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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

RICHARD C. ROSENBERG et al., Plaintiffs and Respondents, v. GERALD M. PAUL, M.D., A MEDICAL CORPORATION et al., Defendants and Appellants.	B277056 (Los Angeles County Super. Ct. No. BS159677)

APPEAL from a judgment of the Superior Court of Los Angeles County. Marc Marmaro, Judge. Affirmed.

Clark Hill and Richard H. Nakamura; Krane & Smith and Marc Smith for Defendants and Appellants.

Landau Gottfried & Berger, James H. Berry, Jr., Kate LaQuay; Greines, Martin, Stein & Richland and Cynthia E. Tobisman for Plaintiffs and Respondents.

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Two orthopedists had a contract to share office space and staff, and to split those expenses. After one of the orthopedists died unexpectedly, his widow and adult son continued using the office space and staff for several months to wind down his practice but after a month refused to pay their share of the expenses. To recover that unpaid share, the surviving doctor demanded arbitration against the deceased orthopedist's professional corporation, against his successors in interest, and against the personal representative of his estate. An arbitrator found that the nonpayment of expenses breached the office space and staff sharing contract; ruled that the widow and son—as successors in interest to the deceased orthopedist and/or representatives of his estate—were liable for that breach (along with the professional corporation); and imposed a constructive trust on any funds from the professional corporation's or the deceased orthopedist's assets. The trial court confirmed the award. On appeal, the widow and son argue that the arbitrator lacked the power to decide if they were proper parties to the arbitration as successors in interest to the deceased orthopedist or as personal representatives of his estate; that the arbitrator was wrong to decide that they were; and that the arbitrator got it wrong on the merits. We conclude there is no basis to disturb the arbitrator's award, and affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

A. *Creation of Expense Sharing Agreement (Agreement)*

Dr. Gerald Paul (Dr. Paul) and Dr. Richard Rosenberg (Dr. Rosenberg) were both doctors of orthopedic medicine in 2001.

That year, they entered into a contract under which they would (1) share, and split the cost of, office space and staff in a

medical office suite in Tarzana, California (Agreement, §§ 1.02, 1.04, 1.09); and (2) assist the other's orthopedic practices by seeing one another's patients while the other was on vacation or not on call and by acting as a "first assistant" during surgeries the other performs (Agreement, §§ 2.01, 2.02). The contract clarified that it "constitute[d] a license arrangement for the use of certain office space," but did not "constitute a . . . partnership or joint venture of any type or manner." (Agreement, § 6.09.)

The contract—which the parties informally refer to as the Expense Sharing Agreement (Agreement)—has the following terms pertinent to this appeal:

Ninety-day termination clause. Starting in 2002, either party may terminate the Agreement "upon ninety (90) days notice in writing to the other party." (Agreement, §§ 3.01, 3.02.)

Anti-assignment clause. Because "the rights and obligations of the parties to this Agreement are personal and of a unique nature," neither party may assign the Agreement to another "without the prior written consent of the parties." (Agreement, § 6.05.)

Heirs, legal representatives, and successors clause. The Agreement is "binding on, and inure[s] to the benefit of, the parties to it and their heirs, legal representatives, successors and assigns," but specifies that they, too, are bound by the anti-assignment clause. (Agreement, § 6.05.)

Arbitration clause. "Any controversy or claim arising out of or relating to th[e] Agreement, or the breach thereof" is to be "settled by arbitration in accordance with the Rules of the American Arbitration Association." (Agreement, § 6.01.)

Attorney's fees clause. The "successful or prevailing party" in "any legal action or any arbitration or other proceeding . . . brought . . . in connection with any of the provisions of th[e] Agreement" is "entitled to recover reasonable attorneys' fees and other costs incurred in that action or proceeding." (Agreement, § 6.04.)

Dr. Paul signed the Agreement, both individually and on behalf of his medical corporation (Paul PC).

B. *Unexpected Death of Dr. Paul and Subsequent Use of Office Space and Staff*

In October 2013, Dr. Paul died while on vacation. He was survived by his wife Judi and his adult son, Johnathan.[1]

Over the next several months, Dr. Paul's family continued to use the Tarzana office space and staff to collect payments for medical services rendered by Dr. Paul before his death, to transcribe reports for examinations conducted by Dr. Paul before his death, and generally to wind down Dr. Paul's practice. Indeed, less than a month after Dr. Paul's death, Johnathan, who had worked in the office in a non-medical capacity for many years, sent an e-mail to the office staff referring to them as "my staff" and informing them that he would be moving into his father's office and "acting in his role from this point forward."

Judi and Johnathan paid Dr. Rosenberg $60,000 as Dr. Paul's share of the office space and staff expenses for November 2013, but made no further payments. Instead, on January 9, 2014, a lawyer writing on behalf of "Dr. Paul's heirs" informed Dr. Rosenberg that Judi and Johnathan would be vacating the

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[1] Because these individuals share the same last name, we will use their first names for clarity. We mean no disrespect.

office suite "on or before January 15, 2014," and took the position that they owed no further payments for office space or staff.

C. *Arbitration*

1. *Dr. Rosenberg's arbitration demand and pre-hearing events*

In May 2014, Dr. Rosenberg filed a demand for arbitration with the American Arbitration Association. The demand alleged claims for breach of contract, common counts, and indemnity and defense, all arising out of the refusal to pay office space and staff expenses. The demand named three respondents: (1) Paul PC; (2) Dr. Paul, "A Deceased Person (by and through his heirs and/or successor[s] in interest . . .)"; and (3) Dr. Paul's "[e]state."

Paul PC responded with (1) an answer raising 21 affirmative defenses, and (2) 10 counterclaims against Dr. Rosenberg.

Dr. Rosenberg filed an amended arbitration demand. The amended demand alleged three additional claims—for fraud (false representations), fraud (omission and nondisclosure), and unjust enrichment. The amended demand also added Judi and Johnathan as respondents in three capacities—"individually," "as heirs and successors in interest to Dr. Paul," and "as representatives of the Paul Estate." The demand expressed Dr. Rosenberg's intent to "ask the Arbitrator for a determination of the capacity in which Judi . . . and Johnathan . . . may be named and required to participate as individual parties to this arbitration."

In response to the arbitrator's directive that the parties confer as to whether Judi and Johnathan were properly named as individuals, the parties filed a joint report memorializing that Dr. Rosenberg (1) would "not join Jud[i] . . . and Johnathan . . . as parties to this arbitration *in their individual capacities*"; and

(2) would accordingly delete language from two paragraphs in the amended arbitration demand naming them in their "individual capacities." (Italics added.)

A few weeks later, the arbitrator entered a procedural order summarizing that the parties had "stipulated that [Dr. Rosenberg] ha[s] named Jud[i] . . . and Johnathan . . . as Respondents in the case in their representative capacities only and not individually."

Nearly six months later, and a few days before the evidentiary hearing before the arbitrator was set to begin, Paul PC filed an opening brief stating its position that the "sole Respondent in this Arbitration is Paul PC" and that the "individual Paul family members are not parties to this Arbitration" in any capacity.

2. *Arbitration hearing and award*

The arbitrator conducted a four-day evidentiary hearing in late June 2015.

On the second day of the hearing, the arbitrator explained her view that "the intention from the beginning was to have both the estate and the corporation be respondents" and that the parties so "stipulated."

On the last day of the hearing, the attorney for Paul PC, Judi, and Johnathan (collectively, respondents) moved the arbitrator for a nonsuit on the ground that no claim could proceed against Judi or Johnathan "in any capacity." After entertaining extensive argument, the arbitrator said she would "take" "the motion for a nonsuit" "under submission."

Respondents thereafter filed a closing brief, where they again argued that "Judi . . . and Johnathan . . . cannot be liable"

to Dr. Rosenberg "in any capacity"—either as individuals or in any representative capacity.

On November 15, 2015, the arbitrator issued a 23-page written award. The arbitrator concluded that Judi and Johnathan were properly named as respondents in the arbitration, even though the Agreement was signed only by Dr. Paul and Paul PC, because they (1) "stepped into the shoes of Dr. Paul and Paul PC [and] continue[d] to run the practice" and wind down its affairs after Dr. Paul's death; and (2) have "participate[d] actively in this Arbitration," including by "accept[ing] the benefit of the stipulation they entered into at the beginning of this case." On the merits, the arbitrator concluded that Paul PC and Dr. Paul had breached the Agreement by not paying for their share of office space and staff expenses through 90 days after the January 9, 2014 letter terminating the Agreement. That amount came to $309,713, along with $44,594.25 in pre-award interest, and $258,348.19 in attorney's fees and costs. The arbitrator denied relief to Dr. Rosenberg on his remaining claims and rejected Paul PC's remaining two counterclaims on their merits (Paul PC had previously withdrawn the other eight). The arbitrator held Judi and Johnathan "responsible in their representative capacities" and imposed a constructive trust over any assets of Paul PC or Dr. Paul personally that "Judi and Johnathan" may have "distributed to themselves and their other family members" in any amount "necessary to satisfy the award in this case."

II. Procedural Background

Dr. Rosenberg filed a timely petition to confirm the arbitrator's award. Respondents filed an untimely opposition, with a supplemental filing a few weeks after that.

The trial court issued a tentative ruling granting the petition to confirm the arbitration award. Following a hearing, the court ordered supplemental briefing, and the parties filed extensive supplemental briefs.

Following a second hearing, the trial court ultimately adopted a new, nine-page tentative ruling confirming the arbitrator's award. The court ruled that the arbitrator was empowered to decide whether Judi and Johnathan were proper parties to the arbitration because by "submitting [the] issue[] to be resolved by the arbitrator on the merits, [they] authorized the arbitrator to determine these issues[,] and they agreed to be bound by her findings." The court next ruled that the arbitrator's decision that Judi and Johnathan were proper parties to the arbitration was "not wholly groundless or completely irrational" because: (1) they "stipulated to arbitration in their representative capacities" and otherwise participated in the arbitration; and (2) they "assumed the benefits of the" Agreement "by using the office space" and staff, thereby "effectively stepp[ing] into the position of Dr. Paul and succeed[ing] to all the rights, duties, and responsibilities of Dr. Paul, as his successors," thereby making them subject to the Agreement's arbitration clause. The court finally ruled that (1) the arbitrator's finding that Paul PC and Dr. Paul had breached the Agreement was neither "wholly groundless" nor "completely irrational," and (2) the arbitrator's imposition of a constructive trust was "'rationally related'" to the breach of the Agreement.

The trial court entered judgment confirming the arbitration award and awarding (1) $309,713 in breach of contract damages, (2) pre-award interest of $44,594.25, (3) post-award interest of $646,823.44, (4) attorney's fees of $258,348.19 and $16,795, and

(5) arbitration costs of $34,168. The judgment also imposed a constructive trust in Dr. Rosenberg's favor over the "assets of Paul PC" and "the personal assets of Dr. Paul" as to any assets "distributed directly or indirectly" to or by Judi or Johnathan.

Judi and Johnathan filed a timely notice of appeal.

DISCUSSION

Judi and Johnathan's appeal raises what boil down to three distinct issues:[2] (1) Was the arbitrator empowered to decide whether Judi and Johnathan were proper parties to the arbitration (or should that question have been decided by a court)? If the arbitrator was the proper decision maker, (2) did the arbitrator properly conclude that Judi and Johnathan were subject to the Agreement's arbitration clause? And if the arbitrator did, (3) was the arbitrator's ruling on the merits—that is, the finding that Dr. Paul breached the Agreement and the imposition of a constructive trust—proper?

As a general matter, we independently review a trial court's order confirming an arbitration award. (*Condon v. Daland Nissan, Inc.* (2016) 6 Cal.App.5th 263, 267.) We also independently review the threshold question of who is the proper decision maker (the first issue). (See *Sandquist v. Lebo Automotive, Inc.* (2016) 1 Cal.5th 233, 243-244 (*Sandquist*) [engaged in independent review of this question].) If the proper decision maker is an arbitrator, then our "standard for reviewing the arbitrator's decision" on the issues of arbitrability and on the merits (the second and third issues) is the same as "the standard [we] apply when [we] review any other matter that parties have agreed to arbitrate"—namely, we apply an "'extremely narrow'"

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[2] Paul PC does not challenge the trial court's ruling.

standard of review that looks to whether the arbitrator "exceeded [her] powers" and "accord[s] 'substantial deference to the arbitrator['s] own assessment[] of [her] contractual authority'"; "errors of fact or law" are not enough to upset the arbitrator's ruling. (*First Options of Chicago, Inc. v Kaplan* (1995) 514 U.S. 938, 943 (*First Options*); *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 11; Code Civ. Proc., § 1286.2, subd. (a); 9 U.S.C. § 10; *Ajida Technologies, Inc. v. Roos Instruments, Inc.* (2001) 87 Cal.App.4th 534, 541.) Our task is to review the trial court's ruling, not its reasoning. (*People v. Financial Casualty & Surety, Inc.* (2017) 10 Cal.App.5th 369, 386.)

I. Who is the Proper Decision Maker?

Whether a particular dispute is subject to arbitration "'is strictly "a matter of consent."'" (*Sandquist*, *supra*, 1 Cal.5th at p. 252, quoting *Granite Rock Co. v. Teamsters* (2010) 561 U.S. 287, 299.) If the parties to a dispute later disagree over whether they have consented to the arbitration of a particular dispute, the default presumption—and it is a "strong" one—is that this disagreement over "arbitrability" is to be decided by a court (rather than an arbitrator). (*Sandquist*, at pp. 249-251; see also *Bruni v. Didion* (2008) 160 Cal.App.4th 1272, 1285 [applying rule to successor in interest to signatory to written agreement]; *Suh v. Superior Court* (2010) 181 Cal.App.4th 1504, 1513 [applying presumption to non-signatories to written agreement].) But "the parties are free to designate the arbitrator as the one to decide whether a particular dispute is subject to arbitration [citations], although they must do so 'clearly and unmistakably' if they wish to rebut the default presumption to the contrary [citations]." (*Douglass v. Serenivison, Inc.* (2018) 20 Cal.App.5th 376, 386-387 (*Douglass*).)

Parties can "clearly and unmistakably" consent to having an arbitrator decide whether their dispute is subject to arbitration: (1) by signing a contract, in advance of any dispute, that designates the arbitrator as the one to decide such questions of arbitrability (*O'Malley v. Petroleum Maintenance Co.* (1957) 48 Cal.2d 107, 110); (2) by expressly agreeing (through a stipulation or other written or oral agreement), after a dispute has arisen, to have the arbitrator decide such questions of arbitrability (e.g., *Caro v. Smith* (1997) 59 Cal.App.4th 725, 729); or (3) by manifesting an "implied in fact agreement" to have the arbitrator decide such questions of arbitrability "through their conduct (which may additionally be deemed to estop them from denying such an agreement)" (*Douglass*, *supra*, 20 Cal.App.5th at p. 387; *Benaroya v. Willis* (2018) 23 Cal.App.5th 462, 474 (*Benaroya*); *Cabrera v. Plager* (1987) 195 Cal.App.3d 606, 613, fn. 8).

When it comes to whether a party's conduct constitutes an implied agreement or consent to have an arbitrator decide questions of arbitrability, appearing in the arbitral forum solely to object to the arbitrator's jurisdiction is not enough to constitute consent, "at least if the party makes that objection 'prior to participat[ing]' in the arbitration." (*Douglass*, *supra*, 20 Cal.App.5th at p. 387, citing *International Film Investors v. Arbitration Tribunal of Directors Guild* (1984) 152 Cal.App.3d 699, 706; see also *First Options*, *supra*, 514 U.S. at p. 946 [written objection; no consent]; *Keller Construction Co. v. Kashani* (1990) 220 Cal.App.3d 222, 225, fn. 2 (*Keller*) ["merely appear[ing] [to] articulate[] . . . objection to the arbitration proceeding"; no consent].) Conversely, asking an arbitrator to decide questions of arbitrability is enough to constitute consent to having the

arbitrator decide those questions. (*Fidelity & Cas. Co. v. Dennis* (1964) 229 Cal.App.2d 541, 544 [party "twice submitted on [the] merits"]; *Kelly Sutherlin McLeod Architecture, Inc. v. Schneickert* (2011) 194 Cal.App.4th 519, 529 ["The arbitrator's powers may be expanded or restricted by the scope of the issues submitted to arbitration"]; *George Day Construction Co. v. United Brotherhood of Carpenters & Joiners, Local 354* (9th Cir. 1984) 722 F.2d 1471, 1475 (*George Day*) [when "the arbitrability issue is argued along with the merits, and . . . submitted to the arbitrator for decision, it becomes readily apparent that the parties have consented to allow the arbitrator to decide the entire controversy, including the question of arbitrability"].) Submission of an issue to an arbitrator constitutes consent because the contrary rule would countenance gameplaying by allowing parties to "'voluntarily submit [their] claim to arbitration, await the outcome, and, if the decision is unfavorable, then challenge the authority of the arbitrators to act.'" (*Lovret v. Seyfarth* (1972) 22 Cal.App.3d 841, 859-860.)

We independently agree with the trial court that Judi and Johnathan consented to having the arbitrator decide whether they were proper parties to the arbitration by (1) raising that issue in their opening brief to the arbitrator, (2) asking the arbitrator to grant a nonsuit in their favor on that basis, (3) arguing the issue in their closing brief to the arbitrator, and (4) allowing the arbitrator to take the issue under submission and to decide it.

Judi and Johnathan offer five arguments against this conclusion.

First, they argue that they objected to being parties to the arbitration, just like the party opposing arbitration in *Benaroya*,

supra, 23 Cal.App.5th 462. This is not relevant because the pertinent question when it comes to the proper decision maker is whether Judi and Johnathan objected to *having the arbitrator decide whether they should be parties to the arbitration*. The party in *Benaroya* objected to "the arbitrator's exercise of jurisdiction." (*Id.* at p. 466.) Judi and Johnathan made no such objection. Instead, they argued that they were not "liable" to Dr. Rosenberg under the Agreement or under the Probate Code—and, critically, they asked *the arbitrator* to rule on those arguments in their motion for nonsuit. This constitutes consent to having the arbitrator decide the question of arbitrability. And even if we construed their request to rule on their "liability" under the Agreement as an objection to the arbitrator's jurisdiction and ignore that they asked the arbitrator to rule on that objection, Judi and Johnathan coupled that request with a request for a ruling on matters beyond the applicability of the Agreement itself (and hence, a ruling on the merits). As noted above, this also constitutes consent. (*George Day*, *supra*, 722 F.2d at p. 1475.)

Second, Judi and Johnathan contend that they were only appearing in the arbitration on behalf of Paul PC, and thus never really asked the arbitrator to decide whether *they* were parties in their representative capacities. This contention is belied by the record. In their pre- and post-hearing briefs, as well as during their oral motion for nonsuit, Judi and Johnathan specifically argued—and asked the arbitrator to decide whether—they were proper parties in "any capacity."

Third, Judi and Johnathan assert that the trial court and arbitrator were wrong to rely on a variety of facts in support of their conclusions that they had "consented" to arbitration. More

specifically, they argue that: (1) the filing of an answer to Dr. Rosenberg's initial demand for arbitration is of no significance because it was filed only on behalf of Paul PC (as Dr. Rosenberg's amended arbitration demand specifically naming Judi and Johnathan had yet to be filed); (2) the filing of Dr. Rosenberg's amended arbitration demand is of no impact because, while specifically naming them in its text, it did not formally substitute them as "Doe" respondents and because they never filed an answer to the amended demand; (3) their pre-hearing stipulation is of no value because it merely confirmed that Dr. Rosenberg was not naming them in their individual capacities, but did not amount to consent to arbitration in their representative capacities; (4) their failure to petition the superior court to object to the arbitration in the early stages of the dispute is of no moment because resort to a judicial tribunal is not necessary to register an objection to arbitration; and (5) their argument during the nonsuit motion that Dr. Paul's estate had yet to be probated (and thus did not yet exist) is of no effect because it cannot constitute broader consent to the arbitrator as a decision maker. Even if we assume that Judi's and Johnathan's arguments are well taken, they do not in any way undermine the critical fact that they asked the arbitrator to decide whether they were proper parties and thereby consented to have the arbitrator act as the decision maker on that question.

Fourth, Judi and Johnathan contend that the Agreement's incorporation of the American Arbitration Association's rules, including the rule designating the arbitrator to be the decision maker on questions of arbitrability, was insufficient to bind them because they never signed the Agreement. To be sure, some courts have held that a written contract's incorporation of

arbitration rules that delegate questions of arbitrability to the arbitrator does not bind non-signatories. (*Benaroya*, *supra*, 23 Cal.App.5th at p. 467; *Ajamian v. CantorCO2e, L.P.* (2012) 203 Cal.App.4th 771, 789-790; cf. *Greenspan v. LADT, LLC* (2010) 185 Cal.App.4th 1413, 1440-1441 [incorporation of rules can constitute "clear and unmistakable" consent as to signatories].) However, our conclusion rests on Judi's and Johnathan's *conduct* in submitting questions of arbitrability to the arbitrator, not on their express consent to the terms of the Agreement.

Lastly, Judi and Johnathan argue that the trial court erred in ruling that they "stepped into" Dr. Paul's shoes (and by the court's reliance on *Keller*, *supra*, 220 Cal.App.3d 222, which deals with general partners), and that they were not Dr. Paul's or Paul PC's "alter ego." These arguments are doubly irrelevant: The trial court did not rely on either of those rationales in concluding that Judi and Johnathan had consented to having the arbitrator decide questions of arbitrability, *and* they are wholly independent of our reason for concluding that Judi and Johnathan consented.

II. Did the Arbitrator Exceed Her Powers in Concluding That Judi and Johnathan Were Properly Subject to Arbitration?

The question whether a dispute is properly subject to arbitration can, and in this case does, entail two sub-questions: (1) Are the *parties* properly subject to arbitration, and (2) Is the *dispute itself* properly subject to arbitration?

A. *Proper Parties*

The arbitrator did not exceed her powers in concluding that Judi and Johnathan were proper parties to the arbitration in their representative capacities as successors in interest to Dr.

Paul, in his individual capacity, under the Agreement.[3]

The Agreement was signed by Dr. Paul in two capacities, on behalf of Paul PC and in his individual capacity. As a general rule, a contract "survive[s] the death of a contracting party" (*Carr v. Progressive Casualty Ins. Co.* (1984) 152 Cal.App.3d 881, 890), particularly "where the contract, by its terms, shows that performance by others was contemplated" (*Howard v. Adams* (1940) 16 Cal.2d 253, 258 (*Howard*)). As noted above, the Agreement expressly contemplates that it will "inure to the benefit of" Dr. Rosenberg's and Dr. Paul's "heirs, legal representatives, successors and assigns." A "successor" or "successor in interest" is a person who "'step[s] into [the decedent's] position'" (*Exarhos v. Exarhos* (2008) 159 Cal.App.4th 898, 905), and "who takes the place that another has left, and sustains the *like part or character*." (*Perez v. 222 Sutter St. Partners* (1990) 222 Cal.App.3d 938, 948, fn. 8; *Otay Land Co., LLC v. U.E. Limited, L.P.* (2017) 15 Cal.App.5th 806, 860-861; see generally Code Civ. Proc., § 377.11 [defining "decedent's successor in interest" as a "successor in interest who succeeds . . . to a particular item of the property that is the subject of a cause of action"].) It is undisputed that Judi and Johnathan continued to use the office space and staff after Dr. Paul's death; in that respect, they stepped into Dr. Paul's shoes under the Agreement with respect to the use of the office space and staff. In these circumstances, Judi and Johnathan—as the successors in interest

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[3] Because Judi and Johnathan are proper parties in this representative capacity, we need not decide whether they are *also* proper parties in the capacity of personal representatives of Dr. Paul's estate.

to Dr. Paul in his individual capacity—were "bound by the arbitration provisions of the [A]greement[] [he] signed." (*Thomas v. Westlake* (2012) 204 Cal.App.4th 605, 613, fn. 5.) This rule dovetails neatly with the general principle that the "voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it" (Civ. Code, § 1589; *id.*, § 3521 ["He who takes the benefit must bear the burden"]), which applies with equal force when the "obligation" is the duty to arbitrate (see, e.g., *NORCAL Mutual Ins. Co. v. Newton* (2000) 84 Cal.App.4th 64, 81-82; *JSM Tuscany, LLC v. Superior Court* (2011) 193 Cal.App.4th 1222, 1239).

Judi and Johnathan challenge this analysis on what amount to five different grounds.

First, they assert that the Agreement is a contract for Dr. Paul's personal services as an orthopedic practitioner and that, as such, it does *not* survive his death. Admittedly, "an executory contract of a strictly personal nature is terminated by the death of the party by whom the personal service is to be performed." (*Howard*, *supra*, 16 Cal.2d at p. 258.) Thus, the portion of the Agreement obligating Dr. Paul to provide back-up medical assistance to Dr. Rosenberg's patients does not survive Dr. Paul's death. But the portion allowing Dr. Paul to share the office space and staff does not call for Dr. Paul's "personal service"; indeed, Judi and Johnathan were able to use the office space and staff for months after Dr. Paul's death. *That* portion survived Dr. Paul's death. Because Judi and Johnathan are proper successors in interest as to that portion, they are properly sued in that capacity for breach of the Agreement that is confined, as it is here, to that portion.

Second, Judi and Johnathan contend that the Agreement's clause regarding "heirs, legal representatives, successors and assigns" is of no effect because it is merely boilerplate and that the Agreement does not elsewhere specify that it may apply to non-signatories. However, a contract provision is not unenforceable merely because it uses standard contractual language. (*Cal-State Business Products & Services, Inc. v. Ricoh* (1993) 12 Cal.App.4th 1666, 1681 [so noting]; cf. *O'Hare v. Municipal Resource Consultants* (2003) 107 Cal.App.4th 267, 284 [fact that contractual term imposed by party with greater bargaining power is boilerplate is relevant to whether that term is procedurally unconscionable].) There is no need for the Agreement to be any more specific. Relatedly, they assert that the "heirs" clause only binds heirs to the Agreement's substantive terms and not its arbitration clause. However, the plain language of the "heirs" clause is not so limited, and we decline to construe the clause as allowing the successors in interest to pick and choose which parts of the Agreement apply to them and which do not. And it does not matter, as Judi and Johnathan seem to suggest, that they did not *read* the Agreement or its arbitration clause. (See *N.A.M.E.S. v. Singer* (1979) 90 Cal.App.3d 653, 656.)

Third, Judi and Johnathan posit that they were merely winding down Dr. Paul's practice and collecting for medical services he provided before his death. Thus, they continue, they did not really get any benefit under the Agreement because they were not generating any new revenue from the ongoing practice of medicine. However, the benefit pertinent to this arbitration regarding the office space and staff expenses was the use of that

space and staff, and it is undisputed that Judi and Johnathan received *that* benefit.

Fourth, Judi and Johnathan assert that the trial court is really holding them liable as individuals—despite their stipulation to the contrary—because there is no probate estate for Dr. Paul, and there is no other basis on which to hold them liable in a representative capacity. This assertion overlooks that they may be (and, as we conclude, *are*) liable as successors in interest to Dr. Paul as an individual signatory to the Agreement.

Lastly, Judi and Johnathan contend that Dr. Rosenberg cannot proceed against them in arbitration because he did not satisfy the requirements for filing a creditor's claim under the Probate Code. This contention lacks merit because (1) Judi and Johnathan are proper parties to the arbitration as successors in interest to Dr. Paul under the Agreement (and thus irrespective of their standing as personal representatives of his estate), and (2) the creditor claim filing requirement applies, as pertinent here, to "liability *of the decedent*" (Prob. Code, § 9000, subd. (a)(1), italics added), not to liabilities of his successors in interest. Here, the money sought by Dr. Rosenberg is for shared expenses incurred after Dr. Paul's death, which by definition is not a liability of the decedent.

B. *Proper Scope*

The arbitrator also did not exceed her powers in determining that Dr. Rosenberg's breach of contract claim for office space and staff expenses was within the scope of the Agreement's arbitration clause. That clause, as noted above, reaches "[a]ny controversy or claim arising out of or relating to th[e] Agreement, or the breach thereof." "The language 'arising out of or relating to' as used in [an] arbitration provision is

generally considered a broad provision." (*Khalatian v. Prime Time Shuttle, Inc.* (2015) 237 Cal.App.4th 651, 659.) Dr. Rosenberg's claim for unpaid office space and staff expenses is grounded entirely on obligations set forth in the Agreement itself, and thus "aris[es] out of" and "relat[es] to" the Agreement.

Judi and Johnathan respond that the arbitration clause does not reach *this* dispute because it arises out of Dr. Paul's death, how to allocate office expenses (including reductions for the successors in interest's non-use of any medical equipment), and a number of other contingencies not specifically addressed in the Agreement. However, the Agreement's failure to address certain contingencies does not negate the salient fact that Dr. Rosenberg's breach of contract claim is one that "aris[es] out of or relat[es] to th[e] Agreement, or the breach thereof." The arbitration clause reaches "any" such "controversy or claim," and "any" means "any." (*Santa Clarita Organization for Planning & the Environment v. Abercrombie* (2015) 240 Cal.App.4th 300, 312.) Judi and Johnathan relatedly assert that construing the Agreement in way that requires Dr. Paul to be responsible for paying rent 90 days after he dies is unreasonable. But construing the Agreement in a way that allows Dr. Paul's heirs and successors in interest to use the office space and staff for free for several months is ostensibly just as unreasonable. More to the point, however, Judi's and Johnathan's assertion relates more to the merits of Dr. Rosenberg's breach of contract claim than to the question of arbitrability, and accordingly does not undercut our conclusion that the arbitrator's ruling on the issue of arbitrability was within her powers.

III. Did the Arbitrator Exceed Her Powers in Ruling on the Merits of Dr. Rosenberg's Breach of Contract Claim?

The arbitrator's ruling on the merits has two components salient to this appeal—namely, (1) her conclusion that Judi and Johnathan, as Dr. Paul's successors in interest under the Agreement, breached that Agreement by not paying Dr. Paul's share of the office space and staff expenses through 90 days after they gave notice on January 9, 2014, and (2) her imposition of a constructive trust over the assets of Paul PC and Dr. Paul distributed by or to Judi or Johnathan.

A. *Breach of Contract*

To prevail on a claim for breach of contract, a party must prove (1) a contractual duty, (2) a breach of that duty, (3) causation, and (4) damages. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.) By its plain language, the Agreement obligated Dr. Paul and his successors in interest to pay their share of office space and staff expenses specified in the Agreement until 90 days after they gave Dr. Rosenberg written notice of an intent to terminate the Agreement. What it is more, it undisputed that Judi and Johnathan occupied the office space and used the staff from the time of Dr. Paul's death through at least January 9, 2014, when they gave notice of their intent to vacate on or before January 15, 2014. During that period, they paid $60,000 toward the shared expenses, but no more. This amount was less than the amount called for by the Agreement, and thus constituted a breach of the Agreement. Neither Judi nor Johnathan disputes the arbitrator's calculation of the amount unpaid beyond passing references to price reductions due to their nonuse of medical equipment; however, they provide no reasoned argument, legal authority, or record citations in support of this contention. (*People v. Bryant, Smith and Wheeler* (2014) 60

Cal.4th 335, 363-364.) In sum, Dr. Rosenberg established all of the elements of his breach of contract claim.

Judi and Johnathan raise two arguments in response.

First, they assert that the Agreement should be deemed to have terminated when Dr. Paul died. The arbitrator did not exceed her powers in determining that the Agreement should not be so construed: The plain terms of the Agreement do not so specify (e.g., *Travelers Casualty & Surety Co. v. Employers Ins. of Wausau* (2005) 130 Cal.App.4th 99, 115), and there are good reasons to assume that the surviving family of either doctor would need time—and, critically, office space and staff—to wind down the practice of either doctor in the event of his untimely death. Indeed, that is precisely what happened here.

Second, Judi and Johnathan contend that they are entitled to a reduction in damages in the amount of the life insurance policy proceeds that Dr. Rosenberg received under the life insurance policy he took out on Dr. Paul's life. (Dr. Paul took out a similar policy on Dr. Rosenberg's life.) The arbitrator did not exceed her powers in rejecting this argument given that nothing in the Agreement itself or in any other agreement between the two doctors obligated the doctors to use the proceeds of any life insurance policy they collected to offset the cost of unpaid office space and staff expenses.

B. *Constructive Trust*

"A constructive trust is an involuntary equitable trust created by operation of law as a remedy to compel the transfer of property from the person wrongfully holding it to the rightful owner." (*Communist Party v. 522 Valencia, Inc.* (1995) 35 Cal.App.4th 980, 990.) Before a court may impose a constructive trust, it must find: (1) "the existence of . . . property or some

interest in property"; (2) "the *right* of a complaining party to that" property; and (3) "some *wrongful* acquisition or detention of the [property] by another party who is not entitled to it." (*Ibid.*; *Cramer v. Biddison* (1968) 257 Cal.App.2d 720, 724; Civ. Code, §§ 2223, 2224.) The acquisition or detention of property is "wrongful" if it is "gain[ed] . . . by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act." (Civ. Code, § 2224.) Breaching a contract is a wrongful act, and money held as a consequence of a breach is subject to a constructive trust. (*GHK Associates v. Mayer Group, Inc.* (1990) 224 Cal.App.3d 856, 878.)

The arbitrator imposed a constructive trust on the assets of Dr. Paul and Paul PC that Judi and Johnathan may have distributed to themselves or other family members to the extent necessary to satisfy the judgment based on their breach of the Agreement. Because Dr. Rosenberg is entitled to (and thus has a right to) satisfy the judgment in his favor and because the money subject to the trust was acquired through Judi's and Johnathan's wrongful refusal to adhere to the Agreement's terms, the arbitrator did not exceed her powers in concluding that a constructive trust was warranted. Moreover, a constructive trust may be imposed on Judi and Johnathan for their wrongful retention of the money, even though that money originally belonged to Dr. Paul or Paul PC. (E.g., *Westbrook v. Superior Court* (1986) 176 Cal.App.3d 703, 712 [so holding, with respect to property held by a personal representative].)

Judi and Johnathan make two categories of arguments against the imposition of a constructive trust.

First, they argue that Dr. Rosenberg never proved that they engaged in fraud or were the alter egos of Dr. Paul or Paul

PC. These findings are not prerequisites to the creation of a constructive trust, so their absence is of no moment.

Second, Judi and Johnathan contend that there was no proof that they stripped Paul PC of its assets. This, too, is not an element of a constructive trust.

* * * * * *

In light of our analysis of the issues presented, we have no occasion to consider the many alternative bases for affirmance offered by Dr. Rosenberg.

DISPOSITION

The judgment is affirmed. Dr. Rosenberg is entitled to costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
HOFFSTADT

We concur:

_____, P. J.
LUI

_____, J.
CHAVEZ