[Cite as *Mansour v. Woo*, 2012-Ohio-1883.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

ROBERT G. MANSOUR, SPECIAL ADMINISTRATOR OF THE ESTATE OF MATTHEW J. LAYMAN,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2011-A-0038**
- vs -	:	
C.K. WOO, M.D., et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Ashtabula County Court of Common Pleas, Case No. 2010 CV 1096.

Judgment: Affirmed.

Paul W. Flowers, Paul W. Flowers Co., L.P.A., Terminal Tower, 35th Floor, 50 Public Square, Cleveland, OH 44113-2216 (For Plaintiff-Appellant).

Kenneth P. Abbarno and *Brian D. Sullivan*, Reminger & Reminger Co., L.P.A., 1400 Midland Building, 101 West Prospect Avenue, Cleveland, OH 44115-1093 (For Defendants-Appellees, C.K. Woo, M.D.; Chong Kyoo Woo, M.D., CO., d.b.a. University Womens Health Clinic; and C.K. Woo M.D., Inc., d.b.a. University Womens Health Clinic).

Jason P. Ferrante, Sutter, O'Connell & Farchione, 3600 Erieview Tower, 1301 E. 9th Street, Cleveland, OH 44114 (For Defendant-Appellee, Ashtabula County Medical Center).

MARY JANE TRAPP, J.

{¶1} Appellant, Robert G. Mansour, appeals from the judgment of the Ashtabula County Court of Common Pleas, granting summary judgment in favor of

appellees, Ashtabula County Medical Center ("ACMC"), C.K. Woo, M.D., Chong Kyoo Woo, M.D., Co., and C.K. Woo, M.D., Inc. (collectively "Woo"). Mr. Mansour, as special representative of the estate of Matthew Layman, brought a wrongful death action against ACMC and Woo on behalf of the beneficiaries of Matthew Layman's estate.

{¶2} From the record before us, Matthew's parents, Natalie McCormick, fka Natalie Layman, and Kevin Layman ("Laymans"), were the only identified beneficiaries of his estate. The trial court entered summary judgment in favor of ACMC and Woo based upon various settlement documents from a previous medical negligence action brought by Matthew's parents, individually and on behalf of Matthew as his guardian.

{¶3} Mr. Mansour brings this appeal, first arguing that the settlement agreement between Woo and the Laymans is limited in nature and does not contemplate nor prohibit a subsequent wrongful death action. He further argues that he was not a party to the prior settlement agreements between ACMC and the Laymans, and Woo and the Laymans, and therefore is not bound by them.

{¶4} We agree that neither the covenant not to sue given to Woo nor the release given to ACMC binds Mr. Mansour as the personal representative of the decedent's estate, because the Laymans, individually and as Matthew's parents, could release only their son's future wrongful death claim, as well as their own. There is no evidence in the record that the Laymans had authority to release the future wrongful death claims of other statutory beneficiaries. So, in theory then, Mr. Mansour, as the holder of the statutorily created exclusive right to file a wrongful death action, could still pursue a wrongful death action for the benefit of a surviving spouse, child, or other next of kin. But the Complaint does not identify any surviving spouse, child, or other next of

kin, nor has any evidentiary quality material been submitted identifying a potential beneficiary in response to the motions for summary judgment.

{¶5} Mr. Mansour essentially asserts that identification of the specific wrongful death beneficiaries at the pre-trial stage is premature, because it is the probate court that ultimately makes that determination *after* a settlement or verdict is submitted to it for approval. Once again, Mr. Mansour is correct, but if there are *no* potential beneficiaries even identified at the pre-trial stage, except those who have either already released or agreed not to further pursue their claims, then no one exists who could benefit from any recovery.

{¶6} The trial court took notice of the Standard Probate Form 1.0 filed by Mr. Mansour with his application for authority to administer Matthew's estate. Form 1.0 listed only Matthew's parents, but this form could never be utilized to establish the identity of potential wrongful death beneficiaries. Form.1.0 is used, when opening an estate, to list the surviving spouse, children and lineal descendants of deceased children. Only in the event that there are no surviving spouse, children and lineal descendants of deceased children, would other next of kin even be listed on that form.

{¶7} Although Form 1.0 is an imperfect vehicle for identifying wrongful death beneficiaries, and should not be relied upon by a trial court as determinative of the identity of wrongful death beneficiaries, it was submitted in evidentiary quality form in support of a motion for summary judgment. For purposes of Civ.R. 56, it sufficiently identified the portion of the record before the trial court that demonstrated an absence of a genuine issue of fact on a material element of the nonmoving party's claim. From the record before us, we find that Mr. Mansour cannot meet one of the prerequisites for

recovery in a wrongful death action – "the existence of a beneficiary for whom the exclusive right is to be maintained." McCormac, *Wrongful Death in Ohio*, Section 2.07, at 11 (1982). *See also Doyle v. Baltimore & Ohio RR. Co.*, 81 Ohio St. 184 (1909).

{¶8} Thus, we must agree that, because (1) Mr. Mansour does not dispute that the Laymans' claims have been either released or will not be further pursued because of a settlement agreement, and (2) Mr. Mansour failed to identify *any* potential heirs at law or next of kin who might benefit from this suit, no issue of material fact remains for trial. The trial court properly granted summary judgment.

Substantive Facts and Procedural History

{¶9} In 1992, Mrs. Layman was expecting a child and was under the obstetrical care of Woo. In August of 1992, she presented to the labor and delivery unit of ACMC and gave birth to Matthew, who, as a result of the labor and delivery, suffered permanent neurological impairment. In November of 1993, Matthew Layman, by and through Mrs. Layman, and Mr. and Mrs. Layman, individually, filed a complaint against ACMC and Woo for medical negligence. The issue of liability was tried to a jury, and the Laymans prevailed.

The "Full and Final Release & Settlement Agreement" With ACMC

{¶10} After the verdict, the Laymans entered into two separate and individual settlement agreements with ACMC and Woo, and dismissed the lawsuit with prejudice. The first agreement, dated April 21, 1995, is entitled "Full and Final Release & Settlement Agreement" ("Release"), and is between the Laymans, individually and on behalf of Matthew, and ACMC.

{¶11} This agreement states that the Laymans "do hereby fully and forever release and discharge" ACMC "from all liabilities, claims, demands and causes of action of [sic] kind and in any way relating to medical care, treatment, examination and advice" received by Mrs. Layman and Matthew.

{¶12} The Release specifically excluded Woo and two other physicians who rendered care to Mrs. Layman and Matthew, as well as their practice corporations.

{¶13} The Release also included "all claims that the [Laymans] have or may have had against" ACMC, "for injuries and damages sustained, or to be sustained in the future" and included, but was not limited to, the following: "medical expenses, rehabilitation expenses, therapy expenses, nursing expenses, hospital expenses, costs, interest, loss of services, loss of consortium, loss of companionship, bodily injuries, personal injuries, loss of support, loss of pleasure of life, loss of enjoyment of life, hedonic damages, pain and suffering, emotional distress, mental anguish, physical disabilities, mental disabilities, mental retardation, cerebral palsy, developmental delays, reduced life expectancy, lost income, and all other damages and injuries of whatever nature whatsoever, whether known or unknown, whether temporary or permanent, both now and in the future, and which the [Laymans], or anyone acting on their behalf, and Matthew J. Layman, and any on his behalf, may have had the right to recover from" ACMC.

{¶14} The Release was a binding and complete settlement between the Laymans and ACMC, and stated that the Laymans "recognize and agree that [they] are fully and forever releasing and discharging" ACMC from "any and all claims, demands, cause of action and liabilities * * *."

The "Covenant Not to Sue and Cease Suing" With Woo

{¶15} The second agreement was entitled "Covenant Not to Sue and Cease Suing" ("Covenant"), and was executed on May 12, 1995, between the Laymans, individually and on behalf of Matthew, and C.K. Woo, M.D., K.C. Nagaprakash, M.D., Dr. I.W. Kim, M.D., Inc. (collectively "Woo"), and their agents, employees, heirs, executors, administrators, insurers, successors and assigns.

{¶16} The Covenant stated that the Laymans would "cease from suing or pursuing any claim against Woo" and covered "any claim arising or which might arise out of the care * * *." Further, the Covenant stated that it was "being given in good faith and in full and final satisfaction of any and all claims or rights or causes of action against" Woo.

{¶17} The Laymans received substantial monetary consideration for each of the settlement agreements, and the malpractice action was dismissed with prejudice.

Subsequent Wrongful Death Action

{¶18} Sixteen years later, in 2008, Matthew died from what was diagnosed as aspiration pneumonia, allegedly secondary to the neurological injury he suffered at birth. Mr. Mansour was appointed as the special representative of Matthew's estate and filed a wrongful death action against ACMC and Woo on behalf of Matthew's beneficiaries. Mr. and Mrs. Layman were the only two relatives listed on the Standard Probate Form 1.0 filed with the Application for Authority to Administer Estate.

{¶19} Both Woo and ACMC filed motions for summary judgment based on the existence of the Covenant and the Release. They argued that, although the action was filed by the estate's representative, the Laymans, as sole beneficiaries of the estate,

were the real parties in interest and were precluded from any further recovery because they had previously released and discharged ACMC, and had agreed not to pursue any further legal action against Woo resulting from any and all claims arising out of the medical care provided to their son in 1992.

{¶20} ACMC and Woo asserted that the settlement documents included a future claim of wrongful death, even though such a claim for relief had not yet accrued at the time the agreements were executed. Mr. Mansour opposed summary judgment, arguing that the settlement agreements did not, in fact, contemplate and encompass a subsequent wrongful death claim. Alternatively, he argued that, because he was not a party to the 1995 agreements, he was not barred from bringing the wrongful death suit, even if the Laymans were.

{¶21} The trial court granted summary judgment to both ACMC and Woo. Regarding the ACMC Release, the court found that the Laymans "individually" released and discharged ACMC "from all liabilities, claims, demands and causes of action of any kind, including injuries and damages sustained in the future whether known or unknown." The court further found that the Covenant given to Woo, "by its language specifically includes allegations of future expenses and damages, and further covers any claims arising or which might arise. The only common sense meaning that can be assigned to the language of these settlement documents is that [the Laymans] understood, at the time they agreed to them, that they were personally releasing and waiving any claim that could arise from the medical negligence related to the birth of Matthew, including a possible wrongful death action."

{¶22} Further, the trial court found that Mr. Mansour could not proceed with the wrongful death action when the only estate beneficiaries, the Laymans, were barred from pursuing any claims against ACMC and Woo arising out of the 1992 medical care. "It is beyond unrealistic to expect that the plaintiff should be permitted to prosecute and the defendants should be required to defend a wrongful death action when no person who would be entitled to recover can be named."

{¶23} In light of the trial court's grant of summary judgment to both ACMC and Woo, Mr. Mansour filed a timely notice of appeal and now brings two assignments of error:

{¶24} "[1.] The trial court erred, as a matter of law, by concluding that the covenant not to sue and cease suing that had been executed on May 12, 1995 in favor of defendant-appellee, C.K. Woo, M.D., during the earlier personal injury action served to release him and his employers from liability for the subsequent wrongful death claim that accrued on October 14, 2008."

{¶25} "[2.] The trial judge erred, as a matter of law, by holding that a wrongful death claim can be barred by a release that was entered by the decedent's parents years before the decedent passed away."

Standard of Review

{¶26} We review de novo a trial court's order granting summary judgment. *Hapgood v. Conrad*, 11th Dist. No. 2000-T-0058, 2002-Ohio-3363, ¶13, citing *Cole v. Am. Industries and Resources Corp.*, 128 Ohio App.3d 546 (7th Dist.1998). "A reviewing court will apply the same standard a trial court is required to apply, which is to determine whether any genuine issues of material fact exist and whether the moving

party is entitled to judgment as a matter of law." *Id*., citing *Parenti v. Goodyear Tire & Rubber Co*., 66 Ohio App.3d 826, 829 (9th Dist.1990).

{¶27} "Since summary judgment denies the party his or her 'day in court' it is not to be viewed lightly as docket control or as a 'little trial'. The jurisprudence of summary judgment standards has placed burdens on both the moving and the nonmoving party. In *Dresher v. Burt* [75 Ohio St.3d 280(1996)], the Supreme Court of Ohio held that the moving party seeking summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record before the trial court that demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. The evidence must be in the record or the motion cannot succeed. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case but must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) that affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. If the moving party has satisfied its initial burden, the nonmoving party has a reciprocal burden outlined in the last sentence of Civ.R. 56(E) to set forth specific facts showing there is a genuine issue for trial. If the nonmoving party fails to do so, summary judgment, if appropriate shall be entered against the nonmoving party based on the principles that have been firmly established in Ohio for quite some time in *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112." *Welch v. Ziccarelli*, 11th Dist. No. 2006-L-229, 2007-Ohio-4374, ¶40.

The Scope of the Covenant with Woo

{¶28} In his first assignment of error, Mr. Mansour argues that the Laymans' 1995 Covenant given to Woo did not and could not release a future wrongful death action. Mr. Mansour asserts that the Covenant is much more limited in nature than the Release with ACMC, only resolving Matthew's personal injury claim and the Laymans' derivative claims for medical expenses and loss of services brought in 1993, and that it did not contain "standard release language." Woo, on the other hand, asserts that the Covenant was entered into in "full and final satisfaction of any and all claims or rights or causes of action against" Woo, and encompassed both present and future claims of any kind.

{¶29} "A covenant not to sue is nothing more or less than a contract and should be so construed. * * * It tends to encourage the settlement of controversies and litigation." *Diamond v. Davis Bakery, Inc.*, 8 Ohio St.2d 38, 42 (1966). A court must interpret the intent of the parties, and that intent is presumed to reside in the language used by the parties. *Skivolocki v. East Ohio Gas Co.*, 38 Ohio St.2d 244, 247 (1974).

{¶30} "[A] settlement agreement must meet the essential requirements for the formation of a valid contract before it will be subject to enforcement." *Riordan's Sporting Goods, Inc. v. Riordan's Sports & Equip., LLC*, 11th Dist. No. 2002-T-0099, 2003-Ohio-3878, ¶12. "To constitute a valid settlement agreement, the terms of the agreement must be reasonably certain and clear." *Rulli v. Fan Co.*, 79 Ohio St.3d 374, 376 (1997). In other words, a settlement must not be ambiguous, and a contract is clear and unambiguous if it can be given a definite legal meaning. *Westfield v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, ¶11. "'The decision as to whether a contract is ambiguous and thus requires extrinsic evidence to ascertain its meaning is one of law.'

Ohio Historical Soc. v. Gen. Maintenance & Eng. Co. (1989), 65 Ohio App.3d 139, 146 * * *. If a contract is clear and unambiguous, then its interpretation is a matter of law and there is no issue of fact to be determined. See, generally, *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St. 2d 241 * * *. A court will not construe language that is clear and unambiguous on its face. *Logsdon v. Fifth Third Bank of Toledo* (1994), 100 Ohio App.3d 333, 339 * * *. It is only when an ambiguity is found that the meaning of words used becomes a question of fact. *Ohio Historical Soc., supra,* at 146." *Dodds v. Conrad*, 11th Dist. No. 99-P-0079, 2001 Ohio App. LEXIS 591, *5 (Feb. 16, 2001).

{¶31} It appears that the dispute centers not on what was released, but, rather more precisely, who released what.

{¶32} The Covenant provided that the Laymans "shall cease from suing or pursuing any claim against Woo" arising from the 1992 treatment "without limits as to time and place and covers any claims arising or which might arise out of the care * * *." While Mr. Mansour concedes that the Laymans could not "file or litigate a wrongful death action" because of their settlement agreement, the essence of Mr. Mansour's argument is that the covenant does not extinguish or "release" Woo from the wrongful death claim itself. Woo, however, gets the benefit of a release in regard to the Laymans' claims and those of Matthew that first arose upon his death 18 years later. Simply put, Mr. Mansour posits that the Laymans did not release their claims; they only agreed not to pursue them any further.

{¶33} We agree, but the analysis does not end there because we must also determine whether the Covenant operates to bar one who was not a party to the

Covenant from maintaining a wrongful death action for the benefit of other beneficiaries. We determine, in theory, it does not.

The Necessary Elements of a Wrongful Death Action

{¶34} Claims of wrongful death are governed by R.C. 2125. This claim for relief is statutory in nature and did not exist at common law. Ohio's wrongful death statute states 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 surviving spouse, the children, and the parents of the decedent, all of whom are rebuttably presumed to have suffered damages by reason of the wrongful death, and for the exclusive benefit of the other next of kin of the decedent." (Emphasis added.) R.C. 2125.02(A). Any amount received by the personal representative in a wrongful death action *shall* be distributed to the beneficiaries of the decedent. R.C. 2125.03(A)(1).

{¶35} It is well-settled that a claim for wrongful death is an independent claim for relief, independent of that held by a decedent immediately prior to death. *See, e.g., Karr v. Sixt,* 146 Ohio St. 527 (1946). "The two actions are not in the same right, and hence a recovery and satisfaction in one case is not a bar to recovery in the other." *Mahoning Valley Ry. Co. v. Van Alstine*, 77 Ohio St. 395 (1908), paragraph three of the syllabus.

{¶36} The Supreme Court of Ohio further refined these concepts in *Thompson v. Wing*, 70 Ohio St.3d 176 (1994), stating, "[b]ecause a wrongful death action is an independent cause of action, the right to bring the action cannot depend on the existence of a separate cause of action held by the injured person immediately before his or her death. To conclude otherwise would convert the wrongful death action from

an independent cause of action to a derivative action, one dependent on a separate cause of action. Moreover, the wrongful death action does not even arise until the death of the injured person. It follows, therefore, that the injured person cannot defeat the beneficiaries' right to have a wrongful death action brought on their behalf because the action has not yet arisen during the injured person's lifetime. Injured persons may release their own claims; they cannot, however, release claims that are not yet in existence and that accrue in favor of persons other than themselves." *Id.* at 183. *See also* R.C. 2125.02 (A)(3)(a).

{¶37} While it is well-settled that a wrongful death action accrues only upon death and that the status of a beneficiary is fixed or determined at the time of death, it appears equally well-settled that a potential beneficiary may settle and resolve with prejudice a future wrongful death claim before the death of the decedent, so long as one is relinquishing only his or her own known right. *See, e.g, Lambert v. Western Reserve Care Sys*., 7th Dist. No. 97 C.A. 238, 2000 Ohio App. Lexis 801 (Feb. 24, 2000); *Sloan v. Standard Oil Co.*, 177 Ohio St. 149 (1964).

{¶38} The elements of a wrongful death action are set out in R.C. 2125.02 and were succinctly summarized by Judge McCormac in his treatise on wrongful death: "In order to be entitled to recover damages from wrongful death, the personal representative of the decedent must prove the following elements: (1) the death of the decedent; (2) the commencement of the action for wrongful death within two-years thereafter; (3) a wrongful act, neglect or default of defendant which proximately cause the death and which would have entitled the decedent to maintain an action and recover damages if death had not ensued; (4) *that the decedent was survived by a spouse,*

children, parents or other next of kin, and (5) that the survivors have suffered damages by reason of the wrongful death." (Emphasis added.) McCormac, *supra,* at Section 2.02.

{¶39} A wrongful death action shall be brought in the name of the personal representative of the decedent for the exclusive benefit of the surviving spouse, children, parents and next of kin of the decedent. R.C. 2125.02(A)(1). The personal representative is not the real party in interest, the beneficiaries are. Because "compensation to the beneficiaries *denominated* is the purpose of the statute," they have "consequently been referred to as the real parties in interest." (Emphasis added.) *Gibson v. Solomon*, 136 Ohio St. 101,105 (1939). *See also Douglas, Admx. v. Daniels Bros. Coal Co.,* 135 Ohio St. 641, 647 (1931). Therefore, the representative "is really only the nominal party, having no interest in the action himself or for the estate for which he is acting;" he is merely acting as a "trustee on behalf of the particular persons designated as beneficiaries." *Gibson* at 105. Courts will look beyond the nominal party whose name appears formally upon the record and will treat as the real party him whose interests are involved in the litigation * * *." *Id*. at 107.

{¶40} Further, unlike the decedent's spouse, children and parents, other next of kin must prove their damages, because they are not rebuttably presumed to have suffered damages as a result of the wrongful death. *Ramage v. Central Ohio Emergency Services, Inc.* 64 Ohio St.3d 97 (1992).

{¶41} It necessarily follows that, if all those who have a presumptive loss have already settled and/or released their wrongful death claims prior to the decedent's death and the personal representative cannot identify at least one next of kin as a potential

beneficiary of any eventual settlement or verdict, we must conclude that the personal representative cannot meet all of the necessary elements of a wrongful death action.

{¶42} There is no dispute that the Laymans' wrongful death claims have either been released or may not be further pursued. It is also beyond dispute that there are no persons identified as a surviving spouse, children and other next of kin listed in the Complaint or in any evidentiary quality material submitted in response to the motions for summary judgment.

{¶43} As we noted earlier, the trial court took notice of the Standard Probate Form 1.0 filed by Mr. Mansour with his application for authority to administer Matthew's estate. Form 1.0 is used when opening an estate to list the surviving spouse, children and lineal descendants of deceased children; only in the event there are no surviving spouse, children and lineal descendants of deceased children, would other next of kin even be listed on that form. Thus, the form in and of itself is not dispositive, and Mr. Mansour correctly asserts that it is the probate court that ultimately determines who the beneficiaries are and how they will share in the proceeds *after* a settlement or verdict is submitted to the court for approval. But if there are *no* potential beneficiaries even identified at the pre-trial stage, except those who have already released their claims or who have agreed not to further pursue their claims, then there is no one who could benefit from any recovery.

{¶44} While Form 1.0 is not dispositive, we do find that it was submitted in evidentiary quality form and sufficiently identified the portion of the record before the trial court that demonstrated an absence of a genuine issue of fact on a material element of the nonmoving party's claim. Faced with this evidence in support of a

motion for summary judgment, Mr. Mansour had to satisfy his reciprocal burden. In this case, that burden could only be met by identifying at least one person who could benefit from a recovery.

{¶45} From the record before us, we find that Mr. Mansour did not meet that burden.

{¶46} Thus, because Mr. Mansour does not dispute that the parents' claims cannot not be further pursued as a result of the settlement agreement, and he failed to identify *any* potential heirs at law or next of kin who might benefit from this suit, we agree that no issue of material fact remains for trial, and summary judgment was properly granted to Woo.

{¶47} We are unwilling to go down the path suggested by Mr. Mansour's argument and force Woo to defend a lawsuit and potentially face another verdict in the off-chance that a presently unknown sibling or aunt may appear after any verdict.

Is the Personal Representative Bound by the Release Given to ACMC?

{¶48} In his second assignment of error, Mr. Mansour argues that the trial court erred in determining that the Release given to ACMC by the Laymans in 1995 bars him from bringing a wrongful death action on behalf of Matthew Layman's beneficiaries. He asserts that he was not a party to either settlement agreement in 1995, and thus is in no way bound by them. The thrust of Mr. Mansour's argument is that the Laymans did not have the legal capacity to settle or waive a statutory claim for wrongful death that had not yet arisen at the time the settlements were concluded. Only Mr. Mansour, acting as the duly authorized personal representative of the decedent's estate, could release a claim for wrongful death, and thus the claim remains "legally viable."

{¶49} As we found with the Woo Covenant, we find that although he is not precluded by the Release from pursuing a wrongful death action against ACMC in the abstract, the facts presented in this case prevent Mr. Mansour from doing so.

{¶50} As a result of the Release given to ACMC, the Laymans, only, are precluded, as a matter of law, from recovering from any wrongful death action brought on their behalf. *See, e.g.*, *Davis v. Dembek*, 150 Ohio App.3d 423, 2002-Ohio-6443 (10th Dist.) (holding that decedent's wife and adult daughter were barred from recovering on a wrongful death claim, because they had individually settled all of their future claims against the tortfeasor years earlier in a personal injury case; decedent's minor children were permitted to recover under the wrongful death statute, however, because their mother lacked the authority to settle the future claims of her minor children).

{¶51} Much of our earlier analysis pertaining to the Woo Covenant and the conclusions reached are equally applicable to our consideration of the effect of the ACMC Release.

{¶52} Had there been a denominated beneficiary other than the Laymans, who was not a party to the Release, he or she would be entitled to have Mr. Mansour pursue a wrongful death action on his or her behalf. *See, e.g., Thompson, supra*; *Kissinger v. Pavlus*, 10th Dist. No. 01AP-1203, 2002-Ohio-3083 (prohibiting decedent's husband, as administrator of the estate, from pursuing a wrongful death claim on his own behalf because he had entered into a settlement agreement, but allowing him to do so on behalf of other beneficiaries not parties to the settlement). Mr. Mansour has failed to

identify at least one other beneficiary who could possibly recover damages, besides the Laymans, who gave ACMC a clear and unambiguous full and final release.

{¶53} Thus, we find that while Mr. Mansour, in his representative capacity, is not bound by the Release executed by the Laymans, a release that operates as a release of their claims only, he failed to put forth a genuine issue of material fact remaining for trial. "It has been long and well established that it is the duty of every judicial tribunal to decide actual controversies between parties legitimately affected by specific facts and to render judgments which can be carried into effect." *Fortner v. Thomas*, 22 Ohio St.2d 13, 14 (1970). *Compare Diamond v. Charles*, 476 U.S. 54, 106 S. Ct. 1697, 90 L. Ed. 48 (1986) (explaining the "cases" and "controversies" requirement for litigation in federal courts). That is why we are also unwilling to force ACMC to defend a lawsuit and potentially face another verdict in the off-chance a presently unknown next of kin may surface after any verdict.

{¶54} The judgment of the Ashtabula County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J., concurs,

TIMOTHY P. CANNON, P.J., concurs in part, dissents in part with Concurring/Dissenting Opinion.

TIMOTHY P. CANNON, P.J., concurs in part, dissents in part with Concurring/Dissenting Opinion.

{¶55} I respectfully concur in part and dissent in part from the opinion of the majority.

{¶56} R.C. 2125.02 sets forth those individuals entitled to recover in a wrongful death action in the state of Ohio. The statute lists the surviving spouse, children, and parents as persons who have been rebuttably presumed to have suffered damage. The statute further includes the phrase, "and for the exclusive benefit of the other next of kin of the decedent." There was a split of authority as to whether the "next of kin" referred to in the statute were entitled to anything if a spouse, child, and/or parent survived the decedent. The Ohio Supreme Court resolved this issue in *Ramage v Cent. Ohio Emergency Serv., Inc.*, 64 Ohio St.3d 97 (1992), stating:

> **{¶57}** Pursuant to the Ohio wrongful death statute, R.C. 2125.02, other next of kin, although not presumed to have sustained damages, may recover damages for mental anguish and loss of society upon proper proof thereof, even though there is a surviving parent, spouse, or minor children. *Id*. at paragraph two of the syllabus.

{¶58} As the majority notes, appellant, administrator of the decedent's estate, claims identification of the beneficiaries at the pre-trial stage is premature because it is the probate court that ultimately makes that determination after a settlement or verdict is submitted for approval. Although the majority agrees with this contention, I disagree. Identification of the beneficiaries is necessary to establish the existence of a claim. Disregarding, for the moment, the issues concerning a determination of liability, assessment of the value of a wrongful death claim is primarily dependent upon the

beneficiaries in existence at the time of death and their relationship to the decedent. If there are no beneficiaries who have sustained loss of support, society, comfort, and companionship, there is simply no wrongful death claim to pursue.

{¶59} Therefore, in order to establish an entitlement to summary judgment, appellees need to do one of the following: (1) establish the effectiveness of the release and/or covenant not to sue, or (2) establish the absence of beneficiaries, including "next of kin".

The Covenant

{¶60} When this case was initially resolved in 1995, the law required that a claim involving a minor or incompetent be approved by the probate court if it had a value in excess of $10,000. R.C. 2111.18. Rule 68 of the Rules of Superintendence was revised in 1997 to require that parents of minors be given notice of any application for authority to settle such claims. However, there is no requirement that any other next of kin be notified. There is nothing in the record to indicate that any individuals who may be beneficiaries under R.C. 2125.02 were notified of the probate proceedings to approve the settlements at issue. There is nothing in either the release or the covenant that even purports to bind the "heirs, executors, or administrators" of the parties to the release and covenant. Therefore, neither can be binding on any next of kin who were not parties to those contracts. If it was clear that Matthew's life expectancy was limited or reduced, the only way to bind the beneficiaries to relinquish or release whatever claims they might have for his wrongful death would be to have them sign off on the covenant or release. Therefore, neither the release nor the covenant is binding upon those beneficiaries who did not participate in that portion of the settlement.

The Wrongful Death Action

{¶61} The next question is whether it has been established, for summary judgment purposes, that Matthew has no wrongful death beneficiaries entitled to recovery.

{¶62} I agree with the majority that, at some point, the burden shifts to appellant to establish the existence of the wrongful death claim. Yet, in a summary judgment exercise, appellee was first required to identify "those portions of the record before the trial court that demonstrate the absence of a genuine issue of fact on a *material element of the nonmoving party's claim*." Appellee has not met this initial burden.

{¶63} Appellee, ACMA, attached Form 1.0 to its motion for summary judgment. As recognized by the majority, Form 1.0 is used when opening an estate; the front page of that form lists only the surviving spouse, children, and the lineal descendants of deceased children. Further, "only in the event there are no surviving spouse, children and lineal descents of deceased children," would other next of kin even be listed on that form. When there are parents, as in this case, the form does *not* require a listing of grandparents, siblings, or other "next of kin" contemplated by R.C. 2125.02, the wrongful death statute. The majority is correct that Form 1.0 is not dispositive—appellee has not provided any evidence to demonstrate the absence of beneficiaries, including next of kin—a material element of the nonmoving party's claim. Form 1.0 cannot be used as evidence to establish the lack of beneficiaries as, in this case, only the parents were required to be listed on the form. Consequently, the burden never shifted to appellant to set forth specific facts showing there is a genuine issue for trial.

{¶64} As of yet, the record is simply unclear whether Matthew has grandparents, siblings, or other "next of kin," although appellant asserts in his complaint that the wrongful death action was brought "for the exclusive benefit of the beneficiaries of the Estate of Matthew J. Layman, including, but not limited to, Decedent's mother, Natalie McCormick." These beneficiaries may have claims that have never been released. However, contrary to the position of appellant, the existence of any potential beneficiary is not something he can shroud in mystery. I agree with the majority that the claims of the parents have been extinguished by contract. Therefore, if there are no other beneficiaries who had a relationship with Matthew that would entitle them to recovery, the administrator has no claim to pursue.