15-0490

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

JOSEPH C. RUDISH, as
Administrator of the Estate of
CHRISTINA RUDISH,

Plaintiff,

v.

JEREMIAH CONNOR and
NATIONWIDE ASSURANCE COMPANY,

Defendants.

Civil Action No. 03-C-10k

Judge Mark A. Karl
(Judge Stone, sitting by assignment).

2015 APR 24 11:58

ORDER DENYING MOTION TO DISMISS SECOND AMENDED COMPLAINT

On April 10, 2015, came the Defendant, Nationwide Assurance Company, by counsel, Melanie Morgan Norris, Esq., and came the Plaintiff, Joseph Rudish as the Administrator of the Estate of Christina Rudish, by counsel, Chad Groome, Esq., for a previously scheduled hearing on the Defendant's Motion to Dismiss Second Amended Complaint.

Whereupon, having considered the Motion, the briefing in support thereof and in opposition thereto and the entire record, and having further entertained the oral arguments of counsel for each party, this Court finds that the Motion was timely and properly filed by the Defendant in response to the Plaintiff's filing of a Second Amended Complaint, but that in any event the Court may exercise its discretion to revisit a previous denial of a motion to dismiss in order to ensure the proper administration of justice. *See, e.g., 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). Nonetheless, granting the pending Motion would, expressly or impliedly, reverse the prior Order entered by Judge Mark Karl, denying Defendant's prior motion. This Court is loathe to reverse prior rulings by another Judge. Accordingly, this Court **DENIES** Defendant's Motion to Dismiss Second Amended

Complaint and ADOPTS the findings of fact and conclusions of law in the Order entered December 22, 2014.

The objections of the parties are hereby noted and preserved.

The Clerk is hereby directed to send a copy of this Order to all counsel of record.

Entered: April 24, 2015

Judge Stone, sitting by assignment

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12-22-14

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

CHRISTINA RUDISH,	*	
	*	
Plaintiff,	*	
	*	CIVIL ACTION NO.: 03-C-10K
vs.	*	
	*	
JEREMIAH CONNER and	*	
NATIONWIDE ASSURANCE	*	
COMPANY,	*	
	*	
Defendants.	*	

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

On the 19th of September came the plaintiff, Christina Rudish, deceased, by and through her counsel David A. Jividen, Chad C. Groome and Jividen Law Offices, PLLC, and the defendant, Nationwide Assurance Company, by and through its counsel, Melanie M. Norris and Steptoe & Johnson, PLLC, for a hearing on defendant Nationwide Assurance Company's *Motion to Dismiss Upon Suggestion of Death*.

The Court, having reviewed the briefs of counsel, having heard the arguments of the parties, and having reviewed the relevant authorities, hereby makes the following findings of fact and conclusions of law:

Findings of Fact

1. There is pending before this Court the Complaint of plaintiff, Christina Rudish, against defendant, Nationwide Assurance Company, for third-party violations of the West Virginia Unfair Trade Practices Act and violations of the administrative regulations of the West Virginia Office of the Insurance Commissioner.

2. On July 23, 2013, the plaintiff, by counsel, suggested the death of party-plaintiff, Christina Rudish, upon the record of this matter.

3. Thereafter, the defendant, Nationwide Assurance Company, filed its *Motion to Dismiss Upon Suggestion of Death* asserting therein that the death of the plaintiff, Christina Rudish, should result in the dismissal of the instant action to there extent that it was argued that her claims of third-party violations of the Virginia Unfair Trade Practices Act and violations of the administrative regulations of the West Virginia Office of the Insurance Commissioner do no survive her death.

4. The plaintiff responded asserting that since claims for bad faith have been found to be assignable at common law, those actions must survive the death of the plaintiff. In her response, filed September 12, 2013, the plaintiff moved to amend her complaint to substitute the plaintiff for her husband or an estate in accordance with **Rule 25(a) of the West Virginia Rules of Civil Procedure**, within ninety (90) days of the suggestion of death upon the record.

Conclusions of Law

1. The validity of an assignment of claims for common law and statutory bad faith was confirmed by the West Virginia Supreme Court of Appeals in **Strahin v. Sullivan, 220 W.Va. 329, 647 S.E.2d 765 (2007).**

2. 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)."

3. The **Strahin** Court expressly found, at **Syllabus Point 9**, that the assignment of a bad faith claim was permissible, specifically finding that a **Shamblin** claim was freely assignable. At **Footnote 2** of **Strahin**, the Court recognized that two prior reported cases hinted at the assignability of a bad faith claim, but neither of those cases directly examined the propriety of such an assignment. See **Aluise v. Nationwide Mut. Fire Ins. Co., 218 W.Va. 498, 625 S.E.2d 260 (2005); Hubbard v. State Farm Indem. Co., 213 W.Va. 542, 584 S.E.2d 176 (2003)**. It would appear that **Strahin** is the first case in West Virginia to expressly hold that a bad-faith-style claim may be validly assigned.

4. **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.

5. **West Virginia Code § 55-7-8a** did not override the common law rules regarding survival, but expressly supplemented the common law with several additional categories of causes of action that would thereinafter survive.

6. The West Virginia Supreme Court of Appeals in **Woodford v. McDaniels, 81 S.E. 544 (1914)** acknowledged that the assignability of claims and the survival of claims go hand-in-hand. See **also 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). In other words, if a claim is found to be assignable, that claim must also survive the death of the claimant. As the Court in **Woodford** 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.

7. Similarly, the Court in **Hereford** at 391-392, 52 S.E.2d at 749 – 750 found:

> 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.

8. 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.

9. As such, in light of the Court's opinion in **Strahin v. Sullivan**, ***supra***, the claims of Christina Rudish should be held to survive her death to the extent that it is a long-standing principle of West Virginia law that claims that are held to be assignable at common law must also survive the death of the claimant.

10. The decisions relied upon by the defendant, Nationwide, do not dictate a contrary result. Each of those cases follows the reasoning of **Wilt v. State Auto. Mut. Ins. Co.**, **203 W.Va. 165, 506 S.E.2d 608 (1998)**, which was decided long before the Court formally recognized the assignability of bad faith claims in **Strahin**. Moreover, none of those cases, including **Wilt**, suggest that the interplay between assignability and survival were discussed by the Court or raised by the litigants therein. Accordingly, it would appear that this issue presents a matter of first impression.

11. Accordingly, in light of the aforesaid findings and conclusions, defendant Nationwide Assurance Company's *Motion to Dismiss Upon Suggestion of Death* is hereby **DENIED**.

12. The plaintiff's *Motion to Substitute Plaintiff Under Rule 25 of the West Virginia Rules of Civil Procedure* is hereby **GRANTED**, to the extent that those claims survive at common law and insofar as the *Motion* was timely filed under the Rule.

13. The plaintiff shall have ninety (90) days from the entry of this Order to file a pleading and/or amended complaint substituting the decedent for a proper party.

The Clerk shall transmit a copy of this Order to all counsel of record.

It is so **ORDERED**.

Objections and exceptions are saved.

Entered this 22ND day of December, 2014.

MARK A. KARL, JUDGE