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Supreme Court of Texas.  
In re Labatt Food Service, L.P.  
No. 07-0419.

September 9, 2008.

Appearances:

Nissa M. Dunn, Law Offices of Nissa Dunn, P.C., San Antonio, Texas, for relator.

Leo D. Figueroa, Law Offices of Leo D. Figueroa, P.C., San Antonio, Texas, for real party in interest.

Before:

Chief Justice Wallace B. Jefferson; Don R. Willett, Dale Wainwright, Paul W. Green, Phil Johnson, Nathan L. Hecht, Scott A. Brister, and David M. Medina, Justices.

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CHIEF JUSTICE JEFFERSON: Be seated. The Court is ready to hear argument in 07-0419, In re Labatt Food Service.

COURT MARSHAL: May it please the Court. Ms. Dunn will present argument for the Relator. The Relator has reserved five minutes for rebuttal.

ORAL ARGUMENT OF NISSA M. DUNN ON BEHALF OF THE PETITIONER

MS. DUNN: May it please the Court. This case presents two issues the potentially impact the enforceability of arbitration agreements. First, a wrongful death beneficiaries who stand in a legal shoes of their decedent bound by the decedent's agreement to arbitrate. And second, does a provision in the contract that violates the Texas Labor Codes prohibition on pre-injury waivers void a separate arbitration agreement contain in that same contract. With regard to the first issue, national policy embodied in the Federal Arbitration Act requires that arbitration agreements be placed on the same footing as other contracts. Because this Court has consistently held that a decedent's pre-death contracts bind his beneficiaries. This national policy requires that the beneficiaries also be bound by decedent's pre-death agreement to arbitrate.

With regard to the second issue, three principles preclude reliance on a pre-injury waiver to void the separate arbitration agreement detain in the same contract. -

UNKNOWN SPEAKER: [inaudible].

MS. DUNN: - No arbitration provision is severable from the remainder of the contract as a matter of Federal Substantive Arbitration Law. And it's attacked on the validity of the agreement as a whole rather than the arbitration agreement itself must be submitted to the arbitrator. Second, the Federal Arbitration Act preempts any state law to the extent that it prevents or restricts the enforcement of a, a valid arbitration agreement. And finally, as this Court recently held just On August 29th in, In re Poley America, if an invalid provision can be easily excise from agreement without destroying the underlying purpose of that agreement then a severability cause says a separate valid arbitration agreement. The facts in this case are fairly straightforward Carlos ...

JUDGE MEDINA: But on this-- are the survivor claims derivative of, of the employee's claims?

MS. DUNN: I'm sorry, your Honor ...

JUDGE MEDINA: Are this claims-- are they derivative of the employee's claims but not fully ...

MS. DUNN: They're completely derivative, your Honor.

JUDGE MEDINA: Can-- Which address that in, and distinguish our case, Russell versus Ingersoll-Rand.

JUDGE BRISTER: Well, what I mean, if, if all these folks went to court, then the signatory could not Mr. Dancy. He could not settle the case for anybody else as longer if, if they're grown ups they have to settle their own case, right?

MS. DUNN: That's correct.

JUDGE BRISTER: And if he signed the settlement agreement binding myself and anybody else from my family, we wouldn't pay any attention to it.

MS. DUNN: That's correct as long as he is still alive, your Honor. But of course that -

JUDGE BRISTER: Is ...

MS. DUNN: - the difference is that the wrongful death statute only allows the cause of action if the decedent would have been entitled to bring the action had lived. And this Court has held for many, many years that wrongful death claims are entirely derivative of the decedent's cause of action. In Russel versus Ingersoll-Rand, who's he just referenced, the Court said that the wrongful death beneficiary stand in the shoes of the decedent and they're subject to all the defenses that the decedent would have been subject to had lived.

JUDGE WILLET: But aren't they also suing for-- not only for the decedent's pain and suffering prior to death but their own pain and suffering for loss of consortium, loss of companionship does not totally derivative, isn't it?

MS. DUNN: The only difference is as you put it, Justice Willet, is the damages they're being sued for, otherwise the claims are totally derivative. For instance as it's already been pointed out, if the decedent had signed to release that completely released all of the claims, the wrongful death beneficiaries will be bound by that release regardless of the nature of their damages, even other damages are, are personal as they would have been had the decedent lived. They're nevertheless bound by that release that the decedent-- that the decedent signed and executed before his death. Again, under the Federal Arbitration Act, arbitration agreements stand on equal footing with other contracts and apply to this case, the plaintiffs are going to be bound by any pre-death agreement to the same extent that they would be bound by any other agreement, the decedent executed at the time of his

death. Had Dancy lived, he would've been required to arbitrate all claims arising from his occupational injury or death and so because his beneficiaries are subject to the same defenses that he would've been subject to, they likewise are bound to arbitrate all claims in accordance with this agreement.

JUDGE MEDINA: Are they, third party beneficiaries under the contract?

MS. DUNN: I think they are, your Honor. But of course the, the contracts specifically-- we signed on behalf of heirs and beneficiaries but the Court doesn't necessarily need to reach that question because of the derivative nature of the claims here.

I'd like to go on and discuss the cases from the Intermediate Courts of Appeals and state, that have already addressed the issue. This case as which are relied on by the plaintiffs hold that wrongful death beneficiaries contrary to Labatt's position are not bound by the decedent's agreement to arbitrate. But I don't think that these cases sufficiently recognized the totally derivative nature of wrongful death claims and what they don't explain is the, the anomaly that's created by their opinions. That a wrongful death beneficiary can be bound by an agreement that completely disposes of his claims but not by an agreement that preserves those claims but simply changes the form where they'll be litigated.

The earliest case is Gomez ver-- versus Zardenetta, which is from the Fourth Court of Appeals. And in that case the Court acknowledged the derivative nature of wrongful death claims and even stated and recognized that if the decedent's settles a case then his beneficiary's claims are barred. The Courtroom went on to hold that wrongful death beneficiaries is non-signatories, can't be bound by the decedent's agreement to arbitrate. But in that holding, the Court relied on a case out of the Corpus Christi Court, Merrill Lynch versus Longoria which dealt with loss of consortium claims. And the problem with relying on loss of consortium is that-- although loss of consortium claims are said to be derivative, they are not derivative to the same extent that wrongful death claims are. In other words, whereas a release will bind a wrongful death beneficiary, a release by directly inter-party will not bar a claim for loss of consortium by the spouse or the child or the parent claiming loss of consortium.

So the analogy is not appropriate and if the claims are truly derivative, if the wrongful death beneficiary truly stands in the legal shoes of the decedent, then he is bound by the same agreement to arbitrate as the decedent would have been bound by.

The second case that is addressed whether decedents are bound by-- are whe-- excuse me, whether wrongful death beneficiaries are bound by the decedent's agreement to arbitrate is In re Kepcka from the first court in Houston. In that case, the Court recognized then in certain circumstances non-parties in an arbitration agreement can be bound to arbitrate if they stand in the shoes of the person who signed the agreement which is precisely the position that wrongful death beneficiaries occupy with respect to their decedent's agreement to arbitrate. This Court has said that they stand in a legal shoes of decedent but the Court then turned around and said, "But we find that wrongful death beneficiaries aren't bound by the decedent's agreement to arbitrate and in that holding they seem to rely and emphasize again on the personal nature of the damages." But again as it was stated before the damages are no more personal than the ones that would be completely release and we know that wrongful death beneficiaries are bound by decedent's release.

Since this case was a fully brief several months ago, the first court has attempted to reconcile that distinction in *In re Gentle* saw which is at 2008 West law 2186086. But there are internal inconsistencies in that opinion that I think make its reasoning suspect. The Court in that case agrees that the wrongful death-- a wrongful death action is subject to the same defenses that the decedent's action would have been subject to had he lived. But the Court said that whether a decedent-- that those defenses have to do with the merits of the claim and that whether a decedent's agreement to arbitrate was binding on a wrongful death beneficiary as a gateway issue. And the Court said that's not the type of defense that the Supreme Court was talking about when it said that the wrongful death beneficiaries are bound by any defenses that the decedent would've been bound by.

JUDGE MEDINA: And it's your position that the agreement is unenforceable because it's a pre-injury waiver of the decedent's rights rather than something for an arbitrator to decide and not this Court?

MS. DUNN: That's correct, your Honor. You know, the United States Supreme Court just recently, in Alaska a couple of years reaffirms that it's a matter of Federal Substantive Arbitration Law which is applicable in state courts. Arbitration agreements are severable from the remainder of the agreement and if there's a challenge to the agreement as a whole as opposed to the just, the arbitration provision then the question has to go to the arbitrator.

And the plaintiffs in this case have admitted in their brief that their claim of invalidity goes to the contract as a whole. The indemnity provision that they claim constitutes a pre-injury waiver is contained in paragraph 3 of the election that Mr. Dancy signed in the agreement to arbitrate as contained in the separate provision in paragraph 4. So the question is, is clearly one for the arbitrator.

JUDGE MEDINA: But Counsel, do these employees receive before they sign these arbitration agreements if any, just like, "You sign this if you want to work here or otherwise, you know hit the door, I mean how is that work?"

MS. DUNN: Your Honor, that's not part of the record and I, I just don't know the answer to that question. As far as we know, you know Mr. Dancy was given plaintiff opportunity to read it and the plaintiffs haven't disputed that he signed the agreement. They haven't raised any issue regarding the invalidity he asked to Mr. Dancy. The only, the only claims they have in this case are first that; The plaintiffs have wrongful death beneficiaries were not signatories to this agreement and should be bound. And secondly that the separate provision in the agreement on a constitutes of pre-injury waiver and therefore, makes the entire agreement unenforceable.

JUDGE WILLET: Ah, can you turn to the, to the Labor Code prohibition against the waivers of claims.

MS. DUNN: Sure. Again, as a matter of Federal Substantive Arbitration Law -- the question -- because it goes to the contract as a whole should be submitted to the arbitrator in the First Instance. But in any event, the Federal Arbitration Act preempts inconsistent state laws that would limit or prevent the enforceability of a valid arbitration agreement.

All the Courts of Appeals that have addressed the issue thus far have unanimously held that the FAA preempts section 406.033(e) to the extent that it's inconsistent with the valid agreement to arbitrate. In addition to the *In re Boarder Steel* case that of *El Paso* and the *In re RNR Personnel's Specialist* case and of *Tyler*, both of which are cited

in our brief. In re buy some materials as of [inaudible] case that is come out since the case was briefed in the first court from Houston, joined the other two courts to hold that Section 46033 is preempted. So to the extent that the Labor Code provision would limit or prevent enforceability of this valid arbitration provision in the election Mr. Dancy signed is preempted by the Federal Arbitration Act.

And finally, section 8 of the election, Mr. Dancy signed provides that any provision-- if any provision is rendered or declared invalid, that invalidation shall not affect the remaining provisions of the agreement. On August 29, this Court and in, In re Poley America found that a similar provision permitted unquestionable provisions of an agreement to the excise from the contract without defeating the underlying purpose of the agreement and so the case was allowed to proceed to arbitration despite the existence of unquestionable provisions in the agreement and the plaintiffs have argued in this case that, that because Mr. Dancy's election was conditioned on a waiver of a right to sue that it was part in parcel of that agreement and so it's not severable the invalid provision-- alleged invalid provision is not severable from the rest of the agreement.

JUDGE BRISTER: Before your time runs out, let me ask you. Could he have agreed that his heirs and beneficiaries would go to arbitration that he personally wouldn't?

MS. DUNN: And what would the effect of that if had on ...

JUDGE BRISTER: Exactly same circumstances except a grand-- instead of agreeing for himself and the heirs and the bank-- and the family, he said, "My family will go but I'm not."

MS. DUNN: I suppose he could have because again if they-- the-- at that point, I guess they would be have to be considered third party beneficiaries because they're not necessarily stepping in his shoes but they will be bound by agreement, an agreement that expressly dealt with their rights. So it'll be a little bit different ...

JUDGE BRISTER: It's a derivative greater than work if it splits the two.

MS. DUNN: He split it to know. Then, then if he-- If they are going to step into his shoes ...

JUDGE BRISTER: But then I'm wondering if, if, if your argument is really a derivative one. It's not based on the fact that he agreed on behalf of his beneficiaries.

MS. DUNN: You're correct, your Honor. They are alternative arguments. The, the principal argument is based on the derivative nature of the claims, they are subject to any defense that he wouldn't have been subject to ...

JUDGE BRISTER: Third-- yeah-- the third, third party beneficiary used a word 'cause you've given the third party some.

MS. DUNN: That's correct.

JUDGE BRISTER: I'm unaware of third party detrimental agreements. You're a third party-- You and I agreed that, the Chief's going to be paid from house payment, that's not going to be enforceable.

MS. DUNN: That's, that's correct, your Honor.

JUDGE BRISTER: So really -

MS. DUNN: [inaudible] benefits.

JUDGE BRISTER: - so really if, if he hadn't agreed from himself, we couldn't impose this against the beneficiary.

MS. DUNN: Whether he did agree on behalf of his heirs and beneficiaries ...

JUDGE BRISTER: I know but if-- but did they, did they-- they're not, they're not benefiting from going to arbitration our witness going

to which your argument that they get a benefit from going to arbitration.

MS. DUNN: Well, they get the benefit of any, of any benefits he would have receive when under his election under the plan that he elected under.

JUDGE JEFFERSON: Any further questions? Thank you, Counselor. The Court is now ready to hear argument from the Real Party in Interest.

COURT ATTENDANT: May it please the Court. Mr. Figueroa will represent argument for the Real Party in Interest.

ORAL ARGUMENT OF LEO D. FIGUEROA ON BEHALF OF THE RESPONDENT

MR. FIGUEROA: May it please the Court, Counsel. There's two issues in this case as, as Counsel indicated the first issue is whether or not under the Federal Arbitration Act, the agreement signed by a Carlos Dancy Jr., should be enforced. I believe that is the primary issue. The secondary issue, is whether or not because of the agreement violates the Texas Labor Code because of its pre-injury waiver, because that's inter-- inextricably intertwined with the whole agreement that it should be dismissed-- because of that. A party seeking to compel arbitration under the Federal Arbitration Act must establish in the First Instance that there is a valid arbitration agreement and at the claims raised fall within that. There's no right as this Court is aware to arbitrate and there's no right to arbitrate exist in the absence of a binding agreement to arbitrate. There is no presumption in favor of whether an arbitration agreement in fact exist. But the policy in favor of arbitration ...

JUDGE BRISTER: But we, but we held that assignees are bound. We've held that assignees are bound. Successor in the interest, everybody agrees with that.

MR. FIGUEROA: That, that's true, your Honor, but the burden of proof here, it has ...

JUDGE BRISTER: If he, if he the agrees to go to arbitration and then says, he's going to somebody else. They're going to be bound even though they never sign.

MR. FIGUEROA: There's no question about that. But that's not what we have in this particular instance.

JUDGE BRISTER: I know, I know but it's pretty close -

MR. FIGUEROA: 'Cause ...

JUDGE BRISTER: - because I mean, if he wasn't there, they wouldn't have this cause of action. There is derivative.

MR. FIGUEROA: Well, they're right, they're, they're right-- although it is derivative and I-- this is what I disagree with Counsel for she mentioned the Longoria case, the Merrill Lynch Longoria case the loss of, of consortium there. There's no question but that the spouses claim is derivative of the husband's claim and the fact that, that get settled does not preclude or bar her claim. The, the remedy there in order to bar that would be the specifically set forth that in a release. Another instance that I would call to the Court's attention is for example you have an injury to-- a parent and there is a loss of consortium claim by the children. And if that parent settles his claimed unless the release specifically encompasses and calls and mentions the, the claim of the children, the children's claim survives and notwithstanding the fact -

JUDGE BRISTER: Yes, yeah.

MR. FIGUEROA: - that, that it is derivative.

JUDGE BRISTER: Parents, you know unless they appear, they explain or whatever, they don't settle somebody else's claim but this is different because the wrongful death-- the person who dies if they lived for a while they can settle their beneficiary's claim.

MR. FIGUEROA: But I think a fair reading of this agreement is that it is specifically restricted to his claim against the company and does not encompass the claims of his parents or his children.

JUDGE BRISTER: What's the ...

MR. FIGUEROA: I mean, his parents are ...

JUDGE BRISTER: What language, what language lead you that?

MR. FIGUEROA: And, and a, and the language that, that, that I'm specifically relying on in that regard is if you look at the beginning of the agreement. It says, "this agreement is made by and between Carlos Dancy" the employee, In re Labatt Food Services. Further down on the agreement it says, "The agreement goes on to state for whom the agreement is intended", and it says, "It is for the exclusive benefit of its employees." And the prefatory language that's underline before you get to the bottom portion of the agreement it says, "You agreed to indemnify, you agreed to arbitrate." So I think a fair reading of that agreement is that, that it is restricted solely to Carlos Dancy Jr. That it is not contemplate or encompass the claims of his children nor does it encompass the claim of his parents. They had made of an, an argument based on the third party beneficiary argument.

As this Court is aware, there is a presumption against confronted third party beneficiaries status on non-contracting parties and in determining the intent of the parties and that I think is the crucial thing here-- is the intent of the parties. Court's presumed that the party's contract did only for themselves and not for the benefit of third parties unless the obligation to the third party is clearly and fully spelled out in-- the, the contract. The agreement must clearly and fully expressed an intent to confer a direct benefit on the third party and that's not done here. And the crucial thing and there's no dispute about this, there is no question about that-- the plaintiffs, the children and parents of Carlos Dancy Jr. have not sued on the contract, have not received benefits under the contract and as a Court is aware in the third party beneficiary contract. Even if you assume that, that, that they're might be a possibility that a third party can disclaim benefits and that is clearly what is happened here. They have not sought benefits of any kind under this contract nor have a sued on the basis of that as well.

JUDGE GREEN-: But do you think Dancy met when he agreed that he will arbitrate claims relating to occupational injury or death? What do you mean by when he said, the agreement and said injuries relate her-- claims related to, to death.

MR. FIGUEROA: Well, I mean I, I have-- think that, I think that's certainly it talks about his occupational injury and that-- and I mean and, and to the extent that he was -

JUDGE GREEN: He, he ...

MR. FIGUEROA: - going to proceed under that agreement that, that -

JUDGE GREEN: Increase ...

MR. FIGUEROA: - agreement in lieu of-- and I make mention, I mean an, an invalid agreement because it ultimately constitutes a pre-injury waiver under a Labor Code.

JUDGE GREEN: Well, okay. But of any part from that. Then you say that he contemplated that his estate-- he, he-- 'cause he term death as

in there.

MR. FIGUEROA: I think, I think I've got, I think, I think as to a survival action and to the extent that he's had been-- a survival action is premised on the basis that the state is suing for the damages sustained by the decedent, the pain, suffering and other damages sustained by the decedent before the decedent's death. I think that is encompass by that language and would be encompass by this agreement.

JUDGE JEFFERSON: So you can a split proceeding them and arbitration for this survival claims and then the beneficiaries would be sue in, in Court.

MR. FIGUEROA: I think they could and, and what I would call the Court's attention to and this is not set forth in the briefs but routably, recently in a Merrill Lynch line of cases that the Court has decided, the Court specifically that's Merrill Lynch's Trust Company FSB and Henry Medina line of cases in which the Court parceled out aspects of that particular controversy that the Court said, "Well, we believe that as to the Merrill Lynch Trust Company and as to the agent that should be arbitrated." But as to this affiliated companies that was not set forth in the agreement and interestingly and I think very positively so.

The Court looked at that and said, "You know enforcing a, a, a arbitration agreement against non-signatories, we have an obligation under this line of cases not to go too far and we need to be careful about we are doing." And until the United States Supreme Court has looked at this issue and ruled on it, the Court I think ultimately said, "We're not going there, we're not going to make, you know the, the--s bring in this other parties and, and have that part in parcel of this arbitration." And so in that instance it was split and that I think, I think, I think rightly so.

JUDGE JOHNSON: Counsel, of, of any this record reflect whether any benefits whatsoever have been played under this plan two or four, the decedent or his family?

MR. FIGUEROA: I think, if you look at-- I think if you look at the record in terms of the argument that was made before the trial judge, Judge Joel Brown, from San Antonio, their-- that no benefits had been paid nor have any benefit had been sought and there certainly nothing, nothing in the record that indicates that.

JUDGE JOHNSON: The life insurance for example or anything like that.

MR. FIGUEROA: Nothing, nothing whatsoever.

JUDGE JOHNSON: The reason I'm wondering is under arbitrations says here that the-- and it says any controversies which relate in any manner to this agreement the plan or to the occupational injury or death of employees. Seems as well when we you are talking about death that maybe the contracting parties contemplated Mr. Dancy was not going to be here. So someone else is going to have to make a claim for death. So whoever and whatever was included in there seem-- may have been relied upon this part of the agreement here.

MS. FIGUEROA: The, the disagreement and the way I read that your Honor is, is that I believe that, that contemplated as any claims on the contract and any claims based on a survival claim asserting the rights that Carlos Dancy Jr. had prior to his death. There's nothing in this indemnification agreement that indicates that when Carlos Dancy Jr. signed this that he was signing this in a representative capacity. That he was signing, saying, "I am signing in, in, in a way my children's individual rights under a wrongful death statute or I am signing this on behalf of my parents to waive their rights and to have



them proceed under this arbitration probation." In that regard and this is-- have cited in the brief what I would refer the Court to in addition to the In re Gentle case that was cited by Counsel. There is a case out of the Corpus Christi Court of Appeals, the SSP partner's case and that, and that is found and I could subsequently send a lot of brief to the Court on that. And that's at 241 South Western 3rd, 162 in which that Court had specific language and if I might, I might ...

JUDGE JOHNSON: But before you gets to that, let me ask you this. In the paragraph 3 it says, "The employee, individually on behalf of heirs on beneficiaries alleged to be covered under the plan and receive the comprehensive benefits available." There are on the result. It ref- - it -- it-- you, you mentioned and it says that for the exclusive benefit that part of the contract. But then we see another part of contract where it says that he is doing this and representing to the employer that he is doing on behalf of this heirs on beneficiaries. What reconciliation if any do we have?

MR. FIGUEROA: And, and that is where the, the In re Kepcka case and this In re SSP case, speak to that issue saying that you can't be an, an heir or beneficiary of your own claim. The, the claim-- that reference heirs and beneficiaries his talking about or, or they are talking about claims that emanate directly from him with respect to a survival cause of action. That does not encompass the personal causes of action under the wrongful death statute that, that Carlos Dancy Jr.'s parents had and that his children had. And that does not contemplate that, that just contemplates the, the causes of action that flow directly from Carlos Dancy Jr. and, and that would encompass, I believe -

JUDGE JOHNSON: But it's the company ...

MR. FIGUEROA: - on a survival cause of action in, in the SSP case that receive on specific language-- and more specific in what we have here and the Court found and, and did not hold the parties to arbitration. And it said, "The agreement contained the provision stating that the, that the agreement flowed -- and if you be hold on just the second here -- and it binds and benefits our successors, subsidiaries, assigns beneficiaries, heirs, children, spouses, parents

JUDGE BRISTER: We got the legal appoint representatives.

MR. FIGUEROA: - and legal representative," -

UNKNOWN SPEAKER: It [inaudible].

- they would be very, very specific here and this Court have ...

JUDGE BRISTER: He-- If they a-- thought his spouse and she send it should be bound. When, when he got employed said, "You are one of the employed, your wife's going to come and sign that."

MR. FIGUEROA: I think that it's probably right. If she would have sign something, if she could have been a signatory to contract, yes.

JUDGE BRISTER: Children could not sign if they are underage.

MR. FIGUEROA: That's, that's true your Honor, that's true.

JUDGE BRISTER: Unless somebody would sign on their behalf.

MR. FIGUEROA: That's true, your Honor.

JUDGE BRISTER: And that would be their parents could sign on their behalf, all right?

MR. FIGUEROA: Well, I don't believe that, that would've, would have been appropriate if you look at the Field Camp versus Gas Camp Case of the Fifth Circuit which I think is, is controlling in this situation. And the Court said, "I, I believe in that case that-- that the-- although Texas law does allow under the family code for a parents to In re in the certain contracts on behalf of their children that it

would not as a matter of law allow the enforcement in that situation to, to hold them to an arbitration probation."

JUDGE BRISTER: That would be different from other contracts.

MR. FIGUEROA: That's, that's, that's, that's the reasoning, reasoning in that case. Yes, your Honor.

JUDGE BRISTER: Is that's ...

JUDGE HECHT: What was your answer? Does that would be different from other contracts if we do that?

MR. FIGUEROA: Yes.

JUDGE JOHNSON: It could be bound to other contracts but not arbitrational contract?

MR. FIGUEROA: That's correct, that's correct.

JUDGE JOHNSON: Was the FAA have to-- does the FAA have anything to say about that?

MR. FIGUEROA: Well, they'd not specifically in the statute of course but certainly in the, in the case law like that, that circuit decision that's specifically addressed that issue. And it does and, and it made that, it looked to that issue under Texas law and as you know whether or not Texas law applies a federal law applies is still has not been determined although this Court has said, "We're, we're going to make sure that our rulings are consistent with whatever the Federal Courts have to say on the issue because it is in federal act."

In summary then, we would say that, that based on a fair reading of this agreement that Carlos Dancy Jr. signed, his parents and his children had-- did not find it. They have not sued on the basis of it, they have sought benefits under the contract, they are not seeking benefits under the contract. And based on all the previous case law on - in this area including the In re Gentle case, the In re SSP case, the Kepcka case ...

JUDGE BRISTER: Let me ask before you conclude. Do you agree that the majority of states that have looked at this issue have gone their way rather yours?

MR. FIGUEROA: That, I'm not sure that I could-- I, I, I, I could agree with that, I don't know the answer to that question.

JUDGE BRISTER: Cert-- certainly some that have gone each way.

MR. FIGUEROA: I, I certainly, that-- I think counsel has cited in the briefs some, some state court cases that, that may upheld that way. But, but the cases in, in Texas and a federal court cases, I don't believe would fall into that category.

JUDGE WILLETT: And what have Ms. Dunn's assertion that the Labor Code provision is indisputably preempted by the FAA?

MR. FIGUEROA: I don't think, I don't think that's accurate and here's why, because the line of preemption cases say, "If, if the state law whether it's case law or statutory law is specifically directed at in validating or specifically directed at the arbitration agreement to design, to defeat it or whatever then there's no question by that it is preempted." If on the other hand, you got a law-- a, a, a, a compendium of laws that deal generally with contract law or other aspects of state law and they are not specifically targeted that, that arbitration agreement then I don't think it is preempted. I think, I think the case law says that in that instance there is not preemption at all.

With respect to the, the illegality, we certainly acknowledge that there's the line of cases that say, "Well, if your, if argument has the illegality as I saw the contract as, as, as a whole then it's matter for the arbitrator." But, but as this Court is aware from that recent decisions, if this is inextricably intertwined with the basis for this agreement in which I think and believe that this agreement is that then

I think it falls. What I would mentioned there, I mean, that is certainly as not the strongest argument. I believe that strongest argument of course is that that there has-- was never an agreement in the first place. And as the court as aware from looking at the record when Judge Joel Brown looked at this issue, he didn't rule on that basis, he didn't rule on the basis of, of the Labor Code. He rules specifically on the basis that the parents and the children were non-signatories of the contract. He rejected all these other arguments as to the third party beneficiary aspect and the derivative nature of the claims aspect and under the family code.

Whatever file, I've mentioned, as to those last two arguments is I'm not aware of any Texas case or any federal case as to the derivative nature argument or as to an argument of Family Code that has said we are going to enforce arbitration against this non-signatories based on that and because arbitration is a matter of contract, is a matter of consent not coercion, we would urge that this Court denied the mandamus.

JUDGE JEFFERSON: Any further question? Thank you, Counsel.

REBUTTAL ARGUMENT OF NISSA M. DUNN ON BEHALF OF PETITIONER

MS. DUNN: I would respectfully disagree with Mr. Figueroa's contention that this agreement has language as somehow excise it out-- the wrongful death claim. I think this has been pointed out by several members of the Court. This agreement that Mr. Dancy signed requires arbitration of all claims related to occupational injury or death including wrongful death claims.

JUDGE MEDINA: Does it matter that the beneficiary has been sought any benefits under the contract?

MS. DUNN: No, I don't think it makes any difference. If they truly stepped in to the shoes-- Mr. Dancy as his beneficiaries and they're bound by any defense that he would have bound by. And Mr. Dancy sought to prosecute this claims, he would have been required to submit them to arbitration and so his wrongful death beneficiaries are likewise required to submit arbitration.

JUDGE JEFFERSON: If this were not an arbitration agreement and Mr. Dancy had said to his employer, "I will never file, I'll never pursue a wrongful death and I don't want any my be-- beneficiaries ever to pursue wrongful death action for your negligence." Is that enforceable law against the beneficiaries?

MS. DUNN: I think, then you would have an issue with section 4673 'cause that's purely, a pre-injury waiver which is clearly under the Texas Labor Code unenforceable. The point is that the plaintiffs here are attempting to use Section 406.033 to invalidate the entire contract including the separate valid provision to arbitrate. And that this Court held recently In re Poley America that invalid provision to the extent that this whole issue is not one that needs to go to the arbitrator. That allegedly invalid provision can excised out without destroying the underlying purpose of this agreement. Just like in, In re Poley America, the principal purpose of this agreement and an independent part of this agreement was that the parties would submit any claims arising from occupational injury or death to arbitration. And there is no reason why this provision that is allegedly in violation of the Texas Labor Code should invalidate the separate

independent agreement to arbitrate to which the plaintiff haven't attacked in itself is invalid.

I'd like to go back and talk about SSP Partner's case. I don't believe that was a wrongful death case, I'll maybe mistaken but I don't think it was. And I'd like to use that as an example of why this Court should not rely on loss of consortium type cases to hold to that wrongful death beneficiaries are not bound. Loss of consortium cases are different from wrongful death cases because loss of consortium claims are not derivative to the extent that wrongful death claims are. Most importantly for purposes of this case, a directly and insured claimants can't go out and release or settle a claim and bind another party who has a loss of consortium claim.

This Court held in Whittlesey versus Miller that once spouse's settlement or release of claims against the tortfeasor is not going to bar his spouse's claim for loss of consortium, not saw in a wrongful death claim. This Court has held for over a hundred years that a release by the decedent also binds his wrongful death beneficiaries. They step in to the legal shoes of the decedent and are bound by any defense that the decedent would've, have been bound by had he lived.

As far as other states Justice Brister, you asked about that. There are not identified the tremendous number of cases that they seem to go along the same line that if the states, wrongful death statute is interpreted as one where the beneficiary's rights were totally derivative like they are in Texas. Then no beneficiaries are going to be bound by the decedent's agreement to arbitrate and an example of this is a case I cited in my brief, Cleveland versus Menn which cited at Page 10. On the other hand, that there are some jurisdictions and to give an example; Ohio, they treat their wrongful death claims more like loss of consortium claims in Texas. In other words, those Courts say, "They're derivative in the sense that you have to establish liability of underlying tortfeasor that they're not derivative in the sense that we're not going to allow the decedent's pre-death agreements to preclude any claims by the wrongful death beneficiaries an example of those jurisdictions will be Ohio, Impeers versus Columbia Steel, at 873 nor the second 1258.

Again, Texas falls in the former like Mississippi. Under Texas law, wrongful death beneficiary's claims are totally derivative of the decedent's claims. He steps into the legal shoes of the decedent and he's bound by any pre-death agreements that would've bound the decedent. And for that reason, plaintiffs in this case were obligated to arbitrate their claims just as Mr. Dancy would have been obligated to arbitrate his claims had he lived.

JUDGE JEFFERSON: Any further questions? Thank you Counsel, the case is submitted and that concludes the arguments for this morning and the Marshal will now adjourn the courtroom.

COURT MARSHAL: All rise. Oyez, oyez, oyez, the Honorable, the Supreme Court of Texas now is in adjourn.

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