

IN THE SUPREME COURT OF MISSOURI

DALE LAWRENCE, individually and )  
as the Personal Representative of the Estate )  
of DOROTHY LAWRENCE, )  
 )  
Plaintiff/Respondent, )  
 )  
vs. ) No. 89291  
 )  
BEVERLY MANOR, a Missouri corporation, )  
 )  
Defendant/Appellant. )  
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Appeal from the Circuit Court  
Of Jackson County

The Honorable Jon R. Gray  
Circuit Judge

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Brief Of Amicus Curiae  
Missouri Chamber of Commerce and Industry

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### **Interest of the Amicus**

The Missouri Chamber of Commerce and Industry (“Chamber”) is the largest general business organization in Missouri. A not-for-profit corporation, the Chamber represents more than 3,000 businesses, 200 local chambers, and various other Missouri business groups. On behalf of its members, the Chamber works to promote Missouri’s economy before the state legislature, state agencies, and state courts.

Resolution of the issue discussed in this brief is of great interest to the Chamber and its members. The reliability and certainty of contracts – including contracts that address the resolution of existing or potential tort litigation – are essential to conducting commerce. The Chamber therefore has a strong interest in this Court confirming that Missouri continues to recognize that a wrongful death claimant’s right of action is limited by the right of action the decedent herself would have had. Absent this rule, businesses could not reliably depend on bargains struck with their customers unless they also somehow determined, found, and contracted with all potential wrongful death claimants.

Section 537.085, Mo. Rev. Stat., and a century’s worth of Missouri cases make it clear that a wrongful death claimant cannot have greater rights than the decedent would have had if she had lived. No matter what words are used to describe the action, the claimant’s right of action is limited to that of the decedent. This Court first stated the rule in 1906 in Strode. The Court has repeatedly endorsed that rule – in 1976 in Hardin, in 1983 in O’Grady, and most recently last year in Burns. Even absent this Court’s clear precedent, the wrongful death statute explicitly states that a wrongful death defendant may assert the same defenses it could have asserted directly against the decedent.

**Argument**

**I. Wrongful Death Actions Are Derivative, and Therefore The Rights Of A Claimant Are Limited To Those The Decedent Would Have Had.**

Missouri law makes clear that a wrongful death claimant has no greater rights than those of the decedent. A wrongful death action will not lie in court when the decedent would not herself have been able to sue for her personal injuries had she lived, including because she had contractually waived her right to litigate.

**A. The Statute Itself Limits Claimants To The Rights Of The Decedent.**

The wrongful death statute answers the question now before this Court. See State Board of Registration for the Healing Arts v. McDonagh, D.O., 123 S.W.3d 146, 160 (Mo. banc 2004) (“Forget (the cases). Read the statute.”) (Wolff, J., concurring in part and dissenting in part).

The statute makes explicit that a wrongful death claimant can have no greater rights than the decedent would have had if she had lived to sue for her own injuries. If the decedent would have had no right to pursue her claim in court, then a wrongful death claimant will also be barred from doing so. Indeed, the very provision giving rise to the statutory cause of action limits its use to situations in which the decedent could have sued “if death had not ensued.”

Whenever the death of a person results from any act, conduct, occurrence, transaction, or circumstance which, **if death had not ensued, would have entitled such person to recover damages** in respect thereof, the person or party

who, or the corporation which, **would have been liable if death had not ensued**  
shall be liable in an action for damages . . .

§537.080 Mo. Rev. Stat. (emphasis added).

In 1955, the Missouri legislature removed any doubt that the rights of a wrongful death claimant are dependent upon those of the decedent. The amended statute makes clear that any defense that could be asserted against the decedent's action for personal injuries may also be asserted against a wrongful death claimant suing for the same tortious conduct.

On the trial of such action to recover damages for causing death, **the defendant may plead and prove as a defense any defense which the defendant would have had against the deceased** in an action based upon the same act, conduct, occurrence, transaction, or circumstances which caused the death of the deceased, and which action for damages the deceased would have been entitled to bring had death not ensued.

§537.085 Mo Rev. Stat. (emphasis added).

If the decedent could not bring her own lawsuit for personal injuries, then no wrongful death claimant may sue for the same tortious conduct.

**B. Missouri Courts Limit The Claimant's Rights To Those Of Decedent.**

In addition to the statute itself, the principle of *stare decisis* clearly answers the question now before this Court. Eighty Hundred Clayton Corp. v. Director of Revenue, 111 S.W.3d 409, 411 fn3 (Mo. banc 2003) (“This Court has held that, under the doctrine of *stare decisis*, a decision of this Court should not be lightly overruled, particularly where the opinion has remained unchanged for many years and is not clearly erroneous and manifestly wrong.”); Hinton v. Sigma-Aldrich Corp., 93 S.W.3d 755, 760 (Mo. App. 2002) (*stare decisis* has particular importance in matters of statutory interpretation).

The black letter rule – limiting the rights of a wrongful death claimant to those the decedent would have had – has been applied (including well-prior to enactment of §537.085) in a variety of contexts. These cases make clear that the wrongful death claimant’s rights fall right along with the rights of the decedent, without regard to whether the wrongful death claimant did anything to cause the loss of the decedent’s rights. State ex rel. Hardin v. Sanders, 538 S.W.2d 336, 339-340 (Mo. banc 1976) (denying recovery to the parents of an unborn decedent because their rights were limited by those of the unborn child who could not have sued “at the time the injury was sustained”); O’Grady v Brown, 654 S.W.2d 904, 910-911 (Mo. 1983) (reversing Hardin regarding the timing issue, but restating the general rule that the claimant’s right to sue depends upon the decedent’s rights “if death had not ensued”); Zuber v. Clarkson Construction Co., 315 S.W.2d 727 (Mo. 1958) (wrongful death verdict reversed because defendant had no duty to decedent due to decedent’s criminal actions); Fitzpatrick v. Kansas City Southern Ry. Co., 146 S.W.2d 560, 565 (Mo. 1941) (“Plaintiff may not

maintain an action under the statute if deceased could not have maintained an action for damages had he survived.”); Worth v. St. Louis-San Francisco Ry. Co., 69 S.W.2d 672 (Mo. 1934) (wrongful death claim barred by decedent’s contributory negligence); Klein v. Abramson, 513 S.W.2d 714 (Mo. App. 1974) (daughter may not sue stepfather for mother’s wrongful death because interspousal immunity doctrine would have precluded mother from suing); Campbell v. Callow, 876 S.W.2d 25 (Mo. App. 1994) (because parental immunity law would have precluded child from suing his mother, child’s father could not sue the mother for wrongful death). When this Court recently stated that “the (wrongful death) cause of action is derivative of the underlying tortious acts that caused the fatal injury” it was not changing Missouri law – it was affirming it. State ex rel Burns v. Whittington, 219 S.W.3d 224, 225 (Mo. banc 2007). The rights of a wrongful death claimant are dependent on, and limited by, those of the decedent.

Similarly, and most pertinently, Missouri courts have long made clear that a decedent’s prior contractual waiver of her own right to sue for personal injuries also thereby waives the right of any claimant to sue for wrongful death. The fact that the wrongful death claimant did not sign the contract makes no difference.

In Strode v. St. Louis Transit Co., 95 S.W. 851 (Mo. banc 1906), this Court addressed whether the children of a decedent driver could sue for wrongful death despite the fact their father had released his personal injury claim for the accident before he died. This Court concluded that the father’s release of his right to sue prevented the children from suing, and thus reversed a jury’s verdict with directions that judgment be entered for the defendant. Id. at 856.

In discussing Lord Campbell's act, from which our statutes are borrowed, Judge Cooley says: "**It is seen, on a perusal of these statutes, that it gives an action only when the deceased himself, if the injury had not resulted in his death, might have maintained one.** In other words, it continues for the benefit of the wife, husband, etc., a right of action which, at the common law, would have terminated at the death, and enlarges its scope to embrace the injury resulting from the death. If, therefore, the party injured had compromised for the injury, and accepted satisfaction previous to the death, there could have been no further right of action, and consequently no suit under the statute."

Strode, 95 S.W. at 855 (quoting Cooley on Torts (2d Ed.) 309) (emphasis added).

Under the holdings of this state , . . . **there must have been a right of action in the deceased, had he lived, before there exists a right of action in the widow or children.**

Id. at 856 (emphasis added).

Strode has never been overturned and remains good law. In 2006, the United States Court of Appeals for the Eighth Circuit applied Strode and §537.085 to affirm that a plaintiff-mother in Missouri had no right to bring a wrongful death action because her decedent-son had released his own claims against the defendant. Stern v. Internal Medicine Consultants, 452 F.3d 1015 (8<sup>th</sup> Cir. 2006).<sup>1</sup>

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<sup>1</sup> Affirming summary judgment entered by United States District Court for the Eastern District of Missouri, 4:04-cv-01458-SNL.

The district court correctly held that the answer to whether David Stern's release of his claims operates to preclude his mother's wrongful death claim is found in *Strode v. St. Louis Transit Co.*, 197 Mo. 616, 95 S.W. 851 (1906) (en banc). . . . The (Strode) Court determined that Dill's release barred a wrongful death claim by his children.

Id. at 1017.

The Eighth Circuit rejected the plaintiff's argument that Strode was no longer good law because the statute had been amended since 1906 to add types of damages that might be recovered.

The argument fails because it confuses a cause of action with a measure of damages. . . . Ruth Stern's wrongful death claim cannot be dependent upon the measure of damages she seeks. Rather, her claim is dependent upon whether she can satisfy the statutory requirement that her son could have pursued a claim . . . .

**The district court properly held that Ruth Stern cannot maintain a claim pursuant to §537.080 because she cannot show that her son had a viable cause of action at his death.**

Id. at 1018-1019 (internal citations and punctuation omitted) (emphasis added).

The Eighth Circuit further affirmed the district court's finding that §537.085 also barred the wrongful death action. Stern, 452 F.3d at 1019.

The clear language of §537.085 allows a defendant to raise as a defense to a wrongful death claim any defense that would have been available in a cause of action the decedent could have brought. In this instance, David Stern's release

would have been a valid and complete defense to any claim he might have asserted against the physicians arising out of their medical care. So, too, the release is available to the physicians in their defense of Ruth Stern's wrongful death claim. This does not mean that we construe David Stern's release to relieve the physicians of liability to someone not a party to the release. Rather, **David Stern released his own potential claim, thereby ensuring that he was no longer entitled to bring an action.** According to §537.080.1, a wrongful death claim can be brought only if the decedent would have been entitled to recover damages "if death had not ensued." David Stern would not have been entitled to recover additional damages from the physicians because he released any such right. As a consequence, his mother was not entitled to bring a wrongful death claim.

Id. at 1019-1020.

In 2007, the Missouri Court of Appeals faced the same issue and reached the same conclusion. In Campbell v. Tenet Healthsystem, DI, Inc., 224 S.W.3d 632 (Mo. App. 2007), the plaintiff had brought a wrongful death action arising from the death of her sister. The circuit court dismissed the action, and enforced the verbal settlement agreement that the plaintiff had previously authorized as her sister's attorney-in-fact. Id. at 634. Applying Strode and Stern, the Court of Appeals affirmed.

Here, we similarly ask whether (decedent) Goodman would have been able to pursue a personal injury claim had she survived. We find that she would not. As discussed above, Attorney and Litigation Manager, in making an oral settlement,

contemplated releasing Defendant from liability for Goodman’s personal injury. Consequently, had Goodman survived, she would be unable to pursue a personal injury claim against Defendant. In the words of Section 537.080.1, Goodman would not be “entitled . . . to recover damages.” Because the earlier settlement of Goodman’s personal injury claim would prohibit Goodman from suing for personal injury if she had not died, by Section 537.080.1 her survivors are foreclosed from recovering for wrongful death.

224 S.W.3d at 638 (citing Stern, 452 F.3d at 1019-1020 and Strode, 95 S.W. at 856).

The statute and the cases thus make clear that a wrongful death claimant cannot litigate a claim that the decedent would be barred from litigating had she lived. A wrongful death claimant’s rights cannot exceed those of the decedent. That has been the rule since 1906, and it is the rule today.

**C. Terminology Differences Do Not Affect Application Of The Rule.**

Moreover, this rule applies regardless of what label is used to describe a wrongful death cause of action.

For at least one hundred years, Missouri courts have struggled with different terminology in attempting to describe the nature of a wrongful death action. Is it a new right? Is it a transmitted right? Is it an independent right? Is it a derivative right? At least for the present issue, the label applied makes no difference. The essence of the cause of action is clear from the statute that creates it.

Indeed, as the Court of Appeals has observed, the fact that the cause of action is one created by statute offers a means of harmonizing what might otherwise appear as

conflicting characteristics.

In Missouri, there was no common law cause of action for wrongful death. . . . The Wrongful Death Act . . . created a new and different cause of action not known to the common law. . . The right of action thus created is neither a transmitted right nor a survival right. . . Therefore, a party bringing an action under these statutes is required to bring himself in his pleading and proof strictly within the statutory requirements . . .

We must therefore look to and the plaintiff is necessarily bound by the statutes as to her right to maintain this action. **In so doing, we must bear in mind the well-established principle that where a cause of action is created by legislative enactment, where none theretofore existed, such right may be conditioned as the legislative body sees fit.**

\* \* \*

**The clear meaning of this statute is that the legislature saw fit to condition the right to sue for wrongful death upon the primary fact that the decedent could have maintained an action for damages for the injuries had he survived.**

Klein, 513 S.W.2d at 716-717.

In fact, although courts have differed in their nomenclature, such semantic differences have not prevented those courts from reaching the same conclusion with regard to the issue at bar – to the extent the decedent’s rights in a personal injury claim are limited, a wrongful death claimant’s rights are also limited. See Klein, 513 S.W.2d at

716-717 (finding the “new and different cause of action” was nonetheless barred because decedent’s own action would have been barred) (internal citations and punctuation omitted) (emphasis added). See also Campbell v. Callow, 876 S.W.2d 25 (Mo. App. 1994) (simultaneously finding that a wrongful death claim is not a “transmitted right” and yet concluding that the wrongful death claim fails because the claimant is subject to the same parental immunity doctrine that would have applied to the decedent).

Two Missouri Supreme Court cases illustrate even more directly the point that the substantive result does not depend on labels. In Strode, this Court openly considered various descriptions for the wrongful death cause of action, but concluded that the result was the same no matter the label it chose. The Court states:

Whether the right of action is a transmitted right or an original right; whether it be created by a survival statute or by a statute creating an independent right, the general consensus of opinion seems to be that the gist and foundation of the right in all cases is the wrongful act, and that for such wrongful act but one recovery should be had, and that if the deceased had received satisfaction in his lifetime, either by settlement and adjustment or by adjudication in the courts no further right of action existed.

\* \* \*

We therefore conclude . . . in this case the release in evidence is a complete bar to this action . . .

95 S.W. at 854, 856.

A few years later, in State ex rel Thomas v. Daues, 283 S.W. 51 (Mo. banc 1926),

the author of the Strode opinion confronted his own words in a different context. In Thomas, the Court analyzed whether a wrongful death claim was the same cause of action for purposes of the evidentiary rule that barred a witness from testifying when the other party to the same cause of action is dead. The wrongful death plaintiff cited Strode to support his claim that the actions were the same, and thus that the train's engineer should not be allowed to testify about the decedent's contributory negligence. The Court disagreed, and acknowledged the difficulties in pigeon-holing the cause of action:

The case of *Strode v. Transit Co.* . . . is one written by the writer hereof. In writing that case we discovered the sundry expressions of our court as to the character of the action by the survivor of one killed by a negligent act, and tried to steer clear of a personal commitment to any particular name for the cause of action. We had read the cases from 60 Mo. on down, and prior cases. In that case it was broadly contended that, although the deceased had settled with the tortfeasor, yet the survivors had a cause of action. This proposition we ruled against the plaintiffs, and said it mattered not by what name their suit might be called . . . [W]e were dodging the issue as to the meaning of the action. This case is of no special help to relator. It has been cited, however, as authority on the doctrine that the right is a transmitted right. In view of the whole opinion, and the caution which we were using to dodge the naming of the cause of action possessed by the survivors, its citation was hardly justified.

Thomas, 283 S.W. at 54 (internal citations and punctuation omitted).

This Court in Thomas then found that the trial court should have admitted the

testimony of the train engineer about the decedent's contributory fault, and reversed the jury verdict for her husband. Yet, despite the fact the Court explicitly found that the wrongful death action was a new and different one belonging to the husband, 283 S.W. at 56, it nonetheless simultaneously made clear that this new cause of action itself was derivative in that it would have been terminated altogether had the wife released her right to bring it.

Absent death, her cause of action was damage to herself. With her death (**absent a settlement of her cause of action**) there sprang up for the first time (under the Damages Act) a cause of action in her husband.

Id. at 56 (parentheticals in original) (emphasis added).

In the case now before the Court, the Court of Appeals correctly concluded that the wrongful death claimant's rights are "derivative" i.e. conditioned on and limited by those of the decedent. The Court of Appeals' mistake was in hinging that conclusion on its finding that "Burns unquestionably changed Missouri's wrongful death law." Lawrence v. Manor, 2008 WL 731561\*4 (Mo. App.). In truth, the statute and this Court's pre-Burns decisions also compel the conclusion that the claimant's rights are limited to those of the decedent.

The source of the Court of Appeals' error, and of the error by the circuit court in its initial ruling, may be found in the over-emphasis they place on the labels that have been used to describe the wrongful death cause of action. Citing Finney v. National Healthcare Corp., 193 S.W.3d 393 (Mo. App. 2006), the courts below relied upon past descriptions of the wrongful death action as "a new cause of action" and "not a

transmitted right” to conclude that wrongful death claims are “not derivative.” 2008 WL 731561 at \*2-3. What the courts below and the Finney court have ignored is that such labels are not determinative of the issue at bar. It is a false dichotomy to assert that the rights of a wrongful death claimant are “not derivative”, i.e. dependent on and limited by those of the decedent, simply because the cause of action is a “new” one created by statute. As the Klein court made clear, the statute both created a new cause of action and limited the rights of claimants under that statute to those held by the decedent. 513 S.W.2d 714.

The Finney court became so entangled in labels that it completely misread the two cases it relied upon and that, in turn, were relied upon by the courts below in this case. Indeed, O’Grady and Campbell v. Callow stand for exactly the opposite proposition than that for which they have been cited. Although this Court did say in O’Grady that a wrongful death claim was not “a transmitted right”, it nevertheless repeated the general rule that the action only lies for the claimant to the extent the decedent would be entitled to recover. 654 S.W.2d at 910. In Campbell v. Callow, the Court of Appeals described the wrongful death claimant’s right of action as not a “transmitted right.” 876 S.W.2d at 26. Nonetheless, the court correctly found that the wrongful death claimant was limited to the same rights of action the decedent would have had. Because the decedent’s action against her mother would have been barred by the then-existing parental immunity doctrine, the Campbell court found that the wrongful death claimant’s rights were also subject to the defense. Citing both Sections 537.080 and 537.085, Mo. Rev. Stat., the Campbell court thus affirmed the dismissal of the action.

The Campbell court stated:

The clear meaning of this statute is that the legislature saw fit to condition the right to sue for wrongful death upon the primary fact that the decedent could have maintained an action for damages for the injuries had he survived.

Id. at 28 (quoting Klein, 513 S.W.2d at 717).

**D. The Majority Rule Limits The Wrongful Death Claimant's Rights To Those Of The Decedent.**

Missouri law is thus consistent with the majority of jurisdictions, and with the Restatement, in limiting the rights of a wrongful death claimant to those the decedent would have had if had she lived. See Sides v. St. Anthony's Medical Center, --S.W.3d--, 2008 WL 2971771 (Mo.) (noting the majority and Restatement (Second) of Torts rules as regards the matter there at issue).

The vast majority of other jurisdictions having legislation including the phrase “**if death had not ensued**” have similarly held a settlement by the injured party or a suit reduced to judgment during the lifetime of the injured party barred a later suit by the next of kin.

Union Bank Of California, N.A. v. Copeland Lumber Yards, Inc., 160 P.3d 1032, 1037 (Ore. App. 2007) (emphasis added) (citation and punctuation omitted).

Indeed, the Mississippi Supreme Court recently considered the exact issue now before this court – whether the decedent's contract to arbitrate a tort claim bars a later wrongful death action by her family. Cleveland v. Mann, 942 So.2d 108 (Miss. 2006). In analyzing the effect of Mississippi's wrongful death statute, which is virtually

identical to Missouri's, the Mississippi Supreme Court stated:

Based on the clear language of the statute, a wrongful death beneficiary is only allowed to bring claims that the decedent could have brought if the decedent had survived. Since the beneficiaries may only bring claims the decedent could have brought had the decedent survived, logic requires us to conclude that the converse is true, that is, the decedents may NOT bring claims the decedent could not have brought, had the decedent survived. Thus, plaintiffs in this case may not bring claims Mann could not have brought himself.

\* \* \*

Because Mann agreed to arbitrate, he could not have brought this claim for medical malpractice even if death had not ensued. He would have been required to submit his claim to arbitration. Therefore, since Mann could not have brought this claim, neither can plaintiffs.

Id. at 118-119.

Of course, the result reached by the Mississippi Supreme Court is set forth in the Missouri statute itself. §537.085. It is interesting to note that the dissenting opinion in Mann fell victim to the false dichotomy between “derivative” and “not transmitted” rights. The dissent tries to argue that the majority position is incorrect because wrongful death actions in Mississippi are not “derivative”, as they are in some other jurisdictions. Id. at 120-121 fn 4 (incorrectly listing Missouri as supporting the dissent's position by quoting Missouri courts that described wrongful death rights as not a “transmitted right”). Even if the dissent were correct about the importance of the “derivative” label – which it

is not – that would only support the conclusion that the Mississippi court’s holding would be applicable in Missouri, where wrongful death rights are, and have always been, “derivative.” See Burns, 219 S.W.3d at 225.

The majority – and Missouri rule – is also consistent with the Restatement (Second) of Torts.

Although the death statutes create a new cause of action, both they and the survival statutes are dependent upon the rights of the deceased. **Hence, if no action could have been brought by the deceased if still alive, no right of action exists.** Likewise, a release by the deceased or a judgment either in his favor or, if won on the merits, in favor of the defendant, bars an action after the death.

§925, cmt. (a) at 528 (emphasis added).

**E. As A Matter Of Public Policy, A Wrongful Death Claimant Should Be Limited To Rights The Decedent Would Have Had.**

The statutory rule – that a wrongful death claimant may not sue when the decedent has waived her own right to do so – is also good public policy. Absent the rule, the interests of both potential parties to a settlement or other waiver would be compromised. There would be major obstacles to settling personal injury cases where there is a realistic concern that plaintiff might die from her injuries. A defendant would be reluctant to settle – no matter the wishes of the plaintiff – unless it had obtained the signatures of every potential wrongful death claimant. Even assuming the defendant could somehow determine which family members would hold the right of action at the time of the future death and find those relatives, one family member’s objection could

scuttle the entire agreement. The same logic applies to arbitration agreements. The interest of both parties in agreeing to arbitration would be compromised unless the rule set forth in the statute and repeatedly confirmed by this Court is maintained. See Group Health Plan, Inc. v. BJC Health Systems, Inc., 30 S.W.3d 198, 202 (Mo. App. 2000) (arbitration provides a “speedy, efficient, and less expensive alternative to court litigation”).

And the public’s interest is not limited to those who have a claim. Indeed, if a provider of goods and services cannot rely upon traditional legal principles, an entire range of services might become unavailable or more expensive to the public. For example, numerous businesses offer services that have inherent risks – e.g., a stable for horseback riding or a field for paintball games. It is not uncommon for such businesses to obtain a (perfectly enforceable) waiver of claims for the business’s future negligence as a condition of participation. See Alack v. Vic Tanny Int’l of Missouri, 923 S.W.2d 330, 334 (Mo. banc 1996). Such a waiver allows the business to reduce its own costs of insurance and hence leads to lower prices for consumers. If the waiver is unenforceable in the event of wrongful death, however, these benefits (and perhaps the services) vanish.

Moreover, if a wrongful death claimant can avoid a decedent’s contractual promise not to sue simply because the claimant did not sign anything, why should the claimant not also be able to avoid the decedent’s assumption of the risk or contributory fault? That would be the logical result of Respondent’s argument in this case – that he is not bound by the agreement because he did not sign it. After all, the hypothetical family member did not assume any risk or contribute any fault. Will professional sports teams

be required to distribute the warnings on ticket stubs not only to the fan who attends the game, but also to a fan's entire family before admitting the fan to the stadium? What about product warnings issued by manufacturers?

Of course, these results would be absurd and contradict the clear language of the statute, but they would follow from the logic of the trial court's ruling. Fortunately, Missouri law has already addressed these concerns. The legislature and this Court have made clear that a wrongful death claimant cannot have greater rights than the decedent would have had if she had lived. When a decedent has waived her right to adjudicate her claims in court in favor of arbitration, no wrongful death claimant may do so.

## **II. Smith v. Brown And Williamson Tobacco Corp., 2007 WL 2175034 (Mo. App.).**

The case of Smith v. Brown and Williamson Tobacco Corp., 2007 WL 2175034 (Mo. App), which this Court recently re-transferred to the Western District, has not been previously discussed by the parties or the courts below. The opinion should continue to be ignored. The opinion fails to consider the dispositive statutory provision, §537.085, misstates the holding in O'Grady, and is contrary to over one hundred years of precedent from this Court – all which make perfectly clear that the rights of a wrongful death claimant are limited by the rights of the decedent. Further, as pointed out in the vociferous dissent, the result of Smith would undermine the public policy that favors the non-judicial resolution of disputes.

### **Conclusion**

For these reasons, the Chamber respectfully submits that the Court should hold that a wrongful death claimant's right of action is derivative of the decedent's, thereby

limiting the claimant's rights to sue to those the decedent would have had to sue for the same tortious conduct. If a decedent has waived the right to sue in favor of arbitration, then the wrongful death claimant's rights are also so limited. The Chamber expresses no opinion on the result of the particular agreement in this case or the ultimate disposition of the appeal.

Respectfully submitted,

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### **Certificate of Compliance**

The undersigned counsel hereby certifies pursuant to Rule 84.06(c) that this brief (1) contains the information required by Rule 55.03; (2) complies with the limitations contained in Rule 84.06(b); and (3) contains 5,231 words, exclusive of the sections exempted by Rule 84.06(b)(2) of the Missouri Supreme Court Rules, based on the word count that is part of Microsoft Word 2003. The undersigned counsel further certifies that the CD has been scanned and is free of viruses.

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**Certificate of Service**

I certify that one paper copy of this brief and one electronic copy on CD, as required by Missouri Supreme Court Rule 84.06(g), were served on each of the counsel identified below by placement in the United States Mail, postage paid, on August 25, 2008:

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