

IN THE SUPREME COURT OF OHIO

ALICE PETERS, Administrator, etc.)	
)	Case No. 06-507
Appellee,)	
)	
-vs.-)	On Appeal from the Franklin County
)	Court of Appeals
COLUMBUS STEEL CASTINGS CO.)	Tenth Appellate District
)	
Appellant.)	Court of Appeals
)	Case No. 05APE-03-308

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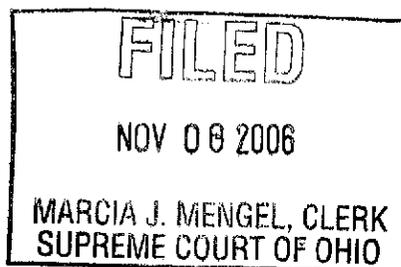


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I. INTRODUCTION.

Appellee would prefer if the Ohio Arbitration Act is “only tangentially” related to this appeal. And that this case is about taking away a “property right,” or the right of Appellee to assert her wrongful death claim. Neither is true. Nor is it true, as Appellee asserts, that *Mahoning Valley Ry Co. v. Van Alstine* (1908), 77 Ohio St. 395, 83 N.E. 601 addresses or resolves the issue before this Court.

This appeal asks this Court to address an issue undecided in Ohio: the interplay between Ohio’s wrongful death and arbitration statutes. Aware that this Court’s decisions addressing the interplay between Ohio’s wrongful death statutes and other Ohio statutes is not helpful to her position in this appeal, it is not surprising that Appellee, Alice Peters (“Peters”) seeks to limit this Court’s analysis to her so-called “*Mahoning* rule.” In so doing, Appellee obscures the nature of both wrongful death claims and arbitration in Ohio determinative of the issue in this appeal. As the Court recognized in *Thompson v. Wing* (1994), 70 Ohio St. 3d 176, 637 N.E.2d 917 by adopting the *Restatement of the Law 2d, Judgments* (1982) §46, the issue is not whether wrongful death claims are independent or derivative in Ohio. As this Court has repeatedly recognized, wrongful death claims are independent for purposes of preserving beneficiaries’ right to pursue a claim for damages, but are also expressly conditioned on the decedent’s liability theory against the tortfeasor. The flaw in Appellee’s argument relating to the interplay between R.C. §2125.01 *et seq.* and R.C. §2711.01 *et seq.* – and her sole reliance on *Mahoning* – is unveiled by an examination of her analogies.

According to Appellee, compelling arbitration of the wrongful death claims would be “equivalent to – and just as wrong as – asserting that a bank, merely because it is both the executor of a father’s estate and the trustee of a daughter’s account, must disburse the daughter’s

account proceeds according to the father's directions." (Appellee's Merit Brief, pp. 1-2). Appellee's analogy overstates the nature of wrongful death claims in Ohio. The father's estate and the daughter's bank account have no nexus and are wholly independent. In contrast, both the wrongful death claim held by the statutory beneficiaries and the injury claim held by the decedent (or the survivorship claim held by his estate) are contingent on the validity of the legal theory of liability possessed by the decedent. R.C. §2125.01, *et seq.* Because of this "close alignment of interests" between the decedent and the statutory beneficiaries, the Court in *Thompson* could bar the beneficiaries from re-litigating issues already litigated by the decedent before his death:

We believe the beneficiaries' relationship with the decedent is close enough to conclude that the beneficiaries are in *privity* with the decedent.

* * *

Because the beneficiaries are in *privity* with the decedent, they are *collaterally estopped* from relitigating issues that were decided in the decedent's own action.

Thompson, 70 Ohio St. 3d at 184 (emphasis added) (See also *Syllabus* ¶2). Appellee asserts that the Court's adoption of the *Restatement of the Law 2d, Judgments* (1982) §46 relating to *collateral estoppel* does not otherwise impact the "*Mahoning* rule" for purposes of "bar[ring]" a wrongful death claim under the doctrine of *res judicata*. (Merit Brief of Appellee, pp. 17-18). What Appellee does not – and cannot – explain is why the Court's reasoning in *Thompson* with respect to the application of *res judicata* is any more germane to the issue in this appeal than its reasoning relating to the application of *collateral estoppel*. Contrary to Appellee's refrain, analyzing the "independence" of wrongful death claims for the reasons announced in *Mahoning* and its progeny is neither applicable nor helpful when analyzing the interplay between R.C.

2125.01, *et seq.* and R.C. 2711.01, *et seq.* Arbitration does not limit the personal representative's right to assert an "independent" wrongful death claim to recover damages at issue in *Mahoning*.

Ignoring the nature of arbitration, Appellee asserts that compelling arbitration of a wrongful death claim based on the decedent's promise to arbitrate is tantamount to seeking to collect tolls based on the quitclaim of the decedent's interest in the Brooklyn Bridge, when the title is held by a different real party in interest (the statutory beneficiaries). (Merit Brief of Appellee, p. 2). CSC is not seeking to take or otherwise limit Appellee's right to recover damages – or collect tolls – based on her wrongful death claim. It is merely seeking to compel Appellee to pursue those damages in a forum favored by Ohio public policy and chosen by the decedent and CSC to resolve all disputes, including any "intentional tort" claim, arising in the workplace at CSC.

Appellee's analogies are not only legally flawed, they are inconsistent. While Appellee argues that arbitration is "only tangentially" involved in this appeal, she seeks to distinguish this Court's decision relating to the interplay between Ohio's wrongful death and uninsured motorist statutes, *Holt v. Grange Mut. Cas. Co.* (1997), 79 Ohio St.3d 401, 683 NE 2d 1080, on the basis that it was driven by the purpose Ohio's "insurance law." (Appellee's Merit Brief, p. 15). Recognizing the "special nature" of a wrongful death claim in Ohio and the purpose of the uninsured motorist statute, this Court could hold in *Holt* that the statutory beneficiaries are parties, by operation of Ohio law, to an uninsured motorist contract even though they were not named as insureds in the contract:

Due to the special nature of a wrongful death claim, the concept of [contractual] *privity* is inapplicable. It is sufficient that the *decedent* was in *privity* with the underinsurance carrier for coverage to be available.

Holt v. Grange Mut. Cas. Co. (1997), 79 Ohio St. 3d 401, 410, 683 N.E.2d 1080, 1087 (emphasis added) (*Syllabus 1*: “When a personal representative of a decedent brings a wrongful death action seeking to recover damages on behalf of the beneficiaries, the personal representative pursues the recovery the decedent is no longer capable of pursuing.”). Just as the resolution of the issue in *Holt* required an analysis of the nature of both wrongful death claims and Ohio’s uninsured motorist law, a resolution of the interplay between R.C. 2125.01, *et. seq.* and R.C. 2711.01, *et. seq.* requires this Court to address the nature of both wrongful death claims and arbitration in Ohio.

Peters’ wrongful death claim is expressly contingent on the existence of a workplace intentional tort by CSC against William Peters. Arbitration does not adversely affect or compromise the right of the personal representative, Alice Peters, to obtain damages on behalf of the statutory beneficiaries’ for the alleged wrongful death of Mr. Peters stemming from the workplace intentional tort by CSC. To the contrary, arbitration provides a forum favored as a matter of public policy for the pursuit of legal claims and remedies in Ohio. Accordingly, enforcing Mr. Peters’ and CSC’s voluntary agreement to submit all claims – including intentional tort claims – arising in the workplace at CSC to arbitration does not offend the “independence” of wrongful death claims and is entirely consistent with their unique nature as repeatedly recognized by this Court. The personal representative of the decedent who steps into one of the decedent’s shoes in asserting his intentional tort theory against CSC on behalf of his statutory beneficiaries should, therefore, be compelled to step into his other shoe in which he agreed to arbitrate all claims arising out of the workplace at CSC.

II. ARGUMENT.

Proposition of Law No. 1:

When a personal representative asserts a wrongful death claim, and, therefore, steps into the shoes of a 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.

A. Appellee Expands *Mahoning* And Its Progeny Beyond Its Holding Material To This Appeal.

At issue in *Mahoning* was whether a wrongful death claim is “independent” insofar as a prior lawsuit for injuries to the decedent prosecuted to judgment as a survivorship claim by the administrator for his estate does not bar – or operate as *res judicata* with respect to – a later filed wrongful death claim prosecuted on behalf of the statutory beneficiaries. The Court recognized that the decedent’s claim (the survivorship claim held by the estate prosecuted to judgment in *Mahoning*) seeks only to recover *damages* for injuries to the decedent sustained before his death while the wrongful death claim seeks separate and distinct *damages* to the statutory beneficiaries because of the decedent’s death. *Mahoning*, 77 Ohio St. at 414. In *Mahoning*, however, the Court still recognized the underlying connection and overlap between the survivorship and wrongful death claims in the decision’s seminal passage quoted by Appellee:

It is manifest from the foregoing that the revived action [for the injuries to the decedent during his lifetime] and the later action [the damage to the beneficiaries because of his death] are not the same. They rest primarily upon the *same alleged negligence* of the defendant and the *same absence of contributory negligence* of the injured person, but in the revived action the *damages* are for personal injuries to the injured person for which an action would lie if death had not ensued, and such damages to enure when recovered to the benefit of the estate, while in the later action the suit is prosecuted in the interest of other parties and the measure of *damages* is the pecuniary loss they have sustained by the death.

Id. at 414, 83 N.E. at 607 [emphasis added].

Appellee cites to a long list of cases that have relied on her “*Mahoning* rule” as if they are dispositive of this appeal. As these string-cited cases evidence, however, Appellee’s “*Mahoning* rule” has not remotely been applied in a context providing any illumination to the issue in this appeal. Instead, these cases merely reiterate the holding in *Mahoning* that an action for injuries to the decedent does not “bar” a later filed wrongful death claim seeking damages for the statutory beneficiaries. See *May Coal Co. v. Robinette* (1929), 120 Ohio St. 110, 114-15, 165 N.E. 576, 577-78 (merely holding the decedent’s survival action does not “bar” a wrongful death action for damages to the statutory beneficiaries under the doctrine of *res judicata*); *Industrial Commission of Ohio v. Davis* (1933), 126 Ohio St. 593, 595 186 N.E. 505, 505-506 (merely holding decision by industrial commission relating to injuries during decedent’s life inadmissible in later industrial commission action for compensation due to employee’s death); *Maguire, v. Cincinnati Traction Co.* (Ohio Cir. Ct. 1911), 12 Ohio C.C. (N.S.) 431, 23 Ohio C.D. 24, *judgment affirmed without opinion in* 87 Ohio St. 512, 102 N.E.1121 (merely recognizing that release of claims by decedent during his life for damages growing out of injury does not “bar” independent wrongful death claim for damages to the statutory beneficiaries); *Jones v. Multi-Color Corp.* (1995), 108 Ohio App. 3d 388, 396, 670 N.E.2d 1051, 1057 (merely recognizing “recreational waiver” signed by decedent cannot operate as a complete “bar” to workers’ compensation death benefits); *DeHart v. Ohio Fuel Gas Co.* (1948), 84 Ohio App. 62 at Syllabus ¶3, 85 N.E. 2d 586 (merely recognizing that a judgment denying recovery for personal injury

does not “bar” a wrongful death claim for damages to the statutory beneficiaries).¹

This Court’s most recent application of *Mahoning* in *Thompson v. Wing*, (1994), 70 Ohio St. 3d 176, 637 NE 2d 917, however, warrants some scrutiny. The Court in *Thompson* departed from the broad construction of the “*Mahoning* rule” urged here by Appellee, recognizing the convergence – or “close alignment of interests” – of the decedent’s claim for injuries during his life (or the survivorship claim held by his estate) and wrongful death claims require the application of *collateral estoppel*. *Id.* at 84 (recognizing “the decedent has every incentive to vigorously pursue personal injury....”). Appellee’s effort to dismiss this reasoning misses the point. Appellee asserts that the Court’s adoption of the *Restatement of the Law 2d, Judgments* (1982) §46 relating to *collateral estoppel* does not otherwise impact the “*Mahoning* rule” for purposes of “bar[ring]” a wrongful death claim under the doctrine of *res judicata*. (Merit Brief of Appellee, pp. 17-18). But, why is the Court’s reasoning in *Thompson* with respect to the *res judicata* any more germane to the issue in this appeal than its reasoning relating to *collateral estoppel*? In the words of the *Restatement of the Law 2d, Judgments* §46(c), “[t]he question is how independent the [wrongful death] claim should be” – in this case relating to the enforcement of a decedent’s agreement to pursue the intentional tort premising Peters’ wrongful death claim

¹ The remaining string-cited cases by Appellee do not even involve the application of Appellee’s “*Mahoning* rule.” See *Rubeck v. Huffman* (1978), 54 Ohio St. 2d 20, 374 N.E.2d 411 (merely holding that punitive damages are unavailable under the clear language of Ohio’s wrongful death statute); *Seeley v. Expert, Inc.* (1971), 26 Ohio St. 2d 61, 269 N.E. 2d 121 (not even addressing a wrongful death claim, but merely addressing the “savings” clause for claims asserted by living plaintiff); *Wellston Iron Furnace Co. v. Rinehart* (1923), 108 Ohio St. 117, 119-120, 140 N.E. 623, (merely addressing the availability of a wrongful death claim to claims for negligent operation of a motor vehicle under Section 6308 of the Ohio General Code); *Cleveland Electric Ry Co. v. Hayes* (1908), 78 Ohio St. 431, 85 N.E. 1123 (unspecified on appeal, case affirmed on authority of *Mahoning*); *Koler v. St. Joseph Hospital* (1982), 69 Ohio St. 2d 477, 479, 432 N.E.2d 821, 823 (merely giving meaning to amendment to the wrongful death statute providing a two year statute of limitations for wrongful death claims); *Moss v. Hirzel Canning Co.* (1955), 100 Ohio App. 509, 137 N.E.2d 440 (merely holding funeral expenses not available under applicable wrongful death statute).

in a forum that poses *no threat* to any “independent” right to recover all available wrongful death damages for the statutory beneficiaries of William Peters.

As will be seen, Appellee’s “*Mahoning* rule” does not address – or answer – this question as it relates to the interplay between R.C. 2125.01 et. seq. and R.C. 2711.01, et. seq.²

B. Appellee Ignores And Misstates Authority Determinative Of The Interplay Between Ohio’s Arbitration And Wrongful Death Statutes.

1. This Court’s analysis of the “interplay” between Ohio’s wrongful death statute and other Ohio statutes explicate the relevant nature of a wrongful death claim.

Appellee and her *Amici* would like this Court to believe that *Holt v. Grange Mut. Cas. Co.* (1997), 79 Ohio St. 3d 401, 683 N.E. 2d 1080 is an outlier that limits its reach to Ohio’s then developing insurance law. Appellee is correct that in reaching its decision relating to the interplay of wrongful death and uninsured motorist statutes, the Court considered the effect of its decision on insurance law. In addressing this effect, the Court struggled with insurance contracts and, specifically, whether statutory beneficiaries could be named parties to the contracts, as a matter of law, when they were not in “contractual privity” with the insurance provider. As the

²Appellee also attempts to make some weight by examining inapplicable amendments to the wrongful death statute since the Supreme Court’s decision in *Mahoning* – as if the legislature’s failure to change a decision inapplicable to this appeal is determinative. Notably, only one of the nine (9) amendments described by Appellee is remotely relevant to the issue in this appeal: The 1955 amendment to the wrongful death statute. By allowing the “joinder” of the wrongful death and survivorship claims in one action, the 1955 amendment precluded inconsistent verdicts, recognizing that both claims are premised on the same theory of liability held by the decedent before his death. See Ronald L. Willis, *Wrongful Death and Personal Injuries – Joinder of Causes of Action and Counterclaims*, 16 Ohio St. L.J. 501, 507 (1955). Here, if the decisions of the trial court and court of appeals are allowed to stand, Mr. Peters’ estate’s survivorship claim will be subject to arbitration, but not the personal representative’s claim for wrongful death on behalf of the statutory beneficiaries – a result that will either lead to inconsistent judgments or the application of *collateral estoppel* based on which action (the common pleas or arbitration action) is decided first. Avoiding such inconsistent results or judicial inefficiency is another reason to compel the personal representative who pursues Mr. Peters’ intentional tort theory against CSC on behalf of his statutory beneficiaries to comply with his agreement to submit any claims arising out of the workplace at CSC to arbitration.

dissent recognized, in holding that the statutory beneficiaries' were covered parties, by operation of law, to the insurance contract, the Court expressly overruled contrary dicta in *Wood v. Shepard* (1998), 38 Ohio St. 3d 86, 526 N.E.2d 189 and created a new precedent in Ohio. *Holt*, 79 Ohio St. 3d at 412 (Cook, J., joined by Mover and Lundberg Stratton, JJ., dissenting). In so doing, the Court also went beyond insurance law, relying on the unique nature of a wrongful death claim:

Appellant cites the following passage from *Wood v. Shepard* (1988), 38 Ohio St. 3d 86, 91, 526 N.E.2d 1089, 1093, in support of its contention that only those wrongful death claimants in contractual *privity* with an underinsurance provider can be considered to be covered by the underinsurance policy:

“It is contended that the wrongful death statute, and specifically R.C. 2125.02, could be used, under today’s decision, to permit recovery by persons who are not in any way contractually in *privity* with an underinsured carrier. This, of course, is not the case. Only an *insured* under the underinsured motorist provision can recover under the policy for injury or wrongful death.” (Emphasis *sic*)

Initially, this observation made in *Wood* was dictum. It was undisputed in *Wood* that all claimants were “insureds” under the policy, just as the claimant in *Reeck* came within the definition of an “insured” in that policy. Moreover, when the nature of a wrongful death claim is considered in the proper context, it becomes obvious that the wrongful death claimants seek recovery due to their status as statutory beneficiaries of an “insured” – the decedent. Thus, there is no need for the claimants to be in *privity* with the underinsurance carrier. Due to the special nature of a wrongful death claim, the concept of *privity* is inapplicable. It is sufficient that the *decedent* [emphasis in original] was in *privity* with the underinsurance carrier for coverage to be available. The *Wood* observation certainly was not meant to give underinsurance providers *carte blanche* to define an “insured” without due respect for the principles underlying former (and current) R.C. 3937.18 and Chapter 2125.

Holt, 79 Ohio St. 3d at 410 [emphasis added].

Just as the Court considered the purpose of insurance law and the nature of wrongful death claims in addressing the interplay between Ohio’s uninsured motorist and wrongful death statutes in *Holt*, this Court should consider the purpose of arbitration and the nature of wrongful death claims in addressing the interplay between Ohio’s arbitration and wrongful death statutes.

Appellee and her *Amici* may not embrace the well-settled public policy in Ohio favoring pre-dispute arbitration agreements. She cannot, however, dispute that refusing to compel arbitration based on a decedent's agreement will, in practice, devastate arbitration of wrongful death claims in Ohio based on pre-dispute agreements, even though arbitration does not remotely affect the "independent" right of the personal representative to pursue damages for the wrongful death of the decedent on behalf of his statutory beneficiaries.

Appellee's attempt to dismiss the Court's treatment of the interplay between Ohio's wrongful death and intermediate appeal statute is equally unavailing. Attempting to narrow the focus of this appeal to her "*Mahoning* rule," Appellee takes CSC to task by asserting that in its discussion of *Stevens v. Ackman* (2001), 91 Ohio St. 3d 182, 743 N.E.2d 901, 906, CSC disputes that wrongful death claims are "independent." (Merit Brief of Appellee, p. 19). CSC has not – and does not – dispute that wrongful death claims are "independent" insofar as this Court explained in *Mahoning*, *Robinette* and *Thompson*. In addressing the interplay with the intermediate appeal statute, as well as Ohio's uninsured motorist statute and the doctrine of *collateral estoppel*, however, this Court has repeatedly recognized the limits to that "independence." Appellee understandably desires to limit the reach of the Court's reasoning in *Stevens*. In excluding wrongful death claims from the "special proceeding" subset of cases involving proceedings "specially created by statute" in which intermediate appeals of summary judgments are permitted under R.C. 2505.02(B)(2), this Court, however, expressed without ambiguity the unique history and nature of wrongful death claims in Ohio:

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. Both R.C. 2505.02(A)(2) and *Polikoff's* syllabus paragraph require that a special proceeding be one "specially created by statute."

In *Thompson v. Wing* (1994), 70 Ohio St. 3d 176, 181, 637 N.E.2d 917, 921, a majority of this court, by quoting *Griffiths v. Earl of Dudley* (1892), 9 Q.B. Div. 357, 363, seemed to accept, at least by implication, that R.C. Chapter 2125 does not “give any new cause of action, but only substitutes the right of the representative to sue in the place of the right which the deceased himself would have had if he had survived.” See *Thompson*, 70 Ohio St. 3d at 186, 637 N.E.2d at 925 (Douglas, J., concurring in judgment)

Stevens, 91 Ohio St. 3d at 189.

It is the fundamental nature of a wrongful death claim reiterated in *Stevens* – that the statutory beneficiaries (or the personal representative suing on their behalf) step into the decedent’s shoes to pursue the legal theory he “would have if he had survived” – that is fatal to Appellee’s position in this appeal. Appellee cannot dispute that to prevail on her wrongful death claim she must establish that CSC is liable for a workplace intentional tort against the decedent, William Peters. Inasmuch as Mr. Peters freely and voluntarily agreed that all claims arising in the workplace at CSC should be submitted to arbitration, Appellee – in stepping into his shoes to pursue his intentional tort theory against CSC – should also be compelled to comply with his agreement to arbitrate the same legal claim against CSC when, as here, the arbitration agreement expressly *protects* Peters’ “independent” right to pursue her wrongful death claim for damages against CSC.

2. States outside of Ohio compel arbitration of wrongful death claims even though they recognize such claims as “independent.”

All three of the state supreme courts that have considered the applicability of a decedent’s pre-dispute arbitration agreement to wrongful death claims recognize that the decedent’s agreement is binding upon the wrongful death claims pursued on behalf of the decedent’s statutory beneficiaries. See *Briarcliff Nursing Home, Inc. v. Turcotte* (Ala. 2004), 894 So.2d 661, 665; *Allen v. Pacheco* (Colo. 2003), 71 P.3d 375, 379; *Cleveland v. Mann* (Aug. 31, 2006), Miss. Sup. Ct. No. 2005-CA-00924-SCT, 2006 Miss. LEXIS 467. Two of these cases, *Briarcliff*

and *Allen*, involved states that, like Ohio, consider wrongful death claims to be “independent” causes of action consistent with the purpose of Appellee’s “*Mahoning* rule.” *Briarcliff*, 894 So.2d at 669 (Johnstone, J., dissenting); *Allen*, 71 P.3d at 379.

Appellee wrongly asserts that *Briarcliff* “did not involve an independent [wrongful death] claim.” (Appellee Brief, p. 21). The *Briarcliff* dissent correctly stated the law of Alabama that “the Wrongful Death Statute creates a new cause of action, not a derivative one or one based upon the right of succession to the decedent.” 894 So.2d at 669 (Johnstone, J., dissenting)[emphasis added] (Relying upon *Breed v. Atlanta, B. & C. R.R.*, 4 So.2d 315, 317 (Ala. 1941), in which the Alabama Supreme Court held that “[t]he right of action which the [wrongful death] statute gives is a new right, not derivative nor the right of succession to the person slain.”). The *Breed* court recognized wrongful death claims are “independent” for purposes of whether the administrator of a decedent’s estate could sue for wrongful death damages when the decedent had been sentenced to life imprisonment and was, therefore, deprived of all civil rights including the right to seek redress for civil injury resulting from the railroad’s negligence. *Breed*, 4 So. 2d at 316. Unquestionably aware of this authority in Alabama, the majority in *Briarcliff* chose not to be limited by inapplicable independent/derivative categories developed for other purposes. Instead, the majority correctly analyzed the nature of a wrongful death claim, where the personal representative “stands in the shoes of the decedent” in pursuing his theory of liability against a tortfeasor to recover separate wrongful death damages for his beneficiaries, in addressing the enforceability of the decedent’s

pre-dispute arbitration agreement that does not bar wrongful death damages to his beneficiaries. (See discussion in Appellant's Merit Brief, p. 17).³

In *Allen*, the Supreme Court of Colorado expressly held that "independent" wrongful death claims are governed by the decedent's pre-dispute arbitration agreement. *Allen*, 71 P.3d at 379. Observing that wrongful death claims in Colorado are "separate and distinct" from the claim the decedent could have brought had he survived, the Court still enforced the decedent's broad arbitration agreement that covered the wrongful death claim. *Id.* at 379. Notably, Appellee neither addresses nor attempts to distinguish *Allen*.

In *Cleveland*, the Supreme Court of Mississippi also found that the wrongful death claim was bound by the decedent's arbitration agreement. 2006 Miss. LEXIS 467 at *22-27. Appellee relies upon the dissent's argument that a wrongful death claim is an independent cause of action and, therefore, it should not be subject to the arbitration agreement. (Appellee's Brief, p. 20). Like the Alabama Supreme Court, the majority, however, chose not to apply the dissent's "independent" category developed for purposes unrelated to the application of the decedent's pre-dispute arbitration agreement to the wrongful death claim. Accordingly, contrary to Appellee's assertion, the *Cleveland* case holds only that a wrongful death claim is bound by a decedent's pre-dispute arbitration agreement under a wrongful death statute virtually identical to

³ Appellee also attempts to distinguish *Briarcliff* on the basis that the wrongful death claims in that case were brought by an administratrix and an executor of the estates. (Appellee Brief, p. 21). This is a distinction without a meaning in Alabama. The Alabama wrongful death statute requires that a wrongful death cause of action must be brought by a representative of the decedent's estate. *Waters v. Hipp* (Ala 1992), 600 So. 2d 981, 982 ("A 'personal representative' for the purpose of § 6-5-410 [Alabama's wrongful death statute], is an executor or an administrator."). Thus, the fact that the wrongful death claims in *Briarcliff* were brought by an administratrix and an executor of the decedents' estates did not alter the nature of wrongful death claims in Alabama.

Ohio – and in a state, like Ohio, that recognizes wrongful death claims are “independent” for purposes unrelated to the interplay between the wrongful death and arbitration statutes.

The Indiana Court of Appeals, in *Sanford v. Castleton Health Care Center, LLC* (Ind. App. 2004), 813 N.E.2d 411, 420, also supports CSC’s position. In *Sanford*, the court held that the beneficiaries’ wrongful death claim *is* subject to a pre-dispute arbitration agreement entered into by the decedent, even though Indiana also recognizes that wrongful death claims are otherwise “independent” for the same purpose as Ohio. See *Holmes v. AC and S, Inc.* (Ind. App. 1999), 709 N.E.2d 36, 39 (“Because the wrongful death claim is designed to compensate for the loss to the survivors caused by the decedent’s death, and not the underlying injury, the survivor’s claim is *independent* and *not derivative*: ‘the action derives from the tortious act and not from the person of the deceased.’” (emphasis added)(quoting *In re Estate of Pickens* (1920), 255 Ind. 119, 263 N.E.2d 151, 156).⁴

Accordingly, all three of the state supreme courts to address the issue – Alabama, Colorado, and Mississippi⁵ – and the Indiana Court of Appeals, have compelled arbitration of wrongful death claims based on the decedent’s pre-dispute arbitration agreement. Moreover,

⁴ Appellee relies on a few state courts of appeals – Texas, Missouri, and California – that have not applied a decedent’s arbitration agreement where wrongful death claims are considered “independent.” See *In re Kepka* (Tex. App. 2005), 178 S.W.3d 279, 294-95; *Finney v. Nat’l Healthcare Corp.* (Mo. App. 2006), 193 S.W.3d 393, 397; *Goliger v. AMS Properties, Inc.* (Cal. App. 2004), 123 Cal. App. 4th 374, 377, 19 Cal. Rptr. 3d 819. These states, however, did not analyze the limits of the “independence” of wrongful death claims, as this Court has done in *Thompson v. Wing* (1994), 70 Ohio St.3d 176, 184, *Holt v. Grange Mut. Cas. Co.* (1997), 79 Ohio St.3d 401, and *Stevens v. Ackman* (2001), 91 Ohio St. 3d 182, 743 N.E.2d 901, 906.

⁵ See also *Global Travel Marketing, Inc. v. Shea* (Fla. 2005) 908 So.2d 392 (Supreme Court of Florida enforcing pre-dispute arbitration agreement signed by the decedent’s mother as to a wrongful death claim asserted by the decedent’s father.).

three of these decisions – *Briarcliff*, *Allen*, and *Sanford* – were rendered in states that recognize that wrongful death claims are “independent” for similar purposes as Ohio.⁶

3. Appellee’s “property rights” are not “taken” by compelling arbitration: pre-dispute arbitration agreements covering claims “not yet in existence” are expressly endorsed by Ohio public policy.

As much as Appellee’s “*Mahoning* rule” obscures the material nature of wrongful death claims in Ohio, Appellee’s “property rights” mantra misstates the nature of arbitration in Ohio. Compelling Appellee to comply with Mr. Peters’ agreement to arbitrate his intentional tort theory against CSC does not abrogate – or otherwise limit – Appellee’s right to pursue her “independent” wrongful death claim or recover the full panoply of damages and remedies that would otherwise be available to Appellee in the Franklin County Court of Common Pleas. (*See* cases cited and discussed at pp. 23-26 of Merit Brief of Appellant. *See also* R.31, Ex. B., DRP, pp. 7, 22, 25; Suppl. To the Briefs, Supp 8, Supp 15 and Supp 17). Nonetheless, Appellee and her *Amici* argue that because a decedent cannot “release” the right of the personal representative to assert a wrongful death claim following his death, the decedent should also be precluded from binding the statutory beneficiaries to a pre-dispute arbitration agreement. (Merit Brief of Appellee, pp. 19-20; Brief of Amicus Ohio Employment Lawyers Association, pp. 12; Brief of Amicus Ohio Trial Lawyers Association, pp. 4). This assertion misstates the nature of arbitration. Unlike the complete “bar” or “release” of claims, Ohio and federal courts recognize that arbitration does not operate as a waiver of any substantive rights. (*See* Cases cited and discussed at pp. 24-26 of Merit Brief of Appellant). *See also Cross v. Carnes* (Trumbull Cty.

⁶ Neither Appellee nor her *Amici* address *Parsley v. Terminix* (Sept. 15, 1998), S.D. Ohio No. C-3-97-394, 1998 U.S. Dist. LEXIS 22891 – the only other court, to CSC’s knowledge, that has addressed the interplay between Ohio’s wrongful death and arbitration statutes. (*See* discussion in Merit Brief of Appellant, pp. 20-23). For the reasons discussed in Appellee’s opening Merit Brief, the court in *Parsley* – not the court of appeals below – correctly applied this Court’s wrongful death jurisprudence in compelling arbitration on the basis of the decedent’s pre-dispute agreement to arbitrate the liability theory premising her wrongful death claim against Terminix.

1998), 132 Ohio App 3d 157, 169 (“we note that the parent’s consent and release to arbitration only specifies the forum for resolution of the child’s claim; it does not extinguish the claim;” enforcing pre-dispute arbitration agreement). Accordingly, in contrast to the complete “release” or “bar” of claims, pre-dispute arbitration agreements, by definition, apply to claims that are “not yet in existence” and, nonetheless, are *avored* as a matter of federal and state public policy. See *ABM Farms, Inc. v. Woods* (1998), 81 Ohio St. 3d 498, 500, 692 N.E. 2d 574 (enforcing pre-dispute arbitration agreement); *Circuit City Stores v. Adams* (2001), 532 U.S. 105, 123-124, 121 S. Ct. 1302, 149 L.Ed. 2d 234 (enforcing pre-dispute arbitration agreement); *Greentree Fin. Corp. – Alabama v. Randolph* (2000), 531 US 79, 89-90, 121 S. Ct. 513, 148 L Ed 2d 373 (“We have likewise rejected generalized attacks on arbitration that rest on ‘suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants’ [citation omitted].”).

C. Appellee’s and *Amici*’s Assertion That The DRP Does Not Cover Appellee’s Wrongful Death Claim Is Contrary to Its Express Terms and Well-Settled Arbitral Authority.

Perhaps aware of their precarious reliance on *Mahoning* and its progeny to the issue in this appeal, Appellee and her *Amicus* seek to revisit – for the first time – the language of the DRP. In so doing, Appellee and her *Amicus* assert a fall-back argument: that even if the personal representative (or the statutory beneficiaries) are otherwise “parties” to the DRP in view of the legal nature of wrongful death claims and arbitration in Ohio, the DRP does not purport to cover either the statutory beneficiaries or their claim asserted in this lawsuit. (See Merit Brief of Appellee, pp. 11, 14; Brief of Amicus Ohio Academy of Trial Lawyers, p. 5). Appellee’s and *Amicus*’ assertion is wrong.

First, as discussed above, given the unique nature of a wrongful death claim (which is pursued by the personal representative), there is no need for the wrongful death claim or the

statutory beneficiaries to be named in the DRP. *See Parsley, supra.* (neither “wrongful death” or “beneficiaries” identified in pre-dispute arbitration agreement); *Holt* 79 Ohio St. 3d at 410 (holding statutory beneficiaries not named in underinsurance contract are “insureds” as a matter of Ohio law). Out-of-state decisions addressing the issue before this Court have, therefore, compelled arbitration, even though neither the statutory beneficiaries nor their wrongful death claim were expressly identified in the pre-dispute arbitration agreement. *See Briarcliff*, 894 So.2d at 663-664 (no reference to “wrongful death” claim or “beneficiaries” in pre-dispute arbitration agreement); *See also Cleveland*, 2006 Miss. LEXIS 467 , at *9, ¶ 13 (no reference to “wrongful death” claim in pre-dispute arbitration agreement); *Sanford*, 813 N.E. 2d at 415 (no reference to “beneficiaries” or to “wrongful death” claim in pre-dispute arbitration agreement.).

Second, even assuming such a requirement exists, the statutory beneficiaries are expressly named as parties in the DRP:

4. Application and Coverage.

- A. Unless and until revoked by the Company pursuant to this Plan, this Plan applies to and binds the Company, all employees defined in paragraph 2.E. above, and their heirs, *beneficiaries*, successors and assigns of any such persons. All such persons shall be deemed *parties* to this Plan.

(DRP, at p. 11; Suppl. To the Briefs, Supp 10)[emphasis added].⁷ While Appellee contends this reference to “beneficiaries” applies only to the survivorship action held by the estate, there is no reason – and Appellee advances none – for this conclusion. (See Merit Brief of Appellee, p. 14). The term “beneficiaries,” as expressly recognized throughout Ohio’s wrongful death jurisprudence, specifically includes those entitled to damages under the wrongful death statute.

⁷ Paragraph 2.F. of the Plan specifically provide: “Party” means the Company and those employees and persons defined in paragraph 2.E. of the Plan.” (DRP, p. 10; Suppl. To the Briefs, Supp 9).

The Ohio Revised Code repeatedly and consistently refers to those persons as “beneficiaries.” See *Ohio Rev. Code* § 2125.02 (A)(2) (referring to “the *beneficiaries* described in division (A)(1)”); *Ohio Rev. Code* § 2125.02 (A)(3) (refers to the “status of all *beneficiaries* of the civil action for wrongful death.”). See also *Ohio Rev. Code* § 2125.03, entitled “Distribution to *beneficiaries*,” providing in part that the wrongful death recovery “shall be distributed to the *beneficiaries* or any one or more of them.” [Emphasis supplied.] *Ballentine’s Law Dictionary* (3rd ed. 1969) defines “beneficiary” as a “person named by statute as entitled to the proceeds, or a share of the proceeds, of a statutory action, such as an action for wrongful death.”

Third, given the personal representative’s (and statutory beneficiaries’) status as parties under the DRP by operation of Ohio law, the DRP must be construed broadly to cover the wrongful death claim asserted here by Appellee. *Parsley, supra*, at pp. 20-21(enforcing “the broad language of the arbitration clause” and “resolving doubts in favor of arbitration;” holding wrongful death claim subject to decedent’s pre-dispute arbitration agreement even though neither “beneficiaries” nor “wrongful death” identified in the arbitration agreement).

Here, the DRP, by its express terms, specifically covers all claims arising in the workplace at CSC, including the “intentional tort” claim asserted by Appellee. (DRP, at p. 11-12; Suppl. To the Briefs, Supp 10). It also expressly provides that the “beneficiaries” of Peters are “deemed parties” to the DRP. (*Id.*).

As a matter of federal and Ohio law, “any doubts concerning the scope of arbitrable issues should be resolved *in favor of arbitration.*” *Moses H. Cone Hospital v. Mercury Construction Co.* (1983), 460 U.S.1, 24-25 (emphasis added). Furthermore, if the agreement to arbitrate is broadly worded, as is the case here, a presumption arises that *all legal claims* are arbitrable, except those excluded by the Federal Arbitration Act:

[T]he existence of a broad agreement to arbitrate creates a presumption of arbitrability which is only overcome if it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that [it] covers the asserted dispute.

Oldroyd v. Elmira Savings Bank, FSB (2nd Cir. 1998), 134 F.3d 72, 76 (reversing trial court's refusal to stay proceedings pending arbitration); *See also Council of Smaller Enterprises v. Gates, McDonald & Co.* (1998), 661, 687 N.E. 2d 1352, 1356, 80 Ohio St. 3d 666, (“[W]here the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that an order to arbitrate the particular grievance should not be denied unless it may be said with *positive assurance* that arbitration clause is not susceptible of an interpretation that the covers the asserted dispute. *Doubts should be resolved in favor of coverage.*”[emphasis added] cited with approval in *Academy of Medicine of Cincinnati v. Aetna Health, Inc.* (2006), 108 Ohio St.3d 185, 193).

Due their status as parties to the DRP by operation of Ohio law, refusing to enforce Mr. Peter's and CSC's pre-dispute agreement to submit all claims arising in the workplace at CSC, including “intentional tort” claims and claims asserted on behalf of his “beneficiaries,” to arbitration would abrogate both the express intent of the DRP and the controlling public policy of the United States and the State of Ohio reflected in the FAA and the Ohio Arbitration Act.

III. CONCLUSION.

Appellee's position rests on the erroneous notion that arbitration is a threat to the “independence” of wrongful death claims. Appellee is wrong. Giving meaning to both the applicable nature of wrongful death claims and arbitration in Ohio requires that Peters be compelled to litigate Mr. Peters' intentional tort theory and seek collection of all the beneficiaries' available wrongful death damages in the arbitral forum selected by William Peters and CSC.

Accordingly, for the foregoing reasons and the reasons discussed in its Merit Brief, Columbus Steel Castings Co. respectfully requests that this Court reverse the decision of the court of appeals and the trial court with instructions to enforce the DRP as to the wrongful death claim asserted by the personal representative of William Peters on behalf of his beneficiaries.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2006, a copy of the foregoing *Reply Brief of Appellant* was sent by first class U.S. mail, postage prepaid, to:

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LEXSEE 2006 MISS LEXIS 467

KENNETH CLEVELAND, M.D., AND CENTRAL SURGICAL ASSOCIATES, PLLC v. JOHN MANN AND MARK MANN, HIS SONS, BENEFICIARIES OF JOHN D. MANN, DECEASED

NO. 2005-CA-00924-SCT

SUPREME COURT OF MISSISSIPPI

2006 Miss. LEXIS 467

August 31, 2006, Decided

SUBSEQUENT HISTORY: Writ of mandamus denied Cleveland v. Mann, 2006 Miss. LEXIS 478 (Miss., Aug. 31, 2006)

PRIOR HISTORY: [*1] COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT. DATE OF JUDGMENT: 02/23/2005. TRIAL JUDGE: HON. TOMIE T. GREEN.

DISPOSITION: REVERSED AND REMANDED.

COUNSEL: FOR APPELLANTS: LORRAINE WALTERS BOYKIN, WHITMAN B. JOHNSON.

FOR APPELLEES: W. O. DILLARD.

JUDGES: DICKINSON, JUSTICE. SMITH, C.J., WALLER AND COBB, P.JJ., AND CARLSON, J., CONCUR. DIAZ, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY EASLEY AND GRAVES, JJ.; RANDOLPH, J., JOINS IN PART.

OPINION BY: DICKINSON

OPINION: NATURE OF THE CASE: CIVIL - WRONGFUL DEATH

EN BANC.

DICKINSON, JUSTICE, FOR THE COURT:

P1. This is an appeal of a trial court's order denying a motion to compel arbitration. For the reasons discussed herein, we reverse and remand for entry of an appropriate order consistent with this opinion, compelling arbitration.

BACKGROUND FACTS AND PROCEEDINGS

P2. On September 17, 2002, John D. Mann underwent a total gastrectomy for stomach cancer. This surgery was performed by Dr. Kenneth Cleveland at Central Mississippi Medical Center ("CMMC"). Approximately nine months later, Mann again sought medical care from Dr. Cleveland for a hernia which developed in relation to Mann's gastrectomy.

P3. During this appointment, [*2] Mann was presented with a Clinic-Physician-Patient Arbitration Agreement. The terms of the agreement are stated individually, with a space after each term for the patient to initial his understanding of that term. The agreement must be signed by both the patient and an authorized representative for Central Surgical Associates ("CSA") and initialed by the doctor. Mann signed the agreement on June 18, 2003, which was after his gastrectomy but prior to the surgery to repair his hernia. The surgery to repair his hernia was scheduled for and performed on July 7, 2003, nineteen days after Mann signed the agreement. The next day, Dr. Cleveland performed another surgery to repair Mann's bowel, which was punctured during the hernia repair. Following this third surgery, complications developed which required Mann to have a CT scan. This scan revealed Mann had liver cancer. On August 27, 2003, Mann died of metastatic gastric cancer of the liver. n1

n1 Plaintiffs state in their brief that they, along with CMMC, believe the cause of Mann's death was sepsis due to the infection caused when his bowel was punctured during the hernia repair. Plaintiffs argue this is contrary to the cause of death Dr. Cleveland put in his medical records, which was cancer. The conflict regarding the cause of Mann's death is not an issue for this Court to decide.

[*3]

P4. On April 16, 2004, John and Mark Mann ("plaintiffs"), wrongful death beneficiaries of Mann, brought a medical malpractice action against Dr. Cleveland, CSA, and CMMC. The complaint alleged Dr. Cleveland was negligent in the care and treatment of Mann during the surgical procedure and post-operative care, which took place at CMMC.

P5. On May 19, 2004, Dr. Cleveland and CSA filed a Motion to Compel Arbitration and Stay Proceedings or Dismiss. The basis for this motion was the arbitration agreement executed between Dr. Cleveland, CSA, and Mann prior to Mann's second surgery. Dr. Cleveland and CSA argued plaintiffs were bound by this agreement, as the agreement stated it was binding on Mann's "heirs-at-law or personal representatives."

P6. In their Response to the Motion to Compel Arbitration, plaintiffs asserted that Mann did not enter into the agreement knowingly, voluntarily, and intelligently, and the agreement violated the Mississippi Arbitration Act. The response further claimed that if the agreement was not void, it nevertheless did not bind plaintiffs, as they were beneficiaries under the wrongful death statute, rather than "heirs" because "they did not inherit the cause [*4] of action because it did not exist until his wrongful death."

P7. On February 24, 2005, Hinds County Circuit Court Judge Tomie T. Green issued a Memorandum Opinion and Order Denying Motion to Compel Arbitration. Judge Green held that the agreement fell within the realm of adhesion and was unconscionable. Dr. Cleveland and CSA filed a timely notice of appeal pursuant to *Tupelo Auto Sales, Ltd. v. Scott*, 844 So.2d 1167, 1170 (Miss.

2003) (holding an appeal may be taken from an order denying a motion to compel arbitration). The issues on appeal are as follows:

I. Whether the trial court erred in finding the arbitration agreement to be unenforceable.

II. Whether the arbitration agreement is binding on Mann's wrongful death beneficiaries.

STANDARD OF REVIEW

P8. This appeal stems from the denial of a motion to compel arbitration. This Court engages in de novo review of motions to dismiss and motions to compel. *Vicksburg Partners, L.P. v. Stephens*, 911 So.2d 507, 513 (Miss. 2005). The Federal Arbitration Act provides that "arbitration agreements 'shall be valid, irrevocable, and enforceable, save upon such grounds [*5] as exist at law or in equity for the revocation of any contract.'" *Norwest Fin. Miss., Inc. v. McDonald*, 905 So.2d 1187, 1192 (Miss. 2005) (quoting 9 U.S.C. § 2). "Doubts as to the availability of arbitration must be resolved in favor of arbitration." *IP Timberlands Operating Co. v. Denmiss Corp.*, 726 So.2d 96, 107 (Miss. 1998) (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983)). Further, this Court has held that "[a]rticles of agreement to arbitrate, and awards thereon are to be liberally construed so as to encourage the settlement of disputes and the presumption will be indulged in favor of the validity of arbitration proceedings." *Russell v. Performance Toyota, Inc.*, 826 So.2d 719, 722 (Miss. 2002).

DISCUSSION

I. Whether the trial court erred in finding the arbitration agreement to be unenforceable.

P9. The Federal Arbitration Act provides a two-pronged inquiry for determining the validity of a motion to compel arbitration. *East Ford, Inc. v. Taylor*, 826 So.2d 709, 713 (Miss. 2002). [*6] The first prong requires a threshold finding that the agreement to be arbitrated has a nexus to interstate commerce, followed by a finding that the terms of the arbitration agreement require the parties to arbitrate the kind of dispute involved in the litigation. *Id.* The second prong addresses whether legal constraints external to the agreement, such as fraud, duress, or unconscionability, foreclose arbitration of the claims. *Id.* (citing *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 686, 116 S. Ct. 1652, 134 L. Ed. 2d 902 (1996)).

Interstate Commerce

P10. In considering these two prongs, we turn to our decision in *Vicksburg Partners*, wherein this Court held, "[a] threshold determination which must be considered is whether the parties' . . . agreement falls within the provisions of § 2 of the Federal Arbitration Act." 911 So.2d at 514. Section 2 of the Federal Arbitration Act states:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, [*7] or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of

such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

P11. The trial court stated the enforceability of an arbitration agreement between a medical provider and a patient was one of first impression for the court. Plaintiffs assert this agreement regarding a medical procedure cannot be construed as affecting interstate commerce. n2 However, Dr. Cleveland and CSA argue the medical treatment provided to Mann affects interstate commerce under *Vicksburg Partners*, where this Court held, "singular agreements between care facilities and care patients, when taken in the aggregate, affect interstate commerce." 911 So.2d at 515. While the *Vicksburg Partners* opinion was handed down subsequent to the trial court's ruling in this case, we have held that all judicial decisions apply retroactively unless the Court has specifically stated the ruling is prospective. [*8] See *Miss. Transp. Comm'n v. Ronald Adams Contractor, Inc.*, 753 So.2d 1077, 1093 (Miss. 2000); *Morgan v. State*, 703 So.2d 832, 839 (Miss. 1997). Therefore, following our opinion in *Vicksburg Partners*, we conclude the economic activities of Dr. Cleveland and CSA affect interstate commerce, and the Federal Arbitration Act is applicable.

n2 In determining the scope of transactions "involving commerce" under the Federal Arbitration Act, the United States Supreme Court has "concluded that the phrase 'involving commerce' is to be interpreted broadly and [is] the functional equivalent of the phrase 'affecting commerce,' which signals Congress' intent to exercise its Commerce Clause powers to the fullest extent." *Vicksburg Partners*, 911 So.2d at 514-15 (citing *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273-74, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995)). Interestingly, the agreement provides, "[a]ll parties agree that their relationship affects interstate commerce and that this Agreement shall be governed by the Federal Arbitration Act."

[*9]

Arbitrability of Dispute

P12. Plaintiffs further argue this dispute is not within the scope of the agreement because it was executed subsequent to Mann's 2002 gastrectomy, and the 2003 hernia repair - the procedure for which the agreement was signed - was necessitated by the gastrectomy. Plaintiffs assert there was no agreement executed prior to the gastrectomy, so any injury arising therefrom is not subject to arbitration. Plaintiffs contend that if the agreement is found to be valid, this Court would be setting a "dangerous precedent," as it would "allow the appellant to get a signature nine months after the first surgery to remove the stomach and use it to defend against puncturing the intestines in the second operation."

P13. However, the agreement at issue states, "[p]atient agrees that in the event of any dispute, claim, or controversy arising out of or relating to the performance of medical services . . . such dispute or controversy shall be submitted to JAMS [n3] . . ." (Emphasis added). The theory of the plaintiffs' case is that the initial procedure led to the need for the hernia repair, and the hernia repair was negligently performed, leading to this lawsuit. [*10] Thus, the procedures are related by plaintiffs' own theory of the case, and they are covered by the arbitration agreement.

n3 "JAMS" stands for "Judicial Arbitration and Mediation Services," and it is a company which provides alternative dispute resolution services.

External Legal Constraints - Unconscionability

P14. The FAA's second prong of analysis requires us to consider whether legal constraints external to the parties' agreement foreclose arbitration of the claims. Plaintiffs assert this agreement was not signed by Mann knowingly, voluntarily and intelligently, and it is procedurally and substantively unconscionable. The trial court held "the agreement falls well within the realm of adhesion and unconscionability."

P15. This Court has defined unconscionability as "an absence of meaningful choice on the part of one of the parties, together with contract terms which are unreasonably favorable to the other party." *Taylor*, 826 So.2d at 715 (quoting *Bank of Ind., Nat'l Ass'n v. Holyfield*, 476 F. Supp. 104, 109 (S.D. Miss. 1979)). [*11] We recognize two types of unconscionability-procedural and substantive:

Procedural unconscionability may be proved by showing a lack of knowledge, lack of voluntariness, inconspicuous print, the use of complex legalistic language, disparity in sophistication or bargaining power of the parties and/or a lack of opportunity to study the contract and inquire about the contract terms. Substantive unconscionability may be proven by showing the terms of the arbitration agreement to be oppressive.

Taylor, 826 So.2d at 714 (citations omitted). "Procedural unconscionability looks beyond the substantive terms which specifically define a contract and focuses on the circumstances surrounding a contract's formation." *Vicksburg Partners*, 911 So.2d at 517. In *Entergy Mississippi, Inc. v. Burdette Gin Co.*, 726 So.2d 1202, 1207 (Miss. 1998), this Court divided procedural unconscionability into two general categories: lack of knowledge and lack of voluntariness.

1. Procedural Unconscionability-Lack of Knowledge

P16. "A lack of knowledge is demonstrated by a lack of understanding of the contract terms [*12] arising from inconspicuous print or the use of complex, legalistic language, disparity in sophistication of parties, and lack of opportunity to study the contract and inquire about contract terms." *Vicksburg Partners*, 911 So.2d at 517 (citations omitted).

P17. First, plaintiffs argue this agreement was procedurally unconscionable because of a disparity in the sophistication of the parties due to Mann's lack of education and inability to read or understand the agreement. However, this Court has held the inability to read does not render a person incapable of possessing adequate knowledge of the arbitration agreement he or she signed. *See Equifirst Corp. v. Jackson*, 920 So.2d 458, 464 (Miss. 2006).

P18. Plaintiffs also assert the agreement was not properly explained to Mann, as the terms would have been difficult for him to understand. The agreement is a two-page document. In a bold, capitalized font larger than that of the rest of the document, the first page of the document states:

NOTICE: BY SIGNING THIS CONTRACT YOU ARE AGREEING TO HAVE ANY CLAIM OF NEGLIGENCE OR MEDICAL MALPRACTICE DECIDED BY NEUTRAL BINDING ARBITRATION [*13] AND YOU ARE GIVING UP YOUR STATUTORY AND CONSTITUTIONAL RIGHT TO A JURY OR COURT TRIAL.

This first page is signed and dated by J. Loftin, as an authorized representative of CSA, signed by Mann, and initialed by Dr. Cleveland.

P19. The second page of the agreement contains an explanation of each term found on the first page of the agreement. The top of this page states the patient is to initial next to each term after a member of the medical staff has explained that term to the patient. Mann's initials appear next to each term. The bottom of the second page states, "I hereby confirm that I have explained the arbitration agreement to the Patient and the Patient has affirmed his or her understanding of that agreement by initialing or signing beside each of the foregoing provisions." This statement is signed by Jennifer Loftin, an authorized representative for CSA, and is initialed by Dr. Cleveland.

P20. In her affidavit, Barbara Templeton, Mann's sister-in-law, stated she accompanied Mann to his appointment on June 18, 2003. She said Mann was handed a document and told by the receptionist to sign it and to ask Dr. Cleveland any questions he may have. She stated she went [*14] to the restroom for three to five minutes, and when she returned, Mann was ready to leave. Templeton testified that on the way home, Mann told her he asked Dr. Cleveland what the agreement meant, and Dr. Cleveland replied, "It's so you won't sue me."

21. In his affidavit, Dr. Cleveland disputes these claims and maintains that Mann signed the agreement and initialed his understanding on the second page of the agreement before meeting with him. Dr. Cleveland stated that when he met with Mann, he asked Mann if he signed the agreement and understood it, and then he answered Mann's questions regarding the agreement. Dr. Cleveland asserted in his affidavit that Mann's signature and his initials "signified that he had read the contract, had its terms explained to him, fully understood its terms, and consented to the surgery." Dr. Cleveland explained that his initials at the bottom of both pages of the agreement "confirmed that all of [Mann's] questions regarding the arbitration agreement had been answered."

P22. This Court has not been furnished with an affidavit or any testimony from Jennifer Loftin, the authorized representative from CSA who signed the agreement stating she explained [*15] its terms to Mann. Plaintiffs argue that it "appears these may not be Mann's initials" on the second page, and that J. Loftin who signed on the first page is not the same as Jennifer Loftin who signed on the second page. This contention was not asserted at the trial level. Additionally, plaintiffs offer no evidence to support this contention and cite no legal authority for this argument in their brief. Therefore, this argument merits no consideration by this Court. See *Ferrell v. River City Roofing, Inc.*, 912 So.2d 448, 456 (Miss. 2005) (failure to cite relevant authority obviates Court's obligation to review issue); *Tate v. State*, 912 So.2d 919, 928 (Miss. 2005) (appellate court will not review issues raised for the first time on appeal).

P23. The language in this agreement is neither complex nor convoluted. The language stating Mann was giving up his right to a trial is boldly printed in all capital letters in a font larger than the

font in the rest of the agreement. The second page of the agreement fully states and explains the individual terms of the agreement. Plaintiffs' claim that Mann could not have understood the agreement [*16] is without merit, as this Court has held, "[a] person cannot avoid a written contract which he has entered into on the ground that he did not read it or have it read to him . . ." *Cont'l Jewelry Co. v. Joseph*, 140 Miss. 582, 585, 105 So. 639 (1925). Further, Mann signed the first page of the agreement and initialed beside each term on the second page, denoting his understanding of the terms. Mann's initials on the second page of the agreement also indicate he was provided an opportunity to inquire about the agreement's terms. Plaintiffs may not escape the agreement by simply stating Mann did not read the agreement or have it read to him or understand its terms.

P24. Plaintiffs further claim the agreement was procedurally unconscionable because Mann did not have the opportunity to study the contract. They assert Mann was not provided with a copy of the contract to take home, and the original agreement was not furnished to the trial court. However, plaintiffs did not present these arguments to the trial court, and they have not provided any evidence or legal authority for support. Therefore, this Court is not obligated to consider the issue of whether Mann [*17] was furnished with a copy of the agreement. See *Ferrell*, 912 So.2d at 456; *Tate*, 912 So.2d at 928.

2. Procedural Unconscionability-Lack of Voluntariness

P25. A contract of adhesion is an agreement "drafted unilaterally by the dominant party and then presented on a 'take-it-or-leave-it' basis to the weaker party who has no real opportunity to bargain about its terms." *Taylor*, 826 So.2d at 716 (citations omitted). Such contracts are usually pre-printed and contain provisions in extremely small print. *Id.*

A lack of voluntariness is demonstrated in contracts of adhesion when there is a great imbalance in the parties' relative bargaining power, the stronger party's terms are un-negotiable, and the weaker party is prevented by market factors, timing or other pressures from being able to contract with another party on more favorable terms or to refrain from contracting at all.

Id. at 716 (citations omitted).

P26. This agreement was prepared for Dr. Cleveland and CSA by the Phelps Dunbar, LLP, law firm. The agreement appears on a printed form but does not contain any [*18] small print. However, the parties dispute whether the agreement was presented on a "take it or leave it" basis. Plaintiffs assert Mann was in a great deal of pain during the June 18 visit to Dr. Cleveland's office. Templeton also stated in her affidavit that during the visit, Mann was in pain and under stress because of the hernia. On the other hand, Dr. Cleveland stated Mann was not under a heavy burden of pain or stress at the time of signing.

P27. The claim of a lack of voluntariness fails for several reasons. First, Mann initialed on the second page of the agreement next to the term stating, "[p]atient is not in need of emergency care or under immediate stress." Second, the agreement provides for rescission within fifteen days of signing the agreement, and Mann had nineteen days before his surgery. Additionally, the agreement states, "[b]efore signing the Agreement the Patient may make written changes in the Arbitration

Agreement if they so desire and present these to the Clinic for approval." While the trial court held it did not seem reasonable or practical for Mann to have secured legal advice in light of his pressing medical condition, Mann's surgery was not scheduled [*19] until nineteen days after he executed the agreement, so Mann did not have "to choose between forever waiving available remedies in a judicial forum, or forgoing necessary medical treatment . . ." *Vicksburg Partners*, 911 So.2d at 525. For all of these reasons, we conclude the agreement was not procedurally unconscionable.

3. Substantive Unconscionability

P28. Plaintiffs argue the agreement was substantively unconscionable due to Dr. Cleveland's and CSA's right to choose the arbitration association and the patient's right to appeal only in limited circumstances. At the trial level, plaintiffs did not assert as substantively unconscionable the patient's limited right to appeal. They also failed to provide any argument or legal authority to support this assertion in their brief to this Court. Therefore, this Court is under no duty to consider this argument. *See Ferrell*, 912 So.2d at 456; *Tate*, 912 So.2d at 928.

P29. Notwithstanding the procedural bar, this claim further fails on its merits. "Substantive unconscionability may be found when the terms of the contract are of such an oppressive character as to be [*20] unconscionable." *Russell*, 826 So.2d at 725. This Court has held, "[s]ubstantive unconscionability is present when there is a one-sided agreement whereby one party is deprived of all the benefits of the agreement or left without a remedy for another party's nonperformance or breach." *Vicksburg Partners*, 911 So.2d at 521.

P30. The portion of the agreement regarding CSA's choice of an arbitration association states, "[a]rbitration will be performed by JAMS. This is a national association of neutral arbitrators. They don't work for Physician or for the Patient. The Clinic will pay the costs, except for the first \$ 125.00, and each side will pay for their own attorneys and other costs." Mann initialed next to the explanation of this term of the agreement. However, plaintiffs argue Mann could not have known what JAMS was, and it was unconscionable that Dr. Cleveland and CSA chose the arbitration association who would hear the dispute.

P31. In *Vicksburg Partners*, this Court looked to examples cited by the Tennessee Supreme Court of "oppressive" arbitration agreements. In *Buraczynski v. Eyring*, 919 S.W.2d 314, 320-21 (Tenn. 1996), [*21] the Tennessee Supreme Court cited *Beynon v. Garden Grove Medical Group*, 100 Cal. App. 3d 698, 161 Cal.Rptr. 146, 150 (Cal. Ct. App. 4th Dist. 1980), in which the court found an agreement oppressive where a health care provider required arbitration take place before a panel of three physicians. *Vicksburg Partners*, 911 So.2d at 521. The Tennessee Court further cited *Broemmer v. Abortion Services of Phoenix, Ltd.*, 173 Ariz. 148, 840 P.2d 1013, 1016 (Ariz. 1992), in which the Arizona Supreme Court held unconscionable an agreement drafted by an abortion services clinic in which arbitration had to take place in front of physicians specializing in obstetrics and gynecology. *Vicksburg Partners*, 911 So.2d at 521.

P32. This Court has held, "[w]hile unconscionably oppressive terms can be facially invalid, a per se finding of substantive unconscionability is strictly applicable only to a provision that by its very language significantly alters the legal rights of the parties involved and severely abridges the damages which they may obtain." *Id.* The agreement at issue provides Mann with a fair [*22] opportunity and a proper forum in which to dispute his claims. It does not limit Mann's damages, Mann's legal rights, or Dr. Cleveland's and CSA's liability. The agreement further provides for arbi-

tration by a neutral association in the business of providing neutral arbitrators. For these reasons, we conclude the agreement at issue is not substantively unconscionable.

P33. We find the agreement is neither procedurally nor substantively unconscionable. Therefore, the trial court erred in denying the Motion to Compel Arbitration.

II. Whether the arbitration agreement is binding on Mann's wrongful death beneficiaries.

P34. Plaintiffs assert the agreement is not binding on their claim, as it was not signed by them or by anyone with authority to sign on their behalf. However, the agreement expressly states it applies to "any dispute . . . between Patient (whether a minor or an adult) or the heirs-at-law or personal representative of Patient, as the case may be, and the Clinic, PLLC and each Physician individually"

P35. In *Terminix International, Inc. v. Rice*, 904 So.2d 1051, 1058 (Miss. 2004), this Court adopted the Fifth Circuit's holding in [*23] *Washington Mutual Finance Group, LLC v. Bailey*, 364 F.3d 260, 266 (5th Cir. 2004), that the plaintiff was bound by an arbitration agreement signed by her husband, although not by her. "It does not follow . . . that under the [Federal Arbitration] Act an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision. [We have made] clear that a nonsignatory party may be bound to an arbitration agreement if so dictated by the ordinary principles of contract and agency." *Terminix*, 904 So.2d at 1058 (quoting *Washington Mutual*, 364 F.3d at 266).

P36. Further, this Court held in *Smith Barney, Inc. v. Henry*, 775 So.2d 722, 726 (Miss. 2001), "[t]he death of a party to an agreement to arbitrate future disputes does not invalidate the agreement." The agreement in *Smith Barney* plainly stated it was binding on heirs, successors, and administrators, as does the agreement at issue. *Id.* at 727. This Court upheld the agreement in *Smith Barney*, concluding, "[a]ccording to the terms of the agreement, [plaintiff] is [*24] not required to be a signatory in order to be bound by the arbitration clause. As a successor of [the deceased], [plaintiff] is covered by the arbitration clause of the client agreements." *Id.* at 727.

P37. The dissent takes a contrary view, which it rests upon several false premises. First, the dissent says a wrongful death action belongs solely to the heirs of the deceased. This premise, of course, is completely contrary to the express language of our wrongful death statute, which provides that, in a wrongful death suit, the plaintiff must pursue "all the damages of every kind to the decedent and all damages to every kind to any and all parties interested in the suit." Miss. Code Ann. § 11-7-13 (Rev. 2004). The parties "interested in the suit" are not limited to the wrongful death beneficiaries, but could include the estate of the decedent, an insurance company exercising its right of subrogation, and any other parties claiming a right of recovery.

P38. The dissent is also incorrect in stating that wrongful death is different from other torts because it cannot arise until after death. Wrongful death is not a tort, but rather [*25] a cause of action based upon an underlying tort that must have been committed against the decedent, resulting in the decedent's death. *Id.*

P39. Finally, and perhaps most significantly, the dissent misunderstands what is required under Section 11-7-13 to justify a wrongful death claim. Under the statute, a wrongful death claim is one the decedent must have been able to bring had death not ensued. The statute opens with the following mandate:

Whenever the death of any person . . . shall be caused by any real, wrongful or negligent act or omission, . . . as would, *if death had not ensued, have entitled the party injured or damaged thereby to maintain an action* and recover damages in respect thereof, . . . the person . . . that *would have been liable if death had not ensued*, . . . shall be liable for damages

Miss. Code Ann. § 11-7-13.

P40. Based on the clear language of the statute, a wrongful death beneficiary is only allowed to bring claims that the decedent could have brought if the decedent had survived. Since the beneficiaries may only bring claims the decedent could have brought had the decedent survived, logic [*26] requires us to conclude that the converse is true, that is, the decedents may NOT bring claims the decedent could not have brought, had the decedent survived. Thus, plaintiffs in this case may not bring claims Mann could not have brought himself. This same reasoning was applied unanimously by this Court in *Jenkins v. Pensacola Health Trust*, 933 So. 2d 923, 2006 Miss. LEXIS 208, at *8 (Miss. 2006), where we held that the beneficiaries could not bring a claim for wrongful death where the statute of limitations had expired and would have prevented the decedent from bringing the claim herself. *Id.*

P41. Because Mann agreed to arbitrate, he could not have brought this claim for medical malpractice even if death had not ensued. He would have been required to submit his claim to arbitration. Therefore, since Mann could not have brought this claim, neither can plaintiffs.

P42. Although the dissent skillfully attempts to support its view by citing cases from other jurisdictions, we are not troubled by the authorities cited. While it is true that a few jurisdictions take a contrary view, our holding today fully comports with Mississippi [*27] law and the law of many other jurisdictions. See *Briarcliff Nursing Home, Inc. v. Turcotte*, 894 So.2d 661, 664 (Ala. 2004) (Alabama Supreme Court held that a wrongful death action was covered by the decedent's agreement to arbitrate); *Herbert v. Superior Court*, 169 Cal. App. 3d 718, 727, 215 Cal. Rptr. 477 (Cal. App. 2d Dist. 1985) (wrongful death suit by non-signatories of the arbitration agreement was covered by the agreement); *Allen v. Pacheco*, 71 P.3d 375, 379 (Colo. 2003) (Colorado Supreme Court held that an arbitration agreement applied to wrongful death claims). We are presented with no compelling reason to discard our own precedent and adopt the reasoning advanced by a handful of foreign courts of appeals.

P43. In its opinion and order, the trial court held that in light of this Court's decision in *Smith Barney*, plaintiffs were bound by the agreement. We agree with this holding of the trial court.

CONCLUSION

P44. As to Issue I, we find the agreement is valid under the two prong test enumerated by this Court in *Taylor*. The agreement unambiguously provides that the method of dispute [*28] resolution is arbitration, and the terms of the agreement are fair and do not impermissibly limit the rights of the patient. Therefore, we hold the trial court erred in denying the Motion to Compel Arbitration.

P45. As to Issue II, this Court made clear in its holdings in *Terminix* and *Smith Barney* that heirs-at-law may be bound by arbitration agreements to which they were not signatories. Therefore, the trial court did not err in holding that plaintiffs are bound by the agreement executed by Mann.

P46. For these reasons, we reverse the trial court's judgment denying the motion to compel arbitration, and we remand this case to the trial court with instructions that it enter an appropriate order, consistent with this opinion, compelling the parties to submit their dispute to arbitration.

P47. REVERSED AND REMANDED.

SMITH, C.J., WALLER AND COBB, P.JJ., AND CARLSON, J., CONCUR. DIAZ, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY EASLEY AND GRAVES, JJ.; RANDOLPH, J., JOINS IN PART.

DISSENT BY: DIAZ

DISSENT:

DIAZ, JUSTICE, DISSENTING:

P48. With respect to my colleagues in the majority, I am compelled to dissent. The majority defies logic and the basic principles [*29] of contract law by holding that parties to a contract can bind the cause of action belonging to a third party--a cause of action that does not yet exist and which does not arise from the contract. A creature of statute, the wrongful death action belongs solely to the heirs of the deceased and those who might stand in place of the decedent.

I. Wrongful Death.

P49. The majority finds that the arbitration agreement is binding on the heirs of John D. Mann. For this proposition, they only cite two cases, neither of which involve wrongful death. The case of *Smith Barney, Inc. v. Henry* is relied upon heavily; however, that case involved a lawsuit for the breach of fiduciary duty, negligence, and conspiracy, *not* wrongful death. 775 So.2d 722, 724 (Miss. 2001).

P50. Also cited for support is *Terminix Intern., Inc. v. Rice*, where a plaintiff made the argument that she was not bound by an arbitration agreement signed by her husband; this case also did not involve wrongful death. 904 So.2d 1051, 1057-58 (Miss. 2004).

P51. The analysis in the majority opinion simply does not address the most important facet of wrongful death: wrongful [*30] death is different from other torts because it cannot arise until *after* death. "Wrongful death is a *separate and distinct* cause of action, which can be brought *only* by the survivors of the deceased." *Gentry v. Wallace*, 606 So.2d 1117, 1119 (Miss. 1992) (emphasis added), *overruled on other grounds by Jenkins v. Pensacola Health Trust, Inc.*, 933 So.2d 923, 2006 WL 1098895, *2 (Miss. 2006). For "while a personal injury case enables an injured party to recover damages for the injuries he has sustained, a wrongful death action is intended to compensate the heirs of the deceased for losses stemming from the death of the injured party." *Id.* at 1120. *See also In re Estate of England*, 846 So.2d 1060, 1066 (Miss. Ct. App. 2003). n4

n4 In some states, wrongful death is a "deivative" action pursuant to statute. *See Ballard v. Southwest Detroit Hosp.*, 119 Mich. App. 814, 327 N.W.2d 370, 371 (Mich. Ct. App. 1982). That is not the case in our state.

[*31]

P52. This clear precedent establishes logically that since a wrongful death action cannot arise until *after* the death of a party to an arbitration agreement, the heirs cannot be bound by an arbitration agreement, which by its nature is only binding for actions that could have been brought by the decedent. If we decide here today that wrongful death actions, which arise after the death of the party to arbitration, are covered by that agreement, what is *not* covered by this arbitration agreement? See *Smith v. Steinkamp*, 318 F.3d 775, 777 (7th Cir. 2003).

P53. Other courts have also determined that wrongful death actions are separate and distinct causes of action, and have refused to require arbitration by virtue of the common law or state statute. See *Goliger v. AMS Props., Inc.*, 123 Cal. App. 4th 374, 377, 19 Cal. Rptr. 3d 819 (Cal. Ct. App. 2 Dist. 2004) (arbitration agreement did not bind daughter even when she signed as "responsible party," as she was not signing away her personal right to a wrongful death action); *Dream Maker Constr., Inc. v. Murrell*, 268 Ga. App. 721, 603 S.E.2d 72, 72-73 (Ga. Ct. App. 2004) ("the Georgia Arbitration [*32] Code was never intended by the General Assembly to encompass personal injury or wrongful death actions . . . because the Act expressly excluded such subject matter from coverage," examining O.C.G.A. § 9-9-2 (c)(10), which prohibits "[a]ny agreement to arbitrate future claims arising out of personal bodily injury or wrongful death based on tort"); *Finney v. Nat'l Healthcare Corp.*, 193 S.W.3d 393, 397 (Mo. Ct. App. 2006) (refusing to compel daughter to arbitrate wrongful death claim in nursing home case); *Campbell v. Callow*, 876 S.W.2d 25, 26 (Mo. Ct. App. 1994) ("A wrongful death claim does not belong to the deceased . . . The right of action is neither a transmitted right nor a survival right, but is created and vested in the survivors at the moment of death"); *In re Kepka*, 178 S.W.3d 279, 294-95 (Tex. App.-Houston 2005) (representative's wrongful death action not bound by arbitration).

II. Standard of Review.

P54. An agreement to waive one's right to a jury trial impacts multiple portions of the Mississippi Constitution. The Bill of Rights of our state constitution guarantees that [*33] "[a]ll courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice shall be administered without sale, denial, or delay." Miss. Const. of 1890, art. 3, § 24 (emphasis added).

P55. Further, "[n]o person shall be debarred from prosecuting or defending any civil cause for or against him or herself, before any tribunal in the state, by him or herself, or counsel, or both." Miss. Const. of 1890, art. 3, § 25 (emphasis added). In all these matters, "[t]he right of trial by jury shall remain inviolate . . ." Miss. Const. of 1890, art. 3, § 31 (emphasis added). n5

n5 The waiver of a trial by jury via arbitration also collides with other portions of the Constitution of 1890, namely Sections 13 ("in all prosecutions for libel the truth may be given in evidence, and the jury shall determine the law and the facts under the direction of the court . . .") and 14 ("No person shall be deprived of life, liberty, or property except by due process of law").

[*34]

P56. The repetition of the word "shall" in our Constitution demonstrates that these rights were to remain inviolate under any circumstances. However, these critical facets of our state constitution are all supposedly abridged by the simple act of signing a contract. The judicial power of the state of

Mississippi is vested in this Court by that same Constitution, and it is accordingly our duty as a court to safeguard the constitutional rights of the citizens of Mississippi. Miss. Const. of 1890, art. 6, § § 144, 146.

P57. In deference to the rights of the citizens of Mississippi and the language in our state constitution, I believe that any arbitration agreement, which by its nature purports to abridge constitutional rights, should be reviewed with a high level of scrutiny. Additionally, the circumstances surrounding the decision of the parties to enter into the arbitration agreement should also be examined when determining the validity of the arbitration agreement. These safeguards are needed because arbitration is not simply a choice of forum; it intimately affects a citizen's constitutional rights.

P58. As the learned trial judge noted, "[t]he average patient is usually not as [*35] familiar with arbitration . . . as may be the medical provider . . . who urges him to sign away his rights." Out of concerns for the lack of bargaining power the patient might have, and of the fact that the agreement may be one-sided, the trial court "use[d] caution in its scrutiny of . . . arbitration agreements, especially since the agreement is offered to the patient as a prerequisite to necessary medical treatment." This "cautious" approach is warranted by the significance of the legal rights at stake.

P59. The right to a jury of one's peers and the right of access to the court system of the state of Mississippi is a fundamental right with which arbitration significantly interferes, and it should be reviewed accordingly. See *Miss. Comm'n on Judicial Performance v. Wilkerson*, 876 So.2d 1006, 1011 (Miss. 2004) (restrictions on First Amendment-guaranteed speech are reviewed with strict scrutiny); *Associated Press v. Bost*, 656 So.2d 113, 117 (Miss. 1995) ("Strict scrutiny review has also been applied when a statute infringes upon a fundamental right"); *Doe v. Doe*, 644 So.2d 1199, 1210 (Miss. 1994) (parents' right [*36] to raise children is fundamental and any deprivation is reviewed with strict scrutiny); *Miss. H.S. Activities Ass'n, Inc. v. Coleman ex rel. Laymon*, 631 So.2d 768, 774 (Miss. 1994) (noting that the right to travel is fundamental and restrictions are reviewed with strict scrutiny). Arbitration continues to pose a threat to the constitutional rights of the citizens of Mississippi and must be scrutinized accordingly. I would apply a strict scrutiny standard in reviewing all arbitration agreements, regardless of whether the issues were raised at the trial court or by the parties.

P60. For the foregoing reasons, I respectfully dissent.

EASLEY AND GRAVES, JJ., JOIN THIS OPINION. RANDOLPH, J., JOINS THIS OPINION IN PART.

LEXSEE 1998 US DIST LEXIS 22891

**GENEVA PARSLEY, CO-EXECUTRIX OF THE ESTATE OF
MELVA ALLENE PARSLEY, DECEASED, et al., Plaintiff, vs.
TERMINIX INTERNATIONAL COMPANY, L.P., et al., Defendants.**

Case No. C-3-97-394

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DIS-
TRICT OF OHIO, WESTERN DIVISION**

1998 U.S. Dist. LEXIS 22891

**September 15, 1998, Decided
September 15, 1998, Filed**

DISPOSITION: [*1] Defendant's Motion to Dismiss Overruled but its Motion to Stay Proceeding Pending Arbitration Sustained, and Plaintiff's Motion for Leave to Propound in Excess of Forty Interrogatories Sustained as to Bayer Corporation but Overruled as Moot with regard to Terminix International Company, L.P.

COUNSEL: For GENEVA PARSLEY, GENEVA PARSLEY, plaintiffs: Richard Lanahan Goodman, The Lawrence Firm, Cincinnati, OH.

For THE TERMINIX INTERNATIONAL COMPANY LIMITED PARTNERSHIP, TERMINIX INTERNATIONAL INC, defendants: Kelly Maria Carbetta-Scandy, Montgomery, Rennie & Johnson, Cincinnati, OH.

For THE TERMINIX INTERNATIONAL COMPANY LIMITED PARTNERSHIP, TERMINIX INTERNATIONAL INC, defendants: Mitchell Pinsly, Margolis Edelstein Law Firm, Philadelphia, PA.

For BAYER CORPORATION, defendant: Robert H Nichols, Schottenstein Zox & Dunn, Columbus, OH.

For BAYER CORPORATION, defendant: Jack E Urquhart, Laura E DeSantos, Beirne, Maynard & Parsons, Houston, TX.

JUDGES: WALTER HERBERT RICE, CHIEF JUDGE, UNITED STATES DISTRICT COURT.

OPINION BY: WALTER HERBERT RICE

OPINION:

DECISION AND ENTRY OVERRULING DEFENDANT TERMINIX'S MOTION TO DISMISS, BUT SUSTAINING ITS MOTION TO STAY PROCEEDINGS PENDING ARBITRATION (DOC. [*2] # 2); DECISION AND ENTRY SUSTAINING PLAINTIFF'S MOTION FOR LEAVE TO PROPOUND INTERROGATORIES IN EXCESS OF FORTY IN NUMBER (DOC. # 13) AS TO DEFENDANT BAYER AND DECLARING SAME TO BE MOOT WITH RESPECT TO DEFENDANT TERMINIX; CONFERENCE CALL SET

Pending before the Court is Defendant's n1 Motion to Dismiss, pursuant to Fed. R. Civ. P. 12(b)(1), or to Stay Proceedings Pending Arbitration, pursuant to 9 U.S.C. § 3 (Doc. # 2), and Plaintiff's Motion for Leave to Propound Interrogatories in Excess of Forty in Number (Doc. # 13). For the reasons assigned, Defendant's Motion to Dismiss is Overruled but its Motion to Stay Proceeding Pending Arbitration is Sustained, and Plaintiff's Motion for Leave to Propound in Excess of Forty Interrogatories is Sustained as to Bayer Corporation but Overruled as Moot with regard to Terminix International Company, L.P.

n1 Plaintiff brought suit against numerous defendants, namely Terminix International Company LP; Terminix International, Inc.; Servicemaster Consumer Services LP; Servicemaster Company LP; Servicemaster LP; and Servicemaster Management Corporation (collectively identified correctly as Terminix International Company, L.P.); and Bayer Corporation. For the purpose of this Decision, Defendant refers to Terminix International Company, L.P.

[*3]

I. Background

Melva Parsley entered into a contract with Terminix International Company, L.P., ("Terminix") to protect her property from subterranean termites. (Doc. # 1) The terms and conditions on the back of the contract provided, in part: "The Purchaser and Terminix agree that any controversy or claim between them arising out of or relating to this agreement shall be settled exclusively by arbitration." (Doc. # 2, Ex. B) The contract also contained a limitation of liability provision, located within both the disclaimer paragraph and in the arbitration paragraph. (Id.)

Accordingly to Plaintiff's Complaint, on August 17, 1992, Terminix employees or agents performed an initial inspection of the Parsley property. (Compl. P 21) At that time, Terminix noted an active dug well located within three to five feet from the foundation perimeter of the kitchen of Melva Parsley's home. (Id.) The employees/ agents also discovered that the dug well was the source of the daily water supply for Melva and Geneva Parsley. (Id.) The Parsleys relied on the well water for drinking, bathing, washing, and other daily water uses. (Id.)

On August 18, 1992, Terminix applied the [*4] pesticide/termiticide Pryfon 6 (Isofenphos) around the perimeter of the house. (Id. P 20) Another application of the same pesticide was performed on September 10, 1992. (Id.) On August 18, 1993, Terminix again applied pesticide, this time using Dursban TC. (Id.)

Plaintiff asserts that the pesticides were placed too close to the dug well, contaminating it. (Id. PP 22, 25) She contends that, due to the contamination, she and her mother ingested Pryfon 6 on a

daily basis for a period of years. (Id. P 26) As a result, Melva Parsley allegedly suffered physical and emotional injuries attendant to Agnogenic Myeloid Metaplasia ("AMM") and Acute Myeloid Leukemia ("AML"), disability, loss of earnings, loss of enjoyment of life and medical expenses. (Id. PP 28, 29) In addition, Geneva Parsley asserts that she has sustained permanent injuries that will cause future disability, suffering, loss of earning capacity and medical expenses. (Id.) Melva Parsley died on December 18, 1995. (Id. P 28)

On September 3, 1997, Geneva Parsley filed suit individually and as executrix for the estate of her mother, Melva Parsley, against Terminix International Company LP; Terminix [*5] International, Inc.; Servicemaster Consumer Services LP; Servicemaster Company LP; Servicemaster LP; Servicemaster Management Corporation (collectively identified correctly as Terminix International Company, L.P.) for personal injuries and wrongful death; for violations of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"); for breach of express and implied warranties; and for losses as a surviving child of Melva Parsley. (Doc. # 1) Plaintiff further asserted causes of action against Bayer Corporation, as manufacturer of Pryfon 6, for violations of the Ohio Product Liability Act, for violations of FIFRA, and for breaches of express and implied warranties. (Id.) On October 31, 1997, Terminix filed a Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1)/Stay Proceedings Pending Arbitration Pursuant to 9 U.S.C. § 3. n2 (Doc. # 2) Bayer Corporation filed an Answer on November 3, 1997. (Doc. # 3)

n2 Terminix couched its Motion as one for dismissal for lack of subject matter jurisdiction, pursuant to Fed. R. Civ. P. 12(b)(1). Although other courts in this district have stated that a motion to dismiss premised on the argument that a plaintiff's claim must be submitted to arbitration should be analyzed under Rule 12(b)(1), *Dalton v. Jefferson Smurfit Corp.*, 979 F. Supp. 1187 (S.D. Ohio 1997)(Dlott, J.), the use of Rule 12(b)(1) in the present context is inappropriate. The instant case requires this Court to determine the enforceability of a contractual provision between the parties requiring arbitration of disputes arising from their contract. As such, the concern before this Court presents a simple contract issue, not whether the arbitration clause divests this Court of subject matter jurisdiction. See *Quasem Group, Ltd. v. W.D. Mask Cotton Co.*, 967 F. Supp. 288 (W.D. Tenn. 1997)("The court finds the a more appropriate view of [cases compelling arbitration under 9 U.S.C. § 201] is that the court is enforcing the contract, and not that it lacks subject matter jurisdiction over the dispute.").

Because the Federal Arbitration Act was intended to place arbitration agreements upon the same footing as other contracts, any other interpretation of the issue before the Court would contravene the intent of Congress in enacting the Federal Arbitration Act ("FAA"). The FAA allows courts to compel arbitration and stay court proceedings pending such arbitration. Such actions by a court would be impermissible if it were divested of subject matter jurisdiction. See *Filanto, S.p.A. v. Chilewich Internat'l Corp.*, 789 F. Supp. 1229, 1241-42 (S.D.N.Y. 1992)(Dismissal for lack of subject matter jurisdiction under 9 U.S.C. § 206 "is facially absurd because the enabling legislation gives the district court the power at least to compel arbitration. How could even this limited power be exercised with out subject matter jurisdiction?"). This Court, therefore, finds Terminix's Motion is more appropriately viewed as a motion to compel arbitration, not to dismiss for lack of subject matter jurisdiction. That portion of the Defendant's Motion seeking dismissal is, therefore, Overruled.

[*6]

In its Motion to Dismiss/Stay Proceedings Pending Arbitration, Terminix asserts that the arbitration clause is valid and that it covers all causes of action alleged. (Doc. # 2) It contends that Geneva Parsley's claims brought for her mother are, therefore, arbitrable under the express terms of the contract and that Geneva Parsley's individual claims are arbitrable, as well, because she was a third-party beneficiary to the contract. (Id.)

In her Reply Memorandum (Doc. # 5), Plaintiff states she is willing to submit voluntarily to arbitration, provided that this Court rule that the limitation of damages, provided for in the contract, is invalid. Plaintiff also requests that this Court "maintain its role as the final 'arbiter' with regard to any discovery controversies [sic] which might arise in the instant case." (Id.) However, Plaintiff also asserts that the limitations of damages provision is inapplicable to the causes of action alleged and violates the Ohio Constitution; that the arbitration clause is unconscionable and does not apply to the survival and wrongful death claims; and that the arbitration clause is unenforceable as to the claim under FIFRA. (Id.)

Terminix [*7] responds that the limitation of damages provision must be considered separate from the arbitration provision, that the Federal Arbitration Act bars Plaintiff from asserting unconscionability, and that the "federal statute exception" does not apply to her FIFRA claim. (Doc. # 6)

II. Terminix's Motion to Dismiss or Stay Pending Arbitration (Doc. # 2)

The Federal Arbitration Act ("FAA") was designed to quell the traditional common-law hostility to arbitration clauses and to ensure enforcement of such agreements. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 84 L. Ed. 2d 158, 105 S. Ct. 1238 (1985); see *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 131 L. Ed. 2d 76, 115 S. Ct. 1212 (1995); *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 270, 130 L. Ed. 2d 753, 115 S. Ct. 834 (1995). To that end, Congress provided that provisions in any "contract evidencing a transaction involving commerce" which provide for settlement by arbitration of disputes arising out of such contract or transaction "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation [*8] of a contract." 9 U.S.C. § 2 (1947).

In determining whether the parties agreed to arbitrate their dispute, the Court is to use the federal substantive law of arbitrability. *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24-25, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983). "Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Id.* The FAA mandates that district courts refer parties to arbitration on issues as to which the parties have agreed to arbitrate. *Byrd*, 470 U.S. at 218. Conversely, the FAA "requires piecemeal resolution when necessary to give effect to an arbitration agreement." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 20 (emphasis in original).

In resolving Defendant's Motion, this Court must engage in a series of inquiries. *H & M Charters, Inc. v. Reed*, 757 F. Supp. 859, 864 (S.D. Ohio 1991)(Smith, J.). First, the Court must determine whether the parties created a valid agreement [*9] to arbitrate the dispute. *Id.*; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626, 87 L. Ed. 2d 444, 105 S. Ct. 3346 (1985). Second, the Court must determine if the allegations are within the scope of the arbitration provision. *H & M Charters*, 757 F. Supp. at 864. Third, because a federal statutory claim is asserted,

the Court must determine whether Congress intended the FIFRA claim to be nonarbitrable. See *id.* Fourth, assuming that the claims are subject to arbitration, the Court must determine which parties are subject to the arbitration provision. Finally, the Court must decide whether to stay the balance of the proceedings pending arbitration. *Id.*; *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 844 (2d Cir. 1987). Each of these issues will be addressed in turn.

A. ENFORCEABILITY OF THE ARBITRATION PROVISION

Parsley attacks the enforceability of the arbitration clause in two ways. First, she argues that the last sentence of the paragraph, which limits damages, is inapplicable to the causes of actions alleged and violates the Ohio Constitution. Second, she argues that [*10] the arbitration clause is unconscionable.

1. Limitation of Damages

First, Parsley argues that the arbitration clause is unenforceable, because the limitation of damages sentence in that clause violates Ohio law. (Doc. # 5) Terminix replies that the damage limitation sentence is merely a reiteration of disclaimer and limitation of liability language found elsewhere in the agreement. (Doc. # 6) It asserts that the sentence, therefore, has no bearing on the agreement to arbitrate, and its enforceability is an issue for the arbiter to determine. (*Id.*) This Court finds Terminix's argument compelling.

A number of Ohio courts have addressed whether an arbitration agreement is unenforceable when the binding nature of the arbitration award depended upon the amount of the award given by the arbiter. See, e.g., *Trupp v. State Farm Mut. Auto. Ins. Co.*, 62 Ohio App. 3d 333, 575 N.E.2d 847 (Mont. Cty. 1989). In those cases, which involved damages for car accidents involving uninsured motorists, the arbitration provision at issue provided for the award to be binding if it was less than the limits allowed under Ohio's Financial Responsibility law, but allowed *de novo* [*11] review if the award exceeded such limits. *Id.* Although a number of courts have found those arbitration provisions to be unconscionable, the crucial aspect was that the binding nature of the provision hinged on the amount of damages awarded, which resulted in unfairness to insured, who was forced to accept a small award while the insurer was not forced to accept a large one. E.g., *id.*; *Kolcan v. Western Reserve Mut. Cas. Co.*, 1994 Ohio App. LEXIS 4082, Nos. 65582, 65790, 1994 WL 505275 (Cuyahoga Cty. Sept. 15, 1994).

The present arbitration provision requires no such complex analysis. The last sentence of the arbitration clause states, "In no even shall either party be liable to the other for indirect, special or consequential damages or loss of anticipated profits." (Doc. # 2, Ex. B) Although this sentence is located within paragraph ten of the terms of conditions, along with the requirement of arbitration, there is no nexus between the arbitration requirement and the limitation of liability. In fact, the same limitation of liability is located in Terms and Conditions, paragraph 6, part D (Disclaimers). Thus, although reiterated within the arbitration provision, Plaintiff has independently [*12] agreed to limitation of liability in the disclaimer provision, paragraph 6. Therefore, whether the limitation of liability sentence is enforceable is independent of the question of whether the arbitration can go forward. Accordingly, the presence of the limitations of damages provision does not render unenforceable the arbitration provision in the contract between Melva Parsley and Terminix.

2. Unconscionability

Next, Parsley argues that the arbitration clause is unconscionable for two reasons. First, she asserts that the arbitration provision is unconscionable, because it waives a right to a jury trial and possibly limits damages. (Doc. # 5) Second, she argues, in essence, that the contract was commercially unreasonable and an unfair contract of adhesion. Plaintiff contends that, as a result of the disparate bargaining power of the parties, Melva Parsley was forced to assent to the arbitration provision. (Id.)

Although the FAA provides that arbitration agreements are valid, such provisions may be attacked under "such grounds as exist at law or in equity for the revocation of a contract." 9 U.S.C. § 2. Recognized defenses include fraud, duress [*13] and unconscionability. See *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 116 S. Ct. 1652, 134 L. Ed. 2d 902 (1996). Where a party alleges that the contract as a whole is unconscionable, the issue of the enforceability of the contract is arbitrable. See *Prima Paint Corp. v. Flooding & Conklin Mfg. Co.*, 388 U.S. 395, 404, 18 L. Ed. 2d 1270, 87 S. Ct. 1801 (1967); *Coleman v. Prudential Bache Sec., Inc.*, 802 F.2d 1350, 1352 (11th Cir. 1986) ("Claims alleging unconscionability, coercion, or confusion in signing the agreement generally should be determined by an arbitrator because those issues go to the formation of the entire contract rather than to the issue of misrepresentation in the signing of the arbitration agreement."). However, when a party attacks the arbitration provision by asserting that the provision itself is unconscionable, the enforceability of the arbitration provision is an issue for the Court. Id.

"Unconscionability is determined by reference to the relative benefit of the bargain to the parties at the time of its making, the nature of the methods employed in negotiating it, and the relative bargaining power [*14] of the parties." *United States v. Bedford Assocs.*, 657 F.2d 1300, 1312-13 (2d Cir. 1981), cert. denied, 456 U.S. 914, 72 L. Ed. 2d 173, 102 S. Ct. 1767 (1982). To establish that an agreement is unconscionable, the complaining party must demonstrate: 1) substantive unconscionability, by showing that the contract terms are unfair and unreasonable, and 2) procedural unconscionability, by showing that the circumstances surrounding the contract were so unfair as to cause there to be no voluntary meeting of the minds. *Collins v. Click Camera & Video, Inc.*, 86 Ohio App. 3d 826, 621 N.E.2d 1294, 1299 (Mont. Cty. 1993).

Parsley has not demonstrated that the terms of the arbitration clause, which requires arbitration in lieu of a jury trial, are unfair and unreasonable. The "loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate." *Pierson v. Dean, Witter, Reynolds, Inc.*, 742 F.2d 334 (7th Cir. 1984). The mere agreement to arbitrate is not inherently unfair and unreasonable. See *Neubrandner v. Dean, Witter, Reynolds, Inc.*, 81 Ohio App. 3d 308, 610 N.E.2d 1089, 1091 (Summit Cty. 1992) [*15] (arbitration cannot be avoided by voluntary acceptance of arbitration over the chance to litigate to a jury); *Madden v. Kaiser Foundation Hosps.*, 17 Cal. 3d 699, 552 P.2d 1178, 1186-1188, 131 Cal. Rptr. 882 (Cal. 1976) (a party who agrees to arbitration is bound even if the clause does not contain an express waiver of the right to a jury trial).

Furthermore, the arbitration provision is printed in a legible font on the bottom of the back of the contract in the same font as other terms. The arbitration provision is printed as its own paragraph, labeled "Arbitration" in capital letters. As such, Melva Parsley should have known she was agreeing that all claims arising from or relating to the contract would be submitted to arbitration. Thus, there is no indication that the arbitration provision was substantively unfair.

Parsley has also failed to show that the arbitration clause is procedurally unconscionable. Even if the Court accepts that Melva Parsley was a sixty-three year old woman with little education and little or no experience in similar transactions n3 (Doc. # 5), Plaintiff has not demonstrated that the

insertion of the arbitration provision into the contract [*16] was done in a procedurally unfair manner. Even if Terminix drafted the contract and had greater bargaining power, the mere fact that the contract is a contract of adhesion or the product of unequal bargaining power does not cause the contract to be unconscionable. For example, in *Carnival Cruise Lines, Inc. v. Shute*, the Supreme Court enforced a forum selection clause against an unsophisticated cruise ship passenger, notwithstanding the disparity in the parties' bargaining power and the fact that the contract had not been subject to negotiation. 499 U.S. 585, 593-95, 111 S. Ct. 1522, 113 L. Ed. 2d 622 (1991). An arbitration clause may similarly be enforceable despite Parsley's and Terminix's unequal bargaining positions. In addition, Plaintiff has neither alleged nor argued that Melva Parsley was forced to contract with Terminix as opposed to another pest control company. See *Askenazi v. General Elec. Co.*, 1997 Ohio App. LEXIS 3560, Nos. 16303, 16307, 13085, 1997 WL 447355 at *3 (Mont. Cty. Aug. 8, 1997)(clause not procedurally unconscionable when plaintiffs could have contracted with another company or tried to negotiate different terms). In light of the Supreme Court's mandate that questions regarding the enforceability [*17] of an arbitration clause should be resolved in favor of arbitration, Plaintiff has failed to demonstrate that the arbitration clause should not be enforced.

n3 Plaintiff has failed to provide an affidavit or other evidence to substantiate her assertions. See *Rainbow Inv., Inc. v. Super 8 Motels, Inc.*, 973 F. Supp. 1387, 1389-90 (M.D. Ala. 1997)("the court must be presented with evidentiary facts that tend to show the existence of grounds at law or in equity to support the revocation of the arbitration agreement."). However, the Court will assume, arguendo, the veracity of this information in resolving the Motion.

B. SCOPE OF ARBITRATION PROVISION

Parsley claims that the arbitration provision should not apply, because her wrongful death claims exceed the scope of the arbitration provision. Although not explicitly outlined by courts, the determination of this issue involves a two step process. First, the Court must determine the breadth of the arbitration provision. Second, [*18] the Court must conclude whether the claim fits within the scope of the provision.

1. Breadth of the Arbitration Provision

Melva Parsley's contract with Terminix states that "The Purchaser and Terminix agree that any controversy or claim between them arising out of or relating to this agreement shall be settled exclusively by arbitration." (Doc. # 2, Ex. B) Neither Parsley nor Terminix has cited controlling authority interpreting the language of the agreement. However, in other federal courts of appeals, the language "arising out of or relating to" has been interpreted broadly, allowing for tort actions to be arbitrable under contract arbitration clauses. In *Tracer Research Corp. v. National Env'tl. Servs. Co.*, the Ninth Circuit distinguished between contracts that provide for arbitration of claims "arising out of" the contract and those with language saying "arising under and relating to." 42 F.3d 1292, 1295 (9th Cir. 1994), cert. dismissed, 515 U.S. 1187 (1995). The court concluded that "arising out of" language limits arbitration clauses to disputes related to performance of the contract itself, while "arising under and relating to" language [*19] covers all claims touching matters covered by the

agreement. *Id.*; see also *Pierson*, 742 F.2d 334 (claims of fraud under contract, breach of fiduciary duty, negligence, and gross negligence are arbitrable under arbitration clause with "arising out of or relating to" language). This Court similarly takes a broad view of the phrase "arising out of or relating to" and interprets it to encompass all claims, contractual or tort, touching on the contract.

2. Scope of the Arbitration Provision

In determining whether the Parsleys' wrongful death action fits within the scope of "arising out of or relating to" language, the Court must "focus on the factual allegations in the complaint rather than the legal causes of action asserted." *Genesco, Inc. v. T. Kakiuchi & Co., Ltd.*, 815 F.2d 840 (2d Cir. 1987). For example, in *Genesco*, *supra*, a company engaged in the manufacturing and distribution of tailored clothing brought an action against sellers arising from an alleged conspiracy between the sellers and an employee to supply the company with overpriced, damaged, unsuitable or noncompetitive goods. The *Genesco* court found that the allegations [*20] of fraud, RICO, unfair competition and unjust enrichment claims were all subject to arbitration under the sales contracts because they were predicated on and "not wholly independent of" the contract. However, the claim that the sellers interfered with the company's contract with the employee was not arbitrable because it was not related to the sales agreements. 815 F.2d at 856. Taking a similarly broad approach, in *Barrowclough v. Kidder, Peabody & Co., Inc.*, the Third Circuit found that a dispute over an unfunded deferred compensation plan was subject to arbitration under an agreement which required arbitration of all disputes arising out of or relating to the employment or termination of employment. 752 F.2d 923, 938 (3d Cir. 1985).

Considering the broad language of the arbitration clause and the policy of resolving doubts in favor of arbitration, the wrongful death and survival actions arise out of or relate to the extermination agreement between Melva Allene Parsley and Terminix. The wrongful death and survival actions stem from allegations that Terminix, while performing their extermination contract, placed Pryfon 6, a highly toxic pesticide, close [*21] to Melva Parsley's dug well, resulting in her consumption of water contaminated with Pryfon 6. Like the arbitrable claims in *Genesco*, it is the behavior by Terminix in performing its contract with Melva Parsley that Geneva Parsley alleges proximately caused Melva Parsley's death. As such, both the wrongful death and survival suits against Terminix directly stem from their performance of the extermination contract. n4 Thus, the wrongful death and survival actions are arbitrable under the arbitration clause of the extermination contract.

n4 Geneva Parsley argues that only the wrongful death and survival claims do not fall under the arbitration agreement. Although not addressed by Plaintiff, her other claims against Terminix fall under the arbitration agreement for the same reasons as the wrongful death and survivor claims.

C. FIFRA

Plaintiff asserts that her claims under FIFRA are not subject to arbitration because Congress specifically intended the district court to have jurisdiction over FIFRA claims. [*22] "It is well-settled that statutory claims may be the subject of an arbitration agreement enforceable under the

Federal Arbitration Act." *Cosgrove v. Shearson Lehman Bros.*, 1997 U.S. App. LEXIS 392, No. 95-3432, 1997 WL 4783 (6th Cir. Jan. 6, 1997), cert. denied, 139 L. Ed. 2d 112, 118 S. Ct. 169 (1997); see *Gilmer v. Interstate/Johnson Lane Corp.* 500 U.S. 20, 26, 114 L. Ed. 2d 26, 111 S. Ct. 1647 (1991). The Supreme Court has stated that "having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Gilmer*, 500 U.S. at 26, quoting *Mitsubishi*, 473 U.S. at 628.

7 U.S.C. § 136n(c) states that "district courts of the United States are vested with jurisdiction specifically to enforce, and to prevent and restrain violations of [FIFRA]." This section, however, merely states the district courts have jurisdiction, not that they have jurisdiction to the exclusion of other fora. When Congress has intended district courts to have exclusive jurisdiction over claims, they have explicitly [*23] stated so. See, e.g., 28 U.S.C. § 1333 (admiralty and prize), § 1338 (patents), and § 1346(f) (quiet title where federal government claims an interest). Therefore, this Court does not interpret 7 U.S.C. § 136n(c) to require resolution of FIFRA disputes in a federal judicial forum. n5

n5 Defendant asserts that the Plaintiff is not entitled to protection from arbitration of her FIFRA claims, because FIFRA does not provide for a private cause of action. Although it is questionable that FIFRA provides a private right of action, see *People for Env'tl. Progress v. Leisz*, 373 F. Supp. 589, 592 (C.D. Cal. 1974), that issue does not affect the arbitrability of the claim and is more appropriately raised during arbitration.

D. PARTIES SUBJECT TO ARBITRATION

Terminix asserts that Geneva Parsley's claims against it are subject to arbitration, because she was a third-party beneficiary of the contract between it and Melva Parsley. Plaintiff did not [*24] respond to those contentions. "Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT&T Technologies, Inc. v. Communications Workers of Amer.*, 475 U.S. 643, 648, 89 L. Ed. 2d 648, 106 S. Ct. 1415 (1986) (quoting *United Steelworkers v. Warrior & Gulf Navig. Co.*, 363 U.S. 574, 4 L. Ed. 2d 1409, 80 S. Ct. 1347 (1960)). As a general rule, a person who is not a signatory to a contract containing an arbitration clause is not bound by the arbitration clause. See *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592 (6th Cir. 1995)(discussing guarantor).

Ohio n6 has recognized that certain third-party beneficiaries may assert rights as if they had been signatories to the contract. See *Visintine & Co. v. New York, Chicago & St. Louis R. Co.*, 169 Ohio St. 505, 160 N.E.2d 311 (1959); *Norfolk & Western Co. v. United States*, 641 F.2d 1201, 1208 (6th Cir. 1980). The Ohio Supreme Court has distinguished between two kinds of beneficiaries: intended beneficiaries and incidental beneficiaries. *Id.* Adopting section 302 of the Restatement [*25] of the Law 2d, Contracts (1981), the Ohio Supreme Court has stated,

(1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if "recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either

(a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or

(b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

(2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

Hill v. Sonitrol of Southwestern Ohio, 36 Ohio St. 3d 36, 521 N.E.2d 780, 784 (1988).

n6 Plaintiff's Complaint asserts that this Court has subject matter jurisdiction due to diversity of citizenship of the parties, pursuant to 28 U.S.C. § 1332. Thus, this Court will look to the law of the forum state, Ohio, in resolving this issue.

[*26]

The Sixth Circuit has applied this standard with an "intent to benefit" test. *Norfolk & Western Co.*, 641 F.2d at 1208; *Trinova Corp. v. Pilkington Bros.*, 70 Ohio St. 3d 271, 638 N.E.2d 572, 577 (1994). Under this analysis, in determining whether a person is an intended beneficiary, the inquiry is whether the promisee intends that a third party should benefit from the contract. *Id.* Even if a third party benefits from the contract, if the promisee has no intent to benefit a third party, then any third party beneficiary to the contract is merely an incidental beneficiary who has no enforceable rights or obligations under the contract. *Id.*; *Hill*, 521 N.E.2d at 784. "There must be evidence that the promisee assumed a duty to the third party." *Trinova Corp.*, 638 N.E.2d at 577.

"Those cases which have construed whether a contract was made for the direct or incidental benefit of a third party have looked necessarily to the language of the contract to make this determination." *Hill*, 521 N.E.2d at 785; *Point East Condo. Owners' Ass'n, Inc. v. Cedar House Assoc. Co.*, 104 Ohio App. 3d 704, 663 N.E.2d 343, 356, 1995 Ohio App. 3d 2145 (Cuyahoga Cty. 1995). [*27] In *Hill*, *supra*, a bookstore employee sued a security system company as a third-party beneficiary to a contract between her employer and a security system when the employee and her husband were accosted outside the store and held inside by an assailant. The Ohio Supreme Court found that the contract was intended to protect only the property in the store, not people, and therefore the employee was not an intended beneficiary of the contract. *Id.*

In contrast, in *Anderson v. Olmsted Utility Equip., Inc.*, 60 Ohio St. 3d 124, 573 N.E.2d 626 (1991), the Ohio Supreme Court found that city workers, who were injured when a "cherry picker" device which they were using failed, could sue as third party beneficiaries of a contract between the city and Olmsted to rebuild the device. In so finding, the court stated that the city clearly intended

the workers to benefit from the contract because the purpose of rebuilding the device was the safety of linemen. 573 N.E.2d at 631-32.

Similarly, the United States District Court for the Eastern District of Michigan held that an employee was a third-party beneficiary of his employer's contract with a foreign firm when the employee was [*28] to perform the contract for his employer and he was to receive commissions under the contract. *Ripmaster v. Toyoda Gosei, Co., Ltd.*, 824 F. Supp. 116 (E.D. Mich. 1993). The terms of the agreement clearly indicated an intention for the employee to personally benefit from the contract.

In the instant case, the contract between Melva Parsley and Terminix was to protect her home from termite damage. Although not mentioned in the agreement, the Court can infer that Melva Parsley likely intended other persons residing at her home to receive the benefit of the Terminix contract. See *Terminix International Co., LP, v. Ponzio*, 693 So. 2d 104 (Fla. Ct. App. 1997)(although only the husband had signed the contract with Terminix, the non-signing plaintiffs, who members of the household, were asserting third-party beneficiary status and, thus, were bound by the arbitration provision in the contract). There are two paragraphs in her Complaint which indicate that Geneva Parsley resided with Melva Parsley. First, paragraph 21 states that Defendant "knew that this dug well was used as the daily water supply by Melva Allene Parsley and Plaintiff Geneva Parsley for [*29] drinking, bathing, washing and other routine daily water uses." (Compl. P 21) Second, paragraph 17 alleges that certain individuals acted within the scope of their employment with Terminix when they inspected and sprayed "the premises of the decedent, Melva Allene Parsley, and Plaintiff Geneva Parsley located at 5651 Sugar Valley Road, Camden, Preble County, Ohio." (Id. P 17) Based on these allegations, Geneva has alleged that she resided at Melva Parsley's home. The Court, therefore, can reasonably infer that Melva Parsley intended Geneva Parsley to receive the benefits of the Terminix contract. Thus, the Court concludes that the claims brought by Geneva Parsley in an individual, not representative, capacity must also be submitted to arbitration.

Although not discussed by the parties, the claims raised against Defendant Bayer Corporation are not subject to the stay pending arbitration between Plaintiff and Terminix. Bayer was not a party to the contract. No party has claimed that Bayer was third party beneficiary of the contract, nor is the language "arising from or relating to" sufficiently broad to encompass claims against a third party such as Bayer. See *Boyd v. Homes of Legend, Inc.*, 981 F. Supp. 1423 (M.D. Ala. 1997). [*30] Accordingly, only those claims raised by Geneva Parsley against Terminix are subject to arbitration.

E. STAYING PROCEEDINGS

FAA § 3 provides that when the Court finds the issues arbitrable, "the court in which such suit is pending . . . shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement." The Supreme Court has stated that when the a dispute is subject to arbitration, the FAA "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Byrd*, 470 U.S. at 218 (emphasis in original). Accordingly, this Court will stay the proceedings with regard to all of the causes of action alleged by Geneva Parsley against Terminix pending arbitration of those claims.

As for the causes of actions alleged by Geneva Parsley against Bayer, which are not subject to arbitration, the question of whether to stay litigation of these issues pending arbitration of the Melva

Parsley's claims is left to the Court as [*31] a matter of its discretion to control its docket. n7 Moses H. Cone Hosp., 460 U.S. at 21, n.23. Here, many of the issues involved in the allegations against Bayer appear to be distinct from those which will be subject to arbitration. Because Bayer will not be involved in the arbitration process, the litigation against Bayer would be needlessly protracted by staying the proceedings against it pending arbitration between Plaintiff and Terminix. Accordingly, the Court sees no reason to stay the litigation of these nonarbitrable claims.

n7 Conversely, the Supreme Court has stated that arbitration proceedings need not be stayed pending resolution of the nonarbitrable claims out of concern for the preclusive effects of the arbitration. Byrd, 470 U.S. at 213, 221-224.

F. LIMITATIONS OF LIABILITY PROVISION

Plaintiff has requested that this Court, should it hold that her claims must be submitted to arbitration, make a determination that the limitation of liability provision contravenes [*32] Ohio law and is inapplicable to the causes of action pled. The issue of the enforceability of the limitation of damages provision is an issue for the arbiter, not for the Court. See *Prima Paint Corp.*, 388 U.S. at 404. Accordingly, this Court may not make such a determination.

G. DISCOVERY OVERSIGHT

Finally, Plaintiff requests that this Court expressly maintain its role as the final arbiter with regard to any discovery disputes that may arise in the instant case. (Doc. # 5) With regard to the claims which are submitted to arbitration, the Court cannot agree to Plaintiff's request. First, the Court notes that the Federal Rules of Civil Procedure, including those concerning discovery, generally do not apply to proceedings before arbiters. Fed. R. Civ. P. 81(a)(3); 14 James Wm. Moore et al., *Moore's Federal Practice* P 81.08[1] (3d ed. 1998). Such issues are normally resolved by arbitration rules agreed upon by the parties. 14 James Wm. Moore et al., *Moore's Federal Practice* P 81.08[1] (3d ed. 1998).

More importantly, when parties agree to arbitration, they are contractually foregoing to opportunity to avail themselves of a judicial forum. Although [*33] the Court may conduct some pre-trial proceedings when a case is referred to arbitration, *Performance Unlimited v. Questar Publishers, Inc.*, 52 F.3d 1373 (6th Cir. 1995)(preliminary injunction), the court should only take such actions when necessary to preserve the meaningfulness of the arbitration process. If this Court were to resolve discovery disputes that arise within the arbitration context, the Court would be interfering with, not preserving, that process. Such conduct would contradict the principles established by the FAA and the Supreme Court. Accordingly, the Court will not retain oversight of discovery conducted during arbitration.

III. Motion to Propound Interrogatories in Excess of Forty in Number (Doc. # 13)

In an unrelated motion, Parsley requests leave to propound more than forty interrogatories to Defendants Bayer and Terminix. (Doc. # 13) She asserts that the additional interrogatories are specific and not abusive in light of the complexity of the issues involved, and that the additional inter-

rogatories are necessary to identify witnesses and prepare for depositions. Terminix objected to the Motion, asserting that this suit does not require [*34] extensive paper discovery and that Plaintiff is seeking information that could be obtained from third parties. (Doc. # 14) Bayer also responded that additional interrogatories are unnecessary because the information can be obtained through document requests. n8 (Doc. # 19) Because Parsley's claims against Terminix must be referred to arbitration, her Motion with regard to Terminix is moot. Thus, the Court must resolve Plaintiff's Motion only with respect to Bayer.

n8 In opposing Parsley's Motion, Bayer has not objected to specific interrogatories as being overly burdensome or oppressive. Accordingly, the Court will analyze Plaintiff's First Set of Interrogatories in toto.

Bayer claims that Parsley has propounded in excess of one hundred seventy (170) interrogatories. (Doc. # 19) However, whether Parsley should be permitted to propose that amount of interrogatories upon Bayer is not dependent upon the number of interrogatories; rather, the question is whether the amount of interrogatories is unduly burdensome [*35] or oppressive in light of the issues presented by this case. See 7 James Wm. Moore et al., Moore's Federal Practice P 33.173[3] (3d ed. 1998).

With some exceptions, the questions asked of Bayer do not appear to require complex or difficult to find information. Furthermore, the interrogatories appear to assist Parsley in identifying individuals or issues from and for which she may perform additional discovery. Bayer correctly points out that much of the information requested of them likely could be obtained through other discovery methods, particularly document requests. The interrogatories that ask for detailed technical information appear to fall within this category. Pursuant to Fed. R. Civ. P. 33(d), for those interrogatories where the answer would be derived from business records and the burden of ascertaining the answer would be substantially the same for either Bayer or Parsley, Bayer may choose to answer such questions by identifying the documents and allowing Parsley a reasonable opportunity to inspect such. Accordingly, Parsley's First Set of Interrogatories, viewed in toto, do not appear to be unduly burdensome or oppressive. Plaintiff's request to propound more [*36] than forty interrogatories to Defendant Bayer is Sustained.

Counsel for Plaintiff and Defendant Bayer will take note that a telephone conference call will be had, beginning at 8:30 a.m. on Thursday, October 1, 1998, for the purpose of determining the viability of the March 22, 1999, trial date.

September 15, 1998

WALTER HERBERT RICE, CHIEF JUDGE

UNITED STATES DISTRICT COURT