

IN THE SUPREME COURT OF OHIO

BRIAN TAYLOR, Exr., : Case Number 2013-0118
Plaintiff-Appellee : On Appeal from the
vs. : Summit County Court of Appeals,
Ninth Appellate District
FIRST RESOLUTION INVESTMENT :
CORP., *et al.*, : Court of Appeals
Defendants-Appellants : Case No. CA26042

**APPELLANTS, FIRST RESOLUTION INVESTMENT CORP. AND FIRST
RESOLUTION MANAGEMENT CORP.'S, MOTION TO DISMISS
COUNTS IV AND V OF APPELLEE'S FIRST AMENDED CLASS ACTION
COUNTERCLAIM**

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MOTION

Now come the Appellants, First Resolution Investment Corp. and First Resolution Management Corp. (hereinafter, collectively, “FRIC”), by and through undersigned counsel, and hereby move this Honorable Court to dismiss Count IV, claims for damages pursuant to the Ohio Consumer Sales Practices Act (hereinafter, “CSPA”), and Count V, Abuse of Process, from the Appellee’s First Amended Class Action Counterclaim (hereinafter, “First Am.Countercl.”), for the reasons set forth in the following Memorandum of Law submitted in support of this Motion.

Respectfully submitted,

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MEMORANDUM OF LAW

On or about September 25, 2015, counsel for the Appellee notified this Court and the parties that Appellee, Sandra Taylor Jarvis, had passed away. (Suggestion of Death, filed Sept. 25, 2015). Subsequently, the Appellee's personal representative, Brian Taylor, moved the Court to be substituted for the Appellee. (Motion to Substitute Party, filed Oct. 30, 2015). The Court granted substitution on or about November 13, 2015. Although the personal representative's Motion may be construed that Appellee is relinquishing all but her Fair Debt Collection Practices Act (hereinafter, "FDCPA") claims, (*see id.* at 4 ("Brian should be substituted as a party for Sandra because he's the Executor of Sandra's Estate and Sandra's *FDCPA* claims survive her death." (emphasis added))), since Appellee does not expressly withdraw the CSPA and Abuse of Process causes of action, (Def.'s First Am. Countercl., Counts IV, V), FRIC respectfully requests that the Court dismiss these claims because they abated at Appellee's death.

Abatement of Claims

At the common law, a pending action at law "abated by the death of either party, regardless of the fact that the cause of action might survive." *Chilcote v. Hoffman*, 97 Ohio St. 98, 101, 119 N.E. 364 (1918). If the claim survived, the decedent's personal representative could reinstate the case. *State ex rel. Ahrens v. City of Cleveland*, 133 Ohio St. 423, 424, 14 N.E.2d 351 (1938). Actions for injury to property rights survived; personal injury claims did not. *City of Cincinnati v. Hafer*, 49 Ohio St. 60, 65-66, 30 N.E. 197 (1892). In addition to those claims that survived under common law, the General Assembly provided that "causes of action for mesne profits, or injuries to the person or property, or for deceit or fraud, also shall survive; and such actions may be

brought notwithstanding the death of the person entitled or liable thereto.” R.C. 2305.21. “Injuries to the person” means “physical injuries.” *Witcher v. Fairlawn*, 113 Ohio App.3d 214, 217, 680 N.E.2d 713 (9th Dist.1996); *Village of Oakwood v. Makar*, 11 Ohio App.3d 46, 47, 463 N.E.2d 61 (8th Dist.1983). The statute expands the common law but supports its emphasis that “actions in which the wrongs complained of affect primarily property or property rights are survivable actions.” *Nations Credit v. Pheanis*, 102 Ohio App.3d 71, 79, 656 N.E.2d 998 (2nd Dist.1995).

Appellee’s CSPA Claim (Count IV)

Appellee pleaded a damages claim under the CSPA, R.C. 1305.01, *et seq.* (First Am.Compl., ¶ 186; *see id.*, ¶ 208). Ms. Jarvis claimed she was damaged personally because she was “compelled to spend time and money retaining counsel and appearing in and defending the lawsuit * * *” (*Id.*, ¶ 186). She did not bring a rescission claim.

Because Appellee does not advance a property injury or a physical injury, the CSPA claim abated at Ms. Jarvis’ death. *Motzer Dodge Jeep Eagle, Inc. v. Ohio Atty. Gen.*, 95 Ohio App.3d 183, 192-93, 642 N.E.2d 20 (12th Dist.1994) (“*Motzer*”) (affirming denial of restitution claim); *but see Estate of Cattano v. High Touch Homes, Inc.*, 6th Dist. Erie No. E-01-022, 2002-Ohio-2631 (“*Cattano*”) (views CSPA claim as survivable “fraud” action) and *Nations Credit v. Pheanis*, 102 Ohio App.3d 71, 79, 656 N.E.2d 998, 1003 (2nd Dist.1995) (CSPA rescission claim survives but expressed no opinion on CSPA damages claim). The Twelfth District determined a restitution claim against an auto dealership under the CSPA was not an “injury to property” that would survive the purchaser’s death. *Motzer*, 95 Ohio App.3d at 192-93. Similarly, Ms. Jarvis

sought personal damages – but not “injuries to the person” – that she ascribed to FRIC’s alleged CSPA violation.

Cattano’s holding is at odds with other appellate districts’ views that the CSPA’s “basic test is one of fairness; the act need not rise to the level of *fraud*, negligence, or breach of contract.” *Mannix v. DCB Serv., Inc.*, 2nd Dist. Montgomery No. 19910, 2004-Ohio-6672, ¶ 18 (citing *Thompson v. Jim Dixon Lincoln Mercury, Inc.*, 12th Dist. Butler No. 82-11-0109, 1983 WL 4353, *1 (Apr. 27, 1983) (emphasis added)); accord *Shumaker v. Hamilton Chevrolet, Inc.*, 184 Ohio App.3d 326, 335, 2009-Ohio-5263, 920 N.E.2d 1023, 1031, ¶ 19 (4th Dist.); *McPhillips v. United States Tennis Assn. Midwest*, 11th Dist. Lake No. 2006-L-187, 2007-Ohio-3594, ¶ 27; *Chestnut v. Progressive Cas. Ins. Co.*, 166 Ohio App.3d 299, 2006-Ohio-2080, 850 N.E.2d 751, ¶ 23 (8th Dist.); cf. *Ferron v. Dish Network, L.L.C.*, 195 Ohio App.3d 686, 693, 2011-Ohio-5235, 961 N.E.2d 705 (10th Dist.) (Rule 8 was sufficient to state CSPA claim without the particularity required by Rule 9 for fraud claims). Therefore, since the CSPA claim does not survive, Appellee has no claim to maintain; therefore, the Court should dismiss Count IV.

Appellee’s Abuse of Process Claim (Count V)

Abuse of process is a “cognizable tort[] under Ohio common law.” *Mayer v. Bristow*, 91 Ohio St.3d 3, 16, 40 N.E.2d 656 (2000). “Simply, abuse of process occurs where someone attempts to achieve through use of the court that which the court is itself powerless to order.” *Robb v. Chagrin Lagoons Yacht Club, Inc.*, 75 Ohio St.3d 264, 271, 662 N.E.2d 9 (1996). Again, Appellee seeks damages for this tort, (First Am.Compl. (Count V), ¶ 203), but the abuse of process claim abated at Ms. Jarvis’ death, *Black v. Pheils*, 6th Dist. Wood No. WD-03-045, 2004-Ohio-4270, ¶ 39 (citing *Lewis v. City of St.*

Bernard (1952), 157 Ohio St. 549, 106 N.E.2d 554). As Appellee may not prosecute a non-existent action, the Court should dismiss Count V.

Conclusion

For the reasons stated herein, Appellants, First Resolution Investment Corp. and First Resolution Management Corp., respectfully request that the Court dismiss Counts IV and V of Appellee's First Amended Class Action Counterclaim because the claims for damages under the Ohio Consumer Sales Protection Act and for Abuse of Process, abated at Ms. Jarvis' death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that a copy of the foregoing has been served upon the following by regular U.S. Mail this 13th day of November 2015:

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