

Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS

NO. SJC-13282

SUFFOLK COUNTY

MICHAEL CUDDY, Special Personal Representative and
GRACE FABIANO, Personal Representative of
the Estate of Ralph Fabiano
Plaintiffs-Appellants

v.

PHILIP MORRIS USA, INC. and SHAW'S SUPERMARKETS, INC.
Defendants-Appellees

ON APPEAL FROM ORDERS OF SUFFOLK COUNTY SUPERIOR COURT
BUSINESS LITIGATION SESSION

**BRIEF FOR AMICUS CURIAE:
MASSACHUSETTS DEFENSE LAWYERS ASSOCIATION**

Kevin W. Buono, Esq.
BBO#693548

MORRISON MAHONEY LLP
250 Summer Street
Boston, MA 02210
Tel. (617) 439-7558
Fax (617) 342-4997
kbuono@morrisonmahoney.com

Dated: November 14, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....4

STATEMENT OF INTEREST OF *AMICUS CURIAE*.....9

DECLARATION PURSUANT TO MASS. R. A. P. 17(c)5.....10

STATEMENT OF ISSUES.....11

STATEMENT OF THE CASE.....11

STATEMENT OF THE FACTS.....11

SUMMARY OF ARGUMENT.....11

ARGUMENT.....15

I. THE JUDICIARY’S “DERIVATIVE INTERPRETATION” OF THE WRONGFUL DEATH STATUTE IN GGNSC IS DETERMINATIVE OF THE QUESTION PRESENTED BY THE APPEAL.....17

- A. *The Judiciary Branch Has Interpreted Claims for Wrongful Death Brought Pursuant to M.G.L. c. 229, § 2 as “Derivative” of A Decedent’s Claims For Personal Injury and No Subsequent Amendments to § 2 or Other Grounds Exist to Retract A Derivative Interpretation.....17*
- B. *The Derivative Interpretation of Claims Under the Chapter 229, § 2 Requires Dismissal of an Estate’s Wrongful Death Claims if its Decedent Could Not Himself Have Maintained an Individual Claim Arising Out of the Injury that Caused His Death.....22*
- C. *The Court Should Endorse the Trial Court’s Reading of § 2 as Permitting Only “Viable” Causes of Action to be Filed within the Three-Year Limitations Period.....31*

<p>II. THE COURT'S PRIOR PRECEDENTS SUPPORT THE PRINCIPLE THAT A DECEDENT MAY BIND HIS ESTATE BY HIS OWN DECISIONS, ACTS, AND OMISSIONS, WHETHER CONCIOUS OR UNCONSCIOUS.....</p>	34
<p>III. BARRING WRONGFUL DEATH CLAIMS IN CASES WHERE THE DECEDENT'S PERSONAL INJURY CLAIMS HAVE LAPSED UNDER THE APPLICABLE STATUTE OF LIMITATIONS ADVANCES THE LEGISLATIVE POLICY EVINCED BY SUCH STATUTES.....</p>	41
CONCLUSION.....	45
CERTIFICATE OF COMPLIANCE.....	47
CERTIFICATE OF SERVICE.....	48

TABLE OF AUTHORITIES

CASES :

Adams v. Armstrong World Indus., Inc.,
596 F. Supp. 1407 (D. Idaho 1984),
rev'd in part on other grounds, 790 F.2d 893
(9th Cir. 1986) 24, 25, 26, 28, 29

Behurst v. Crown Cork & Seal USA, Inc.,
203 P.3d 207 (Or. 2009) 20

Bell v. Morrison,
26 U.S. 351 (1828) 43

Brink v. Continental Cas. Co.,
2022 WL 3334509 (D.D.C. 2022) 27

Brown v. Union Pac. R.R. Co.,
2020 WL 3428984 (D. Neb. 2020) 27

Campione v. Wilson,
422 Mass. 185 (1996) 30

Castorena v. Gen. Elec.,
238 P.3d 209 (Idaho 2010) 29

Chase Sec. Corp. v. Donaldson,
325 U.S. 304 (1945) 44

Cuddy v. Philip Morris USA Inc.,
No. 1784CV02213-BLS1, 2021 WL 6880839
(Mass. Super. 2021) 32

Deggs v. Asbestos Corp. Ltd.,
381 P.3d 32 (Wash. 2016) 27

DeHart v. Ohio Fuel Gas Co.,
85 N.E.2d 586 (Ohio App. 1948) 26

Delesma v. City of Dallas,
770 F.2d 1334 (5th Cir. 1985) 40

Doherty v. Diving Unlimited Int'l, Inc.,
484 Mass. 193 (2020) 21, 38

<u>Doty v. Dorsch</u> , 449 P.3d 1233 (Table), 2019 WL 5090387 (Kan. Ct. App. 2019)	27
<u>Drake v. St. Francis Hosp.</u> , 560 A.2d 1059 (Del. 1989)	27
<u>Edwards v. Fogarty</u> , 962 P.2d 879 (Wyo. 1998)	27, 43
<u>Est. of Stokes ex rel. Spell v. Pee Dee Fam. Physicians, L.L.P.</u> , 699 S.E.2d 143 (2010)	27
<u>Fidler v. E.M. Parker Co.</u> , 394 Mass. 534 (1985)	20
<u>Gaudette v. Webb</u> , 362 Mass. 60 (1972)	20, 36, 44
<u>Gerald v. R.J. Reynolds Tobacco Co.</u> , 67 V.I. 441 (2017)	28
<u>GGNSC Admin. Servs., LLC v. Schrader</u> , 484 Mass. 181 (2020)	<i>passim</i>
<u>Gilman v. Shames</u> , 208 A.3d 1279 (Conn. App. 2019)	28
<u>Gramlich v. Travelers Ins. Co.</u> , 640 S.W.2d 180 (Mo. Ct. App. 1982)	26
<u>Hallett v. Town of Wrentham</u> , 398 Mass. 550 (1986)	37
<u>Hecht v. Ohio & M. R. Co.</u> , 32 N.E. 302 (Ind. 1892)	36
<u>Hicks v. Missouri Pac. R. Co.</u> , 181 F. Supp. 648 (W.D. Ark. 1960)	25, 26
<u>In re Labatt Food Serv., L.P.</u> , 279 S.W.3d 640 (Tex. 2009)	20
<u>Ingenito v. AC & S, Inc.</u> , 633 A.2d 1172 (Pa. Super. 1993)	27

<u>Kane v. Rohrbacher,</u> 83 F.3d 804 (6th Cir. 1996)	40
<u>Klein v. Catalano,</u> 386 Mass. 701 (1982)	42
<u>Lambert v. Vill. of Summit,</u> 433 N.E.2d 1016 (Ill. App. 1982)	27-28, 43
<u>Laramie v. Philip Morris USA Inc.,</u> 488 Mass. 399 (2021)	21
<u>Larcher v. Wanless,</u> 557 P.2d 507 (Cal. 1976)	25
<u>Lawlor v. Cloverleaf Mem'l Park, Inc.,</u> 243 A.2d 293 (N.J. Super. Law. Div. 1968)	26
<u>Marco v. Green,</u> 415 Mass. 732 (1993)	45
<u>Mellon v. Goodyear,</u> 277 U.S. 335 (1928)	39
<u>Miller v. Luther,</u> 489 N.W.2d 651 (Wis. Ct. App. 1992)	26
<u>Mirick v. Phelps,</u> 297 Mass. 250 (1937)	34
<u>Mummert v. Alizadeh,</u> 77 A.3d 1049 (Md. 2013)	28
<u>N.O. Nelson Mfg. Corp. v. Dickson,</u> 53 N.E.2d 640 (Ind. App. 1944)	25
<u>Neill v. Brackett,</u> 234 Mass. 367 (1920)	34
<u>Nelson v. Am. Nat. Red Cross,</u> 26 F.3d 193 (D.C. Cir. 1994)	27
<u>Nierman v. Hyatt Corp.,</u> 59 Mass. App. Ct. 844 (2003), rev'd on choice-of-law grounds, 441 Mass. 693 (2004)	44

<u>Nierman v. Hyatt Corp.,</u> 441 Mass. 693 (2004)	41
<u>Order of R.R. Telegraphers v. Ry. Express Agency,</u> 321 U.S. 342 (1944)	42
<u>Quincy Tr. Co. v. Town of Pembroke,</u> 346 Mass. 730 (1964)	30
<u>Russell v. Ingersoll-Rand Co.,</u> 841 S.W.2d 343 (Tex. 1992)	27
<u>Saab v. Massachusetts CVS Pharmacy, LLC,</u> 452 Mass. 564 (2008)	39
<u>Santos v. Lumbermens Mut. Cas. Co.,</u> 408 Mass. 70 (1990)	37
<u>Sinopoli v. R.J. Reynolds Tobacco Co.,</u> No. 2176-CV-00087, 2021 WL 8134423 (Mass. Super. 2021)	32
<u>Sisson v. Lhowe,</u> 460 Mass. 705 (2011)	37, 45
<u>Skridla v. Gen. Motors Co.,</u> 46 N.E.3d 945 (Ill. App. 2015)	27
<u>Smith v. McComb Infirmary Ass'n,</u> 196 So. 2d 91 (Miss. 1967)	25
<u>St. Francis Hosp. v. Thompson,</u> 31 So. 2d 710 (Fla. 1947)	26
<u>United States v. Kubrick,</u> 444 U.S. 111 (1979)	43
<u>W. Union Tel Co. v. Preston,</u> 254 F. 229 (3d Cir. 1918)	25
<u>Wall v. Massachusetts Ne. St. Ry. Co.,</u> 229 Mass. 506 (1918)	35, 37
<u>Wilson v. Jackson Hill Coal & Coke Co.,</u> 95 N.E. 589 (Ind. App. 1911)	25

STATUTES:

F.S.A. § 768.02..... 26

M.G.L. c. 152, § 24..... 38

M.G.L. c. 229..... *passim*

M.G.L. c. 229, § 2..... *passim*

M.G.L. c. 260, § 2A..... 41, 45

M.G.L. c. 260, § 4..... 45

M.G.L. c. 260, § 7..... 44

RULES:

Mass. R. A. P. 17(c)5..... 10

ACTS AND RESOLVES:

St. 1958, c. 238, § 1..... 12, 19, 36

St. 1989, c. 215, § 1..... 22

OTHER AUTHORITIES:

2 Harper & James, *Torts* § 24.6 (1956)..... 39

12 AM. JUR. TRIALS, *Wrongful Death Actions* (1966)..... 20

22 Am.Jur.2d § 37 (1965 and 1984 supp.)..... 25

Developments in the Law: Statutes of Limitations,
63 Harv. L. Rev. 1177 (1950) 42

Joseph W. Glannon, *Massachusetts Statutes of
Limitations: A User's Guide*,
19 Suffolk J. Trial & App. Advoc. 1 (2014) 44

Milhollin, *Interest Analysis and Conflicts Between
Statutes of Limitation*,
27 Hastings L.J. 1 (1975) 44

Prosser, *Torts* (4th ed. 1971)..... 39

Restatement (Second) of Judgments § 46 (1982)... 39, 40

Restatement (Second) of Torts § 899 (1979)..... 23

S. SPEISER, *Recovery for Wrongful Death*,
(2d ed. 1975)..... 23-24

STATEMENT OF INTEREST OF AMICUS CURIAE

The Massachusetts Defense Lawyers Association ("MassDLA"), *amicus curiae*, is a voluntary, non-profit, statewide professional association of trial lawyers who defend corporations, individuals, and insurance companies in civil lawsuits. Members of the MassDLA do not include attorneys who, for the most part, represent claimants in personal injury litigation. The purpose of the MassDLA is to improve the administration of justice, legal education, and professional standards, and to promote collegiality and civility among members of the Bar. To promote its objectives, the MassDLA participates as *amicus curiae* in cases raising issues of importance to its members, their clients, and the judicial system. The MassDLA believes that this is such a case and that its perspective can assist the court in resolving the important issues raised by this appeal.

DECLARATION PURSUANT TO MASS. R. A. P. 17(c)5

Pursuant to Massachusetts Rule of Appellate Procedure 17(c)5, the *amicus curiae* hereby declares the following:

- a. this brief was not authored in whole or in part by any party;
- b. the preparation or submission of this brief was not funded by any party;
- c. no other person or entity, other than the *amicus curiae*, contributed money intended to fund the preparation or submission of this brief; and
- d. the *amicus curiae* does not represent and has not represented any of the parties to the present appeal in another proceeding involving similar issues, nor was the *amicus curiae* a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

STATEMENT OF ISSUES

Whether the personal representative of an estate may nevertheless bring a claim for wrongful death pursuant to M.G.L. c. 229, § 2 within the three-year statute of limitations provided for therein even though the estate's decedent did not prosecute individual claims for damages arising from the injury that caused his death within the limitations period applicable to such claims.

STATEMENT OF THE CASE

The MassDLA, as *amicus curiae*, adopts the parties' statement of the case regarding the prior proceedings.

STATEMENT OF THE FACTS

The MassDLA, as *amicus curiae*, takes no position regarding the facts of the case on appeal, which do not appear to be in dispute, and devotes this brief to the questions posed in the Court's announcement soliciting *amicus* briefs, under the factual circumstances described therein.

SUMMARY OF ARGUMENT

The personal representative of a decedent's estate should not be permitted to bring claims for wrongful death pursuant to M.G.L. c. 229, § 2 if the estate's decedent failed to bring individual claims for damages

arising from the injury that caused his death within the limitations period applicable to any such claims, even if the wrongful death claim is filed within the three-year statute of limitations for such claims.

In Massachusetts, wrongful death claims are founded in the common law, but must be prosecuted in accordance with the statutory procedures set forth in the wrongful death statute. Under amendments to the statute enacted by the Legislature in 1958, those procedures permit compensation for wrongful death only "under such circumstances that the deceased could have recovered damages for personal injuries if his death had not resulted." St. 1958, c. 238, § 1. This court recently interpreted this amendment as an express tethering, by the Legislature, of wrongful death claims to the tortious conduct that caused the decedent's personal injury, and determined that "no cause of action for wrongful death exists unless the decedent could have sued for personal injury," finding, in other words, that wrongful death claims are "derivative" of the underlying personal tort claims available to decedents during their lifetimes. GGNSC Admin. Servs., LLC v. Schrader, 484 Mass. 181, 188 (2020) (hereinafter, "GGNSC"). The court in GGNSC therefore adopted the "majority rule" among

States to have considered the issue, which bars death actions by beneficiaries unless the estate's decedent could have brought an action himself for the personal injuries that caused his death. The court applied the rule under the facts before it in concluding that, since the estate's decedent could not have prosecuted her individual tort claims in court—because she had signed an arbitration agreement—neither could her estate, following her death, prosecute wrongful death claims derivative of the same personal injury claims that the decedent had bound herself to arbitrate out of court. Id. at 191-192.

The prerequisite described in GGNSC, that decedents must themselves have been capable of bringing an action for the injuries that caused their death in order for their estates to prosecute wrongful death claims, is not exclusive to the issue of arbitrability addressed in that case. Rather, the majority rule adopted in GGNSC has broad applicability and provides that if there exists *any* meritorious defense to the individual personal injury claims of a decedent, that defense also operates to bar any wrongful death claims which are derivative of the personal injury claims. (Pages 17-34)

In the instant appeal, it is undisputed that the appellant's decedent failed to file timely personal injury claims for the development of her ultimately fatal emphysema and chronic obstructive pulmonary disorder, allegedly caused by the appellees' products. Under the rule set forth in GGNSC, that decision binds her estate against prosecuting wrongful death claims that are derivative of that injury. The judgment of the trial court should therefore be affirmed.

The MassDLA further believes that a broad application of the majority rule announced in GGNSC would be consistent with prior decisions of this court concerning the power, responsibility, and capability of individuals to bind the conduct of their estates through their decisions, acts, and omissions. (Pages 34-40)

Moreover, adherence to the majority approach would also further the legislative purposes of the Commonwealth's various statutes of limitation, which have as their aim to balance the needs of citizens to redress injuries with their right to be protected from protracted exposure to liability. (Pages 41-45)

ARGUMENT

As amicus curiae, the MassDLA offers its perspective on three considerations, one determinative and two suggestive, that inform the answer to the question presented in the court's solicitation of briefs.

The first, singularly-determinative consideration concerns the breadth of the applicability of this court's determination in GGNSC that common law claims for wrongful death pursued under M.G.L. c. 229 are "derivative" of a decedent's claims arising from the injury common to both claims. Since the Legislature has not amended the Commonwealth's wrongful death statute since GGNSC, and the court had not been presented with any convincing reasons to retract its derivative interpretation, that interpretation is determinative of the question presented in this appeal. That interpretation informed the rule announced in GGNSC that "no cause of action for wrongful death exists unless the decedent could have sued for personal injury." Accordingly, where a decedent would have no cause of action for personal injury because he failed to file a complaint within the time prescribed in the applicable statute of limitations, his estate may not file a

wrongful death claim arising from the same injury under c. 229, § 2, even if the death action is filed within the three years prescribed in that statute.

The two ancillary considerations that the amicus curiae believes are also strongly suggestive of the result it advances concern (i) the legislative policy manifested by the Commonwealth's various statutes of limitation, enacted primarily to prevent the filing of prejudicially stale claims, and (ii) a line of consistent decisions by this court that support an advisable general principal that citizens of the Commonwealth should be empowered, while living, to plan and bind the conduct of their estates in accordance with their wishes. This succession of decisions has held that the omissions of a decedent, no less than his affirmative acts, are binding on the conduct of a personal representative who purports to act on his behalf. A logical extension of that principal would hold that a decedent who failed (or consciously decided not) to bring personal injury claims binds his estate against prosecuting actions that are derivative of those claims. Each of these considerations are addressed in turn.

I. THE JUDICIARY'S "DERIVATIVE INTERPRETATION" OF THE WRONGFUL DEATH STATUTE IN GGNSC IS DETERMINATIVE OF THE QUESTION PRESENTED BY THE APPEAL.

A. *The Judiciary Branch Has Interpreted Claims for Wrongful Death Brought Pursuant to M.G.L. c. 229, § 2 as "Derivative" of A Decedent's Claims For Personal Injury and No Subsequent Amendments to § 2 or Other Grounds Exist to Retract A Derivative Interpretation.*

In GGNSC, this court addressed for the first time whether the wrongful death claim of a statutory beneficiary under the modern-day version c. 229, § 2 is derivative of the decedent's individual tort claims arising from the same injury and concluded that it was. 484 Mass. at 184. The court was asked to address that question because the decedent in the case, a nursing home patient, had signed an arbitration agreement that bound her to arbitrate (out of court and without a jury) any claims she may have had against the defendant, a nursing home. After the decedent died while in the defendant's care, the personal representative of her estate filed a wrongful death claim against the defendant, which in turn sought to compel the estate to honor the arbitration agreement signed by the decedent. Id. at 182-184. As the court explained, determining whether the estate should be bound to honor the arbitration agreement signed by the decedent required a

further determination whether the estate's wrongful death claim was "derivative" or "independent" of the decedent's potential personal injury claims against the nursing home. As the court explained:

If[, on the one hand,] we characterize claims of beneficiaries under a wrongful death statute as "derivative," then the wrongful death liability is but an extension of the decedent's personal injury claim. This means that the beneficiaries of the death action can sue only if the decedent would still be in a position to sue. Courts that follow this interpretation emphasize that the same tortious "conduct" which caused the decedent's personal injury also undergirds the wrongful death action. Under this view, because the wrongful death action is derivative of the decedent's rights, the decedent enjoys exclusive rights over the wrongful death action such that he or she can agree to arbitrate that claim entirely.

[But if,] [o]n the other hand, [] claims under a wrongful death statute are "independent," then the decedent's disposition of his personal injury claim would have no effect on the wrongful death claim. The situation would be as though the injured person and his beneficiary each had a separate legal interest in his life, assertable by separate action. Courts following this interpretation have held that wrongful death liability does not concern recovery for personal injury at all or any other claim that the decedent may have had against the tortfeasor. [Rather,] [t]he action deals only with the economic effect the decedent's death had upon specific family members. Thus, the decedent would be without authority to bind beneficiaries ... to arbitration for her wrongful death claims.

Id. at 185-186 (cleaned up; internal citations and quotations omitted).

After setting forth the stakes, the court undertook a thorough analysis of whether claims brought under the Massachusetts wrongful death statute were "derivative" or "independent" of the claims of decedents. After summarizing the succession of amendments made to the statute since 1840, the court determined that a 1958 amendment to the statute limited recovery thereunder to "such circumstances that the deceased could have recovered damages for personal injuries if his death had not resulted. Id. at 188, citing St. 1958, c. 238, § 1. The court interpreted this clause literally as meaning that a decedent's executor or administrator can bring a negligence claim pursuant to Chapter 229, § 2 "only 'under such circumstances' in which the decedent could have raised an ordinary negligence claim" himself. Id. The court found that this clause favored a derivative interpretation. Id.

Likewise, the court found that the "language and structure" of Chapter 229 favored a derivative interpretation as well, since it separated the permissible claimant (under § 2, only the personal representative of the estate) from the permissible beneficiaries (the categories of survivors enumerated in § 1). The court therefore reasoned that the Legislature

"thereby intended wrongful death rights to remain tied to the decedent's action." Id.

Finally, the court traced the historical development of judicial interpretations of Chapter 229, noting that several precedents which had interpreted the statute as creating independent causes of action for estate beneficiaries had been overruled following the 1958 amendment. Id. at 189-190. By systematic comparison of judicial interpretations of Chapter 229 from the early twentieth century to those made after the 1958 amendment, the court determined that, "[o]verall the 'trend in our law is against allowing' claims under [Chapter 229], § 2 to be independent of the decedent's own cause of action." Id. at 190, quoting Fidler v. E.M. Parker Co., 394 Mass. 534, 547 (1985). See also Gaudette v. Webb, 362 Mass. 60, 71 (1972).

For these reasons, and considering the majority view expressed in decisions from other jurisdictions,¹ the GGNSC court concluded that wrongful death actions must be precluded unless the decedent could have brought

¹ GGNSC, 484 Mass. at 190, citing 12 AM. JUR. TRIALS, *Wrongful Death Actions* § 16, at 344-345 (1966); Behurst v. Crown Cork & Seal USA, Inc., 203 P.3d 207, 213 (Or. 2009); In re Labatt Food Serv., L.P., 279 S.W.3d 640, 646 (Tex. 2009).

an action for the injuries that caused his death. 484 Mass. at 191.

Because the nursing home patient in GGNSC had executed a binding arbitration agreement, the court found she could not have pursued personal injury claims against the defendant nursing home in the Superior Court had she survived her injuries. Thus, given the finding that her estate's wrongful death claims were derivative rather than individual, the court held that the majority rule required that the wrongful death claim be dismissed for the same reason the decedent's claim would have been dismissed had she lived, to wit, the arbitration agreement she signed prohibited prosecution of personal injury claims in the Superior Court. Id. at 192.

In the short time since GGNSC was decided, this court has twice reaffirmed its adoption of a derivative interpretation of Chapter 229. See Doherty v. Diving Unlimited Int'l, Inc., 484 Mass. 193, 196 (2020) (Chapter 229, § 2 "creates a derivative right of recovery for the statutory beneficiaries" listed in § 1); Laramie v. Philip Morris USA Inc., 488 Mass. 399, 406 (2021) (awards under Chapter 229, § 2 are "tied directly to the decedent").

No amendments to c. 229 have been enacted since the court's decision in GGNSC that could be interpreted as addressing the interpretation that informed the decision. In fact, the statute has remained totally unchanged since 1989. M.G.L.A. c. 229, § 2 (Credits) (West 2022). See also St. 1989, c. 215, § 1.

B. The Derivative Interpretation of Claims Under Chapter 229, § 2 Requires Dismissal of an Estate's Wrongful Death Claims if its Decedent Could Not Himself Have Maintained an Individual Claim Arising Out of the Injury that Caused His Death.

It warrants emphasis, for the purposes of the present appeal, that GGNSC did not limit the court's adoption of the majority approach to preclude only those wrongful death claims brought on behalf of decedents who had signed arbitration agreements. Rather, the court announced a broadly applicable rule that precludes any estate's wrongful death action unless its decedent could have brought an action himself for the injuries that caused his death. 484 Mass. at 191.

Considerable attention was given above to tracing the GGNSC court's derivative interpretation of wrongful death claims in the Commonwealth because that interpretation is dispositive of this appeal, and should be dispositive of *any* case brought under c. 229, § 2 in

which there would have been a (or any) viable defense to personal injury claims by the decedent, had he lived, for the same injury that is the subject of his estate's wrongful death claims.

Several courts and commentators have recognized that the outcome of the question now before the court turns on whether wrongful death claims in a particular jurisdiction are derivative or independent of a decedent's personal injury claims. Comments to § 899 of the Restatement (Second) of Torts (1979) by its authors at the American Law Institute note that, in the statute of limitations context:

Under most wrongful death statutes, the cause of action is a new and independent one, accruing to the representative or to surviving relatives of the decedent only upon his death; and since the cause of action does not come into existence until the death, it is not barred by prior lapse of time, even though the decedent's own cause of action for the injuries resulting in death would be barred. In some jurisdictions, however, the wrongful death acts take the form of statutes providing for the survival of the decedent's own cause of action, in which case the statute of limitations necessarily runs from the time of his original injury.

See cmt (c). Earlier, a second edition of Stuart M. Speiser's seminal volume on *Recovery for Wrongful Death*, published in 1975, had also noted this dichotomy:

The difficulty involved in determining whether the running of the general statute of limitations against [a] decedent before his death bars the right of action for his death is somewhat similar to that involved in the solution of some other problems regarding defenses in actions for wrongful death—namely, first, whether the wrongful death statute grants a new cause of action for the benefit of the designated beneficiaries or merely provides for a survival of the original cause of action; and, second, whether the statute intends it to be a condition precedent to the right of action that [the] decedent was capable of maintaining an action at the time immediately preceding his death or merely at the time of injury.

On the one hand, it has been held that a wrongful death action may not be maintained if the personal injury statute of limitations has run against the decedent. This has been the result in some states where the particular statute involved ... gave a right of action if "the act," causing the death "is such as" would have entitled decedent to maintain an action....

In other jurisdictions, although decedent fails to bring a personal injury action within the time set by statute, his personal representative is not barred from bringing suit for the death resulting from the injury.

S. SPEISER, *Recovery for Wrongful Death*, § 11.17 at pp. 192-194, vol. 2 (2d ed. 1975), as quoted in Adams v. Armstrong World Indus., Inc., 596 F. Supp. 1407, 1413 (D. Idaho 1984), rev'd in part on other grounds, 790 F.2d 893 (9th Cir. 1986). In Adams, a federal court in Idaho took up the same issue now before the court without the benefit of any explicit rulings from the Idaho Supreme Court deciding whether an action for wrongful

death could be maintained "if the deceased, at the date of his death, would have been barred by the statute of limitations." 596 F. Supp. at 1414. In divining the answer the court believed the Idaho Supreme Court would have given, the intrepid federal judge deciding the issue undertook an extensive survey of state and federal cases, treatises, and other literature (over thirty sources in all) and determined that the "dominant rule" prohibited wrongful death actions in situations where the statute of limitations had run on the decedent's personal injury claim. Id. (collecting cases), citing 22 Am.Jur.2d § 37 (1965 and 1984 supp.) and Hicks v. Missouri Pac. R. Co., 181 F. Supp. 648, 653 (W.D. Ark. 1960) ("since the right of [the decedent] to recover for his own injuries was barred by limitations prior to his death, his administratrix is now barred from maintaining an action for the benefit of the next of kin").²

² The Appendix to the Adams decision lists over thirty cases, less than a quarter of which did not follow the dominant rule. 596 F. Supp. at 1415. The courts in those cases made *independent*, as opposed to derivative, interpretations of wrongful death claims under the respective state death statutes at issue. See e.g., W. Union Tel Co. v. Preston, 254 F. 229, 234 (3d Cir. 1918); Larcher v. Wanless, 557 P.2d 507, 512-513 (Cal. 1976); N.O. Nelson Mfg. Corp. v. Dickson, 53 N.E.2d 640, 641 (Ind. App. 1944), citing Wilson v. Jackson Hill Coal & Coke Co., 95 N.E. 589, 590 (Ind. App. 1911); Smith v. McComb Infirmary Ass'n, 196 So. 2d 91, 93 (Miss. 1967);

In the nearly four decades since Adams was decided, "[t]he majority view [has remained] that where an action for death depends on the decedent having a cause of action for damages, the action for death is barred if at the time of the decedent's death the applicable statute of limitation ha[s] run against decedent's action. Miller v. Luther, 489 N.W.2d 651, 654 (Wis. Ct. App. 1992), citing Hicks, supra, at 653. That there even remains a cohort of decisions that have maintained the minority view over these decades continues to be a function of the same dichotomy of interpretations of the States' various wrongful death statutes discussed at length above.

Gramlich v. Travelers Ins. Co., 640 S.W.2d 180, 186 (Mo. Ct. App. 1982); Lawlor v. Cloverleaf Mem'l Park, Inc., 243 A.2d 293, 298 (N.J. Super. Law. Div. 1968), rev'd, 256 A.2d 46 (N.J. App. Div. 1969), rev'd, 266 A.2d 569 (N.J. 1970); DeHart v. Ohio Fuel Gas Co., 85 N.E.2d 586, 590 (Ohio App. 1948).

The only case in this grouping which does not explicitly mention whether its interpretation of the wrongful death statute is independent or derivative is St. Francis Hosp. v. Thompson, 31 So. 2d 710, 711 (Fla. 1947) (en banc). There, the Supreme Court of Florida said it need not reach that question because the parties had simply asked whether the statute of limitations in a death case commenced to run from the date of the wrongful act or from the date of death; the court answered that it was the latter. Id. The court did not undertake any analysis of the provision of the Florida wrongful death statute providing that liability shall be for "such damages as the party or parties entitled to sue may have sustained." F.S.A. § 768.02.

That is, in jurisdictions where wrongful death claims have been interpreted as derivative of claims that the decedent might have brought had he survived, courts have consistently barred death actions in circumstances where the decedent let the limitations period lapse on claims he might have had arising from the injury that caused his death. Brink v. Continental Cas. Co., 2022 WL 3334509, *5 (D.D.C. 2022) (applying Texas law); Brown v. Union Pac. R.R. Co., 2020 WL 3428984, *4 (D. Neb. 2020) (applying federal law); Doty v. Dorsch, 449 P.3d 1233 (Table), 2019 WL 5090387, *11 (Kan. Ct. App. 2019) (unpublished disposition); Deggs v. Asbestos Corp. Ltd., 381 P.3d 32, 40 (Wash. 2016); Skridla v. Gen. Motors Co., 46 N.E.3d 945, 949 (Ill. App. 2015); Est. of Stokes ex rel. Spell v. Pee Dee Fam. Physicians, L.L.P., 699 S.E.2d 143, 146 (2010); Edwards v. Fogarty, 962 P.2d 879, 882-883 (Wyo. 1998); Nelson v. Am. Nat. Red Cross, 26 F.3d 193, 199 (D.C. Cir. 1994) (applying D.C. law); Ingenito v. AC & S, Inc., 633 A.2d 1172, 1176 (Pa. Super. 1993); Russell v. Ingersoll-Rand Co., 841 S.W.2d 343, 345-352 (Tex. 1992); Drake v. St. Francis Hosp., 560 A.2d 1059, 1062 (Del. 1989); Lambert v. Vill. of Summit, 433 N.E.2d 1016, 1020 (Ill. App.

1982). See also Gilman v. Shames, 208 A.3d 1279, 1287 (Conn. App. 2019).

In jurisdictions where the state statute is interpreted as enabling estates to file claims wholly independent of the decedent's claims arising from the same injury, the outcomes in modern-day decisions have remained consistent with those issued in the early twentieth century. See, e.g., Gerald v. R.J. Reynolds Tobacco Co., 67 V.I. 441, 480 (2017); Mummert v. Alizadeh, 77 A.3d 1049, 1060 (Md. 2013).

What has remained tediously consistent in this vast body of case law, spanning well over a century, is that the outcome of the question posed by this appeal has in the vast majority of cases turned on the deciding court's interpretation of wrongful death claims under the applicable death statute as being independent or derivative of a decedent's claims. This is perhaps best exemplified by legal developments in Idaho, introduced above. Recall that in Adams, supra, a federal judge sitting in the U.S. District Court for the District of Idaho guessed at how the Supreme Court of Idaho would have interpreted the state wrongful death statute and whether it required the dismissal of wrongful death claims brought in circumstances where the decedent had

failed to file injury claims within the statute of limitations before his death. 596 F. Supp. at 1412-1414. As discussed, after compiling dozens of cases, the judge determined to follow the majority rule barring such actions. But nearly three decades later, in Castorena v. Gen. Elec., 238 P.3d 209 (Idaho 2010), the Supreme Court of Idaho addressed the identical issue for itself, and rejected the Adams court's interpretation of the state wrongful death statute, instead finding that it "creates a new and independent cause of action ... entirely distinct from any action the decedent may have brought on her own behalf...." Id. at 219-220 ("This Court is not bound by [Adams'] interpretations of Idaho law."). Castorena's reversal of Adams's adoption of the majority rule in Idaho demonstrably illustrates that a court's endorsement of the "majority view" or the "minority" one necessarily turns exclusively on a court's independent-versus-derivative interpretation of wrongful death claims in a given jurisdiction.

The universal principle that binds the result in "derivative" jurisdictions is that, where a given claim is derivative of *another* person's rights and remedies, any defenses that could have been raised against a claim by the injured person may also be raised against the

derived claim asserted by the person's heirs and estate (see pin citations on pp. 27-28). See also Quincy Tr. Co. v. Town of Pembroke, 346 Mass. 730, 732 (1964) (where claimant assigns his right to sue to another, any defense which defendant could raise against the assignor may also be raised against assignee); Campione v. Wilson, 422 Mass. 185, 194 (1996) (same, in the context of actions by third party beneficiaries in contract actions).

This is important because the appellant in this case maintains that the court's prior derivative interpretation in GGNSC is not determinative of the issue before the court. See Blue Br., pp. 36-37 ("Th[e] general principle (that wrongful death actions are derivative) was not meant to resolve procedural issues that are specifically addressed by other provisions of [c. 229, § 2]...."). This position is refuted fully by the stark dichotomy revealed by the aforementioned collection of rulings from across the United States. Given that this dichotomy of interpretations has been wholly indicative of the outcomes in any given jurisdiction, the amicus curiae suggests that this court's decision in GGNSC is dispositive of the question presented by this appeal, notwithstanding the

appellant's desire to diminish the significance of the court's previous interpretation of § 2 as it is constituted today.

C. The Court Should Endorse the Trial Court's Reading of § 2 as Permitting Only "Viable" Causes of Action to be Filed within the Three-Year Limitations Period.

The arguments of the appellant now before the court attempt to diminish the import of GGNSC by suggesting that the Legislature "did not intend internal contradiction" within § 2 by inserting, via the 1958 amendment, a limitation upon actions for wrongful death to "such circumstances that the deceased could have recovered damages for personal injuries if his death had not resulted...." Blue Br., pp. 35-36. The appellant maintains that "GGNSC's interpretation of that provision ... should not be extended to override or rewrite [the] provision of the same statute" providing that "[a]n action to recover damages under this section shall be commenced within three years from the date of death...." Id., p. 36; M.G.L. c. 229, § 2. This argument reads into § 2 an inconsistency which is not there. Rather, the two clauses must simply be read together.

The trial court below correctly recognized as much, determining that ruling on the appellees' joint motion

to dismiss did not require it to make an election from between the "under such circumstances clause" and the "three years" clause. The motion judge held that the latter clause merely "establishes the timeframe within which a *viable* wrongful death action must be commenced." Cuddy v. Philip Morris USA Inc., No. 1784CV02213-BLS1, 2021 WL 6880839, *3 (Mass. Super. 2021) (Davis, J.) (emphasis in original). At least one other judge of the Superior Court has since adopted that reading of the single paragraph that constitutes § 2. Sinopoli v. R.J. Reynolds Tobacco Co., No. 2176-CV-00087, 2021 WL 8134423, *2 (Mass. Super. 2021) (Mulqueen, J.). The majority approach in other jurisdictions and this court's decision in GGNSC supports that reading of § 2, and the amicus curiae respectfully suggests that this court, if it determines that it will affirm the decision of the trial court, should adopt the phrasing of the lower court's decision. The concise and plainly phrased qualification of § 2's "three years" clause employed in the trial court's decision makes the effect of this court's derivative interpretation upon the death statute easy to understand. The clarity and simplicity of the court's ultimate adjudication of the question presented may prove as important as the adjudication itself, where

the appellant here has suggested that Massachusetts citizens like its decedent may not have prosecuted timely personal injury claims during her lifetime because she believed that her estate's beneficiaries would be made whole in a wrongful death case. In the event the court agrees that the derivative interpretation it announced in GGNSC has broad applicability to wrongful death claims, such that any defense that might be asserted against the personal injury claims of a decedent would bar the derivative claims of his estate, the amicus curiae believes that the trial court's straightforward reading of a single word into the last sentence of § 2 offers litigants concise notice that if an individual wishes for his future estate to recover for injuries that could ultimately cause his death, he must take care to extinguish any potential defenses to his own personal injury claims which he is able because those defenses may be exercised against his estate to the same effect. Thus, under the elegant solution offered by the trial court, informed litigants would fully understand that the last sentence of § 2 in effect reads that a "[viable] action to recover damages under this section shall be commenced within three years from the date of death, or

within three years from the date when the deceased's executor or administrator knew, or in the exercise of reasonable diligence, should have known of the factual basis for a cause of action...." (bracketed word inserted).

II. THE COURT'S PRIOR PRECEDENTS SUPPORT THE PRINCIPLE THAT A DECEDENT MAY BIND HIS ESTATE BY HIS OWN DECISIONS, ACTS, AND OMISSIONS, WHETHER CONSCIOUS OR UNCONSCIOUS.

Barring wrongful death claims in the setting of elapsed personal injury claims arising from a common injury would not only be consistent with GGNSC's derivative interpretation of c. 229, § 2 and the dominant rule adopted in the majority of jurisdictions; it would also be consistent with this court's previous jurisprudence concerning the rights of individuals to exercise control over the course and management of their estates. This is an important principle that should be preserved in the Commonwealth. Indeed, Massachusetts law has long emphasized that the planning and control of one's own affairs to follow death must prioritize the "free agency," "sound judgment," and genuine "untrammelled desire" of the individual. Neill v. Brackett, 234 Mass. 367, 369 (1920); Mirick v. Phelps, 297 Mass. 250, 253 (1937).

Several seminal decisions by this court provide that the elections, acts, and omissions of a decedent should and do bind his estate following his death. See pp. 38-39, *infra*. In addition to forming the basis for a virtuous legal system within which to plan one's affairs, one that properly prioritizes citizens' freedom of agency, this principal also flows directly from a derivative interpretation of c. 229. In illustrating this premise, it is important to note that this court was not always of the view that decedents had a modicum of control over the course of actions brought by their estates. Over a century before its decision in GGNSC, this court made an "independent interpretation" of the version of the wrongful death statute in effect at that time, and concluded that actions brought under the statute were ones "over which the deceased ha[d] no control." Wall v. Massachusetts Ne. St. Ry. Co., 229 Mass. 506, 507 (1918). In Wall, the decedent had executed a broad release of the defendant railroad operator in connection with her purchase of train tickets. The release required that the decedent hold the railroad harmless "from any and all claims, demands, actions and causes of action, of every name and nature, that I have or might have against [the railroad] as a result of all

injuries, either personal or property, sustained by me on or about this 30th day of December, 1915." The court held that while this release would have barred any action by the decedent against the railroad during her lifetime, it did not bar recovery in a death action brought by her estate. Id. at 507. The court noted that, at that time, the death statute did not condition the right to bring a death action "only if he might have maintained an action had he lived," as provisions in other States' death statutes provided. Id., citing Hecht v. Ohio & M. R. Co., 32 N.E. 302, 305 (Ind. 1892).

However, the court was later required to amend its interpretation of c. 229 following the Legislature's aforementioned 1958 amendments to the statute, which conditioned recovery for wrongful death to circumstances in which "the deceased could have recovered damages for personal injuries if his death had not resulted." St. 1958, c. 238, § 1. Following enactment of the 1958 amendments, this court's decisions in the lead up to GGNSC strongly intimated that it would ultimately conclude, when asked to address the question squarely, that actions brought pursuant to the amended statute were derivative of decedents' personal injury claims. See Gaudette v. Webb, 362 Mass. 60, 72 (1972)

(administrator acts "merely as a representative" for beneficiaries of decedent's estate); Hallett v. Town of Wrentham, 398 Mass. 550, 556 (1986) (death statute "provides the exclusive action for the recovery of the damages it encompasses" by designated beneficiaries); Santos v. Lumbermens Mut. Cas. Co., 408 Mass. 70, 77 (1990) (estate beneficiaries utilize the administrator as a "conduit" to recover their consortium-like claims); Sisson v. Lhowe, 460 Mass. 705, 710 (2011) ("claims for recovery based on personal injury, wrongful death, or loss of consortium are not distinct when they derive from the same constellation of facts").

Finally, it was in GGNSC that this court expressly overruled Wall's independent interpretation of death actions brought under c. 229, § 2. 484 Mass. at 188-190. After GGNSC, wrongful death actions were no longer ones "over which the deceased ha[d] no control." On the contrary, the court said of derivative claims brought on behalf of the decedent in that case, "the decedent alone had the right to decide whether the [estate] must arbitrate those claims." Id. at 191.

To date, the judiciary's derivative interpretation of § 2 claims has reinforced the premise that individuals

should be and are empowered to bind claims made by their eventual estates in at least a few respects.

First, as discussed, in GGNSC itself, the court held that a decedent could bind her estate to privately arbitrate death actions, over the objection and resistance of the personal representative designated to administer the estate. Id. (personal representative's lack of consent to arbitrate "inconsequential" in light of decedent's informed execution of arbitration agreement with defendant).

Second, in Doherty, supra, the court held that a decedent could bind his eventual estate against bringing a wrongful death claim at all by executing a covenant not to sue just before his death. 484 Mass. at 194 (affirming trial's ruling that estate beneficiaries "had no rights independent of the decedent's cause of action, which was waived" in written release signed by decedent).

Third, this court also held that a decedent who accepts employment with an employer who falls under the ambit of the Massachusetts Workers' Compensation Act, M.G.L. c. 152, effectively binds his estate against later prosecuting wrongful death claims against the employer, since § 24 of the act requires participating

employees to waive their right to sue in tort for work-related injuries. Saab v. Massachusetts CVS Pharmacy, LLC, 452 Mass. 564, 570 (2008).

Moreover, although this court has not, since GGNSC, considered a case in which the decedent had, during his lifetime, already won, lost, or settled an action for the injuries that ultimately caused his death, the Restatement (Second) of Judgments § 46 (1982), provides that in jurisdictions (like Massachusetts) where “a wrongful death action is permitted only when the decedent had a claim at the time of his death,” a previous judgment for or against the decedent arising out of an injury precludes a subsequent wrongful death action arising out of that same injury “to the same extent that the [decedent] would have been precluded from bringing another action” based on the that injury. That is, “[a] judgment in an action by the decedent for his injuries has the same preclusive effects on them as it has on him.” Id., cmt (b).³ Similarly, the “settlement

³ See also the Reporters Notes to § 46, citing Prosser, Torts at 898-914 (4th ed. 1971), 2 Harper & James, Torts § 24.6 (1956), and Mellon v. Goodyear, 277 U.S. 335, 343 (1928) (“The clear weight of authority is that a prior judgment for or against the decedent precludes a wrongful death action by his beneficiaries.”)

of the decedent's personal injury claim ... extinguishes the wrongful death claim against that tortfeasor." Id., cmt (b). See also Delesma v. City of Dallas, 770 F.2d 1334, 1338-1339 (5th Cir. 1985); Kane v. Rohrbacher, 83 F.3d 804, 805-806 (6th Cir. 1996).

Given this line of consistent applications of the derivative interpretation of wrongful death claims, this court should now apply it in a fifth context by holding that a decedent's decision not to prosecute personal injury claims within the applicable statute of limitations binds his estate against filing a wrongful death claim if and when the injury ultimately causes his death. Such a ruling would not only constitute a natural extension of this court's prior applications of a derivative interpretation of wrongful death claims brought under c. 229, it would also be consistent with the majority rule employed in jurisdictions where courts have made a derivative interpretation of claims made under their respective death statutes. See Part I(B), *supra*.

III. BARRING WRONGFUL DEATH CLAIMS IN CASES WHERE THE DECEDENT'S PERSONAL INJURY CLAIMS HAVE LAPSED UNDER THE APPLICABLE STATUTE OF LIMITATIONS ADVANCES THE LEGISLATIVE POLICY EVINCED BY SUCH STATUTES.

The trial court's straightforward harmonization of § 2's "under such circumstances" clause with its "three years" clause as establishing "the timeframe within which a *viable* wrongful death action must be commenced," see Part I(C), *supra*, is not only consistent with the derivative interpretation announced in GGNSC; it is also consistent with the Legislature's purpose in enacting statutes of limitation such as M.G.L. c. 260, § 2A, which in this case would have operated to bar the personal injury claims of the appellant's decedent had she lived, given that she had failed to file her own claim after more than ten (10) years of sustaining her original injury.

Statutes of limitation such as § 2A reflect the Legislature's judgment as to the proper balance between "the need of its citizens to redress injuries and their right to be protected from protracted exposure to liability." Nierman v. Hyatt Corp., 441 Mass. 693, 697-698 (2004). "There comes a time when a defendant ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations, and he ought

not to be called on to resist a claim 'when evidence has been lost, memories have faded, and witnesses have disappeared.'" Klein v. Catalano, 386 Mass. 701, 709 (1982), quoting *Developments in the Law: Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185 (1950) (internal citation omitted). See also Order of R.R. Telegraphers v. Ry. Express Agency, Inc., 321 U.S. 342, 348-349 (1944) (statutes of limitation "promote justice by preventing surprises through the revival of claims that have been allowed to slumber....").

The risk of unfairly protracted exposure to liability under the appellant's interpretation of c. 229, § 2 would be acute. The parties to the instant appeal agree that the appellant's decedent knew for at least ten (10) years that her diagnoses of emphysema and chronic obstructive pulmonary disease were linked to her use of the appellees' products. The appellant's reading of § 2 maintains that the wrongful death claim should still be permitted even if the decedent had been aware of the link between her use of the products and her diagnoses for thirty, forty, or even fifty years, so long as the estate filed the case within three (3) years after the decedent's death. The burdens placed on any defendant sued so long after an initial injury would be

insurmountable. In spans of time that lengthy, the death or disappearance of relevant witnesses, the disposal of relevant documents in the normal course, and the fading of memories are substantial disadvantages which are virtually guaranteed in such circumstances. United States v. Kubrick, 444 U.S. 111, 117 (1979); Bell v. Morrison, 26 U.S. 351, 360 (1828).

The amicus curiae urges the court to consider, as other courts have, the Legislature's purpose in enacting the applicable statute of limitations when answering the question posed by this appeal. The policies underlying such laws would be undermined by the reading suggested by the appellant. See Lambert, 433 N.E.2d at 1020 (policy purposes of statutes of limitation "apply with equal validity whether the plaintiff is an injured party or his personal representative"); Edwards, 962 P.2d at 882 (noting that adoption of "minority view" would mean "wrongful death actions could be brought several years, or even decades, after the negligent act which caused the death, and possibly without regard to whether the deceased had already sued and recovered damages during his lifetime").

Moreover, the appellant's appeals to an unjust result here are unwarranted. While it is certainly true

that, generally speaking, the protections afforded by statutes of limitation inure to the benefit of defendants and the judiciary at the expense of plaintiffs, Nierman v. Hyatt Corp., 59 Mass. App. Ct. 844, 848 (2003), rev'd on choice-of-law grounds, 441 Mass. 693 (2004), citing Milhollin, *Interest Analysis and Conflicts Between Statutes of Limitation*, 27 Hastings L.J. 1, 11 (1975), the window of time provided under such statutes was one carefully considered by the Legislature. See Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945) (statutes of limitation evince a legislature's "public policy about the privilege to litigate"). The concerns of potential plaintiffs confronted with unique or prejudicial circumstances preventing them from timely filing claims under the statute of limitations have frequently been addressed by the Legislature, which has codified a broad scheme of methods to toll limitations periods in appropriate circumstances. See, e.g., Gaudette, 362 Mass. at 71-72, analyzing M.G.L. c. 260, § 7; Joseph W. Glannon, *Massachusetts Statutes of Limitations: A User's Guide*, 19 SUFFOLK J. TRIAL & APP. ADVOC. 1 (2014) (discussing the tolling of claims (i) during period of minority or incapacity, (ii) during continuing representation or

treatment, (iii) due to fraudulent concealment, and (iv) under the doctrine of equitable estoppel). And this court has supplemented such protections by, for example, permitting amendment of timely-filed complaints for medical malpractice actions to add wrongful death counts when the plaintiff dies before trial and after the expiration of the statute of repose. See generally Sisson, *supra*, analyzing c. 260, § 4.

CONCLUSION

The amicus curiae respectfully offers its views on the question presented by this appeal, appreciating the court's sensitive task in construing c. 260, § 2A; c. 229, § 2; and its prior decision in GGNSC "harmoniously[,]" so as to give rise to a consistent body of law." Marco v. Green, 415 Mass. 732, 736 (1993), and submits that, for the reasons set forth in this brief, affirming the decision of the trial court would be most consistent with a derivative interpretation of wrongful death claims in the Commonwealth.

Respectfully submitted,

/s/ Kevin W. Buono

Kevin W. Buono, Esq.

BBO#693548

MORRISON MAHONEY LLP

250 Summer Street

Boston, MA 02210

Tel. (617) 439-7558

Fax (617) 342-4997

kbuono@morrisonmahoney.com

Dated: November 14, 2022

**CERTIFICATE OF COMPLIANCE
PURSUANT TO RULE 16(k) OF THE
MASSACHUSETTS RULES OF APPELLATE PROCEDURE**

I, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass. R. A. P. 16 (a) (13) (addendum);

Mass. R. A. P. 16 (e) (references to the record);

Mass. R. A. P. 18 (appendix to the briefs);

Mass. R. A. P. 20 (form and length of briefs, appendices, and other documents); and

Mass. R. A. P. 21 (redaction).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 20 because it is produced in the monospaced font Courier New at size 12 point, ten and one-half (10½) characters per inch, and contains 37 total non-excluded argument pages prepared with Microsoft Word 2013.

1/s/ Kevin W. Buono

Kevin W. Buono, Esq.
BBO#693548
MORRISON MAHONEY LLP
250 Summer Street
Boston, MA 02210
Tel. (617) 439-7558
Fax (617) 342-4997
kbuono@morrisonmahoney.com

Dated: November 14, 2022

CERTIFICATE OF SERVICE

Pursuant to Mass. R. A. P. 13(d), I hereby certify, under the penalties of perjury, that on November 14, 2022, I have made service of the Amicus Brief via the Massachusetts Tyler Host electronic filing system upon the parties to this appeal.

/s/ *Kevin W. Buono*

Kevin W. Buono, Esq.
BBO#693548
MORRISON MAHONEY LLP
250 Summer Street
Boston, MA 02210
Tel. (617) 439-7558
Fax (617) 342-4997
kbuono@morrisonmahoney.com