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Appellate Procedure

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APPELLATE PROCEDURE

I. INTRODUCTION

The following survey article[1] discusses the most important elements of appellate procedure in New Mexico—jurisdiction, finality of judgments, and the scope and standard of review. A number of recent supreme court and court of appeals cases demonstrate the importance to the practitioner of understanding the basic elements of appellate procedure. Unless otherwise noted, the authors have limited this article to civil appeals from the district court in an attempt to present a concise yet comprehensive analysis of appellate procedure.

II. JURISDICTIONAL REQUIREMENTS

After entry of a final judgment[2] by a district court in a civil action, a party has thirty days to file a notice of appeal with that district's court clerk.[3] The notice of appeal should specify the name of the appellant and appellee, the name and address of the appellate counsel, and the name of the court.[4] Post-trial motions, such as a motion for j.n.o.v. or a motion for a new trial, do not extend the thirty-day time limit.[5]

A party may make a motion with the district court to extend the time for filing the notice of appeal.[6] Where such a motion is filed within thirty days from the entry of the final judgment or order, and where the moving party has demonstrated good cause for the delay, the district court may extend the time for filing up to thirty additional days.[7] The district court judge most likely abuses his discretion by refusing to grant motions to extend the time to file the notice of appeal.[8] If the thirty-day time limit for filing the notice of appeal has expired, the district court may extend the time for filing only up to thirty days upon the moving party's demonstration of excusable neglect or circumstances beyond its control.[9] The district court may not grant a motion for extension

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1. This article covers all applicable cases from August 1990 to August 1991.

2. See *infra* section II(B) for a discussion on what decisions are reviewable on appeal.

3. N.M. R. APP. P. 12-201(A); N.M. STAT. ANN. § 39-3-2 (Repl. Pamp. 1991). A party appealing the final judgment of an administrative agency has thirty days to file the notice of appeal with the appellate court clerk. N.M. R. APP. P. 12-601(B).

4. N.M. R. APP. P. 12-202(B).

5. *Id.* 12-201(D).

6. *Id.* An appellee may collect damages up to 10% of the judgment from an appellant who files a frivolous appeal. N.M. R. APP. P. 12-403(B)(4); N.M. STAT. ANN. § 39-3-27 (Repl. Pamp. 1991). Therefore, such extensions of time may be useful as they allow a party additional time to research and prepare for issues that will arise on appeal, reconsider the costs and benefits of further litigation, attempt to negotiate a settlement, or seek new counsel.

7. N.M. R. APP. P. 12-201(E)(1).

8. Guess v. Gulf Ins., 94 N.M. 139, 143, 607 P.2d 1157, 1161 (1980).

9. N.M. R. APP. P. 12-201(E)(2). Prior to the 1990 amendment, language in rule 201(E) technically allowed the district court to extend the time indefinitely. The 1990 amendment limits the amount of time to 30 days.

of time after sixty days from the time the appealable order was entered.[10]

Failure to file the notice of appeal within thirty days has traditionally been held to deprive the appellate courts of jurisdiction.[11] The appellate court needs jurisdiction before it can hear the case on the merits.[12] As a matter of practice, the courts liberally construe the rules of appellate procedure, including rule 201(A), so that they can determine cases on their merits.[13] Yet, the courts have also warned practitioners to conform to the rules or "suffer the pangs of outrageous misfortune"[14]—summary dismissal of the appeal.

A. Place of Filing Requirements

The supreme court has original appellate jurisdiction over appeals from the district court in which one or more of the counts of the complaint allege breach of contract, appeals from the Public Service Commission, removals from the State Corporation Commission, and from the granting of writs of habeas corpus.[15] The court of appeals' jurisdiction is limited to those appeals not included in the supreme court's original appellate jurisdiction.[16]

Failure to direct an appeal to the appropriate appellate court is not a fatal mistake.[17] Yet, getting the process started by filing a timely notice of appeal *with the district court* may be extremely important. Since 1989, two supreme court cases[18] and three court of appeals cases[19] have addressed

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10. *Id.* 12-201(E)(4).

11. *See* Public Serv. Co. v. Wolf, 78 N.M. 221, 430 P.2d 379 (1967); Board of Educ., Penasco Indep. School Dist. No. 4 v. Rodriguez, 77 N.M. 309, 422 P.2d 351 (1966); Miller v. John Doe, 70 N.M. 432, 374 P.2d 305 (1962); Labansky v. Labansky, 107 N.M. 425, 759 P.2d 1007 (Ct. App. 1988); *In re* Jasso, 107 N.M. 75, 752 P.2d 790 (Ct. App. 1987); Chavez-Rey v. Miller, 99 N.M. 377, 658 P.2d 452 (Ct. App. 1982); Seaboard Fire & Marine Ins. Co. v. Kurth, 96 N.M. 631, 633 P.2d 1229 (Ct. App. 1980); Brazfield v. Mountain States Mut. Casualty Co., 93 N.M. 417, 600 P.2d 1207 (Ct. App.), *cert. denied*, 93 N.M. 205, 598 P.2d 1165 (1979). *But see* Govich v. North Am. Sys., Inc., 112 N.M. 226, 814 P.2d 94 (1991).

12. Rice v. Gonzalez, 79 N.M. 377, 444 P.2d 288 (1968); Davidson v. Enfield, 35 N.M. 580, 3 P.2d 979 (1931); Brazfield v. Mountain States Mut. Casualty Co., 93 N.M. 417, 600 P.2d 1207 (Ct. App.), *cert. denied*, 93 N.M. 205, 598 P.2d 1165 (1979).

13. *See generally* Public Serv. Co. of N.M. v. Catron, 98 N.M. 134, 646 P.2d 561 (1982) (because clerk of court had closed office for Good Friday afternoon, appellant's notice of appeal filed three days after expiration of thirty day limit was held timely); State v. Peppers, 110 N.M. 393, 796 P.2d 614 (Ct. App. 1990) (untimely filing of criminal appeal presumptively held to be consequence of ineffective assistance of counsel and will be treated as if filed in a timely fashion); Archuleta v. New Mexico State Police, 108 N.M. 543, 775 P.2d 745 (Ct. App.) *cert. denied*, 108 N.M. 354, 772 P.2d 884 (1989) (thirty-day limit to file notice of appeal not applicable to rule 1-060(B) motions).

14. See, for example, Judge Sutin's warning in Weiss v. Hanes Mfg. Co., 90 N.M. 683, 685, 568 P.2d 209, 211 (Ct. App. 1977).

15. *See* N.M. R. APP. P. 12-102(A).

16. *Id.* 12-102(B); *see also* N.M. CONST. art. VI, § 29.

17. *See* N.M. STAT. ANN. § 34-5-10 (Repl. Pamp. 1990); "No matter on appeal in the supreme court or the court of appeals shall be dismissed for the reason that it should have been docketed in the other court, but it shall be transferred by the court in which it is filed to the proper court. Any transfer under this section is a final determination of jurisdiction . . . ." *Id.*

18. Marquez v. Gomez, 111 N.M. 14, 801 P.2d 84 (1990); Lowe v. Bloom, 110 N.M. 555, 798 P.2d 156 (1990).

19. Torres v. Smith's Management Corp., 111 N.M. 547, 807 P.2d 245 (Ct. App. 1991); Singer v. Furr's, Inc., 111 N.M. 220, 804 P.2d 411 (Ct. App. 1990); Martinez v. Wooten Constr. Co., 109 N.M. 16, 780 P.2d 1163 (Ct. App. 1989).

whether the failure to file the notice of appeal with the district court creates jurisdictional error. The following section attempts to reconcile these five cases and state the current law regarding place-of-filing requirements.

1. *Lowe v. Bloom*

In *Lowe v. Bloom*,[20] Lowe failed to file the notice of appeal with the district court within thirty days.[21] Consequently, the New Mexico Supreme Court dismissed Lowe's appeal from summary judgment.[22] While Lowe had filed his notice of appeal in a "timely fashion,"[23] his notice was filed with the court of appeals rather than the district court.[24] Five months after the judgment was entered, Lowe's notice of appeal found its way into the district court files.[25] Lowe complied with all other rules of appellate procedure. Pursuant to rule 12-202(D)(3), Lowe mailed copies of the notice of appeal to the district court judge and to the appellees.[26] Lowe filed his brief-in-chief, after an extension, within the time allotted by rule 12-210(B).[27] Lowe argued that the supreme court's jurisdiction was invoked despite his failure to comply with the court's place-of-filing requirements.[28] Arguing that he had "substantially complied" with the rules of appellate procedure, Lowe claimed that the appellees were not prejudiced by the defective notice of appeal.[29]

The court did not agree with Lowe that his failure to file notice of appeal with the district court was only a "technical violation" under rule 12-312.[30] Recognizing that its appellate rules were to be liberally construed in order to reach the merits of appeals, the court nevertheless held itself to the long-standing rule that it could not exercise discretion when it lacked jurisdiction.[31] Finding itself in-step with the "majority rule" the court announced that "the very concept of a timely filing . . . includes the concept that the party has substantially complied with ap-

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20. 110 N.M. 555, 798 P.2d 156 (1990).

21. *Id.*

22. *Id.*

23. Lowe filed his notice of appeal just two days after the district court had entered summary judgment against him. *Id.*

24. *Id.*

25. *Id.* at 558, 798 P.2d at 159.

26. *Id.* at 555, 798 P.2d at 156. New Mexico Rule of Appellate Procedure 12-202(D)(3) states: "The appellant shall give notice of the filing of a notice of appeal . . . by serving a copy on the appellate court, trial judge, tape monitor or court reporter who took the record and trial counsel of record for each party other than the appellant."

27. *Lowe*, 110 N.M. at 558, 798 P.2d at 159. The appellant assigned to the general calendar must file and serve his brief within thirty days after the entry of the transcript of the district court proceedings. *See* N.M. R. APP. P. 12-210(B).

28. *Lowe*, 110 N.M. at 556, 798 P.2d 157.

29. *Id.*

30. *Id.* New Mexico Rule of Appellate Procedure 12-312(C) states: "An appeal filed within the time limits provided in these rules shall not be dismissed for technical violations of Rule 12-202 which do not affect the substantive rights of the parties."

31. *Lowe*, 110 N.M. at 555-56, 798 P.2d at 156-57; *see also* Johnson v. Johnson, 74 N.M. 567, 569, 396 P.2d 181, 183 (1964) (so far as jurisdictional defects are concerned there can be no exercise of discretion).

plicable place-of-filing requirements . . . ."[32] The court concluded that Lowe's mailing a copy of his defective notice of appeal to the district court judge was not a "bona fide attempt to 'file' a notice of appeal as that term is used in rule 12-201."[33]

In holding that Lowe's failure to comply with the place-of-filing requirements of rule 12-202(A) could "not transform a jurisdictional defect into a technical one,"[34] the court overruled the court of appeals' holding in *Martinez v. Wooten Construction Co.*[35] In *Wooten*, an employee, Martinez, filed a notice of appeal with the Worker's Compensation Division within thirty days from a Hearing Officer's decision that he was temporarily totally disabled.[36] Martinez did not comply with rule 12-601(A), which requires that the notice of appeal be filed with the clerk of the court of appeals.[37] The construction company filed a motion to dismiss the appeal.[38]

The New Mexico Court of Appeals held that Martinez's failure to file his notice of appeal with the clerk of that court did not deprive the court of appellate jurisdiction.[39] Characterizing Martinez's mistake as a "technical violation," the court found that because the employer received timely notice of Martinez's intention to appeal, it could not have been prejudiced.[40] The court found further support for their appellate jurisdiction in the legislative intent of New Mexico's Worker's Compensation system that benefit claims be decided on their merits.[41] As further support for hearing Martinez's appeal, the court cited a statute that required the transfer of appeals mistakenly filed in the supreme court to the court of appeals and visa versa.[42]

The New Mexico Supreme Court in *Lowe* overruled the court of appeals to the extent that *Wooten* suggested that failure to substantially comply with the requirements of rule 12-202(A) results in merely a technical

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32. *Lowe*, 110 N.M. at 556, 798 P.2d at 157. The court, citing only eight other state courts which have held that failure to comply with place-of-filing requirements deprives the court of jurisdiction, nevertheless declared it to be the "majority rule."

33. *Id.*

34. *Id.*

35. 109 N.M. 16, 780 P.2d 1163 (Ct. App. 1989).

36. *Id.* at 16-17, 780 P.2d at 1163-64.

37. *Id.* New Mexico Rule of Appellate Procedure 12-601(A) states: "Notwithstanding any other provision of law, direct appeals from orders, decisions or actions of boards, commissions, administrative agencies or officials shall be taken by filing a notice of appeal or complaint on appeal with the appellate court clerk . . . within thirty (30) days from the date of the order, decision or action appealed from."

38. *See Wooten*, 109 N.M. at 17, 780 P.2d at 1164.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 18, 780 P.2d at 1165 (citing N.M. STAT. ANN. § 34-5-10 (Repl. Pamp. 1990)). It is not clear why the *Martinez* court cited section 34-5-10 as this was not a case where an appeal designated for the court of appeals has mistakenly been filed with the supreme court. The language of section 34-5-10 does not necessarily indicate a general legislative preference against treating place-of-filing requirements as jurisdictional. By enacting section 34-5-10, the legislature may have made a decision to narrowly expand the courts' appellate jurisdiction over a distinct set of cases—appeals filed in the wrong appellate court.

deficiency rather than a jurisdictional one.[43] Finding Lowe's reliance on *Wooten* understandable,[44] the supreme court nevertheless offered two reasons why *Wooten*'s precedential value should have been viewed with skepticism. The supreme court noted that though the court of appeals denied the employer's motion to dismiss the appeal, the court of appeals went on to summarily rule against Martinez on the merits.[45] Moreover, the court noted that certiorari was not sought in the *Wooten* case.[46]

In his dissent to *Lowe*, Justice Montgomery accused the majority of being "emptily formalistic" in addressing the question of whether the place-of-filing requirements should be construed as jurisdictional in the same way as the time-of-filing requirements.[47] Justice Montgomery suggested that the court look beyond the mechanical language of rules 12-201(A) and 12-202(A) and focus on the purposes and policies behind those rules.[48] While filing the notice of appeal within the time allotted by rule 12-201(A) serves the very important purpose of giving the court and the opposing party notice of the moving party's intention to appeal, filing the notice of appeal with the district court clerk does not serve a similar purpose.[49] Attempting to come up with any remotely important reason why the notice of appeal must be filed with the district court clerk, Justice Montgomery posited:

> No doubt it is helpful for the clerk to be notified that an appeal is in the offing, but preparation of the record proper may not even be begun until the clerk receives a copy of the docketing statement, as provided in rule 12-209(B) . . . . Again, nothing in the appellate process hinges on whether the district court clerk receives the original notice of appeal, a copy . . . or even any document at all purporting to represent the notice of appeal.[50]

According to Justice Montgomery, the dismissal of Lowe's appeal because he filed his notice with the court of appeals rather than the district court simply failed to effectuate the purposes behind the rules of appellate procedure.[51]

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43. *Lowe*, 110 N.M. at 556, 798 P.2d at 157.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.* (Montgomery, J., dissenting).
48. *Id.* at 557, 798 P.2d at 158.
49. *Id.*
50. *Id.*
51. *Id.* Justice Montgomery listed three other reasons why he felt the court erred in dismissing Lowe's appeal. First, Justice Montgomery felt that *Wooten* was correctly decided. *Id.* at 557-58, 798 P.2d at 158-59. Second, Justice Montgomery noted without elaboration the constitutional right to one appeal. *Id.* (citing N.M. CONST., art. VI, § 2). For a discussion of how the constitutional right to one appeal may affect place-of-filing requirements, see *infra*, text accompanying notes 103-137.

Finally, the circumstances in *Lowe* seemed to be a perfect case for applying rule 12-312(C). *Lowe*, 110 N.M. at 558, 798 P.2d at 159. The appellees did not discover that Lowe had mistakenly filed his notice of appeal with the court of appeals until Lowe served them with a copy of his brief-in-chief. *Id.* Appellees learned of Lowe's intent to appeal within a week of the district court's grant of their summary judgment motion; for well over five months appellees had been preparing as if the appeal had been filed correctly. *Id.* Because the appellees suffered no prejudice, Justice Montgomery was apparently unimpressed by their contention that strict enforcement of rule 12-202 was necessary to "preserve the integrity of the Court" and to "prevent abuses of the appellate process." *Id.*

Justice Montgomery did not believe the court ought to prostrate itself over its perceived jurisdictional boundaries. Justice Montgomery quipped:

> [L]awyers and judges [tend] to think of the concept of "jurisdiction" as if it were a *thing*—a kind of substance permeating the court, which the court either does or does not have depending on whether there has or has not been sufficient invocation to confer it. But jurisdiction . . . is not something whose existence can be determined by looking through a microscope or other instrument to see whether or not it is there; jurisdiction is an intensely practical concept used basically to tell lawyers and judges, and the general public, when a court will entertain a case and when it will not. The rules prescribing and delimiting jurisdiction should therefore be construed and applied in similarly practical ways- to accomplish the objective of defining those instances when a court will decide a controversy and when, presumably for good reasons, it will refuse to decide.[52]

Having explained his "definition" of jurisdiction,[53] Justice Montgomery concluded that Lowe's appeal should be entertained because "our judicial system proceeds on the assumption that after a final judgment of a district court the losing party is entitled to have the court's ruling reviewed on its merits."[54]

2. *Singer v. Furr's, Inc.*

The New Mexico Court of Appeals readdressed the question of place-of-filing requirements five months after the supreme court's decision in

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52. *Id.* at 558-59, 798 P.2d at 159-60.

53. Justice Montgomery's definition of jurisdiction begs the question of when a court will entertain an appeal. Asking *when* a court will entertain an appeal cannot be answered before asking *why* it should decide a controversy.

The purposes of allowing appeals are two-fold. First, appeals allow for error correction and to promote fairness in and reliance on the judicial system. This function or purpose of appeals has been referred to as the "reviewing function." *See* R.A. LEFLAR, INTERNAL OPERATING PROCEDURES OF APPELLATE COURTS 3 (1976); *see also* P. CARRINGTON, D. MEADOR & M. ROSENBERG, JUSTICE ON APPEAL 2 (1976). Second, appeals ensure doctrinal and procedural uniformity among the lower courts. As such attempts at unification sometimes involve quasi-legislative decisions, this function of appeals has appropriately been referred to as the "lawmaking function." *See* R.A. LEFLAR, *supra* at 4; *see also* CARRINGTON, MEADOR & ROSENBERG, *supra* at 2-3.

The court's power to promote fairness and uniformity is not unlimited. In New Mexico, the courts' jurisdiction is prescribed by law and by the Constitution. N.M. CONST., art. VI, §§ 1-3, 27, 29. Moreover, the appellate courts would be overwhelmed if they did not establish methods for filtering out frivolous appeals. *See generally* Minzner & Donnelly, *History of the New Mexico Court of Appeals*, 22 N.M.L. REV. 593 (1992). Thus, the supreme court has erected a number of procedural hurdles which force an appeal to proceed in an orderly and timely fashion; these hurdles may also dissuade vindictive or stubborn litigants from pursuing frivolous appeals.

54. *Lowe*, 110 N.M. at 559, 798 P.2d at 160. Justice Montgomery's dissent in *Lowe* was not the first time he has indicated that he wants to see the tension between the court's desire to promote fairness and uniformity and the court's constitutional duties and limitations resolved in favor of giving a losing litigant a chance to be heard. Just two months before *Lowe* was decided, Justice Montgomery stated in his dissent in Maples v. State, 110 N.M. 34, 791 P.2d 788 (1990): "Where . . . there are two possible interpretations relating to the right to an appeal, that interpretation which permits a review on the merits rather than rigidly restricting appellate review should be favored." *Id.* at 42, 791 P.2d at 796.

Lowe. In *Singer v. Furr's, Inc.*,[55] the court of appeals dismissed an employee's appeal of a worker's compensation award. The employee, Singer, filed his notice of appeal with the Worker's Compensation Division rather than with the court of appeals.[56] Singer filed the defective notice two weeks after the Worker's Compensation decision, well within the thirty-day time limit.[57]

In response to the calendar notice's proposed dismissal of the appeal, Singer asked the court to distinguish his case from *Lowe* because *Lowe* was limited to appeals initiated pursuant to rule 12-202(A).[58] Singer argued that his failure to comply with the place-of-filing requirements of rule 12-601 did not result in jurisdictional error.[59] In support of that contention, Singer claimed that the rules of appellate procedure should be construed more liberally in workers' compensation cases than in other appeals.[60]

Though *Lowe* was not a workers' compensation case, the court found the supreme court's overruling of *Wooten* an indication that the supreme court meant *Lowe* to stand for the proposition that "notices of appeal must be timely filed in the correct tribunal," including appeals arising under rule 12-601.[61] As for Singer's contention that workers' compensation appeals were deserving of a different standard than other appeals, the court failed to see any reason for creating such a distinction and, in light of Singer's failure to cite any authority for such a proposition, refused to exempt workers' compensation appeals from the jurisdictional requirements of rule 12-601(B).[62]

3. *Marquez v. Gomez*

Having applied the supreme court's holding in *Lowe* to *Singer*, the New Mexico Court of Appeals next sought to apply *Lowe* retroactively. In *Marquez v. Gomez*,[63] however, the New Mexico Supreme Court again pulled the rug from under the court of appeals and its treatment of place-of-filing requirements.

In late 1988, the court of appeals had proposed summary reversal of a trial court's order granting summary judgment against Ramon and Viola Marquez in their wrongful death action on behalf of their deceased son.[64] Eighteen months later, as a result of the decision in *Lowe*, "the court of appeals directed the Marquezes to show cause why their appeal should not be dismissed for failure to timely file notice of appeal in the district court."[65] The Marquezes had filed their notice of appeal with

55. 111 N.M. 220, 804 P.2d 411 (Ct. App. 1990).
56. *Id.*
57. *Id.*
58. *Id.* at 221, 804 P.2d at 412.
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. 111 N.M. 14, 801 P.2d 84 (1990).
64. *Id.* at 14, 801 P.2d at 84.
65. *Id.*

the court of appeals rather than the district court.[66] Other than filing their notice of appeal with the wrong court, the Marquezes complied with all other rules of appellate procedure. Bound by the decision in *Lowe*, however, the court of appeals dismissed the Marquezes' appeal.[67]

In an opinion that lacked the extensive analysis of *Lowe*, the supreme court reversed the court of appeals dismissal of the Marquezes' appeal.[68] Because the Marquezes had filed their docketing statement with the district court, and because the docketing statement "referred" to the notice of appeal, the court held that "any objections to the insufficiency of the filing must go to its content and not, as was the case in *Lowe*, to the place the notice was filed or delivered."[69] Thus, the failure of the Marquezes to strictly comply with rule 12-202(A) was considered a technical violation that did not affect the substantive rights of the parties.[70] The Marquezes' "substantial compliance" was enough to vest jurisdiction in the court of appeals.[71]

The court's conclusion hinged on its somewhat innovative finding that the Marquezes' docketing statement could serve as constructive notice of appeal.[72] The court claimed that its finding of constructive notice was supported by *Johnson v. Johnson*.[73] In *Johnson*, the supreme court agreed to hear an appeal to a quiet title action despite the fact that the appellant's notice of appeal was denominated as a "motion" rather than as a "notice."[74] The court stated that: "[t]o hold otherwise would quite clearly be a step backward toward technical and formal procedure rather than forward in the direction of liberal application of rules favoring disposition of cases on the merits wherever possible, no question of jurisdiction being present."[75]

The situation faced by the court in *Johnson*, however, is distinguishable from that faced by the court in *Marquez*. Mrs. Johnson's "motion" for appeal was filed with the district court and contained the information required in a notice of appeal.[76] The court merely had to decide whether the document in front of them complied with the rules for initiating an appeal.[77] Thus, Mrs. Johnson's "motion" complied with the content and place-of-filing requirements for the notice of appeal.[78] The Marquezes,

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66. *Id.*
67. *See* Alexander v. Delgado, 84 N.M. 717, 507 P.2d 778 (1973) (court of appeals is bound by supreme court decisions).
68. *Marquez*, 111 N.M. at 15, 801 P.2d at 85.
69. *Id.* at 14-15, 801 P.2d at 84-85.
70. *Id.*
71. *Id.*
72. *Id.* at 15, 801 P.2d at 85.
73. 74 N.M. 567, 396 P.2d 181 (1964).
74. *Id.* at 569, 396 P.2d at 182.
75. *Id.*
76. *Id.*
77. *Id.*
78. The Marquezes received an extension of time to file their notice of appeal from the district court. *Marquez*, 111 N.M. at 14, 801 P.2d at 84. It is ironic that the Marquezes made their motion for the extension of time to the district court judge, yet failed to file their notice of appeal with that court's clerk.

on the other hand, never filed a notice of appeal with the district court.[79] Unlike *Johnson*, the court in *Marquez* was required to find a wholly different document—the docketing statement—to take the place of the notice of appeal.[80] The court's attempt to liken the Marquezes—whose notice of appeal did not meet either the time or place-of-filing requirements—to Mrs. Johnson—whose notice of appeal was only deficient in content—is not entirely convincing.[81]

Regardless of whether the Marquezes filed their notice of appeal in the wrong place but within the right time, it is clear that the court had to both stretch the precedential value of *Johnson*[82] and ignore their earlier decision in *Lowe*. What is not clear is whether *Marquez* overruled or distinguished *Lowe*, or whether the holding in *Marquez* is limited to the facts of that case.[83]

4. Reconciling *Lowe* with *Marquez*

To say that *Lowe* is distinguishable from *Marquez* because the Marquezes served a docketing statement on the district court clerk while Mr.

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79. *Id.* The Marquezes complete failure to notify the district court of their impending appeal stands in stark contrast with Elwood Lowe's sending a copy of his notice of appeal to the district court within the time allowed. *Lowe*, 110 N.M. at 555, 798 P.2d at 156. Did Lowe's facsimile give the district court any less "constructive notice" than the Marquezes' docketing statement?

80. *Marquez*, 111 N.M. at 14-15, 801 P.2d at 84-85. The information found in a docketing statement is substantially more involved than the content required of a notice of appeal. The notice of appeal need only specify the names of the appellee(s) and appellant(s) and the names and addresses of their respective counsel and indicate whether the appeal is to be taken by the court of appeals or the supreme court. N.M. R. APP. P. 12-202(B). In contrast, the docketing statement must contain, among other things, a statement of the nature of the proceeding, a statement summarizing all facts material to a consideration of the issues presented, a statement of the issues presented and how they arose and were preserved in the trial court, a list of supporting authorities, a reference to all related or prior appeals, as well as proof that the appeal was timely filed. N.M. R. APP. P. 12-208(B). The docketing statement is to be filed with the appellate court clerk with a copy going to the district court clerk. *Id.* Clearly, the docketing statement and the notice of appeal are substantially dissimilar documents with completely different purposes.

81. *Cf.* Mitchell v. Dona Ana Savings & Loan, 111 N.M. 257, 804 P.2d 1076, *cert. denied sub nom.* Avallone v. Martin, 112 N.M. 235, 814 P.2d 103 (1991), where the New Mexico Supreme Court reversed the court of appeals' dismissal of an appeal by an attorney sanctioned under rule 11 where the notice of appeal designated the client rather than the attorney as the appellant. The court stated:

> [The notice of appeal] made it clear to all concerned that it was Avallone and not his client who was prosecuting the appeal . . . where an appellant is obviously present before the court and vigorously pursuing his case—although his name is missing from the caption of the case and he has erroneously designated someone else as the appellant—the court and all those concerned may yet have sufficient knowledge of the parties and their positions to hear the merits of the case . . . . To decline jurisdiction over Avallone's appeal in this situation appears to us an exaltation of form over substance.

Id. at 258, 804 P.2d at 1077. Ironically, though the facts and analysis in *Mitchell* invite comparison to *Johnson*, the supreme court did not mention the twenty-year-old *Johnson* case, even though it was the lynch-pin in *Marquez*.

82. The use of *Johnson* is ironic in light of the supreme court's warning in that case which said:

> Although we adopt a position of liberality, counsel desiring or attempting to appeal should comply with the rules as promulgated and not rely on the court to overlook departures therefrom. In other words, we propose to consider nonjurisdictional deviation from the rules in each case as it arises. So far as jurisdictional defects are concerned there can be no exercise of discretion.

Johnson, 74 N.M. at 569, 396 P.2d at 182.

83. Note that Justice Montgomery concurred with Justice Ransom's opinion in *Marquez*.

Lowe sent only a copy of his notice of appeal to the district court judge simply restates the question—why was the court's jurisdiction invoked in one case and not the other?[84] The first opportunity to reconcile *Marquez* with *Lowe* belonged to the court of appeals.[85] Bound to follow supreme court precedent,[86] the court of appeals was faced with the unenviable task of deciding which was the rule and which was the exception—*Lowe* or *Marquez*.

5. *Torres v. Smith's Management Corp.*

In *Torres v. Smith's Management Corp.*,[87] the New Mexico Court of Appeals dismissed an employer's appeal of a workers' compensation award to its employee, Torres, because it was filed with the court of appeals rather than the district court.[88] The employer had filed the defective notice within the thirty days allowed for filing the notice of appeal.[89] The employer had also sent a copy of the notice of appeal to the district court judge.[90]

In response to the calendar notice's proposed dismissal of the appeal, the employer asked the court to distinguish his case from *Lowe* because *Lowe* should not apply in cases where "confusion and ambiguity exists between applicable court rules and legislative provisions."[91] The employer was appealing a workers' compensation award against it and section 52-5-8 requires that appeals from the Workers' Compensation Administration be filed with the court of appeals.[92] Thus, the employer argued, there was a conflict between the court rule and a statute.[93]

The court of appeals responded by pointing out that the case did not originate with the Workers' Compensation Division, but came out of the district court.[94] Moreover, the court cited *Maples v. State*[95] for the proposition that on procedural matters, a rule adopted by the supreme court governs over an inconsistent statute.[96] Rule 12-202(A) governed the

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84. What makes *Marquez* so difficult to reconcile with *Lowe* is the fact that Elwood Lowe, as required by the rules of appellate procedure, sent a copy of his docketing statement to the district court too. *Lowe*, 110 N.M. at 558, 798 P.2d at 159.

85. Torres v. Smith's Management Corp., 111 N.M. 547, 807 P.2d 245 (Ct. App. 1991).

86. Alexander v. Delgado, 84 N.M. 717, 507 P.2d 778 (1973).

87. 111 N.M. 547, 807 P.2d 245 (Ct. App. 1991).

88. *Id.* at 549, 807 P.2d at 247.

89. *Id.* at 548, 807 P.2d at 246.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 548, 807 P.2d at 246.

94. *Id.*

95. 110 N.M. 34, 791 P.2d 788 (1990).

96. *Torres*, 111 N.M. at 548, 807 P.2d at 246. *Maples* was not the first time the court held a rule adopted by the supreme court to trump an inconsistent statute where both purport to either vest or divest the court with appellate jurisdiction. *See* Lovelace Medical Center v. Mendez, 111 N.M. 336, 805 P.2d 603 (1991); Southwest Underwriters v. Montoya, 80 N.M. 107, 452 P.2d 176 (1969); State v. Arnold, 51 N.M. 311, 183 P.2d 845 (1947). *See generally* Browde & Occhialino, *Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need For Prudential Constraints*, 15 N.M.L. REV. 407 (1985).

place-of-filing requirements for the employer's appeal, not section 52-5-8.[97] Thus, the court rejected the employer's attempt to distinguish *Lowe*.[98]

Upon concluding that the reasoning in *Lowe* controlled the disposition of the case, the court then made passing reference to *Marquez*.[99] Why the court of appeals chose to apply *Lowe* over *Marquez* is not explained. Neither *Lowe* nor *Marquez* involved workers' compensation claims. The court of appeals implied, however, that *Lowe*'s overruling of *Wooten*[100]—a workers' compensation case—was an indication that *Lowe* should govern the employer's misdirected notice of appeal.[101] The court of appeals had already held in *Singer* that the place-of-filing requirement for appeals from the Workers' Compensation Division (rule 12-601) was jurisdictional.[102] Thus, the court was merely taking the next step by applying *Lowe* to workers' compensation cases which originate in district court.

6. *Govich v. North American Systems, Inc.*

The court of appeals' valiant attempt to reconcile *Lowe* and *Marquez* in *Torres* may have been in vain. Dicta from the supreme court in *Govich v. North American Systems, Inc.*[103] indicates that the court of appeals has had the rug pulled out from under them once again.

In *Govich*, the supreme court overruled the defendant's motion to dismiss the Goviches' appeal of a partial summary judgment order in their products liability action.[104] After having summary judgment entered against them on their personal injury claims, the Goviches filed a timely notice of appeal.[105] Shortly after entering summary judgment on the issue of defendant's liability for the Goviches' personal injury, the district court dismissed the Goviches' claims for personal injury and property damage.[106] The Goviches filed timely notice of appeal to the dismissal order.[107] The defendant moved to dismiss the first appeal.[108] Because the Goviches' property damage claim survived the summary

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97. *Torres*, 111 N.M. at 548, 807 P.2d at 246.

98. *Id.*

99. *Id.* The court of appeals did not appear to have considered whether the Smith's Management Corp. docketing statement gave the trial court constructive notice of their appeal.

100. *See supra* note 43 and accompanying text.

101. *Torres*, 111 N.M. at 548, 807 P.2d at 246.

102. *Id.* at 548-49, 807 P.2d at 246-47.

103. 112 N.M. 226, 814 P.2d 94 (1991).

104. *Id.* at 229-30, 814 P.2d at 97-98.

105. *Id.* at 229, 814 P.2d at 97. The notice of appeal, mistakenly filed with the court of appeals, was transferred to the supreme court pursuant to N.M. STAT. ANN. section 34-5-10.

106. *Govich*, 112 N.M. at 229, 814 P.2d at 97. The district court's order dismissing the Goviches' claims arose in response to defendant's motion to compel answers to interrogatories. Because the summary judgment order for all practical purposes dismissed the Goviches' claims (the Goviches' property damage claims had been subrogated to their insurance company), discovery was moot, and the district court denied the motion and subsequently dismissed the suit. *Id.*

107. *Id.* This second notice of appeal was also transferred to the supreme court pursuant to N.M. STAT. ANN. section 34-5-10.

108. *Govich*, 112 N.M. at 229, 814 P.2d at 97.

judgment against the personal injury claims, the court held that there was no final order from which an appeal could be taken.[109]

The defendant then moved to dismiss the second appeal.[110] The defendant argued that because the second notice of appeal mentioned and attached only to the order denying defendant's motion to compel and dismissing the Goviches' suit, the Goviches' notice of appeal failed to confer jurisdiction over the partial summary judgment order.[111]

The court disagreed with defendant's argument, classifying the Goviches' second notice of appeal as only a technical violation of rule 12-202(B).[112] The court held that the defendant had not been prejudiced by the technical violation as the Goviches' intent to appeal the merits of the personal injury claim was apparent from their filing of the premature notice of appeal from the summary judgment order.[113] The court concluded that the second notice of appeal was the functional equivalent of an appeal from the partial summary judgment order and the order of dismissal.[114] The court then went on to address the case on its merits.[115]

Neither the time-of-filing requirements of rule 12-201(A) nor the place-of-filing requirements of rule 12-202(A) were relevant to *Govich*. Nevertheless, the court used *Govich* as an opportunity to reconcile *Lowe* and *Marquez*.[116] The court stated:

> While we recently held [in *Lowe*] that the appellate rules for time and place of filing a notice of appeal govern the proper invocation of our jurisdiction . . . we also have stated [in *Marquez*] the policy of facilitating the right of appeal by liberally construing technical deficiencies in a notice of appeal otherwise satisfying the time and place of filing requirements . . . . The constitutional mandate that "an aggrieved party shall have the absolute right to one appeal" evinces the strong policy in this state that courts should facilitate rather than

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109. *Id.* New Mexico Rule of Civil Procedure 1-054(C)(1) provides that in the absence of an express determination by the court that there is no just reason for delay, an adjudication of fewer than all the claims shall not terminate the action as to any of the claims and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all claims.

110. *Govich*, 112 N.M. at 230, 814 P.2d at 98. Tactically, the defendant hoped to stymie appellate review of the underlying issue of comparative negligence and the rescue doctrine which had been decided in the defendant's favor by the trial court on summary judgment. The Goviches' first appeal, which sought to address the negligence issue, was properly dismissed by the court as premature. *Id.*; see also the discussion of final judgments, *infra* notes 140-77 and accompanying text. The defendants then hoped to limit review of the Goviches' second appeal to whether the trial court's dismissal of the lawsuit was an abuse of discretion. Though unsuccessful, the defendant's strategy was certainly clever. The court, after disposing of the procedural issue and agreeing to entertain the appeal of the summary judgment, reversed and remanded for trial on the merits. *Govich*, 112 N.M. at 231-34, 814 P.2d at 99-102.

111. New Mexico Rule of Appellate Procedure 12-202(B) requires that a copy of the judgment appealed from be attached to the notice of appeal. The defendant argued that if the Goviches had wished for appellate review of the merits of their case, they would have also attached the summary judgment order to their notice of appeal. *Govich*, 112 N.M. at 230, 814 P.2d at 98.

112. *Govich*, 112 N.M. at 230, 814 P.2d at 98.

113. *Id.*

114. *Id.*

115. *Id.* at 231-34, 814 P.2d at 99-102.

116. *Id.* at 230, 814 P.2d at 98.

> hinder, the right to one appeal . . . . *As a matter of terminology, we properly should refer hereafter to the mandatory sections of our rules of appellate practice as "mandatory" and discard the term "jurisdictional" that has been used over time by most federal and state courts to describe a mandatory precondition to the exercise of jurisdiction* . . . . Though we have stated in categorical terms that we cannot entertain an appeal when the notice does not satisfy the requirements for time and place of filing, what we in essence have held is simply that, with respect to the mandates for time and place of filing the notice of appeal, we decline to exercise discretion to excuse or justify any improper attempt to invoke our jurisdiction. *It is probably imprecise to say we cannot exercise such discretion.*[117]

To find jurisdiction to hear the Goviches' appeal of the summary judgment order, the New Mexico Supreme Court did not have to challenge the long-standing notion that the court has no authority to hear appeals unless its jurisdiction has been properly invoked.[118] In fact, the court cited two earlier cases where the content of notice rule was held not to be jurisdictional.[119] Thus, the question arises—why did the court even attempt to reconcile *Lowe* and *Marquez*, and what affect will the above dicta have on defective appeals?

7. Does Appellate Jurisdiction Survive *Govich*?

The New Mexico Supreme Court's decision to treat the place and time-of-filing requirements as "mandatory" rather than "jurisdictional" must have been more than a semantic exercise. *Govich* did not purport to overrule *Lowe*. Though the dicta in *Govich* is open to a number of interpretations, it is hard to imagine that the "emptily formalistic" approach complained about by Justice Montgomery in *Lowe* will be resurrected.[120]

One way to read the dicta in *Govich*, which purports to make place and time-of-filing requirements "mandatory" rather than "jurisdictional," is that it represents a victory of substance over form. The supreme court has often expressed concern that mere technicalities or procedures could impede the search for justice and fairness.[121] The court may tolerate an

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117. *Id.* (emphasis added) (citations omitted).

118. *See supra* note 12 and accompanying text.

119. *Govich*, 112 N.M. at 230, 814 P.2d at 98 (citing Baker v. Sojika, 74 N.M. 587, 588-89, 396 P.2d 195, 196 (1964); Nevarez v. State Armory Bd., 84 N.M. 262, 264, 502 P.2d 287, 289 (1972)).

120. *Lowe*, 110 N.M. at 556, 798 P.2d at 157 (Montgomery, J., dissenting).

121. *See, e.g.*, Mitchell v. Dona Ana Sav. & Loan Ass'n, 111 N.M. 257, 258, 804 P.2d 1076, 1077 (1991) ("While we admire the court of appeals' determination to proscribe 'sloppy practice,' we feel that it might be better to tolerate a little sloppiness in the service of the few appellants whose appeals might otherwise fall through the cracks for their lack of adherence to technicalities"); *Lowe*, 110 N.M. at 556-59, 798 P.2d at 157-60 (Justice Montgomery, dissenting); Public Serv. Co. v. Cartron, 98 N.M. 134, 135, 646 P.2d 561, 562 (1982); Guess v. Gulf Ins., 94 N.M. 139, 143, 607 P.2d 1157, 1161 (1980) ("However strictly we interpret this rule, we cannot under the circumstances ignore the position of Guess, the real party in interest, in this scenario. His complaint involves the death of his wife and two children. The seriousness of the case is one of the many elements for consideration . . . ."); Garver v. Public Serv. Co., 77 N.M. 262, 266, 421 P.2d 788, 792 (1966); *see also* N.M. R. APP. P. 12-312.

appellant's failure to follow the rules for filing a notice of appeal except where the appellee is prejudiced by such infractions.[122] If it is truly imprecise to say that the appellate courts cannot exercise discretion over time and place-of-filing requirements, as Justice Ransom suggested in *Govich*, then practitioners who are delinquent in the protection of their client's right to appeal ought not give up the vigorous pursuit of an invocation of the courts' appellate jurisdiction.[123]

On another level, the dicta in *Govich* may represent another round in the court's on-going fray with the legislature over the scope of judicial rule-making power.[124] The supreme court, vested with the exclusive right to prescribe and regulate pleading, practice and procedure in all courts, including lower courts,[125] is responsible for simplifying and promoting the speedy determination of litigation upon its merits,[126] avoiding a confusion in the methods of procedure,[127] and providing uniform rules of pleading and practice.[128] The creation of a right of appeal, however, is a matter of substantive law and outside the province of the court's rule making power.[129] By treating time and place-of-filing requirements as "mandatory" rather than "jurisdictional," the court appears to have enlarged its appellate jurisdiction over appeals which previously would have had to have been dismissed.

Finally, the dicta in *Govich* may represent a change in the court's treatment of the constitutional right to appeal. Though the people of New Mexico amended their constitution to guarantee an aggrieved party the absolute right to one appeal,[130] the court's early response to the amendment was cool.[131] The court repeatedly held that the amendment could not redress a criminal defendant's failure to comply with Rules

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122. The New Mexico Court of Appeals recently found *Govich* to stand for the proposition that the court may properly exercise its discretion and invoke jurisdiction if substantive rights of the parties are not negatively affected thereby. State v. Alvarez, 113 N.M. 82, 823 P.2d 324 (Ct. App.), *cert. denied*, 113 N.M. 23, 821 P.2d 1060 (1991).

123. After *Govich*, seeking certiorari over the dismissal of a defective appeal is unlikely to be held to be frivolous or lead to the sanctions provided for in N.M. R. APP. P. 12-403(B)(4) and N.M. STAT. ANN. section 39-3-27 (Repl. Pamp. 1991).

124. *See generally* Browde & Occhialino, *supra* note 96; *accord* Lovelace Medical Center v. Mendez, 111 N.M. 336, 805 P.2d 603 (1991); Maples v. State, 110 N.M. 34, 791 P.2d 788 (1990); Southwest Community Health Serv. v. Smith, 107 N.M. 196, 755 P.2d 40 (1988); Ammerman v. Hubbard Broadcasting, 89 N.M. 307, 551 P.2d 1354 (1976); State v. Arnold, 51 N.M. 311, 183 P.2d 845 (1947); State v. Roy, 40 N.M. 397, 60 P.2d 646 (1936).

125. N.M. CONST. art. VI, § 3; *see also In re* Motion for a Subpoena Duces Tecum, 94 N.M 1, 2, 602 P.2d 539, 540 (1980).

126. N.M. STAT. ANN. § 38-1-1(A) (Repl. Pamp. 1987).

127. *Ammerman*, 89 N.M. at 310, 551 P.2d at 1357 (quoting State v. Roy, 40 N.M. 397, 421, 60 P.2d 646, 661 (1936)).

128. *Id.*

129. *Arnold*, 51 N.M. at 314, 183 P.2d at 846.

130. N.M. CONST. art. VI, § 2.

131. *See, e.g.*, State v. Garlick, 80 N.M. 352, 353, 456 P.2d 185, 186 (1969) ("We perceive of no reason to consider that the amendment to the constitutional provision in any way altered the effect of the court rule fixing the time in which the guaranteed right to appeal should be exercised. That the appeal should be within a reasonable time which has been fixed at thirty days, as noted above, is not in any sense a deprivation of the guaranteed right. It is nothing more nor less than a procedural requirement which must be met to exercise the right").

of Criminal Appellate Procedure.[132] Ironically, the court began to warm up to an aggrieved party's right to appeal only when the state claimed to be the aggrieved party. In a number of cases,[133] the court held that the amendment provided the state a right to appeal in a criminal prosecution, though such appeals are generally prohibited by force of the double jeopardy provisions of the United States and New Mexico Constitutions.[134] In these cases, the court held that though it may establish rules of procedure, in doing so it may not abridge or diminish any right expressly provided by the Constitution.[135] Having held that a rule of the court cannot deny an aggrieved party the right to appeal in criminal cases,[136] the dicta in *Govich* may have extended that holding to civil cases.

8. Conclusion

Admittedly the affect *Govich* might have on appellate procedure is speculative. What appears to be certain, however, is that the court will no longer employ its place and time-of-filing requirements to limit access to appellate review.[137] It is probably optimistic to say that the court's liberalizing place and time-of-filing requirements may actually alleviate some of the problems associated with its burgeoning caseload[138] as the increased discretion at least limits the courts' job to judging cases on their merits. Because the majority of the cases involving place and time-of-filing requirements cited herein were decided in the last two years, one has the sense that the issue has reached but a momentary culmination.

B. Decisions Reviewable—What Can Be Appealed?

A substantial concern affecting a party's right to appeal is whether the appellate courts can review the order or judgment of the trial court. Typically, the appellate courts follow the "finality rule" and will not review a trial court decision that does not completely dispose of the merits of the case.[139]

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132. *See, e.g.*, Olguin v. State, 90 N.M. 303, 563 P.2d 97 (1977); Hudson v. State, 89 N.M. 759, 557 P.2d 1108 (1976).

133. *See, e.g.*, Smith v. Love, 101 N.M. 355, 683 P.2d 37 (1984); State v. Aguilar, 95 N.M. 578, 624 P.2d 520 (1981); State v. Giraudo, 99 N.M. 634, 661 P.2d 1333 (Ct. App. 1983).

134. N.M. CONST. art. II, § 15; N.M. STAT. ANN. § 39-3-3(C).

135. *Smith*, 101 N.M. at 356, 683 P.2d at 38; *see also* State v. Galvan, 100 N.M. 769, 676 P.2d 1334 (1984).

136. *Smith*, 101 N.M. at 356, 683 P.2d at 38; *see also* State v. Watson, 82 N.M. 769, 487 P.2d 197 (Ct. App. 1971).

137. *See, e.g.*, Johnson v. School Bd. of Albuquerque, 113 N.M. 117, 823 P.2d 917 (Ct. App. 1991). ("We decline to hold that an effective means of controlling our backlog is by dismissing appeals because a document was filed in this court a few days late.").

138. *See generally* Minzner & Donnelly, *supra* note 53.

139. Floyd v. Towndrow, 48 N.M. 444, 152 P.2d 391 (1944).

1. History, Purpose, and Use of the Finality Rule

a. History of the Rule

The New Mexico Supreme Court has found that it is without jurisdiction in matters where a trial court order lacks finality.[140] The court originally based its conclusion on a supreme court rule giving an aggrieved party three months to appeal from a "final judgment."[141] This rule, however, has since been repealed[142] and replaced by a statute that vests appellate jurisdiction over final judgments in civil cases in both the supreme court and court of appeals.[143] Interestingly, the supreme court's review of "finality" cases has been extremely limited since the addition of the court of appeals.[144] Yet, as evidenced by its most recent decision, the supreme court will construe the "final judgment" requirement in the statute like it construed the old supreme court rule.[145]

The New Mexico Court of Appeals also holds that its jurisdiction is limited to appeals from final judgments, interlocutory orders which practically dispose of the merits of an action, and final orders entered by a trial court after the entry of a judgment which affect some substantial right of one of the parties.[146] The court of appeals principally has based its rulings on statutory law,[147] but has also used the New Mexico Rules of Civil Procedure,[148] and the old rules of civil appellate procedure.[149] The court of appeals seems to draw from a wider array of statutory and judicially created law when it seeks to determine whether

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140. *In re* Quintana, 82 N.M. 698, 699, 487 P.2d 126, 127 (1971).

141. *Floyd*, 48 N.M. at 446, 152 P.2d at 393. The supreme court referred to 1917 N.M. Laws ch. 43, § 1 (the old supreme court rule) as "1941 Comp., § 19-201(5)(1)".

142. 1971 N.M. Laws ch. 222, § 18.

143. N.M. STAT. ANN. § 39-3-2 (Repl. Pamp. 1991).

144. The supreme court's most recent ruling on the finality issue came in Kelly Inn No. 102, Inc. v. Kapnison, 113 N.M. 231, 824 P.2d 1033 (1992). To find a supreme court decision regarding the finality rule before this case, however, one has to go back to Angel v. Wilde, 86 N.M. 442, 525 P.2d 369 (1974). In *Angel*, the court relied upon the old supreme court finality rule and divested itself of jurisdiction. *Id.* at 443, 525 P.2d at 370. More recently, the supreme court clarified that the dismissal of a counterclaim could only be brought by interlocutory appeal, B.L. Goldberg & Assoc. v. Uptown, Inc., 103 N.M. 277, 705 P.2d 683 (1985), and denied certiorari in a case involving a finality question. Lepiscopo v. Hopwood, 110 N.M. 30, 791 P.2d 481 (Ct. App.), *cert. denied*, 110 N.M. 72, 792 P.2d 49 (1990).

145. In *Kelly Inn No. 102, Inc.*, the supreme court restated the general rule that "an order or judgment is not considered final unless all issues of law and fact have been determined and the case disposed of by the trial court to the fullest extent possible." *Kelly Inn No. 102, Inc.*, 113 N.M. at 236, 824 P.2d at 1038 (quoting B.L. Goldberg & Assoc. v. Uptown, Inc., 103 N.M. 277, 278, 705 N.M. 683, 684 (1985)). One should note, however, that the supreme court explicitly recognized that this rule was not absolute. *Id.*

146. Watson v. Blakely, 106 N.M. 687, 690, 748 P.2d 984, 987 (Ct. App. 1987), *overruled on other grounds*, Kelly's Inn No. 102, Inc. v. Kapnison, 113 N.M. 231, 824 P.2d 1033 (1992).

147. *See, e.g.*, Thorton v. Gamble, 101 N.M. 764, 688 P.2d 1268 (Ct. App. 1984) (appellate court's jurisdiction is limited by N.M. STAT. ANN. section 39-3-2 (Cum. Supp. 1984)).

148. *See, e.g.*, Watson v. Blakely, 106 N.M. 687, 748 P.2d 984 (Ct. App. 1987) (court determined that it did not have jurisdiction over an appeal based upon N.M. R. CIV. P. 1-054(C)).

149. *See, e.g.*, Cole v. McNeill, 102 N.M. 146, 692 P.2d 532 (Ct. App. 1984) (court declared that civil appeals may be taken from any final judgment or decision and based this declaration on N.M. R. Civ. App. P. 3(a) (superseded by N.M. R. APP. P. 12-201)).

an order or judgment is not final. This may be the reason why the supreme court's review of finality case has been so limited.

b. Purpose of the Rule

Both the New Mexico Supreme Court and the New Mexico Court of Appeals have stated that the purpose behind the "final judgment" requirement is to avoid "piecemeal" litigation.[150] Accordingly, the courts have set up criteria to determine whether a judgment is final. First, a judgment is not final unless it is in the form of a formal written order or judgment.[151] In addition, the ruling of the trial judge must completely dispose of all issues of law and questions of fact necessary to determine the case.[152] In order to make this determination the appellate court looks at the substance of an order rather than its form so that it may properly determine the effect of the judgment on the rights of some or all of the parties.[153] If the effect of an order is to "practically dispose of the merits" of the case, then the appellate court will review the order.[154]

c. Use of Rule

The appellate courts find that many specific trial court rulings generally are not final judgments.[155] Included in the list of non-final, non-appealable orders are oral rulings,[156] temporary restraining orders,[157] temporary injunctions,[158] denials of motions to amend complaints,[159] dismissals without prejudice,[160] actions involving multiple claims where the order does not dispose of all of the claims,[161] and orders awarding motion for new trial.[162]

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150. Floyd v. Towndrow, 48 N.M. 444, 447, 152 P.2d 391, 392 (1944); *Thorton*, 101 N.M. at 767, 688 P.2d at 1271.

151. Bouldin v. Bruce M. Bernard, Inc., 78 N.M. 188, 429 P.2d 647 (1967).

152. *Floyd*, 48 N.M. at 446, 152 P.2d at 392.

153. Village of Los Ranchos de Albuquerque v. Shively, 110 N.M. 15, 17, 791 P.2d 466, 468 (Ct. App. 1989), *cert. denied*, 109 N.M. 704, 789 P.2d 1271 (1990).

154. *Id.*

155. For a more complete listing of non-final judgments see the notes following N.M. R. APP. P. 12-201.

156. Bouldin v. Bruce M. Bernard, Inc., 78 N.M. 188, 429 P.2d 647 (1967); Miller v. Connecticut Gen. Life Ins. Co., 84 N.M. 321, 323, 502 P.2d 1011, 1013 (Ct. App. 1972) (Sutin, J., specially concurring).

157. State *ex rel.* Dep't of Human Servs. v. Natural Mother, 97 N.M. 707, 643 P.2d 271 (Ct. App. 1982).

158. Griffin v. Jones, 25 N.M. 603, 186 P. 119 (1919).

159. Clancy v. Gooding, 98 N.M. 252, 647 P.2d 885 (Ct. App. 1982).

160. Ortega v. Transamerica Ins. Co., 91 N.M. 31, 569 P.2d 957 (Ct. App. 1977). *But see* Maitlen v. Getty Oil Co., 105 N.M. 370, 733 P.2d 1 (Ct. App. 1987) (dismissals without prejudice in workers' compensation cases that are dismissed on grounds of prematurity are appealable because such dismissals are sufficiently final; otherwise, worker would never be entitled to review on the merits).

161. Aetna Casulty & Sur. Co. v. Miles, 80 N.M. 237, 453 P.2d 757 (1969); Montoya v. Anaconda Mining Co., 97 N.M. 1, 635 P.2d 1323 (Ct. App. 1981).

162. Labansky v. Labansky, 107 N.M. 425, 759 P.2d 1007 (Ct. App. 1988).

2. Exceptions to Finality Rule

Two general exceptions to the finality rule exist.[163] First, in some circumstances parties may appeal interlocutory judgments or orders that do not practically dispose of the merits.[164] The trial judge must certify that the order or judgment involves some controlling question of law and that an immediate appeal from the order may "materially advance the ultimate termination of the litigation."[165] Even after the trial court certifies the appeal, however, the appellate court is given the discretion to deny the appeal.[166] The appellate court must balance the orderly process of appellate review against the need to have the legal issue resolved before it will grant the appeal.[167]

The second exception to the general finality rule relates to multiple parties and multiple claims. Where an action involves multiple claims, the New Mexico Rules of Civil Procedure for the District Courts allow a trial judge the discretion to enter a final judgment as to one or more, but fewer than all, of the claims.[168] This exception can be used only if the trial judge "makes an express determination that there is no just reason for delay."[169] The determination that there is no reason for delay lies solely within the discretion of the trial court.[170] If the trial judge does make the determination, then the order is final and can be appealed.[171]

Furthermore, where an action involves multiple parties, the rules of civil procedure give the trial court the discretion to enter a final judgment "adjudicating all issues as to one or more, but fewer than all [of the] parties."[172] Such a ruling is considered a "final judgment" and can be appealed even though such judgment would not practically dispose of the merits of the entire case.[173] The rule here, however, is that the judge does not have to make an express determination of "no just reason for delay."[174] In fact, a party could lose their right to appeal if a judge adjudicates all of the issues relating to that party and an appeal is not taken within the requisite time frame because the judgment is final as to that party when all issues are settled.[175] The trial judge

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163. Jurisdiction over extraordinary writs may count as a third exception but is not discussed because extraordinary writs fall outside the scope of this survey article.

164. N.M. STAT. ANN. § 39-3-4 (Repl. Pamp. 1991). See N.M. R. APP. P. 12-203 for the steps that need to be taken to perfect an interlocutory appeal.

165. N.M. STAT. ANN. § 39-3-4 (Repl. Pamp. 1991).

166. State v. Hernandez, 95 N.M. 125, 619 P.2d 570 (Ct. App. 1980).

167. Schlieter v. Carlos, 108 N.M. 507, 775 P.2d 709 (1989).

168. N.M. R. CIV. P. 1-054(C)(1).

169. *Id.*

170. Navajo Ref. Co. v. Southern Union Ref. Co., 105 N.M. 616, 735 P.2d 533 (1987).

171. N.M. R. CIV. P. 1-054(C)(1).

172. N.M. R. CIV. P. 1-054(C)(2).

173. *See* Rivera v. King, 108 N.M. 5, 7, 765 P.2d 1187, 1189 (Ct. App.), *cert. denied*, 107 N.M. 785, 765 P.2d 758 (1988).

174. *Id.*

175. Seaboard Fire & Marine Ins. Co. v. Kurth, 96 N.M. 631, 633 P.2d 1229 (Ct. App. 1980).

can expressly provide that the judgment was not meant to be final in which case the judgment cannot be appealed.[176]

3. Recent Cases

Two cases pertaining to the finality rule and appellate court jurisdiction were decided by the New Mexico courts during the year covered by this survey issue.[177] Both cases warrant review due to the particular analysis that the courts provided in each case.

In *State v. Webb*,[178] the state charged Webb with capital murder.[179] Webb's counsel asked that the court allow medical tests to determine if Webb was competent to stand trial.[180] The trial court held a hearing and determined that Webb was incompetent and that he was dangerous.[181] The court ordered that Webb be detained in a secure facility.[182] Webb appealed this decision.[183]

The court of appeals found that it did not have jurisdiction to hear the appeal because the order of the trial court was not a final judgment. The court applied the *Floyd v. Towndrow*[184] definition of "final judgment" and determined that the order of the trial court did not practically dispose of the merits of the case.[185] The court based this determination on the fact that competency hearings are only one part of the criminal process.[186] The court found that a ruling which requires a defendant to be held over to determine competency in no way disposes of the question as to the guilt or innocence of a party.[187] Thus, reasoned the court, until the case is either dismissed, tried, or the defendant is involuntarily committed, the ruling of the trial court is not final.[188]

This case clarifies how the appellate courts will review cases regarding the finality rule. As the court stated, it gave the term "finality" a practical, rather than a technical, construction and looked at the substantive effect of the order of the trial court on the rights of the defendant.[189] In this case, the court placed emphasis on the different

176. N.M. R. Civ. P. 1-054.

177. State v. Webb, 111 N.M. 78, 801 P.2d 660 (Ct. App.), *cert. quashed*, 111 N.M. 164, 803 P.2d 253 (1990); *In re* Forfeiture of $2,730.00, 111 N.M. 746, 809 P.2d 1274 (1991). This article does not do an analysis of Kelly's Inn No. 102, Inc. v. Kapinson, 113 N.M. 231, 824 P.2d 1033 (1992). Attorneys should read this case to see the supreme court's latest discussion of the finality issue.

178. 111 N.M. 78, 801 P.2d 660 (Ct. App.), *cert. quashed*, 111 N.M. 164, 803 P.2d 253 (1990).

179. *Id.* at 78, 801 P.2d at 660.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. 48 N.M. 444, 152 P.2d 391 (1944).

185. *Webb*, 111 N.M. at 79, 801 P.2d at 661.

186. *Id.* at 80, 801 P.2d at 662.

187. *Id.*

188. *Id.*; *see also In re* Parnell, 92 N.M. 490, 590 P.2d 638 (Ct. App. 1979) (persons involuntarily committed have the right to appeal the initial commitment).

189. *Webb*, 111 N.M. at 79, 801 P.2d at 661.

stages of the competency proceeding.[190] It appears that the defendant would have the right to appeal at any stage of the competency proceeding except the one addressed in the case.[191] Had the attorney for the defendant in this case examined the effects of an order at each stage, she might have avoided the jurisdictional defect.

The *Webb* decision also adds to the court's previous decisions regarding the finality rule.[192] The court demonstrated that it will look to effects of the trial court's judgment and will do what is possible to avoid piecemeal litigation. Using a similar construction of the finality rule, an appellate court could, for example, determine that an order granting a new trial is not a final order because the effect of the order is to stay the entry of the judgment of the case. On remand, an appellate court could only order the trial court to enter the judgment, at which time the losing party could appeal, or uphold the grant of a new trial on substantive grounds and send the case back to the trial court for a re-trial. Either way the trial court is forced to take some action to dispose of the case before the parties can rightfully appeal the issues.[193]

During this survey period, the New Mexico Supreme Court also reviewed an issue closely related to the finality rule. In *In re Forfeiture of $2,730.00*,[194] the New Mexico Supreme Court decided the issue of whether execution on a final judgment divested an appellate court of jurisdiction.[195] The supreme court basically held that execution on a final judgment does not necessarily divest the appellate courts of in personam jurisdiction.[196]

The case was actually a consolidation of two similar cases, one involving the seizure of cash from James Mitchell and the other involving the seizure of a 1984 Pontiac.[197]

The issue in Mitchell's case revolved around the fact that the Farmington police seized cash from Mitchell claiming it was the fruit or instrumentality of a violation of the Controlled Substances Act.[198] The court entered a default judgment of forfeiture against Mitchell and the City executed on the judgment by transferring the cash to the city

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190. *Id.* at 79-80, 801 P.2d at 661-62.

191. *Id.*

192. The *Webb* decision does not merely reinforce the idea that only decisions which "practically dispose of the merits" are appealable although the decision is based upon this concept. Rather, the decision clarifies what the court will look at when reviewing finality decisions. In this case the court of appeals looked to future possibilities (conviction, involuntary commitment) to determine that the order was not final. *Id.*

193. The supreme court used this exact analysis in Cockrell v. Gilmore, 74 N.M. 66, 390 P.2d 655 (1964), where it determined that an order granting a new trial generally is not a final order. This analysis has not yet been extended to orders granting new trials in criminal cases. *See, e.g.*, State v. Ferguson, 111 N.M. 191, 803 P.2d 676 (Ct. App.) (court reviewed order granting new trial but did not state basis for appellate court jurisdiction over case), *cert. denied*, 111 N.M. 144, 802 P.2d 1290 (1990).

194. 111 N.M. 746, 809 P.2d 1274 (1991).

195. *Id.* at 747, 809 P.2d at 1275.

196. *Id.*

197. *Id.*

198. *Id.*; *see also* N.M. STAT. ANN. §§ 30-31-1 to -41 (Repl. Pamp. 1989).

coffers.[199] Mitchell appealed in an effort to get his money back but the court of appeals granted the City's motion to dismiss the case for lack of jurisdiction.[200] Mitchell then appealed to the supreme court.[201]

The Pontiac case[202] had very similar facts. The State of New Mexico sought forfeiture on the car and several thousand dollars.[203] The owner of the car failed to answer the state's complaint.[204] Without giving notice to the owner of the Pontiac, the state filed a motion for default judgment which the trial court granted.[205] The state executed on the judgment before the owner could take any action and the owner appealed.[206] The court of appeals reversed the trial court holding that the default judgment had been improperly entered despite the state's claim that the court lacked jurisdiction.[207] The state appealed the decision of the court of appeals.[208]

The supreme court consolidated the cases in order to determine whether the appellate court had jurisdiction over a case after one party executed on a forfeiture judgment.[209] Farmington and the state argued that the court lost its jurisdiction over the judgments when the parties executed on them.[210] The argument was based on the fact that forfeiture proceedings are classified as in rem proceedings.[211] Appellate courts only have control over in rem proceedings when the court can "exercise control over the defendant res."[212] Farmington and the state argued the execution on the forfeiture judgment removed the res from the court's control and divested the court of jurisdiction.[213]

The supreme court, however, did not agree. The court reviewed case law and, relying on *Devlin v. State ex rel. New Mexico State Police Department*,[214] agreed that it would not have in rem jurisdiction if it lost control over the res.[215] Yet, the court also found that *Devlin* "recognized that in personam jurisdiction may exist concurrently with in rem jurisdiction."[216]

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199. *In re Forfeiture*, 111 N.M. at 747, 809 P.2d at 1275.
200. *Id.*
201. *Id.*
202. State *ex rel.* New Mexico State Police Dep't v. One 1984 Pontiac, 111 N.M. 85, 801 P.2d 667 (Ct. App. 1990), *rev'd sub nom. In re* Forfeiture of $2,730.00, 111 N.M. 746, 809 P.2d 1274 (1991).
203. *In re Forfeiture*, 111 N.M. at 747, 809 P.2d at 1275.
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.* at 747-48, 809 P.2d at 1275-76.
210. *Id.* at 747, 809 P.2d at 1275.
211. *Id.* at 748, 809 P.2d at 1276.
212. *Id.*
213. *Id.* Farmington and the state relied upon Devlin v. State *ex rel.* New Mexico State Police Department, 108 N.M. 72, 766 P.2d 916 (1988), for the holding that appellate courts do not have jurisdiction over in rem proceedings when the courts do not control the defendant res.
214. 108 N.M. 72, 766 P.2d 916 (1988).
215. *In re* Forfeiture of $2,730.00, 111 N.M. at 748, 809 P.2d at 1276.
216. *Id.* (citing *Devlin*, 108 N.M. at 74, 766 P.2d at 918).

The court determined it had in personam jurisdiction on the basis that the state and city had invoked the jurisdiction and assistance of the courts in order to initiate a forfeiture proceeding and thus confiscate private property.[217] The court found that to allow a state entity to invoke the power of the court in order to obtain and execute on a judgment, and then have that entity argue that the court did not have jurisdiction over the appeal, "would be intolerable."[218] Thus, the court reversed the court of appeals in Mitchell's case and affirmed the trial court in the case of the 1984 Pontiac.[219]

This case is valuable because the court expressly dealt with the effect that an execution on a final judgment has on a party's right to appeal. The claimants filed their appeals in a timely manner and the parties followed all other correct procedure. As was noted in the decision, however, the record did not show that either Mitchell or the owner of the car had moved to stay the judgments pending appeal.[220] Thus, Farmington and the state seemed to have the right to execute on their judgments. Under *Devlin*, this execution on the final judgment of the trial court would divest the appellate court of in rem jurisdiction.[221]

Yet, the court found that the execution on the final judgment did not supersede the right of the claimants to appeal a final judgment.[222] The court held that it has continuing in personam jurisdiction over any party that starts forfeiture proceedings.[223] From a public policy standpoint, the court could not have decided this case any other way. As the court recognized, it would be unfair to allow a party to use the court's power to secure a final judgment and then claim the court did not have jurisdiction.

Furthermore, had the court decided otherwise, parties would, in essence, be given the opportunity to rush out and execute on judgments and divest the appellate courts of jurisdiction. This would, in effect, completely wipe out an aggrieved party's right to appeal because the appellate courts would lose jurisdiction over the matter.[224] By ruling as it did, the supreme court preserved the finality rule and the right to appeal in circumstances where a governmental entity seeks and obtains a forfeiture judgment and then executes on that judgment. Thus, in this instance, the execution on a final judgment does not supersede an aggrieved party's right to appeal.

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217. *Id.* at 748, 809 P.2d at 1276.
218. *Id.*
219. *Id.* at 750, 809 P.2d at 1278.
220. *Id.* at 748, 809 P.2d at 1276.
221. *Id.*
222. *Id.*
223. *Id.*
224. Attorneys should note, however, that the decision in this case did not overrule *Devlin*. Therefore, the appellate courts still will be divested of jurisdiction when they lose control of the res. This implies that an aggrieved party still might not have the right to one appeal when jurisdiction is solely based on in rem jurisdiction.

4. Conclusion

Although the supreme court and court of appeals have carved out some exceptions, the general rule is that only final written orders or judgments are reviewable. The test for finality comes down to a determination of whether the effect of an order practically disposes of the merits of the case.[225] If the trial court can still act on the merits of the case the appellate court generally will not review any trial court judgment or order.

The practitioner should note that the finality rule can be both a help and a hinderance to a case. Most of the time the finality rule acts to bar an appeal. Thus, counsel wants an order or judgment deemed final so that the case can proceed on appeal. Yet, there are times when a practitioner should argue that an order is not final to avoid other jurisdictional requirements. That is, if an attorney can argue that an order is not final, then the attorney may be able to keep an appeal from being dismissed for time-of-filing or place-of-filing defects.[226]

III. SCOPE OF REVIEW

After determining jurisdiction, appellate courts must determine whether an issue falls within its "scope of review." This "scope of review" is generally defined as "[t]he matters proper for consideration by an appellate court upon review of a lower court decision."[227] Consequently, an appellate court must determine whether an issue is proper for review before it can instigate such review.

A. Preservation of Issues

Typically, an appellate court will not review an issue unless the party seeking review raised the contention or preserved the issue in the trial court.[228] Because review on appeal is limited to a consideration of the transcript on the record certified by the clerk of the trial court,[229] matters outside of the record created in the trial court will not be considered on appeal.[230] This rule also extends to the docketing statement.[231] Further, prior to a recent amendment to appellate rule 12-213(A) issues not raised in the docketing statement could not be argued

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225. Floyd v. Towndrow, 48 N.M. 444, 152 P.2d 391 (1944).

226. In Lebansky v. Lebansky, 107 N.M. 425, 759 P.2d 1007 (Ct. App.), *cert. denied*, 107 N.M. 308, 756 P.2d 1203 (1988), the appellant attempted to circumvent time-of-filing requirements by arguing that the trial court's judgment was not a final judgment due to the filing of post-trial motions. His argument was unsuccessful because N.M. R. APP. P. 12-201 specifically defined when the time-of-filing requirement started. This may not always be the case and attorneys should try this argument when possible.

227. BALLENTINE'S LAW DICTIONARY 1145 (3d ed. 1969).

228. *See* Barnett v. Cal M, Inc., 79 N.M. 553, 445 P.2d 974 (1968).

229. Federal Nat'l Mortgage Ass'n v. Rose Realty, Inc., 79 N.M. 281, 282, 442 P.2d 593, 594 (1968).

230. Adams v. Loffland Bros. Drilling, 82 N.M. 72, 76, 475 P.2d 466, 470 (Ct. App. 1970).

231. To see what is required in a docketing statement see N.M. R. APP. P. 12-208.

in an appellant's brief-in-chief without leave of the court.[232] In addition, issues that are listed in the docketing statement which are not argued are deemed abandoned.[233]

In comparison, an appellate court will not review findings of fact and conclusions of law if the party seeking appeal did not submit findings and conclusions to the trial court.[234] Findings of fact that are unchallenged become the facts upon which the case rests on appeal.[235] Furthermore, unchallenged jury instructions become binding on the parties and cannot be challenged on appeal.[236] Overall, appellate court review is limited to the record created in the trial court.[237]

To make an issue part of the record, and thus properly preserve the issue for review, the party seeking review must have made a specific objection regarding the issue in order to invoke a ruling from the trial court.[238] General objections like "irrelevant and immaterial" without further specification will not provide a basis for review.[239] The specific objection rule applies in particular to review of the introduction of evidence[240] and to the review of jury instructions.[241]

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232. *Compare* N.M. R. APP. P. 12-213(A) *with* N.M. R. App. P. 12-213(A)(3) (Recomp. 1986). *Cf.* N.M. R. App. P. 12-210(D)(3) (current rule limits issues raised in memoranda opposing proposed summary disposition to those issues raised in docketing statement); N.M. R. App. P. 12-210(D)(3) (Recomp. 1986) (does not restrict issues).

In Maloney v. Wreyford, 111 N.M. 221, 804 P.2d 412 (Ct. App. 1990), the court of appeals stated that it would not review issues brought up in an appellant's brief-in-chief if those issues were not first addressed in the appellant's docketing statement. *Id.* at 225, 804 P.2d at 416. The continuing validity of this holding is questionable, however, given the recent amendment to N.M. R. APP. P. 12-213(A). The amendment removed the language "[a] party shall be restricted to arguing only the issues contained in the docketing statement" from the brief-in-chief rule.

233. State v. McGill, 89 N.M. 631, 632, 556 P.2d 39, 40 (Ct. App. 1976).

234. Smith v. Maldonado, 103 N.M. 570, 711 P.2d 15 (1985).

235. Begay v. First Nat'l Bank of Farmington, 84 N.M. 83, 85, 499 P.2d 1005, 1007 (Ct. App.), *cert. denied*, 84 N.M. 77, 499 P.2d 999 (1972); *see also* Cordova v. Broadbent, 107 N.M. 215, 216, 755 P.2d 59, 60 (1988) (unchallenged trial court findings are binding on appeal).

236. Bendorf v. Volkswagenwerk Aktiengeselischaft, 90 N.M. 414, 564 P.2d 619 (Ct. App.), *cert. denied*, 90 N.M. 636, 567 P.2d 485 (1977).

237. Sears v. Anton Chico Land Grant, 83 N.M. 372, 492 P.2d 643 (1971); Trujillo v. Employment Sec. Dep't, 105 N.M. 467, 743 P.2d 245 (Ct. App. 1987). Attorneys should note that if the transcripts and briefs presented in the case are sufficient enough to preserve the issue on review then the court will review the merits, even if the issue is not specifically preserved. Huckins v. Ritter, 99 N.M. 560, 661 P.2d 52 (1983). Practitioners, however, would be well advised to specifically preserve all issues.

238. State v. Lopez, 84 N.M. 805, 809, 508 P.2d 1292, 1296 (1973); *see also* N.M. R. APP. P. 12-216. For a good discussion on preserving the record see Salvador, *Some General Thoughts on Preserving the Record*, 20 N.M. TRIAL LAW. 105 (1992).

239. State v. Zarafonetis, 81 N.M. 674, 676, 472 P.2d 388, 390 (Ct. App.), *cert. denied*, 81 N.M. 669, 472 P.2d 383 (1970). An example of a specific objection would be objecting to the admission of an opinion on the basis that a witness does not have the requisite expertise to form an opinion. The objections of "irrelevant, incompetent, and immaterial," which were often shouted by Perry Mason's counterpart, Hamilton Berger, probably would not pass the specificity requirement.

240. Williams v. Vanderhoven, 82 N.M. 352, 482 P.2d 55 (1971); *see also* N.M. R. EVID. 11-103 (objections to introduction of evidence must be timely made and specifically stated). Attorneys should note that rule allows review of evidentiary questions where there are "plain errors affecting [the] substantial rights" of the appellant. N.M. R. EVID. 11-103(D).

241. Grety v. Demers, 86 N.M. 141, 520 P.2d 869 (1974); *see also* Lewis v. Rodriguez, 107 N.M. 430, 739 P.2d 1012 (Ct. App. 1987) (to preserve error to a given instruction, a party must either tender a correct instruction and alert the court that the new instruction corrected the defect, or specifically point out what is wrong with the instruction given through a proper objection).

B. *Exceptions to Preservation Rule*

The courts have provided for some exceptions to the general rule requiring preservation.[242] Appellate courts can still consider jurisdictional questions,[243] questions involving the general public interest[244] or questions involving a fundamental error or fundamental rights of a party,[245] regardless of whether the issue was preserved in the trial court.[246] Absent a specific preservation, issues that do not fall within one of these exceptions may not be raised for the first time on appeal.[247]

C. *Recent Cases*

Three cases pertaining to issue preservation have been decided within the survey period.[248] One case specifically deals with whether an issue was properly preserved in the trial court. The other two cases pertain to what issues can be raised for the first time on appeal.

1. Proper Preservation

In *State v. Goss*,[249] police officers arrested Donal and Johnny Goss at a roadblock for possession of marijuana.[250] The roadblock was to be used only to check driver's licenses, proof of registration, and proof of insurance.[251] The officers at the roadblock, however, smelled the odor of marijuana in the Goss' automobile, giving them probable cause to conduct a secondary search.[252] Upon inspection of the automobile the police discovered 831 pounds of marijuana.[253]

Goss challenged the constitutionality of the roadblock arguing that the roadblock violated the fourth and fourteenth amendments of the Constitution,[254] the New Mexico Constitution,[255] and principles estab-

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242. N.M. R. APP. P. 12-216(B).

243. *Id.*; *see also* Johnson v. C & H Constr. Co., 78 N.M. 423, 432 P.2d 267 (Ct. App. 1967) (jurisdictional questions can be raised at any time).

244. N.M. R. APP. P. 12-216(B)(1); *see also* Pineda v. Grande Drilling Co., 111 N.M. 536, 807 P.2d 234 (Ct. App. 1991); *In re* Jasso, 107 N.M. 75, 752 P.2d 790 (Ct. App. 1987).

245. N.M. R. APP. P. 12-216(B)(2). Attorneys should note that this exception usually only arises in criminal law and constitutional law matters, Canada, *Raising New Issues on Appeal*, N.M. BAR BULL., Oct. 17, 1991, at 11, and that the appellate courts have been very active recently in reviewing criminal cases based upon fundamental error. *See, e.g.*, State v. Ortega, 112 N.M. 554, 817 P.2d 1196 (1991); State v. Osborne, 111 N.M. 654, 808 P.2d 624 (1991).

246. N.M. R. APP. P. 12-216(B).

247. State v. Aranda, 94 N.M. 784, 786, 617 P.2d 173, 175 (Ct. App. 1980). For a more complete discussion of N.M. R. APP. P. 12-216 see Canada, *Raising New Issues on Appeal*, N.M. BAR BULL., Oct. 17, 1991, at 11.

248. State v. Goss, 111 N.M. 530, 807 P.2d 228 (Ct. App.), *cert. denied*, 111 N.M. 416, 806 P.2d 65 (1991); Pineda v. Grande Drilling Co., 111 N.M. 536, 807 P.2d 234 (Ct. App. 1991); C.E. Alexander & Sons, Inc. v. DEC Int'l, Inc., 112 N.M. 89, 811 P.2d 899 (1991).

249. 111 N.M. 530, 807 P.2d 228 (Ct. App.), *cert. denied*, 111 N.M. 416, 806 P.2d 65 (1991).

250. *Id.* at 532, 807 P.2d at 230.

251. *Id.* at 531, 807 P.2d at 229.

252. *Id.* at 532, 807 P.2d at 230.

253. *Id.*

254. U.S. CONST. amend. IV, XIV.

255. N.M. CONST. art. II, sec. 10.

lished under New Mexico case law.[256] The court of appeals, however, found that the issue was not properly preserved in the trial court.[257] The court could not find in the record any specific objections to the constitutionality of the roadblocks.[258]

The defendants argued that they had in fact raised the issue of constitutionality in a motion to suppress the evidence found during the roadblock search.[259] The court reasoned, however, that the motion to suppress did not "set out with particularity the grounds relied on for the relief sought."[260] In other words, the defendants did not expressly call the constitutionality of the roadblock into question because the motion to suppress did not specifically cite controlling case law.[261] In addition, defendants' counsel could have questioned the officers who set up the roadblock and briefed the motion to suppress, but did neither.[262] The court held that the defendant, did not preserve the issue in the trial court and it could not be heard on appeal.[263]

The court expressly recognized that the specificity requirement in criminal cases was the same as in civil cases.[264] The court cited the decision in *National Excess Insurance Co. v. Bingham*[265] to support this contention. In *National Excess Insurance Co.*, the court held that a movant is required to set forth the grounds for a motion with specificity.[266] If a party fails to do this then that party may be barred from appealing the denial of the motion.[267] This interpretation of the specificity requirement supports the proposition that general objections to issues will not be sufficient to warrant appellate review.

Goss reaffirms New Mexico law and provides a good example of just how specific an attorney may have to be in his or her objections on an issue. If counsel is not specific enough, the court may find that the issue was not properly preserved and cannot be reviewed.

2. Issues Raised For the First Time on Appeal

During the survey period, the court of appeals decided *Pineda v. Grande Drilling Corp.*[268] Although this case involved an administrative law appeal, it is significant because it provides the most recent example of the appellate courts' willingness to allow an appeal based on the needs of the public interest. In *Pineda*, the New Mexico Court of

256. *Goss*, 111 N.M. at 532, 807 P.2d at 230 (citing a violation of the standards set down in City of Las Cruces v. Betancourt, 105 N.M. 655, 735 P.2d 1161 (Ct. App. 1987)).
257. *Id.* at 533, 807 P.2d at 231.
258. *Id.*
259. *Id.*
260. *Id.*
261. *Id.*
262. *Id.*
263. *Id.*
264. *Id.*
265. 106 N.M. 325, 742 P.2d 537 (Ct. App. 1987).
266. *Id.* at 327, 742 P.2d at 539.
267. *Id.*
268. 111 N.M. 536, 807 P.2d 234 (Ct. App. 1991).

Appeals ruled on an issue that was not properly preserved in the trial court on the basis that the issue involved the general public interest.[269]

The appeal revolved around a Workers' Compensation Division award of benefits to Delores Pineda for the death of her husband. The husband's death occurred in the course of his employment with Grande Drilling Company.[270] The award included attorney's fees based upon a statute that went into effect after the filing of the action.[271] Grande Drilling appealed the award of the fees arguing that the fees could not have been awarded under the statute in effect at the time the claim was filed.[272] The appellate court addressed the issue of whether the new statute could be validly applied to a case filed before the statute took effect.[273]

The court of appeals found that Grande Drilling had failed to raise this particular issue before the Workers' Compensation Judge and had failed to raise it in its initial appellate briefs.[274] The court found, however, that this issue could be heard for the first time on appeal because it involved a general public interest.[275] The court recognized the public interest exception in the rules of appellate procedure[276] and decided that the award of attorney's fees should be reversed because the fees could not be awarded under the statute in effect at the time of filing.[277]

The court alerted the bar and the Worker's Compensation Division that new regulations would not apply to any case filed before the regulations went into effect.[278] Thus, the court essentially invoked its power to decide public interest questions simply in order to send a message to the legal community.

Although the use of the public interest exception in this case appears broad,[279] the court carefully avoided making *Pineda* an all-embracing precedent. Notably, the court expressly stated that it would not invariably use the public interest exception to consider all challenges to the validity of statutes.[280] Thus, the court implied that not all issues relating to the validity and application of statutes fall within the general public interest exception.

In addition, the court pointed out that the issue was arguably a jurisdictional question and thus fit within the jurisdictional question

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269. *Id.* at 540, 807 P.2d 238.
270. *Id.* at 537, 807 P.2d 235.
271. *Id.*
272. *Id.*
273. *Id.* at 540, 807 P.2d 238.
274. *Id.* at 539, 807 P.2d 237.
275. *Id.*
276. *See* N.M. R. APP. P. 12-216(B).
277. *Pineda*, 111 N.M. at 540, 807 P.2d at 238.
278. *Id.*
279. The use of the exception seems broad in the sense that if the court did not limit the precedential value of this case, practitioners could have cited the case as standing for the proposition that any challenge to a statute can be heard for the first time on appeal because it is in the public interest to have the court instruct the bar on the proper application of the statute.
280. *Pineda*, 111 N.M. at 540, 807 P.2d at 238.

exception.[281] By doing this the court left open the possibility of future interpretation of whether the public interest exception alone is enough to allow the review of a statute.[282] By not solely relying on the public interest exception the court impliedly limited its application.[283]

Another case decided during this survey period involved appellate review of a jurisdictional question. In *C.E. Alexander & Sons, Inc. v. DEC International, Inc.*,[284] the New Mexico Supreme Court decided a breach of warranty case involving an arrangement in which DEC sold the Alexander company some milking equipment.[285] Upon purchasing the equipment, Alexander entered into a separate trade agreement with Mr. Buster Goff in which Goff gave Alexander registered cows in exchange for unregistered cows.[286] As part of the trade agreement with Alexander, Goff retained a partial interest in the registered cows.[287]

After the installation of the milking equipment, Alexander's cows developed a fairly common udder infection.[288] Alexander sued DEC for breach of warranty on the basis that the DEC equipment was responsible for the udder infection.[289] A jury returned a verdict against DEC and DEC appealed.[290]

The issue on appeal was whether the appellate court had jurisdiction over a matter when a necessary and indispensable party was not joined in the litigation.[291] DEC argued that Goff was a necessary and indispensable party because his interests were inextricably tied with Alexander's claim.[292] According to DEC, Goff's interests and Alexander's interests were tied because both retained partial interest in the registered cows.[293] Goff's nonjoinder, DEC argued, created a jurisdictional defect that divested the court of the power to hear the appeal.[294]

The court found that DEC failed to raise the nonjoinder issue in the trial court.[295] Relying on precedent, however, the court found that it could rule on the issue since the issue involved a jurisdictional question.[296]

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281. *Id.* (citing State v. Patten, 41 N.M. 395, 69 P.2d 931 (1937), as a case that defines the subject-matter jurisdiction of a tribunal).

282. This case now either stands for the proposition that validity of statute issues are jurisdictional questions or the proposition that validity of statute issues involve the general public interest or both. Impliedly, the weight of this case as precedent is limited.

283. It is still best to specifically preserve issues in the trial court, especially considering the limited use of the exceptions. Moreover, after *Pineda* attorneys may want to "piggy back" a public interest exception argument with other exceptions in order to increase the chances of appellate review.

284. 112 N.M. 89, 811 P.2d 899 (1991).

285. *Id.* at 90, 811 P.2d at 900.

286. *Id.*

287. *Id.*

288. *Id.* at 91, 811 P.2d at 901.

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.* The court relied upon Sellman v. Haddock, 62 N.M. 391, 310 P.2d 1045 (1957), *overruled on other grounds*, Safeco Ins. Co. v. United States Fidelty & Guar. Co., 101 N.M. 148, 679 P.2d 816 (1984), as precedent for the proposition that the joinder issue could be raised for the first time on appeal.

Thus, the issue could be raised for the first time on appeal and did not have to be preserved in the trial court.[297]

The appellate court affirmed the trial court ruling against DEC.[298] In so doing, the court stated that the failure to join a party did not create a jurisdictional defect.[299] The court expressly overturned previous case law which had held that failure to join an indispensable party was in fact a jurisdictional defect.[300] The court reasoned that rule 19 of the New Mexico Rules of Civil Procedure[301] gave the trial court the discretion to do a factual balancing test to determine whether a party was indispensable.[302] The court decided that appellate courts were not in a good position to administer this balancing test.[303] Therefore, the court held that the nonjoinder issue would no longer be considered jurisdictional.[304] Therefore, the nonjoinder question must be preserved in the trial court if it is to be reviewed.

The practitioner should be aware of this case for two reasons. First, the case changed the law regarding nonjoinder issues in that they are no longer jurisdictional questions. Therefore, the issue must be preserved in the trial court if it is to be reviewable by the court. More importantly, however, an attorney should be aware of the court's strong reiteration of the rule that appellate courts are not in a position to do a factual balancing test.[305] Not only must the legal question be preserved below but the factual predicate supporting the appellant's view must also be preserved below. If a party fails to preserve sufficient evidence in the record, the court most likely will leave the trial court's ruling undisturbed.[306]

D. Conclusion

The appellate courts repeatedly say that they will not decide issues that are not properly preserved in the trial court. Preservation is necessary

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297. *Alexander*, 112 N.M. at 91, 811 P.2d at 901.

298. *Id.* at 96, 811 P.2d at 906.

299. *Id.* at 91, 811 P.2d at 901.

300. *Id.* (court expressly overturned Holguin v. Elephant Butte Irrigation Dist., 91 N.M. 398, 575 P.2d 88 (1977)).

301. N.M. R. Civ. P. 1-019.

302. *Alexander*, 112 N.M. at 91, 811 P.2d at 901. In *Sellman*, 62 N.M. 391, 310 P.2d 1045, the court cited to the rule of civil procedure regarding joinder of parties but still held that the nonjoinder issue was jurisdictional and could be raised in the appellate courts. Since *Sellman*, the rule has changed to give the trial court much more discretion over the facts surrounding the non-joinder of an indispensable party. *Compare* N.M. R. Civ. P. 1-019 *with* N.M. R. Civ. P. 19(a) (Comp. 1953). Because the trial court can now apply the factual balancing test, the non-joinder question becomes one of fact rather than one of jurisdiction.

303. *Alexander*, 112 N.M. at 92, 811 P.2d at 902.

304. *Id.* at 91, 811 P.2d at 901.

305. In this case, the court impliedly reasoned that the applicable rule of civil procedure had changed enough to make the non-joinder issue a question of fact to be decided in the trial court and not a question of jurisdiction. This change in the rule essentially divested the appellate courts of jurisdiction over non-joinder issues not raised in the trial court because the appellate courts do not have the appropriate tools to determine the facts and apply the balancing test.

306. The court implied this proposition when it noted the sanctity of judgments rendered by the trial court. *Alexander*, 112 N.M. at 96, 811 P.2d at 906 (court should indulge all reasonable inferences in support of the judgment).

because the appellate courts only review the record from the trial court for error and do not make evidentiary or factual findings.[307] Thus, unless an issue falls within one of the exceptions to the general rule, the court will not review any issue that is not sufficiently preserved in the trial court.

Exceptions to this rule allow appellate courts to review all jurisdictional questions, or questions involving the general public interest, fundamental error, or the fundamental rights of a party. The courts are not quick to use these exceptions, however, and generally limit their application even when they do use them.[308] Thus the best course of action is for counsel to properly and fully preserve all issues in the trial court.[309] Failure to do so could cost a client the right to have the issue reviewed by an appellate court.

IV. STANDARD OF REVIEW[310]

Even though a party satisfies all of the jurisdictional requirements and properly preserves all of his or her issues for appeal, that party still might not be able to win on the merits of the appeal. The appellate courts employ certain standards or burdens of proof that must be met in order to win an appeal.[311] If these standards or burdens cannot be met, the party will lose his or her appeal on the merits. These standards and burdens are generally known as "standards of review."

Standards of review can come in many forms. The standards may be based upon the amount of deference that the appellate court is willing to give. For instance, appellate courts typically will defer to the trial court's findings and conclusions.[312] In addition, the appellate courts generally limit their interpretation of statutes by deferring to the legislature's judgment or political role.[313]

Furthermore, the standards may be established based on how much the court is willing to scrutinize the constitutionality of a person's, group's, or governmental entity's actions.[314] The standard may also be

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307. *Id.* at 92, 811 P.2d at 902.

308. *See* Pineda v. Grande Drilling Corp., 111 N.M. 536, 807 P.2d 234 (Ct. App. 1991).

309. An attorney may be wise to object or otherwise preserve anything that might even possibly become an appealable issue. The practitioner, however, should be aware of rule 11 which could cause an attorney or a party to get sanctioned for frivolous motions. *See* N.M. R. Civ. P. 1-011.

310. This survey will only address the standard of review following a trial and judgment. It does not cover the standards of review for appeals from summary judgment, directed verdict, or the like. In addition, it does not cover the standards of review for appeals from non-final judgments.

311. *See, e.g.*, Trujillo v. City of Albuquerque, 110 N.M. 621, 798 P.2d 571 (1990) (court held that intermediate scrutiny applied to plaintiff's equal protection claim); Tallman v. ABF (Arkansas Best Freight), 108 N.M. 124, 767 P.2d 363 (Ct. App.) (whole record review applied to workers' compensation appeals), *cert. denied*, 109 N.M. 33, 781 P.2d 305 (1988).

312. *See* Clovis Nat'l Bank v. Harmon, 102 N.M. 166, 692 P.2d 1315 (1984); Mascarenas v. Gonzales, 83 N.M. 749, 497 P.2d 751 (Ct. App. 1972) (reviewing court will view facts in favor of the prevailing party, will allow all reasonable inferences that support the verdict, and will disregard evidence not favorable to the verdict).

313. *See generally* Peyton v. Nord, 78 N.M. 717, 437 P.2d 716 (1968).

314. See Trujillo v. City of Albuquerque, 110 N.M. 621, 798 P.2d 571 (1990), for a discussion of the three tiers of scrutiny that are applied to constitutional law cases.

based upon a statute or rule of procedure.[315] Finally, the standard may be based upon principles established in previous case law.[316]

A. General Standard of Review Rules

1. Deference Given to Trial Court Judgment

The appellate courts give substantial deference to the trial court's judgment.[317] New Mexico appellate courts will accept all inferences in favor of the verdict and disregard any inferences to the contrary.[318] In addition, the appellate courts will not disturb the judgment of the trial court as to the facts established by the evidence unless such facts are not supported by substantial evidence.[319] Furthermore, appellate courts will affirm the trial court ruling even if the trial court relies upon the wrong rationale, but the judgment is inherently correct.[320] Thus, the appellate courts will not disturb the ruling if it is the "correct result for a wrong reason."[321]

Finally, appellate courts will not overturn a verdict or judgment when there is harmless error.[322] By definition, harmless error is an error that would not affect the result of the case.[323] The rationale for the harmless error rule is that the role of the appellate courts is to correct wrong results not correct errors that could not change the result.[324] Therefore, like the "right for the wrong reason" rule, the appellate courts will affirm a trial court decision that is not free from error so long as the error is harmless.

2. Limitations on the Interpretations of Statutes

Aside from the trial court decision, a party may try to challenge the constitutionality of a statute as part of its appeal. Counsel should note,

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315. *See, e.g.*, N.M. R. APP. P. 12-207(D) (establishes standard of review for setting aside district court's decisions regarding supersedeas bonds); N.M. R. EVID. 11-103 (establishes burden of proof required to have case heard on plain error grounds); N.M. STAT. ANN. § 27-3-4(F) (establishes standard of review in cases regarding the Public Assistance Appeals Act).

316. Although this concept is difficult to support in general, one only needs to look at recent workers' compensation cases like Evans v. Valley Diesel, 111 N.M. 556, 807 P.2d 740 (1991), to see that the standard of review for workers' compensation cases is based upon the "whole record" review that is stated in Tallman v. ABF (Arkansas Best Freight), 108 N.M. 124, 767 P.2d 363 (Ct. App.). This "whole record" review typically applies to all cases being appealed from administrative agencies.

317. *See generally* Clovis Nat'l Bank v. Harmon, 102 N.M. 166, 692 P.2d 1315 (1984).

318. Clovis Nat'l Bank v. Harmon, 102 N.M. 166, 168-69, 692 P.2d 1315, 1317-18 (1984); Mascarenas v. Gonzales, 83 N.M. 749, 751, 497 P.2d 751, 753 (Ct. App. 1972).

319. Getz v. Equitable Life Assurance Soc'y, 90 N.M. 195, 198, 561 P.2d 468, 471 (1977); Anaconda Co. v. Property Tax Dep't, 94 N.M. 202, 608 P.2d 514 (Ct. App. 1979), *cert. denied*, 94 N.M. 628, 614 P.2d 545 (1980).

320. H.T. Coker Constr. Co. v. Whitfield Transp., Inc., 85 N.M. 802, 805, 518 P.2d 782, 785 (Ct. App. 1974).

321. *Id.*

322. Jewell v. Seidenberg, 82 N.M. 120, 477 P.2d 296 (1970).

323. *Id.* at 124, 477 P.2d at 300; *see also* Gough v. Famariss Oil & Ref. Co., 83 N.M. 710, 496 P.2d 1106 (Ct. App.), *cert. denied*, 83 N.M. 698, 496 P.2d 1094 (1972).

324. *Gough*, 83 N.M. 710, 496 P.2d 1106.

however, that the power of the appellate court to find a statute unconstitutional is somewhat limited. This is because of the fact that appellate courts give deference to the legislature.[325]

Generally, the appellate courts will not find legislative acts unconstitutional unless no other conclusion can be reached.[326] In reviewing the statute, the court will construe each word or phrase in connection with every other word, phrase or portion, in order to determine the legislative purpose.[327] All questions or doubts are resolved in favor of constitutionality.[328] Therefore, a party must be very persuasive when arguing the legislative purpose of the statute violates the constitution.[329]

3. Other Standards of Review[330]

Appellate review of the merits of a case is typically limited to the determination of whether the trial court's findings of fact are supported by substantial evidence and whether the trial court properly applied the law.[331] Factual determinations can only be set aside where the decision of the trial court is based on facts not supported by substantial evidence.[332]

While there are many standards of review for many situations, the non-deferential[333] standards that seem to be most used or most important are the substantial evidence test, abuse of discretion standard, constitutional scrutiny standards, and whole record review.

a. Substantial Evidence Test

If an issue before the appellate court is a factual issue, then the court applies the substantial evidence test.[334] That is, the appellate court determines whether the findings of fact entered by the trial court are supported by substantial evidence.[335] Substantial evidence is defined as relevant evidence that a reasonable mind might accept as adequate to support a conclusion.[336] Appellate courts will not reweigh the evidence

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325. *See* Peyton v. Nord, 78 N.M. 717, 437 P.2d 716 (1968). Appellate courts give more deference to legislative enactments than to trial court decisions. This is in part due to the separation of powers doctrine set forth in article III of the New Mexico Constitution which limits the judiciary's control over the legislature. *See* N.M. CONST. art. III, § 1.

326. *Peyton*, 78 N.M. at 725, 437 P.2d at 724.

327. *Id.* at 724-25, 437 P.2d at 723-24.

328. *Id.* at 725, 437 P.2d at 724.

329. *See id.*

330. This article does not attempt to address all standards of review for all situations. Instead, this section will attempt to set out the most used or most important standards.

331. Esquibel v. Hallmark, 92 N.M. 254, 255-56, 586 P.2d 1083, 1084-85 (1978).

332. Groff v. Circle K Corp., 86 N.M. 531, 525 P.2d 891 (Ct. App. 1974).

333. Non-deferential standards are those standards that fall into the categories discussed immediately proceeding this subsection.

334. *See, e.g.*, Garcia v. Marquez, 101 N.M. 427, 684 P.2d 513 (1984).

335. Abbinett v. Fox, 103 N.M. 80, 86, 703 P.2d 177, 183 (Ct. App.), *cert. quashed*, 103 N.M. 62, 702 P.2d 1007 (1985).

336. Kueffer v. Kueffer, 110 N.M. 10, 12, 791 P.2d 461, 463 (1990); Den-Gar Enters. v. Romero, 94 N.M. 425, 429, 611 P.2d 1119, 1123 (Ct. App.), *cert. denied*, 94 N.M. 628, 614 P.2d 545 (1980).

to determine whether it supports an alternative result.[337] In addition, the appellate courts will not resolve conflicts in evidence[338] but will instead review the facts in a light most favorable to the prevailing party.[339] Overall, the courts will not disturb trial court findings that are supported by substantial evidence.[340]

b. Abuse of Discretion Standard

Trial court judges are vested with wide discretion to rule on many issues. When a judge uses this discretion to effectuate a judgment and the judgment is appealed, the appellate courts review the trial court's judgment under the abuse of discretion standard.[341] Generally, the trial court's discretion is only invoked when that court is asked to make a legal conclusion.[342] When a party challenges a legal conclusion, the standard typically applied by the courts is whether the law was correctly applied to the facts.[343] If the law was incorrectly applied, the appellate courts would presumably overturn the trial court's decision.

c. Review of Constitutional Claims

Appellate courts review constitutional claims using a three-tiered analysis.[344] The appellate court's skepticism towards an action or a law that infringes upon some right or discriminates against some class will determine which tier or level of scrutiny will be applied. Knowing which level of scrutiny will be applied could determine whether a party will appeal because the strict scrutiny test is almost impossible to pass while the rational basis test is quite easy to overcome.

The courts may require that the party that is infringing upon the rights of others pass strict scrutiny.[345] Strict scrutiny requires that the infringing party show that its actions advanced a compelling interest by the least drastic means.[346] The courts may also apply heightened or intermediate scrutiny which requires the infringing party to prove that

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337. *Abbinett*, 103 N.M. at 86, 703 P.2d at 183.

338. *See* Thompson v. Getman, 74 N.M. 1, 389 P.2d 854 (1964).

339. Padilla v. Lawrence, 101 N.M. 556, 560, 685 P.2d 964, 968 (Ct. App. 1984).

340. Flinchum Constr. Co. v. Central Glass & Mirror Co., 94 N.M. 398, 400, 611 P.2d 221, 223 (1980). The policy rationale for this rule is that trial courts are in the best position to determine the relevant facts of a case.

341. *See, e.g.*, State v. Ferguson, 111 N.M. 196, 803 P.2d 676 (Ct. App.) (grant of new trial will be overturned only upon a showing of clear and manifest abuse of discretion), *cert. denied*, 111 N.M. 144, 802 P.2d 1290 (1990).

342. This comes by definition because if a trial court is ruling on an issue then it is making a legal conclusion based upon the facts of the case. *See, e.g.*, Kennedy v. Moutray, 91 N.M. 205, 572 P.2d 933 (1977) (trial court decided that pre-judgment interest should not be awarded under the facts of the case).

343. Texas Nat'l Theaters, Inc. v. City of Albuquerque, 97 N.M. 282, 287, 639 P.2d 569, 574 (1982).

344. *See generally* Trujillo v. City of Albuquerque, 110 N.M. 621, 798 P.2d 571 (1990).

345. *Id.*

346. *Id.* at 623 n.2, 798 P.2d at 573 n.2 (citing Bernal v. Fainter, 467 U.S. 216, 219 (1984)).

its actions are substantially related to an important interest.[347] Finally, the courts may apply the rational basis test which simply requires a showing that the actions of the infringing party are rationally related to a legitimate interest.[348]

d. Whole Record Review

The final standard of review that is most often employed by the appellate court is the "whole record" standard of review.[349] While this standard is generally only applied to cases originating in administrative agencies, it warrants discussion in this article because the appellate courts, hearing cases appealed from the district courts, apply the same standard as the district courts hearing appeals from the administrative agencies.[350] Thus, in these civil appeals from the district courts, the appellate courts apply the whole record standard of review.[351]

The whole record review is limited to the question of whether there is substantial evidence on the whole record to support the decision of the trial court.[352] This differs from the ordinary "substantial evidence" test in that the whole record review determines whether the decision of the trial court is justified whereas the substantial evidence test determines whether specific findings of facts are supported.[353] Additionally, whole record review does not necessarily give deference to the trial court's decision because the appellate court can make an independent judgment if the trial court's decision is not supported by substantial evidence.[354]

B. Recent Cases

The appellate courts decided two cases relating to the standard of review in civil cases during the past survey year.[355] Both cases involved the "whole record" standard of review.[356] Through the decisions the court refined this standard and in some ways brought it in line with the more traditional standards of review.

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347. *Id.* (citing Richardson v. Carnegie Library Restaurant, Inc., 107 N.M. 688, 693, 763 P.2d 1153, 1158 (1988)).

348. *Id.* at 628, 798 P.2d at 578.

349. Although this is really not an exception, "whole record" review gives little or no deference to the trial court's judgment and the appellate court does not really look for abuse of discretion. In essence, the court gives the parties a new hearing based upon the record at each stage of the appeal. *See* Watson v. Town Council of Bernalillo, 111 N.M. 374, 376, 805 P.2d 641, 643 (Ct. App. 1991) (court observed that parties get de novo review each time an appeal is made).

350. Watson v. Town Council of Bernalillo, 111 N.M. 374, 376, 805 P.2d 641, 643 (Ct. App. 1991).

351. *Id.*

352. Tallman v. ABF (Arkansas Best Freight), 108 N.M. 124, 128, 767 P.2d 363, 367 (Ct. App.), *cert. denied*, 109 N.M. 33, 781 P.2d 305 (1988).

353. *Compare Tallman*, 108 N.M. 124, 767 P.2d 363 *with Abbinett*, 103 N.M. 80, 703 P.2d 177.

354. *See* Trujillo v. Employment Sec. Dep't, 105 N.M. 467, 470, 734 P.2d 245, 248 (Ct. App. 1987); *see also* Kelly & Gilmore, *Administrative Law*, 19 N.M.L. REV. 575, 616-19 (1989).

355. Watson v. Town Council of Bernalillo, 111 N.M. 374, 805 P.2d 641 (Ct. App. 1991); Evans v. Valley Diesel, 111 N.M. 556, 807 P.2d 740 (1991).

356. *Watson*, 111 N.M. at 376, 805 P.2d at 643; *Evans*, 111 N.M. at 558, 807 P.2d at 742.

In *Watson v. Town Council of Bernalillo*[357] the court of appeals faced a zoning issue that originated when Eugene Watson and others brought suit to stop the annexation of land.[358] A gypsum wallboard manufacturer wanted to annex the land in order to construct and operate a manufacturing plant.[359] Watson and other protestors, citing health and welfare concerns, fought the annexation of the land and the construction of the plant.[360]

The manufacturer proposed its annexation plan to the Bernalillo Zoning Commission, which in turn recommended to the Bernalillo Town Council that the plan be accepted.[361] Over the objections of the protestors, the town council accepted the plan and approved the annexation of the land.[362] The protestors appealed to the district court which used the whole record standard of review to uphold the council's decision.[363] The protestors then appealed the district court's decision.[364]

The court of appeals applied the "whole record" standard of review to the case on the basis that this case involved the appeal of an administrative opinion.[365] Using this standard, the court found that there was substantial evidence on the record to support the district court's decision.[366] Therefore, the court affirmed the district court's decision.[367]

In affirming, the court of appeals did an extensive analysis of the whole record standard of review.[368] Central to the court's analysis was the fact that the district court and the court of appeals applied the same standard of review on appeal.[369] Both courts were required to review all evidence bearing on the finding or decision of the council "to determine if there was substantial evidence to support the result."[370] As the court said, "an appellant in effect gets the benefit of a de novo appellate review, which not even a defendant convicted of a capital offense receives."[371] The court, however, felt obliged to follow supreme court precedent and could only call upon the supreme court to somehow limit the whole record review when it reaches the second-tier of judicial review.[372]

The supreme court impliedly answered this call in *Evans v. Valley Diesel*.[373] In *Evans*, a worker received injuries while working on his

357. 111 N.M. 374, 805 P.2d 641 (Ct. App. 1991).
358. *Id.* at 375, 805 P.2d at 642.
359. *Id.*
360. *Id.*
361. *Id.* at 376, 805 P.2d at 643.
362. *Id.*
363. *Id.*
364. *Id.*
365. *Id.*
366. *Id.* at 383, 805 P.2d at 649.
367. *Id.*
368. *Id.* at 376-77, 805 P.2d at 643-44.
369. *Id.* at 376, 805 P.2d at 643.
370. *Id.*
371. *Id.* at 377, 805 P.2d at 644.
372. *Id.*
373. 111 N.M. 556, 807 P.2d 740 (1991).

personal vehicle in his employer's garage.[374] The workers' compensation judge determined that the worker was injured during the scope of his employment and awarded him benefits.[375] The employer appealed to the court of appeals.[376] The court of appeals applied the whole record standard of review and determined that the evidence on the record was not sufficient enough to support the findings of the workers' compensation judge.[377] The court of appeals reversed the award of benefits and the worker appealed.[378]

On appeal, the supreme court also applied the whole record standard of review, as was required by precedent.[379] In doing so, however, the court reviewed not only the sufficiency of evidence based upon the whole record, but also reviewed the correctness of the court of appeals' opinion.[380] The supreme court found that the court of appeals incorrectly applied the whole record standard.[381] The supreme court said that even under the whole record standard the reviewing court must start out with the perception that all evidence will be viewed in the light most favorable to the agency's decision.[382] The court of appeals had made an independent finding of the facts and thus misapplied the whole record standard.[383] In addition, the supreme court said the court of appeals incorrectly found that the evidence was not sufficient to support the agency's findings.[384] Accordingly, the supreme court reversed the decision of the court of appeals and reinstated the award of benefits.[385]

When examining *Evans* in light of the decision and analysis of *Watson*, counsel can see that the whole record standard of review can no longer be considered a complete de novo appellate hearing, as was feared in *Watson*. This can be inferred from the fact that the supreme court reviewed both the correctness of the agency's determination and the correctness of the decision by the court of appeals. The *Evans* court was able to review the sufficiency of evidence and also review both the findings of fact and the application of law made by the court of appeals. This implies that the whole record standard will no longer be used just to review the agency's fact finding for a second time but will also be able to review the correctness of the trial court's decision.

In addition, the *Evans* court brought the whole record standard more in line with traditional standards by pointing out that the reviewing

374. *Id.* at 557, 807 P.2d at 741.
375. *Id.*
376. *Id.*
377. *Id.*
378. *Id.*
379. *Id.* at 558, 807 P.2d at 742. The court cited Tallman v. ABF (Arkansas Best Freight), 108 N.M. 124, 767 P.2d 363 (Ct. App.), *cert. denied*, 109 N.M. 33, 781 P.2d 305 (1988), as the precedent that requires the reviewing court to use the whole record standard.
380. *Evans*, 111 N.M. at 558-59, 807 P.2d at 742-43.
381. *Id.* at 558, 807 P.2d at 742.
382. *Id.* at 559, 807 P.2d at 743.
383. *Id.*
384. *Id.*
385. *Id.* at 560, 807 P.2d at 744.

court must give deference to the trial court's findings of fact if the findings are supported by substantial evidence.[386] This is equivalent to the traditional deference given to the finders of fact in most civil cases.

C. *Conclusion*

The New Mexico appellate courts apply standards of review to all appeals. The standard may result from the deference that the appellate court gives to either the trial court's decision or the legislative body's judgment. Furthermore, the standards may result from statutes, appellate rules, or principles established in previous New Mexico case law.

It is important to know which standard of review will be used by the appellate courts for at least two reasons. First, if a party knows which standard of review will be applied then that party can accurately evaluate the likelihood of success and decide whether to appeal. If the appealing party realizes that he or she has to meet a very high standard of review, that party may forego the appeal because of the minimal likelihood of success. Second, if the party decides to go ahead with his or her appeal, that party will need to know what burden of proof it must meet to win. Either way, the first item of research for any attorney should be to determine what burden of proof or standard of review has to be satisfied to win the appeal.

V. CONCLUSION

Every aggrieved party has the statutory right to appeal a trial court decision to the New Mexico Supreme Court or the New Mexico Court of Appeals.[387] To invoke this right, however, aggrieved parties must follow the New Mexico Rules of Appellate Procedure. Aggrieved parties may lose their right to an appeal if they fail to follow these rules.

This survey article attempts to address some of the pitfalls that can cost an aggrieved party the right to have his or her appeal reviewed. Practitioners must realize that if they do not satisfy the jurisdictional requirements such as time-of-filing and place-of-filing then they run the risk of having their client's appeal dismissed. Furthermore, if counsel appeals a non-final order or fails to properly preserve an issue in the trial court or in the docketing statement, then the whole appeal or at least some of the issues generally will not be reviewed. Finally, even if counsel follows all the rules and preserves all the issues, the likelihood of success on appeal might be limited because the appellate courts apply certain standards of review.

There are exceptions to all of these rules, but attorneys should not count on the exceptions. Instead, attorneys should try to win the case at trial or, at a minimum, preserve all issues for review. If a party has to appeal, then he or she should follow all of the rules of appellate

386. *Id.* at 559, 807 P.2d at 743.
387. N.M. STAT. ANN. § 39-3-2 (Repl. Pamp. 1991).

procedure in order to secure review of the merits of the appeal. On appeal, the aggrieved party should know which type of standard the appellate court will apply so that he or she can meet the correct burden of proof. If an aggrieved party follows these steps then that party will be able to assess whether there is a reasonable probability of prevailing on appeal.

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