NEW MEXICO LAW REVIEW

Volume 15
Issue 2 *Spring 1985*

Spring 1985

Civil Procedure

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CIVIL PROCEDURE

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I. INTRODUCTION

The New Mexico appellate courts decided approximately eighty cases involving questions of civil procedure law during the survey year. Not all of the cases are considered in this Article. Discussion of cases reaffirming the standard for directed verdicts[1] and summary judgments[2] has been omitted, as has discussion of cases interpreting statutes of limitation because several of these cases are currently pending in the New Mexico Supreme Court.[3] The cases that are discussed are organized in this Article according to the sequence in which they are presented in a lawsuit.

II. SUBJECT MATTER JURISDICTION

Questions concerning the scope of the jurisdiction of New Mexico state courts continue to arise. If a court does not have jurisdiction, the judge cannot act in any matter that might require him to use his discretion. In *Pueblo of Laguna v. Cillessen & Son, Inc.*,[4] for example, the supreme court held that once a proper affidavit of disqualification of a judge has

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1. Toppino v. Herhahn, 100 N.M. 564, 673 P.2d 1297 (1983); State Farm Fire & Casualty Co. v. Price, 101 N.M. 438, 684 P.2d 524 (Ct. App. 1984).

2. Young v. Seven Bar Flying Service, Inc., 101 N.M. 545, 685 P.2d 953 (1984); Serna v. Roche Laboratories, 101 N.M. 522, 684 P.2d 1187 (Ct. App. 1984); New Mexico Tire & Battery Co. v. Ole Tires, 101 N.M. 357, 683 P.2d 39 (1984); Tabet v. Campbell, 101 N.M. 334, 681 P.2d 1111 (1984); Sprague v. City of Las Vegas, 101 N.M. 185, 679 P.2d 1283 (1984); Wine v. Neal, 100 N.M. 431, 671 P.2d 1142 (1983); Walker v. Key, 101 N.M. 631, 686 P.2d 973 (Ct. App.), *cert. quashed*, 101 N.M. 555, 685 P.2d 963 (1984); Penny v. Sherman, 101 N.M. 517, 684 P.2d 1182 (Ct. App.), *cert. denied*, 101 N.M. 555, 685 P.2d 963 (1984); Kerman v. Swafford, 101 N.M. 241, 680 P.2d 622 (Ct. App.), *cert. denied*, 101 N.M. 189, 679 P.2d 1287 (1984); Gantt v. L & G Air Conditioning, 101 N.M. 208, 680 P.2d 348 (Ct. App. 1983), *cert. quashed*, 101 N.M. 189, 679 P.2d 1287 (1984); Gouveia v. Citicorp Person-to-Person Fin., 101 N.M. 572, 686 P.2d 262 (Ct. App. 1984); Hendren v. Allstate Ins. Co., 100 N.M. 506, 672 P.2d 1137 (Ct. App. 1983); Parrish v. McDaniel, 101 N.M. 257, 680 P.2d 638 (Ct. App. 1984); Armijo v. Albuquerque Anesthesia Servs., 101 N.M. 129, 679 P.2d 271 (Ct. App. 1984); LeBlanc v. Northern Colfax County Hosp., 100 N.M. 494, 672 P.2d 667 (Ct. App. 1983).

3. Kern v. St. Joseph Hosp., Inc., 24 N.M. Bar Bull. 10 (Ct. App. Jan. 10, 1985), *cert. granted*, 24 N.M. Bar Bull. 17 (Jan. 17, 1985); Irvine v. St. Joseph Hosp., Inc., 23 N.M. Bar Bull. 1257 (Ct. App. Dec. 6, 1984), *cert. granted*, 23 N.M. Bar Bull. 1241 (Dec. 6, 1984); Keithley v. St. Joseph's Hosp., Inc., 23 N.M. Bar Bull. 1220 (Ct. App. Nov. 29, 1984), *cert. granted*, 23 N.M. Bar Bull. 1297 (Dec. 20, 1984).

4. 101 N.M. 341, 682 P.2d 197 (1984).

been filed, that judge has no jurisdiction to exercise his discretion in any matter.[5]

In *Martinez v. Martinez*,[6] the court of appeals reminded attorneys that once an appeal from an order of the district court is filed, the district court loses jurisdiction. The appellant filed his notice of appeal before filing his requested findings of fact. The filing of the notice of appeal divested the district court of its jurisdiction.[7]

The supreme court clarified the scope of district court jurisdiction on remand in *Central Adjustment Bureau, Inc. v. Thevenet*.[8] The court reiterated its holding in *Vinton Eppsco, Inc. v. Showe Homes, Inc.*,[9] stating that a district court has jurisdiction only to comply with the mandate of the appellate court on remand.[10] Even if the district court is certain that the opinion of the appellate court is incorrect, the district court lacks jurisdiction to exceed the bounds of that opinion.[11] An award of attorneys' fees, without an express order of the court, was therefore outside the bounds of the trial court's jurisdiction on remand.[12]

In *Kutz v. Independent Publishing Co.*,[13] the court held that a trial court has authority not only to order a default judgment as a sanction for failure to comply with court instructions, but if the default judgment is set aside on certain conditions, the failure to comply with those conditions will result in reinstatement of the default judgment.[14] The defendants argued that the court had no power to enter the default judgment merely because they had missed a deadline, but that argument failed.[15] Once the original default judgment had been entered based on a failure to "otherwise defend" under Rule 55(a),[16] the court had jurisdiction to impose conditions to set aside that judgment.[17] The court, therefore, had jurisdiction to re-

5. *Id.* at 343, 682 P.2d at 199.

6. 101 N.M. 493, 684 P.2d 1158 (Ct. App. 1984).

7. *Id.* at 495, 684 P.2d at 1160. Furthermore, because the appellant had failed to file his requested findings of fact before filing his notice of appeal, he had waived his right to object to the sufficiency of the evidence. *Id.* at 496, 684 P.2d at 1161.

8. 101 N.M. 612, 686 P.2d 954 (1984).

9. 97 N.M. 225, 638 P.2d 1070 (1981).

10. 101 N.M. at 614, 686 P.2d at 956.

11. *Id.*

12. *Id.* The supreme court, however, did award attorneys' fees, stating that it had neglected to do so through an oversight. While the district court had no jurisdiction to award the fees, the supreme court was able to do so to correct the matter. The supreme court relied on Southwestern Inv. Corp. v. City of Los Angeles, 38 Cal.2d 623, 241 P.2d 985 (1952), to correct "a matter inadvertently overlooked" on its own motion. 101 N.M. at 614, 686 P.2d at 956.

13. 101 N.M. 587, 686 P.2d 277 (Ct. App. 1984).

14. *Id.* at 589-90, 686 P.2d at 279-80. The breach of the conditions imposed need not have anything to do with the original default judgment.

15. The defendants missed a pretrial conference, failed to obtain counsel after being instructed to do so by the court, and generally obstructed the progress of the action. *Id.* at 590-91, 686 P.2d at 280-81.

16. N.M. R. Civ. P. 55(a).

17. N.M. R. Civ. P. 60(b). The court can set aside a final judgment upon "such terms as are just."

impose the judgment when the defendants failed to comply with those conditions.

In a worker's compensation case, the court of appeals ruled that the trial court had jurisdiction to hear an employer's petition to reduce or to terminate the compensation paid to an employee when the employee refused to submit to medical treatment.[18] It was not necessary that the court award the compensation in order to hear the petition.[19] In *Brooks v. Hobbs Municipal School,* the court of appeals held that N.M. Stat. Ann. section 52-1-51 (1978) implicitly gave the court jurisdiction to hear such a petition even when the employer was paying benefits voluntarily, rather than as a result of adjudication.[20] The court compared section 52-1-51 to section 52-1-56(A), which allows a court to change the amount of compensation if there is a change in the worker's condition; it noted that the district court's jurisdiction under the latter section was limited to courts "in which any workman *has been awarded* compensation."[21] Because there is no such limit on the jurisdiction of a court if the claimant refuses to undergo medical treatment and the court had jurisdiction to order a decrease in benefits under section 52-1-51, the court of appeals decided that the district court had jurisdiction to consider a petition to decrease benefits.[22]

The district court also had jurisdiction to reinstate a complaint that had been twice dismissed *sua sponte* for failure to prosecute, according to the court in *Mora v. Hunick.*[23] The court of appeals ruled that the trial court had jurisdiction to reinstate the complaint even though the statute of limitation had run when the complaint was reinstated for the second time.[24] The record did not reflect the authority under which the trial court acted in dismissing the case, but the court of appeals assumed that the court's action was predicated upon its inherent authority. The case was then over unless the trial court chose to reinstate it properly.[25] The court chose to do so; because the time between the second dismissal and the reinstatement was only seven weeks and a motion to reopen a final judgment could be made under N.M. R. Civ. P. 60(b) within one year, the reinstatement was proper and the court had jurisdiction.[26]

Two recent cases have broadly interpreted the scope of the jurisdiction of the New Mexico courts when an action is brought pursuant to the

18. Brooks v. Hobbs Mun. School, ___ N.M. ___, 688 P.2d 25 (Ct. App. 1984).
19. *Id.* at ___, 688 P.2d at 28.
20. *Id.* N.M. Stat. Ann. § 52-1-51 (1978) gives a court discretion to reduce or terminate an award of benefits if an employee refuses to undergo medical treatment.
21. ___ N.M. at ___, 688 P.2d at 28 (emphasis added).
22. *Id.*
23. 100 N.M. 466, 672 P.2d 295 (Ct. App. 1983).
24. *Id.* at 469, 672 P.2d at 298.
25. *Id.* at 468, 672 P.2d at 297.
26. *Id.* at 468, 469, 672 P.2d at 297, 298.

Revised Uniform Reciprocal Enforcement of Support Act (RURESA).[27] In *Altman v. Altman*,[28] the court of appeals determined that New Mexico courts had jurisdiction to modify a Florida divorce decree. The Altmans were divorced in Florida in 1980. Mr. Altman later moved to New Mexico. After Mr. Altman fell behind in his alimony and child support payments, Mrs. Altman initiated an action under RURESA to enforce the payments. Mr. Altman argued that the district court should modify the decree because of changed circumstances.[29] Following a hearing to contest the enforcement of the obligations, the trial court lowered the amount of alimony and increased the amount of child support due the wife. Mrs. Altman appealed, claiming that the district court had no jurisdiction to consider the husband's allegations of changed circumstances or to modify the decree based upon those changed circumstances. She argued that section 40-6-39(c) did not allow the court to hear any defense but those permitted in actions to enforce foreign money judgments.[30]

The court considered the jurisdiction of the trial court over the questions of alimony and child support separately. Noting that it was not clear that RURESA applied to alimony, the court analyzed the question of jurisdiction, first assuming that RURESA applied, and then assuming that it did not.[31] The court found that the district court had jurisdiction to modify the decree under both Florida and New Mexico law; the court, therefore, was not forced to decide whether RURESA applied to the enforcement of alimony payments.[32]

Under RURESA, New Mexico law clearly is applicable to modifications of child support.[33] Because New Mexico law allows modification of child support decrees upon a showing of changed circumstances, the district court had jurisdiction to increase the amount of child support due, even though it was the court's unilateral decision to do so.[34]

27. N.M. Stat. Ann. §§ 40-6-1 to -41 (Repl. Pamp. 1983).

28. 101 N.M. 380, 683 P.2d 62 (Ct. App. 1984).

29. Mr. Altman's gross income was $225,000 per year at the time of the divorce. His annual income at the time of the hearings in the RURESA action was $61,000. *Id.* at 382, 683 P.2d at 64.

30. *Id.* at 383, 683 P.2d at 65.

31. *Id.* at 383-84, 683 P.2d at 65-66. If RURESA applied to alimony, New Mexico law would be applicable, and the court would be empowered to hear the defaulting obligor's motion to modify the support order. The court analyzed N.M. Stat. Ann. § 40-6-39 (Repl. Pamp. 1983) and noted that, while § 40-6-39(A) provided that foreign support orders were to be treated as New Mexico support orders, § 40-6-39(C) restricted the defenses the obligor might use at the hearing. The court stated that § 40-6-39(B) resolved the conflict between the two sections by granting the obligor 20 days to petition the court for relief. Once relief was requested, the court had the power to modify the decree. Florida law provided that support decrees could be modified, so the court had authority to modify the decree prospectively under N.M. Stat. Ann. § 40-4-7 (Repl. Pamp. 1983) if RURESA did not apply.

32. 101 N.M. at 384-85, 683 P.2d at 66-67.

33. *Id.* at 385, 683 P.2d at 67. *See* N.M. Stat. Ann. § 40-6-7 (Repl. Pamp. 1983).

34. 101 N.M. at 385-86, 683 P.2d at 67-68. Neither party had requested an increase in child support payments, but when the trial court decreased the amount of alimony to be paid, it increased the amount to be paid in child support. The court pointed out that under the property settlement, child support was to increase when the alimony payments ended. *Id.*

In the second case analyzing the jurisdiction of New Mexico courts under RURESA, the court of appeals found that the trial court had jurisdiction to order the obligor to pay child support, although the decree state's court would have lacked such jurisdiction. In *State ex rel. Alleman v. Shoats,*[35] a mother attempted to force a father to pay child support under a Missouri divorce decree. The father, while conceding his duty to support his children, attacked the New Mexico court's jurisdiction to order child support under a RURESA action. He argued that no court had jurisdiction under RURESA to order support because the Missouri court which had presided over the divorce did not have personal jurisdiction over him. Furthermore, the New Mexico district court had found that the Missouri court lacked jurisdiction to order him to pay child support; it, therefore, refused to give full faith and credit to the Missouri decree.[36]

The court of appeals rejected the father's argument, holding that the district court had jurisdiction to order support and was not limited to enforcing the decree state's order.[37] Relying on *Natewa v. Natewa,*[38] the court noted that jurisdiction is proper when an obligor in New Mexico owes support to someone in another state and has a duty of support under the laws of New Mexico.[39] In fact, the court has jurisdiction to order support even when the question of support has not been previously determined.[40]

New Mexico courts have jurisdiction to change the custodial parent, but have discretion to refuse to exercise their jurisdiction. In *Hester v. Hester,*[41] the court held that while the trial court had subject matter jurisdiction under the Child Custody Jurisdiction Act (CCJA)[42] to transfer custody to the father, it did not abuse its discretion by refusing to assert jurisdiction.[43] The father and mother had obtained their divorce in Santa Fe District Court. The mother then moved to Colorado, taking their child with her. Three months later, when the child was visiting the father in New Mexico, the father petitioned for a change of custody in the same court which had awarded custody to the mother in the final divorce decree. The trial court held that New Mexico was not a convenient forum, finding that asserting jurisdiction would encourage custody litigation and prevent that litigation in the state in which the child presently lived.[44] Since the

35. 101 N.M. 512, 684 P.2d 1177 (Ct. App. 1984).
36. *Id.* at 515, 684 P.2d at 1180.
37. *Id.* at 516, 684 P.2d at 1181.
38. 84 N.M. 69, 499 P.2d 691 (1972).
39. 101 N.M. at 516, 684 P.2d at 1181.
40. *Id.*
41. 100 N.M. 773, 676 P.2d 1338 (Ct. App.), *cert. denied,* 101 N.M. 11, 677 P.2d 624 (1984).
42. N.M. Stat. Ann. § 40-10-4 (Repl. Pamp. 1983).
43. 100 N.M. at 775, 676 P.2d at 1340.
44. *Id.* at 777, 676 P.2d at 1342. The trial court relied on guidelines embodied in N.M. Stat. Ann. §§ 40-10-2(C), (D) (Repl. Pamp. 1983).

CCJA was enacted to prevent such occurrences, the court declined to exercise its jurisdiction.

The court of appeals found that the trial court's findings were supported by substantial evidence.[45] The court noted that application of the doctrine of forum non conveniens is within the discretion of the trial court, and while the evidence was close, the appellate court would not weigh it as long as the trial court had not abused its discretion.[46]

In *Los Alamos County v. Beery*,[47] the supreme court addressed the appellate jurisdiction of the district court. The district court had ordered a remand five months after it dismissed an appeal from a magistrate court as moot. The *pro se* defendant argued that the court had no jurisdiction to order the remand because the dismissal was an adjudication on the merits. The supreme court noted that a district court's order of dismissal of an appeal from a magistrate court in effect affirmed the magistrate court judgment and, therefore, was not an adjudication on the merits.[48] Ordering a remand returned jurisdiction to the magistrate court, so the judgment could be enforced. The court characterized the remand as "housekeeping."[49]

The court of appeals distinguished the jurisdictional requirements for an appeal *de novo* to the district court from the procedural requirements in *Sleeper v. Ensenada Land & Water Association*.[50] The case involved an appeal from a decision on water rights by the State Engineer. While the notice of appeal had to be filed within thirty days of the receipt of the decision, and a copy of that notice had to be served upon the parties within thirty days of the filing of the notice of appeal, the failure to file proof of service within thirty days of serving the opposing party would not defeat the jurisdiction of the district court.[51] The court reasoned that filing proof of service was merely procedural.[52] This characterization of the requirements for appeal of the State Engineer's decision allowed a review on the merits rather than foreclosing such review. The court held that due process requirements are satisfied with service, thus giving the court jurisdiction.[53] Filing proof of service had no effect upon the court's jurisdiction, as long as the service itself was timely.[54]

The court of appeals again distinguished between procedural and sub-

45. 100 N.M. at 776, 676 P.2d at 1341.
46. *Id.*
47. 101 N.M. 157, 679 P.2d 825 (1984).
48. *Id.* at 158, 679 P.2d at 826.
49. *Id.*
50. 101 N.M. 579, 686 P.2d 269 (Ct. App. 1984).
51. *Id.* at 581, 686 P.2d at 271.
52. *Id.*
53. *Id.* at 582, 686 P.2d at 272.
54. *Id.*

stantive requirements for district court jurisdiction in *Trujillo v. Puro*.[55] The court held that the failure to present specific claims to the Medical Review Commission in a medical malpractice action did not defeat the trial court's subject matter jurisdiction.[56] The plaintiff presented a statement of the facts, naming the persons involved.[57] The court ruled that it was unnecessary for the plaintiff to present each count or claim to the commission. The district court had jurisdiction over the medical malpractice claims once the plaintiff complied with the requirements of the Medical Malpractice Act.[58]

This year, the New Mexico courts broadly interpreted the scope of original subject matter jurisdiction in the district courts. It is clear, however, that the appellate courts are much less willing to be deferential to district court jurisdiction once the district court's original jurisdiction has been extinguished by an appeal. In those cases, district court jurisdiction is confined to the precise limits specified in the remand order.

III. PERSONAL JURISDICTION

The supreme court gave expansive interpretation to the scope of New Mexico's long-arm statute in *Kathrein v. Parkview Meadows, Inc.*[59] In *Kathrein*, a New Mexico resident sued the defendant, a Minnesota corporation operating a Wickenburg, Arizona alcoholism treatment center in which the plaintiff's husband had enrolled, for personal injury. The program included a "Family Week," in which the individual and his family participated in therapy sessions.

The plaintiff alleged that her participation in Family Week caused her to suffer continual severe emotional and psychological trauma, as well as lost income, medical expenses, and future medical expenses. The complaint alleged that the defendant was negligent in soliciting the plaintiff's attendance at Family Week because the defendant knew that the plaintiff would be confronted with a psychologically and emotionally stressful environment, but had failed to obtain the plaintiff's medical history. The complaint did not allege that the plaintiff suffered the injury in New Mexico, but founded its allegation of jurisdiction on the defendant's "transaction of any business" within the state.[60]

55. 101 N.M. 408, 683 P.2d 963 (Ct. App. 1984).

56. *Id.* at 410, 683 P.2d at 965.

57. The Medical Malpractice Act requires that the plaintiff's application to the Medical Review Commission contain "a brief statement of the facts of the case, naming the persons involved, the dates and the circumstances, so far as they are known, of the alleged act or acts of malpractice." N.M. Stat. Ann. § 41-5-15(B)(1) (Repl. Pamp. 1982).

58. 101 N.M. at 410, 683 P.2d at 965.

59. ___ N.M. ___, 691 P.2d 462 (1984). New Mexico's long-arm statute is codified at N.M. Stat. Ann. § 38-1-16 (1978).

60. *See* N.M. Stat. Ann. § 38-1-16(A)(1) (1978).

The defendant moved to dismiss the complaint for lack of personal jurisdiction, claiming that the plaintiff's cause of action did not arise from an act specified by New Mexico's long-arm statute.[61] The trial court denied the defendant's motion to dismiss, and the court of appeals reversed, finding no relationship between the defendant's activities in New Mexico and the plaintiff's cause of action.[62]

The supreme court reversed the court of appeals. The supreme court focused on the defendant's activities in New Mexico,[63] and concluded that they were "of sufficient magnitude" to justify the exercise of jurisdiction by the New Mexico courts.[64] Having established that the defendant's activities within the state were "continuous and purposeful,"[65] the court found that the constitutional due process "minimum contacts" standard of *International Shoe* was met.[66] The court then equated New Mexico's statutory standard for obtaining long-arm jurisdiction with the due process "minimum contacts" standard and enumerated various factors to be considered in determining whether a non-resident defendant transacted business in the state. These factors include "the voluntariness of the defendant's contact with the state, the nature of the transaction, the applicability of New Mexico law, the contemplation of the parties, and the location of likely witnesses."[67] Emphasizing that the applicability of the long-arm statute "must be determined by the facts in each case,"[68] the court found that the defendant's "total activities" in New Mexico were sufficient to justify subjecting the defendant to the jurisdiction of the New Mexico courts.[69]

The court of appeals addressed a similar issue but reached a different conclusion in *Swindle v. General Motors Acceptance Corp.*[70] In 1981, the plaintiff had signed a retail installment contract to purchase an au-

61. The defendant's statutory agent in Arizona was served with process. Because service was not obtained under N.M. Stat. Ann. §38-1-6 (1978), jurisdiction had to be established under New Mexico's long-arm statute. ___ N.M. at ___, 691 P.2d at 463.

62. "The long-arm statute requires a close relationship between jurisdictional activities and a cause of action." ___ N.M. at ___, 691 P.2d at 462-63.

63. Defendant advertised its alcoholism treatment center in the yellow pages of the Albuquerque telephone directory, had contacted the director of the Albuquerque affiliate of the National Council on Alcoholism to solicit his referral of patients to the treatment center, had mailed a brochure to the plaintiff inviting her to attend Family Week, and had telephoned the plaintiff to encourage her attendance. *Id.* at ___, 691 P.2d at 463.

64. *Id.*

65. *Id.*

66. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

67. ___ N.M. at ___, 691 P.2d at 464.

68. *Id.* (quoting Telephonic, Inc. v. Rosenblum, 88 N.M. 532, 534, 543 P.2d 825, 827 (1975)).

69. ___ N.M. at ___, 691 P.2d at 464. Justice Stowers dissented, agreeing with the rationale of the court of appeals, and finding that the plaintiff had not established any relationship between the defendant's activities in New Mexico and her cause of action. *Id.* (Stowers, J., dissenting).

70. 101 N.M. 126, 679 P.2d 268 (Ct. App.), *cert. denied,* 101 N.M. 77, 678 P.2d 705 (1984).

tomobile from Bill Swad Chevrolet, Inc. ("Swad"). The contract was signed in Columbus, Ohio, where the plaintiff was then a resident. Swad requested the plaintiff to sign a second installment contract, apparently because of mathematical errors in the first contract, but assured her that there would be no changes in the substantive terms of the parties' agreement. After signing the second contract, the plaintiff moved to New Mexico, and the contract was transferred from the General Motors Acceptance Corp. ("GMAC") office in Ohio to a New Mexico GMAC office.

There were material differences in the second contract,[71] but the plaintiff did not discover them until September 1982. She then filed suit against Swad and GMAC in Bernalillo County District Court. Swad moved to dismiss for lack of personal jurisdiction, and after discovery, the trial court granted Swad's motion. The court of appeals affirmed.

The plaintiff argued that the New Mexico court had jurisdiction under the long-arm statute, either because Swad had transacted business in New Mexico or because it had committed a tortious act here. Analyzing both claims under the due-process "minimum contacts" standard articulated in *World-Wide Volkswagen Corp. v. Woodson*,[72] the court of appeals concluded that Swad's contacts with New Mexico were insufficient to satisfy that standard.[73] Swad had never been authorized to do business in New Mexico, had never done business in New Mexico, had not advertised in New Mexico, and had no employees, agents, or facilities in New Mexico.[74] Furthermore, Swad had not purposely availed itself of the privilege of conducting activities in New Mexico.[75] Finally, the court refused, on constitutional grounds, to rely on *Roberts v. Piper Aircraft Corp.*[76] to find that Swad had committed a tortious act in New Mexico:

> To classify Swindle's continued liability on her contract as sufficient injury committed within New Mexico under *Roberts* would expand our long-arm statute beyond constitutional due process limits. New Mexico cannot exercise personal jurisdiction over a nonresident defendant solely on the basis of a plaintiff's residency at the time of the lawsuit.[77]

The court, therefore, affirmed the trial court's grant of Swad's motion to dismiss for lack of personal jurisdiction.

71. The second contract included a higher cash price, a higher total finance charge, a higher deferred payment price, and higher monthly installment payments and represented the automobile as "Used" rather than "New." 101 N.M. at 127, 679 P.2d at 269.

72. 444 U.S. 286 (1980).

73. 101 N.M. at 128, 679 P.2d at 270.

74. *Id.*

75. *Id.*

76. 100 N.M. 363, 670 P.2d 974 (Ct. App. 1983).

77. 101 N.M. at 128-29, 679 P.2d at 270-71.

Despite the apparent dissimilarity in their results, both *Kathrein* and *Swindle* were, at least arguably, correctly decided. The courts in both cases analyzed the out-of-state defendants' contacts with New Mexico in reviewing the jurisdictional challenges. In so doing, the courts demonstrated that careful attention to the magnitude of the defendant's actions in New Mexico will be required in determining whether the New Mexico courts have personal jurisdiction over out-of-state defendants.

In addition to addressing the scope of New Mexico's long-arm statute, the court of appeals further defined the standard for determining the sufficiency of a challenge attacking the jurisdiction of the court in *Aetna Casualty and Surety Co. v. Bendix Control Division*.[78] The trial court granted the defendant's motion to dismiss, finding that plaintiff's complaint had not shown sufficient minimum contacts to support personal jurisdiction over the defendant. The court of appeals reversed, holding that the defendant's unverified motion to dismiss, not supported by affidavits or other sworn testimony, was insufficient to constitute a proper challenge to the plaintiff's allegations of jurisdictional facts.[79] Although the court acknowledged that upon a proper challenge to the court's jurisdiction the burden shifts to the plaintiff to support his allegation that personal jurisdiction over the defendant is present, the court added substance to the requirement that the defendant present a "proper challenge" before that burden would shift to the plaintiff. The court emphasized that "a proper challenge must contain something in addition to the bare allegations of the motion."[80] A statement by the defendant, under oath by affidavit or verification of the motion, setting forth or verifying acts which support the defendant's claim of lack of minimum contacts would have been sufficient.[81] The legal arguments of counsel were deemed not to be "evidence" and could not constitute evidentiary support for the motion to dismiss.[82]

The *Bendix* court reaffirmed the trend begun in *Plumbers Specialty Supply Co. v. Enterprise Products Co.*,[83] where the court expressed "reservations" about forcing the plaintiff to establish a portion of his substantive case before trial.[84] The court of appeals thus established a procedure

78. 101 N.M. 235, 680 P.2d 616 (Ct. App. 1984). The plaintiff appealed from an order dismissing its amended complaint, which sought reimbursement for worker's compensation benefits paid to Val Montoya, the involuntary plaintiff.

79. *Id.* at 240-41, 680 P.2d at 621-22. The court reiterated the principle that an allegation of a tortious act in New Mexico is sufficient to support an inference of minimum contacts. *Id.* at 240, 680 P.2d at 621.

80. *Id.* at 240, 680 P.2d at 621.

81. *Id.* Such proof would satisfy N.M. R. Civ. P. 7(b), which requires a motion to "state with particularity the grounds therefor."

82. 101 N.M. at 240, 680 P.2d at 621.

83. 96 N.M. 517, 632 P.2d 752 (Ct. App. 1981).

84. *Id.* at 520, 632 P.2d at 755.

that effectively circumvents the requirement that the plaintiff prove his jurisdictional allegations upon a challenge by the defendant.[85] After *Bendix*, defendants will have to be prepared to come forward with evidence that personal jurisdiction is lacking before the plaintiff will be forced to support his allegations.

IV. JUDGE SELECTION

On March 1, 1984, the New Mexico Supreme Court decided *State ex rel. Gesswein v. Galvan*[86] and issued new rules governing the disqualification of judges in both civil and criminal proceedings.[87] In *Gesswein*, the court addressed the issue of whether a district judge could be disqualified and to what extent New Mexico court rules and statutes enlarge or abridge the right to disqualify as established in the state constitution. The court recognized that the New Mexico Constitution guarantees the right to a fair and impartial tribunal by presuming the existence of partiality under specified circumstances:

> No justice, judge or magistrate of any court shall, except by consent of all parties, sit in any cause in which either of the parties are related to him by affinity or consanguinity within the degree of first cousin, or in which he was counsel, or in the trial of which he presided in any inferior court, or in which he has an interest.[88]

The court then emphasized that the "interest" necessary to disqualify a judge specified in the constitution "includes actual bias or prejudice, not some indirect, remote, speculative theoretical or possible interest."[89]

The court examined the judicial disqualification statute[90] to determine whether it constituted substantive or procedural law. If procedural, the court could modify or suspend it by rule. In earlier cases, the court had held that the statutory right to disqualify was substantive.[91] The court emphasized, however, the subtlety of the distinction between substantive and procedural law and determined that the statute merely provided a *method* of disqualification which was procedural in nature and therefore

85. That requirement was established by the New Mexico Supreme Court in State ex rel. Anaya v. Columbia Research Corp., 92 N.M. 104, 583 P.2d 468 (1978).

86. 100 N.M. 769, 676 P.2d 1334 (1984). *See also* Slusher, *Criminal Procedure*, 15 N.M.L. Rev. ___ (1985), in this issue for a discussion of the applicability of Gesswein to criminal cases.

87. The new rules are designated as N.M. R. Civ. P. 88 and 88.1 and N.M. R. Crim. P. 34.1 and 34.2.

88. N.M. Const. art. VI, § 18.

89. 100 N.M. at 770, 676 P.2d at 1335.

90. N.M. Stat. Ann. § 38-3-9 (1978).

91. *See* Gerety v. Demers, 92 N.M. 396, 589 P.2d 180 (1978); Beall v. Reidy, 80 N.M. 444, 457 P.2d 376 (1969); State *ex rel.* Hannah v. Armijo, 38 N.M. 73, 28 P.2d 511 (1933).

a prerogative of the state supreme court.[92] The court held that "this Court can adopt a rule of procedure when the operation of the court is involved and the existing process has created a problem."[93] The court retracted existing rules governing judicial disqualification and substituted new rules.[94]

The new rules became effective March 5, 1984. N.M. R. Civ. P. 88 governs designation of judges, and N.M. R. Civ. P. 88.1 governs disqualification of judges. Rule 88 allows local district court rules to govern the initial designation of judges.[95] In multi-judge districts, whenever a judge is disqualified or recuses himself, local district court rules will govern the assignment of the case to another judge, unless the parties agree on a substitute judge within seven days, and that judge agrees to hear the case.[96] If the case cannot be reassigned to another judge, that fact will be certified to the Chief Justice of the New Mexico Supreme Court, who will designate a judge.[97] That designated judge may only be disqualified pursuant to article VI, section 18 of the New Mexico Constitution.[98]

Rule 88.1 provides that no party may disqualify more than one judge.[99] To disqualify a judge, a party must file an affidavit of disqualification with the court clerk within ten days after service of process on the defendant.[100] The affidavit of disqualification must state sufficient facts showing the bias, prejudice, or interest of the judge being disqualified, and must be accompanied by a certificate of counsel stating that to the best of his knowledge, information, and belief, the facts contained in the affidavit are true and correct.[101] The clerk will then give written notice to each party. Within ten days of that notice, any other party who wishes to

92. 100 N.M. at 772, 676 P.2d at 1337. The court cited Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 310, 551 P.2d 1354, 1357 (1976), *cert. denied*, 436 U.S. 906 (1978).

93. 100 N.M. at 772, 676 P.2d at 1337. The court cited the 1981-1982 Annual Report of the Judicial Department as evidence of the problem. Over 2,000 judicial disqualifications had been filed during the course of the year of the report. The court found this number of judicial disqualifications to constitute an "unreasonable burden" on the system. 100 N.M. at 773, 676 P.2d at 1338.

94. 100 N.M. at 773, 676 P.2d at 1338. The court promulgated new rules governing judge selection and disqualification in both civil and criminal proceedings. This Survey addresses only those rules dealing with civil procedure.

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

96. N.M. R. Civ. P. 88(b).

97. N.M. R. Civ. P. 88(c).

98. N.M. R. Civ. P. 88(d). N.M. Const. art. VI, § 18 is quoted *supra* text accompanying note 88.

99. N.M. R. Civ. P. 88.1(b). This restriction raises a constitutional problem if a party has valid constitutional grounds on which to challenge more than one judge. For example, if a party challenges an appellate judge on the grounds that he sat on the same case while a trial court judge, and the judge who is subsequently assigned the case is the party's first cousin, that party would have a valid constitutional challenge for the second, as well as the first judge. Under Rule 88.1(b) it appears that he is foreclosed from making the second challenge.

100. N.M. R. Civ. P. 88.1(c).

101. N.M. R. Civ. P. 88.1(f).

disqualify any other judge who might hear the case must file a provisional affidavit of disqualification naming the judge to be disqualified.[102] The contents of the provisional affidavit are subject to the same standards specified for affidavits of disqualification.

As a practical matter, the new judicial disqualification rules will eliminate the disqualification of judges.[103] Although Rule 88.1 appears to allow parties to disqualify judges, challengers are now limited to the grounds for disqualification enumerated in the New Mexico Constitution. These grounds will restrict the judge-shopping rampant under the former Rule. Practitioners who are unable to demonstrate a judge's bias will have to explore alternative avenues of judge selection.[104]

V. PLEADINGS

A. Real Party In Interest

The New Mexico Supreme Court once again attempted to clarify the law regarding joinder and naming insurance companies as parties in *Safeco Insurance Co. of America v. United States Fidelity & Guaranty Co.*[105] The case arose out of an automobile accident in which Kim Taylor's car collided with a car driven by Nicholas Calomino and another car driven by Richard Vigil, but owned by Eugene Vigil. Taylor was insured by the defendant ("USF&G"), Calomino was insured by Safeco, and the Vigils were uninsured. USF&G paid the bulk of Taylor's damages and then sued Calomino, Safeco, and the Vigils on a subrogation theory, naming Taylor an involuntary plaintiff to the extent of her $100 deductible. The trial court dismissed Safeco, but the court of appeals, citing earlier New Mexico decisions, reversed the trial court and required that Safeco be joined as a party defendant.[106]

The supreme court reversed the court of appeals.[107] The court acknowledged that previous decisions had "unnecessarily confused" the question of determining those parties who must be joined to permit the proper maintenance of a lawsuit, with the fear that disclosure of insurance at

102. N.M. R. Civ. P. 88.1(d).

103. As this issue goes to press, however, the legislature has just passed a bill which would permit each party to any civil or criminal action to exercise one peremptory disqualification of a judge. The bill is awaiting the governor's signature.

104. Moving for a change of venue or dismissal on grounds of forum non conveniens might serve as alternative methods of judge selection.

105. 101 N.M. 148, 679 P.2d 816 (1984). In doing so, the supreme court did not write on a clean slate. *See* Dow, *Insurance Law,* 15 N.M.L. Rev. ___ (1985), in this issue for a discussion of the New Mexico cases preceding *Safeco.*

106. 101 N.M. at 149, 679 P.2d at 817. The court of appeals relied on Maurer v. Thorpe, 95 N.M. 286, 621 P.2d 503 (1980); Sellman v. Haddock, 62 N.M. 391, 310 P.2d 1045 (1957); and Campbell v. Benson, 97 N.M. 147, 637 P.2d 578 (Ct. App. 1981).

107. 101 N.M. at 149, 679 P.2d at 817.

trial might result in prejudice to an insurer or an insured party.[108] The court therefore declared that the rules of civil procedure would continue to govern joinder of parties,[109] but further declared that the fact of an insurance company's joinder would not be disclosed to the jury.[110] The insured party would assert his claim for all damages against the party or parties who allegedly caused the harm, including any amounts due his insurer by subrogation. Once the injured party recovered damages, the insurer would then be allowed to prove its subrogation claim to the trial court, and the court would apportion the recovery between the insured and his insurer.[111] *Safeco* thus reaffirmed the New Mexico Supreme Court's intention to be guided by the rules of civil procedure while providing for non-disclosure of the fact of insurance when insurance companies actively participate as parties.

The court of appeals strictly construed the standard for determining a real party in interest for purposes of appeal in *St. Sauver v. New Mexico Peterbilt, Inc.*[112] In *St. Sauver,* the plaintiff brought a negligence action for damages arising out of a car accident that occurred on a state road within the boundaries of the Zia Indian Pueblo. The named defendants included, among others, the New Mexico State Highway Department ("NMSHD") and Juan Medina, an enrolled member of the Zia Pueblo. Medina filed a motion to dismiss, which was uncontested by the plaintiff, but was contested by NMSHD.[113] The trial court granted Medina's motion to dismiss for lack of subject matter jurisdiction, and NMSHD appealed. The court of appeals dismissed the appeal on the ground that NMSHD lacked standing.[114]

The court cited N.M. Civ. App. R. 3(a), which provides that "any party aggrieved" may appeal from a final order or judgment. To be "aggrieved," the party must have a personal or pecuniary interest or property right adversely affected by the judgment;[115] that interest must be "immediate, pecuniary, and substantial, not nominal or a remote con-

108. *Id.* at 149-50, 679 P.2d at 817-18.

109. *Id.* at 149, 679 P.2d at 817. The court cited N.M. R. Civ. P. 17, 19 and 21, as applicable to joinder of parties. *Id.*

110. 101 N.M. at 150, 679 P.2d at 818. In dissent, Justice Stowers strongly disagreed with the majority's insistence on keeping secret the involvement of the insurance company: "Once properly joined, a party should not be given a special non-disclosed status." *Id.* at 153, 679 P.2d at 821.

111. *Id.* at 150, 679 P.2d at 818. The court reversed the earlier New Mexico decisions, insofar as they were inconsistent with its approach. *Id.*

112. 101 N.M. 84, 678 P.2d 712 (Ct. App. 1984).

113. Medina's motion to dismiss was based on lack of personal and subject matter jurisdiction. *Id.* at 85, 678 P.2d at 713.

114. *Id.*

115. *Id.* at 85-86, 678 P.2d at 713-14 (citing Ruidoso State Bank v. Brumlow, 81 N.M. 379, 467 P.2d 395 (1970)).

sequence of judgment."[116] NMSHD had argued that it would be aggrieved if the trial court applied the doctrine of joint and several liability to the action after dismissing Medina.[117] The court of appeals rejected NMSHD's argument, explaining that NMSHD's interest in Medina's dismissal depended on subsequent events at trial that might not occur and that NMSHD had suffered no present injury as a result of Medina's dismissal.[118] The harm was both remote and contingent; it, therefore, was insufficient to support standing.

B. Amendment

The New Mexico Supreme Court reaffirmed its policy of liberally permitting amendment of pleadings in *First National Bank of Santa Fe v. Southwest Yacht & Marine Supply Corp.*[119] The court addressed the amendment of an affidavit of replevin and held that the amended affidavit related back to the date of the original affidavit.[120] The plaintiff bank had attempted to replevy goods pledged as security for the payment of a note.[121] The trial court granted the defendant's motion to dissolve the writ of replevin, because the affidavit of replevin did not comply with the New Mexico replevin statute.[122] The trial court, however, did grant leave to the plaintiff to amend the affidavit.[123] The bank amended its affidavit and moved for partial summary judgment on the ground that the amended affidavit had cured the defects in the original affidavit. The trial court found that the amended affidavit did not relate back and, therefore, did not cure the defects in the original affidavit.

Reversing the trial court, the supreme court noted that amendments to pleadings are favored when amendment is in the interest of justice.[124]

116. 101 N.M. at 86, 678 P.2d at 714 (citing Leoke v. County of San Bernardino, 57 Cal. Rptr. 770, 249 Cal. App. 2d 767 (1967)).

117. 101 N.M. at 86, 678 P.2d at 714. NMSHD was also concerned that, as a practical matter, Medina might be immune from suit because "some Indian reservations lack a formal court structure and a well-defined body of law to apply to tort cases." *Id.* at 87, 678 P.2d at 715. The court of appeals refused to read Bartlett v. New Mexico Welding Supply, Inc., 98 N.M. 152, 646 P.2d 579 (Ct. App.), *cert. denied*, 98 N.M. 336, 648 P.2d 794 (1982), as creating a general exception to the rejection of joint and several liability for immune tortfeasors. 101 N.M. at 87, 678 P.2d at 715.

118. 101 N.M. at 87, 678 P.2d at 715.

119. 101 N.M. 431, 684 P.2d 517 (1984).

120. *Id.* at 434, 684 P.2d at 520.

121. The other claims involved in this suit are not discussed in this Article. The constitutionality of the replevin statute, as well as the available remedies for wrongful replevin, are discussed at length in the opinion, but do not bear on the relation back of the amended affidavit.

122. 101 N.M. at 434, 684 P.2d at 520. *See* N.M. Stat. Ann. §§ 42-8-1 to -22 (1978).

123. After a writ of replevin has been quashed, amendment may be made to cure a defect in the affidavit of replevin. The amendments can be made whenever an ordinary pleading could be amended. 101 N.M. at 434, 684 P.2d at 520. *See also* N.M. Stat. Ann. § 42-9-14 (1978).

124. 101 N.M. at 434, 684 P.2d at 520.

Amendments in replevin actions are also liberally permitted.[125] Amendments to pleadings relate back to the date of the original pleading "[w]henever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading."[126] Therefore, the amended affidavit related back to the date of the original affidavit.[127]

The court apparently decided that its policy of favoring amendments to affidavits of replevin in conjunction with N.M. R. Civ. P. 15 led so inexorably to its decision that it did not offer a detailed explanation of its rationale. The court merely applied the "cited statutes and case law to the facts in the present case . . . [and found] that the amended affidavit did relate back to the time of the filing of the original affidavit in replevin."[128]

In contrast to the supreme court's liberal stance in *Southwest Yacht,* the New Mexico Court of Appeals refused to construe the term "representative" liberally to allow an amended complaint to relate back to the original complaint in *Mackey v. Burke*.[129] In *Mackey,* Mr. and Mrs. Mackey, the parents of an infant daughter, filed an action for compensatory and punitive damages based on malpractice arising from the medical treatment of their daughter before her death. In their initial complaint they had filed "individually and as the natural parents" of the deceased, but in their amended complaint they added Mr. Mackey as a party plaintiff in his capacity as their daughter's personal representative. The trial court entered summary judgment for the defendants on the grounds that the plaintiffs' amended complaint did not relate back to their earlier defective complaint and, therefore, was barred by the three-year statute of limitations.

In determining that the initial complaint was defective, the court of appeals focused on the term "representative," as it appears both in the Medical Malpractice Act[130] and the Wrongful Death Act.[131] The court acknowledged that the term "representative," as it appears in the Medical Malpractice Act, has a broader meaning than "personal representative," but also pointed out that the broader meaning existed only for the purpose of covering situations where the patient was not dead, but unable to pursue the suit personally.[132] Because the infant in this case was dead,

125. *Id. See also* Vigil v. Johnson, 60 N.M. 273, 291 P.2d 312 (1955).

126. N.M. R. Civ. P. 15.

127. 101 N.M. at 434, 684 P.2d at 520.

128. *Id.*

129. 23 N.M. Bar Bull. 474 (Ct. App. May 3, 1984), *cert. quashed,* 24 N.M. Bar Bull. 65 (Jan. 31, 1985).

130. N.M. Stat. Ann. §§ 41-5-1 to -28 (Repl. Pamp. 1982).

131. N.M. Stat. Ann. §§ 41-2-1 to -4 (Repl. Pamp. 1982). The act provides that a suit for wrongful death "shall be brought by and in the name or names of the personal representative or representatives of such deceased person." *Id.* § 41-2-3.

132. 23 N.M. Bar Bull. at 476.

the court found this definition inapplicable and referred instead to the term "representative" as defined in the Wrongful Death Act.[133] Under that statute, the court distinguished between a "personal representative" and a "statutory beneficiary": "Status as a potential statutory beneficiary is not the test for authority to bring a wrongful death action. If each potential beneficiary was considered a personal representative, the suits could be unending and contradictory."[134]

The court referred to N.M. R. Civ. P. 17 and declared that, under the wrongful death statute, the real party in interest is the personal representative.[135] Because the parents did not meet the test for real parties in interest articulated in *L.R. Property Management, Inc. v. Grebe*,[136] the court of appeals found that they did not have the right to enforce the action until a personal representative had been named.[137] Finding that the amended complaint did not relate back to the original complaint, the court of appeals affirmed the decision of the trial court.[138]

This year, the supreme court also looked at the effect an amendment to a complaint has on the running of the three-year period within which a complaint must be prosecuted.[139] In *Fidelity National Bank v. Collier*,[140] the plaintiff amended its complaint to add additional defendants, including the appellees, the Thomases, and an additional cause of action. Both causes of action were for foreclosures on separate mortgages in favor of the plaintiff as security for a loan to the same businesses. In the first complaint, the plaintiff only attempted to foreclose on the mortgage held by the original defendants. The Thomases were not necessary parties in that action. In the amended complaint, the plaintiff attempted to foreclose

133. *Id.*

134. *Id.*

135. *Id.* at 478. The court of appeals discussed this section of the Wrongful Death Act in Dominguez v. Rogers, 100 N.M. 605, 673 P.2d 1338 (Ct. App. 1983). In that case, the court held that the statute did not confer an unconditional right to intervene, but rather, that the requirement of N.M. R. Civ. P. 24(a)(2) had to be satisfied. That rule allows intervention of right if the party (1) claims an interest relating to the action and (2) shows that his ability to protect that interest would be impaired or impeded as a practical matter, *unless* existing parties adequately represent his interest. In *Dominguez*, the court found that the plaintiff, the decedent's natural father, had established a prima facie showing that he had an "interest" as required by the rule, but failed to show inadequate representation by the deceased's natural mother, her personal representative as required by the Wrongful Death Act. The court of appeals, therefore, affirmed the trial court's denial of the plaintiff's motion to intervene. 100 N.M. at 608, 673 P.2d at 1341.

136. 96 N.M. 22, 627 P.2d 864 (1981). "A real party in interest is 'determined by whether one is the owner of the right being enforced and is in a position to discharge the defendant from the liability being asserted in the suit.'" *Id.* at 23, 627 P.2d at 865 (quoting Jesko v. Stauffer Chem. Co., 89 N.M. 786, 790, 558 P.2d 55, 59 (Ct. App. 1976)).

137. 23 N.M. Bar Bull. at 478.

138. *Id.* at 479.

139. *See* N.M. R. Civ. P. 41(e). If the plaintiff does not prosecute within three years, the defendant may move to dismiss the complaint for failure to prosecute.

140. 101 N.M. 273, 681 P.2d 58 (1984).

on the Thomases' separate mortgage and to recover the full amount of the debt guaranteed by the Thomases.

The plaintiff settled with all of the defendants except the Thomases. Three years after the original complaint was filed, but two weeks short of three years after the complaint was amended to include them, the Thomases filed a motion to dismiss, relying on N.M. R. Civ. P. 41(e).[141] The trial court granted the motion to dismiss the case with prejudice. The New Mexico Supreme Court reversed, stating that the three-year period began to run at the time the amended complaint was filed because the amended complaint included a different cause of action against the Thomases.[142]

The court noted that, although the claims against the original defendants and the Thomases arose out of the same series of transactions, the mortgages were separate and the plaintiff was attempting to collect the full amount of the debt based upon separate guarantees. Because the mortgages and the guarantees were separate, and neither party would have been a necessary party to the other action if the causes of action had been separated, the court held that the claims against the Thomases were causes of action separate from those against the original defendants.[143] As a result, the three-year period started to run in favor of the Thomases when the amended complaint was filed. The court reversed the trial court's decision and remanded the cause because the period had not expired when the Thomases filed their Rule 41(e) motion to dismiss for failure to prosecute.[144]

VI. DISCOVERY

The recent appellate cases concerning discovery have dealt primarily with the propriety of imposing sanctions for the failure to comply with discovery orders. In *Lehman v. Wilson*,[145] the plaintiff obtained a jury verdict of $424,300 against the defendant in a personal injury suit arising from an accident in which the plaintiff ran into the back of the defendant's

141. The Thomases claimed that the plaintiff had not taken any steps to end the case since it filed the original complaint three years earlier. *Id.* at 274, 681 P.2d at 59.

142. 101 N.M. at 275, 681 P.2d at 60. The running of the period in which a case must be prosecuted is the same for all defendants, regardless of when the defendants were added to the complaint, only if the cause of action against an additional defendant is the same as the cause of action against the original defendants. Normally, the three-year period will start to run when the original complaint is filed. *Id.* at 274, 681 P.2d at 59. *See also* Morris v. Fitzgerald, 73 N.M. 56, 385 P.2d 574 (1963).

143. 101 N.M. at 275, 681 P.2d at 60.

144. *Id.*

145. 23 N.M. Bar Bull. 182 (Ct. App. Feb. 16, 1984). This opinion was officially withdrawn by the New Mexico Supreme Court after it granted certiorari, and the parties agreed on a settlement. This case, therefore, is not presented here for its precedential significance, but rather for its inherent interest.

tractor-trailer. The plaintiff alleged that the defendant's failure to maintain adequate rear lighting on his vehicle proximately caused the accident. During discovery, the defendant was requested to produce the tractor-trailer for inspection and testing of the taillights. When less stringent methods failed, the court orally ordered production of the tractor-trailer. When the truck was finally produced, new taillights and wiring had been installed.

The plaintiff moved for discovery sanctions under N.M. R. Civ. P. 37 and, at a motion hearing, the trial court found that the defendant had "negligently and/or intentionally" removed the taillights and wiring from the truck, causing irreparable harm to the evidence.[146] As a sanction, the trial court instructed the jury that, as a matter of law, the defendant was guilty of negligence because of his failure to have operative taillights.[147] The defendant appealed from the trial court's action on three bases: (1) that an oral order is an insufficient basis on which to impose discovery sanctions; (2) that the trial court's finding of negligent or willful destruction of evidence was not supported by substantial evidence; and (3) that the trial court abused its discretion by imposing a sanction establishing negligence as a matter of law.[148]

The court of appeals affirmed the trial court. The court first held that an oral order was a sufficient basis for the imposition of discovery sanctions, as long as the requirement of "chargeable knowledge" was met.[149] The court pointed out that federal courts had held that discovery sanctions could be imposed under Fed. R. Civ. P. 37 for violation of oral orders and found the federal rule "substantially similar to the New Mexico rule."[150]

Reviewing the defendant's second claim of error, the court emphasized that it would apply an even stricter standard of review than "substantial evidence" when reviewing lower court imposition of discovery sanctions. The appellate court would reverse the lower court only if "the appellate court has a 'definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.'"[151] Upon review of the "full record," the court

146. *Id.* at 183.

147. *Id.*

148. *Id.*

149. *Id.* at 184. "[O]ne who is chargeable with knowledge of an oral order exposes himself to contempt proceedings if the order is disobeyed." *Id.* (citing State v. Sanders, 96 N.M. 138, 628 P.2d 1134 (Ct. App. 1981)).

150. 23 N.M. Bar Bull. at 184. The court cited Penthouse Int'l., Ltd. v. Playboy Enters., 663 F.2d 371 (2d Cir. 1981), and Henry v. Sneiders, 490 F.2d 315 (9th Cir.), *cert. denied*, 419 U.S. 832 (1974).

151. *Id.* (quoting United Nuclear Corp. v. General Atomic Co., 96 N.M. 155, 203, 629 P.2d 231, 279 (1980)).

of appeals refused to find that the trial court had committed a "clear error of judgment."[152]

Addressing the defendant's third claim, that the trial court had abused its discretion by establishing negligence as a matter of law and imposing its finding as a discovery sanction, the court of appeals affirmed the applicability of the standard articulated by the United States Supreme Court in *Societe Internationale v. Rogers*[153] and cited in *United Nuclear Corp. v. General Atomic Co.*[154] a discovery sanction that entails the denial of an opportunity to be heard on the merits may only be imposed when the failure to comply with discovery orders is due to the willfulness, bad faith, or fault of the disobedient party.[155] Because the discovery sanction imposed in this case denied the defendant the opportunity to have an important issue determined on its merits, the court of appeals ruled that the *Rogers* standard was applicable. Nevertheless, the court held that the defendant's negligence and deliberate replacement of allegedly faulty equipment constituted sufficient "fault" to justify the sanction: "Since the negligent *or* intentional conduct found by the trial court constitutes sufficient 'willfulness' or 'fault,' and because the sanction imposed was tailored to defendant's failure to comply with the discovery ordered, the trial court did not abuse its discretion in fitting the penalty to the circumstance."[156]

Similarly, in *Thornfield v. First State Bank,*[157] the court of appeals affirmed the trial court's entry of a default judgment against the plaintiff for failure to comply with the trial court's order compelling discovery.[158] The court found that the plaintiff's action supported the trial court's finding of willfulness, although the plaintiff had not acted in bad faith.[159] Unable to find a default judgment to be an inappropriate sanction, the court of appeals affirmed the trial court's ruling.[160]

152. 23 N.M. Bar Bull. at 184.

153. 357 U.S. 197 (1958).

154. 96 N.M. 155, 202, 629 P.2d 231, 238 (1980).

155. 23 N.M. Bar Bull. at 185. This standard was reaffirmed in Pittard v. Four Seasons Motor Inn, Inc., ___ N.M.___, 688 P.2d 333 (Ct. App.), *cert. quashed,* 101 N.M. 555, 685 P.2d 963 (1984) (no abuse of discretion in trial court's refusal to direct a verdict or enter a default judgment against the defendant absent a willful or bad faith failure to comply with a discovery order).

156. 23 N.M. Bar Bull. at 185 (emphasis in original).

157. 23 N.M. Bar Bull. 80 (Ct. App. Jan. 26, 1984), *cert. granted,* 23 N.M. Bar Bull. 953 (Sept. 13, 1984).

158. *Id.* at 83.

159. *Id.* at 82. Despite a court order requiring the plaintiff to complete discovery obligations within five days, the plaintiff made only a partial response to interrogatories after eight days and no response whatever to the court's request for production. Furthermore, the plaintiff acknowledged that he had not fulfilled discovery requirements at the final hearing. *Id.*

160. *Id.* at 83.

VII. JURY TRIAL

A district court withdrew legal issues from a jury on the grounds that there were also equitable issues involved in *Peay v. Ortega*,[161] but the New Mexico Supreme Court disapproved of the trial court's action. The plaintiff brought an action for specific performance of a real estate agreement and for damages. The parties agreed to try the case before a jury, and the trial court ordered a jury trial pursuant to that stipulation and N.M. R. Civ. P. 39(b). After two days of testimony, however, the trial judge, having determined that the issues were equitable, discharged the jury and proceeded to try the case and enter judgment for the defendants. The plaintiffs appealed, and the supreme court reversed. The court held that once the parties consented to try an issue before a jury and the court ordered a jury trial, the trial court could not then withdraw the legal issues from the jury on the grounds that equitable issues were also involved.[162]

In another case involving issues relevant to jury trials, *Sewell v. Wilson*,[163] the New Mexico Court of Appeals examined a trial court's grant of extra peremptory challenges in a medical malpractice action. In *Sewell*, three doctors were named co-defendants. The trial court had granted one of the doctors, Dr. Gerety, five separate peremptory challenges in addition to the five joint challenges for the other two doctors, based on his "antagonism of interest" with them.[164] The plaintiff claimed error in awarding the five additional peremptory challenges, and although the court of appeals reversed on other grounds, it addressed the issue, assuming that the issue would again arise on retrial.

The court found that the interests of Dr. Gerety were antagonistic to those of the other two doctors for several reasons. First, Dr. Gerety had filed a separate answer, raising the affirmative defenses of independent intervening cause and the negligence of others.[165] The court also focused on the dissimilarity between the acts of negligence attributed to the different defendants. Unlike his co-defendants, Dr. Gerety was not accused of negligence in prescribing drugs. The court pointed out that when

161. 101 N.M. 564, 686 P.2d 254 (1984).

162. *Id.* at 565, 686 P.2d at 255. The court relied on N.M. R. Civ. P. 39(b) and Evans Fin. Corp. v. Strasser, 99 N.M. 788, 664 P.2d 986 (1983), to support its conclusion that the jury was entitled to try the material issues of fact inherent in the legal issues. 101 N.M. at 565, 686 P.2d at 255.

163. 101 N.M. 486, 684 P.2d 1151 (Ct. App. 1984).

164. *Id.* at 491-92, 684 P.2d at 1156-57. Peremptory challenges are governed by N.M. R. Civ. P. 38(e).

165. 101 N.M. at 492, 684 P.2d at 1157. The court also noted that shortly after certiorari was denied in Bartlett v. New Mexico Welding Supply, Inc., 98 N.M. 152, 646 P.2d 579 (Ct. App.), *cert. denied*, 98 N.M. 336, 648 P.2d 794 (1982), Dr. Gerety retained separate counsel. 101 N.M. at 492, 684 P.2d at 1157.

different independent acts of negligence are alleged in a suit governed by comparative negligence, multiple defendants will almost always have antagonistic interests, thereby justifying additional peremptory challenges.[166] The court thus gave back-handed credence to the defendants' argument that the combination of comparative negligence and the abolition of joint and several liability guarantees that multiple defendants will automatically seek to establish each others' liability.[167]

The court of appeals also addressed the correct procedure for dealing with inconsistencies in special verdicts in *Lehman v. Wilson*.[168] That negligence case was submitted to the jury on general verdict and special interrogatory forms. The jury returned inconsistent answers to the special verdict questions, as it found that plaintiff's negligence was not a proximate cause of the accident, yet attributed 27.5% of the fault to the plaintiff. The jury did not complete the general verdict form. During the ensuing discussion between the trial judge and counsel, the jury foreman stated that although the jury had been confused about the definition of "proximate cause," it had arrived at the damage figure of $424,300 by reducing total damages by the 27.5% it had attributed to plaintiff's negligence. The trial judge then entered judgment for the plaintiff in that amount.[169]

The court of appeals affirmed the trial court judgment.[170] The court pointed out that the special verdicts seemed inconsistent because of the jury's failure to return a general verdict. N.M. R. Civ. P. 49(b), therefore, was inapplicable to the situation presented.[171] The court then addressed Rule 49(a), which refers only to special verdicts. The court pointed out that the rule does not require that the jury return to the jury room for reconsideration or that the trial court grant a new trial in the event of special verdict inconsistencies.[172] Instead, in the absence of specific direction in the rules of civil procedure, the trial judge questioned the jury foreman to ascertain the jury's intent.[173] The court approved this method of reconciling the inconsistencies in the special verdict answers:

166. 101 N.M. at 493, 684 P.2d at 1158. The court quoted Distad v. Cubin, 633 P.2d 167, 170 (Wyo. 1981).

167. 101 N.M. at 492, 684 P.2d at 1157.

168. 23 N.M. Bar Bull. 182 (Ct. App. Feb. 16, 1984). For a more complete discussion of the facts of this case, see *supra* notes 145-56 and accompanying text.

As indicated *supra* note 145, this opinion was withdrawn by the New Mexico Supreme Court. It is discussed, therefore, for its interesting treatment of this issue, and not for its precedential value.

169. 23 N.M. Bar Bull. at 188.

170. *Id.* at 191.

171. *Id.* at 189-90. The court pointed out that N.M. R. Civ. P. 49(b) was addressed at general verdicts accompanied by special interrogatories. Because no general verdict form was completed, this section of the rule was inapplicable.

172. N.M. R. Civ. P. 49(a).

173. 23 N.M. Bar Bull. at 190.

> We believe the trial court correctly refused to exalt form over substance, . . . and, applying good judicial skills and wisdom, quite properly reconciled the seeming inconsistencies in the special verdict answers. To require the jury to return and write down what the foreman explained to the court and counsel would have been redundant; to require a new trial would be wasteful, dilatory, and heedless of judicial economy.[174]

VIII. POST-TRIAL PROCEDURE

This survey year, the New Mexico appellate courts decided several cases involving trial court findings of fact. In *Whorton v. Mr. C's*,[175] the supreme court emphasized that, in a non-jury trial, the trial court is required to find only those ultimate facts necessary to determine the issues.[176] In *Whorton*, the plaintiffs sought to enjoin the defendants from selling wine and beer at restaurants operated by the defendants. The land titles contained restrictive covenants prohibiting the sale of alcoholic beverages, but the trial court entered judgment for the defendants, ruling that the restrictive covenants were unenforceable. The plaintiffs appealed, arguing that the trial court erred when it refused to adopt several of the plaintiffs' requested findings of fact, and the supreme court reversed.[177]

The supreme court held that it was not error for the trial court to refuse the plaintiffs' requested findings of fact because those were findings of evidentiary facts, rather than ultimate facts. Furthermore, the trial court did not err in refusing findings of fact that were not supported by substantial evidence.[178] Nevertheless, the court reversed, because some of the findings of fact adopted by the trial court were not supported by substantial evidence.[179]

The court of appeals addressed the timing of filing findings of fact in *McCaffery v. Steward Construction Co.*[180] In *McCaffery*, which involved a claim for worker's compensation benefits, the parties filed briefs instead of presenting closing arguments to the court. The plaintiff submitted his brief and a letter to the judge, stating that he was awaiting the defendants' brief and the judge's decision before submitting findings and conclusions. He added that if the judge wished to follow some other procedure, he should inform the plaintiff. Within a few days of receiving the defendants' brief, the judge issued a written letter decision which included findings

174. *Id.* (citation omitted).
175. 100 N.M. 651, 687 P.2d 86 (1984).
176. *Id.* at 652-53, 687 P.2d at 87-88.
177. *Id.*
178. *Id.* at 653, 687 P.2d at 88.
179. *Id.* at 655, 687 P.2d at 90.
180. 101 N.M. 51, 678 P.2d 226 (Ct. App. 1984).

of fact in favor of the defendants, and directed counsel to prepare the necessary order and submit it to his successor.[181] The defendants prepared a proposed final judgment, which was entered two weeks later when the plaintiff failed to object.

The plaintiff appealed, claiming that his letter to the judge constituted a general request to be allowed to file requested findings of fact and conclusions of law prior to the entry of final judgment. The defendants argued that the plaintiff had waived specific findings of fact and conclusions of law because he failed to make a proper demand for them and because he failed to submit requested findings of fact and conclusions of law. The court interpreted the language of N.M. R. Civ. P. 52(B)(1)(f) and concluded that the rule was satisfied "if counsel makes a written request for permission to file findings of fact and conclusions of law to the trial judge by letter, or by a timely written request . . . provided counsel subsequently submits requested findings of fact and conclusions of law in a timely fashion."[182] The court determined that the rule did not require a formal written request for findings of fact and conclusions of law and, therefore, found that the plaintiff's letter to the judge "was sufficient to constitute a general request for leave to file requested findings of fact and conclusions of law."[183]

The plaintiff, however, was precluded under Local Rule 20 from submitting requested findings of fact and conclusions of law because more than ten days had elapsed after the trial court rendered its decision.[184] The court held that the time began to run once the trial court issued its letter decision, not when that decision was actually filed in the court file.[185] The plaintiff, therefore, waived any objections he might have had to the sufficiency of the trial court's findings and conclusions.[186]

In *Martinez v. Martinez*,[187] in contrast, the New Mexico Supreme Court held that the plaintiff's failure to submit a specific requested conclusion of law did not constitute waiver of the issue, and therefore, was not fatal to her claim on appeal. The trial court had informed the parties of its decision, including its award of attorney's fees to the defendant, by letter on September 14, 1982. Although final judgment was entered on No-

181. *Id.* at 53, 678 P.2d at 228. The trial judge was Judge Philip Baiamonte, who resigned shortly after his letter decision in this case, which was issued on June 30, 1983. His successor was Judge Rebecca Sitterly.

182. *Id.* at 54, 678 P.2d at 229. N.M. R. Civ. P. 52(B)(1)(f) provides that a "party will waive specific findings of fact and conclusions of law if he fails to make a general request therefor in writing, or if he fails to tender specific findings and conclusions."

183. 101 N.M. at 55, 678 P.2d at 230.

184. *Id.*

185. *Id.*

186. *Id.* at 56, 678 P.2d at 231. *See also* Crownover v. Nat'l Farmers Union Property and Casualty Co., 100 N.M. 568, 673 P.2d 1301 (1983).

187. 101 N.M. 88, 678 P.2d 1163 (1984).

vember 15, 1982, the plaintiff requested on September 23, 1982 that the trial court reconsider its findings of fact and conclusions of law as specified in the decision, and specifically challenged the trial court's award of attorney's fees. The supreme court found that the plaintiff had properly called the trial court's attention to the question of attorney's fees and, therefore, had properly preserved the issue on appeal.[188]

During the survey year, the New Mexico appellate courts also addressed the issue of reopening judgments. In *Koppenhaver v. Koppenhaver,*[189] the court of appeals held that a direct reversal in case law is an exceptional circumstance to be considered in reopening a final decree. In *Koppenhaver,* the court found that there were unique circumstances justifying its holding that the trial court must consider the wife's motion to set aside a final decree of legal separation.[190] The court held that the trial court must consider modifying the decree under N.M. R. Civ. P. 60(b)(6).[191] The exceptional and compelling circumstances necessary for a court to consider reopening a decree were present in this case, because the trial court had followed New Mexico law in refusing to consider the wife's motion.[192] The supreme court then decided *Walentowski v. Walentowski,*[193] which overruled the cases upon which the trial court had relied.

The supreme court's reversal of established precedent was an exceptional circumstance.[194] The court of appeals held that the trial court must use its discretion to determine whether the decree should be modified.[195] The court stressed that the decision to modify the decree, and the extent to which the decree might be modified, were strictly within the trial court's discretion. The trial court's decision of what was fair and equitable in a given case would only be overturned for an abuse of discretion.[196]

188. *Id.* at 93, 678 P.2d at 1168.

189. Koppenhaver v. Koppenhaver, 101 N.M. 105, 678 P.2d 1180 (Ct. App.), *cert. denied,* 101 N.M. 11, 677 P.2d 624 (1984).

190. *Id.* at 109, 678 P.2d at 1184. The separation decree was filed at a time when military benefits were considered separate property. When the New Mexico Supreme Court decided Walentowski v. Walentowski, 100 N.M. 484, 672 P.2d 657 (1983), reversing earlier precedent, Mrs. Koppenhaver filed a motion to reopen the property settlement under N.M. R. Civ. P. 60(b).

191. The court said that a motion pursuant to Rule 60(b)(6) was the appropriate motion. Although it was not clear to the court which subsection of Rule 60(b) was being used, the court stated that it did not matter. 101 N.M. at 108, 678 P.2d at 1183.

192. In Psomas v. Psomas, 99 N.M. 606, 661 P.2d 884 (1982), the supreme court held that the Former Spouses' Protection Act was not retroactive. The Former Spouses' Protection Act allows courts to treat military retirement benefits in accordance with their states' property laws. *Id.* at 609, 661 P.2d at 887.

193. 100 N.M. 484, 672 P.2d 657 (1983). *Walentowski* held that the Former Spouses' Protection Act *is* retroactive. *Id.* at 487, 672 P.2d at 660.

194. *See Koppenhaver,* 101 N.M. at 109, 678 P.2d at 1184.

195. *Id.*

196. *Id.* In Harkins v. Harkins, 101 N.M. 296, 681 P.2d 722 (1984), the trial court refused to modify the judgment, saying that the stipulated final divorce decree was equitable at the time it was made. The supreme court agreed that the trial court had to consider Mrs. Harkins' 60(b)(5) motion

IX. FINAL JUDGMENTS

The New Mexico courts continue to accept only those appeals stemming from final judgments, except in a few limited circumstances.[197] In *Bartow v. Kernan,*[198] the court dismissed an appeal from the denial of a motion for a protective order. The appellants sought to stay a deposition set to be taken to perpetuate the deponent's testimony until the trial court decided the issue of the deponent's competency. Because an order granting or denying a motion for a protective order under N.M. R. Civ. P. 26(C) is not a final order, as it usually does not finally dispose of the case, the court dismissed the appeal.[199] The court found that the appeal was not an authorized interlocutory appeal under N.M. Stat. Ann. § 39-3-4 (1978).[200]

A grant of summary judgment may not be a final judgment for purposes of appeal. In *City of Albuquerque v. Jackson,*[201] the trial court granted the plaintiff's motion for summary judgment. The grant of summary judgment effectively disposed of all the issues in the case, but the defendant was permitted to amend his counterclaim to assert another claim. Because the defendant could amend his counterclaim, the summary judgment was not a final judgment for purposes of appeal.[202] Since the trial court did not include the "magic" words "no just reason for delay"[203] in its grant of summary judgment, the defendant properly waited until the conclusion of the case to file his appeal.[204]

Whether a judgment is final can be important aside from the need to determine the timing of an appeal. If a judgment is not final, a court in another state will not give that judgment the full faith and credit required under article IV, section 1 of the United States Constitution. In *Reeve v. Jones,*[205] the court held that once a judgment in another state is considered

to reopen the decree, but said that the trial court did not abuse its discretion in holding that an award of alimony was equitable in lieu of dividing what at the time was thought to be the husband's separate property. *Id.* at 297, 681 P.2d at 723. The court emphasized that the change in the law making military retirement pay community property did not mean that the trial court abused its discretion by denying a motion to reopen, but rather that the trial court must consider the motion. *Id.* If the movant failed to show that it would be inequitable for the decree to have prospective application, the fact that the decree to which the parties stipulated was entered at a time when the law was different would not require the trial court to reopen. *Id.*

197. Appeals are also permitted from interlocutory orders which practically dispose of the merits of an action, from final orders after a judgment which affects substantial rights, and from the grant of partial summary judgment if the trial court states that "there is no just reason for delay." N.M. R. Civ. P. 54 (b)(1).

198. 101 N.M. 532, 685 P.2d 387 (Ct. App. 1984).

199. *Id.* at 534, 685 P.2d at 389.

200. *Id.*

201. 101 N.M. 457, 684 P.2d 543 (Ct. App.), *cert. denied,* 101 N.M. 419, 683 P.2d 1341 (1984).

202. *Id.* at 458-59, 684 P.2d at 544-45.

203. *Id.* at 459, 684 P.2d at 545; *see* N.M. R. Civ. P. 54(b)(1).

204. 101 N.M. at 459, 684 P.2d at 545.

205. 101 N.M. 320, 681 P.2d 746 (Ct. App. 1984).

to be final and can be enforced in that state, it can be enforced in New Mexico.[206] The pendancy of an appeal in another state will have no effect on the execution of the judgment in New Mexico if there would be no bar to the execution of that judgment in the state rendering the original judgment. Goals of finality and national unification underlie the full faith and credit clause; these goals can be upheld by allowing execution on an original judgment once it is final for purposes of the original judgment state's law.[207]

X. RES JUDICATA

The supreme court decided two res judicata cases in the last year. In *Xorbox v. Naturita Supply Co., Inc.*,[208] the court reminded practitioners that res judicata is an affirmative defense under N.M. R. Civ. P. 8(c) and, therefore, must be raised before entry of the judgment or it will be waived.[209]

Xorbox filed in New Mexico district court to recover on a default judgment granted in New York against the defendants. The New York court had granted relief for the principal and interest due on a promissory note. In New Mexico, the defendants again suffered a default judgment, and the district court granted recovery on the New York judgment and awarded reasonable attorney's fees and costs, as provided for in the note. The defendants appealed, arguing that the res judicata effect of the New York judgment barred the New Mexico court from granting attorney's fees in the subsequent New Mexico action.[210]

The New Mexico Supreme Court held that, because res judicata is an affirmative defense, the defendants had waived the defense when they failed to raise it prior to entry of the default judgment.[211] The defendants, relying on N.M. Civ. App. R. 11, argued that they had no opportunity to raise the defense of res judicata, and thus should be allowed to raise the defense on appeal.[212] The court held that Rule 11 was inapplicable because both of defendants' attorneys were present at the hearing on the motion to set aside the New Mexico default judgment. Furthermore, the defendants were given time to object to the New Mexico court proceeding after they had received notice of that proceeding.[213]

206. *Id.* at 321-22, 681 P.2d at 747-48.
207. *Id.* at 322, 681 P.2d at 748.
208. 101 N.M. 337, 681 P.2d 1114 (1984).
209. *Id.* at 339, 681 P.2d at 1116.
210. *Id.* at 338-39, 681 P.2d at 1115-16. The defendants argued that the full faith and credit clause, U.S. Const. art. IV, § 1, prevented the New Mexico court from adding attorney's fees and costs to the New York judgment when the New York court had not awarded attorney's fees. 101 N.M. at 338-39, 681 P.2d at 1115-16.
211. 101 N.M. at 339, 681 P.2d at 1116.
212. *Id.*
213. *Id.*

The court did not reach the question of whether the defense of res judicata would have been available had the defendants raised it before the entry of the New Mexico default judgment. The defense of res judicata was permanently waived, however, when the defendants failed to raise it after entry of the default judgment.

In *Myers v. Olson,*[214] the court held that a prior stipulated final decree which determined the property rights of the parties was res judicata as to the plaintiff's subsequent claim of an interest in the property.[215] In *Myers,* residential property was awarded to the plaintiff's former wife according to a stipulated final divorce decree. The former wife then deeded the property to her daughters. After the death of the former wife, the plaintiff brought an equitable lien action, alleging that his former wife had promised him that he could live in the house during his lifetime and that the daughters (the defendants) would be unjustly enriched if the court did not impose an equitable lien. The defendants moved for summary judgment on the grounds that the property rights had been determined in the earlier dissolution proceeding. The trial court granted the motion, and the New Mexico Supreme Court affirmed.[216]

The final decree clearly and unambiguously stated that the property in question was the former wife's separate property.[217] The court noted that res judicata is used to protect parties from relitigating lawsuits, "to promote judicial economy," and to encourage reliance upon final judgments.[218] The court then looked at the four elements necessary for the application of res judicata and determined that those elements were present.[219] The court stated that both suits must be identical, in that: "1) the parties must be the same or in privity; 2) the subject matter must be identical; 3) the capacity or character of persons for or against whom the claim is made must be the same; and 4) the same cause of action must be involved in both suits."[220]

The first element was met because the defendants were in privity with the plaintiff's former wife by virtue of the deed giving them the property. The existence of an equitable lien on the property would clearly have been an issue in the dissolution proceeding because the decree expressly divided the property of the plaintiff and his former wife in an equitable manner.[221] Thus, the second element of res judicata was met. The third

214. 100 N.M. 745, 676 P.2d 822 (1984).
215. *Id.* at 749, 676 P.2d at 826.
216. *Id.* at 745, 676 P.2d at 822.
217. *Id.* at 746, 676 P.2d at 823. The final decree did not refer to any agreement between the plaintiff and his former wife concerning his right to live in her house after the divorce. *Id.*
218. *Id.* at 747, 676 P.2d at 824.
219. *Id.* at 747-48, 676 P.2d at 824-25.
220. *Id.* at 747, 676 P.2d at 824 (citations omitted).
221. *Id.*

element necessary for application of res judicata also was met because the capacity or character of the persons involved was the same in both actions insofar as the property interest was concerned.[222]

The court discussed the fourth element in detail. Referring to *Three Rivers Land Co. v. Maddoux*,[223] the court determined that the same cause of action was involved in both suits.[224] In deciding that both suits involved the same cause of action, the legal theories available to the parties were not determinative. Rather, "the cause of action is to be viewed in the context of the transaction from which it arose."[225] The earlier form of judgment, a stipulated decree, had no effect on the applicability of res judicata to bar a second action arising from the same transaction as the earlier suit.

222. *Id.*

223. 98 N.M. 690, 652 P.2d 240 (1982).

224. 100 N.M. at 747, 676 P.2d at 824.

225. *Id.* The court referred to the Restatement (Second) of Judgments, §§ 24, 25 (1980), and applied the transactional test found in those sections. Because the second suit would involve the same proof presented in the first suit and the same facts decided in the first suit, the court found that the issue of whether the plaintiff had an equitable lien on the residential property would have formed a convenient trial unit with the earlier dissolution proceeding. 100 N.M. at 748, 676 P.2d at 825.