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SUPREME COURT COPY

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4th Civil No. G040843

IN THE

Supreme Court

OF THE STATE OF CALIFORNIA

ALEJANDRA RUIZ, et al.,

Plaintiffs and Respondents,

vs.

ANATOL PODOLSKY, [redacted]

Defendant and Appellant,

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

PETITION FOR REVIEW

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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?

REVIEW SHOULD BE GRANTED

As matters now stand, given the differing results reached by the appellate courts on varying factual permutations, there are two potential answers to the question presented: (1) non-signatory heirs can be compelled to arbitrate if the decedent so intended, the contract so specified, and the one-action rule in wrongful death cases requires it, or (2) non-signatory heirs can never be compelled to arbitrate. The Court of Appeal's decision here takes the second position: that non-signatory heirs bringing wrongful death claims can never be compelled to arbitrate their claims (absent "a preexisting agency-type relationship"). (Slip Opn. at p. 2.) The Court of Appeal's decision, which highlights and exacerbates a split in the appellate courts, cannot stand.

In this case, the Court of Appeal failed to follow the most applicable precedent and unnecessarily exacerbated a conflict in the law on the issue of the enforceability of arbitration agreements against

non-signatory heirs of a decedent asserting wrongful death claims arising out of the decedent's medical treatment.

The Court of Appeal abandoned the careful approach taken by prior courts, and instead proclaimed that it would single-handedly resolve what it characterized as "an irreconcilable divergence of views" in the case law. (Slip Opn. at p. 12.) In its eagerness to do so, the Court of Appeal upended the balance of competing considerations and interests (*viz.*, the decedent-patient's right to privacy, concerns about the sanctity of the patient-physician relationship, and the one-action rule applicable to wrongful death claims versus the rights of heirs to litigate in the forum of their choice) that prior decisions had repeatedly established. The Court of Appeal here simply pronounced that it found the balance of these considerations to come out on the side of the heirs – in sweeping contravention of the most applicable precedent.[1]

The Court of Appeal's decision unnecessarily produces confusion and instability in this area of the law. This Court should grant this Petition for Review to reverse the *Ruiz* decision, secure uniformity of decision in this area, and give guidance on this important question of law.

[1] For the reasons stated in this Petition for Review, Dr. Podolsky will also be filing a Request for Depublication of the *Ruiz* decision.

STATEMENT OF REVIEWABILITY

Review by this Court is "necessary to secure uniformity of decision" (Cal. Rules of Court, rule 8.500(b)(1)), and "to settle an important question of law." (*Ibid.*)

Specifically, the Court of Appeal purported to resolve a split in the case law governing enforcement of arbitration agreements against nonsignatories bringing wrongful death claims. As explained below, the Court of Appeal highlighted a rift in the case law, and then erred by failing to follow the most applicable precedent. Prior to *Ruiz*, courts had sought to take a case-by-case approach, by looking to the particular facts of each case and determining whether enforcement of arbitration agreements against all heirs was appropriate. *Ruiz* upended the efforts of previous courts, and threw the law into a state of greater confusion.

Given the Court of Appeal's reasoning and statement of its position, Dr. Podolsky concluded that seeking a Petition for Rehearing in the Court of Appeal would be futile.

This Court should reverse the *Ruiz* decision.

STATEMENT OF THE CASE

The Court of Appeal decision never quotes the language of the arbitration agreement between the patient, Raphael Ruiz, and the physician, Anatol Podolsky, M.D. That is surprising for several reasons.

First, the "Physician-Patient Arbitration Agreement" signed by Mr. Ruiz recited the standard language required by 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 at p. 14, emphasis added.) That statement appeared in large bold red type, as required by Section 1295.[2]

Second, the Arbitration Agreement 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,

[2] 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.)

> by entering into it, are giving up their constitutional rights to have any such dispute decided in a court of law before a jury, and instead are accepting the use of arbitration.

(AA at p. 14, emphasis added.)

Third, the Arbitration Agreement provided, at Article 2, entitled "All Claims Must Be Arbitrated," that, "It is the intention of the parties that this agreement binds all parties whose claims may arise out of or may 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 at p. 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 in his side of the physician-patient relationship.

Fourth, the Arbitration Agreement provided, also at Article 2, that, "All 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 at p. 14, emphasis added.)

Fifth, the Arbitration Agreement provided, at Article 3, that "The 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." (AA at p. 14, emphasis added.) In other words, both the patient, Mr. Ruiz, and his physician, 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 at p. 14, emphasis added.)

In summary, the patient, Mr. Ruiz, and his physician, 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.

Notwithstanding this clear indication that the patient-decedent, 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. 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 at p. 40, emphasis omitted.)

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

Plaintiffs relied upon a single decision in support of their argument, *Buckner v. Tamarin* (2002) 98 Cal.App.4th 140. (AA at pp. 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 at p. 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 at p. 81.)

The Superior Court attempted to explain his reasoning as to why splitting the heirs between court and arbitration, while "awkward," 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.)

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, p. 81.) The parties then stipulated to "global discovery." (AA at pp. 88-92.) Dr. Podolsky filed a notice of appeal. (AA pp. 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.) The Court of Appeal chose to follow the *Rhodes* line of authority. (Slip Opn., p 2-3, 22.) The Court of Appeal certified the opinion for publication. (Slip Opn., p. 23.) The decision was filed on June 24, 2009, and became final on July 24, 2009.

REASONS WHY REVIEW SHOULD BE GRANTED

I. THE *RUIZ V. PODOLSKY* DECISION UNNECESSARILY EXACERBATES A CONFLICT IN THE CASE LAW

A. The Court Of Appeal Erred By Seeking To Change Existing Law

The Court of Appeal here went too far in seeking to disavow *Herbert* 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*, "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. at 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*, 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. at 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*, 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. California Courts Seek To Avoid Creating Conflicts In The Case Law

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 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.

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

The concurring opinion of then-Associate Court of Appeal Justice Ron George in *Baker v. Birnbaum* (1988) 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*, "there 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.

D. 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* (1991) 231 Cal.App.3d 1586, 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", quoting *Gross v. Recabaren* (1988) 206 Cal.App.3d 771]; *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.[3] Instead, *Buckner* sought to harmonize *Herbert* with the existing case law. It distinguished *Herbert* on the facts, noting that "*Herbert*'s rationale is

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

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 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*.

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.

II. MR. RUIZ'S WIFE AND ADULT CHILDREN SHOULD HAVE BEEN COMPELLED TO ARBITRATE

A. *Herbert* Was The Most Analogous Case And The Court Of Appeal Should Have Followed 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.)[4]
- The facts in *Baker* 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. (*Baker, supra,* 202 Cal.App.3d 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*

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

was wrongly decided in failing to follow *Herbert* and its progeny.)

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.[5]

The case most similar to the facts of this case was *Herbert*. The Court of Appeal here decided not to follow this applicable precedent and instead attempted to create entirely new law.

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[5] 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.)

As discussed in the next section, the Court of Appeal's decision blithely dismissed (1) the intent of the contracting parties and 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 concerns regarding the patient-physician relationship and patient privacy expressed in *Herbert* and its progeny; and (3) the one-action rule relied upon in *Herbert* and its progeny.

B. The Court Of Appeal Ignored The Intent Of The Contracting Parties And The Effect Of Code Of Civil Procedure Section 1295

Courts hold 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* (1994) 21 Cal.App.4th 1508, 1510; *Herbert, supra*, 169 Cal.App.3d at 725.)

Indeed, 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].)

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* (1985) 164 Cal.App.3d 320, 324), and the wrongful death claimants are subject to the same defenses that could have been asserted against the decedent. (*Saenz v. Whitewater Voyages, Inc.* (1990) 226 Cal.App.3d 758, 763-64; 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, supra,* 169 Cal.App.3d at 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, supra,* 21 Cal.App.4th at 1510; *Herbert, supra,* 169 Cal.App.3d at 725.) As noted in *Gross*, "[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.'" (*Gross, supra,* 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.)

The Court of Appeal ignored the import of Code of Civil Procedure section 1295, which *Herbert* and other cases had pointed to as evincing the strong legislative preference in favor of arbitration of medical malpractice claims.[6] (See, e.g., *Bolanos, supra*, 231 Cal.App.3d at 1591 .)

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, supra,* 206 Cal.App.3d at 775-76.)

Pietrelli specifically noted that *Rhodes* was a "pre-MICRA case," and that *Rhodes* came before the passage of Section 1295. (*Pietrelli, supra,* 13 Cal.App.4th at 947, n.1; see also *Herbert, supra,*

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[6] 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).)

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 . . . "].)

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 for wrongful death] is a creature of statute, the cause . . . exists only so far . . . as the legislative power may declare"].) 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, supra,* 169 Cal.App.3d at 726-27.)

The *Ruiz* decision offered essentially no analysis of the effect of Section 1295. It 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.

C. The Court Of Appeal Failed To Address Crucial Issues Regarding The Patient-Physician Relationship

As *Herbert* noted, 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, 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, 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, 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*, the Court of Appeal again reinforced these concerns and the paramount nature of the patient-physician 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, 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.[7]

D. The Court Of Appeal Erred In Attempting To Dismiss The Import Of The One-Action Rule And Misapplied That Rule

Because *Buckner* itself, which the Court of Appeal here relied upon, pointed out that *Herbert* was distinguishable primarily because the one-action rule was implicated in *Herbert* and not implicated in *Buckner*, the court in *Ruiz* realized that it had to attempt to diminish the importance of the one-action rule, because that rule was in fact applicable here. The Court of Appeal's efforts to do so failed.

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[7] It is for the reasons set out above (*i.e.*, the patient-physician relationship, the intent of the contracting parties, and the effect of Section 1295, that Dr. Podolsky submits that *Buckner* was wrongly decided. *Buckner* failed to address the reasoning of *Herbert* and distinguished it solely on the grounds that in *Buckner*, the one action rule was inapplicable.

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. at p. 6), the Court of Appeal then stated that

> [t]he one action rule, however, is not jurisdictional, and its protections may be waived. 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. at 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. at 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. at pp. 3-4), is utterly unfounded and simply turns the established law on its head.

In the directly analogous situation in *Herbert*, 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, 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,[8] 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* – an application recognized and left undisturbed by *Buckner.* Moreover, the *Ruiz* decision eviscerates the effect of the one-action rule in wrongful death cases stemming from alleged medical malpractice. This was error.

E. The Court of Appeal Offered No Analysis As To Why "Contract Principles" And "Right To A Jury Trial" Should Trump The Patient-Physician Relationship And The One-Action Rule

The Court of Appeal 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. at p. 3) and 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. at p. 22.)

However, the Court of Appeal offered no analysis whatsoever to back up these sweeping statements regarding the "basic contract

[8] Now Code of Civil Procedure section 377.60.

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.

The *Ruiz* decision upsets long-established law. As noted in *Pietrelli, 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, 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 spouse's right to jury trial of a treatment-related claim . . . ." However, *Mormile* held the former outweighed the latter, following the analysis in *Herbert, supra,* 169 Cal.App.3d at 725 and *Gross, supra,* 206 Cal.App.3d at 781 (concluding 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.)[9]

Indeed, in *Scroggs v. Coast Community College* (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

[9] The *Ruiz* opinion does not once mention the *Mormile* decision, even though that decision was cited to the court by Dr. Podolsky. (AOB at pp. 15-16.)

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 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* decision, which viewed requiring arbitration of the nonsignatories' wrongful death claim as somehow denigrating the nonsignatories' rights.

Moreover, as *Herbert* 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." (*Herbert, supra,* 169 Cal.App.3d at 725; see also *Argonaut, supra,* 164 Cal.App.3d at 324; *Saenz, supra,* 226 Cal.App.3d at 763-64.)

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.

Given the previous analyses finding that the considerations of the patient-physician 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.

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"][10].)

F. The Court Of Appeal Read Too Much Into *Rhodes*

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

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

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 at p. 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.

G. The Court Of Appeal Erred In Gratuitously Opining That Mr. Ruiz's Wife Was Not Bound To Arbitrate

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 Brief at 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* and *Mormile*.)

There was no justification for the Court of Appeal to opine that Mrs. Ruiz was not in fact bound to arbitrate. The cases cited by the plaintiffs themselves (and analyzed above) demonstrate precisely why she was bound. As noted in *Gross* and *Mormile*, spouses are able to bind each other given their fiduciary duties to each other, 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 one on which 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].)

CONCLUSION

Because the Court of Appeal's decision in *Ruiz* creates a conflict in the case law, this Court should grant review in this matter and reverse the Court of Appeal's opinion.

DATED: July 31, 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 8,194 words.

DATED: July 31, 2009

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Filed 6/24/09

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ALEJANDRA RUIZ et al.,	
Plaintiffs and Respondents,	G040843
v.	(Super. Ct. No. 07CC08001)
ANATOL PODOLSKY,	O P I N I O N
Defendant and Appellant.	

Appeal from an order of the Superior Court of Orange County, James Di Cesare, Judge. Affirmed.

Schmid & Voiles, Denise H. Greer for Defendant and Appellant.

Cornelius P. Bahan, Inc., and Cornelius P. Bahan for Plaintiffs and Respondents.

This appeal arises from the trial court's denial of a physician's petition to compel arbitration of the wrongful death action brought by the adult children heirs of his patient, Rafael Ruiz (Rafael).[1] Alejandra Ruiz (Wife) and the four adult children, Alejandro, Ana, Diana, and Samuel (collectively referred to as the Adult Children) filed an action against Anatol Podolsky, an orthopedic surgeon, and other health care providers (who are not parties to this appeal). Podolsky sought to enforce the arbitration agreement he had with Rafael against the surviving heirs. Wife conceded she was bound by the arbitration agreement, but she and the Adult Children argued the Adult Children were not bound to arbitrate, and the matter should remain in superior court to prevent conflicting rulings. The trial court granted the petition to compel arbitration as to Wife but denied the petition as to the Adult Children. On appeal, Podolsky argues Rafael had the broad authority to waive the Adult Children's right to a jury trial of their independent wrongful death claims simply because Rafael's spouse conceded she was bound to the agreement and the wrongful death statute requires litigation of the action in one forum.

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

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[1] We refer to the Ruiz family by their first names for clarity and ease of reference, and intend no disrespect. (See *In re Marriage of Olsen* (1994) 24 Cal.App.4th 1702, 1704, fn. 1.)

nonsignatory heirs to a medical arbitration agreement, especially in cases of wrongful death.

Based on our review of the authority in California and other jurisdictions, we conclude California's wrongful death statute does not create a derivative action and therefore Rafael lacked authority (express or implied) to bind Wife or the Adult Children to the physician-patient arbitration agreement he signed simply to receive treatment for himself from Podolsky. Principles of equity and basic contract law outweigh the convenience of litigating in one forum and the public policies favoring arbitration. Accordingly, we hold the trial court correctly concluded the Adult Children cannot be compelled to arbitrate their wrongful death claims.

As for Wife, it appears she was not bound to the arbitration agreement, but she invited error on this issue in the trial court by conceding she must arbitrate her claim. This court cannot revisit the issue because Wife failed to appeal from the court's order compelling arbitration of her claim. Consequently, this 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),[2] 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. Thus, we have a case in which Wife can be compelled to arbitrate her claim; the Adult Children cannot be forced to arbitrate their claims. The defendant ordinarily is given the protection of litigating in one forum; however, 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

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[2] All further statutory references are to the Code of Civil Procedure, unless otherwise indicated.

forums. All may end well, but this is likely not the result Podolsky envisioned. He now risks the possibility of inconsistent results and additional expense by litigating the same claim in two forums. He has the option to waive his right to arbitrate Wife's claim or proceed. The decision is his, not ours. The order is affirmed.

FACTS

In July 2007, Wife and the Adult Children filed a complaint against Podolsky and other health care professionals alleging wrongful death and medical malpractice. They maintained the defendants failed to adequately identify and treat Rafael's hip fracture resulting in complications, and eventually his death.

Podolsky filed an answer to the complaint, and attached a copy of the arbitration agreement he made with Rafael. A few months later, Podolsky filed a petition to compel arbitration. Wife conceded she was subject to the arbitration agreement. However, she and the other heirs argued that because only one plaintiff was bound to arbitrate, the court should allow the parties to proceed in the trial court to avoid inconsistent verdicts, unnecessary delay, multiple actions, and duplicative discovery. Podolsky responded the Adult Children were "swept up" into the arbitration agreement along with Wife due to the "one action rule" for wrongful death suits.

The trial court disagreed. It denied the petition as to the Adult Children, and granted the petition as to Wife. The court stayed the superior court "action pending resolution of arbitration to avoid the possibility of inconsistent rulings." It set a date by which arbitration must be completed and also scheduled a postarbitration status conference date. Podolsky appealed the order denying arbitration. Wife did not appeal.

DISCUSSION

A. Standard of Review

"There is no uniform standard of review for evaluating an order denying a motion to compel arbitration. [Citation.] If the [trial] court's order is based on a decision of fact, then [the reviewing court] adopt[s] a substantial evidence standard. [Citations.]

Alternatively, if the court's denial rests solely on a decision of law, then a de novo standard of review is employed. [Citations.]" (*Robertson v. Health Net of California, Inc.* (2005) 132 Cal.App.4th 1419, 1425.)

Like many physicians, it was Podolsky's practice to offer new patients an arbitration agreement to sign before being examined. Rafael signed the agreement when he went to Podolsky's office, he was not examined that day, but he was asked to return 10 days later. The agreement provided, in pertinent part, "It is the intention of the parties that this agreement bind all parties whose claims may arise out of or relate to the treatment or services 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." (Bold omitted.) The relevant facts and arbitration agreement's language are undisputed. Accordingly, we independently review the agreement's effect. (*Coast Plaza Doctors Hospital v. Blue Cross of California* (2000) 83 Cal.App.4th 677, 684.)

B. General Law Regarding Wrongful Death—the One Action Rule

A wrongful death cause of action is a statutory claim (§§ 377.60-377.62). "In some states, the decedent's right of action for his or her injuries survives, and the recovery goes to the decedent's estate. However, the usual statute creates a new cause of action in favor of the heirs as beneficiaries. [California's] current statute [(§ 377.60)]. . . lists specific persons entitled to sue for wrongful death . . . . The cause of action is based upon the plaintiffs' own independent pecuniary injury suffered by loss of the decedent, and is distinct from any action that the decedent might have maintained had he or she survived. [Citations.]" (6 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 1378, pp. 798-799; *Horwich v. Superior Court* (1999) 21 Cal.4th 272, 283 [wrongful death in California creates new cause of action that is *not derivative* but distinct from any action that deceased might have maintained].)

The wrongful death claim is unique because unlike other tort actions, "Any recovery is in the form of a lump sum verdict determined according to each heirs' separate interest in the decedent's life [citation], with each heir required to prove his or her own individual loss in order to share in the verdict. (§ 377.61 . . . .) Because a wrongful death action compensates an heir for his or her own independent pecuniary losses, it is one for 'personal injury to the heir.' [Citations.] Thus, in a wrongful death action the 'injury' is not the general loss of the decedent, but the particular loss of the decedent to each individual claimant." (*San Diego Gas & Electric Co. v. Superior Court* (2007) 146 Cal.App.4th 1545, 1550-1551 (*San Diego Gas & Electric Co.*).)

"A wrongful death action is considered joint, single and indivisible, meaning that all heirs should join in a single action and there cannot be a series of suits by heirs against the tortfeasor for their individual damages. [Citation.] 'The action is joint only insofar as it is subject to the requirement that all heirs should join in the action and that the damages awarded should be in a lump sum.' [Citation.] As explained by our high court, the wrongful death statute 'is a procedural statute establishing compulsory joinder and not a statute creating a joint cause of action.' [Citation.] Accordingly, each heir has a 'personal and separate cause of action' and the expiration of the statute of limitations as to one heir does not impact the timely wrongful death claims of other heirs. [Citation.]" (*San Diego Gas & Electric Co., supra,* 146 Cal.App.4th at p. 1551.)

C. Courts Can Infer Waiver of the One Action Rule

As discussed above, "Generally, there may be only a single action for wrongful death, in which all heirs must join. There cannot be a series of such suits by individual heirs. [Citation.] This is the so-called one action rule. One of its effects is that settlement of a wrongful death case instituted by only some of the heirs will bar others from prosecuting another action against the same defendant. (*Mayerhoff v. Kaiser Foundation Health Plan, Inc.* (1977) 71 Cal.App.3d 803, 805-807, . . . [affirming dismissal of dependent parents' separate action following settlement of spouse and

children's action].) After settlement of the action, heirs who were neither voluntarily nor involuntarily joined in it must instead seek a remedy against the settling heirs, not the defendant. (*Smith v. Premier Alliance Ins. Co.* (1995) 41 Cal.App.4th 691, 697, . . . (*Smith*).)" (*Gonzales v. Southern Cal. Edison Co.* (1999) 77 Cal.App.4th 485, 489 (*Gonzales*).)

"The 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.' (*Smith, supra*, 41 Cal.App.4th at p. 698.) 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. [Citations.]" (*Gonzales, supra,* 77 Cal.App.4th at p. 489.)

As explained by one court, the one action rule was designed to provide defendant protection from successive suits by heirs of whose existence the defendant had not known. (*Valdez v. Smith* (1985) 166 Cal.App.3d 723, 727-728.) But 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. [Citations.] Defendants could have made a timely objection and had the action abated or at least could have made plaintiff a party to the action. [Citations.] . . . [T]he failure of defendants to do so should not estop the plaintiff from bringing his rightful claim for wrongful death." (*Id.* at p. 728.) The *Valdez* court concluded: "We hold that when, as in the present case, the defendant in a pending action has actual knowledge of the existence, identity and status of an omitted heir and fails to have said omitted heir made a party to the action, a settlement and dismissal with prejudice of the pending action will not bar a subsequent

action by the omitted heir against the defendant." (*Id.* at p. 731.) The defendants had "waived their right to insist upon a single action joined in by all the heirs." (*Ibid.*; accord, *Smith, supra,* 41 Cal.App.4th at p. 697 ["if the defendant had *knowledge* of the omitted heir, but did not attempt to abate the action or join the heir, the defendant waives the right to a single wrongful death action. . . ."].)

The facts of this case are sufficiently similar to those of *Valdez.* Podolsky does not dispute he is aware of the identities of all Rafael's heirs. As will be explained in greater detail below, Podolsky has the legal option of compelling one heir (Wife) to arbitration but not the others. He has two choices. He may choose to waive his right to arbitrate Wife's claim and join it with the other wrongful death claims in superior court. If he chooses not to join Wife in the trial court, he will have waived the protections offered by the one action rule. As explained anon, the convenience of litigating in one forum for one party does not trump another party's right to a jury trial of his or her own, independent action.

D. Rules Regarding Contractual Arbitration

"Public policy favors arbitration as an expedient and economical method of resolving disputes, thus relieving crowded civil courts. However, arbitration assumes that the parties have elected to use it as an alternative to the judicial process. [Citation.] Arbitration is consensual in nature. The fundamental assumption of arbitration is that it may be invoked as an alternative to the settlement of disputes by means other than the judicial process solely because all parties have chosen to arbitrate them. [Citations.] Even the strong public policy in favor of arbitration does not extend to those who are not parties to an arbitration agreement or who have not authorized anyone to act for them in executing such an agreement. 'The right to arbitration depends on a contract.' [Citations.]" (*County of Contra Costa v. Kaiser Foundation Health Plan, Inc.* (1996) 47 Cal.App.4th 237, 244-245 (*County of Contra Costa*).)

E. When Are Nonsignatory Parties Bound to an Arbitration Agreement in California

"The California cases binding nonsignatories to arbitrate their claims fall into two categories. In some cases, a nonsignatory was required to arbitrate a claim because a benefit was conferred on the nonsignatory as a result of the contract, making the nonsignatory a third party beneficiary of the arbitration agreement. In other cases, the nonsignatory was bound to arbitrate the dispute because a preexisting relationship existed between the nonsignatory and one of the parties to the arbitration agreement, making it equitable to compel the nonsignatory to also be bound to arbitrate his or her claim." (See *County of Contra Costa, supra*, 47 Cal.App.4th at p. 242; see also § 1281 [right to arbitration depends on contract].) Podolsky argues Rafael's wife and adult heirs fall into the second category because Rafael bound Wife to arbitration and her wrongful death action cannot be tried in a different forum from the other nonsignatory heirs. We disagree. Absent one of the recognized exceptions (a benefit conferred to a third party beneficiary arrangement or a preexisting relationship) Rafael had no authority to bind his nonsignatory Adult Children to the arbitration agreement Rafael signed with a physician for his personal medical treatment.

"Appellate courts have stated that arbitration agreements are enforced with regularity against nonsignatories. [Citation.] However, a preexisting relationship between the nonsignatory and one of the parties to the arbitration agreement is a common factor in these cases." (*County of Contra Costa, supra*, 47 Cal.App.4th at p. 242.) For example, it is well settled, "Minors are bound by a parent's agreement to arbitrate medical malpractice claims filed against a health care provider. (§ 1295, subd. (d); *Doyle v. Giuliucci* (1965) 62 Cal.2d 606, 609-610; see *Pietrelli v. Peacock* (1993) 13 Cal.App.4th 943, 947 [preconception contract binds child]; *Bolanos v. Khalatian* (1991) 231 Cal.App.3d 1586, 1591 [infant claiming in utero injuries]; *Wilson v. Kaiser Foundation Hospitals* (1983) 141 Cal.App.3d 891, 896-900.)" (*County of Contra Costa, supra,* 47 Cal.App.4th at p. 243.) Similarly, a person who is authorized to act as the

patient's agent can bind the patient to an arbitration agreement. (*Hogan v. Country Villa Health Services* (2007) 148 Cal.App.4th 259, 265-268.)

"Employees who did not agree to arbitrate claims must do so when an employer acting on their behalf enters into a medical services contract containing an arbitration clause. (*Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 702-709 [statutes granted state employers implied authority to contract for medical plan on employees' behalf]; *Harris v. Superior Court* (1986) 188 Cal.App.3d 475, 477 ["a non-signatory doctor who benefited from an arbitration agreement between a patient and a health plan which provided the doctor's employer, a hospital, with patients was bound by the arbitration clause in the health care agreement"].) Likewise, the general partner of a limited partnership is bound by the arbitration agreement entered into by the partnership and a third party. (*Keller Construction Co. v. Kashani* (1990) 220 Cal.App.3d 222, 225-229.)" (*County of Contra Costa, supra*, 47 Cal.App.4th at p. 243.) One court recently summarized these exceptions as follows: "The common thread of all the above cases is the existence of an agency or similar relationship between the nonsignatory and one of the parties to the arbitration agreement. In the absence of such a relationship, courts have refused to hold nonsignatories to arbitration agreements . . . .' [Citations.]" (*Buckner v. Tamarin* (2002) 98 Cal.App.4th 140, 142-143 (*Buckner*).)

F. Authority to Bind Spouses and Adult Children

The body of California authority concerning the binding effect of arbitration agreements on nonsignatory spouses and adult children is difficult to decipher. Essentially, there are two lines of cases that take very different approaches to resolving the issue.

The divergent paths can be clearly seen by first examining two appellate decisions, decided the same year, deciding the same issue, and relying on the two lines of wrongful death cases. Both of the 1988 opinions involved the issue of whether a spouse who signed a patient-physician agreement requiring arbitration of medical malpractice

claims also binds to arbitration the non-signatory spouse who brings a loss of consortium claim. In *Baker v. Birnbaum* (1988) 202 Cal.App.3d 288, 291-293 (*Baker*), the court held husband who was not a party to the arbitration agreement was not required to arbitrate his loss of consortium claim. Prior to wife's breast implant surgery, she signed a patient-physician arbitration agreement. The *Baker* court determined the agreement did not bind her nonsignatory spouse when the services for which she had contracted were for only herself. (*Id.* at p. 292.) In reaching this conclusion, the *Baker* court relied exclusively upon its earlier decision in *Rhodes, supra,* 76 Cal.App.3d 606, holding husband and son were not required to arbitrate a wrongful death action where the patient (wife and mother) had signed an arbitration agreement, and the husband had also signed such an agreement acting as her agent. Husband did not sign the arbitration agreement for himself. The *Rhodes* court reasoned, "We are aware of the strong public policy in favor of arbitration as a means of resolving controversies [citation], but that policy does not extend to those who are not parties to an arbitration agreement or who have not authorized anyone to act for them in executing such an agreement. The right to arbitration depends on a contract. (§ 1281.) Neither [husband] nor the son have ever contracted to forego *their* rights to have *their* cause of action determined by a jury in a normal judicial proceeding. Although a wrongful death action must rest on a cause of action in the decedent, we cannot hold that the decedent's agreement to arbitrate *her* possible cause of action is effective to bar the constitutional and procedural rights of the decedent's heirs in their own, independent action." (*Rhodes, supra,* 76 Cal.App.3d at pp. 609-610.)

A few months after the Second District, Division Four published the *Baker* decision, Division Two of the same appellate district reached a contrary conclusion in *Gross v. Recabaren* (1988) 206 Cal.App.3d 771, 781 (*Gross*). The *Gross* court held husband's physician-patient agreement to arbitrate "'any dispute as to medical malpractice'" extended to a nonsignatory wife's loss of consortium claim. Rather than

follow the *Baker* decision, the *Gross* court decided to follow the approach taken in an older wrongful death case from Division Five of the Second District, *Herbert v. Superior Court* (1985) 169 Cal.App.3d 718 (*Herbert*). The *Gross* court explained, "In resolving this issue we are in the unhappy position of having to choose between the decisions of two of our colleagues, *Baker*[, *supra,*] 202 Cal.App.3d 288, and *Herbert*[, *supra,*] 169 Cal.App.3d 718, appeals decided by this district's divisions four and five respectively. Though the cases are distinguishable on a number of points (see the concurring opinion of Justice George in *Baker, supra*, 202 Cal.App.3d at p. 294), their holdings appear to reflect an irreconcilable divergence of views extending beyond any factual differences." (*Gross, supra,* 206 Cal.App.3d 771, 778 -779.)[3]

Although *Herbert* involved an arbitration agreement entered when husband enrolled himself and wife in a group medical plan, the *Gross* court applied its reasoning to a situation involving one spouse's physician-patient agreement for medical care. The court concluded permitting a patient to submit any dispute to arbitration (including those of a spouse) is: (1) consistent with the language of the statutes governing the contents of medical arbitration contracts (§ 1295); (2) "essential to further the goals of the legislation and the judicially declared preference in favor of joining loss of consortium and negligence claims"; (3) a "safeguard [to] the physician-patient relationship; and" (4) a way to "preserve important privacy rights of the patient." (*Gross, supra,* 206 Cal.App.3d at p. 781.)

We agree with the observation in *Gross* that the split of authority on this issue reflects "irreconcilable divergence of views that extend beyond any factual

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3 In his concurring opinion, then Associate Justice Ronald M. George indicated there was no reason to discuss or disapprove of the *Herbert* decision because it involved a different kind of arbitration provision and a different kind of lawsuit. He found "the majority's discussion of the *Herbert* case to be inappropriate and unnecessary to [the] decision." (*Baker, supra*, 202 Cal.App.3d at p. 295.)

differences." (*Gross, supra,* 206 Cal.App.3d at p. 779.) We found it helpful to examine the evolution to these two lines of cases to better understand the different legal viewpoints and approaches to resolve the issue.

G. Case Law Evolution

As noted above, *Rhodes,* decided in 1978, was the first case to consider the issue of whether one spouse can bind the other spouse to a physician-patient arbitration agreement. (*Rhodes, supra,* 76 Cal.App.3d at p. 608.) The court concluded the cases concerning a parent's "broad powers" to make contracts for the benefit of a minor child were not helpful. (*Id.* at p. 609.) It reasoned, "[H]ere we are not concerned with any contract by a person having protective powers such as those inherent in the parent-child situation." (*Ibid.*) The court recognized wrongful death is not derivative but distinct from any action the deceased may have made. It concluded, "[W]e cannot hold that the decedent's agreement to arbitrate *her* possible cause of action is effective to bar the constitutional and procedural rights of the decedent's heirs in their own, independent action." (*Id.* at pp. 609-610.)

The following year *Hawkins v. Superior Court* (1979) 89 Cal.App.3d 413, 415-416 (*Hawkins*), was published holding husband's application for Kaiser health insurance for himself and his wife, which contained an arbitration clause, required wife to pursue her wrongful death action in arbitration. Although wife never personally agreed to the arbitration provision, the court held the case was distinguishable from *Rhodes,* which "involved an individual patient contracting for medical services for herself whereas in the instant case the husband contracted for health care services for himself and his wife. . . Spouses have mutual obligations to care for and support the other [citation], including the obligation to provide medical care [citations], and they occupy a fiduciary relationship to each other. [Citations.] Decedent had the power to contract for the health plan for himself and his wife and, ... implicit in that power is the implied authority to agree for himself and his wife to arbitrate claims arising out of medical malpractice."

(*Hawkins, supra,* 89 Cal.App.3d at pp. 418-419.) It analogized the purchase of a spouse's health insurance to those cases holding a parent has authority to contract for a minor child's medical services and bind the child to arbitration (*Doyle v. Giuliucci, supra,* 62 Cal.2d at p. 610), and an employer may bind those enrolled in the employees' group health care contract containing an arbitration provision (*Madden v. Kaiser Foundation Hospitals, supra,* 17 Cal.3d at p. 709).

Next came *Herbert, supra,* 169 Cal.App.3d 718, which offered a philosophically different approach to the issue. That case involved a member of the Teamster's Union who enrolled his wife and five minor children in a Kaiser group health plan, which required arbitration of medical malpractice disputes. After husband died, the widow and her eight children (the five minors enrolled with Kaiser plus three adult children who were not) filed a wrongful death action against the group health care provider. The court determined the three adult children who were not members of the plan were nevertheless bound by it. (*Id.* at pp. 724-725.)

The *Herbert* court reasoned, "The claims of [wife] and the five minor children are governed by *Hawkins*[, *supra*,] 89 Cal.App.3d 413 (a case which also involved a Kaiser plan)." (*Herbert, supra,* 169 Cal.App.3d at p. 722.) The *Herbert* court recognized the *Hawkins* court left undecided the issue of "whether the arbitration provision of the plan agreement is binding upon adult heirs who are not members of the plan. [Citation.] We conclude that the arbitration contract executed by Mr. Herbert bound both the member and nonmember heirs to arbitrate their claims." (*Id.* at p. 724.)

The *Herbert* court offered many different policy reasons to support its conclusion, implicitly rejecting the *Rhodes* court's straightforward statutory analysis approach, recognizing wrongful death is the decedent's heirs' own, independent action. (*Herbert, supra,* 169 Cal.App.3d at pp. 724-727; see *Rhodes, supra,* 76 Cal.App.3d at p. 610.) The *Herbert* court explained, "Important to our determination of this issue is an analysis of the agreement and the legal policies supporting it. The agreement was

negotiated by the Teamsters, of which decedent was a member, with Kaiser for the benefit of the union's members. It is similar in nature to the agreement reviewed in *Madden . . ., supra,* 17 Cal.3d 699 [employee bound by group medical services contract entered into between the employer and Kaiser]." (*Herbert, supra,* 169 Cal.App.3d at p. 724.) The *Herbert* court noted the Supreme Court had concluded an arbitration contract such as the one in *Madden* was not an adhesion contract because the agreement was "'a product of negotiations between parties possessing parity of bargaining strength.'" (*Id.* at p. 724, citing *Madden, supra,* 17 Cal.3d at p. 703.)

In addition to the above logic, the *Herbert* court offered the following laundry list of reasons that support binding the nonsignatory adult heirs: (1) The action cannot be split into two different tribunals because "a single cause of action exists in the heirs for the wrongful death of a decedent"; (2) a wrongful death action is "technically a separate statutory cause of action" but "in a practical sense" it is "derivative of a cause of action in the deceased"; (3) "it is obviously unrealistic to require the signatures of all the heirs" (who are not identified until the time of the decedent's death) and might not be available; (4) if the heirs "refused to sign they should not be in a position possibly to delay medical treatment to the party in need"; (5) decedents can bind their heirs through contracts and wills; (6) the Code of Civil Procedure (sections 1283.1 and 1295)[4]

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[4] Section 1283.1 provides "(a) All 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." (Italics added.)

Section 1295 provides for the arbitration of professional negligence claims including wrongful death and delineates strict requirements for a valid medical malpractice arbitration provision in an individual contract for medical services. Although these provisions were inapplicable to the Kaiser insurance plan at issue in *Herbert* the court found the language permitted arbitration of wrongful death and should be enforced. It concluded the language of "sections 1283.1 and 1295 evidence a legislative intent that a patient who signs an arbitration agreement may bind his heirs to that agreement,

evidences a legislative intent for arbitration of wrongful death actions arising from medical malpractice, and "[i]t would be illogical to construe these statutory provisions to apply only under the fortuitous circumstances that *all* potential heirs are also plan members"; (7) arbitration is neither "'an extraordinary procedure'" nor "'especially disadvantageous'" to the heirs; and (8) ample authority supports the "strong judicial and public policy favoring arbitration over litigation as a means of settling disputes in medical malpractice cases[,]" including wrongful death actions. (*Herbert, supra,* 169 Cal.App.3d at pp. 724-727.)

The *Herbert* court attempted to make its case factually distinguishable from *Rhodes,* stating in a footnote the *Rhodes* court simply held "an agreement to arbitrate signed by a decedent with the defendant hospital did not bind a nonsigning party to the agreement. There was no provision in the agreement whereby the signing party intended to bind his or her heirs to the arbitration clause." (*Herbert, supra,* 169 Cal.App.3d at p. 725, fn. 2.)

The *Herbert* decision was rejected by the majority in the next appellate court to consider the issue nearly a decade later. The Second Appellate District, Division Four revisited the issue in *Baker, supra,* 202 Cal.App.3d 288. The patient in *Baker* signed an agreement to arbitrate "'any dispute as to medical malpractice . . .' [which] 'purported to bind [the patient] and 'anyone else who may have a right to assert a claim on [her] behalf . . .' as well as other persons for whom she had responsibility, such as her spouse and any children." (*Id.* at p. 290.) The patient and her husband brought claims against the doctor: The wife alleged negligence and the husband alleged loss of consortium. The court determined the agreement was inapplicable to the husband's claim for loss of consortium because the patient had "contracted for medical care solely on her own behalf, and the agreement to arbitrate related only to such services as would be

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regardless of whether the heirs are also members of the plan." (*Herbert, supra,* 169 Cal.App.3d at p. 727.)

provided to her under that contract." (*Id.* at p. 292.) The court concluded there was no language in the agreement which would support a finding it was signed on behalf of any person other than wife. (*Id.* at p. 293.) As in *Rhodes,* the court in *Baker* reasoned that although public policy favors arbitration, "Arbitration assumes, however, an election by the parties involved to use it as an alternative to the judicial process. A party cannot be compelled to arbitrate a dispute it has not elected to submit. [Citation.]" (*Id.* at p. 291.)

The *Baker* court declined to follow the *Herbert* opinion for several reasons. It noted the case was distinguishable and legally at odds with its legal approach to the issue. It concluded, "Relying on principles expounded in the *Doyle* and *Hawkins* decisions, the *Herbert* court reasoned that the decedent had the implied authority to bind his wife and minor children to the arbitration clause contained in his group medical coverage based on their fiduciary relationship and his right and duty to provide for their medical care. . . . [¶] . . . The court reasoned that the arbitration clause contained in the negotiated group health care plan was of the type approved by the Supreme Court in *Madden . . ., supra,* 17 Cal.3d 699 . . ., and that this was significant because both those plans, unlike individual contracts for medical services, were negotiated from a parity of bargaining power. . . . [¶] The case before us is distinguishable from *Herbert* for, by implication, *Herbert* acknowledges that an individual contract for medical services, as is involved here, should be more rigorously analyzed and less quickly applied to the claims of a nonsignatory. (See also *Hawkins, supra,* 89 Cal.App.3d at p. 418 [distinguishing *Rhodes* on the basis that it involved an individual contract not a group health plan]; *Dinong v. Superior Court, supra,* 102 Cal.App.3d at pp. 852-853 [noting greater statutory protection for those signing individual contracts for medical services].) [¶] We must expressly decline to follow *Herbert*, however, in that it, as appellant argues, would apparently attempt, even in this situation, to force respondent herein to arbitrate solely to avoid litigation of these claims in two different tribunals. [¶] We consider the

respondent's exercise of his right to a jury trial paramount to the court's convenience in having all parties litigate in a single action." (*Baker, supra,* 202 Cal.App.3d at p. 293.)

As noted above, the next case published a few months later, *Gross, supra,* 206 Cal.App.3d at pp. 780-781, followed the *Herbert* case's approach to the issue. It stated, "After carefully considering each of the foregoing decisions, we are persuaded the reasoning articulated in *Herbert . . ., supra,* 169 Cal.App.3d 718, more appropriately treats with the practical realities of the situation and more accurately reflects existing case law governing the applicability of arbitration agreements to nonsignatories. [¶] We, also, are unable to accede to the suggestion in *Baker. . ., supra,* 202 Cal.App.3d at page 294, that an individual contract for medical services 'should be more rigorously analyzed and less quickly applied to the claims of a nonsignatory' than a negotiated group health plan. Heightened scrutiny, of course, is appropriate in the case of contracts of adhesion (*Madden . . ., supra,* 17 Cal.3d at p. 710, and cases cited therein), but when an arbitration agreement comports with the requirements of section 1295, it is, by definition, 'not a contract of adhesion, nor unconscionable nor otherwise improper. . . .' (§ 1295, subd. (e).)" (*Gross, supra,* 206 Cal.App.3d at pp. 780-781.)

Nearly a decade later, in 1996, the court in *County of Contra Costa, supra,* 47 Cal.App.4th 237, 245, considered the issue of binding nonsignatories to an arbitration agreement in a different context, however, the court's discussion of nonsignatories in medical malpractice arbitration is noteworthy. In *County of Contra Costa,* a pedestrian injured by a car sued the driver, the county, and the transit authority. She also raised a medical malpractice action against her treating health care provider, who moved to compel arbitration of the pedestrian's action as well as the indemnity cross action brought against the provider by the other defendants. The trial court and appellate court agreed the arbitration agreement did not bind the cross-claimants, who had not signed the arbitration agreement and they had not agreed to be bound by its terms. The court

discussed the limited circumstances in which nonsignators can be bound by an arbitration agreement. It concluded, "In essence, an action to compel arbitration is a suit in equity to compel specific performance of that contract. [Citation.] Absent a written agreement—or a preexisting relationship or authority to contract for another that might substitute for an arbitration agreement—courts sitting in equity may not compel third party nonsignatories to arbitrate their disputes. [¶] We are aware that other appellate courts read the underlying contracts more broadly, finding that a medical malpractice arbitration clause applies to any claim arising out of the contracted-for services, regardless of whether they are asserted by the patient or a third party. (See *Bolanos v. Khalatian, supra,* 231 Cal.App.3d at p. 1591; *Gross . . . supra,* 206 Cal.App.3d at p. 781 [loss of consortium].) However, these cases, in our view, ignore the constitutional and procedural rights of the nonsignatory third parties who had no prior connection to a signatory party to the arbitration agreement. (See *Rhodes . . ., supra,* 76 Cal.App.3d at pp. 609-610.)" (*County of Contra Costa, supra,* 47 Cal.App.4th at p. 245.)

In 2002, the Second District appellate court, Division Four again considered the issue, holding the decedent's physician-patient arbitration agreement purporting to bind "his heirs" was not enforceable against the decedent's three adult daughters. (*Buckner, supra,* 98 Cal.App.4th at p. 141.) The court reasoned none of the exceptions to binding nonsignatories to an arbitration agreement applied: "Their father entered into the arbitration agreement solely for his own medical care. He was not their agent, they were not married to him, and they were not minors. He therefore lacked the authority to waive their right to a jury trial of their claims." (*Id.* at p. 143.)

The *Buckner* court determined the *Herbert* case was factually distinguishable: "In *Herbert*, the wrongful death claimants fell into three groups. For two of those groups—the widow and minor children—the decedent's right to bind them to arbitration rested on well-grounded legal principles involving spouses and parents and children. For the third group, however—adult children who did not belong to the health

plan—the decedent had no authority to act. The *Herbert* court nevertheless found that practical considerations involving the indivisibility of wrongful death claims permitted the arbitration agreement to sweep up the adult children. *Herbert's* rationale is inapplicable here because respondents are not dividing their wrongful death claims between different forums. Accordingly, *Herbert* does not apply." (*Buckner, supra,* 98 Cal.App.4th at p. 143.)

More recently two federal district courts have adopted the reasoning set forth in *Herbert.* (*Drissi v. Kaiser Found. Hosps., Inc.* (N.D.Cal. 2008) 543 F.Supp.2d 1076, 1081; *Clay v. Permanente Med. Group, Inc.* (N.D.Cal. 2007) 540 F.Supp.2d 1101, 1111.) Those courts distinguished *Rhodes, Baker,* and *Buckner* as not including decedent's spouse or the estate, so there was "no concern of splitting a wrongful death suit across forums or reaching inconsistent results." (*Clay v. Permanente Med. Group, Inc., supra,* 540 F.Supp.2d at p. 1111.)

To briefly summarize, the line of cases starting with the *Rhodes* decision approached the issue by looking to the statutory language creating the wrongful death action. Recognizing such claims are not derivative actions, those courts have determined a patient's authority to bind others to his or her arbitration contract are limited by traditional contract principles and exceptions regarding the binding of nonsignators. It must be equitable to compel a nonsignatory to waive his or her right to a jury trial of his or her independent wrongful death action. The second line of authority, originating with the *Herbert* case, approaches the issue focusing on the goal of enforcing medical malpractice arbitration agreements, especially in wrongful death cases. These cases have essentially broadened the authority of one particular class of claimants (medical patients), to bind others to arbitration without the benefit of an agency or other preexisting relationship. Simply stated, the public policy supporting arbitration of medical malpractice disputes, the Legislature's implicit approval of arbitration of wrongful death actions, and the concern patients will be denied treatment if he or she cannot bind all

possible heirs to arbitration had been deemed to outweigh the constitutional and procedural rights of nonsignatory third parties.

H. Out of State Authority

Before deciding which line of reasoning we find more persuasive, it is worth noting other states have resolved the issue of whether nonsignatory adult heirs should be "swept up" into the deceased's arbitration agreement based on whether the wrongful death action is an independent or derivative cause of action. (See *In re Labatt Food Service, L.P.* (Tex. 2009) 279 S.W.3d. 640 [under Texas law beneficiaries stand in decedent's legal shoes and are bound by his agreement]; *Cleveland v. Mann* (Miss. 2006) 942 So.2d 108, 118-119 [beneficiaries bound by decedent's arbitration agreement because under Mississippi Wrongful Death Act, beneficiaries may bring suit only if decedent would have been entitled to bring action immediately before death]; *Briarcliff Nursing Home, Inc. v. Turcotte* (Ala. 2004) 894 So.2d 661, 665 [administrator of estate bringing wrongful death claim bound because administrator stands in legal shoes of decedent]; *Ballard v. Southwest Detroit Hosp.* (Mich. Ct. App. 1982) 327 N.W.2d 370, 372 [administrator bringing wrongful death action bound by arbitration agreement because wrongful death is a derivative cause of action under Michigan law]; but see *Bybee v. Abdulla* (Utah 2008) 189 P.3d 40, 43 [beneficiaries not bound because wrongful death is an independent cause of action under Utah law]; *Finney v. Nat'l Healthcare Corp.* (Mo. Ct. App. 2006) 193 S.W.3d 393, 395 [beneficiary not bound because under Missouri law the wrongful death act creates a new cause of action belonging to the beneficiaries].)

We also have reviewed one case from Colorado, which did not decide the issue based on the statutory language but rather resolved the issue on what the contracting parties intended. (*Allen v. Pacheco* (Colo. 2003) 71 P.3d 375, 379-380 [beneficiaries bound when contract reflects intent of the parties to bind beneficiaries].) This appears to

be the approach also adopted in part by the cases in California following *Herbert, supra,* 169 Cal.App.3d 718 [beneficiaries bound when contract reflects intent of the parties to bind beneficiaries].

F. Our Analysis

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 had he survived. The heirs do not stand in the shoes of the party who signed the arbitration agreement. We find the reasoning of the *Rhodes* line of cases and those of our sister jurisdictions employing a straightforward statutory analysis of the issue most persuasive. There is no compelling reason to create a new exception to bind nonsignatories to a contract. We find no contractual or statutory basis to confer on "medical patients" the special status of being able to waive the constitutional due process rights of family members (who are not third party beneficiaries or when there is no preexisting relationship).

Rafael was not securing a medical plan for the Adult Children when he agreed to arbitration; they received no benefit from the contract. The contract was not created by a person having protective powers, such as those inherent with minors and employees. This is not a case involving a fiduciary, agency, or other preexisting relationship. [Rafael] entered into the arbitration agreement simply to obtain his own medical care. We find no legal or rational basis to make the wrongful death statute's "one action rule" a new exception to bind nonsignatories to an arbitration contract. This court will 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 on a consensual written contract), ignore the fundamental right to have a jury trial, and ignore constitutional rights to due process.

On a final note, we conclude equitable principles of invited error preclude us from disturbing the court's ruling with respect to Wife. "The 'doctrine of invited error' is an 'application of the estoppel principle': 'Where a party by his conduct induces the commission of error, he is estopped from asserting it as a ground for reversal' on appeal. [Citations.] At bottom, the doctrine rests on the purpose of the principle, which is to prevent a party from misleading the trial court and then profiting therefrom in the appellate court. [Citations.]" (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 403.) "Under the doctrine of invited error, when a party by its own conduct induces the commission of error, it may not claim on appeal that the judgment should be reversed because of that error. [Citations.]" (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 212.) In the plaintiffs' joint opposition to the petition to compel arbitration it was conceded Wife was bound by the arbitration agreement. She did not appeal from the ruling compelling her to arbitrate, and in the respondent's brief, the parties again concede Wife was bound to the arbitration agreement. Under these circumstances, we will not disturb the trial court's ruling.

DISPOSITION

The order is affirmed. Respondents shall recover their costs on appeal.

CERTIFIED FOR PUBLICATION

O'LEARY, J.

WE CONCUR:

SILLS, P. J.

RYLAARSDAM, J.

PROOF OF SERVICE BY MAIL
4th Civil Case No. G040843

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 **PETITION FOR REVIEW** by placing true and correct copies thereof in sealed envelopes addressed to the parties listed on the attached Service List:

By Express Mail or other Overnight Delivery – I deposited the sealed envelope in a box or other facility regularly maintained by the express service carrier, or delivered to an authorized courier or driver authorized by the express service carrier to receive documents, in an envelope or package designated by the express service carrier with delivery fees paid or provided for, addressed to the person on whom it is to be served, at the office address as last given by that person on any document filed in the cause and served on this office, or otherwise at the party's place of residence.

-AND-

By United States Postal Service – I am readily familiar with the business's practice for collecting and processing of correspondence for mailing with the Untied States Postal Service. In that practice correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business, with the postage thereon fully prepaid, in Pasadena, California. The envelope was placed for collection and mailing on this date following ordinary business practice.

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 July 2009 at Pasadena, California.

MiChelle McGrath

SERVICE LIST
SUPREME COURT CASE NO. _____
4th Civil Case No. G040843

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