IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 15-0490

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel. NATIONWIDE ASSURANCE COMPANY,

Petitioner,

vs.

HONORABLE Robert B. Stone, Retired, sitting by assignment as Judge of the Circuit Court of Marshall County, West Virginia; and JOSEPH C. RUDISH, as Administrator of the Estate of CHRISTINA RUDISH,

Respondents.

VERIFIED PETITION FOR WRIT OF PROHIBITION

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TABLE OF CONTENTS

I. QUESTION PRESENTED 1

II. STATEMENT OF THE CASE 1

III. SUMMARY OF THE ARGUMENT 4

IV. STATEMENT REGARDING ORAL ARGUMENT 5

V. ARGUMENT 5

A. Issuance of a Writ of Prohibition Is Appropriate Under the Standard Established by this Court 5

B. The Trial Court Acted Without Subject Matter Jurisdiction Because the Estate Has No Standing to Bring the Statutory Bad Faith Claims of the Decedent 6

C. The Trial Court's April 24, 2015 Order Is Clearly Erroneous As a Matter of Law 8

1. UTPA Claims Do Not Survive the Death of the Claimant Because A UTPA Claim Did Not Exist at Common Law and its Survivability Is Not Provided For By Statute 8

2. *Strahin v. Sullivan* Regarding the Assignability of *Shamblin* Claims Did Not Alter the *Wilt* Opinion Holding No Survivability of UTPA Claims 13

3. The Respondent Judge Stone Abused His Discretion by Limiting His Review of the Motion Based Upon His Reluctance to Reverse Prior Conclusions of Law Entered by Judge Karl Particularly When Judge Stone had Previously Held that UTPA Claims Are Extinguished Upon the Death of the Claimant 18

VI. CONCLUSION 20

VERIFICATION 21

TABLE OF AUTHORITIES

Cases

Adkins v. Allstate,
Civil Action No. 98-C-0122 (Cabell Cty. Cir. Ct. Sept. 20, 1999) 9

Collins v. Sw. Reinsurance,
Certified Question Order, Civil Action No. 16-CV- 0561 (July 15, 2010, Cabell County Circuit Court) 9

Dellinger v. Pediatrix Med. Group, P.C.,
232 W. Va. 115, 750 S.E.2d 668 (2013) (*per curiam*) 18

Eastern Associated Coal Corp. v. Doe,
159 W. Va. 200, 220 S.E.2d 672 (1975) 6

Findley v. State Farm Mut. Auto. Ins. Co.,
213 W. Va. 80, 576 S.E.2d 807 (2002) 7

Finney v. MIG Capital Management, Inc.,
2014 WL 1276159 (S.D. W. Va., Mar. 27, 2014) 13

Green ex rel. Estate of Green v. City of Welch,
467 F. Supp. 2d 656 (S.D. W. Va. 2006) 13

Hereford v. Meek,
132 W. Va. 373, 52 S.E.2d 740 (1949); 15, 16

Hinkle v. Bauer Lumber & Home Bldg. Ctr., Inc.,
158 W. Va. 492, 211 S.E.2d 705 (1975). 6

Keeney v. Infinity Ins. Co.,
231 F. Supp. 2d 488 (S.D. W. Va. 2002) 10, 11, 12, 13,17

Martin v. State Farm Mut. Auto. Ins. Co.,
2010 U.S. Dist. LEXIS 106224 (S.D. W. Va. Sept. 30, 2010). 12

Murphy v. E. Am. Energy Corp.,
224 W.Va. 95, 680 S.E.2d 110 (2009). 20

O'Brien v. Allstate Ins. Co.,
2010 U.S. Dist. LEXIS 134573 (N.D. W. Va. Dec. 20, 2010) 12

Pirelli v. Bd. Of Educ. Mongongalia Cnty.,
182 W.Va. 261, 387 S.E.2d 315 (1989) 13

Riffle v. C.J. Hughes Const. Co.,
226 W. Va. 581, 703 S.E. 552 (2010). 18

Schulz v. Jan Care Ambulance of Nicholas Cty.,
Civil Action No. 04-C-447 (Monongalia Cty. Cir. Ct., Feb. 13, 2006) 9, 19

Slack v. Kanawha Cty. Housing,
188 W. Va. 144, 423 S.E.2d 547 (1992) 8

Snodgrass v. Sisson's Mobile Home Sales, Inc.,
161 W.Va. 588, 244 S.E.2d 321 (1978) 11, 15,16, 17

State ex rel. Gessler v. Mazzone,
212 W. Va. 368, 572 S.E.2d 891 (2002) 6

State ex rel. Hoover v. Berger,
199 W.Va. 12, 483 S.E.2d 12 (1996). 5, 6

State ex rel. Sabitino v. Richards,
127 W.Va. 703, 34 S.E.2d 271 (1945). 5, 6

Stebbins v. Allstate,
Civil Action No. 95-C-218 (Harrison Cty. Cir. Ct., Feb. 16, 1999) 9, 13, 14

Strahin v. Sullivan,
220 W. Va. 329, 647 S.E.2d 765 (2007). 13, 15

Tennant v. Marion Health Care Found., Inc.,
194 W. Va. 97, 459 S.E.2d 374 (1995). 19

Thompson v. Branches-Domestic Violence Shelter of Huntington, W. Va.,
207 W. Va. 479, 534 S.E.2d 33 (2000) 8

U. S. Gypsum Co. v. Schiavo Bros., Inc.,
668 F.2d 172 (3d Cir. 1981) 19

Wilt v. State Auto. Mut. Ins. Co.,
203 W. Va. 165, 506 S.E.2d 608 (1998) 10, 11, 12, 13, 15, 17, 19

Woodford v. McDaniels,
73 W. Va. 736, 81 S.E. 544 (1914) 15, 16

Zuleski v. Hartford,

Civil Action Nos. 2:05-0880-82 (Feb. 27, 2006, S.D. W. Va.) 12

Statutes

W. Va. Code §53-1-1 ..... 1, 7

W. Va. Code § 55-2-12 ..... 9,11,14,15, 16

W. Va. Code § 55-7-8a ..... *passim*

Court Rules

W. Va. R. App. P. 19(a) 5

W. Va. R. App. P. 20(a)(2),(4) 1

W. Va. R. App. P. 21(d) 5

W. Va. R. Civ. P. 25(a)(1) 1

I. QUESTION PRESENTED

Did Respondent Judge Stone commit a clear error of law and exceed his judicial authority by denying Petitioner's motion to dismiss second amended complaint and holding that claims brought pursuant to the West Virginia's Unfair Trade Practices Act are assignable, and therefore survivable, following the death of the claimant?

II. STATEMENT OF THE CASE

The instant writ arises out of the April 24, 2005 Order entered by the Circuit Court of Marshall County, West Virginia (Judge Stone, sitting by assignment) holding that statutory bad faith claims brought pursuant to the Unfair Trade Practices Act (the "UTPA") survive the death of the claimant. *See* Appx. 0001-2.

This case arises out of Nationwide's handling of a third-party liability claim made by Christina Rudish against Nationwide's insured, Jeremiah Connor, following an automobile accident on August 25, 2001. Decedent Christina Rudish instituted this Civil Action by filing a Complaint against the tortfeasor, Jeremiah Connor, on January 9, 2003. *See* Appx. 0038-40. Thereafter, on August 15, 2005, Christina Rudish filed an Amended Complaint, this time naming Mr. Connor's insurance carrier, Nationwide Assurance Company, as a direct defendant and alleging only a single claim for statutory bad faith based upon alleged violation of the UTPA. *See* Appx. 0041-48. The claim against Nationwide was initially stayed, pending resolution of the underlying claim against Mr. Connor, which was ultimately settled prior to trial.

In 2013, Ms. Rudish died from causes unrelated to the underlying motor vehicle accident, and on July 23, 2013, pursuant to W. Va. R. Civ. Pro. 25(a)(1), counsel for the decedent filed a "Notice of Suggestion of Death of Plaintiff, Christina Rudish." *See* Appx. 0049-50. On August 12, 2013, Defendant Nationwide filed its Motion to Dismiss Upon Suggestion of Death, on the basis that the decedent's statutory bad faith (UTPA) claim expired upon her death. *See* Appx.

0051-59. On September 12, 2013, counsel for Ms. Rudish filed a Response in Opposition to Defendant Nationwide Assurance Company's Motion to Dismiss Upon Suggestion of Death and Motion to Substitute Plaintiff Under Rule 25 of the West Virginia Rules of Civil Procedure. *See* Appx. 0060-79.

Following a hearing held on September 19, 2013, Judge Karl of the Circuit Court of Marshall County, entered on December 22, 2014 Findings of Fact and Conclusions of Law Denying Defendant Nationwide Assurance Company's Motion to Dismiss Upon Suggestion of Death and Granting Plaintiff's Motion to Substitute Plaintiff Under Rule 25 of the West Virginia Rules of Civil Procedure, in the original format as submitted by counsel for Ms. Rudish (hereinafter "December 22, 2014 Order"). *See* Appx. 0003-8. Pursuant to the December 22, 2014 Order, the trial court held that claims for statutory bad faith (*i.e.*, UTPA claims) survive the death of the claimant. *Id.* at ¶ 9.[1] The December 22, 2014 Order further granted the Motion to Substitute Plaintiff, and allowed the decedent's counsel 90 days to file a newly amended Complaint substituting the estate as plaintiff in place of the decedent. *See* Appx. 0003-8.

Plaintiff's Second Amended Complaint was filed on February 9, 2015. *See* Appx. 0089-96. Plaintiff's Second Amended Complaint alleges, in pertinent part, that Joseph Rudish is the duly appointed Administrator of the Estate of Christina Rudish. *See id.* at ¶ 1. It alleges that Nationwide was the insurance carrier of the tortfeasor involved in the underlying action with Ms. Rudish that occurred on August 25, 2001. *See id.* at ¶¶ 2-3. The Second Amended Complaint further alleges that Nationwide committed multiple violations of West Virginia Code § 33-11-4(a) and Title 114, Series 14 of the Legislative Rules of the Insurance Commissioner during its handling of Ms. Rudish's third-party claim. *See id.* at ¶¶ 13-15. As a result of Nationwide's

[1] The UTPA was amended in 2005, to eliminate third-party claims. The December 22, 2014 Order, however, does not limit its analysis and holding as applying to only third-party statutory UTPA claims, but rather is broadly worded to encompass all statutory UTPA claims.

alleged "bad faith" handling of Ms. Rudish's bodily injury claim, it is alleged that Ms. Rudish was caused to sustain severe emotional distress, mental anguish, inconvenience, annoyance, embarrassment, costs, expenses and attorney fees. *See id.* at ¶¶ 19-20. Finally, the Second Amended Complaint prays that Judgment be awarded in favor of the Estate and against Nationwide. *See id.* at *ad damnum* clause.

On March 23, 2015, Nationwide filed its Motion to Dismiss Second Amended Complaint. *See* Appx. 0097-151. Plaintiff filed a Response in Opposition to Defendant Nationwide Assurance Company's Motion to Dismiss Second Amended Complaint on April 8, 2015. *See* Appx. 0152-174. Nationwide submitted its Reply Brief in Support of Motion to Dismiss Second Amended Complaint on April 10, 2015. *See* Appx. 0175-198. Thereafter, oral arguments were held on April 10, 2015. *See* Appx. 0009-0037. On April 24, 2015, Judge Stone, sitting by assignment,[2] entered the "Order Denying Motion to Dismiss Second Amended Complaint." *See* Appx. 0001-2.

The April 24, 2015 Order is the impetus for the filing of the Writ for Prohibition. Therein, the trial court found that Nationwide's motion was properly and timely filed. However, the trial court noted that granting the motion would expressly or implied reverse the holdings in the December 22, 2014 Order, and that court is loathe to reverse the holdings of another judge. *See* Appx. 0001-2; 0009-0037 at p. 26. As such, the trial court denied the second motion to dismiss, expressly adopting all of the findings and fact and conclusions of law set forth in the prior Order of December 22, 2014. *See id.*

[2] The Honorable Judge Mark Karl of the Marshall County Circuit Court retired, effective March 31, 2015. The Honorable Judge Robert B. Stone (senior status) was assigned to hear Retired Judge Karl's pending matters until April 30, 2015. Presently, the Honorable Judge Arthur Recht (senior status) is presiding over Retired Judge Karl's matters until a replacement is appointed.

The Respondent Judge committed a clear error of law and exceeded his judicial authority by exercising subject matter jurisdiction in a case where none exists and by adopting the findings and fact and conclusions of law as set forth in the trial court's prior order entered December 22, 2014. The Respondent Judge further abused his discretion by limiting his review of the motion based upon the fact that he was loathe to overturn previous conclusions of law entered by a former Judge, even though the Respondent Judge had himself previously ruled to the contrary on this precise issue of law. Accordingly, Petitioner asserts its entitlement to a writ of prohibition.

III. SUMMARY OF THE ARGUMENT

Petitioner seeks relief from the Order below, denying Petitioner's *Motion to Dismiss Second Amended Complaint* and asks this Court to intervene because the trial court exceeded its legitimate powers by proceeding where no cause of action lies since the decedent's statutory bad faith claims brought pursuant to the UTPA expired upon her death. The trial court's order was further without subject matter jurisdiction since the plaintiff Estate has no standing to pursue claims that expired upon the death of the claimant.

The issue herein is a purely legal question, and the facts related to the issue are not disputed by the parties. Although the underlying action involved a claim for third-party bad faith, since abolished by statute, the Order of the trial court below has much broader implications as the holding applies to all claims, whether first-party or third-party, brought pursuant to the UTPA. Further, the circuit courts and federal courts sitting in West Virginia that offer a split of authority on this purely legal issue likewise address both third and first party claims. As such, this Honorable Court should grant the Petitioner's Writ for Prohibition.

IV. STATEMENT REGARDING ORAL ARGUMENT

Oral argument is warranted under West Virginia Rule of Appellate Procedure 20(a)(2) and (4) because this case involves an issue that is both of fundamental public importance and has resulted in conflicts among decisions of lower tribunals. Alternatively, the appeal may be suitable for oral argument under W. Va. App. Rule 19(a) because it involves assignments of error on a narrow issue of law. Because this Court should reverse the circuit court's orders, a memorandum decision may not be appropriate. *See* W. Va. R. App. P. 21(d).

V. ARGUMENT

A. Issuance of a Writ of Prohibition is Appropriate under the Standard Established by this Court.

Pursuant to W. Va. Code §53-1-1, "[t]he writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has no jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers."

In determining whether to grant a writ of prohibition in a matter in which the trial court is acting within its jurisdiction, but is alleged to have exceeded its authority, this Court examines five factors:

> whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

State ex rel. Hoover v. Berger, syl. pt. 4, 199 W.Va. 12, 483 S.E.2d 12 (1996).

"In determining the third factor, the existence of clear error as a matter of law, [the Supreme Court] will employ a *de novo* standard of review, as in matters in which purely legal

issues are at issue." *State ex rel Gessler v. Mazzone,* 212 W.Va. 368, 372, 572 S.E.2d 891, 895 (2002).

Herein, a writ should be granted because the trial court acted without subject matter jurisdiction in denying the Petitioner's *Motion to Dismiss Second Amended Complaint.* Moreover, even assuming, *arguendo*, that the trial court was within its jurisdiction, application of the five *Hoover* factors to the case *sub judice*, mandates that the writ be accepted as the lower court's Order is clearly erroneous as a matter of law. Moreover, the Respondent Judge abused his discretion in limiting his review of the motion simply because the Court was loathe to overturn prior conclusions of law reached by a former Judge.

B. <u>The Trial Court Acted Without Subject Matter Jurisdiction Because the Estate Has No Standing to Bring the Statutory Bad Faith Claims of the Decedent.</u>

By denying the Petitioner's *Motion to Dismiss Second Amended Complaint*, thus continuing the underlying litigation, the trial court acted without subject matter jurisdiction. Due process requires that a court undertaking to determine the rights and liabilities of parties shall have subject matter jurisdiction. *Hinkle v. Bauer Lumber & Home Bldg. Ctr., Inc.*, 158 W. Va. 492, 211 S.E.2d 705, Syl. Pt. 2 (1975). Accordingly, "[w]henever it is determined that a court has no jurisdiction to entertain the subject matter of a civil action, the forum court must take no further action in the case other than to dismiss it from the docket." *Id.* at Syl. Pt. 1. Standing, mootness and ripeness implicate the Court's subject matter jurisdiction. *See Eastern Associated Coal Corp. v. Doe*, 159 W. Va. 200, 220 S.E.2d 672, 678 (1975).

"Standing" means "'[a] party's right to make a legal claim or seek judicial enforcement of a duty or right.'" *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 576 S.E.2d 807, 821 (2002) (quoting *Black's Law Dictionary* 1413 (7th ed. 1999)). Standing is comprised of the following three elements:

> . . . First, the party attempting to establish standing must have suffered an "injury-in-fact" – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct forming the basis of the lawsuit. Third, it must be likely that the injury will be redressed through a favorable decision by the court.

Id., 576 S.E.2d 807 at Syl. Pt. 5. Furthermore,

> [s]tanding does not refer simply to a party's capacity to appear in court. Rather, standing is gauged by the specific common-law, statutory or constitutional claims that a party presents. "Typically, . . . the standing inquiry requires careful judicial examination . . . to ascertain whether the particular plaintiff is entitled to an adjudication *of the particular claims asserted.*"

Id., 576 S.E.2d at 821-22 (citation omitted) (emphasis in original).

Herein, the Estate has no standing to pursue the decedent's third-party statutory bad faith claims because, as discussed *infra,* Christina Rudish's statutory bad faith claims expired upon her death. The Estate is *not* entitled to an adjudication of the *particular claims asserted herein*, and therefore, the Estate has no standing. As such, the trial court acted without subject matter jurisdiction when it entered the April 24, 2015 Order, denying Petitioner's *Motion to Dismiss Second Amended Complaint* thereby perpetuating the underlying litigation wherein the Plaintiff has no standing.

C. **The Trial Court's April 24, 2015 Order Is Clearly Erroneous As a Matter of Law**.

1. *UTPA Claims Do Not Survive the Death of the Claimant Because A UTPA Claim Did Not Exist at Common Law and its Survivability Is Not Provided For By Statute*.

The trial court's April 24, 2015 Order holding that the statutory bad faith claims of the decedent survived her death is clearly erroneous as a matter of law and contrary to this Court's prior holding in *Wilt v. State Automobile Mutual Insurance Co.*, 203 W. Va. 165, 506 S.E.2d 608

(1998). Decedent's statutory bad faith claims were based on alleged violations by Nationwide of the Unfair Trade Practices Act ("UTPA"). Survivability of a statutory bad faith (UTPA) claim was previously addressed by the West Virginia Supreme Court of Appeals in *Wilt*. Although the precise issue in *Wilt* dealt with the applicable statute of limitations for a statutory UTPA claim, the Court necessarily addressed the survivability of a UTPA claim before it could address the issue of statute of limitations. In doing so, the *Wilt* Court looked to both W. Va. Code § 55-2-12 and § 55-7-8a(a). *Wilt*, 203 W. Va. at 167, 506 S.E.2d at 610; *see also Thompson v. Branches-Domestic Violence Shelter of Huntington, W. Va.*, 207 W. Va. 479, 484, 534 S.E.2d 33, 38 (2000) (noting that W. Va. Code § 55-2-12 "must be read *in pari materia* with W. Va. Code § 55-7-8a(a) (1959)), citing to *Slack v. Kanawha Cty. Housing*, 188 W. Va. 144, 423 S.E.2d 547 (1992).

W. Va. Code § 55-2-12 states:

> Every personal action for which no limitation is otherwise prescribed shall be brought: (a) Within two years next after the right to bring the same shall have accrued, if it be for damage to property; (b) within two years next after the right to bring the same shall have accrued if it be for damages for personal injuries; and (c) within one year next after the right to bring the same shall have accrued if it be for any other matter of such nature that, in case a party die, it could not have been brought at common law by or against his personal representative.

W. Va. Code § 55-7-8a(a) states in pertinent part:

> (a) In addition to the causes of action which survive at common law, causes of action for injuries to property, real or personal, or injuries to the person and not resulting in death, or for deceit or fraud, also shall survive; and such actions may be brought notwithstanding the death of the person entitled to recover or the death of the personal liable.

The *Wilt* Court clearly held that "[g]iven its recent statutory genesis, ***an unfair settlement practices claim clearly did not survive at common law*** . . . ." *Wilt*, 203 W. Va. 165, 171, 506 S.E.2d 608, 614 (1998) (emphasis added). Therefore, the *Wilt* Court concluded that UTPA claims fall "squarely" into subdivision (c) of W. Va. Code § 55-2-12, which addresses matters

that "could not have been brought at common law by or against [a claimant's] personal representative." *See* W. Va. Code § 55-2-12.

Following the West Virginia Supreme Court's opinion in *Wilt*, the issue of survivability of UTPA claims following the death of the claimant has been directly addressed by at least three separate circuit courts in West Virginia, each of which relied upon the holding in *Wilt* that UTPA claims did not survive at common law to conclude that a third-party statutory UTPA claims did not survive the death of the claimant. *See Schulz v. Jan Care Ambulance of Nicholas Cty.*, Civil Action No. 04-C-447, 2006 WL 4584371 (Monongalia Cty. Cir. Ct., Feb. 13, 2006) (J. Stone); *Stebbins v. Allstate*, Civil Action No. 95-C-218 (Harrison Cty. Cir. Ct., Feb. 16, 1999); *Adkins v. Allstate*, Civil Action No. 98-C-0122 (Cabell Cty. Cir. Ct. Sept. 20, 1999)[3]. At least one of those circuits has likewise concluded that first party statutory UTPA claims do not survive the death of the decedent. *See Collins v. Southwest Reinsurance*, Certified Question Order, Civil Action No. 16-CV- 0561 (July 15, 2010, Cabell County Circuit Court) (holding that a first party statutory bad faith claim which has a one year statute of limitations under *Wilt*, does not survive the death of the policyholder).

Survivability of a statutory UTPA claim following the death of the decedent was also thoroughly analyzed by the late Judge Haden of the United States District Court for the Southern District of West Virginia in *Keeney v. Infinity Ins. Co.*, 231 F. Supp. 2d 488 (S.D. W. Va. 2002), wherein Judge Haden determined that the West Virginia Supreme Court of Appeal's prior holding in *Wilt* was dispositive of the issue. Relying on *Wilt*, the *Keeney* Court held that a UTPA claim does not survive the claimant's death, stating that "there is no statutory basis to conclude a claim under the [Unfair Trade Practices] Act survives the death of the plaintiff harmed by the

[3] Copies of the aforementioned circuit court orders are included with the Petition.

insurer" and "since the statutory claim did not exist at common law, there is no common-law basis for survivability either." *Keeney*, 231 F. Supp. 2d at 490-91.

The facts in *Keeney* are analogous to the facts of the instant action. The Plaintiff, Thomas Keeney, was injured in an automobile accident in 1999. In 2001, Mr. Keeney and his wife filed suit against the tortfeasor, alleging negligence. They also named the tortfeasor's insurance carrier as a defendant, alleging violations of the UTPA. Mr. Keeney's wife alleged loss of consortium against both defendants. Shortly after the suit was filed, the Plaintiffs settled their claims against the tortfeasor, but their third-party bad faith claims against the carrier remained pending. *Keeney*, 231 F. Supp. 2d at 488.

In 2002, Mr. Keeney died from causes unrelated to the accident. Thereafter, the Court granted summary judgment in favor of the insurance carrier on Mr. Keeney's UTPA claim, finding that the claim did not survive Mr. Keeney's death. The Court, relying upon the Supreme Court of Appeals of West Virginia's prior decision in *Wilt*, held that the UTPA claim did not survive the claimant's unrelated death because: (1) the driver's claim under the Act did not exist at common law and, thus, would not have survived at common law; and (2) the driver's claim under the Act was not listed as an action that survived by statute under W. Va. Code § 55-7-8a. When the *Keeney* Court was subsequently faced with a motion to reconsider, it denied the motion. The late Judge Haden explained that the *Wilt* opinion was dispositive on the issue of survivability of a UTPA claim:

> In *Wilt*, the victims of an automobile accident sued an insurer under the Act. The Supreme Court of Appeals held a claim under the Act was governed by an one-year limitations period. Although that holding is of little moment here, the analysis underlying the same is dispositive for the Court in discharging its prognosticative responsibilities under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). *See, e.g., Roe v. Doe*, 28 F.3d 404, 407 (4th Cir.1994)("Where there is no case law from the forum state which is directly

on point, the district court attempts to do as the state court would do if confronted with the same fact pattern.").

In light of *Wilt*, then, the Court is called upon once again [upon a motion to reconsider] to determine whether Thomas' claim survived his death. A subsidiary question in *Wilt* was which portion of the limitations periods contained in West Virginia Code Section 55-2-12 controlled an Unfair Trade Practices Act claim. That limitations provision states:

> Every personal action for which no limitation is otherwise prescribed shall be brought: (a) Within two years next after the right to bring the same shall have accrued, if it be for damage to property; (b) within two years next after the right to bring the same shall have accrued if it be for damages for personal injuries; and (c) within one year next after the right to bring the same shall have accrued ***if it be for any other matter of such nature that, in case a party die, it could not have been brought at common law by or against his personal representative.***

W. Va. Code § 55-2-12 (emphasis added). Also relevant is West Virginia Code Section 55-7-8a, which the Supreme Court of Appeals has read *in pari materia* with Section 55-2-12. *Snodgrass v. Sisson's Mobile Home Sales, Inc.*, 161 W. Va. 588, 592-93, 244 S.E.2d 321, 324 (1978)("Under customary rules of statutory construction, the 1959 changes to W. Va. Code, 55-2-12, must be read *in pari materia* with W. Va. Code, 55-7-8a, since both relate to the same subject matter and were adopted as a part of a common plan."). Section 55- 7-8a lists which actions survive the death of the plaintiff:

> (a) ***In addition to the causes of action which survive at common law, causes of action for injuries to property, real or personal, or injuries to the person and not resulting in death, or for deceit or fraud, also shall survive***; and such actions may be brought notwithstanding the death of the person entitled to recover or the death of the person liable.

W. Va. Code § 55-7-8a (emphasis added).

Relying upon these statutes, **the Supreme Court of Appeals in *Wilt* observed:**

> **Given its recent statutory genesis, an unfair settlement practices claim clearly did not survive at common law** and thus falls squarely into subdivision (c) [of Section 55-2-12] ....

Wilt, 203 W. Va. at 170, 506 S.E.2d at 613.

Reading these statutory and case law excerpts together, two things become clear. First, there is no statutory basis to conclude a claim under the [Unfair Trade Practices] Act survives the death of the plaintiff harmed by the insurer. Second,

> since the statutory claim did not exist at common law, there is no common-law basis for survivability either.

Id. at 490-91 (emphasis added).

The *Keeney* analysis has subsequently been followed by federal courts sitting in both the Northern and Southern Districts of West Virginia, in cases involving both third and first party statutory UTPA claims. *See, e.g., Martin v. State Farm Mutual Auto. Ins. Co.*, 2010 U.S. Dist. LEXIS 106224, * 8 (S.D. W. Va. Sept. 30, 2010) (concluding that deceased plaintiff's first-party statutory and common law bad faith claims did not survive plaintiff's death pursuant to W. Va. Code 55-7-8(a)); *O'Brien v. Allstate Insurance Co.*, 2010 U.S. Dist. LEXIS 134573 * 8 (N.D. W. Va. Dec. 20, 2010) (finding that the first party statutory and common law bad faith claims brought by Estate of deceased plaintiff did not survive the decedent's death under West Virginia law such that the Estate had failed to state a claim); *Zuleski v. Hartford,* Civil Action Nos. 2:05-0880-82 (Feb. 27, 2006, S.D. W. Va.) (concluding third-party statutory bad faith claims expired upon claimant's death).

Not only is the *Keeney* analysis required by this Court's holding and analysis in *Wilt*, it is also consistent with the opinions addressing the survivability of other statutorily created claims, akin to the statutorily created UTPA claims at issue herein. *See, e.g., Finney v. MIG Capital Management, Inc.*, 2014 WL 1276159 (S.D. W. Va., Mar. 27, 2014) (holding that the plaintiff's claims for violations of the West Virginia Consumer Credit Protection Act, W. Va. Code § 46A-2-128 did not survive the death of the decedent); *Green ex rel. Estate of Green v. City of Welch*, 467 F. Supp.2d 656 (S.D. W. Va. 2006) (holding that under West Virginia state law, the plaintiff's claim for recovery under the West Virginia Human Rights Act, W. Va. Code § 5-11-1, *et seq.*, did not survive the death of the decedent).

Applying the language of W.Va. Code § 55-7-8a and *Keeney* analysis in this case, the Ms. Rudish's UTPA claim ceased to exist upon her death. First, a UTPA claim is a recently created claim by legislature, thus, there is no common law basis for survivability. *See, e.g., Pirelli v. Bd. of Educ. Monongalia Cnty.*, 182 W.Va. 261, 263, 387 S.E.2d 315, 317 (1989) ("[T]he cause of action, sex discrimination, is a recent creation of the legislature and did not exist at common law."). Second, there is no statutory basis of survivability under W.Va. Code § 55-7-8a(a). The Legislature could have provided that a UTPA claim survives the death of a claimant, but did not do so. And like numerous other personal actions and statutory claims such as libel, defamation, false arrest, false imprisonment, malicious prosecution, invasion of privacy, and consumer protection claims, a UTPA claim is for injury to rights or reputation, not for physical or bodily injuries as required to survive under West Virginia's survival statute. As such, Ms. Rudish's UTPA claim abated upon her death.

2. *Strahin v. Sullivan Regarding the Assignability of Shamblin Claims Did Not Alter the Wilt Opinion Regarding the Survivability of UTPA Claims*.

The trial court's April 24, 2015 Order, by adopting the findings of fact and conclusions of law as set forth in the December 22, 2014 Order, mistakenly relied upon this Court's decision in *Strahin v. Sullivan*, 220 W. Va. 329, 647 S.E.2d 765 (2007), to support its erroneous conclusion of law that statutory UTPA claims are assignable, and therefore must survive the death of the claimant. Order at 9.

First, the Order notably fails to cite to any opinion from the West Virginia Supreme Court of Appeals holding that a third-party UTPA claim, such as is at issue herein, is freely assignable. Rather, the Order relies upon the holding of *Strahin* – a case that did not even involve a UTPA claim and is therefore, irrelevant to the determination of the issue herein. *Strahin* centered around an assignment of a *Shamblin*, or excess verdict, claim wherein the alleged tortfeasor

assigned his claim against his own liability carrier to an injured claimant in exchange for a covenant not to execute by the claimant. The "assignability" discussion from *Strahin* is limited to a single small paragraph:

> We note that assignment of a *Shamblin* claim is clearly permissible. This Court has long held that "'[a] chose in action may be validly assigned.' However, the mere assignment of rights does not translate into automatic recovery. Rather, the assignee must still satisfy all of the essential elements of the cause of action. By coupling the assignment in this case with a covenant not to execute prior to trial and thus prior to an excess verdict, the *Shamblin* claim was automatically extinguished."

Strahin, 220 W. Va. at 337, 647 S.E.2d at 773 (internal citations omitted). Importantly, not only did the *Strahin* case deal with the assignability of an entirely different type of claim, it also failed to address the survivability of even the *Shamblin* claim. Nonetheless, based upon the holding in *Strahin* that an entirely different type of claim, a *Shamlin* claim, is assignable the trial court's Order broadly concluded that any "bad-faith-style claim may be validly assigned,"[4] *See* Appx. 0001-8.

Next, the April 24, 2015 Order, by incorporating the findings of fact and conclusions of law set forth in the December 22, 2014 Order, wrongly relied upon a concept of duality between survivability and assignability – an antiquated concept that no longer exists – to conclude that if a statutory UTPA claim is assignable, it is also survivable. *See* Appx. 0001-2; 0003-8 at p. 5, ¶ 9. Notably, in so holding, the April 24, 2015 Order declined to follow this Court's holding in *Wilt*, that UTPA claims did not survive at common law. *See Wilt*, 203 W. Va. at 171, 506 S.E.2d at 614 ("[g]iven its recent statutory genesis, *an unfair settlement practices claim clearly did not survive at common law* . . . ."). Instead, the Order relies upon a string of antiquated cases from the West Virginia Supreme Court which previously "acknowledged that the assignability of claims and the survival of claims go hand-in-hand." *See* Appx. 0001-2; 0003-8 at p. 3, ¶ 6, citing

[4] It should be noted that *Strahin* dealt with the assignment of a first party claim, not a third-party claim.

to *Woodford v. McDaniels*, 81 S.E. 544 (1914); *Hereford v. Meek*, 132 W. Va. 373, 52 S.E.2d 740 (1949); State ex rel. *Sabitino v. Richards*, 127 W.Va. 703, 34 S.E.2d 271 (1945); and *Snodgrass v. Sisson's Mobile Home Sales, Inc.*, 161 W.Va. 588, 244 S.E.2d 321 (1978). The Court held that the "doctrine of duality of assignability and survival, as espoused in *Woodford* and *Hereford*, is the law of this State as it applies to this case." *See* Appx. 0001-2; 0003-8 at p. 5, ¶ 8.

The April 24, 2015 Order erroneously applied the antiquated case law, ignoring clear West Virginia case law and statute that mandates a contrary conclusion of law. In fact, the *Woodford*, *Hereford* and *Sabitino* cases were relied upon in the Court's Order to support its findings all pre-date 1950, and more notably, pre-date important legislative changes that occurred in 1959. Ironically, *Snodgrass v. Sisson's Mobile Home Sales, Inc.*, 161 W.Va. 588, 244 S.E.2d 321 (1978), one of the more "recent" cases relied upon in the April 24, 2015 Order does not support the Court's conclusions of law, but rather clarifies that the 1959 legislative changes on survivability of claims obviated the "duality doctrine" of survivability and assignability that was relied upon in pre-1959 case law:

> Both *Gawthrop* [1914] and *Sabatino* [1945] proceeded on the theory that at common law assignability and survivability were equal and convertible concepts so that if the answer to one were found, the other was automatically answered. Under the *Gawthrop-Sabatino* approach, no inquiry was made to determine if the Legislature had altered the survivability analysis by statute. Indeed, there was little occasion to make such inquiry since the statute of limitations on personal actions, W.Va. Code, 55-2-12, was cast entirely in terms of survivability until 1959. In 1959, the Legislature made several significant statutory changes to W.Va. Code, 55-2-12, and W.Va. Code, 55-7-8, rearranging the latter section and creating a new section 8a.

Snodgrass, 161 W. Va. at 591, 244 S.E.2d at 323.

The *Snodgrass* Court recognized that "the 1959 changes to W. Va. Code § 55-2-12 must be read *in pari materia* with W. Va. Code § 55-7-8a, since both relate to the same subject matter

and were adopted as a part of a common plan." *Snodgrass*, 161 W. Va. at 592-93, 244 S.E.2d at 324. As noted by the Court in *Snodgrass*, following the 1959 legislative changes, common law survivability of a cause of action is no longer the test:

> When W. Va. Code 55-7-8a, is read *in pari materia* with W. Va. Code 55-2-12(a) and (b), relating to the limitation on suit for damage to property and personal injuries, ***common law survivability of these causes of action is no longer the test.*** The reason is two-fold. First, these subsections do not contain any requirement as to survivability, but merely express a stated period in which the actions must be brought. Second, the provisions of subsection (a) of W. Va. Code, 55-7-8a, statutorily create survivability by the following language:
>
> "In addition to the causes of action which survive at common law, causes of action for injuries to property, real or personal, or injuries to the person and not resulting in death, or for deceit or fraud, also shall survive; and such actions may be brought notwithstanding the death of the person entitled to recover or the death of the person liable."
>
> The effect of this subsection is to create statutory survivability for the causes of action contained therein to parallel the same causes of action set out in W. Va. Code 55-2-12(a) and (b).
>
> ***
>
> By isolating causes of action for fraud and deceit and combining them with personal actions which will survive under W. Va. Code 55-7-8a, it is apparent that the Legislature intended to exclude from statutory survivability under subsection (a) other personal tort actions such as defamation, false arrest and imprisonment, and malicious prosecution. ***These latter personal actions, lacking statutory survivability and possessing no common law survivability, take a one-year statute of limitations under W. Va. Code, 55-2-12(c).***

Snodgrass, 161 W. Va. at 593-595, 244 S.E.2d at 324-325 (emphasis added).

Like the claims addressed in *Snodgrass*, the legislature similarly intended to exclude UTPA claims from statutory survivability. The West Virginia legislature could have provided for survivability of statutory UTPA claims, but chose not to do so. Therefore, as previously pronounced by this Court in *Wilt*, statutory UTPA claims, lacking survivability and possessing no common law survivability (because such claims did not exist at common law) have a one year statute of limitations and expire upon the death of the plaintiff. *See Wilt*, 203 W. Va. at 171, 506

S.E.2d at 614. The assignability of the claim has no impact on the survivability of the claim under W. Va. Code § 55-7-8a when read in pari material with W. Va. Code § 55-2-12.

The analysis relied upon in *Snodgrass*, a case cited in the April 24, 2005 Order as supporting the Court's erroneous position, is actually quite similar to the analysis of the Courts in *Wilt*, *Keeney* and their progeny. As in *Snodgrass*, in *Keeney*, the interplay between W. Va. Code 55-2-12 and W. Va. 55-7-8a was the focus of the Court wherein the Court held that the UTPA claim did not survive the claimant's unrelated death because: (1) the driver's claim under the Act did not exist at common law and, thus, would not have survived at common law; and (2) the driver's claim under the Act was not listed as an action that survived by statute under W. Va. Code § 55-7-8a.

Pursuant to the established case law, it is without question that the decedent's UTPA claims did not survive her death, such that the trial court's April 24, 2015 Order is clearly erroneous as a matter of law.

3. *The Respondent Judge Stone Abused His Discretion By Limiting His Review of the Motion Based Upon His Reluctance to Reverse Prior Conclusions of Law Entered by Judge Karl Particularly When Judge Stone had Previously Held that UTPA Claims Are Extinguished Upon the Death of the Claimant.*

The April 24, 2015 Order is also contrary to clear West Virginia law to the extent that the Court's denial of Petitioner's Motion to Dismiss was based solely on Judge Stone's reluctance to enter an Order that "would, expressly or impliedly, reverse the prior Order entered by Judge Mark Karl, denying Defendant's prior motion." *See* Appx. 0001-2; 0009-0037 at p. 26. ("This Court is loathe to reverse prior rulings by another Judge.").

West Virginia law clearly permits a Court to "exercise its discretion to revisit a previous denial of a motion to dismiss in order to ensure the proper administration of justice." *See* Appx. 0001-2, citing to *Dellinger v. Pediatrix Medical Group, P.C.*, 232 W. Va. 115, 750 S.E.2d 668,

673 n.8 (2013) (*per curiam*); *Riffle v. C.J. Hughes Const. Co.*, 226 W. Va. 581, 703 S.E. 552, 557 n.5 (2010).

Moreover, the fact that Petitioner's Motion to Dismiss Second Amended Complaint was ultimately heard by Judge Stone, rather than Judge Karl, did not in any way limit the authority of Judge Stone to grant the pending motion, even if it meant reconsidering Judge Karl's prior December 22, 2014 Order. The West Virginia Supreme Court of Appeals has previously noted that:

> [W]here a successor judge is asked to reconsider a legal ruling of his unavailable predecessor, the successor judge is empowered to reconsider those issues to the same extent as his predecessor could have.

Tennant v. Marion Health Care Foundation, Inc., 194 W. Va. 97, 105 at fn. 3 (1995), *accord United States Gypsum Co. v. Schiavo Bros., Inc.*, 668 F.2d 172, 176 (3d Cir. 1981) ("Where a successor judge is asked by timely and proper motion to reconsider the legal conclusions of an unavailable predecessor, he or she is empowered to reconsider those issues to the same extent that his or her predecessor could have.").

Judge Stone previously considered the precise issue of survivability of a third party statutory bad faith claim, and, relying on the *Wilt* opinion, held that such claims do not survive the death of the decedent:

> [T]his Court . . . in light of the relevant legal authority has concluded that a third-party statutory bad faith claims is personal to the plaintiff, and thus does not survive the death of the plaintiff. First, the West Virginia Supreme Court of Appeals held in *Wilt v. State Auto Mut. Ins. Co.*, 203 W. Va. 165, 506 S.E.2d 608 (1998) that a claim under the UTPA would not have survived the death of the plaintiff at common law and that such a claim must therefore be specifically addressed by the statute in order to defeat the statute of limitations applicable to common law claims. Moreover, the survival statutes in West Virginia, specifically West Virginia Code § 33-11-4, § 55-2-12 and §55-7-8a, do not provide for the survival of such a claim. As such, the death of the Plaintiff Olive Schulz effectively extinguished that count of the Complaint in which Plaintiff alleged that Empire violated the UTPA.

Jan Care Ambulance, 2006 WL 4584371 (Monongalia Cty. Feb. 13, 2006) (J. Stone). By limiting his review and adopting the findings of fact and conclusions of law entered by Judge Karl in the December 22, 2014 Order, Judge Stone actually ruled against himself in the April 24, 2015 Order.

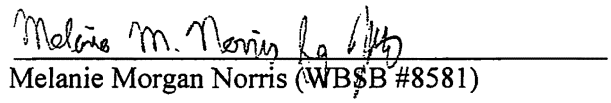
Moreover, because the conclusions of law set forth in the December 22, 2014 Order were clearly contrary to the law, it was incumbent upon Judge Stone to grant the Motion to Dismiss Second Amended Complaint, thereby reversing the errant conclusions of law in the December 22, 2014 Order, rather than adopting the errant conclusions in his April 24, 2015 Order. *See, e.g., Murphy v. Eastern American Energy Corp.,* 224 W.Va. 95, 101, 680 S.E.2d 110, 116 (2009) ("Although this Court is loathe to overturn a decision so recently rendered, it is preferable to do so where a prior decision was not a correct statement of law").

As such, to the extent that grating Petitioner's Motion to Dismiss the Second Amended Complaint would have impliedly or expressly reversed the conclusions of law set forth in the December 22, 2014 Order denying Petitioner's Motion to Dismiss Upon Suggestion of Death, it was entirely within Judge Stone's discretion to do so in order to ensure proper administration of justice and compliance with clear West Virginia law.

VI. CONCLUSION

For all of the reasons set forth herein, Nationwide Assurance Company petitions this Honorable Court for relief from the circuit court's Order denying Nationwide's Motion to Dismiss Second Amended Complaint, entered on April 24, 2015. Petitioner respectfully requests that this Court issue a writ of prohibition in this matter and award Petitioners such other relief as set forth herein and/or that the Court deems appropriate.

NATIONWIDE ASSURANCE COMPANY,
By Counsel



Melanie Morgan Norris (WBSB #8581)
Counsel for Petitioner Nationwide Assurance Company

VERIFICATION

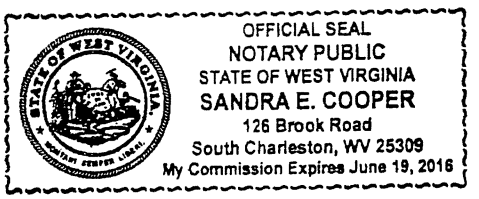
I, Melanie Norris, Esq., being first duly sworn, state that I have read the foregoing VERIFIED PETITION FOR WRIT OF PROHIBITION OR IN THE ALTERNATIVE, WRIT OF MANDAMUS; that the factual representations contained therein are true, except so far as they are stated to be on information and belief; and that insofar as they are stated to be on information and belief, I believe them to be true.

Melanie M. Norris by [illegible]
Melanie Norris, Esq.

Taken, subscribed, and sworn to before me this 26th day of May, 2015.

My Commission expires: June 19 2016.

Sandra E. Cooper



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 15-

STATE OF WEST VIRGINIA ex rel. NATIONWIDE ASSURANCE COMPANY,

Petitioners,

vs.

HONORABLE Robert B. Stone, Retired, sitting by assignment as Judge of the Circuit Court of Marshall County, West Virginia; and JOSEPH C. RUDISH, as Administrator of the Estate of CHRISTINA RUDISH,

Respondents.

CERTIFICATE OF SERVICE

I, Melanie Morgan Norris, counsel for Petitioner Nationwide Assurance Company, do certify that I have this 26th day of May 2015, served the foregoing "*Petition for Writ of Prohibition*" and "*Appendix*" thereto via U.S. Mail upon the parties to whom a rule to "show cause" should also be served at their respective offices, to wit:

Honorable Judge Stone
c/o Marshall County Circuit Clerk
600 Seventh Street
Moundsville, WV 26041

Honorable Judge Recht
c/o Marshall County Circuit Clerk
600 Seventh Street
Moundsville, WV 26041

David A. Jividen, Esq.
Jividen Law Offices, PLLC
729 North Main Street
Wheeling, WV 26003

Melanie Morgan Norris (WBSB #8581)
Counsel for Petitioner Nationwide Assurance Company

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA
Division No. 1

OLIVE SCHULZ
(now deceased),

Plaintiff,

v.

Civil Action No. 04-C-447
The Honorable Robert B. Stone

JAN CARE AMBULANCE OF
NICHOLAS COUNTY,
a West Virginia Corporation, and
EMPIRE FIRE AND MARINE INSURANCE
COMPANY OF NEBRASKA,

Defendants.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS AND DENYING PLAINTIFF'S MOTION TO SUBSTITUTE PARTY

This matter came before this Court on September 19, 2005 pursuant to Plaintiff's Motion to Lift Stay and Substitute Proper Party and Defendant Empire's Response in opposition thereto. The proposed party to be substituted, William Schulz, was not present in person but was represented by counsel, John Angotti. Defendant Empire Fire and Marine Insurance Company of Nebraska had no representative present, but was represented by counsel, Stuart McMillan.

Facts and Procedural History

This case arises out of a personal injury suit filed by the Plaintiff, Olive Schulz (hereinafter "Plaintiff"), against the two Defendants, alleging that the negligence of the Defendant, Jan Care (hereinafter "Jan Care"), caused her to suffer injuries and alleging that the Defendant, Empire (hereinafter "Empire"), violated the West Virginia Unfair Trade Practices Act (hereinafter "UTPA") in failing to act reasonably and promptly in responding to the

resulting claim for compensation.[1] By Agreed Order entered October 26, 2004, all issues pertaining to Plaintiff's claim against Empire were bifurcated and stayed.

Having settled Count I of the Complaint with the Plaintiff, Jan Care was dismissed from this case by Order dated September 9, 2005. As such, the third-party bad faith claim against Empire remains the sole remaining claim in this case.

In its Motion, Plaintiff seeks to lift the stay imposed by the bifurcation of the bad faith claim and to substitute William Schulz for the original plaintiff, Olive Schulz, now deceased. Empire, conversely, seeks to have the remaining bad faith claim dismissed, arguing that the law in West Virginia does not allow for the survival of a third-party statutory bad faith claim following the unrelated death of the plaintiff. Following the arguments of counsel and review of the pertinent pleadings in this case, the Court provided the Plaintiff with additional time in which to address Empire's request to be dismissed from the case while acknowledging the strength of the Empire's argument.

Discussion

Having received no response from the Plaintiff in the four months since the hearing, this Court reviewed the arguments of counsel and the pleadings in this case in light of the relevant legal authority and has concluded that a third-party statutory bad faith claim is personal to the plaintiff, and thus does not survive the death of the plaintiff. First, the West Virginia Supreme Court of Appeals held in *Wilt v. State Auto Mut. Ins. Co.*, 203 W. Va. 165, 506 S.E.2d 608 (1998) that a claim under the UTPA would not have survived the death of the plaintiff at common law and that such a claim must therefore be specifically addressed by statute in order to defeat the statute of limitations applicable to common law claims. Moreover, the survival statutes in West Virginia, specifically West Virginia Code § 33-11-4, § 55-2-12 and §55-7-8a,

[1] Such claims are commonly referred to as "third-party statutory bad faith" claims.

do not provide for the survival of such a claim[2]. As such, the death of the Plaintiff Olive Schulz effectively extinguished that count of the Complaint in which Plaintiff alleged that Empire violated the UTPA. The underlying tort suit having already been resolved, there remain no justiciable issues in this case.

Conclusion

For the foregoing reasons, the Court ORDERS that Plaintiff's Motion to Lift Stay and Substitute Proper Party is DENIED. Having so dispensed with the justiciable issues in this case, the Court ORDERS that this case be DISMISSED with prejudice and removed from the docket of the Court.

A copy of this Order shall be provided by the Clerk of Court to all counsel of record.

ENTERED: February 13, 2006

JUDGE

ENTERED Feb. 13, 2006

CIVIL ORDER BOOK 117 PAGE 35

JEAN FRIEND, CLERK

[2] While the federal case cited by the Defendant in its Response, *Keeney v. Infinity Ins. Co.*, 231 F. Supp.2d, 488 (S.D. W. Va. 2002) is not controlling in this matter, this Court nonetheless finds the similarity of facts and the Federal Court's interpretation and application of *Wilt* to the question of UTPA survival highly persuasive.

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

RICHARD J. STEBBINS,

Plaintiff,

vs.

MICHAEL D. MCVICKER
and ALLSTATE INSURANCE
COMPANY,

Defendants.

In: 2/19/99
Billed:
Calendar:

CIVIL ACTION NO. 95-C-218-2

Copy to:
WMJ
EKF ✓
DAB
ALB
Clerk

DEADLINE:

ORDER DISMISSING COUNT TWO WITH PREJUDICE

This matter came before the Court the 31st day of August, 1998, upon the Motion to Dismiss of Allstate Insurance Company upon the appearance of the substituted Plaintiff, Roger Curry as Executor of the Estate of Richard J. Stebbins by counsel, Anthony J. Cicconi; Defendant Michael D. McVicker, by his counsel, Timothy R. Miley and Defendant Allstate Insurance Company, by and through its counsel, E. Kay Fuller and Martin & Seibert, L.C. After entertaining oral argument of counsel and permitting additional time to Allstate Insurance Company for additional briefing and upon further research by the Court, the Court makes the following findings of facts.

1. The Plaintiff was injured June 21, 1993 when Michael D. McVicker allegedly drove his vehicle into the Plaintiff's vehicle.

2. A jury found Mr. McVicker at fault and awarded $464,696.00 on July 22, 1996.

3. Plaintiff filed an Amended Complaint on August 30, 1996, adding Allstate

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Insurance Company alleging violations of the Unfair Claims Settlement Practices Act and a breach of the "implied covenant of duty of good faith and fair dealing" at Count 2.

4. On March 20, 1998. Richard J. Stebbins died testate and Roger D. Curry was named as Executor of the Stebbins Estate. Since that time this Court has permitted Roger D. Curry to be substituted as the Plaintiff in this matter in his representative capacity.

5. This Court finds that Richard J. Stebbins was a Third-Party claimant seeking insurance proceeds from a policy of insurance issued by Allstate Insurance Company to Michael D. McVicker.

Based upon the foregoing findings of facts, the Court concludes that any allegations of the Plaintiff's Complaint which allege common law duties of good faith and fair dealing or the "implied covenant and duty of good faith and fair dealings" as alleged in Paragraph 8 of the Plaintiff's Amended Complaint as set forth in Count 2 of the Amended Complaint is not a cause of action available to a Third-Party claimant. Rather such an implied duty runs only between an insurance carrier and its insured and given that Mr. Stebbins was not an Allstate insured, he cannot maintain such a cause of action for lack of standing to assert such a claim. Therefore, it is accordingly ADJUDGED and ORDERED that any cause of action against Allstate Insurance Company asserted by Mr. Stebbins or by his executor alleging such a common law cause of action be and hereby is dismissed with prejudice.

Additionally the Court concludes that any allegation for violation of West Virginia Code §33-11-4 must also be dismissed with prejudice as such a cause of action is governed by a one year statue of limitations pursuant to West Virginia Code §55-2-12. Moreover, the West Virginia Supreme Court of Appeals held in *Wilt v State Auto Mut. Ins. Co.*, ___ W.Va. ___,

#2868 P.008/010
OCT.03.2003 15:17

506 S.E.2d 608 (1998), that a one year statute of limitations applied for causes of action which do not survive at common law. The *Wilt* Court ruled that the one year statue of limitations governs an Unfair Claims Settlement Practices due to its "recent statutory genesis." Therefore, this Court concludes that any cause of action stated against Allstate Insurance Company for alleged violations of the Unfair Claims Settlement Practices Act did not survive the death of Richard J. Stebbins because such an action was not granted statutory survivability by West Virginia Code §55-7-8 a(a).

WHEREFORE, it is accordingly ADJUDGED and ORDERED that the remaining portions of Count 2 of the Plaintiff's Amended Complaint are also dismissed with prejudice.

The Court notes that the parties agree that Count 3 of the Amended Complaint which purports to state a declaratory judgment action shall remain upon this Court's docket and shall be subject to additional Motions and/or ruling of this Court.

The Court notes the objection and exception to counsel for the Plaintiff.

The Court hereby directs its Clerk to enter the foregoing and to forward attested copies to counsel of record herein.

ENTER: Feb 16, 1999

JUDGE THOMAS A. BEDELL

This document prepared by:

E. Kay Fuller

E. Kay Fuller
Counsel for Allstate Insurance Company.

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#2868 P.009/010 OCT.03.2003 15:18

STATE OF WEST VIRGINIA
COUNTY OF HARRISON, TO-WIT:

I, Donald L. Kopp II, Clerk of the Fifteenth Judicial Circuit of Harrison County, West Virginia, hereby certify the foregoing to be a true copy of the ORDER entered in the above styled action on the 16th day of February, 1999

IN TESIMONY WHEREOF, I hereunto set my hand and affix the Seal of the Court this 17th day of February, 1999.

Donald L. Kopp II
Cirucit Clerk
Fifteenth Judicial Circuit
Harrison County, West Virginia

1ND 1
9/20/9
(25)

IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

CHARLES ARTHUR ADKINS, deceased,
by SALLY M. ADKINS, as EXECUTRIX, and
SALLY M. ADKINS, Individually

Plaintiffs,

v.

Civil Action No. 98-C-0122
Honorable David M. Pancake

EMMA LOUISE WINTZ and
ALLSTATE INSURANCE COMPANY,

Defendants.

ORDER

On the 31st day of August, 1999, came the Plaintiff, by Charles K. Games, Jr., and the Defendant, Allstate Insurance Company, by Tanya M. Kesner, upon the Motion of Allstate Insurance Company to dismiss the claims of the Estate of Charles Arthur Adkins. The Court, after having reviewed the Motion and Memorandum in Law filed in support of the Motion and having heard the arguments of counsel does hereby find that the cause of action of the Estate of Charles Arthur Adkins does not survive his death. The Court finds that the West Virginia Supreme Court of Appeals decision in Wilt v. State Automobile Mutual Ins. Co., 506 S.E.2d 608 (W.Va. 1998), specifically holds that a claim under the Unfair Trade Practices Act, pursuant to W.Va. Code § 33-11-4(9), does not survive the death of the claimant. The Court does, therefore, **GRANT** the Motion of Defendant, Allstate Insurance Company, to dismiss the claims of the Estate of Charles Arthur Adkins.

The objections and exceptions of the Plaintiff are hereby preserved.

All of which is accordingly so **ORDERED, ADJUDGED** and **DECREED.**

113826

Entered this 20th day of September, 1999.

Honorable David M. Pancake
Judge, Circuit Court of Cabell County

STATE OF WEST VIRGINIA
COUNTY OF CABELL,
I, ADELL CHANDLER, CLERK OF THE CIRCUIT COURT FOR THE COUNTY AND STATE AFOBESAID DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT ENTERED ON _____
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS _____ SEP 20 1999
CLERK
CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

Presented by:

Brent K. Kesner (WV State Bar #2022)
Tanya M. Kesner (WV State Bar #5162)
Kesner, Kesner & Bramble
Suite 500, United Center
P. O. Box 2587
Charleston, WV 25329
(304) 345-5200

Approved as to form by:

Kenneth P. Hicks (WV State Bar #5063)
Charles K. Games, Jr. (WV State Bar #7445)
343 Fifth Avenue
Huntington, WV 25701
Counsel for Plaintiff

113826