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Civil Procedure

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CIVIL PROCEDURE

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During the *Survey* year, the courts implicitly upheld the constitutionality of Rule 4(g) of the New Mexico Rules of Civil Procedure, dealing with service by publication,[1] settled the law as to whether a counterclaim may be brought in a quiet title action,[2] and resolved an apparent conflict in general and specific venue statutes.[3] In an important case on arbitration, the supreme court decided that a district court does have jurisdiction to determine whether a party has waived its right to arbitrate.[4] The issues presented in the cases examined are dealt with in the sequence in which they would arise in litigation. A brief discussion of some of the 1979 amendments to the Rules of Civil Procedure is also included.

I. VENUE

A. Conservatorship proceedings.

In *Santa Fe National Bank v. Galt*,[5] the court of appeals resolved an apparent conflict between the general venue statute[6] and the statute governing venue in conservatorship proceedings.[7] The Bank, as conservator of an infant, sued Galt in Santa Fe County for damages. The acts giving rise to the cause of action occurred in Eddy County; the infant was a resident of Eddy County, and none of the defendants were residents of Santa Fe County. Under the general venue

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1. Clark v. LeBlanc, 92 N.M. 672, 593 P.2d 1075 (1979).
2. Ortega, Snead, Dixon & Hanna v. Gennitti, 93 N.M. 135, 597 P.2d 745 (1979).
3. Santa Fe Nat'l Bank v. Galt, 94 N.M. 111, 607 P.2d 649 (Ct. App.), *cert. denied*, ___ N.M. ___, 614 P.2d 545 (1980).
4. United Nuclear Corp. v. General Atomic Co., 93 N.M. 105, 597 P.2d 290 (1979).
5. 94 N.M. 111, 607 P.2d 649 (1980).
6. N.M. Stat. Ann. § 38-3-1(A) (1978) provides that civil actions commenced in the district courts shall be brought:

> in the county where either the plaintiff or defendant or some one of them, in case there be more than one of either, resides; or second, in the county where the contract sued on was made or is to be performed, or where the cause of action originated or indebtedness sued on was incurred; or third, in any county in which the defendant or either of them may be found in the judicial district where the defendant resides.

7. N.M. Stat. Ann. § 45-5-403(A) (1978).

statute, which allows a plaintiff to bring suit in the county in which he resides, venue in Santa Fe County was proper. Defendants contended that in a case for damages brought by a conservator, the venue statute for conservatorship proceedings, which restricts venue to the judicial district where the protected person resides, was applicable.

The court noted that ordinarily "[c]onflicts between general and specific statutes are resolved by giving effect to the specific statute."[8] However, the specific statute in this case was limited to conservatorship proceedings, with no provision for actions instituted by the conservator. The court held that the specific statute governed the original conservatorship appointment, but in all subsequent proceedings initiated by the conservator the general venue statute applied.[9]

B. Suits against the state.

Venue is no longer equated with jurisdiction in suits against the state, its officers, or employees.[10] In *New Mexico Livestock Board v. Dose,*[11] appellant raised the venue issue for the first time in its petition for certiorari. Appellant relied on *Bureau of Revenue v. MacPherson*[12] and *Allen v. McClellan*[13] for authority that the venue statute is "jurisdictional on its face"[14] and that an objection to venue thus can be raised for the first time on appeal.

In dismissing the appeal, the supreme court looked to *Kalosha v. Novick,*[15] where the general venue statute for transitory actions was determined not to be jurisdictional and could be waived. Finding nothing in the statutory scheme to "canonize any one section as jurisdictional,"[16] the court expressly overruled *Bureau of Revenue v. MacPherson* and *Allen v. McClellan.*

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8. 94 N.M. at ____, 607 P.2d at 652 (citing Bird v. Apodaca, 91 N.M. 279, 573 P.2d 213 (1977); Bureau of Revenue v. Western Elec. Co., 89 N.M. 468, 553 P.2d 1275 (1976)).

9. In so holding, the court relied on the following:

> Litigation brought by or against third persons who claim property adversely to the protected person, who are indebted to him, or who have claims against him or his estate, may be conducted in another court if litigation of the kind involved could have been conducted there in the absence of conservatorship proceedings.

2 R. Wellman, Uniform Probate Code Practice Manual 529 (2d. ed. 1977).

10. N.M. Stat. Ann. § 38-3-1(G) (1978) provides that suits against the state, its officers or employees shall be brought in the court of the county where their offices are located, or at the capital.

11. 94 N.M. 68, 607 P.2d 606 (1980).

12. 79 N.M. 272, 442 P.2d 584 (1968).

13. 77 N.M. 801, 427 P.2d 677 (1967).

14. 79 N.M. at 273, 442 P.2d at 585; 77 N.M. at 806, 427 P.2d at 680.

15. 84 N.M. 502, 505 P.2d 845 (1973).

16. 94 N.M. at ____, 607 P.2d at 609.

II. LONG-ARM JURISDICTION

In *Barker v. Barker,*[17] the supreme court gave full faith and credit to an Indiana court rule, which serves as the basis of Indiana's long-arm jurisdiction.[18] The Barkers had lived in Indiana for four years during their marriage. The wife sued for divorce in Indiana, and the court asserted personal jurisdiction over the husband, then a New Mexico resident, by means of the Indiana court rule. In a subsequent divorce proceeding initiated by the husband in New Mexico, the trial court entered judgment reducing the Indiana decree to judgment in New Mexico.[19] In affirming the decision, the court reasoned that "rules adopted by a court have the effect of law as to proceedings in such court"[20] and that the rule's constitutionality had been implicitly recognized by the Indiana court.[21] Therefore, the decree was entitled to full faith and credit, particularly when the facts which gave the Indiana court jurisdiction would have conferred in personam jurisdiction over a nonresident under the New Mexico long-arm statute.

III. SERVICE BY PUBLICATION

The supreme court applied Rule 4(g) of the New Mexico Rules of Civil Procedure, before the 1979 amendment, for the first time in *Clark v. LeBlanc,*[22] thereby implicitly upholding the constitutionality of in personam jurisdiction under the rule. Former Rule 4(g) provides for service by publication upon a defendant who has concealed himself within the state or avoided personal service.[23] A determination of willful concealment is the crucial finding needed to trigger ap-

17. 94 N.M. 162, 608 P.2d 138 (1980).

18. Ind. R. Tr. P. 4.4(A)(7) provides as a basis for asserting jurisdiction: "living in the marital relationship within the state notwithstanding subsequent departure from the state, as to all obligations for alimony, custody, child support, or property settlement, if the other party to the marital relationship continues to reside in the state." The New Mexico long-arm statute, N.M. Stat. Ann. § 38-1-16 (1978), is substantially the same.

19. The wife had counterclaimed to the husband's divorce complaint, alleging that the decree was entitled to full faith and credit.

20. 94 N.M. at ___, 608 P.2d at 140 (citing Spingola v. Spingola, 91 N.M. 737, 580 P.2d 958 (1978); Burg v. City of Albuquerque, 33 N.M. 184, 262 P. 225 (1927); State v. Doe, 90 N.M. 568, 566 P.2d 117 (Ct. App. 1977)).

21. The Indiana rule was validated by its application in Neill v. Ridner, 153 Ind. App. 149, 286 N.E.2d 427 (1972), in which the court found that the acts which gave rise to an action of bastardy satisfied the "minimum contact" requirement.

22. 92 N.M. 672, 593 P.2d 1075 (1979).

23. N.M.R. Civ. P. 4(g) sets out the procedure for service by publication when the defendant "has concealed himself within the state, [or] has avoided service of process upon him."

plication of the rule.[24] The *Le Blanc* court found that a personal judgment may be based upon constructive service under Rule 4(g) because the rule observes the twin due process requirements of "minimum contact"[25] and "adequate notice."[26] Minimum contact with the state is clearly satisfied when the defendant is a resident, and notice by publication is adequate when the defendant has concealed himself to avoid service.

Ordinarily, service by publication is deemed to be adequate notice only for actions in rem.[27] The court justified the Rule 4(g) exception, finding that the act of concealment constitutes a waiver of notice.[28] This exception apparently is based on policy considerations, as the court observed that "[t]o allow a person to escape his civil obligation by purposefully hiding himself would be to encourage deception."[29] The 1979 amendment to Rule 4(g) incorporates the *Le Blanc* holding.

IV. WAIVER OF JURY TRIAL

In *Vesper Construction Co. v. Rain for Rent, Inc.*,[30] the Tenth Circuit Court of Appeals held that a right to jury trial in one case cannot be revived when that case is consolidated with another in which a jury demand was timely filed.[31] Vesper had sued Rain for Rent for breach of contract and requested a jury trial.[32] Rain for Rent then separately sued Vesper and the United States under the

24. The case was remanded for a finding as to whether the defendant "purposefully concealed himself to avoid service of process." 92 N.M. at 674, 593 P.2d at 1077.

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

26. Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950).

27. In Chapman v. Farmers Ins. Group, 90 N.M. 18, 558 P.2d 1157 (Ct. App. 1976), the court of appeals held that service by publication is effective only for in rem actions, where the defendant is given constructive notice of the action when the court assumes control of defendant's property located within the jurisdiction. The *LeBlanc* court noted that it "agree[d] with the application of the *Chapman* rule in most cases." 92 N.M. at 673, 593 P.2d at 1076.

28. 92 N.M. at 673, 593 P.2d at 1076. This potentially troublesome sentence might justify a finding of jurisdiction, even though the procedural requirements of Rule 4(g) are not met, on the basis that notice was waived.

29. *Id.*

30. 602 F.2d 238 (10th Cir. 1979).

31. This was a question of first impression in the Tenth Circuit. The court cited as authority Walton v. Eaton Corp., 563 F.2d 66 (3d Cir. 1977) (right to demand jury trial in second, duplicative action cannot be revived where plaintiff expressly waived jury trial in first action) and Roth v. Hyer, 142 F.2d 227 (5th Cir. 1944) (right to demand jury in new trial not revived by reversal where plaintiff waived jury at first trial by failure to make timely demand).

32. Fed. R. Civ. P. 38(b) provides:

> Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue.

Miller Act,[33] but failed to file a timely jury demand. The court consolidated the two cases for trial and announced that Rain for Rent's claims would not be tried to a jury.[34] The court of appeals affirmed, finding that Rain for Rent's failure to file a timely demand constituted a waiver of that right. Rain for Rent could not rely on its at-trial demand for a jury, especially when an earlier opportunity to request a jury had been ignored.[35]

V. PLEADINGS–COUNTERCLAIMS IN QUIET TITLE ACTIONS

In *Ortega, Snead, Dixon & Hanna v. Gennitti*,[36] the supreme court resolved the question of whether a counterclaim may be brought in a quiet title action. Plaintiffs filed suit against eight named defendants, seeking judgment on an open account and foreclosure of a mortgage. Four of the defendants sought, by counterclaim, to quiet title to the subject property. Title was quieted in two defendants, and one of the remaining defendants appealed, claiming that the trial court lacked jurisdiction to entertain a counterclaim to quiet title.[37]

At the time of the decision, under New Mexico case law counterclaims could not be asserted in quiet title actions,[38] but counterclaims to quiet title were allowed in other actions.[39] The *Ortega* suit involved a quiet title counterclaim in a foreclosure action, and thus was not inconsistent with the second line of cases. The court took the opportunity, however, to state it would overrule the principle that cross-claims and counterclaims to quiet title are not permissible in other actions, thus eliminating the conflict which had previously existed.[40] The court relied on policies favoring joinder of claims in civil litigation.[41]

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33. 40 U.S.C. § § 270a-270d (1976 and Supp. III 1979).

34. The trial court believed that jury trial of the Miller Act claims was improper in any case; the court of appeals did not address the issue.

35. The trial court had informed counsel two months before trial that the Miller Act claims "will have to be a non-jury . . . I have tried to get counsel in to dicuss (sic) this matter personally but I haven't had any success." 602 F.2d at 240.

36. 93 N.M. 135, 597 P.2d 745 (1979).

37. Appellant's position is somewhat precarious: he was one of the four who had brought the counterclaim in the trial court.

38. Jackson v. Hartley, 90 N.M. 428, 564 P.2d 992 (1977) (counterclaim for ejectment); Clark v. Primus, 62 N.M. 259, 308 P.2d 584 (1957) (counterclaim for accounting).

39. Martinez v. Mundy, 61 N.M. 87, 295 P.2d 209 (1956) (action for ejectment), *followed in* Bailey v. Barranca, 83 N.M. 90, 488 P.2d 725 (1971).

40. The court cited Professor Walden's comments on the confusing state of the law: "whether or not two actions, one of which involves a suit to quiet title, can be determined in a single proceeding in New Mexico may depend upon the wholly coincidental factor of which party first commences litigation." Walden, *The "New Rules" in New Mexico*, 25 F.R.D. 107, 121 (1960). The Court noted that "[s]uch a distinction is untenable." 93 N.M. at 139, 597 P.2d at 749.

41. The court noted that "in determining whether a counterclaim or cross-claim may be brought in a quiet title action, or whether a counterclaim or cross-claim to quiet title may

VI. ARBITRATION

A. Waiver of right to arbitrate.

In *United Nuclear Corp. v. General Atomic Co.*,[42] the supreme court held that district courts have jurisdiction to decide whether a party requesting arbitration has waived its right to do so. In so holding, the court sided with a "strong majority of courts"[43] and found additional authority in the Federal Arbitration Act,[44] which "mandates that a court in which a case is pending, and [in which] a stay is requested for arbitration, has jurisdiction to determine whether the movant is 'in default in proceeding with such arbitration.' "[45] The court affirmed the district court's holding that General Atomic Corporation [hereinafter GAC] had waived its right to arbitrate.

The first lawsuit was filed by United Nuclear[46] against GAC[47] in Santa Fe District Court on August 8, 1975. United Nuclear alleged fraud, unlawful monopolistic practices, and violation of the antitrust laws, and sought cancellation of two uranium supply contracts and damages;[48] GAC counterclaimed for over one billion dollars. Defendants removed the cause to federal court, where it was dismissed.[49] United Nuclear again filed suit against GAC in the Santa Fe District Court, alleging the same claims. Three weeks later GAC filed an interpleader action in federal court, stating that it was not waiving its right

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be brought in any other action, the proper analysis is that provided in Rules 1, 13, 20(b) and 42." 93 N.M. at 140-41, 597 P.2d at 749.

42. 93 N.M. 105, 597 P.2d 290 (1979). This case has been the subject of previous decisions of the New Mexico Supreme Court: United Nuclear Corp. v. General Atomic Co., 91 N.M. 41, 570 P.2d 305 (1977) (upholding personal jurisdiction of trial court over Detroit Edison), General Atomic Co. v. Felter, 90 N.M. 120, 560 P.2d 541 (1977) (upholding injunction prohibiting parties from instituting related actions in other courts), *rev'd*, 434 U.S. 12 (1977); United Nuclear Corp. v. General Atomic Co., 90 N.M. 97, 560 P.2d 161 (1976) (upholding personal jurisdiction of trial court over GAC). A recent New Mexico Supreme Court decision, 199 pages in unpublished form, affirmed a default judgment entered against GAC for willful and bad faith failure to comply with the trial court's discovery orders. United Nuclear Corp. v. General Atomic Co., No. 11,988 (N.M., filed Aug. 29, 1980).

43. 93 N.M. at 114, 597 P.2d at 299.

44. 9 U.S.C. § 3 (1976).

45. 93 N.M. at 114, 597 P.2d at 299.

46. United Nuclear is a major New Mexico uranium supplier.

47. GAC is a partnership composed of Gulf Oil Corporation and Scallop Nuclear.

48. The 1971 and 1973 supply agreements had become extremely unprofitable for United Nuclear. In the most recent New Mexico Supreme Court decision in this case, the court stated that "between 1972 . . . and 1975, when this suit was filed, the price of uranium in the United States increased from approximately $6.00 per pound to approximately $40.00 per pound." United Nuclear Corp. v. General Atomic Co., No. 11,988 (N.M., filed Aug. 29, 1980).

49. The action was voluntarily dismissed by United Nuclear. The first action named both GAC and its constituent partners, Gulf and Scallop, as defendants. United Nuclear voluntarily dismissed the case and refiled in state court, naming only the partnership as defendant.

to arbitration. On March 2, 1976, the case was dismissed for lack of subject matter jurisdiction. GAC appealed the dismissal to the Tenth Circuit, where it was affirmed.[50]

Upon United Nuclear's motion, the Santa Fe court enjoined GAC from proceeding to litigate or arbitrate the same issues in any other jurisdiction. GAC appealed to the United States Supreme Court, which reversed.[51] The trial on the merits in Santa Fe had been in progress for several days when the Supreme Court decision was announced, but GAC moved to stay trial until arbitration of the issues could be accomplished. The trial court denied the motion on the grounds that GAC had waived its right to arbitrate.[52]

The New Mexico Supreme Court's affirmance of the waiver holding was carefully reasoned and firmly supported. The court prefaced its analysis of the waiver issue with a discussion of the strong policy favoring arbitration, noting that "the party asserting the default in pursuing arbitration bears a heavy burden of proving waiver."[53] In answering the question, the court considered two factors: (1) whether the movant objectively manifested an intent to arbitrate, and (2) whether the delay in demanding arbitration had resulted in substantial prejudice to the opposing party. The finding of prejudice is critical. "The courts generally hold that dilatory conduct by the party seeking arbitration, unaccompanied by prejudice to the opposing party, does not constitute waiver."[54]

Relinquishment of the right to arbitrate must be intentional. "Such intention may be inferred when a party takes action inconsistent with its right to demand arbitration."[55] The court emphasized that no single act specifically has been held to constitute waiver; rather "[t]he courts have looked to the totality of the proof in each case to arrive

50. General Atomic Co. v. Duke Power Co., 553 F.2d 53 (10th Cir. 1977).

51. General Atomic Co. v. Felter, 434 U.S. 12 (1977). The Court held that "it is not within the power of state courts to bar litigants from filing and prosecuting in personam actions in the federal courts." 434 U.S. at 12.

52. GAC challenged six of the court's findings as to waiver:

> (a) the preliminary injunction did not prohibit GAC from demanding arbitration in the district court; (b) for twenty-seven months GAC did not "in any way manifest its intention or desire to arbitrate rather than litigate"; (c) GAC made numerous motions for extensions and discovery orders and "represented to the district court that such orders were necessary for its preparation for trial"; (d) information obtained from UNC by GAC by way of discovery would not otherwise have been available to it; (e) UNC had been prejudiced and would be irreparably injured if a stay were ordered; and (f) GAC was in default and had relinquished any rights to arbitrate.

93 N.M. at 118, 597 P.2d at 303.

53. *Id.* at 115, 597 P.2d at 300 (citations omitted).

54. *Id.*

55. *Id.*

at a decision."[56] The court considered cases in which waiver was found and isolated factors that contributed to a finding of waiver, including answering a complaint, filing a complaint or a counterclaim, participating in discovery, moving for summary judgment, and going to trial on the merits.[57] Each of these factors, with the exception of moving for summary judgment, was present in this case.

GAC argued that the preliminary injunction against litigating or arbitrating in other courts prohibited it from making a demand for arbitration. The state court had ordered that arbitration within New Mexico was to be conducted under its supervision; GAC argued that this would be a violation of its rights.[58] The supreme court noted that GAC could have demanded arbitration at any time in the trial court and that there was no violation of the right to request arbitration.

The trial court found that GAC's repeated statements that it did not intend to waive its rights to arbitration were inconsistent with its failure to manifest a desire to arbitrate for twenty-seven months after the lawsuit was first filed.[59] An intent to arbitrate also was inconsistent with GAC's failure to assert arbitration as an affirmative defense in either its answer or the pre-trial order as well as with its participation in lengthy and expensive discovery proceedings.[60] Based on these findings, the court upheld the trial court's finding that GAC did not intend to arbitrate.

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56. *Id.* at 117, 597 P.2d at 302.

57. For citations to cases in which these factors appeared, *see* 93 N.M. at 116-17, 597 P.2d at 301-02.

58. The court stated:

> Inherent in GAC's argument is the impermissible presumption that if it had made demand for arbitration [in New Mexico under the supervision of the Santa Fe court] the trial court would have acted unlawfully rather than follow the mandate of the Federal Arbitration Act. We must presume that the court would have done its "supervision" in accordance with that law.

93 N.M. at 119, 597 P.2d at 304.

59. The court noted that

> [c]ommon sense dictates that a litigant that has been so capably represented by such a host of outstanding lawyers, who have meticulously handled every other infinitesimal detail, and who have verbally displayed such ferocious passion for arbitration, could have found a way to say: "Judge, we want to arbitrate."

Id.

60. GAC's compliance with discovery involved

> the efforts of more than 37 lawyers, 19 para-professionals, 80 management personnel and engineers, plus secretarial and clerical personnel. . . . Over 100 depositions were taken resulting in 16,000 pages of testimony and 2,785 deposition exhibits. GAC contended that the parties had designated approximately 11,000 exhibits. UNC claimed that GAC had copied 500,000 pages of its records.

Id. at 113, 597 P.2d at 298.

The finding of material prejudice to United Nuclear rested in part on the extent to which both parties had participated in discovery. Generally, discovery is very limited in arbitration proceedings;[61] therefore, GAC obtained information that would not have been made available in arbitration. Having determined that for twenty-seven months GAC did not objectively manifest an intent to arbitrate, and that the delay resulted in prejudice to United Nuclear, the court upheld the trial court's finding that GAC had waived its right to arbitration. The court also considered the fact that discovery is often the most expensive and time-consuming element of a trial and, thus, is inconsistent with the policies behind arbitration.[62]

B. Finality of arbitration awards.

State policy favoring arbitration was the basis for the decision in *Dairyland Insurance Co. v. Rose.*[63] The supreme court held that the New Mexico Uniform Arbitration Act[64] repealed, by implication, that portion of the uninsured motorist statute which allows appeals of arbitration awards de novo to the district court.[65] With certain statutory exceptions, arbitration awards are final.[66]

VII. ENTRY OF JUDGMENT

In *Hubbard v. Howell,*[67] the supreme court held that a court has subject matter jurisdiction to enter a default judgment against a third-

61. "In most cases, discovery in arbitration is limited to the discovery available under the Arbitration Act itself. . . . The only discovery mentioned in the Act is the taking of depositions of witnesses who cannot be subpoenaed or who are unable to attend the hearing." 93 N.M. at 117, 597 P.2d at 302 (citations omitted). Germane to the issue of discovery but not arbitration, the court states that filing a protective order does not automatically stay the time for answering interrogatories and indicates that an order of the court postponing the time for filing an answer would be required. Query: does this not also apply to depositions, written or oral?

62. "The most often cited reasons for enforcing arbitration agreements are to 'ease the congestion in the court systems, to speed up the resolution of disputes, and to afford a more economical means of disposing of cases.' " 93 N.M. at 114, 597 P.2d at 299 (citations omitted).

63. 92 N.M. 527, 591 P.2d 281 (1979).

64. N.M. Stat. Ann. § § 44-71-1 to -22 (1978).

65. Although repeal by implication is not favored, a latter statute will be held to supersede former law when the new law is "so inconsistent with and repugnant to the former law on the same subject as to be irreconcilable with it. . . ." 92 N.M. at 530, 591 P.2d at 284 (citing Stokes v. New Mexico State Bd. of Educ., 55 N.M. 213, 217, 230 P.2d 243, 245 (1951)).

66. An award may be vacated by a court where the award was procured as a result of fraud or corruption; there was evident partiality; the arbitrators exceeded their powers; the hearing was improperly conducted; or there was no arbitration agreement. N.M. Stat. Ann. § 44-7-12 (1978).

67. 94 N.M. 36, 607 P.2d 123 (1980).

party defendant on a contribution claim *before* the defendant claiming contribution has been adjudged liable for or has paid more than his share of the common obligation.[68] This holding must be considered in light of the facts of the case. Hubbard was sued for attorney's fees, and in turn sued Howell for contribution. Howell failed to appear, and default judgment was entered on the contribution claim. On the basis of the default, Hubbard negotiated a settlement with the attorneys, and the suit against Hubbard was dismissed with prejudice.[69] Hubbard then sought to enforce the default judgment against Howell.

Rule 55(d) of the New Mexico Rules of Civil Procedure permits a default judgment to be entered against a third-party defendant.[70] Generally, however, a judgment for contribution is not proper until the party seeking contribution has paid more than his share of the common obligation.[71] The court found that the trial court did not abuse its discretion in entering the default judgment pursuant to Rule 55(d). Disposition of the original case was reached as a result of a default judgment entered against Howell, who had, in effect, admitted liability in that case by failing to contest the judgment until it was sought to be enforced.[72]

VIII. APPEAL

A. Right to an appeal.

In *State v. Pernell,*[73] the court of appeals considered the constitutional right to an appeal. Pernell was committed to the New Mexico State Hospital under a statute[74] which lacks a provision for an appeal

68. Hubbard's complaint contended that he had paid only his pro rata share of the attorney's fees; this fact was never contested.

69. Howell argued, unsuccessfully, that the dismissal with prejudice had the effect of vacating the default judgment entered against him earlier on the third-party claim. The court rejected the argument apparently because the default was entered before the dismissal and was in fact a condition to it.

70. Entry or refusal of entry of default judgment is within the discretion of the court. Gallegos v. Franklin, 89 N.M. 118, 547 P.2d 1160 (Ct. App. 1976).

71. In Board of Educ. v. Standhardt, 80 N.M. 543, 458 P.2d 795 (1969), the court held that a defendant may file a contribution claim pursuant to N.M.R. Civ. P. 14 before plaintiff's claim is judicially determined. The following language in the opinion offers some support for the *Hubbard* holding: "We believe Rules 13(g) and 14 . . . permit the determination of such [contribution] claims although a money judgment for indemnity must be subject to cross-claimant's actual loss." 80 N.M. at 547, 458 P.2d at 799. *Standhardt* was not cited as authority for the holding by the *Hubbard* court, however, which seemed to rely on the fact that the discretion rests with the court to enter default judgments.

72. In *Gallegos v. Franklin,* the court stated that "[b]y virtue of the default, the defendants have admitted the allegations of the complaint." 89 N.M. at 123, 547 P.2d at 1165.

73. 92 N.M. 490, 590 P.2d 638 (Ct. App. 1979).

74. N.M. Stat. Ann. § 43-1-11 (Repl. 1979).

from the commitment order.[75] Several other statutes relating to involuntary commitment procedures specifically mention an "expeditious appeal."[76] The court apparently was concerned that the lack of such a provision might be construed as denying the right to appeal under the statute under which Pernell was committed. Laying these fears to rest, the court held that the 1965 amendment of the New Mexico Constitution[77] gives an aggrieved party "an absolute right to one appeal,"[78] notwithstanding the lack of statutory authority.[79]

B. Mootness.

The court found the questions raised in the *Pernell* case to be of sufficient public importance to uphold denial of a motion to dismiss the appeal for mootness. Pernell was discharged from the hospital while the appeal was pending, and thus could obtain no practical relief from a reversal of the commitment order. The court noted that generally, "New Mexico appellate courts will not decide questions 'wherein no actual relief can be afforded.' "[80] An exception will be made when the questions presented are of great public interest and importance and when those questions are likely to recur.[81] In this case, because the short-term order was capable of repetition and many people are affected by involuntary commitment procedures, the court properly exercised its discretion in deciding to review the case.[82]

IX. REOPENING OF JUDGMENT

A. Grounds for reopening judgment under Rule 60(b).

In *Jemez Properties v. Lucero*,[83] the court of appeals distinguished between degrees of fraud for the purpose of reopening a judgment

75. The statute sets out the procedure by which an adult may be involuntarily committed to a mental institution for a period of observation not to exceed 30 days. Briefly, the statute requires that the adult be represented by counsel at a court hearing to determine if commitment is warranted by clear and convincing proof of the criteria for commitment.

76. N.M. Stat. Ann. § 43-1-13(D) (Repl. 1979) (involuntary commitment of disabled adults to residential care); *Id.* § 43-1-12(B) (extended commitment of adults); *Id.* § 43-1-16(F) (residential treatment of minors).

77. N.M. Const. art. 6, § 2.

78. 92 N.M. at 492, 590 P.2d at 640 (citing the constitutional amendment).

79. Prior to the amendment, the right to an appeal was "purely statutory." State v. Chacon, 19 N.M. 456, 145 P. 125 (1914).

80. 92 N.M. at 493, 590 P.2d at 641 (citing Atchison, T. & S.F. Ry. v. State Corp. Comm'n, 79 N.M. 793, 794, 450 P.2d 431, 432 (1969)).

81. The court relied on City of Albuquerque v. Campos, 86 N.M. 488, 525 P.2d 848 (1974), a case involving the propriety of a strike which was settled while the appeal was pending.

82. The court cited *In re* Ballay, 482 F.2d 648 (D.C. Cir. 1973) for support that Pernell's involuntary commitment was of public importance.

83. 94 N.M. 181, 608 P.2d 157 (Ct. App.), *cert. denied*, ___N.M. ___, 614 P.2d 545 (1980).

pursuant to Rule 60(b) of the New Mexico Rules of Civil Procedure. The Luceros had forged a deed and falsified public records in the initial action for ejectment and to quiet title.[84] More than a year later the forgery was discovered.[85] Jemez Properties moved, under Rule 60(b)(6), to set aside the final order in the initial action.[86] Rule 60 (b)(6) requires that a motion be made "within a reasonable time" after the entry of judgment. The Luceros contended that the sole basis for reopening the judgment under the facts was "fraud or misrepresentation" under Rule 60(b)(3), which limits the time for making a motion to one year after judgment. The motion by Jemez could be sustained only by a finding that the facts fell within the scope of 60(b)(6).[87]

The grounds for granting relief under 60(b)(6) (any other circumstances) are exclusive of the other five grounds for granting a 60(b) motion.[88] To justify granting the 60(b)(6) motion, the court had to distinguish the Luceros' fraudulent actions from "ordinary fraud" contemplated by 60(b)(3). The court had no difficulty in finding that tampering "with public records . . . in such a way as to make their other misdeeds undetectable . . ."[89] constituted the "exceptional circumstances" required for granting relief under 60(b)(6).[90]

X. RULES OF CIVIL PROCEDURE

A number of amendments to the New Mexico Rules of Civil Procedure, which affect all cases filed in the district court on or after October 1, 1979, were adopted.[91] Because New Mexico practitioners are now familiar with many of these changes, this brief discussion will touch on changes made in three areas only.

84. On August 25, 1975, an order was entered dismissing the complaint and quieting title in the Luceros. At approximately the same time and in a companion case, plaintiffs Airy brought suit against the Luceros seeking an easement, which was denied.

85. On September 21, 1976, the Airys moved for and were granted a new trial upon the introduction of affidavits establishing the forgery.

86. The motion was granted, as was summary judgment to quiet title in the Walshes, who were acting for Jemez Properties.

87. The court noted that 60(b)(6) may not be used to circumvent the time limitations of 60(b)(1), (2), and (3). 94 N.M. at ____, 608 P.2d at 160 (citing Parks v. Parks, 91 N.M. 369, 574 P.2d 588 (1978)).

88. This point was settled in the leading case of Klapprott v. United States, 335 U.S. 601, 614-15, *modified on other grounds,* 336 U.S. 942 (1949).

89. 94 N.M. at ____, 608 P.2d at 160. In a footnote the court rejected an argument that such an action constitutes "fraud upon the court", itself an independent ground for relief under 60(b). Fraud upon the court is that "which attempts, successfully or unsuccessfully, to defile the court itself or which fraud is perpetrated by officers of the court." *Id.* at ____ n.1, 608 P.2d at 160 n.1.

90. The court cites two cases for the proposition that exceptional circumstances are required for granting relief under 60(b)(6): Perez v. Perez, 75 N.M. 656, 409 P.2d 804 (1966); Battersby v. Bell Aircraft Corp., 65 N.M. 114, 332 P.2d 1028 (1958).

91. N.M.S. Ct. Order Misc. 8000, filed Aug. 28, 1979.

A. Service of Process–Rule 4.

Rule 4 was amended substantially. Upon the filing of a complaint, the clerk no longer has one year within which to issue the summons, but must do so "forthwith."[92] Both the prohibition against service on Sunday, and the requirement that the summons be read to the defendant, if he refuses to accept the papers, were deleted.[93] The summons still may be served by posting, but only when a copy is also mailed to the defendant at his last known mailing address.[94] New, detailed provisions for service on corporations and businesses,[95] minors,[96] and the state[97] or state agencies[98] also were adopted. The special provisions for service upon railroad companies were deleted.[99]

Rule 4(g), providing for service by publication, was rewritten and reorganized.[100] The rule now requires the defendant to file a responsive pleading or motion,[101] rather than enter an appearance as required by the former rule.[102]

B. Discovery–Rules 26, 32, 33, 34, 35, 36.

Rule 26 is now a general discovery rule and applies to all means of discovery. The scope of discovery and the requirements of the rule were brought closer to the federal rule, with two exceptions.[103] A major change in the scope of discovery was made with regard to trial preparation. The rule now requires a showing of "substantial need" and that the items desired cannot be obtained without undue hardship to compel discovery of documents and tangible things prepared by a party, including his representative, in anticipation of litiga-

92. N.M.R. Civ. P. 4(a).
93. Compiler's note to N.M.R. Civ. P. 4.
94. N.M.R. Civ. P. 4(e)(1).
95. N.M.R. Civ. P. 4(e)(2).
96. N.M.R. Civ. P. 4(e)(7).
97. N.M.R. Civ. P. 4(e)(3)(i).
98. N.M.R. Civ. P. 4(e)(3)(ii).
99. Compiler's note to N.M.R. Civ. P. 4.
100. Service by publication specifically is allowed when: (1) the relief sought does not require personal service, and (2) the party is so located that process cannot be personal, or (3) the defendant is a New Mexico resident and has concealed himself to avoid service. N.M.R. Civ. P. 4(g).
101. N.M.R. Civ. P. 4(g).
102. N.M.R. Civ. P. 4 (1979).
103. Compiler's note to N.M.R. Civ. P. 26. The New Mexico rule lacks two provisions found in the federal rule. Fed. R. Civ. P. 26(b)(2) permits discovery, but not admission at trial, "of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered." Fed. R. Civ. P. 26(e)(1)(A) requires supplementation responses with respect to "any question directly addressed to . . . the identity and location of persons having knowledge of discoverable matters."

tion.[104] Additional limitations governing discovery of expert testimony also are included.[105]

Rule 32,[106] governing New Mexico practice with regard to the use of depositions and objections thereto, now conforms to the federal rule, except that objections must be filed in the action and notice served on the party giving notice to avoid waiving errors and irregularities in the notice of taking the deposition,[107] and objections regarding disqualification of the officer taking the deposition should be filed in the action and served on the party giving notice.[108] Extensive changes in the rules concerning the procedure for making objections and the time for responding to interrogatories were made, based on the federal rule.[109] Additional changes in rules governing production of documents,[110] mental and physical examinations,[111] and requests for admissions also were implemented.[112]

C. Extraordinary Writs—Rule 65.

A new Rule 65[113] provides that writs of execution, writs of garnishment in aid of execution, writs of possession issued pursuant to section 42-4-12 of the New Mexico statutes,[114] and writs of attachment directed to land or an interest in land (excluding rents, issues and profits from land) are to be issued by the district court clerk without the approval of the judge.[115] All other writs require express written approval of the judge, endorsed on the writ in conformity with the requirements spelled out by the United States Supreme Court.[116] Rule 65 sets out in detail the formal and procedural requirements for extraordinary writs. The writs may be issued imme-

104. N.M.R. Civ. P. 26(B)(2).

105. N.M.R. Civ. P. 26(B)(3). Note specifically N.M.R. Civ. P. 26(B)(3)(c), relating to payment of expert witness fees to the opposing side for discovery.

106. N.M.R. Civ. P. 32.

107. N.M.R. Civ. P. 32(C)(1).

108. N.M.R. Civ. P. 32(C)(2).

109. *See* N.M.R. Civ. P. 33, which extends response time to 30 days, requires notice to all parties, and provides parties a means for the acquisition of copies. *Compare* N.M.R. Civ. P. 33 *with* Fed. R. Civ. P. 33 *and* the former New Mexico rule, which required response within 15 days.

110. N.M.R. Civ. P. 34 allows requests for production without requiring a court order.

111. N.M.R. Civ. P. 35 requires an examining physician to provide reports of previous examinations of the same condition, as well as reports of recent examinations.

112. N.M.R. Civ. P. 36, like Fed. R. Civ. P. 36, now extends time of response and requires reasonable inquiry before a "lack of information" answer will be allowed.

113. N.M.R. Civ. P. 65.

114. N.M. Stat. Ann. § 42-4-12 (1978).

115. N.M.R. Civ. P. 65(a).

116. *See* Fuentes v. Shevin, 407 U.S. 67 (1972), and Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969), as explained in Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974).

diately and without notice, if the proponent can satisfy the immediacy of harm requirement and his attorney certifies in writing the efforts made to give notice and the reasons why notice should not be required.[117]

117. N.M.R. Civ. P. 65(g).