S175204

IN THE

Supreme Court

OF THE STATE OF CALIFORNIA

ALEJANDRA RUIZ; ALEJANDRO RUIZ; ANA RUIZ; DIANA RUIZ; SAMUEL RUIZ

Plaintiffs and Respondents,

vs.

ANATOL PODOLSKY, M.D.

Defendant and Appellant.

ANSWER BRIEF ON THE MERITS

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

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QUESTION PRESENTED

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

ANSWER TO QUESTION PRESENTED

No, the patient-decedent's agreement with the physician to arbitrate claims should not require the patient's adult children (or his wife) to arbitrate their claims for wrongful death. There are just reasons recognized by the Court of Appeal as to why the answer to this question is not true, especially in this case.

This matter is only incidentally about arbitration. It is fundamentally about property.

Plaintiffs own causes of action. Those causes of action did not exist prior to decedent's death. The proceeds of those causes of action do not pass through the decedent's estate. The proceeds are treated, for tax purposes, as the property of the Plaintiffs. Decedent had no legal interest in either the causes of action or the proceeds.

Prior to his death, decedent Rafael Ruiz and Defendant Dr. Podolsky signed an agreement that notes "the intention of the parties [to the agreement]" that the agreement binds the spouse and heirs of decedent. The agreement includes an

arbitration clause, and the agreement recites that "*Both* parties to this contract" are giving up *their* constitutional rights to adjudication in a court by a jury.

Dr. Podolsky asserts that his agreement with decedent Mr. Ruiz binds Plaintiffs, who are strangers to the agreement, to arbitrate their causes of action and to give up their constitutional rights.

Even if the language of the agreement called for such a result – which it does not – any control the decedent sought to exercise by contract over Plaintiffs' property is null. Decedent had no property interest in Plaintiffs' claims that he could bargain away to Defendant. *Goliger v. AMS Properties, Inc.* (2004) 123 Cal. App. 4th 374, 377 (arbitration agreement did not bind daughter even when she signed as "responsible party," as she was not signing away her personal right to a wrongful death action). If the decedent had quitclaimed to Defendant all his interest in the Brooklyn Bridge, but the title was held by the Plaintiffs, Defendant would not be entitled to begin collecting tolls.

Additionally, any perceived waiver by decedent of the Plaintiffs' constitutional rights would not meet the requisite standard that the waivers be knowing and voluntary (*See inter alia Rodriguez v. Superior Court* (2009) 176 Cal.App.4th 1461).

Nothing in Code of Civil Procedure Section 1295 alters these fundamental principles of contract and constitutional law. The provisions of 1295(b), highlighting the importance of waiving the rights of access to courts and juries, only reinforce these principles.

Other states in which wrongful death claims are the property of heirs have found that a decedent's purported binding of heirs to arbitration has no effect. This court should reach the same result. (*Lawrence v. Beverly Manor*, 273 S.W.3d 525, 527 (Mo. 2009); *Peters v. Columbus Steel Castings Co.*, 115 Ohio St.3d 134, 873 N.E.2d 1258 (2007); *See also Washburn v. Beverly Enterprises-Georgia, Inc.*, 2006 WL 3404804, *6 (S.D.Ga. 2006); *In re Kepka* (Tex. App. 2005), 178 S.W.3d 279, 294-95 (representative's wrongful death action not affected by an arbitration agreement that was not signed in representative capacity).

The Court of Appeal was right in its analysis and correct in finding that "[p]rinciples of equity and basic contract law outweigh the convenience of litigating in one forum and the public policies favoring arbitration." (Slip Opn., p.3.)

This case should be affirmed so that the beneficiaries can control their own property and can exercise the rights of access to courts and of trial by jury that are theirs to assert, that they have asserted, that they have not waived, and that no one has waived on their behalf.

STATEMENT OF THE CASE

The Plaintiffs are the wife and natural adult children of decedent Rafael Ruiz (Mr. Ruiz) as follows: Alejandra Ruiz (Wife) and Alejandro Ruiz, Ana Ruiz, Diana Ruiz, and Samuel Ruiz (Adult Children). (AA 2, 40.)

The Defendant / Appellant Anatol Podolsky, M.D. (Dr. Podolsky) is a board-certified orthopedic surgeon licensed to practice medicine in the state of California. (AA 3, 4.)

Decedent Mr. Ruiz first presented to Dr. Podolsky's office on July 17, 2006 with a STAT referral from his primary care physician due to MRI findings that established decedent had bilateral hip fractures that required immediate intervention. (AA 20.)

While the facts as to what exactly transpired at this appointment are in issue, what is known is that Dr. Podolsky's office personnel presented decedent with intake / pre-treatment paperwork, including the subject medical services arbitration agreement as well as a questionnaire concerning insurance information and a patient history which included information pertaining to the cause of decedent's injuries. (AA 20.) Mr. Ruiz was required to sign the arbitration agreement in order to obtain treatment from Dr. Podolsky. The only thing Mr. Ruiz made clear was that he signed the required documents in order to obtain the treatment he desperately needed.

It is also certain that Dr. Podolsky never spoke with or examined Mr. Ruiz. It is further known that Dr. Podolsky's office requested clarification as to whether

the treatment would be covered under Mr. Ruiz's personal group insurance coverage or through the Worker's Compensation system which required authorization. Decedent was given a return appointment for ten days later on July 27, 2006 and was sent back to his primary care physician to determine how Dr. Podolsky's treatment charges would be paid[1]. (RT 8:1-6.)

Tragically, Mr. Ruiz died at age 56 on July 25, 2006 – 8 days after his initial unsuccessful appointment with Dr. Podolsky and two days before his next scheduled appointment. (AA 4, 40.)

Plaintiffs do not dispute that the agreement signed by decedent Mr. Ruiz meets the minimum requirements of Code of Civil Procedure section 1295 and do not contest the factual recitation of the language of the agreement set forth in Appellant's Opening Brief (AOB, 4-5) as well as Dr. Podolsky's Opening Brief on the Merits (OB, 6-8).

On July 17, 2007, Plaintiffs filed a complaint in the Orange County Superior Court against Dr. Podolsky and other health care providers who are not parties to this appeal[2] alleging claims for wrongful death/medical malpractice. (AA 1.) The allegations state that defendants failed to diagnose, care, treat and appropriately monitor and follow-up on decedent including the failure to

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[1] There are factual disputes as to these issues which are yet to be determined in the litigation.

[2] Defendant incorrectly indicated that there are nine additional Defendants. Correctly stated, there remain six additional superior court Defendants in this action.

adequately identify and treat decedent's hip fractures and resulting complications. (AA 4.)

Dr. Podolsky was served with the complaint on December 12, 2007 (AA 7-8) and filed his answer on January 10, 2008 which contained a copy of the arbitration agreement. (AA 9-13, 14.) It should be noted that Dr. Podolsky initially denied having any records pertaining to Mr. Ruiz, including the arbitration agreement, and first disclosed the agreement when the answer was filed.

On March 27, 2008, Dr. Podolsky filed a petition to compel arbitration of the Wife's and Adult Children's claims and to stay the superior court action as to Dr. Podolsky only. The hearing on the petition was set for April 25, 2008. (AA 17-36.)

Plaintiffs' opposition was filed and served on April 14, 2008 set forth the following grounds for denial of the petition:

1. Plaintiffs Alejandro Ruiz, Ana Ruiz, Diana Ruiz and Samuel Ruiz are the adult children of the decedent, Rafael Ruiz and are not bound by the terms of the arbitration agreement between decedent and this petitioning defendant;

2. Decedent Rafael Ruiz lacked the authority to waive his children's' rights to a jury trial of the claims against this defendant;

3. Only Plaintiff Alejandra Ruiz as the wife of decedent is subject to the arbitration agreement and there are no grounds or rationale to force this matter to be litigated in two forums under these circumstances; and

4. Judicial economy will be served by denying this petition in that all defendants and all claims will be determined in the Superior Court without further delay or need for any stay orders. (AA 39.)

Plaintiffs' opposition further cited *Buckner v. Tamarin* (2002) 98 Cal.App.4th 140 as legal support for their position that the adult child heirs are not bound by the arbitration agreement. (AA 38-44.) Plaintiffs also argued that since only decedent's Wife is **potentially subject** to the arbitration agreement, the granting of this Petition would therefore result in only the Wife and Dr. Podolsky initially litigating the action with the bulk of the matter on hold pending that outcome. Plaintiffs therefore argued that judicial efficiency and economy will be served by keeping all defendants and all plaintiffs in the Superior Court since it will avoid unnecessary delay, inconsistent verdicts, multiplicity of actions, and duplicative discovery and asserted that the trial court has inherent power to control the judicial proceedings and process before it and issue such an order so as to conform to law and justice pursuant Code of Civ. Proc. section 128(a)(8); Cal. Const., Art. VI, section 1; and *Walker v. Superior Court* (1991) 53 Cal.3d. 257. (AA 41.)

Dr. Podolsky replied to Plaintiffs' opposition as set forth in the AOB at pages 6-7. The facts also reflect that the hearing on the petition was continued from April 25, 2008 to June 20, 2008 but those facts are in issue. Dr. Podolsky indicates in the AOB that the continuance was due to plaintiffs considering dismissing Dr. Podolsky which plaintiffs contest even though counsel for Dr.

Podolsky made such a representation at the hearing on the petition on June 20, 2008 (RT 7:21-26). The actual request for the continuance was to participate in early mediation and for Plaintiffs to bring in two new defendants whose identities became known in the initial discovery proceedings[3]. Counsel for the new defendants were served with notice of the petition (AA 76-80) and appeared at the June 20, 2008 hearing. (RT 8:15-20)

The trial court issued its tentative ruling prior to the June 20, 2008 hearing which is correctly set forth in the AOB at page 7. While Plaintiffs submitted on the tentative (RT 1:7-8; 2:24), counsel for Dr. Podolsky requested oral argument. The substance of that argument is set forth in the AOB at pages 7-11.

Following oral argument, the court determined that the tentative will be order of the court. (RT 9:25 – 10:5.)

Notice of the court's ruling on the petition was served on June 25, 2008. (AA 83-87.)

Dr. Podolsky filed his appeal of the court's June 20, 2008 order on August 14, 2008. (AA 93.)

On June 24, 2009, the Court of Appeal, Fourth Appellate District, Division Three, affirmed the order denying arbitration as to the Adult Children and reluctantly affirmed the order granting arbitration as to the Wife:

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[3] The record reflects that Plaintiffs' counsel was unavailable for the June 20, 2008 hearing and a special appearance was made by counsel who was not familiar with the background as to why the hearing had been continued and other nuances of the case so the record could not be clarified at that time. (RT 2:10-12)

> 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. (Slip Opn. p. 3.)

In so doing, and after an extensive analysis of California case law as well as out of state authority, the Court found that while there are divergent paths, the reasoning of the *Rhodes v. California Hospital Medical Center* (1978) 76 Cal.App.3d 606 (*Rhodes*) line of cases are most persuasive:

> 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. (Slip Opn. at 22.)

The Court's decision became final on July 24, 2009. Dr. Podolsky petitioned for review on August 3, 2009 and this Court granted the Petition on October 14, 2009.

LEGAL DISCUSSION

I. DECEDENT MR. RUIZ HAD NO PROPERTY INTEREST IN THE WRONGFUL DEATH CLAIMS THAT ARE BEFORE THE COURT AND NO POWER TO AFFECT THEM ON BEHALF OF HIS BENEFICIARIES

A. Decedent Mr. Ruiz Had No Legal Rights Or Property Interest In The Wrongful Death Claims In Issue

A wrongful death action is an independent claim on behalf of decedent's heirs for damages they personally suffered on account of the death. (Code of Civil Procedure section 377.60.) Enumerated heirs are entitled to recover damages on their own behalf for the loss they have sustained by reason of decedent's death; the action is separate and distinct from the victim's action; damages belong to the wrongful death plaintiffs personally. (Rutter's Cal. Prac. Guide, *Probate*, Ch. 15-B, 15:280, 15:292.)

These rules are long standing.

In *Bartolozzi v. Mallegni* (1921) 185 Cal.458, 458, the court held that the action for wrongful death authorized by Code of Civil Procedure section 377 is

solely for the benefit of the heirs to compensate them for pecuniary loss suffered by them by reason of the death.

Twenty years later, in *Secrest v. Pacific Elec. Ry. Co.* (1943) 60 Cal.App.2d 746, 748, the court concluded that:

> "...it is settled by many decisions in California that a plaintiff suing under section 376 or section 377 of the Code of Civil Procedure does not represent the right of action which the deceased would have had if the latter had survived the injury. A new right is created entirely distinct from that which was vested in the injured person before his death. The right of action vested in a decedent abates and a new and independent cause of action for damages for his death immediately arises in favor of the heirs or personal representatives. Such right of action is wholly independent and it is no less independent because it has its origin in the same tort."

Thereafter in *Willis v. Gordon* (1978) 20 Cal.3d 629, 637-638 the concurring opinion of Justice Mosk elaborated on the wrongful death statutes finding that it gives a victim's representative a totally new right of action, on different principles making it clear that wrongful death legislation was designed to afford a remedy not available at common law for damages the heirs suffer in their own right which are unrelated to the damages that were suffered by the decedent prior to his death and any rationale is suspect that permits consideration of the conduct of the deceased to reduce or defeat the independent damages suffered by the heirs.

The wrongful death statute was also held to vest a personal and separate cause of action in each heir who sustains damage by reason of the wrongful death of a decedent. *Cross v. Pacific Gas & Electric* (1964) 60 Cal.2d 690, 692; *Washington v. Nelson, M.D.* (1979) 100 Cal.App.3d 47, 52.

Further, in *Valdez v. Smith* (1985) 166 Cal.App.3d. 723, 726 the court reiterated the findings in *Cross*:

> "The *Cross* court also noted that 'each heir should be regarded as having a personal and separate cause of action' and 'the interests of the heirs are separate rather than joint.'"

The following year, in *Mayo v. White* (1986) 178 Cal.App.3d 1083, 1090, the court confirmed a cause of action for wrongful death under Code of Civil Procedure section 377 is clearly not an asset of the estate of the decedent and is vested in the " heirs" as defined in the Probate Code, and any recovery is solely for the benefit of such " heirs" to compensate them for injuries they actually suffered by reason of the death of the decedent. (Citations.)

That same year, the court in *Ferguson v. Dragul, M.D.* (1986) 187 Cal.App.3d 702, 709 held that a wrongful death action is a separate action from the decedent's medical malpractice claim; is not a continuation of the decedent's claim but is an entirely new cause of action created in the heirs with the decedent's death the event giving rise to the cause of action and the injury sustained by the heirs.

More recent cases confirm the earlier decisions.

In *San Diego Gas & Electric v. Sup. Ct. (2007)* 146 Cal.App.4th 1545, the court emphasized that the wrongful death action compensates an heir for his or her own independent pecuniary losses suffered as a result of decedent's death and is for personal injury to the heir. The "injury" is not the general loss of the

decedent, but the particular loss of the decedent to each individual claimant. Any recovery is in the form of a lump sum settlement or verdict determined according to each heir's separate interest in the decedent's life , with each heir required to prove his or her own individual loss in order to share in the verdict. 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. (*See* also *Brumley v. FDCC California, Inc.* (2007) 156 Cal.App.4th 312)

In further support of the position that Decedent Mr. Ruiz had no legal rights or property interest in the wrongful death claims, Plaintiffs rely on *Madison v. Superior Court* (1988) 203 Cal.App.3d 589, *Horwich v. Superior Court* (1999) 21 Cal.4th 272 and *Chavez v. Carpenter* (2001) 91 Cal.App.4th 1433.

In *Madison* the court held that a scuba diving student had no power or right to waive a wrongful death action by his heirs and therefore the release signed by him did not limit his parent's right to prosecute an action for wrongful death as a result of his subsequent drowning. In so doing the court stated:

> "As this is a wrongful death case, we must deal first with the issue of Ken's purported "release" of plaintiffs' wrongful death claim. Although the agreement expressly purports to release and discharge any action for wrongful death, it is clear that Ken had no power or right to waive that cause of action on behalf of his heirs. *Scroggs v. Coast Community College Dist.* (1987) 193 Cal.App.3d 1399, 239 Cal.Rptr. 916.)This is a right which belongs not to Ken but to his heirs. 'The longstanding rule is that a wrongful death action is a separate and distinct right belonging to the heirs, and it does not arise until the death of the decedent'. *Earley v. Pacific Electric Ry. Co.*, (1917), 176 Cal. [79, 81, 167 P. 513]."

Madison, supra, 203 Cal.Ap.3d 589, 596.

More importantly, in *Horwich v. Superior Court* (1999) 21 Cal.4th 272, 283-284 the court held that a decedent cannot release a wrongful death claim on behalf of his or her heirs in settlement with the defendant). (Citing *inter alia Scroggs v. Coast Community College Dist.* (1987) 193 Cal.App.3d 1399, 1404.)

Further, in *Chavez v. Carpenter* (2001) 91 Cal.App.4th 1433, the court determined that a claimant's wrongful death cause of action arises when the *victim* dies and is not "extinguished" by the claimant's subsequent death and may be brought or continued by claimant's personal representative or successor in interest pursuant to Code of Civil Procedure section 377.30 and 377.20 thereby once again affirming the property right of the heir in the wrongful death claim. (Id. 1443-1444.)

Succinctly put, decedent Mr. Ruiz had no property interest in Plaintiffs' claims that he could bargain away to Defendant. *Goliger v. AMS Properties, Inc.* (2004) 123 Cal. App. 4th 374, 377.

B. Decedent Mr. Ruiz Was Not Plaintiffs' Agent At The Time He Executed The Medical Services Arbitration Contract And Therefore Had No Authority To Bind Them To Its Terms

Pursuant to California law, an arbitration agreement must be enforced on the basis of the state standards that apply to contracts in general. *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972. On that point, the issue is whether decedent Mr. Ruiz had the authority to bind his nonsignatory heirs to the terms of the arbitration agreement in issue.

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. (*See Gross v. Recabaren* (1988) 206 Cal.App.3d 771, 781; *Mormile v. Sinclair* (1994) 21 Cal.App.4th 1508, 1514; and *Norcal Insurance Co. v. Newton* (2000) 84 Cal.App.4th 64, 73-75; but *see Baker v. Birnbaum* (1988) 202 Cal.App.3d 288, in which the court held that a patient spouse cannot bind her non-signatory spouse to individual medical services contracts which cover only the patient.)

However, such an expansion has not been held to apply to adult children where the contract was for an individual's medical services and not under a group or family health plan.

Plaintiffs rely on *Buckner v. Tamarin* (2002) 98 Cal.App.4th 140 in support of their position that the adult child heirs of decedent were not bound by the arbitration provisions in Mr. Ruiz's medical services contract with Dr. Podolsky. In *Buckner* a father had signed a medical arbitration agreement covering any dispute over his care, including claims by his heirs. (*Id.* at 141-142.) The father's adult daughters brought wrongful death claims and the defendant petitioned to compel arbitration. The trial court denied the defendant doctor's petition to compel arbitration affirmatively stating that the patient's adult daughters do not fall into any of the categories excepting the general principal that a person bound to the arbitration agreement must be a part to it. (*Id.* at 142-143) The court further held that their father had no authority to waive their right to a jury trial of their

claims in that the arbitration agreement, as here, was solely for decedent's own medical care. (*Ibid.*)

The defendant in *Buckner,* like Dr. Podolsky here, asked the court of appeal to force the adult daughters into arbitration by asserting their father had the power to act on their behalf based on the holding in *Herbert v. Superior Court* (1985) 169 Cal.App.3d. 718 which the *Buckner* court declined. (*Id.* at 142-144.)

In *Herbert* a father signed a group healthcare plan for his wife and five minor children which the court held unquestionably bound those individuals to the group plan's arbitration agreement (*Id.* at 720.) The only question raised on appeal was whether the agreement bound the other three (3) adult children. Despite case law to the contrary, the *Herbert* court found that it was impractical to hold an arbitration hearing for six plaintiffs covered by the agreement and a separate trial for the same claims by the three adult plaintiffs and swept the adult children into the arbitration agreement based on the reasoning that wrongful death is a single, joint, and indivisible claim possessed by all survivors; it cannot be split, and must be tried in one forum. (*Id.* at 725.)

Dr. Podolsky maintains that *Buckner's* decline of *Herbert* does not support Plaintiffs' position in that the *Buckner* court found *Herbert's* rationale inapplicable because those respondents were not dividing their wrongful death claims between different forums as is the case here. This does not change the fact that the *Buckner* court affirmed the trial court's order finding that the father entered into the arbitration agreement solely for his own medical care, he was not his daughters'

agent, they were not married to him, they were not minors and he therefore lacked the authority to waive their right to a jury trial of their claims. (*Buckner v. Tamarin, supra,* at 143.) In other words, there were additional factors considered by the *Buckner* court which are factually analogous and supportive of Plaintiffs' position, the trial court's ruling, and the Court of Appeal's decision.

The *Buckner* court further found that two post *Herbert* decisions cited by Dr. Podolsky, *Mormile v. Sinclair* (1994) 21 Cal.App.4th 1508[4] and *County of Contra Costa v. Kaiser Foundation Health Plan, Inc.* (1996) 47 Cal.App.4th 237), which purported to follow *Herbert*'s holding that an arbitration agreement can bind nonsignatory adult child heirs did not in reality support *Herbert* since **neither** case involved nonsignatory **adult child heirs**. *Buckner v. Tamarin, supra* at 143-144.

Aside from the questionable constitutionality of the *Herbert* decision other courts besides the *Buckner* court have decided that the *Herbert* decision should not be expanded beyond its unique facts. (*See Baker v. Birnbaum* (1988) 248 Cal.App.3d 288 expressly declining to follow *Herbert* finding its rationale was based upon group health plans as opposed to a contract for an individual.)

There is additional persuasive authority in cases similar to *Buckner* which are against forcing nonsignatory adults to arbitrate claims absent proof that the nonsignatory adult authorized an agent to waive their constitutional right to a jury trial.

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[4] *Mormile* involved arbitration by a spouse; *County of Contra Costa* involved third party indemnity claims.

In *Rhodes v. California Hospital Medical Center* (1978) 76 Cal.App.3d 606, the husband and son brought a claim for wrongful death of their wife and mother. Mr. Rhodes, the decedent's husband, signed an arbitration agreement with a hospital purportedly as his wife's agent. The defendant hospital sought to compel arbitration of the wrongful death claims brought by the decedent's husband and son. The trial court denied arbitration and the Court of Appeal affirmed that decision, finding that despite the strong policy in favor of arbitration, "[n[either Mr. Rhodes 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." (*Id.* at 609, emphasis in original.)

While the *Rhodes* case has been distinguished as a pre-MICRA case, the court's election to uphold the constitutional and procedural rights of decedent's heirs by finding that the 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 agreement" has not been overruled and is consistent with *Buckner.*

In *Goliger v. AMS Properties, Inc.* (2004) 123 Cal.App.4th 374 an adult child signed an arbitration agreement with a nursing home on behalf of her mother Mary Goliger as the responsible party. Ms. Goliger thereafter died from alleged negligent care in the nursing home and the nursing home petitioned to compel arbitration on Ms. Goliger's survival claims. The *Goliger* court denied the petition holding that: "An adult who has no agency relationship with other adults cannot

sign away the other adult's right to a jury trial." (*Id.* at 377-378.) In other words, decedent Mr. Ruiz had no property interest in Plaintiffs' claims that he could bargain away to Defendant.

It is evident that the trial court and the Court of Appeal did not find that decedent Mr. Ruiz as signatory to the arbitration agreement was authorized to enter into the agreement on the nonsignatories' behalf. (*Pagarigan v. Libby Care Centers, Inc.* (2002) 99 Cal.App.4th 298, 301-301.) "The strong public policy in favor of arbitration does not extend to those who are not parties to an arbitration agreement, and a party cannot be compelled to arbitrate a dispute that he has not agreed to resolve by arbitration." (*County of Contra Costa v. Kaiser Foundation Health Plan* (1996) 47 Cal.App.4th 237, 245.)

Per *County of Contra Costa,* it is well-settled under California law that the public policy behind arbitration does not extend to those who have not authorized anyone to act for them in executing such agreements. (*Id.)* As stated in *Bensara v. Marciano* (2002) 92 Cal.App.4th 987, 991: "It is one thing to permit a nonsignatory to relinquish his right to a jury trial, but quite another to compel him to do so." (*See also Victoria v. Superior Court* (1985) 40 Cal.2d 734, 744 and *Broughton v. Cigna Healthplans of California* (1999) 21 Cal.4th 1066, 1105 - "[T]he first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute.")

Other states in which wrongful death claims are the property of heirs have found that a decedent's purported binding of heirs to arbitration has no effect.

This court should reach the same result. (*Lawrence v. Beverly Manor*, 273 S.W.3d 525, 527 (Mo. 2009); *Peters v. Columbus Steel Castings Co.*, 115 Ohio St.3d 134, 873 N.E.2d 1258 (2007); *See also Washburn v. Beverly Enterprises-Georgia, Inc.*, 2006 WL 3404804, *6 (S.D.Ga. 2006); *In re Kepka* (Tex. App. 2005), 178 S.W.3d 279, 294-95 (representative's wrongful death action not affected by an arbitration agreement that was not signed in representative capacity); "Arbitration is a creature of contract. '[A]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes-but only those disputes-that the parties have agreed to submit to arbitration.'" (*First Options v. Kaplan* (1995) 514 U.S. 938, 943, 115 S.Ct. 1920, 131 L.Ed.2d 985; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* (1985), 473 U.S. 614, 626, 105 S. Ct. 3346, 3353. Arbitration agreements should be "as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.* (1967), 388 U.S. 395, 405 n.12, 87 S. Ct. 1801, 1806 n.12.

As stated by the *Ruiz* Court:

> "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)." (Slip Opn. 22.)

Mr. Ruiz did not and could not bind Plaintiffs to the terms of the arbitration contract as asserted by Dr. Podolsky.

C. The Post *Buckner* Cases Which Ordered Heirs Into Arbitration Should Not Apply To This Case

In addition to *Herbert v. Superior Court* (1985) 169 Cal.App.3d 718 which is addressed *supra,* Dr. Podolsky submits that there other cases, including two specific federal cases which follow *Herbert* in the interpretation of California law concerning the binding effect of an arbitration provision as to adult child heirs - *Clay v. Permanente Medical Group, Inc.* (N.D. Cal. Dec. 14, 2007) 540 F. Supp.2d 1101 and *Drissi v. Kaiser Foundation Hospitals, Inc.* (N.D. Cal. Jan. 3, 2008) 543 F. Supp.2d 1076.

Both the *Clay* and *Drissi* courts recognized there is a split in California Courts of Appeal regarding the applicability of binding arbitration provisions to non-signatory adult child heirs. (*Clay v. Permanente Medical Group, Inc., supra* at 1111 and *Drissi v. Kaiser Foundation Hospitals, Inc., supra* at 1080.) Both courts chose to follow the reasoning in *Herbert* because the Clay spouses and Mrs. Drissi were enrolled in health plans that required arbitration of any claims brought by the health plan member or the personal representative or the heirs. (*Clay, supra* 1111 and *Drissi, supra* at 1081.) They further followed *Herbert* to preserve the "one action rule" in requiring the nonsignatory adult child heirs to arbitrate their wrongful death claims to avoid both inconsistent results or a series of such suits by the individual heirs. (*Id.* at 1111-1112).

While the "one action rule" is discussed *infra*, there are distinct differences between *Herbert, Clay and Drissi* and the within action that warrant consideration.

First, there is no group or family health plan in which decedent Rafael Ruiz or his spouse was a participant;

Second, the only person who was to receive care from Dr. Podolsky was the decedent Rafael Ruiz;

Third, the adult children received no benefit from the medical services contract with Dr. Podolsky;

Fourth, the estate of Mr. Ruiz is not a plaintiff; and

Fifth, all of the Plaintiffs are joined in this single action.

Factually, the line of cases which do not bind nonsignatory adults (including spouses) are more analogous to this action. (*See Rhodes v. California Hospital Medical Center* (1978) 76 Cal.App.3d 606; *Baker v. Birnbaum* (1988) 202 Cal.App.3d 288; and *Buckner v. Tamarin* (2002) 98 Cal.App.4th 140)

More importantly, these post *Buckner* cases were before the trial court at the time of the June 20, 2008 hearing and were argued by Appellant's counsel but the Court still denied arbitration as to the adult children and determined that *Buckner* is controlling and that the "decedent's adult children" are not bound by the arbitration agreement. (AA 81.)

Based on the distinguishing facts of the within matter and the cases cited by Dr. Podolsky, the trial court was correct in its analysis and its decline to grant the petition as to the adult child heirs.

Moreover, the Court of Appeal, after consideration of California case law and out of state authority found "the reasoning of the *Rhodes* line of cases and

those of our sister jurisdictions employing a straightforward statutory analysis of the issue most persuasive". (Slip Opn. 22.)

Dr. Podolsky has failed to present sufficient justification to reverse these findings.

D. Pursuant To The Recent Decision of *Rodriguez v. Superior Court* Any Perceived Waiver By Decedent Of The Plaintiffs' Constitutional Rights Would Not Meet The Requisite Standard That The Waivers Be Knowing And Voluntary

There is no conclusive presumption that a person who signs a document containing text complying with the Medical Injury Compensation Reform Act (MICRA) requirements for a waiver of the right to jury trial has in fact consented to arbitration as required to form an enforceable agreement. *Rodriguez v. Superior Court* (2009) 176 Cal.App.4th 1461, 1468.

Moreover, a statutory prerequisite to an enforceable medical malpractice arbitration agreement under MICRA is that the person signing the agreement must have 30 days to review the agreement and reconsider whether he or she knowingly and voluntarily intends to waive the right to a jury trial, or alternatively, desires to rescind the agreement. (*Id.* 1469; Code of Civil Procedure section 1295, subd. (c).) Further, MICRA's provision for a 30-day period in which a party can rescind a medical malpractice arbitration agreement should be interpreted as a strict and exclusive prerequisite for waiver of a jury trial. (*Id.* 1470; *Grafton Partners v. Superior Court* (2005) 36 Cal.4th 944, 956.)

Here, as in *Rodriguez*, Mr. Ruiz signed the arbitration agreement on July

17, 2006 believing he must sign the agreement in order to have Dr. Podolsky treat him. (AA 14.) However, he died on July 25, 2006 within the statutory 30-day revocation period, and the agreement provided no procedure for rescission after his death.

Also as in *Rodriguez*, "the earmarks" that Mr. Ruiz "may not have knowingly and voluntarily waived his own rights, not to mention" the rights of his wife and adult children, are present. (*Id.* 1469.)

Mr. Ruiz signed the arbitration agreement himself and the determinative factor is his intent, not the intent of some representative after his death. Mr. Ruiz's death shortly after the signing of the agreement renders it impossible to make any evidentiary finding regarding whether his alleged waiver of his rights, not to mention his heirs' rights, to a jury trial was knowing and voluntary. Accordingly, Mr. Ruiz's death prior to the expiration of the 30-day period renders it impossible to establish that an arbitration agreement exists that is enforceable under Code of Civil Procedure section 1295:

> "When weighing the competing interests of an individual's constitutional right to a jury trial against the Legislative preference for arbitration of medical malpractice claims codified in section 1295, in the absence of proof of the individual's knowing and voluntary waive of such rights, the individual's constitutional rights must prevail."

Rodriquez, supra, at 1470.

In light of the *Rodriguez* holding, Plaintiffs should not be bound by the arbitration agreement.

II. THE PHYSICIAN-PATIENT RELATIONSHIP SHOULD NOT BE THE PRIMARY RATIONALE FOR FORCING THE PLAINTIFFS TO ARBITRATE THEIR WRONGFUL DEATH CLAIMS

There is a certain irony in Dr. Podolsky's position that the sanctity of the physician-patient relationship is paramount and should force Plaintiffs to arbitrate their wrongful death claims. After all, Dr. Podolsky refused to treat Mr. Ruiz until issues involving payment for his services had been resolved. Further, had Mr. Ruiz lived, the arbitration agreement as to Mr. Ruiz's negligence claim would be enforceable and the Adult Children would have no claim. (*See Baxter v. Superior Court* (1977) 19 Cal.3d 461; *Borer v. American Airlines, Inc.* (1977) 19 Cal.3d 441; and *St. Francis Medical Center v. Superior Court* (1987) 194 Cal.App.3d 668 – a child has no cause of action in negligence for loss of parental consortium.)

That being said, the physician-patient relationship is not sufficient to warrant the result Dr. Podolsky is seeking.

Dr. Podolosky relies on *Herbert* for the position that the Court of Appeal did not consider the physician-patient relationship in its decision. A full reading of the opinion in the context of the facts of the case proves otherwise.

As stated *supra*, the *Herbert* case involved a medical plan covering the Herbert family. It was not the independent physician-patient arbitration agreement Mr. Ruiz signed simply to receive his treatment, and his treatment only. There was no issue that decisions as to the terms of his medical treatment, including the arbitration provision, were his alone to make.

Under these circumstances, there is no contractual or statutory basis to confer on "medical patients" such as Mr. Ruiz the special status of being able to waive his family members' constitutional due process rights irrespective of the physician-patient relationship. (Slip Opn. at 22.)

Such a finding certainly does not undermine Justice Tobriner or the case law recognizing valid arbitration agreements which are enforceable against proper parties. (OB 14-18.)

III. THE COURT OF APPEAL DID INDEED CONSIDER THE INTENT OF RAFAEL RUIZ AND CODE OF CIVIL PROCEDURE SECTION 1295 IN REACHING ITS DECISION

Dr. Podolosky relies on *inter alia Bolanos v. Khalatian* (1991) 231 Cal.App.3d 1586 (*Bolanos)* in support of his position that the *Ruiz* Court ignored the intent of the contracting parties and Code of Civil Procedure section 1295 in reaching its decision. Absent from that analysis is the later case of *County of Contra Costa* (1996) 47 Cal.App.4th 237 which did not follow the *Bolanos* line of thinking.

In *County of Contra Costa,* after considering the *Bolanos* and *Gross* cases and the findings 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, the court discussed the limited circumstances in which nonsignatories can be bound by an arbitration agreement and opined that the *Bolanos* and *Gross* cases went too far and ignored the constitutional and procedural

rights of the nonsignatory third parties. It further definitively stated that the strong public policy in favor of arbitration does not extend to those who are not parties to the agreement or who have not authorized anyone to act for them in executing the agreement. (*County of Contra Costa, supra* 47 Cal.App.4th at p. 244-245; *see* also Slip Opn. at 8 and 17.)

The Court of Appeal, after consideration of Code of Civil Procedure section 1295 and the cases pertinent thereto, rightly found that a cause of action created by the wrongful death statute is separate and distinct from a cause of action the deceased would have had for personal injuries had he survived; heirs do not stand in the shoes of the party who signed the arbitration agreement; and there is 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). (Slip Opn. at 22.)

These findings are not in error nor are they grounds for reversal of the Court of Appeal's opinion.

IV. THE COURT OF APPEAL'S ANALYSIS AS TO WHY "CONTRACT PRINCIPLES" AND "RIGHT TO A JURY TRIAL" OUTWEIGH THE CONVENIENCE OF LITIGATING IN ONE FORUM AND THE PUBLIC POLICIES FAVORING ARBITRATION WAS SOUND AND LEGALLY SUPPORTED

It is beyond dispute that the parties to an action for wrongful death have a right to trial by jury. (California Constitution., Art. I, section 16; Code of Civil Procedure section 592; *De Castro v. Rowe* (1963) 223 Cal.App.2d 547, 552.)

Further, California Constitution's right to trial by jury is considered so fundamental that ambiguity in a statute permitting waivers of the right must be resolved in favor of according to a litigant a jury trial. *Rodriguez v. Superior Court* (2009) 176 Cal.App.4th 1461, 1467; California Constitution, Art. I, section 16; *People v. Smith* (2003) 110 Cal.App.4th 492, 500; *Grafton Partners v. Superior Court* (2005) 36 Cal.4th 944, 956.)

The Court of Appeal appropriately analyzed why contract principles and the right to a jury trial in these circumstances outweigh the convenience of litigating in one forum and the public policies favoring arbitration. It did so in its analysis of the one action rule (Slip Opn. at 5 – 8); in its analysis of the rules regarding contractual arbitration and nonsignatory parties (Slip Opn. at 8- 10); and in its lengthy analysis of the evolving body of authority, including out of state authority, concerning the binding effect of arbitration agreements on nonsignatory spouses and adult children (Slip Opn. at 10-22). It did not err; it did not create entirely new law; and it did not throw into uncertainty the rules and policies governing enforcement of arbitration agreements. Its conclusions were sound and legally supported.

V. THE TRIAL COURT AND COURT OF APPEAL CONSIDERED THE "ONE ACTION RULE" FOR WRONGFUL DEATH CASES AND DETERMINED THE HEIRS' RIGHTS SHOULD NOT BE COMPROMISED

In reliance on *Smith v. Premier Alliance Ins. Co.* (1995) 41 Cal.App.4th 691, 697 and *Gonzales v. Southern California Edison Co.* (1999) 77 Cal.App.4th 485, Dr. Podolsky submits that the situations described by the *Ruiz* court are

inapposite here and the decision subjecting him to two separate wrongful death proceedings violates the well-established one action rule which requires that all heirs be joined in a single suit for wrongful death. (OB 37-39.)

However, the "one action" rule is a general rule which is not jurisdictional and its protections may be waived. (*Gonzalez, supra* at 489.) Moreover, the Plaintiffs in this case complied with the rule which pursuant to *National Metal & Steel Corporation v. Colby Crane and Manufacturing* (1988) 200 Cal.App.3d 1111, 1116, only requires that an heir who wishes to pursue a claim for wrongful death bring his or her action jointly with all other heirs which the *Complaint for Damages: Wrongful Death / Medical Malpractice* filed on July 17, 2007 evidences was done. (AA 1-2.)

Further, while there is a strong state policy in favor of binding arbitration, the constitutional right to pursue claims in a judicial forum, with trial by jury, is a substantial right and one not lightly to be deemed waived. (California Constitution, Art. I, section 16; *Pardee Construction Co. v. Superior Court* (2002) 100 Cal.App.4th 1081, 1091; See also *Villa Milano Homeowners Association v. Davorge* (2000) 84 Cal.App.4th 819., 829 citing *Marsch v. Williams* (1994) 23 Cal.App.4th 250, 254.)

The trial court's and Court of Appeal's recognition of the rights of the heirs of decedent Mr. Ruiz is evident in that this issue was fully briefed and argued by Dr. Podolsky, including the issue of sweeping the adult child heirs into the

arbitration versus splitting them off resulting in Dr. Podolsky's participation in the arbitral forum as well as the jury trial.

The trial court found as follows:

> "There is a policy favoring the enforcement of arbitration agreements. It is undisputed that decedent's spouse is bound by the arbitration Agreement and that the decedent's adult children are not (Buckner). RPs cannot avoid the Agreement by the fact that some of them are not bound to the agreement (Madden p. 714)." (AA 81)

The Court of Appeal further found:

> "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." (Slip Opn. 22.)

Nothing in the language of Code of Civil Procedure section 1295 provides that a party to an arbitration provision in a medical services contract can unilaterally give up the constitutional right to have the dispute decided in a court of law before a jury for anyone other than the contracting party. In fact section 1295 specifically states that any contract for medical services which contains a provision for arbitration of any dispute as to professional negligence of a health care provider **shall** have such provision as the first article of the contract and **shall** be expressed in the following language:

> "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** (emphasis added), by entering into it, are giving up their constitutional right to have any such dispute decided in a court of law before a jury, and instead are accepting the use of arbitration."
>
> Code Civ. Proc. section 1295(a).

Expanding the binding effect of an arbitration agreement to include those who are not parties to the contract must be on a case by case basis pursuant to the laws of contract of this State. *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972. (*See also Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 709, fn. 11 and *Warfield v. Summerville Senior Living, Inc.* 158 Cal.App.4th 443.)

Further, there is no question that the one action rule and how it applied to the facts of this case were considered and thoroughly analyzed by the Court of Appeal. In fact, it is discussed and dissected in 4 pages of the 23 page opinion commencing at page 5.

In reaching its opinion, the Court of Appeal found that (1) the one action rule is not jurisdictional, its protections can be waived, and courts can infer waiver (*Smith v. Premier Alliance Ins. Co.* (1999) 77 Cal.App.4th 691, 698; Slip Opn. at 7); and (2) the one action rule was designed to provide a defendant protection from successive suits by heirs of whose existence the defendant had not known which is not the case here (*Valdez v. Smith* (1985) 166 Cal.App.3d 723, 727-728; Slip Opn. at 7-8). *See* also *Ruttenberg v. Ruttenberg* (1997) 53 Cal.App.4th 801, 808 which

held each heir has a personal and separate wrongful death cause of action and a separate rather than a joint interest and that strict compliance with the statutory "one action" procedure is not jurisdictional.

Under the factual circumstances of this case, both the trial court and the Court of Appeal accurately determined that Dr. Podolosky put himself in the position of waiving the one action rule (Slip Opn. at 3 and 8.) and 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 independent action. (Slip Opn. at 3, 8 and 22.)

VI. THE COURT OF APPEAL'S FINDING THAT MR. RUIZ'S WIFE WAS NOT BOUND TO ARBITRATE WAS CONSISTENT WITH THE COURT'S ANALYSIS OF ALL OF THE CASE LAW THAT FORMED THE BASIS OF ITS OPINION

The Court of Appeal methodically analyzed both California and out of state authority in reaching its decision and the opinion that Mr. Ruiz's Wife and his Adult Children were not bound by the arbitration agreement. This was not gratuitous. And while Plaintiffs were constrained by the position they took as to the Wife based on *Buckner*, it does not change the conclusions reached by the *Ruiz* Court that the Wife is not bound by the arbitration agreement. (Slip Opn. at 23.) It should also be noted that the Plaintiffs did indeed argue in the trial court that the entire matter should remain in the superior court to prevent conflicting rulings and to avoid inconsistent verdicts, unnecessary delay, multiple actions, and duplicative discovery which was discussed in the Respondent's Brief and referenced in the *Ruiz* opinion. (Slip Opn. at 2 and 4.) Dr. Podolsky's reliance on *Reyes v. Kosha*

(1998) 65 Cal.App.4th 451,456 fn.1 (sic)[5], *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979 and *Havstad v. Fidelity National Title Ins. Co.* (1997) 58 Cal.App.4th 654, 661 is therefore misplaced.

VII. THE COURT OF APPEAL APTLY CLARIFIED THE LAW AS IT RELATES TO ARBITRATION OF WRONGFUL DEATH CLAIMS

A. The Court Of Appeal Did Not Change Existing Law

Dr. Podolosky argues that the trial court and Court of Appeal are wrong and the *Ruiz* decision fails to apply existing law including *Herbert v. Superior Court, supra,* 169 Cal.App.3d 718 and cases following that opinion.

After a thorough examination of *Herbert* and the cases pre and post that decision, both the trial court and the Court of Appeal found otherwise. In so doing, the Court of Appeal determined that while there are divergent paths, the reasoning of the *Rhodes v. California Hospital Medical Center* (1978) 76 Cal.App.3d 606 (*Rhodes*) line of cases are most persuasive:

> "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). (Slip Opn. at 22.)

[5] The actual cite is 65 Cal.App.4th 451, 466, fn. 6.

These findings did not change existing law but rather clarified the law applicable to the Plaintiffs.

B. The Court of Appeal Followed The Cases Most Analogous With the Type of Arbitration Agreement In Issue

Dr. Podolosky asserts that the *Ruiz* Court improperly relied on the *Rhodes* line of cases in reaching its decision in that the facts in *Herbert* are the most analogous. (OB 50.) While this has been addressed *supra,* a key component considered by the *Ruiz* Court was the type of arbitration agreement signed by Mr. Ruiz which was dissimilar to the medical plan contract in *Herbert.*

In so doing, the court concluded:

> "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." (Slip Opn. at 22.)

Based on these findings, Dr. Podolosky's position that the failure of the Court of Appeal to follow *Herbert* is "literally unprecedented" lacks merit.

C. The Court of Appeal Opinion Resolved Conflicts In The Case Law

After its comprehensive analysis of the divergent case law on these issues,

the Court of Appeal followed the precedents it believed were applicable to this case. In so doing, it did not violate the basic principle that California courts should avoid creating conflicts nor did it "radically alter the landscape" (OB 52-53.) On the contrary, the *Ruiz* decision added light to the legal landscape and resolved conflicts in the case law consistent with *Bratt v. City and County of San Francisco* (1975) 50 Cal.App.3d 550, 555 and *Hall v. Pacific Tel. & Tel. Co.* (1971) 20 Cal.App.3d 953, 954-955.

D. Justice George's Concurring Opinion In An Earlier Court Of Appeal Decision Was Referenced By The Court of Appeal And Considered In Its Analysis

The *Ruiz* decision ultimately rested on the cases which determined a patient's authority to bind others to his or her arbitration contract is limited by traditional contract principles and equity. In so doing, the *Ruiz* Court relied on, *inter alia, Baker v. Birnbaum* (1988) 202 Cal.App.3d 288 (*Baker*). The concurring opinion of then-Associate Court of Appeal Justice Ron George in *Baker* was addressed in the *Ruiz* opinion in its discussion of *Gross v. Recabaren* (1988) 206 Cal.App.3d 771, 781 (*Gross*). In that discussion, Justice George's opinion that *Baker* and *Herbert* were distinguishable on a number of points was acknowledged, including the finding that 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. (*Baker, supra*, 202 Cal.App.3d at p. 295.) (Slip Opn. at 12.)

Dr. Podolosky argues that the approach Justice George took in *Baker,*

should have been taken by the *Ruiz* Court and *Herbert* should not have been disavowed. However, the analysis of *Herbert* undertaken by the *Ruiz* Court was indeed necessary in that unlike *Baker,* the issue of construction of an arbitration provision in the context of the statutory cause of action for wrongful death was at issue. *Id.*

The *Ruiz* Court again, painstakingly considered every aspect of the divergent case law and the facts associated therewith, including *Herbert* and *Baker,* before reaching its conclusion. (Slip Opn. at 9-22.) And that conclusion, consistent with *Baker,* was that a party's exercise of the right to a jury trial is paramount to the court's convenience in having all parties litigate in a single action. (*Baker, supra,* 202 Cal.App.3d at p. 293; Slip Opn. at 22.)

E. The Court of Appeal Appropriately Distinguished The Cases In This Area

The *Ruiz* Court took no shortcuts in discussing and distinguishing the cases in this area, including *Rhodes, Baker, Buckner v. Tamarin* (2002) 98 Cal.App.4th 140 (*Buckner*), *County of Contra Costa* v. *Kaiser Foundation Health Plan, Inc. (County of Contra Costa)* on the one hand, and *Herbert, Gross, Drissi v. Kaiser Foundation Hospitals, Inc.* (2008) 543 F. Supp.2d 1076, *Clay v. Permanente Med. Group, Inc.* (N.D.Cal. 2007) 540 F.Supp.2d 1101 on the other. Having done so, the court summarized as follows:

> "...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." (Slip Opn. at 20-21)

The *Ruiz* Court thereafter correctly reached the conclusion that the "reasoning of the *Rhodes* line of cases and those of our sister jurisdictions employing a straightforward statutory analysis of the issue most persuasive". (Slip Opn. at 22.)

As to the Plaintiffs' concession that Rafael's wife was bound by the arbitration clause, it too was considered, but did not play a role in the Court's reasoning other than finding that she was not in fact bound based on the myriad of cases considered by the Court.

F. The Import Given To The *Rhodes* Case By The Court of Appeal Was Proper

In its analysis of the split of authority in California involving the binding effect of arbitration agreements on spouses and adult children, the Court of Appeal summarized that there were two lines of cases in this area and identified *Rhodes* as the beginning of the line of cases that found 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 *Herbert* as the basis for the line of cases that hold patients being treated have the broad authority to bind nonsignatory heirs to a medical arbitration agreement, especially in cases of wrongful death. (Slip Opn. at 2.)

It did not stop there. The Court went on to examine the general law regarding wrongful death and the one action rule and cases relative thereto, the rules and cases pertaining to contractual arbitration, and ultimately the numerous cases that followed *Rhodes* and those that followed *Herbert.* In other words, the Court did not read too much into *Rhodes* – it was just the first chapter in the long line of cases considered by the Court in reaching its decision.

The fact that Plaintiffs failed to raise *Rhodes* in the trial court has no bearing on the appropriate import given to *Rhodes* by the Court of Appeal.

CONCLUSION

The Court of Appeal's opinion is sound, appropriately preserves Plaintiffs' rights and resolves conflicts in the case law. It should be affirmed.

DATED: December 11, 2009

Respectfully submitted,

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By: 

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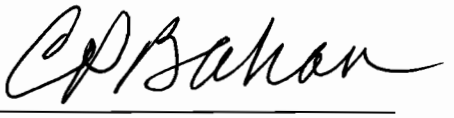
CERTIFICATION

Counsel relies on the word processing computer program used to prepare this brief to determine the word count. Based on that program, the within Answer, including footnotes, contains approximately 10,118 words.

Dated: December 11, 2009

CORNELIUS P. BAHAN, INC.

By: 

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PROOF OF SERVICE
SUPREME COURT CASE NO. S175204
(4TH Civil Case No. G040843)

STATE OF CALIFORNIA
COUNTY OF ORANGE

I am employed in the County of Orange, State of California; I am over the age of 18 and not a party to the within action; my business address is: 18200 Von Karman Avenue, Ste. 500, Irvine, CA 92612.

On this day, December 14, 2009, I served the foregoing document described as: **ANSWER BRIEF ON THE MERITS** on all interested parties / entities in this action by placing the original where indicated as well as true copies thereof enclosed in sealed envelopes addressed as follows:

SEE ATTACHED SERVICE LIST.

Service was effectuated as follows:

(XX) VIA FIRST CLASS MAIL (C.C.P. § 1011, 1012, 1013, 1013a)

I placed such envelope for deposit with the United States Postal Service by placing it for collection and mailing at my business address on the date stated pursuant to the attached SERVICE LIST.

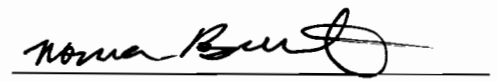
( ) VIA PERSONAL DELIVERY (C.C.P. § 1011)

I personally served said document as stated on the attached SERVICE LIST.

(XX) VIA UPS / OVERNIGHT DELIVERY (C.C.P. § 1011, 1012, 1013, 1013a)

I placed such envelope for deposit in a UPS Depository located at my business address for next business day delivery as stated on the attached SERVICE LIST.

(XX) (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 14th day of December, 2009 at Irvine, California.



NORMAN BROTHERS

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(4TH Civil Case No. G040843)

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