

The Reach of Arbitration Agreements in Wrongful Death Cases
Considerations at the State and Federal Levels in West Virginia

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I. Introduction

Generally, a contract cannot bind nonparties.¹ However, as in most areas of law, there are exceptions to this rule. Specifically, in the context of arbitration agreements, there are instances in which a nonsignatory may be compelled to arbitrate.² The following common law theories present well-known examples: (1) assumption, (2) piercing the corporate veil, (3) alter ego, (4) incorporation by reference, (5) third-party beneficiary, (6) waiver, and (7) estoppel.³ Interestingly, in the context of wrongful

¹ See, e.g., *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 294, 122 S. Ct. 754, 764, 151 L. Ed. 2d 755 (2002) (“It goes without saying that a contract cannot bind a nonparty.”); *Koerber v. Wheeling Island Gaming, Inc.*, Civil Action No. 5:12CV97, 2013 WL 162669, at *3 (N.D. W. Va. Jan. 15, 2013) (“It is well established that, as a general matter, non-parties to contracts cannot be held to possess rights or responsibilities thereunder.”).

² See, e.g., *Int’l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 416–17 (4th Cir. 2000) (“Well-established common law principles dictate that in an appropriate case a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties.”); *accord Williamsport Realty, LLC v. LKQ Penn-Mar, Inc.*, Civil Action No. 3:14-CV-118, 2015 WL 2354598, at *5 (N.D. W. Va. May 15, 2015) (indicating that “theories arising out of common law principles of contract and agency law” may be “used to bind nonsignatories to arbitration agreements” (internal quotation and citation omitted)); Syl. Pt. 10, *Chesapeake Appalachia, LLC v. Hickman*, 236 W. Va. 421, 781 S.E.2d 198 (2017) (“A signatory to an arbitration agreement cannot require a non-signatory to arbitrate unless the non-signatory is bound under some traditional theory of contract and agency law.”).

³ *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630, 129 S. Ct. 1896, 1902, 173 L. Ed. 2d 832 (2009) (quoting 21 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 57:19, 183 (4th ed. 2001)); see also Syl. Pt. 10, *Chesapeake*, 236 W. Va. 421, 781 S.E.2d 198 (holding that a nonsignatory to an arbitration agreement may be bound by its terms based upon the theories of incorporation by reference, assumption, agency, veil piercing or alter ego, and estoppel).

death claims, states are split on whether a nonsignatory may be compelled to arbitrate under an agreement signed by the decedent prior to his death.⁴

⁴ Some states, including New Mexico, Texas, Minnesota, Georgia, Arkansas, Florida, and Mississippi, view wrongful death causes of action as derivative in nature, and therefore subject to the same constraints as the decedent himself prior to his death. *See, e.g., THI of N.M. at Hobbs Ctr., LLC v. Spradlin*, 532 F. App'x 813, 817–18 (10th Cir. 2013) (concluding that a wrongful death claim in New Mexico “is a derivative action by the beneficiaries, and those beneficiaries, therefore, stand in the position of their decedent” (internal quotation and citation omitted)); *Johnston v. United States*, 85 F.3d 217 (5th Cir. 1996) (articulating that “the right to maintain a wrongful death action” in Texas “is entirely derivative of the decedent’s right to have sued for his own injuries immediately prior to his death”); *Kane v. Rohrbacher*, 83 F.3d 804, 805 (6th Cir. 1996) (referencing Michigan case law interpreting wrongful death actions as those that are “expressly made derivative of the decedent’s rights” (internal quotation and citation omitted)); *Schultz ex rel. Schultz v. GGNCS St. Paul Lake Ridge LLC*, Civil No. 17-2754, 2018 WL 1073168, at *3–4 (D. Minn. Feb. 27, 2018) (analyzing various decisions by Minnesota state courts describing wrongful death claims as those arising out of, derived by, and stemming from the decedent’s death); *United Health Servs. of Ga., Inc. v. Norton*, 797 S.E.2d 825, 827 (Ga. 2017) (“The derivative nature of wrongful death actions has been recognized repeatedly, and it has previously been held that settlements and waivers made by decedents have bound their beneficiaries, despite the fact that the beneficiaries were not parties to the agreements in question.”); *Searcy Healthcare Ctr., LLC v. Murphy*, No. CV-13-210, 2013 WL 6047164, at *3 (Ark. Nov. 14, 2013) (“[B]ecause the wrongful-death claim is derivative, the wrongful-death beneficiaries have the same limitations as the decedent would if the decedent brought the claim, and are bound by the agreements entered into by the decedent involving the decedent’s claims.”); *Laizure v. Avante at Leesburg, Inc.*, 109 So. 3d 752, 762 (Fla. 2013) (“The estate and heirs stand in the shoes of the decedent for purposes of whether the defendant is liable and are bound by the decedent’s actions and contracts with respect to defenses and releases.”); *Carter v. Miss. Dep’t of Corrs.*, 860 So. 2d 1187, 1192 (Miss. 2003) (“[T]his Court has found that a wrongful death suit is a derivative action by the beneficiaries, and those beneficiaries, therefore, stand in the position of their decedent.”).

Other states, though acknowledging that wrongful death claims are derivative in the sense that they depend on the decedent’s ability to maintain a cause of action had death not occurred, hold that nonsignatories to a decedent’s arbitration agreement cannot be bound by its terms. *See, e.g., Strickholm v. Evangelical Lutheran Good Samaritan Soc’y*, No. 4:11-CV-00059-BLW, 2011 WL 2532395, at *3 (D. Idaho June 24, 2011) (“[U]nder ordinary principles of contract law, heirs should not be bound by an arbitration agreement they did not sign in their personal capacity.”); *Carter v. SSC Odin Operating Co.*, 976 N.E.2d 344, 358–61 (Ill. 2012) (applying “basic principles of contract law” in holding that a nonparty to an arbitration agreement could not be forced to arbitrate); *Ping v. Beverly Enters., Inc.*, 376 S.W.3d 581, 598 (Ky. 2012) (holding wrongful death claims as not derivative, but “separate and distinct”); *Peters v. Columbus Steel Castings Co.*, 873 N.E.2d 1258, 1262 (Ohio 2007) (holding wrongful death claims “accrue[] independently to [the decedent’s] beneficiaries for the injuries they personally suffered as a result of the death” and, therefore, nonsignatory beneficiaries “cannot be forced into arbitration”); *Pisano v. Extendicare Homes, Inc.*, 77 A.3d 651, 660 (Pa. Super. Ct. 2013) (“We conclude that wrongful death actions are derivative of decedents’ injuries but are not derivative of decedents’ rights.”).

II. Discussion

West Virginia's wrongful death statute provides, in pertinent part:

Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action to recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to murder in the first or second degree, or manslaughter.⁵

It appears evident from the statute that a wrongful death claim may be brought by a decedent's estate based upon negligence or other wrongful acts insofar as the decedent himself could have maintained an action for the same.⁶ Indeed, wrongful death actions brought pursuant to § 55-7-5 are classified by the the West Virginia Supreme Court of Appeals as "derivative claims."⁷ Yet, the West Virginia Supreme Court of Appeals has not addressed the specific issue of whether a nonsignatory may be forced to arbitrate under an agreement signed by the decedent in the context of wrongful death cases,⁸ and local state and federal court decisions currently offer conflicting conclusions.

⁵ W. Va. Code § 55-7-5.

⁶ Section 55-7-5 establishes a right of action based upon wrongful acts or negligence that, "if death had not ensued," would "have entitled the party injured to maintain an action to recover damages in respect thereof."

⁷ See Syl. Pt. 4, *Davis v. Foley*, 193 W. Va. 595, 457 S.E.2d 532 (1995) ("The damages in a wrongful death action arise out of the death of the decedent thereby making a wrongful death action a derivative claim."); accord Syllabus, *Dairyland Ins. Co. v. Westfall*, 199 W. Va. 334, 484 S.E.2d 217 (1997) (per curiam).

⁸ The West Virginia Supreme Court has, however, acknowledged that "the nonsignatory exception to the rule requiring express assent to arbitration" may be invoked in certain circumstances. See Syl. Pt. 3, *State ex rel. United Asphalt Suppliers, Inc. v. Sanders*, 204 W. Va. 23, 511 S.E.2d 134 (1998) (declining to depart from the general rule that nonsignatories to an arbitration agreement may be compelled to arbitrate, but recognizing that exceptions exist).

For example, in *HCR ManorCare, Inc. v. Carr*, the decedent, prior to her death, was a nursing home resident at Heartland in Martinsburg, West Virginia.⁹ Within the first two months of her stay, the decedent signed two arbitration agreements with Heartland, which provided, in pertinent part:

All claims arising out of or relating to this Agreement, the Admission Agreement or any and all past or future admission of the Patient at this Center, or any sister Center operated by any subsidiary of HCR ManorCare, Inc. (“Sister Center”), including claims for malpractice, shall be submitted to arbitration.¹⁰

Approximately six months after signing the agreements, the decedent died “[a]s a result of alleged medical negligence during her residency at Heartland.”¹¹ In April of 2016, the decedent’s estate filed a wrongful death action in the Circuit Court of Kanawha County, West Virginia.¹² Heartland, along with other affiliated business entities, subsequently filed a motion in federal court to compel arbitration and stay the state court proceeding.¹³ One of the arguments raised by the estate was that, as a nonsignatory, it could not be compelled to arbitrate under the previous agreements entered into between the decedent and Heartland.¹⁴

In granting the nursing home’s motion to compel arbitration, the United States District Court for the Northern District of West Virginia found, based upon the language

⁹ Civil Action No. 3:16-CV-68, 2017 WL 282421, at *1 (N.D. W. Va. Jan. 20, 2017).

¹⁰ *Id.* at *4.

¹¹ *Id.* at *1.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

of § 55-7-5, that “wrongful death actions in West Virginia are derivative in nature.”¹⁵ In so finding, the Court opined that the statute “preserve[s] a deceased person’s right of action after the person’s death”¹⁶ and may be maintained only insofar as “the deceased person himself could have maintained an action for damages had he survived.”¹⁷ The Court ultimately found that

[a]ccording to West Virginia law, the Estate’s state court wrongful death action exists only insofar as the decedent herself could have maintained an action for negligence, or other wrongful acts, against the Plaintiffs. The state court [wrongful death] action, and any potential recovery resulting therefrom, is derivative based upon the decedent’s own ability to recover. Thus, here, had the decedent survived, she would have been “limited in form to arbitration.” *See Wilkerson ex rel. Estate of Wilkerson v. Nelson*, 395 F. Supp. 2d 281, 289 (M.D.N.C. 2005). Accordingly, the Estate is likewise limited, and bound, by the arbitration agreements.¹⁸

After finding the arbitration agreements applicable to the estate’s wrongful death claim, the Court considered whether it should compel arbitration under the Federal Arbitration

¹⁵ *Id.* at *3 (citing Syl. Pt. 4, *Davis*, 193 W. Va. 595, 457 S.E.2d 532).

¹⁶ *Id.* (internal quotation omitted) (quoting *Brooks v. Weirton*, 202 W. Va. 246, 253 n.7, 503 S.E.2d 814, 821 n.7 (1998)).

¹⁷ *Id.* (internal quotation omitted) (quoting *Panagopoulous v. Martin*, 295 F. Supp. 220, 223 (S.D. W. Va. 1969)); *see also Hoover’s Adm’x v. Chesapeake & Ohio Ry. Co.*, 46 W. Va. 268, 33 S.E. 224, 225 (1899) (discussing West Virginia’s wrongful death statute in declaring that “the true reason why the administrator cannot maintain this action where the deceased was guilty of contributory negligence, or received satisfaction or executed a release during his lifetime, is not because of a bar occasioned by the conduct or act of the plaintiff, but because the statute plainly does not give an action in such cases, but only where the deceased might have maintained an action, but failed to do so, against a defendant liable for damages, but who has not satisfied the same.”).

¹⁸ *Carr*, 2017 WL 282421, at *4.

Act (“FAA”),¹⁹ which codifies the well-known federal policy in favor of arbitral dispute resolution.²⁰ The Court ultimately ordered the estate to “proceed to arbitration.”²¹

The Northern District of West Virginia also upheld an arbitration agreement as valid against a nonsignatory in *GGNSC Morgantown, LLC v. Phillips*.²² Similar to the facts in *Carr*, prior to her death, the decedent in *Phillips* entered into an alternative dispute resolution (“ADR”) agreement with the nursing home where she resided.²³ The agreement provided that all disputes between the decedent and the nursing home would be resolved by mediation or binding arbitration.²⁴ In addition, the agreement indicated that its terms were applicable to “all persons whose claim is or may be derived through or on behalf of [the administratrix of the decedent’s estate], including any next of kin, guardian, executor, administrator, legal representative, or heir.”²⁵

Following the decedent’s death, the administratrix of her estate served a notice of claims on the nursing home, advising of her intent to file suit for wrongful death as a result of the decedent’s inadequate care and treatment at the facility that ultimately resulted in her death.²⁶ When the administratrix refused to engage in arbitration, the nursing home filed a complaint in the United States District Court for the Northern

¹⁹ 9 U.S.C. §§ 1–16.

²⁰ *See E.E.O.C.*, 534 U.S. at 289, 122 S. Ct. at 761–62, 151 L. Ed. 2d 755; *see also Carr*, 2017 WL 282421, at *3.

²¹ *Carr*, 2017 WL 282421, at *6.

²² Civil Action No. 1:14CV118, 2014 WL 5449674, at *7–8 (N.D. W. Va. Oct. 24, 2014).

²³ *Id.* at *1.

²⁴ *Id.*

²⁵ *Id.* (internal quotation omitted).

²⁶ *Id.*

District of West Virginia seeking an order compelling the administratrix to arbitrate her claims pursuant to the ADR agreement.²⁷ Also similar to *Carr*, the administratrix of the decedent's estate in *Phillips* was not a signatory to the ADR agreement.²⁸ In directing the parties to proceed to arbitration, the *Phillips* Court provided only a cursory reference to the administratrix's status as a nonsignatory, but ultimately rejected her argument that the ADR agreement signed by the decedent was inapplicable to her wrongful death claim against the nursing home.²⁹

Dissimilarly, in *Davis v. AMFM, LLC*, the Circuit Court of Kanawha County, West Virginia, held that the subject wrongful death beneficiaries were not bound by an arbitration agreement executed by the decedent and the decedent's legal representative.³⁰ In *Davis*, when the decedent was admitted into a nursing home in Bluefield, West Virginia, her son, pursuant to a durable power of attorney, completed paperwork that included an arbitration agreement.³¹ Following the decedent's death, the plaintiff, on behalf of the decedent's estate, filed suit raising survival and wrongful death claims in relation to alleged neglect and abuse suffered by the decedent while a resident at the nursing home.³² In declining to compel arbitration of the wrongful death claims, the Kanawha County Circuit Court refused to recognize such claims as derivative and found

²⁷ *Id.* at *2.

²⁸ *Id.* at *3.

²⁹ *Id.* at *7–8.

³⁰ No. 13C1279, 2014 WL 7877116, at *2–3 (W. Va. Cir. Ct. Feb. 18, 2014).

³¹ *Id.* at *1.

³² *Id.*

that beneficiaries of an estate do not “stand in the position of their decedent.”³³ The circuit court held that an individual “cannot be bound to an arbitration agreement by mere reference in the agreement any more than any other type of contract.”³⁴

III. Conclusion

In summary, it appears West Virginia’s federal courts may be more inclined to compel nonsignatories to arbitrate their wrongful death claims in accordance with the expansive reach of the FAA. But, in contrast, West Virginia state courts may adhere to more limited contract principles and could be less inclined to compel nonsignatories to arbitrate their arguably derivative claims. Regardless, the text of West Virginia Code § 55-7-5 seems to define wrongful death claims as purely derivative of the decedent’s death and limit such causes of action to those that were available to, and could have been brought by, the decedent immediately prior to his or her death. Arguably, this construction requires nonsignatory wrongful death claimants to be bound by their decedent’s arbitration agreements.

³³ *See id.* at *2 (“Defendants argue that, while West Virginia’s Wrongful Death Act creates independent claims for survivors, these claims are nonetheless derivative because they are dependent upon a wrong committed on another person, and thus, the beneficiaries stand in the position of their decedent. The Court disagrees.”).

³⁴ *Id.* at *3.