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Civil Procedure - The Adoption of the Collateral Order Doctrine in New Mexico: Carrillo v. Rostro

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CIVIL PROCEDURE—The Adoption of the Collateral Order Doctrine in New Mexico: *Carrillo v. Rostro*

I. INTRODUCTION

In *Carrillo v. Rostro*,[1] the New Mexico Supreme Court held that defendant school board members, who refused to renew the plaintiff's administrative contract because of her criticism of the school board's actions at a public meeting, were not entitled to a defense of qualified immunity against plaintiff's civil right's claims under 42 U.S.C. § 1983 (1988).[2] In addition, the New Mexico Supreme Court held that the trial court's denial of summary judgment on defendant's qualified immunity defense was reviewable before trial[3] under the collateral order doctrine adopted by the United States Supreme Court in *Cohen v. Beneficial Industrial Loan Corp.*[4] The New Mexico Supreme Court also adopted the writ of error as the procedural device to invoke the collateral order doctrine.[5]

Using the context of a qualifed immunity defense against a civil rights claim under 42 U.S.C. § 1983, this Note explores the process by which the New Mexico Supreme Court adopted the collateral order doctrine and the implications of that decision. This Note also examines the rationale of the *Carrillo* court in adopting the writ of error as the procedural device for invoking the doctrine.

II. STATEMENT OF THE CASE

At a 1987 public meeting, Principal Rose Mary Carrillo voiced her opposition to a proposed action of the Bernalillo Board of Education. Her opposition centered on the Board's position with regard to make-up days and the Board's commitment to quality education. Board members allege that her tone was abrasive, harassing, inappropriate and unprofessional.[6]

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1. 114 N.M. 607, 845 P.2d 130 (1992).

2. "Every person, who under color of any statute [or] regulation . . . of any State . . . causes to be subjected, any citizen . . . to the deprivation of any rights . . . secured by the Constitution . . . shall be liable to the party injured . . . ." 42 U.S.C. § 1983 (1988).

In *Carrillo*, plaintiff (a state employee) sued individual state defendants for an alleged violation of her First and Fourteenth Amendment right to speak at a public meeting on a matter of public concern.

3. *Carrillo*, 114 N.M. 607, 845 P.2d 130.

4. 337 U.S. 541 (1949).

5. *Carrillo*, 114 N.M. at 616, 845 P.2d. at 139.

6. The plaintiff and the defendant disagreed as to the exact details and nuances of plaintiff's address to the Board. Rostro alleged Carrillo's tone and demeanor were inappropriate and unprofessional, i.e., shaking her finger at the board and loudly proclaiming, "Hey you don't care about these kids, all you care about is taking off for those three days." Brief for Appellant at 7, Carrillo v. Rostro, 114 N.M. 607, 845 P.2d 130 (1992) (No. 19,650). Carrillo alleged that she did not raise her voice nor did she jump up and down or shake her finger at the Board. *Id.* at 2. "Her speech was strong in favor of her opinion, but not critical of the Board." *Id.*

In 1988, the Board, basing its decision "in part" on Carrillo's behavior at the 1987 meeting, voted not to renew Carrillo's administrative contract.[7] In response, Carrillo filed a suit against the Board in their official capacities as members of the Bernalillo Board of Education seeking relief for violation of her civil rights under 42 U.S.C. § 1983 (1988). However, Carrillo amended her complaint when it became clear that the Board could not be sued for money damages in its official capacity under section 1983.[8] The amended complaint sought relief under section 1983 against the defendants in their individual capacities.[9]

The amended complaint alleged that the Board's decision not to renew her administrative contract was made in retaliation for comments and opinions expressed at the March 1987 meeting.[10] Carrillo alleged that the Board violated her First Amendment rights to free speech and her Fourteenth Amendment rights to due process.[11]

The defendants raised the defense of qualified immunity, and filed a summary judgment motion on all of plaintiff's claims. The plaintiff argued that there were genuine issues of material fact with regard to free speech[12] and the existence of an implied contract of employment which would give rise to a procedural due process right.[13] The trial court denied summary judgment and refused to certify the qualified immunity issue for immediate review.[14]

On appeal, defendants made two arguments: 1) that New Mexico should recognize a pretrial right of appeal from a district court's denial of a public official's motion for summary judgment seeking qualified immunity from a section 1983 claim, and 2) that the trial court erred in refusing to grant them qualified immunity.[15]

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7. *Carrillo*, 114 N.M. at 610, 845 P.2d at 134.

8. *See* Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989), decided after Carrillo brought suit. Will, denied a promotion, filed suit against the Department of State Police and the Director of State Police under 42 U.S.C. § 1983. The Supreme Court held that neither the state nor its officials acting in their official capacities were "persons" within the meaning of the federal civil rights statute. *Id.* at 71.

9. *Carrillo*, 114 N.M. at 610, 845 P.2d at 134.

10. *Id.* at 611, 845 P.2d at 133. In addition to the free speech claim and the deprivation of her interest in continued employment without due process of law, the plaintiff also alleged that the Board had breached an implied employment contract and failed to allow her to inspect public records in violation of N.M. STAT. ANN. §§ 14-2-1 to -3 (1978). Yet, the only issues on appeal involve the plaintiff's claims under 42 U.S.C. § 1983.

11. *Carillo*, 114 N.M. at 610, 845 P.2d at 134.

12. *See supra* note 7 and accompanying text.

13. The plaintiff eventually abandoned her procedural due process claim because the law on whether an implied contract could be found, based on past conduct and dealings with the employer, was not clearly established at the time of her suit. Kestenbaum v. Pennzoil Co., 108 N.M. 20, 766 P.2d. 280 (1988), *cert. denied*, 490 U.S. 1109 (1989), decided seven months after Carrillo's suit, established that an implied employment contract may be found to exist from the "totality of the parties' relationship." The court also noted that *Kestenbaum* involved private employers and not government employers. The difference between private employers and government employers such as a school board concerning contracts is that all employment contracts with a government entity must be in writing. N.M. STAT. ANN. § 37-1-23(A) (Repl. Pamp. 1990).

14. *Carrillo*, 114 N.M. at 622-23, 845 P.2d. at 145-46.

15. *Id.* at 611, 845 P.2d. at 134.

The New Mexico Supreme Court adopted the collateral order doctrine to allow review of summary judgments denying qualified immunity defenses to claims of violation of plaintiff's First and Fourteenth Amendment rights. Moreover, the court chose the writ of error as the implementation device for invoking the collateral order doctrine.

III. HISTORICAL AND CONTEXTUAL BACKGROUND OF THE COLLATERAL ORDER DOCTRINE

A. The Creation of the Collateral Order Doctrine

Under federal law, the collateral order doctrine allows appellate courts to grant immediate review to a small class of interlocutory orders which 1) conclusively determine a disputed question, 2) resolve an important issue which is separate from and collateral to the merits of the claim, 3) decide an issue which would be effectively unreviewable when a final judgment on the merits was entered, and 4) which presents a serious and unsettled question.[16]

Title 28 of the United States Code gives the appellate courts jurisdiction over appeals which are "final decisions" of district courts.[17] To comply with 28 U.S.C. § 1291,[18] appellate courts must determine which orders from the lower courts are final for the purposes of jurisdiction and subsequent appeal.[19] Ordinarily a final order is one that disposes of the case.[20] When a court issues an order which does not address the merits of the case, it does not finally dispose of the matter. Nevertheless, an order may address a right which could be irreparably lost if review were not permitted prior to taking the merits to a full trial.[21] Examples of claimed rights which could be lost if an immediate appeal were disallowed are the right to absolute immunity[22] and to qualified immunity.[23]

Cohen v. Beneficial Industrial Loan Corp.[24] recognized the "serious and unsettled question"[25] created by the loss of a claimed right. The threshold issue in *Cohen* was whether the district court's order refusing to apply a New Jersey statute requiring complainants to give security for the reasonable expenses of the suit in the event the suit failed was an

16. *See* Nixon v. Fitzgerald, 457 U.S. 731 (1982).

17. *See* 28 U.S.C. § 1291 (1988); *see also* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 545 (1949). The purpose of the final decision requirement is to maintain the review status of the court of appeals and prevent its intervention in the lower court proceedings which are "tentative, informal or incomplete." *Id.* at 546.

18. 28 U.S.C. § 1291 (1988). "The court of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court." *Id.*

19. *See generally* Carrillo v. Rostro, 114 N.M. 607, 612-14, 845 P.2d 130, 135-37 (1992).

20. *Id.* at 613, 845 P.2d at 136.

21. *Id.*

22. *See* Nixon v. Fitzgerald, 457 U.S. 731 (1982).

23. *See* Mitchell v. Forsyth, 472 U.S. 511 (1985).

24. 337 U.S. 541 (1949).

25. *Id.* at 547.

appealable one.[26] The Court determined that the district court's refusal to apply the statute did not go to the merits of the case but to a claimed right.[27] If the trial continued to final judgment then the rights conferred by the statute would be lost "probably irreparably."[28] In its reasoning, the Court determined that the New Jersey statute allowing for reasonable expenses "fall[s] in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."[29] In announcing the collateral order doctrine, the Court held that the district court's order was a final disposition of a claimed right which is not an ingredient of the cause of action and was therefore appealable.[30]

Richardson-Merrell Inc. v. Koller[31] refined the collateral order doctrine established in *Cohen*. The plaintiff brought suit against a drug manufacturer seeking damages for birth defects. On the question of whether the disqualification of counsel in a civil case was a final decision appealable under the collateral order doctrine, the Supreme Court determined that the United States District Court's disqualification order was not a final decision on the merits, and was therefore not subject to an immediate appeal.[32] The Court, in its reasoning, refined and clarified the collateral order doctrine as a narrow exception to a final judgment rule.[33] To fall within the exception, the order must: 1) conclusively determine a disputed question; 2) resolve an important issue completely separate from the merits of the action; and 3) concern a right that would be effectively unreviewable on appeal from final judgment.[34] By announcing the conditions for review, the Court clearly established that not all interlocutory orders are reviewable.

B. The Application of the Collateral Order Doctrine by the United States Supreme Court and the Appeals Court

Since announcing the collateral order doctrine in *Cohen* and refining its applicability in *Richardson*, the United States Supreme Court has invoked the collateral order doctrine to grant review of various interlocutory orders. In *Moses H. Cone Memorial Hospital v. Mercury Construction Company*[35] a contractor who was denied arbitration of a dispute

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26. *Id.* at 545.
27. *Id.* at 546.
28. *Id.*
29. *Id.*
30. *Id.*
31. 472 U.S. 424 (1985).
32. *Id.* at 429-30.
33. *Id.* at 430-31.
34. *Id.*; *see also* 9 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE 73 (2d ed. 1993). Moore notes that the third prong of the collateral doctrine is the most important. The final order which is sought for review must involve a claimed right which would be essentially lost and unretrievable if not appealed prior to an adjudication of the actual merits of the case. *Id.*
35. 460 U.S. 1 (1983).

with the hospital under the Federal Arbitration Act sought relief in the form of a petition for mandamus and by appeal.[36] On *certiorari* to the Supreme Court, the Court determined that the district court's stay order regarding arbitration was a final order[37] and therefore appealable to appellate courts under 28 U.S.C. § 1291.[38] The Supreme Court reasoned that even if the district court order was not final for the purpose of appeal it would still fall within the exception to finality criteria set out in *Cohen*.[39] Furthermore, if the final order, which amounted to a refusal to adjudicate, was not reviewable immediately it would effectively be unreviewable on an appeal.[40]

Similarly, in *Nixon v. Fitzgerald*,[41] President Nixon sought review of an interlocutory order denying him absolute presidential immunity with regard to the discharge of an Air Force management analyst.[42] In announcing its *certiorari* jurisdiction on the immunity issue, the United States Supreme Court stated that Nixon's appeal fell within the collateral order doctrine of *Cohen* and raised a "serious and unsettled" question of law.[43]

Abney v. United States[44] noted that the collateral order doctrine of *Cohen* was applicable to both civil and criminal proceedings.[45] In *Abney*, a pretrial order which rejected claims of former jeopardy was determined to be a final decision which met the requirements of 28 U.S.C. § 1291[46] regarding jurisdiction to review final decisions.[47] The defendant was thus able to seek immediate review of the district court's rejection of his double jeopardy claim.

In addition to the application of the collateral order doctrine in United States Supreme Court cases, appellate courts in different states have also adopted the collateral order doctrine.[48] The courts have applied it in granting review of various interlocutory orders.

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36. *Id.*

37. *Id.* at 10. The Supreme Court held that a stay order is final when the sole purpose and effect of the stay is precisely to surrender jurisdiction of a federal court to a state court. *Id.*

38. *Id.* at 2.

39. *Id.* at 11.

40. *Id.*

41. 457 U.S. 731 (1982).

42. *Id.* at 731. In this case, the analyst testified to a congressional subcommitee on cost overruns and technical problems in the development of a United States Air Force airplane. Fitzgerald was dismissed in a department reorganization. He claimed retaliation and filed suit for damages. Nixon claimed absolute immunity for the action.

43. *Id.* at 731-32. Presidential immunity reaches into essential presidential prerogatives inherent in the office. It is reasoned that if the president is not immune to civil suit, he would not be able to carry out the responsibilities of the office.

44. 431 U.S. 651 (1977).

45. *Id.* at 659.

46. *See supra* note 21.

47. *Abney*, 431 U.S. at 658.

48. In Hatch v. Minot, 369 So. 2d 974 (Fla. Ct. App. 1979), *cert. denied*, 373 So. 2d 458 (Fla. 1979), the District Court of Appeals of Florida, citing *Cohen*, held that an interlocutory order in eminent domain is a final order for the purposes of appeal. The eminent domain action which determined the dispostion of funds was a final determination "of a particular matter . . . which

C. *New Mexico Courts and the Collateral Order Doctrine*

The adoption of the collateral order doctrine in *Carrillo v. Rostro*[49] is a case of first impression for New Mexico. Before the *Carrillo* case, *Cohen* had been cited,[50] but no appellate court had ruled on the collateral order doctrine. The question of adopting the collateral order doctrine came before the appellate court in *Allen v. Board of Education*.[51] In *Allen*, an order denying a motion to dismiss the plaintiff's claims and an order for summary judgment based on the Tort Claims Act immunity were before the court for review.[52] The court concluded that the collateral order doctrine as cited in *Mitchell*[53] did not apply in the case before the court because the two motions up for review did not finally determine a claim which is collateral to the actions.[54] Therefore, the court declined to rule on its adoption for New Mexico.[55]

The collateral order doctrine again came before the New Mexico Supreme Court in *Carrillo*. A denial of a qualified immunity claim by the Bernalillo School Board provided the setting for the adoption of the collateral order doctrine.[56]

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was separable from and collateral to that action" and, hence, was reviewable as a "final order" even though it did not determine the eminent domain action. In Scroggins v. Edmondson, 297 S.E.2d 469 (Ga. 1982), the Supreme Court of Georgia held that a superior court order on a motion to cancel a lis pendens notice was directly appealable. Although under a traditional analysis, the order would not be considered final because a trial on the merits was still pending, the order falls within the collateral order exception of *Cohen*. The court stated that "an important right might be lost if review had to await final judgment because the realty might be sold before conclusion of the action, making cancellation 'effectively unreviewble on appeal.'" *Id.* at 472.

Several other state appellate courts have likewise held various interlocutory orders appealable under the collateral order doctrine of *Cohen*. In Ass'n of Owners of Kukui Plaza v. Swinerton & Walgerg Co., 705 P.2d 28, 34 (Haw. 1985), an order denying motion for a stay pending arbitration was deemed appealable, and in Jolley v. State, 384 A.2d 91, 94 (Md. 1978), an order finding defendant incompetent to stand trial in a criminal case was appealable under *Cohen*'s collateral order doctrine.

49. 114 N.M. 607, 845 P.2d 130 (1992).

50. *See* Central-Southwest Dairy Coop. v. Am. Bank of Commerce, 78 N.M. 464, 432 P.2d 820 (1967). In this case the supreme court considered whether a judgment appealed from was a decision final and appealable under Rule 54(b). *Id.* at 466, 432 P.2d at 822. The court mentioned *Cohen* for the general premise that a final order need not be the last order possible made in the disposition of a case. *Id.*; *see also* Kelly Inn No. 102, Inc. v. Kapnison, 113 N.M. 231, 824 P.2d 1033 (1992). In this case the supreme court held that the awarding of attorney fees while reserving a exact determination of those fees until a future date was a final judgment for the purposes of appeal. *Id.* The court cited *Cohen* for the premise that the question of finality is "a practical, rather than technical term, and its meaning is to be developed from case to case . . . ." *Id.* at 240, 824 P.2d 1042.

51. 106 N.M. 673, 748 P.2d 516 (Ct. App. 1987).

52. *Allen*, 106 N.M. at 673, 748 P.2d at 516.

53. Mitchell v. Forsyth, 472 U.S. 511 (1985).

54. *Allen*, 106 N.M. at 674, 748 P.2d at 517. The court reasoned that the immunity granted by the Tort Claims Act is immunity from liability which is distinguishable from the immunity from suit sought in Harlow v. Fitzgerald, 457 U.S. 800 (1982). Moreover, the orders were neither collateral to nor separate from the merits and therefore did not fit into the collateral order exceptions cited in *Mitchell*.

55. *Carrillo*, 114 N.M. at 614, 845 P.2d at 137.

56. *Id.* at 623, 845 P.2d at 146.

IV. ANALYSIS AND IMPLICATIONS

A. *The Rationale of the Carrillo Court*

Two issues came before the *Carrillo* court. The first was "whether the trial court's denial of summary judgment on defendants' qualified immunity defense was reviewable, before trial, under the collateral order doctrine of [*Cohen*]."[57] The second issue was whether the trial court erred in refusing to grant defendant school board qualified immunity to plaintiff's First and Fourteenth Amendment claims under section 1983.[58] Consistent with the appeals process, the court first needed to determine its jurisdiction.[59] New Mexico Statute section 39-3-2 is substantially similar to federal law 28 U.S.C. § 1291 in that it provides for civil appeals from district court.[60] The New Mexico Supreme Court has jurisdiction to hear an appeal from district court on any "final judgment."[61] Therefore, the question before the court was whether summary judgment on the issue of qualified immunity was a final decision and if so was it immediately appealable in state as well as federal court.[62]

The New Mexico Supreme Court looked to federal case law to determine the appealability of an order denying qualified immunity.[63] The court referred to the reasoning of *Mitchell* in which the Court determined that qualified immunity is an entitlement not to stand trial under certain circumstances. This right can be effectively lost if a case is erroneously permitted to go to trial.[64] The irretrievability of this right places it clearly within the exceptions outlined in the collateral order doctrine. With this reasoning in mind, the supreme court determined that "the collateral order applies and the court's denial of summary judgment is reviewable."[65]

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57. *Id.* at 609, 845 P.2d at 132.

58. The trial court denied summary judgment on the issue of qualified immunity because there was a factual dispute between plaintiff's and defendants' version of plaintiff's tone and demeanor at the 1987 meeting. *Id.* at 609, 845 P.2d at 132.

59. *Id.* at 612, 845 P.2d at 135.

60. "Within thirty days from the entry of any final judgment or decision, any interlocutory order or decision which practically disposes of the merits of the action, or any final order after entry of judgment which affects substantial rights, in any civil action in the district court, any party aggrieved may appeal therefrom to the supreme court or to the court of appeals, as appellate jurisdiction may be vested by law in these courts." N.M. STAT. ANN. § 39-3-2 (Repl. Pamp. 1991).

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

62. *Carrillo*, 114 N.M. at 614, 845 P.2d at 137.

63. *See* Harlow v. Fitzgerald, 457 U.S. 800 (1982). *Harlow* discusses the differences between absolute and qualified immunity, their context of applicability, and the burden required to meet each type of immunity.

64. Mitchell v. Forsyth, 472 U.S. 511 (1985) fleshed out *Cohen*'s collateral order doctrine as it applies to decisions denying qualified immunity. *Mitchell* recognized that 28 U.S.C. § 1291 gave the appellate courts jurisdiction over appeals from final decisions of the district courts, but it also clarified that 'finality' does not necessarily mean the last order possible in a particular case. *Id.* The Court allowed an appeal on a qualified immunity issue because it was a final decision of a claimed right which was separate from and collateral to the merits of the case. The Court concluded that if the right to qualified immunity cannot be appealed before adjudication on their merits, the right would be effectively lost. *Id.*

65. *Carrillo*, 114 N.M. at 616, 845 P.2d at 139. With the adoption of the collateral order doctrine, New Mexico joined other federal circuit appellate courts and other state courts in determining that an order denying qualified immunity is reviewable under the collateral order doctrine. *Id.* at 616 n.7.

B. The Writ of Error as the Procedural Avenue for Invoking the Collateral Order Doctrine

The New Mexico Supreme Court adopted the collateral order doctrine but reserved the freedom to apply the doctrine "as we deem appropriate in future cases."[66] The court recognized that the collateral order doctrine "if applied in too many contexts, [would] allow interruption of trial court proceedings by any party claiming hardship because of postponement of review—a result that the final-judgment rule seeks to prevent."[67] The court also noted that by denying immediate appeal to certain interlocutory orders, the United States Supreme Court confined the application of the collateral order doctrine to a narrow field of exceptions to final orders.[68]

Recognizing a judicial hostility to the doctrine, and the possibility of trial interruption through piecemeal appeals, the New Mexico Supreme Court chose a little used procedural device, the writ of error, for curbing a wholesale use of the collateral order doctrine.[69] The court chose the almost defunct writ of error over the writ of superintending control reserving the writ of superintending control for specific categories of cases such as fundamental rights, public interest, and "'erroneous, arbitrary, and tyrannical' order[s] of the lower courts."[70] In further explaining its choice, the court traced the constitutional and statutory authority for the writ of error as a method of appellate review.[71]

In practice, a party who does not have an adequate remedy by way of an appeal may make a timely application to the court for a writ of error which would be issued solely at the discretion of the court. If the court issues the writ, the procedure then follows the Rules of Appellate Procedure: "If the writ of error is issued, the procedure thereafter shall be the same as though a notice of appeal were filed on the date the writ issues."[72]

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66. *Id.* at 617 n.9, 845 P.2d at 140 n.9.

67. *Id.* at 616, 845 P.2d at 139.

68. *Carrillo*, 114 N.M. at 616 n.8, 845 P.2d at 139 n.8 (citing Laura Lines S.R.L. v. Chasser, 490 U.S. 495 (1989)). The supreme court held that a district court's denial of defendant's motion to dismiss damages on the basis of a contractual forum selection clause was not immediately appealable under sec. 1291. The order was not final nor was the right to be sued only in a particular forum destroyed or in danger of being irretrievably lost should a trial on the merits proceed to its conclusion.

See also Van Cauwenberghe v. Biard, 486 U.S. 517 (1988) (in a civil fraud action, a denial of defendant's motion to dismiss on the grounds that an extradited person is immune from civil process was held not to be a final order, nor did it fit the narrow exception of the collateral order doctrine).

69. *Id.* at 616, 845 P.2d at 139.

70. *Id.* at 618, 845 P.2d at 141.

71. The *Carrillo* court traced the history of the writ of error as a method of appellate review through New Mexico common law, through statute and through rules of appellate procedure. *Carrillo*, 114 N.M. app. at 623, 845 P.2d app. at 147.

"[T]he Supreme Court shall have . . . power to issue writs of . . . error . . . . Such writs may be issued by direction of the court, or by any justice thereof." N.M. CONST. art. VI, § 3. In addition, New Mexico law provides for writs of error. "Writs of error to bring into the supreme court any cause adjudged or determined in any of the district courts, as provided by law, may be issued by the supreme court, or any justice thereof, if application is made within the time provided by law for the taking of appeals." N.M. STAT. ANN. § 39-3-5 (Repl. Pamp. 1991)

72. N.M. R. APP. P. 12-503.

In announcing its decision to adopt the collateral order doctrine and the writ of error as its procedural avenue, the supreme court permitted the denial of qualified immunity in *Carrillo* to retroactively stand for an application to invoke the new doctrine. In so doing, the court certified for review defendant's claim of qualified immunity on plaintiff's First Amendment claim.[73]

C. *Implications*

The New Mexico Supreme Court clearly recognized that an injustice may occur when an interlocutory order effectively disallowing a statutory claim of right could not be brought before the court prior to a full adjudication on the merits. In adopting the collateral order doctrine, the New Mexico Supreme Court followed *Cohen* and *Mitchell* by allowing an avenue of review for those rights which would be irretrievably lost in the absence of an immediate appeal. However, the New Mexico Supreme Court was careful in its adoption of the doctrine by retaining its own discretionary powers to review or refuse to review various interlocutory orders which may come before it under the writ of error. "We remain free to apply the doctrine as we deem appropriate in future cases."[74]

Moreover, the New Mexico Supreme Court clearly recognized that an abuse of the collateral order doctrine could delay and interrupt court proceedings and could virtually nullify the final judgment rule of the appeals procedure.[75] Thus, through the writ of error, the court effectively narrowed the scope of the application of the collateral order doctrine and maintained its own discretionary power to determine which appeals fall within that scope.[76] The court opened up a procedural avenue for appeals from interlocutory orders collateral to the merits of a case, and at the same time announced its control over the invocation and application of the doctrine.

V. CONCLUSION

In *Carrillo*, the New Mexico Supreme Court followed federal civil procedure in adopting the collateral order doctrine. The doctrine permits appeals from a narrow range of final orders which conclusively determine a right of law separate from the merits of the case and which, if not immediately appealable before final judgment, would essentially be unreviewable. The *Carrillo* court also selected the writ of error as the procedural avenue for the doctrine, thus providing for the doctrine's more narrowly circumscribed use.

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73. In reviewing the free speech issue, the court eventually held that the school board was not entitled to pretrial immunity as contemplated in *Harlow* and *Mitchell*.

74. *Carrillo*, 114 N.M. at 617 n.9, 845 P.2d at 140 n.9.

75. *Id.* at 616, 845 P.2d at 139.

76. *Id.* at 627, 845 P.2d at 150.