IN THE SUPREME COURT OF OHIO

ALICE PETERS, Administrator, and others,

Plaintiffs-Appellees,

against,

COLUMBUS STEEL CASTINGS CO.,

Defendant-Appellant.

Case No. 2006-0507

On Appeal from the Court of Appeals for Franklin County, Ohio, Tenth Appellate District, Case Number 05APE-03-308

BRIEF OF AMICUS CURIAE OHIO EMPLOYMENT LAWYERS ASSOCIATION URGING AFFIRMANCE

Michael J. Rourke, #0022950
Rourke & Blumenthal
493 South High Street
Suite 450
Columbus, Ohio 43215
Telephone: 614-220-9200
Fax: 614-220-7900
Attorney for Appellee Alice Peters, Administrator

Richard R. Renner, #0029381
Tate & Renner
505 N. Wooster Avenue
P.O. Box 8
Dover, Ohio 44622
330-364-9900
330-364-9901 FAX
rrenner@igc.org
Attorney for Amicus Curiae Ohio Employment Lawyers Association

Richard A. Millisor, #0062883
R. Scott Harvey, #0046910
Terry E. Lardakis, #0025649
Millisor & Nobil Co., L.P.A.
9150 South Hills Boulevard, Suite 300
Cleveland, Ohio 44147-3599
Telephone: 440-838-8800
Fax: 440-838-8800
Attorneys for Appellant Columbus Steel Castings, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

SUMMARY OF ARGUMENT 1

STATEMENT OF INTEREST 2

STATEMENT OF THE FACTS 3

ARGUMENT

I. Appellant's Proposition of Law I:

"When a personal representative asserts a wrongful death claim, and therefore, steps into the shoes of the decedent by pursuing the legal rights enjoyed by the decedent had he lived, the wrongful death claim is subject to arbitration when the decedent would have been required to submit to arbitration the same claim underlying the wrongful death claim."

II. Propositions of Law of Amicus Curiae OELA: 3

A. Statutory wrongful death claims are owned by the survivors, and not by the decedent's estate. 3

B. An arbitration agreement between a decedent and a tortfeasor is not binding on the decedent's survivors, or their statutory wrongful death claim. 9

C. Wrongful death claims are subject to arbitration only when the administrator, acting on behalf of the survivors, and the tortfeasor enter into a written arbitration agreement after the wrongful death claim arises. 14

CONCLUSION 14

SIGNATURE 15

CERTIFICATE OF SERVICE 15

TABLE OF AUTHORITIES

Constitution

U.S. Constitution, Fourteenth Amendment, Due Process Clause 5

Statutes

R.C. 2109.24 4

R.C. 2125.01 8

R.C. 2125.02 .... 4, 6, 7

R.C. 2125.02(A)(1) 1, 3, 6, 8

R.C. 2125.02(D) 6

R.C. 2125.03 6

R.C. 2505.02 8

R.C. 3937.18(A) 6

R.C. 4301.22(B) 13

9 U.S.C. § 2, Federal Arbitration Act (FAA) 9

9 U.S.C. § 4 11

Other Sources

Illinois Fair Employment Practices Act 5
Kansas Statutes, K.S.A. 5-402 11

Cases

*Air Line Pilots Ass'n v. Mille*r (1998), 523 U.S. 866, 879 9

AT & T Technologies, Inc. v. Communications Workers of Am. (1986),
475 U.S. 643, 648, 106 S.Ct. 1415, 89 L.Ed.2d 648 10

Baltimore & Ohio R.R. Co. v. United States (1923),
261 U.S. 592, 597, 67 L.Ed. 816, 43 S.Ct. 425 10

Barga v. Motorists Mut. Ins. Co. (1991),
77 Ohio App. 3d 723, 726, 603 N.E.2d 322 4

Briarcliff Nursing Home, Inc. v. Turcotte (Ala. 2004), 894 So.2d 661, 665 7

Burwell v. Maynard (1970),
21 Ohio St.2d 108, 50 O.O.2d 268, 255 N.E.2d 628 4

Cincinnati Ins. Co. v. Phillips (1989), 44 Ohio St.3d 163, 166 7

Cincinnati Indemn. Co. v. Martin (1999), 85 Ohio St.3d 604, 608 6

City of Cincinnati v. United States (Fed. Cir. 1998), 153 F.3d 1375, 1377 10

City of El Centro v. United States (Fed. Cir. 1990), 922 F.2d 816, 820 ... 10

Council of Smaller Ent. v. Gates, McDonald & Co. (1998),
80 Ohio St.3d 661, 665, 687 N.E.2d 1352 10

Davis v. Prudential Securities, Inc. (11th Cir. 1995), 59 F.3d 1186, 1193 .. 9

Equal Employment Opportunity Comm'n v. Waffle House, Inc. (2002),
534 U.S. 279, 294 9

First Options of Chicago, Inc. v. Kaplan (1995),
514 U.S. 938, 943-45, 115 S.Ct. 1920, 131 L.Ed.2d 985 11

Fleetwood Enterprises, Inc. v. Gaskamp (5th Cir. 2002),
280 F.3d 1069, 1073 11

Ft. Frye Teachers Assn., OEA/NEA v. State Emp. Relations Bd.,
102 Ohio St.3d 283, 2004-Ohio-2947 13

Gerig v. Kahn, 95 Ohio St.3d 478, 2002-Ohio-2581, 769 N.E.2d 381 ..... 10, 11, 12

Gorman v. Columbus Elec. Co. (1945), 144 Ohio St. 593, 60 N.E.2d 700 . 7

Gorman v. Columbus & Southern Ohio Elec. Co. (1945),
144 Ohio St. 593 , 597 7

Goss v. Lopez (1975), 419 U.S. 565, 573-74 5

Harmon v. Philip Morris, Inc. (Ct. App. Cuyahoga 1997),
120 Ohio App.3d 187, 697 N.E.2d 270 11

Henderson v. Lawyers Title Ins. Corp.,
108 Ohio St.3d 265, 2006-Ohio-906, ¶ 28 10

Holt v. Grange Mutual Cas. Co. (1997), 79 Ohio St.3d 401, 407 .... 5, 6

In re Estate of Bost (1983),
10 Ohio App.3d 147, 10 OBR 199, 460 N.E.2d 1156 4

In re Estate of Ross (1989), 65 Ohio App.3d 395, 400,
jurisdictional motion overruled overruled in (1990),
50 Ohio St.3d 717, 553 N.E.2d 1363 4

In re Estate of Marinelli (1994), 99 Ohio App.3d 372, 378, 650 N.E.2d 935 6

In re Estate of Steigerwald, 2004-Ohio-3834, ¶17 6

Karr v. Sixt (1946), 146 Ohio St. 527 7

Klema v. St. Elizabeth's Hospital (1960), 170 Ohio St. 519, 166 N.E.2d 765 6

Koler v. St. Joseph Hosp. (1982), 69 Ohio St.2d 477 7

Kyes v Pennsylvania Rd. Co. (1952),
158 Ohio St. 362, 49 O.O. 239, 109 N.E.2d 503 4

Logan v. Zimmerman Brush Co. (1982), 455 U.S. 422 5

Maestle v. Best Buy Co.,
100 Ohio St.3d 330, 2003-Ohio-6465, at ¶20 ("Maestle I") 9

Mahoning Valley Ry. Co. v. Van Alstine (1908),
77 Ohio St. 395, 83 N.E. 601 7

May Coal Co. v. Robinette (1929),
120 Ohio St. 110 , 116, 165 N.E. 576, 578 7

MBNA America Bank, N.A. v. Credit (April 28, 2006), No. 94,380 11

Memphis Light, Gas & Water Div. v. Craft (1978), 436 U.S. 1, 11-12 5

Morrison v. Circuit City Stores, Inc.,
317 F.3d 646, 668 (6th Cir. 2003) (*en banc*) 11

Mullane v. Central Hanover Bank & Trust Co. (1950), 339 U.S. 306 5

Penn Central Transp. Co. v. City of New York (1978), 438 U.S. 104 5

Prem v. Cox (1983), 2 Ohio St.3d 149, 150-51 7

Ramage v. Central Ohio Emergency Services, Inc. (1992),
64 Ohio St.3d 97, 106, 592 N.E.2d 828 6

Riley Manufacturing Co., Inc. v. Anchor Glass Container Corp.,
157 F.3d 775, 779 (10 th Cir. 1998) 11

Rubec v. Huffman (1978), 54 Ohio St.2d, 20, 22 4

Savoie v. Grange Mut. Ins. Co. (1993),
67 Ohio St.3d 500, 504, 620 N.E.2d 809 6

Specht v. Netscape Communications Corp. (2d Cir. 2002), 306 F.3d 17, 30 9

State Farm Auto. Ins. Co. v. Alexander (1992), 62 Ohio St.3d 397 6

Stevens v. Ackman, 91 Ohio St.3d 182, 189, 2001-Ohio-249 8

Tennant v. State Farm Mut. Ins. Co. (1991),
81 Ohio App. 3d 20, 23, 610 N.E.2d 437 4

Teramar Corp. v. Rodier Corp. (Ct. App. Cuyahoga 1987),
40 Ohio App.3d, 531 N.E.2d 721 11

Thompson v. Wing (1994), 70 Ohio St.3d 176, 637 N.E.2d 917 7

Total Med. Management, Inc. v. United States,
104 F.3d 1314, 1319 (Fed. Cir. 1997), *cert. denied*,
522 U.S. 857, 118 S.Ct. 156, 139 L.Ed.2d 101 (1997) 10

United Steelworkers of Am. v. Warrior & Gulf Navigation Co. (1960),
363 U.S. 574, 582, 80 S.Ct 1347, 4 L.Ed.2d 1409 10

*Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Universit*y (1989), 489 U.S. 468, 479 9

Walker v. Ryan's Family Steak Houses, *Inc.* (6th Cir. 2005),
400 F.3d 370, 381 11

SUMMARY OF ARGUMENT

The purpose of Ohio's wrongful death statute is to prevent Ohioans from wrongfully killing one another. Imposing civil liability on those who commit wrongful and homicidal acts, the law serves a deterrent effect. All Ohioans have a duty to be mindful of whether their acts or omissions could cause fatal injuries to others. Awareness that one may face cross-examination in front of a jury about their actions assists all Ohioans in this mindfulness.

The deterrent effect of civil liability is most important when applied to intentional acts. When people act intentionally, they are most amenable to the dissuasive effects of their liability for their actions.

Ohio's wrongful death statute serves another purpose in providing compensation to the surviving spouse, children and parents of a decedent. Ohio law presumes that such family member suffered damages by reason of the wrongful death of their loved one, and accordingly provides a wrongful death claim, "for the exclusive benefit of" the next of kin of the decedent. R.C. § 2125.02(A)(1). Accordingly, the wrongful death claim, itself, belongs to the survivors, and not to the decedent.

The deterrent effect of civil liability would be undercut if tortfeasors could believe that they had some protection against civil liability, or a way to reduce their civil liability. Any legal precedent that allows tortfeasors to believe they can prevent survivors from holding them accountable, before a jury of their peers, for the full measure of damages caused by the wrongful death, will put all Ohioans at greater risk of potentially fatal injuries.

Ohio's wrongful death statute was written in the blood of previous generations of victims, and they remain a matter of life and death. For this reason, the amicus urges this Court to affirm the opinion of the court of appeals. Arbitration can still apply to wrongful death claims, but only when the lawful representative of the survivors is persuaded that arbitration is in the best interests of the survivors who

own the claim. In particular, employees should be protected from overreaching employers who would attempt to condition employment on the employee's waiver of civil remedies, not only for the employee, but also from the employee's survivors who would seek to hold the employer liable for wrongfully causing the death of the employee.

STATEMENT OF INTEREST

The Ohio Employment Lawyers Association (OELA) is the state-wide professional membership organization in Ohio comprised of lawyers who represent employees in labor, employment and civil rights disputes. OELA is the only state-wide affiliate of the National Employment Lawyers Association (NELA) in Ohio. NELA and its 67 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been treated illegally in the workplace. OELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. OELA advocates for employee rights and workplace fairness while promoting the highest standards of professionalism and ethics.

As an organization focused on protecting the interests of workers who are subjected to unlawful discrimination OELA has an abiding interest in ensuring the integrity of our system of civil adjudication of disputes. It needs to provide remedies that fairly compensate those subjected to discrimination. Doing so can effectively deter such unlawful discrimination in the future. The aim of OELA's amicus participation is to cast light not only on the legal issues presented in a given case, but also on the practical effect and impact the decision in that case may have on access to the Courts for people who have been unlawfully treated in the workplace.

OELA has an interest in this case to assure that arbitration agreements are enforced only when they arise from genuine agreements between the parties. OELA has a particular concern about the use of

arbitration agreements, such as the one between appellant and William Peters, to reach beyond the grave to bind persons who never signed or otherwise assented to it. If appellant is successful in this case, the result will give employers a sense of protection from liability for conditions that are substantially certain to cause injury or death. This is not a sense that bodes well for the safety of all Ohioans.

STATEMENT OF THE FACTS

The amicus adopts the statement of the facts contained in the merit brief of the appellee.

ARGUMENT

Proposition of Law I:

> *"When a personal representative asserts a wrongful death claim, and therefore, steps into the shoes of the decedent by pursuing the legal rights enjoyed by the decedent had he lived, the wrongful death claim is subject to arbitration when the decedent would have been required to submit to arbitration the same claim underlying the wrongful death claim."*

Propositions of Law of Amicus Curiae OELA:

> **A statutory wrongful death claim is owned by the survivors, and not by the decedent.**
>
> **An arbitration agreement between a decedent and a tortfeasor is not binding on the decedent's survivors, or their statutory wrongful death claim.**
>
> **Wrongful death claims are subject to arbitration only when the administrator, acting on behalf of the survivors, and the tortfeasor enter into a written arbitration agreement after the wrongful death claim arises.**

A. Statutory wrongful death claims are owned by the survivors, and not by the decedent's estate.

The Ohio General Assembly established a wrongful death claim by law, and made such claims the property of a decedent's survivors. R.C. § 2125.02(A)(1) provides:

> An action for wrongful death shall be brought * * * for the exclusive benefit of the surviving spouse, the children, and the parents of the decedent, all of whom are rebuttably presumed to have suffered damages by reason of the wrongful death, and for the exclusive benefit of the other next of kin of the decedent.

The right to sue for wrongful death in Ohio is a creature of statute. *Rubec v. Huffman* (1978), 54 Ohio St.2d, 20, 22. The deterrent effect of a wrongful death claim is best served by requiring the tortfeasor to answer to the survivors, rather than to the decedent. The public policies of deterrence of tortfeasors, and compensation for survivors, are both served by providing living human faces on the plaintiff's side of the table when the jurors hear the arguments and evidence of the wrongful death.

Recovery under the statute is, thus, for the exclusive benefit of a decedent's surviving spouse, the children, and other next of kin. That is, wrongful death actions are not intended to compensate a decedent's estate. See *Tennant v. State Farm Mut. Ins. Co.* (1991), 81 Ohio App. 3d 20, 23, 610 N.E.2d 437. It is settled that the representative who brings the wrongful death action is a nominal party, unless he or she is also a beneficiary, and that the beneficiaries are the real parties in interest. *Kyes v Pennsylvania Rd. Co*. (1952), 158 Ohio St. 362, 49 O.O. 239, 109 N.E.2d 503; *Burwell v. Maynard* (1970), 21 Ohio St.2d 108, 50 O.O.2d 268, 255 N.E.2d 628. The representative acts as a trustee managing the wrongful death claim for the benefit of the survivors. *In re Estate of Ross* (1989), 65 Ohio App.3d 395, 400, jurisdictional motion overruled overruled in (1990), 50 Ohio St.3d 717, 553 N.E.2d 1363. The representative is still bound by his or her general fiduciary duties, and the beneficiaries can always initiate a proceeding in the probate court under R.C. 2109.24 to remove the representative if his or her conduct is not in the best interests of the beneficiaries. Compare *In re Estate of Bost* (1983), 10 Ohio App.3d 147, 10 OBR 199, 460 N.E.2d 1156. As R.C. 2125.02(A)(1) makes the statutory beneficiaries the real parties in interest in a wrongful death claim; a decedent's estate has no claim to wrongful death benefits. See *Burwell v. Maynard* (1970), 21 Ohio St. 2d 108, 110, 255 N.E.2d 628; *Barga v. Motorists Mut. Ins. Co.* (1991), 77 Ohio App. 3d 723, 726, 603 N.E.2d 322. The survivors are the owners of the claim.

It should be sufficient that the General Assembly has placed ownership of the statutory wrongful death claim with the survivors. Property is determined by state law. *Mullane v. Central Hanover Bank & Trust Co*. (1950), 339 U.S. 306 (a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause); *Logan v. Zimmerman Brush Co*. (1982), 455 U.S. 422 (claim created by Illinois Fair Employment Practices Act is a property right protected by Due Process). The hallmark of property, the United States Supreme Court has emphasized, is an individual entitlement grounded in state law, which cannot be removed except "for cause." *Memphis Light, Gas & Water Div. v. Craft* (1978), 436 U.S. 1, 11-12. Once state law establishes a property interest, it cannot be taken from the lawful owner except by due process of law. *Goss v. Lopez* (1975), 419 U.S. 565, 573-74. A cause of action created by state law can be viewed as a bundle of rights. *Penn Central Transp. Co. v. City of New York* (1978), 438 U.S. 104.

The merit brief of appellant, pp. 6 and 16, has focused on one sentence of dicta from *Holt v. Grange Mutual Cas. Co*. (1997), 79 Ohio St.3d 401, 407 ("The personal representative is, conceptually, stepping into the shoes of the insured decedent"). This one sentence from *Holt* was not intended to establish law, but rather to help readers visualize the majority's opinion on the contract question. In *Holt*, this Court was interpreting a contract of insurance. In particular, the question was whether the survivors would be "insureds" for purposes of insurance benefits. The Court was interpreting the intention of the contracting parties about who was an "insured." The Court's holding in *Holt* was never intended to affect the survivors' rights with respect to the tortfeasor, but only with respect to the decedent's insurance. The one sentence from *Holt* quoted by the appellant's merit brief makes clear that it was intended as explanatory, and not as an rule of adjudicatory law. It is a metaphor. This sentence specifically states that it is provided, "***conceptually***," and thus is not meant to be the outcome of the

case. This sentence is clearly dicta and not controlling law in the courts of Ohio. It flows from the liberality of recent Ohio Supreme Court decisions about UM coverage. See, *e.g*., *State Farm Auto. Ins. Co. v. Alexander* (1992), 62 Ohio St.3d 397; *Cincinnati Indemn. Co. v. Martin* (1999), 85 Ohio St.3d 604, 608 ("The *Holt* decision was premised on the unique interplay between former R.C. 3937.18(A) and R.C. 2125.01 *et seq*."). This is especially true in cases of wrongful death. See *Savoie v. Grange Mut. Ins. Co*. (1993), 67 Ohio St.3d 500, 504, 620 N.E.2d 809 (referring to "elevated status of wrongful death claims in Ohio" and stating that "General Assembly and this court have expressed the view that damages for wrongful death claims should not be limited").

Nevertheless, as the appellant's merit brief tries so valiantly to analogize wrongful death to survivorship claims, it is helpful to review all the ways in which a wrongful death claim is different from survivorship claims. First, the statute places ownership with the survivors, and not the decedent's estate. R.C. 2125.02(A)(1). They are presumed to have suffered damages from the wrongful death. R.C. 2125.02; *Ramage v. Central Ohio Emergency Services, Inc.* (1992), 64 Ohio St.3d 97, 106, 592 N.E.2d 828. Second, the proceeds of a statutory wrongful death claim go to the survivors, and not to the creditors of the decedent, nor to the heirs named in a decedent's will. The decedent has no control over who receives the proceeds of a statutory wrongful death claim. The distribution is determined by a probate court on principles of equity and fairness. R.C. 2125.03; *In re Estate of Marinelli* (1994), 99 Ohio App.3d 372, 378, 650 N.E.2d 935; *In re Estate of Steigerwald*, 2004-Ohio-3834, ¶17. Third, the statute of limitations for a statutory wrongful death claim runs from the date of death, and not from the date of the injury to the decedent. R.C. 2125.02(D); *Klema v. St. Elizabeth's Hospital* (1960), 170 Ohio St. 519, 166 N.E.2d 765. This distinction is most significant in cases where the decedent suffers a long period between the original injury and the date of death. Even if the decedent decides not

to pursue a claim for damages arising during his or her lifetime, the survivors may still choose to pursue the claim for wrongful death. Fourth, a decedent cannot waive or release a wrongful death claim since such a claim does not exist until the moment of the decedent's death. *Gorman v. Columbus Elec. Co.* (1945), 144 Ohio St. 593, 60 N.E.2d 700.

It is well-established that an action for wrongful death is distinct from a survivorship action. *Thompson v. Wing*[1] (1994), 70 Ohio St.3d 176, 637 N.E.2d 917; *Cincinnati Ins. Co. v. Phillips* (1989), 44 Ohio St.3d 163, 166; *May Coal Co. v. Robinette* (1929), 120 Ohio St. 110 , 116, 165 N.E. 576, 578. Although the tortious act may create a cause of action by the injured, it also is the basis for a wrongful death action by the personal representative acting on behalf of the survivors. An action by an administrator to recover damages for the wrongful death of the decedent and an action instituted by the decedent in his lifetime to recover damages for his injuries are "maintained under separate and independent rights * * *." *Gorman v. Columbus & Southern Ohio Elec. Co*. (1945), 144 Ohio St. 593 , 597. Wrongful death is a new cause of action distinct and apart from the right of action which the injured person may have had. *Karr v. Sixt* (1946), 146 Ohio St. 527, paragraph one of the syllabus; *Koler v. St. Joseph Hosp*. (1982), 69 Ohio St.2d 477. R.C. 2125.02 creates a right for those who suffer loss from the decedent's wrongful death. Therefore, the action has its derivation from the tortious act and not from the person of the deceased. *Prem v. Cox* (1983), 2 Ohio St.3d 149, 150-51.

---

[1] In *Thompson*, at 182, this Court noted that Ohio established the minority view on this issue long ago. It pointed to *Mahoning Valley Ry. Co. v. Van Alstine* (1908), 77 Ohio St. 395, 83 N.E. 601, paragraph two of the syllabus. The minority status of Ohio's holding on this issue explains why other states would bind the heirs to the decedent's arbitration agreements when Ohio will not. The holdings in *Briarcliff Nursing Home, Inc. v. Turcotte* (Ala. 2004), 894 So.2d 661, 665, and other cases cited on pages 18-21 and 27 of appellant's merit brief are inconsistent with the survivor's ownership of the claim, and accordingly do not apply in Ohio. Our sister states have looked at the liability claims from the tortfeasor's point of view, and given them the benefit of their compulsory arbitration agreements. The Ohio wrongful death statute, however, is written for the benefit of the survivors. They are the owners of the claim.

The flaw in appellant's argument is revealed on page 17 of its merit brief. There, the brief claims that Alice Peters is bound to the Dispute Resolution Plan (DRP) "as the personal representative of the estate of William Peters ***." Alice Peters, in this action, does not represent the interests of her late husband's estate, but rather the interests of his survivors. R.C. § 2125.02(A)(1). Neither Alice Peters nor those survivors are parties to the DRP.

The merit brief of the appellant focuses, on page 6, on the conditional language of the statute creating the cause of action:

> When the death of a person is caused by a wrongful act, neglect or default which would have entitled *the party injured to maintain an action and recover damages if death had not ensued*, the person who would have been liable *if death had not ensued* * * * shall be liable to an action for damages * * *.
>
> R.C. § 2125.01 (emphasis as added by the merit brief of appellant).

The merit brief of the appellant attempts to downplay the phrase "if death had not ensued" by suggesting that the death itself is not an important consideration.[2] The suggestion that the death is a mere trifle

---

[2] Accordingly, appellant's reliance at pp. 13-14 of its merit brief on *Stevens v. Ackman*, 91 Ohio St.3d 182, 189, 2001-Ohio-249, is misplaced. In *Stevens*, this Court acknowledged the statutory provision for the right of the personal representative to bring an action that the deceased would have, "*if he had survived*." The *Stevens* Court was not saying that wrongful death claims are survivorship claims. The *Stevens* Court did not address the question of whether wrongful death claims are derivative or separate claims. *Stevens* only addressed the question of whether denial of a motion for summary judgment in a wrongful death action could be appealed on an interlocutory basis. The *Stevens* Court decided this issue based on the common law recognition of the claim for wrongful death, and did not need to address its statutory nature under Ohio law. The paragraph immediately before the one quoted by appellant's merit brief (at p. 14) began as follows:

> Although we have focused on the consideration that the true underlying action in this case was recognized at common law, there is another aspect of R.C. 2505.02 and Polikoff that indicates that the trial court order in this case was not entered in a special proceeding.

The language quoted by appellant was unnecessary to this Court's holding in *Stevens*, and was, therefore, dicta. It helped the reader to visualize the Court's explanation of its holding, but it was not part of the holding of that decision. The appellant's merit brief emphasized the word "*substitutes.*" The emphasis was added by appellant, and was not in the original *Stevens* opinion. The implications of the quote would be different if appellant chose to emphasize the word "seemed" instead.

misses the whole point of the statutory wrongful death claim. This argument shows why an exculpatory holding would be so dangerous to Ohioans. Our state places a value on the life of every person in our State by requiring tortfeasors to recognize the full measure of consequences that flow from any wrongful death. No life is a trifle, and the decedent's death does make a difference.

B. An arbitration agreement between a decedent and a tortfeasor is not binding on the decedent's survivors, or their statutory wrongful death claim.

Arbitration is predicated upon the consent of the parties. 9 U.S.C. § 2. By grounding arbitration in the consent of the parties, the Federal Arbitration Act[3] (FAA) ensures that "[a]rbitration under the Act is a matter of consent, not coercion." *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Universit*y (1989), 489 U.S. 468, 479; *Davis v. Prudential Securities, Inc*. (11th Cir. 1995), 59 F.3d 1186, 1193. As the Second Circuit said, "Arbitration agreements are no exception to the requirement of manifestation of assent. This principle of knowing consent applies with particular force to provisions for arbitration." *Specht v. Netscape Communications Corp*. (2d Cir. 2002), 306 F.3d 17, 30 (finding on-line software merchant's arbitration clause unenforceable because consumers did not see it and could not give their assent to it). See also, *Air Line Pilots Ass'n v. Miller* (1998), 523 U.S. 866, 879 ("a party can never be compelled to relinquish her right of access to court"); *Equal Employment Opportunity Comm'n v. Waffle House, Inc.* (2002), 534 U.S. 279, 294 ("[W]e do not override the clear intent of the parties *** simply because the policy favoring arbitration is implicated.").

While the law may encourage parties to settle their contractual disputes expeditiously through arbitration, it remains a basic principle that "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers of Am. v. Warrior & Gulf*

---

[3] The FAA is similar to the Ohio arbitration statutes. *Maestle v. Best Buy Co.*, 100 Ohio St.3d 330, 2003-Ohio-6465, at ¶20 ("Maestle I").

Navigation Co. (1960), 363 U.S. 574, 582, 80 S.Ct 1347, 4 L.Ed.2d 1409. See, also, *AT & T Technologies, Inc. v. Communications Workers of Am.* (1986), 475 U.S. 643, 648, 106 S.Ct. 1415, 89 L.Ed.2d 648; *Henderson v. Lawyers Title Ins. Corp.*, 108 Ohio St.3d 265, 2006-Ohio-906, ¶ 28; *Gerig v. Kahn*, 95 Ohio St.3d 478, 2002-Ohio-2581, 769 N.E.2d 381, ¶ 14; *Council of Smaller Ent. v. Gates, McDonald & Co*. (1998), 80 Ohio St.3d 661, 665, 687 N.E.2d 1352.

An agreement to arbitration cannot be found merely because the proffered agreement does not waive any substantive rights. (Reference page 24 of appellant's merit brief.) The proponent must produce evidence that the opposing party actually assented to the agreement. A valid express contract requires "a mutual intent to contract including offer, acceptance, and consideration ***." *Total Med. Management, Inc. v. United States* (Fed. Cir. 1997), 104 F.3d 1314, 1319, *cert. denied*, 522 U.S. 857, 118 S.Ct. 156, 139 L.Ed.2d 101. Even without an express contract, there may still be an implied-in-fact contract if there is a meeting of the minds which can be inferred from parties' conduct showing, in light of the surrounding circumstances, a tacit understanding between them. *City of Cincinnati v. United States* (Fed. Cir. 1998), 153 F.3d 1375, 1377 (citing *Baltimore & Ohio R.R. Co. v. United States* (1923), 261 U.S. 592, 597, 67 L.Ed. 816, 43 S.Ct. 425). "Like an express contract, an implied-in-fact contract requires '(1) mutuality of intent to contract; (2) consideration; and, (3) lack of ambiguity in offer and acceptance.' " Id. (quoting *City of El Centro v. United States* (Fed. Cir. 1990), 922 F.2d 816, 820). An express offer and acceptance are not necessary, but the parties' conduct must indicate mutual assent. Id.

The laws of arbitration apply only after a court determines that parties have formed an agreement to arbitrate under state law principles governing contract formation.[4] *First Options of Chicago, Inc. v.*

---

[4] The issue of whether an agreement to arbitrate exists cannot be decided by the arbitrator unless there is "clear and unmistakable evidence" of the parties' intent to submit the question of arbitrability to

Kaplan (1995), 514 U.S. 938, 943-45, 115 S.Ct. 1920, 131 L.Ed.2d 985; *Fleetwood Enterprises, Inc. v. Gaskamp* (5th Cir. 2002), 280 F.3d 1069, 1073 ("[T]his federal policy favoring arbitration does not apply to the determination of whether there is a valid agreement to arbitrate between the parties; instead '[o]rdinary contract principles determine who is bound.'") (citation omitted); *Riley Manufacturing Co., Inc. v. Anchor Glass Container Corp.* (10 th Cir. 1998), 157 F.3d 775, 779 ("[W]hen the dispute is whether there is a valid and enforceable arbitration agreement in the first place, the presumption of arbitrability falls away.") See also *Walker v. Ryan's Family Steak Houses*, *Inc.* (6th Cir. 2005), 400 F.3d 370, 381 (noting that the Sixth Circuit in *Morrison v. Circuit City Stores, Inc.* (6th Cir. 2003), 317 F.3d 646, 668 (*en banc*), "clearly adopted the knowing and voluntary standard for agreements to arbitrate in lieu of litigation," and applying the standard to deny enforcement). In *MBNA America Bank, N.A. v. Credit* (April 28, 2006), No. 94,380,[5] the Supreme Court of Kansas held that, "An agreement to arbitrate bestows such jurisdiction. When the existence of the agreement is challenged, the issue must be settled by a court before the arbitrator may proceed. See 9 U.S.C. § 4; K.S.A. 5-402."

On page 24, appellant's merit brief, in footnote 6, gives an incomplete explanation of this Court's holding in *Gerig v. Kahn*, 95 Ohio St.3d 478, 2002-Ohio-2581, 769 N.E.2d 381. In *Gerig*, this Court held that "a signatory to a contract may enforce an arbitration provision against a nonsignatory seeking a declaration of the signatories' rights and obligations under the contract." Id. at ¶ 19. The

---

arbitration. *First Options of Chicago, Inc. v. Kaplan* (1995), 514 U.S. 938, 943-45, 115 S.Ct. 1920, 131 L.Ed.2d 985. If a party never agreed to arbitration, the claim for enforcement of an award must fail. *Teramar Corp. v. Rodier Corp*. (Ct. App. Cuyahoga 1987), 40 Ohio App.3d, 531 N.E.2d 721 (signatory to a personal guaranty not bound by a related document containing an arbitration clause, but not her signature); *Harmon v. Philip Morris, Inc*. (Ct. App. Cuyahoga 1997), 120 Ohio App.3d 187, 697 N.E.2d 270 (acknowledging receipt of a document containing an arbitration clause does not establish agreement to arbitrate).

[5] http://www.kscourts.org/kscases/supct/2006/20060428/94380.htm

enforcement of an arbitration agreement under *Gerig* flows not merely from "equitable principles," as claimed by appellant, but from how the rights to be enforced derived from a contract that required arbitration to resolve disputes about its effects. The holding in *Gerig* flows from the derivative nature of the rights to be enforced. It has no application to wrongful death claims since such claims are separate and independent, not derivative.

There is no dispute that Alice Peters never entered into any agreement for arbitration. William Peters, while subjected to the requirement that he sign the arbitral agreement as a condition of employment, could bind himself to arbitration.[6] He could even bind his heirs and assigns to arbitrate their derivative rights in his claims. He could never bind Alice Peters to arbitrate her claims. Appellant's merit brief, p. 16, claims that, "[b]ecause the 'beneficiaries' are not parties to the wrongful death action, there is technically no need for them to be 'parties' to the DRP." Appellant's merit brief overlooks that there is a need for Alice Peters to be a party to any arbitration agreement before such agreement can be enforced against her.

Appellant's merit brief, page 11, attempts to confuse this issue by arguing that Alice Peters would have been in "privity" to William Peters for collateral estoppel purposes.[7] Being in "privity" with another person, however, is not the same as giving assent for consideration as is required to form a contract. Collateral estoppel is not a doctrine of contract law. It is a rule of judicial economy that saves our court system from retrying issues that were previously resolved. Accordingly, we accept that once an issue is tried to judgment, it binds the parties, and those who were not parties, but were sufficiently

---

[6] The DRP Acknowledgment of Receipt and Agreement to be Bound between the parties covers "any legal claims or disputes I may have against the Company regarding my employment or the termination of my employment." R. 31, Supp. 2-3. The words "wrongful death claims" do not appear in the DRP.

[7] There is no claim that William Peters tried, or even commenced, an injury claim against appellant. Accordingly, collateral estoppel cannot apply to Alice Peters.

aligned with a party so that they would expect to rely on the other to advance their interests in the original adjudication. Consent to the prior adjudication is immaterial as collateral estoppel is applied for the court's benefit of avoiding a repetition of litigation. It is technically incorrect to say that the decedent would be representing the interests of the survivors. It is more accurate to say that our legal system, for purposes of avoiding duplication, will bind all the wrongful death parties to the judgment of a decedent's injury claim, trusting that decedent was sufficiently motivated to prosecute the claim. Application of collateral estoppel to a wrongful death claim has nothing to do with the wholly independent nature of wrongful death claims. Independent parties are subjected to, and benefit from, collateral estoppel in numerous other instances that do not bind parties to the contract entered by others. In *Ft. Frye Teachers Assn., OEA/NEA v. State Emp. Relations Bd.*, 102 Ohio St.3d 283, 2004-Ohio-2947, this Court held that SERB was bound by collateral estoppel to accept the outcome of a federal court determination that a teacher's non-renewal was motivated, in part, by animus against the teacher's union organizing. The union benefited from the civil rights action prosecuted by the teacher. Consent is still required to bind any party to an arbitral agreement. Being in privity with a person for collateral estoppel purposes is not the same as consenting to the contracts of another.

Similarly, cases arising under R.C. 4301.22(B) (Ohio's Dram Shop Act) have no application here. If the defendant committed no wrongful act in providing liquor to a customer who voluntarily wants to become intoxicated, then there is no wrongful death claim against that defendant. This conclusion has nothing to do with binding survivors to the contracts of the decedent. It is only about the merits of whether there is a wrongful act from which any liability could flow.

C. Wrongful death claims are subject to arbitration only when the administrator, acting on behalf of the survivors, and the tortfeasor enter into a written arbitration agreement after the wrongful death claim arises.

For arbitration to gain acceptance as an alternative to civil litigation, it needs to show the public that it can provide faster final awards that are fair enough to justify agreement to the process. Arbitration will not gain acceptance if consumers feel that such procedures are forced upon them without agreement, or by coerced agreement.

Appellant can arbitrate the instant wrongful death claim only when it persuades Alice Peters that arbitration is an adequate, yet faster, process, and the best process for adjudication of her claim.[8] So far, arbitration has been nothing but a hurdle for Alice Peters, one that has delayed consideration of the merits on account of appellant's hope for a lesser award. The cause of arbitration would be well served by a marketing strategy that remembers its roots in the consent of all parties.

CONCLUSION

It is fundamentally unfair to subject Alice Peters to an arbitration agreement she never assented to, for which she received no consideration, and over which she had no opportunity to negotiate or decline. The Ohio Employment Lawyers Association (OELA) urges this Court to affirm the judgment and opinion of the court of appeals.

---

[8] The merit brief of appellant, pp. 26-27, bemoans the difficulty of obtaining the signatures of every conceivable heir and survivor on an arbitration agreement that covers wrongful death claims. However, it cites not one case requiring the consent of anyone other than the personal representative who is empowered to prosecute the wrongful death claim for the benefit of the survivors.

Respectfully submitted by:

Attorneys for Amici Curiae OELA

____

Richard R. Renner, #0029381
Tate & Renner
505 N. Wooster Avenue
PO Box 8
Dover, Ohio 44622
Phone: 330-364-9900
Fax No. 330-364-9901
rrenner@igc.org

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing Brief of Amicus Curiae Ohio Employment Lawyers Association Urging Affirmance was served by regular U.S. mail, postage pre-paid, on the following persons at the following addresses on this ________ day of September, 2006:

Richard A. Millisor, R. Scott Harvey, Terry E. Lardakis
Millisor & Nobil Co., L.P.A.
9150 South Hills Boulevard, Suite 300
Cleveland, Ohio 44147-3599

Michael J. Rourke
Rourke & Blumenthal
493 South High Street, Suite 450
Columbus, Ohio 43215

____

Richard R. Renner, #0029381

PETERAMI.SAM