IN THE SUPREME COURT OF OHIO

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

REPLY BRIEF OF *AMICI CURIAE*, OHIO CHAMBER OF COMMERCE AND OHIO MANUFACTURERS' ASSOCIATION IN SUPPORT OF APPELLANT

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FILED
NOV 06 2006
MARCIA J MENGEL, CLERK
SUPREME COURT OF OHIO

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST OF *AMICI CURIAE* 1

ARGUMENT 2

Proposition of Law: 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 2

A. Wrongful Death Claims, "Independent" Or Otherwise, Are Subject To An Arbitration Agreement Executed By The Decedent. 2

B. A Decedent And His Personal Representative, Who Is Pursuing A Claim For His Wrongful Death, Are In Privity As A Matter Of Law. 5

C. Arbitration Is Favored As A Means Of Resolving Disputes Because It Offers Benefits That Are Unavailable Through The Courts Without Limiting Or Eliminating The Available Rights Or Remedies. 7

1. Arbitration benefits all Ohio citizens by reducing the case load of the courts and the related cost to the public. 8

2. Arbitration benefits Ohio businesses by resolving disputes in a fair and efficient manner. 9

3. Arbitration does not remove the deterrent effect implicit in tort liability. 10

4. There are ramifications associated with precluding wrongful death claims from resolution through arbitration. 10

CONCLUSION 11

CERTIFICATE OF SERVICE 13

TABLE OF AUTHORITIES

Page

CASES

ABM Farms, Inc. v. Woods (1997), 81 Ohio St.3d 498, 692 N.E.2d 574 8

Automatic Die & Products Co. (1954), 162 Ohio St. 321, 123 N.E.2d 401 8

Brennan v. Brennan (1955), 164 Ohio St. 29, 128 N.E. 89 8

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

Bruni v. Tatsumi (1976), 46 Ohio St.2d 127 4

Campbell v. Automatic Die & Products Co. (1954), 162 Ohio St. 321, 123 N.E.2d 401 8

Cooper v. Sisters of Charity of Cincinnati (1971), 27 Ohio St.2d 242 4

Dayton Classroom Teachers Association v. Dayton Board of Education (1975), 41 Ohio St.2d 127 8

Gibbons-Grable Co. v. Gilbane Building Co. (1986), 34 Ohio App.3d 170, 517 N.E.2d 559 8

Grindell v. Huber (1971), 28 Ohio St.2d 71, 275 N.E.2d 614 ..... 3, 4

Hershberger v. Akron City Hosp. (1987), 34 Ohio St.3d 1, 516 N.E.2d 204 4

Holt v. Grange Mutual Cas. Co. (1997), 79 Ohio St.3d 401, 683 N.E.2d 1080 6

Kelm v. Kelm (1993), 68 Ohio St.3d 26, 623 N.E.2d 39 8

Littleton v. Good Samaritan Hospital and Health Center (1988), 39 Ohio St.3d 86 4

Mahoning Valley Ry. Co. v. Van Alstine (1908), 77 Ohio St. 395, 83 N.E. 601 3

May Coal Co. v. Robinette (1929), 120 Ohio St. 110, 165 N.E. 576 3

Menardi v. Petrigalla (Cuyahoga App. 1983), 11 Ohio App.3d 9, 462 N.E.2d 1246 8

Musick v. Dutta (2006), 167 Ohio App.3d 269, 2006-Ohio-2864, 854 N.E.2d 1114 4

Parsley v. Terminix Co. (S.D.Ohio Sept. 15, 1998), No. 3-97-394, 1998 U.S. Dist. LEXIS 22891 7

Peltz v. Sears, Roebuck & Co. (E.D. Pa. 2005), 367 F.Supp. 2d 711 2

Southland Corp v. Keating (1984), 465 U.S. 1, 79 L.Ed. 2d 1, 104 S. Ct. 852 8

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Springfield v. Walker (1885), 42 Ohio St. 543 8

Thompson v. Wing (1994), 70 Ohio St.3d 176, 637 N.E.2d 917 ..... 3, 4, 5, 6

West v. Miami Valley Hospital (1998), 99 Ohio Misc.2d 1, 714 N.E.2d 469 ..... 3, 4

Wilkerson v. Nelson (M.D.N.C. 2005), 395 F. Supp. 2d 281 2

STATUTES

R.C. 2125.01 3

R.C. 2125.02(A)(1) 5

R.C. 2305.113 3

R.C. 2305.113(E)(7) 4

R.C. 2711.01 8

STATEMENT OF INTEREST OF *AMICI CURIAE*

The Ohio Chamber of Commerce ("Chamber") was founded in 1893 and is Ohio's largest and most diverse statewide business advocacy organization. The Chamber works to promote and protect the interests of its 4,000 business members while building a more favorable Ohio business climate. As an independent and informed point of contact for government and business leaders, the Ohio Chamber is a respected participant in the public policy arena. The advocacy efforts of the Ohio Chamber of Commerce are dedicated to supporting and strengthening the overall business climate in Ohio.

The Ohio Manufacturers' Association ("OMA") is a statewide association of more than 2,000 manufacturing companies that collectively employ the majority of the 800,000 men and women who work in manufacturing in Ohio. The OMA represents manufacturers' interests before the General Assembly and state regulatory agencies. The OMA advocates public policies that will foster an economic and regulatory environment in which manufacturing businesses can thrive and the people of Ohio can enjoy the benefits of a robust manufacturing economy.

The judgment of the Tenth District Court of Appeals, if allowed to stand, would exclude all wrongful death claims from arbitration agreements. The negative impact on *amici curiae* would include the loss of the various benefits afforded by arbitration to their members. This loss would not be offset by any benefit to the parties, who enjoy the same rights and remedies under either system, but would be compounded by adding to the burden imposed upon the judicial system through increased case volume and its associated cost to the public. For these reasons, the decision of the Tenth District Court of Appeals is inconsistent with the legislative, judicial and public policy of Ohio.

ARGUMENT

Proposition of Law: 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.

This appeal presents a discrete legal issue:

> Is an arbitration agreement, that would have been valid and binding upon an individual for purposes of pursuing a personal injury claim, valid and binding upon his personal representative upon his death for purposes of pursuing a claim based upon his wrongful death?

Despite the straightforward issue before the Court, Appellee and her *amici curiae* have muddied the waters by distorting the issue at hand and distracting the Court from the relevant considerations necessary to decide this issue. The Ohio Chamber of Commerce and the Ohio Manufacturers' Association are filing this Reply Brief in an effort to offer clarification on behalf of their members.

A. Wrongful Death Claims, "Independent" Or Otherwise, Are Subject To An Arbitration Agreement Executed By The Decedent.

Several courts from outside Ohio have already recognized that an arbitration agreement is binding upon the personal representative of a decedent for purposes of pursuing a wrongful death claim where the decedent's underlying claim would have been subject to arbitration. Briarcliff Nursing Home, Inc. v. Turcotte (Ala. 2004), 894 So.2d 661; Wilkerson v. Nelson (M.D.N.C. 2005), 395 F. Supp. 2d 281; Peltz v. Sears, Roebuck & Co. (E.D. Pa. 2005), 367 F.Supp. 2d 711. The appellate court below chose to disregard all of these cases.

The appellate court below found that it could not follow the holdings of Briarcliff, Wilkerson and Peltz because it perceived that those decisions turned upon the "derivative" nature of wrongful death claims in those jurisdictions, which it believed was at odds with the "independent" nature of wrongful death claims in Ohio. (See Op. January 31, 2006, 2006-Ohio-

382 at ¶¶ 18-19; see also Appellant's Supplement to the Briefs, pp. 29-30). Not only is that finding an inaccurate reflection of the law in those jurisdictions, but it reflects a misunderstanding of the significance of characterizing a claim as "independent."

The Tenth District correctly recognized that a civil claim for wrongful death in Ohio, pursuant to R.C. § 2125.01 *et seq.*, is an "independent" claim. Thompson v. Wing (1994), 70 Ohio St.3d 176, 182, 637 N.E.2d 917, citing, Mahoning Valley Ry. Co. v. Van Alstine (1908), 77 Ohio St. 395, 83 N.E. 601, paragraph two of the syllabus, and May Coal Co. v. Robinette (1929), 120 Ohio St. 110, 165 N.E. 576, paragraph two of the syllabus. While this characterization is almost uniformly accepted, the Tenth District confused the meaning and significance of this characterization below. To better appreciate and understand the significance of the characterization of a wrongful death claim as an "independent" claim, it is important to understand what an "independent" claim is not.

An "independent" claim is not the opposite of a "derivative" claim. In fact, those two characterizations, which measure different aspects of a claim, are not mutually exclusive. See West v. Miami Valley Hospital (1998), 99 Ohio Misc.2d 1, 9, 714 N.E.2d 469 (holding that derivative claims for parental loss of consortium claims are separate claims that belong to the parent and are subject to their own limitations period); see also, Grindell v. Huber (1971), 28 Ohio St.2d 71, 75, 275 N.E.2d 614 (holding that a derivative loss of consortium claim is separate and distinct from the underlying claim). Consider the claim that a wife can bring for the loss of consortium she experiences as a result of injuries sustained by her husband, allegedly due to medical negligence, pursuant to R.C. § 2305.113. The claim is derivative in nature because the wife's claim arises out of and would not exist but for the fact that her husband had a claim for his

injuries.[1] This same loss of consortium claim is also independent in many respects. First of all, the wife can pursue this claim even if her husband never pursues his claim, regardless of whether that is because his claim is time barred or he simply chooses not to pursue it. See Miami Valley Hospital, 99 Ohio Misc. at 1; Grindell, 28 Ohio State.2d at 75. In addition, the wife's claim will have an accrual date and statute of limitations of its own that operates independently of her husband's claim. Musick v. Dutta (2006), 167 Ohio App.3d 269, 2006-Ohio-2864 at ¶15, 854 N.E.2d 1114, citing, Hershberger v. Akron City Hosp. (1987), 34 Ohio St.3d 1, 516 N.E.2d 204 Finally, the damages available under the loss of consortium claim belong only to the wife for her injuries. R.C. § 2305.113(E)(7). Accordingly, a claim for loss of consortium is one example of a claim that is both derivative and independent.

An "independent" claim is also not a "separate" claim. In fact, a claim for wrongful death relies upon and shares several elements with the underlying claim that was or could have been pursued by or on behalf of the decedent had he survived. This is easily demonstrated by comparing and contrasting the elements of a negligence claim being brought by an injured survivor with a wrongful death claim being brought when there was a death resulting from those same injuries.[2] The necessary elements of both claims include (1) the existence of a duty, (2) a breach of that duty, (3) that proximately caused (4) damages. Id. Importantly, both claims involve the exact same duty, breach of duty and proximate causation. In fact, if a jury

[1] The past tense "had" is used here because the actual requirement set forth in Thompson is only that the husband had a claim at one point. That claim need not be viable when the wife pursues her claim so long as there has not been a judgment defeating his claim.

[2] The elements that must be proven to establish a medical negligence action are duty, breach of that duty, proximate causation, and harm or damages. Bruni v. Tatsumi (1976), 46 Ohio St.2d 127; Littleton v. Good Samaritan Hospital and Health Center (1988), 39 Ohio St.3d 86; Cooper v. Sisters of Charity of Cincinnati (1971), 27 Ohio St.2d 242. The elements that must be proven to establish a wrongful death action are duty and a breach of that duty that proximately causes death. Thompson v. Wing (1994), 70 Ohio St.3d 176, citing 1 Speiser, Recovery for Wrongful Death (2 Ed. 1975) 64, Section 2:1

determines that any one of these first three elements is absent relative to the personal injury claim of the injured person, a future claim for his wrongful death arising out of those same injuries is bound by that finding. Thompson, 70 Ohio St.3d at 184-85. In that sense, a wrongful death claim can be barred by the actions of the decedent during his lifetime, even before the claim ever accrues. The only difference between the elements of these two claims is the nature of available damages and who receives them. Therefore, a wrongful death claim is not a separate claim at all because it shares and relies heavily upon the underlying negligence claim.

By their very nature, wrongful death claims necessarily arise out of and rely upon the existence of an underlying claim for their very existence. Whether this causes them to be labeled as derivative claims is entirely immaterial. The relevant consideration in this appeal is not whether the claim is "independent" versus "derivative" or "separate" or "distinct." The relevant consideration is whether there is sufficient privity of interest between the decedent and his personal representative to bind the personal representative by the agreement to arbitrate that was entered into by the decedent. There is.

B. A Decedent And His Personal Representative, Who Is Pursuing A Claim For His Wrongful Death, Are In Privity As A Matter Of Law.

Ohio Revised Code § 2125.02(A)(1) provides that "a civil action for wrongful death shall be brought in the name of the personal representative of the decedent for the exclusive benefit of the [beneficiaries]..." As such, beneficiaries are statutorily precluded from bringing a wrongful death action because it can only be brought by the decedent's personal representative. Nonetheless, *Amicus* OELA contends that a decedent's beneficiaries somehow *own* the wrongful death claim. To the contrary, as their title states, beneficiaries only *benefit* from such a claim because of their relationship with the decedent before his death. If beneficiaries are to be given ownership rights, the only thing that they ever own is their equitable portion of damages.

Therefore, they really own nothing at all unless and until there is a determination that damages are owed. This can only occur after a determination has been made by a trier of fact on the elements of duty, breach of duty, and proximate causation. When the claim is initiated, while it is being developed and even while it is being presented to a trier of fact, the only one with any rights is the decedent's personal representative and she is bound by the forum choice of the decedent she represents.

As a practical matter, the personal representative who brings a wrongful death claim is almost never going to be an actual party/signatory to an arbitration agreement entered into by the decedent. Therefore, requiring actual signatures would be fatal to arbitration of wrongful death claims in Ohio. Fortunately, an actual signature is not required because it is not the personal representative's signature that binds them to the arbitration agreement, but their special relationship with the decedent they represent. This creates a unique relationship involving a close alignment of interests.

This Court has considered the impact of the close alignment of interests between and among decedents, their personal representatives and their beneficiaries and found that it creates privity. See Thompson, 70 Ohio St.3d at 184; Holt v. Grange Mutual Cas. Co. (1997), 79 Ohio St.3d 401, 410, 683 N.E.2d 1080. Specifically, in Thompson, this Court found that wrongful death beneficiaries are in privity with the decedent sufficient to allow collateral estoppel to eliminate their claim where the decedent litigated the shared elements of the wrongful death claim as part of his survivorship claim during his lifetime and received an adverse verdict. In Holt, this Court found privity by determining that it was unnecessary given the special nature of wrongful death claims brought on behalf of a decedent by his personal representative who receives the damages and then apportions them to the beneficiaries.

One Ohio federal court has recognized that an arbitration agreement is binding upon the personal representative of a decedent for purposes of pursuing a wrongful death claim where the decedent's underlying claim is bound. Parsley v. Terminix Co. (S.D.Ohio Sept. 15, 1998), No. 3-97-394, 1998 U.S. Dist. LEXIS 22891. The Tenth District disregarded this case based upon its concern that the decision does not contain a discussion regarding whether the personal representative had agreed to arbitrate. However, as discussed above, this was an unnecessary discussion as privity clearly exists as a matter of law between a decedent and her personal representative who is bringing a wrongful death claim. Therefore, Parsley stands for the valid proposition that a personal representative is bound by an arbitration agreement relative to a claim for wrongful death where the decedent agreed to arbitrate her underlying claim.

When an individual enters into a valid arbitration agreement that would apply to his personal injuries, the arbitration agreement also applies to any wrongful death claim made by his personal representative upon his death. This is consistent with the reality of wrongful death claims, where there exists a unique interplay between and among the decedent, his personal representative and his beneficiaries. Importantly, this is also consistent with longstanding legal principles of contractual interpretation as well as legislative, judicial and public policy.

C. Arbitration Is Favored As A Means Of Resolving Disputes Because It Offers Benefits That Are Unavailable Through The Courts Without Limiting Or Eliminating The Available Rights Or Remedies.

Courts can recognize, define, and sometimes even create legal rights and remedies. However, the courtroom is not the only forum for resolving legal disputes and it is also not always the best forum in many respects. In fact, in Ohio arbitration is encouraged by the legislature, state and federal courts and the public in general because it is able to offer many benefits that are not available through the state or federal courts, with less cost to the public and without limiting or eliminating the available remedies.

1. **Arbitration benefits all Ohio citizens by reducing the case load of the courts and the related cost to the public.**

There is little dissent when it comes to the value that arbitration brings to dispute resolution in Ohio. The legislature encourages resolution of disputes through arbitration. See R.C. § 2711.01, *et seq.* State and federal courts also encourage resolution through arbitration. ABM Farms, Inc. v. Woods (1997), 81 Ohio St.3d 498, 501, 692 N.E.2d 574; Kelm v. Kelm (1993), 68 Ohio St.3d 26, 27, 623 N.E.2d 39; Southland Corp v. Keating (1984), 465 U.S. 1, 10, 79 L.Ed. 2d 1, 104 S. Ct. 852. Finally, public policy favors and encourages arbitration. See Dayton Classroom Teachers Association v. Dayton Board of Education (1975), 41 Ohio St.2d 127, 132 (noting that it is the policy of the law to favor and encourage arbitration), citing Campbell v. Automatic Die & Products Co. (1954), 162 Ohio St. 321, 123 N.E.2d 401; Springfield v. Walker (1885), 42 Ohio St. 543 (wherein the Court ordered the school board to arbitrate a grievance as set forth in the terms of the collective bargaining agreement); Gibbons-Grable Co. v. Gilbane Building Co. (1986), 34 Ohio App.3d 170, 173, 517 N.E.2d 559 (the court recognized the policy of the law favoring and encouraging arbitration,[3] and then held that the subcontractor was bound by an arbitration agreement that existed between the general contractor and the property owner because that provision was incorporated by reference into the agreement between the subcontractor and general contractor through broad general language); and Menardi v. Petrigalla (1983), 11 Ohio App.3d 9, 11, 462 N.E.2d 1246. There is good reason for this consensus.

One obvious reason for the endorsement enjoyed by arbitration is the fact that it creates an alternate forum that reduces the overall burden upon a busy judicial system. Another reason that arbitration is encouraged is the fact that arbitration is privately funded, usually by one or

[3] Citing Brennan v. Brennan (1955), 164 Ohio St. 29, 128 N.E. 89, and Automatic Die & Products Co. (1954), 162 Ohio St. 321, 123 N.E.2d 401.

both parties to the arbitration, reducing the financial burden imposed upon the public, which is obligated to fund the judicial system. Because these two public benefits can be achieved while preserving the rights and remedies of the parties, everyone benefits from arbitration.

2. Arbitration benefits Ohio businesses by resolving disputes in a fair and efficient manner.

When a claim is made against an Ohio business, the goal of both sides is, or should be, to get the claim resolved in a fair and expeditious manner. This can be achieved equally well in both an Ohio court and through arbitration. Contrary to the assertion of *Amici* OATLA, arbitration most definitely does not impair the future right of beneficiaries to recover damages. Instead, parties in either forum can address the same claims and remedies, have legal representation, conduct written discovery, take depositions, present evidence, subpoena witnesses, submit briefs and have the dispute determined by a panel of neutral and disinterested individuals. (R. 31, Milligan Aff., ¶ 7, Ex. B, p. 16-22; see Appellant's Supplement to the Briefs, pp. 2, 12-15.) In essence, the parties can do everything before and during an arbitration that they would otherwise do before and during a trial in a courtroom.

By choosing arbitration, parties generally enjoy faster resolution because they can schedule the arbitration when they are ready to proceed, without regard to the docket of a busy judge with hundreds of cases to manage, including criminal matters that often demand immediate attention. Parties also enjoy finality. Specifically, once their arbitration panel reaches a decision, they have their result and can move on. The lengthy and expensive appeal process that is used (and sometimes abused) in the judicial system is generally unavailable.

Arbitration is a private forum that affords disputing parties all of the same rights and remedies available in the judicial system with the added benefit that it is generally more expeditious, both in the time that it takes to have the "trial" and in the fact that the result is

generally final and saves the time and money that is often expended pursuing post trial appeals. In that regard, it offers Ohio businesses much needed efficiency and certainty.

3. Arbitration does not remove the deterrent effect implicit in tort liability.

Amici OELA noted that there is some deterrent effect implicit in a wrongful death claim because the tortfeasor is forced to face the survivors before the trier of fact and is responsible to compensate them if found liable. Where *Amici* OELA goes astray is the contention that this deterrent effect is lost when the claim is resolved through arbitration. As noted above, both would proceed in a nearly identical fashion with respect to the preparation and presentation of the claim. The fact that the alleged tortfeasor faces a panel of arbitrators instead of a panel of jurors cannot possibly be sufficient to materially reduce the overall deterrent effect. In arbitration, the tortfeasor would still face the survivors and would be responsible to compensate them if found liable.

4. There are ramifications associated with precluding wrongful death claims from resolution through arbitration.

Carving wrongful death claims out of the arbitration arena is not without consequence. As discussed above, this would cost the judicial system the benefit that arbitration has provided in the form of a reduced case burden and would cost the citizens of Ohio who have to fund the judicial system. These are not the only costs and possibly not even the most significant ones.

If wrongful death claims are not subject to arbitration agreements entered by the decedent, then what happens when there is both a survivorship claim and a wrongful death claim being pursued simultaneously? The increased monetary cost of having these two interrelated claims proceeding simultaneously in two different forums is the least of the concerns. Of greater concern is the very real risk of conflicting rulings and possibly conflicting verdicts. For example, assume that an arbitration panel considering the survivorship claim found that there

was a duty, a breach of that duty, and proximate causation and then awarded survivorship damages. Further assume that a civil jury found no breach of duty and, therefore, does not even consider the issue of damages related to the wrongful death claim. There are now two completely different determinations on the same set of facts. In this instance, does the decision that came down first bind the second? Do the conflicting decisions cancel each other out? Does each result stand alone? Whatever the result, this will not instill confidence or satisfaction on the part of anyone in the system of justice in Ohio.

As parties face the cost of proceeding in two forums on nearly all of the same issues with all of the added cost and the associated risk of inconsistency, the only available solution will likely be to forego arbitration on any of the claims. The end result is that arbitration, with all of its many benefits, is discarded out of necessity. That would be a very unfortunate, and avoidable, outcome.

CONCLUSION

Arbitration is encouraged as an alternate forum to the courtroom for purposes of resolving disputes. Because arbitration affords benefits to both the involved parties and to the public in general that would not be available through the formal judicial system, without limiting or reducing any of the available rights or remedies, it is almost universally encouraged as a means of resolving disputes. Importantly, there is no legitimate legal or public policy reason to exclude wrongful death claims from resolution through arbitration.

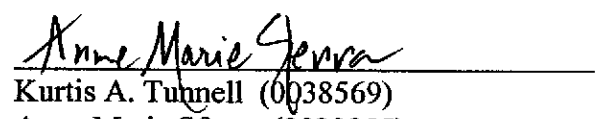
A wrongful death claim necessarily arises out of and relies upon an underlying claim, generally a tort claim of some form. These claims share all of the same elements, except the element of damages, and each can only be brought by the affected person or, where he is unable due to his death, by his personal representative who is then acting on his behalf. If the affected person executed an agreement that established arbitration as the sole forum for resolving all

disputes with the other party to the agreement, then this must necessarily include the claims he is able to bring for his injuries and the claims that a personal representative must bring for him upon his death. Any other result would run afoul of the agreement and legislative, judicial and public policy.

The decision of the Tenth District below effectively performs a post mortem modification of binding arbitration agreements to carve out wrongful death claims. This not only inappropriately changes the terms agreed upon by the parties, but it does so without justification. Specifically, parties who contracted for resolution through arbitration are denied the benefits of the forum and system to which they agreed. Instead, they are returned to the judicial system that does not afford the parties any greater rights or remedies, but does impose public costs.

Amici curiae urge this Court to establish that wrongful death claims are subject to arbitration agreements where the underlying survivorship claim is/was bound by that agreement.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Reply Brief of *Amici Curiae*, Ohio Chamber of Commerce and Ohio Manufacturers' Association in Support of Appellant was sent via regular U.S. mail, postage prepaid this 6th day of November 2006, to the following:

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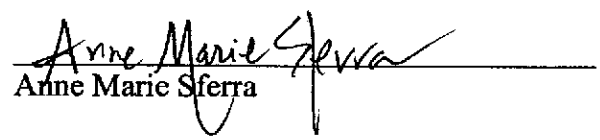

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