

COPY

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 15-0490

STATE OF WEST VIRGINIA ex rel. NATIONWIDE ASSURANCE COMPANY,

Petitioner and Defendant hereinbelow,

vs.

HONORABLE Robert B. Stone, sitting by assignment as Judge of the Second Judicial Circuit of Marshall County, West Virginia, and JOSEPH C. RUDISH, as Administratrix of the Estate of Christina Rudish,

Respondents.

RESPONSE IN OPPOSITION TO VERIFIED PETITION FOR WRIT OF PROHIBITION

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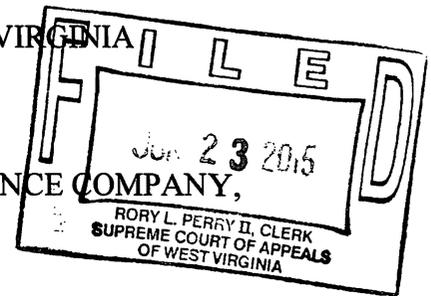


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I. QUESTION PRESENTED

Did Respondent, Judge Stone, commit clear error of law and exceed his judicial authority in his April 24, 2015 Order by denying the Motion to Dismiss Second Amended Complaint of Petitioner and Defendant hereinbelow, Nationwide Assurance Company, by upholding the Circuit Court of Marshall County's December 22, 2014 Order holding that the extra-contractual insurance claims of the former Plaintiff hereinbelow, Decedent Christina Rudish, survived her death insofar as those claims are assignable at law?

II. STATEMENT OF THE CASE

With the exception of the Petitioner, Nationwide Assurance Company's, conclusive statements that Judge Stone committed clear error, exceeded his judicial authority, and abused his discretion; the Respondent, Joseph C. Rudish, as the Administratrix of the Estate of Christina Rudish, hereby adopts the Statement of the Case submitted by the Petitioner, Nationwide Assurance Company, and incorporates the same herein by reference, except as stated and/or supplemented hereinbelow. The facts surrounding this Petition are procedural and largely undisputed.

The Respondent, Joseph C. Rudish, as the Administratrix of the Estate of Christina Rudish, would add that the issues of law raised herein by the Petitioner, Nationwide Assurance Company, were previously decided by the Circuit Court of Marshall County in its December 22, 2014 Order. The Petitioner, Nationwide Assurance Company, did not seek reconsideration of the decision, nor an appellate review of the December 22, 2014 Order entered by former Circuit Judge, Mark A. Karl. In March of 2015, Judge Karl announced his retirement. Following that announcement, the Petitioner filed its Motion to Dismiss Second Amended Complaint and set the matter for hearing for a date after Judge Karl's scheduled retirement date of March 31, 2015.

While the April 24, 2015 Order may be the impetus for this particular Writ, that Order merely echoed the previous holdings of this Court that were not appealed.

III. SUMMARY OF THE ARGUMENT

The Verified Petition for Writ of Prohibition of Nationwide Assurance Company must be denied as the Petitioner is merely attempting to improperly seek interlocutory review of the Circuit Court of Marshall County's April 24, 2015 and December 22, 2014 Orders. Despite its contentions, Petitioner, Nationwide Assurance Company, is with adequate relief at the conclusion of the case in the way of a direct appeal and would suffer no prejudice upon denial of the instant Petition. The April 24, 2015 Order of the Circuit Court of Marshall County (Judge Stone) and the December 22, 2014 Order of the Court (Judge Karl), to which it related, were not made in error. The Circuit Court of Marshall County properly found that the claims of the Respondent and Plaintiff hereinbelow, Joseph C. Rudish, as the Administratrix of the Estate of Christina Rudish, survived the death of his spouse, Christina Rudish. The Circuit Court accurately reasoned in both Orders that, since those claims are assignable at common law, the same also survived at death pursuant to **W.Va. Code § 55-7-8a, Woodford v. McDaniels, 73 W.Va. 736, 81 S.E. 544 (1914)** and its progeny. The Respondent and Plaintiff hereinbelow, Joseph C. Rudish, as the Administratrix of the Estate of Christina Rudish, may properly assert his deceased wife's extra-contractual insurance claims in the Circuit Court of Marshall County, and the Verified Petition for Writ of Prohibition should be refused accordingly.

IV. STATEMENT OF ORAL ARGUMENT

Oral argument is unwarranted insofar as the Writ of Prohibition should be refused as an improper interlocutory appeal of the April 24, 2015 Order of the Circuit Court of Marshall County and an untimely appeal of the December 22, 2014 Order of the Circuit Court. To the

extent that the instant Writ is entertained by the Court, oral argument pursuant to **Rule 19 of the West Virginia Rules of Appellate Procedure** is sufficient. The issues of law herein are sufficiently narrow to warrant **Rule 19** argument. Those legal issues regard settled law concerning the survival of claims that are assignable at law, and are only novel insofar as that legal issue is being applied in the scope of an extra-contractual insurance claim.

V. **ARGUMENT**

1. **A Writ of Prohibition should not issue herein as the Petitioner and Defendant hereinbelow, Nationwide Assurance Company, is attempting to seek an interlocutory appeal of the Circuit Court of Marshall County's April 24, 2015 Order and an untimely appeal of the Court's December 22, 2014 Order, by disguising it as a Writ seeking the original jurisdiction of this Court. The Petitioner has adequate alternative means for seeking relief in the way of a direct appeal and the weight of the balancing factors of the *State ex rel. Hoover v. Berger* test militate in favor of refusing the relief requested by Nationwide.**

The Court should refuse the Petition of the underlying Defendant, Nationwide Assurance Company, as a Writ of Prohibition is not an appropriate mechanism for obtaining an improper interlocutory appeal of the Circuit Court of Marshall County's April 24, 2015 Order. The Petitioner is attempting herein to seek an interlocutory appeal of a denial of a motion to dismiss that is disguised as a writ of original jurisdiction. The Writ also seeks the untimely appeal of the issues ultimately decided by the Circuit Court of Marshall County in its December 22, 2014 Order, issues which the Petitioner did not appeal. The Petitioner will have adequate opportunity to seek appellate relief at the close of this case. As such, relief by way of Writ of Prohibition should be denied.

“Prohibition does not lie to correct mere errors and cannot be allowed to usurp the functions of appeal, writ of error or certiorari.” Syl. Pt. 2, **State ex rel. Stanek v. Kiger**, 155 W.Va. 587, 185 S.E.2d 491 (1971). “The general rule is that there is a presumption of regularity of court proceedings; it remains until the contrary appears and the burden is on the person who alleges

such irregularity to affirmatively show it.” **Syl. pt. 1, State ex rel. Massey v. Boles, 149 W.Va. 292, 140 S.E.2d 608 (1965)**. “‘The rationale behind a writ of prohibition is that by issuing certain orders the trial court has exceeded its jurisdiction, thus making prohibition appropriate.’ State ex rel. Allen v. Bedell, 193 W.Va. 32, 36, 454 S.E.2d 77, 81 (1994) (Cleckley, J., concurring). As such, ‘writs of prohibition ... provide a drastic remedy to be invoked only in extraordinary situations.’ 193 W.Va. at 37, 454 S.E.2d at 82.” **State ex rel. Shrewsberry v. Hrko, 206 W.Va. 646, 649, 527 S.E.2d 508, 511 (1999)**.

Pursuant to **Syllabus Point 4 of State ex rel. Hoover v. Berger, 199 W.Va. 12, 483 S.E.2d 12 (1996)**, “In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) 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.” The Petitioner has only argued one **Hoover** factor to be applicable – that the Circuit Court of Marshall County committed clear error.

The weight of the factors in **Hoover** militates against this Court entertaining Nationwide's Writ of Prohibition. First, the Petitioner is with other adequate means of seeking the desired relief, such as a direct appeal. In fact, Nationwide has already had one opportunity to seek relief from the Circuit Court of Marshall County's rulings on the exact issues raised in this matter following the Court's December 22, 2014 Order. However, it neglected to raise those issues on appeal. Second, the Petitioner would suffer no prejudice or damage as a result of this Court rejecting the instant Writ of Prohibition; and, despite having the burden of demonstrating such, the Petitioner has not articulated any prejudice or damages that it may suffer. Third, the Circuit Court of Marshall County's April 24, 2015 Order is not clearly erroneous insofar as the same was based upon both valid statutory and common law authority as set forth in the arguments in subsections hereinbelow. Fourth, Nationwide has not identified the Circuit Court's error as being an "oft repeated" one, and a decision either way from other Circuit Courts in future litigation is unlikely insofar as the cause of action asserted herein, a third-party violation of the UTPA, was subsequently abrogated by statute. See **W.Va. Code § 33-11-4a**. Fifth, if any of the factors were arguably applicable, it is that this matter may present a matter of first impression as it applies to the facts of this case. The question of whether an extra-contractual claim survives death has never been reduced to a syllabus point in West Virginia, and the *dicta* in **Wilt v. State Auto. Mut. Ins. Co.**, 203 W.Va. 165, 506 S.E.2d 608 (1998) relied upon by the Petitioner has not been revisited since the Court's recognition that extra-contractual insurance claims may be assigned. See **Strahin v. Sullivan**, 220 W.Va. 329, 647 S.E.2d 765 (2007); see also **Aluise v. Nationwide Mut. Fire Ins. Co.**, 218 W.Va. 498, 625 S.E.2d 260 (2005); and **Hubbard v. State Farm Indem. Co.**, 213 W.Va. 542, 584 S.E.2d 176 (2003). Again, however, the application of those principles to third-party extra-contractual insurance claims is unlikely to be a

major issue in the future due to the statutory abrogation. Moreover, the Court's holdings in **Woodford v. McDaniels**, 73 W.Va. 736, 81 S.E. 544 (1914) and its progeny are not matters of first impression and, in conjunction with **West Virginia Code § 55-7-8a**, continue to control the doctrine of survival of claims in West Virginia.

The relief sought by the Petitioner should be refused insofar as it has failed to sustain its burden under the **Hoover** factors. The Petitioner will have an adequate opportunity to have any appealable issues heard by this Court at the conclusion of this case by way of direct appeal. Nationwide once missed the deadline for appealing the identical issues raised herein following the Circuit Court's issuance of its December 22, 2014 Order. The interlocutory relief that it improperly seeks by way of Writ of Prohibition should therefore be denied.

2. The Circuit Court of Marshall County did not act without subject matter jurisdiction when it entered its April 24, 2015 Order, as the Respondent is with standing to assert the claims of his Decedent wife to the extent that those claims are freely assignable and likewise survivable.

The Petitioner is incorrect in its assertion that the Circuit Court of Marshall County acted without subject matter jurisdiction over the Respondent's claims when it denied the Petitioner's Motion to Dismiss Second Amended Complaint. "To obtain relief in prohibition on the ground that a tribunal is acting outside of its jurisdiction, the petitioner must clearly demonstrate that it lacks authority to adjudicate a particular matter before it: 'A writ of prohibition does not lie in the absence of a clear showing that a trial court is without jurisdiction to hear and determine a proceeding....' Syl. pt. 1, in part, *Fahey v. Brennan*, 136 W.Va. 666, 68 S.E.2d 1 (1951); see also *Fisher v. Bouchelle*, 134 W.Va. 333, 335, 61 S.E.2d 305, 306 (1950) ("the writ will not be awarded in cases where it does not clearly appear that the petitioner is entitled thereto"); *Syllabus, Vineyard v. O'Brien*, 100 W.Va. 163, 130 S.E. 111 (1925) ("The writ of prohibition will issue only in clear cases, where the inferior tribunal is proceeding without, or in excess of,

jurisdiction.”); Syl. pt. 3, in part, *Buskirk v. Judge of Circuit Court*, 7 W.Va. 91 (1873) (“Prohibition can only be interposed in a clear case of excess of jurisdiction on the part of some inferior judicial tribunal.”).” **Health Mgt., Inc. v. Lindell**, 207 W.Va. 68, 72, 528 S.E.2d 762, 766 (1999).

In the instant case, the Circuit Court of Marshall County properly found that the Respondent had standing to assert the extra-contractual insurance claims of his Decedent wife to the extent that the same were assignable and for those reasons argued in greater detail in the subsections hereinbelow. See **Strahin v. Sullivan**, 220 W.Va. 329, 647 S.E.2d 765 (2007); **West Virginia Code § 55-7-8a**; and **Woodford v. McDaniels**, *supra*. The Circuit Court’s decision was grounded in both valid statute and common law. Accordingly, the Circuit Court did not act without jurisdiction hereinbelow and the Petitioner has failed to “clearly demonstrate” a lack of subject matter jurisdiction. The interlocutory relief that it improperly seeks by way of Writ of Prohibition should therefore be denied.

3. The April 24, 2015 Order of the Circuit Court of Marshall County was not erroneous, but well-reasoned and based upon statutory authority and common law precedent instructing that assignable claims survive death.

The Circuit Court of Marshall County’s April 24, 2015 Order was not erroneous and was firmly rooted in West Virginia law. The April 24, 2015 Order upheld the Circuit Court’s findings in its December 22, 2014 Order that claims that are assignable are also survivable at common law. Since extra-contractual insurance claims are assignable, those claims, likewise, survive at death.

Extra-contractual insurance claims have been found by this Court to be freely assignable. This principle was confirmed in **Strahin v. Sullivan**, 220 W.Va. 329, 647 S.E.2d 765 (2007). Therein, at **Syllabus Point 8 of Strahin**, the Court reiterated the principle that “[a] chose in

action may be validly assigned.’ Syl. pt. 2, *Hartman v. Corpening*, 116 W.Va. 31, 178 S.E. 430 (1935).’ Syllabus Point 3, *Boarman v. Boarman*, 210 W.Va. 155, 556 S.E.2d 800 (2001).” The **Strahin** Court expressly found, at **Syllabus Point 9**, that the assignment of an extra-contractual claim was permissible; specifically finding that a **Shamblin**-style claim to be assignable. At **Footnote 2 of Strahin**, the Court recognized that two prior reported cases suggested that extra-contractual insurance claims were assignable, but neither of those cases directly examined the propriety of such an assignment and held such. See **Aluise v. Nationwide Mut. Fire Ins. Co., supra.**; and **Hubbard v. State Farm Indem. Co., supra.** It would appear that **Strahin** is the first case in West Virginia to expressly hold that an extra-contractual insurance claim may be validly assigned.

As the Respondent pointed out at the Circuit Court level, the common law recognition of the assignability of an extra-contractual insurance claim by the Court in **Strahin v. Sullivan** has broader ramifications than the simple recognition of the ability to transfer that particular chose in action to another person or entity. The finding that extra-contractual insurance claims are assignable at common law renders those claims survivable upon death at both common law and pursuant to statute.

West Virginia Code § 55-7-8a provides the statutory prescription in this State for the survivability of claims upon the death of a claimant. As **West Virginia Code § 55-7-8a(a)(with emphasis added)** instructs

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.

As this Court may see, § 55-7-8a did not override the common law rules regarding survival, but expressly supplemented the common law with the identification of several causes of action that would thereafter be deemed to survive pursuant to statute. At common law, the former general rule of survival was that tort actions died with the individual. See Henning v. Farnsworth, 41 W.Va. 548, 23 S.E.2d 663 (1895). However, over the course of time, common law exceptions have been clearly carved out, as contemplated by the language of the statute.

One of those exceptions was recognized by this Court in Woodford v. McDaniels, *supra*. In Woodford, the Court acknowledged that the assignability of claims and the survival of claims went hand-in-hand. In other words, if a claim was found to be assignable, that claim must also survive the death of the claimant. As the Court in Woodford at ____, 81 S.E. at 545-546 stated

What is, and what is not, a cause of action personal in nature is frequently determined by the question whether it is or is not assignable; assignability and survivability being convertible terms. If, therefore, the party in whom it exists cannot by contract, as by assignment, place it beyond his control, it will not survive. *Selden v. Bank*, 239 Ill. 67, 87 N. E. 860, 130 Am. St. Rep. 180; *Francis v. Burnett*, 84 Ky. 23; *Lawrence v. Martin*, 22 Cal. 173; 13 Enc. Pl. & Pr. 426; *Blake v. Griswold*, 104 N. Y. 613, 11 N. E. 137; *Cardington v. Fredericks*, 46 Ohio St. 442, 21 N. E. 766; *Comegys v. Vasse*, 1 Pet. 193, 7 L. Ed. 108; 1 Cyc. 49; *Railroad Co. v. Read*, 87 Va. 189, 12 S. E. 395. The cause of action in this case is not such as may be assigned. 5 Am. & Eng. Enc. Law & Prac. 890; *Slauson v. Schwabacher*, 4 Wash. 783, 31 Pac. 329, 31 Am. St. Rep. 948; *546 *Nooman v. Orton*, 34 Wis. 259, 17 Am. Rep. 441; *O'Donnel v. Seybert*, 13 Serg. & R. (Pa.) 54. Not being assignable, it does not survive, in view of the authorities cited.

As the Court may see, the Woodford Court reasoned that the terms “assignable” and “survivable” were synonymous for, at least, legal purposes. This would appear to be a reasonable conclusion since, if a chose of action were held to be freely assignable, the transferability of the same would be substantially interfered with and/or usurped if the life-in-

being of the transferring party were the measuring stick for the continuing validity of the assigned action.

The **Woodford** decision is not an ancient anomaly within this State's jurisprudence. The **Woodford** rule was echoed years later in **Hereford v. Meek**, 132 W.Va. 373, 52 S.E.2d 740, (1949) and **State ex rel. Sabitino v. Richards**, 127 W.Va. 703, 34 S.E.2d 271 (1945). The Court in **Hereford** at 391-392, 52 S.E.2d at 749 – 750 found that:

At common law a claim for damages for personal injury, being strictly personal in character, did not survive the death of the injured person and was not assignable. 4 Am.Jur., Assignments, Section 30; Byrd v. Byrd, 122 W.Va. 115, 7 S.E.2d 507. The element of survivability is ordinarily the test of the assignability of a claim or a chose in action. State ex rel. Sabatine v. Richards, 127 W.Va. 703, 34 S.E.2d 271; Woodford v. McDaniels, 73 W.Va. 736, 81 S.E. 544, 52 L.R.A., N.S., 1215. 'In the absence of any statutory provision declaring a particular chose in action to be assignable or nonassignable, the general test of assignability is whether the chose will survive.' 4 Am.Jur., Assignments, Section 25. The rule which appears to be supported by the weight of authority is that a statute which provides for the survival of an action operates incidentally to remove the restriction against its assignability. 4 Am.Jur., Assignments, Section 31. But that rule has no application to the amendment of 1945 which, though declaring that the designated right of action shall survive, expressly provides that the statute shall not be construed to give the right to assign a claim for a tort which is not otherwise assignable. A claim for personal injury, however, can by statute be made to survive the death of the injured person and still be without the quality of assignability. 'In some jurisdictions it is held that a right of action for personal injuries is not assignable, even though such action is made survivable by statute. This result has been reached under the view that nothing is assignable, either at law or in equity, which does not directly or indirectly involve a right to property, and that the statute providing for the survival of an action for personal injuries was not intended to transform the right of action into a property right, and also under the view that the assignment of a cause of action for personal injuries is contrary to public policy.' 4 Am.Jur., Assignments, Section 31. The above mentioned provision of the fourth sentence of the section, which denies the right of assignment of a claim for a tort not otherwise assignable, does not give assignability to the tort dealt with in the other provisions of the section. Under the rule of the common law it is not assignable. Winston v. Jordan, 115 Va. 899, 80 S.E. 756. No statute of this State has come to the attention of this Court which gives it assignability or removes it from the operation of the common-law rule. Though the right of action mentioned in the third sentence of the section is not assignable, it is, by virtue of that portion of the statute, expressly given survivability; and the test of the application of the statute of limitations, in the cases now before this Court, is the survivability of the

cause of action upon which each action is based. *Watson v. Daniel*, 165 Va. 564, 183 S.E. 182; *Trust Company of Norfolk v. Fletcher*, 152 Va. 868, 148 S.E. 785, 73 A.L.R. 1111. See also *Barnes Coal Corporation v. Retail Coal Merchants Association*, 4 Cir., 128 F.2d 645.

As the Court may see, **Hereford** suggests that, while a claim that is assignable must be survivable, the same is not necessarily true in reverse. In fact, **Hereford** contemplates that statutory recognition of survivability of a claim does not ensure the assignability of those claims pursuant to **Woodford**.

The assignability-survivability dichotomy was most recently revisited in **Snodgrass v. Sisson's Mobile Home Sales, Inc.**, 161 W.Va. 588, 244 S.E.2d 321 (1978). Therein, **Snodgrass** reaffirmed the existence of the **Woodford** rule. However, the Court in **Snodgrass at 591-592, 244 S.E.2d at 323-324** reasoned, that for the purposes of statute of limitations principles, the **Woodford** rule had been modified by statute to cause the survival of additional causes of action that did not survive at common law. In other words, the "assignability test" was no longer the lone litmus test for survivability to the extent that survivability had been expanded by statute to include causes of action not previously recognized as surviving the death of a claimant. See **Id. at 325, 244 S.E.2d at 325**. Despite finding the common law rule to have been partially statutorily modified, **Snodgrass** did not find the common law doctrine of duality of these principles to be abrogated by the statute. The reason for this obvious.

The plain language of § 55-7-8a(a) expressly states that causes of action which are expressly set forth in the statute as surviving the death of a party are in addition to common law principles of survivability and do not act to their exclusion. It is important to note that § 55-7-8a(a) does not indicate that it applies to common law claims that survive at common law. Rather, the statute clearly specifies that it applies to any claims that survive at common law. It matters not that the Petitioner's claims are, in part, grounded in the *Unfair Trade Practices Act*.

There are no limitations on the types of claims that can subject to the statute if the Courts have recognized a basis for their survival. In this case, the basis is the assignability of the claims.

The duality of assignability and survival, as espoused in **Woodford** and **Hereford**, is still the law of this State as it applies to this case. Other than the unrelated modification of the rule in **Snodgrass**, undersigned counsel is unable to find anywhere in the annals of West Virginia law where the same has been fully abrogated, either by subsequent decision or legislative proscription. As such, the Circuit Court of Marshall County's April 24, 2015 Order, that the extra-contractual insurance claims of Christina Rudish survive her death, was entirely correct.

The Petitioner's major contention is that the issue of survivability of extra-contractual insurance claims has already been dealt with in **Wilt v. State Auto. Mut. Ins. Co., 203 W.Va. 165, 506 S.E.2d 608 (1998)**. **Wilt** regarded the application of the statute of limitations to claims of bad faith and did not regard a direct inquiry into the issue of survivability. Of course, because of the peculiar interplay between the limitations statute and the survival statute, the issue of survivability of bad faith claims was briefly addressed in **Wilt in dicta**. Specifically, the Court in **Wilt at 171, 506 S.E.2d at 614** reasoned that, "[g]iven its recent statutory genesis, an unfair claims settlement practices claim clearly did not survive at common law...." The **Wilt** Court did not engage in any meaningful analysis of § 55-7-8a(a) when it made this broad and sweeping suggestion. The **Wilt** Court also did not articulate this finding in a syllabus point and recognize it as a new point of law in West Virginia. In fact, this Court has never held in any syllabus point that an extra-contractual insurance claim does not survive death.

It is important to note that the **Wilt** decision came before the formal recognition of the assignability of extra-contractual insurance claims in West Virginia. As such, that issue could not have been contemplated by the authors of the opinion and there is no evidence to suggest that

this issue was raised by the litigants therein. Furthermore, the Wilt Court's reasoning is in error as it misconstrued the plain language of § 55-7-8a(a), making the same critical error as made by the Petitioner herein. The Court in Wilt at 171, 506 S.E.2d at 614, construed § 55-7-8a(a) to apply to common law claims that survived as opposed to claims that survive at common law. There is a massive and obvious distinction between these two constructions and, since Wilt, the common law has developed and found extra-contractual insurance claims to be assignable and, thus, survivable. The *dicta* in the Wilt decision will obviously have to be revisited in light of both Strahin, and Wilt's faulty interpretation of § 55-7-8a(a).

The Respondent cannot dispute that a few United States District Court and Circuit Court cases in West Virginia, as relied upon by the Petitioner, have found extra-contractual insurance claims not to survive death. However, in addition to the fact that none of those cases are binding authority on this Court, those opinions relied upon by the Petitioner are unpersuasive as they all share the same fault. Each and every one of those opinions is entirely reliant upon the *dicta* in Wilt, misinterprets it as binding authority, and ignores its obvious faulty interpretation of the scope of § 55-7-8a(a). Those cases fail to recognize that the survivability of extra-contractual insurance claims has never been reduced to a syllabus point in West Virginia, nor did those cases attempt to tackle the issue of the assignability of extra-contractual claims.

The relief sought by the Petitioner must be denied. **West Virginia Code § 55-7-8a(a)** clearly and unequivocally recognizes that certain causes of action may survive at common law. The Court has found on multiple occasions that claims that are assignable also survive at common law. Extra-contractual insurance claims have been found to be assignable at common law. As such, extra-contractual claims survive death. It matters not that a handful of non-binding cases have held the contrary. The Wilt decision that those cases relied upon is incorrect

in its interpretation of § 55-7-8a(a), and since Wilt there has developed a recognition of the assignability of extra-contractual insurance claims in the common law. As such, the Circuit Court of Marshall County's Order was not clearly erroneous, was well-reasoned and grounded in binding precedent, and recognized the flaws of the United States District Courts and Circuit Courts that have addressed the issue and held the contrary.

4. The Court's decision in *Strahin v. Sullivan* implicitly altered the dicta in *Wilt* regarding the survivability of extra-contractual insurance claims.

The Petitioner is incorrect in its assertion that Strahin v. Sullivan, 220 W.Va. 329, 647 S.E.2d 765 (2007) did not modify Wilt. Strahin did not merely recognize the assignability of Shamblin-style claims as the Petitioner argues. See Shamblin v. Nationwide Mutual Insurance Co., 183 W.Va. 585, 396 S.E.2d 766 (1990). Careful review of Strahin demonstrates that the Court therein implicitly held that bad faith claims and declaratory judgment claims were also freely assignable. At Footnote 2 of Strahin, the Court cited to the prior decisions of Aluise v. Nationwide Mutual Fire Ins. Co., 218 W.Va. 498, 625 S.E.2d 260 (2005)(assignability of bad faith claims) and Hubbard v. State Farm Indemnity Co., 213 W.Va. 542, 584 S.E.2d 176 (2003)(assignability of declaratory judgment actions) as authority for its express holding that Shamblin claims were assignable. In reliance of the same, the necessary implication is that the holding in Strahin was not to be construed as being limited only to the assignability of Shamblin claims.

Furthermore, the Circuit Court of Marshall County did not erroneously apply "antiquated case law," as the Petitioners argue based upon Snodgrass v. Sisson's Mobile Home Sales, Inc., 161 W.Va. 588, 244 S.E.2d 321 (1978). The Petitioner's interpretation of Snodgrass is grossly flawed and ignores the fact that the decision expressly supports the Circuit Court's result. Snodgrass did not profess the assignability-survivability approach to have been abandoned. The

holding of the **Snodgrass** Court was that the assignability-survivability dichotomy was no longer the litmus test for survivability, but that the doctrine of survival was expanded further by **W.Va. Code, 55-7-8a(a)** to recognize additional causes of action that were not yet recognized as surviving death pursuant to the common law.

The **Snodgrass** Court acknowledged that the **Gawthrop v. Fairmont Coal Co., 74 W.Va. 39, 81 S.E. 560 (1914)** and **State ex rel. Sabatino v. Richards, supra.** cases employed an “assignability-survivability” test to determine whether claims survived at common law. The **Snodgrass** Court when analyzing and applying **W.Va. Code, 55-7-8a(a)** expressly found that the duality of assignability and survivability was still applicable in light of that code section and employed it in its reasoning. The Court stated, “The suit here is to collect a civil penalty. As previously noted, **Gawthrop**, **Sabatino**, and the general law hold that such suit is a personal action which does not survive at common law. **However, it is not solely by these authorities that we apply the one-year statute of limitations in W.Va.Code, 55-2-12(c)**, but also because it does not fall within the categories of causes of action which survive by virtue of W.Va.Code, 55-7-8a(a).” **Snodgrass** at 596, 244 S.E.2d at 325-26 (emphasis added). By stating that **Gawthrop** and **Sabatino** were not the sole authority for determining survivability, logically the Court found that the doctrine of duality of assignability and survivability remained intact in the survivability analysis, but was supplemented by the statute.

Accordingly, the Court must turn a blind eye to the Petitioner’s efforts to spin the **Snodgrass** decision as somehow abrogating the doctrine of duality of assignability and survivability. The **Snodgrass** Court expressly applied the doctrine of duality of assignability and survivability in its analysis of whether the one-year statute of limitations applied to the claims

therein. The doctrine of duality of assignability and survivability is far from antiquated and remains alive and well in this State's jurisprudence.

5. **Judge Stone, as a temporary substitute judge for the Circuit Court of Marshall County, did not refuse to revisit the issues decided in Judge Karl's December 22, 2014 Order, but adopted the findings in the December 22, 2014 Order as his own. Regardless, Judge Stone was under no obligation to revisit those issues as the Petitioner, Nationwide Assurance Company, suggests.**

The suggestion of Petitioner, Nationwide Assurance Company, that Judge Stone refused to hear the issues in Nationwide's Motion to Dismiss Second Amended Complaint is not entirely correct. To the contrary, Judge Stone reaffirmed and adopted Judge Karl's findings in the Court's December 22, 2014 Order. While Judge Stone indicated that he was "loathe to overrule or rule in a different way" than Judge Karl, he also expressly stated during the hearing that "...Judge Karl took a position, and I'm going to take the same position. I'm choosing, basically, to deny this motion for the reasons that Judge Karl stated." Appx., p. 34, lines 21-22. As the Court may see, Judge Stone did consider the Petitioner's underlying Motion, but adopted Judge Karl's substantive findings in the December 22, 2014 Order instead. He did not avoid ruling on the Motion as Nationwide infers.

Even if Judge Stone would have refused to revisit Judge Karl's December 22, 2014 Order altogether, it would not have be an abuse of discretion for him to do so. While substitute successor judges are permitted to revisit previously-decided issues, they certainly are not required to do so. The Petitioner cites no authority instructing that substitute successor judges are mandated to revisit prior orders of the Court. As such, Judge Stone could not have abused his discretion in refusing to revisit the Order as it was solely within his discretion to rehear the issue that was decided months before.

Lastly, the Petitioner, Nationwide Assurance Company, infers that it was an abuse of discretion for Judge Stone to deny the relief it sought insofar as it asserts that he ruled in the opposite manner on the issues herein in a case in the Circuit Court of Monongalia County. The Petitioner neglects to provide a copy of the order it relies upon, which purports to be an unreported decision of a trial court. Irrespective, the Petitioner again provides no authority to suggest that the prior decisions of Circuit Courts in West Virginia are binding authority on other Circuit Courts (or even the same Judicial Circuit), or that the prior decisions of a Judge are binding on that Judge in subsequent ruling.

Judge Stone articulated his ability to change his mind on legal issues he has previously ruled upon at the hearing when he stated that

No one used the term “the law of the case,” and I don’t think that that really is too important because, listen, I had cases where after I made rulings and orders, I absolutely concluded it was dead wrong, and I don’t remember how I did it, but I got that issue back before the Court and reversed myself.

Appx. pp. 33-34.

Simply put, Circuit Judges are not bound to their prior decisions. They may reverse themselves in the same case, and take contrary positions in subsequent cases. There is no authority for the Petitioner’s inference that Judge Stone was required to reverse Judge Karl’s decision or be found to be abusing his discretion simply because he is alleged by the Petitioner to have rendered a past decision on the opposite side of the same issue. Accordingly, the Petitioner’s unsupported assertion that Judge Stone abused his discretion by refusing to reverse Judge Karl must be rejected.

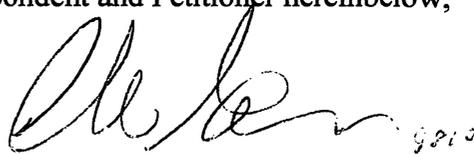
VI. CONCLUSION

The Verified Petition for Writ of Prohibition of Nationwide Assurance Company must be denied as the Petitioner is merely attempting to improperly seek interlocutory review of the

Circuit Court of Marshall County's April 24, 2015 and December 22, 2014 Orders. The Circuit Court properly reasoned in both Orders that, since those claims are assignable at common law, the same also survived at death pursuant to **W.Va. Code § 55-7-8a, Woodford v. McDaniels, 81 S.E. 544 (1914)** and its progeny. The Respondent and Plaintiff hereinbelow, Joseph C. Rudish, as the Administratrix of the Estate of Christina Rudish, may properly assert his deceased wife's extra-contractual insurance claims in the Circuit Court of Marshall County, and the Verified Petition for Writ of Prohibition should be refused accordingly.

Respectfully Submitted,
JOSEPH C. RUDISH, as Administratrix of
the Estate of Christina Rudish,
Respondent and Petitioner hereinbelow,

BY:



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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that a true and correct copy of the foregoing **RESPONSE IN OPPOSITION TO VERIFIED PETITION FOR WRIT OF PROHIBITION** was delivered by U.S. Mail, First Class Postage Pre-Paid, this 23rd day of June, 2015, to the follow counsel and parties of record, as follows:

Honorable Judge Stone
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