S175204

SUPREME COURT COPY

IN THE

Supreme Court

OF THE STATE OF CALIFORNIA

ALEJANDRA RUIZ, et al.,
Plaintiffs and Respondents,

vs.

ANATOL PODOLSKY, M.D.,
Defendant and Appellant.

SUPREME COURT
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APPELLANT'S REPLY 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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INTRODUCTION

Plaintiffs do not deny that arbitration is a fair and equitable way to resolve the dispute in this case, but plaintiffs nevertheless insist on trial. (Answer Brief on the Merits, hereafter "ABM," pp. 27-28.) Plaintiffs speak of their "property interest" in their wrongful death claim (ABM, pp. 10-14), but plaintiffs offer no explanation why that property interest will in any way be impaired by having the claim heard in an arbitral forum.

Plaintiffs assume that the property interests of adult heirs who are opposed to arbitration should override the interests of physicians and their patients who made clear at the outset their preference for arbitration. That original intent – and the public policies favoring arbitration – should not be thwarted. (See, *e.g.,* ABM, p. 18.)

The following explains why plaintiffs are wrong.

I. PLAINTIFFS RELY ON FACTS OUTSIDE THE RECORD

The factual recitation in plaintiffs' Answer Brief on the Merits (ABM, pp. 4-5) contains multiple references to "facts" that are not in the record before this Court.

Plaintiffs cite page 20 of the Appellant's Appendix for their statements, "with a stat referral from his primary care physician due to MRI findings that established decedent had bilateral hip fractures that required immediate intervention" and "Dr. Podolsky's office

personnel presented decedent with intake / pre-treatment paperwork, including the subject medical services arbitration agreement as well as a questionnaire concerning insurance information and a patient history which included information pertaining to the cause of decedent's injuries. (AA 20.)" (ABM, p. 4.) Appellant's Appendix does not support those statements of fact.

Plaintiffs state that "Dr. Podolsky refused to treat Mr. Ruiz until issues involving payment for his services had been resolved." (ABM, p. 25.) The record does not support that statement of fact and plaintiffs offer no record cite to support the statement.

Plaintiffs do not even offer record cites for their claims that "Mr. Ruiz was required to sign the arbitration agreement in order to obtain treatment from Dr. Podolsky. The only thing Mr. Ruiz made clear was that he signed the required documents in order to obtain the treatment he desperately needed." (ABM, p. 4.) Again, Appellant's Appendix does not support those statements of fact.

Because these facts are not established in the sparse factual record before this Court, defendant objects. (Cal. Rules of Court, Rule 8.204(a)(2)(C) [briefs on appeal must provide a summary of significant facts "limited to matters in the record"]; *In re Rogers* (1980) 28 Cal.3d 429, 437, fn. 6 [contention was not cognizable on appeal because party relied on facts outside the record].)

As the Court would expect, on an appeal from an order denying a petition to compel arbitration such as this, the factual record developed at the trial court was quite thin, given the early stage of the litigation from which the appeal is taken.

II. PLAINTIFFS DO NOT EXPLAIN WHY THEY OPPOSE ARBITRATION, AND THEY DEFINITELY DO NOT ACKNOWLEDGE THE BENEFITS OF ARBITRATION

A. PLAINTIFFS FAIL TO EXPLAIN THE REASONS FOR THEIR HOSTILITY TO ARBITRATION

Plaintiffs repeatedly declare in the Answer Brief on the Merits that they oppose arbitration and want a jury trial. Plaintiffs do not explain, however, the reason for their opposition to arbitration, or how having their wrongful death claims heard in a different forum will affect the substance of their claims.

That is surprising if only because defendant Dr. Podolsky acknowledged in his Opening Brief on the Merits (hereafter "OBM") that there are "Disadvantages of Arbitration." (OBM, pp. 16-17, citing Jerold S. Sherman, *Judicial Review in Arbitration*, California Lawyer (April 2009), pp. 45-46.) Plaintiffs do not identify which of those disadvantages of arbitration is the reason for their preference that the Superior Court resolve the dispute with Dr. Podolsky regarding the cause of Mr. Ruiz's alleged wrongful death. Nor do plaintiffs acknowledge that there are "Advantages of Arbitration" (*ibid.*) and that there are public policies that favor arbitration for dispute resolution.

Rather, plaintiffs simply declare "that the entire matter should remain in the superior court to prevent conflicting rulings and to avoid inconsistent verdicts, unnecessary delay, multiple actions, and duplicative discovery …." (ABM, p. 32.) They do not emphasize the point, however, presumably because those problems are so easily

remedied, that those problems are resolved by plaintiffs agreeing to join their mother in her arbitration of the wrongful death claim against Dr. Podolsky. If plaintiffs had joined their mother in arbitration, who has conceded that she is bound to arbitration, they would have accomplished "a fair and equitable way of resolving the dispute arising from Mr. Ruiz's death" (OBM, pp. 14-16) and they likely would have resolved that dispute by now.

Whatever the reason, it is obvious that plaintiffs are "hostile" to arbitration. Their opposition is consistent with the well-known hostility of some attorneys and the "long-standing judicial hostility to arbitration" that has been noted on many occasions by the United States Supreme Court and by this Court. (OBM, pp. 19-21.)[1]

In any event, plaintiffs fail to explain how having their claims heard in an arbitral forum would abrogate or diminish their wrongful death claims. That is because it is clear that the choice of forum here would not affect the substance of plaintiffs' claims.

B. PLAINTIFFS FAIL TO ACKNOWLEDGE THE BENEFITS OF ARBITRATION

Beyond failing to point to disadvantages of arbitration, or why they are opposed to arbitration of their claims, plaintiffs fail to acknowledge the benefits of arbitration.

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[1] See also *Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, 1343 [noting that the California Arbitration Act was intended "to overcome an anachronistic judicial hostility to agreements to arbitrate, which American courts had borrowed from English common law"].)

California courts have long recognized that arbitration is efficient, and in many instances, speedier than litigation in court. (See, *e.g.*, *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9 [acknowledging "strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution"]; *Porter v. Golden Eagle Ins. Co.* (1996) 43 Cal.App.4th 1282, 1287 [same].)

Arbitration serves a beneficial function for the judicial system in that arbitration can assist the judicial system in becoming more efficient: for example, arbitrators can resolve factual issues, and courts can, in turn, rely on the factual findings made in arbitration. (See, *e.g.*, *Cable Connection, Inc. v. DIRECTV, Inc*, *supra*, 44 Cal.4th at 1355-57 [allowing for review of arbitrator's conclusions for legal error].)

C. PLAINTIFFS COULD HAVE RESOLVED THEIR WRONGFUL DEATH CLAIM AGAINST DR. PODOLSKY BY NOW IF THEY HAD AGREED WITH THEIR MOTHER AND DR. PODOLSKY TO ARBITRATE

If the adult heir plaintiffs truly were concerned with having their substantive claim against Dr. Podolsky heard as quickly as possible, plaintiff could have easily accomplished this by agreeing to arbitrate their claim with their mother. Instead, by opposing arbitration here, even though Mrs. Ruiz has conceded that she is bound to arbitration, it is the adult heir plaintiffs who attempted to force the claim against Dr. Podolsky into separate forums. In this instance, the most efficient and expeditious manner in which to handle

the action would be to require the adult heirs to arbitrate their claim along with their mother.

D. Enforcement Of Arbitration Clauses Will Assist The State's Courts In Coping With The Financial Crisis

Given the Legislature's express preference for arbitration as a speedy and efficient alternative to litigation in court, and California courts' long-standing policy of supporting arbitration, it is clear that this Court should consider the benefits to the State's judiciary of a policy of enforcing arbitration agreements. Such enforcement would relieve overburdened courts facing an unprecedented financial crisis. (See, *e.g.*, Catherine Ho, *Judges Predict Deeper Budget Cuts for 2010*, Los Angeles Daily Journal (Dec. 29, 2009), p. 1.) Arbitration provides a crucial safety valve for our State's court system, allowing courts to order that disputes subject to arbitration be resolved in private arbitral forums.

III. Plaintiffs' "Property Interests" In Their Wrongful Death Claims Are Not Diminished In Any Way If Those Claims Are Heard In An Arbitral Forum

A. Plaintiffs' "Property Interests" Can Be Resolved In Arbitration, Which Is Nothing More Than A Different Forum

Plaintiffs lead their brief (ABM, p. 1) and argue at length (ABM, pp. 10-14) about plaintiffs' "property interests" in their

wrongful death claim. Plaintiffs assert that "[t]his matter is only incidentally about arbitration. It is fundamentally about property." (ABM, p. 1.)

Specifically, plaintiffs argue that they have a "property interest in the wrongful death claims that are before the court." (ABM, p. 10, emphasis omitted.) Plaintiffs' point is, apparently, that their father did not have a "property interest" in the wrongful death claim and, therefore, that he had "no power to affect" their "property interest[s]." (*Ibid.*) Plaintiffs' argument essentially is that their "property interest" is paramount to their father's interests. This argument is a red herring.

Plaintiffs do not argue that the substance of their wrongful death claim would be extinguished or diminished *in any way* if plaintiffs were to arbitrate their claim. The issue is *where* the wrongful death claim against Dr. Podolsky will be heard. Arbitration provisions simply specify an alternative forum for the settlement of disputes. As Dr. Podolsky pointed out in his OBM, that argument was directly addressed in *Scroggs v. Coast Community College Dist.* (1987) 193 Cal.App.3d 1399, 1401, among other places. In *Scroggs*, the court 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. . . . [I]t 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." (*Id.* at 1404; see OBM, pp. 35-36, internal quotations omitted.) Indeed, *Scroggs*' point was echoed by the United States Supreme Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* (1985) 473 U.S. 614, 628: "By agreeing to arbitrate a statutory claim,

a party *does not forgo the substantive rights afforded by the statute*; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." (Emphasis added.)

Plaintiffs offer no response to *Scroggs* and make no attempt to distinguish the case; they simply ignore it. The *Scroggs* decision appears in plaintiffs' Answer Brief on the Merits only in the context of being cited by other decisions, with no discussion of the case. (ABM, pp. 13-14.) Similarly, plaintiffs offer no explanation for the Court of Appeal's failure to make any attempt to address *Scroggs* or the well-established principle set out therein, that requiring a claim to be heard in an arbitral forum does not, in any way, diminish or abrogate the substantive claim.

Indeed, the decisions plaintiffs cite in support of their "property interests" argument involve cases where there were attempts to waive wrongful death claims *altogether*. (See ABM, pp. 13-14, citing *Madison v. Superior Court* (1988), 203 Cal.App.3d 589 [involving decedent's attempt to waive heirs' wrongful death action completely]; *Horwich v. Superior Court* (1999) 21 Cal.4th 272 [same].)

Plaintiffs also rely on *Chavez v. Carpenter* (2001) 91 Cal.App.4th 1433, 1443-44 (ABM, pp. 13-14), which states nothing more than that a wrongful death claim arises when the victim dies and is personal to the claimant. That is not disputed here. The issue is whether the wrongful death claim is in any way impaired if it is heard in an arbitral forum. Plaintiffs have not argued that there is any impairment – because there is not. (*Scroggs v. Coast Community*

College, supra, 193 Cal.App.3d at 1404.) Plaintiffs' reliance on *Goliger v. AMS Properties, Inc.* (2004) 123 Cal.App.4th 374, 377, is similarly inapposite, as that case did not involve a split forum or a spouse or other heir who was concededly bound to arbitrate. Importantly, the patient did not sign the arbitration agreement in *Goliger;* an adult child did. Moreover, *Goliger* says nothing about "property interests" being affected when wrongful death claims are heard in arbitral forums. (*Ibid.*)

In making their lengthy "property interest" argument, plaintiffs lose sight of a crucial point: this case *did not* involve an attempt by Mr. Ruiz to waive or preemptively extinguish the wrongful death claims of his heirs. He simply directed the forum in which they would resolve their claim for his wrongful death. Thus, what is at issue in this case is simply the question of *where* – in which forum – the plaintiffs' wrongful death claims will be heard. The substantive wrongful death claims are unaffected by the choice of forum. As noted, plaintiffs offer no argument – because they cannot – that having their claims litigated in arbitration will in any way diminish or affect their substantive claims.

B. PLAINTIFFS DO NOT HAVE "PROPERTY INTERESTS" IN THE FORUM OF JURY TRIAL

Plaintiffs' argument makes no sense unless they are arguing that their rights to a jury trial on the wrongful death claim somehow constituted "property." Plaintiffs offer no argument or authority, however, to support that proposition. Indeed, there is no such authority. (See, *e.g.*, *Goodspeed Airport, LLC v. East Haddam Land*

Trust, Inc. (2d Cir. 2006) 166 Fed.Apx. 506, 508 ["We find no support for the principle that there is a 'property right' to nonarbitrary government enforcement of regulations. The protection from arbitrariness is not a property right but the essence of the constitutional right to substantive due process, whose violation requires the deprivation of some external property right"].) Finally, the argument that the right to jury trial is a property right is on its face absurd. Plaintiffs have no ability to sell, transfer, assign, or possess this supposed "property interest."

The Court of Appeal fell into this logical sinkhole as well. The court stated, in support of its conclusion that the adult heirs could not be bound to arbitration, that "California law is clear that the cause of action created by the wrongful death statute is separate and distinct from the cause of action the deceased would have had for personal injuries." (*Ruiz v. Podolsky*, slip opinion, p. 22.)

As with plaintiffs' "property interest" argument, the Court of Appeal's point is irrelevant to the analysis here, given that plaintiffs' "separate and distinct" causes of action for wrongful death would not be extinguished or diminished if they were heard in an arbitral forum. Given that the substance of plaintiffs' claims is not impacted by the forum in which they are heard, the Court of Appeal's point is entirely inapposite.

C. A Direct Analogy Can Be Drawn Between Arbitration Agreements Such As The One At Issue Here And Forum-Selection Clauses

A direct analogy can be drawn between arbitration clauses and forum-selection clauses. Both involve private, contractual agreements to control the forum in which claims will be heard. Indeed, the *Herbert* court noted that "[t]he decedent by contract often chooses the forum in which the claim of his heirs arising out of his death may be tried." (*Herbert v. Superior Court* (1985) 169 Cal.App.3d 718, 726.) The United States Supreme Court also has drawn this analogy: "An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute." (*Scherk v. Alberto-Culver Co.* (1974) 417 U.S. 506, 519.)

Under California law, forum-selection clauses are enforced unless it can be shown that to enforce the clause would somehow violate public policy, or would not result in a reasonable and fair forum for the litigation of a claim. (See, *e.g., Berg v. MTC Electronics Technologies* (1998) 61 Cal.App.4th 349, 358-60.) Moreover, forum-selection clauses are enforced, in proper circumstances, against non-signatories. The test is whether the non-signatory is "closely related." (See *Net2Phone, Inc. v. Superior Court* (2003) 109 Cal.App.4th 583, 587-88 [enforcing forum-selection clause against non-signatory where non-signatory was "closely related to the contractual relationship" at issue]; Cf. *Hugel v. Corp of Lloyd's* (7th Cir. 1993) 999 F.2d 206, 209 ["In order to bind a non-party to a

forum-selection clause, the party must be closely related to the dispute such that it becomes foreseeable that it will be bound"].) This test is clearly met here.

Here, plaintiffs have never made *any* argument at all that requiring their wrongful death claims to be litigated in arbitration would fail to provide them with a reasonable and fair forum. Plaintiffs simply give no reason for their unjustified and unexplained hostility to arbitration.

IV. PLAINTIFFS MAKE NO ATTEMPT WHATSOEVER TO ADDRESS DR. PODOLSKY'S ESTOPPEL ARGUMENT

Plaintiffs have chosen simply to ignore Dr. Podolsky's argument that plaintiffs are estopped from resisting arbitration, given that their claims relate to and arise out of the contract governing the relationship between Mr. Ruiz and Dr. Podolsky. (See OBM, pp. 45-47.)

There is no discussion of the issue at any place in plaintiffs' Answer Brief on the Merits. Plaintiffs apparently have nothing to say about this issue, perhaps because it cannot be disputed that plaintiffs' claims relate to and arise out of the contractual relationship between Mr. Ruiz and Dr. Podolsky. (See OBM, pp. 45-47.) Because plaintiffs' claims relate to and arise out of that contractual relationship, plaintiffs are estopped from denying the effect of the arbitration agreement in that contract. (*Ibid.*)

V. PLAINTIFFS' ARGUMENT ESSENTIALLY IS THAT SURVIVING HEIRS' RIGHTS TO JURY TRIAL TRUMP THE ARBITRATION AGREEMENT

A. *MORMILE* AND *GROSS* ADDRESSED AND DISPOSED OF THE SAME JURY TRIAL ARGUMENT PLAINTIFFS PRESENT HERE

Plaintiffs argue that Mr. Ruiz's right to control the terms of his treatment and his privacy interests must be trumped by plaintiffs' rights to jury trial (see *e.g.,* ABM, pp. 25-26), but plaintiffs do *not once* cite to or quote from the decision analyzed in Dr. Podolsky's OBM, *Mormile v. Sinclair* (1994) 21 Cal.App.4th 1508, 1514-16, a decision that addressed this question head-on, as follows:

> Two competing rights are at stake: the patient's right of privacy and the spouse's right to jury trial of a treatment-related claim. Without trivializing the latter right, we believe the *Gross* court's focus was most appropriately placed on the sanctity of the physician-patient relationship – a safe haven which would be severely threatened if the physician were obliged to obtain the signature of the patient's spouse to the arbitration agreement. . . . "The significance of a patient's personal privacy rights with respect to medical matters is accorded special protection by the Legislature . . . In addition, the California voters in 1972 amended article I, section 1 of our state Constitution to include among the various 'inalienable rights' that of 'pursuing and obtaining . . . privacy.' The 'zones of privacy' created by this amendment 'extend to the details of one's medical history . . . an

> area of privacy infinitely more intimate, more personal in equality and nature than many areas already judicially recognized." . . .
>
> In the balance, [the 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.

(Emphasis added, internal quotations omitted; see also OBM, p. 27, quoting *Mormile.*)

The *Mormile* court reviewed in detail the concerns set out in *Gross v. Recabaren* (1988) 206 Cal.App.3d 771, 782, regarding the practical problems of requiring a doctor to inquire into the marital status of patients, and requiring the signatures of various heirs to insure that all claims related to the medical treatment will be arbitrable. (*Mormile v. Sinclair, supra*, 21 Cal.App.4th at 1515.)

The *Mormile* court also emphasized that the purpose and intent of Code of Civil Procedure section 1295 would be thwarted if heirs were allowed to simply ignore arbitration agreements signed by patients. (*Ibid.*) This was a similar analysis to the one that the *Herbert* court conducted in depth, to reach the conclusion that the patient's rights to control his treatment and his rights of privacy outweighed the rights of his heirs to have their claims – which arose out of the patient's treatment – be heard in the forum of their choice. (*Herbert v. Superior Court, supra*, 169 Cal.App.3d at 725.)

Plaintiffs simply fail to deal with any of this in their Answer Brief on the Merits. In doing so, they follow in the steps of the Court of Appeal, which, as Dr. Podolsky noted in his OBM, did not once

mention the *Mormile* decision in its opinion, 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 of Appeal by Dr. Podolsky. (OBM, p. 36, n. 11, citing AOB, pp. 15-16.)

B. THE COURT OF APPEAL'S DECISION IGNORES THE CRUCIAL PRIVACY CONCERNS AND WOULD EVISCERATE THE POSSIBILITY OF ARBITRATION IN CASES LIKE THIS AGREEMENT

The practical effect of the Court of Appeal's decision here is to eviscerate the possibility of arbitration in wrongful death cases such as this.

In order to effectuate arbitration of all claims arising out of a physician-patient relationship, the patient would be required to ask his family members and potential heirs for their agreement to arbitrate. The patient's family would then be drawn into and forcibly inserted into the physician-patient relationship, and would have the ability to interfere with that relationship, and potentially, the patient's ability to quickly (and privately) obtain treatment.

The *Ruiz* court's dismissal of the concerns regarding privacy set out in *Herbert, Gross, Mormile* and other cases ignores the messy realities of modern family relationships. How are all potential heirs to be identified at the time of the patient's treatment? How can we allow a patient's family members to have the ability to veto an arbitration agreement that a patient and his physician agree to enter into to govern all claims arising out of the physician-patient relationship?

As the court in *Gross* persuasively reasoned:

> [T]he most significant consideration, to authorize an intrusion into a patient's confidential relationship with a physician as the price for guaranteeing a third person, . . . 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 [family members] will voluntarily communicate with each other regarding their respective medical treatment .... Nonetheless, it would be impermissible to adopt a rule that would require them, or their physicians, to do so, or that would permit one [family member] to exercise a type of veto power over the other's decisions. Yet construing section 1295 to require a [family member's] concurrence in an arbitration agreement would, in certain situations at least, have exactly that effect. . . .
>
> It would appear indisputable that if [family members] 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.

(*Gross v. Recabaren*, *supra*, 206 Cal.App.3d 771, 782-783.)

C. THE PATIENT'S ABILITY TO BIND HIS HEIRS TO ARBITRATE CAN BE ANALOGIZED TO THE PATIENT'S ABILITY TO BIND HIS HEIRS THROUGH WILLS AND TRUSTS

As the *Herbert* court noted, there are many decisions that are made for adult child heirs, by their parents' wills and trusts: "Decedents are able to bind their heirs through wills and other

testamentary dispositions ...." (*Herbert v. Superior Court, supra,* 169 Cal.App.3d at 725.) For example, the adult heirs could not claim for loss of support if the decedent left his estate to others. As another example, the decedent could direct the manner in which the adult heirs will resolve disputes, through a no contest clause.[2]

In either event, the principle is the same: a patient-decedent can control and bind his heirs in certain ways through testamentary dispositions; the same can be said of binding agreements to arbitrate through which the patient-decedent seeks to compel all claims by any of his heirs, arising out of the patient-decedent's own treatment, to be arbitrated. (See *Herbert v. Superior Court, supra,* 169 Cal.App.3d at 725.)

VI. PLAINTIFFS' RELIANCE ON THE WRONGLY DECIDED *RODRIGUEZ* DECISION IS UNAVAILING

Instead of grappling with California precedent such as *Mormile* and *Gross* that have already considered and disposed of arguments virtually identical to theirs, plaintiffs rely almost entirely on *Rodriguez v. Superior Court* (2009) 176 Cal.App.4th 1461, 1468, in support of their "right to jury trial" argument. (ABM, pp. 2, 23-24, 28.) Their argument is unpersuasive, however, if only because

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[2] "[A] no contest clause conditions a beneficiary's right to take [his] share ... under such an instrument upon the beneficiary's agreement to acquiesce to the terms of the instrument. [Citation.] [¶] No contest clauses are ... favored by the public policies of discouraging litigation and giving effect to the purposes expressed by the testator." (*Burch v. George* (1994) 7 Cal.4th 246, 254.)

plaintiffs acknowledge that the Arbitration Agreement in their case is binding and enforceable.

In *Rodriguez*, the court held that a physician could not enforce an arbitration agreement signed by a decedent against decedent's minor daughter, who was a non-signatory, because the physician failed to show that the patient knowingly and intelligently waived the right to jury trial. (*Ibid.*) There, the court framed the issue as one of whether there was "an enforceable arbitration agreement." (*Id.* at 1469.) The court found, for various reasons that there was not an enforceable arbitration agreement. (*Ibid.*)

The court did not reach the question of whether the minor child's right to a jury trial was waived because the court decided that there was no enforceable arbitration agreement: "Under the facts in the case before us, however, we conclude that the document purporting to be Newton's agreement to arbitrate is not enforceable. *When no enforceable agreement exists, no order compelling arbitration can be issued.*" (*Id.* at 1472, emphasis added.)

The fundamental flaw in the *Rodriguez* decision is that the court concluded that because there was no proof that the decedent would not have exercised her option to revoke the agreement if she had lived beyond the 30-day revocation period, the agreement could not be binding and enforceable. That is a plain misreading of basic contract law. The non-exercise of an option to revoke does not make an otherwise binding agreement non-binding. (See, *e.g.*, *Alexander v. Zion's Sav. Bank & Trust Co.* (Utah 1955) 287 P.2d 665, 667 ["The reservation by the maker of the right or power to revoke the trust in whole or in part does not prevent the interest or estate in the property

from passing immediately. The failure to exercise such an option to revoke is not a condition precedent to the passing of the ownership of the property"].)

Moreover, here, in contrast to *Rodriguez*, plaintiffs have *conceded* that there is an enforceable arbitration agreement. Plaintiffs explicitly conceded that Mr. Ruiz's spouse was bound to arbitrate – acknowledging the existence of a binding and enforceable arbitration agreement here. (AA at 39, Plaintiffs' Opposition to Defendant's Petition to Compel Arbitration ["Only Plaintiff Alejandra Ruiz as the wife of the decedent is subject to the arbitration agreement . . . "]; see also RT 3 [defense counsel noting and reiterating that the parties did not dispute that Mrs. Ruiz was bound by the agreement].)

Plaintiffs *did not argue* on appeal that the trial court had erred in ordering arbitration as to Mrs. Ruiz.

As the Court of Appeal recognized, this was a binding judicial admission by plaintiffs. (*Ruiz v. Podolsky*, slip opinion, p. 23; see *Black v. Department of Mental Health* (2000) 83 Cal.App.4th 739, 747 (finding that party's statements in its brief were binding judicial admissions); *Mangini v. Aerojet-General Corp.* (1991) 230 Cal.App.3d 1125, 1152 [same]; *DeRose v. Carswell* (1987) 196 Cal.App.3d 1011 [same].)

To the extent that plaintiffs rely on the *Rodriguez* case for the proposition that the arbitration agreement here could not have waived the plaintiffs' rights to jury trial, that argument also fails because the *Rodriguez* case failed to address the analysis and points set out above, from *Mormile, Gross,* and *Herbert*, among other authorities, finding that a patient's rights to control his medical treatment and his rights to

privacy, among other factors, outweigh his heirs' right to jury trial. *Rodriguez* failed to engage in the requisite analysis of the prior authorities because it decided the case on a finding that there was no enforceable arbitration agreement. (*Rodriguez v. Superior Court, supra*, 176 Cal.App.4th at 1472.)

The *Rodriguez* case is flawed; it is distinguishable, and it is inapposite.

VII. PLAINTIFFS MINIMIZE CODE OF CIVIL PROCEDURE SECTION 1295 AND THE REST OF THE STATUTORY SCHEME OF WHICH IT IS A PART, MICRA

Plaintiffs simply dismiss the import of Section 1295 and the MICRA scheme of which it is a part. (ABM, pp. 2, 23-24, 30-31.) Plaintiffs fail to address Dr. Podolsky's point that the wrongful death claim did not exist at common law in California; it is a statutory claim, created by the Legislature. (*Justus v. Atchison* (1977) 19 Cal.3d 564, 572 [noting that wrongful death action has statutory rather than common law origin and that Legislature both created and limited the remedy], overruled on other grounds in *Ochoa v Superior Court* (1985) 39 Cal.3d 159, 171.) By enacting Section 1295, the Legislature specifically expressed its preference that arbitration agreements governing wrongful death claims be enforced. (See OBM, pp. 28-30.) Plaintiffs have no response to the observation in *Herbert v. Superior Court, supra*, 169 Cal.App.3d at 727, that Section 1295 "evidence[s] a legislative intent that a patient who signs an arbitration agreement may bind his heirs to that agreement ...."

Indeed, in other contexts, it has been recognized that where the Legislature creates cause of action and therefore the right to a jury trial, the Legislature retains the power to limit the right to a jury trial on a wholly statutory claim. This Court has declared, for example, in the criminal context, that "the right to a jury trial of the prior conviction allegations . . . is purely a creature of state statutory law . . . When a state need not provide a jury trial at all, it follows that the erroneous denial of that right does not implicate the federal Constitution." (*People v. Epps* (2001) 25 Cal.4th 19, 29.) In the same opinion, this Court held that in enacting Penal Code section 1025(c), the Legislature intended to abrogate the statutory right to a jury trial with respect to the question of a defendant's identity as a prior felon. (*People v. Epps, supra*, 25 Cal.4th at 25-26.)

Plaintiffs offer a stunted response to Dr. Podolsky's detailed analysis of the effect of Section 1295, and the argument that the Legislature knew well what it was doing when it passed that statute as part of the MICRA scheme to control medical malpractice litigation, and that the Legislature was well within its rights to limit how heirs' claims for wrongful death could be brought. Plaintiffs rely only on the decision in *County of Contra Costa v. Kaiser Foundation Health Plan, Inc.* (1996) 47 Cal.App.4th 237. That case is inapposite and does not support plaintiffs' position.

In *Contra Costa*, the plaintiff was hit by a negligently driven vehicle. (*Id.* at 240.) She was then treated at a hospital. (*Ibid.*) The plaintiff's health plan with the hospital contained an arbitration clause. (*Ibid.*) Plaintiff sued, among others, the hospital, the driver, the county that maintained the intersection where she had been hit, and

the transit authority. The driver, the county, and the transit authority asserted cross-claims against the hospital (on the theory that the hospital had negligently treated plaintiff), and the hospital, based on its arbitration agreement *with plaintiff*, sought to compel arbitration of the driver's, the county's, and the transit authority's cross-claims against the hospital. (*Id.* at 240-42.)

The Court of Appeal upheld the denial of the hospital's motion to arbitrate the cross-complainants' claims, finding that the cross-complainants had no relationship and "no prior connection" at all to the patient or the hospital. (*Id.* at 243-44.) That is obviously not the case here, where the plaintiffs were the spouse and children of Mr. Ruiz. *Contra Costa* involves attempts to force nonsignatories who are strangers to the parties in the contract to arbitrate, and where the nonsignatories have nothing to do with the medical relationship. That is not the case here. Nor did *Contra Costa* involve a wrongful death claim or implicate the one-action rule.

Plaintiffs have failed to put forward any argument to counter the conclusions in *Herbert* and other cases that the Legislature knew full well what it was doing in passing Section 1295, and that the Legislature was expressing its preference for arbitration generally, and that heirs' claims for wrongful death be arbitrated.

VIII. PLAINTIFFS DISTORT THE FACTS OF *HERBERT V. SUPERIOR COURT*, WHICH IS THE MOST RELEVANT AND APPLICABLE CALIFORNIA AUTHORITY, TO ARGUE THAT IT IS DISTINGUISHABLE

A. THE FACTS OF *HERBERT V. SUPERIOR COURT* ARE INDISTINGUISHABLE

Herbert v. Superior Court is the most relevant and applicable California case because, like this case, *Herbert* involved the decedent's wife, who was concededly bound to the arbitration agreement, and several adult heirs, who claimed they were not bound to the arbitration agreement. (See OBM, pp. 50-52.) Plaintiffs attempt to distinguish the *Herbert* case (ABM, pp. 16-17, 25, 33-34), but they resort to a very unfortunate distortion of *Herbert* 's facts. Specifically, plaintiffs argue that "the *Herbert* case involved a medical plan covering the Herbert family. It was not the independent physician-patient arbitration agreement Mr. Ruiz signed simply to receive his treatment, and his treatment only." (ABM, p. 25.) Plaintiffs also argue that arbitration agreements have "not been held to apply to adult children [nonsignatories] where the contract was for an individual's medical services and not under a group or family health plan." (ABM, p. 15.) Plaintiffs imply that in *Herbert* the decedent and his family, including his adult heirs, were part of a group health plan. That is simply untrue.

In *Herbert*, the decedent, his spouse, and his *minor* children were all members of a group health plan. The decedent's three *adult* heirs *were not*. "[Decedent] Clarence Herbert was a member of the Kaiser Foundation Health Plan as were his wife and five minor

children. [Decedent's] [t]hree adult heirs . . . were *not* members of the plan." (*Herbert v. Superior Court, supra*, 169 Cal.App.3d at 720, emphasis added.)

Not once in plaintiffs' Answer Brief on the Merits do plaintiffs explain that in *Herbert* the three adult heirs were *not* members of decedent's group plan.

Plaintiffs are desperate to distinguish the *Herbert* case because the sole case they relied on in the trial court, and the case upon which the Court of Appeal heavily relied, was *Buckner v. Tamarin* (2002) 98 Cal.App.4th 140, which did *not* involve similar facts to this case. In *Buckner*, no spouse or other heirs were concededly bound to arbitrate, so the one-action rule was not implicated and there was no need to split forums. (*Id.* at 143.)

Only the *Herbert* case presented the same facts found in this case, namely:

- A split between heirs who are concededly bound to arbitrate and heirs who argue that they are not bound;
- An arbitration agreement that explicitly extends to claims made by the decedents' heirs; and
- A wrongful death claim brought by decedents' heirs, thereby implicating the one-action rule.

B. PLAINTIFFS SIMILARLY DISTORT *CLAY* AND *DRISSI*, IN THEIR UNSUCCESSFUL ATTEMPTS TO DISTINGUISH THOSE CASES

Plaintiffs also attempt to distinguish the post-*Buckner* cases that applied *Herbert* to similar factual scenarios. (ABM, p. 22.) As they

did with *Herbert* however, plaintiffs rely on questionable characterizations of the facts of these cases in an attempt to avoid their application here. (*Ibid.*)

In *Clay v. Permanente Medical Group, Inc.* (N.D. Calif. 2007) 540 F.Supp.2d 1101, the patient-decedent signed an arbitration agreement that covered all claims by heirs. Wrongful death claims were brought by decedent's wife and his adult children, who were non-signatories to the arbitration agreement. The court found that the wife was bound to arbitrate, given that she was in the same health care plan as decedent, and based on the fiduciary relationship between spouses. (*Id.* at 1111-12.) The court also found that the decedent's adult heirs were bound to arbitrate. (*Id.* at 1112.) The court noted that "[u]nder the one-action rule, there may be only a single action for wrongful death, in which all heirs must join," and that "[b]ecause a wrongful death cause of action may not be split, the case must be tried in a single forum." (*Ibid.*, internal quotations omitted.) The court reiterated *Herbert's* policy concerns regarding the patient's rights of privacy and his right to control the terms of his treatment. After distinguishing *Rhodes v. California Hospital Medical Center* (1978) 76 Cal.App.4th 1461 (on the ground that the arbitration agreement there did not purport to reach heirs), *Baker v. Birnbaum* (1988) 202 Cal.App.3d 288 (same), and *Buckner* (on the ground that there was no spouse or other heir who was bound to arbitrate in that case), the court concluded that "[t]he *Herbert* facts are very similar to those now before the Court, and the *Herbert* reasoning is persuasive," and ordered all of the plaintiffs to arbitrate their claims. (*Ibid.*)

The court in *Drissi v. Kaiser Foundation Hospitals, Inc.* (N.D. Calif. 2008) 543 F.Supp.2d 1076, faced very similar facts. The plaintiff-decedent had signed an arbitration agreement that covered claims by heirs. She died allegedly because defendant physician had failed to provide her with a kidney transplant quickly enough to avoid her death. That is, like this case, plaintiffs alleged that the physician failed to treat decedent. Unlike *Clay*, none of the plaintiffs in *Drissi*, including decedent's husband, were members of the same health plan. (*Id.* at 1081.)

The *Drissi* court carried out a careful review of the case law, distinguishing *Rhodes* and *Baker* on the grounds that in those cases, the arbitration agreements did not purport to reach claims by heirs, and *Buckner* on the ground that in that case, neither the decedent's estate nor his spouse was a plaintiff. (*Id.* at 1081) Like the *Clay* court, the *Drissi* court concluded that "[o]f the cases reviewed by the Court, *Herbert* is the most applicable." (*Ibid.*)

The court held that the fact that decedent and her husband were not members of the same health plan was irrelevant because "it appears that the fiduciary duties and obligations of spouses to provide medical care for one another are sufficient basis for binding one another to arbitration agreements." (*Ibid.*, citing *Herbert v. Superior Court, supra*, 169 Cal.App.3d at 723-24, and *Hawkins v. Superior Court* (1979) 89 Cal.App.3d 413, 418-19.) Thus, decedent's "agreement that her heirs would arbitrate claims arising from her membership in the [health plan]" bound her husband. (*Ibid.*) Further, given that the decedent's estate and decedent's husband were bound to

arbitrate, the court held that the decedent's adult children would also be required to arbitrate under the one-action rule. (*Ibid.*)

Plaintiffs are unable to distinguish either of these cases. Plaintiffs describe both decisions as "health plan" decisions, stating: "Both courts chose to follow the reasoning in *Herbert* because the Clay spouses and Mrs. Drissi were enrolled in health plans that required arbitration of any claims brought by the health plan member or the personal representative or the heirs." (ABM, p. 21.) As demonstrated above, this was *not* the case in *Drissi*, where the court made a point of noting that the decedent's husband was *not* a member of the same health plan as the decedent. (*Drissi v. Kaiser Foundation Hospitals, Inc., supra*, 543 F.Supp.2d 1081.)

Indeed, the facts of *Drissi* fit the facts of this case precisely. Like this case, in *Drissi* "there [was] no group or family health plan in which decedent [or her spouse] was a participant." (ABM, p. 22.) As in this case, in *Drissi* "the only person who was to receive care from [the physician] was [the decedent.]" (*Ibid.*) "[T]he adult children [in *Drissi*] received no benefit from the medical services contract" with the physician there, given the allegation that the decedent in that case died as a result of the physician's negligence in *not* providing the decedent in that case with a kidney transplant in time. (*Ibid.*) And, as in this case, "the Plaintiffs [were] joined in a single action" for wrongful death. (*Ibid.*)

That Mr. Ruiz's estate is not a plaintiff is irrelevant, given *Drissi*'s reasoning, which holds that if any plaintiff bringing a wrongful death claim is bound to arbitrate, the other plaintiffs bringing wrongful death claims will also be required to arbitrate under

the one-action rule, as explained in *Herbert*. (*Drissi v. Kaiser Foundation Hospitals, Inc., supra*, 169 Cal.App.3d at 725-26.)

Plaintiffs offer none of this analysis of the facts of *Clay* or *Drissi*. Instead, plaintiffs simply state, in summary fashion, that "[f]actually, the line of cases which do not bind signatory adults (including spouses) are more analogous to this action," citing *Rhodes, Baker*, and *Buckner* – and, incredibly, offering *no analysis at all*. (ABM, pp. 21-23.) As shown above, the *Clay* and *Drissi* cases carefully reviewed *Rhodes, Baker*, and *Buckner* and explained in detail why each of those cases was inapposite. Plaintiffs simply ignore the analysis in *Clay* and *Drissi*, and make no attempt to explain how *Rhodes, Baker*, and *Buckner* are "factually . . . more analogous to this action." Plaintiffs make no such attempt because they cannot.

The well-reasoned opinions in *Clay* and *Drissi* reached the correct result: faced with facts indistinguishable from those presented here, those courts found *Herbert* to be the most relevant and applicable case, applied that case, and appropriately required all of the nonsignatory heirs to arbitrate their claims.

C. The Authorities On Which Plaintiffs Rely Are Factually Inapposite

The other authorities relied upon by plaintiffs are easily distinguished.

As previously noted plaintiffs' reliance on *Goliger v. AMS Properties, Inc, supra*, 123 Cal.App.4th at 377 is inapposite, as that case did not involve a split forum, an agreement signed by a patient-decedent, or a spouse or other heir who was concededly bound to

arbitrate. Moreover, contrary to plaintiffs' suggestion, *Goliger* says nothing about "property interests" being affected when wrongful death claims are heard in arbitral forums. (ABM, p. 14.)

Pagarigan v. Libby Care Center, Inc. (2002) 99 Cal.App.4th 298, 301, involved three adult children of a decedent who had died at a nursing care facility. As in *Goliger*, the patient-decedent had not signed the arbitration agreement, and the decedent had not authorized her children to sign the agreement on her behalf, though the children did anyway. The court found that because the children had not been authorized to sign the arbitration agreement on behalf of their decedent mother, there was no valid arbitration agreement. (*Id.* at 30.) That is not the case here, where Mr. Ruiz signed the arbitration agreement himself, and plaintiffs do not dispute that there was a valid arbitration agreement in place – and have in fact conceded that fact. (AA, 22.)

Benasra v. Marciano (2001) 92 Cal.App.4th 987 involved a libel action and arbitration agreements found in licensing agreements. (*Id.* at 990.) The case did not involve a wrongful death claim, a Section 1295 arbitration agreement, or any parties or heirs who were concededly bound to arbitrate.

Victoria v. Superior Court (1985) 40 Cal.3d 734, 744, involved a patient-plaintiff who was allegedly sexually assaulted by a hospital orderly. The hospital moved to compel arbitration pursuant to its arbitration agreement with the plaintiff. The court found that the sexual misconduct at issue was outside the scope of the arbitration clause. (*Ibid.*) The case does not have anything to do with nonsignatories.

Broughton v. Cigna Healthplans of California (1999) 21 Cal.4th 1066, 1073, similarly did not involve the issue of nonsignatories, but rather the issue of whether a Consumer Legal Remedies Act claim could be subject to arbitration.

Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal.4th 951, 960, involved a question of "the circumstances under which a court may deny a petition to compel arbitration because of the petitioner's fraud in inducing the arbitration agreement or waiver of the arbitration agreement." Again, the case did not involve the issue of nonsignatories.

In sum, plaintiffs rely on inapposite and easily distinguishable cases, while largely ignoring or attempting to dismiss the applicability of the most relevant cases – *Herbert, Clay*, and *Drissi* – where the facts presented were essentially identical to those here. Plaintiffs' efforts to distinguish those authorities, which are on all fours with this case, are, for the reasons set out in detail above, wholly unsuccessful.

D. NOWHERE DO PLAINTIFFS ACKNOWLEDGE THAT THE PRIMARY CASE RELIED ON BY THE COURT OF APPEAL, *RHODES*, INVOLVED AN ARBITRATION AGREEMENT THAT DID NOT PURPORT TO EXTEND TO HEIRS

Incredibly, despite the fact that Dr. Podolsky has repeatedly emphasized that the *Rhodes* case is inapposite and distinguishable because that case involved an arbitration agreement that did *not* purport to extend to heirs, plaintiffs make no attempt to address this point. (See, *e.g.,* ABM, pp. 37-38 [discussing *Rhodes* but failing to

acknowledge that *Rhodes* involved an arbitration agreement that did not purport to cover claims by heirs].)

That plaintiffs are unwilling or unable to grapple with this fact regarding *Rhodes* demonstrates the weakness of the plaintiffs' and the Court of Appeal's reliance on *Rhodes*.

IX. OUT-OF-STATE AUTHORITIES SUPPORT DR. PODOLSKY'S POSITION

The weight of out-of-state authorities support Dr. Podolsky's position that the adult heirs should be bound to arbitrate. The majority of courts in sister states – in Texas, Mississippi, Alabama, Colorado, Ohio, Michigan – to have considered this question hold that such non-signatories should be bound to arbitrate.

For example, the Texas Supreme Court, in *In re Labatt Food Service, L.P.* (Tex. 2009) 279 S.W.3d 640, 645-56, held that wrongful death claimants who were nonsignatories to a decedent's arbitration agreement could be compelled to arbitrate: "If we agreed with [the plaintiffs], then wrongful death beneficiaries in Texas would be bound by a decedent's contractual agreement that completely disposes of the beneficiaries' claims, but they would not be bound by a contractual agreement that merely changes the forum in which the claims are to be resolved .... [R]egardless of the fact that [decedent's] beneficiaries are seeking compensation for their own personal loss, they still stand in [decedent's] legal shoes and are bound by his agreement."

As another example, in *Allen v. Pacheco* (Colo. 2003) 71 P.3d 375, 379-80, the Colorado Supreme Court similarly held that

nonsignatory heirs could be compelled to arbitrate their wrongful death claim based on an arbitration agreement signed by a decedent patient: "Because the contract reflects the intent of the parties to bind claimants other than signatory members, the fact that [plaintiff] is a non-party does not . . . exempt her from the arbitration agreement. . . . [S]he is bound by the agreement."

Numerous other courts in sister states have taken this approach. (See *Cleveland v. Mann* (Miss. 2006) 942 So.2d 108, 119; *Briarcliff Nursing Home, Inc. v. Turcotte* (Ala. 2004) 894 So.2d 661, 664; *Gerig v. Kahn* (Ohio 2002) 769 N.E.2d 381, 386-87 [on equitable estoppel theory in medical malpractice case]; *Ballard v. Southwest Detroit Hosp.* (Mich. Ct. App. 1982) 327 N.W.2d 370 [similar]; accord *Jansen v. Salomon Smith Barney, Inc.* (N.J. Super. 2001) 776 A.2d 816, 820-21 [requiring arbitration of nonsignatory heirs' negligence claims against decedent's financial advisors].)[3]

Plaintiffs do not address – much less make any effort to distinguish – any of the above authorities.

The out-of-state authorities upon which plaintiffs rely are distinguishable. The arbitration agreement at issue in *Lawrence v. Beverly Manor* (Mo. 2009) 273 S.W.3d 525, 527, was narrower than the language in the agreement here and thus limited the ability of the decedent to bind her heirs.

[3] Numerous federal cases also hold that nonsignatory heirs can be compelled to arbitrate their wrongful death claims. (See, *e.g.*, *Graves v. BP America, Inc.* (5th Cir. 2009) 568 F.3d 221, 223-34; *Peltz v. Sears, Roebuck & Co.* (E.D.Pa. 2005) 367 F.Supp.2d 711, 718-19.)

Peters v. Columbus Steel Castings Co. (Ohio 2007) 873 N.E.2d 1258, 1262, involved a wrongful death claim arising out of a work accident. *Peters* did not implicate the crucial questions of patient privacy and the physician-patient relationship involved in this case. In the medical malpractice context, the Ohio Supreme Court, as noted above, upheld the enforcement of arbitration agreements against nonsignatories. (See *Gerig v. Kahn*, *supra*, 769 N.E.2d at 386-87.) *Peters* did not disavow or even address *Gerig*.

Washburn v. Beverly Enterprises-Georgia, Inc. (S.D.Ga. Nov. 14, 2006) No. CV 106 051, 2006 WL 3404804, *6, relied on a Texas appellate court decision, *In re Kepka* (Tex. App. 2005) 178 S.W.3d 279, 295, which was explicitly *disapproved of* in the Texas Supreme Court's recent decision *In re Labatt Food Service, L.P., supra,* 279 S.W.3d at 647 ["Some Texas courts of appeals have held that wrongful death beneficiaries are not bound by a decedent's agreement to arbitrate. *See*, *In re Kepka*, 178 S.W.3d 279, 288 .... To the extent the holdings of courts of appeals conflict with our decision, we disapprove of them"], citation omitted.) Plaintiffs, of course, also rely on the disapproved *Kepka* decision (ABM, p. 20) and fail to note that *Kepka* has been disapproved of by the Texas Supreme Court. (*Ibid.*) Thus, plaintiffs' out-of-state authorities argument relies on authorities that are no longer good law.

The majority of out-of-state courts agree with the *Herbert*, *Mormile*, *Gross, Clay*, and *Drissi* line of cases; their reasoning is persuasive and should be applied here.

CONCLUSION

Plaintiffs' Answer Brief on the Merits begins with an irrelevant argument. Plaintiffs ignore relevant authority, *Mormile* and *Gross*, decisions that have considered and explicitly rejected arguments identical to those ones plaintiffs put forward here. Plaintiffs fail to distinguish the most relevant cases, *Herbert*, *Clay*, and *Drissi*.

The weakness of plaintiffs' arguments underlines the weakness of the Court of Appeal decision they are attempting to defend. The Court of Appeal's decision relied heavily on the *Rhodes* case, which involved an arbitration agreement that did not even purport to extend to heirs. The Court of Appeal decision rejected the most relevant and applicable cases, *Herbert*, *Clay* and *Drissi*, and even attempted to brush aside plaintiffs' own judicial admission that Mrs. Ruiz was bound to arbitration.

The Court of Appeal's decision should be reversed.

DATED: January 4, 2010

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CERTIFICATION

This brief has been prepared using a proportionately spaced typeface, consisting of 14 points, producing approximately 240 words per page. Counsel relies on word processing software to determine the word count of this brief. As determined by that software, this brief consists of approximately 8,359 words.

DATED: January 4, 2010

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PROOF OF SERVICE BY MAIL AND BY OVERNIGHT COURIER

In Re: APPELLANT'S REPLY BRIEF ON THE MERITS; No. S175204
Caption: ALEJANDRA RUIZ, et al. vs. ANATOL PODOLSKY, M.D.
Filed: IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
(Dispatched by overnight courier for filing in San Francisco office.)

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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I certify (or declare) under penalty of perjury that the foregoing is true and correct. Executed on January 4, 2010, at Los Angeles, California.

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