



IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

TODD LOPEZ, as Personal Representative  
of the Wrongful Death Estate of Richard Paiz  
and LORETTA PAIZ, individually,

Plaintiffs-Respondents,

vs.

No. S-1-SC-40416

PRESBYTERIAN HEALTHCARE SERVICES,  
HOSPITALIST MEDICINE PHYSICIANS OF  
TEXAS, PLLC d/b/a/ SOUND PHYSICIANS  
HOLDINGS, LLC, KENNETH DALE, and  
KARAN MAHAJAN,

Defendants-Petitioners.

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On Writ of Certiorari to the Court of Appeals of New Mexico

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## Introduction

This case demonstrates the need for this Court to clarify the analysis that applies when there is a failure to timely seek appointment of a personal representative for an action under the Wrongful Death Act, §§ 41-2-1 to -4 (1882, as amended through 2001) (“WDA”). Embedded within the issue is the question of what law controls the analysis.

In *Chavez v. Regents of the University of New Mexico*, 1985-NMSC-114, 103 N.M. 606, this Court held that the personal representative requirement for an action under the WDA is not jurisdictional and that the failure to seek appointment of the personal representative within the applicable limitations period is a procedural defect that may be remedied under Rule 1-015(C) NMRA or Rule 1-017(A) NMRA.

Subsequently, the Court reaffirmed in *Deutsche Bank National Trust Company v. Johnston*, 2016-NMSC-013, 369 P.3d 1046 (citing *ACLU of N.M. v. City of Albuquerque*, 2008-NMSC-045, 144 N.M. 471), that when a statute creates a cause of action and designates who may sue, whether the plaintiff has standing affects a district court’s subject matter jurisdiction. The Court also added Rule 1-017(B) NMRA (2014) (Wrongful death actions; personal representative) which requires a district court to appoint a personal representative for a wrongful death action and that a petition seeking the appointment be filed before or with the action.

From the foregoing law, the following questions arise. As New Mexico law currently stands, is a failure to timely seek appointment of a wrongful death personal representative still viewed as a procedural defect that may be remedied under *Chavez*? Or do the statutory standing principles in *Johnston*, as applied to the WDA, show that the appointment affects a district court's subject matter jurisdiction such that the appointment must be timely sought under Rule 1-017(B)? Is there another analysis that applies?

The lower courts' answers differ. The district court ruled that *Johnston* and Rule 1-017(B) required Plaintiff Todd Lopez to timely seek appointment as the wrongful death personal representative and that his failure to do so left the court without subject matter jurisdiction over the wrongful death part of the case. The Court of Appeals reversed. In applying the statutory standing principles from *Johnston*, the Court of Appeals applied prudential standing concepts in deciding whether they were met and, although acknowledging Rule 1-017(B), the Court of Appeals bypassed the rule and treated *Chavez* as controlling so as to allow a plaintiff to seek appointment as the wrongful death personal representative outside the rule's outer time limit.

Traced over time, the law shows that since *Chavez* this Court has clarified the necessity of and procedure for a plaintiff to timely seek appointment as the wrongful



death personal representative. The district court apprehended the clarifications in ruling as it did. The Court of Appeals misapprehended them in its opinion.

This Court should reverse the Court of Appeals and, in doing so, clarify that under more recent law from this Court, a plaintiff who seeks to become the personal representative for a wrongful death action must timely seek the appointment because of statutory standing and its effect on a district court's subject matter jurisdiction. Jurisprudentially, as it currently stands, New Mexico law calls for such analysis.

### **Summary of Facts and Proceedings**

Three years from the date of Richard Paiz's death in 2019, a complaint for wrongful death was filed, the caption of which named Plaintiff Todd Lopez as the Personal Representative of the Wrongful Death Estate of Richard Paiz. (RP 1.) A few months later in 2022, Plaintiffs filed and served a first amended complaint with the same caption. (RP 11.) A few months later, a discovery answer of Mr. Lopez's uncovered the fact that no court had appointed him as Mr. Paiz's wrongful death personal representative. *See Lopez v. Presbyterian Healthcare Servs.*, 2024-NMCA-055, ¶ 2, \_\_\_ P.3d \_\_\_ (A-1-CA-41177, April 10, 2024). Plaintiffs proceeded to file a motion asking the district court to make the appointment. (RP 115.) Defendants opposed the motion, contending that Rule 1-017(B) required Plaintiffs to seek the appointment "before" or "with" their filing of the original complaint. *See Lopez*, 2024-NMCA-055, ¶ 2.

During the hearing on the motion, the court *sua sponte* raised the question of whether it had subject matter jurisdiction to act on the motion, explaining:

I have a serious issue with respect to this particular motion . . . . That issue is my ability to act in this situation because I may not have jurisdiction[.]

I would refer the parties to *Deutsche Bank National Trust Company [v.] Johnston*, [2016-NMSC-013, ¶ 11,] . . . . a foreclosure case, but it deals with standing[.]

[T]he Supreme Court in the *Deutsche Bank* case . . . makes this observation. And that is when a statute creates a cause of action and designates who may sue, the issue of standing becomes interwoven with that of subject matter jurisdiction. Standing then becomes a jurisdictional prerequisite to an action. So I've got an issue about whether I have jurisdiction to do anything with respect to the wrongful death action.

(Tr. (1/24/23) at 3:19:12-3:21:07.)

After affording the parties an opportunity to brief the issue, the court held a hearing on it. (Tr. (4/27/23).) In response to Plaintiffs' argument that Rule 1-017(A) NMRA, as applied in *Chavez* controlled the analysis (*id.* at 9:06:00-9:07:08), the court observed, "the Supreme Court added Rule 17[B] almost 30 years after *Chavez*. So the Supreme Court came in and clarified *Chavez*, . . . would be a possibility here." (*Id.* at 9:16:15-9:16:48.) Before the hearing ended, the court firmed up that view, orally ruling, "*Deutsche Bank* and Rule 17[B], which . . . clarify . . . who and when . . . a party may bring . . . [an] action under the Wrongful Death Act, require[] the dismissal of the wrongful death part of this case." (*Id.* at 9:54:01-9:54:37.)

Following that ruling, Plaintiffs asked the court to address their later-filed motion for leave to file a second amended complaint which included allegations seeking the appointment of Mr. Lopez as Mr. Paiz’s personal representative. (*Id.* at 9:57:21-9:57:41; RP 344.) In responding, the court explained, “if I found that I don’t have jurisdiction, I don’t know how I can make a ruling on the motion to amend.” (*Id.* at 9:57:58-9:58:03.)

During the subsequent presentment hearing on the parties’ proposed forms of order, in response to Plaintiffs’ argument that the order should refer to *Chavez* (Tr. (5/26/23) at 10:16:39-10:17:48; *id.* at 10:18:50-10:19:22), the court questioned the need to include *Chavez*. (*Id.* at 10:19:23-10:20:03.) In recalling its oral ruling, the court explained that it had not said that *Chavez* had been overruled but instead that it “wasn’t controlling with respect to this particular case.” (*Id.* at 10:19:45-10:20:03.) The court therefore declined to include *Chavez* in the order that it entered dismissing the wrongful death part of the case with prejudice. (RP 525.)

On interlocutory appeal, the Court of Appeals reversed. *Lopez*, 2024-NMCA-055, ¶ 1. In its discussion, the Court of Appeals addresses the WDA and *Chavez*, 2024-NMCA-055, ¶¶ 6-9, before it addresses post-*Chavez* developments in the law regarding statutory standing and its relationship with subject matter jurisdiction and Rule 1-017(B), *id.* ¶¶ 10, 12-15, and undertakes its analysis of statutory standing under the WDA, *id.* ¶¶ 16-21.

In addressing the WDA, the Court of Appeals recognizes that Section 41-2-1 of “the WDA provides a cause of action for an individual whose death is allegedly caused by the wrongful act, neglect or default of another,” *id.* ¶¶ 6, 11, and that Section 41-2-3 provides that “[e]very action mentioned in Section 41-2-1 . . . shall be brought by and in the name of the [PR] of the deceased person.” *Id.* ¶ 7 (quotation marks omitted).

“In *Chavez*, our Supreme Court addressed whether the failure to seek appointment of a PR within the WDA statute of limitations bars suit.” *Id.* ¶ 8. “This Court determined that the failure to appoint a PR was jurisdictional – a position our Supreme Court explicitly rejected as ‘unnecessarily restrictive[,]’” reasoning that “‘the PR is only a nominal party . . . selected by the Legislature to act as the statutory trustee for the . . . statutory beneficiaries,’” and that “‘it is merely incidental that a PR is named to bring a wrongful death action.’” *Id.* (citations omitted) (alterations omitted). “As a result, under *Chavez*, the appointment of a PR after a WDA complaint has been filed may be accomplished under either Rule 1-015 or Rule 1-017.” *Id.* (internal quotation marks & citation omitted).

In addressing Rule 1-017(B), after acknowledging that it addresses “the appointment of a [WDA] PR” and quoting the rule, the Court of Appeals discusses committee commentary to the rule which suggests that it does not mark a departure from *Chavez*. *Id.* ¶ 10.

In addressing standing and its relationship with subject matter jurisdiction, the Court of Appeals recognizes that “district courts have . . . statutory jurisdiction in ‘special cases and proceedings as provided by law.’ N.M. Const. art. VI, § 13.” *Id.* ¶ 12. “Standing . . . is generally prudential and not jurisdictional, but may be a jurisdictional matter when a litigant asserts a cause of action created by statute.” *Id.* (citing *ACLU of N.M.*, 2008-NMSC-045, ¶ 9) (internal quotation marks omitted).

“In 2016, our Supreme Court in *Johnston* reaffirmed . . . that ‘when a statute creates a cause of action and designates who may sue, the issue of standing becomes interwoven with that of subject matter jurisdiction. Standing then becomes a jurisdictional prerequisite to an action.’” *Id.* ¶ 13 (citation omitted). “The primary aim of the *Johnston* Court was to clarify . . . standing in the context of modern mortgage foreclosure actions” which the Court determined is “prudential . . . and . . . to be evaluated according to the three traditional elements: injury in fact, causation, and redressability.” *Id.* (internal quotation marks & citation omitted). “If the standing elements are not met, . . . a plaintiff generally cannot show that they have stated a cause of action entitling them to a remedy.” *Id.* (internal quotation marks & citation omitted) (alteration omitted). “Apart from a brief reference to the general rule, the Court in *Johnston*, did not address the requirements for statutory standing.” *Id.*

“A few years later, however, *Gandydancer, LLC v. Rockhouse CGM, LLC*, [2019-NMSC-021, 453 P.3d 434,] specifically raised the issue of statutory standing and its relation to [a] cause of action created by statute.” *Id.* ¶ 14. “The . . . Court, relying on [*Key v. Chrysler Motors Corporation*, 1996-NMSC-038, 121 N.M. 764] – an earlier statutory standing case – explained that . . . whether the Court discusses it as a cause of action or standing, both doctrines allow plaintiffs to enforce a right in the courts.” *Id.* (internal quotation marks & citation omitted). “The *Key* Court . . . described statutory standing to require a showing of injury in fact, causation, redressability, and an interest . . . within the zone of interests . . . protected or regulated by the statute.” *Id.* (internal quotation marks and citation omitted). “The *Gandydancer, LLC* Court similarly evaluated statutory standing[.]” *Id.*

“In *Gandydancer, LLC* and *Key*, [because] the plaintiff[s] . . . were . . . individuals bringing a statutory cause of action[,]. . . . it was clear that the *plaintiff* must have standing under the statute. Under the WDA, however, the plaintiff is merely a representative[.]” *Id.* ¶ 15. “For this reason, we must separately consider the WDA in the context of statutory standing . . . to determine whether the district court properly dismissed the WDA claim[.]” *Id.*

In recognizing that “the WDA is a purely statutory cause of action for which standing is a jurisdictional prerequisite,” the Court of Appeals evaluates standing under the WDA according to its understanding of this Court’s analysis in

*Gandydancer, LLC*. *Id.* ¶ 16 (internal quotation marks omitted). Based on its standing analysis, the Court of Appeals concludes that “the injured deceased person, and not the PR, has standing to establish an action under the WDA[,]” *id.* ¶ 16, and that “the appointment or request for appointment is not a jurisdictional prerequisite to establish statutory standing or a cause of action under the WDA.” *Id.* ¶ 21.

Although the Court of Appeals acknowledges the parties’ differing views as to whether Rule 1-017(B) limits the time within which the personal representative appointment may be sought, the Court of Appeals “decline[s] . . . to definitively construe Rule 1-017(B)’s requirements.” *Id.* ¶ 22. “For the reasons explained in this opinion, the statutory standing principles . . . in *Johnston* do not undermine the determination in *Chavez* that the appointment of a PR is not jurisdictional and Rule 1-015 and Rule 1-017 may operate to correct and relate back any appointment errors.” *Id.*

### **Argument**

*Standard of review:* De novo review applies. *See Martinez v. Segovia*, 2003-NMCA-023, ¶ 9, 133 N.M. 240 (issues of lack of jurisdiction and interpretation and application of law and procedure present legal issues reviewed de novo); *State v. Allen*, 2014-NMCA-111, ¶ 7, 336 P.3d 1007 (application of law to undisputed facts reviewed de novo).

*Statement of preservation:* PHS’s arguments were preserved by its arguments below (RP 145-56; RP 162-63; RP 374-84; Tr. (1/24/23) at 3:09:35-3:13:35; Tr. (4/27/23) at 9:29:22-9:38:27; COA AB at 6-20) and by the Court of Appeals’ opinion, *Lopez*, 2024-NMCA-055.

**I. Since It Decided *Chavez*, This Court Has Developed Law Which Clarifies The Necessity Of and Procedure For Timely Seeking Appointment of A Personal Representative For A Wrongful Death Action.**

**A. When *Chavez* Was Decided There Was A Lack Of Clarity In The Law Regarding The Appointment Of a Personal Representative For A Wrongful Death Action.**

*Chavez* was not the first case that presented an issue as to the effect of a failure to seek the timely appointment of a personal representative for a wrongful death action. Previously the issue had arisen in *Mackey v. Burke*. 1984-NMCA-028, 102 N.M. 294, *overruled by Chavez*, 1985-NMSC-114.

The Court of Appeals in *Mackey* observed that the issue could be considered as one involving plaintiffs who “lacked standing to sue.” 1984-NMCA-028, ¶ 14. In *Chavez*, although observing that the right of action under the WDA is “purely statutory” and that Section 41-2-3 “requires that every such action ‘shall be brought by . . . the personal representative . . . of [the] deceased person[,]’” 1985-NMSC-114, ¶ 7, the Court reasoned that it is “merely incidental that a personal representative is named to bring a wrongful death action” because the personal



representative is “only a nominal party . . . selected by the Legislature to act as the statutory trustee for the . . . statutory beneficiaries.” *Id.* ¶ 8 (internal quotation marks & citation omitted). “The important thing is that the action . . . not fail because of the absence of a party capable of suing[.]” *Id.* ¶ 10 (citation omitted). As a result, the Court decided:

The Court of Appeals in *Mackey* . . . . drew several erroneous conclusions: (1) that the personal representative requirement is jurisdictional; (2) that if it is not met the suit is a ‘nullity’; and (3) that an amendment under NMSA 1978, Civ.P. Rule 15(c) (Repl. Pamp. 1980) adding a party as a personal representative would not relate back to the original filing so as to avoid the bar of the statute of limitations. We believe this view of the personal representative requirement of the Wrongful Death Act is unnecessarily restrictive and that NMSA 1978, Civ.P. Rules 15(c) and 17(a) (Repl. Pamp. 1980) dictate a different result.

*Id.* ¶ 11.

Both *Mackey* and *Chavez* include discussions of the tort statutes pursuant to which the plaintiffs had brought their lawsuits, statutory language in which understandably may have contributed to the plaintiffs’ failure to recognize that they needed to seek appointment of a personal representative under the WDA for their lawsuits. *Mackey*, 1984-NMCA-028, ¶¶ 1-3; *Chavez*, 1985-NMSC-114, ¶¶ 1, 3, 6. At the time, Rule 1-017 NMRA did not provide procedural guidance on the issue.

**B. Since *Chavez*, This Court Has Developed Law Clarifying The Effect Of Statutory Standing On District Court Subject Matter Jurisdiction.**

Since it decided *Chavez* nearly forty years ago, this Court has developed law which in general clarifies when a plaintiff's standing is a jurisdictional prerequisite for a cause of action. The principles that the district court invoked from *Johnston* reflect those developments.

“As a general rule, standing in our courts is not derived from the state constitution, and is not jurisdictional.” *Johnston*, 2016-NMSC-013, ¶ 11 (internal quotation marks & citation omitted). An exception, however, applies when a statute creates a cause of action and designates who may sue.

The exception derives from the New Mexico Constitution. Article VI, Section 13 – which in providing that “[t]he district court shall have original jurisdiction in all matters and causes not excepted in this constitution, and such jurisdiction of special cases and proceedings as may be conferred by law” – vests a district court with two types of subject matter jurisdiction. *Ottino v. Ottino*, 2001-NMCA-012, ¶ 7, 130 N.M. 168. The first type – original or general jurisdiction – “covers those matters known to the common law and equity practice of England prior to 1776.” *Id.* ¶ 8 (internal quotation marks & citation omitted). The second type – statutory jurisdiction – “[covers] special cases and proceedings as may be conferred by law[,]” *id.* ¶ 7, meaning by an enactment of the Legislature. *See In re Forest*,

1941-NMSC-019, ¶ 10, 45 N.M. 204 (“[S]pecial statutory proceedings . . . are statutory proceedings to enforce rights and remedies created by statute and which were unknown to the common law and equity practice of England prior to 1776.”).

“Where a cause of action is created by statute, the Legislature empowers the courts to adjudicate a new kind of claim and, thus, the Legislature may condition the exercise of that power on the plaintiff’s satisfaction of certain prerequisites[.]” *Phoenix Funding, LLC v. Aurora Loan Servs., LLC*, 2017-NMSC-010, ¶ 19, 390 P.3d 174, one of which may be to show that the plaintiff is a person who may bring the cause of action. Thus, “[w]here the Legislature has granted specific persons a cause of action by statute, the statute governs who has standing to sue.” *San Juan Agric. Users Ass’n v. KNME-TV*, 2011-NMSC-011, ¶ 8, 150 N.M. 64 (internal quotation marks & citation omitted); *cf. Phoenix Funding, LLC*, 2017-NMSC-010, ¶ 18 (When “the requirement of a plaintiff’s standing is not derived from a constitutional limitation of the judiciary to decide cases or controversies, it is not a jurisdictional prerequisite to . . . [a] cause of action that a New Mexico court is called to adjudicate.”); *see also Johnston*, 2016-NMSC-013, ¶ 10 (“[S]tanding is jurisdictional in the context of statutory causes of action rather than all causes of action.”).

The foregoing principles can be distilled to the statutory standing principles invoked by the district court. Under the principles:

When a statute creates a cause of action and designates who may sue, the issue of standing becomes interwoven with that of subject matter jurisdiction. Standing then becomes a jurisdictional prerequisite to an action.

*Johnston*, 2016-NMSC-013, ¶ 11 (quoting *ACLU of N.M.*, 2008-NMSC-045, ¶ 9 n.1) (quotation marks omitted) (alteration omitted).

Phrased in the generally applicable terms that they are, the statutory standing principles have been treated accordingly. They have been invoked by this Court and the Court of Appeals in a variety of legal contexts. *See, e.g., Johnston*, 2016-NMSC-013, ¶¶ 1, 11 (reaffirming adoption of the guidelines in a mortgage foreclosure context); *Disabled Am. Veterans v. Lakeside Veterans Club, Inc.*, 2011-NMCA-099, ¶¶ 1, 7, 150 N.M. 569 (corporate liquidation context). They have been applied straightforwardly when a statute creates a cause of action and designates who may sue. *E.g., Disabled Am. Veterans*, 2011-NMCA-099, ¶¶ 7, 11, 13. They have become a settled component of New Mexico’s standing jurisprudence.

**C. Since *Chavez*, this Court Has Exercised Its Rule-Making Authority To Clarify That Under Rule 1-017(B) A Personal Representative Appointment Must Be Sought Before Or At The Commencement Of A Wrongful Death Action.**

Section 41-2-3 of the WDA requires that every wrongful death action in Section 41-2-1 be “brought by . . . the personal representative of the deceased person[.]” From that statutory language it is implicit that the wrongful death personal representative must be in place toward the commencement of a wrongful

death action. But the WDA does not provide procedural details as to how someone becomes the personal representative in the first instance and the time by which that must occur.

In 2014, this Court amended Rule 1-017 (Parties plaintiff and defendant; capacity) to provide those details. The amendment provides:

**B. Wrongful death actions; personal representative.** An action for wrongful death brought under Section 41-2-1 NMSA 1978 shall be brought by the personal representative appointed by the district court for that purpose under Section 41-2-3 NMSA 1978. A petition to appoint a personal representative may be brought before the wrongful death action is filed or with the wrongful death action itself.

Rule 1-017(B) eliminates any procedural uncertainty that in the past understandably may have resulted in a wrongful death plaintiff being excused for belatedly seeking judicial appointment as the personal representative.

The first sentence of Rule 1-017(B) reiterates the Legislative mandate in Section 41-2-3 that a wrongful death action must be brought by the personal representative. The sentence clarifies that it is necessary to seek judicial appointment to become the personal representative.

The second sentence of Rule 1-017(B) delimits the time within which appointment as the personal representative may be sought. The language in the sentence gives a putative wrongful death personal representative two options: (1) file the petition before the wrongful death action or (2) join the petition with the

action. The language does not authorize a filing seeking the appointment later in the proceedings.

The timing language ensures that a personal representative with standing is in place toward the outset of the action, as is necessary for a district court to exercise subject matter jurisdiction. *See Bank of N.Y. Mellon v. Lopes*, 2014-NMCA-097, ¶ 7, 336 P.3d 443 (“[S]tanding must be established as of the commencement of a suit.” (citation omitted)); *Resolution Trust Corp. v. Binford*, 1992-NMSC-068, ¶ 8, 844 P.2d 810 (“It is the well-settled rule that subject-matter jurisdiction is tested as of the time of the filing of the complaint.” (citation omitted)); *Amica Mut. Ins. Co. v. McRostie*, 2006-NMCA-046, ¶ 17, 139 N.M. 486 (Without subject matter jurisdiction, a court has “no power or authority to act”). The language also averts the procedural problems that may later emerge when a plaintiff has not been properly appointed as the wrongful death personal representative. *E.g., Oakey v. Tyson*, 2017-NMCA-078, 404 P.3d 810. Thus, while Rule 1-017(B) is procedural in nature, it plays a key role in the analysis.

**II. The Court Of Appeals Misapprehended The Law That Governs Statutory Standing And Its Effect On Subject Matter Jurisdiction.**

**A. Rather Than Applying The Statutory Standing Principles As This Court Articulated Them, The Court of Appeals Applied Prudential Standing Principles In Analyzing Standing Under The WDA.**

The Court of Appeals determined that “because the WDA creates a cause of action not available at common law and grants that cause of action to specific persons” – “the injured deceased person in section 41-2-1 and the PR in Section 41-2-3” – “standing must be established as a jurisdictional prerequisite.” *Lopez*, 2024-NMCA-055, ¶ 17. The Court of Appeals rejected Defendants’ argument that Section 41-2-3 establishes that the wrongful death personal representative has standing. *Id.* ¶ 18. In deciding that “further standing analysis [was] required,” *see id.* ¶ 16, to identify “*who* has standing under the WDA,” *id.* ¶ 17, the Court of Appeals “proceed[ed] to evaluate standing under the WDA according to . . . [this] Court’s analysis . . . set forth in *Gandydancer, LLC*[.]” *Id.* ¶ 16. The Court of Appeals’ ensuing analysis reveals that it misapprehended the law in three key respects.

First, as a threshold matter, the Court of Appeals failed to recognize that there was no need for the standing analysis that it undertook. When a statute creates a cause of action and designates who may bring the action, no further statutory standing analysis need occur. *See, e.g., Disabled Am. Veterans*, 2011-NMCA-099,

¶ 7 (“Under the present circumstances, standing is a jurisdictional question because Section 53-8-55(A)(1) creates a cause of action and explicitly designates who is entitled to bring an action under that provision.”).

The reasons why are straightforward. A legislative body may statutorily confer standing and, when that occurs, the statutory language governs who has standing. See, e.g., *Protection & Advocacy Sys., Inc. v. Presbyterian Healthcare Servs.*, 1999-NMCA-122, ¶ 21, 128 N.M. 73 (“[W]e do not conduct our own analysis of prudential considerations, because standing is governed by specific statutory language.”); *French-Hesch v. French-Williams*, 2010-NMCA-008, ¶¶ 2, 15, 147 N.M. 620 (standing similarly governed by statutory language); see also *Archer v. Preisser*, 723 F.2d 639, 640 (8th Cir. 1983) (“Iowa Code Ann. § 611.20 (West. 1981) provides for the survival of actions. Section 611.22 grants standing to bring such an action only to the legal representative or successors in interest of the deceased.”).

Second, the Court of Appeals failed to recognize that this Court did not undertake statutory standing analysis in *Gandydancer, LLC*. While in *Gandydancer, LLC*, the Court acknowledged the statutory standing principles it reaffirmed in *Johnston*, 2019-NMSC-021, ¶ 7, the Court did not apply them based on its recognition that the case at hand called for a different analysis. “GandyDancer and Rock House argue over whether the [Unfair Practices Act (“UPA”)] contemplates *competitive standing*. However, a more precise framing of the issue is whether the



UPA creates a cause of action to recover lost profits damages from a competitor.”

*Id.* ¶ 8.

In transitioning its analysis, the Court invoked prudential standing and cause of action concepts from *Key*. *Id.* (invoking 1996-NMSC-038, ¶¶ 10-12); *see also Johnston*, 2016-NMSC-013, ¶ 16 (“Arguments based on a lack of prudential standing are analogous to asserting that a litigant has failed to state a legal cause of action . . . . [W]e generally require injury in fact, causation, and redressability to establish standing. If those elements are not be met, . . . a plaintiff generally cannot show that he or she has stated a cause of action[.]” (internal quotation marks & citation omitted)). In doing so, the Court referred to its determination in *Key* that “there is no significant difference between having standing to sue and having a cause of action under the UPA. So whether this Court discusses it as a cause of action or standing, both doctrines allow plaintiffs to enforce a right in the courts.” *Gandydancer, LLC*, 2016-NMSC-013, ¶ 8 (internal quotation marks & citation omitted).

The Court of Appeals read paragraph 8 in *Gandydancer, LLC* to mean that statutory standing and prudential standing concepts are interchangeable. *See, e.g., Lopez*, 2024-NMCA-055, ¶ 17 (“To the extent that our determination about whether standing is prudential or jurisdictional relies on the identity of specific persons, the WDA meets that bar.”); *id.* ¶ 20 (“Close analysis of [*Johnston*] as well as

*Gandydancer, LLC* demonstrates that to establish standing – whether prudential or jurisdictional – the plaintiff must at least demonstrate a right to be enforced or a cause of action.”).

Based upon its reading, the Court of Appeals applied prudential standing concepts in its WDA standing analysis. Because “Section 41-2-1 . . . . satisfies the three traditional requirements used to establish standing in common law causes of action: injury in fact, causation, and redressability,” and “protects the injured deceased person’s interests,” *Lopez*, 2024-NMCA-055, ¶ 18 (internal quotation marks & citation omitted), the Court of Appeals reasoned that the decedent has standing to sue. *Id.* ¶ 18. Conversely, because “[t]he WDA grants the PR no cause of action, the PR has no injury in fact, and no interest of the PR’s is protected by the WDA[,]” the Court of Appeals reasoned that, “Section 41-2-3 addresses not standing but capacity to sue.” *Id.* ¶ 19; *see also id.* ¶ 20 (elaborating on its reasoning as to why a WDA personal representative lacks standing).

The Court of Appeals’ reasoning is rooted in its misreading of paragraph 8 in *Gandydancer, LLC*. What this Court decided in *Gandydancer, LLC* is that, “[c]urrently, the UPA does not provide a cause of action for competitive injury claims.” *Id.* ¶ 10; *see also id.* ¶¶ 19-20 (statutory history of the UPA regarding competitive claims). Consequently, *Gandydancer, LLC* cannot be read as modifying or eliminating the distinction between statutory and prudential standing principles.

*Martinez v. Chavez*, 2008-NMSC-021, ¶ 12, 144 N.M. 1 (“It is well established that cases are not authority for propositions not considered.”) (internal quotation marks & citation omitted). In relying on prudential standing concepts from *Key* invoked in *Gandydancer, LLC*, the Court of Appeals also failed to consider that *Key*, 1996-NMSC-038, was decided before this Court “clarified” statutory standing analysis. See *Disabled Am. Veterans*, 2011-NMCA-099, ¶ 7 (referring to the statutory standing analytical principles the Court adopted in *ACLU of N.M.*, 2008-NMSC-045, ¶ 9 n.1); accord *Phoenix Funding, LLC*, 2017-NMSC-010, ¶ 18.

Third, as additional support for its standing determination, the Court of Appeals reverted to *Chavez*. “As the *Chavez* Court explained, the appointment of a PR is ‘incidental,’ as opposed to pivotal.” *Lopez*, 2024-NMCA-055, ¶ 21 (citation omitted).

But in *Chavez*, the Court did not address the question of standing under the WDA, 1985-NMSC-114, and the characterizations of the personal representative in *Chavez* predate this Court’s clarification of statutory standing analysis and its effect on a district court’s subject matter jurisdiction, see *Disabled Am. Veterans*, 2011-NMCA-099, ¶ 7, as well as the Court’s adoption of Rule 1-017(B). Given this Court’s clarifications in the law regarding the necessity of and procedure for a plaintiff to timely seek appointment as the wrongful death personal representative, it no longer is appropriate to characterize the appointment as an inconsequential

matter and to allow the appointment to take place at any point in the proceedings. *Supra* pp. 12-16. To the contrary, under current New Mexico law, as applied to the WDA, the standing of a wrongful death personal representative impacts whether the district court can exercise subject matter jurisdiction over a wrongful death action. *Infra* Point III.

**B. Rather Than Applying Rule 1-017(B), The Court of Appeals Bypassed The Rule.**

The Court of Appeals treated the timing language in Rule 1-017(B) as not marking a departure from *Chavez*. That treatment is attributable to the Court of Appeals' reading of the committee commentary to Rule 1-017(B) and, more specifically, the second sentence in it. "Failure to appoint a personal representative before the filing of a wrongful death action is not a jurisdictional defect and, under proper circumstances, may be accomplished after the action is filed." Rule 1-017 cmte. cmtry. (citing *Chavez*, 1985-NMSC-114). Consequently, the Court of Appeals concluded that as in *Chavez*, "Rule 1-015 and Rule 1-017 . . . may operate to correct . . . any appointment errors." *Lopez*, 2024-NMCA-055, ¶ 22.

The Court of Appeals' analysis is not correct. The language of Rule 1-017(B), not the committee commentary to it, comprises the governing law. *See State v. Barber*, 2004-NMSC-019, ¶ 10 n.1, 135 N.M. 621. The timing language in Rule 1-017(B) marks a departure from *Chavez* because the language establishes the filing of a wrongful death action as the latest that a plaintiff may seek to be appointed as

the personal representative. *See Tafoya v. Baca*, 1985-NMSC-067, ¶¶ 16-17, 103 N.M. 56 (when this Court promulgates a rule, it supersedes prior inconsistent case law and controls); *see also Rodriguez v. Sanchez*, 2019-NMCA-065, ¶ 12, 451 P.3d 105 (when this Court amends its rules, presumably it is aware of its own existing interpretations of the rules and intends to change or clarify existing law governing procedural practice in state courts). Consequently, a plaintiff cannot seek to be appointed as the wrongful death personal representative later in the proceedings.

**III. As Applied To The WDA, This Court’s Clarified Statutory Standing Analysis and Rule 1-017(B) Require A Plaintiff To Timely Seek Appointment As The Wrongful Death Personal Representative.**

The analysis called for by this Court’s clarifications of statutory standing analysis and Rule 1-017(B) is straightforward. To begin with, as this Court articulated them, *supra* p. 14, the statutory standing principles clearly apply to the WDA.

“Legislative enactment of the [WDA] created a new cause of action in derogation of the common law.” *Romero v. Byers*, 1994-NMSC-031, ¶ 15, 117 N.M. 422. “By prior common law, a right of action for personal injuries was extinguished by the death of the person injured, and no civil action could be maintained for a tort resulting in death.” *Id.* In providing “the statutory authority for a wrongful death action,” *Estate of Lajeunesse ex rel. Boswell v. Bd. of Regents of Univ. of N.M.*, 2013-NMCA-004, ¶ 10, 292 P.3d 485, the Act states:

Whenever the death of a person shall be caused by the wrongful act, neglect or default of another, . . . then . . . the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured.

NMSA 1978, § 41-2-1 (1882, as amended through 1953). “Any such right of action is purely statutory.” *Chavez*, 1985-NMSC-114, ¶ 7; *accord Torres v. Sierra*, 1976-NMCA-064, ¶ 9, 89 N.M. 441 (“Any right of action for wrongful death is of statutory origin[.]”).

“The . . . personal representative is . . . the person who may prosecute this . . . statutory action.” *Stang v. Hertz Corp.*, 1970-NMSC-048, ¶ 5, 81 N.M. 348 (internal quotation marks omitted). “The cause of action under our [WDA] is in the personal representative.” *Id.* ¶ 18 (internal quotation marks & citation omitted). Correspondingly, Section 41-2-3 of the WDA “requires that every such action ‘shall be brought by and in the name . . . of the personal representative . . . of such deceased person.’” *See Chavez*, 1985-NMSC-114, ¶ 7 (citation omitted). An action under the WDA therefore “may be brought by the personal representative of the deceased person only.” *See Hall v. Stiles*, 1953-NMSC-041, ¶ 7, 57 N.M. 281.

It follows that a personal representative’s standing is jurisdictional for a wrongful death action. Because such standing is not self-executing, a plaintiff seeking to become the personal representative for a wrongful death action must seek the appointment from a district court in accordance with Rule 1-017(B). Under the

language of the rule, the petition may be filed “before” or “with” the wrongful death action and no later. *Supra* p. 15.

In the present case, Mr. Lopez did not seek to be appointed as the personal representative before or when the wrongful death action was filed. *Supra* p. 3. Mr. Lopez did not seek to be appointed until nearly six months after the wrongful death action was filed. *See id.* By, then, as the district court recognized, it was too late for Mr. Lopez to seek the appointment, leaving the court without subject matter jurisdiction. *Supra* pp. 4-5. Consequently, it was proper for the court to dismiss the wrongful death action, Rule 1-012(H)(3) NMRA, as it did. *Supra* p. 5.

### **Conclusion**

This Court should reverse the Court of Appeals and affirm the district court.

Respectfully submitted,

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### **Statement Regarding Oral Argument**

PHS requests oral argument. The answer to the analytical question presented by this case has significance for this case and others in which a question arises as to the effect of a plaintiff's failure to timely seek appointment as the personal representative for a wrongful death action. Oral argument will assist the Court in exploring the positions of the parties and the authority relating to this significant issue.

### **C E R T I F I C A T E   O F   S E R V I C E**

I certify that the foregoing pleading was filed through the Odyssey File-and-Serve electronic filing system, which caused a copy to be served automatically on all counsel of record this 3rd day of September, 2024.

RODEY, DICKASON, SLOAN,  
AKIN & ROBB, P.A.

s/ Jocelyn Drennan

By \_\_\_\_\_