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Civil Procedure

Lisa Burke

Judith D. Schrandt

CIVIL PROCEDURE

LISA BURKE* AND JUDITH D. SCHRANDT**

I. INTRODUCTION

This Survey highlights selected opinions decided during the Survey year and discusses some of the significant changes in the New Mexico Rules of Civil and Appellate Procedure. A few decisions from the previous Survey year are included if pertinent to decisions of this year, as last year's Survey Issue did not include a survey of civil procedure. No major themes or trends are noted this year, thus, this article is organized according to the issues as they would arise in a single lawsuit beginning with jurisdiction.

II. SUBJECT MATTER JURISDICTION

The New Mexico Supreme Court decided one case this year involving state court jurisdiction over causes of action involving Indians. This area of jurisdiction is of particular concern in New Mexico given the state's large Indian population, the number of Indian sovereignties, and the extent of Indian land in the state. In *Foundation Reserve Insurance Co. v. Garcia*,[1] the supreme court concluded that the state district court had jurisdiction over a declaratory judgment action that an insurance company brought against Indian defendants to determine the insurer's duties under an insurance policy issued to one of the defendants. In coming to this conclusion, the court utilized the "infringement" test first set out in *Williams v. Lee*.[2] A court applying the "infringement" test asks whether a state court action infringes "on the right of reservation Indians to make their own laws and be ruled by them."[3] The answer to this question determines whether a state court has jurisdiction over a controversy involving an Indian party or acts occurring on reservation land.

In upholding the district court's jurisdiction in *Garcia*, the supreme court gave great deference to the fact that the parties entered into the insurance contract off of the reservation, even though the accident which gave rise to the controversy occurred on the reservation. In this regard, the court distinguished *Hartley v. Baca*.[4] *Hartley v. Baca* involved a personal injury action arising out of an automobile accident which occurred on an Indian reservation. In both *Hartley* and *Garcia*, the plaintiffs were non-Indians and the defendants were Indians,

*J.D., University of New Mexico, 1985; Law Clerk to Judge James A. Parker, U.S. District Court, New Mexico.

**J.D., University of New Mexico School of Law, 1984; Associate at Sheehan, Sheehan & Stelzner, P.A., Albuquerque, New Mexico.

1. 105 N.M. 514, 734 P.2d 754 (1987).
2. 358 U.S. 217 (1959).
3. *Id.* at 220.
4. 97 N.M. 441, 640 P.2d 941 (Ct. App. 1981), *cert. quashed*, 98 N.M. 51, 644 P.2d 1040 (1982).

and in both cases an automobile accident on the reservation was the event which precipitated the lawsuit. By characterizing the *Garcia* lawsuit as a contract action rather than a tort action, the supreme court found that the cause of action arose off the reservation, because the parties entered into the contract of insurance off the reservation.

Garcia is an important decision, as it represents the supreme court's reluctance to leave to the tribal courts the resolution of business disputes between non-Indians and Indians when the parties entered the underlying transaction off the reservation. Before *Garcia,* normal business transactions conducted off the reservation with Indian parties may have required non-Indian parties to resort to tribal remedies when disputes arose. Under *Garcia,* non-Indian parties can transact business without concern for whether an Indian party is involved in the transaction.[5]

The supreme court decided two cases involving the interplay between a statute of limitation and amendments to pleadings under New Mexico Rule of Civil Procedure 15. These two cases hold that an amendment curing jurisdictional defects in a complaint cannot save jurisdiction when it is filed after a jurisdictional statute of limitations has run, even though the complaint was filed before the statute had run. The first case, *Dinwiddie v. Board of County Commissioners of Lea County,*[6] involved a thirty-day statute of limitations for bringing an election contest. The supreme court held that once the thirty days had expired and the district court lacked jurisdiction over the subject matter of the action, an unverified and therefore fatally defective complaint filed within the limitations period could not be amended to remedy the verification requirement.[7] Thus, the court in effect held that the verification requirement itself was a jurisdictional prerequisite to suit which must be satisfied within the thirty-day statute of limitations.[8]

Citizens for Los Alamos, Inc. v. Incorporated County of Los Alamos,[9] presented a similar situation, this time in a zoning context. Again the supreme court concluded that where a thirty-day statute of limitations is jurisdictional, an amendment to rectify a faulty complaint filed after the thirty-day statute of limitations does not relate back to rescue the original complaint. The plaintiff in *Citizens for Los Alamos* had filed its complaint within thirty days of an adverse decision of the zoning authority, but the complaint did not conform to the statutory requirements for appealing a decision of the zoning authority.[10]

5. The *Garcia* court recognized that exclusive tribal jurisdiction would exist over an action involving a proprietary interest in Indian land. *Id.* at 516, 734 P.2d at 756. Thus, not all controversies surrounding contracts formed off the reservation are necessarily within the jurisdiction of state district courts.

6. 103 N.M. 442, 708 P.2d 1043 (1985) *cert. denied,* 476 U.S. 1117 (1986).

7. *Id.* at 445, 708 P.2d at 1046.

8. The statute in question states in pertinent part,

> Any action to contest an election shall be commenced by filing a verified complaint of contest in the district court of the county where either of the parties resides. Such complaint shall be filed no later than thirty days from issuance of the certificate of nomination or issuance of the certificate of election to the successful candidate.

N.M. STAT. ANN. §1-14-3 (Repl. Pamp. 1985).

9. 104 N.M. 571, 725 P.2d 250 (1986).

10. The statute at issue in this case was N.M. STAT. ANN. §3-21-9(A) (Repl. Pamp. 1985).

> Any person aggrieved by a decision of the zoning authority . . . may present to the district court a petition, duly verified, setting forth that the decision is illegal, in whole

These two decisions mark an important exception to the relation back doctrine. In areas where a statute of limitations might be jurisdictional, complaints should be carefully drafted to insure not only compliance with the statute of limitations but also compliance with any other special pleading requirements within the statutory period for bringing the action.

In the domestic relations area, the court of appeals held in *State ex rel. Benzing v. Benzing*,[11] that an alimony award is covered by the New Mexico Revised Uniform Reciprocal Enforcement of Support Act's (RURESA)[12] definition of "duty of support." Thus, the New Mexico district court had jurisdiction to enforce a New Jersey award of alimony.[13] The court of appeals had expressly left this question open in *Altman v. Altman*.[14] The court of appeals' decision in *Benzing* conforms with the construction that other jurisdictions give to RURESA to include enforcement of spousal support in the definition of "duty to support."[15]

Within the survey year, the court of appeals had three opportunities to apply the Uniform Child Custody Jurisdiction Act (UCCJA)[16] in order to determine whether New Mexico courts had jurisdiction over change of custody situations. The third decision, *Meier v. Davignon*,[17] is discussed first.

The *Meier* court upheld the New Mexico trial court's jurisdiction to modify its own custody award on the basis of Section 40-10-4(A)(2) of the New Mexico Statutes, which employs the "best interest of the child" standard.[18] In *Meier*, the parents of the child had been awarded joint physical custody by a New Mexico court.[19] After the mother moved to Oklahoma, the New Mexico court modified custody with alternating custody for five months.[20] Once the child reached school age, the mother had custody during the school year and the father had custody during the summer months.[21] Father petitioned the court in New Mexico to transfer custody to him.[22] The court of appeals upheld the district court's jurisdiction to grant custody to father.[23] The court found that the actions of the mother which served to undermine the father's relationship with the child, together with the father's continued residency in New Mexico and the child's

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or in part, and specifying the grounds of the illegality. The petition shall be presented to the court within thirty days after the decision is entered in the records of the clerk of the zoning authority.

The supreme court had previously held that the limitations statute was jurisdictional in *Bolin v. City of Portales*, 89 N.M. 192, 548 P.2d 1210 (1976).

11. 104 N.M. 129, 717 P.2d 105 (Ct. App. 1986).

12. N.M. STAT. ANN. §§40-6-1 through 40-6-41 (Repl. Pamp. 1986).

13. 104 N.M. at 131, 717 P.2d at 107.

14. 101 N.M. 380, 383, 683 P.2d 62, 65 (Ct. App. 1984).

15. 104 N.M. at 131, 717 P.2d at 107.

16. N.M. STAT. ANN. §§40-10-1 through 40-10-24 (Repl. Pamp. 1986).

17. 105 N.M. 567, 734 P.2d 807 (Ct. App. 1987).

18. N.M. STAT. ANN. §40-10-4(A)(2) states that New Mexico courts have jurisdiction to decide child custody matters when it is in the best interest of the child because:

(a) the child and his parents, or the child and at least one contestant, have a significant connection with New Mexico; and

(b) there is available in New Mexico substantial evidence concerning the child's present or future care, protection, training and personal relationships.

19. 105 N.M. at 568, 734 P.2d at 808.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 571, 734 P.2d at 811.

significant connections with New Mexico through the father's joint physical custody, supported a finding that it was in the best interest of the child that the district court continue to exercise jurisdiction.[24]

Significantly, the court of appeals refused to balance the number of contacts the child had with different states or the amount of evidence available in each state to determine whether the New Mexico court had continuing jurisdiction under Section 40-10-4(A)(2) to modify custody.[25] This is a proper analysis, given the purpose of continuing jurisdiction of the court that made the custody determination which is to discourage forum shopping. Looking for continuing significant contacts in the original state, rather than balancing contacts between the original state and other states which might have contact with the child, gives a presumption of continuing jurisdiction in the original state which is in keeping with the spirit of the UCCJA.

In contrast to *Meier, Trask v. Trask*[26] found that continuing jurisdiction was lacking under the "best interest of the child" test where mother and children had moved away from New Mexico and the only connections between the children and New Mexico were children's visitation with father, father's joint legal custody, and father's continued residence in New Mexico.[27] In both *Meier* and *Trask,* one parent continued to reside in the original state. The cases are distinguishable, however, because in *Trask,* the parent in the original state had visitation rights only, without physical custody.[28] Thus, the court found the child's contacts with the original state to be far less significant than in *Meier.*[29] This underlines the court's express intent in *Trask* to examine the child's contacts, not the parents', in determining jurisdiction.[30]

Trask also construed the "home state" definition of the UCCJA to mean the state in which the child resided for six consecutive months immediately preceding the commencement of the new custody proceedings, not the original divorce proceedings.[31] Thus, New Mexico was not the children's "home state" in determining continuing jurisdiction, when the children had been residing with mother for three years prior to the initiation of the proceedings to modify visitation.[32]

Finally, the court in *Trask* determined that, as in other areas, parties cannot consent to jurisdiction under the UCCJA.[33] Thus, a consent decree which provides for continuing jurisdiction in New Mexico district court to modify custody is not effective if the court does not otherwise have jurisdiction under the provisions of the UCCJA.

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24. *Id.* at 569-70, 734 P.2d at 809-10.

25. *Id.* at 570, 734 P.2d at 810.

26. 104 N.M. 780, 727 P.2d 88 (Ct. App. 1986).

27. Father conceded that evidence concerning the children's needs was not available in New Mexico. Father's claim that such information is not required in visitation modification proceedings was rejected by the court of appeals. *Id.* at 782-83, 727 P.2d at 90-91.

28. *Id.* at 781, 727 P.2d at 89.

29. *Id.* at 782, 727 P.2d at 90.

30. *Id.* at 783, 727 P.2d at 91.

31. *Id.* at 782, 727 P.2d at 90.

32. New Mexico would have had continuing jurisdiction to modify visitation under N.M. STAT. ANN. §40-10-4(A)(1) (Repl. Pamp. 1986), independently of the "best interests of the child" test, if New Mexico had been the home state of the children.

33. 104 N.M. at 783, 727 P.2d at 91.

The third case, *Elder v. Park*,[34] involved the question of when New Mexico is required to defer to another state's exercise of jurisdiction in a custody setting. The court of appeals held that New Hampshire was the home state of the child under New Hampshire law, the UCCJA and the Federal Parental Kidnapping Prevention Act (PKPA).[35] Thus, New Hampshire's prior exercise of jurisdiction over the child precluded the New Mexico courts from taking jurisdiction.[36]

The interesting aspect of *Elder* is the court of appeals' holding that the notice requirement of the PKPA is not jurisdictional.[37] This interpretation leads to the conclusion that a custody determination is pending in a jurisdiction even though process has not been served. The court of appeals specifically left open the question of exactly what events will preclude another state from exercising jurisdiction.[38] In *Elder*, however, the court of appeals found that the entry of a temporary order of custody by a New Hampshire court, without notice, was sufficient to preclude New Mexico from exercising jurisdiction.[39]

Even though notice is not jurisdictional, the court was careful to note that lack of notice made the temporary order of the New Hampshire court unenforceable in New Mexico under the PKPA.[40] Underlying the separation of jurisdiction from full faith and credit determinations is a continuing concern, seen in all three of the UCCJA cases, that the primary goal of avoiding jurisdictional competition and conflict in making custody awards mandates construction of the UCCJA and the PKPA such that only one court should be found to have jurisdiction over custody matters at any one time.[41]

This policy concern was taken one step further by the New Mexico Supreme Court in *State ex rel. Department of Human Services v. Avinger*.[42] In *Avinger*, the supreme court held that the provisions of the UCCJA apply to determine if a children's court in New Mexico has jurisdiction to modify a Texas custody decree in a child neglect and dependency proceeding brought under N.M. Stat. Ann. Sections 32-1-1 through 32-1-53 of the New Mexico Statutes.[43] The court found that as Texas had continuing jurisdiction under the UCCJA, the children's court was without authority to modify the Texas decree even though an emergency situation was alleged.[44] Also noteworthy is the supreme court's holding that the

34. 104 N.M. 163, 717 P.2d 1132 (Ct. App. 1986).

35. 28 U.S.C. §1738A (1981).

36. 104 N.M. at 167, 717 P.2d at 1136.

37. Those requirements are contained in subsection (e) as follows: "Before a child custody determination is made, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated and any person who has physical custody of a child." 28 U.S.C. §1738A(e) (1981).

38. 104 N.M. at 169, 717 P.2d at 1138.

39. *Id.*

40. *Id.* at 169-70, 717 P.2d at 1138-39.

41. If the notice requirements were found to be jurisdictional, a situation would have arisen where New Hampshire was exercising jurisdiction according to its statutory authority, but simultaneous jurisdiction in New Mexico was not precluded by the PKPA.

42. 104 N.M. 255, 720 P.2d 290 (1986).

43. N.M. STAT. ANN. §§32-1-1 to -53 (Repl. Pamp. 1981).

44. *Id.* at 260, 720 P.2d at 295. N.M. STAT. ANN. §40-10-(A)(3) (Repl. Pamp. 1986) confers jurisdiction on a children's court if "the child is physically present in New Mexico and . . . it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected;".

PKPA does not preempt the UCCJA in the area of child neglect and dependency proceedings, as the PKPA is not applicable to such proceedings.[45]

III. PERSONAL JURISDICTION

In the last two survey years, the court of appeals has examined the New Mexico long-arm statute[46] twice and both times has found that personal jurisdiction did not exist. In *Fox v. Fox*,[47] personal jurisdiction over father was found to be lacking in a proceeding to increase child support. As the parties never lived in New Mexico in the marital relationship, mother asserted jurisdiction under Subsection 1 of the long-arm statute, which provides for jurisdiction over those who transact business in the state.[48] The court found that the payment of child support in New Mexico does not constitute minimum contacts with the state such that the parent can be said to have purposefully availed himself of the benefits, protections, and privileges of the laws of the state.[49] The result in *Fox* is not surprising[50] given the United States Supreme Court decision in *Kulko v. Superior Court of California*[51] where, in a similar case, the court found no jurisdiction under due process considerations.

In another domestic relations case, *Sparks v. Caldwell*,[52] the New Mexico Supreme Court ruled that the Uniformed Services Former Spouses' Protection Act[53] preempts the New Mexico long-arm statute with regard to the disposition of retirement benefits after divorce. This decision is of importance in the domestic relations area, as subsection 1408(c)(4) of the federal Act enumerates the jurisdictional bases for applying the section and in doing so, departs from the New Mexico long-arm statute having to do with divorce.[54] Under the federal subsection, jurisdiction is present only if the member of the armed forces has (1) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (2) his domicile in the forum state, or (3) he consents to jurisdiction. Thus, it is possible to have long-arm jurisdiction over a military spouse for divorce purposes but not have jurisdiction over that person for purposes of treating his or her retirement benefits in a community property settlement.

The most important personal jurisdiction case decided this year by the court of appeals is *Visaragga v. Gates Rubber Co.*[55] In *Visaragga*, Gates Rubber manufactured a hose and sold it to Littlejohn, who in turn sold the hose to

45. 104 N.M. at 257, 720 P.2d at 292.
46. N.M. STAT. ANN. §38-1-16 (Repl. Pamp. 1987).
47. 103 N.M. 155, 703 P.2d 932 (Ct. App. 1985).
48. *Id.* at 156, 703 P.2d at 933.
49. *Id.* at 156-57, 703 P.2d at 933-34.
50. *Id.*
51. 436 U.S. 84 (1978).
52. 104 N.M. 475, 723 P.2d 244 (1986).
53. 10 U.S.C. §1408 (1982).
54. N.M. STAT. ANN. §38-1-16(A)(5) (Repl. Pamp. 1987) confers jurisdiction in an action for divorce, separate maintenance or annulment, if such cause of action arises from "the circumstance of living in the marital relationship within the state, notwithstanding subsequent departure from the state, as to all obligations arising from alimony, child support or real or personal property settlements . . . if one party to the marital relationship continues to reside in the state."
55. 104 N.M. 143, 717 P.2d 596 (Ct. App.), *cert. quashed*, 104 N.M. 137, 717 P.2d 590 (1986).

Timpte.[56] Timpte incorporated the hose onto a tank truck and sold the truck to a New Mexico corporation.[57] While the truck was making a delivery of gasoline in New Mexico, an explosion occurred injuring the plaintiff.[58] All transactions preceding the sale of the tank truck by Timpte took place in Colorado.[59]

Littlejohn, a defendant in the lawsuit in New Mexico, moved to dismiss for lack of personal jurisdiction.[60] It was established that Littlejohn's only connections with New Mexico were unsolicited sales to three customers in New Mexico.[61] As the cause of action was unrelated to these sales, the court of appeals found that these connections were insufficient to bring Littlejohn within the "transaction of any business" provision of the long-arm statute.[62]

In analyzing subsection 3 of the long-arm statute,[63] which predicates jurisdiction on the commission of a tortious act within the state, the court of appeals held that more than foreseeability that the hose might find its way to New Mexico is necessary to satisfy minimum contacts in a stream of commerce case.[64] That something more is found by looking at the quality and nature of defendant's acts to determine if defendant has purposefully availed himself of the privilege of conducting activities in the forum state.[65] In the case of a secondary distributor with a narrow market for its products in the forum state, which has never pursued a policy of purposeful business activity in the state, and whose contacts are minimal and random in nature, no minimum contacts exist.[66]

A year after *Visarraga*, the United States Supreme Court decided a similar stream of commerce case, *Asahi Metal Industry Co., Ltd. v. Superior Court of Calif., Solano County*.[67] In *Asahi*, the Supreme Court was faced with the question of whether the awareness of a foreign manufacturer that its component part would reach the forum state in the stream of commerce constituted minimum contacts under *International Shoe Co. v. Washington*[68] and its progeny.

In a crazy quilt of concurrences, four justices found that minimum contacts were lacking under the same analysis used by the New Mexico Court of Appeals in *Visarraga*. In order to find minimum contacts, both the *Asahi* and *Visarraga* courts require an action on the part of the defendant which is purposefully directed toward the forum state.[69] Such action must be something more than merely placing a product in the stream of commerce.[70] The other four justices in *Asahi*, who were willing to reach the minimum contacts analysis, agreed that "pur-

56. *Id.* at 145, 717 P.2d at 588.
57. *Id.*
58. *Id.* at 144, 717 P.2d at 587.
59. *Id.* at 145, 717 P.2d at 588.
60. *Id.* at 145-46, 717 P.2d at 588-89.
61. *Id.* at 147, 717 P.2d at 590.
62. *Id.* The "transaction of business" provision is found at N.M. STAT. ANN. §38-1-16(A)(1) (Repl. Pamp. 1987).
63. N.M. STAT. ANN. §38-1-16(A)(3) (Repl. Pamp. 1987).
64. 104 N.M. at 148, 717 P.2d at 591.
65. *Id.*
66. *Id.* at 149, 717 P.2d at 592.
67. 107 S. Ct. 1026 (1987).
68. 326 U.S. 310 (1945).
69. 107 S. Ct. at 1031; 104 N.M. at 148, 717 P.2d at 591.
70. 107 S. Ct. at 1031.

poseful availment" is the test, but disagreed with the result reached by the first four justices.[71] In the second four justices' view, the awareness of a participant in the "regular and anticipated flow of products" that its product is being marketed in the forum state is sufficient.[72] In either event, the *Visarraga* analysis is consistent with either approach taken by the United States Supreme Court. The final result in *Visarraga* is also in accordance with either result in *Asahi*, as Littlejohn's anticipated flow of products into New Mexico was minimal.[73]

IV. NOTICE

One of the changes in the New Mexico Rules of Civil Procedure this Survey year occurred in the area of service of process. Under the new Rule 1-004, which became effective for cases filed on or after January 1, 1987, service now can be made by first class mail on certain classes of persons.[74] The new rule conforms with existing federal practice.[75]

In *Macaron v. Associates Capital Services Corp.*,[76] the court of appeals declared that the New Mexico Tax Code sale provisions do not provide for constitutionally adequate notice in certain circumstances. The notice requirement of the Tax Code sale provisions allows for notice by certified mail to the legal owner and published notice to the rest of the world before real property can be

71. *Id.* at 1035.

72. *Id.*

73. An eight member majority of the United States Supreme Court in *Asahi* agreed that under traditional notions of fair play and substantial justice it would have been unreasonable to assert jurisdiction over this particular defendant under the circumstances. The factors that the court looked at in making this determination were the burden on the defendant, the interests of the forum state and the plaintiff's interests in obtaining relief.

Although the case had started out as a products liability case, the only piece of the lawsuit not settled was an indemnity claim on the part of a Taiwanese corporation against petitioner, a Japanese corporation, based on a sale made in Taiwan and a shipment of goods from Japan to Taiwan. With these facts, the Court concluded that California did not have a sufficient interest in the litigation to balance out the burden on petitioner, as an alien defendant, in litigating the issue in California.

Although this discussion of the *Asahi* decision is by no means exhaustive, it is interesting to note that the Supreme Court has made it clear in the *Asahi* decision that the due process analysis is definitely a two pronged process with separate considerations under each prong. Although the Supreme Court has been utilizing this two step approach consistently; *see, e.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985), this is the first time that, at least for some of the justices, the outcome of the two prongs is divergent. Thus, even with minimum contacts, it is possible to find no personal jurisdiction.

74. The new section E reads:

> A summons and complaint may be served upon a defendant of any class referred to in Subparagraph (1) or (2) of Paragraph F of this rule by mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served, together with two (2) copies of a notice and acknowledgement conforming with the form set out below and a return envelope, postage prepaid, addressed to the sender. If no acknowledgment of service under this subdivision of this rule is received by the sender within twenty (20) days after the date of mailing, service of such summons and complaint shall be made by a person authorized by Paragraph D of this rule, in the manner prescribed by Subparagraph (1) or (2) of Paragraph F of this rule. Unless good cause is shown for not doing so, the court shall order the payment of the costs of personal service by the person served if such person does not complete and return within twenty (20) days after mailing the notice and acknowledgement of receipt of the summons.

75. FED. R. CIV. P. 4(c)(2)(C) and (D).

76. 105 N.M. 380, 733 P.2d 11 (Ct. App. 1987).

sold for delinquent taxes.[77] In *Macaron* a mortgagee failed to receive actual notice before a tax sale of the mortgaged property.[78] The court held that the situation was indistinguishable from the recent United States Supreme Court case of *Mennonite Board of Missions v. Adams*.[79] The *Mennonite* Court, in holding that a mortgagee under Indiana law had a legally protected property interest, found that a mortgagee was entitled to more than constructive notice before a tax sale if the mortgagee is identified in a mortgage that is publicly recorded.[80] Adequate notice to such a mortgagee is constructive notice supplemented by notice mailed to the mortgagee or by personal service.[81]

A person constitutionally entitled to more than constructive notice under *Mennonite* is any party whose "name and address are reasonably ascertainable using reasonably diligent efforts."[82] In both *Mennonite* and *Macaron* the mortgagees had recorded interests which were easily accessible to the state.[83] Thus, both were entitled to notice under the due process clause of the fourteenth amendment of the United States Constitution before the tax sale.

A party with an unrecorded purchase agreement to buy real property was not so lucky in *Cano v. Lovato*.[84] In *Cano*, which was decided before *Macaron*, the court of appeals refused to require the state to go beyond the county clerk's record to ascertain parties who might have an interest in property, unless the state has actual knowledge of such parties.[85] Thus, in New Mexico, the *Mennonite* requirement to use reasonable diligence to ascertain parties with an interest in property before a tax sale is limited to checking for parties with recorded interests.

V. PLEADINGS

The New Mexico Supreme Court adopted two new pleading rules which will affect cases filed after January 1, 1987. New Mexico Rule of Civil Procedure 1-010(B) was amended to add a restriction that, except in cases based on contract or based on written instruments or agreements, complaints will not be accepted by the district court clerk if they allege damages in any specific monetary amount. If district court clerks follow this new rule, the new pleading restriction will be enforced at the moment of filing. This could be hazardous if a party attempts to file a complaint which does not comply with the new rule on the last possible day under a statute of limitations and the clerk's office fails to accept it.

New Mexico Civil Procedure Rule 1-011 was also amended and will be effective after January 1, 1987. The amendment to Rule 11 extends the good faith signature requirement for attorneys signing pleadings to attorney signatures

77. N.M. STAT. ANN. §§7-38-66(A) and 7-38-67(A) (Repl. Pamp. 1986).
78. 105 N.M. at 381, 733 P.2d at 12.
79. 462 U.S. 791 (1983).
80. *Id.* at 798.
81. *Id.*
82. *Id.* at 800.
83. *Id.* at 798; 105 N.M. 382, 733 P.2d at 13.
84. 105 N.M. 522, 734 P.2d 762 (Ct. App. 1986), *cert. denied*, 104 N.M. 246, 719 P.2d 1267 (1986) *cert. quashed* 105 N.M. 438, 733 P.2d 1321 (1987).
85. *Id.* at 533, 734 P.2d at 773.

on all other papers submitted or filed on behalf of a client.[86] The new rule also extends the granting of sanctions to parties for willful violations.

Res judicata as an affirmative defense may now be raised on a motion to dismiss for failure to state a claim under New Mexico Civil Procedure Rule 1-012(b)(6) if the facts supporting the defense appear plainly upon the face of the complaint. This holding by the New Mexico Supreme Court in *Universal Life Church v. Coxon*[87] follows federal motion practice and overrules *Three Rivers Land Company v. Maddoux*[88] in this regard.

Plaintiffs, in filing complaints, should be careful to anticipate possible affirmative defenses which might appear from the face of the complaint. To insure that a complaint will not be dismissed prematurely, plaintiffs need to not only anticipate affirmative defenses but include any factual allegations which might serve to guard against them. This is the teaching of *Romero v. U.S. Life Insurance Co.*[89] In *Romero*, the court of appeals held that as it was clear from the face of the complaint that the action was time-barred under the applicable statute of limitations, the trial court should have dismissed the complaint.[90] Factual allegations in the complaint of tolling or estoppel were necessary to save the complaint from dismissal.[91]

In *Tipton v. Texaco*, the supreme court continued the development of New Mexico law on the subject of the abolition of joint and several liability under *Bartlett v. New Mexico Welding Supply, Inc.*,[92] by extending the scope of New Mexico Civil Procedure Rule 1-014(A) to allow defendants the use of the third-party complaint as a means of joining other alleged tortfeasors.[93] Rule 1-014(A) provides that a defendant may bring in a non-party "who is or may be liable to him for all or part of the plaintiff's claim against him." The supreme court recognized that the rule contemplates joinder under Rule 1-014(A) only if secondary liability to the defendant is alleged,[94] which is not the case between many joint tortfeasors after the abolition of joint and several liability. In *Tipton*, however, the court found that a more liberal construction of Rule 1-014(A) was necessary in the joint tortfeasor context to assure that the practice engaged in before *Bartlett* of bringing in joint tortfeasors as third parties could continue under Rule 1-014.[95] By interpreting Rule 1-014 more broadly than its language

86. Under N.M. R. Civ. P. 1-011, "an attorney certifies by his signature that he has read the pleading or other paper, that to the best of his knowledge, information and belief there is a good ground to support it; and that it is not interposed for delay."

87. 105 N.M. 57, 728 P.2d 467 (Ct. App. 1986), *cert. denied*, 107 S. Ct. 2482 (1987).

88. 98 N.M. 690, 652 P.2d 240 (1982), *overruled*, 105 N.M. 57, 728 P.2d 467 (1986).

89. 104 N.M. 241, 719 P.2d 819 (Ct. App. 1986).

90. *Id.* at 242-43, 719 P.2d at 820-21.

91. *Id.* at 243, 719 P.2d at 821. *Romero* also held that the lower court was mistaken in taking judicial notice of a previous case on file with the same court in ruling on the motion to dismiss. In making this determination, the court of appeals was merely reiterating the long established rule that if any matters outside the pleadings are taken into consideration by the court on a motion to dismiss for failure to state a claim, the motion needs to be treated as a summary judgment motion.

92. 98 N.M. 152, 646 P.2d 579 (Ct. App. 1982), *cert. denied*, 98 N.M. 336, 648 P.2d 794 (1982).

93. Tipton v. Texaco, 103 N.M. 689, 712 P.2d 1351 (1985).

94. *Id.* at 691-92, 712 P.2d at 1353-54.

95. *Id.* at 693, 712 P.2d at 1355.

would suggest, the court in essence has amended Rule 1-014 to procedurally accommodate the abolition of joint and several liability.[96]

This approach presents a problem for tort cases involving joint tortfeasors tried in diversity by federal courts. Federal courts are not going to be as willing to give the same liberal gloss to Federal Civil Procedure Rule 14(a) as the New Mexico courts give to the identical New Mexico Rule 1-014(A). In *Hefley v. Textron, Inc.*,[97] the Tenth Circuit specifically held that federal courts are not bound to follow state third party practice procedure even though federal courts are bound by a state's substantive rules on the abolition of joint and several liability.[98] Furthermore, *Hefley*, in construing Federal Rule 14(a), disallowed the joinder of potential concurrent tortfeasors as third parties under a state law that had abolished joint and several liability.[99] Thus, although defendant's problem of joining concurrent tortfeasors is solved by the use of Rule 14(A) in state court, no method has been judicially endorsed for federal courts sitting in diversity in New Mexico.

The court of appeals had its first opportunity to apply the rule of *Tipton* in *Wilson v. Gillis*.[100] In doing so, the court of appeals limited *Tipton* by refusing to allow defendant to join a concurrent tortfeasor who had already settled with plaintiff.[101] Under the court of appeals' interpretation, *Tipton* only applies to third parties who are potentially liable to plaintiff.[102] As a settling tortfeasor would not be subject to further liability if joined, Rule 1-014(A) cannot be used to join that party.[103] The court noted that to allow defendants to bring in settling tortfeasors as parties would discourage settlement, when settlement is to be encouraged in such situations. On another collateral pleading matter, the court of appeals further held that a defendant need not join third parties to raise the *Bartlett* defense as an affirmative defense in an answer.[104]

In *Passino v. Cascade Steel Fabricators, Inc.*,[105] the supreme court let stand a court of appeals' determination that a defaulting tortfeasor is not entitled to introduce evidence of comparative fault of other defendants at a hearing to

96. The supreme court in a later case agreed that Rule 1- 014(A) was "adjusted" by *Tipton* to "prevent sweeping changes in third-party practice by keeping within the rule a category of cases we have long considered appropriate for consolidated adjudication." Grain Dealers Mut. Ins. Co. v. Reed, 105 N.M. 586, 587, 734 P.2d 1269, 1270 (1987). For a full discussion of the procedural ramification of *Tipton*, see Occhialino, *Procedural Ramifications of the Bartlett* Decision: *Tipton* Tiptoes Toward a Solution, IX The New Mexico Trial Lawyer 37 (April 1986).

97. 713 F.2d 1487 (10th Cir. 1983).

98. *Id.* at 1496-97.

99. *Id.* at 1498. *Hefley* involved Kansas law.

100. 105 N.M. 259, 731 P.2d 955 (Ct. App. 1986), *cert. denied*, 105 N.M. 230, 731 P.2d 373 (1987).

101. *Id.* at 262-63, 731 P.2d at 958-59.

102. *Id.* at 262, 731 P.2d at 958.

103. *Id.* at 263, 731 P.2d at 959.

104. *Id.* at 262. It should be noted that the legislature passed a Bill during the Survey year, which will take effect for cases initially filed on and after July 1, 1987, specifically purporting to answer legislatively many of the substantive questions and problems which have arisen with the abolition of joint and several liability. Although the Bill will have definite procedural ramifications in tort litigation, it is beyond the scope of this Survey to discuss the substantive provisions of the Bill and their possible procedural ramifications.

105. 105 N.M. 457, 734 P.2d 235 (Ct. App. 1986).

determine damages in a case where the other defendants have settled with plaintiff.[106] The court reasoned that by defaulting, a defendant has conceded his liability and has waived an apportionment of damages.[107] To find otherwise would allow a defaulting party to litigate his culpability, which should be foreclosed to him under the default rules.[108] The court of appeals found this to be a harsh but inevitable result.[109]

The court of appeals' concern for the result to the defaulting tortfeasor and the history of this case are examples of the courts' struggle to find an equitable framework for comparative negligence and the abolition of joint and several liability. Judge Bivins, in his concurrence in *Passino*, suggests that once damages are determined, the amount paid in settlement by the other parties should be deducted from plaintiff's award from the defaulting party.[110] This solution, however, which insures that plaintiff not receive a double recovery, does not give plaintiff the benefit of the bargain in a good settlement. Rather, that benefit is passed on to a defaulting tortfeasor. On the positive side for plaintiff, if plaintiff makes a bad settlement decision, the defaulting defendant will be liable such that plaintiff is made whole, even if the amount paid by the defaulting party represents more than that tortfeasor's comparative fault.

In contrast, *Wilson v. Galt*[111] provides that a plaintiff's award against a defendant is not to be reduced by any amount that plaintiff has already received in settlement with other defendants. Thus, in the non-defaulting situation, plaintiff is entitled to the benefit of his bargain.[112]

As becomes obvious in any discussion of the developing law of the abolition of joint and several liability under *Bartlett*, many procedural and substantive questions remain for the legislature and the courts to tackle. At times it appears that with each new development, new questions arise as fast as solutions are found to the problems at hand.

VI. DISCOVERY

Once again, the recent appellate cases concerning discovery dealt primarily with the propriety of imposing sanctions for failure to comply with discovery orders. New Mexico has long adhered to the rule that before the court may impose a discovery sanction which would entail a denial of an opportunity to be heard on the merits, noncompliance must be shown to be willful, in bad faith or due to the fault of the disobedient party.[113]

106. *Id.* at 458-59, 734 P.2d at 236-37.

107. *Id.*

108. *Id.* at 459, 734 P.2d at 237.

109. *Id.*

110. *Id.*

111. 100 N.M. 227, 668 P.2d 1104 (Ct. App. 1983).

112. Section 1(E) of Senate Bill 164 may foreclose Judge Bivins' suggested approach although that is not clear. Section 1(E) provides:

> "No defendant who is severally liable shall be entitled to contribution from any other person, nor shall such defendant be entitled to reduce the dollar damages determined by the factfinder to be owed by the defendant to the plaintiff in accordance with Subsection B of this section by any amount that the plaintiff has recovered from any other person whose fault may have also proximately caused injury to the plaintiff.

N.M. Sen. Bill 164 (1987).

113. United Nuclear Corp. v. General Atomic Co., 96 N.M. 155, 202, 629 P.2d 231, 278 (1980). A willful violation is defined in *United Nuclear* as: "Any conscious or intentional failure to comply . . . , as

In *Sandoval v. United Nuclear Corp.*,[114] the fact that plaintiff was an excludable alien constituted an excuse for non-compliance with a court order that he appear in New Mexico for a deposition. As plaintiff's failure to appear was not willful, due to his status, the trial court erred in terminating plaintiff's worker's compensation benefits as a sanction under New Mexico Civil Procedure Rule 1-037.[115] The court also found that evidence of plaintiff's physical condition which might have made it impossible for him to travel to New Mexico was relevant to plaintiff's willful non-compliance.[116] The fact that plaintiff was a fugitive and was subject to arrest if he returned to the United States, however, did not render the deposition order burdensome.[117]

A similar situation of non-compliance was presented in *Bishop v. Lloyd McKee Motors, Inc.*[118] In that case, the court of appeals intimated that if a plaintiff was prevented from complying with a discovery order due to his military service, dismissal as a sanction would be inappropriate.[119]

The New Mexico Supreme Court adopted certain amendments to the New Mexico discovery rules, effective for cases pending after October 15, 1986.[120] The most significant change occurred with the amendment to Rule 1-026(B)(3) which makes insurance contracts discoverable in the event that the insurance company may be liable to satisfy any part or all of a judgment or liable to indemnify or reimburse payments made to satisfy a judgment. Once again, this amendment mirrors the existing Federal Civil Procedure Rules.[121]

The amendments to Rules 1-030 and 1-032 concern the methods for taking depositions and the use of depositions at trial. Of significance is the permissible use of a deposition of a witness who is within 100 miles from the trial or hearing, if an order is entered prior to the deposition permitting such use and the notice of the deposition states the intended use at trial.[122]

VII. AMENDMENT OF PLEADINGS

In the three cases concerning amendment of pleadings decided during the Survey year, the New Mexico Court of Appeals remained faithful to the well-established policy of liberally permitting amendment of pleadings, while balancing that policy against unfair surprise or prejudice to the opposing party. In *Beyale v. Arizona Public Service Co.*,[123] the court of appeals held that amendment

distinguished from accidental or involuntary non-compliance, and . . . no wrongful intent need be shown to make such a failure willful."

114. 105 N.M. 105, 729 P.2d 503 (Ct. App. 1986).

115. *Id.* at 109, 729 P.2d at 507. The action in *Sandoval* was filed by defendant to terminate benefits on the basis that plaintiff's disability had terminated.

116. *Id.*

117. *Id.*

118. 105 N.M. 399, 733 P.2d 368 (Ct. App. 1987).

119. *Id.* at 401, 733 P.2d at 370. The dismissal of the case in *Bishop* was reversed and remanded because the trial court did not specifically make a finding of willful noncompliance. Such a finding is necessary in order to impose a sanction of dismissal.

120. New Mexico Civil Procedure Rules 1-026, 1-030, 1-032, and 1-037 were amended.

121. Amended Rule 1-026 also incorporates the federal limitations placed on discovery due to expense, inconvenience, duplication, etc., and follows the Federal Rules in making provisions for discovery conferences.

122. N.M. R. Civ. P. 1-032(A)(3)(c). The new rules also require notice of intended use at trial to appear in the notice of deposition if the deposition is to be used at trial pursuant to Rule 1-032(A)(3)(f). Subsection (f) allows the use of a deposition at trial upon "exceptional circumstances."

123. 105 N.M. 112, 729 P.2d 1366 (Ct. App.), *cert. quashed*, 105 N.M. 111, 729 P.2d 1365 (1986).

should not be allowed if the effect of such amendment would be undue surprise or prejudice to the opposing party.[124] In this worker's compensation case, defendant announced during its opening statement that it would rely on failure to give notice as an affirmative defense.[125] That affirmative defense had not been pleaded in defendant's answer to plaintiff's complaint.[126] At the end of the first day of trial, defendant formally moved to amend the pleadings to raise the issue of notice on the ground that evidence had been introduced on that issue.[127] The trial court upheld plaintiff's objection, and orally ruled that defendant had waived the affirmative defense of failure to give notice.[128] After judgment was entered in favor of plaintiff, defendant moved for a new trial on the basis that it should have been permitted to litigate the issue of notice;[129] the trial court denied the motion.

The court of appeals affirmed the trial court's refusal to permit amendment of defendant's answer on the first day of trial.[130] The court noted that the purpose of pleadings, to give the opposing party notice of the claims being made, "would hardly be accomplished by a ruling that the issue of notice need not be 'placed in issue' until opening statements."[131] Defendant had not disputed that plaintiff would have been prejudiced if the issue had been litigated at trial, but argued that any prejudice would have been cured by a continuance.[132] The court of appeals rejected defendant's argument because the case had been pending for three years at the time of trial, and the grant or denial of a continuance was within the trial court's discretion.[133] The court's ruling was based, however, on the fact that plaintiff had not impliedly consented to trial on the notice issue.[134]

In *Berry v. Meadows*,[135] on the other hand, plaintiff failed to object at trial to the introduction of evidence relating to affirmative defenses not pled in defendant's answer. The court of appeals upheld the trial court's award to defendant based on those affirmative defenses.[136] Similarly, in *Bagwell v. Shady Grove Truck Stop*,[137] the court of appeals affirmed the trial court's amendment of plaintiff's complaint when trial of the complaint as amended had occurred.[138] The trial court's failure to enter an order explicitly granting plaintiff's motion to amend the complaint did not alter that result.[139]

VIII. SUMMARY JUDGMENT

During this Survey year, the United States Supreme Court decided two important cases dealing with the appropriate standard for summary judgment under

124. *Id.*, at 115, 729 P.2d at 1369.
125. *Id.* at 113, 729 P.2d at 1367.
126. *Id.* at 113-14, 729 P.2d at 1367-68.
127. *Id.* at 114, 729 P.2d at 1368.
128. *Id.*
129. *Id.*
130. *Id.* at 116, 729 P.2d at 1370.
131. *Id.* at 115, 729 P.2d at 1369.
132. *Id.*
133. *Id.* at 116, 729 P.2d at 1370.
134. *Id.*
135. 103 N.M. 761, 713 P.2d 1017 (Ct. App. 1986).
136. *Id.* at 768, 713 P.2d at 1024.
137. 104 N.M. 14, 715 P.2d 462 (Ct. App. 1986).
138. *Id.* at 16, 715 P.2d at 464.
139. *Id.*

the Federal Rules of Civil Procedure.[140] The standard for summary judgment articulated in these cases differs significantly from the standard traditionally applied under the New Mexico Rules of Civil Procedure. Although the New Mexico courts' analyses of the New Mexico rules traditionally followed the federal courts' analyses of the federal rules, the new United States Supreme Court cases squarely present the New Mexico courts with the question of whether to continue this practice. If the cases coming from the New Mexico courts since the decisions from the United States Supreme Court are any indication, New Mexico will continue to adhere to a stricter standard for summary judgment under the New Mexico rules.

In *Celotex Corp. v. Catrett*, the United States Supreme Court held that the movant for summary judgment need only "inform the district court of the basis for its motion," and identify the portions of the record demonstrating "the absence of a genuine issue of material fact."[141] The burden then shifts to the nonmovant to demonstrate the existence of a genuine issue of material fact.[142] The Court reasoned that if, after adequate time for discovery, the party who would have the burden of proof at trial failed to make a showing sufficient to establish the existence of an essential element of his case, Federal Rule of Civil Procedure 56(c) required the entry of summary judgment against the nonmovant.[143]

In *Anderson v. Liberty Lobby, Inc.*, the United States Supreme Court elaborated on the standard's requirement of a "genuine" issue of material fact. The Court held that when plaintiff was required to prove his case by clear and convincing evidence at trial, the same standard applied in determining whether plaintiff had demonstrated the existence of a genuine issue of material fact sufficient to defeat defendant's motion for summary judgment.[144] A lesser burden of proof would have undermined the traditional analysis of summary judgment under the standard to be applied to motions for directed verdict.[145] In both *Celotex* and *Liberty Lobby*, then, the United States Supreme Court indicated its support for the granting of summary judgment motions under Federal Rule 56.

During the Survey year, the New Mexico appellate courts decided three cases dealing with the standard for summary judgment after *Celotex* and *Liberty Lobby* were decided.[146] In none of the New Mexico cases were the *Celotex* or *Liberty*

140. Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

141. *Celotex*, 477 U.S. at 323. *Celotex* involved a wrongful death action brought on behalf of a worker exposed to defendant's asbestos products. The court of appeals had held that defendant's failure to support its summary judgment motion with evidence negating exposure precluded a grant of summary judgment in its favor. The plaintiff, however, had failed to answer interrogatories identifying witnesses who could testify about the decedent's exposure to defendant's asbestos products.

142. *Id.*

143. *Id.* at 322.

144. *Liberty Lobby*, 477 U.S. at 255. This case involved a libel suit brought by a "citizens' lobby" and its founder against columnist Jack Anderson, his publisher and the publishing company's president as a result of allegedly defamatory articles depicting plaintiffs as neo-Nazi, anti-Semitic, racist and fascist. The United States Supreme Court had previously established that in a libel suit brought by a public figure, the plaintiff was required to show by clear and convincing evidence that defendant has acted with actual malice. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). That standard was, therefore, applicable in *Liberty Lobby* as well.

145. 477 U.S. at 250-51.

146. Koenig v. Perez, 104 N.M. 664, 726 P.2d 341 (1986); Martinez v. Logsdon, 104 N.M. 479, 723 P.2d 248 (1986); Burgi v. Acid Engineering, Inc., 104 N.M. 557, 724 P.2d 765 (Ct. App.), *cert. denied*, 104 N.M. 460, 722 P.2d 1182 (1986).

Lobby standards applied or discussed. In *Koenig v. Perez,* the New Mexico Supreme Court stated that the movant for summary judgment must make a "prima facie showing" of entitlement to summary judgment.[147] After that showing is made, the burden shifts to the nonmovant "to show at least a reasonable doubt as to whether a genuine issue for trial exists."[148] The court did not elaborate on the "reasonable doubt" standard and its practical application in rules of civil, as opposed to criminal, procedure.

In *Martinez v. Logsdon,* the New Mexico Supreme Court stated that after the movant has made a prima facie showing of entitlement to summary judgment, the nonmovant "must submit more than a bare assertion that an issue of fact exists" to defeat the motion.[149] Again, the court did not discuss the precise burden on the nonmovant.

Finally, in *Burgi v. Acid Engineering, Inc.,* the New Mexico Court of Appeals relied on established New Mexico summary judgment jurisprudence[150] and stated that a genuine issue of material fact exists when equally logical but conflicting inferences can be drawn from basic, material facts that are not in dispute.[151] These three cases show no deviation from the strict standard for summary judgment traditionally applied under the New Mexico Rules of Civil Procedure, and no accommodation of the newly-articulated standards under the Federal Rules of Civil Procedure.

IX. JURY TRIAL

A. Right to Jury Trial

In two cases decided during the Survey year, the New Mexico Supreme Court and Court of Appeals articulated more clearly the approach to be used in determining when the right to jury trial attaches in civil cases, and how to try cases presenting legal and equitable issues. In *State ex rel. McAdams v. District Court of the Eighth Judicial District,* the New Mexico Supreme Court determined that the question of guarantor liability was a legal issue independent of a foreclosure suit, and that defendants were, therefore, entitled to a jury trial on that issue.[152] The court also reaffirmed the rule that when legal and equitable issues are joined in a lawsuit, the trial court first should decide the equitable issues, and allow any remaining independent legal issues to be tried to the jury.[153]

In *Scott v. Woods,*[154] the New Mexico Court of Appeals adopted the rule set out by the United States Supreme Court in *Ross v. Bernhard*[155] for determining

147. 104 N.M. at 666, 726 P.2d at 343.

148. *Id.*

149. 104 N.M. at 482, 723 P.2d at 251.

150. The court cited the standard set out in Akre v. Washburn, 92 N.M. 487, 590 P.2d 635 (1979). 104 N.M. at 559, 724 P.2d at 767.

151. 104 N.M. at 559, 724 P.2d at 767.

152. 105 N.M. 95, 728 P.2d 1364 (1986). The court followed Evans Financial Corp. v. Strasser, 99 N.M. 788, 664 P.2d 986 (1983) and reconciled the earlier case of Young v. Vail, 29 N.M. 324, 222 P. 912 (1924). *Young v. Vail* was still good law insofar as it held that there is no right to jury trial of legal issues necessarily decided in the foreclosure suit. 105 N.M. at 96, 728 P.2d at 1365.

153. 105 N.M. at 97, 728 P.2d at 1366.

154. 105 N.M. 177, 730 P.2d 480 (Ct. App.), *cert. quashed,* 105 N.M. 26, 727 P.2d 1341 (1986).

155. 396 U.S. 531 (1970).

when a party is entitled to a jury in a shareholder's derivative suit. In *Ross v. Bernhard,* the Court devised a test for identifying issues for jury determination by considering the nature of the underlying claim, its historical origins, and the practical limitations of the jury.[156] Applying that test, the New Mexico Court of Appeals determined that when a "shareholder's derivative suit raised legal claims or issues to which the corporation would be entitled to a jury trial, those claims or issues should be tried to a jury when demanded."[157] The trial court would be required to make findings of fact and enter conclusions of law as to the issues not requiring a jury, even when an advisory jury was used.[158] The court emphasized, however, that the right to jury trial was not to be determined by the terminology used in the complaint; rather, the burden was on the party asserting the right to a jury trial to establish that right.[159] The court also stated that the nature of relief sought was not determinative; the court must examine the nature of the claims to determine whether they were equitable or legal in substance.[160] After reviewing the nature of plaintiffs' claims, the court of appeals determined that plaintiffs had failed to demonstrate any issue or claim that was triable to the jury, reversed the jury verdict in favor of plaintiffs and remanded to the district court for entry of findings of fact and conclusions of law.[161]

B. Trial Procedure

In two cases decided during the Survey year, the New Mexico Court of Appeals gave broad latitude to the procedural decisions of the trial judge in conducting trials,[162] and, in two other cases, restricted the ability of successor judges to complete trials begun by their predecessors.[163] In *Gallegos v. Yeargin Western Constructors,* the court of appeals upheld the trial court's refusal to allow modification of the pretrial order to enable the defendants to call witnesses not identified in that order.[164] Defendants had identified additional witnesses three weeks before trial and one week after the deadline specified in the pretrial order for identifying witnesses.[165] The substance of these witnesses' testimony was identified less than two weeks before trial, after the deadline for completing discovery had passed.[166] The court of appeals found no abuse of discretion in the trial court's refusal to allow modification of the pretrial order to allow defendants to call the additional witnesses.[167]

156. The three-prong test, as explained in *Scott v. Woods,* considered (1) premerger custom, (2) the remedy sought, and (3) the abilities and limitations of juries. 105 N.M. at 182, 730 P.2d at 485.

157. *Id.* at 183, 730 P.2d at 486.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* at 188, 730 P.2d at 491.

162. Gallegos v. Yeargin Western Constructors, 104 N.M. 623, 725 P.2d 599 (Ct. App. 1986); Sanchez v. National Elec. Supply, 105 N.M. 97, 728 P.2d 1366 (Ct. App. 1986).

163. Pritchard v. Halliburton Serv., 104 N.M. 102, 717 P.2d 78 (Ct. App.), *cert. denied,* 103 N.M. 798, 715 P.2d 71 (1986); Grudzina v. New Mexico Youth Diagnostic & Dev. Center, 104 N.M. 576, 725 P.2d 255 (Ct. App.), *cert. quashed,* 104 N.M. 460, 722 P.2d 1182 (1986).

164. 104 N.M. at 625, 725 P.2d at 601..

165. *Id.*

166. *Id.*

167. *Id.* The court emphasized the fact that defendants had not disclosed the substance of the witnesses' testimony or made the witnesses available for depositions without notice when they became aware of the need for the additional witnesses. *Id.* Had defendants done so, the result might have been different.

In the same case, the court of appeals also upheld the trial court's refusal to grant a continuance when a defense witness failed to appear at trial.[168] The witness had not been subpoenaed.[169] The appellate court pointed out that a party has an obligation to subpoena a witness if he wants to assure his presence.[170] Since defendants had neither subpoenaed their witness, nor proffered his testimony by deposition, the court of appeals upheld the trial court's refusal to grant a continuance.[171]

On a different trial procedure issue, the court of appeals in *Pritchard v. Halliburton Services* held that a successor judge may not sign and file findings of fact and conclusions of law prepared by the predecessor judge who heard the case but left the bench before signing and entering a decision.[172] The predecessor judge had prepared the findings and conclusions but had not signed them when she left office; her successor signed them and entered judgment. The court considered New Mexico Rules of Civil Procedure 1-052(B)(1)[173] and 1-063,[174] and reasoned that in this case Rule 1-063 could not provide an exception to Rule 1-052's mandate that the trial court provide a written decision consisting of findings of fact and conclusions of law stated separately.[175] Such written findings may ordinarily only be entered by the judge who "conducted the trial and heard the evidence."[176] Rule 1-063 would have applied to allow another judge to conduct proceedings only after findings of fact and conclusions of law were filed. The appellate court refused to allow a successor judge to render a decision without having heard the evidence or observed the witnesses,[177] and determined that the proper remedy was a new trial.[178]

In *Grudzina v. New Mexico Youth Diagnostic & Development Center,* a case decided shortly after *Pritchard,* the court of appeals held that although a successor judge did not have authority to enter findings of fact and conclusions of law

168. *Id.* at 626, 725 P.2d at 602.

169. *Id.*

170. *Id.*

171. *Id. See also,* Sanchez v. National Elec. Supply, 105 N.M. at 99, 728 P.2d at 1368 (plaintiff must show actual prejudice to overturn trial court's denial of a request for continuance).

172. 104 N.M. at 103, 717 P.2d at 79.

173. N.M. R. Civ. P. 1-052(B)(1)(a) provides in part:

> Upon the trial of any case by the court without a jury, its decision, which shall consist of its findings of fact and conclusions of law, must be given in writing and filed with the clerk in the cause. In such decision the court shall find the facts and give its conclusions of law pertinent to the case, which must be stated separately.

174. N.M. R. Civ. P. 1-063 provides:

> If by reason of death, sickness or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or findings of fact and conclusions of law are filed, then any other judge regularly sitting in or assigned to the court in which the action was tried may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.

175. 104 N.M. at 104, 717 P.2d at 80.

176. *Id.*

177. *Id.* at 105, 717 P.2d at 81. The court also found that the fact that the predecessor judge had prepared the decision did not affect the result; an unsigned decision, like oral statements, did not constitute a decision by the trial court. *Id.* Rather, the term "decision," as used in Rule 1-052(B)(1), meant findings of fact and conclusions of law. *Id.*

178. *Id.* at 106, 717 P.2d at 82.

prepared by a predecessor judge, such error was not jurisdictional or fundamental and therefore did not necessitate a new trial.[179] In that case, neither party objected when the successor judge signed the findings of fact and conclusions of law, and the issue was not raised on appeal.[180] The court clarified its earlier holding in *Pritchard*, explaining that although the successor judge's signing findings of fact and conclusions of law prepared by his predecessor was error, such action was unauthorized, rather than void for lack of jurisdiction.[181] The court stated that the parties could agree to have the successor judge enter the findings of fact and conclusions of law, or otherwise complete the case, but specifically did not decide whether the simple failure to object, without a stipulation, was sufficient to waive the right to have the judge who heard the evidence decide the case.[182] This issue remains an open question.

X. POST TRIAL PROCEDURE

A. Post Trial Motions

The New Mexico Supreme Court adopted a new rule concerning post trial motions, which will significantly affect cases filed after January 1, 1987. New Mexico Rules of Civil Procedure 12-201(E)(5) provides that a motion for new trial, or a post trial motion attacking the judgment, verdict or findings of fact, is automatically deemed denied if not granted within thirty days from the date filed. Furthermore, the new rule provides that the time for filing an appeal is not extended by filing a motion for new trial.

The court of appeals affirmed the grant of a new trial because of the improper conduct of the court bailiff towards the jury in *Prudencio v. Gonzales*.[183] The bailiff was the brother-in-law of one of the defendants in this wrongful death action.[184] During the trial, the bailiff had introduced the jury to his wife, who was the sister of one of the defendants, and the sister-in-law of another defendant.[185] The bailiff had also introduced the jury to his young daughter and son, the niece and nephew of two defendants, and had allowed his son to eat with the jury.[186] At the hearing on plaintiffs' motion for new trial, the court heard testimony that the bailiff had urged the jury not to select one of the panel members as foreman, and that the bailiff had hinted that he was somehow involved in the trial.[187] Although the plaintiffs stipulated that the jurors, if called as witnesses, would testify that they had not been influenced by the bailiff's conduct, the trial court found that the "subjective and subtle nature of these incidents created the presumption that the jury had been improperly influenced," and ordered a new trial.[188]

179. 104 N.M. at 581, 725 P.2d at 260.
180. *Id.* at 580, 725 P.2d at 259.
181. *Id.* at 581, 725 P.2d at 260.
182. *Id.*
183. 104 N.M. 788, 727 P.2d 553 (Ct. App.), *cert. denied*, 104 N.M. 761, 726 P.2d 1391 (1986).
184. 104 N.M. at 789, 727 P.2d at 554.
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*

The court of appeals affirmed the grant of a new trial.[189] The court ruled that the trial court's order of a new trial was not an abuse of discretion, because "a bailiff, by his position, represents the authority of the court, and where there is evidence of impartiality of the jury's deliberations, the trial court, in the exercise of its discretion, may properly order a new trial."[190] The court of appeals agreed that the record supported a finding of improper influence by the bailiff, from which a presumption of prejudice might arise, because "jurors will seldom admit their inability to act impartially," and that defendants failed to rebut the presumption.[191] The court of appeals upheld, therefore, the trial court's decision ordering a new trial in order to avoid any appearance of impropriety in the earlier trial.[192]

In a second case seeking post trial relief, *Rodriquez v. Conant*, the New Mexico Supreme Court considered the delicate balance between finality of judgment and the court's traditional reluctance to grant default judgments.[193] Plaintiff Conant had instituted a defamation action against her employer, as a result of plaintiff's alleged "failure" of a polygraph examination administered to certain employees suspected of theft.[194] Plaintiff subsequently amended her complaint to add defendant Rodriquez, who owned and operated the polygraph administering business, and the employee who conducted the polygraph examination.[195] Plaintiff's employment was subsequently terminated, allegedly as a result of the results of the polygraph examination.[196]

Defendant Rodriquez was served with the amended complaint but neither answered the complaint nor filed an appearance.[197] The trial court entered a default judgment against defendant on the issue of liability, and, after a hearing on damages at which defendant Rodriquez did not appear, and about which defendant Rodriquez did not receive notice, entered a final judgment for plaintiff for all damages requested plus costs.[198] Defendant Rodriquez moved to set aside the default judgment, which motion was granted by the trial court without a hearing.[199] The court of appeals reversed the trial court's order setting aside the default judgment, on the grounds that the record disclosed no grounds supporting the trial court's discretion to set aside the default judgment.[200]

The supreme court reversed.[201] The court disagreed with the court of appeals' statement that the only ground advanced by defendant to set aside the judgment was excusable neglect under New Mexico Rule of Civil Procedure 1-060(b)(1).[202] It thus found no need to review the court of appeals' determination that failure to recall being served—constituting mere carelessness or forgetfulness—was

189. *Id.* at 790, 727 P.2d at 555.
190. *Id.*
191. *Id.*
192. *Id.*
193. 105 N.M. 746, 737 P.2d 527 (1987).
194. *Id.* at 747, 737 P.2d at 528.
195. *Id.*
196. *Id.*
197. *Id.* at 747-49, 737 P.2d at 528-30.
198. *Id.* at 748, 737 P.2d at 529.
199. *Id.*
200. *Id.*
201. *Id.* at 750, 737 P.2d at 531.
202. Under Rule 1-060(b)(1), a judgment may be set aside for reasons of mistake, inadvertence, surprise, or excusable neglect.

insufficient justification for setting aside the judgment under that Rule.[203] Instead, the supreme court found that the trial court's action could be sustained under Rule 1-060(b)(6).[204] The court emphasized Rule 1-060(b)(6)'s requirement of a showing of exceptional circumstances and reasons for relief other than those set out in Rules 1-060(b)(1) through (5).[205] The supreme court found that a combination of two circumstances fulfilled that requirement: first, that plaintiff failed to provide notice to defendant despite her communications with defendant during the pendency of her lawsuit,[206] and, second, the fact that the default judgment awarded $55,000.00 in damages, while plaintiff had settled her claims against her employer for only $1,900.00.[207] Furthermore, although the court explicitly refused to reach the merits of defendant's defenses,[208] the court stated that "they demonstrate the existence of a meritorious defense."[209] Therefore, because defendant demonstrated both a meritorious defense and grounds for relief under Rule 1-060(b)(6), the supreme court held that the district court had not abused its discretion by setting aside the default judgments.[210]

B. Appeals

During the Survey year, the New Mexico Supreme Court enacted new Rules of Appellate Procedure governing all appeals from orders or judgments entered on or after January 1, 1987, and governing all original proceedings filed in the supreme court on or after that date.[211] The Rules provide detailed requirements pertaining to filing,[212] docketing statements,[213] assignment of cases,[214] oral arguments,[215] and rehearings,[216] and must be consulted by practitioners in the New Mexico appellate courts.

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203. 105 N.M. at 750, 737 P.2d at 531.

204. Rule 1-060(b)(6) provides general grounds for relief in addition to the five specific reasons set forth in Rule 1- 060(b), namely, "any other reason justifying relief from the operation of the judgment."

205. 105 N.M. at 750, 737 P.2d at 531.

206. *Id.*

207. *Id.*

208. Defendant had alleged that he had obtained two releases of liability from plaintiff before conducting her polygraph examinations, that he was acting as the agent of plaintiff's employer, that the employee who administered the polygraph examinations was not defendant's employee but an independent contractor, and that plaintiff's complaint against defendant failed to state a cause of action. *Id.*

209. *Id.*

210. *Id.* at 751, 737 P.2d at 532.

211. The new Rules of Appellate Procedure are codified at N.M. STAT. ANN. §§ 12-101 to -607 (Recomp. 1986) and are to be cited as SCRA 1986, 12-____. SCRA 1986, 12-101.

212. SCRA 1986, 12-201(A) and (B) regulate the timing of filing the notice of appeal and the content of that notice; 12-202(D) regulates service of the notice of appeal.

213. SCRA 1986, 12-208 regulates the timing of filing and content of docketing statements. Rule 12-312(A) provides that failure to file a docketing statement may be grounds for dismissal of an appeal. *See also,* DeTevis v. Aragon, 104 N.M. 793, 727 P.2d 558 (Ct. App. 1986), in which the appellate court held that nonjurisdictional issues not addressed in the docketing statement could not be asserted for the first time in the appellate brief-in-chief.

214. Under SCRA 1986, 12-210 cases are to be assigned to one of four calendars, based on the docketing statement: the general, limited, legal and summary calendars. The different calendars have substantively different briefing schedules and requirements.

215. Oral argument must be requested by a separate pleading and must set out the reasons why oral argument would be helpful. SCRA 1986, 12-214(B). Oral argument may not be requested in cases assigned to the summary calendar. SCRA 1986, 12-210(E).

216. SCRA 1986, 12-404 regulates motions for rehearing. Under Rule 12-404(C) the granting of a motion for rehearing has the effect of suspending the decision or opinion of the court until final determination by the appellate court.

The New Mexico Court of Appeals decided two cases bearing on procedural prerequisites to appeals during the Survey year. In *Dillard v. Dillard*,[217] the court held that appellant's failure to make a written request of the trial court for findings and conclusions constituted a waiver of objection to the district court's findings and precluded appellate review of the district court order.[218] The court specifically reserved ruling on whether a written general request would be sufficient to preserve a party's right to claim error in the trial court's refusal to make findings and conclusions.[219]

In *McCauley v. Tom McCauley & Sons, Inc.*,[220] the court of appeals ruled that it was within the trial court's discretion to grant a motion for extension of time to file a notice of appeal even after a motion to dismiss the appeal as untimely had been filed with the court of appeals.[221] The court of appeals had not, however, ruled on the motion to dismiss when the motion for extension of time was filed.[222]

The New Mexico Court of Appeals also ruled on three cases dealing with the finality of judgments for purposes of appeal during the Survey year. In *Hiatt v. Kiel*,[223] the court of appeals ruled that a judgment improperly entered because it was entered without notice to defense counsel was not a final judgment for purposes of appeal.[224] The trial court subsequently granted defendant's motion to set aside the judgment, but later reversed the grant of the motion, and reinstated the judgment. Defendant appealed from that judgment within the statutorily-specified period, but plaintiff moved to dismiss the appeal on the grounds that defendant ought to have appealed after the judgment first had been entered. The court of appeals disagreed, and denied the motion to dismiss on the grounds that the initial judgment had not been a final judgment because it was entered im-

217. 104 N.M. 763, 727 P.2d 71 (Ct. App. 1986).

218. *Id.* at 765, 727 P.2d at 73. Appellant had failed to tender any requested findings and conclusions to the trial court. Appellant also failed to include, on appeal, any record of the proceedings before the trial court prior to the order from which she appealed. *Id.*

219. *Id.* at 766, 727 P.2d at 74.

220. 104 N.M. 523, 724 P.2d 232 (Ct. App. 1986).

221. *Id.* at 525, 724 P.2d at 234. The new Rules of Appellate Procedure now specify that the district court retains jurisdiction to rule on a motion for extension of time to file a notice of appeal, regardless of whether the notice of appeal has been filed. SCRA 1986, 12-201(E)(3).

222. 104 N.M. at 525, 724 P.2d at 234. Defendants had filed a timely notice of appeal from a judgment entered on May 3, 1984. Plaintiff's cross-appeal should have been filed by June 4, 1984, under CIV. R. APP. P. 3(a)(1), now SCRA 1986, 12- 201(A). Plaintiff actually filed her cross-appeal on June 6, 1986. Defendants filed a motion with the court of appeals to dismiss plaintiff's cross-appeal as untimely, but before the appellate court ruled on the motion, plaintiff filed a motion for extension of time to file the notice of appeal, pursuant to CIV. R. APP. P. 3(f), which is now codified at SCRA 1986, 12-201(E)(2). The motion for extension of time had been filed more than 30 days after the entry of judgment, but less than 60 days after judgment was entered. The trial court granted plaintiff's motion after hearing arguments by both parties. The court of appeals was not notified that the district court had granted the motion for extension of time, and granted defendants' motion to dismiss plaintiff's cross-appeal on June 25, 1984. After the court of appeals learned that the motion for extension of time had been granted, it reinstated plaintiff's cross-appeal. The court then declined to reconsider its reinstatement of the appeal. *Id.*

223. 25 N.M. BAR BULL. 567 (Ct. App. Apr. 29, 1986).

224. *Id.* at 569. Defense counsel had received notice of the judgment after judgment was entered, in violation of N.M. STAT. ANN. §39-1-2 (1978). That statute provides that when the judgment of the court is not rendered at the time of a hearing before the judge, "no judgment or order relative to the matters pertaining to such hearing shall be entered until notice of the same shall have been given to the attorneys for the respective parties in the action."

properly; only the reinstatement of the judgment was a "final judgment" from which the defendant could appeal.[225]

In *Mitchell v. Mitchell*,[226] a divorce action, the court of appeals ruled that a letter from the trial court was not a final and appealable order. The trial had been bifurcated and, after one issue had been tried, the trial court notified the parties as to its rulings on the issue by letter, indicating that the husband's C.P.A. practice would be characterized as a community asset for purposes of property division. The court of appeals ruled that the letter lacked the statutory language required under New Mexico Rule of Civil Procedure 1-054(c) to terminate the action,[227] and that the court's ruling became final only when the final judgment subsequently was entered in the case.[228]

Similarly, in *Waisner v. Jones*,[229] the New Mexico Court of Appeals reaffirmed its policy against piecemeal appeals when it held that an appeal from a trial court Rule 1-060(b) order was premature. Following a jury verdict in a case for unlawful repossession of a vehicle, the trial court granted defendant's motion for relief under Rule 1-060(b), and ordered a sale of the vehicle by a special master. The proceeds of the sale were to be held by the court until the court made a final determination as to the proceeds' distribution. The court of appeals held that this order was not a final judgment, because the distribution issue remained to be decided by the trial court.[230] The appeal was, therefore, dismissed as premature.[231]

XI. RES JUDICATA AND COLLATERAL ESTOPPEL

The New Mexico appellate courts decided three cases dealing with issues of res judicata and collateral estoppel during the Survey year. In *Protest of Plaza del Sol Limited Partnership v. Assessor for the County of Bernalillo*,[232] the court held that a stipulation fixing property tax values was res judicata only for the year in question; it was not binding on any subsequent tax year. In *Silva v. State*,[233] the second case concerning this issue, the New Mexico Supreme Court provided a detailed analysis of the law governing res judicata and collateral estoppel while affirming the denial of partial summary judgment in a case arising

225. 25 N.M. BAR BULL. at 568-69.

226. 104 N.M. 205, 719 P.2d 432 (Ct. App.), *cert. denied*, 104 N.M. 84, 717 P.2d 60 (1986).

227. N.M. R. CIV. P. 1-054(c) provided in pertinent part as follows:

> [W]hen more than one claim for relief is presented in an action . . . the court may enter a final judgment as to one or more but fewer than all of the claims only upon an express determination that there is no just reason for delay. In the absence of such determination, any order or other form of decision, however designated, which adjudicates fewer than all the claims shall not terminate the action as to any of the claims and the claims and the order or other form of decision is subject to revision at any time before the entry of judgement adjudicating all the claims.

228. 104 N.M. at 208, 719 P.2d at 435.

229. 103 N.M. 749, 713 P.2d 565 (Ct. App. 1986).

230. *Id.* at 751, 713 P.2d at 567.

231. *Id. See also*, B.L. Goldberg & Assoc., Inc. v. Uptown, Inc., 103 N.M. 277, 705 P.2d 683 (1985) (trial court order dismissing a counterclaim held not a final, appealable order).

232. 104 N.M. 154, 717 P.2d 1123 (Ct. App.), *cert denied*, 104 N.M. 54, 716 P.2d 245 (1986).

233. 26 N.M. BAR BULL. 962 (Nov. 3, 1987).

out of a prior action taken by the United States District Court of the District of New Mexico.[234] The state court action arose out of the death of a prison inmate who committed suicide while incarcerated.[235] Plaintiffs had moved for summary judgment on the issue of liability, relying on the doctrines of res judicata or, alternatively, upon collateral estoppel.[236] Their motion relied on a federal court order finding that the Secretary of Corrections and others connected with the Department of Corrections had failed to operate by the standards and procedures required by the earlier federal court consent decree.[237]

The supreme court found the doctrine of res judicata inapplicable, because the ultimate facts necessary for the resolution of the two suits were different, and the issues necessarily dispositive in the prior action were different from those in the subsequent case.[238] The doctrine of collateral estoppel, however, would apply even though the cause of action in the second case was not identical with that of the first case.[239] Although the supreme court acknowledged that New Mexico had adhered to the rule that collateral estoppel required the parties in the second suit to be the same or in privity with the parties in the first suit, the court recognized that "[a] growing number of jurisdictions hold that, absent fundamental unfairness in a given case, the doctrine of collateral estoppel may be applied against parties or their privies to both suits regardless of whether the party asserting the doctrine was privy to the first suit."[240] The court then adopted the rule articulated by the United States Supreme Court in *Parklane Hosiery Co. v. Shore*,[241] and allowed a plaintiff to use the doctrine of offensive collateral estoppel to foreclose a defendant from litigating an issue that the defendant had

234. *Id.* at 965. The prior case, Duran v. Anaya, No. 7-721-JB (D.N.M. June 27, 1986), is a class action in which partial consent decrees and an agreement were approved and adopted on July 14, 1980, requiring the State of New Mexico, its Corrections Department, and its Secretary of Corrections to operate by certain standards, procedures and policies, for the benefit of a class of prison inmates to which Silva, the deceased plaintiff in this case, belonged.

235. 26 N.M. BAR BULL. at 962.

236. *Id.*

237. *Id.* The federal court order was based on unchallenged findings by a special master who had conducted an evidentiary hearing into the events and circumstances surrounding plaintiff Silva's death. Adherence to the required standards and procedures would have caused Silva to be placed on a suicide watch and would have protected him from a suicide attempt, or, following the suicide attempt, would have aided in his resuscitation. *Id.*

238. *Id.* at 963. The supreme court explained that "the hearing ordered by the federal court to inquire into whether the defendants in *Duran* were in compliance with the 'consent decree' with respect to the events and circumstances surrounding Silva's death was not the same cause of action as the personal representative's action for wrongful death." *Id.* at 962-63.

239. *Id.* at 963.

240. *Id.* The court cited Edwards v. First Fed. Sav. & Loan Ass'n of Clovis, 102 N.M. 396, 401, 696 P.2d 484, 489 (Ct. App. 1985) for the proposition that "defensive" use of collateral estoppel was allowed despite the fact that the defendant had not been a party to the prior federal court action. In that action brought by Edwards against the United States, Edwards had claimed that a tax was wrongfully levied on First Federal Savings & Loan Association of Clovis. In Edwards' second lawsuit, First Federal relied on the memorandum and decision in the federal suit, which actually and necessarily decided the issues presented in the second state action. In *Silva*, the New Mexico Supreme Court approved the court of appeals' decision affirming summary judgment in *Edwards*. 26 N.M. BAR BULL. at 963.

241. 439 U.S. 322 (1979). In *Parklane Hosiery*, the United States Supreme Court approved a rule allowing the use of "offensive" collateral estoppel except in cases where a plaintiff could easily have joined in the earlier action or where the application of offensive estoppel would be unfair to a defendant. *Id.* at 330-31.

previously litigated unsuccessfully, even if the plaintiff had not been privy to the prior action.[242] The court determined, however, that the federal court had not actually and necessarily made a final determination that any failure of defendants to exercise ordinary care was a proximate cause of Silva's death.[243] Therefore, the trial court's denial of summary judgment on the issue of liability was proper.[244]

Finally, in *Western Production Credit Association v. Kear*,[245] the New Mexico Supreme Court held that the doctrine of collateral estoppel prohibited relitigation of an affirmative defense that was raised and litigated in an earlier lawsuit on a debt owed by defendants to plaintiff. A judgment creditor had brought suit against the defendants to set aside two conveyances of land alleged to have been made fraudulently in an attempt to prevent collection of defendants' obligation to plaintiff.[246] Defendants had claimed that they had been forced to sell cattle as a means of partially satisfying their debt to plaintiff, but they had neither pled that affirmative defense nor moved to have the pleadings amended to conform to the evidence at trial.[247] The supreme court ruled that the evidence should have been excluded, but that even if considered, the affirmative defense was barred by collateral estoppel because it had been litigated in an earlier action.[248]

XII. STATUTES OF LIMITATION

The New Mexico appellate courts decided four cases dealing with statutes of limitations during the Survey year; two of these cases have procedural implications, and the remaining two are more significant in their substantive application. In *Dow v. Chilili Cooperative Association*,[249] the New Mexico Supreme Court held that when defending against a summary judgment motion, the party claiming that a statute of limitations should be tolled has the burden of alleging sufficient facts that, if proved, would toll the statute. In an action for injunctive relief for interference with use and enjoyment of land, plaintiff had successfully moved for partial summary judgment on the basis that defendant's counterclaim was barred by the statute of limitations contained in Section 37-1-4 of the New Mexico Statutes. Defendant conceded that the four-year statute of limitations applied, but urged the application of a second statute, tolling the limitations period.[250] Defendant failed to substantiate its argument with admissible evidence, and therefore failed to carry its burden in opposing the motion for summary judgment.[251]

242. 26 N.M. BAR BULL. at 964.
243. *Id.*
244. *Id.* at 965.
245. 104 N.M. 494, 723 P.2d 965 (1986).
246. *Id.*
247. *Id.* at 495, 723 P.2d at 966.
248. *Id.*
249. 105 N.M. 52, 728 P.2d 462 (1986).
250. The second statute of limitations provided that in an action for injuries to property on the ground of fraud, the cause of action would not accrue until the fraud was discovered. N.M. STAT. ANN. §37-1-7 (1978).
251. 105 N.M. at 54, 728 P.2d at 464.

In *Estate of Gutierrez v. Albuquerque Police Department*,[252] the court of appeals determined that the two-year statute of limitations contained in Section 41-4-15 of the New Mexico Statutes was not tolled while the case was pending in federal court. This wrongful death action had originally been filed in federal district court under federal civil rights statutes, with a pendent state law claim against the Albuquerque Police Department and the Bernalillo County Detention Center.[253] Plaintiff's state law claim subsequently was dismissed, and plaintiff refiled that claim in state court, after the two-year period specified in the New Mexico Tort Claims Act's statute of limitations had passed.[254] The court of appeals acknowledged the dilemma faced by plaintiffs seeking to litigate their federal civil rights claims and state law claims in the same forum, in the face of "a rapidly shifting set of federal precedents."[255] Nevertheless, the court held that the plaintiff's case was barred by the statute of limitations and that equitable tolling would not apply, because plaintiff had had his day in court.[256] The court also held that the savings provision codified at Section 37-1-14 was inapplicable in the face of the specific statute of limitations contained in Section 41-4-15.[257]

Finally, the New Mexico Supreme Court in *Delgadillo v. City of Socorro*[258] held that a gas line replacement and relocation was a "physical improvement to real property," thus rendering the ten-year statute of limitations contained in Section 37-1-27 (1978) applicable to bar third-party plaintiff's action.[259] In *Long v. Weaver*,[260] the New Mexico Court of Appeals held that the limitations period under the New Mexico Tort Claims Act begins when the injury manifests itself in a physically objective manner and is ascertainable, rather than when the wrongful or negligent act occurs. The court of appeals affirmed the trial court's finding that a genuine issue of material fact precluding summary judgment existed, because a factual question existed as to when the plaintiff's injury manifested itself and was ascertainable.[261]

252. 104 N.M. 111, 717 P.2d 87 (Ct. App.), *cert. denied*, 103 N.M. 798, 715 P.2d 71 (1986).

253. *Id.* at 112, 717 P.2d at 88.

254. *Id.*

255. *Id.* at 116, 717 P.2d at 92 (citing Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984) and Wojciechowski v. Harriman, 607 F. Supp. 631 (D.N.M. 1985)).

256. 104 N.M. at 116, 717 P.2d at 92. Plaintiff had had a hearing on the merits of his federal claims against the same defendants in federal district court and had appealed to the Tenth Circuit Court of Appeals. Therefore, "[t]here is no 'technical forfeiture,' no denial of plaintiff's day in court." *Id.*

257. N.M. STAT. ANN. §37-1-14 (1978) provides: "If, after the commencement of an action, the plaintiff fails therein for any cause, except negligence in its prosecution, and a new suit be commenced within six months thereafter, the second suit shall, for the purposes herein contemplated, be deemed a continuation of the first." The court also noted that N.M. STAT. ANN. §37-1-17 (1978) provided that the earlier section would not apply when another statute of limitations limited the action. 104 N.M. at 114, 717 P.2d at 90.

258. 104 N.M. 476, 723 P.2d 245 (1986).

259. *Id.* at 479, 723 P.2d at 248.

260. 105 N.M. 188, 730 P.2d 491 (Ct. App. 1986).

261. *Id.* at 192, 730 P.2d at 495.