# In The Supreme Court of Pennsylvania

Nos. 869 & 870 MAL 2007

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LAURA A. AMBROGI, Co–Administrator of the Estate of Tara DeSimone; and JAMES M. HOBAN, Co–Administrator of the Estate of Tara DeSimone; and FRANK C. CIFELLI, Co–Administrator of the Estate of Joseph DeSimone, a Minor; and JAMES M. HOBAN, Co–Administrator of the Estate of Joseph DeSimone, a Minor,

Plaintiffs/Respondents,

v.

ROBERT M. REBER; and ROSEMARY REBER; and REBER REAL ESTATE, INC.; And REBER PROPERTY MANAGEMENT; et al.,

Defendants/Petitioners.

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**BRIEF IN OPPOSITION TO PETITION FOR ALLOWANCE OF APPEAL**

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On Petition for Allowance of Appeal from the Judgment of the Superior Court of Pennsylvania at Nos. 1700 &1840 EDA 2006 filed September 7, 2007, Affirming the Preliminary Injunction of the Court of Common Pleas of Delaware County, No. 05–2118 entered June 20, 2006

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Howard J. Bashman
2300 Computer Avenue
Suite G–22
Willow Grove, PA 19090
(215) 830–1458

Larry Bendesky
Brian E. Fritz
Carmen P. Belefonte
Saltz, Mongeluzzi, Barrett & Bendesky, P.C.
1650 Market Street, 52nd Floor
Philadelphia, PA 19103
(215) 496–8282

Counsel for Plaintiffs/Respondents

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## I. INTRODUCTION

On December 8, 2003, 23–year–old Tara DeSimone and her four–year–old son Joseph burned to death in a fire that occurred in the apartment where they resided at 338 Beverly Boulevard in Upper Darby, Pennsylvania. The boy's father, Frank Cifelli, also lived in the apartment, and he suffered severe injuries in the fire but survived.

In this lawsuit, the estates of Tara and Joseph DeSimone together with Frank Cifelli have asserted that the owners of their apartment — defendants Robert and Rosemary Reber, either individually or through Reber Real Estate, Inc. and/or Reber Property Management — are responsible in tort for having caused the deaths of Tara and Joseph DeSimone and the serious injuries sustained by Cifelli.

The Reber defendants possess only $1 million in liability insurance applicable to the plaintiffs' claims. Between the time of the deadly fire and plaintiffs' motion for a preliminary injunction, the Reber defendants had sold off more than $3 million in real estate holdings, the proceeds of which were not reinvested back into their real estate business enterprise. After conducting two evidentiary hearings and finding that the Reber defendants appeared to be engaged in a process of rendering themselves judgment–proof from execution on the excess judgment that appears certain to result from plaintiffs' lawsuit, Judge Charles B. Burr, II of the Court of Common Pleas of Delaware County issued a limited and finely–calibrated preliminary injunction that merely requires the Reber defendants going forward to deposit the net proceeds realized on the sale of real estate properties into a court–

monitored escrow account. The defendants are free to use or reinvest the money in that escrow account on application to the trial court. The Superior Court's affirmance of the trial court's preliminary injunction absolutely does not preclude the defendants' continued use in the normal course of business of proceeds from sales of their real estate holdings.

The preliminary injunction that the Reber defendants challenge by means of their Petition for Allowance of Appeal is based on well–settled Pennsylvania law, represents a proper exercise of the trial court's discretion, and will in reality be mooted by the result of the jury trial scheduled to begin in this case on March 17, 2008. Moreover, the main argument advanced in the Petition for Allowance of Appeal — that the trial court's injunction is contrary to inapplicable federal law announced in the U.S. Supreme Court's 5–4 ruling in *Grupo Mexicano de Desarrollo, S.A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999) — is waived because the Reber defendants failed to cite to *Grupo Mexicano* in their Pa. Superior Court briefing. Nor did the Reber defendants call the *Grupo Mexicano* decision to the Pa. Superior Court's attention in any other manner, and the Reber defendants likewise never once cited to *Grupo Mexicano* while the plaintiffs' preliminary injunction request was pending before the trial court.

For these reasons, and the additional reasons detailed below, the Petition for Allowance of Appeal should be denied.

## II. RELEVANT FACTUAL AND PROCEDURAL HISTORY

The lawsuit that gives rise to this matter asserts that the Reber defendants are liable in tort for having caused the deaths of 23–year–old Tara DeSimone and her four–year–old son Joseph, both of whom burned to death in a fire that occurred in an apartment owned and maintained by the Reber defendants. The lawsuit also asserts that the Reber defendants are liable in tort for having caused plaintiff Frank Cifelli, who was Joseph's father and Tara's companion, to sustain serious injuries in that very same fire. The fire occurred on December 8, 2003 at 338 Beverly Boulevard in Upper Darby, Pennsylvania.

In May 2006, the Reber defendants notified counsel for the plaintiffs that the 338 Beverly Boulevard property was under contract to be sold to an unrelated third–party. Shortly thereafter, the plaintiffs discovered that the Reber defendants had, between the time of the fire in December 2003 and May 2006, sold off more than $3 million in real estate holdings without reinvesting any of the proceeds of those sales back into their real estate business.

It is undisputed that the Reber defendants possess only $1 million in liability insurance applicable to plaintiffs' claims — that defendants are liable in tort for causing the death of a young mother and her small child and causing serious personal injuries to a third person, stemming from a fire alleged to have resulted from defendants' negligence. It is also undisputed that the value of plaintiffs' claims against the Reber defendants is substantially in excess of $1 million.

Believing that the Reber defendants were engaged in an ongoing scheme intended to divest themselves of assets to make themselves execution–proof in the event of a verdict in favor of the plaintiffs in excess of the $1 million insurance coverage applicable to the deadly fire, plaintiffs moved for a preliminary injunction to require only that the Reber defendants place into a court–supervised escrow account the net proceeds of any sale of real property, which could then be reinvested by the Reber defendants at any time with approval of the trial court.

After two separate lengthy hearings, the Court of Common Pleas of Delaware County issued a limited and finely–calibrated preliminary injunction that merely requires the defendant to deposit into a court–supervised escrow account the net proceeds of future real estate sales, which may be used or otherwise reinvested on application to the trial court.

As Judge Burr explains in his Rule 1925(a) opinion:

> The amount of a potential verdict against the Defendants in the case at bar cannot be presently ascertained, and given the horrific deaths and injuries from the fire that gave rise to this law suit, the damages awarded, if Plaintiffs prevail, could be large indeed. To allow the Defendants the ability to spend the proceeds of liquidation of their assets at will under the circumstances before the Court will thus work an irreparable harm to the plaintiffs' ability to recover the full measure of the damages incurred.

Trial court opinion at 19.

In setting forth the basis for the preliminary injunction, Judge Burr's opinion states:

> Although Defendants have realized close to $3,000,000.00 from this apparent fire sale of their property since December of 2003, there is no evidence that they are still in possession of these funds or whether, as

> defense counsel have occasionally and jokingly suggested, they were used to buy a boat or were given to others, or are sitting in a bank in the Cayman Islands. All in all, the rapid rate of the timing and the large amount of proceeds realized from Defendants' sale of their assets since the time of the fire, coupled with the potential for a verdict larger than the available insurance coverage, as well as the case authority of *Walter v. Stacy, supra*, which is relevant to just such circumstances as are presented here below, provide a reasonable basis for entry of the unobtrusive and well–tailored Order which is the subject of this appeal.

*Id.* at 17

In a critical passage that the Petition for Allowance of Appeal essentially overlooks, Judge Burr's opinion then proceeds to explain:

> Further, this Order does not preclude nor impede the Defendants from entering into any real estate purchase or sale, nor does it cloud title to any of the properties that might be involved, nor encumber any sale as claimed. The Order merely requires the Defendants to advise the Court of any sale or transfer of any real property in which they possess an ownership interest, to place the net proceeds thereof in an interest bearing account in accord with Defendants' own suggestion, and to petition the Court for permission to make withdrawals therefrom.

*Id.*

In the nearly one and a half years since the trial court entered that preliminary injunction, the trial court has not once prevented the Reber defendants from reinvesting the proceeds of sales of real estate back into their real estate business. Quite simply, the preliminary injunction only prevents the Reber defendants from absconding away with the assets of their business enterprises so as to make themselves judgment–proof in the event of a judgment in excess of one million dollars.

The Reber defendants thereafter appealed from the entry of the preliminary injunction to the Superior Court of Pennsylvania. On appeal, the Reber defendants did not argue — as they now maintain as the central basis of their Petition for Allowance of Appeal — that a preliminary injunction entered to preserve a defendant's assets where the evidence strongly suggests the pursuit of a scheme to become judgment–proof is never lawfully permitted. Rather, in the Superior Court, the Reber defendants had only argued that the trial court abused its discretion by supposedly misweighing the handful of factors pertinent to the grant of a preliminary injunction.

On April 10, 2007, there was oral argument in this appeal before a panel consisting of three of the Pa. Superior Court's most experienced jurists: Joseph A. Hudock, Maureen Lally–Green, and Robert E. Colville. On July 24, 2007, that three–judge panel issued a non–precedential Memorandum Opinion affirming the trial court's preliminary injunction. The use of a non–precedential Memorandum Opinion reflected the Superior Court panel's considered judgment that its ruling consisted of an uncontroversial application of well–settled existing law.

On petition of the plaintiffs, which the Reber defendants opposed, the Superior Court panel decided to withdraw the Memorandum Opinion and reissue the identical decision as a published opinion in which Judge Hudock was identified as the author. It is from that decision that the Reber defendants have filed their Petition for Allowance of Appeal.

Judge Hudock's opinion for the Superior Court explains that "[t]he entry of a preliminary injunction for the purpose of enjoining the dissipation of assets in anticipation of a lawsuit is not a novel event." Slip Op. at 8. Relying primarily on the Pa. Superior Court's 2003 precedent in *Walter* v. *Stacy*, 837 A.2d 1205 (Pa. Super. Ct. 2003), Judge Hudock's opinion explains: "There is nothing unique about the requirement imposed by the trial court in this case that precludes Appellants from selling their real property without placing the net proceeds into a court supervised escrow account. * * * We conclude that Pennsylvania law does not preclude a trial court from granting a preliminary injunction to prevent dissipation of assets." Slip Op. at 9.

Judge Hudock's opinion contains the following summary of the trial court's findings in support of the preliminary injunction:

> The trial court has explained in great detail why it concluded that an injunction was necessary to prevent immediate and irreparable harm to Appellees that cannot otherwise be compensated adequately. The trial court found the likelihood to be "undeniably strong" that a jury will return a verdict well in excess of a million dollars in this case. Trial Court Opinion, 11/9/06, at 16. However, the record discloses that Appellants have only a million dollars in liability insurance applicable to the fire that caused the deaths by burning of a young mother and her child and the serious injury of a third individual. *Id.* Appellants do possess extensive real estate holdings in Pennsylvania, which the trial court found would be more than adequate to satisfy any verdict Appellees are likely to obtain against Appellants—but only if Appellants remain in possession of these assets at the time a judgment is entered. *Id.* at 16–17.

Slip Op. at 12.

In affirming the preliminary injunction at issue, the Superior Court took care to emphasize the preliminary injunction's limited and finely–calibrated effect, which the Reber defendants ignore in their Petition for Allowance of Appeal:

> Appellants have not been precluded from listing and selling their properties, from reinvesting the net proceeds from any sales or from using the net proceeds in a manner consistent with their normal business practices. The trial court's injunction simply prevents Appellants from liquidating their properties for the purpose of hiding or dissipating assets. As already discussed, Appellees have been required to post a bond sufficient to cover any loss of interest Appellants might experience by being required to escrow funds. We again note that the trial court clearly indicated it would establish a reasonable ceiling to the amount held in escrow and that Appellants are free to petition at any time for the release of funds so that their assets can be used to run their business and are not irrationally tied–up.

*Id.* at 18–19 (citations omitted).

As Judge Hudock's opinion recognizes, "Appellants have not cited to any authority, either statutory or decisional, that affords them a legal right to dissipate assets for the purpose of becoming judgment–proof. This is the conduct that the trial court's injunction prohibits, not the lawful conduct of running their business." Slip Op. at 19.

Judge Hudock, writing on behalf of a unanimous three–judge Pa. Superior Court panel, is absolutely correct. The Reber defendants' Petition for Allowance of Appeal brazenly asks this Court to grant allocatur to hold that Pennsylvania law would permit defendants whose negligence has caused a young mother and her four–year–old child to burn to death and the child's father to suffer severe injuries

in that same fire to systematically render themselves judgment–proof in order to avoid financial responsibility for their tortious misconduct.

Such an outrageous request should not be granted by this Honorable Court. Fortunately, the Petition for Allowance of Appeal fails to establish that any of the three the questions presented therein are worthy of this Court's review, and therefore the Petition for Allowance of Appeal should be denied.

## III. REASONS WHY THE PETITION FOR ALLOWANCE OF APPEAL SHOULD BE DENIED

### A. Defendants' Contention That The Superior Court Should Have Adopted Federal Law Or The Supposed Law Of Seven Other States In Deciding Whether To Affirm The Prohibitory Preliminary Injunction Is Without Merit And Has Been Waived

This case involves absolutely no federal question whatsoever that might arguably cause the U.S. Supreme Court ruling on which the Petition for Allowance of Appeal relies so heavily to be relevant to this case.

Due to a unique quirk of federal law, the equitable power of U.S. District Courts is limited to the power that chancery courts possessed in England in the year 1789. Thus, the question confronting the U.S. Supreme Court in *Grupo Mexicano de Desarrollo, S.A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999), was whether a preliminary injunction could be used to restrain a defendant's assets to protect a potential money judgment in favor of the plaintiff under federal common law applicable only in the federal court system.

Recognizing that Congress could legislate such a remedy, the majority in the U.S. Supreme Court's 5–4 ruling in *Grupo Mexicano* held that because the chancery courts of England did not recognize the propriety of such an injunction in 1789, federal district courts lacked the power under federal common law to issue such an injunction today. Both the majority and dissent in the *Grupo Mexicano* case recognized that in 1975, England's chancery courts issued a ruling that recognized as proper and lawful the use of a preliminary injunction to restrain a defendant's assets to protect a potential money judgment in favor of the plaintiff. *See Grupo Mexicano*, 527 U.S. at 327 (noting that the English Court of Chancery "did not provide an injunctive remedy such as this until 1975"); *id.* at 339 (Ginsburg, J., dissenting) ("As the Court observes, preliminary asset–freeze injunctions have been available in English courts since * * * 1975"). But because English equitable courts had not recognized the remedy in 1789, the majority in *Grupo Mexicano*, by a sharply divided 5–4 vote, ruled that later developments in the equitable law of England were irrelevant to the equitable authority of federal district courts in the United States. It bears observation that two members of the slender five Justice majority in *Grupo Mexicano* — Chief Justice William H. Rehnquist and Associate Justice Sandra Day O'Connor — have since left the Court.

The Petition for Allowance of Appeal relies on the U.S. Supreme Court's 1999 ruling in *Grupo Mexicano* and the decisions of the courts of seven other states (five of which were not issued by state courts of last resort) to assert that somehow the Superior Court of Pennsylvania's ruling, which followed well–settled Pennsylvania

law to prevent the Reber defendants from continuing with their scheme to strip themselves of all assets and thus become judgment–proof, is deserving of this Court's review.

This first ground for review advanced in the Reber defendants' Petition for Allowance of Appeal must be rejected for two independent reasons: **first**, this ground for review has been waived, because the Reber defendants never once raised or relied on *Grupo Mexicano* or the other state court rulings in their appellate briefing before the Pa. Superior Court; and **second**, the fact that seven state courts (in decisions whose authority is open to substantial question, as discussed below) have followed the U.S. Supreme Court's antiquated view of equitable power does not make that outdated approach the "majority approach" or an approach that Pennsylvania courts should choose to follow.

On the issue of waiver, the Reber defendants' Brief for Appellants filed in the Pa. Superior Court failed to cite even once to the U.S. Supreme Court's ruling in *Grupo Mexicano*, and the Brief for Appellants never asserted that it was beyond a Pennsylvania court's equitable authority to issue a preliminary injunction to restrain a defendant's assets to protect a potential money judgment in favor of the plaintiff. The Reber defendants also failed to draw the *Grupo Mexicano* decision to the Pa. Superior Court's attention in any other way and did not once mention the ruling at oral argument. Moreover, neither within their brief nor at oral argument did the Reber defendants cite any of the other seven state court rulings that supposedly represent a "majority" view.

Defendants maintain in their Petition for Allowance of Appeal that the Pa. Superior Court's earlier precedents *did not* compel a ruling in favor of the plaintiffs on appeal, but the defendants failed to present to the Superior Court any of the case law from other jurisdictions that defendants now contend the Superior Court erred in failing to follow. The defendants' failure to draw that case law to the attention of the Superior Court gives rise to a classic instance of waiver that mandates denial of the first question presented for review. *See* Pa. R. App. P. 302(a); *Pentlong Corp.* v. *GLS Capital, Inc.*, 573 Pa. 34, 48 n.17, 820 A.2d 1240, 1248 n.17 (2003) (holding that argument not presented to intermediate appellate court is waived and will not be considered by this Court); *Commonwealth* v. *Piper*, 458 Pa. 307, 309–11, 328 A.2d 845, 847 (1974) (issue not raised in trial court or Superior Court cannot be raised for first time on allocatur).

Furthermore, the strength of authority that those seven state court rulings represent is vastly overstated in the Petition for Allowance of Appeal. Only two of those seven decisions come from state courts of last resort. Four of those seven decisions come from state intermediate appellate courts, two of those four are intermediate appellate courts lacking statewide jurisdiction, and one of those four decisions is an unpublished, non–precedential intermediate appellate court ruling. The final one of those seven state court rulings is a trial court's opinion. In short, defendants' claim that those seven state court decisions represent a majority view is refuted by the very tenuous authority offered in support of that unconvincing claim.

The Reber defendants' Petition for Allowance of Appeal attempts to mislead this Court into believing that perhaps the Reber defendants had presented this very same argument to the Pa. Superior Court, because the Petition for Allowance of Appeal chides the Superior Court for "ignoring the substantial authority" consisting of *Grupo Mexicano* and the aforementioned seven state court rulings. Pet. at 15. Yet it is the Reber defendants, and not the Pa. Superior Court, who must be faulted, because the Reber defendants did not cite to any of that case law when briefing or arguing this appeal before the Superior Court. The "substantial authority" that the Reber defendants now condemn the Pa. Superior Court for "ignoring" (Pet. at 15) is the very same "substantial authority" that the Reber defendants themselves ignored in their Brief for Appellants filed in the Pa. Superior Court.

To summarize, the Reber defendants' argument before the Pa. Superior Court was never that a court of equity in Pennsylvania lacks the inherent power to issue the sort of preliminary injunction at issue here, and the only federal case that they cited on that point recognized that even a federal court could issue such an injunction under appropriate circumstances, *see Hoxworth* v. *Blinder, Robinson & Co.*, 903 F.2d 186, 198 (3d Cir. 1990) (Becker, J.). Even if the Pa. Superior Court's ruling against the Reber defendants were erroneous, which it is not, it would consist of invited error that the Reber defendants brought upon themselves. Because the first issue is waived, it provides no basis for granting allowance of appeal.

Moreover, even if the Reber defendants' argument based on *Grupo Mexicano* were not waived, it would still be without merit. The Supreme Court of South

Carolina, in 2004, was faced with the very same argument based on *Grupo Mexicano* that the Reber defendants are now belatedly seeking to make before this Court. *See Scratch Golf Co.* v. *Dunes West Residential Golf Properties, Inc.*, 603 S.E.2d 905 (S.C. 2004). South Carolina's highest court correctly rejected the argument, recognizing that *Grupo Mexicano* merely held "that a U.S. District Court was not authorized to issue a preliminary injunction — absent a prior attachment of a money judgment — because the remedy was historically unavailable in a federal court of equity." *Scratch Golf Co.*, 603 S.E.2d at 907.

Directly addressing the U.S. Supreme Court's ruling in *Grupo Mexicano*, South Carolina's highest court unanimously held:

> This decision limiting a federal court's equitable powers is not dispositive of whether a state court judge may restrain a defendant's assets prior to the attachment of a money judgment. There is no federal question here that would cause the *Grupo* decision to be binding in this state court proceeding. Thus we decline to apply the *Grupo* analysis to this matter.

*Scratch Golf Co.*, 603 S.E.2d at 907.

The first ground on which the Reber defendants seek allowance of appeal — based on *Grupo Mexicano* and the ruling of a handful of courts from other states — is both without merit and waived and therefore should be rejected.

### B. The Pennsylvania Superior Court's Ruling Rests On Well–Settled Principles Of Pennsylvania Law That Have Been Employed Rarely, Selectively, And Only In The Most Exceptional Cases

The decision the Pa. Superior Court issued in this case — originally as a non–precedential Memorandum Opinion — relied heavily on the Pa. Superior Court's December 1, 2003 ruling in *Walter* v. *Stacy*, 837 A.2d 1205 (Pa. Super. Ct. 2003), which affirmed a preliminary injunction that prevented two defendants who had been sued for causing the death of another person from engaging in the "unfair, wholesale dissolution of their assets in anticipation of civil liability." *Id.* at 1207.

It would indeed be a frightening proposition if anytime that someone commenced a civil suit for damages the plaintiff could obtain a preliminary injunction requiring the defendant to maintain a court–supervised escrow account containing sufficient funds to pay the plaintiff's claim. But while the Reber defendants predict that the ruling against them will give rise to just that parade of horribles, the empirical evidence demonstrates that nothing could be further from the truth.

The calumny and disdain that the Reber defendants direct toward the Pa. Superior Court's ruling in their case and in the *Walter* case draw no support from what is actually happening in the real world. Since December 1, 2003, there has been no rash of successful preliminary injunction motions to restrain the assets of defendants who are suspected of seeking to become judgment–proof, and there is no reason to believe that the Pa. Superior Court's recent ruling in this case will give

rise to an abundance of such motions when the *Walter* case, now nearly four years old, has failed to do so.

What the Reber defendants are in fact asking this Court to hold, as the Pa. Superior Court's ruling correctly recognized, is that they have "a legal right to dissipate assets for the purpose of becoming judgment–proof." Slip Op. at 19. The trial court's limited, finely–calibrated preliminary injunction allows the Reber defendants to continue to operate their business and simply prevents them "from liquidating their properties for the purpose of hiding or dissipating assets." *Id.* at 18. Pennsylvania law does not recognize the right of a defendant to "liquidat[e] their properties for the purpose of hiding or dissipating assets" in order to become judgment proof after causing the deaths of others, as the Pa. Superior Court properly recognized, and this Court should not invent those rights to permit the Reber defendants to escape financial responsibility for causing two deaths and serious injuries to a third person.

Another reason why this case is an inappropriate vehicle for review is that the Reber defendants' Petition for Allowance of Appeal overlooks that the injunction that they challenge is analogous to the legislatively–authorized exercise of injunctive relief available under Pennsylvania's version of the Uniform Fraudulent Transfer Act, 12 Pa. Cons. Stat. Ann. §§5101–5110. The very sort of asset dissipation in which the Reber defendants have engaged is actionable under 12 Pa. Cons. Stat. Ann. §5104(a)(1), titled "Transfers fraudulent as to present and future creditors," because that section prohibits as fraudulent transfers made "with actual

intent to hinder, delay or defraud any creditor of the debtor." Plaintiffs qualify as present creditors of the defendants under the UFTA because they assert a right to receive payment from the defendants. *See* 12 Pa. Cons. Stat. Ann. §5101 (defining both "claim" and "creditor"). Section 5107(a)(3)(i) expressly allows as a remedy "an injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property." 12 Pa. Cons. Stat. Ann. §5107(a)(3)(i).

In sum, the Pa. Superior Court's ruling in this case represents a proper application of well–settled Pennsylvania law that has not resulted in any untoward proliferation of non–meritorious requests to restrain the assets of defendants whose liability has yet to be established. And the very type of remedy that the Reber defendants challenge as impermissible has been expressly authorized by Pennsylvania's legislature in the Uniform Fraudulent Transfer Act, although the Petition for Allowance of Appeal ignores this fact. For these reasons, the second ground raised for allowance of appeal is without merit and should be denied.

### C. The Final Basis For Allowance Of Appeal Asks This Court To Review And Correct Factual And Discretionary Determinations Made By The Trial Court And Thus Fails To Satisfy Any Of This Court's Rigorous Standards For Review

The third and final ground for review that the Reber defendants invoke asserts that both the trial judge and the three–judge Pa. Superior Court panel improperly balanced the six factors governing the granting of a preliminary injunction.

This basis for review is absolutely without merit. This Court's standards for review were crafted to exclude precisely this sort of fact–bound error correction. A total of four judges have already carefully evaluated the preliminary injunction at issue here and have found it to be proper under Pennsylvania's longstanding criteria for issuing preliminary injunctive relief. *See* Pa. Superior Court's Slip Op. at 11–21; Trial Court's Rule 1925(a) Op. at 13–18. Having the seven Justices of this Court conduct that very same inquiry under the abuse of discretion standard after four other highly qualified jurists have already come to the same unanimous conclusion regarding the propriety of injunctive relief would serve no useful purpose.

The six factors relevant to the granting of preliminary injunctive relief are: (1) immediate and irreparable harm that cannot be adequately compensated by money damages; (2) greater injury would result from refusing the injunction than from granting it; (3) the preliminary injunction restores the parties to their status as it existed before the alleged wrongful conduct; (4) the movant is likely to prevail on the merits; (5) the preliminary injunction is reasonably suited to abate the offending activity; and (6) the preliminary injunction will not adversely affect the public interest.

To begin with, the Superior Court properly recognized that the preliminary injunction at issue in this case is a prohibitory injunction, subject to less scrutiny than a so–called "mandatory injunction." *See* Slip Op. at 8. As a result, the Pa. Superior Court properly limited its inquiry on appeal to determining "whether an

examination of the record reveals 'any apparently reasonable grounds' support the trial court's disposition." *Id.* The Petition for Allowance of Appeal does not contest the Superior Court's ruling that the injunction at issue is a prohibitory injunction.

On the question of immediate and irreparable harm that cannot be adequately compensated by money damages, the Superior Court's decision recognizes that the trial court found that plaintiffs were facing immediate and irreparable harm resulting from the defendants ongoing scheme to render themselves judgment–proof from any verdict in excess of their $1 million liability insurance. *See* Slip Op. at 12–14. The Superior Court also accepted as appropriate the trial court's finding that the likelihood of such an excess verdict was "undeniably strong." *Id.* at 12. And the reason why this immediate and irreparable harm could not be adequately compensated by money damages is that defendants' scheme consists of making money damages uncollectible. *See id.* at 14. There is no basis, under the abuse of discretion standard, for this Court to reach a contrary result.

On the question of whether greater injury would result from refusing the injunction than from granting it, the Superior Court's ruling recognizes that the trial court has granted "a carefully crafted injunction" that "protect[s] Appellees' right to actually collect a judgment if they prevail at trial, while protecting Appellants' right to run the business and reinvest or otherwise use the proceeds of any property sales." Slip Op. at 15. The Superior Court's decision also recognizes that the trial court's injunction envisions "a reasonable ceiling to the amount held

in escrow and that Appellants would be free to petition for the release of funds so that their assets would not be tied–up irrationally." *Id.* Only by egregiously misportraying the scope and effect of the trial court's injunction can the defendants maintain that somehow the injunction harms them to a greater degree than it validly protects the interest of the plaintiffs, who have already lost their lives and suffered serious personal injuries due to the defendants' negligence.

On the question of whether the preliminary injunction restores the parties to their status as it existed before the alleged wrongful conduct, the Superior Court agreed with the trial court that the proper status quo ante is the situation of the parties before defendants' negligence caused the deaths of two of the plaintiffs and serious personal injury to the third plaintiff. *See* Slip Op. at 17. In this regard, the Superior Court's ruling recognizes that the trial court's preliminary injunction permits the defendants to abscond with proceeds from the $3 million in real estate sales that they realized between the time of the fire and the preliminary injunction motion. *See* Slip Op. at 17–18. Thus, to the extent that the preliminary injunction in any way fails to return the parties to the status quo ante, it does so in a way that solely benefits the defendants/petitioners in the approximate amount of $3 million realized from the sales of real estate occurring between the time of the fire and when the preliminary injunction issued.

On the question of whether the movant is likely to prevail on the merits, the Superior Court's decision recognizes that the trial court found that the plaintiffs have a reasonable likelihood of recovery on their tort claims against defendants.

The Superior Court also approved of the trial court's conclusion that defendants have no lawful right under Pennsylvania law to "dissipate assets for the purpose of becoming judgment proof." Slip Op. at 19. Neither of these two conclusions represents an abuse of discretion.

On the question of whether the preliminary injunction is reasonably suited to abate the offending activity, the Superior Court's decision repeatedly recognizes that the trial court's preliminary injunction does not prevent the defendants from engaging in "the lawful conduct of running their business." Slip Op. at 19. As the Superior Court's opinion explains, "We again note that the trial court clearly indicated it would establish a reasonable ceiling to the amount held in escrow and that Appellants are free to petition at any time for the release of funds so that their assets can be used to run their business and are not irrationally tied–up." *Id.* 18–19. The preliminary injunction prevents defendants from engaging in the unlawful activity of dissipating their business's assets to become judgment–proof, while at the same time the preliminary injunction also permits defendants to engage in the lawful activity of continuing to run their real estate business utilizing these assets. This represents the quintessential example of a preliminary injunction that is reasonably suited to abate the offending activity.

Finally, on the issue of adversely affecting the public interest, the preliminary injunction does not negatively affect the public interest in any respect. As the Superior Court's opinion explains, "[o]n appeal, Appellants have failed to

show, as they were required to do, how granting the preliminary injunction negatively impacts the public interest." Slip Op. at 21.

All six of the factors relevant to the granting of a preliminary injunction were properly considered by the trial court in the first instance, and the Superior Court quite reasonably ruled that none of the trial court's conclusions constituted an abuse of discretion. This third and final issue presented in the Petition for Allowance of Appeal falls far short of satisfying this Court's rigorous standards for review and should therefore be rejected.

One final impediment to this Court's review on Petition for Allowance of Appeal must be noted in closing. The preliminary injunction that the Reber defendants challenge was intended to prevent their continued pre–judgment dissipation of assets in order to become judgment–proof. The trial of the death and personal injury claims at issue in this suit is scheduled to commence on March 17, 2008, and soon thereafter a jury will return with a verdict in favor of either the plaintiffs or the defendants. Once judgment is entered on that verdict, the plaintiffs will no longer require the benefit of the preliminary injunction at issue herein because plaintiffs will be entitled to execute on that judgment in the absence of adequate security being posted by the defendants.

It is unlikely in the extreme that this Court would grant review and issue a ruling on the merits of this matter before March 17, 2008, and therefore the preliminary injunction that the Reber defendants are challenging is likely to become moot before this Court would be able to adjudicate the merits of this

challenge. That this Court's review of the challenged preliminary injunction would be unable to afford any relief to the Reber defendants represents one more reason for this Court to deny the Petition for Allowance of Appeal.

## IV. CONCLUSION

For the foregoing reasons, the Petition for Allowance of Appeal should be denied.

Respectfully submitted,

Dated: October 22, 2007

Larry Bendesky
Brian E. Fritz
Carmen P. Belefonte
Saltz, Mongeluzzi, Barrett &
Bendesky, P.C.
1650 Market Street, 52nd Floor
Philadelphia, PA 19103
(215) 496–8282

Howard J. Bashman
2300 Computer Avenue
Suite G–22
Willow Grove, PA 19090
(215) 830–1458

Counsel for Plaintiffs/Respondents

## CERTIFICATE OF SERVICE

I hereby certify that I am this day serving a true and correct copy of the foregoing document upon the person and in the manner indicated below which service satisfies the requirements of Pa. R. App. P. 121:

**Service by first class mail addressed as follows:**

Charles K. Graber, Esquire
150 South Warner Road
Suite 156
King of Prussia, PA 19406
(610) 535–6420

and

Thomas G. Wilkinson, Jr., Esquire
Josh M. Greenbaum, Esquire
Sandra Schultz Newman, Esquire
Robert G. Katz, Esquire
COZEN O'CONNOR
The Atrium
1900 Market Street
Philadelphia, PA 19103
(215) 665–2000

Counsel for Petitioners

J. Patrick Hickey, Esquire
Raffaele & Puppio, LLP
19 West Third Street
Media, PA 19063
(610) 891–6710
Co–counsel for Respondent Frank G. Cifelli

Joseph F. Van Horn, Jr., Esquire
Bodell, Bove, Grace & Van Horn, P.C.
30 South 15th Street, Suite 600
Philadelphia, PA 19102
(215) 864–6600
Counsel for Respondents Frank Giorgini and
Country & Town Plumbing

George P. Noel, Esquire
25 East Second Street
P.O. Box 1590
Media, PA 19063
(610) 892–7700
Counsel for Respondents Gregory Downs and
Better Homes and Garages

Michael A. Cognetti, Esquire
Swartz Campbell, L.L.C.
One South Church Street, Suite 400
West Chester, PA 19382
(610) 692–9500
Counsel for Respondent David Jenkins

Dated: October 22, 2007

Howard J. Bashman
I.D. No. 61029
2300 Computer Avenue
Suite G–22
Willow Grove, PA 19090
(215) 830–1458
Counsel for Plaintiffs–Respondents