S175204

IN THE

Supreme Court

OF THE STATE OF CALIFORNIA

ALEJANDRA RUIZ, et al.,

Plaintiffs and Respondents,

vs.

ANATOL PODOLSKY, M.D.,

Defendant and Appellant.

OPENING BRIEF ON THE MERITS

AFTER A DECISION BY THE COURT OF APPEAL
FOURTH APPELLATE DISTRICT, DIVISION THREE
[4th Civil No. G040843]

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

STATE CASES

FEDERAL CASES

STATUTES

OTHER AUTHORITIES

QUESTION PRESENTED

Whether a patient-decedent's Code of Civil Procedure section 1295 arbitration agreement with a physician that is properly enforced as to a non-signatory spouse heir bringing a wrongful death claim also requires non-signatory adult children of the decedent who are plaintiffs in the same wrongful death action to arbitrate their claims?

ANSWER TO QUESTION PRESENTED

Yes, the agreement of a physician and a patient to arbitrate claims requires the patient's adult children to arbitrate their claims for wrongful death. There are multiple reasons why this is true, particularly in this case.

First, the physician-patient arbitration agreement expressly requires such. The physician-patient arbitration agreement expressly applies to "all claims," and the agreement specifically refers to claims for "wrongful death." So that there will be no doubt in that regard, the agreement also declares the intention of the physician and the patient to bind the spouse and any children. So that there will be consistency in that regard, the agreement not only binds the patient's heirs but also the physician's estate, as well as his partners, associates, employees and any others whose claims may arise from the physician-patient relationship. In addition Mr. Ruiz and Dr. Podolsky agreed that they would arbitrate "all claims based upon the same incident, transaction

or related circumstances . . . ." (AA 14.) Finally, so that there will be consistency with other litigation that the patient or his family might choose to pursue, the agreement also includes the consents of the physician and patient to the joinder of others, such as the co-defendant health care providers in this case, to the arbitration.

Second, California has a strong public policy favoring arbitration over a jury trial or other litigation, in that arbitration is a speedy and relatively inexpensive means of resolving disputes and eases court congestion. (See, *e.g*, *Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699.) That public policy extends to claims by non-signatories to the arbitration agreement, such as minor children (*Doyle v. Giuliucci* (1965) 62 Cal.2d 606) and employees who enrolled in a health care plan negotiated by their agent or representative. (*Madden v. Kaiser Foundation Hospitals, supra,* 17 Cal.3d at 705-710.) Even the Court of Appeal in this case acknowledged that public policy. (*Ruiz v. Podolsky* Slip Opn., pp. 3, 8, 14-15, 20-21.) That public policy is embodied in the California Arbitration Act (Code Civ. Proc., §§ 1280 et seq.), including the specific provision for arbitration of medical malpractice claims. (§ 1295.)

Third, the physician-patient arbitration agreement precisely incorporated the language dictated by that statute, Code of Civil Procedure section 1295.

Despite these and other reasons for compelling arbitration, the Court of Appeal affirmed the order denying arbitration of the wrongful death claim of the adult children in this case. The Court of Appeal surveyed "[t]he body of California authority concerning the

binding effect of arbitration agreements on nonsignatory spouses and adult children" and found "two lines of cases that take very different approaches to resolving the issue." (Slip Opn., p. 10.) The court rejected the line of cases that compelled arbitration in such circumstances and instead followed the line of cases that denied arbitration, based solely upon the characterization of wrongful death actions as "not derivative actions." (Slip Opn., p. 20.) The court reasoned that "[t]he heirs do not stand in the shoes of the party who signed the arbitration agreement." (Slip Opn., p. 22.)

The Court of Appeal was wrong in its analysis. The adult children do "stand in the shoes of the party who signed the arbitration agreement." Their wrongful death claim is based upon the physician-patient relationship, just as the wife's claim is based upon that relationship. Indeed, but for that relationship, there could be no claim of wrongful death because there would be no duty upon which that claim could be based. In other words, the claim is "intimately founded in and intertwined" with the underlying obligations between the physician and the patient, including the contractual obligations. That is true even though the wrongful death claims are cast in tort rather than contract. (See, *e.g.*, *Boucher v. Alliance Title Company, Inc.* (2005) 127 Cal.App.4th 262, 271-272.)

That also is why the Court of Appeal was wrong when it stated that "[p]rinciples of equity and basic contract law outweigh the convenience of litigating in one forum and the public policies favoring arbitration." (Slip Opn., p. 3.) To the contrary, equity requires that the adult children be estopped to resist arbitration. (See, *e.g., Turtle*

Ridge Media Group, Inc. v. Pacific Bell Directory (2006) 140 Cal.App.4th 828.)

In summary, this Court now has an opportunity to help other courts of appeal avoid the confusion that misled the court in this case. This Court can clarify the law as it relates to arbitration of wrongful death claims and, thereby, prevent future courts of appeal from taking "very different approaches to resolving the issue." (Slip Opn., p. 10.) Hereafter, the question will be answered first, by reference to the arbitration agreement itself, second, whether the wrongful death suit arises from a claim of professional negligence against a health care provider, thereby invoking the specific statute.

STATEMENT OF THE CASE

Rafael Ruiz sought care and treatment for his fractured hip. (AA 1-5.) During the months of June and July, 2006, he consulted with many health care providers. (AA 40.) One of the physicians from whom Mr. Ruiz sought care was Appellant, Anatol Podolsky, M.D.[1] That was during an office visit, on July 17, 2006. (AA 20.) It was not an emergency visit. (*Ibid.*)

Mr. Ruiz was offered a "Physician-Patient Arbitration Agreement." (AA 20; for a copy of arbitration agreement itself, see AA 14, 34.) Dr. Podolsky and Mr. Ruiz both signed the agreement, and they did so that day. (AA 22.) It was Dr. Podolsky's custom and practice to offer all new patients the opportunity to agree to arbitration and to give patients who sign a copy of the agreement to take home. (AA 20.) Dr. Podolsky believes that Mr. Ruiz received a copy.[2] The arbitration agreement included a provision that allowed Mr. Ruiz to revoke (AA 14, 34, Article 5), but Mr. Ruiz did not revoke the arbitration agreement. (AA 20.)

More to the point of this appeal, however, the agreement provided that Dr. Podolsky and Mr. Ruiz agreed to arbitrate *all* claims between them, including those by or against Dr. Podolsky's business

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[1] There are nine additional defendants in this action, including one Doe Defendant.

[2] The uncontested allegations of a petition to compel arbitration are deemed admitted. (See *A.D. Hoppe Co. v. Fred Katz Const. Co.* (1967) 249 Cal.App.2d 154, 158; Code Civ. Proc., § 1290.)

associates and those by or against Mr. Ruiz's heirs. (AA 20.) The agreement did so in many ways but, in particular, the broad language of the arbitration agreement included arbitration of claims for wrongful death. (*Ibid.*)

First, the "Physician-Patient Arbitration Agreement" complied with the standard language of Code of Civil Procedure section 1295 (b): "Notice: By signing this contract you are agreeing to have *any issue of medical malpractice* decided by neutral arbitration and you are giving up your right to a jury or court trial. See Article 1 of this contract." (AA 14, emphasis added.) That statement appeared in large bold red type, as required by Section 1295.[3]

Second, and consistent with this statutory language, the agreement further provided, at Article 1 entitled "Agreement To Arbitrate," that

> It is understood that *any dispute as to medical malpractice*, that is as to whether any medical services rendered under this contract were unnecessary or unauthorized or were improperly, negligently or incompetently rendered, will be determined by submission to arbitration as provided by California law, and not by a lawsuit or resort to court process except as California law provides for judicial review of arbitration proceedings. Both parties to this contract, by entering into it, are giving up their constitutional rights to have any such dispute decided in a court of law before a

[3] Plaintiffs have conceded, as they must, that the arbitration agreement met the requirements of Code of Civil Procedure section 1295. (Respondents' Br. at p. 5.)

> jury, and instead are accepting the use of arbitration.

(AA 14, emphasis added.)

Third, the agreement specifically recited, at Article 2 entitled "All Claims Must Be Arbitrated," "the intention of the parties that this agreement binds all parties whose claims may arise out of or relate to treatment or service provided by the physician *including any spouse or heirs of the patient and any children, whether born or unborn*, at the time of the occurrence giving rise to any claim." (AA 14, emphasis added.) In other words, Mr. Ruiz acknowledged his intention to bind not only himself but also his wife and adult children. Dr. Podolsky also knew that he was binding all of the people involved on his side of the physician-patient relationship, including his "partners, associates, association, corporation or partnership, and the employees, agents and estates of any of them." (*Ibid.*)

Fourth, Article 2 of the Arbitration Agreement provided that "[a]ll claims for monetary damages exceeding the jurisdictional limit of the small claims court against the physician, and the physician's partners, associates, association, corporation or partnership, and the employees, agents and estates of any of them, must be arbitrated including, without limitation, claims for loss of consortium, *wrongful death*, emotional distress or punitive damages." (AA 14, emphasis added.)

Fifth, Article 3 of the Arbitration Agreement provided that "[t]he parties consent to the intervention and joinder in this arbitration of *any person or entity* which would otherwise be a proper additional party in a court action, and upon such intervention and joinder any

existing court action against such additional person or entity shall be stayed pending arbitration." (AA 14, emphasis added.) In other words, both Mr. Ruiz and Dr. Podolsky agreed that others could join in the arbitration. In addition, they agreed that they would arbitrate "*all claims based upon the same incident, transaction or related circumstances*," as set forth in Article 4 of their Arbitration Agreement. (AA 14, emphasis added.)

In summary, Mr. Ruiz and Dr. Podolsky both made it very clear, in several different ways, that it was their wish that any claims arising from the physician's rendition of services to the patient should be arbitrated.

Unfortunately, Mr. Ruiz died on July 25, 2006, at the age of 56, from pulmonary thromboemboli caused by the fractured hip. (AA 4, 40.)[4]

On July 17, 2007, plaintiffs filed a lawsuit in Orange County Superior Court, case number 07CC08001, which lawsuit plaintiffs characterized as "Wrongful Death / Medical Malpractice." (AA 1.) Plaintiffs alleged that they are the wife and four children of the patient.[5] (AA 2.)

Plaintiffs named seven defendants: a hospital, a medical group, four individual physicians, and one individual physician's assistant.

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[4] Pulmonary embolism is defined as "the occlusion of one or more pulmonary arteries by thrombi that originate elsewhere, typically in the large veins of the lower extremities or the pelvis." (Beers, et al., Merck Manual of Diagnosis and Therapy (18th ed. 2006) § 5, p. 412.)

[5] Subsequently, in opposing arbitration, plaintiffs explained that all four children are adults. (AA 40.)

(AA 1-6.) Plaintiffs alleged that all of these health care provider defendants were "the principal, agent, servant, employee, partner, and/or representative of their co-defendants; that each of the Defendants acted within the course and scope of such relationship in committing the alleged acts and omissions."[6] (AA 2-3.)

Plaintiffs alleged that the various relationships between decedent and defendants were all based on contractual relationships. Specifically, in alleging that the defendant health care providers owed duties to decedent, plaintiffs alleged that decedent "consulted with and engaged for compensation the medical services of Defendants" and that defendants "undertook such employment and agreed to render such medical care." (AA 4.)

In their complaint, plaintiffs alleged wrongful death in general terms.[7] (AA 1-5.) Dr. Podolsky, the individual physician who is pursuing this appeal, denies that he was negligent in treatment of the patient and that he injured the patient or the patient's heirs. (AA 22; see also AA 9-13 [Answer to Complaint].) Dr. Podolsky also petitioned for arbitration of the wrongful death claim against him. (AA 17-37, 45-65, 70-80.)

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[6] Subsequently, in opposing arbitration, plaintiffs explained that two more defendants were added to the lawsuit, another medical corporation and another individual physician. (AA 40.)

[7] Subsequently, in opposing arbitration, plaintiffs explained that their lawsuit arose from "the care and treatment (or lack thereof) provided to decedent Rafael Ruiz in June and July, 2006. Plaintiffs claimed that defendants failed to diagnose and treat decedent's fractured hip resulting in his death from pulmonary thromboemboli due to the fracture on July 25, 2006 at the age of 56." (AA 40.)

Notwithstanding the clear indication that Mr. Ruiz had agreed to arbitrate *all claims* arising from the physician-patient relationship, his adult children opposed arbitration of their claims for his wrongful death. (AA 38-44.) The adult children did not deny that Mr. Ruiz agreed to arbitration, nor did they deny that his agreement included their claims for wrongful death. Rather, they simply declared "that the children of decedent are not bound by the arbitration agreement." (AA 40, emphasis omitted.)

Notably, plaintiffs explicitly and unequivocally conceded that Mr. Ruiz's wife was bound to arbitration. (AA 39 ["...Plaintiff Alejandra Ruiz as the wife of decedent *is subject to the arbitration agreement* . . ."], emphasis added; see also RT 3.)

Plaintiffs relied upon a single appellate decision in support of their opposition to arbitration, *Buckner v. Tamarin* (2002) 98 Cal.App.4th 140. (AA 40-41.) Plaintiffs argued that case "held that the decedent did not have the authority to waive his daughters' right to a jury trial of their claims in that the arbitration agreement, as here, was solely for decedent's own medical care." (AA 41, citing *Buckner, supra,* 98 Cal.App.4th at 143.)

The Superior Court granted the Petition to Compel Arbitration as to Mr. Ruiz's wife but denied arbitration as to Mr. Ruiz's adult children. (AA 81.) The trial court attempted to explain its reasoning as to why it split the heirs between court and arbitration: that while "awkward," it would "work out in the end."

> THE COURT: You know, it is awkward. And maybe in many instances plaintiffs decide voluntarily to proceed in an

> arbitration forum that includes all the heirs, but the fact of the matter is in this context I really make the ultimate decision of whoever tries this case. So if there is to be any allocation between the heirs, the adult heirs who are dependent to some extent under the law, and they get to have some allocation under the law, that will really be tied to the arbitration award and the verdict by the judge who tries the case. So although it appears to be confusing, I think everything will work out in the end. Okay. So I cannot foretell the future. And I cannot give you any pre-ruling. But I think that's probably how it will work out so that your concerns will be addressed at some later time, even though it does seem to be a little bit awkward.

(RT 6:5 to 6:21.)

The trial court also noted that, as to the parallel arbitration and superior court litigation, his order was proposing, "[i]f there does for some reason present some overlap [in issues between the two proceedings], . . . then I would address that." (RT 7:13 to 7:16.)

With respect to the claims by the adult children, and the claims against the other defendants, the trial court announced the following:

> The Court finds it preferable to stay the remaining action pending resolution of arbitration to avoid the possibility of inconsistent rulings. Parties are to appear in person or by court call to discuss stipulations re discovery that would save time and money and to select a post arbitration status conference date. The Court will also set a date by which arbitration must be completed.

(AA 81.) The parties then stipulated to "global discovery." (AA 88-92.) Dr. Podolsky filed a notice of appeal. (AA 93-94.)

The Court of Appeal, Fourth Appellate District, Division Three, affirmed the order granting arbitration as to the spouse and denying arbitration as to the adult children. The Court of Appeal began its opinion with the observation that,

> In California, there is a split of authority as to the scope of a patient's authority to bind his or her spouse and adult children to an arbitration agreement. One line of cases beginning with *Rhodes v. California Hospital Medical Center* (1978) 76 Cal.App.3d 606 (*Rhodes*), holds wrongful death is not a derivative cause of action and therefore a patient cannot bind nonsignatory heirs bringing a wrongful death claim absent a preexisting agency-type relationship. Another line of cases following *Herbert v. Superior Court* (1985) 169 Cal.App.3d 718 (*Herbert*), suggests there are important public policy reasons to infer patients being treated have the broad authority to bind nonsignatory heirs to a medical arbitration agreement, especially in cases of wrongful death.

(Slip Opn., pp. 2-3.) Before emphasizing that the adult heirs here were not bound to arbitrate, the Court of Appeal noted that "[p]ublic policy favors arbitration as an expedient and economical method of resolving disputes, thus relieving crowded civil courts . . . ." (*Id.* at 8, citing *County of Contra Costa v. Kaiser Foundation Health Plan, Inc.* (1996) 47 Cal.App.4th 237, 244-245.) The court also recognized "the public policy supporting arbitration of medical malpractice disputes

[specifically]," and "the Legislature's implicit approval of arbitration of wrongful death actions . . . ." (*Id.* at 20.)

The Court of Appeal chose to follow the *Rhodes* line of authority. (Slip Opn., pp. 2-3, 22.) The court certified its opinion for publication (Slip Opn., p. 23) and filed the decision on June 24, 2009. The court's decision became final on July 24, 2009.

This Court granted Dr. Podolsky's Petition for Review on October 14, 2009.

LEGAL DISCUSSION

I. THE COURT SHOULD ENFORCE MR. RUIZ'S AGREEMENT WITH DR. PODOLSKY TO ARBITRATE THE RUIZ FAMILY CLAIM FOR WRONGFUL DEATH, IF ONLY BECAUSE THE CLAIM ARISES FROM THE PHYSICIAN-PATIENT RELATIONSHIP

A. Arbitration Of Plaintiffs' Wrongful Death Claim Is A Fair And Equitable Way Of Resolving The Dispute Arising From Mr. Ruiz's Death, And Plaintiffs Do Not Contend Otherwise

Over 30 years ago, Justice Tobriner explained that "although the courts in the past regarded arbitration as an unusual and suspect procedure, they now recognize it as an accepted method of settlement of disputes." (*Madden v. Kaiser Foundation Hospitals, supra*, 17 Cal.3d at 702.)

> The transformation of legislative and judicial attitudes toward arbitration has encouraged a dramatic development in the use of this procedure. A 1952 study estimated that "aside from personal injury cases and cases in which the government is a party, more than 70 percent of the total civil litigation is decided through arbitration rather than by the courts" (Mentschikoff, *The Significance Of Arbitration – A Preliminary Inquiry* (1952) 17 Law & Contemp. Prob. 698). In the following decades arbitration further expended its role to encompass in certain circumstances

> disputes requiring evaluation of personal injury claims: California and many other states now require arbitration of uninsured motorist claims (see Ins. Code, § 11580.2), and proposals for no-fault automobile insurance frequently provide for arbitration (see Judicial Council of Cal., Study of the Role of Arbitration in the Judicial Process (1973) pp. 71-73).

(17 Cal.3d at 707.) Justice Tobriner then observed "the growing interest in and use of arbitration to cope with the increasing volume of medical malpractice claims." (17 Cal.3d at 708.) He noted

> the benefits of the arbitral forum. The speed and economy of arbitration, in contrast to the expense and delay of jury trial, could prove helpful to all parties; the simplified procedures and relaxed rules of evidence in arbitration may aid an injured plaintiff in presenting his case. Plaintiffs with less serious injuries, who cannot afford the high litigation expenses of court or jury trial, disproportionate to the amount of their claim, will benefit especially from the simplicity and economy of arbitration; that procedure could facilitate the adjudication of minor malpractice claims which cannot economically be resolved in a judicial forum.

(17 Cal.3d at 711-712.) Justice Tobriner concluded,

> Under the aegis of permissive legislation and favorable judicial decisions, arbitration has become a proper and usual means of resolving civil disputes, including disputes relating to medical malpractice. We should not now turn the judicial clock backwards to

> an era of hostility toward arbitration. We should not fetter that institution with artificial requirements that a contracting agent must secure express authorization to enter into an arbitration provision or that the provision itself must explicitly waive rights to jury trial. We should not impose debilitating obstructions, such as those urged by plaintiffs, which could very well jeopardize the legality of the huge number of presently functioning and efficacious arbitration agreements.

(17 Cal.3d at 714-715.)

Recently, those and other "Advantages of Arbitration" were surveyed in California Lawyer magazine: "more predictable awards," "speed," "cost savings," "choice of a decision-maker," and "confidentiality." (Jerold S. Sherman, *Judicial Review in Arbitration*, California Lawyer (April 2009) pp. 45, 46, emphasis in subheadings omitted.) The "Disadvantages of Arbitration" also were identified: "inadequate record," "informal rules of evidence," "limited discovery," "no guarantee of experts," and "no malicious prosecution." (*Id.*, at 46, emphasis in subheadings omitted.) The author recommended to readers that "if you decide to proceed with ADR rather than litigate in court, the best way to handle these concerns is to customize the arbitration agreement." (*Id.*, at 47.) In doing so, he was following this Court's lead in *Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334. (*Id.* at 45-47.)

The arbitration agreement at issue in this case, between a physician, Dr. Podolsky, and a patient, Mr. Ruiz, does precisely what the author of the recent article recommended. The agreement

provides that all claims must be arbitrated, not only including those claims between the physician and the patient, but also those claims between the physician and the patient's heirs, "including any spouse or heirs of the patient and any children." (AA 14) It includes claims not only against the physician but also claims against "the physician's partners, associates, association, corporation or partnership, and the employees, agents and estates of any of them." (*Ibid.*) It includes a provision whereby the physician and the patient "consent to the intervention and joinder in this arbitration of any party or entity which would otherwise be a proper additional party in a court action." (*Ibid.*)

In addition to those procedural directions, the arbitration agreement further provides that "[d]iscovery shall be conducted pursuant to Code of Civil Procedure section 1283.05, however, depositions may be taken without prior approval of the neutral arbitrator." (AA 14.)[8]

The arbitration agreement also has a substantive law dimension, in that "the parties agree that provisions of California law applicable to health care providers shall apply to disputes within this arbitration agreement, including, but not limited to, Code of Civil Procedure section 340.5 and 667.7, and Civil Code Sections 3333.1 and 3333.2." (AA 14.) The agreement also provides for protections of others, such as the arbitrators. "The parties agree that the arbitrators have the immunity of a judicial officer from civil liability when acting in the

[8] Code of Civil Procedure 1283.05, subd. (a) provides for the same discovery as would be conducted in a superior court setting, including a "guarantee of experts."

capacity of arbitrator under this contract. This immunity shall supplement, not supplant, any other applicable statutory or common law." (*Id.*)

In addition, the arbitration agreement clarifies that it will apply to all future care the patient may seek: "It is the intent of this agreement to apply to all medical services rendered any time for any condition." (AA 14.) This Court recently found such a provision to be enforceable in *Reigelsperger v. Siller* (2007) 40 Cal.4th 574.

Finally, the agreement includes an additional, optional provision, that the agreement may be enforced retroactively. (AA 14.) Mr. Ruiz initialed that provision. (*Ibid.*)

In other words, the physician-patient arbitration agreement here specifically anticipates and contractually addresses a number of arguable "disadvantages of arbitration" that might occur in a case for alleged professional negligence. In particular, the physician-patient arbitration agreement includes provisions that are directed toward assuring efficiency of arbitration and toward assuring consistent results in arbitration. Those provisions specifically address the concerns of the adult children of the patient, Mr. Ruiz, who are the plaintiffs here.

As a result, arbitration pursuant to the agreement between Dr. Podolsky and Mr. Ruiz is a fair and equitable way to resolve disputes arising from the physician-patient relationship, including the Ruiz family claim for wrongful death.

B. Arbitration Of The Ruiz Family Claim For Wrongful Death Is Consistent With The Efforts To Overcome Long-Standing Judicial Hostility To Arbitration, A Hostility That There Is No Evidence That Mr. Ruiz Shared

The California Legislature enacted Code of Civil Procedure section 1295 in 1975, while *Madden v. Kaiser Foundation Hospitals, supra*, was pending in this Court. As the Court noted in a footnote to its decision in that case, Section 1295 "specifies the language which must be used in an arbitration provision inserted into an individual medical services contract. Although this enactment does not apply to the case at bar, it evidences legislative acknowledgment of arbitration as a means of resolving malpractice disputes." (*Madden v. Kaiser Foundation Hospitals, supra*, 17 Cal.3d at 708, fn. 9.)

Understandably, the Legislature inserted that provision regarding arbitration of malpractice disputes into the California Arbitration Act. The Court surveyed the history of the California Arbitration Act in its seminal decision, *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 16-25.

The arbitration agreement in the present case follows Section 1295 precisely.

Surprisingly, the Court of Appeal made no direct reference, anywhere in its opinion, to the fact that the arbitration agreement follows Section 1295. That is particularly surprising because the court specifically cited to Code of Civil Procedure section 1281.2, subdivision (c) in offering its harsh opinion of the procedural effect of the order compelling arbitration in this case:

> [T]his case presents a unique legal quagmire. On one hand, the wrongful death statute ordinarily calls for "one action" to be jointly maintained by the heirs. On the other hand, Code of Civil Procedure section 1281.2, subdivision (c), eliminates any discretion to disregard Wife's purported arbitration agreement with the health care provider, despite the possibility of inconsistent results inherent in litigating the same wrongful death action in two forums.

(Slip Opn., p. 3, footnote omitted.) The provision to which the Court of Appeal apparently was referring was the final sentence in subsection (c), "This subdivision shall not be applicable to any agreement to arbitrate disputes as to the professional negligence of a health care provider made pursuant to Section 1295." (Code Civ. Proc., § 1281.2, subd. (c).)[9] Implicitly, the Court of Appeal questioned the decision of the Legislature, to allow parties to litigate in two forums and thereby create "a unique legal quagmire."[10]

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[9] The final sentence in Code of Civil Procedure 1281.2, subd. (c), was added in 1978 at the request of the California Medical Associates to ensure that Section 1295 arbitration agreements would be valid even if other defendants without arbitration agreements were in the lawsuit.

[10] The Court of Appeal was correct in one respect: Section 1281.2, subd. (c), eliminates any discretion to disregard a physician-patient arbitration agreement in the face of multiple defendants. This would not result in "litigating the same wrongful death action in two forums" because all heirs would be litigating their wrongful death claim against Dr. Podolsky in the arbitration, and all heirs would be litigating their superior court claims against the other defendants. That is the intent of Section 1281.2, subd. (c).

The Court of Appeal's remark is symptomatic of a judicial indisposition to arbitration that has been noted in many corners. The United States Supreme Court explained it this way, "Congress enacted the FAA to replace *judicial indisposition to arbitration* with a national policy favoring [it] and placing arbitration agreements on equal footing with all other contracts." (*Hall Street Associates, LLC v. Mattel, Inc.* (2008) 552 U.S. 576, 128 S.Ct. 1396, 1402, emphasis added, internal quotations omitted, citing *Buckeye Check Cashing, Inc. v. Cardegna* (2006) 546 U.S. 440, 443.) The California Supreme Court noted in *Cable Connection, Inc. v. DirectTV, Inc.,* that the California Arbitration Act is similar to the FAA, and "the similarity is not surprising, as the two share origins in the earlier statutes of New York and New Jersey." (44 Cal.4th at 1343.) As noted in *Cable Connection*,

> the CAA, like the FAA, provides that arbitration agreements are 'valid, enforceable, and irrevocable, save upon such grounds as exist for the revocation of any contract.' § 1281; see 9 U.S.C. § 2.) This provision was intended to 'overcome an *anachronistic judicial hostility to agreements to arbitrate*, which American courts have borrowed from English common law.'

(*Cable Connection, Inc., supra,* 44 Cal.4th at 1343, emphasis added.)

C. The Relationship Between Mr. Ruiz And Dr. Podolsky Was Contractual, And In The Contract Signed By Both Mr. Ruiz and Dr. Podolsky, They Agreed That All Claims Arising Out Of Their Physician-Patient Relationship Would Be Arbitrated

1. Plaintiffs' wrongful death action is based upon the physician-patient relationship between Dr. Podolsky and Mr. Ruiz, which relationship began with an agreement between Dr. Podolsky and Mr. Ruiz

The physician-patient relationship was entered into through a contractual agreement, in which Dr. Podolsky agreed to provide medical treatment to Mr. Ruiz. In exchange, Mr. Ruiz agreed, among other things, that he and all of his heirs would arbitrate any claims arising out of the rendition or failure to render that medical treatment. As such, if Mr. Ruiz had filed a lawsuit against Dr. Podolsky by reason of medical negligence, that claim would have been subject to arbitration, precisely because Dr. Podolsky allegedly breached the duty created when he and Mr. Ruiz entered into their physician-patient relationship.

It is precisely that duty which now provides the basis of the wrongful death claim being pursued by Mr. Ruiz's family, including his adult children. The wrongful death cause of action here turns on the question of whether Dr. Podolsky owed Mr. Ruiz a duty, and that duty turned on the question of whether Dr. Podolsky agreed to enter into a physician-patient relationship with Mr. Ruiz.

Indeed, given the contractual nature of the physician-patient relationship and given that the wrongful death claim is based on that

relationship, Mr. Ruiz's heirs should be estopped to deny the arbitration agreement applies to them. (See, *e.g.*, *Bardin v. Daimlerchrysler Corp.* (2006) 136 Cal.App.4th 1255, 1272 ["The physician-patient relationship is a contractual one"], quoting *Scripps Clinic v. Superior Court* (2003) 108 Cal.App.4th 917, 940.) This will be explained further below.

2. The agreement between Dr. Podolsky and Mr. Ruiz included an agreement to arbitrate all claims, including a claim by the Ruiz family for wrongful death, which agreement is enforceable even though it was not signed by the heirs

Admittedly, the wife and adult children of Mr. Ruiz did not sign the arbitration agreement. They are non-signatories. They are bound to arbitrate, nevertheless. Courts have held that non-signatory parties can be bound to arbitration agreements. (See, *e.g.*, *Boucher v. Alliance Title Co., supra,* 127 Cal.App.4th at 262; *Rowe v. Exline* (2007) 153 Cal.App.4th 1276, 1289.) More to the point of this case, courts have held that non-signatory parties are bound to arbitration agreements signed by decedents when the language of the agreement evinces a clear intent to bind the non-signatories. (See, *e.g.*, *Mormile v. Sinclair* (1994) 21 Cal.App.4th 1508, 1510; *Herbert v. Superior Court* (1985) 169 Cal.App.3d 718, 725.)

Here, though the Court of Appeal claimed to be upholding "basic contract principles," it failed to consider the specific language of the contract Mr. Ruiz signed, in which he specifically agreed that any claims brought by his heirs related to his treatment would be

subject to arbitration. (See *Mormile v. Sinclair, supra,* 21 Cal.App.4th at 1510; *Herbert v. Superior Court, supra*, 169 Cal.App.3d at 725.) As noted in *Gross v. Recabaren* (1988) 206 Cal.App.3d 771, 777, "[b]ecause the scope of arbitration is a matter of agreement between the parties, 'the court should attempt to give effect to [their] intentions, in light of the usual and ordinary meaning of the contractual language and the circumstances under which the agreement was made [citation].' [Citation.]" (206 Cal.App.3d at 777, citing *Victoria v. Superior Court* (1985) 40 Cal.3d 734, 744.) Moreover, "[a]ny doubts concerning the scope of arbitrable issues must be resolved in favor of arbitration." (*Ibid.*, citing *Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street* (1983) 35 Cal.3d 312, 323.)

3. The courts should not require that, in order for such an agreement to be enforceable in a wrongful death action, the agreement must be signed by the family, because that will interfere with the physician-patient relationship

The courts should not require that, in order for arbitration agreements to be enforceable against heirs, the heirs must sign the agreement. Arbitration will be impossible, if only because it cannot be determined who the heirs will be until after the death that makes them heirs. Prior to that point in time, there are no heirs, there only is the family. Even assuming that the family must sign the agreement, there will be problems.

As the court noted in *Herbert v. Superior Court, supra*, one of the most significant considerations in this context is the specter of heirs interfering with or delaying the patient's treatment by withholding their consent to arbitration: "[I]t is obviously unrealistic to require the signatures of all the heirs, since they are not even identified until the time of death, or they might not be available when their signatures are required. Furthermore, if they refused to sign they should not be in a position possibly to delay medical treatment to the party in need." (*Herbert v. Superior Court, supra,* 169 Cal.App.3d at 725.) The *Herbert* court further noted that "[a]lthough wrongful death is technically a separate statutory cause of action in the heirs, it is in a practical sense derivative of a cause of action in the deceased." (*Ibid.*)

In *Gross v. Recabaren, supra,* the Court of Appeal reiterated the concerns expressed in *Herbert*:

> [I]n our view the most significant consideration, to authorize an intrusion into a patient's confidential relationship with a physician as the price for guaranteeing a third person, even a spouse, access to a jury trial *on matters arising from the patient's own treatment*, poses problems of a particularly serious nature. One might hope that spouses will voluntarily communicate with each other regarding their respective medical treatment, whether it involves a routine matter or a most intimate and sensitive procedure such as a vasectomy or the termination of a pregnancy. Nonetheless, it would be impermissible to adopt a rule that would require them, or their physicians, to do so, or that would permit one spouse to exercise a type of veto power

> over the other's decisions. Yet construing section 1295 to require a spouse's concurrence in an arbitration agreement would, in certain situations at least, have exactly that effect.

(*Gross v. Recabaren, supra,* 206 Cal.App.3d at 782, emphasis in original.) The court also noted that "[i]t would appear indisputable that if spouses disagree on any decision regarding the terms of medical treatment, including the desirability of an arbitration provision, the view of only one can prevail. Inasmuch as the patient is more directly and immediately affected, as between the two, the balance must weigh in that individual's favor." (*Id.* at 783.)

In *Mormile v. Sinclair, supra*, the Court of Appeal again reinforced these concerns and the paramount nature of the physician-patient relationship in these situations:

> [The patient's] agreement with her physician provided for arbitration of *all* claims arising out of or relating to [the patient's] medical treatment or services, including the claims of any spouse or heir. There is no question the agreement was intended to define and bind those individuals with a potential cause of action if negligent treatment of [patient] resulted in her injury or death. [Citation.] [Plaintiff's] loss of consortium claim is based on [the patient's] injury or a disability allegedly resulting from [defendant physician's] professional negligence. An order compelling arbitration of [plaintiff's] claim is consistent with the language of the statute, subserves the legislative goals underlying section 1295, protects [patient's] right to privacy in her relationship with her

> physician and ensures that no third party will be able to intrude into that relationship or veto [patient's] choices. In the balance, [patient's] right to decide the terms of her medical treatment *outweighs [plaintiff's] right to a jury trial of his loss of consortium claim.*

(*Mormile v. Sinclair, supra,* 21 Cal.App.4th at 1515-1516, emphasis added.)

These considerations were barely touched upon in *Ruiz.* Moreover, to the extent they were discussed, the *Ruiz* court took it upon itself to simply reverse the balance found in *Herbert, Gross,* and *Mormile* with little analysis. That is, whereas *Herbert* and its progeny specifically found that a patient's right to decide the terms of her medical treatment outweighs an heir's right to litigate in the forum of his choice, *Ruiz* upended this balance.

This was error. It is for the reasons set out above (*i.e.*, the physician-patient relationship, the intent of the contracting parties, the effect of Section 1295, and the applicable public policies), that Dr. Podolsky submits that *Buckner v. Tamarin, supra*, was wrongly decided. *Buckner* failed to address the reasoning of *Herbert* and distinguished *Herbert* solely on the ground that, in *Buckner*, the one action rule was inapplicable.

4. Another reason for enforcing the arbitration agreement in this case is that it complies with Code of Civil Procedure section 1295, which reinforces the Legislature's stated support of binding arbitration in the medical context

The Court of Appeal in *Ruiz v. Podolsky* ignored the import of Code of Civil Procedure section 1295 and cases Dr. Podolsky had pointed to as evincing the strong legislative preference in favor of arbitration of medical malpractice claims. (See, *e.g.*, *Bolanos v. Khalatian* (1991) 231 Cal.App.3d 1586, 1591.) Section 1295, which states the legislative preference for arbitration in "any dispute as to professional negligence of a health care provider," defines "professional negligence" as "a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or *wrongful death*, provided that such services are within the scope of services for which the provider is licensed . . . ." (Code Civ. Proc., § 1295, subd. (g)(2), emphasis added; see also Code Civ. Proc., § 1283.1, subd. (a).)

The Court of Appeal's failure to address this point flew in the face of well established law. As stated in *Pietrelli v. Peacock* (1993) 13 Cal.App.4th 943, 947, n.1, "[t]o the extent that *Rhodes* suggests that a patient has no authority to bind nonsignatories to an arbitration agreement without their consent, it is out of step with both the overwhelming weight of California authority and the strong public policy favoring arbitration in medical malpractice cases heralded by the enactment of section 1295." (Citing *Keller Construction Co. v.*

Kashani (1990) 220 Cal.App.3d 222, 226, n.3; *Gross v. Recabaren, supra,* 206 Cal.App.3d at 775-76.)

The purpose of Section 1295 is to encourage and facilitate arbitration of medical malpractice disputes. (*Riegelsperger v. Siller, supra,* 40 Cal.4th at 578, citing *Pietrelli v. Peacock, supra,* 13 Cal.App.4th at 946, and *Gross v. Recabaren, supra*, 206 Cal.App.3d at 776.) Accordingly, the provisions of Section 1295 are to be construed liberally. (*Ibid.*, citing *Preferred Risk Mutual Ins. Co. v. Reiswig* (1999) 21 Cal.4th 208, 215.)

The court in *Pietrelli* specifically noted that *Rhodes* was a "pre-MICRA case," and that *Rhodes* was decided before the passage of Section 1295. (*Pietrelli v. Peacock, supra,* 13 Cal.App.4th at 947, n.1; see also *Herbert v. Superior Court, supra,* 169 Cal.App.3d at 727 [noting that Section 1295 "evidence[s] a *legislative intent* that a patient who signs an arbitration agreement *may bind his heirs to that agreement* . . . "], emphasis added.)

In considering the effect of Section 1295, it is important to keep in mind that the cause for wrongful death is "statutory rather than common-law [in] origin," and that "the [L]egislature both *created and limited* the remedy." (*Ruttenberg v. Ruttenberg* (1997) 53 Cal.App.4th 801, 807, emphasis added; see also *Bromme v. Pavitt* (1992) 5 Cal.App.4th 1487, 1497 ["Because [the cause of action for wrongful death] is a creature of statute, the cause . . . exists only so far . . . as the legislative power may declare"]; *Titolo v. Cano* (2007) 157 Cal.App.4th 310, 318-20 [discussing effect and application of Section 1295].)

The import of the wholly statutory origin of wrongful death claims in California is that the Legislature was well within its rights to limit how heirs' claims for wrongful death could be brought, and its own preference that those claims be heard in arbitration where the decedent had signed an arbitration agreement that complied with Section 1295. *(Herbert v. Superior Court, supra,* 169 Cal.App.3d at 726-727.)

The Court of Appeal's failure to address the import of Section 1295 was a glaring hole in its analysis. Arguably, the court failed to address the statute because there is no legitimate way to get around the statute's clearly stated preference for arbitration in medical malpractice cases such as this one. Long-standing case law had established that the provisions of Section 1295 were to be interpreted liberally in order to advance the Legislature's policy of encouraging arbitration in medical disputes. That recently was reiterated by this Court. (*Riegelsperger v. Siller, supra*, 40 Cal.4th at 578.)

5. There is another provision in the Code of Civil Procedure, section 1283.1, that also demonstrates the Legislature's stated support of binding arbitration of wrongful death actions

Code of Civil Procedure section 1283.1, which addresses discovery rights in arbitration, offers further evidence of the Legislature's support for arbitration in the medical malpractice context, and specifically in wrongful death actions. Section 1283.1, subdivision (a), provides that "[a]ll of the provisions of [s]ection 1283.05 [relating to the right of discovery in arbitration] shall be

conclusively deemed to be incorporated into, made a part of, and shall be applicable to, every agreement to arbitrate any dispute, controversy, or issue arising out of or resulting from any injury to, *or death of*, a person caused by the wrongful act or neglect of another." (Emphasis added.)

D. The Potential Of Arbitration, To Be More Expeditious And Efficient Than Court Proceedings, Can Be Realized, But Only If The Court And All Of The Parties Act In A Way That Is Consistent With The Promise Of Arbitration

1. There are ways to address plaintiffs' concern that arbitration of part of their wrongful death claim and Superior Court trial of the other part of their claim might result in inefficiency and inconsistent results

In *Cable Connection, Inc., supra,* this Court noted that the parties and the courts share an interest in arbitration. "The benefits of enforcing agreements like the one before us are considerable, for both the parties and the courts. The development of alternative dispute resolution is advanced by enabling private parties to choose procedures with which they are comfortable." (*Cable Connection, Inc., v. DIRECTV, Inc., supra*, 44 Cal.4th at 1363.)]

In *Moncharsh v. Heily & Blase, supra*, this Court acknowledged that judicial review may be appropriate when "granting finality to an arbitrator's decision would be inconsistent with the protection of a party's statutory rights." (3 Cal.4th at 32; see also

Aguilar v. Lerner (2004) 32 Cal.4th 974, 981-82.) And in fact, that is precisely the path down which the trial court was proceeding here, where it suggested that it would be able to review the results of the arbitration proceedings to ensure that all parties' rights were protected and there was no duplication in awards.

The trial court's instincts as to the management of arbitration were correct: the judiciary should have a role in overseeing arbitration results, to ensure that they are conducted fairly and in a manner that ensures that all parties' rights are protected.

2. Although the Superior Court erroneously denied arbitration as to the adult children, in several other respects the court acted consistently with the promise of arbitration

As the trial court recognized, the plaintiffs have legitimate concerns, if only because, as the trial court put it, it is "awkward" to arbitrate as to one plaintiff and not as to the other plaintiffs. The trial court promised to address the plaintiffs' concerns, at a later point in time in the Superior Court litigation, and that promise was laudable.

Dr. Podolsky submits that the trial court will be able to manage the litigation even more effectively, and thereby allay not only plaintiffs' concerns but also those of Dr. Podolsky, by ordering arbitration as to *all* of the plaintiffs, not just the wife, pursuant to the contract into which Mr. Ruiz and Dr. Podolsky entered. In particular, the trial court will be in a better position to compare and manage the combination of (1) the arbitrators' award of wrongful damages against Dr. Podolsky, if any, and (2) the jury's award of damages against the

co-defendants, if any, if all of the plaintiffs' wrongful death action against Dr. Podolsky is arbitrated in one forum. Separate litigation of the plaintiffs' wrongful death action against Dr. Podolsky in two forums, the wife in arbitration and the adult children in Superior Court, will make the trial court's task that much more complex. Not only will the trial court more easily be able to ensure that neither the plaintiffs' rights nor Dr. Podolsky's rights are infringed, the trial court might be able to allay plaintiffs' concerns altogether by persuading the co-defendants to voluntarily join that arbitration.

Arguably, that is what the trial court did, at least insofar as the plaintiffs were concerned. The court hinted that the adult children might agree to join the arbitration, *i.e.*, to "decide voluntarily to proceed in an arbitration forum that includes all the heirs, ..." (RT 6:5 to 6:7.) The court was unsuccessful in that respect, but in one other respect, the court actually succeeded. The court persuaded all of the parties to stipulate to combined discovery and thereby avoid the inefficiency of duplicate discovery. (RT 9:12-24.)

The point is that the trial court knew that the benefits of arbitration could be achieved, and the plaintiffs' concerns addressed, if the plaintiffs and the trial court showed a willingness to work with the arbitral process. Moreover, the trial court knew that the advantages of arbitration would be achieved even with the obvious complexity of Mr. Ruiz's wife being ordered into arbitration but his adult children not. The trial court knew that it could work with the parties and, ultimately, reconcile the results in order to ensure that there were no inconsistent outcomes or other defects in the process.

The point is that the trial court did make an effort to balance the competing interests here, and to manage those claims that would be arbitrated with those claims that the adult children insisted should be litigated in court. The trial court's efforts recognized the important role of arbitration in allowing parties to arrange for private proceedings under their control. The trial court also recognized the difficulties with enforcing arbitration against non-signatories.

The trial court's instincts were correct: arbitration should be enforced, but the judiciary has the ultimate role to ensure that the outcome of arbitration is fair, respects the rights of all parties, and is carried out in accord with basic procedural requirements. (*Moncharsh v. Heily & Blase, supra,* 3 Cal.4th at 32.)

3. The Court of Appeal did not act consistently with the promise of arbitration, but rather, selectively emphasized certain "contract principles" and the "right to a jury trial" to trump the patient-physician relationship and the one-action rule

The Court of Appeal announced at the outset of its decision that "[p]rinciples of equity and basic contract law outweigh the convenience of litigating in one forum and the public policies favoring arbitration." (Slip Opn., p. 3.) The court said at the end of its decision that it would "not endorse or propagate a rule permitting courts to 'sweep up' nonsignatory parties into arbitration for the sake of judicial convenience as that would require us to ignore basic contract law principles (arbitration dependant [*sic*] on a consensual

written contract), ignore the fundamental right to have a jury trial, and ignore constitutional rights to due process." (Slip Opn., p. 22.) However, the Court of Appeal offered no analysis whatsoever to back up these sweeping statements regarding the "basic contract principles" or the adult children's purported "fundamental right to . . . a jury trial" or "constitutional rights to due process . . . ." The Court of Appeal merely enumerated these purported issues.

4. Other courts of appeal, and even the court that decided *Ruiz v. Podolsky*, should decide cases in such a way as to achieve the promise of arbitration

As noted in *Pietrelli v. Peacock, supra,* 13 Cal.App.4th at 947, n. 1, "the overwhelming weight of California authority" and "strong public policy favoring arbitration in medical malpractice cases heralded by the enactment of section 1295" weigh strongly in favor of compelling the non-signatory adult children to arbitrate here. Previous cases in this area, such as *Mormile v. Sinclair, supra,* 21 Cal.App.4th at 1514, recognized that "[t]wo competing rights are at stake" in situations such as the one here, namely, "the patient's right of privacy and the [heir]'s right to jury trial of a treatment-related claim . . . ." However, *Mormile* held the former outweighed the latter, following the analysis in *Herbert v. Superior Court, supra,* 169 Cal.App.3d at 725 and *Gross v. Recabaren, supra,* 206 Cal.App.3d at 781. *Mormile* concluded that mandatory arbitration was "not only consistent with the language of [section 1295], but . . . essential to further the goals of the legislation and the judicially declared

preference in favor of joining [the claims]; safeguard the physician-patient relationship; and preserve important privacy rights of the patient." (*Mormile, supra,* 21 Cal.App.4th at 1514.)[11]

Indeed, in *Scroggs v. Coast Community College Dist.* (1987) 193 Cal.App.3d 1399, 1403-04, the same Division of the Court of Appeal that decided *Ruiz* (Fourth District, Division 3), noted that "arbitration provision[s] in . . . contracts [for medical care are] a reasonable restriction, for [they do] no more than specify a forum for the settlement of disputes." As *Scroggs* noted, "it is clear that imposing a requirement to arbitrate *only limits the litigant's choice of a forum, and in no way proscribes or impairs the substantive right.*" (*Ibid.*, emphasis added.) The analysis of the *Scroggs* opinion was entirely absent in the *Ruiz v. Podolsky* decision, which viewed requiring arbitration of the nonsignatories' wrongful death claim as somehow denigrating the nonsignatories' rights.

Thus, in considering the balance of the decedent's privacy rights and relationship with his physician on the one hand, and the nonsignatories' rights on the other, it must be kept in mind that the nonsignatories' wrongful death claims are, in a very practical sense, derivative of the decedent's injuries. Given that the decedent *himself* agreed to arbitration of all claims, the weight of the nonsignatories' purported rights to litigate in the forum of their choice must be adjusted accordingly.

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[11] The *Ruiz* opinion does not once mention the *Mormile* decision, even though that decision arose out of the same Division of the Court of Appeal that decided *Ruiz* and even though the decision was cited to the court by Dr. Podolsky. (AOB pp. 15-16.)

Given the previous analyses finding that the considerations of the physician-patient relationship and the patient's privacy outweighed the rights of the patient's relatives to sue in the forum of their choice, and further finding that enforcing arbitration against the non-signatory heirs in "no way proscribes or impairs the substantive right" of the relatives to bring their claims, the *Ruiz* court erred in ignoring this precedent and creating entirely new law.

E. Plaintiffs' Assertion That There Will Be Two Inconsistent Proceedings, Which Is An Inefficient Approach That Might Result In Inconsistent Results, Is True Only Because Plaintiffs Take Inconsistent Positions As To Arbitration

1. The one-action rule actually *reinforces* both the California Wrongful Death Statute and the California Arbitration Act

The Court of Appeal's decision allows for two different proceedings in two different forums, for one wrongful death cause of action against one defendant.

Admittedly, there are multiple plaintiffs in this action, and there are multiple defendants. However, the approach taken by the Court of Appeal creates the most inefficient and unworkable outcome.

The Court of Appeal here relied upon *Buckner v. Tamarin, supra*, and rejected *Herbert v. Superior Court, supra*. However, *Buckner* itself pointed out that *Herbert* was distinguishable primarily because the one-action rule was implicated in *Herbert* and not implicated in *Buckner*.

In other words, the Court of Appeal realized that it had to diminish the importance of the one-action rule here, because that rule was in fact applicable here. The Court of Appeal's efforts to do so failed.

After recognizing that "[g]enerally, there may be only a single action for wrongful death, in which all heirs must join," and that "[t]here cannot be a series of such suits by individual heirs" (Slip Opn., p. 6), the Court of Appeal then stated that

> [t]he one action rule, however, is not jurisdictional, and its protections may be waived. [Citations.] For example, a wrongful death settlement will not terminate the action if the settlement includes less than all of the named heirs. By settling with less than all of the known heirs, the defendant waives the right to face only a single wrongful death action and the nonsettling heirs may continue to pursue the action against the defendant. . . . Similarly, if the defendant settles an action that has been brought by one or more of the heirs, with knowledge that there exist other heirs who are not parties to the action, the defendant may not set up that settlement as a bar to an action by the omitted heirs.

(Slip Opn., p. 7, internal quotations omitted, citing *Smith v. Premier Alliance Ins. Co.* (1995) 41 Cal.App.4th 691, 697; *Gonzales v. Southern California Edison Co.* (1999) 77 Cal.App.4th 485, 489.)

The situations described by the *Ruiz* court in which the one-action rule does not apply are inapposite here. Dr. Podolsky did not "waive" the one-action rule; to the contrary, he sought to enforce it by

forcing all the plaintiffs to litigate in one forum, as in *Herbert*. There was no question of a settlement including less than all of the named heirs. Dr. Podolsky sought to have all of the known heirs litigate their claims together, as required by law.

The Court of Appeal also stated that "when the defendant is aware the heir is not included in the suit, the defendant 'had knowledge that the suit was not the type contemplated under the statute. . . . Defendants could have made a timely objection and had the action abated or at least could have made plaintiff a party to the action. . . . [T]he failure of defendants to do so should not estop the plaintiff from bringing his rightful claim for wrongful death." (Slip Opn., p. 7.) Again, this has nothing to do with the case presented to the courts here. Dr. Podolsky did *not* seek to pursue a suit against less than all of the heirs. He has consistently sought to have all of the heirs litigate in one forum – arbitration.

The Court of Appeal's statement that "we conclude Podolsky has waived the protections offered by the statutorily created 'one action rule' for wrongful death cases by filing his petition to compel arbitration, causing the lawsuit to be split into two forums" (Slip Opn., pp. 3-4), is utterly unfounded and simply turns the established law on its head.

In the directly analogous situation in *Herbert v. Superior Court, supra,* the court found that, because the spouse and minor children were concededly bound to arbitration, and the adult children argued that they were not, the one-action rule and other significant policy considerations would *require* the adult children to arbitrate their claims. (*Herbert v. Superior Court, supra,* 169 Cal.App.3d at 727.)

Herbert noted that "[w]ith a single cause of action for wrongful death existing in all heirs under Code of Civil Procedure section 377,[12] the party entering into [the arbitration agreement] *must* have the authority to bind [his] heirs."

The Court of Appeal here had no basis for simply ignoring the requirements of the one-action rule and applying the rule in a manner directly opposite the application of the rule in *Herbert v. Superior Court* – an application recognized and left undisturbed by *Buckner v. Tamarin.* Moreover, the *Ruiz v. Podolsky* decision eviscerates the effect of the one-action rule in wrongful death cases stemming from alleged medical malpractice. This was error.

[12] Now Code of Civil Procedure section 377.60.

II. THE BINDING EFFECT OF AN ARBITRATION AGREEMENT SHOULD TURN UPON THE INTENTION OF THE PARTIES TO ARBITRATE, NOT THE CHARACTERIZATION OF A CAUSE OF ACTION AS "INDEPENDENT" RATHER THAN "DERIVATIVE"

A. Characterization Of The Cause Of Action As "Independent" Adds Nothing

In California, a wrongful death cause of action is characterized as "independent." That is because there was no wrongful death cause of action under the common law. It was necessary for the Legislature to create such. That means that a wrongful death cause of action is not "derivative." So what? All that means is that, in California, the heirs can pursue a claim for wrongful death even though the decedent settled his own claim for personal injury. If the decedent tried his personal injury claim, and the court found that there was no negligence, his heirs would be bound by that finding.

As the court in *Herbert v. Superior Court, supra*, noted, "[a]lthough wrongful death is technically a separate statutory cause of action in the heirs, it is in a practical sense derivative of a cause of action in the deceased." (169 Cal.App.3d at 725; see also *Argonaut Ins. Co. v. Superior Court* (1985) 164 Cal.App.3d 320, 324; *Saenz v. Whitewater Voyages, Inc.* (1990) 226 Cal.App.3d 758, 763-64.)

Though the Court of Appeal here strove to characterize a wrongful death action as a new and distinct action, rather than a surviving action, other courts have recognized that the wrongful death

action is derivative to the extent that the wrongful death plaintiff "stands in the shoes of the decedent" (*Argonaut Ins. Co. v. Superior Court, supra*, 164 Cal.App.3d at 324) and that the wrongful death claimants are subject to the same defenses that could have been asserted against the decedent. (*Saenz, supra,* 226 Cal.App.3d at 763-764; see also *Atkins v. Strayhorn* (1990) 223 Cal.App.3d 1380, 1395 ["[U]nlike an action for wrongful death, [plaintiff's] claim for loss of consortium is not merely derivative of [her injured spouse's] claim for personal injuries"]; *Herbert v. Superior Court, supra*, 169 Cal.App.3d at 725.)

B. This Court Should Clarify That Mr. Ruiz's Adult Children Were Bound To Arbitrate Because Their Father Wanted Such, Not Because Of The Arbitrary Characterization Of Their Claim As "Independent" Or "Derivative"

It is significant that, in other contexts, the decedent's intent in entering a contract will bind his heirs. For example, in *Paralift, Inc. v. Superior Court* (1993) 23 Cal.App.4th 748, 757-58, the court found that "[t]he decedent's express release of any negligence liability on the part of [defendant] [bound] his heirs" in their action for wrongful death. "Based on the language of the release, it was evidently the intention of the parties that it have a broad and ongoing scope . . . ." (*Ibid.*; accord *Coates v. Newhall Land & Farming, Inc.* (1987) 191 Cal.App.3d 1 [same].)

The Court of Appeal emphasized in its decision, contract principles. However, the court inexplicably ignored the foundational

contract here – the contractual relationship between Dr. Podolsky and Mr. Ruiz, from which the heirs' claim arise. In the underlying contract governing their physician-patient relationship, Mr. Ruiz and Dr. Podolsky explicitly agreed that all claims arising out of the physician-patient relationship would be arbitrated. The heirs would have no claim if there had been no contractual physician-patient relationship: the heirs cannot both rely on this contractual relationship and seek to avoid the terms of the contract, which require arbitration of their claims.

C. This Court Should Clarify That Mr. Ruiz's Wife Was Bound To Arbitrate, Not Only Because She Acknowledged Such, But Also Because Her Husband Wanted Such

For the reasons set out above, it is clear under the relevant precedent that Mr. Ruiz's wife was bound to arbitrate. Indeed, the plaintiffs themselves specifically agreed with defendants on this point. (AA at p. 39 ["Plaintiff Alejandra Ruiz as the wife of decedent is subject to the arbitration agreement . . ."]; Respondent's Br., p. 9 ["California Courts have found that the arbitration provision of a contract pursuant to Code of Civ. Proc. section 1295 can bind a spouse in order to preserve the privacy rights of the patient and provide access to medical treatment"], citing *Gross v. Recabaren, supra*, and *Mormile v. Sinclair, supra.*)

There was no justification for the Court of Appeal to opine that Mrs. Ruiz was not bound to arbitrate. (Slip Opn., pp. 3, 23.) The cases cited by the plaintiffs themselves (and analyzed above)

demonstrate precisely why she was bound. As noted in *Gross v. Recabaren* and *Mormile v. Sinclair*, spouses are able to bind each other given their fiduciary duties to each other and their abilities to act as agents for each other.

Moreover, previous cases had refused to second guess whether a spouse was bound to arbitrate when plaintiffs had conceded that the spouse was bound to arbitrate. For example, in *Byerly v. Sale* (1988) 204 Cal.App.3d 1312, 1316, n. 2, the court noted that "[t]he propriety of referring husband's loss of consortium action to arbitration has not been challenged by plaintiffs in this case . . . and we express no opinion concerning the soundness of the rule [binding spouses to arbitration]."

Here, plaintiffs were bound to the position they explicitly took at trial and on appeal, and the Court of Appeal was powerless to alter the facts established by plaintiffs' own admissions. A party "is bound by the stipulation or open admission of his counsel and cannot mislead the court and jury by seeming to take a position on issues and then disputing or repudiating the same on appeal." (*People v. Pijal* (1973) 33 Cal.App.3d 682, 697; accord *Brown v. Boren* (1999) 74 Cal.App.4th 1303, 1316 ["a litigant may not change his or her position on appeal and assert a new theory"]; *Fontana v. Upp* (1954) 128 Cal.App.2d 205, 211 ["Where parties have taken a certain position during the trial, they cannot adopt a different position on appeal by raising a new issue which the other party was not apprised of at the trial"].)

The Court of Appeal erred in offering its opinion in *dicta* as to the effect of the arbitration agreement as to Mrs. Ruiz – an issue not

raised by plaintiffs on appeal, and that they had conceded at both trial and on appeal. (See, *e.g.*, *Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 456, fn. 1 [appellate court's review limited to issues which have been adequately raised and supported in appellant's brief]; *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979 [noting that it is not appellate court's function to address arguments not raised on appeal]; cf. *Havstad v. Fidelity National Title Ins. Co.* (1997) 58 Cal.App.4th 654, 661 [noting that Court of Appeal will not consider issues that were not raised at trial level].)

D. The Adult Children Should Be Equitably Estopped To Deny Mr. Ruiz's Agreement With Dr. Podolsky To Arbitrate All Claims, Including Claims For Wrongful Death

As noted above, courts have held that non-signatory parties are bound to arbitration agreements. Courts have held that non-signatory parties are bound to arbitration agreements signed by decedents when the language of the agreement evinces a clear intent to bind the non-signatories. (*Mormile v. Sinclair, supra*, 21 Cal.App.4th 1508, 1510; *Herbert v. Superior Court, supra*, 169 Cal.App.3d at 725.)

Moreover, California courts have explained that non-signatories can be bound by arbitration agreements where equitable estoppel applies. Under that theory, "a signatory to an arbitration clause may be compelled to arbitrate against a nonsignatory when the relevant causes of action rely on and presume the existence of the contract containing the arbitration provision." (*Rowe v. Exline* (2007) 153 Cal.App.4th 1276, 1286-87, citing *Boucher v Alliance Title Co., Inc.*

supra, 127 Cal.App.4th at 269; see also *Turtle Ridge Media Group, Inc. v. Pacific Bell Directory* (2006) 140 Cal.App.4th 828, 832-33; *Metalclad Corp. v. Ventana Environmental Organizational Partnership* (2003) 109 Cal.App.4th 1705, 1713-14.)[13]

Though the earlier California cases applying equitable estoppel to bind non-signatories involved arbitration agreements governed by the Federal Arbitration Act and applied federal rather than California law, later California cases have made clear that "[m]erely because a legal concept emanates from federal jurisprudence does not necessarily make it unreasonable, inapplicable, or unpersuasive in a California case. The equitable estoppel theory espoused in *Boucher, Turtle Ridge,* and *Metalclad* did not arise from a federal statute or case law that conflicts with California's arbitration law." (*Rowe v. Exline, supra*, 153 Cal.App.4th at 1288.) As the *Rowe* court noted, "both federal and California arbitration law favor the arbitration of disputes," and "the notion of estoppel is familiar to California law, and California's concern for equity is just as strong as that of federal law."

Here, the theory should be applied. As noted, the physician-patient relationship is contractual. (See, *e.g.*, *Bardin v. Daimler*

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[13] To the extent that Respondents may argue that Dr. Podolsky is precluded from raising equitable estoppel, that argument is meritless. Dr. Podolsky did argue generally that the heirs were, even as non-signatories, bound to the arbitration agreement. Moreover, "even where a legal argument was not raised in the trial court, [appellate courts] have discretion to consider it where, as here, it involves a legal question applied to undisputed facts." (*Rowe v. Exline, supra*, 153 Cal.App.4th at 1287, citing *Resolution Trust Corp. v. Winslow* (1992) 9 Cal.App.4th 1799, 1810.)

Chrysler Corp., supra, 136 Cal.App.4th at 1272 ["'The physician-patient relationship is a contractual one"], quoting *Scripps Clinic v. Superior Court, supra,* 108 Cal.App.4th at 940.) Mr. Ruiz's heirs' claims here for wrongful death arise out of Dr. Podolsky and Mr. Ruiz's contractual physician-patient relationship.

At its base, the equitable estoppel theory is based on the concept that where a non-signatory's claim is intertwined with an underlying contractual relationship, and where the contracting parties agreed to arbitrate all claims, the non-signatory cannot avoid arbitration. (See, *e.g.*, *Boucher v. Alliance Title Co., Inc, supra*, 127 Cal.App.4th at 269 [requiring arbitration where claims were intertwined with contact].)

Here, Mr. Ruiz's heirs' claims are intertwined with the contractual relationship Mr. Ruiz entered into with a physician, Dr. Podolsky, for treatment. For that reason, Mr. Ruiz's heirs should be estopped from subsequently arguing that they are not bound by the arbitration agreement – governing all claims, including Mr. Ruiz's heirs' – for which Mr. Ruiz specifically contracted.

III. BY FOLLOWING THE FOREGOING ANALYSES, THE COURT WILL CLARIFY THE LAW AS IT RELATES TO ARBITRATION OF WRONGFUL DEATH CLAIMS

A. Unlike The Court Of Appeal, This Court Should Reconcile Existing Law

The Court of Appeal here went too far in seeking to disavow *Herbert v. Superior Court, supra*, and its progeny. Had the Court of

Appeal sought to apply existing law, rather than change it, it would have recognized that *Herbert* was the most applicable and factually analogous precedent.

The Court of Appeal posited an "irreconcilable divergence of views" between two lines of cases, one beginning with *Rhodes v. California Hospital Medical Center, supra,* 76 Cal.App.3d at 606, "hold[ing that] wrongful death is not a derivative cause of action and therefore a patient cannot bind nonsignatory heirs bringing a wrongful death claim absent a preexisting agency-type relationship," and one beginning with *Herbert,* described as "suggest[ing] there are important public policy reasons to infer patients being treated have the broad authority to bind nonsignatory heirs to medical arbitration agreement, especially in cases of wrongful death." (Slip Opn., pp. 2-3.) The two lines of cases can in fact be reconciled on the facts.

Herbert did not disavow *Rhodes*, it distinguished *Rhodes*, noting that in *Rhodes,* the language of the arbitration agreement did not purport to bind heirs. (*Herbert, supra,* 169 Cal.App.3d at 725, n.2.) Later cases followed *Herbert*'s example in seeking to harmonize the case law. In *Ruiz v. Podolsky*, the Court of Appeal rejected this careful and incremental approach, and instead produced a decision that created a glaring tear in the fabric of the law.

The Court of Appeal took it upon itself to decide that one side of this perceived split must be rejected. The Court of Appeal concluded, in conclusory fashion, that "the reasoning of the *Rhodes* line of cases . . . employing a straightforward statutory analysis of the issue [was] most persuasive" and rejected entirely the "one-action rule" rationale behind the *Herbert* decision. (Slip Opn., p. 22.) The

Court of Appeal failed to offer compelling reasons for its conclusion and its sweeping revision of the law. After conducting a lengthy survey of the law, the Court of Appeal simply announced that it would follow *Rhodes* and disavow *Herbert*, with little analysis to support its conclusion.

Two points in particular show that, contrary to the Court of Appeal's statements, there was no irreconcilable split in the case law.

First, as noted, the language of the arbitration agreement in *Rhodes* did not purport to reach and bind the decedent's heirs. (*Rhodes, supra,* 76 Cal.App.3d at 606-09; see also *Herbert, supra,* 169 Cal.App.3d at 725, n.2.)

Second, even *Buckner v. Tamarin, supra*, the most recent decision to address the question of whether non-signatory heirs bringing wrongful death claims can be compelled to arbitrate their claims based on an arbitration agreement signed by the decedent, sought to harmonize the case law in this area, and distinguished *Herbert* on its facts, rather than disavow it. Though Dr. Podolsky does not, for the reasons set out below, believe *Buckner* was correctly decided, the *Buckner* decision demonstrates that the Court of Appeal here had no cause to attempt to disavow *Herbert*, as even the cases the Court of Appeal relied upon here did not go as far as the *Ruiz* court did.

B. *Herbert* Was The Most Analogous Case And This Court Should Follow That Case

As presented to the Court of Appeal here, the facts of this case were as follows: decedent signed an arbitration clause expressly binding his heirs. The decedent's wife and adult children sued. The wife conceded that she was bound by the arbitration agreement.

- The facts in *Rhodes* are distinguishable: there, the arbitration clause did not purport to bind heirs. (*Rhodes, supra,* 76 Cal.App.3d at 606-09.)[14]

- The facts in *Baker v. Birnbaum* (1988) 202 Cal.App.3d 288, are distinguishable: as in *Rhodes*, the arbitration clause did not purport to bind heirs. Moreover, the plaintiff in that case did not bring a wrongful death claim. (*Id.* at 294-95.)

- The facts in *Buckner* are distinguishable: there, though the arbitration clause did purport to bind heirs, only the decedent's adult children brought claims; no spouse brought a claim (*Buckner, supra,* 98 Cal.App.4th at 143); thus, there was no need to split forums. (Moreover, as discussed *infra*, Dr. Podolsky's position is that *Buckner* was wrongly decided in failing to follow *Herbert* and its progeny.)

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[14] Remarkably, the Court of Appeal here failed to note that the arbitration agreement here did state that it bound decedent's heirs.

The facts in *Herbert* are the most analogous to those here: the decedent in *Herbert* signed an arbitration clause that did purport to bind heirs. The decedent's spouse and several minor children were concededly bound to arbitration. The court required decedent's adult children, who argued they were not bound, to arbitrate their wrongful death claims with the spouse and the minor children under the "one-action rule" and for other important policy reasons. (*Herbert, supra,* 169 Cal.App.3d at 725-27.)

This is all to say that what the Court of Appeal did here was literally unprecedented. The Court of Appeal could point to no precedent in which a decedent's spouse was concededly bound to arbitrate where the adult heirs were not required to arbitrate their wrongful death claims with the spouse. That is, prior to *Ruiz*, *no court* had ever split the claims of a spouse and adult children for wrongful death into two forums.[15]

As discussed in the next sections, the Court of Appeal's decision dismissed (1) the import of Code of Civil Procedure section 1295 – which expresses the strong legislative preference for arbitration in wrongful death cases arising out of medical malpractice; (2) the intent of the contracting parties; (3) the concerns regarding the patient-physician relationship and patient privacy expressed in

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[15] Indeed, other courts had noted that the situation presented in *Herbert* and in this case supported compelling the adult children to arbitrate. (See *Matthau v. Superior Court* (2007) 151 Cal.App.4th 593, 600 [noting that "preexisting relationship – such as spouses and children in medical malpractice claims – supports the implied authority of the [patient] to bind the nonsignator[ies]"], citing *County of Contra Costa v. Kaiser Foundation Health Plan, Inc.* (1996) 47 Cal.App.4th 237, 243.)

Herbert and its progeny; and (4) the one-action rule relied upon in *Herbert* and its progeny.

C. California Courts Seek To Avoid Creating Conflicts In The Case Law

The *Ruiz* decision produced an unexpected and anomalous result, one that threw into uncertainty the rules and policies governing enforcement of arbitration agreements. This is precisely the state of affairs California courts seek to avoid. (See *State v. Broderson* (1967) 247 Cal.App.2d 797, 803 [noting that "objectives of certainty and stability . . . are major concerns of our legal system"]; *Jackson v. Lodge* (1868) 36 Cal. 28, 49-50 ["If questions which have been over and over again considered, and over and over again decided, are to be treated as still unsettled, then we are without any stable foundation of law or justice"][16].)

California courts seek, wherever possible, to avoid creating conflicts in the case law. (See *Bratt v. City and County of San Francisco* (1975) 50 Cal.App.3d 550, 555 ["[T]his court will not create a conflict in the California decisions by disregarding precedents which are concededly applicable . . . "]; *Hall v. Pacific Tel. & Tel. Co.* (1971) 20 Cal.App.3d 953, 954-955 ["We prefer to avoid creating a direct conflict in decisions"].)

The Court of Appeal here violated this basic principle. Instead of leaving the legal landscape as it was and fitting its decision into

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[16] Overruled on other grounds by *Hughes v. Davis* (1870) 40 Cal.117, 118-19.

that existing landscape, the court here chose to radically alter the landscape: it chose to reach out and disavow *Herbert* and its progeny where there was no justification to do so.

D. Justice George's Concurring Opinion In *Baker* Is Instructive On The Approach The Court Of Appeal Should Have Taken Here

The concurring opinion of then-Associate Court of Appeal Justice Ron George in *Baker v. Birnbaum, supra*, 202 Cal.App.3d 288, 294-95, is instructive in understanding why the *Ruiz* decision was erroneous, overreaching, and not in keeping with the approach appellate courts are bound to take in this State.

In *Baker,* the Court of Appeal held that where a patient signed an individual contract for medical services and the contract contained an arbitration clause, her husband was not bound by that agreement in bringing his loss of consortium claim.

Justice George found that *Herbert* was "distinguishable on several points" and therefore disagreed with the majority's decision to state that it "expressly decline[d] to follow *Herbert.*" (*Baker, supra*, 202 Cal.App.3d at 294.) Justice George noted that *Herbert* had distinguished the situation presented in *Baker*. He noted that in *Baker,* as in *Rhodes*, "[t]here was no provision in the agreement whereby the signing party intended to bind his or her heirs to the arbitration clause." (*Id.* at 295.) He also noted that *Herbert*, unlike *Baker*, had involved a claim for wrongful death, and thus implicated the "well-established rule that '[t]he statutory cause for wrongful

death . . . is a joint one, a single one and an indivisible one . . . .'" (*Ibid.*, citations omitted.)

The key point Justice George made in his concurring opinion is that there was no need for the Court of Appeal in that case to "expressly decline to follow *Herbert*" and create a conflict in the cases because *Herbert* was distinguishable on the facts. As in *Baker*, there was no justification for the *Ruiz* court to attempt to disavow *Herbert*. In fact, as noted *infra*, *Herbert* was the most applicable precedent, and should have been followed here.

This Court should follow the approach advocated by Justice George in *Baker*.

E. Previous Cases In This Area Had Sought To Distinguish Precedent On Their Facts

The *Ruiz* decision made no effort to follow the lead of the precedent in this area, which had sought to distinguish the varying cases in this area on their facts and, to the extent possible, harmonize the cases addressing enforcement of arbitration agreements.

The Court of Appeal sought to rely on *Rhodes*, but, as noted, that case, unlike the present case, did not involve an arbitration clause that sought to bind all of the patient's heirs. (*Rhodes, supra,* 76 Cal.App.3d at 606-09; cf. *Bolanos v. Khalatian, supra*, 231 Cal.App.3d at 1591 ["[W]here, as here, a patient expressly contracts to submit to arbitration any dispute as to medical malpractice, and that agreement fully complies with Code of Civil Procedure section 1295, it must be deemed to apply to *all* medical malpractice claims arising

out of the services contracted for, regardless of whether they are asserted by the patient or a third party"], internal quotations omitted, quoting *Gross v. Recabaren, supra,* 206 Cal.App.3d at 781; *Michaelis v. Schori* (1993) 20 Cal.App.4th 133, 139 [same].) Accordingly, *Rhodes*, on its most basic contractual facts, was wholly inapplicable in *Ruiz.*

Even *Buckner*, so heavily relied upon by the *Ruiz* court, did not purport to overturn or disavow *Herbert* and its progeny.[17] Instead, *Buckner* sought to harmonize *Herbert* with the existing case law. It distinguished *Herbert* on the facts, noting that "*Herbert*'s rationale is inapplicable here because respondents are not dividing their wrongful death claims between different forums." (*Buckner, supra,* 98 Cal.App.4th at 143.) *Buckner*'s approach left *Herbert* intact; the *Buckner* court recognized that there were many different potential factual permutations that courts could face in the non-signatory arbitration context, and that courts should seek to place the facts of the cases before them in the categories established in the case law.

Similarly, the federal courts in the recent cases of *Drissi v. Kaiser Foundation Hospitals, Inc.* (2008) 543 F.Supp.2d 1076, 1081 and *Clay v. Permanente Medical Group, Inc.* (2007) 540 F.Supp.2d 1101, 1111, sought to harmonize the case law in this area. In both those cases, which involved wrongful death claims and facts essentially identical to this case, the courts surveyed the existing case law – including *Rhodes, Baker, Buckner,* and *Herbert* – and found that the facts before them were most analogous to *Herbert*, and therefore

[17] As noted *supra*, and further discussed *infra*, Dr. Podolsky's position is that *Buckner* was wrongly decided.

followed the *Herbert* decision. (*Drissi, supra,* 543 F.Supp.2d at 1081 ["Of the cases reviewed by the Court, *Herbert* is the most applicable"]; *Clay, supra,* 540 F.Supp.2d at 1111 ["The Court finds the facts in *Herbert* more analogous, and adopts the reasoning of that case and its progeny"].)

In both *Drissi* and *Clay*, the courts found nonsignatories bound to arbitration under the one-action rule. The plaintiffs in *Clay* were the wife and adult children of decedent. The court found that, because the wife was bound to the arbitration agreement, the claims of the adult children would have to be arbitrated as well. (*Clay, supra,* 540 F.Supp.2d at 1111-12.) The plaintiffs in *Drissi* were the spouse and adult children of decedent. Again, the court found that because the wife was bound to arbitrate, the claims of the adult children would also have to be arbitrated under the one-action rule. (*Drissi, supra,* 543 F.Supp.2d at 1081.)

The *Ruiz* court should have followed a similar careful and incremental approach. The Court of Appeal should not have sought to drastically alter the established legal landscape with new law, but instead to find which precedent presented facts most analogous to the instant case. The most analogous case, as discussed *infra*, was *Herbert*. The rule of *Herbert* is the one this Court should apply.

Indeed, because the *Ruiz* court recognized that *Herbert* was the most factually analogous case, not only did the Court of Appeal here attempt to disavow *Herbert* and its progeny, the court also took the additional curious step of trying to alter the facts of the case. The plaintiffs' concession that Mrs. Ruiz was bound by the arbitration clause was a stubborn fact that got in the way of the Court of Appeal's

attempt to force the facts of this case into the facts of *Buckner* – where no plaintiff conceded she was bound to arbitration. So the Court of Appeal here took the inexplicable step of complaining about plaintiff's concession and the undisputed facts, and suggesting, in utter *dicta*, that Mr. Ruiz's wife was not in fact bound. As discussed below, the Court of Appeal had no justification to make these gratuitous observations. Therein lies the key to the weakness of the Court of Appeal's opinion, which upends decades of case law by (1) failing to adhere to the most applicable precedent (*i.e.*, *Herbert*), and (2) attempting to alter the facts presented on appeal.

F. This Court Should Not Read Too Much Into *Rhodes*, As The Court Of Appeal Did

One of the reasons we find ourselves in this situation in this case is that the Court of Appeal read far too much into *Rhodes*. The Court of Appeal elevated *Rhodes* to an importance and significance that decision simply does not merit.

The *Rhodes* case was remarkably thin, and relatively devoid of any serious analysis. Despite this, the Court of Appeal in *Ruiz* read into *Rhodes* a sweeping philosophical principle that the case simply did not contain: *i.e.*, that in no circumstances can non-signatory heirs be compelled to arbitrate (absent a preexisting agency-type relationship).

The weakness of the *Rhodes* case and its reasoning is demonstrated by plaintiffs' own disagreement with the case. In the simplistic analysis of *Rhodes*, where decedent's spouse and son

brought claims for wrongful death, the court held that even the decedent's spouse would not be compelled to arbitrate. (*Rhodes, supra,* 76 Cal.App.3d at 609-10.) Plaintiffs here *disagree* with this aspect of *Rhodes*: plaintiffs here concede that Mrs. Ruiz must arbitrate her claims. (AA 39.) As noted, in the trial court, plaintiffs based their opposition to arbitration solely on *Buckner*.

The *Rhodes* decision simply cannot bear the weight the *Ruiz* court sought to place on it.

CONCLUSION

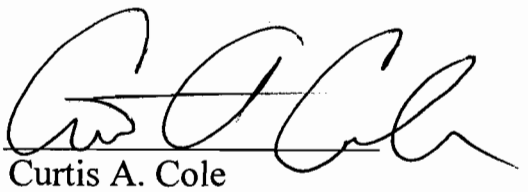
Ultimately, the California judiciary must ensure that arbitration is enforced in keeping with the Legislature's stated policy goal that arbitration be carried out in a manner that is fair to all parties. Here, the trial court made a good faith effort to balance the parties' competing interests. The trial court offered to manage the results of the arbitration and the concurrent litigation. In doing so, the trial court offered the right approach. The trial court could and should have done more, however. The trial court should have ordered that the entire wrongful death claim against Dr. Podolsky be arbitrated, pursuant to the agreement entered into by Mr. Ruiz and Dr. Podolsky.

DATED: November 12, 2009

SCHMID & VOILES

and

COLE PEDROZA LLP

By 

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CERTIFICATION

Counsel relies on word processing software to determine the word count of this brief. As determined by that software, this petition contains 13,971 words.

DATED: November 12, 2009

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STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of or employed in the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 900 Wilshire Blvd., Suite 1530, Los Angeles, California 90017. On this date, I served the persons interested in said action by placing one copy of the above-entitled document in sealed envelopes with first-class postage fully prepaid in the United States post office mailbox at Los Angeles, California, and one service by overnight courier addressed as follows:

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