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September 20, 2013

VIA U.S. MAIL

The Honorable Daniel E. Shearouse, Clerk
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RECEIVED

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20 2013

Re: Coleman, Ann v. Mariner Health Care et al.
Circuit Case Nos.: 2010-CP-21-835 and -836
Appellate Case No.: 2011-194946
YCR File No.: 14264-20110818

S.C. SUPREME COURT

Dear Mr. Shearouse:

Pursuant to Rule 208(b)(7), SCACR, the Appellants¹ submit the following pertinent and significant authority that has come to their attention after briefing was completed in the above-referenced case.

In THI of New Mexico at Hobbs Center, LLC v. Spradlin, No. 12-2182 (10th Cir. Sept. 20, 2013), a copy of which is attached, the United States Court of Appeals for the Tenth Circuit affirmed the federal district court decision cited on page 14, footnote 5 of the Appellants' final reply brief. Also, in Krahmer v. Laurel Healthcare Providers, LLC, No. 30,868, 2013 N.M. App. LEXIS 92 (N.M. Ct. App. Sept. 16, 2013), a copy of which is attached, the Court of Appeals of New Mexico reached a result consistent with Spradlin.

Spradlin and Krahmer are relevant to the Appellants' argument that the wrongful-death claim at issue in this appeal must be arbitrated.

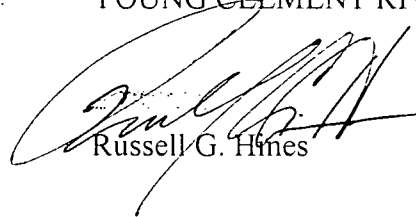
Please file this letter and return a stamped copy to me in the envelope provided. Thank you for your attention to this matter.

¹ As used herein, the term "Appellants" does not include Palmetto Faith Operating, LLC, Individually and d/b/a Faith Health Care Center.

With best wishes and kindest regards, I am

Sincerely,

YOUNG CLEMENT RIVERS, LLP



Russell G. Hines

RGH/rg

Enclosures

cc: (All via U.S. Mail)

Kenneth W. Zeller, Esquire
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FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

September 20, 2013

FOR THE TENTH CIRCUIT

Elisabeth A. Shumaker
Clerk of Court

THI OF NEW MEXICO AT HOBBS
CENTER, LLC; THI OF NEW MEXICO,
LLC,

Plaintiffs-Appellees,

v.

JASON SPRADLIN, as personal
representative of the wrongful death
estate of Douglas A. Spradlin, Jr.,
deceased,

Defendant-Appellant.

No. 12-2182
(D.C. No. 2:11-CV-0792-MV-LAM)
(D. N.M.)

ORDER AND JUDGMENT*

Before **HOLMES, HOLLOWAY, and BACHARACH**, Circuit Judges.

Mr. Douglas Spradlin died not long after being removed from the Plaintiffs-Appellees' nursing home. Mr. Spradlin's son, Jason,¹ brought a wrongful-death

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

action in state court. The Plaintiffs-Appellees then filed suit in federal court to compel arbitration, with diversity jurisdiction being alleged and not disputed. Jason now appeals from a federal district court order compelling arbitration of the wrongful death action. We have appellate jurisdiction under 28 U.S.C. § 1291, and we affirm.

BACKGROUND

In August 2006, Mr. Douglas Spradlin was admitted to THI of New Mexico at Hobbs Center, LLC, a nursing home, for long-term care and treatment of his dementia. He was accompanied by his daughter, Melissa.

Upon admission, Mr. Douglas Spradlin signed a “Durable Power of Attorney for Financial and Healthcare Decision Making,” appointing Jason and Melissa as his attorneys in fact. *Aplt. App.* at 27. Melissa then signed a six-page “Admission Contract.” In doing so, she checked a box indicating that she was “execut[ing] th[e] Contract in the capacit(y)” of “Immediate Family Member,” rather than “Attorney-in-Fact under validly executed power of attorney.” *Id.* at 25. Mr. Douglas Spradlin did not sign the Admission Contract.

The contract contains a clause requiring that any dispute between the parties regarding the Hobbs Center’s provision of healthcare services be resolved by binding arbitration:

¹ For the sake of clarity throughout this order and judgment, we follow Defendant-Appellant’s convention and refer to Mr. Spradlin’s children by their first names.

VI. Arbitration

Pursuant to the Federal Arbitration Act, any action, dispute, claim, or controversy of any kind (e.g., whether in contract or tort, statutory or common law, legal or equitable, or otherwise) now existing or hereafter arising between the parties in any way arising out of, pertaining to or in connection with the provision of healthcare services . . . causing injury to either party whereby the other party or its agents, employees or representatives may be liable, in whole or in part, . . . shall be resolved by binding arbitration administered by the National Health Lawyers Association (the “NHLA”).

Id. at 24. Directly below this clause and immediately above the signature lines is a provision stating that “THE UNDERSIGNED ACKNOWLEDGE THAT EACH OF THEM HAS READ AND UNDERSTOOD THIS CONTRACT, AND THAT EACH OF THEM VOLUNTARILY CONSENTS TO ALL OF ITS TERMS.” *Id.*

Mr. Douglas Spradlin lived at Hobbs Center for roughly two-and-a-half years. On March 6, 2009, he was removed from the home and he died five days later.

In June 2011, Jason, as the personal representative of his father’s estate, sued THI and other defendants in New Mexico state court for wrongful death. In response, THI filed a complaint in federal district court to compel arbitration. Jason then moved to dismiss THI’s complaint, arguing that the arbitration agreement was invalid and unenforceable. In support of her brother’s motion to dismiss, Melissa submitted an affidavit, stating that when she signed the Admission Contract, she “did not know what the term arbitration meant” and that she “felt rushed while signing the documents.” *Id.* at 202. Additionally, Melissa stated she did not believe that her father was capable of understanding the power of attorney that he signed.

The district court concluded that it had diversity jurisdiction over the matter and that the arbitration agreement was valid and enforceable. Having resolved the only issue present, the court then dismissed the case.

DISCUSSION

I. Standards of Review

The Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, embodies the national policy favoring arbitration. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006). “Although the [Supreme] Court has . . . long recognized and enforced a liberal federal policy favoring arbitration agreements, . . . the *question of arbitrability*[] is an issue for judicial determination unless the parties clearly and unmistakably provide otherwise.” *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (citation, brackets, and internal quotation marks omitted).

“[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.” *Id.* (internal quotation marks omitted).

“Generally, courts should apply ordinary state-law principles that govern the formation of contracts to determine whether a party has agreed to arbitrate a dispute.” *Hardin v. First Cash Fin. Servs., Inc.*, 465 F.3d 470, 475 (10th Cir. 2006) (internal quotation marks omitted). We review de novo a district court’s decision compelling arbitration. *Hancock v. Am. Tel. & Tel. Co., Inc.*, 701 F.3d 1248, 1261 (10th Cir. 2012), *cert. denied*, 133 S. Ct. 2009 (2013).

II. Binding Effect of the Admission Contract

A. On Mr. Douglas Spradlin

Jason argues that Melissa had no authority to sign the Admission Contract and bind their father because the power of attorney, which appointed her as an attorney in fact, was signed by their father while he was incompetent. But, as noted by the district court in its order compelling arbitration, the power of attorney is irrelevant because Melissa signed the Admission Contract, not pursuant to her authority as her father's attorney in fact, but simply as "Immediate Family Member." *Aplt. App.* at 25.

But more importantly, in the district court, Jason did not dispute THI's assertion that Mr. Douglas Spradlin, despite not signing the Admission Contract, was bound by it as a third-party beneficiary. And the district court deemed Jason's silence as a "concession of this point." *Id.* at 394 n.1. Arguments not raised in the district court "are waived for purposes of appeal." *Quigley v. Rosenthal*, 327 F.3d 1044, 1069 (10th Cir. 2003). Additionally, Jason raises the third-party-beneficiary issue only in his reply brief before this court. Generally, a party may not attempt to dispute an issue for the first time in a reply brief. *See Reedy v. Werholtz*, 660 F.3d 1270, 1274 (10th Cir. 2011).

Moreover, in arguing before this court that the wrongful-death beneficiaries are not bound by the Admission Contract under a third-party beneficiary theory, which we address below in Part II.B., Jason asserts that Mr. Douglas Spradlin is

indeed bound under a third-party-beneficiary theory: “The contract only was intended to benefit [Mr. Douglas Spradlin], so only he (and perhaps his estate) are bound by its terms.” Aplt. Opening Br. at 34.

Accordingly, we reject Jason’s arguments that the Admission Contract is not binding on Mr. Douglas Spradlin.

B. On Wrongful-Death Beneficiaries

Jason contends that “[t]he arbitration [clause] cannot be applied against the wrongful death beneficiaries” like himself who did not sign the Admission Contract. Aplt. Opening Br. at 33-34. We disagree.²

“Generally, third parties who are not signatories to an arbitration agreement are not bound by the agreement and are not subject to . . . arbitration.” *Horanburg v. Felter*, 99 P.3d 685, 689 (N.M. Ct. App. 2004) (employment discrimination case). But New Mexico’s Wrongful Death Act, N.M. Stat. Ann. § 41-2-1 - § 41-2-4, “transmits to the personal representative the cause of action which the injured person would have had if death had not ensued.” *Stang v. Hertz Corp.*, 463 P.2d 45, 55 (N.M. Ct. App. 1969). Thus, the wrongful-death statute confers upon the beneficiaries those rights that the decedent would have possessed had he lived. *See*

² Additionally, Jason cursorily argues that the arbitration clause cannot bind the beneficiaries because the (1) Admission Contract terminated when Mr. Douglas Spradlin died; and (2) “[t]he wrongful death beneficiaries are not parties to the agreement.” Aplt. Opening Br. at 34. But he did not make these arguments below, and therefore, they are waived. *See Quigley*, 327 F.3d at 1069. Further, perfunctory arguments that fail to frame and develop an issue are insufficient to invoke appellate review. *Murrell v. Shalala*, 43 F.3d 1388, 1390 n.2 (10th Cir. 1994).

N.M. Stat. Ann. § 41-2-1 (providing a cause of action for the statutory beneficiaries insofar as the decedent, had he lived, could have “maintain[ed] an action and recover[ed] damages”); *Romero v. Byers*, 872 P.2d 840, 846 (N.M. 1994) (characterizing the wrongful death statute as a survival statute that “provides a cause of action for the benefit of the statutory beneficiaries to sue a tortfeasor for the damages . . . which the decedent himself would have been entitled to recover had death not ensued” (internal quotation marks omitted)); *Hogsett v. Hanna*, 63 P.2d 540, 543 (N.M. 1936) (stating that the wrongful-death statute, instead of “creat[ing] a new cause of action,” “transmits to the designated persons a cause of action when the injured person would have had one had death not ensued”).

There is a split of authority among the states regarding the binding effect of arbitration provisions on nonsignatory, wrongful-death heirs. “States that bind such plaintiffs generally view wrongful death claims as derivative of the decedent’s claim, or focus on the public policy favoring arbitration agreements. States that do not bind claimants generally emphasize the independence of the wrongful death claim or the need for consent in creating binding arbitration.” *Ruiz v. Podolsky*, 237 P.3d 584, 591 n.2 (Cal. 2010) (citations omitted).

We conclude that in New Mexico, a wrongful-death claim derives directly from the claim possessed by the decedent, had he or she lived. Thus, in New Mexico, as in Mississippi, Florida, Texas, and Michigan, a “wrongful-death suit is a derivative action by the beneficiaries, and those beneficiaries, therefore, stand in the position of

their decedent.” *Trinity Mission of Clinton, LLC v. Barber*, 988 So. 2d 910, 919 (Miss. Ct. App. 2007); *see also Laizure v. Avante at Leesburg, Inc.*, 109 So. 3d 752, 761-62 (Fla. 2013) (“[T]he nature of a wrongful death cause of action in Florida is derivative in the context of determining whether a decedent’s estate and heirs are bound by the decedent’s agreement to arbitrate. 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.”); *In re Labatt Food Serv., LP*, 279 S.W.3d 640, 646 (Tex. 2009) (“[R]egardless of the fact that [decedent’s] beneficiaries are seeking compensation for their own personal loss, they still stand in [decedent’s] legal shoes and are bound by his agreement.”); *Ballard v. Sw. Detroit Hosp.*, 327 N.W.2d 370, 371-72 (Mich. Ct. App. 1982) (“[A]lthough the Michigan wrongful death act provides for additional damages benefitting the decedent’s next of kin for loss of society and companionship, it does not create a separate cause of action independent of the underlying rights of the decedent. Rather, the cause of action is expressly made derivative of the decedent’s rights.”). Consequently, because Mr. Douglas Spradlin was bound by the arbitration clause as a third-party beneficiary, the non-signatory, wrongful-death beneficiaries are likewise bound.

III. Procedural Unconscionability

Jason argues that the arbitration clause in the Admission Contract is procedurally unconscionable because the contract is an adhesion contract. “[U]nconscionability is an equitable doctrine, rooted in public policy, which allows courts to render unenforceable an agreement that is unreasonably favorable to one party while precluding a meaningful choice of the other party.” *Strausberg v. Laurel Healthcare Providers, LLC*, No. 33,331, __ P.3d __, 2013 WL 3226753, at *7 (N.M. June 27, 2013) (internal quotation marks omitted). An adhesion contract is a “standardized contract offered by a transacting party with superior bargaining strength to a weaker party on a take-it-or-leave-it basis, without opportunity for bargaining.” *Id.* at *8 (internal quotation marks omitted). It “is procedurally unconscionable and unenforceable when the terms are patently unfair to the weaker party.” *Id.* (brackets and internal quotation marks omitted). The party claiming unconscionability bears the burden to prove this affirmative contract defense. *Id.* at *9.

In support of his argument that Melissa executed an unconscionable adhesion contract, Jason cites Melissa’s affidavit statements that she has only an eleventh-grade education, she did not know what “arbitration” meant, and she “felt rushed” while signing the documents. Aplt. Opening Br. at 29. But these statements do not indicate (1) whether THI was in a superior bargaining position, as might occur if there were no other suitable and available nursing homes for Mr. Douglas Spradlin,

see Fiser v. Dell Computer Corp., 188 P.3d 1215, 1221 (N.M. 2008) (noting “there was no evidence that Plaintiff could not avoid doing business under the particular terms mandated by Defendant”); or (2) whether the Admission Contract was presented to Melissa on a take-it-or-leave-it basis. And despite Melissa’s limited education and her feeling rushed to sign the documents, nothing indicates that she was incapable of understanding the arbitration clause or that THI used “sharp practices or high pressure tactics” to secure her signature, *Guthmann v. LaVida Llana*, 709 P.2d 675, 679 (N.M. 1985), *overruled in part on other grounds by Cordova v. World Fin. Corp. of N.M.*, 208 P.3d 901 (N.M. 2009). Indeed, the arbitration clause was followed prominently by clear language above the signature lines indicating that she had read, understood, and consented to all the terms of the Admission Contract. Therefore, we conclude that the Admission Contract was not procedurally unconscionable.

IV. Breach of Fiduciary Duty

Jason argues “that THI breached fiduciary duties to [Mr. Douglas Spradlin] by presenting a mandatory arbitration agreement without full disclosure and making sure Melissa understood all its terms and ramifications,” and by “having [Mr. Douglas Spradlin] sign the Power of Attorney knowing that he was mentally incompetent.” Aplt. Opening Br. at 31. But Jason does not identify any New Mexico case declaring that a nursing home has a fiduciary duty to a prospective patient who has not yet entered into an admission contract. Indeed, in the analogous context of applying for

insurance, the New Mexico Court of Appeals has expressly declined to impose such a duty prior to the formation of a contract:

[W]e decline to acknowledge the existence of the insurer's fiduciary duty before the issuance of the policy. At the application stage, the relationship between insurer and insured is similar to that of buyer and seller, and the transaction is little more than an arms-length negotiation involving the purchase of insurance. Ordinarily, a buyer-seller relationship is not fiduciary in nature, even though the seller typically has superior bargaining power and knowledge. An essential feature and consequence of a fiduciary relationship is that the fiduciary becomes bound to act in the interests of [its] beneficiary and not itself. Obviously, this dynamic does not inhere in the ordinary buyer-seller relationship.

Azar v. Prudential Ins. Co. of Am., 68 P.3d 909, 926 (N.M. Ct. App. 2003) (brackets, citation, and internal quotation marks omitted).

Similarly, in the context of seeking nursing-home services, the prospective patient and the nursing home are in a relationship resembling a buyer and seller, with no services forthcoming until *after* contract formation. Until that time, the prospective patient and the nursing home are engaged in no more than negotiations for services, with the patient free to walk away if he or she deems the offered services unsatisfactory.

We conclude then, that New Mexico would not recognize a fiduciary duty between a nursing home and a prospective patient during negotiations over an admission contract. Thus, Jason's breach-of-fiduciary-duty argument fails.

V. Discovery

Jason contends that the district court should not have decided this case without providing an opportunity for discovery. We disagree.

In enacting the FAA, Congress intended that proceedings to compel arbitration be “expeditious and summary,” “with only restricted inquiry into factual issues.”

Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 22 (1983).

To obtain discovery in opposition to a motion to compel arbitration, the arbitration opponent must at least show how discovery would “assist[] them in opposing the motion to compel arbitration.” *Wolff v. Westwood Mgmt., LLC*, 558 F.3d 517, 521 (D.C. Cir. 2009).

But in the district court, Jason provided little specificity as to why discovery was necessary on the issues relevant to opposing arbitration. Indeed, he stated that if the district court was “disinclined to” rule “that the arbitration agreement is unenforceable,” “it should permit discovery and conduct an evidentiary hearing.” Aplt. App. at 261.

On appeal, Jason indicates that discovery was necessary “on whether [Mr. Douglas Spradlin] had mental capacity to sign the Power of Attorney.” Aplt. Opening Br. at 13. As we indicated above, however, that issue is irrelevant and subject to various procedural infirmities. *See supra* Part II.A. (concluding that the power of attorney is irrelevant because Melissa signed the Admission Contract as a

family member rather than as her father's attorney in fact, that the issue was not properly raised, and that Jason conceded the issue).

Jason next claims that discovery was needed to ascertain whether the Admission Contract is procedurally unconscionable. He questions whether "Melissa felt pressured, had no reasonable alternative, or did not fully comprehend what she was signing." *Id.* at 14. The answers to those questions, however, were available to Jason through Melissa, who had already provided an affidavit to aid Jason.

Lastly, Jason asserts that discovery was needed to support his "defense that THI breached fiduciary duties owed to [Mr. Douglas Spradlin]." *Id.* We determined above that New Mexico would not recognize such a defense. Thus, discovery regarding such a defense is irrelevant.

We conclude that the district court did not abuse its discretion in rejecting Jason's request for discovery.

CONCLUSION

The judgment of the district court is affirmed.³

Entered for the Court

William J. Holloway, Jr.
Circuit Judge

³ Jason argues that "[i]n determining a remand remedy, the Court is reminded that THI has not produced most of the nursing home's records for [Mr. Douglas Spradlin's] first several months of admission." *Aplt. Opening Br.* at 20-21. Because we affirm the district court's judgment, we do not reach Jason's remand argument.



THE WRONGFUL DEATH ESTATE OF ANN KRAHMER, BY THE PERSONAL REPRESENTATIVE, CHRIS PECK, Plaintiff-Appellee, v. LAUREL HEALTHCARE PROVIDERS, LLC, ARBOR SPRINGS, LLC, CAPISTRANO INVESTMENTS, LLC, A&J VENTURES, LLC, M. SCOTT ATHANS, ALAN ZAMPINI, SKILLED HEALTHCARE GROUP, LLC, SKILLED HEALTHCARE, LLC, and ST. CATHERINE HEALTHCARE & REHABILITATION CENTER, LLC, Defendants-Appellants.

NO. 30,868

COURT OF APPEALS OF NEW MEXICO

2013 N.M. App. LEXIS 92

September 16, 2013, Filed

NOTICE:

THIS SLIP OPINION IS SUBJECT TO FORMAL REVISION UPON RELEASE OF THE FINAL VERSION.

PRIOR HISTORY: APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY. Carl J. Butkus, District Judge.

COUNSEL: Harvey Law Firm, Dusti D. Harvey, Jennifer J. Foote, Albuquerque, NM; Sorey Law Firm, R. Daniel Sorey, Longview, TX, for Appellee.

Keleher & McLeod, P.A., Kathleen M. Wilson, Cassandra R. Malone, Albuquerque, NM, for Appellants Laurel Healthcare Providers, LLC, Arbor Springs, LLC, Capistrano Investments, LLC, A&J Ventures, LLC, M. Scott Athans, & Alan Zampini.

Rodey, Dickason, Sloan, Akin & Robb, P.A., W. Robert Lasater, Jr., Sandra L. Beerle, Jocelyn Drennan, Albuquerque, NM, for Appellants St. Catherine Healthcare & Rehabilitation Center, Skilled Healthcare, LLC, and Skilled Healthcare Group, LLC.

JUDGES: RODERICK T. KENNEDY, Chief Judge. WE CONCUR: LINDA M. VANZI, Judge, TIMOTHY L. GARCIA, Judge.

OPINION BY: RODERICK T. KENNEDY

OPINION

KENNEDY, Chief Judge.

[*1] Chris Peck (Plaintiff) is the personal representative of the wrongful death estate of the decedent, Ann Krahmer, who he alleges died as a result of a nursing home's poor care. Plaintiff filed a wrongful death action against the nursing home, which responded with a motion to compel arbitration, pursuant to an agreement signed when Krahmer entered the nursing home. In this case, we hold that because a wrongful death action is entirely derivative of the decedent's right to sue, a valid arbitration agreement signed by a competent party binds that party's estate and statutory heirs in a subsequent wrongful death action. We reverse the district court's denial of the motion to compel arbitration and remand for further proceedings.

I. BACKGROUND

[*2] Krahmer entered a nursing home when her family was no longer able to care for her at home. Her son, Plaintiff, signed her admission paperwork, pursuant to the power of attorney he held on her behalf. The Admission Agreement included an Arbitration Agreement that bound Krahmer, her "representatives, successors, family members and heirs[,] and the personal representative or representative of [Krahmer] or [Krahmer's] estate" to arbitrate "any and all disputes associated with this Arbitration Agreement and the relationship created by the Admission Agreement and/or the provision of services under the Admission Agreement."

[*3] Krahmer resided at the nursing home for approximately five months, at which point, she was hospitalized and died. Plaintiff, as personal representative of Krahmer's wrongful death estate, brought a wrongful death lawsuit, alleging that, while in the nursing home's care, she suffered injuries that caused a deterioration of her health and eventual death. *See* NMSA 1978, § 41-2-3 (2001). The nursing home changed hands during Krahmer's stay and was variously owned and managed by a panoply of corporations,¹ along with two individual managers, M. Scott Athans and Alan Zampini (collectively, Defendants).

1 Laurel Healthcare Providers, LLC, Arbor Springs, LLC, Capistrano Investments, LLC, A&J Ventures, LLC, Skilled Healthcare Group, LLC, Skilled Healthcare, LLC, and St. Catherine Healthcare & Rehabilitation Center, LLC.

[*4] Based on the arbitration clause in the Admission Agreement, Defendants moved the district court to compel arbitration. Plaintiff responded that, as the personal representative of Krahmer's wrongful death estate, he is not bound by the Arbitration Agreement. The district court agreed and denied arbitration based solely on its determination that the wrongful death representative is not bound by Krahmer's Arbitration Agreement. This appeal followed.

II. DISCUSSION

[*5] We now consider the sole question in this case: whether Plaintiff, the personal representative of a wrongful death estate, is bound by the Arbitration Agreement that would have bound Krahmer had she lived. The answer depends on the manner in which our Wrongful Death Act, NMSA 1978, §§ 41-2-1 to -4 (1882, as amended through 2001), transmits the rights of the decedent and whether it thus binds the wrongful death representative. "We apply a de novo standard of review to a district court's denial of a motion to compel arbitration." *Cordova v. World Fin. Corp. of N.M.*, 2009 NMSC 21, ¶ 11, 146 N.M. 256, 208 P.3d 901.

A. The Wrongful Death Act Changed Common Law and is Strictly Construed

[*6] When the Wrongful Death Act (the Act) was passed in 1882, it abrogated the common law by providing statutory authority for a wrongful death action to be brought by the personal representative of the injured, deceased person. Sections 41-2-1, -4; *Estate of Lajeunesse ex rel. Boswell v. Bd. of Regents of Univ. of N.M.*, 2013 NMCA 4, ¶ 10, 292 P.3d 485, cert. quashed, 2013 NMCERT 1, 299 P.3d 864. The Act permits a statutory personal representative to bring a cause of action, "notwithstanding the death of the person injured." Section

41-2-1. It is the exclusive remedy governing wrongful death actions in New Mexico. *Stang v. Hertz Corp.*, 1969 NMCA 118, ¶¶ 9-10, 81 N.M. 69, 463 P.2d 45, rev'd on other grounds, 1972 NMSC 31, 83 N.M. 730, 497 P.2d 732. Because a decedent's claim survives her death, we have referred to the Act as a "survival statute." *See Romero v. Byers*, 1994 NMSC 31, ¶ 18, 117 N.M. 422, 872 P.2d 840. As a statute "in derogation of the common law, it is to be afforded a strict, rather than an expansive[,] construction." *Id.* ¶ 15 (citing *El Paso Cattle Loan Co. v. Hunt*, 1924 NMSC 69, ¶ 4, 30 N.M. 157, 228 P. 888. The text of Section 41-2-1 focuses on the wrongdoer's continued liability to the decedent where the death is caused by a wrongful act and, had death not ensued, the injured party would have been entitled to "maintain an action and recover damages in respect thereof[.]" The Act provides that "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." *Id.* Under the strict construction of the Act compelled by *Romero*, the same cause of action exactly as it would have been possessed by the decedent is what is transmitted to the personal representative, and any limitations on the decedent's personal right to maintain an action will survive as well.

B. The Act Transfers No Rights Beyond Those That the Injured Party Possessed

[*7] Since the early days of statehood, New Mexico courts have characterized the Act as a statute that transmits the decedent's rights to file a claim to the representative of the wrongful death estate. In *Hogsett v. Hanna*, our Supreme Court addressed a wrongful death claim based in negligence resulting in death. 1936 NMSC 63, ¶ 1, 41 N.M. 22, 63 P.2d 540. Noting that our wrongful death statute is based on Missouri's statute, our Supreme Court stated that the Act does not create a new cause of action. *Id.* ¶ 9. Rather, "[i]t transmits to the designated persons a cause of action when the injured person would have had one had death not ensued." *Id.* (citing *Proctor v. Hannibal*, 64 Mo. 112 (1876); *White v. Maxcy*, 64 Mo. 552 (1877); *Crumpley v. Hannibal*, 11 S.W. 244 (Mo. 1889)).

[*8] New Mexico courts have continued to characterize the representative's rights as derivative of the decedent's. *See Estate of Lajeunesse*, 2013 NMCA 4, ¶ 14 (stating that the Act "preserves the rights of action and transmits it to the personal representative" (internal quotation marks and citation omitted)), *see also Stang*, 1969 NMCA 118, ¶ 48. In *Stang*, our Supreme Court cited *Hogsett*, among other cases, determining that the personal representative could recover for the injury to the decedent, namely, pain and suffering occurring before death regardless of there being no injury to the benefi-

ciaries. *Stang*, 1969 NMCA 118, ¶ 48-50. Our Supreme Court has further held that, in addition to pecuniary loss to the beneficiaries, a wrongful death representative may recover for the decedent's pain and suffering, which "devolves from (1) that which the victim must newly endure and (2) that which the victim may no longer enjoy." *Romero*, 1994 NMSC 31, ¶ 19. We have held that "[a] literal reading of the statute gives the personal representative a cause of action, only if the decedent could have had one, absent death." *Maestas v. Overton*, 1974 NMCA 89, ¶ 5, 86 N.M. 609, 526 P.2d 203, *rev'd on other grounds*, 1975 NMSC 4, 87 N.M. 213, 531 P.2d 947.

[*9] The federal courts, recently applying New Mexico law in situations analogous to this case, have also concluded on this basis, relying on *Maestas*, that the Act binds a representative to arbitrate. *THI of N.M. at Vida Encantada, LLC v. Lovato*, 848 F. Supp.2d 1309, 1328 (2012) ("Thus, wrongful death claims are derivative of a decedent's rights, and a wrongful death beneficiary has no claim save those claims that the decedent herself would have had."). In *Lovato*, a wrongful death representative brought claims against a nursing home, and the nursing home moved to compel arbitration based on an arbitration agreement that would have bound the decedent. *Id.* at 1314. The *Lovato* court reasoned that because the decedent would have been bound to arbitrate, and the decedent's cause of action is handed on to the personal representative by the Act, the representative is also bound to submit to arbitration. *Id.* at 1328 (citing *Stang*, 1969 NMCA 118, ¶ 49).

[*10] After the *Lovato* case, the United States District Court, in a memorandum opinion, certified to the New Mexico Supreme Court the precise question we face in this case: whether a wrongful death representative is bound to arbitrate if the decedent was personally bound by an arbitration agreement. *THI of N.M. at Vida Encantada, LLC v. Archuleta*, 2013 WL 2387752, No. Civ. 11-399 LH/ACT (D.N.M. April 30, 2013). Our Supreme Court quashed its certification in the matter without rendering a decision, and the federal court went on to determine in a memorandum opinion that the Act bound the representative to arbitration. *Id.* at 6, 10. We agree with the analysis of the Act in *Lovato* as well.

[*11] This Court has previously held that limitations on the decedent's right to sue may also be transmitted in some situations. One such limitation is that only a single recovery, reflecting the single decedent, is permitted under the Tort Claims Act. The recovery is divided among all the beneficiaries of a single decedent's wrongful death estate, rather than to be multiplied by the number of statutory beneficiaries. *Estate of Lajeunesse*, 2013 NMCA 4, ¶ 14. Additionally, *Estate of Lajeunesse* limited the amount of damages recoverable by the per-

sonal representative under the Tort Claims Act to no more than the decedent was allowed to recover. *Id.* ¶¶ 17-18. By analogy, other limitations on the decedent's right to maintain a cause of action for injuries may apply, such as an arbitration agreement.

[*12] The district court in this case erroneously relied on *Bybee v. Abdulla*, 2008 UT 35, 189 P.3d 40, in finding that the personal representative was not bound to arbitrate the decedent's claims. In Utah, wrongful death actions are covered not only by statute, but by a constitutional provision that resists a restrictive interpretation. *Id.* ¶ 19 ("We have previously acknowledged that the wrongful death action's constitutional status entitles it to special protection against attempts to pare back its scope."). In addition, because Utah has both wrongful death and survivor statutes,

[c]laims that could be brought under the survivor statute, unlike those available under the wrongful death cause of action, are based only on special damages that would have been available to the decedent. In contrast, in a wrongful death action[,] the expansive scope of damages available extends well beyond what is permitted by the survivor statute.

Id. ¶ 34. New Mexico, in contrast, does not have a similar survival statute that is distinct from our Act and, as described above, the availability of remedies is limited only to those recoverable by the decedent. For all these reasons, Utah law is unhelpful to our analysis.

[*13] We also disagree with Plaintiff's argument that, because our original wrongful death statute was based on Missouri law, and it recently ruled that its statute does not bind the representative to arbitrate, we should interpret our statute similarly. *Lawrence v. Beverly Manor*, 273 S.W.3d 525, 526 (Mo. 2009) (en banc). Missouri has developed case law characterizing its statute as a non-survival statute that creates a new cause of action for beneficiaries. *Id.* at 527 ("The right of action thus created is neither a transmitted right nor a survival right." (internal quotation marks and citation omitted)). Plaintiff does not take note of the water that has passed under the original legal bridge between our states' statutes. The difference between our courts' interpretation of our Act as one that transmits a derivative right, and Missouri's categorization of its wrongful death act as creating a new statutory right that is based on neither transmittal nor survival of the decedent's cause of action, does not escape our notice. Missouri's law's historical relevance to our Act has ended.

[*14] We also note that New Mexico's strong policy preference for arbitration supports binding the representative by the decedent's agreement. *Dairyland Ins. Co. v. Rose*, 1979 NMSC 21, ¶ 14, 92 N.M. 527, 591 P.2d 281. Our conclusion today in favor of arbitration is also consistent with the United States Supreme Court's recent decision in *Marmet Health Care Center, Inc. v. Brown*, in which it upheld an agreement to arbitrate a decedent's wrongful death estate against West Virginia's categorical prohibition against arbitration agreements covering wrongful death. 132 S. Ct. 1201, 1203-04 (2012). "West Virginia's prohibition against predispute agreements to arbitrate personal[]injury or wrongful[]death claims against nursing homes is a categorical rule prohibiting arbitration of a particular type of claim, and that rule is contrary to the terms and coverage of the [Federal Arbitration Act]." *Id.*

C. The Validity of the Arbitration Clause Was Not Decided Below

[*15] As a final matter, we briefly address Plaintiff's alternative argument that the Arbitration Agreement was substantively unconscionable and therefore unenforceable. Here, the district court did not consider or make any findings on the issue. As a general matter, a party must present us with a ruling on the issue from the district court obtained on the same grounds argued in this Court. *Woolwine v. Furr's, Inc.*, 1987 NMCA 133, ¶ 20, 106 N.M. 492, 745 P.2d 717. Although Plaintiff raised the issue of unconscionability below, the district court

resolved the case solely on the premise that the beneficiaries were not bound to arbitrate, and it "assumed that the 'Arbitration Agreement' is otherwise valid and otherwise applies to the claims in the [c]omplaint." Because the court denied Defendants' motion to arbitrate based only on one of the theories that Plaintiff offered, we remand so that the district court may make factual findings regarding whether the Arbitration Agreement was unconscionable. See *Green v. Gen. Accident Ins. Co. of Am.*, 1987 NMSC 111, ¶ 22, 106 N.M. 523, 746 P.2d 152 ("[T]his Court may remand a case to [the] district court for the making of proper findings of fact.").

III. CONCLUSION

[*16] We hold that the Act transmits Krahmer's cause of action to her representative, whose claim is limited by the Arbitration Agreement binding Krahmer at the time of her death. Because Krahmer was bound to arbitrate her claims with the nursing home, so is her representative. We reverse the district court's denial of Defendants' motion to compel arbitration and remand for findings regarding Plaintiff's remaining arguments.

[*17] **IT IS SO ORDERED.**

RODERICK T. KENNEDY, Chief Judge

WE CONCUR:

LINDA M. VANZI, Judge

TIMOTHY L. GARCIA, Judge