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Christopher D. Vanderbeek

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An Untimely Death of Wrongful Death Claims: Ohio Removes Decedent-Employee Wrongful Death Claims from the Arbitral Forum

Peters v. Columbus Steel Castings Co.¹

I. INTRODUCTION

Consider the life and death of Bob.² Due to his employer’s negligence, Bob is severely injured at work. As soon as that injury occurs, a legal action for personal injury arises, and Bob may sue the wrongdoer (his employer). However, when Bob dies as a result of his injuries, his one claim becomes two. The first is a survival action, which derives from common law and now exists in the statutory codes of virtually all jurisdictions³ and allows Bob’s representative to bring on Bob’s behalf any claims he had against his employer.⁴ The second is a wrongful death action, which did not exist at common law; it came only through statutory enactment.⁵ This action was created to allow Bob’s beneficiaries to collect damages for their injuries as a result of his death.⁶

When Bob dies, Bob’s representative could file either action in order that his estate (in survival) or beneficiaries (in wrongful death) be compensated for losses stemming from his injuries or death. But in Peters v. Columbus Steel Castings Company, a more complex issue arose—what if Bob signed an agreement to arbitrate all of his claims against his employer? Would that bind Bob’s representative to arbitrate an action in survival? In wrongful death? Both? The Ohio Supreme Court answered that Bob’s representative would be compelled to arbitrate the survival claim, but not the wrongful death claim, as the latter is independent from the former. Bob’s beneficiaries may proceed in court on the wrongful death claim, even as the survival claim proceeds in arbitration, and even though Bob signed an agreement to arbitrate his disputes.

¹ 873 N.E.2d 1258 (Ohio 2007).
² This character is fictional, and this is merely a hypothetical.
³ E.g., OHIO REV. CODE ANN. § 2305.21 (West 2006). See also Armes v. Thompson, 222 S.W.3d 79, 82 (Tex. App. 2006) (Survival exists to “prevent a decedent’s common law action from being abated because of their death.”).
⁴ Such claims include hospital bills, funeral expenses, etc.
⁶ For example, the inability to “profit” from the companionship Bob offered, the loss of Bob’s earnings, etc.
II. FACTS AND HOLDING

The plaintiff in this case was Alice Peters ("Peters"), the wife of and estate administrator for William Peters ("decedent"). Decedent was formerly employed by defendant, Columbus Steel Castings Company ("CSC"), through ELS, Inc. Upon beginning to work for CSC, decedent signed an agreement ("the Plan") governing his employment with CSC. The Plan contained an arbitration provision which purported to compel decedent and his "heirs, beneficiaries, successors, and assigns" to arbitrate matters relating to his employment.

Roughly one week after commencing his employment with CSC, decedent died while working, having fallen fifty feet from a catwalk. Thereafter, Peters filed suit in Ohio state court on grounds of wrongful death and survival.

CSC responded to this complaint by moving for dismissal due to lack of jurisdiction, or, alternatively, compulsion of arbitration and a stay of the proceedings. CSC contended that Peters was bound by the arbitration provisions in the Plan. Peters countered that neither she, nor decedent's other beneficiaries, could be bound by an agreement which they did not sign. Over CSC's objection, the trial court adopted a magistrate's decision that the Plan could not preclude decedent's beneficiaries (represented here by Peters) from asserting a wrongful death claim in court. CSC appealed.

On appeal, CSC singularly argued that the trial court erred in not enforcing the Plan against plaintiff. Operating under a de novo standard of review, the

8. Id. ELS was an "employee leasing agency," hired by CSC for recruitment purposes. Id.
9. Id. The agreement was contained in a document called "Dispute Resolution Plan Acknowledgement of Receipt and Agreement to Be Bound." Id.
10. Id. The provision read, "I agree that hereafter I will be bound by the Company's Dispute Resolution Plan. . . . I understand and agree that mediation, and, if unsuccessful, arbitration. . . . will be my sole and exclusive remedies for any legal claims . . . I may have against the Company regarding my employment . . . " Id. The plan expressly covered legal tort claims. Id.
11. Id.
12. Id.
13. See OHIO REV. CODE ANN. § 2125.01 (West 2006):
When the death of a person is caused by wrongful act, neglect, or default which would have entitled the party injured to maintain an action and recover damages if death had not ensued, the person who would have been liable if death had not ensued. . . . shall be liable to an action for damages, notwithstanding the death of the person injured . . .
14. Peters, 2006 WL 225274, at *1. An action in "survival" is merely an extension of decedent's tort action past the decedent's death; the right to bring suit "survives" to the decedent's representative. OHIO REV. CODE ANN. § 2305.21. Plaintiff's theory was premised on CSC's knowledge of the "danger inherent" in requiring employees to work on catwalks, its knowledge that "harm to its employees was substantially certain to occur," and CSC's inaction regarding further employee safety — this amounted to a claim that CSC intentionally caused Peters' death. Peters, 2006 WL 225274, at *1.
15. Id. at *2.
16. Id.
17. Id.
18. Id. The magistrate did mandate arbitration, in accordance with the Plan, as to the survival action Peters brought in tandem with the wrongful death action. Id. For that reason, Peters voluntarily dismissed the survival action in order to proceed as to wrongful death. Id.
19. Id.
20. Id.
appellate court affirmed the ruling of the trial court. The appellate court’s reasoning was twofold: the lack of any agreement to arbitrate between Peters (or decedent’s other beneficiaries) and CSC; and the severability of a wrongful death action from the decedent’s action in survival.

CSC then made, and the Ohio Supreme Court accepted, a discretionary appeal to clarify whether an individual, by agreeing to arbitrate his claims against a particular defendant, can bind his beneficiaries to arbitrate a wrongful death claim against that same defendant. The court affirmed the appellate court’s decision, holding that an employee’s agreement to arbitrate all his disputes regarding his employment may not similarly bind his beneficiaries to arbitrate a wrongful death action against his employer.

III. LEGAL BACKGROUND

There are several inquiries central to the question of whether a decedent’s beneficiaries should be bound by the decedent’s arbitration agreement with his employer—for example, whether the parties intended such a result. The most important inquiry for the Ohio Supreme Court in Peters was its precedent concerning the relationship between a personal tort claim a decedent may have had prior to his death and a subsequent wrongful death claim brought by his beneficiaries. There is considerable conflict, across federal and state courts, as to how to resolve this inquiry.

A. The Interaction Between Wrongful Death and Survival Claims

A survival claim is merely an extension of a decedent’s tort claim notwithstanding the decedent’s death. The effect of such a claim on the existence of a wrongful death action in the decedent’s representative and beneficiaries varies by jurisdiction. The variable is whether the wrongful death action is treated as derivative of the surviving tort action.

In a majority of jurisdictions, the wrongful death action is treated as derivative of the survival action. “Derivative” means “dependent upon a wrong com-
mitted upon another person." If a jurisdiction views the relationship between survival and wrongful death actions in this manner, anything preventing the decedent from litigating a cause of action will similarly "prevent[] survivors from bringing a wrongful death suit." For example, in Union Bank of California, N.A. v. Copeland Lumber Yards, Inc., the court explained that the derivative nature of a wrongful death action comes from the language of the relevant statute. There, the court read the language to imply that if the decedent would not have been able to bring a claim on his injury before he died, his personal representative should not be allowed to pursue such a claim after his death. The effect of such a reading is that the decedent's personal tort claim and his representative's subsequent wrongful death claim are deemed inseparable. The contrary interpretation of wrongful death statutes is that personal injury survival actions and wrongful death actions are independent of one another. That view treats the claims as if "the injured person and his beneficiaries each had a separate legal interest in his life, assertable by separate action." This view treats the absence of a viable claim in the decedent as having no bearing on the viability of a subsequent wrongful death claim by his personal representative. For example, the Arkansas Supreme Court in St. Paul Mercury Insurance Company v. Circuit Court of Craighead County read Arkansas' wrongful death statute as involving "neither the same action, nor the same plaintiff as a survival action brought by the same person in his individual capacity..." The court therefore

P.3d 437 (Colo. banc 2007); Saunders v. Hill, 202 A.2d 807 (Del. 1964); Mowell v. Marks, 603 S.E.2d 702 (Ga. Ct. App. 2004); Union Bank of Cal. N.A. v. Copeland Lumber Yards, Inc., 160 P.3d 1032 (Or. Ct. App. 2007) ("The [wrongful death] statute, in effect, "places a decedent's personal representative in the decedent's shoes, imputing to the personal representative whatever rights, and limitations to those rights, that the decedent possessed." (quoting Storm v. McClung, 47 P.3d 476, 482 (Or. 2002)); Sunderland v. R.A. Barlow Homebuilders, 791 A.2d 384 (Pa. Super. Ct. 2002); County of Dallas v. Sempe, 151 S.W.3d 291 (Tex. App. 2004). 30. 22A AM. JUR. 2D Death § 22 (2008). The notion, in treating the wrongful death action as derivative, is that no wrong has been affected upon the claimants — the personal representative and beneficiaries of the decedent. Id. 31. Clark, supra note 29, at 717; see also RESTATEMENT (SECOND) OF JUDGMENTS, § 46, cmt.b (1982) ("If the claim for wrongful death is treated as wholly 'derivative,' the beneficiaries of the death action can sue only if the decedent would still be in a position to sue."). 32. 160 P.3d 1032, 1035-36 (Or. Ct. App. 2007). The statute reads: When the death of a person is caused by the wrongful act or omission of another, the personal representative of the decedent ... may maintain an action against the wrongdoer, if the decedent might have maintained an action, had the decedent lived, against the wrongdoer for an injury done by the same act or omission. Id. at 1035 (citing Or. REV. CODE § 30.020(1) (2007)) (emphasis added). Note that the emphasized language is similar to Ohio's wrongful death statute. 33. Copeland Lumber, 160 P.3d at 1036. 34. Id. 35. See, e.g., RESTATEMENT, supra note 31, at § 46 cmt.b. 36. Id. 37. See generally St. Paul Mercury Ins. Co. v. Cir. Ct. of Craighead County, W. Div., 73 S.W.3d 584 (Ark. 2002); Walls v. Am. Optical Corp., 740 So. 2d 1262 (La. 1999). 38. St. Paul Mercury Ins. Co., 73 S.W.3d at 589. The "same person" is the decedent's personal representative. Id. The Arkansas wrongful death statute reads, in part: Whenever the death of a person ... shall be caused by a wrongful act, neglect, or default ... such as would have entitled the party injured to maintain an action ... if death had not ensued, ... the person or company or corporation that would have been liable if death had not ensued shall be liable to an action for damages...
drew no connection between survival and wrongful death actions, aside from those inherently present between the claimant involved (the representative, in both instances) and the elements of the claim (both commonly based on some form of negligence).39

The main element that distinguishes between the two views is the controlling court’s interpretation of the underlying wrongful death statute.40 Ohio takes the minority position—that wrongful death and survival actions are independent from one another.

B. The Independence of Wrongful Death from Survival Claims in Ohio

As in other states, Ohio has separate statutes providing for survival and wrongful death claims.41 However, Ohio courts treat the Ohio Wrongful Death Statute as “the only civil remedy available to compensate surviving beneficiaries.”42 This view is in line with the reasoning behind the creation of an action for wrongful death in the first place—to give beneficiaries redress for their injuries, which resulted from the decedent’s death.43

In Thompson v. Wing,44 the Ohio Supreme Court positioned Ohio among those states which treat wrongful death and survival claims as independent from one another.45 There, the decedent, a woman afflicted with cancer, filed a medical malpractice action before she died.46 She claimed damages of lost earnings and earning capacity, diminution of life expectancy, and pain and suffering.47 The decedent won a jury trial in the amount of $50,000; the defendants did not appeal.48

The decedent died following the conclusion of the trial, and the personal representative of her estate filed a wrongful death action against the same parties and on essentially the same allegations as those underlying the decedent’s medical malpractice action.49 Defendants, a hospital and practicing physician, obtained summary judgment, partially on the basis of “a plain reading of the wrongful death statute[s].”50 The Ohio appellate court reversed, stating that wrongful death and malpractice actions arising from the same wrongful act are “distinct [and] independent” from one another.51 The Ohio Supreme Court then granted a motion to clarify the record.52


39. Id.
40. This is true despite the fact most state wrongful death statutes are very similar. Compare OHIO REV. CODE ANN. § 2125.01 (West 2006) with OR. REV. STAT. § 30.020(1) (2006).
41. See OHIO REV. CODE ANN § 2125.01; OHIO REV. CODE ANN. § 2305.21
43. See generally Clark, supra note 29; Warrum v. U.S., 427 F.3d 1048 (7th Cir. 2005).
44. 637 N.E.2d 917 (Ohio 1994).
45. Id.
46. Id. at 918. The basis for her claim was “negligence and malpractice [causing] a substantial delay in the diagnosis of her cancer.” Id.
47. Id. at 918-19.
48. Id. at 919.
49. Id.
50. Id. The trial court also considered the doctrine of collateral estoppel in finding for defendants. Id.
51. Id. Just like the survival claim in Peters, the malpractice claim here was based in tort. Id.
52. Id.
That court affirmed the appellate court's ruling that the language of Ohio's wrongful death statute would not bar a wrongful death action even though the decedent's malpractice action was litigated before she died. Acknowledging divergent views elsewhere, the court noted two precedents that established the independent nature of a wrongful death action in Ohio. The implication of the independence of the wrongful death claim, the court explained, was that the right to bring that claim could not depend on "the existence of a separate cause of action" held by the decedent before her death. Therefore, the decedent's representative was allowed to sue the defendants for wrongful death, even though the decedent had previously litigated the malpractice action personally. As a result, there were two separate claims arising out of one singular event. But there is one major distinction existed between Thompson and Peters—Thompson had nothing to do with a wrongful death claim in the context of an arbitration agreement.

C. General Principles Regarding Treatment of Agreements Binding Parties to Arbitrate Disputes

Unlike Thompson, the wrongful death claim in Peters related to an arbitration agreement between the decedent and his employer. And although arbitration principles had little if anything to do with the outcome in Peters, those principles remain relevant to the treatment of the arbitration provision in the Plan, which governed the decedent's employment.

In determining whether parties have agreed to arbitrate a dispute, courts apply ordinary contract principles. Accordingly, an arbitration agreement must be

53. Ohio Rev. Code Ann §2125.01 (West 2006). At issue was the necessity, under the statute, that the decedent would have been entitled to damages "if death had not ensued ...." Thompson, 637 N.E.2d at 920. Defendants argued this language barred a wrongful death action because a decedent's litigation of a malpractice action would have extinguished her entitlement to damages she had not died, as such an entitlement would be duplicative. id. at 919-20.

54. Id. at 922. Specifically, the court narrowly held that "a recovery in a medical malpractice action by a decedent during his or her lifetime does not bar a subsequent wrongful death action brought pursuant to [the statute] on behalf of the decedent's beneficiaries." id.

55. Id. (discussing Mahoning Valley Ry. Co. v. Van Alstine, 83 N.E. 601 (Ohio 1908) (claimant allowed to continue decedent's personal injury claim in survival, and thereafter institute separate wrongful death action); May Coal Co. v. Robinette, 165 N.E. 576 (Ohio 1929) (claimant who pursued survival and wrongful death claims concurrently allowed to maintain wrongful death action even after losing on survival claim)).

56. Thompson, 637 N.E.2d at 922.

57. Id. The court further provided that collateral estoppel should prevent parties from having to relitigate in a wrongful death action issues that were already decided in the previous suit. Id. at 923. In this case, that meant the representative benefitted from the finding of defendants' liabilities in the previous suit. See id.

58. See discussion, supra Facts and Holding.

59. These principles were barely mentioned. See Peters v. Columbus Steel Castings Co., 873 N.E.2d 1258, 1260-61 (Ohio 2007).

enforced according to its terms. Moreover, in determining the meaning of the terms of an arbitration agreement, a court must attempt to determine the parties' intent in entering the agreement. And as is generally true with all contracts, the only parties who can be bound to an arbitration agreement are those who agree to be bound.

Furthermore, as there is a general presumption in favor of arbitration in all courts within the U.S., any doubts regarding the scope of an arbitration agreement must be resolved in favor of arbitration. This presumption comes directly from the Federal Arbitration Act of 1925. As a result, "arbitration agreements may be more likely [to be enforced] than other kinds of contracts." And an agreement should be enforced "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." The breadth of this presumption can be seen where a court upholds an arbitration agreement unless one of two elements exists: an express exclusion of a particular type of grievance, or "strong evidence . . . of a purpose to exclude the grievance" from the agreement.

Ohio's statute providing arbitration as a forum for dispute resolution follows this federal presumption. However, the presumption has limitations, in Ohio and elsewhere. For example, a party generally cannot be bound to arbitrate claims he did not agree to submit to arbitration.


66. Id. at 35 (emphasis added).

67. Id. (quoting United Steel Workers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960)).


69. OHIO REV. CODE ANN. § 2711.01(A) (West 2006) ("A provision in any written contract . . . to settle by arbitration a controversy that subsequently arises out of the contract . . . shall be valid, irrevocable, and enforceable, except upon grounds that exist at law or in equity for the revocation of any contract.").

70. Palkovitz v. Fraiberg, 702 N.E.2d 935, 937 (Ohio Ct. App. 1997). This follows the contract principle that agreements only bind parties that agree to be bound. See supra, text accompanying note.
Trustees, an Ohio appellate court directly addressed the presumption in favor of arbitration.\(^\text{71}\) There, the court delineated arbitration agreements as of two types—“(1) unlimited clauses providing for arbitration of all disputes that may arise out of the parties’ contractual relationship, and (2) limited clauses providing for arbitration of only specific types of contractual disputes.”\(^\text{72}\) The court therefore implied that an arbitration agreement will be applicable to any dispute arising out of it with only two clear exceptions: where the agreement’s express terms, or the parties’ evidenced intent, render it inapplicable to a specific dispute.\(^\text{73}\)

These arbitral principles can be difficult for courts to apply. One circumstance exemplifying the complexity of their application is where the question arises whether an arbitration provision should be enforced against a party who did not sign the agreement containing the provision.\(^\text{74}\)

D. The Arbitrability of Claims Brought by Non-signatory Parties

The wrongful death claim in Peters directly resulted from an agreement between the decedent and his employer. Therefore, it was signed by the decedent but not by Peters or any of the decedent’s other beneficiaries.\(^\text{75}\) This fact pattern evokes the general principle in arbitration that a party who does not sign an arbitration agreement (a “non-signatory”) cannot be bound by that agreement.\(^\text{76}\) However, there are exceptions to this principle, such as where an agency relationship exists between a signatory and the non-signatory, or when the non-signatory is a third-party beneficiary of the agreement.\(^\text{77}\) The following are several illustrations of courts binding parties to arbitrate their disputes against a signatory party, notwithstanding the parties’ statuses as a non-signatory.

Commentators have stated that, in tort cases\(^\text{78}\) where claimants are found to bound by arbitration agreements to which they were not parties, the common theme is that the torts are related to performance under the contracts at issue.\(^\text{79}\)

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63. However, there are exceptions even to that limitation. See, e.g., Covington v. Lucia, 784 N.E.2d 186, 189 (Ohio. Ct. App. 2003); SouthTrust Bank v. Ford, 835 So.2d 990, 993-94 (Ala. 2002).

For the same reason the powers of an executor or an administrator encompasses [sic] all of those formerly held by the decedent, those powers must likewise be restricted in the same manner and to the same extent as the powers of the decedent would have been. Thus, where an executor or administrator asserts a claim on behalf of the estate, he or she must also abide by the terms of any valid agreement, including an arbitration agreement, entered into by the decedent.

Id.

71. Stillings, 646 N.E.2d at 1187.

72. Id. (citations omitted).

73. See id.

74. In Peters, an Ohio court confronted this specific issue for the first time; the following section provides case law from state courts outside Ohio.

75. See discussion, supra Facts and Holding.


77. See generally World Rentals, 517 F.3d at 1244; Crowley Mar., 70 Cal. Rptr. 3d at 611.

78. Note that tort cases become actions in survival when the original claimant dies.

Thus, those torts "were explicitly agreed to and contemplated by the parties upon execution of the contract[s]."80 For example, in the Mississippi case of Cleveland v. Mann,81 decedent, a medical patient, agreed that he would arbitrate any dispute "relating to the performance of medical services."82 Additionally, the agreement purported to bind the patient's heirs and/or personal representative.83 The court saw this as a circumstance in which holding the non-signatory to the terms of the agreement was dictated by ordinary contract and agency principles.84 The court added that the "death of a party to an agreement to arbitrate . . . does not invalidate the agreement," and that the court must respect the intent of the parties as clearly expressed in the agreements' terms.85

In addition, federal courts have held non-signatories to be bound by arbitration provisions where the parties seek to benefit from the terms of the agreement containing the arbitration provision.86 International Paper concerned a non-signatory buyer's claim as it related to an agreement between a distributor and manufacturer.87 The buyer claimed damages arising out of the warranty and damages provisions of the distributor-manufacturer agreement; however, the buyer claimed not to be bound by the arbitration provision contained in that same agreement.88 The court relied on an estoppel theory in ruling that the buyer was bound to arbitrate under the agreement.89 Under that theory, a non-signatory party cannot escape an agreement's arbitration provision "when he has consistently maintained that the other provisions of the same contract should be enforced to benefit him."90

Finally, two Supreme Court of Alabama decisions have identified dual theories that combine to bind a non-signatory to a car-purchase agreement containing an arbitration clause—the spousal relationship between the signatory and the non-signatory, and the factual relationship between the spouses' claims.91 In Georgia Power Company v. Partin, the husband's action stemmed from an operations contract between his employer and the facility at which he was injured.92 When the wife followed suit with a loss of consortium claim stemming from those same injuries, the court deemed her bound to arbitrate those claims even though she did not sign the purchase agreement.93 In holding the non-signatory wife bound by the arbitration provision, the court reasoned that although the wife had a claim

80. Id.
81. 942 So. 2d 108 (Miss. 2006).
82. Id. at 113 (quoting the arbitration agreement).
83. Id. at 117.
84. Id. at 118.
85. Id. The court also concisely discussed Mississippi's wrongful death statute in determining the beneficiaries must be bound under the agreement. Id. at 118-19.
86. DiLeo, supra note 65, at 53-55 (citing Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen, 206 F.3d 411 (4th Cir. 2000)).
87. Int'l Paper, 206 F.3d at 413.
88. Id.
89. Id. at 417-18.
90. DiLeo, supra note 65, at 56 (citing Int'l Paper, 206 F.3d at 418). The court referred to this as the "direct benefit" doctrine. Id.
92. 727 So. 2d at 4.
93. Id. at 7.
wholly separate from her husband's, the two claims "[sprung] from the same source, i.e., the operations contract."\textsuperscript{94}

More recently, the Alabama Supreme Court reaffirmed its position in \textit{Partin} when it faced a similar situation in \textit{Ritter v. Grady Automobile Group}.\textsuperscript{95} There, the wife purchased a car, signed a purchase agreement containing an arbitration clause, and was injured thereafter.\textsuperscript{96} Her husband, a non-signatory, then filed a loss of consortium action, in the pleading of which he cited to his wife's injuries and the agreement between her and the dealership.\textsuperscript{97} Just as it had done in \textit{Partin}, the court found the husband to be bound by the arbitration agreement signed by his injured wife because both spouses' injuries arose from the same agreement.\textsuperscript{98}

As discussed below, this situation is not unlike that in \textit{Peters v. Columbus Steel Castings Co.}

\textbf{IV. INSTANT DECISION}

In \textit{Peters},\textsuperscript{99} the Ohio Supreme Court separated its analysis into two distinct branches.\textsuperscript{100} The first branch concerned whether a non-signatory to an arbitration agreement can be bound by that agreement.\textsuperscript{101} The court dealt swiftly with this question, laying out the principle that arbitration is a matter of contract and, thus, it can only be compelled as to parties who agree to submit to it.\textsuperscript{102} The court explained that deriving from that principle is the notion that since decedent's beneficiaries did not themselves agree to arbitrate claims arising out of his employment, they could not be bound by an agreement governing it.\textsuperscript{103}

The second branch of the court's analysis concerned whether a survival action, brought before the death of an employee, can be viewed as independent from a wrongful death action arising out of the same circumstances and between the same parties.\textsuperscript{104} To answer this question, the court first considered Ohio's wrongful death statutes.\textsuperscript{105} The court found compelling the language in one provision, which described the wrongful death action as "\textit{for the exclusive benefit} of the decedent's beneficiaries."\textsuperscript{106} The court focused on the reason for an administrator's

\textsuperscript{94} Id. at 6.
\textsuperscript{95} 973 So. 2d 1058.
\textsuperscript{96} Id. at 1060.
\textsuperscript{97} Id.
\textsuperscript{98} Id. at 1065.
\textsuperscript{99} 873 N.E.2d 1258 (Ohio 2007).
\textsuperscript{100} Id. at 1260.
\textsuperscript{101} Id.
\textsuperscript{102} Id. at 1260-61. The court here delineated an aggrieved party's constitutional right to seek redress in court. Id.
\textsuperscript{103} Id. at 1261.
\textsuperscript{104} Id. at 1260. The importance of this question stemmed from the fact that in a survival action, an agreement between the decedent and his employer would bind all members of the decedent's estate, because the survival action "belonged" to the decedent, for his injuries. Id. at 1261. Therefore, the action would not be severable from the decedent, nor from his agreement with his employer, making the arbitration provision applicable against the estate bringing suit. Id.
\textsuperscript{105} Id.
\textsuperscript{106} Id. (quoting \textit{OHIO REV. CODE ANN.} § 2125.02(A)(1) (West 2006). [A] civil action for wrongful death shall be brought in the name of the personal representative of the decedent for the \textit{exclusive benefit of the surviving spouse, the children, and the parents of the
involvement in a wrongful death claim—to efficiently enable the decedent’s beneficiaries to remedy their injuries stemming from the decedent’s death.  

Next, the court looked to precedent. The court pointed to Mahoning Valley Ry. Co. v. Van Alstine, where an administrator was allowed to litigate a wrongful death action after having litigated a survival action on the same facts. The court then consulted Thompson v. Wing to clear up any remaining ambiguity regarding this matter. In that case, noting the split of state authority regarding the relationship between survival and wrongful death actions, the court took the position that litigation of a survival action would not bar subsequent litigation of a wrongful death action.

The court, based on its construction of Ohio’s wrongful death statute and its precedent in Thompson, determined that Ohio courts would treat wrongful death and survival claims as independent actions. The court determined that the Plan, which purported to bind the decedent’s “heirs, beneficiaries, successors and assigns” to arbitration, applied only to an action in survival, because such an action involved the decedent’s claims. The court reasoned that a wrongful death action involves not the decedent’s claims, but those of his beneficiaries. The court concluded that the decedent could not by agreement bind his beneficiaries to arbitrate their wrongful death action. As a result, the Plan could not bind Peters to arbitrate the wrongful death claim against the employer, and Peters was granted the right to litigate her wrongful death claim in a court of law, independently of the survival claim and on behalf of all beneficiaries.

V. COMMENT

Peters irrevocably will cause two problems. First, the treatment of wrongful death claims as independent from survival claims unavoidably will disrupt Ohio’s

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.

Id. (emphasis added by Peters).


108. Id.

109. 83 N.E. 601 (Ohio 1908).

110. Id. at 604-05. The court noted that the Mahoning court plainly stated that survival and wrongful death actions were "not the same." Peters, 873 N.E.2d at 1261 (citing Mahoning, 83 N.E. at 607).

111. 637 N.E.2d 917 (Ohio 1994).

112. Peters, 873 N.E.2d at 1261 (referencing Thompson, 637 N.E.2d 917 (Ohio 1994)).

113. Thompson, 637 N.E.2d at 920-22. A majority of states’ courts treated wrongful death actions as derivative of survival actions; whereas, a minority held survival actions as distinct from wrongful death actions. Id. at 920. In the former circumstance, litigation of survival would bar that of wrongful death; in the latter, litigation of survival would not bar that of wrongful death. Id.

114. Id. at 922. The court reasoned that “injured persons may release their own claims [in survival]; they cannot, however, release claims that are not yet in existence and that accrue in favor of persons other than themselves.” Id.(emphasis omitted). There, however, the court did provide that collateral estoppel would bar a plaintiff from re-litigating individual issues that had already been determined in the survival action. Id. at 923-24.

115. Peters, 873 N.E.2d at 1262.

116. Id. (i.e., decedent had only agreed to arbitrate his own claims against the company, and not anyone else’s).

117. Id.

118. Id. The court summarily pronounced that arbitration “may not be imposed on the unwilling.” Id.
judicial economy. Second, the court’s dismissive attitude toward the arbitral forum could very well disrupt Ohio’s business economy. The root of both problems is Thompson v. Wing, as that case provided much of the court’s reasoning in Peters. Therefore, one solution would be for the Ohio Supreme Court to quickly overrule Thompson in favor of treating wrongful death claims as derivative actions. If not, Ohio business will have to construct employment agreements, and specifically the arbitration provisions therein, very carefully in order that they be given their intended effect.

A. Independence of Claims and the Disruption of Judicial Economy

The court in Peters failed to consider the judicial-economic benefits of the arbitral forum beyond a mere cursory statement. Judicial economy is a phrase generally referring to the efficiency of the judicial system, specifically in the interests of avoiding the duplication of evidence and undue burden on parties. Courts often cite to judicial economy when moving toward expeditious resolutions to disputes.

Because Peters dismissed her survival action to pursue wrongful death, the court did not confront the situation that could ensue if a claimant were to maintain both actions, pursuing survival in the arbitral forum and wrongful death in court. One commentator has suggested that “judicial economy [would] likely be trampled” as a result of the severance of wrongful death claims from survival claims in such a situation, because wrongful death and survival actions are inherently connected. Therefore, they would be most efficiently evaluated together. Each arises from the same tortious liability of one for the injury of another, such that the severance of those two claims to different forums would result in separate adjudications of essentially the same facts. If the survival claim were arbitrated and the wrongful death claim litigated, it would be entirely possible for the arbitrator and the court to come to opposite legal conclusions. For example, the claimant could lose arbitration of the survival action, yet win litigation of the wrongful death claim. The heavy deference reviewing courts owe arbitral decisions would likely compel the court to confirm the claimant’s loss on survival, giving legal effect to an arbitral decision opposite its own on the same set of facts.

119. Peters, 873 N.E.2d at 1260 (“While arbitration is encouraged as a form of dispute resolution, the policy favoring arbitration does not trump the constitutional right to seek redress in court.”).
120. See BLACK’S LAW DICTIONARY (8th ed. 2004).
Furthermore, by separating two actions based on the same factual allegations, the Ohio Supreme Court overspends both judicial time and judicial resources. Parties seeking redress under both claims will have to pay for both litigation of the wrongful death claim and arbitration of the survival claim. In addition, separation of claims unnecessarily expands the amount of time the parties must devote to the action, combining months of arbitration with months, if not years, of litigation. In addition, court dockets that are already full will contain more superfluous matters.

Courts can dispose of such monetary and temporal inefficiencies by merely directing both claims to one forum. Since in cases like Peters the preeminent claim (survival) will be deemed arbitrable, so too should the wrongful death action. Similar claimants would spend far less money and time, while maintaining the ability to pursue both claims against the tortfeasor. In Peters, the Ohio state court system would not have lost nearly four years to this matter. Most importantly, an arbitrator would be able to rule on both claims merely by looking at one set of facts. In Peters, Peters could have redressed both sets of injuries without risk of inconsistent rulings. The Ohio Supreme Court could have reached this efficient result by simply giving effect to the terms of the parties' agreement—an arbitral principle to which the court did not allocate due consideration.

B. Ohio Courts Must Do More to Encourage Use of the Arbitral Forum

Ohio's arbitration statute provides for the validity of all arbitration agreements, except where they would be invalidated by normal contract principles. However, in Peters, the court went only as far as invalidating the decedent's arbitration agreement under one such principle—Peters did not personally agree to arbitrate disputes under that agreement. By abbreviating the discussion in this manner, the court failed to give effect to the agreement's terms, nor did it consider the idea that non-signatories can be bound to arbitrate disputes under certain circumstances.

As a principle, courts must give effect to arbitration agreements' terms, which show the parties' intent. This principle embraces the idea that determining who

125. This is despite the court's own rules guarding against such action. See OHIO R. CIV. P. 42(A)(1) (West 2008) (consolidation of multiple actions "involving a common question of law or fact . . . to avoid unnecessary costs or delay").
127. E.g., in Peters, the Ohio Supreme Court decision alone took seven months to reach finality. See Peters, 873 N.E.2d 1258.
128. Peters originally filed suit on Dec. 2, 2003, and the Ohio Supreme Court dealt its final ruling on Sept. 20, 2007—precise amount of time spanned by this action was 1,388 days, or roughly 46.5 months. And as of the disposition of this case, Peters still had not litigated the issue of her wrongful death claim. See id.; Merit Brief of Appelle, Peters v. Columbus Steel Casting Co., 873 N.E.2d 1258 (Ohio 2007), 2006 WL2982174 at *3.
129. OHIO REV. CODE ANN. § 2711.01(A) (West 2006). See text of statute, supra note 69.
130. Peters, 873 N.E.2d at 1260.
131. See supra, text accompanying notes 61-62. In abiding by this principle, courts have deemed that a grievance may only be excluded from within the bounds of an arbitration agreement if the agreement.
is bound by an arbitration agreement is not always as simple as who signed it.\textsuperscript{132} Accordingly, it is not uncommon for a court to enforce an agreement as to a non-signatory party.\textsuperscript{133} However, the\textit{ Peters} court paid little attention to the terms of the arbitration agreement, which\textit{ expressly} purported to bind his "heirs, beneficiaries, successors, and assigns."\textsuperscript{134} The court therefore disregarded the express intent of both parties that the agreement be binding on all such future parties. The court also did not consider that this type of clause, relating to any legal claims or disputes the decedent had relating to his employment,\textsuperscript{135} might be intended by the parties "to include by reference the peripheral and functional writings, relationships, and documents which characterize the complex transactions of business today."\textsuperscript{136} The court's apparent indifference to this possibility could be viewed as a slight to the arbitral system. Indeed, it would be difficult for two parties to make their intent more clear.

The\textit{ Peters} court also did not give due accord to the general presumption in favor of arbitration.\textsuperscript{137} The backlash of the court's treatment of the arbitral forum could well be forceful. Supporters of the arbitral forum could feel as though the treatment undermines judicial confidence in arbitration.\textsuperscript{138} This sentiment could foster the idea that Ohio's courts generally will not accord due favor to the arbitral forum, despite parties' apparent intent for such favor. This could result in businesses, aware of this theme in Ohio's judicial system, to form elsewhere, in jurisdictions where they could be more confident courts would give effect to their express arbitration agreements. The overall result could be severe injury to Ohio's business economy.\textsuperscript{139}

Furthermore, the\textit{ Peters} court's mention of deference to the arbitral forum was outweighed by the court's cursory conclusion that, seemingly without exception, "only signatories to an agreement are bound by its terms."\textsuperscript{140} This is not always true, as there are necessarily circumstances under which non-signatory

expressly excluded it, or strong evidence shows the parties' intent to exclude it. See supra, text accompanying note 68.

132. DiLeo, supra note 65, at 36 ("'No contract, no arbitration' does not accurately reflect the present legal complexity of the subject.").
133. Id. at 36-37 (citing Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen, 206 F.3d 411, 416 (4th Cir. 2000); Thomson-C.S.F., S.A. v. Am. Arbitration Ass'n, 64 F.3d 773, 776 (2d Cir. 1995)).
134. Peters, 873 N.E.2d at 1260.
135. Id. Much could be made of the fact that the agreement purported to cover only the decedent's claims against his employer. However, this part of the agreement only gives added effect, concerning the parties' intent, of the following portion that\textit{ expressly} bound the decedent's heirs to arbitrate such disputes.
136. DiLeo, supra note 65, at 73.
138. This view would stem from the fact that, although arbitration resulted in a different legal interpretation of the facts, the court maintains its own interpretation for the purpose of the litigated claim.
140. Peters, 873 N.E.2d at 1260. The court further stated, "unless [CSC] proves that Peters's [sic] beneficiaries specifically agreed to arbitrate their wrongful death claims, they should not be bound to do so." Id. at 1261. This runs in direct opposition to federal court language. See Wash. Mut. Fin. Group v. Bailey, 364 F.3d 260, 267 (5th Cir. 2004) ("It does not follow [that] ... an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision.").
parties can be bound by arbitration agreements. One such instance is where the non-signatory’s claim could not have existed but for the contractual relationship between two parties.\(^{141}\) Courts bind such a non-signatory because in bringing her claims, she inherently must rely on the signatories’ underlying agreement. For example, in Peters, without the employment agreement between the decedent and his employer, Peters never would have had a wrongful death claim—that claim resulted from a breach by the employer of a duty that arose only under the employment agreement.\(^{142}\)

Finally, the breadth of the Peters holding is troubling. It is without limiting language. Therefore, it is probable that spouses or other parties with similarly intimate relationships, dealing with happenstance contracts such as basic goods-purchase agreements, could overcome arbitral conventions merely by having only one member of the relationship sign the agreement. Any claim arising from the agreement involving a non-signatory would be held not arbitrable, unless the Ohio Supreme Court suddenly decides to flout its established precedent.

C. The Thompson Precedent and Ohio’s Uncertain Future

The brunt of the court’s reasoning in Peters derived from Thompson v. Wing.\(^{143}\) There, the Ohio Supreme Court reaffirmed that Ohio courts would treat wrongful death and survival claims as separate and independent from each other.\(^{144}\) The court decided this notwithstanding the fact that, when death from injury is not immediate, a wrongful death action is inherently dependent on the existence of a prior tort action.\(^{145}\) Moreover, Thompson had nothing to do with wrongful death actions in the context of arbitration. Nevertheless, it was binding precedent regarding the independent nature of wrongful death actions in Ohio, and because of it, Ohio remains among the minority of states in its treatment of wrongful death actions.\(^{146}\)

However, the Ohio legislature may not be as convinced of the independence of wrongful death claims as the Ohio Supreme Court. Ohio lawmakers showed their uncertainty in 1996, when they voted to amend Ohio’s wrongful death statute,\(^{147}\) transforming it from one virtually identical to the present version into one which “effectively overruled” Thompson.\(^{148}\) It is certainly possible that the leg-

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141. See discussion, supra LEGAL BACKGROUND Section D.
142. It is certainly possible for a claimant to possess a claim for wrongful death without the existence of a contract. See generally Rufo v. Simpson, 103 Cal.Rptr. 2d 492 (Cal. Ct. App. 2001) (parents of murder victim prevailed in wrongful death action against alleged killer). However, where a claim as to an employee’s death is based on employer-negligence, the beneficiary-claimant unavoidably relies on the employment agreement, for that agreement created the duty the employer has allegedly breached.
143. 637 N.E.2d 917 (Ohio 1994). See discussion, supra in LEGAL BACKGROUND Section B for a synopsis of this case.
144. Id. at 182-83.
145. It is important that death not be immediate, as was the case in Peters, because clearly if death were immediate a wrongful death claim could exist without a prior injury claim – there would be no “injury” in such a case; only death. However, if death is not immediate, there must have been a prior injury, which led to the death.
146. Other such states include Arkansas and Louisiana. See supra, text accompanying note 37.
148. Stephen J. Werber, Ohio Tort Reform in 1998: The War Continues, 45 CLEV. ST. L. REV. 539, 542 n.11 (1997). As enacted, Section 2125.01(B) (1) disallowed a death action if the wrongdoer lost a
islation will reevaluate this issue at some future time, possibly forcing the Ohio Supreme Court to reevaluate its treatment of wrongful death claims. For now, though, Ohio businesses are stuck with the court’s current interpretation, and they would do well to consider how to prevent that interpretation from affecting them the same way it affected CSC in Peters.

D. Business Practices in Ohio in the Meantime

Peters made it clear that, in Ohio, when an employer and employee agree to arbitrate disputes flowing from the employment relationship, that agreement will not cover wrongful death claims brought by a deceased employee’s representative. An effective solution to this problem would be for the Ohio Supreme Court to overrule Thompson v. Wing and join the majority of states in treating a wrongful death action as derivative of a decedent’s action upon the death-causing injury. After all, the injury did cause the death, and surely parties would intend that if injury claims would fall under an arbitration agreement, so too would claims stemming from death caused by those injuries. Then, parties like CSC would not be adversely affected courts giving improper effect to the provisions of their employment agreements, and the arbitral forum would be given the deference it commands under the FAA. 149 However, assuming Thompson is not overruled any time soon, Ohio businesses are not wholly without means to bind their employees’ beneficiaries to arbitrate wrongful death claims. 150

For businesses that have not yet formed in Ohio but would like to do so, the simplest course of action would be to operate under the laws of a state that treats wrongful death actions as derivative of tort-survival claims. 151 A business could either incorporate (or otherwise form) under another state’s laws, or expressly set the arbitration agreement as governed by another state’s laws. If the business is willing to leave Ohio, it could simply locate in a different state, thereby operating under that state’s laws by default.

Further, Peters gave special treatment to the agreement’s specific language as to what claims would be arbitrable. 152 The court treated that language as explicitly separating the decedent’s injury claims from wrongful death claims belonging to his beneficiaries. 153 Therefore, it is imperative that businesses refrain from using such limiting language. Rather, they should use broad language, sending to

149. See supra, text accompanying notes 64-68.
150. As a preliminary matter, an obvious but hardly feasible method businesses could undertake to bind beneficiaries to agreements would be to have all of the employee’s putative beneficiaries sign the employment agreement as binding upon them. This is not feasible because it is impossible to know who an employee’s beneficiaries will be as of the time of his death. Luckily for businesses, other more feasible methods do exist.
151. For example, Delaware, Oregon, Georgia, and Colorado, to name a few, are such states. See supra, note 29.
152. Peters, 873 N.E.2d at 1260 ("any legal claims or disputes I may have . ..") (emphasis added).
153. The court took this view notwithstanding that the agreement purported to bind the decedent’s beneficiaries. Id. at 1260-61.
arbitration all disputes that arise from the employment. Of course, the agreement should also expressly bind heirs and beneficiaries, as in Peters.

VI. CONCLUSION

As indicated above, there are certainly means for a business to avoid falling victim to a decision like Peters. However, it is a shame businesses seeking to form in Ohio, and thereby benefit Ohio’s economy, must tip-toe through their operations in order to reach a result that upholds a logical connection between two legal claims and maintains favor toward the arbitral forum. As mentioned above, Ohio’s statewide economy has been faltering for several years. One must wonder if its seeming hostility toward arbitration, a proven method of settling disputes within the corporate paradigm, is at all responsible for that economic slide. It is certainly clear that, in terms of judicial economy, Ohio’s courts stand to gain from a change of view in this area of law. The Ohio Supreme Court holds the key to unlock the benefits in treating wrongful death actions as derivative actions and in giving effect to express arbitration agreements. But there is no indication that key will ever be used.

CHRISTOPHER D. VANDERBEEK

154. See supra, text accompanying notes 80-83. Caveat: it is possible that Ohio courts would implicitly read the “disputes I may have” language into a broadly termed agreement, merely to maintain the independence of wrongful death actions from a decedent’s injury claims. However, at the very least, using broader language would give the drafter a much more colorable argument to confront a claimant’s challenge to arbitrability, particularly in light of the strong presumption favoring arbitration.