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.

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

DEFENDANT-PETITIONER PRESBYTERIAN HEALTHCARE SERVICES' REPLY BRIEF

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Introduction

This reply streamlines and simplifies the analysis of the answer brief filed by Plaintiffs-Respondents Todd Lopez and Loretta Paiz (collectively, "Plaintiffs"). It is not a conventional answer brief. In it, Plaintiffs do not expressly acknowledge and address the arguments made in the brief in chief filed by Defendant-Petitioner Presbyterian Healthcare Services ("PHS") and the brief in chief filed by Defendants-Petitioners Hospitalist Medicine Physicians of Texas, PLLC d/b/a Sound Physicians Holdings, LLC, and Karan Mahajan, in which Defendant-Petitioner Kenneth Dale joined. (*Cf.* AB.) Plaintiffs claim not to have any "quarrel" with the Court of Appeals' analysis (*id.* at 3) but they defend only the result of it. (*Id.* at 2.) Plaintiffs proffer three alternative analytical "options[.]" (*Id.* at 3-4.) But because Plaintiffs would lose under the first option, they develop arguments regarding only the second and third options which they refer to as "paths" in the arguments. (*Id.* at 5, 15).[1] In the arguments, Plaintiffs revert to arguments that they (unsuccessfully) made in the district court. (*Cf.* RP 2/252-65.)

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[1] In briefly following up on the first option in their Introduction, Plaintiffs assert that PHS has urged this Court to overrule *Chavez v. Regents of the University of New Mexico*, 1985-NMSC-114, 103 N.M. 606, without citing anything from PHS's opening brief. (AB at 3-4.) Accurately stated, PHS's position is that *Chavez* does not set forth the analysis that controls in this case based on the Court's subsequent clarifications in the law regarding the necessity of and procedure for a plaintiff to timely seek appointment as the personal representative for a wrongful death action. (PHS BIC at 2-3; *id.* at 12-16; *id.* at 23-25); *infra*.

Given Plaintiffs' ever-evolving positions, PHS provides the following roadmap to navigate them. Starting with the record, it speaks for itself as to the district court's ruling and the question before this Court that arises from the ruling.[2] The district court ruled that Plaintiff Todd Lopez's failure to *seek* appointment as the wrongful death personal representative, before or when the wrongful death claim was filed, left him without statutory standing and, in turn, the court without subject matter jurisdiction over the claim. (PHS BIC at 4-5; *cf.* AB at 1-2.) The court's ruling was based on the analytical framework that the Court affirmed its adoption of in *Deutsche Bank National Trust Company v. Johnston*, 2016-NMSC-013, 369 P.3d 1046 ("*Johnston*"), which the district court, in also considering Rule 1-017(B) NMRA (2014), determined constitute the controlling authority, rather than *Chavez*, 1985-NMSC-114. (PHS BIC at 4-5.) From PHS's perspective, the ruling and the Court of Appeals' analysis of it, frame up the question this Court must resolve – *i.e.*, as New Mexico law currently stands, what is the analysis that applies when a plaintiff fails to timely seek appointment as the personal representative for a wrongful death claim? (*Id.* at 1-3.)

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[2] While the issue is not before the Court, PHS does not concede that Plaintiffs timely filed their claims against PHS based on the statute of repose in the Medical Malpractice Act, NMSA 1978, § 41-5-13 (1976, as amended through 2021). (RP 1/50-58; *cf.* AB at 1.)

As for Plaintiffs' contentions, PHS replies only to the two analytical options or paths that Plaintiffs develop into arguments in Points I and II of their brief.[3] PHS replies to the arguments in a logical sequence. First, PHS addresses why the analytical framework is not dicta that conflates standing and subject matter jurisdiction. (AB Point II); *infra* Point I.A. Second, PHS addresses why under the framework the Wrongful Death Act, NMSA 1978, §§ 41-2-1 to -4 (1882, as amended through 2001) ("WDA") is properly considered a statute that creates a cause of action (AB Point I); *infra* Point II.B. Distilling the arguments to what matters in them shows that neither path provides an option that is analytically correct under existing New Mexico law.

As New Mexico law currently stands, there is another analytical option which is correct – *i.e.*, to simply reverse the Court of Appeals and affirm the district court. As the district court recognized, the analytical framework applies to the WDA,

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[3] Plaintiffs assert that "[a]t every stage" they have "contended that the district court's dismissal for lack of subject matter jurisdiction . . . contradicts" *Chavez*, 1985-NMSC-114. (AB at 3.) In this Court, however, apart from the two sentences in their Introduction regarding the contention, Plaintiffs do not subsequently develop an argument, as they must, for the Court to consider the contention. *See generally Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶¶ 69-71, 309 P.3d 53; *see also Petritsis v. Simpier*, 1970-NMSC-114, ¶ 11, 82 N.M. 4 ("To present a point for our consideration, ... [a]n error claimed must be specifically stated and argued."). Plaintiffs should be deemed to have waived or abandoned the contention. *See, e.g., State v. Neswood*, 2002-NMCA-081, ¶ 10, 132 N.M. 505; *State v. Sandoval*, 1975-NMCA-096, ¶ 11, 88 N.M. 267. Absent an adequately developed argument to address, PHS does not further address the contention. *Infra*.

which in combination with Rule 1-017(B) (which Plaintiffs nowhere mention in their answer brief), requires that a plaintiff timely seek appointment as the wrongful death personal representative, so as to ensure that a personal representative with standing to prosecute a wrongful death claim is in place toward the outset of the proceedings, as is necessary for a district court to exercise subject matter jurisdiction over the claim. *Infra* Point II.

Argument

I. The Two Analytical Paths That Plaintiffs Address In Their Arguments Are Not Analytically Correct.

A. The Analytical Framework Is Not Dicta That Conflates Standing and Jurisdiction. (Reply - Point II AB.)

In Point II of their brief (AB at 15-22), Plaintiffs argue that a "path" for the Court is to "overrule the single footnote in [*ACLU of New Mexico v. City of Albuquerque*, 2008-NMSC-045, 144 N.M. 471 ("*ACLU*")] and its progeny" (*id.* at 15), which they characterize as "dicta" (*id.* at 16-18) that "conflate[s] . . . standing and jurisdiction[.]" (*Id.* at 20.) That is not a path to take.

For starters, the *ACLU* footnote[4] is not dicta. As this Court recently explained, "[l]egal opinions can . . . synthesize new analytical frameworks . . . which

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[4] "We do note, however, that standing may be a jurisdictional matter when a litigant asserts a cause of action created by statute. As the Pennsylvania Superior Court explained: 'When a statute creates a cause of action and designates who may sue, the issue of standing becomes interwoven with that of subject matter

are not strictly necessary to the decision in the case, but which nonetheless provide legal guidance that should be understood as binding." *State v. Mares*, 2024-NMSC-002, ¶ 40, 543 P.3d 1198. So it can be said of the framework in the footnote. *See, e.g.*, *Disabled Am. Veterans v. Lakeside Veterans Club, Inc.*, 2011-NMCA-099, ¶ 7, 150 N.M. 569 ("Our Supreme Court recently clarified the analysis of the issue of standing and its effect on subject matter jurisdiction in New Mexico proceedings." (invoking the *ACLU* footnote)); *see also Phoenix Funding, LLC v. Aurora Loan Servs., LLC*, 2017-NMSC-010, ¶¶ 18-19, 390 P.3d 174 ("We recently clarified the relationship between justiciability requirements and subject matter jurisdiction."; "In some cases, . . . justiciability requirements are jurisdictional prerequisites. For example, standing is a jurisdictional prerequisite where an action is created by statute and the statute specifies only a limited class of plaintiffs who satisfy certain conditions may sue." (as an example, quoting the analytical framework in *Johnston*, 2016-NMSC-013, ¶ 11)).

Correspondingly, the Court chose to affirm its adoption of the analytical framework in *Johnston*, notwithstanding the Court's recognition that Pennsylvania,

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jurisdiction. Standing then becomes a jurisdictional prerequisite to an action.' *In re Adoption of W.C.K.*, 748 A.2d 223, 228 (Pa.Super.Ct.2000) (quoted authority omitted)." *ACLU*, 2008-NMSC-045, ¶ 9 n.1; *see also Johnston*, 2016-NMSC-013, ¶ 11 (acknowledging abrogation of *In re Adoption of W.C.K* by *In re Nomination Petition of deYoung*, 903 A.2d 1164 (2006)).

the source of the framework, no longer follows it. 2016-NMSC-013, ¶ 11. The Court's decision to affirm its adoption of the framework makes sense. Jurisprudentially, the framework fits in New Mexico. The framework aligns with the provision in New Mexico's Constitution that governs district courts' statutory jurisdiction over "'special cases and proceedings as may be conferred by law[,]'" *Ottino v. Ottino*, 2001-NMCA-012, ¶ 7, 130 N.M. 168 (quoting N.M. Const. art. VI, § 13), meaning by a Legislative enactment. *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[.]"). The framework also aligns with the principle that in creating a cause of action, the Legislature may designate who has standing to bring it. (PHS BIC at 13; *see also id.* at 17-18.)

It follows that when the Legislature creates a cause of action and designates who may sue, the standing of the plaintiff bringing the action has jurisdictional import. It further follows that the framework does not improperly conflate standing and jurisdiction. Rather, it recognizes and respects the Constitutional limitation on district courts' statutory jurisdiction. Plaintiffs' two remaining arguments in Point II of their brief (AB at 20-22) do not provide a basis to conclude differently.

First, Plaintiffs' argument that the analysis called for by the question of whether a statute creates a cause of action can "devolve into a maddening historical

and textual analysis" as shown by *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022) and *United States v. Nutter*, 624 F. Supp. 3d 636 (S.D. W. Va. 2022) (AB at 20-21), goes astray. There is a discrete and settled body of law that is available for the Court to apply in answering the question of whether the WDA creates a cause or right of action unknown to the common law. *Infra* Point I.B.

Second, in "propos[ing] that the approach taken by Judge Bustamante in his concurrence is the correct one[,]" Plaintiffs merely rely on a snippet from *Sundance Mechanical & Utility Corporation v. Atlas*, 1990-NMSC-031, ¶ 24, 109 N.M. 683. (AB at 21-22.) Plaintiffs have not adequately briefed the argument, meaning that the Court need not consider it. *See generally Elane Photography, LLC*, 2013-NMSC-040, ¶¶ 69-71; *see also State v. Murillo*, 2015-NMCA-046, ¶ 17, 347 P.3d 284 ("We will not construct [the] argument . . . . To do so would . . . be unfair . . . to the opposing party . . . that is not afforded an opportunity to fully develop an opposing argument.").

Even if considered, the argument does not help Plaintiffs. The *Sundance* snippet appears in the context of the Court's analysis of the appellants' argument that a subcontractor's cross-claim failed to state a cause of action because the cross-claim did not allege that the subcontractor cross-claimant held a contractor's license which deprived the district court of subject matter jurisdiction. 1990-NMSC-031,

¶¶ 4, 7; *see also id.* ¶¶ 17-26. While acknowledging that the issue was argued "under the rubric of failure to state a claim," Judge Bustamante reasons that "the assertion could just as easily have been made that the subcontractor did not have standing to pursue [the cross-claim] because of his failure to allege that he was properly licensed . . . . If the problem with pleadings or the technical requirements for pursuing a claim are curable, the district court has 'the jurisdiction or authority' to consider requests aimed at solving the . . . problem." *Lopez v. Presbyterian Healthcare Services*, 2024-NMCA-055, ¶ 34, 553 P.3d 481.

Such reasoning does not withstand scrutiny. It does not entail consideration of the analytical framework which the Court adopted after *Sundance*, *supra* pp. 4-5 n. 4 (*ACLU* footnote), and which cannot be disregarded as dicta, *supra* pp. 4-6. It also does not entail consideration of the Constitutional limitation on a district court's statutory jurisdiction (PHS BIC at 12-13) which is not a limitation that may be disregarded. *See Sundance*, 1990-NMSC-031, ¶ 13 (citing *Postal Finance Company v. Sisneros*, 1973-NMSC-029, 84 N.M. 724, for the proposition that "garnishment is [a] 'special case or proceeding' over which [the] district court has only such jurisdiction as is conferred by statute"). Judge Bustamante's analytical approach therefore is not the correct one.

In light of the foregoing considerations, neither is the analytical path that Plaintiffs propose. If the Court were to overrule its adoption of the analytical

framework, the Court would eliminate the helpful and straightforward guidance the framework provides regarding statutory standing and its effect on a district court's subject matter jurisdiction under the law of New Mexico.

B. The Wrongful Death Act Creates A Statutory Cause of Action Unknown To The Common Law. (Reply - Point I AB.)

In Point I of their brief (AB at 5-15), where they treat the analytical framework as governing law, Plaintiffs argue that the "narrowest path" for the Court is to decide that "the WDA did not create a new cause of action" that falls within the statutory jurisdiction provision in Article VI, Section 13 of New Mexico's Constitution. (*Id.* at 5.)[5] Again, that is not a path to take.

In addressing the Court of Appeals' statement that it "agree[d] with the parties that the WDA is a statutory cause of action for which no remedy was available at common law" (and omitting the preceding statement mentioning that Plaintiffs acknowledged that "a wrongful death cause of action originates entirely by statute"), *Lopez,* 2024-NMCA-055, ¶ 17, Plaintiffs equivocate on whether they conceded the issue. (AB at 5 n.1.) In fact, when the Court of Appeals asked them about the issue, Plaintiffs affirmatively conceded that the WDA is a statutory cause of action. (Tr. (2/27/24) at 13:45:16-13:46:10.) Having seen the consequence of their concession,

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[5] By focusing exclusively on the statutory cause of action part of the framework in Point I of their argument (AB at 5-15), Plaintiffs do not dispute that the WDA designates who may bring the action. *Supra* pp. 4-5 n.4; (*cf.* PHS BIC at 14).

and not liking it, Plaintiffs are attempting to change their position in this Court. The Court should hold Plaintiffs to the concession that they knowingly made in the Court of Appeals, which disposes of the remainder of Plaintiffs' Point I argument.

Even if this Court considers whether the WDA is a statutory cause of action that falls within a district court's statutory subject matter jurisdiction, the issue does not help Plaintiffs. Such jurisdiction encompasses "special cases and proceedings as may be conferred by law," meaning "rights and remedies created by statute" that "were unknown to the common law." *Supra* p. 6.

For well over 100 years now, this Court has characterized the WDA as creating a cause or right of action unknown to the common law. *See, e.g., Romero v. Atchison, T. & S.F. Ry. Co.*, 1903-NMSC-008, ¶ 4, 11 N.M. 679 ("*Atchison*") ("[A]t common law no action would lie for an injury caused by the death of a human being."); *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."). Only "by virtue of [L]egislative enactment" is there now a cause of action for wrongful death. *See Atchison*, 1903-NMSC-008, ¶ 4; *accord Romero*, 1994-NMSC-031, ¶ 15 ("Legislative enactment of the [WDA] created a new cause of action in derogation of the common law."). Consequently, "[a]ny such right of action is purely statutory." *Chavez*, 1985-NMSC-114, ¶ 7; *see also Torres v. Sierra*,

1976-NMCA-064, ¶ 9, 89 N.M. 441 ("Any right of action for wrongful death is of statutory origin[.]"). "The statutory authority for a death action . . . is in the [WDA]," *Chavez*, 1985-NMSC-114, ¶ 7, which is "the exclusive remedy governing wrongful death actions in New Mexico." *Romero*, 1994-NMSC-031, ¶ 15.

It logically follows that the cause of action under the WDA is a cause of action that falls within a district court's statutory jurisdiction. Plaintiffs' arguments do not demonstrate differently.

For the most part, Plaintiffs argue that *Johnston* shows that the WDA is not a statutory cause of action. (AB at 5-12.)[6] Analysis of the issue is simpler than Plaintiffs make it out to be. The analysis simply entails answering the following question. Did the cause of action at issue exist at common law or instead was it created by the Legislature? As the question relates to the WDA, *Johnston* holds the answer. As the Court acknowledged, an action to enforce a promissory note, which existed at common law before New Mexico adopted the UCC, is "not . . . representative of a right created by statute, such as a wrongful death action." 2016-NMSC-013, ¶ 12 (internal quotation marks & citation omitted).

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[6] In addressing *Johnston*, Plaintiffs assert in passing that, from the Court's discussion, "it is clear that for causes of action codified by statute, no bright line exists between such causes of action that trigger original jurisdiction and such causes of action that trigger statutory jurisdiction." (AB at 8.) Plaintiffs' preceding discussion of the analytical framework belies the assertion. (*Cf. id.* at 7.)

If nonetheless considered, the multifactorial test devised by Plaintiffs based on their reading of *Johnston* (AB at 10), leads to the same answer. Plaintiffs' "created by statute" test similarly asks whether the cause of action existed at common law, albeit in three different ways. Those are: "(1) whether the statute 'codified certain existing rights and clarified their scope'; (2) whether the statute acknowledged the 'continuing vitality of common law principles of law and equity which supplement its provisions'; and (3) whether the common law was a 'principal source of law governing the rights and duties of the parties[.]'" (*Id.* (citations omitted)). Answering the questions, first, a statute cannot "codify" rights unless they existed at common law. Second, a statute cannot recognize "the continuing vitality of common law principles" if a statute overrides the common law. Third, the common law cannot be the "principal source of law governing the rights and duties of the parties" when the common law did not recognize any rights or duties surrounding a wrongful death. Based on the answers, it stands to reason that the wrongful death action that exists in New Mexico was created by statute.

Estate of Brice v. Toyota Motor Corporation, 2016-NMSC-018, 373 P.3d 977 ("*Brice*"), also does not help Plaintiffs as they contend. (AB at 12-13.) Where they argue "[t]hat the WDA does not create a new cause of action is made clear in [*Brice*]" (*id.* at 12), Plaintiffs clip language from one of the Court's statements, *cf.* 2016-NMSC-018, ¶ 20, which they assert shows that the Court "described the common-

law rule against wrongful death actions as a 'bar' or 'exception' to an otherwise existing action for damages in tort." (*Id.*) No such description appears in *Brice*. And, given the Court's preceding discussion, in which the Court explains that a wrongful death action was not recognized at common law, 2016-NMSC-018, ¶ 18, what *Brice* actually makes clear is that the enactment of the WDA created an action for wrongful death that is "controlled by Sections 41-2-1 to -4." *Id.* ¶ 19.

Plaintiffs also argue that the Court's holding in *Brice – i.e.*, that the doctrine of fraudulent concealment may apply to toll the statutory limitations period in the WDA, 2016-NMSC-018, ¶ 1 – indicates that "the WDA is a common-law cause of action." (AB at 12-13.) Plaintiffs reason that "[i]f the cause of action for wrongful death were 'created by statute,' then the analysis would have been quite different: standing to bring the action would be 'jurisdictional' and therefore not subject to judicial modification." (*Id.* at 13.) Plaintiffs are incorrect. To begin with, the fraudulent concealment issue did not require the Court to resolve whether the wrongful death cause of action was created by statute. Therefore *Brice* does not address the jurisdictional issue that this case presents. *Cf. Fernandez v. Farmers Ins. Co. of Ariz.*, 1993-NMSC-035, ¶ 15, 115 N.M. 622 (a case is not authority for a proposition not considered). Further, in *Brice* the Court explained that its holding fell within the Court's authority to fill in a gap not expressly addressed by the WDA

regarding the practical application of the limitations provision. 2016-NMSC-018, ¶¶ 24-26. Therefore *Brice* does not involve a judicial modification of the WDA.

Plaintiffs' arguments regarding *Estate of Krahmer ex rel. Peck v. Laurel Healthcare Providers, LLC,* 2014-NMCA-001, 315 P.3d 298 ("*Krahmer*"), and *Estate of Lajeuenesse ex rel. Boswell v. Board of Regents of the University of New Mexico*, 2013-NMCA-004, 292 P.3d 485 (*Lajeuenesse*") (AB at 13-14), similarly miss the mark. None of the language Plaintiffs quote from the cases appears in the context of analyzing whether the WDA is a statutory cause of action that falls within a district court's statutory subject matter jurisdiction. Neither case presented that question. *See Krahmer*, 2014-NMCA-001, ¶ 5; *Lajeuenesse*, 2013-NMCA-004, ¶ 1. Had the cases presented the question, presumably the Court of Appeals would have answered it affirmatively given other language in the opinions acknowledging that "[a]t common law, a cause of action for personal injuries that resulted in death did not survive the death of the injured person. The WDA provides the statutory authority for a wrongful death action[.]" *Lajeuenesse*, 2013-NMCA-004, ¶ 10 (citation omitted); *Krahmer*, 2014-NMCA-001, ¶ 6 (similar acknowledgement).

Needless to say, in light of the foregoing considerations, *supra* pp. 9-14, PHS does not agree with Plaintiffs' summation of their Point I arguments. (AB at 14-15.) Instead, because Legislative enactment of the WDA created a cause of action

unknown to the common law, it is a statutory cause of action that falls within a district court's statutory jurisdiction.

II. The Correct Analytical Path Is To Reverse The Court Of Appeals and Affirm The District Court.

As PHS already mentioned, *supra* pp. 3-4, there is another analytical path which is to simply reverse the Court of Appeals and affirm the district court. PHS's opening brief sets forth the contours of the appropriate analysis. (PHS BIC at 23-25; *see also id.* at 12-16.) The analysis is in keeping with the clarifications the Court has made in the law since it decided *Chavez*, 1985-NMSC-114, through both its adoption of the analytical framework and Rule 1-017(B), regarding the necessity of and procedure for a plaintiff to timely seek appointment as the personal representative for a wrongful death claim. This case presents the opportunity to synthesize the clarifications and, in turn, to clarify the analysis that applies when a plaintiff fails to timely seek appointment as the wrongful death personal representative under New Mexico law as it currently stands.

Conclusion

For the reasons set forth in PHS's brief in chief and this reply, the Court should reverse the Court of Appeals and affirm the district court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing brief 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 11th day of October, 2024.

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