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4th Civil No. G040843

S 175204

IN THE

Supreme Court

OF THE STATE OF CALIFORNIA

ALEJANDRA RUIZ, et al.,

Plaintiffs and Respondents,

vs.

ANATOL PODOLSKY,

Defendant and Appellant,

Appeal From Orange County Superior Court
The Honorable James Di Cesare, Judge Presiding
[OCSC Case No. 07CC08001]

REPLY IN SUPPORT OF PETITION FOR REVIEW

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INTRODUCTION

Plaintiffs' Answer explains exactly why this Court should grant review.

Plaintiffs concede, as they must, that there were two lines of authority, and that the Court of Appeal here purported to resolve what it saw as a conflict between those two lines of authority.

Plaintiffs cannot explain why the Court of Appeal did not follow the most factually apposite precedent, *Herbert*. Nor do plaintiffs address the fact that the *Rhodes* case that the Court of Appeal based its decision on did not – unlike this case and *Herbert* – involve an arbitration clause that explicitly sought to bind heirs of the patient.

The Answer in fact proves Dr. Podolsky's point: the Court of Appeal flattened crucial factual distinctions in a blunderbuss manner in refusing to follow the most factually apposite precedent, exacerbated a conflict in the law, and produced a confusing, illogical decision that will produce confusion in this area of the law. Review should be granted.

I. PLAINTIFFS ADMIT THAT THE COURT OF APPEAL PURPORTED TO RESOLVE A CONFLICT IN THE CASE LAW

Plaintiffs admit, as they must, that the Court of Appeal purported to resolve a conflict in the case law in its decision. (Answer at p. 4 [". . . the Court found that . . . there are divergent paths . . ."]; p. 5 ["the *Ruiz* decision added light to the legal landscape and resolved conflicts in the case law . . ."].)

Indeed, plaintiffs admit that there was a split in authority on the issue of whether non-signatories could be bound to arbitrate wrongful death claims where the patient-decedent had signed an agreement to arbitrate any claims arising out of his medical treatment. (*Id.*)

This, without more, is grounds for this Court to grant review. (Cal. Rules of Court, rule 8.500(b)(1).)

II. PLAINTIFFS DO NOT EXPLAIN WHY THE COURT OF APPEAL DID NOT FOLLOW MOST FACTUALLY ANALOGOUS CASE – *HERBERT*

In attempting to argue that the Court of Appeal properly declined to follow the most factually analogous case, plaintiffs resort to distorting the facts of *Herbert v. Superior Court* (1985) 169 Cal.App.3d 718. Plaintiffs argue that the "type of arbitration agreement signed by [Ruiz] ... was dissimilar to the medical plan contract in *Herbert*," and then quote language from the Court of Appeal opinion suggesting that in *Herbert*, the patient-decedent was "securing a medical plan for [his] Adult Children . . . ." (Answer at p. 8.) This argument and description of *Herbert* is incorrect and entirely misleading.

Even a cursory perusal of the facts in *Herbert* reveals that the patient-decedent there was *not* attempting to "secur[e] a medical plan for [his] Adult Children," as plaintiffs misleadingly suggest. The *Herbert* opinion clearly recites the facts: "[Patient-decedent] Clarence Herbert enrolled his wife and *five minor children* in a Kaiser group health plan . . . ." (*Herbert, supra,* 169 Cal.App.3d at 720, emphasis added.) The question in *Herbert* was whether patient-decedent's three *adult* heirs – who were not enrolled in the Kaiser plan – would be bound by the arbitration clause signed by patient-decedent. That arbitration clause explicitly stated that it was binding on patient-decedent's heirs. This was *precisely* the situation presented in this case. Plaintiffs' obvious misreading and misstatement of the facts of

the case suggest – at best – that plaintiffs did not carefully read the *Herbert* decision.

Plaintiffs cap off their discussion of *Herbert*, which consists of the misstatement of *Herbert*'s most basic facts and a lengthy block-quote from the *Ruiz* decision, with this statement: "Based on these findings, Podolsky's position that the failure of the *Ruiz* Court to follow *Herbert* is 'literally unprecedented' is without merit." (Answer at p. 9.) Amazingly, nowhere in this section do plaintiffs cite *any* authority – not even the lengthy block-quote from the *Ruiz* decision contains any authority.

It is unclear how plaintiffs can argue that Dr. Podolsky's argument that the Court of Appeal's failure to apply *Ruiz* on these facts was "literally unprecedented" can be "without merit" where *plaintiffs cite no authority*. Plaintiffs' argument, unfortunately, simply makes no sense.

III. PLAINTIFFS ADMIT THAT THEY FAILED TO RAISE *RHODES* IN THE TRIAL COURT AND FAIL TO ACKNOWLEDGE THAT *RHODES* WAS DISTINGUISHABLE

Plaintiffs do not dispute that they failed to raise *Rhodes v. California Hospital Medical Center* (1978) 76 Cal.App.3d 606 in the trial court, where they relied on *Buckner v. Tamarin* (2002) 98 Cal.App.4th 140. Plaintiffs simply argue that their "failure to raise [*Rhodes*] in the trial court . . . has no bearing on the import given to *Rhodes* by the Court of Appeal." (Answer at p. 13.) Contrary to plaintiffs' suggestion, their own refusal to raise *Rhodes* does have bearing on this case.

The Court of Appeal noted only in passing that the arbitration clause in *Rhodes did not contain* language explicitly seeking to bind all of the patient's heirs. (Slip. Opn, at p. 16; Pet. for Rev. p. 10.) This made *Rhodes* easily distinguishable from the situation in *Herbert* and, most significantly, easily distinguishable from this case, where it is undisputed that the language of the arbitration clause explicitly sought to bind Ruiz's heirs. (*Id.* at pp. 5-6.)

IV. PLAINTIFFS MAKE NO EFFORT TO DISTINGUISH *DRISSI* OR *CLAY* AND INSTEAD RELY ON FACTUALLY INAPPOSITE PRECEDENT

The Answer mentions in passing the recent decisions in *Drissi v. Kaiser Foundation Hospitals, Inc.* (2008) 543 F.Supp.2d 1076 or *Clay v. Permanente Medical Group, Inc.* (2007) 540 F.Supp.2d 1101. (Answer at p. 7.) Both of those cases followed the *Herbert* analysis, as both of those cases, like this case, presented factual situations nearly indistinguishable from *Herbert*'s. (Pet. for Rev. at pp. 15-16.) Plaintiffs fail to address these cases or make any attempt to distinguish them because they cannot be distinguished from the facts of this case.

Instead, plaintiffs offer a lengthy discussion of *County of Contra Costa v. Kaiser Foundation Health Plan, Inc.* (1996) 47 Cal.App.4th 237, 242. The facts of that case bear no resemblance to the facts of this case – or the facts of *Herbert, Drissi,* or *Clay*. In *Contra Costa*, a pedestrian was struck by a car as she crossed the street. She was treated for her injuries by Kaiser; as part of that treatment, she had signed an arbitration agreement with Kaiser. The pedestrian sued the driver, the county, and the transit authority for various forms of negligence she alleged caused the accident itself. She sued Kaiser for medical negligence in treating her for the injuries caused by the accident. The driver, county, and transit authority asserted cross-claims against Kaiser for equitable indemnity. Kaiser sought to compel arbitration of the co-defendant's claims based on its arbitration agreement with the plaintiff pedestrian. The Court of

Appeal rejected Kaiser's argument that the plaintiff-pedestrian's arbitration agreement could bind the co-defendants. (*Id.* at 239-42.)

As the recitation of *Contra Costa's* facts make clear, the situation there was completely unrelated to the facts here; it is readily apparent why plaintiffs fail to recite the facts of that case. Most notably, there was no implication of the one-action rule, and the co-defendant's cross-claims were not claims of the patient's heirs. (*Contra Costa, supra,* 47 Cal.App.4th at 239-42.)

Plaintiffs attempt to weave in a discussion of Code of Civil Procedure section 1295 into their discussion of *Contra Costa*. (Ans. at pp. 9-10.) As noted, *Contra Costa*'s facts had little if any resemblance to the facts of this case; the court in *Contra Costa* noted that the third-party co-defendants (i.e., the driver, county, and transit authority) had no relationship to the patient-plaintiff, and the co-defendants' claims were not connected to plaintiff's medical malpractice claims against Kaiser. (*Contra Costa, supra,* 47 Cal.App.4th at 246-47.) *Contra Costa* offers little guidance on the import of Section 1295 on the facts of this case.

CONCLUSION

Plaintiffs' Answer sets out the very reasons this Court should grant review here. Plaintiffs fail to respond to Dr. Podolsky's arguments, fail to distinguish the most applicable precedent, and rely instead on inapposite precedent.

DATED: August 31, 2009

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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 1,317 words.

DATED: August 31, 2009

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PROOF OF SERVICE BY MAIL
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I am over the age of 18 and not a party to the within action. I am employed in the County of Los Angeles, State of California by COLE PEDROZA LLP. My business address is 200 S. Los Robles Avenue, Suite 300, Pasadena, California 91101.

On the below date, I served the document entitled **REPLY IN SUPPORT OF PETITION FOR REVIEW** by placing true and correct copies thereof in sealed envelopes addressed to the parties listed on the attached Service List.

I am readily familiar with the firm's business practice for collection and processing of correspondence for mailing with the United States Postal Service. On this date, I placed for collection and processing the above named document to be deposited with the United States Postal Service in the ordinary course of business, and in the ordinary course of the firm's business, such correspondence was deposited with the United States Postal Service on the date reflected below.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 31st day of August 2009 at Pasadena, California.

MiChelle McGrath

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