

IN THE ATHENS COUNTY COURT OF COMMON PLEAS

ATHENS, OHIO

STATE OF OHIO, ex rel. : Case No. CI-86-11-655
ANTHONY J. CELEBREEZE, JR. :
ATTORNEY GENERAL OF OHIO, : Judge L. Alan Goldsberry

Plaintiff, **F I L: 0 0**
ATHENS COUNTY OHIO

v. : DECISION ON MOTIONS;
SEP 25 1991 JOURNAL ENTRY

DARREL [REDACTED]
dba COZART SANITATION
Defendant. *Margaret Ince*
CLERK OF COMMON PLEAS COURT

Darrel Cozart, the defendant in this action, died on January 10, 1991. His death was suggested on the record, January 29, 1991, by the attorney for his estate, Herman A. Carson. On February 14, 1991, Retanio Aj Rucker, Assistant Attorney General for the State of Ohio, filed a Motion To Substitute Administratrix (Florence Cozart) For The Deceased Defendant. Counsel for the estate of Darrel Cozart responded by filing an Objection To Plaintiff's Motion For Substitution, March 25, 1991. The Court will construe this filing as a Motion to Dismiss as defendant is arguing that the State's entire claim against the defendant and his estate be dismissed. The State of Ohio filed a Memorandum In Support of its own Motion, May 28, 1991.

As a preliminary matter, the Court must determine whether the cause of action alleged in the original Complaint,

filed November 24, 1986, survives the death of Darrel Cozart. Defendant argues the State has brought what amounts to a statutory nuisance claim against Darrel Cozart. Since he is dead, it is argued, the cause of action is extinguished, as nuisance actions abate upon the death of either party pursuant to R.C. 2311.21

Specifically, R.C. 2311.21 provides:

Unless otherwise provided, no action or proceeding pending in any court shall abate by the death of either or both of the parties thereto, except actions for libel, slander, malicious prosecution, for a nuisance, or against a judge of a county court for misconduct in office, which shall abate by the death of either party. (emphasis added).

The Plaintiff contends that this is not a legal nuisance claim but rather a regulatory violation of R.C. Chap. 3734. As actions that result in violations of R.C. Chap. 3734 and the rules adopted thereunder do not constitute legal nuisance cases, they, therefore, do not abate.

In State, ex rel. Brown, v. Rockside Reclamation, Inc., 47 Ohio St.2d 76 (1976), the Supreme Court of Ohio held that an act authorized by the legislature cannot be a public nuisance. Specifically, the Court held:

1. R.C. 3767.13 relates to general nuisances and is superseded by R.C. Chapter 3734, later enacted, in connection with alleged violations of nuisance laws in the operation of a solid waste disposal site licensed by the Director of Environmental Protection.

3. A public nuisance arises out of the violation of public rights or the doing of unlawful acts; and, if the legislature by a law passed within its legislative power authorizes an act to be done which, in the absence of the statute, would be a public nuisance, such act ceases to be legally a nuisance so far as the public is concerned.

State, ex rel. Brown, v. Rockside, 47 Ohio St. 2d at paragraphs one and three of the syllabus.

Further, the Court agrees with the State's suggestion that this same reasoning may be applied to the violations of Ohio's other environmental statutes, i.e. R.C. Chaps. 3704, 6109, and 6111, as they are regulatory violations of statutes meant to control the disposal of solid and hazardous wastes, as well as pollution to waters of the State. This action, then, is clearly not a nuisance action as defendant suggests.

There remains the issue of whether Florence Cozart, administratrix of the estate of Darrel Cozart, may properly be substituted as a party defendant in this matter. Both R.C. Chaps. 3734 and 6111 provide that the State may properly bring an action against any person for past, present and/or future violations of these chapters. In their definition of "person," both R.C. 3734.01(G) and 6111.01(I) cite to R.C. 1.59 which provides:

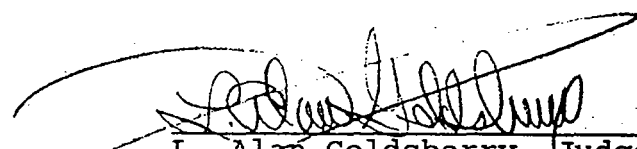
"Person" includes an individual, corporation, business trust, estate, trust, partnership and association.

Since Florence Cozart, as administratrix of the estate of Darrel Cozart, is charged with the fiduciary duty of

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administering the decedent's estate, the Court FINDS that she may properly be substituted as a party defendant in this case.

Based on the foregoing, the Court DENIES defendant's Motion to Dismiss, and ORDERS that Florence Cozart, administratrix of Darrel Cozart's estate, be substituted as a party defendant.



L. Alan Goldsberry, Judge

cc. Retanio Aj Rucker, Assistant Attorney General of the State of Ohio;
Herman A. Carson, Attorney for Florence Cozart, administratrix of the estate of Darrel Cozart