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**Civil Procedure - Necessity of the Personal Representative Status
in Wrongful Death Actions: Fact or Fiction: Chavez v. Regents of
the University of New Mexico**

Nickay Borchard

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CIVIL PROCEDURE—Necessity of the Personal Representative Status
in Wrongful Death Actions: Fact or Fiction?: *Chavez v. Regents of the
University of New Mexico*

I. INTRODUCTION

In *Chavez v. Regents of the University of New Mexico*,¹ the New Mexico Supreme Court held that if a wrongful death action is filed by a person other than the personal representative within the statute of limitations, the failure to appoint a personal representative prior to the running of the limitations period does not bar the suit.² Relying on the New Mexico Rules of Civil Procedure 15(c) and 17(a),³ the court found that an amendment alleging that plaintiff now had the capacity to sue related back to the time of filing the original complaint and that, under the circumstances presented in the case, plaintiffs' joinder of the personal representative was accomplished within a reasonable time.⁴ In overruling the court of appeals decision in *Mackey v. Burke*,⁵ the *Chavez* court brought the state in line with the majority of jurisdictions in the United States. This Note analyzes the *Chavez* court's reasoning in light of Rules 15(c) and 17(a) of the New Mexico Rules of Civil Procedure, and considers the wisdom of the rule that requires wrongful death actions to be prosecuted by personal representatives.

II. STATEMENT OF THE CASE

On November 19, 1980, Sandra Chavez, a seventeen year old girl, died in the University of New Mexico Hospital.⁶ On September 14, 1982, Antonio and Cipriana Chavez brought suit under the New Mexico Tort Claims Act⁷ against the Regents of the University of New Mexico, alleging

1. 103 N.M. 606, 711 P.2d 883 (1985).

2. *Id.* at 607, 711 P.2d at 884.

3. N.M. STAT. ANN. R. CIV. P. 15(c) and 17(a) (Repl. Pamp. 1980).

4. *Chavez*, 103 N.M. at 612, 711 P.2d at 889.

5. 102 N.M. 294, 694 P.2d 1359 (Ct. App. 1984), *cert. quashed*, 102 N.M. 293, 694 P.2d 1358 (1985).

6. *Chavez*, 103 N.M. at 607, 711 P.2d at 884.

7. N.M. STAT. ANN. §§41-4-1 to -27 (Repl. Pamp. 1982 and Cum. Supp. 1985). Because the Tort Claims Act provides the exclusive remedy against a public employee, the two year statute of limitations of the act governs the wrongful death action. See *Regents of the University of New Mexico v. Armijo*, 103 N.M. 174, 704 P.2d 428 (1985); *Armijo v. Tandysh*, 98 N.M. 181, 646 P.2d 1245 (Ct. App. 1981) (holding that the specific inclusion of a wrongful death claim within a malpractice claim makes the limitation period of the Medical Malpractice Act applicable due to the fact that a specific inclusion controls over the general limitation period for wrongful death).

medical malpractice and the wrongful death of their daughter.⁸ The plaintiffs asserted their capacity to sue as "the parents and surviving heirs and representatives of Sandra Diane Chavez, an unmarried minor."⁹ The defendants answered the complaint on September 29, 1982, without raising an affirmative defense of lack of capacity to sue.¹⁰ On June 8, 1983, after the two year statute of limitations applicable under the Tort Claims Act had expired, Plaintiff Cipriana Chavez was appointed personal representative, a statutory requirement for bringing a wrongful death action in New Mexico.¹¹ On November 28, 1984, after two years of discovery and motions on the merits, the defendants filed a motion to dismiss or, in the alternative, for summary judgment based on plaintiffs' failure to obtain court-appointment of a personal representative within the statute of limitations period.¹² The trial court denied defendants' motion, but certified the issue for interlocutory appeal.¹³ Relying on its previous decision in *Mackey v. Burke*,¹⁴ the New Mexico Court of Appeals reversed the trial court on the ground that the wrongful death action was barred

8. *Chavez*, 103 N.M. at 607, 711 P.2d at 884.

9. *Id.* The plaintiffs sought damages for the loss of their daughter's society, comfort, support, counsel and services, for medical and funeral expenses, and for attorney fees.

10. *Id.* The legal capacity to sue is defined as an individual's "right to come into court." BLACK'S LAW DICTIONARY 803 (5th ed. 1979). Capacity is defined as a party's personal right to come into court, regardless of whether the party has an enforceable right or interest or is the real party in interest. 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1559 (1971). See also *Johnson v. Helicopter & Airplane Services Corp.*, 404 F. Supp. 726, 729 (D.C. Md. 1975). Capacity is a procedural issue that deals with personal qualifications of a party to litigate. 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1559.

11. N.M. STAT. ANN. § 41-2-3 (Repl. Pamp. 1982 and Cum. Supp. 1985). Section 41-2-3 provides:

Every such [wrongful death] action . . . shall be brought by and in the name or names of the personal representative or representatives of such deceased person . . . The proceeds of any judgment obtained in any such action shall not be liable for any debt of the deceased: provided, he or she shall have left a husband, wife, child, father, mother, brother, sister or child or children of the deceased child, but shall be distributed as follows:

First. If there be a surviving husband or wife, and no child, then to such husband or wife; if there be a surviving husband or wife and a child or children or grandchildren, then equally to each, the grandchild or grandchildren taking by right of representation; if there be no husband or wife, but a child or children, or grandchild or grandchildren, then to such child or children and grandchild or grandchildren, by right of representation; if such deceased be a minor, childless and unmarried, then to the father and mother, who shall have an equal interest in the judgment, or if either of them be dead, then to the survivor . . .

(emphasis added).

12. *Chavez*, 103 N.M. at 607, 711 P.2d at 884.

13. *Id.*

14. 102 N.M. 294, 694 P.2d 1359 (Ct. App. 1984), cert. quashed, 102 N.M. 293, 694 P.2d 1358 (1985). *Mackey* stood for the proposition that plaintiffs who sued individually and as the natural parents of the deceased were barred from bringing a wrongful death action under the Medical Malpractice Act, N.M. STAT. ANN. §§ 41-5-1 to -28 (Repl. Pamp. 1982), as a result of their failure to name a personal representative within the limitation period.

by the failure of a duly appointed personal representative to sue within the limitations period.¹⁵

The New Mexico Supreme Court granted certiorari and reversed the court of appeals.¹⁶ According to the Supreme Court, plaintiffs' failure to secure court-appointment of a personal representative within the limitations period did not bar the action timely filed by the natural parents of the deceased.¹⁷ In addition, the court overruled any prior case law to the extent that it conflicted with the *Chavez* decision.¹⁸

III. HISTORICAL PERSPECTIVE

At common law, no cause of action existed for wrongful death.¹⁹ Wrongful death actions are thus purely statutory creations and can only be brought as the authorizing statutes permit.²⁰ The New Mexico wrongful death act requires that such a suit be brought "by and in the name or names of the personal representative or representatives of such deceased person."²¹ The term "personal representative" is used to identify the agency, the trustee, or the person who is permitted to prosecute this particular kind of action.²² The New Mexico Wrongful Death Act,²³ like wrongful death statutes in other jurisdictions, considers the personal representative a nominal party, having no interest in the case for himself or the estate he represents.²⁴ Under this view, the personal representative does not act in his capacity as executor, administrator, or representative

15. *Chavez*, 103 N.M. at 607-08, 711 P.2d at 884-85 (citing to the memorandum opinion of the Court of Appeals).

16. *Id.* at 607, 711 P.2d at 884.

17. *Id.*

18. *Id.* at 608, 711 P.2d at 885. Thus, the *Chavez* court effectively overruled the *Mackey* decision, 102 N.M. 294, 694 P.2d 1359. Unfortunately, the plaintiffs in *Mackey* had settled with their insurance company before the *Chavez* decision was rendered so that they were left without recourse to challenge the Court of Appeals' decision in their case.

19. *Ickes v. Brimhall*, 42 N.M. 412, 79 P.2d 942 (1938).

20. *See, e.g., Torres v. Sierra*, 89 N.M. 441, 553 P.2d 721 (Ct. App. 1976); *Perry v. Staver*, 81 N.M. 766, 473 P.2d 380 (Ct. App. 1970). The purpose of the wrongful death statute is to promote safety of life and limb by making negligence that causes death costly to the wrongdoer. *Gutierrez v. Kent Nowlin Constr., Co.*, 99 N.M. 394, 400, 658 P.2d 1121, 1127 (Ct. App. 1981).

21. N.M. STAT. ANN. § 41-2-3 (Repl. Pamp. 1982).

22. *See Stang v. Hertz Corp.*, 81 N.M. 348, 350, 467 P.2d 14, 16 (1970); *Henkel v. Hood*, 49 N.M. 45, 47, 156 P.2d 790, 792 (1945). Other wrongful death statutes designate other persons, such as administrators and executors as the proper parties to bring suit. *See, e.g., Deupree v. Levinson*, 186 F.2d 297 (6th Cir. 1950), *cert. denied*, 341 U.S. 915 (1950); *Griffin v. Workman*, 73 So.2d 844 (Fla. 1954).

23. N.M. STAT. ANN. §§ 41-2-1 to -4 (Repl. Pamp. 1982).

24. *See, e.g., McDavid v. Fiscar*, 342 Ill. App. 673, 97 N.E.2d 587 (1951) (Neither the administrator nor the estate of the decedent has any interest in, or right to, any judgment that may be recovered in a wrongful death action; the real party in interest is the next of kin, as beneficiary); *Re Estate of Ives*, 248 N.C. 176, 102 S.E.2d 807 (1958) (In a wrongful death action, the real party in interest is the beneficiary under the statute, not the administrator).

of the decedent's estate, but sues as a trustee on behalf of the particular persons designated in the act.²⁵ Thus, the next of kin are, in essence, the "real parties in interest" because they share the recovery, even though they are not necessary parties to the action according to the statute.²⁶ Judgment proceeds never become an asset of the community or of the decedent's estate.²⁷ Instead, the proceeds belong to the discoverable and identifiable beneficiaries named in the wrongful death statute.²⁸

Although the Wrongful Death Act specifically mandates an action's commencement by a personal representative, New Mexico decisions prior to *Chavez* diminished the significance of the statutory requirement. The court in *Henkel v. Hood*²⁹ set the standard for interpreting the personal representative clause in the Wrongful Death Act.³⁰ The court indicated that it is merely incidental that a personal representative is required to bring a suit for wrongful death.³¹ It held that a Texas administrator with limited powers could maintain the suit as a personal representative, even though the administrator was not technically qualified to act in New Mexico.³² Most importantly, the *Henkel* decision stands for the proposition that wrongful death actions should not fail because of the absence of a party technically capable of suing.³³

Like *Henkel*, subsequent New Mexico case law has broadly construed the statutory mandate of the personal representative requirement.³⁴ One court even called personal representatives "nominal" parties.³⁵ Another court,³⁶ applying the definitional scope of the *Henkel* court's decision,

25. See 22 AM.JUR.2D *Death* § 198 (1965 and Cum. Supp. 1986).

26. S. SPEISER, RECOVERY FOR WRONGFUL DEATH 2d § 11:28 (1975).

27. See *Varney v. Taylor*, 77 N.M. 28, 419 P.2d 234 (1966); *Baca v. Baca*, 71 N.M. 468, 379 P.2d 765 (1963); *Trefzer v. Stiles*, 56 N.M. 296, 243 P.2d 605 (1952). See *supra* note 11.

28. *Dominguez v. Rogers*, 100 N.M. 605, 673 P.2d 1338 (Ct. App. 1983), *cert. denied*, 100 N.M. 689, 675 P.2d 421 (1983); *Varney*, 77 N.M. at 34, 419 P.2d at 238-39; *Kilkenny v. Kenney*, 68 N.M. 266, 361 P.2d 149 (1961).

29. 49 N.M. 45, 156 P.2d 790 (1945).

30. N.M. STAT. ANN. §§ 41-2-1 to -4 (Repl. Pamph. 1982).

31. *Henkel*, 49 N.M. at 47, 156 P.2d at 791. The *Henkel* court indicated that the personal representative is simply the individual named by the Legislature to bring suit. It is unnecessary for an administrator to have full powers over an estate to sue in New Mexico for wrongful death on behalf of the statutory beneficiaries.

32. *Id.* The *Henkel* court reached this conclusion by defining the scope of the personal representative as expanding to include temporary, special, and ancillary administrators, because the duties of such an administrator were not important to determine an administrator's capacity to sue for wrongful death. An ancillary administration is auxiliary and subordinate to the administration at the place of the decedent's domicile and is established merely for the purpose of collecting assets and paying debts in a foreign state or country. BLACK'S LAW DICTIONARY 41 (5th ed. 1979). A special administration, on the other hand, is the authority to administer upon a few effects of a decedent, rather than his whole estate. *Id.* at 42.

33. 49 N.M. at 47, 156 P.2d at 791.

34. See *Torres*, 89 N.M. at 444, 553 P.2d at 724. See also *Chavez*, 103 N.M. at 608, 711 P.2d at 885.

35. *Dominguez v. Rogers*, 100 N.M. 605, 608, 673 P.2d 1338, 1341 (Ct. App. 1983).

36. *Torres*, 89 N.M. at 444, 553 P.2d at 724.

found that a Mexican national, an alien in the United States, could bring the wrongful death action as the administrator of his son's estate, since an administrator falls within the category of personal representative.³⁷ In sum, the New Mexico case law concerning wrongful death actions tends to favor a liberal interpretation of representative capacity.

A recent New Mexico case, however, adopted a novel approach when considering the question of representative capacity. *Mackey v. Burke*,³⁸ a case decided by the New Mexico Court of Appeals only eighteen months before the Supreme Court decided *Chavez*, involved a situation similar to that in *Chavez*. In *Mackey*, plaintiffs brought a wrongful death action individually and as the parents of their deceased daughter.³⁹ After the statute of limitations had run, plaintiffs filed an amended complaint to add the decedent's father as personal representative.⁴⁰ The trial court entered summary judgment for the defendants.⁴¹ On plaintiff's appeal, the Court of Appeals affirmed the trial court.⁴² The *Mackey* court reasoned that the personal representative requirement was jurisdictional and that a failure to meet the statutory requirement would render the suit a "nullity."⁴³ Because the court interpreted the original complaint as being void, an amendment adding a party as a personal representative could not relate back to the original filing of the complaint so as to avoid the running of the statute of limitations.⁴⁴

The *Mackey* decision followed the minority view on the subject.⁴⁵ According to this view, the individual has no standing to sue in the courts until attaining a personal representative status, and an amendment made after the right of action has expired cannot validate the unauthorized filing of the suit.⁴⁶ Furthermore, the decision in *Mackey* interpreted the *Henkel* court's decision as requiring, as a jurisdictional prerequisite, the court-appointment of a personal representative before filing a wrongful death action.⁴⁷ Emphasizing the representative capacity of the plaintiff, the *Mackey* court concluded that if the personal representative requirement

37. *Id.*

38. 102 N.M. 294, 694 P.2d 1359.

39. *Id.* at 295, 694 P.2d at 1360.

40. *Id.*

41. *Id.*

42. *Id.* at 299, 694 P.2d at 1364. The New Mexico Supreme Court denied certiorari. 102 N.M. 293, 694 P.2d 1358 (1985).

43. *Mackey*, 102 N.M. at 299, 694 P.2d at 1364.

44. *Id.* at 298-99, 694 P.2d at 1363-64.

45. *See, e.g.*, *Mann v. Moss*, 323 F. Supp. 1126 (S.D. Iowa 1971) (refusal to file with the court an authenticated copy of the foreign fiduciary's appointment at the time the wrongful death action was brought or within the two year statute of limitations was a fatal defect not curable by amendment); *General Motors Corp. v. Arnett*, 418 N.E.2d 546 (Ind. Ct. App. 1981) (the plaintiff's belated appointment as personal representative did not relate back to the filing of the original complaint).

46. *Davis v. Meridian & Bigbee R. Co.*, 248 Miss. 707, 161 So.2d 171 (1964).

47. 102 N.M. at 297, 694 P.2d at 1362. In contrast, the *Henkel* court indicated that personal representatives were merely statutory designations.

was not met within the statute of limitations, the suit was a "nullity," due to the inability of the plaintiffs to assert the right sought to be enforced in the action.⁴⁸ Since plaintiffs initially lacked the right to enforce the action, the court concluded that plaintiffs' reliance on Rule 15(c) was misplaced.⁴⁹ The *Mackey* court rejected plaintiffs' arguments that the logic inherent in the Rules of Civil Procedure and the permissiveness usually given to amendments of pleadings should apply to allow plaintiffs' amended complaint to relate back to the date of initial filing.⁵⁰ The alternative would have allowed plaintiffs' amendment to relate back, a view adopted by most courts that favor amendments over forfeitures of causes of action, especially where no prejudice would result to the defendant.⁵¹

IV. DISCUSSION

A. *New Mexico Supreme Court's Decision in Chavez*

In New Mexico, the failure of a plaintiff in a wrongful death action to obtain court-appointment of a personal representative before the running of the statute of limitations will not bar the maintenance of the suit if a subsequent court-appointment is obtained and the personal representative is made a party within a reasonable time.⁵² Realizing that wrongful death actions allow personal injury claims to survive the death of the injured person,⁵³ the New Mexico Supreme Court in *Chavez* noted that the statutory requirement of bringing the suit by a personal representative was a mere formality.⁵⁴ That view is consistent with the trend of the case law in New Mexico, which indicates that it is incidental that a personal representative is authorized to bring a wrongful death action⁵⁵ and that the personal representative is only a nominal party.⁵⁶ One of the guiding principles behind the court's interpretation is that the Wrongful Death Act should be liberally construed⁵⁷ and that the action should not fail

48. *Id.* at 299, 694 P.2d at 1364.

49. *Id.*

50. *Mackey*, 102 N.M. at 297-98, 694 P.2d at 1362-63.

51. WRIGHT & MILLER, *supra* note 10, at § 1555.

52. *Chavez*, 103 N.M. at 607, 711 P.2d at 884.

53. N.M. STAT. ANN. § 41-2-1 provides:

Whenever the death of a person shall be caused by the wrongful act, neglect or default of another . . . and the act, or neglect, or default, is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, 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.

The significance of this section lies in the fact that if the injured party had lived, he would have been able to bring an action against the wrongdoer for personal injuries. *See, e.g., Whitmer v. El Paso & S.W. Co.*, 201 F. 193 (5th Cir. 1912).

54. 103 N.M. at 608, 711 P.2d at 885.

55. *Henkel*, 49 N.M. at 47, 156 P.2d at 791.

56. *Dominguez*, 100 N.M. at 608, 673 P.2d at 1341.

57. *Chavez*, 103 N.M. at 609, 711 P.2d at 886.

simply because the plaintiffs, who were the natural parties to sue, lacked the capacity to sue until after the statute of limitations had run.⁵⁸

In refusing to bar plaintiffs' action, the court relied upon the New Mexico Rules of Civil Procedure 15(c) and 17(a).⁵⁹ Since New Mexico courts prefer to further "the interests of justice and to promote the adjudication of a case upon its merits,"⁶⁰ amendments should be freely granted and permitted to relate back to the original filing of a complaint whenever the requirements of Rule 15(c) are met.⁶¹ The court further relied on Rule 17(a) for the proposition that a reasonable time for joinder or substitution of parties should be permitted when a suit is not commenced by the real party in interest as a result of an honest mistake.⁶² The progression of the case through two years of extensive discovery before the defendants ever questioned the plaintiffs' capacity to sue led the court to the ultimate conclusion that the amendment should relate back to the initial complaint, thereby preventing a bar to plaintiffs' action.⁶³ Relation-back could be accomplished under either Rule 15(c) or 17(a), both because the claim asserted in the amended pleading arose out of the same conduct as specified in the original complaint and because the defendants would not be prejudiced by plaintiffs' appointment as personal representative.⁶⁴

Additionally, the New Mexico Supreme Court expressly overruled *Mackey v. Burke*.⁶⁵ The court reasoned that the Court of Appeals in *Mackey* had drawn three 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 adding a party as a personal representative could not relate back to the original complaint if filed after the statute of limitations had run.⁶⁶ Because the New Mexico Supreme Court saw these views as unnecessarily restrictive, it overturned the *Mackey* decision.⁶⁷ The *Chavez* court also distinguished the cases upon which the *Mackey* court relied to reach its conclusion that the original suit was a nullity.⁶⁸

58. *Id.* (citing the *Henkel* decision for the proposition that incapacity to sue does not bar the action).

59. N.M. R. Civ. P. 15(c) and 17(a).

60. *Chavez*, 103 N.M. at 610, 711 P.2d at 887.

61. *Id.*

62. *Id.*

63. *Id.* at 611-12, 711 P.2d at 888-89.

64. *Id.*

65. *Id.* at 608, 711 P.2d at 885.

66. *Id.* at 609, 711 P.2d at 886.

67. *Id.*

68. *Id.* at 610, 711 P.2d at 887. The *Chavez* court indicated that in *DeVargas v. State ex rel. New Mexico Dep't of Corrections*, 97 N.M. 447, 640 P.2d 1327 (Ct. App. 1981), *cert. quashed*, 97 N.M. 563, 642 P.2d 166 (1982), the original complaint was a nullity because it failed to state a claim for relief under the Civil Rights Act. *Mercer v. Morgan*, 86 N.M. 711, 526 P.2d 1304 (Ct. App. 1974), was distinguished because the suit was filed against a defendant who was deceased at the time of filing the complaint and, therefore, the original pleading was a nullity.

B. Analysis of the Chavez Decision

The New Mexico Supreme Court ruled that plaintiffs' lack of capacity to sue within the limitations period, although otherwise properly brought, would not bar their wrongful death action.⁶⁹ The court held that relation-back of plaintiffs' amended complaint should be permitted when all that is missing is the representative status of the plaintiffs within the statutory period.⁷⁰ Furthermore, the court's reliance on precedent from other jurisdictions served to position New Mexico among the ranks of the majority of United States jurisdictions.⁷¹

Rules 15(c) and 17(a) of the New Mexico Rules of Civil Procedure provided the basis for the court's solution to the problem caused by the plaintiffs' failure to secure court-appointment of a personal representative within the statute of limitations.⁷² New Mexico has patterned its Rules of Civil Procedure after the Federal Rules of Civil Procedure.⁷³ It is well-established at both the state and federal levels that pleadings are not an end in themselves, but are only a means to the proper presentation of a case.⁷⁴ In light of this general goal, Rule 15(c) and the *Chavez* decision recognize that pleadings should not be over-emphasized.⁷⁵

Rule 15(c) governs the relation back of amendments.⁷⁶ It provides that

69. *Chavez*, 103 N.M. at 612, 711 P.2d at 889.

70. *Id.* at 610, 711 P.2d at 887.

71. The majority view authorizes plaintiffs who bring wrongful death actions individually, rather than in a representative capacity, to allege due appointment as a representative through an amendment, notwithstanding the expiration of the statute of limitations. *See, e.g.,* Longbottom v. Swaby, 397 F.2d 45 (5th Cir. 1968); Crowder v. Gordons Trans. Inc., 387 F.2d 413 (8th Cir. 1967); Holmes v. Pennsylvania New York Central Trans. Co., 48 F.R.D. 449 (N.D. Ind. 1969); Shinkle v. Union City Body Co., 94 F.R.D. 631 (D. Kan. 1982); Brohan v. Volkswagen Mfg. Corp. of America, 97 F.R.D. 46 (E.D.N.Y. 1983); Frankel v. Styer, 209 F. Supp. 509 (D.C. Pa. 1962); Fierstein v. Piper Aircraft Corp., 79 F. Supp. 217 (M.D. Pa. 1948); Bermudez v. Florida Power & Light Co., 433 So.2d 565 (Fla. Ct. App. 1983), *cert. denied*, 444 So.2d 416 (1984); Pavlov v. Konwall, 113 Ill. App. 3d 576, 447 N.E.2d 982 (1983); Modern Bakery, Inc. v. Brashear, 405 S.W.2d 742 (Ky. 1966); Burel v. North Carolina Baptist Hospital, Inc., 306 N.C. 214, 293 S.E.2d 85 (1982); Kyes v. Pennsylvania R. Co., 158 Ohio St. 362, 109 N.E.2d 503 (1952). *See also* Annot., 12 A.L.R. FED 233 (1972); Annot., 27 A.L.R.4TH 198 (1984); Annot., 3 A.L.R.3D 1234 (1965).

72. *Chavez*, 103 N.M. at 609, 711 P.2d at 886.

73. *Id.* 103 N.M. at 611, 711 P.2d at 888. *See also* Malone v. Swift Fresh Meats Co., 91 N.M. 359, 362, 574 P.2d 283, 286 (1978).

74. 3 J. MOORE, MOORE'S FEDERAL PRACTICE § 15.02[1] (2nd ed. 1985). *See, e.g.,* Conley v. Gibson, 355 U.S. 41, 48 (1957) ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.") (as cited in Hambaugh v. Peoples, 75 N.M. 144, 153, 401 P.2d 777, 782 (1965); United States v. Hougham, 364 U.S. 310 (1960); Seasons, Inc. v. Atwell, 86 N.M. 751, 753, 527 P.2d 792, 794 (1974) (The purpose of pleadings is to give the parties "fair notice" of both claims and defenses and the grounds upon which they rest).

75. According to Moore, Rule 15 has three purposes: (1) it facilitates amendments; (2) it adopts the relation-back doctrine; and (3) it recognizes that pleadings should not be over-emphasized at the trial stage. MOORE, *supra* note 74, at §§ 15.02[1].

76. N.M. R. CIV. P. 15(c); FED. R. CIV. P. 15(c). Rule 15(c) reads as follows:

(c) Relation back of amendments.

Whenever the claim or defense asserted in the amended pleading arose out of the

a claim asserted in an amended pleading relates back to the date of the original pleading if it arose out of the conduct, transaction or occurrence set forth in the original pleading.⁷⁷ In other words, Rule 15(c) seeks a common core of operative facts in the original and amended pleading.⁷⁸ However, since the purpose of the relation-back doctrine is to ameliorate the effect of the statute of limitations, the standard for determining whether amendments qualify under Rule 15(c) is not simply an identity of transaction test.⁷⁹ In addition, the defendant must have received adequate notice within the limitations period of the claim against him, so that he will not be unfairly prejudiced if the amendment was permitted to relate back.⁸⁰

Although Rule 15(c) is considered a device for changing parties, the rule, as phrased, seems to deal only with changing defendants. At first glance, it would appear inapplicable to changing the capacity of a plaintiff to bring an action. However, the Advisory Committee Note indicates that the approach adopted in Rule 15(c) towards amendments affecting defendants extends by analogy to changing plaintiffs.⁸¹ In fact, the Advisory Committee suggests that the problem of relation back is generally easier to resolve in the context of changing plaintiffs than when it is presented by a change in defendants.⁸² This suggestion is based upon the fact that sufficient identity of interest between the original and new plaintiff can be shown more easily than when defendants are being changed, and there is less likely to be prejudice to the defendant when the only amendment is plaintiff's capacity to sue.⁸³

The *Chavez* court's justification for the result it reached was technically sound. Through its emphasis on Rule 15(c), a rule used primarily to change defendants, the court implied that it is also acceptable to use 15(c)

conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment: (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits; and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

77. *Id.*

78. WRIGHT & MILLER, *supra* note 10, at § 1497 (1971).

79. *Id.*

80. N.M. R. CIV. P. 15(c); FED. R. CIV. P. 15(c); 3 J. MOORE, MOORE'S FEDERAL PRACTICE § 15.15; WRIGHT & MILLER, *supra* note 10, at § 1497.

81. 39 F.R.D. 82-84 (1966). Advisory Committee Note to the 1966 amendment to Rule 15(c). The note indicated that as with changing defendants, the chief consideration of policy is the statute of limitations.

82. 39 F.R.D. at 83; WRIGHT & MILLER, *supra* note 10, § 1501 at 523-24.

83. MOORE, *supra* note 74, at § 15.15[4.-2]. The defendant should thus not be permitted to invoke a limitations defense as long as the scope of the amended pleading remains within the "ambit" of the conduct, transaction, or occurrence set forth in the original pleading. WRIGHT & MILLER, *supra* note 10, § 1501 at 524.

to change plaintiffs.⁸⁴ In the present case, there was little doubt that the plaintiffs' claim against the defendants in their amended complaint was identical to the cause of action alleged in the original complaint. All that was altered was plaintiffs' capacity to sue. Thus, the defendants clearly had notice of the claim against them within the statutory period, and they would not be prejudiced by the appointment of the plaintiff as personal representative after the running of the statute of limitations. Therefore, the *Chavez* court followed the procedural approach that avoided forfeiture and properly allowed plaintiffs' amended complaint to relate back to the original filing of the complaint.

Although no technical error resulted from the court's application of Rule 15(c), a more efficient means of curing a plaintiff's lack of capacity to sue is through a utilization of Rule 17(a), which concerns the "real party in interest."⁸⁵ The real party in interest is the party who, by substantive law, has the right sought to be enforced.⁸⁶ Thus, a party authorized by statute to maintain an action is a real party in interest. In addition to the requirement that the party must be the owner of the right sought to be enforced, New Mexico requires that the plaintiff must be in a position to discharge the defendant from the liability being asserted in the suit.⁸⁷

Because of the liberal application of the Rules of Civil Procedure, a claim that is not prosecuted by the real party in interest may usually be amended if the error results from an honest mistake.⁸⁸ Rule 17(a) stipulates that the court "may allow a reasonable time for ratification of commencement of the action by, or joinder or substitution of, the real party in interest. . . ."⁸⁹ This final sentence in Rule 17(a) was designed to avoid forfeiture and injustice when an understandable mistake was made

84. *Chavez*, 103 N.M. at 610, 711 P.2d at 887.

85. N.M. R. Civ. P. 17(a) provides:

(a) Real party in interest. Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the state so provides, an action for the use of benefit of another shall be brought in the name of the state. Where it appears that an action, by reason of honest mistake, is not prosecuted in the name of the real party in interest, the court may allow a reasonable time for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

86. MOORE, *supra* note 74, § 17.07 at 17-65.

87. *L. R. Property Management v. Grebe*, 96 N.M. 22, 23, 627 P.2d 864, 865 (1981); *Jesko v. Stauffer Chemical Co.*, 89 N.M. 786, 790, 558 P.2d 55, 59 (Ct. App. 1976); *Reagan v. Dougherty*, 40 N.M. 439, 62 P.2d 810 (1936).

88. N.M. R. Civ. P. 17(a).

89. *Id.*

in selecting the party in whose name the action should be brought.⁹⁰ Consequently, a correction of the parties is permitted even after the statute of limitations has run.⁹¹ Like Rule 15(c), Rule 17(a) reflects the general policy of the rules of civil procedure: an error in choosing a party at the pleading stage should not be the basis for dismissal of the action.

The *Chavez* decision could have avoided any resort to Rule 15(c) by relying entirely upon Rule 17(a).⁹² In a wrongful death action, Rule 17(a) and the Wrongful Death Act require that a personal representative file the complaint.⁹³ Rule 17(a) permits "ratification of commencement of the action" within a reasonable time.⁹⁴ Therefore, the court in *Chavez* could have cured the defect in plaintiffs' original complaint, which was amended two months after the running of the limitations period,⁹⁵ by complete reliance on Rule 17(a).

In addition to its solution to the statute of limitations problem, the *Chavez* court discussed the earlier New Mexico case of *DeVargas v. State ex rel. New Mexico Department of Corrections*⁹⁶ with some disapproval.⁹⁷ *Chavez* distinguished *DeVargas* on its facts.⁹⁸ In *DeVargas*, the original complaint failed to state a claim for relief under Section 1983 of the Civil Rights Act.⁹⁹ The court held that any attempt to amend the complaint after the statute of limitations had run would fail since the original complaint was a nullity.¹⁰⁰ The *Chavez* court attempted to reduce the harshness of such a result by stating, somewhat unpersuasively, that the complaint in the present case was "valid on its face."¹⁰¹

While most courts agree that the original complaint is still valid when

90. 39 F.R.D. 85. The Advisory Committee Note to the 1966 amendment to Rule 17(a) indicated that the provision was included simply to promote justice. Now that "justice has been accomplished," the modern function of the rule is simply to protect the defendant against a subsequent action by the party actually entitled to recover and to insure that the judgment will have its proper effect as *res judicata*. *Id.*

91. WRIGHT & MILLER, *supra* note 10, at § 1555.

92. *Id.* at § 1501. See *Longbottom v. Swaby*, 397 F.2d 45 (5th Cir. 1968) (Eliminating the applicability of Rule 15(c) when all that the amendment sought was to change plaintiff's capacity to sue); *Brohan v. Volkswagen Mfg. Corp. of America*, 97 F.R.D. 46 (E.D.N.Y. 1983) (Correcting plaintiff's capacity to sue after the statute of limitations had run was the type of technical mistake contemplated by Rule 17(a)).

93. N.M. STAT. ANN. § 41-2-3.

94. N.M. R. CIV. P. 17(a).

95. 103 N.M. at 607, 711 P.2d at 884.

96. 97 N.M. 447, 640 P.2d 1327 (1981).

97. 103 N.M. at 610, 711 P.2d at 887.

98. *Id.*

99. 42 U.S.C. § 1983 (1982).

100. *DeVargas*, 97 N.M. at 452, 640 P.2d at 1329.

101. 103 N.M. at 610, 711 P.2d at 887. The court explained that the complaint's "only defect is that the plaintiffs failed to secure appointment as personal representatives within the statutory period." *Id.*

capacity to sue is questioned, a party must also have the capacity to sue in order to commence and maintain an action.¹⁰² The distinction between the two views lies in the interpretation given to the statute of limitations period in a wrongful death statute. The minority position, as evidenced in *Mackey v. Burke*,¹⁰³ views the appointment of a personal representative as a condition precedent or a jurisdictional necessity to maintain the action;¹⁰⁴ the majority perceives the appointment of a personal representative as a requirement that is amenable to changes and liberal granting of amendments in order to ensure that the action is prosecuted by the real party in interest.¹⁰⁵ In light of the possibility of harsh results continuing to occur in New Mexico under the minority view, the Supreme Court in *Chavez* favored justice over strict statutory and procedural requirements, and adopted the majority view as it applied to wrongful death actions.

The rationale of *Chavez* also served to undercut the basis of the opinion in *DeVargas*, which did not allow an amendment of a Section 1983 action. In light of the court's shift towards "justice" through the liberal granting of amendments, the failure in the future to allege a cause of action under Section 1983 within the statute of limitations period may not be fatal to the action. *DeVargas* may thus be overturned by relying on the *Chavez* rationale.

C. Ramifications of the Chavez Decision

The *Chavez* decision makes clear that the legislative mandate must be followed; wrongful death actions must be pursued by a personal representative, regardless of the court's depiction of a personal representative as a nominal party.¹⁰⁶ Future wrongful death litigants should heed the New Mexico Supreme Court's directive and obtain court-appointment of a personal representative within the statute of limitations, rather than rely on the *Chavez* court rationale to save them. *Chavez* may well be limited to its specific facts. Thus, in future cases where the natural persons to sue do not bring the action, where they fail to correct their error on their own initiative shortly after the statute of limitations has run, or where "sand-bagging" (the defendants' failure to bring plaintiffs' lack of capacity to the attention of the court until several years after the action commences) exists, a New Mexico court may reject arguments for a relation-back based on furthering the ends of justice and pursuing the goals of the rules of civil procedure.

102. *Pearson v. Anthony*, 218 Iowa 697, 254 N.W. 10 (1934).

103. 102 N.M. 294, 694 P.2d 1359.

104. *See, e.g., Mackey v. Burke*, 102 N.M. 294, 694 P.2d 1359 (Ct. App. 1984); *General Motors Corp. v. Arnett*, 418 N.E.2d 546 (Ind. Ct. App. 1981).

105. *Chavez*, 103 N.M. 606, 711 P.2d 883.

106. *Id.*

V. CONCLUSION

The Supreme Court in *Chavez* returned New Mexico to the mainstream position previously rejected by the court of appeals in *Mackey v. Burke*.¹⁰⁷ Through its reliance on the New Mexico Rules of Civil Procedure 15(c) and 17(a), the court prevented a dismissal of plaintiffs' action for wrongful death that would have resulted from the lack of capacity to sue as personal representative within the statute of limitations. A practitioner confronted with a wrongful death action in the future would do well to obtain court-appointment of a personal representative within the statute of limitations, because the *Chavez* decision may not apply when facts, controlling in this case, are not present in another.

NICKAY BOUCHARD

107. *Id.*; *Mackey*, 102 N.M. 294, 694 P.2d 1359.