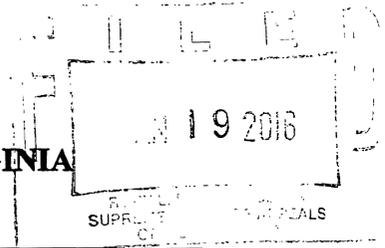


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



CASE NO.: 15-0692

**DIANE HORTON, Executrix of the
Estate of Gene Ray Dudding,**

Plaintiff Below/Petitioner,

v.

**PROFESSIONAL BUREAU OF
COLLECTIONS OF MARYLAND, INC.,**

Defendant Below/Respondents.

RESPONSE TO PETITIONERS' BRIEF

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DATE: January 19, 2016

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II. NATURE OF THE CASE

A. Factual Background

The decedent, Gene Ray Dudding failed to pay a Lowe's debt that he incurred. Appendix at 000008. Respondent Professional Bureau of Collections of Maryland, Inc. was retained to collect that indebtedness. To that end, Respondent placed calls to the decedent's residence in an attempt to collect the debt. Of import, there is no evidence in the factual record to suggest that the Respondent had any knowledge of the decedent's "terminal illness" prior to notice of the decedent's death (despite the representations contained in the Petitioner's brief). On August 20, 2013, the decedent filed a Complaint in the Circuit Court of Putnam County, West Virginia claiming that the Respondent placed telephone calls to the decedent's residential telephone number after it appeared that the decedent was represented by an attorney and the attorney's name and telephone number were known or could be reasonably ascertained. Appendix at 000001. The decedent asserted causes of action for violations of the West Virginia Consumer Credit and Protection Act, Common Law Negligence, Intentional Infliction of Emotional Distress, and Common Law Invasion of Privacy. Appendix at 000002 – 000005. The Respondent generally denied the allegations contained in the decedent's Complaint.

On August 21, 2014, the decedent's daughter, Diana Horton, testified that the decedent had passed away. Appendix at 000009. The record is clear that this is the first notice provided to the Respondent of the decedent's death. Ms. Horton testified that while the decedent was alive that he did not speak to any employee/representative of the Respondent (in direct contravention to the representations made in the Petitioner's brief). Appendix at 000009. Ms. Horton testified that she was the only person who spoke to the Respondent. Appendix at 000009. Ms. Horton testified that she did not personally incur the debt, that she could not identify where the debt

came from, and that she could not recall when she (and purportedly the decedent) retained counsel. Appendix at 000009. In fact, to date, the Petitioner has failed to provide any information/documentation supporting the allegation that the decedent, in fact, had retained counsel during the time frame at issue in this litigation. Ms. Horton testified that the Respondent did not call at unreasonable times of the day, that the Respondent did not call any other telephone number other than the decedent's residential telephone number, and that the decedent did not treat with any medical care provider for any stress, annoyance and/or inconvenience related to the alleged debt collection practices of the Respondent. Appendix at 000009. Importantly, there is no evidence in the factual record that the Respondent communicated directly with the Estate regarding any debt. Appendix at 000113.

B. Procedural Posture

The decedent, Gene Ray Dudding, filed the original Complaint on August 20, 2013. Thereafter the Respondent filed an Answer generally denying the allegations contained in the original Complaint. On March 5, 2014, the Court entered into a Scheduling Order setting the trial date for September 26, 2014. Appendix at 000112. On August 21, 2014, Diana Horton, the decedent's daughter, was deposed. It was revealed at that deposition that Mr. Dudding passed away. Appendix at 000112. It is important to note that the Petitioner failed to provide notice to the Respondent of the decedent's passing prior to that deposition date (even though Mr. Dudding had passed away over one month prior to that deposition taking place). After receiving notice of the decedent's death, on September 5, 2014, the Respondent filed a Suggestion of Death with the Court. Appendix at 000112. On that same date the Respondent filed its Motion for Summary Judgment arguing, among other things, that the claims asserted in the Complaint do not survive the death of the decedent and that the Estate, is not a "consumer" as defined under the West

Virginia Consumer Credit and Protection Act and therefore did not have standing to assert a standalone claim under the Act. Appendix at 000112. On September 6, 2014, the Petitioner filed a Suggestion of Death and filed a Motion to Substitute the Estate as the Plaintiff to assert the claims on behalf of the decedent. Thereafter, responses and replies were filed to the pending Motion for Summary Judgment. On September 12, 2014, the Circuit Court heard oral arguments on the Motion. Upon consideration of the filings and the oral arguments of counsel, the Circuit Court granted the Respondent's Motion as to all causes of action alleged in the Complaint. An Order to that effect was signed by the Court on June 16, 2015, and entered by the Clerk on June 22, 2015.

III. SUMMARY OF RESPONSE TO ASSIGNMENTS OF ERROR

The Circuit Court correctly concluded that Estate is not a "natural person" under the West Virginia Consumer Credit and Protection Act and does not have standing to assert a standalone claim on behalf of the decedent. The Circuit Court correctly concluded that West Virginia Consumer Credit and Protection Act claims do not survive the death of the consumer.

An estate is not a "natural person" for the purposes of a West Virginia Consumer and Credit and Protection Act claim. An estate is defined in a group with other artificial legal entities. Further, Ms. Horton, as a "natural person" arguably only has standing to assert West Virginia Consumer and Credit Protection Act claims on behalf of the Estate where improper debt collection practices are directed to the Estate. Finally, Ms. Horton does not have standing to assert a claim on behalf of the decedent because the personal debt was extinguished on the death of the "consumer." At the time the Motion for Summary Judgment was filed the Estate had not been substituted as party of interest and the purpose of the argument and the trial Court's finding was to forego a standalone claim from the Estate.

The West Virginia Consumer Credit and Protection Act claims do not survive the death of the decedent. The West Virginia Consumer Credit and Protection Act is both a remedial statute and a penal statute. It is clear, given the allegations contained in the Complaint, and based on the factual record, that the Petitioner is only trying to take advantage of the penalty portions of the Act. An action to collect a penalty is not assignable at common law and therefore does not survive the death of the person claiming the right. Had the Legislature intended to allow survivability of a West Virginia Consumer Credit and Protection Act claim, it would have included a provision to that effect in the statute. Further, the claims alleged in the Complaint and the type of conduct under the West Virginia Consumer Credit and Protection Act that constitutes a claim may include a variety of factual scenarios which lack the requisite elements of a fraud claim. The Court's dicta in *Wilt v. State Automobile Mutual Insurance Co.*, 203 W.Va. 165, 506 S.E.2d 608 (1998), clearly indicates that the provisions asserted in the Complaint would not survive the death of the decedent. Moreover, the Petitioner's argument that a discretionary claim for attorney's fees and costs is a property right that survives the death of the decedent is not convincing given that many causes of action where attorney's fees and costs can be asserted are not survivable under the statute.

Finally, the Petitioner's public policy argument is not persuasive. There is no evidence in the factual record that the Respondent had notice that the decedent was on "death's bed" when it attempted to collect the debt. In fact, according to Ms. Horton, the Respondent never spoke to the decedent.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Respondents state that oral argument under W. Va. Rev. R.A.P. 18(a) is not necessary. The issues on appeal are adequately briefed and the case law related to the issues on appeal is well settled.

V. ARGUMENT

A. Standard of Review.

This Court reviews an order granting a motion for summary judgment under a *de novo* standard. Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994).

B. Estate is not a “natural person” under the West Virginia Consumer Credit and Protection Act and does not have standing to assert a standalone claim on behalf of the decedent.

The provision creating a private cause of action for a consumer under the West Virginia Consumer Credit and Protection Act is found in section *W.Va. Code*, 46A-5-101(1). It provides that “if a creditor has violated the provisions of this chapter applying to collection of excess charges, ... statements of account ... illegal, fraudulent or unconscionable conduct, ... [or] any prohibited debt collection practice, ... the **consumer** has a cause of action....” (emphasis added). As that text plainly shows, a plaintiff must be a “consumer” in order to maintain a private cause of action under the West Virginia Consumer Credit and Protection Act.

The definition of “consumer” for the purpose of the West Virginia Consumer Credit and Protection Act claims asserted in this litigation is found at *W.Va. Code*, 46A-2-122(a) as follows: “consumer means any **natural person** obligated or allegedly obligated to pay any debt.” (emphasis added). A “claim” means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance or service which is

the subject of the transaction is primarily for personal, family or household purposes, whether or not such obligation has been reduced to judgment.”

There are four West Virginia Consumer Credit and Protection Act claims asserted in the Complaint including: (1) the alleged violation of *W.Va. Code*, 46A-2-125 for engaging in unreasonable or oppressive or abusive conduct towards the consumer in connection with the attempt to collect a debt by placing telephone calls to the consumer; (2) the alleged violation of *W.Va. Code*, 46A-2-125(d) for causing the consumer’s phone to ring or engaging persons, including the consumer, in telephone conversations repeatedly or continuously or at unusual times or at times known to be inconvenient, with the intent to annoy, abuse or oppress the consumer; (3) the alleged violation of *W.Va. Code*, 46A-2-128(e) for using unfair or unconscionable means to collect a debt from the consumer by communication with the consumer after it appeared that the consumer was represented by an attorney and the attorney’s name and address were known or could be easily ascertained; and (4) the alleged violation of *W.Va. Code*, 46A-2-127(a) and (c) for failing to clearly disclose the name of the business entity making a demand for money upon consumer’s indebtedness. As shown by the documents attached to the appendix, there is no factual evidence supporting any of these allegations. As shown below, for the purposes of the Appeal, the Petitioner focuses entirely on *W.Va. Code*, 46A-2-127.

An estate is not a “natural person” for the purposes for a standalone West Virginia Credit and Protection Act claim. *W.Va. Code*, 46A-1-102(29) defines an “organization” as a “corporation, governmental subdivision or agency, trust, estate, partnership, cooperative or association.” *W.Va. Code*, 46A-1-102(29). Section 102(31), in turn, defines a “person” to include “a natural person... and an organization.” *Id.* 46A-1-102(31). Thus, while the definition of a “person” as it applies to the West Virginia Consumer Credit and Protection Act is broad enough

to encompass natural persons and legal entities, those two subcategories are clearly distinct and not coterminous. Moreover, the fact that estates are defined in a group with other artificial legal entities, such as corporations, reinforces the conclusion that estates are not natural persons. *Cf. Shenandoah Sales & Serv., Inc. v. Assessor of Jefferson Cnty.*, 724 S.E.2d 733, 738 (W.Va. 2012) (“A corporation is not a natural person. It is an artificial entity created by law.”); see also *Black’s Law Dictionary* 1257 (9th ed. 2009) (defining natural person as “[a] human being”).

Much of the non-persuasive authority cited by the Petitioner to defeat the survivability argument relies on the expansive language in the Federal Debt Collection Practices Act. In *Wright v. Fin. Serv. Inc.*, 22 F.3d 647 (6th Cir. 1994), the Sixth Circuit found that the phrase “with respect to any person” includes more than just the addressee of the offending letters and indicated that had the language not been so expansive it may have decided differently. Here, the Legislative intent clearly was to limit standalone actions to natural persons.

C. The West Virginia Consumer Credit and Protection Act claims do not survive the death of the decedent.

The decedent’s personal West Virginia Consumer Credit and Protection Act claims do not survive his death. According to *W.Va. Code*, 55-7-8a(a), “... 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,... 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 West Virginia Consumer Credit and Protection Acts claims alleged in this case are personal to the consumer and do not survive the death of the consumer at common law or under the Act. Had the Legislature intended West Virginia Consumer Credit and Protection Act claims to survive the death of the consumer, a provision to that effect would have been included in the Act.

The Petitioner narrowly focuses on one section of the Act, *W.Va. Code*, 46A-2-127, to support its position that the Act falls under the “deceit or fraud” provision of *W.Va. Code*, 55-7-8a(a). To support its position, the Petitioner primarily focuses on the case of *Stanley v. Sewell Coal Co.*, 169 W.Va. 72, 285 S.E.2d 679 (1981). That case involved a statute of limitations question regarding a common law retaliatory discharge claim. In that case, the Court concluded that the underlying principle of a retaliatory discharge cause of action are sufficiently related to an action for fraud and deceit so that the two-year statute of limitations applies under *W.Va. Code*, 55-2-12, and *W.Va. Code*, 55-7-8a. While this case law may be persuasive when looking at a narrow common law cause of action such as a retaliatory discharge claim, as shown below, via a similar analysis, this Court found that a similar statute to the Act at issue in appeal was not survivable.

In *Wilt v. State Automobile Mutual Insurance Co.*, 203 W.Va. 165, 506 S.E.2d 608 (1998), decided almost 20 years after the Stanley case, the West Virginia Supreme Court stated that a claim under the West Virginia Unfair Trade Practices Act does not survive the death of the consumer. In *Wilt*, the victims of an automobile accident sued an insurer under the Unfair Trade Practices Act. This Court held that a claim under the West Virginia Unfair Trade Practices Act was governed by a one-year limitations period (using the same analysis set forth in *Stanley*).

One of the questions answered in *Wilt* was which portion of the limitations periods contained in *W.Va. Code*, 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). As in *Stanley*, *W. Va. Code*, 55-7-8a, was 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).

As stated above, *W. Va. Code*, 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. In *Wilt*, one of the arguments presented was that provisions contained in the West Virginia Unfair Trade Practices Act are sufficiently related to an action for fraud and deceit so that the tow-year statute of limitations applies under *W. Va. Code*, 55-2-12, and *W. Va. Code*, 55-7-8a.

This Court disagreed. This Court 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. The Court stated that viewing claim under the Unfair Trade practices Act as necessarily fraudulent in nature is problematic... because the type of conduct that constitutes an unfair settlement claim may include a variety of factual scenarios which lack the requisite elements of a fraud claim. The Court examined the grounds for asserting an unfair settlement claim which included misrepresentation of pertinent facts relating to coverage, failure to timely act with regard to both the investigation of claims and the settlement of such claims, and failure to implement procedures to ensure prompt investigation of claims. The Court stated that while the traditional

recognized elements of a fraud claim might exist with regard to those acts of misrepresentation or deception that constitute an unfair settlement claim, other conduct that qualifies as an unfair trade settlement practice clearly does not amount to fraud.

Like the West Virginia Unfair Trade Practices Act, the type of conduct that constitutes a violation of the West Virginia Consumer Credit and Protection Act include a variety of factual scenarios which lack the requisite elements of a fraud claim. This includes calling any person more than thirty times per week or engaging any person in telephone conversation more than ten times per week, calling at unusual times or at time known to be inconvenient, publicizing information relating to any alleged indebtedness or consumer, or contacting a consumer after it is reasonably apparent that the consumer has retained counsel. The Petitioner narrowly relies on one section of the Act to support their position that the Act is survivable. Even under that Section, there are scenarios which lack the requisite elements of fraud including a claim asserted in the Complaint... the failure to clearly disclose the name and full business address of the person to whom the claim has been assigned for collection, or to whom the claim is owed, at the time of making any demand for money. *W.Va. Code*, 46A-2-127(c). Based on the reasoning and dicta set forth in *Wilt*, and given the fact that the Legislature did not include a survivability provision in the Act and narrowly defined the consumer that can assert a claim under the Act, it is clear that claimed violations of the Act do not survive the death of the consumer.

The attorney's fees and costs arguments are without merit. No case law is cited to support this argument, and if a demand for a discretionary award of attorney's fees and costs were meant to forego enforcement of the survivability statute, many causes of action that this Court has stated are not survivable would be simply based on that principle. In fact, "[a] prevailing plaintiff in a *Jenkins* or Unfair Trade Practices [statutory] claim may recover increased costs and

expenses, including increased attorney fees, resulting from the insurance company's use of an unfair business practice in the settlement or failure to settle fairly the underlying claim." *McCormick v. Allstate Ins. Co.*, 197 W.Va. 415, 423, 475 S.E.2d 507, 515 (1996). Had an attorney's fees and costs damages claim been so dispositive to the survivability issue, this Court would not have made the rulings that it did in *Wilt*.

Finally, the Petitioner argues that the West Virginia Consumer Credit and Protection Act is remedial in nature and therefore that alone should entitle claims under the Act to survive. First, while it is true that the Court has said that the West Virginia Consumer Credit and Protection Act, as a whole, is remedial in nature (the Court has said the same thing about the West Virginia Unfair Trade Practices Act), the Court has also held that where a statute contains provisions which are both remedial and penal, such statute should be considered remedial when seeking to enforce the purpose for which it was enacted, and should be considered penal when seeking to enforce the penalty provided therein. Here, based on the factual record, it is clear that the Petitioner is attempting to collect a penalty under the Act.

Reading these statutory and case law excerpts together, two things become clear. First, there is no statutory basis to conclude a claim under the 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. This Court has held that a penalty is statutorily created and is imposed as punishment for a specific act made unlawful by the statute. *Wilson v. Shrader*, 73 W.Va. 105, 79 S.E. 1083 (1913). This Court further held that the amount authorized as a penalty ordinarily bears no relationship to the harm done. *Id.* This Court has explicitly held that that an action to collect a penalty is not assignable at common law and therefore does not

survive the death of the person claiming the right. *Gawthrop v. Fairmont Coal Co.*, 74 W.Va. 39, 81 S.E. 560 (1914).

The death of the decedent, and the suggestion of it upon the record, abated this action as to him because the claims under the West Virginia Consumer Credit and Protection Act do not survive at common law and are not listed as an action that survives under *W.Va. Code, 55-7-8a*. The decedent's claim expired when he died.

D. The trial Court's ruling is not against public policy

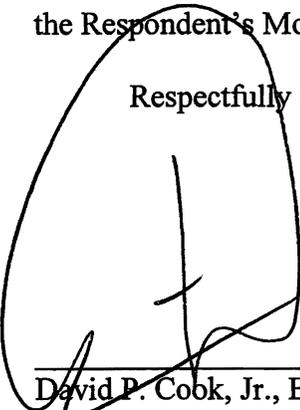
The final argument asserted in the Petitioner's brief is that finding that the claims under the Act are not survivable would somehow "eviscerate the Legislative intent" in drafting the Act. The public policy argument was not persuasive at the hearing on the Motion for Summary Judgment and equally is not persuasive in the Petitioner's brief. No case law or legislative history supporting the Petitioner's position is set forth in the brief. Had the Legislature intended such a result, *W.Va. Code, 55-7-8a* would never been enacted into law. Further, the Legislature clearly intended, via the recent amendments to the Act, to limit the enforceability of the provisions set forth therein (which flies in the face of the expansive reading that the Petitioner argues should apply). The new amendments to the Act, which are extensive, do not include a provision allowing survivability upon the death of the consumer. Had the Legislature intended such, a provision to that effect would have been included. Finally, as asserted above, there is no evidence whatsoever that the Respondent had knowledge of the decedent's medical condition prior to the deposition of Diana Horton. The argument is a red herring and holds no persuasive value to the analyses set forth herein.

CONCLUSION

Petitioners cloud the issues in their Brief. Had the Legislature intended claims under the Act to survive the death of a consumer it would not have narrowly defined a consumer as a natural person. Had the Legislature intended claims under the Act to survive the death of a consumer it would have included a provision in the statute. The claims alleged in the Complaint and the type of conduct under the West Virginia Consumer Credit and Protection Act that constitutes a claim may include a variety of factual scenarios which lack the requisite elements of a fraud claim. The Court's dicta in *Wilt v. State Automobile Mutual Insurance Co.*, 203 W.Va. 165, 506 S.E.2d 608 (1998), clearly indicates that the provisions asserted in the Complaint would not survive the death of the decedent.

For the foregoing reasons, the Respondent respectfully requests that the Court refuse the Petition for Appeal and allow the Order entered by the Circuit Court of Putnam County granting the Respondent's Motion for Summary Judgment, to stand.

Respectfully submitted this 19th day of January, 2016.



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**PROFESSIONAL BUREAU OF
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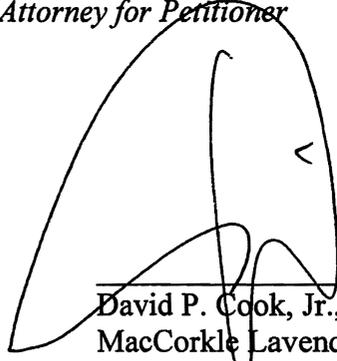
Defendant Below/Respondents.

CERTIFICATE OF SERVICE

I, David P. Cook, Jr., counsel for Respondents, Professional Bureau of Collections of Maryland, Inc., do hereby certify that on January 19, 2015, I served a true and correct copy of the foregoing **RESPONSE TO PETITIONERS' BRIEF** upon all counsel/parties of record, by depositing the same in the regular United States mail, postage prepaid, sealed in an envelope, and addressed as follows:

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A handwritten signature in black ink, appearing to read "David P. Cook, Jr.", is written over a horizontal line. The signature is stylized and somewhat illegible.

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