

**IN THE SUPREME COURT OF OHIO**

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

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**APPELLANTS, CHEEK LAW OFFICES, LLC AND PARRI HOCKENBERRY'S  
MOTION TO DISMISS COUNTS IV AND V OF APPELLEE'S AMENDED  
CLASS ACTION COUNTERCLAIM**

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**MOTION**

Now come Appellants Cheek Law Offices, LLC and Attorney Parri Hockenberry (the “Appellants”) and move this Court to dismiss Counts IV and V of the Appellee’s cause of action for the reasons set forth in the following Memorandum of Law submitted in support of this Motion. Additionally, the Appellants incorporate the arguments in Appellants First Resolution Investment Corp. and First Resolution Management Corp.’s Motion to Dismiss filed in this case on November 13, 2015.

Respectfully submitted,

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## MEMORANDUM OF LAW

On September 25, 2015, counsel for Appellee filed a Suggestion of Death, notifying the Court and the parties to this case that Appellee, Sandra J. Taylor Jarvis had passed away. Subsequently, on October 30, 2015, counsel for appellee moved to substitute Brian Taylor, Executor of the Estate of Sandra J. Taylor Jarvis, in place of the Appellee. The court granted this Motion on November 13, 2015. The Appellee's claim under the CSPA and abuse of process claim, Counts IV and V respectively, are still before this Court, but should be dismissed. The Appellants respectfully request that this Court dismiss these claims because they abated upon Appellee's death.

### Common Law and Abatement of Claims

An action at common law would abate upon the death of either party, no matter if the cause of action would have survived. *Chilcote v. Hoffman*, 97 Ohio St. 98, 101, 119 N.E. 364 (1918). The decedent's personal representative was able to reinstate the claims if they survived. *State e. Rel. Ahrens v. City of Cleveland*, 133 Ohio St. 423, 424 14 N.E.2d 351 (1938). Traditionally, the principles of common law permitted survival of a cause of action if it was based on a property right (*See Chilcote v. Hoffman*, 97 Ohio St. 98 (1918)) but not actions involving injury to the person. (*see Cincinnati v. Hafer*, 49 Ohio St. 60, 65-66 (1892)).

The Ohio Revised Code modifies the common law, allowing for additional claims to survive, stating "[i]n addition to the causes of action which survive at common law, 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." *See* R.C. 2305.21. An "injury to the person" is

defined as an actual “physical injur[y].” See *Witcher v. Fairlawn*, 113 Ohio App.3d 214, 217 (9<sup>th</sup> Dist. 1996) quoting *Oakwood v. Makar*, 11 Ohio App.3d 46, 47 (1983); see also *Joyce v. Columbus*, 21 Ohio Law Abs. 649 (App. 1936). The *Witcher* Court found that where a “tort involves injury to the plaintiff’s personal rights” that the “cause of action does not survive.”

In anticipation of Appellee’s claim that this motion to dismiss is somehow responsive to the Motion for Substitution of Parties filed on October 30, 2015, the Appellants affirmatively state that this motion is based upon the Ohio case law relied upon herein. This case law supports the dismissal of Counts IV and V of the Appellee’s claims not because a representative of the Appellee’s estate has been substituted into this case, but because these claims abated upon the Appellee’s death, as discussed below.

#### **Count IV: CSPA Claim**

As shown above, a claim that survives the death of a party either 1) existed at common law; or 2) has since been modified by the Ohio Revised Code to survive the death of a party. A restitution claim under the CSPA is statutory in nature and did not exist at common law. See *Motzer Dodge Jeep Eagle, Inc. v. Ohio Atty Gen.*, 95 Ohio App.3d 183, 192 (1994) The *Motzer* Court additionally found that such a claim was not one for injury as defined by the survival statute. See *Id.* Because the claim was not a common law claim and simply was not an “injury to property,” the Court upheld the dismissal of this claim, as it did not survive the consumer’s death. See *Id.* at 192-93.

In *Nations Credit v. Pheanis*, 102 Ohio App.3d 71, 74 (1995), the plaintiff’s action for rescission of retail installment contract under the CSPA survived the purchaser’s death. The *Pheanis* Court reasoned that the rescission claim under the CSPA would have

survived at common law because, unlike the restitution or damages claim in *Motzer*, rescission of a contract involves property rights. *See Id.* at 80. The Court found it unimportant that the statute itself did not expressly provide for the action's survival because the action itself was within a category that would have survived at common law. *See Id.*

Finally, in *Estate of Cattano v. High Touch Homes, Inc.*, 2002 WL 1290411 (6th Dist. 2002), the court found that the CSPA claim was a “survivable” fraud claim. Notably, the *Cattano* case is not in line with other CSPA case law, in that other courts do not require a claim under the act to “rise to the level of fraud.” *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). Because that is the case, this Court should look at the remedy being sought by the Appellee in accordance with both *Motzer* and *Pheanis*.

Here, the Appellee pleaded damages under the CSPA, R.C. 1345.01, *et. seq.* (First Am.Compl., ¶ 186; *Id.* ¶ 208). Her claim is that she was damaged because she was “compelled to spend time and money retaining counsel and appearing in and defending the lawsuit.” *See* First Am. Compl., ¶157. But the Appellee noticeably does not advance a claim for any physical injuries (*see Witcher, supra*), or any property damages (*see Motzer,*

*supra*), nor does she pray for the remedy of rescission (*see Pheanis, supra*). Because this case is most analogous to the *Motzer* case, Appellee's CSPA claim did not survive her death, and this Court should dismiss Appellee's CSPA claim (Count IV).

### **Count V: Abuse of Process Claim**

Abuse of process is a recognized claim under Ohio common law (*See Mayer v. Bristow*, 91 Ohio st.3d 3, 16, 40 N.E.2d 656 (2000)) and occurs where "legal procedure has been set in motion in proper form with probable cause, and even with ultimate success, but nevertheless has been perverted to accomplish an ulterior purpose for which it was not designed." *See Yaklevich v. Kemp, Schaffer & Rowe Co., L.P.A.*, 68 Ohio St.3d 294, 297 (1994). An abuse of process claim abates upon the death of the party asserting it. *See Black v. Pheils*, 6<sup>th</sup> Dist. Wood No. WD-03-045, 2004-Ohio-4270, ¶ 39 (citing *Lewis v. City of St. 5 Bernard* (1952), 157 Ohio St. 549, 106 N.E.2d 554). Appellee's claim for abuse of process unquestionably abated upon her death, and this Court should dismiss it.

### **Conclusion**

For the reasons stated in this motion and in the Motion to Dismiss of First Resolution Investment Corp. and First Resolution Management Corp., these Appellants respectfully request that the Court dismiss Counts IV and V of Appellee's First Amended Class Action Counterclaim because the claims abated at Ms. Jarvis' death.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served  
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