

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

ARTHUR BUSTOS, as Personal Representative  
of the Estate of MARK V., *et al.*,

Plaintiffs-Respondents,

v.

No. 33,653

ZIA PARK, LLC, RICK BAUGH,  
STATE OF NEW MEXICO *ex rel.*  
New Mexico Racing Commission, and  
RAMIREZ AND SONS, INC., a  
New Mexico Corporation,

Defendants-Petitioners.

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On Writ of Certiorari to the New Mexico Court of Appeals

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**BRIEF OF AMICUS CURIAE  
NEW MEXICO DEFENSE LAWYERS ASSOCIATION  
IN SUPPORT OF PETITIONERS**

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## SUMMARY OF PROCEEDINGS

### NATURE OF THE CASE / SUMMARY OF RELEVANT FACTS

Plaintiffs filed the lawsuit that forms the basis of this appeal on September 19, 2011. [RP 1] The lawsuit was filed in San Miguel County, which is located in the Fourth Judicial District. [RP 1] The sole basis for establishing venue in San Miguel County was the residence of plaintiff Arthur Bustos. [RP 1-4] Arthur Bustos was a named plaintiff solely in his capacity as personal representative for the Estate of Mark V.<sup>1</sup> [RP 2] No other plaintiff or defendant would have justified venue in San Miguel County under New Mexico's venue statute. [RP 1-4]

### COURSE OF PROCEEDINGS / DISPOSITION IN THE LOWER COURT

Defendants Zia Park, LLC and Rick Baugh filed a Motion to Dismiss for Improper Venue on February 16, 2012. [RP 65-71] Judge Mitchell denied the Motion to Dismiss for Improper Venue; however, he granted Defendants the right to seek interlocutory appeal from the Court of Appeals. [RP 244-45] The Court of Appeals denied the Application for Interlocutory Appeal. [BIC 3] This Court, pursuant to a Petition for Writ of Certiorari to the Court of Appeals, granted the petition. [RP 265-66] This Court, moreover, invited the New Mexico Defense Lawyers Association

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<sup>1</sup> Arthur Bustos, in this case, was not appointed personal representative for the Estate of Mark V. until after the lawsuit was filed. NMDLA agrees with the position taken by Petitioners in the Brief-in-Chief, *i.e.*, that venue cannot be based on the residence of a party not yet officially joined to the lawsuit. This amicus brief, however, will focus on the use of a personal representative appointed prior to the lawsuit as a basis for manipulating venue.

LA”) to file an amicus brief in its order dated July 12, 2012. NMDLA entered an appearance herein on November 13, 2012, thereby providing notice to all counsel of record of its intent to file an amicus brief in this case. *See* Rule 12-215(B) NMRA.

## ARGUMENT

### A. DISMISSAL IS PROPER WHEN PARTIES ARE JOINED TO MANIPULATE VENUE

#### *The Venue Statute Reflects an Attempt to Balance the Interest of the Parties*

Venue is being manipulated in New Mexico to the detriment of both defendants and the judiciary. “Venue relates to the convenience of litigants and reflects equity or expediency in resolving disparate interests of parties to a lawsuit in the place of trial.” *Baker v. BP Am. Prod. Co.*, 2005-NMSC-011, ¶ 6, 137 N.M. 334, 110 P.3d 1071 (internal quotes omitted). The proper venue for a given lawsuit in New Mexico is determined by statute. “Our legislature has provided an expansive venue statute that gives plaintiffs wide latitude in choosing where to bring an action.” *Toscano v. Lovato*, 2002-NMCA-022, ¶ 7, 131 N.M. 598, 40 P.3d 1042, *overruled on other grounds by Baker*, 2005-NMSC-011, ¶ 18. “[T]he venue rules reflect an attempt to balance the common-law right of a defendant to be sued in his most convenient forum (usually the county of his residence) with the right of the plaintiff to choose the forum in which to sue.” *Baker*, 2005-NMSC-011, ¶ 6 (citation omitted). Though plaintiffs are given wide latitude by the venue statute, the balance desired by the statute prohibits plaintiffs from having “unfettered access” to venue. *See Blancett v. Dial Oil*

Co., 2008-NMSC-011, ¶ 5, 143 N.M. 368, 176 P.3d 1100 (“[P]laintiffs do not enjoy an unfettered right to bring an action wherever they please.”).

*Virtually Anyone Can Serve as a Personal Representative*

Plaintiffs are using the appointment of a personal representative under the wrongful death act to manipulate venue in New Mexico. It is undisputed that a lawsuit filed pursuant to the wrongful death act must be prosecuted in the name of a personal representative. *See* NMSA 1978, § 41-2-3 (2001) (“Every action ... shall be brought by and in the name of the personal representative of the deceased person ...”). The role of personal representative, however, is nominal and can, therefore, be served by virtually anyone. “The personal representative is only a nominal party who was selected by the Legislature to act as the statutory trustee for the individual statutory beneficiaries.” *Chavez v. Regents of Univ. of New Mexico*, 103 N.M. 606, 608-09, 711 P.2d 883, 885-86 (1985). “It is merely “incidental” that a “personal representative” is named to bring a wrongful death action.” *Id.* at 608. The stated purpose of the personal representative is to “act as a nominal party for all the statutory beneficiaries in order to centralize the claims and prevent multiple and possibly contradictory lawsuits.” *Id.* at 609.

Virtually any person or entity qualifies to serve as a personal representative under the wrongful death act. “[T]he cases have generally broadly construed who qualifies as a personal representative under the Wrongful Death Act.” *Chavez*, 103

N.M. at 609, 711 P.2d at 886. “[S]omeone must be named and our Legislature has fixed upon such a person [*i.e.*, the personal representative] as the one to sue.” *In re Estate of Sumler*, 2003-NMCA-030, ¶ 8, 133 N.M. 319, 62 P.3d 776 (citation omitted). Since virtually any person or entity is qualified to serve as a personal representative, plaintiffs are selecting a personal representative based on one criterion – the location of their residence.

*Venue Is Manipulated Through Appointment of a Personal Representative*

The venue statute provides a plaintiff with a wide variety of venues in which to file a lawsuit. For example, a plaintiff may file a lawsuit in the venue in which a plaintiff or a defendant resides. *See* NMSA 1978, § 38-3-1(A) (1988) (“All civil actions commenced in the district courts shall be brought ... as follows ... all transitory actions shall be brought in the county where either the plaintiff or defendant, or any one of them in case there is more than one of either, resides ...”). A plaintiff may also file a lawsuit in the venue where the “cause of action originated.” *See id.* (Venue is proper where “cause of action originated”). Plaintiffs, relying on this subsection of the venue statute, are filing suit in the venue where the personal representative, or nominal plaintiff, resides. Often, as is the case in the case at bar, the residence of the personal representative is the only basis by which to establish venue in a given judicial district. Since virtually anyone can serve as a personal

representative, using the residence of the personal representative to establish venue provides plaintiffs with unfettered access to any venue in the state.

The appointment of a personal representative for the sole purpose of manipulating venue is a practice that should be rejected by this Court. In the *Toscano* case, the Court of Appeals declined to find that a plaintiff named an insurance company as a defendant for the sole purpose of manipulating venue. *See Toscano*, 2002-NMCA-022, ¶ 14 (“We think it is clear, however, that plaintiffs have other motivations for joining insurance companies as defendants.”). In reaching its decision, however, the Court of Appeals disapproved the practice of adding a defendant solely to manipulate venue. *See id.* at ¶ 13. “We think that the inquiry ... is similar to the standard applied in federal court, where a defendant must have an actual interest in the litigation and not be a “straw man” brought in to manufacture diversity jurisdiction.” *Id.* at ¶ 13. The Court of Appeals went on to hold that a “plaintiff can select any venue where an action against that party would be permitted by the venue statute ... as long as a defendant ... has not been joined solely to manipulate venue.” *Id.* It is, therefore, apparent from the Court of Appeal’s holding that it is improper for a plaintiff to name a defendant to the lawsuit for the sole purpose of manipulating venue. *See also United Nuclear Corp. v. Fort*, 102 N.M. 756, 761, 700 P.2d 1005, 1010 (Ct. App. 1985) (“A plaintiff may not ... by combining different causes of action having different venues, manipulate venue where a statute specifically mandates that a particular action must



be heard in a particular county.”). Why is it permissible to use a nominal plaintiff, which is a role that can be served by virtually anyone, to manipulate venue when naming a defendant or adding a cause of action for the same purpose is prohibited?

This Court, in overruling the *Toscano* case, expressed concern that the Court of Appeal’s holding resulted in an over-expansion of venue. In the *Toscano* case, the Court of Appeals ultimately concluded that the lawsuit could be filed anywhere, even though both of the drivers resided and the accident occurred in Bernalillo County, because the insurance company was a non-resident. *See Toscano*, 2002-NMCA-022, ¶ 27 (“Because Dairyland is a nonresident, Plaintiff could bring suit against the insurer in any county, and Plaintiff was free to choose Santa Fe County.”). This Court, in rejecting the concept that venue for one is always venue for all, expressed concern with the impact of the ruling in the *Toscano* case. “*Toscano’s* rule undermines the venue statute by allowing a party to pick a forum convenient to no one, a result contrary to the limited venues the venue statute authorizes for residents and foreign corporations with a statutory agent.” *Baker*, 2005-NMSC-011, ¶ 18. “As a direct result of *Toscano*, a litigant can file an action in a county different from the scene of an accident and from the residency of any party.” *Id.* at ¶ 17. This Court found such a practice inconsistent with the intent of the venue statute. *See id.* (“Even heeding the expansive nature of our venue statute, we cannot conclude that the legislature intended to give any party such unbridled discretion.”).

By permitting plaintiffs to establish venue through the personal representatives, plaintiffs enjoy exactly the type of unbridled discretion this Court was concerned with in the *Baker* case. A plaintiff, as done in this case, simply selects a person to serve as personal representative who lives in a desired venue. The plaintiff then uses the residency of that nominal plaintiff to establish that venue is proper. Though not done in this case, the personal representative is often appointed before the lawsuit is filed, giving defendants no ability to contest the selection of the personal representative. The result of this practice is a lawsuit filed “in a county different from the scene of an accident and from the residency of any party” other than the personal representative, who is merely a nominal party. This Court should, therefore, find that the residency of the personal representative, as a nominal party, should not be considered when establishing venue. In the alternative, this Court should hold that the residence of a personal representative may only be used to establish venue if the plaintiff can demonstrate a good faith basis for the selection of the personal representative. In other words, a motion to dismiss for improper venue should be granted unless the plaintiff can prove, to a reasonable degree of probability, that the personal representative was selected for a reason other than to manipulate venue into a given judicial district.

B. THE HOLDING IN THE *SCOTT* CASE NEED NOT BE OVERTURNED

This Court, in its order granting the Petition for Writ of Certiorari, inquired whether the petitioners were seeking to overturn this Court’s holding in *First*

*Financial Trust Company v. Scott*, 1996-NMSC-065, 122 N.M. 572, 929 P.2d 263.

The analysis set forth above renders it unnecessary for this Court to do so. In the *Scott* case, this Court considered only one issue – whether New Mexico would recognize intrastate forum non conveniens as a matter of common law. *See Scott*, 122 N.M. at 572, 929 P.2d at 263 (“[T]his Court ... ordered briefs and further argument on the issue whether forum non conveniens is or should be a doctrine available in New Mexico to allow intrastate transfer from one court to another.”). This Court ultimately concluded that if intrastate forum non conveniens was to be adopted in New Mexico, such adoption must be left to the legislature. *See id.* at 577, 268. However, in the *Scott* case, the reason for First Financial Trust Company’s selection as personal representative was never addressed. *See, id.* at 574, 265 (“First Financial Company [sic] is a consent Personal Representative for the purpose of the New Mexico Wrongful Death Act.”). This Court, in the present case, is urged to adopt a rule that prohibits abuse of the venue statute by selection of a personal representative for the purpose of manipulating venue. The ruling urged in this case is different from the question presented in the *Scott* case, where dismissal would have been based simply on the convenience of the parties.

An example best illustrates how the relief sought in the case at bar differs from this Court’s holding in the *Scott* case. Assume, hypothetically, the record in the *Scott* case reflected that First Financial Trust Company was selected as personal

representative solely to manipulate venue into Bernalillo County. Though venue is *most convenient* in Los Alamos County, this Court's holding in the *Scott* case would bar the defendants from seeking to dismiss the case based on the lack of convenience associated with appearing in Bernalillo County. However, the ruling urged of this Court today would permit the district court to dismiss the case based on improper venue because First Financial Trust Company was selected as personal representative solely to achieve venue in Bernalillo County. In other words, dismissal would not be based on the convenience of the parties, but rather on the plaintiff's motivation for selecting the personal representative. Though this Court has held that the former relief should be left to the legislature, the courts serve as the gatekeepers for the latter form of relief. *See Teaver v. Miller*, 53 N.M. 345, 349, 208 P.2d 156, 159 (1949) ("It is essential, however, that the defendant whose residence is made determinative of the venue of the action be ... not one joined solely to justify the bringing of the action in the county of his residence."). While venue may be proper under the venue statute in a given judicial district even if that venue is inconvenient to the parties (*i.e.*, the *Scott* case), venue is not proper in that same judicial district when a party (or claim) is added to the lawsuit solely to manipulate venue (*i.e.*, the case at bar). This Court may, therefore, adopt the rule sought herein without overruling its holding in the *Scott* case.

C. PUBLIC POLICY SUPPORTS PROHIBITING VENUE MANIPULATION

Public policy supports adoption by this Court of the holding urged by Petitioners and NMDLA. First, and perhaps foremost, the ability of a plaintiff to choose any venue simply by virtue of who it selects as personal representative creates a taxing of judicial resources. Of those cases where the residence of the personal representative creates the sole basis for venue in a given judicial district, a significant number are, anecdotally, filed in San Miguel County or Santa Fe County. As a result of this practice by plaintiffs, the number of cases handled in San Miguel County or Santa Fe County is disproportionate to their staffing, budget and other resources. “Venue is not a substantive right, but a procedural matter designed for the convenience of the litigants and *for allocating judicial resources.*” *Baker*, 2005-NMSC-011, ¶ 17 (emphasis added). Permitting plaintiffs to select a personal representatives for the sole purpose of manipulating venue creates havoc with the allocation of judicial resources because lawsuits that would otherwise potentially be filed in a limited number of venues may now be filed anywhere in the state. The inability to accurately direct and utilize precious judicial resources is one critical public policy reason why this Court should adopt a rule that would prohibit plaintiffs from manipulating venue.

Other public policy considerations also support adoption of the holding urged by Petitioners and NMDLA. The current practice of manipulating venue through

appointment of a nominal plaintiff who lives in a particular venue will only spread if not stopped by this Court. NMDLA is aware of other lawsuits where plaintiffs have used the residency of a guardian ad litem or conservator as the basis for venue in a given judicial district. *See* Rule 1-017(C) NMRA (“When an infant or incompetent person has a representative, such as a general guardian, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person.”). In other words, plaintiffs now have the ability to file a lawsuit involving a wrongful death estate, a child, or a seriously injured or incompetent person (*i.e.*, someone in need of a conservator) anywhere in New Mexico because they can manipulate venue by appointment of a nominal plaintiff in a given judicial district. This Court disfavored exactly that type of unbridled discretion in its ruling in the *Baker* case. Absent intervention by this Court, venue as a “procedural matter designed for the convenience of the litigants” will cease to exist in a large number of tort cases in New Mexico.

Another public policy consideration is the overall integrity of the jury system. Whether true or not, plaintiffs are manipulating venue because there is a perception that certain venues are plaintiff oriented while others are defense oriented. By permitting lawsuits to be heard in venues that have no interest in the case other than as the residence of the personal representative, the concept of a trial “by one’s peers” is lost. The legislature clearly sought to discourage foreign corporations from transacting

business in New Mexico without an agent for service of process by allowing suit against such corporations to be filed in any county. *See* NMSA 1978, § 38-3-1(F) (1988) (Suits against transient persons or non-residents may be brought in any county, unless involving a foreign corporation who maintains a statutory agent in the state). The current practice being utilized by plaintiffs subjects all defendants in cases involving a nominal plaintiff to that same punishment. The venue statute was certainly not meant to punish defendants simply because a nominal plaintiff is being used to prosecute the case. For public policy reasons, this Court should adopt a rule that will prevent the manipulation of venue in cases involving a nominal plaintiff.

### CONCLUSION

Plaintiffs, by appointing a personal representative based solely on the location of his or her residence, are manipulating venue in lawsuits filed pursuant to the wrongful death act. The manipulation of venue, which provides plaintiffs with unfettered access to any venue in the state, is prohibited by this Court. This Court, to prohibit such practices, should hold that a nominal plaintiff, such as the personal representative, cannot be used as the basis for venue under the venue statute. In the alternative, this Court should find it is proper for a district court to dismiss an action based on improper venue unless a plaintiff can prove to a reasonable degree of probability that the selection of the nominal plaintiff was not made to manipulate venue.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading was mailed to the following counsel on the 30<sup>th</sup> day of November 2012:


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