

IT'S TIME TO NULLIFY PENNSYLVANIA'S NULLITY RULE: OVERRULING *THOMPSON V. PECK*

*Anthony P. Beltrami**

ABSTRACT

When a plaintiff sues someone in Pennsylvania who has already died, she cannot amend her complaint to substitute the decedent's personal representative as defendant. Her only recourse is to file an entirely new complaint against the personal representative. What if a plaintiff mistakenly sues someone who she does not know has died, and after a court denies her motion to amend her complaint, the statute of limitations for an action against the decedent's personal representative has expired? Surprisingly, this happens more often than one might think, and the harsh but straightforward answer is that the plaintiff is out of luck. An eighty-four-year-old judge-made rule, known as the "nullity rule," has the power to subject plaintiffs in Pennsylvania to significant hardship based on a legal fiction—that the original complaint is null and void and therefore cannot be amended. Pennsylvania needs to do away with this arbitrary rule and permit a plaintiff who commences an action against a deceased person to amend her complaint, subject to the rule of civil procedure governing amendment of pleadings. The nullity rule lacks any true foundation, and it prioritizes adherence to technicalities over the adjudication of cases on the merits. There is no sense in promoting rigidity for the sake of rigidity. This Note details why and how the nullity rule must be eliminated. It sheds light on a gap in our system of justice that perhaps goes unnoticed by many, but that devastates those whom it affects.

* J.D. Candidate, 2020, Drexel University Kline School of Law; B.A., Moravian College. The publication of this Note symbolizes far more than a year's worth of hard work. I could not have navigated the path that led to this point without the help of my fiancée Staci and my family, especially my late grandfather, Louis "Booty" Beltrami.

TABLE OF CONTENTS

INTRODUCTION	94
I. THE NULLITY RULE.....	96
A. <i>The Origin of the Rule: Thompson v. Peck</i>	99
B. <i>Thompson's Faulty Foundation</i>	101
II. MODERN REASONS FOR DISREGARDING THE RULE.....	108
A. <i>The Equivalence of a Decedent and His Personal Representative in the Context of a Survival Action</i>	108
B. <i>The Distinction Between Subject Matter Jurisdiction and Capacity</i>	111
C. <i>Pennsylvania's Liberal Approach to Civil Procedure</i>	113
III. SOLVING THE PROBLEM.....	118
A. <i>Other States' Approaches</i>	118
B. <i>Proposed Courses of Action</i>	123
1. <i>Amend the rules of civil procedure</i>	123
2. <i>Eliminate the rule through the common law</i>	125
CONCLUSION	126

INTRODUCTION

In 1935, the Pennsylvania Supreme Court declared what may seem like common sense: you cannot sue a dead person.¹ In the same breath, it established a rule that seems less like common sense: if a plaintiff mistakenly sues someone who has already died, she cannot amend her complaint to substitute the decedent's personal representative² as defendant.³ Under Pennsylvania law, the original complaint naming the deceased defendant is a nullity, and the plaintiff must file a new lawsuit against the personal representative.⁴ Moreover, the filing of the original complaint against the deceased defendant does not toll

1. *Thompson v. Peck*, 181 A. 597, 598 (Pa. 1935).

2. In Pennsylvania, the term personal representative means either an executor or an administrator. 20 PA. CONS. STAT. § 102 (2019). The difference between the two titles is that "[a]n executor[]" is the person named in the will to act as personal representative while an administrator[] is the personal representative when the decedent died intestate." *In re Estate of Andrews*, 92 A.3d 1226, 1234 (Pa. Super. Ct. 2014).

3. See *Thompson*, 181 A. at 598.

4. *Id.*

the statute of limitations for the action against the personal representative.⁵ If a plaintiff accidentally sues someone in Pennsylvania that she does not know is dead, and by the time she realizes her mistake the limitations period for a lawsuit against the defendant's personal representative has expired, the plaintiff is out of luck. The plaintiff may never recover for injuries caused by the decedent while he was alive. This eighty-four-year-old common law rule, referred to as "the nullity rule," still affects Pennsylvania plaintiffs today.⁶ While similar rules have been challenged and changed in other states,⁷ Pennsylvania courts continue to apply the nullity rule without second thought.⁸

Although cases in which the nullity rule applies are rare, when the rule does apply, its effects are devastating. The nullity rule has the power to deny a plaintiff, who is potentially entitled to compensation for damage caused to her by a defendant, any chance of recovery simply because she listed the incorrect entity as defendant.⁹ A gap like this in our justice system, no matter how small, and no matter how rarely it occurs, must be sealed. If there is even *one* case in which a procedural rule based on an abstract formality prevents an injured person from recovering in a situation where they would otherwise be entitled to recover, that is one case too many.

The time has come for Pennsylvania to address this antiquated, unfair, and highly prejudicial rule by overruling *Thompson v. Peck*,¹⁰ the case in which the nullity rule originated, and replacing it with a more pragmatic approach to this issue.

5. *See id.*

6. *See, e.g.,* Hartlove v. Parks, No. 2722 EDA 2017, 2018 WL 4061580, at *3 (Pa. Super. Ct. Aug. 27, 2018) (affirming trial court's application of nullity rule).

7. *See, e.g.,* Baker v. McKnight, 447 N.E.2d 104, 108 (Ohio 1983) (explicitly overruling prior case that established nullity rule identical to Pennsylvania's).

8. *See, e.g.,* Murphy v. Krajewski, No. 18 CV 1541, 2019 WL 328132, at *1 (Pa. Ct. Com. Pl. Jan. 25, 2019) (applying nullity rule).

9. *See* McClean v. Djerassi, 84 A.3d 1067, 1071–72 (Pa. Super. Ct. 2013) (affirming trial court's denial of plaintiff's motion to amend based on nullity rule and finding plaintiff's "only recourse was to file a new complaint against the Estate," which he failed to do within limitations period).

10. 181 A. 597 (Pa. 1935).

The Pennsylvania Supreme Court should supplement the rule of civil procedure governing amendments by enacting a provision which allows a plaintiff who mistakenly commences an action against a deceased person to substitute the decedent's personal representative as defendant. If the plaintiff initiated the original lawsuit within the applicable statute of limitations for an action against the personal representative, and the amendment otherwise satisfies the requirements for relation back of amendments, then the amendment should relate back to the date of the filing of the original complaint. Such a rule represents a compromise between the competing interests affected by the nullity rule—a compromise which serves to balance the current protection provided to the defendant's estate with the harm done to the ill-informed plaintiff.

This Note proceeds as follows. Part I illustrates the nullity rule and examines its origins, revealing that the rule may have been unfounded when it was first adopted. Part II explains contemporary reasons for eliminating the rule. More specifically, Part II first discusses the similarities between a decedent and his personal representative for purposes of a survival action, then illustrates the important distinction between subject matter jurisdiction and capacity to be sued to argue that a defective complaint filed against a deceased person can be cured via amendment, and, finally, describes Pennsylvania's preference for flexible pleading rules to illustrate that the nullity rule is an anomaly that directly contradicts this preference. Part III demonstrates the ways in which other states have dealt with this issue, concluding with a proposed solution to the problem in Pennsylvania.

I. THE NULLITY RULE

Imagine that one spring day you are driving to the grocery store when you hear the sound of screeching tires as a distracted driver in the car behind you attempts to stop short but slams into your rear bumper, sending you careening into the windshield. Your windshield shatters, your head is bleeding

badly, and you are borderline unconscious. Paramedics arrive on the scene and assist you. Your injuries are not life threatening, but you suffer a fractured vertebrae and break your nose. Both injuries require surgery, so you will have to miss a combined six weeks of work recovering. In addition to your injuries, your brand-new car is totaled.

As busy as you are, it is not until one year after your accident that you begin to consider the possibility of a lawsuit against the driver who crashed into you. The police recovered his information at the scene of the accident, and you have been told that he was an elderly man from New Jersey. You begin searching for an attorney, and six months later, after numerous recommendations, referrals, and consultations, you find the lawyer you feel is best for your needs. He informs you that you have two years from the date of the accident to file your lawsuit, so you only have six months remaining before the statute of limitations will bar you from suing.

You and your attorney meet several times as he prepares everything needed to initiate the lawsuit, and just shy of six months later he calls to let you know that the complaint has been filed and that it has been served on the defendant. He informs you that there will be no statute of limitations issue because the suit was filed one year, eleven months, and three weeks from the date of the accident—one week within the limitations period. Original process was served by mailing a copy of the complaint and summons to the elderly man's home and to his insurer.

However, a serious problem arises: completely unbeknownst to you or your attorney, the defendant you sued died four months after the accident. The defendant's insurer files an answer informing you that the defendant is deceased. You petition the court for leave to amend your complaint to substitute the defendant's executor as defendant, but the court does not allow you to do so. The court tells you that since your complaint was filed against someone who was dead at the time,

it was a “nullity,” and you cannot amend something that never existed.

Your only recourse is to file a new complaint which names the elderly man’s executor as defendant. However, the statute of limitations for a lawsuit against his executor has already expired. You had either one year from the date of the elderly man’s death, or the remaining time period for any cause of action you had against him at the time of his death—whichever was later. Since at the time the elderly man died, one year and eight months remained before your cause of action against him expired, the same two-year limitations period from the date of the accident applied to your claim against the executor. Because now two years and two weeks have passed since the accident, you may no longer sue the executor to recover for the damage that the elderly man caused you.

This series of events and unfortunate outcome may seem improbable, but this hypothetical situation is modeled after a recent case decided in Pennsylvania.¹¹ In 2018, the Pennsylvania Superior Court reaffirmed the nullity rule in *Hartlove v. Parks*, a case arising from a motor vehicle accident involving a defendant who died before the plaintiffs initiated their action.¹² The *Hartlove* case exemplifies the way the rule is applied by Pennsylvania courts. Trial courts, as well as the Superior Court, apply the rule without questioning its anachronistic foundation.¹³ Once a court determines that *Thompson* applies, it typically rejects other substantive arguments.¹⁴ With all deference to the concept of *stare decisis*, at

11. See *Hartlove*, 2018 WL 4061580, at *1.

12. *Id.*

13. See, e.g., *Montanya v. McGonegal*, 757 A.2d 947, 950 (Pa. Super. Ct. 2000) (“It is well settled that ‘[a] dead man cannot be a party to an action, and any such attempted proceeding is completely void and of no effect. Moreover, because a dead person cannot be a party to an action commenced after his death, substitution of a personal representative of the dead person’s estate is improper.’” (alteration in original) (quoting *Valentin v. Cartegena*, 544 A.2d 1028, 1029 (Pa. Super. Ct. 1988))).

14. See, e.g., *Hartlove*, 2018 WL 4061580, at *3 (“[A]s the [plaintiffs’] attempted proceeding is completely void and of no effect under *Thompson*, we must deem their additional issues moot.”). *But see Montanya*, 757 A.2d at 950–51 (considering whether personal representative’s failure to

some point this rule must be scrutinized. A proper investigation of the rule begins with an examination of the rule's origin. By inspecting the rule's purported foundation, it becomes evident that the rule—not justified today—was not even justified at its inception.

A. *The Origin of the Rule: Thompson v. Peck*¹⁵

In *Thompson v. Peck*, the Pennsylvania Supreme Court held that a complaint filed against a deceased person “is completely void and of no effect,” and, therefore, a plaintiff cannot amend such a complaint to substitute the decedent's personal representative as defendant.¹⁶ In *Thompson*, the plaintiffs initiated a personal injury action against the defendant to recover damages allegedly caused by the defendant's negligence.¹⁷ Unbeknownst to the plaintiffs, the defendant had died ten months before they commenced the action.¹⁸ Upon discovery of this fact, the plaintiffs successfully petitioned the trial court for leave to amend their complaint to substitute the defendant's executors as defendants.¹⁹ On January 21, 1935—four months after the filing of the original complaint but more than one year after the defendant's death—the executors received service of process.²⁰ The executors moved to have the amendment vacated and the complaint dismissed, arguing that the trial court lacked jurisdiction to allow such an amendment, but the court denied the motion, and the defendants appealed.²¹

The Pennsylvania Supreme Court reversed, finding that the amendment was impermissible and that the applicable statute

disclose plaintiff's death until after limitations period expired constituted fraudulent misrepresentation sufficient to toll the statute of limitations but determining it did not).

15. 181 A. 597 (Pa. 1935).

16. *Id.* at 598.

17. *Id.* at 597.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

of limitations barred the plaintiffs' action.²² The court cited Pennsylvania's survival act statute, which allowed a plaintiff one year from a decedent's death to commence any action against the decedent's personal representative that the plaintiff could have brought against the decedent at the time of the decedent's death.²³ The one-year period provided by the statute superseded any statutes of limitation which would have barred the action sooner than one year from the decedent's death.²⁴ Analyzing the facts of the case at hand, the court found that the plaintiffs failed to institute an action against the decedent's executors within one year of the decedent's death.²⁵ The second complaint, which named the decedent's personal representatives as defendants, was filed fourteen months after the decedent's death, and, therefore, the survival act statute barred the plaintiffs' suit.²⁶

The plaintiffs argued that they satisfied the survival act statute by initiating their action against the decedent within the limitations period and later substituting the decedent's executors as defendants.²⁷ The court plainly rejected this argument:

It is fundamental that an action at law requires a person or entity which has the right to bring the action, and a person or entity against which the action can be maintained. By its very terms, an action at law implies the existence of legal parties; they may be natural or artificial persons, but they must be entities which the law recognizes as competent. A dead man cannot be a party to an

22. *Id.* at 598.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

action . . . and any such attempted proceeding is completely void and of no effect.²⁸

Because the complaint against the decedent was void *ab initio*, amendment to substitute the decedent's executors as defendants was futile, as "[t]here can be no amendment where there is nothing to amend."²⁹ Accordingly, the plaintiffs' only recourse was to initiate an entirely new action against the decedent's executors within the one-year limitations period from the date of the decedent's death.³⁰ Since "[n]o proceedings were taken against [the executors] until after the expiration of the year provided for by the statute," the court held that the survival act barred the plaintiffs from recovering for the harms they alleged to have suffered as a result of the decedent's actions.³¹

B. Thompson's Faulty Foundation

The *Thompson* court cited a total of five cases to support the two major propositions supporting the rule: (1) that "[a] dead man cannot be a party to an action," and (2) that "any such proceeding is completely void and of no effect."³² Analysis of the cases cited begins to chip away at the foundation of this archaic rule and calls into question the legitimacy of the rule even at its inception.

To support the first important proposition, that "[a] dead man cannot be a party to an action," the *Thompson* court relied on four cases: *Campbell v. Galbreath*,³³ *Sandback v. Quigley*,³⁴ *Patterson v. Brindle*,³⁵ and *Hurst v. Fisher*.³⁶ However, each of

28. *Id.* (citations omitted).

29. *Id.*

30. *See id.*

31. *Id.*

32. *Id.*

33. 5 Watts 423, 428 (Pa. 1836).

34. 8 Watts 460, 463 (Pa. 1839).

35. 9 Watts 98, 100 (Pa. 1839).

36. 1 Watts & Serg. 438 (Pa. 1841).

these cases referred only to issues surrounding actions commenced by deceased *plaintiffs*, not brought against deceased *defendants*. Nonetheless, the *Thompson* court chose to rely on these cases to adopt a per se rule rather than to tailor a rule to the nuanced facts presented by the case it was deciding.³⁷

In fact, the first case, *Campbell*, involved neither a deceased plaintiff nor a deceased defendant. *Campbell* involved an ejectment action brought by a trustee on behalf of the beneficiaries of the trust.³⁸ While the action was pending, one beneficiary transferred his interest in the land to a third party, and the defendant argued that this transfer extinguished the plaintiff's right to recover the land in question.³⁹ However, since the named plaintiff was the trustee, not the beneficiary, the *Campbell* court rejected this argument.⁴⁰

The *Campbell* court explained, in dicta, that "if the plaintiff once existed, but died before the impetration of the original writ, the defendant may likewise plead this in abatement."⁴¹ This quote appears after the court concluded a discussion about whether the defendant had waived his right to have the plaintiff file a warrant of attorney by failing to compel the plaintiff to do so preliminarily.⁴² The court only mentioned the situation regarding a deceased plaintiff as part of a procedural discussion to illustrate an example of a similar matter which a defendant could waive if he did not plead it initially.⁴³ Thus, the *Campbell* case did not even involve a deceased defendant or plaintiff.⁴⁴ But the *Thompson* court relied on *Campbell* in synthesizing the nullity rule and then applied that rule to the case before it—which involved a deceased defendant—without explaining

37. See *Thompson*, 181 A. at 598.

38. 5 Watts at 425.

39. *Id.* at 424–25.

40. *Id.* at 425.

41. *Id.* at 428.

42. *Id.* at 426–28.

43. See *id.* at 428 (stating that if a defendant does not initially allege that the plaintiff died before the action was commenced, "he will not be permitted to plead those matters after pleading in bar to the action").

44. See *id.* at 423–24.

why *Campbell* applied or acknowledging the distinction between *Campbell* and the case at hand.⁴⁵

The second case that the *Thompson* court relied on in synthesizing the rule, *Sandback v. Quigley*, also did not involve a deceased defendant. *Sandback* involved a dower action in which a widow sought to recover a portion of her deceased husband's estate.⁴⁶ Initially, the defendant's heir denied that the plaintiff and the decedent were ever married, but he then sought to plead that the plaintiff had actually died before the action was initiated.⁴⁷ The court allowed the defendant to plead the plaintiff's death as a defense to the merits of her claim, because "the death of the plaintiff put an end to the action."⁴⁸ At the time *Sandback* was decided, an action for dower could not be pursued after the widow who was entitled to recover died, even by the widow's personal representative.⁴⁹ The court stated that "when the disability of the plaintiff not only suspends the right of action, but destroys it altogether," the defendant may raise this issue at any stage of the litigation.⁵⁰

Sandback, unlike *Thompson*, dealt with a deceased *plaintiff*, not a deceased defendant. Further, *Sandback* dealt with a specific cause of action, irrelevant to the *Thompson* court's analysis, which did not survive the death of the plaintiff.⁵¹ To the contrary, the plaintiffs in *Thompson* were seeking to pursue a cause of action which *did* survive the defendant's death.⁵² However, instead of considering the unique circumstances the *Sandback* court dealt with, and without analyzing the important differences between *Sandback* and the case at hand, the

45. See *Thompson v. Peck*, 181 A. 597, 598 (Pa. 1935).

46. See *Sandback v. Quigley*, 8 Watts 460, 463 (Pa. 1839).

47. *Id.* at 462.

48. *Id.* at 463.

49. *Id.* at 464 ("[I]t would be too great an innovation on established forms, by an act of the court, to allow the substitution of executors as parties in an action of dower, to enable them to recover damages for the detention of the dower.").

50. *Id.* at 463.

51. See *id.* at 462–63.

52. *Thompson v. Peck*, 181 A. 597, 598 (Pa. 1935) (explaining that survival action statute permitted plaintiffs' claim against deceased defendant's personal representatives).

Thompson court, without any explanation, added *Sandback* to its collection of cases that purportedly support the nullity rule.

The third case that the *Thompson* court relied on in announcing the nullity rule yet again did not deal with a deceased defendant. *Patterson v. Brindle* involved an ejectment action brought by a plaintiff to recover land he claimed to have title to but which the defendant also claimed to have title to.⁵³ The defendant sought to plead that the plaintiff had died before the action was commenced; the plaintiff's brother had admitted that he brought the action in his brother's name and that he had not heard from his brother in fourteen years.⁵⁴ The court stated that "the defendant was entitled under the plea of not guilty in [the] ejectment, to prove that the plaintiff was dead at the institution of [the] suit"; this was a valid way of objecting to the plaintiff's claim.⁵⁵

The *Thompson* court drew from this quote in creating the nullity rule but failed to acknowledge the differences between the two cases.⁵⁶ The facts of *Patterson* and the facts of *Thompson* are entirely distinct from one another. The *Patterson* court's discussion regarding the import of the death of the plaintiff takes place entirely within the context of a specific cause of action—ejectment⁵⁷—which is irrelevant to the personal injury action in *Thompson*.⁵⁸ But *Thompson* contains no explanation as to why the logic in *Patterson* applies equally to the facts of the case at hand. Instead, the *Thompson* court simply added *Patterson* to its string of citations, without recognition of the fact that the two cases addressed entirely different issues in completely distinct contexts.

53. 9 Watts 98, 100 (Pa. 1839).

54. *Id.*

55. *Id.* at 100.

56. See *Thompson*, 181 A. at 598 (citing *Patterson*, 9 Watts at 100).

57. *Patterson*, 9 Watts at 99–100 (comparing England and Pennsylvania's pleading rules in ejectment actions).

58. See *Thompson*, 181 A. at 597 ("[P]laintiffs instituted this action of trespass against [the defendant] to recover damages for personal injuries alleged to have been suffered by the minor plaintiff as a result of [the defendant's] negligence.").

The fourth case that the *Thompson* court cited to create the nullity rule likewise did not involve a deceased defendant. In *Hurst v. Fisher*, the plaintiff initiated a suit against the defendant in 1828, but the defendant pleaded that the named plaintiff was dead before the suit was commenced.⁵⁹ In a deposition, the plaintiff's nephew admitted that the plaintiff died in 1820.⁶⁰ The court stated that "[n]o principle is more clear than that suit cannot be brought in the name of a deceased person."⁶¹ The plaintiff's only response was that the defendant had waited too long to plead such a defense, but the court rejected this argument.⁶²

In relying on *Hurst*, the *Thompson* court failed to explain how the distinct issues posed by lawsuits brought *by* deceased persons equal those posed by lawsuits brought *against* deceased persons. The potential danger of a lawsuit brought on behalf of someone who has already died is that the lawsuit is a fraudulent one, brought by someone who has no right to recover. However, the facts of a case like *Thompson* do not present the same situation. In a case like *Thompson*, a living plaintiff is entitled to recover from the person who harmed her. The liability and rights of the decedent have transferred to his estate, via his personal representative, upon his death.⁶³ There is no potential for malevolence under this circumstance. If the plaintiff fraudulently sues a deceased person and obtains a default judgment, she will have to confront the decedent's estate to recover under the judgment. But the decedent's personal representative will be able to petition the court to open the default judgment—assuming the personal representative

59. 1 Watts & Serg. 438, 438 (Pa. 1841).

60. *Id.*

61. *Id.* at 439.

62. *Id.*

63. See 42 PA. CONS. STAT. § 8302 (2019) ("All causes of action or proceedings, real or personal, shall survive the death of the . . . defendant . . ."); 20 PA. CONS. STAT. § 3373 (2019) ("An action or proceeding to enforce any right or liability which survives a decedent may be brought . . . against his personal representative . . . as though the decedent were alive.").

has a “meritorious defense” to the plaintiff’s claim.⁶⁴ Certainly, lack of notice of the suit against the decedent will serve as a reasonable explanation for the personal representative’s failure to respond to the suit.⁶⁵ Alternatively, if a plaintiff were fraudulently suing a deceased defendant and the court allowed her to substitute the personal representative as defendant, the personal representative would have to defend the fraudulent lawsuit just as he would have had he been the named defendant in the original complaint. Nonetheless, the *Thompson* court did not shed any light on the distinction between the two scenarios as it added *Hurst* to the collection of cases that supposedly assisted it in resolving the case before it.

To support the second important proposition of the nullity rule, that any “attempted proceeding [against a deceased defendant] is completely void and of no effect,”⁶⁶ the *Thompson* court relied on only one case: *Brooks v. Boston & North Street Railway Co.*⁶⁷ *Brooks* is a Massachusetts case that, like the four cases explained above, did not involve a deceased defendant.⁶⁸ Instead, *Brooks* involved a personal injury action brought in the name of a deceased person seventeen months after her death and eight months before an administrator was appointed to her estate.⁶⁹ The court stated that “[a]n action at law implies, by its very terms, the existence of a person who has the right to bring the action.”⁷⁰ Since a deceased person is not a “person” recognized by the law, the complaint filed against the defendant “never . . . had an existence and [was] a nullity.”⁷¹

64. Pa.R.C.P. No. 237.3 (outlining procedure and requirements to open a default judgment).

65. See *McFarland v. Whitham*, 544 A.2d 929, 930 (Pa. 1988) (“[B]efore a default judgment can properly be opened, the moving party must show that 1.) the petition to open was promptly filed, 2.) a meritorious defense to the underlying claim exists, and 3.) the failure to act on the original complaint can be reasonably excused.”).

66. *Thompson v. Peck*, 181 A. 597, 598 (Pa. 1935) (citing *Brooks v. Bos. & N. St. Ry.*, 97 N.E. 760 (Mass. 1912)).

67. 97 N.E. 760 (Mass. 1912).

68. See *id.* at 760.

69. *Id.*

70. *Id.*

71. *Id.* at 760–61.

Nor could the administrator of the decedent's estate be substituted as the named plaintiff because, according to the court, "[a]mendment must be bottomed on an intent contemporaneous with the bringing of the action. But one who is dead cannot have an intent in any earthly sense."⁷²

The *Brooks* court provided a logical explanation as to why a complaint filed on behalf of a deceased plaintiff cannot be amended, but the *Thompson* court did not explain why the *Brooks* court's logic applies in a case where the action was filed *against* a deceased defendant. The *Brooks* court explained that the statute allowing amendment "[gave] no countenance to the idea that something phantasmal and visionary may be given a body and a substance by the aid of subsequent events."⁷³ But when a living plaintiff mistakenly commences an action against a deceased defendant and later seeks to substitute the decedent's personal representative, she is not relying on the amendment to breathe life into something "phantasmal" or "visionary."⁷⁴ The plaintiff exists, as does her cause of action against the decedent.⁷⁵

In addition, the defendant's death, by law, creates the defendant's executor or administrator. By amending her complaint, the plaintiff is simply carrying out her original intent: reparation, which will come from the defendant's property or estate, to compensate her for the damage the defendant caused to her. In a case like *Thompson*, unlike when a complaint is filed on behalf of a deceased *plaintiff*, the amendment is in fact "bottomed on an intent contemporaneous with the bringing of the action."⁷⁶ Nonetheless, the *Thompson* court did not address this distinction as it relied on *Brooks* to complete its announcement of the nullity rule.

72. *Id.* at 761.

73. *Id.* at 760–61.

74. *See id.* at 761.

75. 42 PA. CONS. STAT. § 8302 (2019) ("All causes of action or proceedings, real or personal, shall survive the death of the . . . defendant . . .").

76. *But cf. Brooks*, 97 N.E. at 761.

II. MODERN REASONS FOR DISREGARDING THE RULE

In addition to the lack of support for the nullity rule at the time it was created, there are compelling contemporary reasons for eliminating the rule. First, the nullity rule overemphasizes the distinction between a decedent and his personal representative in the context of a survival action. Second, this distinction has erroneously led Pennsylvania courts, in applying the nullity rule, to maintain that an action brought against a deceased person must be dismissed for lack of subject matter jurisdiction.⁷⁷ There is, however, a significant difference between lack of subject matter jurisdiction and capacity to be sued.⁷⁸ Finally, the rule is an anomaly that defies Pennsylvania's flexible approach to civil procedure.

A. The Equivalence of a Decedent and His Personal Representative in the Context of a Survival Action

In Pennsylvania, when a person dies, his personal representative may stand in his shoes to bring or defend lawsuits on his behalf. Pursuant to Pennsylvania's survival action statute, all causes of action "survive the death of the plaintiff or of the defendant."⁷⁹ This legislative enactment altered the traditional common law rule that a person's death extinguished any causes of action that could have been brought by or against him while he was alive.⁸⁰ Instead, "the action survives and simply continues in the decedent's personal representative."⁸¹ A plaintiff may commence an action against a

77. See, e.g., *Murphy v. Krajewski*, No. 18 CV 1541, 2019 WL 328132, at *5 (Pa. Ct. Com. Pl. Jan. 25, 2019) ("This pending action is 'null' and 'void' under firmly established law, and based upon recent Superior Court holdings, this court lacks subject matter jurisdiction.").

78. See *Currier v. Sutherland*, 218 P.3d 709, 712–14 (Colo. 2009) (en banc) (comparing capacity to be sued and subject matter jurisdiction and finding "subject matter jurisdiction and capacity are separate and distinct legal issues," and "a party's lack of capacity to sue or be sued has no bearing upon a court's subject matter jurisdiction over the case").

79. § 8302.

80. *Salvadia v. Ashbrook*, 923 A.2d 436, 439–40 (Pa. Super. Ct. 2007) ("With the survival statute, the plaintiff's death does not abate the cause of action as it did at common law . . .").

81. *Id.* (citing *Tulewicz v. Se. Pa. Transp. Auth.*, 606 A.2d 427, 431 (Pa. 1992)).

decedent's personal representative "to enforce any right or liability which survives a decedent . . . as though the decedent were alive," and inversely, a decedent's personal representative may bring an action on behalf of the decedent.⁸²

A plaintiff has one year to bring any cause of action against a decedent's personal representative.⁸³ "[W]here the normal statute of limitations would run within a year after a defendant's death," section 3383 "extend[s] the statute of limitations . . . so that the statute of limitations would not then expire until one year after death."⁸⁴ Where the statute of limitations would expire *more* than one year after the defendant's death, the limitations period for bringing the action remains unaffected; the period for bringing the action against the personal representative lasts as long as it would have had the decedent remained alive.⁸⁵

If a party to an action dies after the suit has been commenced, that party's personal representative may be substituted for the decedent.⁸⁶ In the event of the death of a party to an action, "the attorney of record for the deceased party shall file a notice of death with the prothonotary."⁸⁷ In addition to that filing, substitution of the decedent's personal representative must comply with Pennsylvania Rule of Civil Procedure 2352,⁸⁸ the rule governing substitution of successors, which requires the filing of "a statement of the material facts on which the right to substitution is based."⁸⁹ For example, if Peter Plaintiff sues David Defendant to recover for personal injuries caused by David's negligence, and David dies at some point after the lawsuit is commenced, David's attorney must file a notice of death with the prothonotary, then file a statement of facts with

82. 20 PA. CONS. STAT. § 3373 (2019).

83. *Id.* § 3383.

84. *Longo v. Estep*, 432 A.2d 1029, 1030 (Pa. Super. Ct. 1981).

85. § 3383.

86. *Id.* § 3372.

87. Pa.R.C.P. No. 2355(a).

88. *Id.*

89. *Id.* No. 2352(a).

the court illustrating the basis for substituting David's personal representative, Eddie Executor. From then on, Eddie Executor becomes the named defendant, and he may finish defending against Paul's suit on behalf of David's estate.

The nullity rule grants too much significance to a technical mistake made by an unwitting plaintiff. By refusing to allow substitution where a plaintiff clearly intended to sue the person who harmed her—and would have named the proper party as defendant had she been aware the defendant was deceased—the rule forces strict adherence to formalities to trump the just adjudication of civil disputes. When a person dies, his personal representative merely becomes the conduit through which a plaintiff must proceed in order to recover for harms caused by the decedent during his lifetime.⁹⁰ The decedent and his estate, through his personal representative, are one in the same for purposes of the decedent's liability.⁹¹ The substance and purpose of the cause of action against the personal representative are identical to the substance and purpose of the cause of action mistakenly brought against the decedent. The only difference is the name of the defendant. Interestingly, where the defendant dies *after* the suit began, substituting the decedent's personal representative is permissible.⁹² But where a plaintiff mistakenly sues a person who died *before* the suit began, substitution is prohibited.⁹³ The equivalence between a decedent and his personal representative in the context of a survival action supports replacing the nullity rule's arbitrary mandate with a more pragmatic approach.⁹⁴

90. See 20 PA. CONS. STAT. § 3373 (2019).

91. See *Tulewicz v. Se. Pa. Transp. Auth.*, 606 A.2d 427, 431 (Pa. 1992) (“A survival action . . . is not a new cause of action but one which ‘merely continues in [the decedent’s] personal representatives the right of action which accrued to the deceased at common law because of the tort.’” (alteration in original) (quoting *Pezzulli v. D’Ambrosia*, 26 A.2d 659, 661 (Pa. 1942))).

92. 20 PA. CONS. STAT. § 3372 (2019).

93. *Thompson v. Peck*, 181 A. 597, 598 (Pa. 1935).

94. See *infra* Section III.B.

B. *The Distinction Between Subject Matter Jurisdiction and Capacity*

Pennsylvania courts applying the nullity rule routinely note that they lack subject matter jurisdiction over a complaint filed against a deceased person. This requires a court to dismiss the complaint and reinforces the concept that such a complaint is not curable by amendment.⁹⁵ The Pennsylvania Superior Court has explicitly stated that the issue is, in fact, one of subject matter jurisdiction:

[T]his Court and our Supreme Court have repeatedly used the terms “null” and “void” when discussing the effect of a filing after a party dies. . . . [A]lthough these past decisions have not explicitly used the term “subject matter jurisdiction” when discussing why an action by or against a deceased party is null and void, it is evident by the use of the terms “null” and “void” that the issue goes to subject matter jurisdiction and not to standing, personal jurisdiction, or a court’s power.⁹⁶

Subject matter jurisdiction “relates to the competency of a court to hear and determine controversies of the general nature of the matter involved.”⁹⁷ In Pennsylvania, the courts of common pleas have “unlimited original jurisdiction of all actions and proceedings,” except those actions which have explicitly been “vested in another court of [the]

95. See, e.g., *Hartlove v. Parks*, No. 2722 EDA 2017, 2018 WL 4061580, at *1, *3 (Pa. Super. Ct. Aug. 27, 2018) (affirming trial court’s dismissal of complaint “as a nullity, without prejudice, on the basis that the court lacked subject matter jurisdiction due to [the defendant’s] death prior to the filing of the complaint”); *Murphy v. Krajewski*, No. 18 CV 1541, 2019 WL 328132, at *5 (Pa. Ct. Com. Pl. Jan. 25, 2019) (applying nullity rule and holding that “pending action [was] ‘null’ and ‘void’ under firmly established law, and based upon recent Superior Court holdings, this court lacks subject matter jurisdiction.”).

96. *Grimm v. Grimm*, 149 A.3d 77, 85 (Pa. Super. Ct. 2016) (footnote omitted) (citations omitted).

97. *McGinley v. Scott*, 164 A.2d 424, 427 (Pa. 1960).

Commonwealth.”⁹⁸ Litigants cannot consent to or waive subject matter jurisdiction.⁹⁹ Pursuant to Pennsylvania Rule of Civil Procedure 1032(b), lack of subject matter jurisdiction may be raised as a defense at any stage of the proceeding, and the court may raise the issue *sua sponte*.¹⁰⁰ If a court determines that it lacks subject matter jurisdiction, Rule 1032(b) directs the court to transfer the case to another court within the state that has subject matter jurisdiction, “but if that is not possible, then it shall dismiss the action.”¹⁰¹

Capacity, on the other hand, “refers to the legal ability of a person to come into court.”¹⁰² The Pennsylvania Supreme Court has stated that “[t]he quintessential example of someone who lacks capacity to sue or be sued is a deceased person, as capacity only exists in living persons.”¹⁰³ The Pennsylvania Rules of Civil Procedure list “lack of capacity to sue” as a preliminary objection a party may raise,¹⁰⁴ and it is a defense that may be waived “unless it is specifically raised in the form of a preliminary objection or in the answer to the complaint.”¹⁰⁵

Deciding a case involving a complaint naming only a deceased defendant, the Colorado Supreme Court, in *Currier v. Sutherland*, clarified the distinction between subject matter jurisdiction and capacity before determining that the true issue was the decedent’s incapacity.¹⁰⁶ The *Currier* court held that “[b]ecause subject matter jurisdiction involves a court’s power to hear a particular type of case or grant a specific type of relief . . . a deceased defendant’s lack of capacity to be sued does not divest a court of subject matter jurisdiction over the case.”¹⁰⁷

98. 42 PA. CONS. STAT. § 931(a) (2019).

99. *McGinley*, 164 A.2d at 428.

100. Pa.R.C.P. No. 1032(b).

101. *Id.*

102. *In re Estate of Sauers*, 32 A.3d 1241, 1248 (Pa. 2011).

103. *Id.* at 1248–49.

104. Pa.R.C.P. No. 1028(a)(5).

105. *Erie Indem. Co. v. Coal Operators Cas. Co.*, 272 A.2d 465, 467 (Pa. 1971).

106. 218 P.3d 709, 712–14 (Colo. 2009) (en banc).

107. *Id.* at 713 (citation omitted).

Important to the court was the fact that, like in Pennsylvania, lack of subject matter jurisdiction is a nonwaivable defense that can be raised at any time, whereas capacity is an issue that can be waived if not raised at the outset of the case.¹⁰⁸

The concept that a complaint filed against a deceased person deprives the court of subject matter jurisdiction cannot be squared with the Pennsylvania Supreme Court's clear pronouncement that a deceased person is "[t]he quintessential example of someone who lacks capacity to . . . be sued."¹⁰⁹ As explained above, subject matter jurisdiction describes a court's ability to hear a certain *type* of case.¹¹⁰ Capacity, however, only encompasses a person's ability to litigate a case.¹¹¹ If Pennsylvania courts recognized that a complaint naming only a deceased person presents a capacity issue, not a subject matter jurisdiction issue, an amendment to cure the defect in capacity by substituting the decedent's personal representative would be permissible.¹¹² Taking this approach, as the *Currier* court did, would help modernize Pennsylvania's approach to pleading rules and would end the Pennsylvania courts' conflation of subject matter jurisdiction and capacity in cases where a plaintiff mistakenly sues a deceased defendant.

C. Pennsylvania's Liberal Approach to Civil Procedure

The Pennsylvania Rules of Civil Procedure state clearly and unequivocally that the rules "shall be liberally construed."¹¹³ The purpose of this liberal construction is "to secure the just, speedy and inexpensive determination of every action or proceeding to which [the rules] are applicable."¹¹⁴ Not only do the Pennsylvania Rules of Civil Procedure mandate liberal

108. *Id.* at 714.

109. *In re Estate of Sauer*, 32 A.3d 1241, 1248 (Pa. 2011).

110. *See McGinley v. Scott*, 164 A.2d 424, 427 (Pa. 1960).

111. *See In re Estate of Sauer*, 32 A.3d at 1248.

112. *See Currier*, 218 P.3d at 714–15.

113. Pa.R.C.P. No. 126.

114. *Id.*

construction of the rules, they specifically empower courts, at any stage of litigation, to “disregard any error or defect of procedure which does not affect the substantial rights of the parties.”¹¹⁵

A plaintiff may commence a civil action in Pennsylvania by filing either a complaint or a praecipe for a writ of summons with the prothonotary.¹¹⁶ The plaintiff must serve an in-state defendant with original process within thirty days after filing the complaint or the issuance of the writ,¹¹⁷ and she has ninety days to serve an out-of-state defendant.¹¹⁸ Generally, only a sheriff may serve original process in Pennsylvania,¹¹⁹ but for actions initiated in Philadelphia County, the Pennsylvania Rules of Civil Procedure also allow service by a “competent adult.”¹²⁰

In Pennsylvania, original process may be served “by handing a copy to the defendant,” or “by handing a copy . . . at the residence of the defendant to an adult member of the family with whom he resides; but if no adult member of the family is found, then to an adult person in charge of such residence.”¹²¹ Additionally, process may be served by handing a copy to “the clerk or manager of the hotel, inn, apartment house, boarding house or other place of lodging at which [the defendant] resides; or . . . at any office or usual place of business of the defendant to his agent or to the person for the time being in charge thereof.”¹²² A plaintiff may serve original process outside Pennsylvania in any of the ways mentioned above, but she may also serve the defendant “by any form of mail requiring a receipt signed by the defendant or his authorized agent,” or

115. *Id.*

116. *Id.* No. 1007.

117. *Id.* No. 401(a).

118. *Id.* No. 404.

119. *Id.* No. 400(a).

120. *Id.* No. 400.1(a). A competent adult is “an individual eighteen years of age or older who is neither a party to the action nor an employee or a relative of a party.” *Id.* No. 76.

121. *Id.* No. 402.

122. *Id.*

according to the laws of the jurisdiction where service is made.¹²³

The Pennsylvania Rules of Civil Procedure permit a party to amend its pleadings at any stage of the litigation.¹²⁴ Rule 1033 permits “[a] party, either by filed consent of the adverse party or by leave of court,” to “at any time change the form of action, add a person as a party, correct the name of a party, or otherwise amend the pleading.”¹²⁵ Pennsylvania trial courts retain “broad discretion” in determining whether to allow a party to amend a pleading,¹²⁶ and the Pennsylvania Supreme Court has made clear that amendment should be liberally permitted.¹²⁷ “The policy underlying this rule of liberal leave to amend is to [e]nsure that parties get to have their cases decided on the substantive case presented, and not on legal formalities.”¹²⁸

Most importantly, Rule 1033 allows for relation back where an amendment “correct[s] the name of a party against whom a claim has been asserted in the original pleading.”¹²⁹ In that case, the amendment relates back to the date the action was commenced so long as the party whom the amendment names received notice of the action

within ninety days after the period provided by law for commencing the action . . . such that it will not be prejudiced in maintaining a defense on the merits and the party knew or should have known that the action would have been brought against

123. *See id.* No. 403.

124. *Id.* No. 1033. A complaint is one of the filings defined as a pleading. *Id.* No. 1017(a)(1).

125. *Id.* No. 1033(a).

126. *Pollock v. Nat'l Football League*, 171 A.3d 773, 778 (Pa. Super. Ct. 2017) (quoting *Schwarzwaelder v. Fox*, 895 A.2d 614, 621 (Pa. Super. Ct. 2006)).

127. *Werner v. Zazyczny*, 681 A.2d 1331, 1338 (Pa. 1996) (“[T]he right to amend should be liberally granted at any stage of the proceedings unless there is an error of law or resulting prejudice to an adverse party.” (quoting *Connor v. Allegheny Gen. Hosp.*, 461 A.2d 600, 602 (Pa. 1983))).

128. *Hill v. Ofalt*, 85 A.3d 540, 557 (Pa. Super. Ct. 2014) (quoting *Chaney v. Meadville Med. Ctr.*, 912 A.2d 300, 303 (Pa. Super. Ct. 2006)).

129. Pa.R.C.P. No. 1033(b).

the party but for a mistake concerning the identity of the proper party.¹³⁰

In other words, where an amended pleading corrects the name of a party, the pleading is considered as having been filed on the date the plaintiff commenced the action if (1) the party named by the amendment had notice of the suit within ninety days after the statute of limitations for the cause of action expires, (2) that party will not be prejudiced in defending the case on the merits, and (3) that party either knew or should have known that if not for the mistake regarding the party's identity, the plaintiff would have brought the initial action against that party.

When a court applies the nullity rule and refuses to allow a plaintiff to amend her complaint to substitute the decedent's personal representative, it fails to carry out its duty to "liberally construe[]" the Pennsylvania Rules of Civil Procedure.¹³¹ A plaintiff may effect service in a multitude of different ways, several of which will include no contact with the actual defendant,¹³² which reveals just how easy it is for a plaintiff to sue a deceased person and not realize her mistake until after the limitations period has expired. For example, if a sheriff serves process on "the clerk . . . of the hotel . . . at which [the defendant] resides,"¹³³ it is not hard to imagine a situation in which that clerk is unaware the defendant has already died. The clerk's unknowing acceptance of service for a deceased defendant would make the sheriff think he has properly served the defendant, misleading the plaintiff to think that she has timely commenced her action. Given how easily a plaintiff may effect service, a rule that harshly punishes a plaintiff who makes a simple mistake does not align with Pennsylvania's preference for flexible pleading rules.¹³⁴

130. *Id.*

131. *Id.* No. 126.

132. *See id.* No. 402(a)(2).

133. *Id.* No. 402(a)(2)(ii).

134. *See Hill v. Ofalt*, 85 A.3d 540, 557 (Pa. Super. Ct. 2014).

Additionally, since the Rules of Civil Procedure explicitly allow parties to amend pleadings, and because Pennsylvania trial courts routinely handle motions to amend pleadings, a *per se* rule proscribing amendment where the complaint names a deceased person is unnecessary. Trial courts have discretion to allow amendments, which are to be permitted liberally. Why, in one particular circumstance, is this discretion stripped from the trial court? A judge handling a motion to amend a complaint naming a deceased person is well-equipped to determine whether “there is an error of law or resulting prejudice to an adverse party” that would stem from substituting the decedent’s personal representative and, if not, should allow the substitution to occur.¹³⁵ Trial judges decide motions every single day; they must analyze circumstances, weigh competing interests, and make decisions within the boundaries of the law. Trial courts can readily apply the rule governing amendments to scenarios in which the nullity rule applies.

Some may argue that the nullity rule protects a personal representative by preventing him from needing to defend a suit years after the decedent’s death. However, statutes of limitation exist for this precise reason. Pursuant to Rule 1033, a plaintiff’s amendment could only relate back where the personal representative was aware of the suit within ninety days of the expiration of the limitations period for the action, is not prejudiced in defending the case on the merits, and knew or should have known that the plaintiff would have brought the suit against the decedent’s estate, not the decedent, had it not been for the plaintiff’s mistake.¹³⁶ If those requirements are not satisfied, and the amendment occurs outside the limitations period, then the statute of limitations will bar the plaintiff from pursuing her action against the personal representative, sufficiently protecting the decedent’s estate.

135. *Werner v. Zazyczny*, 681 A.2d 1331, 1338 (Pa. 1996) (quoting *Connor v. Allegheny Gen. Hosp.*, 461 A.2d 600, 602 (Pa. 1983)).

136. Pa.R.C.P. No. 1033(b).

When a plaintiff mistakenly sues a deceased person and does not realize so until the limitations period expires, she has made a procedural error, and the nullity rule compounds her error by causing her case to be decided based on formalities rather than on its merits. The Rules of Civil Procedure allow a court to “disregard any error or defect of procedure which does not affect the substantial rights of the parties.”¹³⁷ As discussed above, had the plaintiff simply named the personal representative instead of the deceased defendant, she would have been allowed to pursue her cause of action against the personal representative without any issue. The nullity rule forces courts to condone a technical defect that extinguishes the rights of the plaintiff—a direct contradiction to Pennsylvania’s “preference to have claims decided on their merits as opposed to strict enforcement of legal technicalities.”¹³⁸

III. SOLVING THE PROBLEM

While Pennsylvania is not the only state to apply the nullity rule, it does fall into the minority in this regard. Taking a page out of the books of other states who have dealt with this issue, Pennsylvania should eliminate the nullity rule, preferably through legislation or, alternatively, through the common law.

A. Other States’ Approaches

Of the twenty-seven states other than Pennsylvania whose courts have decided a case involving a complaint naming a deceased defendant, only eight states still apply a strict *Thompson*-style nullity rule.¹³⁹ That is, in these eight states, a complaint filed against a deceased person either cannot be

137. *Id.* No. 126.

138. *Dean v. Bowling Green-Brandywine*, 192 A.3d 1177, 1187–88 (Pa. Super. Ct. 2018).

139. *See Maclin v. Congo*, 106 So. 3d 405, 408 (Ala. Civ. App. 2012); *Crenshaw v. Special Adm’r of Estate of Ayers*, No. 11–8, 2011 WL 1896766, at *6 (Ark. May 19, 2011); *Bricker v. Borah*, 469 N.E.2d 241, 242–43 (Ill. App. Ct. 1984); *Burket v. Aldridge*, 216 A.2d 910, 913–14 (Md. 1966); *Mercer v. Morgan*, 526 P.2d 1304, 1305–06 (N.M. Ct. App. 1974); *Krysa v. Estate of Qyra*, 136 A.D.3d 760, 760–61 (N.Y. App. Div. 2016); *Gillespie v. Johnson*, 209 S.E.2d 143, 145 (W. Va. 1974).

amended,¹⁴⁰ or the amendment of the complaint does not relate back to the date the original complaint was filed under any circumstances.¹⁴¹ Pennsylvania's application of the nullity rule falls into the former category. In the latter category, although amendment is permitted, the statute of limitations will bar the plaintiff's claim if she amends the complaint to substitute the decedent's personal representative after the limitations period has expired for an action against the personal representative.¹⁴²

The remaining nineteen states whose courts have decided a case involving a complaint that named a deceased defendant have permitted amendment of the complaint to substitute the decedent's personal representative as defendant.¹⁴³ In these states, where amendment occurs outside the limitations period for an action against the representative, the amendment still must satisfy the statutory requirements required for relation-back in order for the action to survive the statute of limitations.¹⁴⁴

140. See, e.g., *Maclin v. Congo*, 106 So. 3d 405, 408 (Ala. Civ. App. 2012) ("Proceedings instituted against an individual who is deceased at the time the action is filed are a nullity and do not invoke the trial court's jurisdiction. The [plaintiffs'] action against [the decedent] was therefore void *ab initio*. The trial court had no jurisdiction to entertain an amendment of the complaint or any further motions or pleadings; it was required to dismiss the action for lack of subject-matter jurisdiction." (citations omitted)).

141. See, e.g., *Burket*, 216 A.2d at 914 ("[W]here an action, as here, is brought against a dead man, the substitution of his personal representative after the expiration of the period of the [s]tatute of [l]imitations does not relate back to the time of the filing of the original suit so as to prevent the [s]tatute from being a bar to the litigation.").

142. See *id.*

143. See *Hamilton v. Blackman*, 915 P.2d 1210, 1218 (Alaska 1996); *Burgos v. Tamulonis*, 33 Cal. Rptr. 2d 728, 731 (Cal. Ct. App. 1994); *Currier v. Sutherland*, 218 P.3d 709, 714–15 (Colo. 2009) (en banc); *Riley v. Murray*, No. CV 960072104, 1998 WL 7101, at *3 (Conn. Jan. 6, 1998); *Parker v. Breckin*, 620 A.2d 229, 231 (Del. 1993); *Smith v. Crumm*, 778 So. 2d 1088, 1089 (Fla. Dist. Ct. App. 2001); *Robinson v. Estate of Jester*, 775 S.E.2d 569, 571–72 (Ga. Ct. App. 2015); *Trimble v. Engelking*, 939 P.2d 1379, 1381–82 (Idaho 1997); *Eberbach v. McNabney*, 413 N.E.2d 958, 962 (Ind. Ct. App. 1980); *Kueter v. Merrick*, No. 08–0579, 2008 WL 4725406, at *1 (Iowa Ct. App. Oct. 29, 2008); *Hinds v. Estate of Huston*, 66 P.3d 925, 929 (Kan. Ct. App. 2003); *Romano v. Estate of Johnson*, No. 2016-CA-001243-MR, 2018 WL 474508, at *3 (Ky. Ct. App. Jan. 19, 2018); *Holmquist v. Starr*, 521 N.E.2d 721, 723 (Mass. 1988); *Chan v. Katzenmeyer*, 391 N.W.2d 907, 909–10 (Minn. Ct. App. 1986); *Costello v. Casler*, 254 P.3d 631, 636 (Nev. 2011); *Pierce v. Johnson*, 571 S.E.2d 661, 665–66, 668 (N.C. Ct. App. 2002); *Baker v. McKnight*, 447 N.E.2d 104, 108 (Ohio 1983); *Worthington v. Estate of Davis*, 282 P.3d 895, 900 (Or. Ct. App. 2012); *Estate of James v. Payton*, 674 S.E.2d 864, 867 (Va. 2009).

144. See, e.g., *Trimble*, 939 P.2d at 1382.

The states that have chosen not to enforce a strict, hardline nullity rule have done so in five different ways. First, some state courts have expressly declined to adopt the nullity rule and instead have determined that a plaintiff who names a deceased person as defendant has simply misnamed the defendant.¹⁴⁵ For example, the Supreme Court of Idaho decided the issue for the first time in 1997 after a plaintiff who filed a complaint against a deceased defendant had his complaint dismissed with prejudice by a trial court applying the nullity theory.¹⁴⁶ On appeal, the state's supreme court rejected the nullity rule and explained its shortcomings:

The nullity rule is a remnant of an earlier era of strict pleading requirements. Adopting such a rule, and thereby precluding amendment and relation back where a party is improperly named, would frustrate the purpose of our modern rules of pleading which seek to promote the resolution of disputes on their merits rather than to bar suit based on antiquated pleading requirements.¹⁴⁷

Instead of adopting the rule, the Idaho Supreme Court held that “courts can resolve more fairly problems stemming from improperly named defendants by applying [Idaho’s rule of civil procedure governing amendment of pleadings].”¹⁴⁸ Therefore, an Idaho plaintiff may substitute the decedent’s personal representative as defendant, and the amendment relates back to the filing of the complaint so long as the requirements for relation back are met.¹⁴⁹ Indiana took a similar approach in *Eberbach v. McNabney*, declining to adopt the nullity rule and

145. See, e.g., *id.* at 1381–82 (“We thus decline to adopt the nullity rule in Idaho and hold that, where a party has been named improperly, amendment and relation back should be allowed where the [pleading requirements] are met.”).

146. *Id.* at 1379–80.

147. *Id.* at 1381.

148. *Id.*

149. *Id.* at 1381–82.

instead considering the situation a “misnomer of party.”¹⁵⁰ And there, the Indiana Court of Appeals likewise held that the amendment of a complaint to substitute a decedent’s personal representative could relate back to the date of the original complaint if the prerequisites for relation-back were met.¹⁵¹

Similarly, there are state courts that allow substitution of a decedent’s personal representative without expressly acknowledging the misnomer concept; the only determination a court must make in such a state is whether amendment satisfies the statutory requirements for relation-back of amendments.¹⁵²

Second, some state courts with precedential cases establishing a nullity rule still acknowledge the rule’s existence but have created exceptions resulting in certain situations where the nullity rule otherwise would but does not apply.¹⁵³ In Massachusetts, *Chandler v. Dunlop* establishes a nullity rule similar to Pennsylvania’s.¹⁵⁴ Nonetheless, the Supreme Judicial Court of Massachusetts has held that in certain cases where a complaint names only a deceased defendant the nullity rule does not apply.¹⁵⁵ In *Holmquist v. Starr*, the plaintiff filed a complaint against a deceased person, but the Massachusetts Supreme Court held that *Chandler* did not apply and substitution of the decedent’s personal representative was permissible because “(1) the representative of the deceased at the time the action was commenced had legal existence; (2)

150. 413 N.E.2d 958, 962 (Ind. Ct. App. 1980) (“Essentially the plaintiff has sued an entity, Hanson Castor, by the wrong name. Though Castor is dead, his legal existence is not extinguished, but shifted to the special administrator of his estate in existence at the date of the original complaint. The special administrator stands in the shoes of the decedent in defending against liability for his alleged torts.” (footnote omitted)).

151. *Id.*

152. *See, e.g.,* *Currier v. Sutherland*, 218 P.3d 709, 714–15 (Colo. 2009) (en banc) (allowing plaintiffs to substitute estate and special administrator as defendant where complaint originally only named deceased defendant and answer had not yet been filed, but finding that notice requirements for relation back were not satisfied).

153. *See, e.g.,* *Holmquist v. Starr*, 521 N.E.2d 721, 723 (Mass. 1988).

154. *See* 39 N.E.2d 969, 973–74 (Mass. 1942) (declaring complaint filed against deceased person was a nullity and that substitution of a personal representative could not relate back).

155. *See* 521 N.E.2d at 723.

notice was given to the representative of the estate; [and] (3) an answer was filed on behalf of the estate.”¹⁵⁶ The unique circumstances of the *Holmquist* case allowed for deviation from the hardline application of the nullity rule.¹⁵⁷

Third, some state courts with *Thompson*-like nullity rules have expressly overruled the case establishing the rule, replacing it with a more pragmatic and modern rule.¹⁵⁸ In 1978, the Ohio Supreme Court, in *Barnhart v. Schultz*, established a nullity rule identical to the one enunciated by the Pennsylvania Supreme Court in *Thompson v. Peck*.¹⁵⁹ In fact, the *Barnhart* court cited *Thompson* as one of the authorities for the rule.¹⁶⁰ Fifteen years later, in *Baker v. McKnight*, the Ohio Supreme Court revisited the nullity rule and explicitly overruled *Barnhardt*.¹⁶¹ Deeming the rule “overly technical and unnecessarily severe,” the *Baker* court concluded that where the relation-back requirements for amendment of pleadings are otherwise met, a plaintiff may substitute a decedent’s personal representative as defendant so long as the representative receives service of process within one year of the amendment.¹⁶²

Lastly, in Virginia, the state legislature has enacted a statutory provision specifically allowing for the substitution of a decedent’s personal representative where a plaintiff files a complaint against a deceased person.¹⁶³ In *Estate of James v. Peyton*, the Supreme Court of Virginia explained exactly how a Virginia statute abrogated the state’s nullity rule.¹⁶⁴ Before 1991, Virginia courts applied a nullity rule indistinguishable from

156. *Id.*

157. *See* Nutter v. Woodard, 614 N.E.2d 692, 694–95 (Mass. App. Ct. 1993) (applying *Holmquist* exception to nullity rule).

158. *See, e.g.,* Baker v. McKnight, 447 N.E.2d 104, 108 (Ohio 1983).

159. *Barnhart v. Schultz*, 372 N.E.2d 589, 591 (Ohio 1978), *overruled by Baker*, 447 N.E.2d at 108.

160. *Id.*

161. *Baker*, 447 N.E.2d at 108.

162. *Id.*

163. *See* Estate of James v. Peyton, 674 S.E.2d 864, 867 (Va. 2009).

164. *See id.*

Pennsylvania's.¹⁶⁵ Not only was a complaint filed by a Virginia plaintiff which named only a deceased defendant a nullity, but the plaintiff could not cure the error by amending the complaint to substitute the decedent's personal representative as defendant.¹⁶⁶ However, an amendment to the Virginia statute governing the effect of a party to an action's death expressly overruled the common-law nullity rule.¹⁶⁷ That provision, as amended, now states:

If a person against whom a personal action may be brought dies before suit papers naming such person as defendant have been filed with the court, then such suit papers may be amended to substitute the decedent's personal representative as party defendant before the expiration of the applicable limitation period or within two years after the date such suit papers were filed with the court, whichever occurs later, and such suit papers shall be taken as properly filed.¹⁶⁸

In other words, "a suit filed against a defendant who was deceased when the action was filed [may] be amended to substitute the decedent's personal representative and [will] be considered timely filed if the substitution occurred within two years of the original filing date."¹⁶⁹

B. Proposed Courses of Action

1. Amend the rules of civil procedure

The Pennsylvania Supreme Court¹⁷⁰ should amend Pennsylvania Rule of Civil Procedure 1033, the rule governing

165. *See id.*

166. *Id.*

167. *Id.*

168. VA. CODE ANN. § 8.01-229(B)(2)(b) (2019).

169. *Parker v. Warren*, 639 S.E.2d 179, 181 (Va. 2007).

170. The Pennsylvania Supreme Court must ultimately adopt an amendment to a rule of civil procedure. *See* Pa.R.J.A. No. 103. The Pennsylvania Civil Procedural Rules Committee

amendment of pleadings, by inserting a provision similar to the one enacted by Virginia in 1999. As of now, section (a) of Rule 1033 permits a party to amend its pleadings at any time “either by filed consent of the adverse party or by leave of court.”¹⁷¹ Section (b) of Rule 1033 governs relation-back of amendments and states that an amendment “correcting the name of a party against whom a claim has been asserted” relates back to the original complaint so long as that party received notice of the suit “within ninety days after the period provided by law for commencing the action . . . such that it will not be prejudiced in maintaining a defense on the merits and the party knew or should have known that the action would have been brought against the party but for a mistake concerning the identity of the proper party.”¹⁷²

The Pennsylvania Supreme Court should add a section to Rule 1033, which would overrule the nullity rule established by *Thompson v. Peck*, and would state:

Where a party files a complaint that names a defendant who has died after the cause of action accrued against the decedent but before the complaint was filed, that party may amend the complaint by substituting the decedent’s personal representative. Such an amendment relates back to the date of the filing of the complaint against the decedent so long as the amendment otherwise satisfies the requirements of section (b).

The proposed provision strikes a balance between the approaches taken by other states that have chosen not to apply the nullity rule, and it conforms to Pennsylvania’s current rules governing amendment. The proposed addition to Rule 1033

“assists the Supreme Court in the preparation, revision, publication and administration of the rules of civil procedure.” *Civil Procedural Rules Committee*, UNIFIED JUD. SYS. PA., <http://www.pacourts.us/courts/supreme-court/committees/rules-committees/civil-procedural-rules-committee> (last visited Sept. 24, 2019).

171. Pa.R.C.P. No. 1033(a).

172. *Id.* No. 1033(b).

aligns with the approach taken by those states that permit amendment to substitute the decedent's personal representative but require the amendment to satisfy relation back rules if it occurs outside the limitations period for an action against the representative.

2. *Eliminate the rule through the common law*

As an alternative to an amendment to the Rules of Civil Procedure, the Pennsylvania Supreme Court should overrule *Thompson v. Peck* and eliminate the nullity rule by adopting the misnomer theory articulated in *Eberbach v. McNabney*.¹⁷³ The *Eberbach* court explained:

The situation before this court may be categorized as a misnomer of party. Essentially the plaintiff has sued an entity, Hanson Castor, by the wrong name. Though Castor is dead, his legal existence is not extinguished, but shifted to the special administrator of his estate in existence at the date of the original complaint. The special administrator stands in the shoes of the decedent in defending against liability for his alleged torts.¹⁷⁴

Just as this approach conformed to Indiana's "liberal rules of pleading,"¹⁷⁵ an identical theory to replace the current nullity rule in Pennsylvania would serve Pennsylvania's preference for liberal construction of its Rules of Civil procedure.¹⁷⁶

The nullity rule is an archaic, formalistic, and severe approach to pleading rules that cuts directly against Pennsylvania's professed preference. As such, the misnomer theory is an appropriate way to solve the problem created by *Thompson v. Peck*. The misnomer theory furthers Pennsylvania's

173. *Eberbach v. McNabney*, 413 N.E.2d 958, 962 (Ind. Ct. App. 1980).

174. *Id.*

175. *Id.*

176. *See* Pa.R.C.P. No. 126.

goal by modernizing its pleading rules and allowing for amendment where a plaintiff has clearly made her intent known but simply made a technical error.¹⁷⁷ Not only does the misnomer rule relax this technical formality, but it eliminates a part of the law that is essentially a legal fiction. When a plaintiff sues a deceased person, she does so by mistake. Treating the mistake for what it is, rather than acting as if the plaintiff intended to somehow pursue her claim *against someone who is dead*, is a much more realistic way of approaching the problem. For those reasons, adopting the misnomer theory and allowing a plaintiff to amend her complaint to substitute the decedent's personal representative is a suitable way of eliminating the nullity rule.

CONCLUSION

The time has come to abolish the nullity rule. As of now, Pennsylvania courts are required to adhere to this unfair, eighty-four-year-old rule, despite the fact that it lacks a reasoned, well-supported foundation. Surely, adhering to precedent as prejudicial as *Thompson v. Peck* should require an extremely thorough and logical reason for doing so. But the nullity rule lacks any foundation. The cases that the *Thompson* court relied on do not justify the rule. And certainly, a rule with the potential to harm plaintiffs based on a mere technicality the way the nullity rule can, should be defensible against modern attacks if it is to be followed almost a century after its creation. But as displayed by this Note, contemporary arguments weigh in favor of eliminating the rule.

Arguments for retaining the nullity rule are indefensible at worst and feeble at best. When Pennsylvania courts apply the rule, they do not seek to justify its existence or its application. Pennsylvania courts apply *Thompson* because they have no other choice; *Thompson* is binding precedent. So perhaps the only real argument in favor of retaining the rule is *stare decisis*.

177. See *supra* Section II.C.

2019] *NULLIFY PENNSYLVANIA'S NULLITY RULE* 127

But *stare decisis* does not create an absolute rule that unconditionally prohibits a court of last resort from changing course and invalidating a prior case in certain circumstances.¹⁷⁸ If Pennsylvania wants to modernize its pleading rules and allow for more flexible and fair application of its Rules of Civil Procedure, then the nullity rule must be eliminated. Either the Rules of Civil Procedure should be amended to include a provision that specifically permits substitution of a decedent's personal representative where a complaint names a deceased defendant, or the Pennsylvania Supreme Court should explicitly overrule *Thompson* and allow this type of amendment based on the theory that the plaintiff simply misnamed the defendant. Replacing the rule with either one of these pragmatic approaches will not harm defendants, and it will reduce the harm that the nullity rule currently inflicts on plaintiffs. The nullity rule condones rigidity solely for the sake of rigidity. It's time for Pennsylvania to address this issue and nullify the nullity rule.

178. *Stilp v. Commonwealth*, 905 A.2d 918, 967 (Pa. 2006) (“While *stare decisis* serves invaluable and salutary principles, it is not an inexorable command to be followed blindly when such adherence leads to perpetuating error.”).