2012 WL 3659912 (Ohio App. 8 Dist.) (Appellate Brief)
Court of Appeals of Ohio, Eighth District, Cuyahoga County.

Pamela TEDESCHI, Plaintiff-Appellee,

v.

ATRIUM CENTERS, LLC; Essex of Salem I, Defendant-Appellants.

No. 97647.
March 15, 2012.

On Appeal from the Cuyahoga County Court of Common Pleas Case No. 674442

Brief of Plaintiff-Appellee, Pamela Tedeschi

Frank Gallucci,iii, Esq (#0072680), Michael D. Shroge, Esq. (#0072667), Plevin & Gallucci, 55 Public Square, Suite 2222, Cleveland, Ohio 44113, (216) 861-0804, Fax: (216) 861-5322, FGallucci@pglawyer.com, Attorneys for Plaintiff-Appellee, Pamela Tedeschi.

Paul W. Flowers, Esq. (#0046625), Paul W. Flowers Co., L.P.A., Terminal Tower, 35th Floor, 50 Public Square, Cleveland, Ohio 44113, (216) 344-9393, Fax: (216) 344-9395, pwf@pwfco.com.

***ii** TABLE OF CONTENTS

***iii** TABLE OF AUTHORITIES

Cases

*1 STATEMENT OF THE ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S-APPELLANT'S MOTION TO DISMISS, ALTERNATIVELY, MOTION TO STAY AND COMPEL ARBITRATION.

STATEMENT OF THE ISSUES

1. Does this Court possess valid subject matter jurisdiction under R.C. §2711.02(C) over Defendant-Appellant's appeal of the second denial of the request for a stay pending arbitration?

2. Did Plaintiff-Appellee possess appropriate authority through a Power of Attorney for Health Care to execute an Arbitration Agreement on behalf of her mother?

3. Can an agreement to arbitrate that is executed during the Decedent's lifetime preclude litigation of a wrongful death claim that subsequently arises?

***2 STATEMENT OF THE CASE AND FACTS**

Ruth A. Crowe, Deceased, ("Decedent") was 69 years old when she entered a nursing home facility on March 10, 2007 that was owned and operated by Defendant-Appellant, Essex of Salem I ("Essex") and Defendant, Atrium Centers, L.L.C. ("Atrium"). Two days later her daughter, Plaintiff-Appellee, Pamela A. Tedeschi, signed a "Binding Arbitration Agreement" and numerous other documents ostensibly as the Decedent's "LEGAL REPRESENTATIVE." *Apx. 00029.* [1] The Decedent was never asked to, and never did, either review or sign the agreement.

On June 13, 2007, the Decedent was left alone in the facility's courtyard by Defendants' staff. While she was unattended, she fell backwards in her wheelchair and struck her head on the corner of a metal grate. Two days later, she died from the massive brain injuries she had sustained.

The instant wrongful death/survivorship action was commenced on October 24, 2008. Plaintiff alleged that her mother had died as a result of substandard care and treatment that she received while she was a resident in Defendants' nursing home. An Answer was served denying liability on November 12, 2008.

On December 15, 2008, Defendants filed their first Motion to Stay and Compel Arbitration. They maintained therein that the parties' dispute was subject to a Binding Arbitration Agreement dated March 10, 2007. A nursing home administrator, Freda Scott ("Scott"), had signed the agreement on behalf of Defendant Essex. Apx. 0029. Defendant Atrium was not a signatory. Id.

In a motion that was submitted on January 5, 2009, Plaintiff requested additional time in which to conduct discovery and respond to the Motion to Stay and Compel Arbitration. Defendants opposed this request in a Brief in Opposition that was ***3** not submitted until January 29, 2009. In an Entry dated February 9, 2009, the court granted Plaintiff leave to respond on or before March 13, 2009.

A case management conference was conducted on March 2, 2009, during which Plaintiffs counsel indicated that he needed to depose Scott. In a letter dated March 2, 2009, Plaintiffs counsel memorialized these discussions with defense counsel. See Exhibit A, appended to *Plaintiffs* Motion to Lift Stay and Reactivate Case dated September 30, 2009 *("Plaintiffs Motion to Lift Stay").* No response was received, however, in the weeks that followed.

On March 17, 2009, Plaintiffs counsel issued a reminder letter with regard to the request for Scott's deposition. *See Exhibit B, appended to Plaintiffs Motion to Lift Stay.* When dates for the deposition still were not furnished, another follow-up letter was issued by Plaintiffs counsel on April 24, 2009. *Id.,* Exhibit C. Defense counsel responded with a letter dated April 30, 2009, in which he attributed the delay to his establishment of a new law firm. *Id.,* Exhibit D. He promised to "undertake efforts immediately to try to contact Freda Scott and the director of Nursing so that we can get the discovery on this case moving." *Id.*

On May 1, 2009, the trial court granted the "unopposed" Motion to Stay. Apx. 00030. Plaintiffs counsel determined that the most sensible approach was to seek reconsideration of this determination after Scott had finally been questioned. Still, no dates for the deposition were furnished by defense counsel. Plaintiffs counsel then issued another letter on July 20, 2009 attempting to resolve the impasse. *Exhibit E, appended to Plaintiffs Motion to Lift Stay.* He reminded defense counsel that he had not opposed the Motion to Stay and Compel Arbitration "because we've not been produced the depositions as promised by your stand-in counsel." *Id.*

On September 30, 2009, Plaintiff submitted her Motion to Lift Stay and Reactivate Case/Motion to Compel Deposition. She requested that the court return the ***4** case to the active docket and permit her to depose Scott. Defendants responded with a Motion to Stay and Compel Deposition on November 13, 2009. The trial court subsequently determined that this filing should have been titled as a "Brief in Opposition." See Journal Entry dated November 4, 2009. Plaintiffs Reply in Support of her original Motion followed on December 11, 2009. Defendants tendered a Sur-Reply on December 23, 2009.

In an entry dated January 13, 2010, the trial court granted the stay only as to Defendant Essex. *Apx. 00031.* Defendant Atrium had not been a party to the Arbitration Agreement and thus was precluded from seeking refuge thereunder. Plaintiffs Motion to Compel was also denied only with regard to deposing Scott "as to the condition of the Decedent[.]" *Id.*

Plaintiff was finally able to depose Scott on May 3, 2010. Apx. 00011. She testified that she had been in charge of admissions for Defendant Essex from 2003 through 2008. *Id., 00012.* Scott confirmed that a determination was never made as to whether the Decedent was competent to execute legal documents upon her admission. Apx. 0023-24. The administrator had reviewed her Power of Attorney and decided on her own that Plaintiff could sign for her mother. *Id., 00022.* Although the Power of Attorney was only effective once the Decedent lacked "the capacity to make informed health care decisions" for herself, Scott never determined whether this precondition had been met. Id., pp. 00023-24. Plaintiff proceeded to sign the Binding Arbitration Agreement strictly as the purported "LEGAL REPRESENTATIVE" of her mother. *Id., 00029.*

On August 17, 2010, Plaintiff filed a Motion to Lift Stay as to all Defendants. Citing the admissions that had been elicited during Scott's deposition, she argued that the Power of Attorney had been ineffective at the time the Arbitration Agreement was executed on March 12, 2007, since the Decedent had not been found to be incompetent. ***5** In the Brief in Opposition that followed on September 8, 2010, Defendant Essex offered no explanation for how the Power of Attorney could have been operative while the Decedent was alive and lucid and relied instead solely upon a series of inapposite authorities. Accordingly, the trial court lifted the stay in its entirety on January 6, 2011. Apx. 00032.

Defendants then proceeded to file Motions for Summary Judgment, challenging the sufficiency of Plaintiff's expert testimony, which were timely opposed. In a Journal Entry dated October 13, 2011, the court granted the application only as to Defendant Atrium. The jury trial was later scheduled to commence on March 12, 2012. *See Journal Entry dated October 21, 2011.*

In the wake of the summary judgment ruling, Defendant Essex filed a Motion to Dismiss; Alternatively, Motion to Stay and Compel Arbitration on October 17, 2011. No attempt was made to establish that the Power of Attorney could somehow be salvaged. Indeed, no mention at all was made of the trial court's ruling of January 6, 2011, lifting the stay as to all Defendants. Apx. 00032. Plaintiff opposed the senseless application on October 28, 2011.

In an order dated November 4, 2011, the trial court summarily denied the second motion to stay and compel arbitration. Apx. 00033. Defendant responded with a Notice of Appeal on December 5, 2011.

On February 12, 2011, Plaintiff filed her Motion to Dismiss Appeal. She maintained that Defendant Essex had failed to timely commence the interlocutory appeal that had been available under R.C. §2711.02(C), and thus appellate jurisdiction was lacking. Defendant opposed the request on December 27, 2011, and Plaintiffs Reply followed four days later. In an entry dated January 25, 2012, the hearing panel denied the request for dismissal.

***6 ARGUMENT**

THE TRIAL COURT ERRED IN DENYING DEFENDANTS-APPELLANTS MOTION TO DISMISS, ALTERNATIVELY, MOTION TO STAY AND COMPEL ARBITRATION.

I. LACK OF APPELLATE JURISDICTION

Although a hearing panel found on January 25, 2012 that appellate jurisdiction had been conferred under R.C. §2711.02(C), Plaintiff respectfully submits that the merits panel should carefully reevaluate this decision.

Pursuant to Section 3(B)(2), Article IV of the Ohio Constitution, appellate courts possesses jurisdiction " *** to review and affirm, modify, or reverse judgments or final orders of the courts of record ***." Ordinarily, the denial of a motion to stay and compel arbitration would be final and appealable pursuant to R.C. §2711.02(C). Mynes v. Brooks, 124 Ohio St. 3d 13,16, 2009-Ohio-5946, 918 N.E. 2d 511,514 ¶12.

But in this instance Defendant Essexs stay had been denied and lifted on January 6, 2011. Apx. 00032. For whatever reasons, the nursing home declined to seek review under R.C. §2711.02(C) within 30 days of that ruling. Instead, an unsuccessful attempt was made to secure summary judgment.

It was only after Defendant Essex was denied Summary Judgment, and the jury trial became eminent, that the demand for arbitration was revived on October 17, 2011. All of the same arguments that had previously been asserted in an effort to stay the proceedings were re-asserted in the Motion to Dismiss; Alternatively, Motion to Stay and Compel Arbitration. It is now apparent that Defendant was simply attempting to force the common pleas court to issue an appealable order so that the jury trial could be delayed.

This Court has never been receptive to such obstructionist tactics. For example, in Fazio v. Gruttadauria, 8th Dist. No. 90562, 2008-Ohio-4586, 2008 W.L. 4175040, a ***7** judgment of nearly $60 million was imposed ex parte against a stockbroker, who had fled from authorities after his illicit schemes were discovered. *Id.*, ¶1 . He still appealed the ruling and argued inter alia that the proceedings should have been stayed pursuant to an arbitration agreement. Id., ¶19. The unanimous panel observed that the stay had initially been denied on March 16, 2007, but was not appealed within thirty days. *Id.*, . Instead, the stockbroker sought leave on April 24, 2007 to file an interlocutory appeal, which was promptly denied. Id. A motion for reconsideration then followed, which was also rejected by the trial court. *Id.*, In the ensuing appeal, this Court concluded that his "failure to file a notice of appeal within 30 days of March 16, 2007, deprives us of jurisdiction to hear the issue." *Id.*, ¶21. That order had been "final" pursuant to R.C. §2711.02(C), and thus the subsequent trial court activity was a nullity.

The same sound result had been reached in *Schmidt v. Bankers Title & Escrow Agency, Inc.*, 8th Dist. No. 88847, 2007-Ohio-3924, 2007 W.L. 2206757. In that real estate dispute, the trial court had granted an unopposed motion to stay pending arbitration. *Id.*, ¶2. The order was not appealed within thirty days, but later the plaintiff filed a motion to vacate that ruling. *Id.*, ¶3. When that application was denied, an appeal was then promptly filed. *Id.*, ¶4. The unanimous panel observed that Ohio law has long precluded motions to vacate from being utilized as a substitute for a direct appeal. *Id.*, ¶14. Quite clearly, the plaintiff was "attempting to utilize the instant appeal to improperly seek review of alleged errors which he failed to timely appeal." *Id.*, ¶16. The opinion continued that:

> This type of 'bootstrapping' to wit, the utilization of a subsequent order to indirectly and untimely appeal a prior order (which was never directly appealed) is procedurally anomalous and inconsistent with appellate rules which contemplate a direct relationship between the order from which the appeal is taken and the error assigned as a result of that order.

Id., ¶16., quoting ***8** *State v. Church* (November 2, 1995), 8th Dist. No. 68590, 1995 W.L. 643794. Once again, this Court held that the rulings that had been issued in the wake of the first "final order" denying the stay were all nullities that could not be appealed. Id., ¶17

As these controlling authorities attest, the instant Defendant's Motion of October 17, 2011 was nothing more than a request for reconsideration of the ruling of January 6, 2011. That earlier entry had been a "final order" pursuant to R.C. §2711.02(C) since a stay pending arbitration was denied to Defendant Essex. Apx. 0032. It is axiomatic that reconsideration cannot be sought of final orders. Pitts v. Ohio Dept. of Transp. (1981), 67 Ohio St. 2d 378, 379, 423 N.E. 2d 1105, 1106. The ruling of November 4, 2011 is thus a nullity, from which no appeal can lie. Fazio, 2008-Ohio-4586 ¶21-22; Schmidt, 2007-Ohio-3924 ¶16-17.

Alternatively, principles of equitable estoppel should preclude Defendant Essex from attempting to avoid the jury trial through the last-ditch appeal. Ohio law has long precluded a party from taking a position when that party, by its conduct, has induced another to change its own position in good faith reliance upon that conduct. *Shapely, Inc. v. City of Norwood Earnings Tax Bd. of Appeals* (8th Dist. 1984), 20 Ohio App.3d 164, 165, 485 N.E.2d 273, 275; *Grogan v. T.W. Grogan Co., Inc.* (8th Dist. 2001), 143 Ohio App.3d 548, 758 N.E.2d 702, 711; *Armistead v. Vernitron Corp.* (6th Cir. 1991), 944 F.2d 1287, 1299. Long ago the United States Supreme Court explained that:

> The estoppel here relied upon is known as equitable estoppel, or estoppel in pais. The law upon the subject is well settled. The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done, should not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both. This remedy is always so applied as to promote the ends of justice. It is available only for protection and cannot be used as a weapon of assault. It accomplishes that which ought to be done between man and man, and is not permitted to go beyond this limit. ***

***9** *Dickerson v. Colgrove* (1879), 100 U.S. 578, 580-581, 25 L.Ed. 618; *see also, Doe v. Blue Cross/Blue Shield of Ohio* (10th Dist. 1992), 79 Ohio App. 3d 369, 379, 607 N.E. 2d 492, 499.

Here, Defendant Essex voluntarily declined to appeal the final order of January 6, 2011 and proceeded to file a Motion for Summary Judgment instead. Plaintiff was forced to submit a response, and the trial judge reviewed and rejected the request on October 13, 2011. Plaintiff was thus required to devote substantial time and effort in the summary judgment proceedings, which would have been unnecessary if the dispute was legitimately subject to binding arbitration. Parties who sleep on their rights, to an opponent's detriment, should not be afforded a second bite at the apple.

II. THE INOPERATIVE POWER OF ATTORNEY

Turning to the merits of the appeal, the trial judge properly concluded - on both occasions - that Defendant Essex had failed to establish that the agreement to arbitrate was enforceable. The facts pertaining to the execution of the instrument were never in dispute. In her sworn statement, Plaintiff has confirmed that the Nursing Home Administrator, Scott, had first approached her about signing documents on her mother's behalf on March 12, 2007. Apx. 0001. She brought the Power of Attorney with her to the facility at the administrator' request. *Id.*

The Decedent's Power of Attorney for Health Care mirrors the standard form, which has been jointly produced by the Ohio State Bar Association and Ohio State Medical Association. That form has also been approved by the General Assembly. R.C. §1337.17. In customary fashion, Section 2 directs that:

GENERAL STATEMENT OF AUTHORITY GRANTED. I hereby grant to my agent full power and authority to make all heath care decisions for me to the same extent that I could make such decisions for myself if I had the capacity to do so, at any time during which I do not have the capacity to make informed health care decisions for ***10** myself. *** [emphasis added].

Apx. 0004. Just in case this directive was overlooked the "Notice to Adult Executing this Document" section assured the principal that:

> This document gives the person you designate (the attorney-in-fact) the power to make MOST health care decisions for you *if you lost the capacity to make informed health care decisions for yourself.* This power is effective only *when your attending physician determines that you have lost the capacity to make informed health care decisions for yourself* and, notwithstanding this document, as long as you have the capacity to make informed health care decisions for yourself, you retain the right to make all medical and other health care decisions for yourself" [emphasis added].

Apx. 0007. As is commonplace, the Power of Attorney was thus only operable when the Decedent was incapacitated.

Because of the potential for **abuse**, a power of attorney must not be expanded beyond the plain and ordinary terms that were approved by the principal. Roberts v. Davis (5th Dist. 1940), 66 Ohio App. 527, 35 N.E.2d 609 ("It is axiomatic that powers of attorney are to be construed strictly against any enlargement thereof beyond the plain purport of the powers actually granted.") It should go without saying, moreover, that powers of attorney are ineffective when express pre-conditions have not been satisfied. State of Ohio v. Keith (Oct. 22, 1998), 8th Dist. No. 72275,1998 W.L. 742172 (holding that statute, governing durable powers of attorney for health care, did not apply since no physician had determined that patient had lost capacity to make health care decisions).

Plaintiff has confirmed that her mother was never asked to undergo a competency evaluation upon her admission to Essex and, as far as she is aware, no physician had found her to be incompetent. Apx. 0001. The Decedent "was doing well and appeared to be fully aware of her surroundings." **Id.** Had anyone asked, Plaintiff "would have told them that [her] mother was fully competent and able to review, understand (as well as [she] could) and sign any documents on her own." **Id.,** 0002.

***11** The accuracy of Plaintiff's recollection in this regard was confirmed during Scott's deposition. As previously noted, the Nursing Home Administrator conceded that no attempt had been made to discern whether the Decedent was competent upon her admission to the facility. *Apx. 00016-17, 23-24 & 26.* More significantly, the Nursing Home Administrator did not know whether any physician had ever determined that the Decedent lacked the capacity to make her own health care decisions. *Id., 00025.*

Although the Decedent had been disoriented and confused during a previous stay in a hospital, the discharge summary revealed that the 69-year-old "was conscious and alert and oriented." *Id.*, 00020. The Decedent was also "responding to questions very well[.]" Id. Scott's own notes confirmed that the Decedent was alert and oriented at the time of her admission to Essex. Id., 00014-15 & 18-19. A few weeks later, she felt comfortable reviewing a living will with the Decedent, even though Plaintiff was not present. *Id.*, 00021 &26.

Plaintiff is not an attorney and thus believed the Administrator when she indicated that the Power of Attorney allowed her to execute documentation on her mothe's behalf. Apx. 0002. Plaintiff was afraid that if she did not do so, her mother would be unable to remain at Essex. *Id.* "She had been doing extremely well there over her first two days and [Plaintiff] did not want to disrupt her new living arrangements." *Id.* Scott has acknowledged that the Decedent could have been potentially expelled if Plaintiff had refused to sign the documents. *Id.*, 00013.

As plainly reflected above her signature line, Plaintiff signed the Arbitration Agreement strictly as the "LEGAL REPRESENTATIVE" of the Decedent. Apx. 00029. Plaintiff did not intend to execute any documents on behalf of herself or anyone other than her mother. Id., 0002. There would have been no reason for her to do so, since she was not being admitted to the facility. Since there can be no dispute that Scott erroneously determined that the Power of Attorney was valid, even though the Decedent ***12** had never been determined to be incompetent by a physician, there is no dancing around the inescapable verity that the Binding Arbitration Agreement was never properly executed and has no legal effect.

Indeed, settled Ohio law supports the conclusion that no valid Arbitration Agreement exists. In Lithograph Bldg. Co. v. Watt (1917), 96 Ohio St. 74, 117 N.E. 25, the Supreme Court of Ohio refused to enforce a lease executed pursuant to a power of attorney that did not confer upon the agent the authority to enter into the subject lease. The Court observed: "If, however, such instrument be made by one wrongfully assuming to act as agent of the owner, or by one who is such agent, but without actual authority to enter into such a contract, then the instrument cannot be held to be good as a contract to make a lease or deed, and enforceable as such against the owner." Id., 96 Ohio St. at 84-85. See also Taylor v. Ernst & Young, L.L.C. (2011), 2011 W.L. 5009416, 2011-Ohio-5262, -- N.E.2d - (arbitration agreement between insurer and accountant was not enforceable against the non-signatory liquidator, whose claims did not arise until issuance of the liquidation order).

Cases from other jurisdictions have squarely addressed the instant issue and provide additional persuasive authority. Specifically, in Waterman v. Evergreen at Petaluma, LLC (Sept. 25, 2008), Cal. Ct. App., 1st Dist. No. A117682, 2008 W.L. 4359556, a health and rehabilitation center appealed the order of the trial court denying its motion to compel arbitration in an action for personal injuries and **elder abuse** brought by the daughter of a deceased patient. The daughter, like Plaintiff herein, signed arbitration agreements with the facility during her father's admission. The trial court held that the daughter lacked authority to bind her father to those agreements.

The appellate court in *Waterman* upheld this decision. Specifically, the court noted that at the time the daughter signed the arbitration agreements, her authority to act as her father's agent for health care decisions had not been triggered. *Id.* at p. *3.

***13** The court opined:

> In the instant case, however, [the daughter's] authority to act as [her father's] agent with respect to health care was subject to a condition precedent. Specifically, the advance health care directive provided that [the daughter's] authority as her father's agent for health care decisions did not take effect until his primary physician determined that he was unable to make his own health care decisions. Here, no such evidence was presented.

Id. The same sound result is warranted in the case sub judice, and the Arbitration Agreement should be held to be ineffective in toto.

Thus far in the proceedings, Defendant Essex has made no attempt to explain how the Power of Attorney could have been operative while the Decedent was alive and competent. As with its filings below, the Nursing Home's Brief to this Court is conspicuously silent on this dispositive issue. Essex has never disputed, moreover, that arbitration can be ordered only if the Power of Attorney was effective. Since there is no evidence that the Decedent was incapacitated, the trial court's ruling is unassailable.

Essex may be withholding some imaginative argument that will be disclosed for the first time in a Reply Brief so that Plaintiff will be denied an opportunity to respond. Since Plaintiff had first challenged the enforceability of the Power of Attorney early in the proceedings *(Plaintiffs Motion to Lift Stay as to all Defendants dated August 17, 2010, pp. 11-16)* and no attempt was ever made to explain to the trial judge how the Arbitration Agreement could still be salvaged, the nursing home is now precluded from advancing new theories for the first time on appeal. *State ex rel. Gutierrez v. Trumbull Cty. Bd. of Elec.* (1992), 65 Ohio St. 3d 175, 177, 602 N.E. 2d 622, 624; Scott v. East Cleveland (8th Dist. 1984), 16 Ohio App. 3d 429, 431, 476 N.E. 2d 710, 713-714. It is safe to assume, moreover, that any legitimate justification for how Plaintiff could have signed the document as her mother's "LEGAL REPRESENTATIVE" would have been offered long ago. The trial judge's denial of the motion to dismiss or stay should be affirmed.

***14 III. INAPPLICABILITY TO WRONGFUL DEATH ACTIONS**

Even if Plaintiff did somehow possess legal authority to sign the Arbitration Agreement for her mother, a jury trial would still be necessary upon the wrongful death cause of action. Initially, it is important to remember that such claims are independent causes of action that have been created by statute. *Mahoning Valley Ry. Co. v. Van Alstine* (1908), 77 Ohio St. 395, 83 N.E. 601, syllabus; *Dougherty v. Fecsik* (8th Dist. 1996), 116 Ohio App.3d 456, 688 N.E.2d 555,556; *Hall v. Nationwide Mut. Fire Ins. Co.* (Sept. 1, 2005), 10th Dist. No. 05AP-305, 2005-Ohio-4572, 2005 W.L. 2100627, p. *2, ¶ 8; *Kissinger v. Pavlus* (May 21, 2002), 10th Dist. No. 01AP-1203, 2002-Ohio-3083, 2002 W.L. 1013085, pp. *3-4, ¶ 8-14. This conclusion is required by the clear and unambiguous terms set forth in R.C. §2125.02(A)(1), which directs 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. ***

All of the damages allowable under Subsection (B) are of the type suffered by the survivors, not the decedent. The decedents compensable losses are properly brought in either a personal injury or survivorship action. *Hillard v. Western & So. Life Ins. Co.* (3rd Dist. 1941), 68 Ohio App. 426, 429-430, 34 N.E.2d 75, 76-77; *White v. Moody* (1th Dist. 1988), 51 Ohio App.3d 16,24,554 N.E.2d 115,123.

As directed in the Wrongful Death Act, a wrongful death claim is brought and controlled by the court-appointed "personal representative" of the decedent. *Tennant v. State Farm Mut. Ins. Co.* (9th Dist. 1991), 81 Ohio App.3d 20, 24, 610 N.E.2d 437, 439. A wrongful death claim that is filed by the beneficiaries must be corrected or dismissed. *In re Estate of Ross* (11th Dist. 1989), 65 Ohio App.3d 395,400,583 N.E.2d 1379,1383.

The ability of individuals to impair their own beneficiaries' future wrongful death ***15** claims was squarely examined by the Supreme Court of Ohio in Thompson v. Wing, 70 Ohio St.3d 176,1994-Ohio-358, 637 N.E.2d 917. The decedent had secured a judgment against his physician in a medical malpractice action. After he passed away, his representative filed a wrongful death claim based upon the same claim of malpractice. Justice Wright observed in the majority opinion that:

> At the outset, it should be noted that when a person is injured by the tortious conduct of another and the person later dies from the injury, two claims arise. The first is a claim for malpractice or personal injury, enforced either by the injured person herself or by her representative in a survival action. The second is a wrongful death claim, enforced by the decedent's personal representative on behalf of the decedent's beneficiaries. [emphasis added].

Id., 70 Ohio St.3d at 179. The Court then reasoned that:

*** [T]he 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.* [emphasis added].

Id. at 183. The decedent's representative thus was not precluded from seeking damages under R.C. §2125.01 et seq. on behalf of the beneficiaries. Id. at 182-183.

The Court did recognize that the decedent and his family members were in sufficient "privity" with each other to potentially implicate the doctrine of collateral estoppel and prevent issues from being re-litigated in the second proceeding. No suggestion was made, however, that this relationship permitted the decedent to enter agreements, discharging the beneficiaries' future wrongful death claim. To the contrary, the rule emanating from *Thompson* is plainly that individuals may not "release claims that are not yet in existence and that accrue in favor of persons other than themselves." *Id.*, 70 Ohio St.3d at 183.

***16** This fundamental principle was reaffirmed in the context of arbitration agreements in *Peters v. Columbus Steel Castings Co.*, 115 Ohio St. 3d 134, 2007-Ohio-4787, 873 N.E. 2d 1258. An employee had executed a "Dispute Resolution Plan," that required all of his legal claims against the employer to be arbitrated. *Id.*, 115 Ohio St.3d at 135. Eight days later, he fell to his death from a catwalk. *Id.* When the employer sought to enforce the arbitration clause, the trial judge concluded that only the deceased employee's survivorship claims were subject to the agreement. *Id.* The beneficiaries' wrongful death claim could still be pursued in court. *Id.*

Both the appellate court and Supreme Court of Ohio affirmed this determination. *Peters*, 115 Ohio St.3d at 135-136. Writing for a unanimous court, Justice O'Donnell explained that:
*** [The deceased employee] could not restrict his beneficiaries to arbitration of their wrongful-death claims, because he held no right to those claims; they accrued independently to his beneficiaries for the injuries they personally suffered as a result of the death. See Thompson, 70 Ohio St.3d at 182-183, 637 N.E.2d 917. Thus, a decedent cannot bind his or her beneficiaries to arbitrate their wrongful-death claims. Id. The beneficiaries can agree to arbitrate these claims themselves, but they are not required to do so. *Because [the employee's] beneficiaries did not sign the plan or any other dispute-resolution agreement, they cannot be forced into arbitration, [*emphasis added].

Id. at 138, ¶19; *See also Grady v. Winchester Place Nursing & Rehab Ctr.* (July 20, 2009), 5th Dist. No. 08CA59, 2009-Ohio-3660, 2009 W.L. 2217733, p. *4 ("[W]e find the decedent's beneficiaries were not parties to the arbitration agreement and that any wrongful death claims they may have are therefore not subject to arbitration.").

Indeed, the principle that arbitration agreements do not bind wrongful death beneficiaries and compel arbitration of those claims was recently re-affirmed by the Eleventh District in *Wascovich v. Personacare of Ohio* (11th Dist. 2010), 190 Ohio App.3d 619, 622-623, 2010-Ohio-4563, 943 N.E.2d 1030, 1032. There, the court ***17** concluded that only survival claims fell under the arbitration agreement contained in paperwork that the decedent signed upon admission to the defendant's facility.

Even if the Power of Attorney had been operative when the Arbitration Agreement was executed, all that would mean is that Plaintiff was consenting to the arrangement as the Decedent's representative. *But Thompson*, 70 Ohio St. 3d at 183, specifically recognizes that an individual cannot, during his/her lifetime, impair his/her future beneficiaries' entitlement to wrongful death damages under R.C. §2125.01. Simply put, it is legally impossible in Ohio to deny beneficiaries their statutory right to pursue wrongful death damages through agreements that have been signed only by the still-living decedent or his/her legal representative. *Peters*, 115 Ohio St. 3d at 138; Grady, 2009-Ohio-3660, p. *4, ¶28. Such releases can be executed only, if at all, by the beneficiaries themselves. *Id.* Since there is no dispute in this case that Plaintiff never signed the Arbitration Agreement in her individual capacity, arbitration cannot be ordered upon the wrongful death claim. Plaintiffs Memorandum in Opposition, Exhibit A, paragraph 12; Plaintiffs Memorandum in Opposition, Exhibit D, p.3.

True to form, the Appellant's Brief never once explains how the trial judge could have legitimately ordered arbitration of the wrongful death claim. As with her challenge to the effectiveness of the Power of Attorney, Plaintiff had established that she could not be forced to arbitrate the wrongful death claim early in the litigation. *Plaintiffs Reply in Support of Motion to Lift Stay and Reactivate Case dated December 11, 2009, pp. 3-7.* This contention has never been refuted, and any attempt to do so for the first time on appeal should be rejected. *Gutierrez, 65 Ohio St. 3d at 177; Scott*, 16 Ohio App. 3d at 431.

Instead of actually addressing the argument, Defendant Essex has relied upon vacuous slogans such as: "Ohio public policy favors arbitration as a means to settle disputes." *Appellant's Brief, p.* 8 (citation omitted). An entire section of the Brief has ***18** also been devoted to "unconscionability," even though Plaintiff never pursued such an argument below. *Id., pp. 11-13.* In an attempt to force the nursing home to finally confront the obvious flaws in its position, Plaintiff had even expressly acknowledged that fairness and unconscionability are not relevant issues in this case. *Plaintiffs Reply in Support of Motion to Lift Stay dated September 20, 2010, p. 2.* It should now be evident, if it was not substantially earlier, that the demand for

arbitration is being pursued in bad-faith and solely to avoid having to either tender a realistic settlement offer or defend the wrongful death/survivorship claim before a jury.

*19 CONCLUSION

Because Defendant Essex failed to commence an interlocutory appeal under R.C. §27.02(C) at the first available opportunity, these proceedings should be dismissed for a lack of appellate jurisdiction. In the event that this Court holds otherwise, then the trial judge should be affirmed on the grounds that Plaintiff did not possess the capacity to sign the Arbitration Agreement as the Deceden's "legal Representative." This Court should also confirm that the Arbitration Agreement would not apply, in any event, to the wrongful death claim that has been raised. This action should then be remanded for a jury trial upon all claims.

Appendix not available.

Footnotes

1 The Exhibits that have been included in the Appendix (pp. 0001-29) were originally submitted to the trial court as attachments to Plaintiffs Memorandum in Opposition to Defendant Essex of Salem I's Motion to Dismiss dated October 28, 2011.

End of Document