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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Dale E. Van Slambrook
Ninth Judicial Circuit

Appellate Case No. 2025-000350
Circuit Court Case No. 2024-CP-10-00930

Brian Delesline, individually and as Personal Representative of the Estate of Hazel L. Manasse, Respondent,

v.

Medical University of South Carolina (MUSC), Denise Sese, MD, Johns Island Post Acute, LLC d/b/a Johns Island Post Acute, Craig Bullick, and Providence Group, Inc., Defendants,

of which Johns Island Post Acute, LLC d/b/a Johns Island Post Acute, Craig Bullick, and Providence Group, Inc. are the Appellants.

INITIAL BRIEF OF APPELLANTS

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April 28, 2025

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Unpublished Cases

Statutes

Rules

STATEMENT OF ISSUES ON APPEAL

Is Respondent, a wrongful death claimant, bound by an arbitration agreement entered by Decedent during her lifetime?

STATEMENT OF THE CASE

This case arises from the admission of Hazel L. Manasse ("Decedent" or "Manasse") to a skilled nursing facility known as Johns Island Post Acute (the "Facility"). Following the passing of Ms. Manasse, her son, Brian Delesline ("Delesline" or "Respondent") filed suit against Johns Island Post Acute, LLC, Craig Bullick, and Providence Group, Inc. Bullick was the administrator of the Facility, and Providence Group, Inc. is involved in the management of the facility (collectively, these are the "Appellants"). Respondent also sued the Medical University of South Carolina and a physician employed there, and subsequently dismissed the physician; they are not parties to this appeal.

Delesline's Complaint makes out claims for both survival and wrongful death arising from alleged personal injuries sustained by Manasse during her residency at the Facility. (*See generally* Pl. Compl.). Appellants moved to dismiss the Complaint, stay litigation, and compel arbitration under the terms of an Arbitration Agreement (the "Agreement") that Manasse executed herself upon admission to the Facility. (Appellants' Motion to Dismiss; Arbitration Agreement). The Agreement **"applies to any and all claims, disputes and controversies** that would constitute a legally cognizable cause of action in any court of law, including … those based on negligence or intentional tort theories, including but not limited to negligence, medical negligence, corporate negligence, and civil assault or civil battery, that seek to recover monetary damages in civil court **for personal injury, death, or loss to person or property**," and was governed by the Federal Arbitration Act (FAA). (Arbitration Agreement, §§ 4.2 and 4.3, p. 3) (emphasis added).

On September 26, 2024, the Circuit Court heard oral arguments, and on November 21 issued order instructions requesting two draft orders regarding Appellants' Motion to Compel Arbitration. The Court sought one order from Respondent denying the motion as to wrongful death and another from Appellants granting the motion as to survival. (Email dated November 21, 2024 Requesting Orders). On December 16, 2024, the Court entered an order denying Appellants' Motion as to the wrongful death claim, holding that it belonged to the statutory beneficiaries and was "separate" from that the estate of the Decedent. (Order Denying Motion to Compel Arbitration as to Wrongful Death dated December 16, 2024). However, in the second order, issued February 7, 2025, the Circuit Court granted Appellants' motion to compel arbitration as to the survival cause of action, holding that the Arbitration Agreement was valid and enforceable and thus bound Decedent at the time of death. (Order Granting Appellants' Motion to Compel Arbitration as to Survival dated February 7, 2025).

On December 23, 2024, Appellants timely filed a Rule 59(e), SCRCP Motion to Reconsider as to the December 16 Order, contending that the Circuit Court erred in finding that the Agreement did not bind Respondent with respect to the wrongful death action. (Appellants' Motion to Reconsider dated December 23, 2024). On January 13, 2025, Respondent filed a memorandum in opposition to Appellants' Motion to Reconsider, now arguing that Appellants had not before argued the applicability of arbitration agreements to claims for wrongful death and that, therefore, Appellants were precluded from making that argument in their Motion to Reconsider. (Respondent's Memorandum in Opposition filed January 13, 2025). In response, on January 17, 2025, Appellants requested a copy of the transcript from the September 26, 2023 motion hearing and later that day requested that the Court defer its ruling until Appellants had the opportunity to obtain the hearing transcript, in which Appellants countered Respondent's contention that

arbitration agreements are not binding upon wrongful death claimants. (January 17, 2025 Email Requesting Hearing Transcript; January 17, 2025 Email to Court Requesting Time to Consider Transcript). Appellants did not receive any reply from the Court, and, on January 31, 2025, the Circuit Court denied Appellants' Motion to Reconsider. (Order Denying Appellants' Motion to Reconsider dated January 31, 2025). Appellants served Respondent with a Notice of Appeal on February 25, 2025. This appeal follows.

STANDARD OF REVIEW

The question of whether a claim is subject to arbitration is a matter of law subject to *de novo* review. *Aiken v. World Fin. Corp. of S.C.*, 373 S.C. 144, 148, 644 S.E.2d 705, 707 (2007). Likewise, "[w]hether an arbitration agreement may be enforced against a nonsignatory to the agreement is a matter subject to de novo review by an appellate court." *Wilson v. Willis*, 426 S.C. 326, 335, 827 S.E.2d 167, 172 (2019). Still, "a Circuit Court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." *Aiken v. World Fin. Corp. of S.C.*, 373 S.C. 144 at 148. In this appeal, the relevant facts (the existence and terms of the Arbitration Agreement and the factual nature of the claims made out in the Complaint) are undisputed. Instead, this appeal centers on the Circuit Court's conclusion that Respondent's wrongful death claim was not subject to arbitration, in spite of its concurrent ruling that the Arbitration Agreement was valid and enforceable such that it bound Ms. Manasse at the time of her death.

ARGUMENT

Under South Carolina law, a wrongful death claimant stands in the legal shoes of his decedent. The claimant is bound by acts of the decedent. If the decedent entered into an agreement to arbitrate disputes, that agreement is binding on the wrongful death claimants. It is binding because the right to bring a wrongful death claim is derivative of the rights held by decedent during

life. Put another way, if the decedent could not bring the claim in court if she were alive, the wrongful death claimant cannot bring that claim in court after death.

1. Because wrongful death claims are derivative in nature, the Arbitration Agreement bars Respondent from bringing his wrongful death claim in circuit court.

The Circuit Court misinterpreted the wrongful death statute as giving rise to an independent claim and therefore erred in declining to compel Respondent to arbitrate this dispute. In South Carolina, a wrongful death action does not exist independently of the decedent's rights; rather, it is derivative of the decedent's own cause of action. *See Farmer v. Monsanto Corp*., 353 S.C. 553, 558, 579 S.E.2d 325, 328 (2003) ("In a wrongful death action, the representative plaintiff's capacity is derived from the decedent's"). Directly stated, if the decent could not bring the action in circuit court, neither can her wrongful death beneficiaries.

A. Establishing the derivative principle.[1, 2]

This begs the question of what "derived from" or "derivative" means in this context. A wrongful death claim is derivative in the sense that it exists only when the decedent had a right to maintain the action had she lived. The wrongful death statute, S.C. Code Ann. § 15-51-10, creates a cause of action for certain beneficiaries *only if and to the extent that the decedent could have maintained an action for the injuries had he or she lived*. The statute provides that a defendant "who would have been liable, if death had not ensued, shall be liable" in damages for the death, but only if the defendant's wrongful act or neglect was such that it "would, if death had not ensued, have entitled the party injured to maintain an action and recover damages…" Id.

[1] For the sake of convenience, Appellants refer to this concept as the "derivative principle."
[2] The Undersigned would like to thank their legal intern, Maxwell Marshall, for his work developing this brief and they wish him success in law school this coming fall.

South Carolina courts have consistently interpreted this language to mean that the right of a decedent's statutory beneficiaries to recover in wrongful death is entirely contingent upon and equivalent to the decedent's right to recover for the same wrongful act. *See Est. of Stokes ex rel. Spell v. Pee Dee Fam. Physicians, L.L.P.*, 389 S.C. 343, 347, 699 S.E.2d 143, 145 (2010) (holding that a wrongful death action lies only in "those cases in which the party injured would have been entitled to recover if death had not ensued"). This Court recently described the principle: "Although a wrongful death claim is for the benefit of the decedent's family, South Carolina treats this claim as **derivative** of the decedent's own personal claim during his lifetime." *Jolly v. Gen. Elec. Co.*, 435 S.C. 607, 667, 869 S.E.2d 819, 851 (Ct. App. 2021), *aff'd sub nom. Jolly v. Fisher Controls Int'l, LLC*, 443 S.C. 511, 905 S.E.2d 380 (2024) (emphasis added).

Long before the current wrongful death statute was adopted, the South Carolina Supreme Court's exposition of the derivative principle yielded similar results. *See Price v. Richmond & D. R. Co.*, 33 S.C. 556, 560, 12 S.E. 413, 414 (1890) (holding that if the decedent would have been "debarred" from maintaining an action due to some defense, then "it follows necessarily that his administrator is likewise barred"). In short, "if the deceased never had a cause of action, none accrues under the wrongful death statute." *Scott v. Greenville Pharmacy*, 212 S.C. 485, 489, 48 S.E.2d 324, 326 (1948). *See also Quattlebaum v. Carey Canada, Inc.*, 685 F. Supp. 939, 942 (D.S.C. 1988).

B. Applying the derivative principle in other contexts.

Applying this principle, South Carolina courts have held that any legal defense that would defeat or bar the decedent's claim equally defeats or bars the wrongful death claim. For example, if the decedent's claim was time-barred before death, the wrongful death claim is likewise time-barred. *See Estate of Stokes*, 389 S.C. at 349, 699 S.E.2d at 145. If the decedent's own negligence

would have barred her recovery, a wrongful death action by her beneficiaries is also barred. *Price v. Richmond*, 33 S.C. at 560. If the decedent contractually waived or limited her right to bring a lawsuit for injuries by signing a release, wrongful death claimants are bound by the same contractual limitations. *See Rish v. Seaboard Air Line Ry.*, 106 S.C. 143, 90 S.E. 704 (1916) (interpreting the operation of a prior release under the wrongful death statute to conclude that "[i]n this case the deceased could not have recovered, because he had released the defendant. Therefore the beneficiaries under the statute cannot recover.").

South Carolina law has long recognized that a decedent's pre-death contract can "limit or bar" a subsequent wrongful death action because the beneficiaries stand in the decedent's figurative legal shoes. *See, e.g. Price*, 33 S.C. at 560 (holding that the administrator of an estate may not maintain action if the decedent, "by any … cause," was barred from suing) and *Rish*, 106 S.C. at 143, 90 S.E. at 705. Thus, if Decedent in this case had, during her lifetime, entered a release, her estate and wrongful death beneficiaries would be precluded from making out a claim for wrongful death. Wrongful death claimants have no greater rights than their decedent.

C. Applying the derivative principle to the present case.

The derivative principle logically requires reversal of the Circuit Court here. Application of this reasoning led our Supreme Court in *Stokes* to apply the derivative principle to the then-novel issue of whether a statute of limitations which bound the decedent could also bind beneficiaries in a wrongful death action: "Although our precedent has not spoken directly to the statute of limitations issue, our law has remained steadfast to the principle of limiting the right of recovery under the wrongful death statute to those cases in which the party injured would have been entitled to recover if death had not ensued." *Estate of Stokes*, 389 S.C. at 347, 699 S.E.2d at 145.

An agreement to arbitrate claims is just as binding on the decedent, and those individuals standing in the shoes of the decedent, as is any other contract. By signing the arbitration agreement, Manasse did not forfeit her future claim, but she did agree to bring that claim in a specific forum. Manasse agreed that any covered claim would be resolved in the arbitral forum rather than in a civil suit. Because Manasse promised to arbitrate her claims and could not, were she alive, maintain a civil action for her injuries, then, under South Carolina's wrongful death statute and the law interpreting the same, her personal representative cannot bring the same action. *See* S.C. Code Ann. § 15-51-10; *see also Rish*, 106 S.C. at 143, 90 S.E. at 705, and *Stokes*, 389 S.C. at 348, 699 S.E.2d at 146 ("The right to bring a wrongful death claim is thus conditioned upon the decedent's right to maintain a claim or action."). Here, the condition precedent to a wrongful death suit, *i.e.*, that the Decedent "could have maintained an action for the injury had [she] survived," is absent because Decedent previously agreed to bring these claims in arbitration. *Id.* Stated differently, Decedent's agreement to arbitrate gives rise to a defense for Appellants because the action filed by Respondent is not one that "the deceased … could have maintained." *Id.* at 347 (citing *Price*, 33 S.C. at 560).

Moreover and doubling down on the derivative principle, South Carolina law is clear that wrongful death claims belong to the personal representative of the estate, not the beneficiaries individually. *See* S.C. Code Ann. § 15-51-20 and *Fisher on behalf of estate of Shaw-Baker v. Huckabee*, 422 S.C. 234, 240, 811 S.E.2d 739, 742 (2018) (concluding that only a personal representative has standing to sue for wrongful death). Delesline brought suit individually and as personal representative of the estate of his mother, Manasse. (*See* Pl. Compl.). In bringing that wrongful death claim, he acts on behalf of potential wrongful death beneficiaries, but he still brought the action "as Personal Representative of the Estate." (Pl. Complaint). As such, he is bound

by the prior acts of Decedent. The Personal Representative, standing in Decedent's shoes, cannot selectively avoid the Arbitration Agreement entered by Decedent when that Agreement bound Decedent herself. Because the only person entitled to bring an action for wrongful death under South Carolina law is the personal representative of the decedent's estate, they are bound by the decedent's prior agreements just as the decedent would be had death not ensued. *See* S.C. Code Ann. § 15-51-20 and *Fisher,* 422 S.C. at 240, 811 S.E.2d at 742.

D. The Circuit Court mischaracterized the nature of a wrongful death claim.

The Circuit Court characterized the wrongful death cause of action as "separate and distinct" from the survival claim and one "belonging to the Decedent's beneficiaries" such that it supposedly could not be subject to a prior agreement to arbitrate. (Order Denying Motion as to Wrongful Death, p. 4). While it is true that wrongful death is a different cause of action than survival (each created by different statutes and covering different damages), it does not follow that the wrongful death claim is independent of Decedent's legal obligations. The "separate" nature of a wrongful death claim refers to the fact that it compensates different losses, those being the beneficiaries' loss of companionship, financial support, etc., as opposed to the decedent's own losses covered by survival. But wrongful death remains derivative of, and not independent from, the decedent's own rights and agreements. South Carolina courts repeatedly hold that the wrongful death action exists only if and to the extent that the decedent had a viable claim at the time of death. *Estate of Stokes ex rel. Spell,* 389 S.C. at 347. The Circuit Court's reasoning ignores this fundamental principle by treating the wrongful death claim as if it were an unrelated claim belonging solely to third parties (the beneficiaries). In fact, as discussed above, wrongful death beneficiaries have no independent or individual right to recover; wrongful death claims are brought

only by the personal representative of the estate. *See Fisher*, 422 S.C. at 240, and 811 S.E.2d at 742 ("[W]rongful death actions must be brought by the personal representative.").

Decedent's agreement to arbitrate is just as binding on the wrongful death claim as it is on the survival claim. The Circuit Court cannot have it both ways: it cannot accept that Decedent's Arbitration Agreement governs the survival action, which it did, compelling arbitration there, while simultaneously declining to apply that same Agreement to the wrongful death action. Both claims arise from the same alleged wrongful acts. There is no question that were Decedent alive and suing for the same injuries, the Agreement would bar her from bringing that action in civil court.

E. Weighing the same issue, other jurisdictions adopt and apply the derivative principle.

This understanding of the derivative nature of wrongful death claims is not unique to South Carolina. Texas's wrongful death statute contains language very similar to South Carolina's § 15-51-10. "This subchapter applies only if the individual injured would have been entitled to bring an action for the injury if the individual had lived or had been born alive." Tex. Civ. Prac. & Rem. Code Ann. § 71.003 (emphasis added). Considering the same issue in a case on all fours with this appeal, the Texas Supreme Court observed that wrongful death beneficiaries stand "in the exact 'legal shoes' of the decedent, and they are subject to the same defenses to which the decedent's claims would have been subject." *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 644 (Tex. 2009). Consequently, it reasoned, a "decedent's pre-death contract may limit or totally bar a subsequent action by his wrongful death beneficiaries." *Id.*

From there, the *Labatt* court applied the rule to an arbitration agreement, holding that wrongful death beneficiaries were bound by an arbitration clause signed by the decedent, even

though the beneficiaries themselves did not sign it. *Id.* The court reasoned that, just as any decedent's execution of a release would bar a wrongful death suit, this particular decedent's prior agreement to arbitrate dictated the appropriate forum for the wrongful death claim. *Id.* at 645–46.

This conclusion accords with the overwhelming weight of authority in jurisdictions that treat wrongful death actions as derivative. For example, Florida's wrongful death statute requires that "the [tortious] event would have entitled the person injured to maintain an action and recover damages if death had not ensued" in order for statutory beneficiaries to recover. Fla. Stat. Ann. § 768.19 (West). The Florida Supreme Court expressly held that "the execution of a nursing home arbitration agreement by a patient with capacity to contract **binds the patient's estate and statutory heirs in a subsequent wrongful death action** arising from an alleged tort within the scope of the agreement." *Laizure v. Avante at Leesburg, Inc.*, 109 So. 3d 752, 762 (Fla. 2013) (emphasis added).

The reasoning of these courts is directly analogous because South Carolina's wrongful death statute, is, if anything, even more explicit that beneficiaries' rights are derivative of the decedent's rights. In light of the derivative principle contained at the heart of our wrongful death statute, the Circuit Court erred in denying Appellants' Motion to Compel arbitration as to the wrongful death action. The Court treated the wrongful death claim as if it were an independent claim held by strangers to the contract, instead of recognizing that the Personal Representative brings the claim only by stepping into Decedent's legal shoes, and is therefore bound by Decedent's prior agreements. The error is apparent when one considers that had Decedent survived and sued, she would be arbitrating; the fact of death cannot enlarge the forum rights available to her potential wrongful death beneficiaries. Indeed, our Supreme Court has noted that a wrongful death claim, though for the benefit of the decedent's family, is not an independent claim belonging

to those family members in their own right; rather, South Carolina law holds that "the representative plaintiff's capacity is derived from the decedent's." *Farmer*, 353 S.C. at 558. The Circuit Court's ruling cannot be reconciled with that principle.

2. The Circuit Court's reasons for denying arbitration as to the wrongful death claim contravene binding precedent.

In its Order denying Appellants' Motion to Compel Arbitration, the Circuit Court, echoing Respondent's arguments, held that, because a wrongful death action is "separate and independent" from a survival action, the arbitration agreement—though "valid and enforceable" against Decedent—did not bind the statutory beneficiaries in wrongful death. (Order Denying Motion to Compel Arbitration as to Wrongful Death, p. 2). This is mistaken.

A. Wrongful death and survival claims are distinct, but both <u>derive</u> from the rights of the decedent.

While wrongful death and survival are indeed distinct causes of action, they both *derive* from the rights of the decedent. Figure 1, below, depicts the relationship among Decedent's rights and the derivate survival and wrongful death claims:

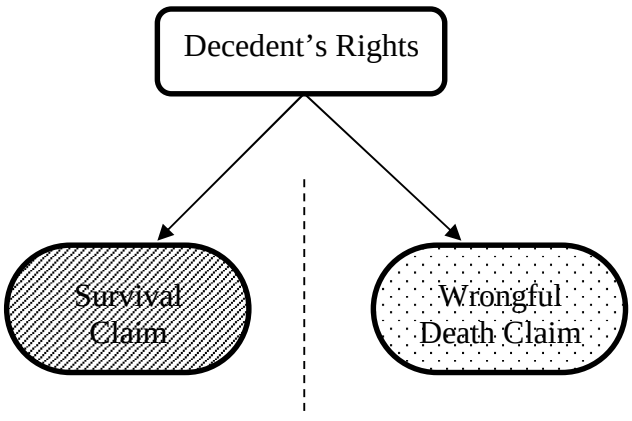

Fig. 1. Diagram showing the relationship among Decedent's rights, survival claims, and wrongful death claims.

As depicted above, the wrongful death claim remains firmly tethered to the decedent's rights. Respondent's contention, that because wrongful death and survival claims are separate both cannot derive from the rights of the decedent, is akin to suggesting that because two siblings are separate individuals both cannot share the same mother.

Further, the beneficiaries' status as nonsignatories to the arbitration contract does not, in itself, answer the question of arbitrability—many types of nonsignatories are bound by arbitration agreements under traditional principles of contract and agency law. The South Carolina Supreme Court recognizes that the issue of whether an arbitration clause can be enforced against nonsignatories is a matter of substantive arbitration law, reviewed *de novo* by the courts. *Wilson*, 426 S.C. at 335.

Here, although the statutory beneficiaries did not sign the Agreement, Respondent (the personal representative bringing this wrongful death claim) stands in the shoes of the Decedent, who *did* sign the Agreement. The proper question was not simply, "Are the beneficiaries nonsignatories?" but rather, "Whose claim is this?" As established above, the personal representative makes a wrongful death claim for the potential beneficiaries. The beneficiaries do not bring the claim individually. Because the claim is made by the personal representative, enforcing Decedent's prior agreement falls in line with ordinary principles of contract enforcement.

South Carolina courts routinely enforce arbitration agreements signed by decedents in wrongful death claims, as Appellants argued below. (Transcript p. 13-14). In fact, the South Carolina Supreme Court has held that "courts may not refuse to compel arbitration simply because a wrongful death claim is involved." *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 378, 759 S.E.2d 727, 731 (2014). Similarly, in *Gray v. PruittHealth-N. Augusta, LLC*, the

Court reversed the trial court's denial of the defendant's motion to dismiss and compel arbitration in a wrongful death suit. Op. No. 2024-UP-292 (S.C. Ct. App. Filed August 7, 2024). It should do the same here.

B. The Circuit Court's reliance on *Solesbee* was misplaced.

In its Order, the Circuit Court relied on the South Carolina Court of Appeals' decision in *Est. of Solesbee by Bayne v. Fundamental Clinical & Operational Servs., LLC*, 438 S.C. 638, 885 S.E.2d 144 (Ct. App. 2023), *reh'g denied* (Apr. 14, 2023), *cert. denied* (Apr. 16, 2024). That reliance was misplaced. In *Solesbee*, a personal representative brought survival and wrongful death claims after a nursing home resident's death, and the nursing home sought to compel arbitration based on an agreement signed, crucially, **by the resident's family member**. The Court of Appeals ultimately affirmed the denial of arbitration in that case—but it did so because it found no valid arbitration agreement was ever formed with the decedent, as the family member who signed lacked authority to bind the decedent. *Id.* at 648.

That holding (like similar holdings in *Coleman* and *Hodge*, cited by the *Solesbee* court) has no bearing on the present case because here it is undisputed that a valid arbitration agreement *does* exist and does bind the Decedent, as evidenced by the Order compelling arbitration as to the survival claim. (Order Granting Motion to Compel Arbitration as to Survival p. 2-3). The *Solesbee* court did note, in discussing the trial court's ruling, that the trial judge had alternatively opined that even if an agreement existed it could not bind the wrongful death beneficiaries. *Estate of Solesbee by Bayne*, 438 S.C. at 645. However, the Court of Appeals in *Solesbee* then expressly declined to reach or decide that issue. In fact, the Court of Appeals acknowledged the nursing home's argument that if the decedent was bound, the wrongful death beneficiaries would be bound as well, and stated, "However, we previously found the Arbitration

Agreement is not enforceable against [the decedent] because she did not sign it … thus, [the decedent]'s cause of action was not barred at the time of her death." *Id.* at 650.

In other words, because the agreement in *Solesbee* was invalid as to the decedent at the time of death, the beneficiaries could proceed in court—a classic application of the derivative principle. The *Solesbee* court had no need to address what would happen if the agreement had bound the decedent. Contrary to Respondent's suggestion, *Solesbee* does not establish a rule that wrongful death claims are *per se* exempt from arbitration. Besides, any such pronouncement would have been dicta, given that the lack of a binding agreement was both dispositive to the outcome of the case and anterior to any issues arising out of the existence of a binding agreement. *See Hagood v. Sommerville*, 362 S.C. 191, 199, 607 S.E.2d 707, 711 (2005) (declining to address an issue when the resolution of a prior issue is dispositive).

3. The Federal Arbitration Act (FAA) preempts any state-law rule that would exclude wrongful death claims from arbitration agreements.

A. The FAA governs the Arbitration Agreement.

Even if this Court were to entertain the notion that South Carolina law could treat arbitration agreements differently than other contracts executed by decedents during their lifetimes (*e.g.*, releases of liability), any such state-law limitation would be preempted by the Federal Arbitration Act (FAA), 9 U.S.C.A. § 1 *et seq*. As the Circuit Court noted below, the Supreme Court of South Carolina's decision in *Dean*, 408 S.C. 371 requires that the FAA "applies to nursing home arbitration agreements and governs the interpretation and enforcement of the agreement at issue in this matter." (Order Granting Motion to Compel Arbitration as to Survival, p. 2). The FAA therefore governs and mandates that the Agreement be considered "valid, irrevocable, and enforceable" save only for general contract defenses not at issue here. 9 U.S.C.A. § 2.

B. State law may not discriminate against arbitration agreements.

The U.S. Supreme Court has made clear that state courts may not adopt special rules that discriminate against arbitration or refuse to enforce arbitration agreements based on the subject matter of the claim. In *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 132 S. Ct. 1201, 182 L. Ed. 2d 42 (2012) (per curiam), the U.S. Supreme Court unanimously struck down a West Virginia rule that had declared pre-dispute arbitration agreements unenforceable in wrongful death and personal injury cases against nursing homes. As the court noted, "[t]he FAA provides that a 'written provision in … a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction … shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.' 9 U.S.C. § 2." *Id.* at 532. Nonetheless, the West Virginia Supreme Court had held such arbitration clauses void as against public policy in cases of patient injury or death. *Id.* at 532. The U.S. Supreme Court vacated that decision, holding that the state's policy was preempted by the FAA. The Supreme Court reaffirmed that "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." *Id.* at 533 (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011)).

As clarified in *Marmet*, any rule, whether statutory or judicial, that exempts wrongful death suits from arbitration agreements is invalid under the Supremacy Clause. Our state's own Supreme Court has applied this reasoning in several cases. "An arbitration clause may be invalidated under a state law only if that law governs the enforceability of all contracts generally." *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 540, 542 S.E.2d 360, 364 (2001) "State law [is] therefore preempted to the extent it [would] invalidate[] the arbitration agreement." *Bradley v. Brentwood Homes, Inc.*,

398 S.C. 447, 454, 730 S.E.2d 312, 315 (2012) (emphasis and internal quotations omitted). In *Dean*, the court noted that *Marmet* had "invalidat[ed] West Virginia's policy refusing to refer wrongful death claims against a nursing home to arbitration." 408 S.C. at 378.

Thus, the Circuit Court's ruling singling out arbitration agreements for disparate treatment compared to other contracts cannot stand in the face of the FAA. The FAA requires courts to "place arbitration agreements on equal footing with other contracts … and enforce them according to their terms[.]" *Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 9, 791 S.E.2d 128, 132 (2016) (quoting *AT&T Mobility LLC*, 563 U.S. at 339) (alterations in original; internal citations omitted). *See also Kindred Nursing Centers Ltd. P'ship v. Clark*, 581 U.S. 246, 251, 137 S. Ct. 1421, 197 L. Ed. 2d 806 (2017) (holding that Kentucky's clear-statement rule, requiring an explicit statement in a power of attorney that the attorney-in-fact has authority to waive the principal's state constitutional rights to access the courts and to a jury trial, disfavors arbitration agreements and therefore is preempted by the FAA). Similarly, the South Carolina Supreme Court and Court of Appeals have insisted that "the FAA requires that courts treat arbitration agreements the same as all other contracts—no more, no less." *Lampo v. Amedisys Holding, LLC*, 445 S.C. 305 (2025) (citing the Court of Appeals opinion in the same case).

Unfortunately, the result here could be read to violate the FAA's requirement of equal treatment. Comparing the Circuit Court's treatment of Decedent's Arbitration Agreement to that of an analogous contractual agreement, the disparity is evident: as discussed, if Decedent had signed a contract waiving her right to sue in court (*e.g.*, a release or covenant not to sue), South Carolina law would unquestionably mandate enforcement of that contract against the wrongful death claim. *Rish v. Seaboard Air Line Ry.*, 106 S.C. 143, 90 S.E. 704. Singling out an agreement to arbitrate for non-enforcement in the same scenario would be discriminatory. The FAA preempts

any such result. The proper analysis is to enforce the arbitration contract "as written" for all disputes it encompasses. *See AT&T Mobility LLC*, 563 U.S. at 352.

The Circuit Court's ruling, if allowed to stand, effectively creates a class-based exception: wrongful death claimants are bound by a decedent's contracts *except* for arbitration agreements. This is precisely the result that *Marmet* and *Kindred Nursing* forbid. Moreover, the FAA's mandate applies with full force in state courts, including South Carolina's. *Dean*, 408 S.C. at 379 ("[T]he basic purpose of the [FAA] is to overcome courts' refusals to enforce agreements to arbitrate, and ensure that arbitration will proceed in the event a state law would have a preclusive effect on an otherwise valid arbitration agreement.") (alterations in original; internal quotations omitted).

Finally, it is noteworthy that enforcing arbitration for the wrongful death claim will serve the FAA's goals of efficient, streamlined dispute resolution. Currently, the survival claim and wrongful death claim are bifurcated. This is not efficient and risks inconsistent determinations on the same facts. There is a strong interest in resolving all claims arising from Decedent's care in the single forum on which the parties agreed. The FAA's purpose is furthered by a ruling that the wrongful death claim should join the survival claim in arbitration, whereas no countervailing interest (legal or equitable) justifies keeping it in court. The potential wrongful death beneficiaries will not be prejudiced by arbitration. They are represented by the same counsel and arbitration would provide a forum to be heard sooner than waiting for a jury trial. Indeed, *Marmet* and *Dean* make clear that arbitration is not an inferior forum even for significant claims like wrongful death; it is simply a different forum, one that Decedent chose in advance. Respecting that choice is a matter of both federal law and fundamental contract law.

In sum, the FAA requires that the wrongful death claim here must proceed in arbitration. Any state rule that might have been interpreted to exclude wrongful death actions from arbitration would in any event be preempted by controlling federal law. This Court should therefore apply the FAA and hold the Arbitration Agreement enforceable as to all claims within its scope, including the wrongful death cause of action.

4. The issue, whether Respondent is bound by the Arbitration Agreement, is preserved for appeal.

Appellants properly raised the issue of whether Respondent is bound by the Arbitration Agreement below. Appellants argued that the Agreement binds Respondent just as it bound Decedent at the time of death. Respondent disputed this argument, contending instead that Respondent is not a party to, and therefore cannot be bound by, the Agreement. The Circuit Court ruled on this issue in favor of Respondent, holding that Respondent was not bound by the Agreement. Thus, the issue is preserved for appellate review.

"There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301–02, 641 S.E.2d 903, 907 (2007). As will be discussed below, each of these four requirements has been met: (1) the issue was raised to and ruled upon by the Circuit Court. This is evident from the record, as will be shown below; (2) Appellants raised the issue; (3) Appellants raised the issue in a timely manner, first in their Memorandum of Law In Support of Their Motion to Compel Arbitration, next at oral argument, and again in their Motion to Reconsider; and (4) Appellants raised the issue with sufficient specificity.

An issue is preserved when the issue was raised such that the alleged error could be reasonably understood by both parties. "A trial court's opportunity to rule necessarily includes both parties being aware of the nature of the objection such that they may present their best arguments addressing that objection." *State v. Morales*, 439 S.C. 600, 609, 889 S.E.2d 551, 556 (2023) (citing *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012)). In their Memorandum of Law, Appellants argued that "a valid contract exists between the parties" because a valid contract existed between Decedent and Appellants. (Appellants' Memorandum of Law, p. 4). Appellants argued that Respondent is "bound to arbitrate this dispute," and that both the survival and wrongful death "claims fall squarely within the ambit of the Arbitration Agreement." (Id. at p. 3). Appellants further argued that Decedent "formed a binding contract with the facility," (Id. at p. 8), that "the particular dispute" between Appellants and Respondent "is arbitrable under the law," (Id. at p. 9), and finally that "[Respondent]'s claims against [Appellants] arise out of [Decedent]'s admissions to the Facility." (Id. at p. 12).

Further, a review of the Transcript makes it clear that Respondent was well aware of the nature of Appellants' argument. In fact, Appellants' argument was characterized aptly by Respondent's counsel during oral argument as follows:

> The bigger issue is [Appellants' counsel] represented that there's an agreement between the parties. They're certainly not. Ms. Manasse isn't a party to the lawsuit; she's deceased. The proper party, the plaintiff, is her son, Brian Delesline. He is a wrongful death beneficiary with his own separate and distinct claims from Ms. Manasse. He never signed the agreement. He never reviewed the agreement. He's never entered into any agreement with the defendants. He's here to

> pursue a survival action on behalf of Ms. Manasse and her estate, but he's also there to pursue his own wrongful death claims. As a wrongful death beneficiary, his claims are separate and distinct from anything that Ms. Manasse would have the authority to sign away.

(Transcript, p. 11-12). Respondent's counsel clearly apprehended the nature of Appellants' argument. Respondent accordingly had an opportunity to make his best arguments and did so. If that were not enough on its own, Appellants' counsel responded to this counterargument by offering to provide the court with additional briefing.

> Your Honor, you know, I appreciate counsel's kind of creative arguments about wrongful death and survival, and if you need additional briefing on that, I'm happy to provide it, but our courts apply arbitration agreements to both wrongful death and survival claims routinely in this state.

(Id. at p. 13-14). Next, Respondent's counsel—again, clearly aware that Appellants' entire argument was premised on the notion that Respondent stands in the shoes of Decedent—promptly offered a rebuttal.

> [Respondent's counsel]: Can I make one final point, Your Honor, about the wrongful death piece?
>
> THE COURT: Certainly.
>
> [Respondent's counsel]: The state -- state law is clear that survival claims and wrongful death claims are separate and distinct. The plaintiff here, who has his own wrongful death claim, is a non-signatory to this agreement. He cannot be

bound by someone else's signature to any agreement.

(Id. at p. 14).

The Circuit Court ruled on the issue in favor of Respondent, writing that "the wrongful death claim is separate and distinct and belonging [sic] to the Decedent's beneficiaries and thus, such claims are not subject to the Arbitration Agreement." (Order Denying Motion to Compel Arbitration as to Wrongful Death, p. 9). Appellants timely filed a Motion to Reconsider which cited supplemental authorities on the issue at bar. (Motion to Reconsider filed December 23, 2024). As discussed above, the issue had already been raised, but Appellants felt that the Court misapprehended the derivative nature of a wrongful death claim.

The South Carolina Supreme Court highlights this precise scenario as a proper use of a motion to reconsider: "[t]here is nothing inherently unfair in allowing a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument. It is inherently unfair to disallow such an opportunity." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 22, 602 S.E.2d 772, 779 (2004). Further proving that point, Respondent filed a Memorandum of Law in Opposition to Appellants' Motion, arguing that Appellants were now precluded from citing additional authorities establishing the derivative principle. Clearly, Respondent was not prejudiced by Appellants' Motion to Reconsider because he go the last word, arguing that "[Appellant]'s initial Memorandum in Support does not use the word 'derivative' 'separate' or 'distinct' once." And Respondent's criticism there is picayune. Determining whether an issue has been properly raised cannot be accomplished by noting the presence or absence of certain magic words: "the party is not required to use the exact name of a legal doctrine to preserve the issue." *Buist v. Buist*, 410 S.C. 569, 574–75, 766 S.E.2d 381, 383–84 (2014) (citations omitted). Moreover, "courts should not apply preservation rules in a technical manner as if this is some sort of game of 'gotcha' elevating form over substance to trap trial

lawyers so as to prevent the appeal of a legitimate issue." *Morales*, 439 S.C. at 609, 889 S.E.2d at 556. *See also Cone v. State*, 443 S.C. 487, 494, 905 S.E.2d 368, 372 (2024) (same). Simply put, the issue of whether the survival and wrongful death claims were bound by Decedent's prior agreement to arbitrate was squarely before the court the entire time. The issue was raised, argued, and ruled upon, and therefore it was preserved.

CONCLUSION

For the reasons stated herein, Appellants urge that the decision of the Circuit Court be REVERSED, and that an order be entered compelling arbitration of all claims in this action in accordance with the Arbitration Agreement and the FAA.

Respectfully submitted this 28th day of April, 2025.

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