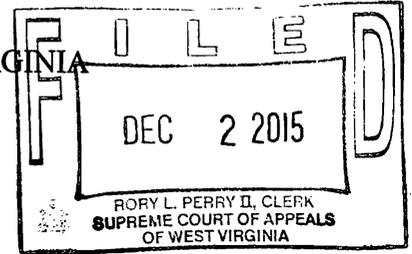


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
No. 15-0692



DIANE HORTON, Executrix of the  
Estate of Gene Ray Dudding, Plaintiff Below,

Petitioner,

vs.

PROFESSIONAL BUREAU OF COLLECTIONS  
OF MARYLAND, INC., Defendant Below,

Respondent.

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**PETITIONER'S BRIEF**

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## ASSIGNMENTS OF ERROR

- I. **Whether the Circuit Court Erred in Concluding That a Decedent's Estate Did Not Have Standing to Pursue West Virginia Consumer Credit and Protection Act Claims.**
- II. **Whether the Circuit Court Erred in Concluding That West Virginia Consumer Credit and Protection Act Claims Do Not Survive the Death of the Claimant.**

## STATEMENT OF THE CASE

The Respondent Professional Bureau of Collections of Maryland, Inc. began contacting and attempting to contact the decedent Gene Ray Dudding in attempts to collect an alleged debt. App. at 000001. Mr. Dudding was terminally ill and sought to have the Respondent to stop contacting him. App. at 000025. Toward this end, Mr. Dudding contacted and retained an attorney regarding the alleged outstanding indebtedness. App. at 000001. When the Respondent contacted the terminally-ill Mr. Dudding again, the Respondent failed to identify the real business name and address of itself. App. at 000003. Mr. Dudding informed the Respondent that he had retained an attorney regarding the alleged outstanding indebtedness, gave the Respondent his attorney's name and contact information, and asked the Respondent to no longer contact him anymore about the matter but to only contact Mr. Dudding's attorney. App. at 000002. Thereafter, the Respondent continued to contact or attempt to contact Mr. Dudding in attempts to collect the alleged debt, thereby failing to clearly disclose the Respondent's name and full business address. *Id.* All during this time, Mr. Dudding was confined to his deathbed, forced to endure the constant and continual aggravation of the telephone calls from the Respondent attempting to collect an alleged debt. App. at 000005. The Respondent did not care that Mr. Dudding was dying.

On August 20, 2013, Mr. Dudding filed a Complaint in Putnam County Circuit Court

against the Respondent citing violations of several different provisions of the West Virginia Consumer Credit and Protection Act (“WVCCPA”) including W.Va. Code§ 46A-2-125; W.Va. Code§ 46A-2-125(d); W.Va. Code§ 46A-2-128(e); and W.Va. Code§ 46A-2-127(a) and (c). App. at 000001.

On July 9, 2014, Mr. Dudding passed away. App. at 000021.

### **PROCEDURAL HISTORY**

The Complaint herein was filed on August 20, 2013. App. at 000001. On July 9, 2014, the plaintiff Mr. Dudding passed away. App. at 000021. On September 5, 2014, the Respondent moved for summary judgment based upon the arguments at issue here on appeal. App. at 000007. On September 6, 2014, the Petitioner filed a Suggestion of Death and moved to substitute the estate as the Plaintiff. App. at 000022. A hearing on the Respondent’s Motion for Summary Judgment was held on September 12, 2014. App. at 000067. The Court granted the Petitioner’s September 6, 2014 Motion to Substitute the executrix of the estate of Mr. Dudding as the plaintiff on October 14, 2014. App. at 000073. Over eight months later, on June 18, 2015, the Court granted the Respondent’s Motion for Summary Judgment and dismissed the case. App. at 000111. The Petitioner filed her Notice of Appeal on July 15, 2015. The Petitioner now hereby perfects her appeal.

### **SUMMARY OF ARGUMENT**

The WVCCPA claims raised by the Petitioner are sufficiently analogous to deceit and fraud such as to survive the death of the claimant, Mr. Dudding, pursuant to this Court’s binding precedent in *Stanley v. Sewell Coal Co.*, 169 W.Va. 72, 78, 285 S.E.2d 679, 683 (1981). In particular, the Petitioner’s claims for fraudulent, deceptive or misleading collection actions under

W.Va. Code § 46A-2-127 are sufficiently analogous to deceit and fraud to survive death.

The survival statute, W.Va. Code § 55-7-8a(a), clearly, plainly and unambiguously preserves injuries to property rights from being extinguished at death. Mr. Dudding was forced by the Respondent to incur obligations to pay his attorney fees and costs to enforce his rights under the WVCCPA, which constitutes an injury to his property rights. The WVCCPA permits Mr. Dudding, and his estate in substitution, to recover attorney fees and costs for this injury to Mr. Dudding's property rights under W.Va. Code § 46A-5-104. Accordingly, the Petitioner's claims to recover the attorney fees and costs incurred by Mr. Dudding are injuries to property rights which survive the death of Mr. Dudding.

Case law and public policy require that an estate have standing to pursue claims that survive the death of the decedent. It would both offend public policy and create an absurd result to find that a claimant's estate did not have standing to pursue claims that the Legislature and interpretive case law provides survive the death of the claimant. For all of these reasons, the Court must reverse the Circuit Court ruling and remand for further consistent proceedings.

#### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Petitioner respectfully requests the opportunity to present oral argument in this case. Petitioner believes the decisional process would be significantly aided by oral argument given the extensive factual record that demonstrates that Circuit Court erred in granting summary judgment. Petitioner further believes a Rule 20 argument and published opinion are appropriate to allow this Court to give Circuit Courts guidance on the issue of the survival of WVCCPA claims. The Petitioner notes that this issue is one of first impression with the WVCCPA.

## ARGUMENT

### I. CLAIMS ANALOGOUS TO FRAUD SURVIVE DEATH OF CLAIMANT

With respect to Plaintiff's claims, W.Va. Code § 55-7-8a(a) provides, in pertinent part, as follows:

(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.

(emphasis added). The Supreme Court of Appeals has consistently held that this statute should be given liberal construction. *Stanley v. Sewell Coal Co.*, 169 W.Va. 72, 78, 285 S.E.2d 679, 683 (1981) (“[W]e recognize that as a general rule a survival statute such as W.Va.Code, 55-7-8a, is to be liberally construed as it is remedial in nature” (citations omitted)). In *Sewell*, the Court found that a cause of action for wrongful discharge contained sufficient elements of constructive fraud that it fit within the express preservation of claims for fraud and deceit set forth in W.Va. Code § 55-7-8a(a). *See Stanley, supra*. Other courts interpreting similarly worded survival statutes have expressly concluded that consumer protection claims survive. *See People ex rel. Fahner v. Testa*, 112 Ill.App.3d 834, 68 Ill.Dec. 396, 445 N.E.2d 1249, 1253 (Ill.App.Ct.1983); *Thomes v. Porter*, 761 S.W.2d 592 (Tex.App.Fort Worth 1988); *State v. Therrien*, 161 Vt. 26, 633 A.2d 272 (1993); *Nations Credit v. Pheanis*, 102 Ohio App.3d 71, 656 N.E.2d 998 (1995); *Cuoco v. Palisades Collections, LLC*, 2014 WL 956229 (D.N.J. 2014) (“The test for survivorship hinges on whether the statutory provision is primarily penal in nature or remedial in nature. *See Bracken v. Harris & Zide, L.L.P.*, 219 F.R.D. 481, 483 (N.D.Cal.2004). Statutory provisions that are penal in nature extinguish at the party's death, whereas statutes that

are remedial in nature survive the party's death. *Acebal*, 60 Fed. Cl. at 555 ("Actions in the nature of a penalty ... abate on death. A cause of action for debt, on the other hand, survives the death of the plaintiff.")). Notably, the Court in *Breeden v. Hueser*, 273 S.W.3d 1 (Mo.App. 2008) expressly so held in the context of a consumer protection claim against a physician where the claim involved improper billing. *See also Bracken v. Harris & Zide, L.L.P.*, 219 F.R.D. 481 (N.D. Cal. 2004)(Because the FDCPA is a remedial rather than penal statute, an FDCPA action survives the death of a debt collector and the trustee of the debt collectors could be substituted as defendants); *Wright v. Fin. Serv. Inc.*, 22 F.3d 647 (6th Cir. 1994) (Executrix, deceased's daughter, stood in the shoes of the debtor, had authority to open and read letters addressed to the debtor, has standing to bring actions under the FDCPA).

In *Stanley*, the Court construed the deceit and fraud provisions of the survival statute to cover a claim for discharge of an employee in violation of public policy finding the "underlying principles of a retaliatory discharge cause of action are sufficiently related to an action for fraud and deceit" such that the claim survives death of the Plaintiff. 169 W.Va. at 77, 285 S.E.2d at 683. In this case all of the WVCCPA claims set forth Count I, paragraphs 11 through 13 of the Complaint and all claims under Article 2 of the WVCCPA are based on the same underlying principles of deceit and constructive fraud found persuasive in *Stanley*. App. at 000002-3. Indeed, these paragraphs of the Complaint specifically plead false, fraudulent, deceptive or misleading representations in violation of W.Va. Code § 46A-2-127. App. at 000003.

Defendant failed to clearly disclose the name of the business entity making a demand for money upon Plaintiff's indebtedness, which was fraudulent, deceptive and misleading under W.Va. Code § 46A-2-127(a) and (c). App. at 000003. The Defendant purposefully omits its

name in order to mislead and deceive the Plaintiff as to who is collecting the debt. This conduct falls within the penumbra of deceit or fraud as set forth in W.Va. Code § 55-7-8a(a) and accepted by *Stanley*.

Furthermore, Plaintiff's claims under Article 2 of the WVCCPA as a whole are sufficiently like deceit and fraud under *Stanley* such that those claims survive the death of the Plaintiff. Furthermore, this Court has repeatedly determined that the WVCCPA is remedial in nature. Accordingly, claims under the WVCCPA should survive the death of the consumer.

**Injuries to property survive the death of a party.** Prior to the Plaintiff's death, the Plaintiff has incurred attorney fees and costs of litigation in defending this action which constitute injuries to property. App. at 000001 and 000005. The Plaintiff is entitled to recover attorney fees and costs under the WVCCPA, W.Va. Code § 46A-5-104, for the Defendant's violations of the WVCCPA App. at 000005. Injuries to property rights, like the Plaintiff's incurring of attorney fees and costs defending against the Defendant's actions, survive death under the clear, plain and unambiguous language of the survival statute, W.Va. Code § 55-7-8a(a). Accordingly, Plaintiff's claims for recovery of attorney fees and costs survive the Plaintiff's death and the administratrix of the estate has a fiduciary obligation to pursue those property damage claims.

## **II. ESTATE HAS STANDING**

Obviously if a claim survived death of the claimant, then the estate would automatically have standing to pursue that claim. Otherwise, the survival statute would be of no force and effect if estates did not have standing to pursue the surviving claims for the deceased who had standing at the time that the claim accrued. As we know, the Court is not to interpret a statute

such that it would have no force and effect as it is presumed the Legislature did not intend to draft a statute that has no force and effect.

This Court stated, in *Zikos v. Clark*, 214 W.Va. 235, 588 S.E.2d 400 (2003):

In syllabus point one of *Bridgeman*, this Court stated that "[d]ivorce actions, and appeals therefrom, abate at the death of a party, **except as to property rights.**" The *Bridgeman* Court expressly stated that "[a]n appeal does lie, however, as to attendant property rights, if those rights survive a party's death and are enforceable in favor of, or against, a party's estate." *Id.* at 679, 391 S.E.2d at 369." The unstated reason in *Zikos* that the claim for property rights survive death is because **the survival statute, W.Va. Code 55-7-8a, specifically provides for the survival of "injuries to property, real or personal"**.

In assessing the Appellee's claim that his daughter, as administratrix of her mother's estate, does not have standing to bring this action and litigate the issue of the validity of the 1998 order, we must emphasize that, quite to the contrary, **the Appellant is obligated to initiate such action through her fiduciary duties as administratrix of Mrs. Clark's estate.** In syllabus point one of *Latimer v. Mechling*, 171 W.Va. 729, 301 S.E.2d 819 (1983), this Court explained: "The personal representative of the estate of a deceased acts in a fiduciary capacity. His duty is to manage the estate under his control to the advantage of those interested in it and to act on their behalf. In the discharge of this duty, the executor or administrator of a deceased's estate is held to the highest degree of good faith and is required to exercise the ordinary care and reasonable diligence which prudent persons ordinarily exercise, under like circumstances, in their own personal affairs."

*I'd.* at 241, 406 (emphasis added). This Court went on in Footnote 7 of *Zikos* to cite numerous other jurisdictions that have found that legal representatives of estates are obligated under law to seek recovery of property damage claims.

Lastly, the Legislature would not have created the survivability of certain types of claims if the Legislature did not also intend for the estate to have standing to pursue those claims. A

similar issue was addressed by this Court in *Nezan v. Aries Technologies, Inc.*, 226 W.Va. 631, 704 S.E.2d 631 (2010). In that case, Nezan as the administrator of the estate of a person killed in a plane crash brought a wrongful death action against the estate of the pilot, who also died in the crash, and used the state's "long arm statute" to effectuate service. The defendant estate therein moved for dismissal partially based upon failure of service. The defendant estate alleged that the "long arm statute" did not recognize service upon the estate or administrator of a deceased person and argued that the failure of the statute to explicitly permit service on the estate or administrator of a deceased person meant that such service could not be effectuated and the case must be dismissed. The Circuit Court agreed and dismissed the case and Nezan appealed. This Court stated:

There is no explicit mention of jurisdiction or service upon the administrator, administratrix, executor, executrix or other personal representative for a deceased non-resident whose action may fit within the seven detailed activities included in the long-arm statute.

*I'd.* at 631.

Further, the Court stated:

While we acknowledge our previous holdings regarding statutory interpretation to be sound, **we must refrain from creating the irrational situation** where a cause of action plainly exists but where there is no mechanism to serve the offending party. . . .

We have held that in regard to statutory construction, **this Court should not create situations where a strict interpretation would lead to an unjust, much less senseless, result.** . . .

Therefore, while acknowledging our rules of statutory construction and interpretation, we find that the circuit court was clearly wrong in its determination that the long-arm statute does not allow for the service of a non-resident's estate. We conclude and hold that **under the broad language** of West Virginia's long-arm statute, West Virginia Code § 56-3-33 authorizes service

of process upon the personal representative of a non-resident's estate.

*Id.* at 642 (emphasis added).

In this case, the Legislature clearly created a cause of action that arose in the Plaintiff and that the Plaintiff had standing to raise that claim while alive. Furthermore, where the Legislature permitted those causes of action to survive the death of the Plaintiff because they were sufficiently analogous to deceit or fraud under *Stanley* or were injury to the Plaintiff's property rights, it would be senseless, irrational and unjust to find that the Legislature did not intend an estate to have standing to pursue a cause of action that survived the death of the Plaintiff, particularly where the estate has a fiduciary obligation to do so.

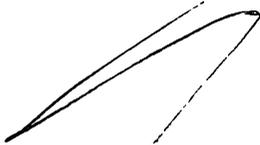
### **III. IT IS MANIFESTLY UNJUST AND AGAINST PUBLIC POLICY TO ALLOW WRONGDOERS TO ESCAPE DUE TO THE DEATH OF THEIR VICTIM**

Lastly, the WVCCPA stands as a remedial statute to provide recovery to the victims of unsavory and illegal debt collection conduct. The statutory damages, attorney fee and cost shifting provisions, and discharge of indebtedness provisions were intended by the Legislature as not only measures to make the victimized consumer whole, but to also create a disincentive to debt collectors from committing the heinous acts prohibited by the WVCCPA, and particularly Article 2. It would eviscerate the Legislative intent of creating a disincentive to debt collectors for committing prohibited acts and fly in the face of manifest justice and public policy to find that a debt collector may harass, harangue and abuse consumers who are on their death beds and then escape the consequences of those obscene acts by the death of their victims. This Court must not send such a message.

## CONCLUSION

It was apparent that the Petitioner's WVCCPA claims were sufficiently analogous to deceit and fraud to survive the death of the plaintiff, Mr. Dudding. The Petitioner's claims for the injuries to the decedent's property rights for attorney fees and costs incurred, clearly survived the decedent's death under the plain and unambiguous language of the survival statute. The remedial nature of the WVCCPA, public policy and substantial justice require that both the WVCCPA claims survive the death of the claimant and that the estate have standing to pursue those survived claims.

For the reasons stated herein, the grant of summary judgment was in error. Petitioner seeks an order from this Court vacating the grant of summary judgment and remanding this case for trial.



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**DIANE HORTON, Executrix of the  
Estate of Gene Ray Dudding, Petitioner  
By Counsel**

**BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**  
**No. 15-0692**

**DIANE HORTON, Executrix of the  
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**Petitioner,**

**v.**

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

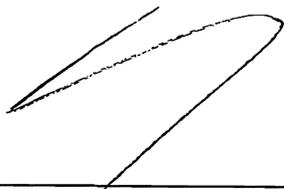
**Respondent.**

**CERTIFICATE OF SERVICE**

The undersigned does hereby certify that a true copy of the foregoing has been served upon the following known counsel of record, this day by USPS to the following addresses:

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Dated this 2nd day of December, 2015.

  
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