in the New Jersey case.[2] Accordingly, Midstates' preliminary objection based on the doctrine of *lis pendens* is denied.

B. Arguments Based on Equitable Principles

Midstates also joins in the argument made by several other Defendant insurers that, even if the *lis pendens* is not strictly satisfied in the present action, this Court should

either dismiss or stay the present suit in favor of the previously-filed actions in order to avoid the waste of judicial resources and duplication of effort.[3] In support of this argument, Defendants point to the following statement made by the Superior Court in *Crutchfield* while discussing the application of the three-pronged *lis pendens* test: "[I]f the identity test is not strictly met but the action involves a set of circumstances where the litigation of two suits would create a duplication of effort on the part of the parties, waste of judicial resources and 'create the unseemly spectacle of a race to judgment,' the trial court may stay the later-filed action." *Crutchfield*, 806 A.2d at 1262 (*quoting Norristown*, 562 A.2d at 904).

In the present case, it is apparent that this Court need not be overly concerned about the principles of comity or "the unseemly spectacle of a race to judgment."

Although, on August 24, 2007, the New Jersey Superior Court denied Fisher's motion to deny or stay the New Jersey action, that court stated that it was denying the motion without prejudice because, at that time, it was not clear that the present action was going to be more comprehensive than the New Jersey action. *See* Affidavit of Taylor M. Hoffman, Exhibit 6 (Transcript) at 34. The court indicated that the ruling on the present preliminary objections would clarify that issue. *Id.* at 32. Such statements suggest that the New Jersey Superior Court is open to the possibility of granting a subsequent motion to dismiss or stay that action if, after this Court rules on the present preliminary objections, the present action appears to be more comprehensive.

By order dated October 22, 2007, the Connecticut action was stayed "due to the more comprehensive nature of the Pennsylvania action." *See* Oct. 25, 2007 Letter of First State, Exhibit (10/22/07 Order). According to First State's counsel, this ruling was made "without prejudice to either party's rights subsequently to seek relief from that ruling." However, on December 3, 2003, the Connecticut Superior Court denied First State's Motion to Reargue, ruling that the October 22, 2007 stay foreclosed any offensive motions in the case. It appears that the Connecticut court does not feel compelled to resolve that case before the present case is resolved.

Clearly, the Connecticut and New Jersey courts have demonstrated that they will consider what this Court does in the present action when deciding how to proceed in the actions pending in their respective courts.[4]

Further, it is this Court's opinion that the New Jersey and Connecticut actions filed by First State and Century Indemnity Company ("Century") were inappropriate attempts to defeat Fisher's right to select the forum for litigating its claims. First State and Century, knowing that negotiations between the parties had deteriorated and that Fisher was about to commence an action against them in Pennsylvania, filed declaratory judgment actions in New Jersey and Connecticut in an attempt to select a favorable forum and determine in advance whether they had a defense to the anticipated breach of contract actions of Fisher. *See Penox Technologies, Inc. v. Foster Medical Corp.*, 376 Pa.Super. 450, 454, 546 A.2d 114, 115 (1988). We note that under Pennsylvania law, declaratory relief would be unavailable in an action filed in anticipation of imminent breach of contract case. *Commonwealth, Dep't of Gen. Services v. Frank Briscoe Co.*, 502 Pa. 449, 466 A.2d 1336 (1983). Thus, here, it would be inequitable for this Court to stay the instant breach of contract action in favor of the inappropriately filed declaratory judgment actions.

For the foregoing reasons, equitable principles do not serve as a basis for a dismissal or stay the present action. The preliminary objections that raise this issue are denied.

C. Insufficient Specificity Regarding Conditions Precedent

Several Defendants have raised preliminary objections to Fisher's Complaint on the basis of insufficient specificity.[5] These Defendants argue that Fisher's failure to specifically plead conditions precedent to the triggering of coverage is fatal to Fisher's claims.

Under Pa.R.C.P. No. 1019 (c), "[i]n pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred." Paragraph 47 of Fisher's Complaint states that "[a]ll of the conditions and requirements imposed by the Policies upon the insured thereunder…have been satisfied and/or have been waived and/or are subject to an estoppel against the pertinent insurer." Additionally Fisher avers in Paragraph 56 of the Complaint that "[t]o the extent that a defendant claims that it has not been notified of or asked to provide coverage benefits…the defendant's conduct excused Fisher from any obligation it might otherwise have to take such actions." These averments are sufficient to comply with the requirements of Rule 1019(c). "It is not necessary that plaintiff aver compliance with the conditions precedent in each particular." *Stevens Mfg. Co. v. Fidelity & Cas. Ins. Co.*, 7 Pa. D. & C.2d 139 (1957). Thus, the Preliminary Objections alleging insufficient specificity with regard to conditions precedent must be overruled.

D. Failure of a Pleading to Conform to Law or Rule of Court (Failure to Attach Insurance Policies to the Complaint)

Several Defendants have alleged that Fisher's Complaint fails to conform to law or rule of court.[6] Specifically, these Defendants contend that Fisher's failure to attach the relevant insurance polices to the Complaint is violative of Pa.R.C.P. 1019(i).

Under Pa.R.C.P. 1019(i), "[w]hen any claim or defense is based upon a writing, the pleader shall attach a copy of the writing, or the material part thereof, but if the writing or copy is not accessible to the pleader, it is sufficient so to state, together with the reason, and to set forth the substance in writing." Due to the voluminous nature of the insurance policies involved in the case, Fisher has not attached all of the implicated policies to the Complaint. However, Fisher has attached a list of the insurance policies to the Complaint as Appendix B. The list includes the policy number, carrier, and the dates in which the policies were in effect. Additionally, Fisher has provided copies of the policies in their possession to each of the Defendants.

When writings have been made readily available to the parties, this Court will not require documents of great bulk to be attached to the Complaint. The Defendants' Preliminary Objections based on Fisher's failure to attach the relevant insurance policies must be overruled.

E. Demurrer/Failure to Conform to Law; Failure to Plead Essential Terms of the Contract; (Exhaustion of Underlying Policy).

Excess and umbrella insurer Defendants have raised Preliminary Objections alleging that the claims lodged against them are not ripe because Fisher has failed to plead exhaustion of the underlying primary insurance polices.[7]

Initially, we note that when reviewing the dismissal of a complaint based upon preliminary objections in the nature of a demurrer, we treat as true all well-pleaded material, factual averments and all inferences fairly deducible therefrom. *D'Elia v. Folino*, 933 A.2d 117, 121 (Pa.Super. 2007). Where the preliminary objections will result in the dismissal of the action, the objections may be sustained only in cases

that are clear and free from doubt. *Id.* To be clear and free from doubt that dismissal is appropriate, it must appear with certainty that the law would not permit recovery by the plaintiff upon the facts averred. *Id.* Any doubt should be resolved by a refusal to sustain the objections. *Id.*

In *J.H. France Refractories Co. v. Allstate Ins. Co.*, 534 Pa. 29, 626 A.2d 502 (1993), the Pennsylvania Supreme Court first addressed the issue of allocation of insurance proceeds in continuous injury cases, specifically in the context of asbestos litigation. The insurance policies at issue in *J.H. France* were pre-1986 comprehensive general liability ("CGL") policies which would be triggered by the occurrence during the policy period of "bodily injury." Affirming the lower court's application of the "multiple-trigger" or "continuous-trigger" theory of determining liability of the insurers, under which all phases of the disease-exposure, progression, and manifestation-independently constitute "bodily injury" triggering coverage, the Supreme Court held that "every insurer which was on the risk at any time during the development of a claimant's asbestos-related disease has an obligation to indemnify." *Id.* at 39, 626 A.2d at 507.

The *J.H. France* Court then decided "how to allocate the liability of each insurer when, as is commonly the case, more than one insurer was on the risk at one time or another during the development of a claimant's disease." *Id.* The Supreme Court held that the insurers whose coverage had been triggered were jointly and severally liable for the full amount of the claim up to policy limits, and that the insured was entitled to select the policy or policies under which it would be indemnified. *Id.* at 41, 626 A.2d at 508. When the policy limits of a selected policy were exhausted, the insured was entitled to seek indemnification from the remaining triggered polices until it achieved full recovery for its losses. *Id.* at 42, 626 A.2d at 509. However, the Court also noted that this did not mean that a single insurer would be saddled with full liability for any injury. Rather, each responding insurer could seek to allocate its losses to other insurers based upon its right of contribution and the "other insurance" clauses of each triggered policy. *Id.* at 41-41, 626 A.2d at 509.

J.H. France dealt only with claims against primary insurers; the case did not involve the complication of excess and umbrella insurers, as we have here. Since *J.H. France*, no Pennsylvania appellate court has dealt with the issue of excess and umbrella insurer liability in the context of a continuous injury case. The Third Circuit, in the case of *Koppers Co., Inc. v. Aetna Cas. and Sur. Co.*, 98 F.3d 1440 (3d Cir.) did however, tackle the issue of excess insurer liability in the context of a continuous injury case.

In *Koppers*, the insured brought action against both primary and excess liability insurers to recover for breach of contract based on the insurers' failure to pay claims for property damage caused by pollution. Applying Pennsylvania law, specifically, the case of *J.H. France*, the *Koppers* Court held that once triggered, policies that purport to indemnify the insured for "all sums" must provide full coverage up to the policy limits, without regard to the existence of other insurance. *Id.* at 1454. The Third Circuit expressly rejected the theory that all applicable primary coverage had to be exhausted before any excess insurer could be obligated to pay. *Id.*[8] However, in order for the excess insurer's policy to be "triggered," the directly underlying policy first must be exhausted. *Koppers*, 98 F.3d at 1454. Only then is the excess policy insurer required to indemnify the insured for the full excess loss up to the policy limits.

In this case, Fisher has failed to properly plead exhaustion of the directly underlying insurance.[9] Because Fisher has not properly plead exhaustion of each of the underlying insurance policies, the excess/umbrella policies have not been "triggered." Therefore, the Preliminary Objections of the excess/umbrella insurer Defendants regarding failure to plead exhaustion must be sustained. However, Fisher will be granted leave to amend to properly plead exhaustion.[10]

F. Preliminary Objections of the Pennsylvania Property and Casualty Insurance Guaranty Association.

The Pennsylvania Property and Casualty Insurance Guaranty Association has raised two preliminary objections to Fisher's Complaint, one based upon Fisher's alleged failure to plead exhaustion of "other insurance" and one regarding the residency requirements of the Pennsylvania Insurance Guaranty Association Act and the Pennsylvania Property and Casualty Insurance Guaranty Association Act. Only the preliminary objections regarding the residency requirements of the Guaranty Association Acts will be discussed and decided in this Opinion. The Pennsylvania Property and Casualty Insurance Guaranty Association's preliminary objection based upon Fisher's failure to plead exhaustion of "other insurance" will be scheduled for reargument.

Prior to discussing the Pennsylvania Property and Casualty Insurance Guaranty Association's preliminary objection, this Court believes it to be prudent to include a brief discussion of the history and purposes of the Association.

Enacted in 1970, the Pennsylvania Insurance Guaranty Association Act, 40 P.S. §§ 1701.101 *et seq.* established the first Pennsylvania Insurance Guaranty Association ("PIGA"), comprised entirely of independent property and casualty insurers. The PIGA was designed to provide a measure of protection to insured policyholders or claimants who were faced with a financial loss because of the insolvency of an insurer. *See Bethea v. Forbes*, 519 Pa. 422, 424, 548 A.2d 1215, 1216 (1988). *See also Schreffler v. Pennsylvania Insurance Guaranty Association*, 586 A.2d 983, 985 (Pa. Super. 1991), *app. denied*, 528 Pa. 644, 600 A.2d 196 (1991). The PIGA was obligated to pay "covered claims" under policies issued by insolvent insurers existing prior to the insurer's insolvency. 40 P.S. §991.1803(b)(1)(i). The PIGA was deemed to be an insurer and was placed in the stead of the insolvent insurer, with all of that insurer's rights, duties, and obligations. *Donegal Mutual Insurance Co. v. Long*, 528 Pa. 295, 300-301, 597 A.2d 1124, 1127 (1991).

Effective February 10, 1995, the former PIGA was reconstituted as the Pennsylvania Property and Casualty Insurance Guaranty Association ("PPCIGA"). As of that date, the old Pennsylvania Insurance Guaranty Association Act was repealed in its entirety, and was replaced by the Pennsylvania Property and Casualty Insurance Guaranty Association Act, 40 P.S. §§ 991.1801 *et seq.* Under the Pennsylvania Property and Casualty Insurance Guaranty Association Act, the PPCIGA carries out essentially the same functions as its predecessor and the basic character and purpose of the Association remain the same.[11]

Having provided a brief description of the PPCIGA's function and genesis, this Court will now discuss the PPCIGA's Preliminary Objection regarding the residency requirements of the Guaranty Association Acts. The PPCIGA contends that Fisher's Complaint fails to conform to law and is legally insufficient because three of the four Plaintiffs do not satisfy the Pennsylvania residency requirement for a "covered claim" under 40 P.S. 991.1802 of the PPCIGA Act and 40 P.S. 1701.103(5)(a)(i) of the PIGA Act.

40 P.S. 991.1802 requires that "the claimant or insured is a resident of this Commonwealth at the time of the insured event: Provided, that for entities other than an individual, the residence of a claimant or insured is the state in which

its principal place of business is located at the time of the insured event…." Similarly, under 40 P.S. 1701.103(5)(a)(i), "a covered claim only includes only a "claim of a person who at the time of the insured event resulting in loss or liability was a resident of this Commonwealth…."

Fisher avers in its Complaint that Plaintiffs Fisher Scientific International Inc. and Fisher Scientific Operating Company have Massachusetts as their principal places of business and that Plaintiff Fisher Hamilton L.L.C.'s principal place of business is in Wisconsin. Only Plaintiff Fisher Scientific Company L.L.C. is averred to have a principal place of business located in Pennsylvania. Thus, because three of the Plaintiffs are not "residents" of Pennsylvania under either the PIGA Act or the PPCIGA Act, the Preliminary Objections of the PPCIGA based on the residency requirement must be sustained and the claims against the PPCIGA waged by the three nonresident Plaintiffs must be dismissed. However, the PPCIGA remains a party to this action since the claims made against the Association by Fisher Scientific Company L.L.C., a Pennsylvania resident, are still outstanding.

BY THE COURT:
/s/Ward, J.

ORDER

AND NOW, this 16th day of January 2008, upon considerations of Defendants' Preliminary Objections to Plaintiffs' Complaint, all responses in opposition, the respective memoranda and all matters of record, and in accord with the Opinion being contemporaneously filed of record, it is hereby ORDERED and DECREED that:

1. The Preliminary Objections of the excess/umbrella insurer Defendants regarding Plaintiffs' failure to plead exhaustion are SUSTAINED. Plaintiffs are granted leave to amend to plead exhaustion within twenty (20) days from the date of this Order.

2. The Preliminary Objection of Pennsylvania Property and Casualty Insurance Guaranty Association ("PPCIGA") based on the residency requirements of the Guaranty Association Acts is SUSTAINED and the claims against the PPCIGA waged by Plaintiffs Fisher Scientific International Inc., Fisher Scientific Operating Company, and Fisher Hamilton L.L.C. are DISMISSED.

3. The Preliminary Objections of Defendant PPCIGA based upon Fisher's alleged failure to plead exhaustion of "other insurance" is hereby scheduled for reargument on February 4, 2008 at 9:30 a.m.

4. The remainder of Defendants' Preliminary Objections are OVERRULED.

BY THE COURT:
/s/Ward, J.

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[1] According to Midstates Reinsurance Corporation, a similar related suit was also filed in New York. *See Traveler's Casualty & Surety v. Honeywell International, et al.*, Index No. 107138/2006 (N.Y. Cty. Sup. Ct.).

[2] We also note that not all of the insurer parties in the New York and New Jersey cases are parties in the present action.

[3] In addition to Midstates, the following Defendants have raised or joined in this argument: First State Insurance Company, Hartford Accident and Indemnity Company, New England Reinsurance Corporation, Twin City Fire Insurance Company, Century Indemnity Company, Westchester Fire Insurance Company, United States Fire Insurance Company, and Columbia Casualty Company.

[4] None of the parties has indicated what has been happening in the related case filed in New York. Presumably, if it appeared that that case was going to proceed without consideration as to how the present case proceeds, the Defendants would have noted that fact. Thus, the pendency of the New York case does not affect this Court's decision on the present preliminary objections.

[5] These Defendants include Employers Mutual Casualty Company, National Casualty Company, Employers Insurance Company of Wausau, GEICO, Republic Insurance Company, Century Insurance Company, Westchester Fire Insurance Company, United States Fire Insurance Company, Westport Insurance Company, Midstates Reinsurance Corporation, Evanston Insurance Company, and Associated International Insurance Company.

[6] These Defendants include Employers Mutual Casualty Company, GEICO and Republic Insurance Company, Century Indemnify Company, Westchester Fire Insurance Company, and United States Fire Insurance Company, Evanston Insurance Company, Evanston Insurance Company, Associated International Insurance Company, AIU Insurance Company, Birmingham Fire Insurance Company of Pennsylvania, Granite State Insurance Company, Illinois National Insurance Company, Landmark Insurance Company, and National Union Fire Insurance Company of Pittsburgh, and Travelers Casualty and Surety Company.

[7] These Defendants include National Casualty Company, Employers Insurance Company of Wausau, GEICO, Republic Insurance Company, Century Indemnity Company, Westchester Fire Insurance Company, United States Fire Insurance Company, Westport Insurance Corporation, Columbia Casualty Company, Associated International Insurance Company, and Travelers Casualty and Surety Company.

[8] We recognize that the Eastern District Court of Pennsylvania reached the opposite result in *General Refractories Co. v. Allstate Ins. Co.*, 1994 WL 246375 (E.D. Pa. 1994). However, we choose to be guided by the holding of the Third circuit in *Koppers* since *Koppers* more accurately interprets *J.H. France.*

[9] Fisher contends that simply because it has brought a breach of contract action against the excess/umbrella insurers, exhaustion of coverage underlying the excess/umbrella policies can be inferred. We disagree. The Complaint contains no facts from which to infer that the underlying policies have been exhausted.

[10] To reach the excess/umbrella insurers, Plaintiffs must plead that their total losses exceed the per-occurrence product/bodily injury coverage limits of each of the directly underlying primary insurers. It is not required that there be actual exhaustion of the underlying policy in the form of payment to the insured. *Id.* To require the insured to actually to collect the full amount of the primary policies in order to "exhaust" that insurance is unnecessarily stringent. *Stargatt v. Fidelity & Cas. Co.*, 67 F.R.D. 689, 691 (D. Del. 1975).

[11] The PPCIGA's obligations under policies issued by insurers that were declared insolvent before February 10, 1995 are governed by the PIGA Act, 40 P.S. §§ 1701.101 *et seq.*, and PPCIGA's obligations under policies issued by insurers that were declared insolvent after February 10, 1995 are governed by the PPCIGA Act, 40 P.S. §§ 991.1801 *et. seq.*

Fisher Scientific Company, L.L.C.; Fisher Scientific International, Inc.; Fisher Scientific Operating Company; and Fisher Hamilton, L.L.C. v. AIU Insurance Company; et al.

Insurance Coverage—Breach of Contract—Exhaustion of "other insurance"—Preliminary Objections

1. Plaintiffs' breach of contract action alleged that the Defendants failed to provide or declined to acknowledge their obligations to provide coverage related to asbestos claims lodged against Plaintiffs. Several of the defendants, including the Pennsylvania Property and Casualty Insurance Guaranty Association (PPCIGA) filed preliminary objections.

2. PPCIGA's preliminary objection was based upon Fisher's alleged failure to plead exhaustion of "other insurance." The exhaustion theory is otherwise known as the non-duplication provision of the PPCIGA Act. In order to have a cognizable claim against the PPCIGA Plaintiff is required to plead exhaustion of the solvent primary insurance. Fisher failed to plead exhaustion of primary solvent insurance and thus this preliminary objection was sustained, but Fisher was granted leave to amend to properly plead exhaustion.

3. PPCIGA argued that Fisher must plead actual payment of available other insurance claims in order to satisfy the exhaustion requirement of the non-duplication provision. The Court believes that to read an actual payment requirement into the exhaustion requirement would create unnecessary delay in litigation and undue burden for plaintiffs. Thus, Fisher was not required to plead actual payment of the claims relating to the solvent primary insurance in order to satisfy the exhaustion requirement but must only plead that its total losses exceed the per-occurrence product/bodily injury coverage limits of the solvent primary insurance.

(William R. Friedman)

Andrew M. Roman, *Mary Ann Dilanni*, *Eric S. Newman*, *Seth A. Tucker*, *Deanna M. Wilcox* and *John H. Fuson* for Fisher Scientific.
Jennifer M. Ellin and *J. Colin Knisely* for The American Insurance Company.
Robert P. Siegel and *C. Leon Sherman* for Associated International Insurance Company.
Guy A. Cellucci and *Michael E. DiFebbo* for Century Indemnity Company, United States Fire Insurance Company and Westchester Fire Insurance Company.
Richard J. Pratt, *Gabriela A. Richeimer* and *Robert B. Stein* for Columbia Casualty Company.
James P. Ruggeri, *Katherine M. Hance*, *Paul H. Titus* and *Keith E. Whitson* for First State Insurance Company.
Richard A. Godshall, *Dwight A. Kern*, *Lawrence D. Mason*, *Christine Magarian* for National Union Fire Insurance Company of Pittsburgh, Pa.
Lise Luborsky for Pennsylvania Property & Casualty Insurance Guaranty Association.
Frank Maneri, *C. Lawrence Holmes* and *Kevin P. Lucas* for Westport Insurance Corporation f/k/a Puritan Insurance Company.

No. GD 07-011419. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

MEMORANDUM OPINION

Ward, J., February 8, 2008—Plaintiffs Fisher Scientific Company LLC, Fisher Scientific International Inc., Fisher Scientific Operating Company, and Fisher Hamilton LLC (collectively "Fisher") have instituted the instant breach of contract action alleging that each of the Defendants[1] has failed to provide or declined to acknowledge its obligation to provide coverage benefits relating to asbestos claims lodged against Fisher them by plaintiffs throughout the country.[2]

Several of the Defendants, including the Pennsylvania Property and Casualty Insurance Guaranty Association ("PPCIGA"), filed preliminary objections challenging Fisher's Complaint on various grounds. In a Memorandum Opinion and Order dated January 17, 2007, this Court, decided all but one of these preliminary objections. This Opinion addresses the preliminary objection raised by PPCIGA that was left undecided.

PPCIGA's preliminary objection is based upon Fisher's alleged failure to plead exhaustion of "other insurance." PPCIGA contends that Fisher is required exhaust all available solvent insurance,[3] before Fisher has a live claim against the PPCIGA under any of the policies written by a now-insolvent insurer, including the insolvent primary insurers.

PPCIGA's exhaustion theory is based upon 40 P.S. §991.1817(a), otherwise known as the non-duplication provision of the PPCIGA Act. The non-duplication provision provides that:

> [a]ny person having a claim under an insurance policy shall be required to exhaust first his right under such policy. For purposes of this section, a claim under an insurance policy shall include a claim under any kind of insurance, whether it is a first-party or third-party claim, and shall include, without limitation, accident and health insurance, worker's compensation, Blue Cross and Blue Shield and all other coverages except for policies of an insolvent insurer. Any amount payable on a covered claim under this act shall be reduced by the amount of any recovery under other insurance.

40 P.S. §991.1817(a). argued

Fisher contends that the non-duplication provision does not apply to this case. In support of its position that the non-duplication provision does not abrogate the joint and several liability method of recovery enumerated in *J.H. France Refractories Co. v. Allstate Ins. Co.*, 534 Pa. 29, 626 A.2d 502 (1993)[4], Fisher cites the case of *Carrozza v. Greenbaum*, 591 Pa. 196, 200, 916 A.2d 553, 556 (2007). In *Carrozza*, the Supreme Court addressed the question of "[w]here two defendants are found jointly and severally liable, one defendant has sufficient insurance coverage to satisfy the entire judgment, and the other defendant's insurer is insolvent, may a court direct the judgment creditor to seek satisfaction exclusively from the solvent insurer, thus effectively discharging the [PPCIGA] of all liability?" *Id.* at 201-202, 916 A.2d at 557. The Court's answer to the question was a qualified "No." *Id.* The Court held that non-duplication of recovery provision of the PPCIGA Act could not be read so broadly as to abrogate the principle of joint and several tort liability where it would otherwise apply. *Id.* at 216, 916 A.2d at 566. Crucial to the Court's decision was a reluctance to disturb the long-standing and well-entrenched doctrine of joint and several tort liability where the legislature failed to expressly provide for the doctrine in the PPCIGA Act. *Id.* at 216, 916 A.2d at 565-566.

In contrast to the long-standing principles of joint and several tort liability, the joint and several liability method of recovery detailed in *J.H. France* was first recognized by the Pennsylvania Supreme Court in 1993, a mere fifteen (15) years ago. The joint and several theory of recovery enumer-

ated in *J.H. France* does not have the long and storied history and entrenchment in the fabric of the law as that of joint and several tort liability. Thus, we find that the rationale of the *Carrozza* court is not applicable to the instant case.

Alternatively, Fisher argues that the non-duplication provision does not apply where PCIGA stands in the shoes of a primary insurer and the "other insurance" is an excess policy. In *Donegal Mut. Ins. Co. v. Long*, 528 Pa. 295, 297, 597 A.2d 1124, 1125 (1991), the Pennsylvania Supreme Court was called upon to determine the responsibility of the Pennsylvania Insurance Guarantee Association[5] to pay a covered claim in a situation where "excess" solvent insurance was available to the claimant. The Court began by noting that the non-duplication section is operative only when there exists a claim which can be brought against another insurer. *Id.* at 301, 597 A.2d at 1127. The Court went on to rule that because the collectability of a claim against an excess insurer is dependent upon the existence of a primary insurer, it is not considered an available claim with respect to the non-duplication provision. *Id.* In *Donegal*, no extant solvent primary coverage existed, hence there could be no excess coverage unless and until PIGA honored its statutory obligation. *Id.*

As in *Donegal*, here, the PPCIGA stands in the shoes of an insolvent primary carrier and Fisher also has coverage with a solvent excess insurer.[6] Thus, pursuant to the *Donegal* holding, Fisher is not required to exhaust any solvent excess insurance before reaching the PPCIGA standing in the shoes of a primary insolvent insurer. However, this case is distinguishable from *Donegal* in that other solvent primary insurance is available to Fisher. And as made clear by *Donegal*, the non-duplication provision's exhaustion requirement still applies to the solvent primary insurance available to the Plaintiff. Thus, in order to have a cognizable claim against the PPCIGA Plaintiff is required to plead exhaustion of the solvent primary insurance.

In this case, Fisher has failed to plead exhaustion of the solvent primary insurance. Therefore, the Preliminary Objection of the PPCIGA will be sustained. However, Fisher will be granted leave to amend to properly plead exhaustion.

At reargument of the undecided PPCIGA preliminary objection held on February 4, 2008, the parties raised the issue of what constitutes "exhaustion." PPCIGA argued that Fisher must plead actual payment of available other insurance claims in order to satisfy the exhaustion requirement of the non-duplication provision. Fisher maintained that to require it to plead actual payment of available other insurance claims would be unnecessarily stringent.

In determining whether Fisher is required to plead actual payment to satisfy the exhaustion requirement of the non-duplication provision we must first look to the statutory language of the Guaranty Association Acts. The PIGA Act did not define exhaustion. See 40 P.S. § 1701.103. The later-enacted PPCIGA Act defines exhaustion as "obtaining the maximum limit under the policy." 40 P.S. § 991.1802. Neither the PIGA Act nor the current PPCIGA Act speaks explicitly to the issue of actual payment.[7] The language of the PPCIGA statutory definition is at best, ambiguous. Furthermore, Pennsylvania case law is unenlightening on the issue.[8]

This Court believes that to read an actual payment requirement into the exhaustion requirement would create unnecessary delay in litigation and undue burden for plaintiffs. Furthermore, we note that here, PPCIGA's liability will not be triggered and the Guaranty Association will not be required to pay unless it is proven by Fisher that its outstanding claims exceed the limits of its the solvent primary insurance. Then and only then, will PPCIGA become liable for that amount (up to its statutory/policy limits) exceeding the amount of primary solvent insurance. There exists no potential for duplication of recovery by Fisher. For these reasons, it is this Court's ruling that Fisher is not required to plead actual payment of the claims relating to the solvent primary insurance in order to satisfy the exhaustion requirement of the non-duplication provision. Instead, this court orders that Fisher must only plead that its total losses exceed the per-occurrence product/bodily injury coverage limits of the solvent primary insurers.

BY THE COURT:
/s/Ward, J.

Dated: February 8, 2008

ORDER

AND NOW, this 8th day of February 2008, it is hereby ORDERED and DECREED that:

1. The Preliminary Objection of Defendant Pennsylvania Property and Casualty Insurance Guaranty Association based upon Fisher's alleged failure to plead exhaustion is SUSTAINED.

2. Plaintiffs are granted an additional 20 days from the date of this Order to file an Amended Complaint.

BY THE COURT:
/s/Ward, J.

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[1] Defendants are the Pennsylvania Property and Casualty Insurance Guaranty Association and numerous insurance companies that contracted with Fisher to provide primary, excess, and/or umbrella insurance coverage.

[2] Plaintiff is a Pennsylvania-based manufacturer and distributor that has been the target of claims by plaintiffs alleging injury from long-term exposure to asbestos.

[3] At the original argument on the preliminary objections filed in this case, PPCIGA's maintained that Fisher was required to exhaust all available solvent insurance, at every layer, before reaching PPCIGA. However, at the reargument on PPCIGA's undecided preliminary objection, held on February 4, 2008, PPCIGA clarified its position and argued that at the very least, Fisher was required to exhaust all available solvent *primary* insurance.

[4] In our Memorandum Opinion and Order of January 17, 2007 this court applied the joint and several liability theory of recovery detailed in *J.H. France* to this case.

[5] Pennsylvania Insurance Guarantee Association was the PPCIGA's predecessor.

[6] PPCIGA actually stands in the shoes of several excess insurers and is insured under several solvent excess policies.

[7] Several states have included the requirement of actual payment in their Guaranty Association Act's definition of exhaustion. Pennsylvania has not.

[8] In support of its position, the PPCIGA has referred the Court to the case of *Burke v. Valley Lines, Inc.*, 421 Pa.Super. 362, 617 A.2d 1335 (1992). In *Burke*, the Superior Court of Pennsylvania ruled that settlement of an uninsured motorist claim for less than the limits of coverage constitutes a failure to exhaust the claimant's rights under the policy and precludes recovery pursuant to the Pennsylvania Insurance Guaranty Association Act. We do not find this case instructive, as it does not speak to the issue of the "actual payment" requirement. Additionally, we note that our own independent research reveals no Pennsylvania case law that directly addresses this issue.

Computational Diagnostics, Inc. v. Brian D. Errigo

Employment—Non-Compete Agreement—Adequate Consideration—Duration and Scope

1. Plaintiff is in the business of providing hospitals with equipment and services for neurophysiological intra-operative monitoring of patients. At issue in this matter are the monitoring services Plaintiff provides to hospitals. By Orders of this Court dated April 11, 2008 and June 6, 2008, injunctive relief was granted in favor of Plaintiff, which Defendant now appeals.

2. Plaintiff's founder, who is also the CEO and Chairman of its Board, testified that 80 percent of its business consists of providing the neurophysiological monitoring services.

3. Defendant began working for Plaintiff in 1998, had extensive technical and business responsibilities including those of a technologist, Product Manager and Director of Marketing with frequent personal contact with customers and access to Plaintiff's business plans and financial information.

4. In 2006 Plaintiff's CEO learned that the University of Pittsburgh Medical Center (UPMC) may have had plans to provide its own monitoring services, eliminating the need for Plaintiff's services. In 2007 Plaintiff's CEO learned that Defendant had been hired by UPMC Presbyterian Hospital and would be managing the entire clinical neurophysiological service for UPMC. Soon thereafter, Plaintiff initiated the present lawsuit.

5. In January 2008 Plaintiff filed its complaint and motion for a preliminary and permanent injunction, which were granted by the Court April 11, 2008. Defendant filed a motion to direct Plaintiff to post a bond and Plaintiff responded in opposition. Cross-motions were filed seeking clarification of the Court's order.

6. Defendant argued that UPMC is a customer rather than a competitor and thus he cannot be enjoined from working for UPMC. A customer's ability to substitute in-house service for its own would take away business from Plaintiff, and if UPMC provides its own monitoring services, Plaintiff would be forced out of business. The competitive threat by UPMC is obvious.

7. Defendant argued that the non-compete agreement was not supported by adequate consideration. Defendant signed the non-compete agreement on July 1, 1998, his first day of employment. On July 7, 1998 Defendant initialed those portions of the non-compete agreement with regard to applicable duration and geographic scope. Defendant's initialed employment contract was sufficient consideration for enforcement of the non-compete agreement.

8. Defendant argued that the Court's order does not protect any legitimate interest of Plaintiff because most of his knowledge, experience and contacts were provided by UPMC where he was employed prior to joining Plaintiff. Defendant gained much of his knowledge necessary for his new position with UPMC while employed by Plaintiff. Moreover, while employed by Plaintiff, Defendant was granted time off to obtain an MBA which was paid for by Plaintiff. If UPMC offered its monitoring services to non-UPMC hospitals, Defendant would likely make use of the knowledge and skills he acquired while employed by Plaintiff.

9. Defendant argued that he was enjoined from working as a mere technician providing services similar to those of an operating room nurse. The duties of a neurotechnician and operating room nurse are not comparable.

10. Defendant argued that this Court's order does not protect any legitimate interest of Plaintiff because UPMC is not a party to this case and is free to continue to implement its own monitoring services. Plaintiff has a legitimate interest in preventing a former employee who entered into a non-compete agreement and who has acquired knowledge and skills from using that knowledge and those skills in the development of a competing program.

11. Defendant argued that the injunction is unreasonable in duration and geographic scope. The duration and geographic scope are reasonable for the protection of Plaintiff's business.

12. Defendant argued that the injunction caused him substantial harm. Defendant is responsible for putting himself in his current predicament. He freely entered into the non-compete agreement and voluntarily terminated his employment with Plaintiff. The potential harm that Defendant may suffer does not justify denial of Plaintiffs request for injunctive relief.

13. Defendant argued that Plaintiff has unclean hands as a result of its recruitment and hiring of other UPMC technicians; however, other technicians did not sign non-compete agreements.

14. Defendant argued that any loss of sales Plaintiff may have suffered did not constitute irreparable harm. The "unbridled continuation" of the violation of a non-compete agreement and resultant incalculable damage to a former employer constitutes justification for equitable intervention.

15. Defendant argued that the Court's order was broader than that which was requested by Plaintiff but Plaintiff's request was for "such further relief as the Court deems just and proper." The Court found it proper to issue the order in the form in which it was ordered.

16. Defendant argued that the preliminary injunction was contrary to public interest. Although the public has an interest in medical services, nothing prevents UPMC from developing its monitoring services without Defendant's assistance and thus the public suffers no harm.

(William R. Friedman)

Maureen P. Kelly and *Rachel E. Brown* for Plaintiff.
Keith E. Whitson and *Janette D. Simmons* for Defendant.

No. GD 08-000608; 891 WDA 2008; 1121 WDA 2008. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

Ward, J., September 3, 2008—Defendant, Brian D. Errigo, appeals Orders of this Court, dated April 11, 2008 and June 6, 2008, granting injunctive relief in favor of Plaintiff Computational Diagnostics, Inc. ("CDI").

Background

Plaintiff, Computational Diagnostics, Inc.

CDI is in the business of providing hospitals with equipment and services for neurophysiological intra-operative monitoring of patients. The only aspect of CDI's business at

issue in the present case is the monitoring services that it supplies to hospitals. Transcript at 6. During the hearing on the injunction at issue, Dr. Robert J. Sclabassi, founder, Chief Executive Officer, and Chairman of the Board of CDI, described neurophysiological intra-operative monitoring as follows:

> Intra-operative monitoring is the idea of – there are certain surgical procedures which have a very high risk with respect to the potential damage to the central nervous system.
>
> So, these are, for example, scoliosis surgery in young children. It's an orthopaedics procedure. Repair of abdominal aortic aneurysms is a cardiothoracic procedure. Acoustic neuroma, neurosurgical procedure. These all have high risk to the nervous system.
>
> So, the idea behind intra-operative neurophysiological monitoring was to put a control booth around the patient and surgeon. So, you would take measurements of the patient's nervous system continuously during surgery and then feed that information back to the surgeon to, one, either help him to avoid damaging the patient's nervous system, or if he had to damage it, allow him to know what he was doing to a patient's nervous system.
>
> So, the idea behind the concept of the field is to prevent injury to the patient's nervous system.

Id. at 18-19.

In conducting this intra-operative monitoring, CDI applies a particular technology called NeuroNet (which was "transferred" to CDI on May 11, 1990). *Id.* at 20. NeuroNet has multiple hardware and software components, which are applied as follows. In the operating room, electrodes are placed on the patient. *Id.* at 22. Some of these electrodes are used to stimulate parts of the patient's nervous system. *Id.* The signals received from this stimulation are then amplified and clarified with NeuroNet technology. *Id.* at 23. Neuro technologists (some of whom may be provided by CDI) are stationed in the operating room to observe the data, which is displayed on CDI hardware. The CDI hardware consists of a "[s]mall cart of instrumentation," including a computer, amplifiers, a stimulator, and a connection to a network. *Id.* NeuroNet software also allows that data to be sent to any remote location via a network connection. *Id.* at 24. CDI is structured such that the data is sent to interpreting physicians and neurophysiologists, who are capable of resolving issues beyond the capabilities of the technologists. *Id.* at 25, 32.

Dr. Sclabassi testified that approximately 80 percent of CDI's business consists of providing the neurophysiological monitoring services. *Id.* at 30. Approximately 11 hospitals – including 10 University of Pittsburgh Medical Center ("UPMC") hospitals – were customers of CDI's service component at the time of the injunction hearing. *Id.* at 34, 39.

Defendant, Brian Errigo

On July 1, 1998, Errigo began working for CDI. *Id.* at 130. The parties dispute whether a non-compete agreement was a part of Errigo's employment contract. For the duration of his employment, Errigo worked as, *inter alia*, a chief clinician for CDI. *Id.* at 42-43. Sclabassi considered Errigo to be a key employee, as Errigo had extensive technical and business duties with CDI, including those of a technologist (1998-2007), Product Manager (1999 to 2002), and Director of Marketing (2002 to 2007). *See Id.* at 42-50, 84. These duties required Errigo to have frequent personal contact with CDI's customers, and provided him with access to CDI's business plans and financial information. *Id.* at 43, 51-55.

The Termination of CDI's Relationships with Errigo and UPMC

At some point as early as August 2006, Sclabassi learned that UPMC may have had plans to provide its own monitoring services, which would eliminate its need for CDI's services. *Id.* at 93. On December 3, 2007, Sclabassi learned that Errigo had been hired by UPMC Presbyterian Hospital. *Id.* at 57. Sclabassi testified that Presbyterian Hospital Director of Surgical Services Paulette Bingham stated that Errigo "would be managing the entire clinical neurophysiological service for the University of Pittsburgh Medical Center with the intention of putting CDI out of business."[1] *Id.* According to Sclabassi, Bingham stated that the service was to be provided to all UPMC hospitals. *Id.* at 57-58. Soon thereafter, CDI initiated the present lawsuit.

Motion for Injunctive Relief

On January 10, 2008, CDI filed its complaint and motion for a preliminary and permanent injunction. In its motion, CDI made the following averments.

In July 1998, CDI hired Errigo on the condition that he enter into a written confidentiality and non-compete agreement. This agreement "prohibited Errigo from becoming involved, directly or indirectly, in a business that is in competition with any business of CDI ('Competing Business') within a 100-mile air radius of any office or other facility of CDI ('Restricted Territory') for a period of 24 months following termination of Errigo's employment with CDI (the 'Non-Compete Period')…."

CDI has provided intra-operative neurophysiological monitoring services at multiple UPMC hospitals for a number of years. "In his new position with UPMC, Errigo plans to use the knowledge, experience, contacts, and Confidential Information and Trade Secrets that he gained while he was employed by CDI to develop a mirror image of CDI's intra-operative neurophysiological monitoring service for use at all UPMC hospitals, thus directly competing with CDI and driving CDI out of all UPMC hospitals." Such conduct constitutes a violation of Errigo's non-compete agreement.[2]

CDI sought, *inter alia*, an order requiring Errigo to comply with the non-compete agreement.

Proceedings in this Court

On April 11, 2008, following a day-long evidentiary hearing and consideration of both parties' post-hearing briefs, this Court signed CDI's proposed order, granting its motion for preliminary and permanent injunctive relief, thereby enjoining Errigo "from engaging, directly or indirectly[,] in the development, oversight, supervision, and/or sale of intra-operative neurophysiological monitoring services for a period of 24 months from the date of this Order within a 100-mile air radius of any office or other facility of CDI."

After Errigo filed a motion to direct CDI to post a bond in accordance with Pa.R.C.P. 1531(b)(1), CDI filed a response in opposition: (1) arguing that no bond was required because this Court granted a permanent, rather than preliminary, injunction; and (2) stating that this Court's order "prevents Errigo from working *in the area of intra-operative neurophysiological monitoring services* for a 24-month period and within a 100-mile air radius of CDI." (emphasis added). The parties then filed cross-motions for clarification of this Court's order, as the parties disputed whether this Court granted a permanent or preliminary injunction, and whether this Court's order prohibited Errigo from working strictly as a technologist in UPMC's operating rooms. On May 8, 2008, Errigo filed his notice of appeal of this Court's April 11, 2008

order (891 WDA 2008).

Upon consideration of the parties' cross-motions for clarification, by order dated June 6, 2008, this Court clarified that:

> Plaintiff's Motion for Preliminary Injunctive Relief was granted. Defendant Brian D. Errigo is enjoined (1) from providing intra-operative monitoring services as a neurotechnologist or neurotechnician until further order of Court for any entity within a 100 mile air radius of CDI's facilities; (2) from supervising, monitoring or overseeing others, either directly or indirectly, providing intra-operative monitoring services for the same time frame and the same geographic region; (3) from developing, managing, overseeing, planning or otherwise participating in any way in any business or portion of a business that provides or intends to provide intra-operative monitoring services in the same time frame and the same geographic region. Specifically, Defendant is enjoined from participating in any way in any intra-operative monitoring services provided by UPMC, or the development, management, oversight or supervision of such services or any plan or program to provide such services, in the same time frame and the same geographic region.

Additionally, by order dated June 6, 2008, this Court granted Errigo's motion to direct CDI to post a bond, ordering that the injunction issued on April 11, 2008 shall not take effect until CDI posts a bond in the amount of $50,000. On July 2, 2008, Errigo filed a notice of appeal of this Court's June 6, 2008 order (1121 WDA 2008). Errigo then filed a motion for reconsideration, which this Court denied. By order dated August 15, 2008, the Superior Court consolidated the appeals docketed at 891 WDA 2008 and 1121 WDA 2008.

Subsequently, Errigo filed separate concise statements of matters complained of on appeal with respect to the appeals of both the April 11, 2008 and June 6, 2008 orders of this Court. The issues raised in Errigo's statement of the issues regarding the April 11, 2008 order are incorporated into his statement of the issues regarding the June 6, 2008 order. This Court disposes of each of the issues raised by Errigo as follows.

Analysis

Competition Between CDI and UPMC

Errigo first argues that this Court erred in enjoining him from working as a technician for UPMC because UPMC is a customer, rather than a competitor, of CDI. Similarly, Errigo argues that this Court "erred because UPMC's decision in August 2006 to stop using outside vendors, such as CDI and Allegheny Monitoring to provide supplemental staffing of IOM[3] technicians for 10 to 15% of its staffing needs, resulting in all IOM services within UPMC being provided by UPMC employees does not constitute competition in the workplace." This Court disagrees.

The terms "customer" and "competitor" are not mutually exclusive. *See Automed Technologies, Inc. v. Eller*, 160 F.Supp.2d 915, 923 (N.D. Ill., 2001) ("Any reasonable business person would certainly consider a customer's ability to substitute in-house service for its own as a competitive threat."). Although UPMC has traditionally been a customer of CDI, there is no dispute that, by providing its own in-house monitoring services, UPMC will take its business away from CDI. Dr. Sharon Enos, Chief Operating Officer of CDI testified that, if UPMC does provide its own monitoring services, CDI would be forced out of business in less than one year. Transcript at 145. UPMC officials understood this to be true as well. *Id.* at 210-11. Given this testimony, the competitive threat created by UPMC's plan to provide its own services is obvious. Additionally, UPMC officers are at least planning to provide UPMC monitoring services to non-UPMC hospitals, thus creating an additional competitive threat to CDI's business. Thus, there is no merit to Errigo's argument that, because UPMC is not a competitor of CDI, the non-compete agreement does not prohibit him from working as UPMC's Director of Clinical Neurophysiology.

Validity of the Non-Compete Agreement

"In order to be enforceable, a covenant not to compete must be: (1) ancillary to the main purpose of a lawful transaction; (2) necessary to protect a party's legitimate interest; (3) supported by consideration; and (4) appropriately limited as to time and territory." *Volunteer Firemen's Ins. Services, Inc. v. CIGNA Property and Casualty Ins. Agency*, 693 A.2d 1330, 1337 (Pa.Super. 1997).

Errigo argues that his non-compete agreement was not supported by adequate consideration because:

> the requirement of signing a non-compete agreement was not disclosed to Errigo in CDI's offer letter; Sharon Enos had no recollection of specifically discussing any requirement with Brian Errigo before he commenced employment and she had no specific recollection of giving the Agreement to Brian Errigo on his first day of employment.

"[A] restrictive covenant is enforceable if supported by new consideration, either in the form of an initial employment contract or a change in the conditions of employment." *Maintenance Specialties v. Gottus*, 455 Pa. 327, 330, 314 A.2d 279, 281 (1974). The covenant need not be executed simultaneously with the initial acceptance of employment or appear in the initial contract itself. 16 Summ. Pa. Jur. 2d Commercial Law § 4:40 (footnotes omitted).

Dr. Enos provided the following testimony regarding CDI's hiring of Errigo and the non-compete agreement at issue. At the time of Errigo's hiring (June 1998), it was her practice to discuss the non-compete agreement with prospective employees before they began working for CDI. Transcript at 129-30. It was also her practice to provide newly-hired employees with a packet of documents, which included a non-compete agreement, on their first day of employment. Errigo's first day of employment with CDI was July 1, 2008. *Id.* at 130. Errigo signed his non-compete agreement and dated it July 1, 1998. *Id.* at 133. At the time the non-compete agreement was signed, it did not include the specific, applicable duration or geographic scope. *Id.* at 134. On July 7, 1998, blanks on the agreement were filled in, indicating the applicable duration (24 months) and geographic scope (a 100-mile radius of CDI's facilities), and Errigo initialed those portions of the agreement. *Id.* at 133-35.

Errigo testified that he was given and signed the non-compete agreement some time after his first day of employment. *Id.* at 250-51. Errigo's testimony flies in the face of his non-compete agreement, which is signed by him and dated July 1, 1998, his first day of employment. Additionally, contrary to Errigo's suggestion, disclosure of the non-compete agreement in CDI's offer letter is not required for enforcement of the agreement. The evidence overwhelmingly indicates that the non-compete agreement was executed at the time that Errigo accepted employment with CDI. Errigo's initial employment contract is sufficient consideration for enforcement of the non-compete agreement.

Errigo also argues that this Court's order "does not pro-

tect any legitimate interest of CDI because most, if not all, of [his] knowledge, experience and contacts in the area of IOM services were provided to him by UPMC while he was employed by UPMC for six years and Enos testified that 99% of the IOM technicians in Pittsburgh are trained at UPMC." Although Errigo had been employed as a technician by UPMC prior to his employment with CDI, it appears that Errigo gained much of the knowledge necessary for the position of UPMC's Director of Clinical Neurophysiology while working for CDI.

If Errigo were to continue to work at UPMC, his duties would include: (i) identifying the equipment and personnel necessary for UPMC's prospective in-house monitoring services; (ii) upgrading the equipment used for intra-operative monitoring; (iii) facilitating the implementation of UPMC's in-house program; (iv) setting the standards of competency and performance of the neuro technologists; (v) facilitating the "scheduling and deploying equipment and technologists for provision of [monitoring] services at other hospitals"; (vi) "manag[ing] the budget for clinical neurophysiology"; and (vii) overseeing quality control of the in-house program. *Id.* at 200-03, 236-40.

While Errigo worked at CDI, Sclabassi provided him with time off so that he could obtain his MBA, which was funded by CDI. Certainly, it appears that the knowledge Errigo acquired during those studies would benefit him in carrying out his proposed duties at UPMC. Additionally, while employed by CDI (but not while employed by UPMC), Errigo held the position of Product Manager. Presumably, the knowledge that Errigo acquired in that capacity would benefit him in carrying out his proposed duties at UPMC that relate to the equipment to be used for its proposed in-house program. Finally, should UPMC ultimately decide to offer their monitoring services to non-UPMC hospitals, it is likely that Errigo will make use of the knowledge and skills he acquired while working as CDI's Director of Marketing. CDI certainly has a significant interest in preventing its former key employees, such as Errigo, from using specialized skills and knowledge cultivated during the employees' employment with CDI to CDI's detriment.

Errigo also argues that this Court erred in enjoining him from working as a mere technician because technicians provide operating room support services similar to those provided by an operating room nurse. However, the testimony given at Errigo's injunction hearing indicates that, unlike nurses, neuro technicians offer specialized support services related to intra-operative monitoring. Neuro technicians require certification and their job duties include the observation of data regarding a patient's nervous system, which is displayed on specialized equipment used during operations. Thus, the duties of neuro technicians do not appear to be comparable to those of nurses stationed in operating rooms.

Additionally, Errigo argues that this Court's order "does not protect any legitimate interest of CDI because UPMC is not a party to this case and is free to continue to implement its August 2006 decision to provide IOM services with only UPMC employees and to stop using outside vendors…to provide IOM technical staffing." Although Errigo is correct that UPMC is free to use its own staff and equipment for the provision of monitoring services, CDI has a legitimate interest in preventing a former employee who entered into a non-compete agreement and acquired specialized knowledge and skills while working at CDI from using that knowledge and those skills in assisting in the development of a competing program such as that being developed by UPMC.

With respect to the validity of the non-compete agreement, Errigo finally argues that the injunction issued is unreasonable in duration, as well as geographic scope, because it has the effect of precluding him "from working in a broad area in the Northeast and other states."[4] This Court disagrees. This Court's order prevents Errigo from providing intra-operative monitoring services as a neuro technologist or neuro technician until further order of Court for any entity within a 100 mile air radius of CDI's facilities. This restriction is to last until further order of this Court, but no longer than 24 months (the duration set forth in Errigo's non-compete agreement). Errigo has not explained why the duration of the restriction is unreasonable, and this Court finds a mere 24-month restriction set forth in a non-compete agreement such as Errigo's is inherently reasonable under the circumstances. Additionally, the geographic area covered – which includes one entire state (West Virginia) and mere portions of six others (Pennsylvania, Ohio, New York, Missouri, Texas, and New Mexico)—is limited to 100 mile air radius of CDI's facilities and, thus, reasonably tailored for the protection of CDI's business.

Equitable Factors

Errigo argues that equitable factors weighed in favor of denial of the motion for injunctive relief.

First, Errigo states that the injunction cause him substantial hardships because he has never worked in any other field and because it hinders his ability to care for his mother, who is ill. Although this Court is sympathetic to hardships that Errigo may suffer as a result of this Court's order, Errigo himself is responsible for putting himself in his current predicament. He freely entered into a non-compete agreement with CDI, and he voluntarily chose to end his employment with CDI. Errigo is a highly-educated individual (CDI assisted him in obtaining his MBA) who, presumably, is capable of finding employment in another field. In light of these circumstances, the potential hardships that Errigo may suffer did not justify denial of CDI's request for injunctive relief.

Next, Errigo argues that injunctive relief should not have been granted because CDI has unclean hands as a result of its recruitment and hiring of numerous UPMC technicians. This argument is meritless. UPMC's technicians were free to leave UPMC to work for CDI, as UPMC did not have non-compete agreements with those employees. Errigo, on the other hand, freely entered into a non-compete agreement with CDI when he began working there.

Errigo also argues that any loss of sales CDI may suffer does not constitute irreparable harm. The Pennsylvania Supreme Court has stated that it is "the threat of the unbridled continuation of the violation [of a non-compete agreement] and the resultant incalculable damage to the former employer's business that constitutes the justification for equitable intervention." *John G. Bryant Co., Inc. v. Sling Testing and Repair, Inc.*, 369 A.2d 1164, 1167 (Pa. 1977). In the present case, CDI does not claim that it will merely lose sales as a result (in part) of Errigo's intended actions; CDI claims that it will be put out of business. It is not possible to determine the monetary loss that CDI will ultimately suffer if forced to end its business. Such incalculable harm constitutes irreparable harm for the purposes of the present action.

Additionally, Errigo argues that this Court "erred in issuing an injunction that is substantially broader than the order requested by CDI in the Motion for Preliminary and Permanent Injunction." Although CDI requested, *inter alia*, an order directing Errigo "to cease engaging in the development, design, sale, operation, and/or installation of intra-operative neurophysiological monitoring systems within the Restricted Area during the Non-Compete Period," CDI also

requested "such further relief as the Court deems just and proper." For the reasons set forth above, this Court found it proper to enjoin Errigo "from participating in any way in any intra-operative monitoring services provided by UPMC, or the development, management, oversight or supervision of such services or any plan or program to provide such services, in the same time frame and the same geographic region." Thus, there is no merit to Errigo's claim that the relief ordered is broader that the relief requested.

Finally, Errigo argues that the preliminary injunction is contrary to the public interest. Although the public has a substantial interest in medical services, as Errigo states in his concise statement of matters complained of on appeal, there is nothing that prevents UPMC from developing its monitoring services without his assistance. Thus, the public will not suffer as a result of the injunction issued by this Court. At the same time, the injunction protects the public's interest in the enforcement of agreements freely entered into by employers and employees.

Therefore, the findings and determinations of this Court should be affirmed.

BY THE COURT:
/s/Ward, J.

[1] While testifying at the injunction hearing, Bingham denied that she stated that UPMC was going to put CDI out of business. Transcript at 278.

[2] In its motion, CDI also made allegations that Errigo had misappropriated trade secrets (and other confidential information), and that he was involved in developing a system that competed with CDI's NeuroNet monitoring *system* (*i.e.*, the software and hardware). However, at the start of the injunction hearing, CDI's counsel indicated that CDI had decided to seek injunctive relief solely on the basis of Errigo's non-compete agreement with respect to its prohibition of providing monitoring *services*. Transcript at 5-6. Thus, this Court has not considered any allegations, which relate only to those issues that CDI chose not to pursue.

[3] Defendant has used the abbreviation "IOM" in place of "intra-operative monitoring."

[4] In his memorandum in support of his motion for reconsideration, Errigo claims that this Court's order precludes him from working in Western Pennsylvania, Eastern Ohio, West Virginia, substantial portions of New York, and parts of Missouri, Texas, and New Mexico.

Select Medical Rehabilitation Services, Inc., d/b/a NW Rehabilitation Associates v. Pennsylvania West Association, a/k/a Penn West Associates, Inc., d/b/a Westwood Nursing and Rehabilitation Center; Primus Care, Inc., formerly known as CareFirst, Inc. and Arthur M. Krauss

Receivership—Injunctive Relief—Damages—Costs and Attorney's Fees—Preliminary Objections

1. Plaintiff was contracted to provide therapeutic services for nursing care residents at Westwood, operated by Defendant, Penn West Associates. In 2002 Defendant, DTB-1997 extended two mortgage loans to Westwood. Westwood defaulted on the loans and thereafter DBD filed a complaint for Confession of Judgment. In 2003 Defendant, CareFirst, Inc. n/k/a Primus was appointed as receiver to take possession of the mortgaged property and to operate Westwood's business. Plaintiff alleges that DBD, Primus and Arthur Krauss, its agent and/or employee conspired to conduct Westwood's business for their own benefit. Plaintiff seeks damages, injunctive relief, and costs and attorney's fees. Defendants DBD, Primus, and Krauss have each filed preliminary objections raising the following.

a. Whether or not the court should allow Plaintiff to maintain the present suit due to Plaintiff's failure to obtain leave to sue the receivership. Granting leave to sue either on behalf of or against a receivership is generally a matter within the sound discretion of the court. Plaintiff argues that since Primus did not post a bond, a receivership never existed and thus leave of court was not required to file suit. A receiver must give such security as the court shall direct. Although DBD filed a praecipe to file a bond in November 2003, it did not do so until July 2007–after the receiver was discharged. Insofar as the court was unable to determine if a bond was timely filed, it *sua sponte* granted Plaintiff leave to maintain the action. A receiver violates Pennsylvania law where it conducts business for the sole benefit of a single party, rather than for the benefit of the creditors.

b. Whether or not Plaintiff failed to state a claim for piercing the corporate veil to hold Defendant Krauss liable. The corporate form will be disregarded only when the entity is used to defeat public convenience, justify wrong, protect fraud or defend crime. If Plaintiff can prove that Krauss engaged in fraud, this court may hold Krauss personally liable.

c. Whether or not the November 2003 appointment order insulates Krauss and Primus from liability. If a receiver exceeds the authority granted by the court or fails to use ordinary care, he or she may be sued personally. Plaintiff claims Primus exceeded its authority and thus these preliminary objections were overruled.

d. Whether or not Plaintiff has stated a viable claim for fraud and misrepresentation against Krauss and DBD because the claim lacks specificity. Plaintiff claimed that DBD had conspired with Primus and Krauss to defraud Plaintiff, and the overt acts were actually committed by Krauss and Primus. Plaintiff's averments are sufficiently specific to set forth a viable claim of fraud and misrepresentation and thus these preliminary objections were overruled.

e. Whether or not Plaintiff's claims of recklessness, fraud and misrepresentation against DBD are barred under the Economic Loss Doctrine because damages sought are merely economic. The Economic Loss Doctrine bars purely economic claims because the tortfeasor has no reason to foresee any harm to the plaintiff's interests. Insofar as Plaintiff's "recklessness" claim sounded in negligence, that aspect of the preliminary objection was sustained; however, the Economic Loss Doctrine does not bar claims for fraud and misrepresentation and thus that aspect of the preliminary objection was overruled.

f. Whether or not Plaintiff's Unjust Enrichment claim is barred by the November 2003 order appointing Primus as receiver. DBD is shielded from liability for any claims, actions or causes of action arising out of or related to events or occurrences *prior* to the appointment of Primus and thus this preliminary objection was sustained.

g. Whether or not Plaintiff failed to state a viable claim for unjust enrichment by failing to aver facts of DBD's wrongdoing or misrepresentation and because Plaintiff has not exhausted statutory or contractual remedies and there

was no direct contractual relationship between Plaintiff and DBD. The court found that Plaintiff did adequately state a claim of fraud/misrepresentation and that a claim for unjust enrichment is based on benefits incurred without a contract, and thus this preliminary objection was overruled.

h. Whether or not Plaintiff has failed to state a viable claim for unjust enrichment against Krauss. Plaintiff's complaint did not indicate how Krauss personally benefited and thus this preliminary objection was sustained.

i. Whether or not Plaintiff has failed to state a viable claim for breach of fiduciary duty against Krauss. Krauss, as an agent of Primus, had a fiduciary duty to all of Westwood's creditors, including Plaintiff and thus this preliminary objection was overruled.

j. Whether or not Plaintiff failed to state whether the contract that serves as the basis for its breach of contract claim is oral or written and, if written, failed to attach a copy of the contract to the complaint. This preliminary objection was sustained and Plaintiff was granted leave to amend its complaint.

k. Plaintiff's claims for declaratory and injunctive relief should be dismissed because Plaintiff has an adequate remedy at law for money damages.

l. Plaintiff's claim for attorneys' fees was stricken because Plaintiff cited no authority for the recovery of attorney's fees when Plaintiff initiates the litigation.

(William R. Friedman)

Charles E. Bobinis for Plaintiff.
Andrew R. Eisemann for Defendant–Primus Care, Inc.
Brad A. Furani for Defendant–Arthur M. Krauss.
Christopher J. Scheuller for Defendant–DBD-1997 HHC, LLC.

No. GD 07-009357. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

MEMORANDUM ORDER OF COURT

I. Relevant Background

Ward, J., December 19, 2007—This case arises in the context of a court-appointed receivership. Defendant Penn West Associates, Inc., d/b/a Westwood Nursing and Rehabilitation Center ("Westwood") operated a nursing facility that furnished, *inter alia*, nursing care to its residents. Plaintiff Select Medical was contracted to provide therapeutic services for patients at Westwood.

In 2002, Defendant BTD-1997, n/k/a DBD-1997 HHC, LLC ("DBD") extended two mortgage loans, in the total amount of $4,929,187.97, to Westwood. As a result of Westwood's subsequent default on those loans, DBD filed a Complaint in Allegheny County for Confession of Judgment, docketed at GD 03-015826 ("original action").

In November 2003, Judge Robert P. Horgos granted DBD's petition to appoint Defendant CareFirst, Inc., n/k/a Primus Care, Inc., ("Primus") as receiver, to take possession of the mortgaged property and operate Westwood's business. Plaintiff claims (as explained in further detail below) that DBD and Primus conspired to conduct Westwood's business for their own benefit, without regard to Westwood's other creditors (including Plaintiff).

Plaintiff more specifically alleges that, shortly after Primus was appointed as receiver, Defendant Arthur Krauss, an agent and/or employee of Primus, contacted Plaintiff and, in order to fraudulently induce Plaintiff to continue delivering services, told Plaintiff that, if Plaintiff "would continue to deliver services [to Westwood], the Receiver would not only see that [Plaintiff] was paid in full for the services rendered to the Receivership, but also intended to provide [Plaintiff] with significant payments toward its pre-Receivership debt." Plaintiff pleads that, based on this misrepresentation, it continued to provide Westwood with therapeutic services. Plaintiff claims that it is owed $242,579.81 for services rendered to the receivership, and $498,376.99 for services rendered to Westwood before the receiver was appointed.

In its complaint, Plaintiff seeks damages, injunctive relief, and costs and attorney's fees, setting forth the following causes of action: breach of fiduciary duties; "recklessness"; fraud; unjust enrichment; and breach of contract.

II. Preliminary Objections

Defendants DBD, Primus, and Krauss have each filed preliminary objections, raising several issues regarding the propriety and sufficiency of Plaintiff's complaint.

A. Whether this Court should allow Plaintiff to maintain the present suit against any of the named Defendants.

A threshold issue raised by all Defendants is whether dismissal of this suit is required due to Plaintiff's failure to obtain from this Court leave to sue the receivership. "[T]he well settled rule that the granting of leave to sue either on behalf of or against a receivership is generally a matter within the sound discretion of the court." *Warner v. Conn*, 347 Pa. 617, 621, 32 A.2d 740, 742 (1943). However, Plaintiff argues that, due to Primus' purported failure to post a bond, no receivership ever existed and, thus, Plaintiff was not required to obtain leave to initiate the present action. Defendants argue that the bond was posted in a timely fashion.

The Pennsylvania Rules provide that a receiver "must give such security…as the court shall direct." Pa.R.C.P. 1533(d). In the present case, the November 2003 appointment order directed Primus to "post" a bond "[p]romptly after the execution of this order…."

In support of its claim that the bond was not posted in a timely fashion, Plaintiff points to the purported absence of any such indication to the contrary on the docket for the underlying case. According to Plaintiff, although DBD filed a praecipe to file a bond effective November 21, 2003, the bond was not actually filed until July 9, 2007 – after the receiver was discharged and Plaintiff filed the instant complaint. In support of its contention that the bond was timely posted, Defendants point to two filings in the underlying proceeding: (1) the July 9, 2007 praecipe; and (2) the language in the order discharging Primus as receiver, which states: "the bond posted shall not be released without further order of court."

Based on the limited evidence available, this Court is unable to determine whether the bond was timely posted. In any event, this Court hereby *sua sponte* grants Plaintiff leave to maintain the present action. This ruling is based upon the pleadings and submissions currently before this Court, which raise substantial questions and concerns (discussed below) regarding the manner in which the receivership at issue was conducted.

This Court "ordinarily…look[s] to the order appointing the receiver to determine what authority had been given to [it] by the court." *Witt v. Com., Dep't of Banking*, 493, Pa. 77, 82, 425 A.2d 374, 376 (1981). Additionally, in Pennsylvania, "[i]t is the duty of the receiver to administer the assets of the receivership estate, and in the management and disposition of property committed to his possession he acts in a fiduciary capacity and with impartiality *towards all interested persons.*" 75 C.J.S. Receivers § 162 (emphasis added); *Cochran v. Shetler*, 286 Pa. 226, 229, 133 A. 232, 233 (Pa. 1936). A receiver "manages the property not for any party but for the court by which he is appointed." *Id.*

> A receiver represents not only the corporation but all its creditors, and as to the latter it is his duty to secure all the assets available for their payment. For this purpose he succeeds to their rights, and has all the powers to enforce such rights that the creditors before his appointment had in their own behalf, even though such powers be beyond those which he has as the representative of the corporation alone. As each creditor may sue, the right is equal in all, and common to all, and hence the receiver, who represents all alike, is the proper party to assert the common right and pursue the common remedy for the common benefit….

Cochran, 133 A. at 233 (citations omitted).

In the present case, DBD and Primus take the position that the receivership was created solely for the benefit of DBD. Clearly, a receivership violates Pennsylvania law where it conducts business for the sole benefit of a single party, rather than for the benefit of all of the debtor's creditors. Moreover, the receivership appears to have violated the November 2003 appointment order, as well as the rules governing receiverships in Pennsylvania, by failing to file monthly financial reports, appoint appraisers to inventory and appraise Westwood's assets, and/or provide Plaintiff and other interested parties with notice of proceedings relating to the receivership. *See* Pa.R.C.P. 1533(f) (setting forth requirement for financial reports) and (g) (setting forth requirement for appraisers).

B. Whether Plaintiff fails to state a claim for piercing the corporate veil, by which Krauss may be held liable.

Krauss, an agent of Primus, argues by way of preliminary objections that Plaintiff fails to state a claim for piercing the corporate veil, by which he may be held liable. "[T]he corporate form 'will be disregarded only when the entity is used to defeat public convenience, justify wrong, protect fraud or defend crime."' *First Realvest, Inc. v. Avery Builders, Inc.*, 410 Pa.Super. 572, 577, 600 A.2d 601, 604 (1991) (quoting *Sams v. Redevelopment Authority,* 431 Pa. 240, 244 A.2d 779 (1968)). In the present case, Plaintiff claims that Krauss fraudulently induced Plaintiff to provide therapeutic services to the receivership. If this claim is proven, this Court may disregard the corporate entity and hold Krauss personally liable for such fraud. Thus, this preliminary objection is hereby overruled.

C. Whether the November 2003 appointment order insulates Krauss and Primus from liability.

The preliminary objections of Krauss and Primus, the receiver, include a demurrer, in which they argue that a provision in the order appointing Primus as receiver insulates them from liability. General hornbook law provides: "If the receiver exceeds the authority granted by the court or fails to use ordinary care, the general rule is that he or she may be sued in a personal capacity." *INF Ent., Inc. v. Donnellon*, 133 Ohio App.3d 787, 789, 729 N.E.2d 1221, 1222 (1999); *Simpson & Son v. Kerkeslager,* 36 Pa.C.C. 549, 18 Pa. D. 510 (Pa.Com.Pl. 1909) ("If a receiver, in making a contract, acts without authority, or exceeds his authority, he becomes and is personally obliged by the agreement and must answer individually for its performance."). Because, Plaintiff claims that Primus exceeded its authority, these preliminary objections are hereby overruled.

D. Whether Plaintiff has stated a viable claim for fraud and misrepresentation against Krauss and DBD.

The preliminary objections of Krauss and DBD, the mortgagor, include a demurrer, in which they argue that, due to a lack of specificity, Plaintiff has failed to state a viable claim for fraud and misrepresentation. "The elements of fraud, or intentional misrepresentation, are (1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance." *Presbyterian Medical Center v. Budd,* 832 A.2d 1066, 1072 (Pa.Super. 2003). Fraud must be "averred with particularity." Pa.R.C.P. 1019(b).

In the present case, Plaintiff claims that DBD had conspired with Primus and Krauss to defraud Plaintiff, and that the overt acts of fraud were actually committed by Krauss and Primus. According to Plaintiff: (1) Krauss represented that, in the event that Plaintiff agreed to provide those services, he and Primus intended to pay Plaintiff for services rendered to the receivership, as well as those previously rendered to Westwood; (2) Krauss, Primus, and DBD intended to induce Plaintiff to provide services; (3) at the time Krauss made such statements, he did so knowing that they were false; (4) Plaintiff reasonably relied upon Krauss' assertions ("their overt acts and statements, which they knew to be false, misled Select Medical into extending credit to a Receivership under false pretenses"); and (5) Krauss' misrepresentations caused Plaintiff to render services for which it has not been paid. Such averments are sufficiently specific and set forth a viable claim of fraud and misrepresentation. Thus, these preliminary objections of Krauss and DBD are overruled.

E. Whether Plaintiff's claims of Recklessness, Fraud, and Misrepresentation against DBD are barred under the Economic Loss Doctrine.

DBD also argues that Plaintiff's claims of Recklessness, Fraud, and Misrepresentation are barred under Pennsylvania's Economic Loss Doctrine because "the damages sought…are merely economic losses flowing from the alleged breach of the Therapy Service Agreement." "The Economic Loss Doctrine is enforced to bar purely economic claims because the tortfeasor has no knowledge of the contract or prospective relation and, therefore, no reason to foresee any harm to the plaintiff's interest." *Adams v. Copper Beach Townhome Communities, LP,* 816 A.2d 301, 307 (Pa.Super. 2003). "Thus, recovery for purely economic loss occasioned by tortious interference with contract or economic advantage is not available under a negligence theory." *Aikens v. Baltimore and Ohio R. Co.*, 348 Pa.Super. 17, 20, 501 A.2d 277, 278 (1985).

Plaintiff's "recklessness" claim appears to be a claim of negligence. Clearly, that claim is barred under the Economic Loss Doctrine. Therefore, DBD's preliminary objection regarding the applicability of the Economic Loss Doctrine to that cause of action is hereby sustained.[1]

The Economic Loss Doctrine does not bar fraud and misrepresentation claims. *See Smith v. Reinhart Ford*, 68 Pa. D. & C.4th 432, 436-37 (Pa.Com.Pl., 2004). Therefore, DBD's preliminary objection regarding the applicability of the Economic Loss Doctrine to Plaintiff's fraud and misrepresentation claim is overruled.

F. Whether Plaintiff's Unjust Enrichment claim is barred by the November 2003 order appointing Primus as receiver.

DBD next "requests that the Court take judicial notice of the fact that the Receiver Order insulates [DBD] from any liability to any party for any claims, actions, or causes of action arising out of or relating to events or circumstances

occurring *prior* to the appointment [of] Primus as receiver." DBD is correct. Thus, this preliminary objection is sustained to the extent that DBD requests that it be shielded from liability for any claims, actions, or causes of action arising out of or relating to events or circumstances occurring *prior* to the appointment of Primus.

G. Whether Plaintiff failed to state a viable Unjust Enrichment claim against DBD because: (1) Plaintiff failed to aver facts supporting recovery based on DBD's wrongdoing or misrepresentation; (2) Plaintiff has not exhausted its statutory or contractual remedies, as its "[o]bligations remain with Westwood, among others"; and (3) there was no direct contractual relationship between Plaintiff and DBD.

DBD's preliminary objection regarding Plaintiff's alleged failure to state a viable claim for unjust enrichment is based on DBD's prior argument that Plaintiff failed to state a claim of fraud/misrepresentation. However, as explained above, Plaintiff has adequately stated a claim of fraud/misrepresentation.

DBD also asserts that Plaintiff cannot recover from DBD for unjust enrichment because: (a) "Plaintiff has not exhausted its statutory or contractual remedies"; and (b) "there was no direct contractual relationship between Plaintiff and DBD." DBD's argument regarding Plaintiff's alleged failure to exhaust its statutory and contractual remedies is vague and unsupported by any authority. Additionally, DBD's argument regarding the lack of a contractual relationship is meritless, as unjust enrichment claims are based on benefits incurred without contracts. *See Northeast Fence & Iron Works, Inc.*, 933 A.2d 664, 668 (Pa.Super. 2007) ("A quasi-contract imposes a duty, *not as a result of any agreement*, whether express or implied, *but in spite of the absence of an agreement*, when one party receives unjust enrichment at the expense of another." (emphasis added)). For these reasons, this preliminary objection is hereby overruled.

H. Whether Plaintiff has failed to state a viable Unjust Enrichment claim against Krauss.

As noted above, the Superior Court has recently stated: "A quasi-contract imposes a duty, not as a result of any agreement, whether express or implied, but in spite of the absence of an agreement, *when one party receives unjust enrichment* at the expense of another." *Id.* (emphasis added). Krauss is correct that the complaint does not indicate how Krauss personally benefited from Plaintiff. Thus, this preliminary objection is sustained.

I. Whether Plaintiff has failed to state a viable Breach of Fiduciary Duty claim against Krauss.

Krauss argues that Plaintiff fails to state a claim for breach of a fiduciary duty, as Plaintiff does not allege that Krauss was appointed as the receiver or otherwise owed any duty to Plaintiff. However, Krauss, as an agent of Primus, had a fiduciary duty to all of Westwood's creditors, including Plaintiff. *See* 75 C.J.S. Receivers § 162 ("It is the duty of the receiver to administer the assets of the receivership estate, and in the management and disposition of property committed to his possession he acts in a fiduciary capacity and with impartiality towards all interested persons." (emphasis added)). Plaintiff claims that Krauss, through Primus, breached his fiduciary duties as a receiver by, *inter alia,* acting in the interests of the Kraus, Primus, and DBD, rather than in the interests of all of Westwood's creditors. For these reasons, this preliminary objection is overruled.

J. Whether, in violation of Pa.R.C.P. 1019(h) and (i), Plaintiff failed to state whether the contract that serves as the basis for its breach of contract claim is oral or written and, if written, Plaintiff failed to attach the contract to the complaint.

In relevant part, Pa.R.Civ.P. 1019 provides:

> (h) When any claim or defense is based upon an agreement, the pleading shall state specifically if the agreement is oral or written.
>
> *Note*: If the agreement is in writing, it must be attached to the pleading. See subdivision (i) of this rule.
>
> (i) When any claim or defense is based upon a writing, the pleader shall attach a copy of the writing, or the material part thereof, but if the writing or copy is not accessible to the pleader, it is sufficient so to state, together with the reason, and to set forth the substance in writing.

In his preliminary objections, Krauss states that: (1) Plaintiff fails to identify, the contract that Krauss allegedly breached, and (2) there is no contract to which Krauss is a party attached to the complaint. Krauss' statements are correct. Thus, this preliminary objection is sustained, and Plaintiff is granted leave to amend its complaint.

K. Whether Plaintiff's claims for declaratory and injunctive relief should be dismissed because Plaintiff has an adequate remedy at law, namely, money damages.

"Injunctive relief will lie where there is no adequate remedy at law." *The Woods at Wayne Homeowners Ass'n v. Gambone Bros.,* 893 A.2d 196, 204 (Pa.Cmwlth. 2006). In the present case, Plaintiff can be compensated for the money allegedly owed to it with money damages. Thus, DBD's preliminary objection challenging Plaintiff's claims for injunctive and declaratory relief is sustained.

L. Whether Plaintiff's claim for attorney's fees should be stricken because "Plaintiff has neither cited a statute nor referenced an agreement" providing for the recovery of such fees.

In support of its claim for attorney's fees, Plaintiff cites *Hartford v. Arnold*, 884 A.2d 316 (Pa.Super. 2005), a case in which the Superior Court recognized that a litigant was entitled to attorney's fees when its opponent *initiated* the matter arbitrarily, vexatiously, or in bad faith. Plaintiff – not Defendants – initiated the present case. Because Plaintiff has not cited any authority providing for attorney's fees, DBD's preliminary objection challenging Plaintiff's claim for such fees is hereby sustained.

III. Conclusion

AND NOW, this 19th day of December 2007, after argument and consideration of the briefs filed, it is hereby ORDERED, ADJUDGED AND DECREED that Defendants' preliminary objections to Plaintiff's Complaint are disposed of as provided above.

BY THE COURT:
/s/Ward, J.

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[1] Krauss challenges Plaintiff's recklessness/negligence claim on ground that Plaintiff did not sufficiently plead the elements of such a cause of action. However, because Plaintiff's recklessness claim is barred under the Economic Loss Doctrine, Krauss' argument is moot.

Palmetto Home Builders, Inc. v. Mark and Chrissanne Hennicke v. Palmetto Home Builders, Inc. and Pa. National Mutual Casualty Insurance Co. et al.

Garnishment—Liability Insurance—Breach of Contract—Enforcement of Settlement Agreement

1. Home builder ("Builder") sued homeowners for release of final $5,000 payment for construction of home. Homeowners counterclaimed for damages sounding in contract and tort.

2. Builder's general commercial liability insurer provided defense under a reservation of rights. The action was settled and discontinued and a settlement agreement signed providing for cash payment of $45,000 to homeowners and performance of additional work by Builder.

3. Builder executed an agreement releasing its insurance carrier from any further duty to defend the claims.

4. Homeowners received the cash portion of the settlement, but Builder did not perform the additional work and Homeowners brought a Petition to Enforce Settlement Agreement. Homeowners' damages for Builder's failure to perform were reduced to a judgment in the amount of $96,090.

5. Homeowners served Builder's insurance carrier with interrogatories pursuant to a Writ of Execution and attempted to collect the judgment from the carrier as garnishee.

6. Insurance carrier filed a Motion for Summary Judgment asserting that its coverage was limited to negligence actions and did not apply to breach of contract actions, and that it had been released by its insured.

7. The Court granted Summary Judgment holding that insurer was not a proper garnishee where no coverage existed for breach of contract claims and because its insured released it from any further liability in the matter. The insured can assert any defenses against the garnishor that it could assert against its insured.

(Lynn E. MacBeth)

Douglas C. LaSota for Plaintiffs.
Miles A. Kirshner for Garnishee.

No. AR 03-006954. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

Folino, J., October 23, 2008—Presently before me is the "Motion for Summary Judgment" filed on behalf of purported Garnishee Pennsylvania National Mutual Casualty Insurance Company ("Penn National"). This Memorandum aims to explain why I must grant Penn National's summary judgment motion and strike the Writ of Execution that counterclaim-Plaintiffs had filed against it.

Sometime in the year 2002, Palmetto Home Builders, Inc. entered into a written contract with Mark and Chrissanne Hennicke; under the terms of this contract, Palmetto was to construct the Hennickes' marital home for a total purchase price of about $140,000. According to Palmetto's version of the events, Palmetto competed its end of the deal and was therefore entitled to full payment; yet, as Palmetto averred, the Hennickes still refused to release Palmetto's final $5,000 payment. As a result, on December 1, 2003, Palmetto Home Builders filed a "Complaint in Arbitration" against the Hennickes. Palmetto's Complaint, which was docketed at AR-03-006954, sought to recover the $5,000 that, it averred, was still outstanding under the contract.

After being served with Palmetto's Complaint, however, the Hennickes quickly turned to the offensive and, in their response to the Complaint, filed a three-count counterclaim against Palmetto. The Hennicke counterclaim, which sounded in both contract and tort, sought substantial damages for the harm that, according to the Hennickes, Palmetto caused to the Hennickes' house and lawn.[1]

After being served with the counterclaim, Palmetto contacted its general liability insurance carrier, Penn National, and demanded that Penn National provide defense and indemnification from the Hennicke counterclaim. Penn National did undertake the defense, though it did so under a reservation of rights.[2]

Litigation on all of the claims continued until September 28, 2006; this was when the Hennickes, Palmetto Home Builders, and various other defendants that were joined along the way signed a "Mutual Settlement and Release Agreement." The Agreement states:

> Mark and Chrissanne Hennicke agree that, *in consideration* for the releases and other good and valuable consideration set forth herein, *the receipt and sufficiency of which is hereby acknowledged,* hereby remises, *releases*…and otherwise forgives Palmetto Home Builders, Inc…their subsidiaries, predecessors-in-interest…and *insurers, from any and all actions,* claims, demands, liabilities, suits, controversies, proceedings, expenses and damages, of any kind and of any nature, whether known or unknown, and from all other rights, demands, damages and liabilities of any kind or nature…which they had, now have or may ever have, from the beginning of the world to date, whether now existing or hereafter arising in connection with or in any way related to the matters set forth in the pleadings filed in the litigation at No. AR03-006954…

"Mutual Settlement and Release Agreement," dated September 28, 2006, at 2 (emphasis added).

Moreover, under the terms of this Settlement Agreement, the Hennickes were entitled to receive compensation, including: 1) from the various defendants, a monetary payment of $45,000 and 2) from Palmetto Home Builders, certain specific construction work on the Hennickes' house and lawn. Since these provisions are important to the instant case, they are quoted at length and read as follows:

> In consideration of the settlement and release of claims and defenses between Palmetto Home Builders, Inc. and Mark and Chrissanne Hennicke…[Palmetto Home Builders and the other, various defendants] agree to pay to Mark and Chrissanne Hennicke the sum of $45,000.00….The amount of $45,000.00 shall be paid as follows:
>
> (a) *$23,100.00 by [Penn National,] the insurance carrier for Palmetto Home Builders, Inc.;*
>
> (b) $17,000.00 by [an unrelated entity];
>
> (c) $2,500.00 by Palmetto Home Builders, Inc. directly;
>
> (d) $1,450.00 by [an unrelated entity]; and

(e) $950.00 by [an unrelated entity].

In addition to the above consideration, Palmetto Home Builders, Inc. shall do the following work on Mark and Chrissanne Hennicke's property as follows:

(a) Use a Schedule 40 pipe to connect French drains and downspout conductors where reasonably possible and to pipe the same to the bottom of the rear slope within 45 days of the execution of this Agreement;

(b) To remove the Horizon-A fill as identified in the AWK report and the scope of the removal is subject to the approval of AWK within 60 days of the request of the Hennickes at a time that is mutually convenient to the parties.

In lieu (b), Mark and Chrissanne Hennicke at any time within 2 years of the date of the execution of this Agreement, can decide not to request that Palmetto Home Builders, Inc. remove the fill. If Mark and Chrissanne Hennicke determine that they do not request Palmetto Home Builders, Inc. remove the fill identified above, then Palmetto Home Builders, Inc. will pay to Mark and Chrissanne Hennicke the sum of $2,000.00

…

(c) Palmetto Home Builders agrees to return the land to the condition prior to the commencement of repairs undertaken by Palmetto Home Builders pursuant to this Agreement.

(d) Palmetto Home Builders, Inc. will expose an area approximately 6 feet in length to a depth to observe the external French drain, at the left rear corner of the home (when viewing home from street) to demonstrate to Plaintiffs that Palmetto Home Builders, Inc. applied waterproofing pursuant to the terms of the written contract. Said excavation shall remain open for observation by Sweetwater Builders, Inc. for no more than a period of seven (7) days.

If it is demonstrated to all parties that Palmetto Home Builders, Inc. complied with the terms of the contract relative to waterproofing, then Mark and Chrissanne Hennicke shall execute a Release in favor of Palmetto Home Builders, Inc. releasing all claims relative to waterproofing.

If the parties disagree whether the waterproofing was done pursuant to the terms of the contract, then Mark and Chrissanne Hennicke have the right within one (1) year from the date that Palmetto Home Builders, Inc. exposed the area set forth in subparagraph (d) to bring a claim for breach of contract in the Court of Common Pleas of Allegheny County, Pennsylvania.

Id. at 4-6 (emphasis added).

Moreover, in another important provision, the "Mutual Settlement and Release Agreement" declares: "[u]pon execution of this Agreement, the parties shall cause their legal counsel to dismiss with prejudice all causes of action, claims, counterclaims and crossclaims set forth in the action." *Id.* at 6. And, indeed, on October 6, 2006, both Palmetto and the Hennickes signed a "Praecipe to Settle And Discontinue," instructing the Prothonotary to "*settle and discontinue all claims* of plaintiff, Palmetto Home Builders, Inc. *and claims of counterclaim plaintiffs Mark and Chrissanne Hennicke* in the" underlying action. "Praecipe to Settle And Discontinue," filed October 6, 2006, at 1 (emphasis added).

What followed spawned the instant dispute. According to the Hennickes, Palmetto simply refused to perform the specific "work" that it had promised under the "Mutual Settlement and Release Agreement."[3] Because of this, on May 31, 2007, the Hennickes filed a "Petition to Enforce Settlement Agreement," averring that, as a result of Palmetto's default, the Hennickes must now spend $93,000 to have a replacement contractor fulfill the work Palmetto promised, but had then failed, to perform. Counterclaim Plaintiffs' "Petition to Enforce Settlement Agreement as to Defendant Palmetto Home Builders, Inc." (hereinafter "Petition to Enforce Settlement Agreement"), filed May 31, 2007, at ¶¶ 11-12. A Rule was then issued against Palmetto, requiring Palmetto to show cause as to why the Hennickes were not entitled to the relief claimed; Palmetto failed to properly respond and, on September 26, 2007, the Rule entered against Palmetto was made absolute with a judgment entered against Palmetto in the amount of $96,090.

In an attempt to collect on this judgment, the Hennickes filed a "Praecipe for Writ of Execution," seeking execution in the amount of $96,570.45 against not only Palmetto Home Builders, but also against Palmetto's general liability insurance carrier, Penn National. As against Penn National, the Hennickes' claim was one of garnishment. Therefore, as is required in such proceedings, the Hennickes served Penn National with the writ as well as "Interrogatories to the Garnishee."[4] Penn National answered the interrogatories and, with the pleadings now closed, both Penn National and the Hennickes have filed motions for summary judgment. According to both of the parties, there are no material issues of fact left in this case and I should rule as a matter of law one way or the other. This memorandum is written specifically in response to Penn National's summary judgment motion.

As stated within Penn National's summary judgment motion, Penn National is not a proper garnishee because: 1) Penn Nation performed its obligations under the "Mutual Settlement and Release Agreement" and the "default/breach of contract which led to the Hennicke's Petition to Enforce Settlement Agreement, and to the instant execution proceeding, was the default/breach of policy holder Palmetto, and not of Penn National"; 2) under a "First Party Release and Agreement," Palmetto agreed to release Penn National from "any and all further obligation under the subject liability insurance policy" and 3) as to the Hennickes' actual counterclaim, "the Penn National policy does not provide coverage to Palmetto for the claims asserted by the Hennicke's." "Motion for Summary Judgment of Purported Garnishee Pennsylvania National Mutual Casualty Insurance Company," filed May 28, 2008 (hereinafter "Penn National's Motion for Summary Judgment"), at ¶¶ 14(d); (c); (e) & 16. I believe that Penn National's first and second arguments mandate that summary judgment be entered in its favor.

As this is a motion for summary judgment, I am mindful that:

> [s]ummary judgment is proper only when the pleadings, depositions, answers to interrogatories, admissions and affidavits and other materials demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. The reviewing court must view the record in the light most favorable to the nonmoving party and

> resolve all doubts as to the existence of a genuine issue of material fact against the moving party. Only when the facts are so clear that reasonable minds could not differ can a trial court properly enter summary judgment.

Wall Rose Mut. Ins. Co. v. Manross, 939 A.2d 958, 962 (Pa.Super. 2007)(internal citations omitted).

As noted above, the current action is one of garnishment. In general, "garnishment" is a "proceeding through which a creditor collects his debt out of property of the debtor in the hands of a third party and may be used to determine whether the garnishee owes a debt to the judgment debtor, or has property of the judgment debtor." *Pa. State Troopers Ass'n v. Pa. State Police, Lost & Damaged Prop. Bd. of Appeal*, 898 A.2d 43, 48 (Pa.Commw. 2006)(internal ellipses omitted). Thus, garnishment is particularly appropriate in the insurance realm; it is, our Superior Court stated, "a well-settled, viable remedy available to a judgment creditor to collect on a judgment from the judgment debtor's insurer." *Butterfield v. Giuntoli*, 670 A.2d 646, 651 (Pa.Super. 1995).

Further, since garnishment is essentially a "lawsuit within a lawsuit," the parties must be aware of the respective burdens they carry. *Bianco v. Concepts 100, Inc.*, 436 A.2d 206, 209 (Pa.Super. 1981). As our Superior Court has made clear, the burden initially falls upon the judgment creditor to "establish the existence of: (1) his judgment, which operates as the assignment to him of the judgment debtor's claims and (2) the insurer's obligation to the judgment debtor by proving the existence of the policy providing liability coverage for his claim and its value." *Id.* (internal citations omitted); *see also*, *Buckley v. Exodus Transit & Storage Corp.*, 744 A.2d 298, 309 (Pa.Super. 1999)(stating: "Fundamental principles of insurance law make clear that, as a necessary prerequisite to recovery upon an insurance policy, the insured must show that a claim is within the coverage provided by the policy"); *Riehl v. Travelers Ins. Co.*, 772 F.2d 19, 23 (3rd Cir. 1985)(stating: "the burden of establishing a valid policy claim falls upon the insured…[t]hus, it [falls] upon [the Insured] to establish…the existence of an 'occurrence' or a loss during the policy period"). If the insurer does, however, "rel[y] upon an exclusion or a breach of a condition as a defense, [it is the insurer who] bears the burden of establishing that defense." *Bianco*, 436 A.2d at 209; *A.G. Allebach, Inc. v. Hurley*, 540 A.2d 289, 293 (Pa.Super. 1988); *see also, Erie Ins. Exch. v. Transamerica Ins. Co.*, 533 A.2d 1363, 1366 (Pa. 1987)(stating: "[w]here an insurer relies on a policy exclusion as the basis for its denial of coverage and refusal to defend, the insurer has asserted an affirmative defense and, accordingly, bears the burden of proving such defense.").

In the case at bar, Penn National has conceded that the Hennickes do indeed have a valid judgment against Penn National's insured. Therefore, the only question this Court must consider is whether, under the commercial general liability insurance policy, Penn National has an "obligation to the judgment debtor" to pay this $96,090 judgment; a question that is dependent upon whether "the policy provid[es] liability coverage for" the specific claim upon which the Hennickes obtained their $96,090 judgment. *Bianco*, 436 A.2d at 209.

And what is the specific claim that gave rise to the $96,090 judgment? Is it some sort of judgment that the Hennickes somehow obtained on their "negligence" counterclaim – a counterclaim that was, on October 6, 2006, expressly "settled and discontinued" – or, instead, did the Hennickes obtain a judgment upon their "breach of settlement agreement" claim? Here, the answer is clear: the Hennickes went to Court to *enforce* the Settlement Agreement, contending that Palmetto *breached the contractual promises* that Palmetto made in the Settlement Agreement; as a result, the Hennickes obtained a judgment against Palmetto for "breach of contract"; hence, the Hennickes' claim that gave rise to the $96,090 judgment was one of "breach of contract."

As will be remembered, on September 28, 2006, the Hennickes, Palmetto Home Builders and various other defendants signed a "Mutual Settlement and Release Agreement." Under the terms of this "Mutual Settlement and Release Agreement," the Hennickes received: 1) from the various defendants, a monetary payment of $45,000; 2) from Palmetto Home Builders, a promise that Palmetto would perform certain specific construction work on the Hennickes' house and lawn and 3) from Palmetto Home Builders, a release from the claims Palmetto levied against the Hennickes. Then, following the Agreement's execution, *the underlying lawsuit was dismissed.*

The instant dispute then arose from the fact that Palmetto *simply refused to perform any of the work that it had agreed to do in the "Mutual Settlement and Release Agreement."* The "Mutual Settlement and Release Agreement" is, of course, an *agreement, i.e.* a contract. *See also, Century Inn, Inc. v. Century Inn Realty, Inc.*, 516 A.2d 765, 767 (Pa.Super. 1986)(stating: "The enforceability of settlement agreements is determined according to principles of contract law."). Thus, when Palmetto refused to perform its obligations under this contract, the Hennickes did not attempt to file a "negligence" claim against Palmetto; nor did the Hennickes attempt to re-open the "negligence" counterclaim that the Hennickes had previously filed against – but had then "settled and discontinued" as to – Palmetto. Rather, when Palmetto failed to perform its obligations under the agreement, the Hennickes filed a *"Petition to Enforce Settlement Agreement,"* seeking $93,000 for the "cost of having a replacement contractor perform the work agreed to by Palmetto." "Petition to Enforce Settlement Agreement," at ¶¶ 11-12.

In retort, the Hennickes argue that "Palmetto did not ultimately comply with all of the terms of the Settlement Agreement and therefore a settlement among the parties was not reached." Counterclaim Plaintiffs' "Motion for Summary Judgment Against Garnishee," filed May 28, 2008, at 5. Such an argument seems to suggest that the settlement contract was, in some way, "voided" by Palmetto's breach and that, because of this, the Hennickes were somehow free to pursue the previously settled negligence count contained within their discontinued counterclaim. The first answer to this argument is that the Hennickes never did in any way attempt to revive or pursue the negligence counterclaim and never did in any way treat the Settlement Agreement as if "a settlement among the parties was not reached": the Hennickes neither petitioned the clerk of courts to "re-open" the "settled and discontinued" counterclaim nor returned the $45,000 given to them by the various defendants. Rather, and quite the opposite, the Hennickes petitioned the Court to *enforce* the Settlement Agreement.

Hence, the Hennickes' claim that gave rise to the $96,090 judgment was not, as the Hennickes contend, one sounding in negligence: the negligence claim had been settled and discontinued months before this $96,090 judgment came into existence. Instead, the Hennickes' claim was for breach of the settlement agreement: the Hennickes claimed that "[d]espite repeated demand, Palmetto refuses to perform its work pursuant to the terms of the Settlement and Release Agreement"; moreover, the damages that the Hennickes received were for the "cost of having a replacement contractor perform the work agreed to by Palmetto" within the

"Mutual Settlement and Release Agreement." "Petition to Enforce Settlement Agreement," at ¶¶ 11-12.

It is, however, settled Pennsylvania law that a commercial general liability insurance policy does not protect against this type of contractual default. Rather, as our Supreme Court has explained, an insurance policy is intended to "insure against accidents," not to substitute as a "performance bond." *Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.*, 908 A.2d 888, 899 (Pa. 2006); *see also, Redevelopment Auth. of Cambria County v. Int'l Ins. Co.*, 685 A.2d 581, 589 (Pa.Super. 1996)(*en banc*)(stating: "The purpose and intent of [a CGL] insurance policy is to protect the insured from liability for essentially accidental injury to the person or property of another rather than coverage for disputes between parties to a contractual undertaking."); *Nabholz Const. Corp. v. St. Paul Fire & Marine Ins. Co.*, 354 F.Supp.2d 917, 922 (E.D.Ark. 2005)(stating: "[t]he purpose of a CGL policy is to protect an insured from bearing financial responsibility for unexpected and accidental damage to people or property. It is not intended to substitute for a contractor's performance bond").

The instant case is no different: as has already been quoted, Palmetto's "Commercial General Liability Insurance Policy" with Penn National only covered, in relevant part, "those sums that [Palmetto] becomes legally obligated to pay as damages because of…'property damage' [where that 'property damage' was] caused by…an accident, including continuous or repeated exposure to substantially the same general harmful conditions." "Commercial General Liability Insurance Policy" between Penn National and Palmetto Home Builders, attached as "Exhibit 'A'" to Penn National's "Motion for Summary Judgment" (hereinafter "CGL Policy"), at Section 1(A)(1)(a)-(b) & Section 5, ¶ 13. Obviously, it is not an "accident" for one party to "refuse[] to perform its work pursuant to the terms of" a contract. "Petition to Enforce Settlement Agreement," at ¶ 11. Indeed, if this Court were to hold otherwise, this Court would effectively (and unlawfully) be converting the current CGL policy into a "performance bond": I would be saying that the CGL policy insulated the Hennickes from the possibility that Palmetto would completely and utterly fail to perform its contractual duties. Such is the purpose of a performance bond, not an insurance contract.

In conclusion, Penn National is entitled to summary judgment because, in Penn National's words, the "default/breach of contract which led to the Hennicke's Petition to Enforce Settlement Agreement, and to the instant execution proceeding, was the default/breach of policy holder Palmetto." "Penn National's Motion for Summary Judgment," at ¶ 14(d). Here, the "Mutual Settlement and Release Agreement" delineated Palmetto's obligations to the Hennickes, Palmetto breached these obligations by "refus[ing] to perform its work" and the Hennickes received damages in the form of the "cost of having a replacement contractor perform the work agreed to by Palmetto." The Hennickes' claim was therefore one for "breach of contract for failure to perform." Yet, as our Supreme Court has held, commercial general liability insurance policies do not provide coverage for such claims. *Kvaerner*, 908 A.2d at 899. And, since the CGL Policy did not provide coverage for the contract claims that gave rise to the judgment against Palmetto, Penn National cannot be said to owe an "obligation to the judgment debtor." Penn National, thus, is not a proper garnishee and is entitled to summary judgment in its favor.

As a separate matter, Penn National is also entitled to summary judgment because its insured, Palmetto, released it from any further liability in the matter. By way of background, when the parties were negotiating towards what would ultimately become the "Mutual Settlement and Release Agreement," Penn National was participating in the case under a "reservation of rights." Penn National's position recognized the fact that, even if its insured were ultimately found liable at trial, Penn National would only have a responsibility to indemnify if certain conditions were met: namely, that the factfinder awarded the Hennickes damages for "'property damage' [where that 'property damage' was] caused by…an accident, including continuous or repeated exposure to substantially the same general harmful conditions." "CGL Policy," at Section 1(A)(1)(a)-(b) & Section 5, ¶13. In order for Penn National to be induced to relent from this position and contribute toward a settlement, several things had to occur. As discussed above: 1) the Hennickes agreed to release Palmetto's insurer from any further claims, and 2) all parties agreed to have the Hennicke counterclaim settled and discontinued on the court docket. But, in addition to all of that, Palmetto also agreed to sign its own release, entitled "First-Party Release and Agreement," in which Palmetto expressly released Penn National from:

> any and all claims, causes of action or other rights which we have, have had, or could have had, under any of the coverages set forth in [the CGL insurance] policy…
>
> …
>
> It is further expressly understood and agreed that the Release set forth above applies to, and will be given effect with respect to, any claim for insurance coverage that may arise, or could arise in the future, regarding performance of these or any in-kind services provided to the Hennickes as a part of the consummation of the settlement of the underlying action.

"First-Party Release and Agreement," dated November 19, 2006, at 1.

As our Superior Court has stated, "[i]n general, the insurer can…assert any defenses against the garnishor that it could assert against its insured." *Butterfield*, 670 A.2d at 651. In the case at bar, Penn National could assert the affirmative defense of "release" against its insured; therefore, pursuant to *Butterfield*, it would seem as if Penn National could also assert the defense of "release" as to "the garnishor[s]," thus precluding the Hennickes' current garnishment action.

Within their Reply Brief, the Hennickes argue that an injured party has "an independent right and not a derivative right to be heard" and also that such independent rights in a liability insurance policy arise "immediately upon the happening of the accident." The Hennickes' "Reply Brief to Garnishee's Brief in Opposition to Counterclaim Plaintiffs' Motion for Summary Judgment," filed July 31, 2008, at 1-2. I agree with those propositions of law, but disagree with the conclusion that the Hennickes draw from them: that the "First-Party Release" has no effect.

According to the now "settled and discontinued" Hennicke counterclaim, the Hennickes suffered damages as a result of Palmetto's alleged "breach of contract" and negligence. And, to the extent that the counterclaim alleged Palmetto caused the Hennickes "property damage," where that "property damage" resulted from an "accident," the Hennickes obtained potential rights in Palmetto's CGL insurance policy. However, the Hennickes then "settled and discontinued" their counterclaim against Palmetto; by doing this, the Hennickes no longer had any potential rights in Palmetto's CGL insurance. Certainly, at that point, Penn National could obtain a release from Palmetto without prej-

udicing any potential rights of the Hennickes.

Thus, it was the negligence counterclaim that gave the Hennickes potential rights in the liability policy. But, after the insurer was released from that counterclaim, and after the counterclaim was discontinued, the Hennickes lost the vehicle through which they could claim potential rights in the policy.

Accordingly, I am entering an order granting Penn National's "Motion for Summary Judgment" and striking the "Writ of Execution" that the Hennickes had levied against the insurer.

ORDER OF COURT

AND NOW, this 23rd day of October, 2008, upon consideration of the Motion for Summary Judgment filed on behalf of purported Garnishee Pennsylvania National Mutual Casualty Insurance Company, it is hereby ORDERED, ADJUDGED and DECREED as follows:

The Motion for Summary Judgment is GRANTED. Thus, purported Garnishee has no further obligation to Counter-Claim Plaintiffs Mark and Chrissane Hennicke, and the Writ of Execution, issued against Pennsylvania National Mutual Casualty Insurance Company on October 26, 2007 is hereby STRICKEN.

BY THE COURT:
/s/Folino, J.

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[1] As against Palmetto, Count I of the Hennickes' counterclaim was for "Breach of Contract"; Count II was for "Negligence" and Count III alleged violations of the "Pennsylvania Unfair Trade Practices and Consumer Protection Law." As our Superior Court has stated, the UTPCPL "embraces actionable conduct which sounds in assumpsit as well as trespass and which parallel actions upon contracts as well as those arising in tort." *Gabriel v. O'Hara*, 534 A.2d 488, 495 (Pa.Super. 1987).

[2] In other words, Penn National provided Palmetto with an immediate defense even though Penn National disputed that it had any obligation ultimately to indemnify. This was done because, under the well-settled law of this Commonwealth, an insurer's "duty to defend is separate from and broader than the duty to indemnify." *Gen. Accident Ins. Co. v. Allen*, 692 A.2d 1089, 1095 (Pa. 1997). Hence, "[i]f the complaint against the insured avers facts that would support a recovery covered by the policy, then coverage is triggered and the insurer has a duty to defend until such time that the claim is confined to a recovery that the policy does not cover." *Id.* In this case, the Hennickes filed their counterclaim against Palmetto for breach of contract and negligence. Yet, Palmetto's insurance policy with Penn National only covered "those sums that [Palmetto] becomes legally obligated to pay as damages because of…'property damage' [where that 'property damage' was] caused by…an accident, including continuous or repeated exposure to substantially the same general harmful conditions." "Commercial General Liability Insurance Policy" between Penn National and Palmetto Home Builders, attached as "Exhibit 'A'" to Penn National's "Motion for Summary Judgment," at Section 1(A)(1)(a)-(b) & Section 5, ¶ 13. Looking at this contractual language, it would appear that, if Palmetto were to have eventually been found liable for "breach of contract," Palmetto would (probably) not have been entitled to indemnification; rather, and phrased generally, indemnification would only have been necessary if Palmetto were to have been found liable on the Hennickes' "negligence" claim.

Explained in another manner, the reason why Penn National undertook Palmetto's defense under a "reservation of rights" is because, at the time the Hennickes filed their claims against Palmetto, Penn National was *potentially* required to indemnify its insured: that is, *if* Palmetto was, ultimately, found liable to the Hennickes and *if* Palmetto's liability was premised upon a finding of "negligence" and *if* Palmetto's "negligence" was the result of "an accident," Penn National would have been required to indemnify Palmetto. And, because the *potential* existed that Penn National would have to indemnify its insured, Penn National was forced to defend its insured "until such time that the [Hennickes'] claim [was] confined to a recovery that the policy [did] not cover." *Gen. Accident Ins. Co.*, 692 A.2d at 1095.

[3] The Hennickes do not dispute that they received the $45,000 the various defendants promised.

[4] As explained by our Superior Court:

> Interrogatories to the garnishee under [Pennsylvania Rule of Civil Procedure] 3144 are procedurally linked to the writ of attachment and are designed to ascertain the property in the possession of a known garnishee. They may be served only at the time of or after issuance of the writ and only upon a garnishee. In the context of the attachment proceeding, such interrogatories are analogous to a complaint, and require the garnishee to respond and assert any available defenses or suffer entry of a default judgment.

PaineWebber, Inc. v. Devin, 658 A.2d 409, 412 (Pa.Super. 1995)(citations omitted).

Commonwealth of Pennsylvania v. Leroy Fears

Post-Conviction Relief—Evidentiary Hearing—Sufficiency of Evidence—Guilty Plea—Death Penalty

1. Defendant was charged with and pled guilty to first degree murder and involuntary deviate sexual intercourse, related to oral sodomy and strangulation death of a twelve-year-old male victim. Defendant now appeals from the denial of post-conviction relief without a hearing.

2. Defendant asserted violation of his constitutional rights and international law. As international law is irrelevant to state courts in Pennsylvania this is without merit.

3. Prosecutorial misconduct for statements made during closing argument can be disregarded by the Court in a bench trial. No federal or state rule requires two attorneys for death penalty cases.

4. Defendant also asserted that proportionality of punishment must be addressed, to ensure it "fits the crime." Although this section was removed in 1997, it was in effect at the time of Defendant's sentence. The Supreme Court reviewed Defendant's case and death sentence and specifically found that the evidence was sufficient to support the aggravating factor under this statute to impose a death sentence and specifically addressed proportionality.

5. As the Defendant participated in an oral colloquy on the record and completed a written waiver form with regard to the right to a jury trial, the Court found that the plea was made voluntarily and knowingly after discussion with coun-

sel and the Court as to his rights.

6. Defendant's claim that he may become incompetent is "speculative" and not ripe for review and, therefore, the Court does not have jurisdiction over it. As the Court was presented with mitigation evidence contrary to Defendant's assertion that he was mentally retarded or incompetent, this claim of error fails.

7. Sufficient evidence existed to support the aggravating factor that a murder occurred during the perpetration of a felony because Defendant pled guilty and admitted that oral sodomy occurred minutes prior to Defendant's strangulation of the victim. This constitutes a sufficient nexus between the murder and felony to support the aggravating factor. Defendant further asserted that an insufficient factual basis existed in the guilty plea colloquy to establish forcible compulsion, an element of the sexual intercourse charge. However, considering the disparity in age, the isolated location, and Defendant's admission on videotape, this claim failed.

8. Defendant asserted a *Miranda* violation with regard to his videotaped confession and statement; however, Defendant initiated the contact with police regarding the victim and completed Pre-Interrogation Waiver forms after being advised of his rights. Defendant confessed to the crimes and waived representation at his preliminary hearing.

9. Defendant finally asserts a claim of ineffective assistance of counsel. Although Defendant asserts that counsel failed to present evidence of his mental health impairments, counsel did present a neutral expert regarding Defendant's mental health, despite no indication of mental impairment in the interactions between counsel and Defendant.

(Angel L. Revelant)

Wilbert Conrad for the Commonwealth.
Sumner Parker for Defendant.

Nos. CC 199409095 and CC199409201. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Zottola, J., September 19, 2008—The factual and procedural histories have been sufficiently stated previously.

Pursuant to Rule Pa.R.A.P. 1925(b), the Defendant filed a Statement of Matters Complained of on Appeal on December 19, 2007. Numerous issues are presented; rather than fully enumerate them, this court chose to attach the Statement. For a full presentation of matters complained of on appeal, please see Attached.

EXCESSIVE CLAIMS

The Defendant asserts twenty-nine issues on appeal. A lengthier appeal creates a presumption that it contains more errors than necessary and makes potentially valid claims seem without merit. Thus, when an attorney alleges numerous errors, this tends to dilute and weaken a good case and not save a bad one. *United States v. Hart*, 693 F.2d 286, 287 (3d Cir. 1982), cited in *Commonwealth v. Robinson*, 864 A.2d 460, 480 (Pa. 2004). With this principle in mind, we now turn to addressing the Defendant's claim upon appeal.

INTERNATIONAL LAW

The Defendant asserts various violations of his Constitutional rights as well and court error based on international law. International law bears no holding on state courts within Pennsylvania. Any allegation asserting a violation of international law is irrelevant and therefore fails.

PREVIOUSLY LITIGATED AND WAIVED CLAIMS

If a Defendant brings allegations with no discussion of whether the issue was previously litigated or waived, these claims must be denied. *Commonwealth v. Gorby*, 787 A.2d 367, 376, 377 (Pa. 2001). The Defendant raises claims in his appeal already addressed by Pennsylvania's Supreme Court; these claims are previously litigated. The Defendant raises claims in his appeal which could have been brought in direct appeal or a previous PCRA; these claims are waived.

Pennsylvania's Supreme Court has addressed Defendant's claims alleged in D(1), D(2), D(3), D(9), D(12), D(13), D(14), D(15), D(16)(a), D(16)(b), D(16)(c)[1], D(17), and D(19) in *Commonwealth v. Fears*, 836 A.2d 52 (Pa. 2003).[2] Because the merits of these claims were decided by the Court on direct appeal, they have been previously litigated and are not cognizable under the Defendant's current appeal. *Commonwealth v. Lambert*, 797 A.2d 232, 239 (Pa. 2001), citing 42 Pa.C.S. §9544(a)(2) (2007), 42 Pa.C.S. §9543 (a)(3) (2007).

Any claim which could have been raised on direct appeal or a prior PCRA but was not is waived under the current PCRA. *Lambert*, 797 A.2d at 240, citing 42 Pa.C.S. §9544(b). It is the Defendant's burden to plead and prove to a preponderance standard that the claim alleged is not waived. 42 Pa.C.S.A. §9543(a)(3). The concept of waiver applies despite Defendant's attempt to overcome it with the mask of ineffective assistance of counsel. *Lambert*, 797 A.2d at 241. A one sentence conclusory statement that counsel was ineffective for failing to raise the claim at trial, on direct appeal, or in post trial motions is no more than a boilerplate allegation. *Id.* at 241. This attempt at disguising a waived claim to allow for its litigation must fail. For all the aforementioned reasons, the Defendant's claims at D(4), D(6), D(7), D(8), D(10), D(11), D(18), D(20), and D(21)[3] are waived and not subject for this court's review.

However, even if the Defendant's claims were not waived or previously litigated, they would still fail for the reasons enumerated below.

DISMISSAL OF PCRA

The Defendant alleges the lower court committed numerous errors during the dismissal of his PCRA petition.

When examining a post-conviction court's denial of relief, the scope of review is limited to a determination of whether the court's findings are supported by the record and are otherwise free of legal error. A court may elect to dismiss a defendant's post-conviction petition for relief if it has thoroughly reviewed the claims and determined that they are utterly without support in the record. *Commonwealth v. Brown*, 767 A.2d 576, 580 (Pa.Super. 2001). It is the defendant's burden to prove all elements necessary for a successful PCRA. *Commonwealth v. Diaz*, 913 A.2d 871 (Pa.Super. 2007).

The Defendant alleges the lower court erred in dismissing the Defendant's PCRA petition without an evidentiary hearing. There exists no absolute right to a hearing pursuant to a PCRA petition; a trial court may dismiss a PCRA without a hearing if the judge determines that no genuine issues of material fact exist on the record. The defendant is therefore not entitled to post-conviction relief. *Brown*, 767 A.2d at 580, Pa.R.Crim.P. 907 (2007), Pa.R.Crim.P. 909 (2007). A court holds an evidentiary hearing only to make necessary factual and credibility determinations on a more complete record. *Diaz*, 913 A.2d at 874, 875.

The Defendant has not established that the trial court abused its discretion in dismissing his PCRA. He asserted no genuine issues of material fact which warranted an eviden-

tiary hearing. Because the Defendant asserts no cognizable error, his claim must fail.

The Defendant asserts that his PCRA petition was denied in violation of Pa.R.Crim.P. 905 (2007). He alleges the trial court failed to provide him with notice of a defect or an opportunity to amend his petition. The rule itself states that a judge "*may* grant leave to amend or withdraw a petition for post-conviction collateral relief" where the "PCRA is defective as originally filed." Pa.R.Crim.P. 905. The term 'defective' covers petitions that are "inadequate, insufficient, or irregular." *Id.*

A PCRA petition must establish the Defendant's conviction or sentence resulted from a statutorily enumerated error, that the issue raised is not waived/previously litigated, and that the failure to litigate the issue prior to trial, during trial, or on direct appeal was not part of counsel's tactical strategy. *Brown*, 767 A.2d at 580. As stated above, the Defendant's petition was dismissed for failing to assert a material issue of genuine fact. He failed to meet his burden of proof. A substantive failure in the petition does not require a judge to grant leave for the Defendant to rethink, reformulate, and reassert his arguments. To apply the Rules of Criminal Procedure in this manner makes the trial court a proof reader of a defendant's PCRA petition, which cannot be allowed. For this reason, the Defendant's claim must fail.

ERRORS BY THE COMMONWEALTH

The Defendant alleges the Commonwealth committed prosecutorial misconduct during its closing argument to the trial court. No jury was present or used in any aspect of the Defendant's case. As the factfinder, the judge is presumed to disregard any inadmissible evidence or statements. *Commonwealth v. Brown*, 476 A.2d 969, 971 (Pa.Super. 1984). Even if Defendant's claim has merit, at most it resulted in harmless error. For this reason, the Defendant's claim must fail.

The Defendant alleges the Commonwealth erred by failing to provide him with two attorneys sufficient to provide his defense against a capital prosecution. No federal or state rule exists requirement appointment for a second attorney for death penalty cases. Because this claim lacks merit, the Defendant's allegation must fail.

VACATING THE DEATH SENTENCE

The Defendant alleges his death sentence should be vacated because 42 Pa.C.S. §9711 (D)(6) (2007) is irrational, arbitrary, and capricious and fails to channel the sentencing judge's discretion. This statute creates an aggravating factor for use during sentencing; it states a sentence can be greater if the sentencing judge finds a murder was committed during the perpetration of a felony. *Id.*

A statute is presumed constitutional and will not be declared unconstitutional unless it clearly, palpably and plainly violates the constitution. All doubts must be resolved in favor of finding constitutionality. *Commonwealth v. Craven*, 817 A.2d 451, 454 (Pa. 2003). The legislature has the power to determine aggravating circumstances which allow for the imposition of the death penalty. It is also constitutional for the death penalty to be imposed if the murder is done within the perpetration of a felony. *Commonwealth v. O'Shea*, 567 A.2d 1023, 1035 (Pa. 1989). Thus, §9711 (D)(6) is presumed constitutional. The Defendant raises no genuine issue to rebut this presumption.

For all the aforementioned reasons, the Defendant's claim must fail.

The Defendant alleges his death sentence should be vacated because he received no proportionality review in the state Supreme Court. Proportionality asks whether the punishment fit the crime. *Commonwealth v. Gribble*, 703 A.2d 426, 438 (Pa. 1998). On June 25, 1997, Pennsylvania removed proportional review from the death penalty statute by altering 42 Pa.C.S. §9711; it deleted subsection (h)(3)(iii). Because the Defendant's death sentence was imposed before 1997, his claim of proportional review must still be addressed. The methodology for addressing proportional review was left to the courts. The court commits a review of cases similar to this one, and determines whether the punishment fits the crime. *Gribble*, 703 A.2d at 439 to 441.

The state Supreme Court reviewed the Defendant's case on a direct appeal. The Court reviewed the Defendant's sentence to death, specifically referencing the proportionality statute. *Fears*, 836 A.2d at 55. The Court found the evidence sufficient to support the aggravating factor, and that the sentence was not the product of passion, prejudice, or any other arbitrary factor. *Id.* at 55. The Defendant's claim has no merit and thus must fail.

RACIAL DISCRIMINATION

The Defendant alleges his sentence was the product of improper racial discrimination. The Defendant must point to instances in the record which indicate his sentence was the result of prejudice. *Gribble*, 703 A.2d at 437. The Defendant fails to point to any instance on the record which grounds his claim.

For this reason, the Defendant's allegation fails.

COURT ERROR

The Defendant claims various instances of error committed by the trial court.

The Defendant alleges that the court erred in considering victim impact evidence during the penalty phase. No jury was used during any of the Defendant's proceedings. As the factfinder, the judge is presumed to disregard any inadmissible evidence or statements. *Brown*, 476 A.2d at 971. At most, an improper admission during sentencing resulted in harmless error. Therefore, the Defendant's claim fails.

The Defendant alleges the trial court erred when it permitted the Defendant to plead guilty to First Degree Murder. He further alleges that such a plea is prohibited in Pennsylvania. He then claims prior counsel was ineffective for allowing him to plead in such a manner.

An examination of both case law and existing legislation shows the Defendant's claim to be invalid. A defendant may plead guilty to a specific degree of murder, even first. It is the Commonwealth's burden to demonstrate the defendant possessed the specific intent to kill. *Commonwealth ex rel. Kerekes v. Maroney*, 223 A.2d 699, 701 (Pa. 1966), *Commonwealth v. Michael*, 674 A.2d 1044 (Pa. 1966). The base inquiry remains whether the plea was knowingly entered. *Maroney*, 223 A.2d at 701. A discussion of whether the Defendant's plea's was voluntary exists in the following section of this opinion.

Pennsylvania's Death Penalty Statute contains a provision which governs a defendant's plea to murder in the First Degree. Subsection 'b' gives the procedure for a guilty plea to this offense. 42 Pa.C.S. §9711(b). Pennsylvania's Rules of Criminal Procedure provides for two alternatives; subsection 'B' allows for the crime plead to be 'murder of the first degree.' Sentencing is then conducted as the law so requires. Thus, no degree of guilt hearing is required. Pa.R.Crim.P. 802 (2007). A statute is presumed constitutional and will not be declared unconstitutional unless it clearly, palpably and plainly violates the constitution. All doubts must be resolved in favor of finding constitutionality. *Craven*, 817 A.2d at 454. The legislature has provided consequences for a plea to murder in the first degree; it is constitutional to do so.

Because a guilty plea to murder in the first degree is permissible within Pennsylvania, the trial court did not err in

accepting the Defendant's plea. Therefore, the Defendant's claim must fail.

The Defendant claims the trial court erred when it accepted the Defendant's guilty plea to Count One of Involuntary Deviate Sexual Intercourse, as there exists no independent evidence to establish the sodomy. The Defendant further alleges his plea violated the Corpus Delicti Rule.

Corpus Delicti exists to prevent the admission of a confession where no crime existed. *Commonwealth v. Bardo*, 709 A.2d 871, 874 (Pa. 1998). To avoid violating this rule, when a defendant confesses to two crimes but corroborating evidence exists for only one, the two must retain a sufficiently close relationship. *Bardo*, 709 A.2d at 874. The Defendant performed oral sodomy on the victim. A few minutes later, the Defendant strangled the victim. When the victim began to revive, the Defendant strangled him until the victim ceased breathing. The passage of a few minutes between a sexual assault and a murder does not violate the purpose of the Corpus Delicti rule. *Id.* at 874.

Because a sufficient nexus exists between the victim's murder and Count One of IDSI, the Defendant's claim must fail.

KNOWING, VOLUNTARY, INTELLIGENT

The Defendant alleges that his guilty plea and various waivers he completed were not knowing, voluntary, and intelligent. He further claims his plea and waivers occurred due to counsel's ineffectiveness.

When a defendant is pleading guilty, the court must ascertain whether the defendant understands the nature of the charges to which he is pleading guilty, that he has a right to a jury trial, that he is innocent until proven guilty, the permissible range of sentences for the offenses charged, and that the court is not bound by the terms of any plea agreement unless it accepts the agreement. *Commonwealth v. Flanagan*, 854 A.2d 489, 500 (Pa. 2004). A Defendant's Constitutional rights are violated only when he has no real notice of the true nature of the charges against him when he entered his plea. *Commonwealth v. Martinez*, 453 A.2d 940, 942 (Pa. 1982).

Upon appeal, courts determine whether the Defendant had notice from the totality of the circumstances surrounding the plea. *Martinez*, 453 A.2d at 942. Courts look at the colloquy and specific exchange on the record, as well as any competent evidence in support of the plea which is a matter of record. *Id.* at 942, 943. The facts must indicate that, at the time he entered his plea, the defendant was made aware of the maximum punishment that might be imposed for his conduct. *Commonwealth v. Persinger*, 615 A.2d 1305, 1307 (Pa. 1992).

In the case at hand, the Defendant submitted to an oral colloquy before the trial court accepted his plea. The Defendant acknowledged he understood that the evidence in his videotaped confession could support a conviction of First Degree Murder. The Defendant understood that by pleading guilty to First Degree Murder, his penalty would be death or life in prison. (S.GP. 53-71)[4] The Defendant stated he understood the elements of all crimes charged. (S.GP. 57, 60-62) The Defendant told the court he was pleading guilty to First Degree Murder because that was the truth. (S.GP. 68) The Defendant completed a written waiver form; the trial court found his plea to be knowing, voluntary, and intelligent. (S.GP. 71) Trial counsel later explained he discussed the circumstances and ramifications of a guilty plea with the Defendant numerous times; he advised the Defendant to plead guilty to create a mitigating factor. He also explained to the Defendant the differences in the degrees of homicide, the preemptory challenges possible, and the jury function during a penalty hearing. (H.T. 142-145, S.GP. 82-83, 85-86, 144-145, 147-148, 157)[5]

The extensive colloquy indicates the Defendant was aware of the crimes to which he pled guilty. Trial counsel stated he explained the role of a jury at all stages of trial, including at sentencing. He was informed that, once he pled, the real issue was whether he would be sentenced to death or life imprisonment. Thus, the Defendant was aware of the maximum possible penalty. The Defendant failed to show any injustice resulting from his plea; no valid reason exists to permit its withdrawal. The Defendant's plea was voluntary and his claim must therefore fail.

This examination of the circumstances surrounding the Defendant's guilty plea shows both his waiver of a jury at sentencing and his waiver of degree of guilt hearing to be voluntary, knowing, and intelligent.

Initially, the Defendant opted to plead guilty to general homicide. Upon further consultation with his attorney, the Defendant chose to plead guilty to First Degree Murder. He did so at the advice of counsel, in an attempt to create the greatest amount of mitigation evidence possible. (S.GP. 56, 57) The record indicates the Defendant would have chosen to plead guilty to First Degree Murder even if informed that a degree of guilt hearing was required. The Defendant stated he pled guilty in this manner because that was the truth. (S.GP. 68) A post trial evidentiary hearing shows the Defendant was informed of the jury's function during a penalty proceeding. He was also informed of the different degrees of homicide. (S.GP. 82-83, 157) The Defendant understood the rights he was giving up, as well as the consequences of doing so. Both of his waivers were knowing, voluntary, and intelligent. For the reasons listed, his claims must fail.

INCOMPETENCE OF DEFENDANT

The Defendant asserts he may become incompetent, and thus a subsequent execution of the Defendant would be improper. For a court to have jurisdiction over a claim, it must be ripe for review. Ripeness requires removal of any speculative facts alleged within an allegation. *Commonwealth v. Lee*, 935 A.2d 865, 895 (Pa. 2007). The Defendant's claim is inherently speculative. Because it is not ripe for review, the Defendant's claim is outside this court's jurisdiction.

The Defendant alleges that he is chronically mentally impaired and thus his execution would violate his state and federal Constitutional rights. The United States Constitution bars the execution of insane individuals, even if the Defendant was sane to stand trial. *Ford v. Wainwright*, 477 US 399, 409 (1986). Pennsylvania recognizes two definitions of mental retardation. The first recognizes that mental retardation is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in the cognitive, social, and practical adaptive skills. The second defines mental retardation as significantly sub-average intellectual functioning (an IQ of approximately 70 or below) beginning before age 18 and concurrent deficits or impairments in adaptive functioning. *Commonwealth v. Miller*, 888 A.2d 624, 630 (Pa. 2005).

A Defendant may establish his or her mental retardation under either of Pennsylvania's standards; the stated adopted no specific IQ cutoff. *Miller*, 888 A.2d at 631. A Defendant who is borderline mentally retarded must show significant deficits in adaptive behavior. *Commonwealth v. Romero*, 2007 Pa. LEXIS 2961, 2988 (Pa. 2007), citing to *Miller*, 888 A.2d at 633. Adaptive skills include language, money management, responsibility and ability to follow rules, meal

preparation, money management, communication, self-care, home-living, use of community resources, functional academic skills, work, leisure, health, and safety. *Romero*, 2007 Pa. LEXIS at 2987.

The Defendant presented mitigating evidence during sentencing. He obtained in a letter from his former roommate; this person indicated the Defendant played a vital role in helping him graduate school. The Defendant had no prior criminal record. The Defendant has functioned within society. While the Defendant asserts he is chronically mentally impaired this fails to meet either definition accepted by Pennsylvania courts. Though the Defendant's actions with the victim exhibit poor judgment and criminal behavior, they are not evidence of mental retardation. For these reasons, the Defendant's claim must fail.

SUFFICIENCY OF THE EVIDENCE

The Defendant asserts various claims alleging insufficiency of the evidence.

A challenge to the sufficiency of the evidence must be reviewed in light of the following standard: "In determining if the evidence is sufficient to sustain a criminal conviction, [the test is] whether accepting as true all of the evidence of the Commonwealth, and all reasonable inferences arising therefrom, upon which the jury could properly have reached its verdict, was it sufficient in law to prove beyond a reasonable doubt that the appellant was guilty of the crime of which he stands convicted." *Commonwealth v. Burton*, 301 A.2d 599, 600 (Pa. 1973).

The Defendant alleges the court erred in finding him guilty of Involuntary Deviate Sexual Assault because insufficient facts exist to establish the aggravating circumstance that the Defendant committed murder in perpetration of a felony.

To establish an aggravating circumstance, a temporal nexus must exist such that the alleged felony is reasonably considered part of the murder. *Commonwealth v. Edmiston*, 634 A.2d 1078, 1091 (Pa. 1993). The Defendant performed oral sodomy on the victim, which constitutes Involuntary Deviate Sexual Intercourse under 18 Pa.C.S. §3123 (2007). The requisite felony occurred. A few minutes later, the Defendant strangled the victim. When the victim began to revive, the Defendant strangled him until the victim ceased breathing.

The short span of time between the Defendant's oral sodomy and strangulation of the victim establish the necessary nexus. Sufficient evidence exists to establish the aggravating circumstance against the Defendant. It is within the discretion of the finder of fact to believe all, part, or none of the evidence. *Commonwealth v. Lyons*, 833 A.2d 245, 258 (Pa.Super. 2003).

For the aforementioned reasons, the Defendant's claim fails.

The Defendant next alleges that an insufficient factual basis exists in the guilty plea colloquy to establish Count One of Involuntary Deviate Sexual Intercourse. Specifically, the Defendant argues there is no evidence of forcible compulsion.

Pennsylvania defines Involuntary Deviate Sexual Intercourse under 18 Pa.C.S. §3123 (2007); it occurs when a person engages in deviate sexual intercourse with a complainant by forcible compulsion and/or by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution. *Id.* While the force required for 'forcible compulsion' under IDSI encompasses a lack of consent, courts interpret it as requiring something more. *Commonwealth v. Buffington*, 828 A.2d 1024, 1031 (Pa. 2003).

Forcible compulsion arises when an adult acts in a manner sufficient to prevent a child's resistance. *Commonwealth v. Rhodes*, 510 A.2d 1217, 1227 (Pa. 1986). The Defendant was thirty-two years of age; the victim was twelve years of age. The oral sodomy occurred in an isolated location, such that the Defendant and the victim were secluded in nature. Defendant stated, in his video taped confession, that the told the victim to stand and undress. The Defendant then began oral sodomy. Due to the age disparity and locale surrounding the sodomy, sufficient evidence thus exists to establish Count One of Involuntary Deviate Sexual Intercourse.

The Defendant's claim must therefore fail.

ACTUAL INNOCENCE

The Defendant alleges he is actually innocent of Count Two of Involuntary Deviate Sexual Intercourse. The felony which comprised his aggravating factor during sentencing came from Count *One* of IDSI. The Defendant was given no additional penalty for his guilty plea to Count Two. The Defendant was not prejudiced from this additional count. Thus, even if the Defendant is actually innocent of this claim, this constitutes harmless error. Thus, the Defendant's claim fails.

The Defendant alleges he is actually innocent of First Degree murder, in that insufficient evidence existed to support his plea and subsequent conviction.

Shawn Hagan is dead; the Defendant's video taped confession is in evidence. Within this tape, the Defendant stated that he strangled the victim after the victim announced he planned oral sodomy between the two occurred. When the victim began to revive, the Defendant choked him again. The Commonwealth presented this evidence at the suppression hearing and at the guilty plea colloquy.

First Degree Murder occurs when the Defendant kills his victim with the specific intent to do so. 18 Pa.C.S. §2502(a) (2007). It is within the discretion of the finder of fact to believe all, part, or none of the evidence. *Commonwealth v. Lyons*, 833 A.2d 245, 258 (Pa.Super. 2003). The Commonwealth can sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. *Lyons*, 833 A.2d at 258. The finder of fact is free to conclude the Defendant intended the natural and probable consequences of his actions to result therefrom. *Commonwealth v. Lewis*, 911 A.2d 558, 563 (Pa.Super. 2006). Enough evidence exists to support the Defendant's plea and conviction of First Degree Murder; the Defendant's claim must therefore fail.

***MIRANDA* VIOLATION**

The Defendant alleges police inappropriately reinitiated questioning after he exercised his rights under *Miranda v. US*, 384 US 436 (1966) and that his statement regarding the case at hand was obtained as a result.

The Defendant initiated contact with police regarding Shawn Hagan, accompanied them to the police station, and volunteered to give a written statement recounting his involvement. (H.T. 18, 25, 28-29, 42) While writing, the Defendant overheard officers discussing the testimony of other witnesses; it was stated that the Defendant asked the victim for alcohol. The Defendant admitted this was true. (H.T. 30, 41) Police ceased questioning the Defendant, advised him of his rights, and gave him a Pre-Interrogation Waiver Form. (H.T. 30, 42) The Defendant stated he wished to finish his statement but not speak aloud. He did not request an attorney. (H.T. 42) The Defendant was incarcerated for the corruption of a minor. The next day, he was taken to Pittsburgh's Detective Bureau for questioning regarding the victim's death. The Defendant stated he wanted to clear himself. (S.GP. 8, 9) He was given and then completed a Pre-Interrogation Waiver Form. (S.GP. 12) The Defendant com-

pleted another of these forms, and was verbally advised of his rights. (S.GP. 30, 31) Police told the Defendant the victim's body was found and that he was a suspect. (S.GP. 32) The Defendant gave a detailed statement, accompanied the officers to the scene of the crime to explain what happened, and confessed. (S.GP. 33, 34) He waived representation at his preliminary hearing. (H.T. 62, 63, 176)

If a suspect is subject to custodial interrogation, he must be clearly advised of his *Miranda* rights otherwise any statement he makes is inadmissible. *Miranda*, 384 US at 444. Custodial interrogation occurs where law enforcement initiates questioning and a suspect is in custody or is deprived of significant freedom of movement. *Id.* at 444.

The Defendant accompanied police of his own volition to the station, and volunteered to write out his involvement with the victim. Once there, he was not confined; no custodial interrogation occurred. Law enforcement was not required to read him his *Miranda* rights before he began to write his statement. This remains true even if the Defendant was the sole focus of the police's investigation. *Commonwealth v. Schoellhammer*, 454 A.2d 576, 579 (Pa.Super. 1982).

Police must read the Defendant his rights before informing him of incriminating statements others made regarding the Defendant. *Commonwealth v. DeJesus*, 787 A.2d 394, 431 (Pa. 2001). In the case at hand, the Defendant overheard such statements due to the free nature of his environment. The Defendant's presence within the police station was so unrestricted, he was able to eavesdrop. Thus, when the Defendant admitted to asking the victim for vodka, he was not subject to custodial interrogation. A *Miranda* violation had not occurred.

After the Defendant confessed to requesting alcohol from the victim, custodial interrogation occurred. He was in a police station, discussing his involvement in a crime with law enforcement. Before questioning can occur during a custodial interrogation, the defendant must make a knowing, voluntary, and intelligent waiver of his *Miranda* rights. *Commonwealth v. Williams*, 650 A.2d 420, 427 (Pa. 1994). The Defendant voluntarily waived his *Miranda* rights each time he signed a Pre-Interrogation Waiver Form.

The request for counsel must be clearly stated; the right must be expressly invoked. In determining whether this right has been violated, courts thus first determine whether the suspect actually invoked this right. *Smith v. Illinois*, 469 US 91, 95 (1984). The right is invoked if there is no ambiguity in the suspect's request. *Smith*, 469 US at 98.

In the case at hand, the Defendant never said he wanted an attorney. He executed two Pre-Interrogation Waiver Forms. After completing two waivers inside the Bureau, the Defendant stated he wanted to clear himself and eventually confessed. His right to counsel was thus never violated.

Thus, the Defendant's right under *Miranda* were never violated and any statements made while in custody are admissible.

INEFFECTIVE ASSISTANCE OF COUNSEL.

When the substantive claim behind Defendant's assertion of ineffective assistance of counsel fails, the ineffective assistance of counsel claim itself must also fail. Counsel cannot be held ineffective for failing to assert or present a meritless claim. *Commonwealth v. Tanner*, 600 A.2d 201, 206 (Pa.Super. 1991). With this principle in mind, we first turn to addressing the Defendant's allegations of ineffective assistance which fail based on their lack of substantive merit for reasons already discussed in this opinion.

The Defendant alleges his trial counsel was ineffective because it failed to challenge the procedure of his guilty plea to First Degree Murder. Because a guilty plea to murder in the first degree is permissible within Pennsylvania, trial counsel was not ineffective for failing to challenge this procedure. Therefore, the Defendant's claim must fail. Thus, this claim alleged by Defendant also fails.

The Defendant alleges that he pled guilty and completed all waivers due to prior counsel's ineffectiveness. As stated above, we find the Defendant's waivers and plea to be voluntarily, knowingly, and intelligently done. Therefore, the Defendant's claim must fail.

The Defendant alleges that counsel was ineffective for failing to motion for a suppression of the Defendant's statements to police, as they were made in violation of *Miranda*. For the reasons stated above, the substantive claim behind this allegation fails. Counsel cannot be ineffective for failing to assert an invalid claim. *Commonwealth v. Tanner*, 600 A.2d 201, 206 (Pa.Super. 1991). The Defendant's claim must fail.

The Defendant alleges prior counsel was ineffective because it failed to challenge the procedure of pleading guilty to First Degree Murder. Pleading guilty in this manner is lawful within Pennsylvania. Because there is no merit behind Defendant's claim, his allegation alleging ineffective assistance of counsel fails.

The Defendant alleges prior counsel was ineffective because it failed to investigate, prepare, and present a diminished capacity defense to First Degree Murder. He further claims he deserves a new trial due to this omission.

A diminished capacity defense attempts to prove that the Defendant was incapable of forming the specific intent to kill; if successful, the defense will reduce the defendant's culpability from first degree murder to third degree murder. This defense is extremely limited. It requires the Defendant to present psychiatric testimony showing a mental disorder that affects the mental functions necessary to formulate a specific intent to kill. This defense only applies when the defendant admits culpability, but contests his degree of guilt. *Commonwealth v. Williams*, 846 A.2d 105, 111 (Pa. 2004). In the case at hand, the defendant chose to waive his degree of guilt hearing and plead guilty to First Degree Murder. Because the diminished capacity defense would thus have no effect, trial counsel can not be ineffective for failing to assert it. For this reason, Defendant's claim must fail.

The Defendant claims he is owed a new trial due to prior counsel's failure to present a diminished capacity defense to First Degree Murder. For the aforementioned reasons, the substantive claim behind this fails. Thus, the Defendant's claim must fail.

When the substantive claim behind Defendant's assertion of ineffective assistance of counsel is valid, the Defendant must allege prior counsel's performance made egregious errors which resulted in his deficient performance, thus prejudicing his trial to the extent its result is unreliable. *Commonwealth v. Pierce*, 527 A.2d 973, 975 (Pa. 1987). A presumption exists that counsel acted effectively. *Pierce*, 527 A.2d at 975. A reviewing court examines the record and determines whether counsel's performance was rooted in a reasonable basis and designed to effectuate his client's interests. *Id.* at 975. Any possible alternatives are not tested using hindsight evaluation; as soon as a reasonable basis for prior counsel's actions is determined, the balance tips in favor of effective assistance. *Id.* The Defendant must also demonstrate how any alleged ineffectiveness prejudiced him. *Id.* Using these principles, we now address Defendant's claims alleging ineffective assistance of counsel.

The Defendant alleges trial counsel was ineffective in failing to investigate and present at sentencing evidence of the Defendant's childhood, family disfunction, and brain damage. He further alleges that counsel's ineffectiveness deprived him

of a fair and reliable capital sentencing proceeding.

Trial counsel has an obligation to conduct a thorough investigation of the defendant's background. *Gorby*, 787 A.2d at 371. The amount of investigation necessary is judged by a reasonableness standard. *Strickland v. Washington*, 466 US 668, 691 (1984). Reasonableness is not determined by a hindsight evaluation; reasonableness depends partially on information from the defendant himself. *Strickland*, 466 US at 689, *Commonwealth v. Peterkin*, 513 A.2d 373, 383 (Pa. 1986).

Failing to call a witness is not per se ineffective assistance of counsel. *Commonwealth v. Moser*, 921 A.2d 526, 531 (Pa.Super. 2007). The decision of which witnesses to call remains a crucial part of counsel's trial strategy. *Strickland*, 466 US at 688. Thus, to establish that prior counsel was ineffective for failing to call a witness, the defendant must show that the witness existed, was available, counsel knew the witness existed, the witness was ready and willing to testify, and the absence of the witness' testimony prejudiced the defendant such he was denied a fair trial. *Moser*, 921 A.3d at 531.

During the penalty phase, trial counsel presented mitigation evidence in the form of a letter. Trial counsel attained this letter from the Defendant's former roommate, Rikiya Asano; Mr. Asano had to be located in Japan. Obtaining this evidence required trial counsel to contact the U.S. Consulate, and Mr. Asano's letter was then notarized by a Consulate, officer. (S.T. 145-146, H.T. 162-163)[6] Trial counsel presented further mitigation evidence from a corrections officer, certifying the Defendant committed no misconduct while incarcerated. *Id*. Trial counsel used a Pre-Sentence Investigation Report to provide Defendant's background information. The Defendant reviewed this Report and made only minor changes. (H.T. 164-165) The Pre-Sentence Report indicates the Defendant's family was reluctant to testify on his behalf. The Defendant failed to present his family at his evidentiary hearing; this absence supports the conclusion that Defendant's family was unavailable and unwilling to testify at the penalty proceedings. *Commonwealth v. Black*, 142 A.2d 495, 498 (Pa.Super. 1958).

A review of the record shows a reasonable basis for trial counsel's actions. Counsel obtained mitigation evidence in the form of letters, one of which was sent from Japan. The Defendant was able to read his own Pre-Sentence Report; at this time the Defendant could have requested deeper background evidence. Finally, this Report and the witnesses present at the Defendant's evidentiary hearing show the witnesses counsel failed to call, namely the Defendant's family, were either unavailable or unwilling to testify. For all these reasons, the Defendant's claim that counsel was ineffective for failing to present adequate evidence of his childhood and family disfunction must fail.

The Defendant alleges trial counsel was ineffective in failing to investigate and present at sentencing evidence of the Defendant's mental health impairments. He also claims that counsel's ineffectiveness deprived him of a fair and reliable capital sentencing proceeding.

Trial counsel and the Defendant had repeated communications during the six months between the Defendant's arrest and trial. The Defendant never exhibited psychotic behavior. (H.T. 61, 145, 152-153,173) Despite the Defendant's seemingly unaffected behavior, counsel still presented an expert from a neutral source, Dr. Christine Martone of the Allegheny County Behavior Clinic. (H.T. 148-150) Counsel chose to use Dr. Martone partly because she stated she could provide psychiatric testimony to boost the Defendant's case. (H.T. 150)

At his evidentiary hearing, the Defendant presented expert testimony from Dr. Ralph Tarter. Dr. Tarter's practice focused on teaching and researching substance and alcohol abuse disorders. (H.T. 227-229) Relying on a telephone interview with the Defendant's mother and the Defendant's birth records, Dr. Tarter testified and gave his diagnosis of the Defendant. He believed the Defendant to be schizophrenic and affected by a personality disorder. (H.T. 195-196, 249) Dr. Tarter testified that these disorders would not be discernable from casual conversation or psychiatric interviews. (H.T. 212-213, 219) Dr. Tarter stated the Defendant experienced a feeling of panic while he assaulted the victim. This was consistent with Dr. Martone's testimony. (H.T. 220, 222-223, 248, 253) Dr. Tarter stated this panic was caused by fear; the Defendant knew his actions with the victim were criminal. The Defendant did not want to return to jail. (H.T. 244-245) Finally, Dr. Tarter admitted that while he interacted with the Defendant, the Defendant was aware of the Doctor's role in his case.

Any possible alternatives prior counsel could have used are not tested using hindsight evaluation; as soon as a reasonable basis for prior counsel's actions is determined, the balance tips in favor of effective assistance. *Pierce*, 527 A.2d at 975. Reasonableness is not determined by a hindsight evaluation; reasonableness depends partially on information from the defendant himself. *Strickland*, 466 US at 689, *Peterkin*, 513 A.2d at 383.

Interaction between the Defendant and counsel gave no indication that the Defendant was mentally impaired. Yet, counsel still attempted to give expert testimony to aid the Defendant's case. An examination of the record indicates counsel thought Dr. Martone would provide beneficial testimony for the Defendant. Counsel knew the sentencing court had viewed Dr. Martone's testimony in other cases favorably. (H.T. 149) The record thus indicates counsel acted reasonably to effectuate the interests of the Defendant.

The value of Dr. Tarter's testimony versus Dr. Malone's testimony cannot be determined using hindsight evaluation. When weighing any possible alternatives, the balance tips in favor of a finding effective assistance as soon as trial counsel's decision are grounded in a reasonable basis. *Pierce*, 527 A.2d at 976. As stated above, the record supports counsel acted reasonably. The Defendant has not rebutted the existing presumption previous counsel was ineffective. Thus, the Defendant's claim must fail.

Because trial counsel performed reasonably and effectively, the Defendant's claim that counsel's ineffectiveness prevented him from receiving a fair and reliable sentencing must also fail.

The Defendant alleges prior counsel was ineffective before it failed to reasonably investigate, develop, and present evidence helpful to the Defendant's defense. This allegation is overbroad; it is not the court's role to ascertain what a defendant means within his appeal. Further, due to the numerous other claims alleging prior counsel's ineffectiveness, addressing this general allegation is unnecessary and redundant. Thus, the Defendant's claim fails.

The Defendant alleges prior counsel was ineffective because it failed to raise issues presented in this petition during trial, post trial motions, and on direct appeal. Because there is no merit to any claim alleged in this petition, counsel cannot be ineffective for failing to raise them. The Defendant's allegation fails.

CATCH ALL RELIEF REQUEST

The Defendant alleges he is entitled to relief because of the combined prejudicial effect of all the errors claimed within his appeal. The argument of a general cumulative effect is rejected in favor of an individualized review of each of the claimed errors. A broad claim such as this does not warrant relief if, after an individualized assessment of all

errors asserted, only a few claims have merit. *Commonwealth v. Jones*, 876 A.2d 380, 387 (Pa. 2005), citing *Commonwealth v. Williams*, 732 A.2d 1167, 1191 (Pa. 1999). In the case at hand, we find merit in none of the Defendant's claims.

For all of the aforementioned reasons, the Defendant's catch all request for relief must

ORDER OF COURT

AND NOW, to-wit, this 19th day of September, 2008, after a careful review of the record and finding that the Petitioner's Application for Post-Conviction Relief lacks any material issue of genuine fact, the Petitioner is put on notice that the Court intends to dismiss the petition without a hearing. A complete list and explanation of reasons why the Petitioner's claim fails to assert an issue of cognizable error follows.

OPINION

A court may elect to dismiss a defendant's post-conviction petition for relief if it has thoroughly reviewed the claims and determined that they are utterly without support in the record. *Commonwealth v. Brown*, 767 A.2d 576, 580 (Pa.Super. 2001). It is the defendant's burden to prove all elements necessary for a successful PCRA. *Commonwealth v. Diaz*, 913 A.2d 871 (Pa.Super. 2007).

DISMISSAL WITHOUT AN EVIDENTIARY HEARING

There exists no absolute right to a hearing pursuant to a PCRA petition; a trial court may dismiss a PCRA without a hearing if the judge determines that no genuine issues of material fact exist on the record. The defendant is therefore not entitled to post-conviction relief. *Brown*, 767 A.2d at 580, Pa.R.Crim.P. 907 (2007), Pa.R.Crim.P. 909 (2007). A court holds an evidentiary hearing only to make necessary factual and credibility determinations on a more complete record. *Diaz*, 913 A.2d at 874, 875.

The Defendant asserted no genuine issues of material fact which warranted an evidentiary hearing. Because the Court finds the Defendant asserts no cognizable error, his petition warrants dismissal without an evidentiary hearing.

DISMISSAL WITHOUT TIME TO AMEND

The Court dismisses the Defendant's petition without granting time for the Defendant to make changes, under Pa.R.Crim.P. 905 (2007). The rule itself states that a judge "*may* grant leave to amend or withdraw a petition for post-conviction collateral relief" where the "PCRA is defective as originally filed." Pa.R.Crim.P. 905. The term 'defective' covers petitions that are "inadequate, insufficient, or irregular." *Id.*

A PCRA petition must establish the Defendant's conviction or sentence resulted from a statutorily enumerated error, that the issue raised is not waived/previously litigated, and that the failure to litigate the issue prior to trial, during trial, or on direct appeal was not part of counsel's tactical strategy. *Brown*, 767 A.2d at 580. As stated above, the Defendant's petition was dismissed for failing to assert a material issue of genuine fact. He failed to meet his burden of proof. A substantive failure in the petition does not require a judge to grant leave for the Defendant to rethink, reformulate, and reassert his arguments. To apply the Rules of Criminal Procedure in this manner makes the trial court a proof reader of a defendant's PCRA petition, which cannot be allowed.

For all the aforementioned reasons, the Defendant's Petition for Post-Conviction Relief will be dismissed.

The Defendant has the right to respond to the proposed dismissal of the Petition within twenty (20) days of the date of this Order.

BY THE COURT:
/s/Zottola, J.

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[1] Because this court finds the Defendant's claims under D(16)(a),(b), and (c) to be previously litigated, the Defendant's claim under D(16)(d) is without merit and invalid.

[2] See Attached to read Defendant's substantive claims.

[3] See Attached to read Defendant's substantive claims.

[4] S.GP. refers to notes of a Suppression/Guilty Plea Proceeding dated December 8, 1994.

[5] H.T. refers to notes of a PCRA Hearing dated June 27, 28, 2000.

[6] S.T. refers to notes of the Trial/Sentencing Proceeding dated February 2, 1995.