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Civil Procedure - The New Mexico Long-Arm Statute and Due Process: Beh v. Ostergard, and the Regents of the University of California

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CIVIL PROCEDURE—The New Mexico Long-Arm Statute and Due Process: *Beh v. Ostergard, and the Regents of the University of California*

I. INTRODUCTION

In *Beh v. Ostergard, and the Regents of the University of California*,[1] the United States District Court, District of New Mexico, held that publishing the results of allegedly negligent research in New Mexico was insufficient minimum contact to allow personal jurisdiction over a California doctor and the Regents of the University of California.[2] The court also held that federal courts sitting in diversity actions have personal jurisdiction to the extent permitted by the law of the forum state.[3] In applying New Mexico law, the court discussed several New Mexico cases, and found some conflicting precedent concerning extra-territorial jurisdiction.[4] After finding that personal jurisdiction was lacking, the *Beh* court dismissed the action rather than transferring it to the proper jurisdiction.[5]

The *Beh* opinion is significant because it clarifies New Mexico law on personal jurisdiction. While the opinion is not binding on New Mexico state courts, it is a successful attempt to analyze, apply, and clarify the apparently inconsistent New Mexico law. This note will discuss personal jurisdiction through an analysis of the long-arm statute in New Mexico, and the due process requirement.

II. STATEMENT OF THE CASE

In 1971, the defendant, Donald Ostergard, was employed by the University of California as Chief of Obstetrics and Gynecology at Harbor-UCLA Medical Center.[6] Dr. Ostergard was also director of the Planned Parenthood Clinic, which operated in conjunction with Harbor-UCLA.[7]

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1. 657 F. Supp. 173 (D.N.M. 1987).
2. *Id.* at 178.
3. *Id.* at 174, (citing Yarbrough v. Elmer Bunker and Assoc., 669 F.2d 614, 616 (10th Cir. 1982)); FED. R. CIV. P. 4(e).
4. *Compare* Winward v. Holly Creek Mills, Inc., 83 N.M. 469, 493 P.2d 954 (1972); Customwood Mfg. v. Downey Constr. Co., Inc., 102 N.M. 56, 691 P.2d 57 (1984) *and* Tarango v. Pastrana, 94 N.M. 727, 616 P.2d 440 (Ct. App. 1980) *with* Moore v. Graves, 99 N.M. 129, 654 P.2d 582 (Ct. App. 1982).
5. *Beh*, 657 F. Supp. at 180.
6. First Amended Complaint at 2.
7. *Id.*

The plaintiff, Donna Beh, then a California resident, received a Dalkon Shield intrauterine contraceptive device (I.U.D.) at the Planned Parenthood Clinic.[8] After moving to New Mexico, Beh developed several complications which led to a hysterectomy.[9]

The plaintiff filed suit alleging negligence, battery, breach of warranty and breach of fiduciary duty against Dr. Ostergard.[10] In addition, the plaintiff filed a claim against Ostergard's employer, the Board of Regents of the University of California.[11] The claim alleged negligent supervision and liability was based on the doctrine of respondeat superior.[12]

The defendants moved to dismiss under Federal Rules of Civil Procedure 12 (b)(2), for lack of *in personam* jurisdiction, and under Rule 12 (b)(6), for eleventh amendment immunity.[13] The court found that although the plaintiff met the requirements of the long-arm statute, the defendants' contacts with New Mexico were insufficient to allow personal jurisdiction and granted the motion to dismiss.[14] The decision was not appealed.

III. DISCUSSION AND ANALYSIS

The *Beh* court had to decide whether it could exercise personal jurisdiction over the defendants.[15] Federal courts, in diversity cases, must apply the substantive law of the forum state.[16] Consequently, the law of New Mexico had to be applied in this case.

There are three elements of personal jurisdiction in New Mexico.[17] First, the defendant must commit one of the acts enumerated in the long-arm statute.[18] Second, the cause of action must arise from one of the acts in the long-arm statute.[19] After the long-arm statute is satisfied, a third element, which is the constitutional requirement of due process, must be

8. *Id.*
9. *Id.*
10. *Beh*, 657 F. Supp. at 174.
11. *Id.*
12. *Id.*
13. *Id.*; Motion to Dismiss First Amended Complaint at 1. Defendants alleged that Dr. Ostergard did not have the requisite minimum contacts for personal jurisdiction. *Id.* They also alleged that both Dr. Ostergard and the University of California were arms and alter-egos of the state of California and therefore the action was barred by the Eleventh Amendment to the United States Constitution. *Id.*
14. *Beh*, 657 F. Supp. at 176, 178, 180.
15. *Id.* at 174.
16. *Id.* at 174 (citing Yarbrough v. Elmer Bunker and Associates, 669 F.2d 614, 616 (10th Cir. 1982)); FED. R. CIV. P. 4(e).
17. *Beh*, 657 F. Supp. at 174. The *Beh* court stated that personal jurisdiction in New Mexico had three elements. *Id.* There are two elements in the New Mexico long-arm statute. The third element is a federal law requirement.
18. *Id.*
19. *Id.*

met.[20] While due process is a federal law issue, New Mexico courts must determine if the defendant has had sufficient minimum contacts with the forum to satisfy the Due Process Clause of the United States Constitution.[21]

A. The Defendant Must Commit One of the Enumerated Acts in the New Mexico Long-Arm Statute.

The New Mexico long-arm statute reads as follows:

> A. Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts enumerated in this subsection thereby submits himself or his personal representative to the jurisdiction of the courts of this state as to any cause of action arising from:
> (1) the transaction of any business within this state; . . .
> (3) the commission of a tortious act within this state; . . .[22]

In applying the long-arm statute, the *Beh* court relied heavily on *Tarango v. Pastrana,*[23] to determine whether a tortious act had been committed in New Mexico.[24] In *Tarango* the plaintiff received a tubal ligation in Texas, and subsequently became pregnant when she returned to New Mexico.[25] The *Tarango* court implied that a tortious act had been committed in New Mexico.[26] The *Beh* court also relied on *Peralta v. Martinez,*[27] which held that even though a wrongful act may have occurred elsewhere, a tort is not complete until there is injury.[28] These holdings are based on the last act doctrine which states that the place of a wrong is where the last event takes place which is necessary to render the actor liable.[29] This test had been adopted in Illinois in connection with the Illinois long-arm statute in *Gray v. American Radiator & Sanitary Corp.*[30] New Mexico adopted a long-arm statute which is nearly identical to that of Illinois.[31] The interpretation of the Illinois statute by Illinois courts is highly persuasive in New Mexico for that reason.[32]

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20. *Id.*
21. *Id.*
22. N.M. STAT. ANN. § 38-1-16 (1978).
23. 94 N.M. 727, 616 P.2d 440 (Ct. App. 1980).
24. *Beh*, 657 F. Supp. at 175; *Tarango*, 94 N.M. at 728, 616 P.2d at 441.
25. *Tarango*, 94 N.M. at 728, 616 P.2d at 441.
26. *Id.*
27. 90 N.M. 391, 564 P.2d 194 (Ct. App. 1977).
28. *Id.* at 393, 564 P.2d at 196.
29. Gray v. American Radiator & Sanitary Corp., 22 Ill. 2d 432, 433-34, 176 N.E.2d 761, 762-63 (1961).
30. *Id.* at 432, 176 N.E.2d at 761.
31. *Beh*, 657 F. Supp. at 176 (citing Hunter-Hayes Elevator Co. v. Petroleum Club Inn. Co., 77 N.M. 92, 94, 419 P.2d 465, 467 (1966)).
32. *Id.*

The federal court applied these holdings to *Beh*.[33] The court determined that the plaintiff satisfied the first part of the test because the tort occurred in New Mexico.[34] The court reasoned that although the act took place in California, the injury occurred in New Mexico.[35]

B. The Cause of Action Must Arise from the Act in the Long-Arm Statute.

The New Mexico long-arm statute states:

> C. Only causes of action arising from acts enumerated in this section may be asserted against a defendant in an action in which jurisdiction is based upon this section.[36]

The federal district court found apparently inconsistent New Mexico precedent interpreting this section of the long-arm statute. In 1972, the New Mexico Supreme Court in *Winward v. Holly Creek Mills, Inc.*[37] stated that the purpose of the provision cited above, requiring that the cause of action arise from one of the acts in the long-arm statute, is to insure a close connection between the non-resident defendant's jurisdictional activities and the cause of action against which he must defend.[38] The federal district court found that in a later case, *Moore v. Graves*,[39] the New Mexico Court of Appeals mischaracterized *Holly Creek Mills*.[40] In 1982, the *Moore* court stated that a non-resident defendant must avail himself of the privilege of conducting activities in New Mexico to invoke the benefits and protection of its laws.[41] The *Moore* court further stated that *this activity is not required to be directly related to plaintiff's cause of action as long as there are sufficient contacts*.[42] Later in 1984, the New Mexico Supreme Court in *Customwood Mfg. v. Downey Construction Co., Inc.*[43] held that a "single transaction of business within this State can be sufficient to subject a nonresident defendant to the jurisdiction of New Mexico courts, provided that the cause of action being sued upon arises from that particular transaction of business."[44]

The *Beh* court suggested that the *Holly Creek Mills* rule was reinstated

33. 657 F. Supp. at 176.
34. *Id.*
35. *Id.*
36. N.M. STAT. ANN. § 38-1-16 (1978).
37. 83 N.M. 469, 493 P.2d 954 (1972).
38. *Id.* at 471-72, 493 P.2d at 956-57.
39. 99 N.M. 129, 654 P.2d 582 (Ct. App. 1982).
40. *Beh*, 657 F. Supp. at 176, n.3.
41. 99 N.M. at 131, 654 P.2d at 584, *quoted in Beh*, 657 F. Supp. at 176, n.3.
42. 99 N.M. at 131, 654 P.2d at 584 (emphasis added).
43. 102 N.M. 56, 691 P.2d 57 (1984).
44. *Id.* at 57, 691 P.2d at 58.

by the New Mexico Supreme Court in *Customwood*.[45] The *Beh* court pointed out that the New Mexico Supreme Court cited *Moore v. Graves*[46] for the proposition that a single transaction of business was sufficient, provided the cause of action arose from that particular transaction, despite the opposite holding in *Moore*.[47] *Moore* and *Customwood* appear inconsistent because *Moore* stated that the activities in New Mexico were not required to be directly related to the cause of action as long as there were other sufficient contacts with the state.[48] The fact that *Moore* cited *Holly Creek Mills*, and *Customwood* cited *Moore* for inconsistent propositions has undoubtedly led to confusion in New Mexico law. The *Beh* court reasoned that in diversity cases it must follow the New Mexico Supreme Court, and held that *Holly Creek Mills*,[49] as reaffirmed by *Customwood*,[50] was the law of New Mexico.[51]

The *Beh* court determined that the plaintiff satisfied the second prong of the test because the cause of action arose from one of the enumerated acts in the long-arm statute.[52] This was a commission of a tortious act in New Mexico.[53] The federal court thus continued its analysis on that basis.[54]

C. *The Defendant Must Have Sufficient Minimum Contacts With the Forum State to Satisfy the Due Process Clause of the United States Constitution.*

In determining the type of activity that satisfies the Due Process Clause, the *Beh* court relied on *Tarango*[55] and *Hanson v. Denckla*.[56] *Tarango* held that the fact that the alleged tort may have been completed in New Mexico is insufficient to confer jurisdiction on a New Mexico court because the minimum contact requirement of the Due Process Clause must also be met.[57] The defendant must have sufficient minimum contacts with the forum so that hailing the defendant into court will not offend traditional notions of fair play and substantial justice.[58] *Hanson* defines the activity as "some act by which the defendant purposefully avails itself of the

45. *Beh*, 657 F. Supp. at 176, n.3.
46. 99 N.M. 129, 654 P.2d 582 (Ct. App. 1982).
47. *Beh*, 657 F. Supp. at 176, n.3.
48. *Moore*, 99 N.M. at 131, 654 P.2d at 584.
49. 83 N.M. 469, 493 P.2d 954 (1972).
50. 102 N.M. 56, 691 P.2d 57 (1984).
51. *Beh*, 657 F. Supp. at 176 n.3.
52. *Id.* at 176.
53. *Id.*
54. *Id.* at 177.
55. 94 N.M. 727, 616 P.2d 440 (Ct. App. 1980).
56. 357 U.S. 235, 253 (1958).
57. 94 N.M. at 728, 616 P.2d at 441.
58. International Shoe Co. v. State of Wash., 326 U.S. 310, 316 (1945).

privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[59]

The *Beh* court reasoned that performing an operation in California does not constitute "purposefully availing oneself of the privilege of conducting activities" within New Mexico.[60]The court looked to *Tarango*, which stated that when one seeks out professional services which are personal in nature, and travels to the locality, one must realize that the services are directed to the needy person and not to a particular place.[61] The *Tarango* court concluded that while it is true that if services are negligently rendered, the consequences will be felt wherever the patient goes, it is unfair to permit a suit in whatever distant jurisdiction the patient may go.[62]

Therefore, the *Beh* court held that in order to establish *in personam* jurisdiction, the plaintiff must allege some act which satisfies the minimum contacts requirement in order to confer jurisdiction on any court, state or federal, in New Mexico.[63] Beh alleged that Dr. Ostergard published articles that circulated in New Mexico which were directly related to the improper research and experimentation he conducted by implanting I.U.D.'s in Ms. Beh and others.[64] It was further alleged that Dr. Ostergard could have expected to benefit professionally by having his articles read by colleagues in New Mexico and he also benefited monetarily from A.H. Robins Co. for doing research using their product, and gaining it national attention.[65]

The *Beh* court, citing *Jones v. 3M Company*,[66] found these contacts insufficient.[67] The *Jones* decision required that the defendants do some act to purposefully avail themselves of the laws of the forum as a basis for personal jurisdiction.[68] The *Jones* court held that the publication of information that fortuitously finds its way into this forum is not such an act.[69] To obtain personal jurisdiction based on publication of information, the plaintiff must allege that the defendant had a regular distribution plan for his publication into New Mexico from which he derived commercial

59. 357 U.S. at 253.
60. 657 F. Supp. at 177.
61. 94 N.M. at 729, 616 P.2d at 442 (quoting Gelineau v. New York Univ. Hosp., 375 F. Supp. 661 (D.N.J. 1974)).
62. *Id.*
63. *Beh*, 657 F. Supp. at 177.
64. *Id.* at 177-78.
65. *Id.* at 178.
66. 107 F.R.D. 202, 207 (D.N.M. 1984).
67. 657 F. Supp. at 178.
68. 107 F.R.D. at 207.
69. *Id.*

benefit,[70] or that the defendant intentionally harmed or defamed the plaintiff in New Mexico by publishing the article.[71] Thus, the *Beh* court applied these standards, determined that it could not exert personal jurisdiction, and granted the defendants' motion to dismiss.[72]

D. The Beh Opinion Raises Further Questions Regarding Personal Jurisdiction.

Beh left unanswered some questions concerning personal jurisdiction. The court, in a footnote, stated that the Board of Regents arguably could be considered "present" in New Mexico because they transacted business and owned property within the state.[73] In that situation, the plaintiff need not use the long-arm statute, but could effect service on the agent within the state and thus obtain general jurisdiction over the defendant.[74]

This raises the question of whether the court has an obligation to exert personal jurisdiction over a defendant before the court when the plaintiff has alleged the wrong grounds for personal jurisdiction. The *Beh* court did not address this issue other than to state that the plaintiff had relied on extra-territorial jurisdiction, and the court must accordingly ignore allegations of acts not specifically enumerated in the long-arm statute.[75] The court is not an investigative body, and if the plaintiff does not bring forth the proper grounds for personal jurisdiction with specific facts to support the claim, the burden on the court to research unargued issues on which no facts are presented would be too great. In the instant case, had the plaintiff alleged personal jurisdiction over the University of California because of presence in the state, and effected service of process upon its agent in New Mexico, the court might have concluded there was general jurisdiction and then would have had to address the immunity issue.[76]

Another issue that would have arisen had the plaintiff alleged general jurisdiction is whether a cause of action must arise out of some contacts with the state. A New Mexico case, *Holly Creek Mills*, states that when

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70. *See* Blount v. T.D. Publishing Corp., 77 N.M. 384, 389, 423 P.2d 421, 426 (1966). *Blount* held that a regular distribution plan with commercial benefit to the non-resident was sufficient contact to satisfy the due process requirement and subject the defendants to the jurisdiction of New Mexico Courts.

71. *See* Calder v. Jones, 465 U.S. 783, 788-91 (1984). *Calder* held that personal jurisdiction was proper in a libel suit when intentional harm resulted from publication of an article within the state.

72. *Beh*, 657 F. Supp. at 178, 180.

73. *Id.* at 175 n.2.

74. *Id.*; FED. R. CIV. P. 4(f).

75. *Beh*, 657 F. Supp. at 175 n.2.

76. The immunity issue was raised by defendants. Finding no personal jurisdiction, however, the *Beh* court did not reach the immunity issue with respect to the University of California. *Id.* at 174.

personal jurisdiction is based on the long-arm statute, the cause of action must arise out of the acts alleged to meet minimum contacts with the forum.[77] In *Holly Creek Mills*, the plaintiff relied on the "transaction of any business" provision in the long-arm statute as a basis for personal jurisdiction.[78] The question, however, arises whether there is a constitutional due process question at all when an out of state university is sued in New Mexico after it is found to be "present" in New Mexico. There is no New Mexico case law on this issue, and *Beh* does not address this question. Theoretically, there would be no due process analysis required because of the University of California's transaction of business and ownership of property within the state. These activities would conceivably make it "present" in the state. *Moore* likewise supports the notion that the cause of action would not have to arise out of the activity within the state as long as there are other sufficient contacts with the state.[79] However, both *Holly Creek Mills* and *Moore* are cases in which personal jurisdiction was based on the New Mexico long-arm statute rather than general jurisdiction, and neither case addressed the question presented here.

In deciding this case, the *Beh* court relied very heavily on *Tarango*.[80] The court stated that the defendant's case was indistinguishable from *Tarango*, "a leading case in this jurisdiction since 1980."[81] While *Tarango* is on point with *Beh*, it is a state court of appeals opinion,[82] and not definitive on a federal constitutional issue.

Three months after *Beh* was decided, the New Mexico Supreme Court decided *Valley Wide Health Services, Inc. v. Graham*.[83] In *Graham*, the plaintiff filed a wrongful death action against a Colorado health care clinic.[84] The plaintiff, a New Mexico resident, took his daughter to Colorado to the clinic.[85] The doctor diagnosed a virus, and prescribed cold baths, aspirin and Tylenol.[86] Two days later, the plaintiff called the clinic to advise the doctor that his daughter's temperature was high and she had begun to vomit.[87] The doctor was not there to receive the call but returned the call to the plaintiff's residence in New Mexico.[88] The doctor advised the plaintiff that the virus was running its course and to continue

77. 83 N.M. at 472, 493 P.2d at 957.
78. *Id.* at 471, 493 P.2d at 956.
79. 99 N.M. at 131, 654 P.2d at 584.
80. 94 N.M. 727, 616 P.2d 440 (Ct. App. 1980).
81. *Beh*, 657 F. Supp. at 180.
82. *Tarango*, 94 N.M. 727, 616 P.2d 440 (Ct. App. 1980).
83. 106 N.M. 71, 738 P.2d 1316 (1987).
84. *Id.* at 72, 738 P.2d at 1317.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*

the recommended treatment.[89] The next day, the daughter died of peritonitis, secondary to pneumonia.[90]

The trial court granted the motion to dismiss for lack of personal jurisdiction.[91] The court of appeals reversed the trial court, holding that as a result of the doctor/patient relationship formed in Colorado, the doctor was compelled to make the telephone call to the plaintiff at his home in New Mexico.[92] This single act of returning the plaintiff's telephone call to New Mexico was sufficient to confer personal jurisdiction on the New Mexico court.[93]

The supreme court reversed the court of appeals[94] and used the same three part analysis used in *Tarango* and *Beh*:[95] There is personal jurisdiction in New Mexico if (1) the defendant did one of the acts enumerated in the long-arm statute; (2) the plaintiff's cause of action arose from that act; and (3) the defendant had minimum contacts with New Mexico sufficient to satisfy constitutional due process.[96] The supreme court held that the doctor did not "purposefully initiate" activity in the state.[97] The single phone call lacked the purposefulness of defendant's contact which is demanded by due process.[98]

The *Graham* opinion is the next step beyond *Tarango* and *Beh*. Rather than mail bills into the state as in *Tarango*, or publish research in the state, as in *Beh*, the *Graham* court had to decide whether a returned phone call was an act in which the doctor purposefully availed himself of the law of the forum.[99] It is unlikely that had the supreme court decided *Graham* before the federal court decided *Beh*, that the *Beh* decision would have been different. However, one wonders how the *Beh* court would have decided *Graham* had they been faced with those facts. *Graham* clearly goes further than *Tarango* in establishing contact with the forum state.

Beh, therefore, is consistent with a subsequent New Mexico Supreme Court opinion in a case involving a tortious act within the New Mexico long-arm statute.[100] Both the United States District Court and the New Mexico Supreme Court recognized that some act in which the defendant

89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* at 73, 738 P.2d at 1318.
95. *Id.* at 72-73, 738 P.2d at 1317-18.
96. *Id.* The first two elements are found in the New Mexico long-arm statute. The third element is a federal law requirement.
97. *Id.* at 73, 738 P.2d at 1318.
98. *Id.*
99. *Id.* at 72-73, 738 P.2d at 1317-18.
100. *See* Valley Wide Health Services, Inc. v. Graham, 106 N.M. 71, 738 P.2d 1316 (1987).

purposefully initiated activity within the state is required to exert personal jurisdiction.[101] Although this is a federal due process requirement and not a requirement under the New Mexico long-arm statute, both federal and state courts must address the issue. The New Mexico courts, however, are not in agreement as to what types of activities meet the minimum contacts requirement needed to exert personal jurisdiction over an out of state defendant.[102]

E. The Case Was Dismissed Rather than Transferred to the Proper Forum.

Although under Federal Rules of Civil Procedure 12 (b)(2) a court should generally dismiss actions when it cannot exercise *in personam* jurisdiction over the defendant, plaintiffs often move the court under 28 U.S.C. Section 1404(a) to transfer the case to a forum which has jurisdiction.[103] The federal statute 28 U.S.C. Section 1404(a) provides for transfer:

> (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.[104]

The *Beh* court raised and decided the issue of whether the court can transfer under Section 1404(a) if it determines that it does not have personal jurisdiction over the defendants.[105] Neither the United States Supreme Court nor the Tenth Circuit has considered the issue.[106] The majority of courts in other circuits and districts, however, hold that lack of personal jurisdiction does not preclude transfer under Section 1404(a).[107]

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101. *Id.* at 73, 738 P.2d at 1318; *Beh*, 657 F. Supp. at 177-78.

102. The court of appeals in *Graham* held that the single act of returning a phone call from Colorado to New Mexico was sufficient for personal jurisdiction. Graham v. Valley Wide Health Services, Inc., No. 8602 (N.M. Ct. App. Apr. 30, 1987). The supreme court reversed the decision and held that the phone call did not "purposefully initiate" activity in the state, "thus invoking the benefits and protections" of New Mexico laws, which is demanded by due process. *Graham*, 106 N.M. at 73, 738 P.2d at 1318.

103. *See infra* note 104.

104. 28 U.S.C. § 1404(a) concerns the transfer of a case from a forum of proper venue to another forum of proper venue. *Beh*, 657 F. Supp. at 178-79 n.6. The *Beh* court determined that venue was proper in New Mexico and 28 U.S.C. § 1404(a) applied. *Id.*

105. 657 F. Supp. at 178.

106. *Id.*

107. *Id.* (citing Reyno v. Piper Aircraft Co., 630 F.2d 149, 164-65 (3d Cir. 1980), *rev'd on other grounds*, 454 U.S. 235 (1982); Torres v. Torres, 603 F. Supp. 440, 442 (D.N.Y. 1985); Welsh v. Cunard Lines, Ltd., 595 F. Supp. 844, 845 (D. Ariz. 1984); Stevens Yachts of Annapolis, Inc. v. American Yacht Charters, Inc., 571 F. Supp. 467, 468 (D. Pa. 1983); Koehring Co. v. Hyde Constr. Co., 324 F.2d 295, 297-98 (5th Cir. 1964); United States v. Berkowitz, 328 F.2d 358, 361 (3rd Cir. 1964), *cert. denied*, 379 U.S. 821 (1961). *Contra* Rhea v. Muskogee Gen. Hosp., 454 F. Supp. 40, 43 (E.D. Okla. 1978)).

The *Beh* court also considered 28 U.S.C. Section 1406(a) which reads:

> (a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.[108]

The *Beh* court[109] considered the United States Supreme Court ruling on 28 U.S.C. Section 1406(a) in *Goldlawr, Inc. v. Heiman*,[110] and was persuaded by a United States district court interpretation of that ruling in *Rhea v. Muskogee General Hospital*.[111] In *Goldlawr*, the Supreme Court held the purpose of transfer was "avoiding the injustice which had often resulted to plaintiffs from dismissal of their actions merely because they had made an erroneous guess with regard to the existence of some elusive fact."[112] The *Goldlawr* Court further held that a mistake as to an "elusive fact of minimum contacts" necessary to support personal jurisdiction mandates transfer to a forum where jurisdiction could be obtained.[113] Dismissal was held to be inappropriate when the result would cause the plaintiff to lose its cause of action under the statute of limitations merely because of a mistake.[114]

Rhea interpreted *Goldlawr* in a case where the plaintiff knew or should have known that service of process could not have been effected over the plaintiff in the district where suit was filed.[115] The *Beh* court relied on *Rhea* when it stated that the plaintiff must reasonably and in good faith believe that the court has personal jurisdiction over the defendant in order to avoid dismissal.[116] The *Beh* court held that in the interest of justice it was persuaded to dismiss rather than transfer the plaintiff's claim to the proper federal district court in California.[117]

The *Beh* case is distinguishable from *Rhea* in that the plaintiff in *Rhea* knew and admitted that no personal jurisdiction existed in the district.[118] The *Beh* court admitted this distinction but stated that the *Beh* case fell between *Goldlawr* and *Rhea*.[119] The *Beh* court stated that unlike *Goldlawr*, the plaintiff in *Beh* had not made a reasonable mistake as to some elusive

108. 28 U.S.C. § 1406(a) concerns the transfer of a case from a forum of improper venue to a forum of proper venue. *Beh*, 657 F. Supp. at 178-79 n.6.
109. 657 F. Supp. at 179.
110. 369 U.S. 463 (1962).
111. 454 F. Supp. 40 (E.D. Okla. 1978).
112. 369 U.S. at 466.
113. *Id.*
114. *Id.*
115. *Beh*, 657 F. Supp. at 179 (quoting *Rhea*, 454 F. Supp. at 43).
116. 657 F. Supp. at 179.
117. *Id.* at 180.
118. 454 F. Supp. at 42.
119. 657 F. Supp. at 179.

fact.[120] Further, the *Beh* court cited twenty five years of case law which clarified the concept of minimum contacts since *Goldlawr* was decided in 1962.[121] On the assumption that *Tarango* was the ruling authority in New Mexico and indistinguishable from *Beh*, the court found that there was no elusive fact in this case with respect to personal jurisdiction.[122]

New Mexico courts have held that the question of minimum contacts should be decided on a case-by-case basis.[123] There is no uniform understanding of the minimum contacts requirement by the New Mexico courts, as evidenced by the court of appeals' and supreme court's opposite jurisdictional rulings in *Graham*.[124] Combined with inconsistent rulings is uncertainty with regard to what extent the New Mexico long-arm statute meets the federal due process/minimum contacts requirement.[125] *Beh* and *Tarango* are good examples of cases which meet the two requirements of the long-arm statute, but fail to meet the federal minimum contacts requirement.[126] Conversely, it may be possible to meet the minimum contacts requirement and not meet the requirements of the New Mexico long-arm statute. For example, if the defendant does not commit an act which is enumerated in the long-arm statute or if the cause of action does not arise from that act, the long-arm statute requirements will not be met regardless of other minimum contacts with the state.[127] It is apparent that the law is not well settled in New Mexico and that there is still confusion over the minimum contacts analysis in personal jurisdiction.

A broad interpretation of *Goldlawr* would result in a case being transferred regardless of whether it was reasonable for the plaintiff to file suit in the improper district.[128] This standard encourages the plaintiff to seek the most favorable forum for his or her cause, knowing that the court will transfer rather than dismiss the claim. For example, if the statute of limitations has run in the proper forum, the plaintiff could file in an improper forum and request a transfer under *Goldlawr*.[129] The transferee state must then determine which state law to apply.[130] If it applies the

120. *Id.*

121. *Id.* at 180 (citing Shaffer v. Heitner, 433 U.S. 186 (1977); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Rush v. Savchuk, 444 U.S. 320 (1980); Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985)).

122. 657 F. Supp. at 180.

123. *Holly Creek Mills*, 83 N.M. at 472, 493 P.2d at 957.

124. 106 N.M. at 72, 738 P.2d at 1317.

125. *Id.* at 72, 73, 738 P.2d at 1317, 1318.

126. *Beh*, 657 F. Supp. at 176-78; *Tarango*, 94 N.M. at 728, 616 P.2d at 441.

127. N.M. STAT. ANN. § 38-1-16 (1978).

128. 369 U.S. at 466-67.

129. *Id.*

130. Under Klaxon v. Stentor Electric Mfg. Co., 313 U.S. 487 (1941), a court ordinarily must apply the choice-of-law rules of the State in which it sits. However, where a case is transferred pursuant to 28 U.S.C. § 1404(a), it must apply the choice-of-law rules of the State from which the case was transferred. Van Dusen v. Barrack, 376 U.S. 612 (1946). . . .
Piper Aircraft Co. v. Reyno, 454 U.S. 234, 243 n.8 (1981).

statute of limitations of the transferor state, it will hear a case that could not have been filed initially in the transferee state.[131]

That is exactly what happened on the same day *Beh* was decided. The United States District Court in New York decided *Smith v. Morris & Manning*[132] and held that the district court had power to transfer a legal malpractice action even though it lacked personal jurisdiction over the defendants.[133] Following *Goldlawr*,[134] the court held that in order to promote adjudication on the merits, venue statutes must be construed to authorize transfer of cases lacking personal jurisdiction, *however wrong* the plaintiff has been in his choice of forum.[135] The possibility that the claim was time-barred under Georgia law and that the plaintiff was "forum shopping" did not dictate dismissal. While some courts deny transfer and dismiss the claim if it is time-barred in the transferee state, the court reasoned the better practice is to transfer because the transferee court may choose to apply the statute of limitations of the transferee state.[136] The court concluded that it was preferable to leave the statute of limitations question to the transferee court in Georgia, and transferred the case in the interest of justice.[137]

Rhea, on the other hand, requires a good faith belief and a reasonable mistake to allow a transfer rather than a dismissal.[138] If a case is dismissed after the statute of limitations has run in the proper district, plaintiffs lose their day in court.[139] The *Beh* court stated that the claim of personal jurisdiction in New Mexico was made in good faith, but was not a reasonable mistake in light of the case law.[140] Because the statute of limitations had run in California, where personal jurisdiction was proper, the plaintiff lost her right to obtain personal jurisdiction in the only remaining forum by the dismissal of the case in New Mexico. This is a harsh result for a plaintiff who has brought a claim for personal jurisdiction in good faith. The above cases demonstrate that the jurisdictions are split on the question of when transfer should be allowed.

Perhaps twenty five years of federal case law on minimum contacts is well settled. New Mexico case law, however, is less clear. Given the policy of deciding the minimum contacts question on a case-by-case basis, it is questionable whether plaintiffs are unreasonable in bringing suits in federal district court. As late as 1987, the New Mexico Court of Appeals held that one phone call was enough to establish minimum contact suf-

131. *Goldlawr*, 369 U.S. at 466.
132. 657 F. Supp. 180 (S.D.N.Y. 1987).
133. *Id.* at 181.
134. 369 U.S. at 466-67.
135. *Morris & Manning*, 657 F. Supp. at 181.
136. *Id.* at 182.
137. *Id.*
138. 454 F. Supp. at 42-43.
139. *Goldlawr*, 369 U.S. at 466.
140. 657 F. Supp. at 179.

ficient to exercise personal jurisdiction.[141] Because the supreme court reversed this decision,[142] it is still apparent that a lack of consensus among New Mexico courts creates continued confusion for the New Mexico bar. Opinions such as *Beh* will help to clarify the concept within the framework of New Mexico law, but the decision is incorrect in holding that a mistake about minimum contacts is unreasonable.

IV. CONCLUSION

The United States District Court, District of New Mexico, succeeded in providing New Mexico state courts with a clear and persuasive application of New Mexico law on personal jurisdiction. The court discussed and clarified the two elements of personal jurisdiction using the New Mexico long-arm statute.[143] In addition, the court recognized a third element: the federal due process/minimum contacts requirement must be satisfied.[144]

The requirements of the long-arm statute are first, the defendant must have committed one of the enumerated acts in the long-arm statute and second, the cause of action must arise out of one of the enumerated acts.[145] *Beh* applied New Mexico case law, which recognizes that a tort occurs when an injury occurs.[146]

The federal due process/minimum contacts requirement is the third element.[147] The defendant must have sufficient minimum contacts with the forum so that hailing him into court will not offend traditional notions of fair play and substantial justice.[148] The court analyzed New Mexico and federal case law in conjunction with the facts of *Beh* to determine whether the court could assert personal jurisdiction in this case.

The plaintiff in *Beh* established that the requirements of the long-arm statute had been met.[149] The tortious act had been committed in New Mexico, because the injury occurred in New Mexico.[150] Also, the cause of action arose out of the commission of that act.[151] However, the de-

141. *Graham*, 106 N.M. at 72, 738 P.2d at 1317.
142. *Id.* at 73, 738 P.2d at 1318.
143. *Beh*, 657 F. Supp. at 174-78.
144. *Id.* at 174. The *Beh* court stated there are three elements of personal jurisdiction in New Mexico. *Id.* However, the New Mexico long-arm statute contains two elements. The third element is a federal law requirement.
145. *Id.* at 174.
146. *Tarango*, 94 N.M. at 728, 616 P.2d at 441; *see* Peralta v. Martinez, 90 N.M. 391, 564 P.2d 194 (Ct. App. 1977), *cert. denied*, 90 N.M. 636, 567 P.2d 485 (1977).
147. *Beh*, 657 F. Supp. at 174.
148. *Id.* at 177.
149. *Id.* at 176.
150. *Id.*
151. *Id.*

fendant's contacts with New Mexico were found to be insufficient for the purpose of protecting the defendant's due process rights.[152] The court held that publication of the results of research was insufficient to meet the minimum contacts requirement to exert personal jurisdiction over the defendant.[153]

After determining that personal jurisdiction was not proper in New Mexico, the case was dismissed rather than transferred to the proper forum.[154] The plaintiff lost her opportunity to obtain personal jurisdiction in the proper forum. This result seems harsh in light of the confusion in New Mexico law.

While the opinion does not answer all questions on personal jurisdiction, it is clearly written and clarifies the complex and apparently inconsistent New Mexico law. The federal district court decision was consistent with past and subsequent New Mexico case law and the federal due process/minimum contacts requirement.[155] This opinion will not be binding on New Mexico state courts, but is persuasive in clarifying and simplifying New Mexico law on personal jurisdiction over foreign defendants.

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152. *Id.* at 178.

153. *Id.*

154. *Id.* at 180.

155. *See* Valley Wide Health Services, Inc. v. Graham, 106 N.M. 71, 738 P.2d 1316 (1987); Winward v. Holly Creek Mills, Inc., 83 N.M. 469, 493 P.2d 954 (1972), Tarango v. Pastrana, 94 N.M. 727, 616 P.2d 440 (Ct. App. 1980). *See also* Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Hanson v. Denckla, 357 U.S. 235 (1958); International Shoe Co. v. State of Wash., 326 U.S. 310 (1945).