NEW MEXICO LAW REVIEW

Volume 52
Issue 2 *Summer*

Summer 2022

A Model of Collegial Judicial Decision-Making: The Ransom-Montgomery Years on the New Mexico Supreme Court

Michael B. Browde
University of New Mexico - School of Law

Mario E. Occhialino
University of New Mexico - School of Law

A MODEL OF COLLEGIAL JUDICIAL DECISION-MAKING: THE RANSOM-MONTGOMERY YEARS ON THE NEW MEXICO SUPREME COURT

Michael B. Browde & Mario E. Occhialino*

INTRODUCTION

The New Mexico Supreme Court has had many distinguished justices who stood out among their colleagues. Occasionally, the Court's history has been graced by the coming together of two or three justices who, while working together, provided a special mix of respectful differing views and philosophies that enhanced the Court's development of the law, the public's better understanding of the judicial process, and the special role of the judiciary in our system of government.

Justice Richard Ransom and Justice Seth Montgomery were one such team. Justice Ransom served on the court from 1987 until his retirement in 1997.[1] He served on the five-member high Court with twelve different fellow justices,[2] many of whom were distinguished in their own right. When, however, Justice Seth Montgomery joined the Court in 1989,[3] something special occurred. The power of Justice Montgomery's intellect and his well-crafted opinions seemed to spark a special relationship between the two, which led the authors to pursue this opportunity to explore that relationship and its influence on the development of the law. Their collaboration greatly enhanced the development of New Mexico law.

---

* Michael and Ted are graduates of Georgetown University School of Law where each was first introduced to the *Palsgraf* case by the superb Torts professor, Professor Thomas O'Toole. They found their way through different routes to the UNM School of Law faculty under the leadership of former Dean Fred Hart, whose inspiration and memory they cherish. Michael and Ted are now Emeriti faculty at the law school.

The authors express their gratitude to Justice Ransom who kindly offered his encouragement and assistance to their efforts, and to attorney Andy Montgomery who helpfully reviewed earlier drafts and also tracked down the papers of his dad, Justice Montgomery, in the bowels of the New Mexico Supreme Court library. Those papers were kindly made available to the authors by Clerk of the Court Joey Moya. The authors also thank Dean Sergio Pareja for a research grant that allowed them to hire law student Lawson Stiff, who provided valuable research work on the article. Elisa Cibils deserves special thanks for shepherding the article through the editorial process, as do Law Review editors Kathryn Sears and Alyssa Segura.

1. Justice Ransom sat on the Court from January 1, 1987, through February 7, 1997. *See* Free Law Project, *Richard E. Ransom (New Mexico Supreme Court)*, CT. LISTENER (Apr. 23, 2022), https://www.courtlistener.com/person/5167/richard-e-ransom/.

2. The justices were: Dan Sosa Jr., Harry E. Stowers Jr., Mary C. Walters, Tony Scarborough, Joseph F. Baca, Charles B. Larrabee, Kenneth B. Wilson, Gene E. Franchini, Stanley F. Frost, Pamela B. Minzner, Dan A. McKinnon III, and Patricio M. Serna. Details on terms of their service can be found on the Court Listener Website. *See id.*

3. Justice Montgomery sat on the Court from September 5, 1989, through October 27, 1994. *See* Free Law Project, *Seth D. Montgomery (New Mexico Supreme Court)*, CT. LISTENER (Apr. 23, 2022), https://www.courtlistener.com/person/5162/seth-d-montgomery/.

Justice Montgomery served for only five years with Justice Ransom before his premature resignation for health reasons in 1994. Although there is much in their written opinions upon which they agreed, Justice Montgomery often provided an alternative vision of the law from that of Justice Ransom. Their differing jurisprudential approaches and perspectives did not preclude efforts to accommodate each other, but when that was not possible, they did not engage in angry dissents or sharp criticism of the other's views. Instead, when they wrote separately and disagreed, they did so with clear statements of their differing views and usually with an acknowledgement of and warm respect for the other person's perspective—a special mode of collegial decision-making worthy of description and further analysis for the ways in which it advanced the law and laid the groundwork for further legal development.

After first providing brief biographies of the justices and their personal relationship, the article examines two subject matter areas where their differing views were most fully developed and made a significant contribution to the development of the law:

- First, the restructuring of the law of negligence with an emphasis on the creation and nature of a duty of care; and
- Second, the legal principles governing the jurisdiction of the New Mexico appellate courts and the resulting tension between legislative and judicial authority over provisions governing access to the appellate courts.

The article concludes with our assessment that sound judicial development of the law often is a product of the interplay between justices of different legal philosophies, who may disagree profoundly on some significant issues, but who respect and learn from the views of one another. Such was their relationship, and New Mexico law is better because these two jurists shared service on the New Mexico Supreme Court, leaving a body of work that resolved many questions and, when agreement was not possible, provided a sound foundation for their successors to continue to refine New Mexico law.

I. THE PERSONAL BACKGROUNDS OF THE JUSTICES AND THEIR RELATIONSHIP

Richard Ransom and Seth Montgomery were only casual acquaintances when they came to the Court. Though they were men of a similar generation, they were molded by different backgrounds and different professional experiences.

1. Richard E. Ransom[4]

Justice Ransom was born December 9, 1932, in Hampton, Iowa. His parents, both teachers, had taken an adventurous honeymoon by motor car through the southwest to California in the mid-twenties, vowing to move to New Mexico to make their home at the earliest opportunity. The move came in 1937, when his father accepted a position as principal of the Training School at New Mexico Normal College in Las Vegas. With his father's commission as a Navy officer at the outbreak

4. The following biography was provided by Justice Ransom.

of World War II, Richard was destined to complete his school years at nine schools in five communities in four states.

Ransom was a 1950 Albuquerque High School graduate. He entered the University of New Mexico (UNM) as a Navy ROTC Marine Corps candidate, majoring in political science with a concentration in Eighteenth Century political philosophy. He enjoyed sports and was a track letterman in high school and college. At UNM, he was president of the senior men's honorary society, the political science fraternity, and the senior class. Following graduation with University Honors in 1954, Ransom served in the Marines as a rifle platoon leader and company commander.

Justice Ransom attended law school at Georgetown University, receiving his law degree in 1959. Returning to New Mexico, he joined the law firm of Smith and Kiker, where his practice consisted largely of representing persons seeking compensation for injuries suffered through the fault of others. During his twenty-eight years of practice, he won several landmark New Mexico consumer protection cases establishing liability for suppliers of defective and toxic products. He also served on the Supreme Court Committee on Uniform Civil Jury Instructions, serving as Chair from 1982 to 1987. He was selected as a Fellow of the International Academy of Trial Lawyers and served on its board of directors from 1979 to 1985. He also served as State Chairman of the American College of Trial Lawyers from 1984 to 1986.

In 1986, Ransom was elected to the New Mexico Supreme Court, serving as Chief Justice from 1991 to 1994. During his ten years on the Court, Justice Ransom authored nearly 300 opinions, including thirty-five special concurrences and fifteen dissents. He also authored over 100 unpublished opinions.

As Chief Justice, among other administrative initiatives, he oversaw the changes in appellate jurisdiction that allowed more discretionary review by the Supreme Court and full court rather than panel participation on cases reviewed by the Supreme Court. After his retirement from the bench, he served for a number of years as an adjunct professor at the UNM School of Law and was the recipient of numerous awards from the Albuquerque Bar, the State Bar, and the Law School.

2. Seth D. Montgomery[5]

A native of Santa Fe, New Mexico, Seth Montgomery was born on February 16, 1937, to A.K. and Ruth Montgomery. Seth was educated in the public schools of Santa Fe, graduating from Santa Fe High School in 1955. He entered Princeton University as a Navy ROTC candidate, and graduated *magna cum laude* with a philosophy degree in 1959. He saw duty as a Navy line officer for three years before entering Stanford Law School, where he became editor-in-chief of the Stanford Law Review, graduating near the top of the class in 1965.

After completing his law studies, Seth returned to Santa Fe, joining his father's law firm, now known as Montgomery & Andrews. During his twenty-four years in private practice, Seth developed expertise in complex litigation,

5. The following biography was gleaned from an obituary published in THE SANTA FE NEW MEXICAN. Daniel Chacon, *Former Chief Justice Recalled as 'The Soul of the Judiciary*,*'* THE SANTA FE NEW MEXICAN, Sept. 19, 1998, at 9, 11.

transactional law, and appellate law. He was selected as a Fellow of both the American College of Trial Lawyers and the American College of Probate Counsel. He was sought out by many in the bar for his extraordinary judgment and sound advice, which he kindly and graciously shared with all. Seth was recognized not only for his legal expertise; he also exhibited his devotion to many local and national public service activities, including service on the Board of Bar Commissioners and as Chairman and President of the Santa Fe Opera. For thirteen years, he also served on the New Mexico Advisory Council to the National Legal Services Corporation, which provides civil legal services throughout the country to those in need. Despite being afflicted with multiple sclerosis in 1971, Seth continued to serve his clients, the profession, and many community service organizations with great dedication and good humor.

In 1989, he was appointed to the state Supreme Court by Governor Garrey Carruthers, where he served as Associate Justice. Toward the end of his career, he was elected as Chief Justice by his colleagues, serving until his retirement in October 1994. He remained active and involved in the law in his later years, authoring a seminal article on appellate jurisdiction that was completed by his attorney son, Andrew, after Seth's untimely death at age 61 on September 18, 1998.[6]

3. Justice Ransom's Reflection on Their Special Relationship

At the request of the authors, Justice Ransom provided the following recollection of his relationship with Justice Montgomery:

> Most often Justice Seth Montgomery and I were in full agreement over the disposition of cases authored by ourselves and by our colleagues in whose authorships we participated. Soon after his arrival on the Court, it became customary for me to drop by Justice Montgomery's chambers for chats in the late afternoon before his wife Peggy came with the specially equipped family van for his ride home.
>
> A close bond of friendship grew between us from those late afternoon discussions wherein we often strove, sometimes successfully but usually not, to recruit the other on a point of law against his will. One might think my background in tort litigation and his in transactional law would be a barrier to our collegial partnership, but our mutual respect for the other seemed to bring about harmony in any conflict.
>
> If we had separate identifiable bents, it may be that I began by looking to the sanctity of process while he began by looking to the sanctity of fairness in the result of the case in controversy—as is evident in many of the cases reviewed in this article.

6. *See* Seth D. Montgomery & Andrew S. Montgomery, *Jurisdiction as May be Provided by Law: Some Issues of Appellate Jurisdiction in New Mexico*, 36 N.M. L. REV. 215 (2006).

> Justice Montgomery was a man of unique courage, vigor, and perseverance. He lived by the motto: "I will do as much as I can as long as I can." The sound intellect and beauty of this man's personality are reflected in his Supreme Court authorships.

II. THE RANSOM-MONTGOMERY DIALOGUES EXPLORED THROUGH THEIR WRITTEN OPINIONS

The interplay between Justices Ransom and Montgomery touched on an array of issues dealt with by the Supreme Court, some of which might also merit further study.[7] The subjects chosen here provide instances where their views are most fully elaborated, allowing in depth exploration of their respective views and influence on one another, as well as their effect on the further development of the law.

Part A of this section of the article is an analysis of the development of the law of negligence, with a focus on the two justices' differing views of when a duty of care to prevent harm to others arises and the proper roles of the judge and jury in resolving the question. That task was not fully completed when they left the bench, and this sub-section concludes with a review of cases in which subsequent justices built on their body of work to further advance the law of negligence in New Mexico.

Part B, which follows, traces the development of the jurisdiction of New Mexico appellate courts. The major issue involves the interplay of New Mexico constitutional provisions dealing with appellate jurisdiction, the role of the legislature in determining appellate jurisdiction, and the proper role of the Court, exercising its rule-making power, to affect access to the appellate courts. Multiple cases dealing with this topic during their joint tenure on the Court provide fertile soil for exploring Justices Ransom and Montgomery's differing views, their attempts to accommodate their respective perspectives, and, when agreement was not possible, the civility of their expressions when writing separately.

A. The Nature and Source of the Defendant's Duty in Negligence Actions

For more than ninety years, law students have read and debated the iconic case of *Palsgraf v. Long Island Railroad Co.*[8] that attempted to decide when one person owes a duty of reasonable care to prevent harm to others and when the law will impose liability for a breach of that duty when the harm occurs. In *Palsgraf*, two eminent Judges of the New York Court of Appeals, Chief Judge Cardozo, writing

---

7. *See, e.g.*, State v. Anderson, 1993-NMSC-077, 116 N.M. 599, 866 P.2d 327 (Ransom, C.J., writing for the majority and Montgomery, J., dissenting) (differing over proper evaluation of evidence and procedural court Rules to allow withdraw of a guilty plea); State v. Neely, 1991-NMSC-087, 112 N.M. 702, 819 P.2d 249 (Ransom, J. specially concurring and Montgomery, J. dissenting in part) (differing views on the validity of the guilty but mentally ill verdict and the proper jury instructions); Trujillo v. City of Albuquerque, 1990-NMSC-083, 110 N.M. 621, 798 P.2d 571 (Ransom, J. writing for majority and Montgomery, J., dissenting in part) (differing views on the handling of evidentiary and legislative facts in a constitutional challenge to the legislative cap on damages); Hale v. Basin Motor Co., 1990-NMSC-068, 110 N.M. 314, 795 P.2d 1006 (Ransom, J., writing for the Court, Montgomery, J., specially concurring) (disagreeing over the distinction between "remedial" and "substantive" statutes and the importance of the underlying purpose of the statute).

8. 248 N.Y. 339, 162 N.E. 99 (1928).

for a four-person majority, and Judge Andrews, for a dissenting group of three, set forth starkly different views of those issues.

No doubt Richard Ransom and Seth Montgomery participated in this ritual introduction to the law of torts at their respective law schools. They could not have anticipated, however, that they would engage in that debate as members of the New Mexico Supreme Court. But they did so, and their dialogue laid the groundwork for their successors to choose a new path governing the law of tort duty and the law of negligence in New Mexico.

The discussion of this topic proceeds in four sections: first, a review of the Cardozo-Andrews debate in *Palsgraf;* second, a discussion of the negligence/duty cases during the Ransom-Montgomery era; third, the influence of Justices Ransom and Montgomery on the later development of the law; and finally, a summary review of the negligence/duty issue.

1. The Palsgraf Case

It is axiomatic that a negligence claim requires the existence of a duty owed by a defendant to a plaintiff, breach of that duty, which is typically based upon a standard of reasonable care, and the breach of duty must be a cause-in-fact and proximate cause of the plaintiff's injury."[9] In *Palsgraf,* Judges Cardozo and Andrews formulated their different perspectives on the central issues of negligence law: when does a person owe a duty of care to protect others from harm?; and what is the relationship among duty, breach of duty, and the required proof that a breach of duty caused compensable harm?

In *Palsgraf*, a passenger carrying a package wrapped in newspaper sought to board a train that had begun to leave the station. Railroad employees assisted him to get on the train. As they did so, the passenger dropped the package. Unknown to the railroad employees, the dropped package contained fireworks that exploded when the package fell to the tracks. The resulting shock waves caused scales located "at the other end of the platform many feet away" to fall, striking Palsgraf.[10] She sued the railroad for negligence, claiming the railroad owed her a duty of care, that its employees breached the duty, and that she suffered injuries as a result. The trial judge allowed the case to go to the jury, which found for Palsgraf. The intermediate appellate court affirmed, and the Railroad obtained further review in the New York Court of Appeals.[11]

Chief Judge Cardozo, writing for the majority, vacated the judgment for Palsgraf and ordered that judgment be entered for the Railroad because the Railroad owed no duty to protect Palsgraf from the injuries she suffered.[12] Judge Andrews, in dissent, would have affirmed the jury verdict, concluding the Railroad did owe a duty

9. *See* Herrera v. Quality Pontiac, Inc., 2003-NMSC-018, ¶ 6, 134 N.M. 43, 73 P.3d 181. In 2004 the New Mexico Supreme Court eliminated the phrase "proximate cause" from the applicable Uniform Jury Instruction. *See* UJI 13-305 NMRA. The change was "intended to make the instruction clearer to the jury and [does] not signal any change in the law of proximate cause." *Id.* cmt.

10. *Palsgraf*, 248 N.Y. at 340–41.

11. *See id.* at 347.

12. *Id.* at 341.

to Palsgraf[13] and the jury was justified in concluding that the Railroad's negligence was a proximate cause of her injuries.[14]

Judge Cardozo's analysis began with the proposition that the Railroad owed a duty of care only to those persons whom the Railroad could reasonably foresee would be harmed at the time its employees acted: "The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension."[15] Having limited the Railroad's duty to foreseeable victims when its employees acted, Judge Cardozo declared that the question whether a person was within the zone of foreseeable risk of injury was "at times a question for the court, and at times, if varying inferences are possible, a question for the jury."[16] In this instance, because the parties had conceded that "there was nothing in the situation to suggest . . . that the parcel wrapped in newspaper would spread wreckage through the station," he concluded as a matter of law that Palsgraf was not a foreseeable victim of the employees' conduct when assisting the passenger carrying a seemingly harmless package[17] and could not recover from the railroad. [18]

Judge Andrews chose a different path. He argued that constraining liability by limiting an actor's duty to those foreseeably injured by the actor's conduct was a mistake. Instead, "[e]veryone owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others . . . even if he be outside what would generally be thought the danger zone."[19] Limitations on liability should be determined by the requirement that negligent actors are liable only if their breach of the universal duty of care is "so connected with the negligence that the latter may be said to be the proximate cause of the former."[20]

---

13. *Id.* at 350, 356 (Andrews, J., dissenting).

14. *Id.* at 356 (Andrews, J., dissenting). Having found no duty, Judge Cardozo did not reach the issue of proximate cause: "The law of causation, remote or proximate, is thus foreign to the case before us . . . If there is no tort to be redressed, there is no occasion to consider what damage might be recovered*." Id.* at 346.

15. *Id.* at 344.

16. *Id.* at 345. The statement that it is for the jury to decide if the plaintiff was a foreseeable victim "if varying inferences are possible" has not met with universal approval among New Mexico Justices who otherwise adopted Judge Cardozo's "foreseeable plaintiff" limit on the scope of the duty owed in a negligence action. *Id. Compare* Calkins v. Cox Ests., 1990-NMSC-044, ¶ 18, 110 N.M. 59, 792 P.2d 36 (Baca, J., writing for the majority) (the judge decides foreseeability as a matter of law), *with* Torres *ex rel.* Torres v. State, 1995-NMSC-025, ¶ 15, 119 N.M. 609, 894 P.2d 386 (Ransom, J., writing for the majority) (juries decide if plaintiff was foreseeable unless as a matter of law no reasonable jury reach could reach the result it did).

17. *Palsgraf*, 248 N.Y. at 345.

18. Because the Railroad owed no duty to Palsgraf, Judge Cardozo had no occasion to delineate the nature of the duty the railroad would have owed Palsgraf, or whether the employees' conduct would have breached that duty. Nor was it necessary for him to determine whether a breach of the railroad's duty would have been a proximate cause of her injuries. Nonetheless, Judge Cardozo opined "[w]e may assume, without deciding, that negligence in relation to the plaintiff, would entail liability for all consequences, however novel or extraordinary." *Id.* at 346.

19. *Id.* at 350 (Andrews, J., dissenting).

20. *Id.* at 351 (Andrews, J., dissenting).

Because juries and not judges are the primary determiners of proximate cause,[21] Judge Andrews would delegate to the jury the role of placing limits on liability for negligent conduct, unconstrained by technical legal definitions of proximate cause:

> What we do mean by the word 'proximate' is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics . . . . The words [are] simply indicative of our notions of public policy.[22]

Removing foreseeability of harm from duty analysis, Judge Andrews would instead make it just one of many factors for the factfinder to take into account in determining proximate cause.[23] Among other non-decisive factors, Judge Andrews added whether the injury is too remote in time and space from the negligent act, "for the greater the distance in time or space, the more surely do other causes intervene to affect the result."[24]

The competing viewpoints of Judge Cardozo and Judge Andrews in *Palsgraf* became the focal point for other jurisdictions struggling to determine whether to set limits on liability for negligent conduct by limiting duty or by using proximate cause as the vehicle for doing so, including New Mexico.

2. The Negligence/Duty Cases During the Ransom-Montgomery Era

In New Mexico, there were few early references to *Palsgraf*.[25] The Supreme Court first discussed *Palsgraf* in some detail three years before Justice Ransom joined the Court. In *Ramirez v. Armstrong*,[26] the Court decided that a cause of action exists in New Mexico for negligent infliction of mental distress to certain bystanders who witness a family member injured by the negligence of a third person.[27] The Court noted that "duty and foreseeability have been closely integrated concepts in

---

21. *See, e.g.*, Derdiarian v. Felix Contracting Corp., 51 N.Y.2d 308, 312, 414 N.E.2d 666, 668 (1980) ("As a general rule, the question of proximate cause is to be decided by the finder of fact, aided by appropriate instructions."). However, "a court may decide questions of . . . proximate cause, if no facts are presented that could allow a reasonable jury to find proximate cause." Calkins v. Cox Ests., 1990-NMSC-044, ¶ 18 n.6, 110 N.M. 59, 792 P.2d 36. Judge Andrews concluded "I cannot say, as a matter of law that the plaintiff's injuries were not the proximate result of the negligence. That is all we have before us." *Palsgraf*, 248 N.Y. at 356 (Andrews, J., dissenting).

22. *Palsgraf*, 248 N.Y. at 352 (Andrews, J., dissenting).

23. *Id.* at 353–54 (Andrews, J., dissenting) ("What the prudent would foresee . . . may have some bearing, for the problem of proximate cause is not to be solved by any one consideration.").

24. *Id.* at 354 (Andrews, J., dissenting).

25. Curry v. Journal Publishing Co.,1937-NMSC-023, ¶¶ 26–28, 41 N.M. 318, 68 P.2d 168, *overruled by* Ramirez v. Armstrong, 1983-NMSC-104, 100 N.M. 538, 673 P.2d 822; Southern Union Gas Co. v. Briner Rust Proofing Co, 1958-NMSC-123, ¶ 18, 65 N.M. 32, 331 P.2d 531, *overruled by* Ramirez v. Armstrong, 1983-NMSC-104, 100 N.M. 538, 673 P.2d 822; Barham v. Baca, 1969-NMSC-105, ¶ 5, 80 N.M. 502, 458 P.2d 228.

26. 1983-NMSC-104, 100 N.M. 538, 673 P.2d 822, *overruled in part on other grounds by* Folz v. State, 1990-NMSC-075, ¶ 3, 110 N.M. 457, 797 P.2d 246 ("We reject the Ramirez requirement that '[t]here must be some physical manifestation of, or physical injury to the plaintiff resulting from the emotional injury.'")

27. *Id.* ¶ 2, 673 P.2d at 823.

tort law since *Palsgraf* stated the issue of foreseeability in terms of duty."[28] The Court stated that *Palsgraf* ruled that "[i]f it is found that a plaintiff and injury to that plaintiff were foreseeable, then a duty is owed to that plaintiff by the defendant."[29] To assure that harm to the family unit would be the focus of the tort, the *Ramirez* Court adopted criteria to limit the range of "deserving claimants," one of which requires there be a "marital or intimate familial relationship between the victim and the plaintiff."[30] The Court thus linked the purpose of the tort—protection of the integrity of the family unit—to the limits of who would be deemed foreseeable plaintiffs. This interplay between policy and the use of the foreseeable plaintiff limit on duty would provide a template for the dialogue between Justices Ransom and Montgomery that follows.

a. Cross v. City of Clovis

Before Justice Montgomery joined the Court, Justice Ransom authored the opinion for the Court in *Cross v. City of Clovis*.[31] The case involved the death of Alan Cross, a young observer standing next to his motorbike watching police set up roadblocks to stop the driver of a stolen vehicle. When a first roadblock failed, the police set up a second one. Cross had been an onlooker at both the first and second roadblocks, but the police only saw him at the scene at the second roadblock, where they did not warn him to move farther away. The stolen vehicle crashed through the second roadblock, striking and killing Cross. Cross's personal representative sued the City, claiming its police officers were negligent for failing to warn Cross to vacate the area. The trial court granted the City's motion for a directed verdict, finding that the City owed no duty to Cross, and the court of appeals affirmed. Authoring the majority opinion, Justice Ransom reversed the judgment for the City.

Justice Ransom acknowledged that in New Mexico, whether a defendant owed the plaintiff a duty is a question for the court to decide.[32] There was no foreseeable plaintiff issue presented, however, because a police officer testified that the deceased was standing within the zone of foreseeable danger when struck by the vehicle.[33] Instead, after describing the duty the police owed Cross,[34] Justice Ransom ruled the jury could reasonably conclude that the police breached the duty[35] and the negligence of the police officers proximately caused his death.[36] Because the issues

28. *Id.* ¶ 9, 673 P.2d at 825.

29. *Id*. In isolation, the sentence suggests that the only criterion for the imposition of a duty of care is that the defendant can foresee that the plaintiff is at risk of harm when the defendant acts. The Ramirez Court's focus on the policies supporting the cause of action and the resulting limits of its scope belies that impression.

30. *Id.* ¶ 11, 673 P.2d at 825.

31. 1988-NMSC-045, 107 N.M. 251, 755 P.2d 589.

32. *Id.* ¶ 5, 755 P.2d at 591 (quoting Schear v. Bd. of Cnty. Comm'rs, 1984-NMSC-079, ¶ 4, 101 N.M. 671, 687 P.2d 728).

33. *Id.* ¶ 18, 755 P.2d at 593.

34. "[A] law enforcement officer has the duty in any activity actually undertaken to exercise for the safety of others that care ordinarily exercised by a reasonably prudent and qualified officer in light of the nature of what is being done." *Id.* ¶ 6, 755 P.2d at 591.

35. *Id.* ¶ 16, 755 P.2d at 593.

36. *Id.* ¶ 18, 755 P.2d at 593.

of breach and proximate cause could not be determined as a matter of law, the Court remanded the case to the trial court for a new trial.[37]

In dicta, Justice Ransom rejected an alternative claim that the police were also negligent in handling the first roadblock for two reasons: first, because the officers "denied seeing Alan at [that] intersection" and second, in any event, "their conduct at the initial roadblock is too remote for a finding of liability independent of conduct at the second roadblock."[38] In *Palsgraf*, Judge Cardozo and Judge Andrews each assigned the remoteness consideration as a factor to determine proximate cause,[39] but Justice Ransom's passing reference to remoteness here, is not tethered to either duty or proximate cause. It proved, however, to be an important concept that Justice Ransom expanded upon in the cases that follow.

b. Calkins v. Cox Estates

Calkins v. Cox Estates[40] was the first of the cases in which Justice Ransom and Justice Montgomery were on the same panel addressing the significance of *Palsgraf* in the development of New Mexico law. The issues involved the relationship of the different elements of a negligence action and the allocation among them of evidence relevant to each. Their differing views were evident in the majority opinion written by Justice Baca that Justice Montgomery joined[41] and Justice Ransom's extensive dissent presenting an alternative perspective that would eventually lead to dueling opinions authored by Justice Montgomery and Justice Ransom.

In *Calkins*, the owner of an apartment complex provided a fenced playground for use of the tenants. The fence was in a state of disrepair and had a hole in it. Eight-year-old Enriquez, who lived with his grandparents at defendant's apartment complex, exited the hole in the fence and proceeded almost 950 feet to a busy roadway where he was struck and killed by a passing car. The family sued for wrongful death, alleging that the landowner's negligence in maintaining the fence was a breach of duty and a proximate cause of Enriquez' death. Finding that the apartment owner owed no duty to Enriquez, the trial court granted summary judgment for the landlord, and the court of appeals affirmed. The Supreme Court reversed the summary judgment, ruling that the landowner owed a duty of care to Enriquez and remanded the case for trial on the issues of breach and proximate cause.[42]

The *Calkins* Court began its analysis by stating that an issue of foreseeability is relevant to both the question of whether a duty is owed and also

37. *Id.* ¶ 19, 755 P.2d at 593.

38. *Id.* ¶ 9, 755 P.2d at 592.

39. Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 346, 162 N.E. 99, 101 (1928) (Cardozo, C.J.) (because there was no duty, "[t]he law of causation, remote or proximate, is thus foreign to the case before us."); *Id.* at 354 (Andrews, J., dissenting) (in determining proximate cause, "[i]s the result too remote from the cause, and here we consider remoteness in time and space.").

40. 1990-NMSC-044, 110 N.M. 59, 792 P.2d 36.

41. In writing the majority opinion in *Calkins*, their colleague Joseph Baca played a significant role on the Court's early development of the law of duty.

42. *Calkins*, 1990-NMSC-044, ¶ 20, 792 P.2d at 43.

whether a breach of duty is a proximate cause of plaintiff's injuries.[43] Citing *Palsgraf*, the Court acknowledged that a defendant owes a duty only to persons whom the actor can foresee is put at risk by the actor's conduct, and that "[t]his concept limits liability for negligent conduct."[44] The majority opinion, however, made clear that foreseeability of a different sort is relevant to determine proximate cause—whether the injury to the foreseeable plaintiff was a foreseeable result of the defendant's conduct—which the Court equated with foreseeability of the "manner of harm" to the plaintiff.[45] The distinction is important, noted the Court, because the "foreseeable plaintiff" requirement for duty is resolved as a matter of law by the judge,[46] while the proximate cause question of foreseeability of manner of harm is a factual question for the jury.[47]

While in 1983, in *Ramirez v. Armstrong*,[48] the New Mexico Supreme Court seemingly construed Judge Cardozo's opinion as making the presence of a foreseeable victim the sole criterion for duty creation,[49] Justice Baca's ruling in *Calkins* differed. He introduced an important additional criterion that must be met before a court creates a duty: "The existence of a duty is a question of policy to be determined with reference to legal precedent, statutes, and other principles comprising the law."[50]

---

43. *Id.* ¶ 5, 792 P.2d at 38.

44. *Id.* ¶ 7, 792 P.2d at 39.

45. *Id.* ¶ 5, 792 P.2d at 38.

46. *Id.*; *see also* S. Union Gas. Co. v. Briner Rust Proofing Co., 1958-NMSC-123, ¶ 18, 65 N.M. 32, 331 P.2d 531 ("Whether, indeed, under the circumstances of a given case, a duty exists is a pure question of law for determination by the court.").

47. *Calkins*, 1990-NMSC-044, ¶ 5, 792 P.2d at 38. Justice Ransom disagreed with Justice Baca's placement of foreseeability of the manner of harm as the test for proximate cause. *Id*. ¶ 22, 792 P.2d at 43 (Ransom, J., dissenting). He noted that the then-applicable Uniform Jury Instruction, UJI 13-305 NMRA, stated the test for proximate cause was whether the resulting injury occurred in "a natural and continuous sequence" from the breach rather than in a foreseeable manner. *Id*. ¶ 21, 792 P.2d at 43 (Ransom, J., dissenting). For Justice Ransom, only when an in issue of independent intervening cause is at issue did the issue of foreseeability become relevant to a determination of proximate cause, pursuant to a supplemental instruction, UJI 13-306 NMRA. *Id.* ¶ 22, 792 P.2d at 43 (Ransom, J., dissenting). In 2004, the Supreme Court made a significant change in UJI 13-305 NMRA, which now provides that to be a cause, the defendant's conduct "must be reasonably connected as a significant link to the [injury] [harm]." UJI 13-305 NMRA. The independent intervening instruction continues to reference foreseeability. UJI 13-306 NMRA.

48. 1983-NMSC-104, ¶ 9, 100 N.M. 538, 673 P.2d 822.

49. *Id*. ¶ 9, 673 P.2d at 825 (stating that *Palsgraf* framed the issue of foreseeability of the plaintiff as a victim of defendant's conduct as the sole determinant of duty: "If it is found that a plaintiff, and injury to that plaintiff, were foreseeable, then a duty is owed to that plaintiff by the defendant."). *But see* Cross v. City of Clovis, 1988-NMSC-045, ¶ 5, 107 N.M. 251, 755 P.2d 589 (holding that "[w]hether a duty exists is a question of law for the courts to decide").

50. *Calkins*, 1990-NMSC-044, ¶ 8, 792 P.2d at 39. The *Calkins* majority did not explicitly state the relationship between the "foreseeable plaintiff" test and the use of policy criteria for determining duty—namely whether either alone may suffice or whether each must be met. This is because the majority found both were present: Enriquez was a foreseeable plaintiff, *id.* ¶ 18, 792 P.2d at 42, and New Mexico statutes and case law expressed the policy that a landlord owes a duty of reasonable care based on the landlord/tenant relationship. *Id.* ¶ 12, 792 P.2d at 40. In finding that both were present, though, the majority may have implied that both criteria must be met before the court imposes a duty of care on the actor.

Having found the landlord owed a duty to Enriquez, the *Calkins* majority also addressed the nature of the duty that the landlord owed. While the general proposition is that an actor owes a duty "to act reasonably under the circumstances,"[51] the same statute or case precedent that creates a duty can also provide a specific statement of the duty owed that modifies the general rule.[52] Finding both precedent and a statute imposed a specific duty, the Court concluded that Cox Estates owed a duty of care to reasonably maintain common areas.[53] The Court remanded the case for the jury to decide whether Cox Estates breached its duty of care and, if so, whether the breach was a proximate cause of Enriquez's death.[54]

Justice Ransom, in dissent, agreed with the majority that whether a duty is owed involves two considerations: First, was the plaintiff a foreseeable victim of the defendant's conduct when the defendant acted?[55] Second, does existing legal policy support the imposition of a duty?[56] But it is at that juncture that Justice Ransom diverged from the Court's opinion. The majority stated the relevant policies were "to be determined [by] reference to legal precedent, statutes, and other principles comprising the law."[57] Justice Ransom instead endorsed the articulation of public policy found in Judge Andrews' *Palsgraf* dissent: "[B]ecause of convenience, of public policy, of a rough sense of justice, the law arbitrarily [decides whether] to trace a series of events beyond a certain point. This is not logic. It is practical politics."[58] Judge Andrews' statement of policy addressed factors relevant to determining proximate cause, rather than duty.[59] Nonetheless, Justice Ransom stated he would "utilize this policy concept"—unmoored from Judge Andrews' articulation of proximate cause—"in deciding duty as a matter of law."[60] He labelled this formulation of policy "the doctrine of remoteness."[61]

Justice Ransom was searching for a policy basis to justify limiting the scope of the duty owed to a foreseeable victim of a defendant's conduct. He acknowledged that in *Calkins*, the apartment owner had a duty to maintain the common areas of the

---

51. *Id.* ¶ 11, 792 P.2d at 40; *see also* UJI 13-1603 NMRA (ordinary care); UJI 13-1604 NMRA (duty to use ordinary care).

52. *Calkins*, 1990-NMSC-044, ¶ 17, 792 P.2d at 42 ("Statute dictates that a landlord has a responsibility to maintain the common areas reserved to the use of the tenants."); *see also* Edward C. v. City of Albuquerque, 2010-NMSC-043, ¶¶ 40–41, 148 N.M. 646, 241 P.3d 1086, *overruled by* Rodriguez v. Del Sol Shopping Ctr. Assocs. L.P., 2014-NMSC-014, ¶ 3, 326 P.3d 465 (modifying the duty of ordinary care for owners/occupiers of commercial baseball stadiums).

53. *Calkins*, 1990-NMSC-044, ¶ 13–14, 792 P.2d at 40.

54. *Id.* ¶ 20, 792 P.2d at 43.

55. *Id.* ¶ 24, 792 P.2d at 44 (Ransom, J., dissenting). He also stated that the foreseeability component of duty "is most often a question of fact and only rarely, as in *Palsgraf,* may foreseeability be considered a false jury issue." *Id.* ¶ 25, 792 P.2d at 44 (Ransom, J., dissenting). This statement is consistent Judge Cardozo's view, *see Palsgraf*, 248 N.Y. 339 at 356, but contrary to Justice Baca's majority view in *Calkins* that "whether the injury to petitioner was a foreseeable result of respondent's breach . . . must be decided as a matter of law by the judge." *Calkins*, 1990-NMSC-044, ¶ 5, 792 P.2d at 38.

56. *Calkins*, 1990-NMSC-044, ¶ 25, 792 P.2d at 44 (Ransom, J., dissenting).

57. *Id.* ¶ 8, 792 P.2d at 39.

58. *Id.* ¶ 26, 792 P.2d at 44 (Ransom, J., dissenting) (quoting *Palsgraf*, 248 N.Y. at 352 (Andrews, J., dissenting)).

59. *Palsgraf*, 248 N.Y. at 352 (Andrews, J., dissenting).

60. *Calkins*, 1990-NMSC-044, ¶ 26, 792 P.2d at 44 (Ransom, J., dissenting).

61. *Id.*

apartment complex,[62] including the playground, and did not dispute that Enriquez, as a tenant, was a foreseeable victim of defendant's negligent maintenance of the fence around the playground. He also accepted the court of appeals' assumption that the purpose of the fence was "to avoid foreseeable risk of harm to tenant children attracted to adjoining property."[63]

Nonetheless, Justice Ransom determined "as a matter of policy . . . it would be unreasonable to impose a duty on the part of the landlord to safeguard eight-year-old tenants from risks of injury on streets not immediately adjoining the property."[64] Having concluded that the duty to maintain the fence was not intended to protect against the hazard of being struck by a vehicle travelling on a frontage road almost 950 feet away,[65] Justice Ransom would rule that "the frontage road hazard was too remote as a matter of law to constitute a risk of injury reasonably giving rise to any duty to maintain the playground fence."[66]

Applying the remoteness doctrine in this way, Justice Ransom would hold that the duty to maintain the playground fence as a matter law was not intended to protect against the dangers of distant hazards. If, however, Enriquez had been struck by a vehicle on a street immediately adjoining the hole in the fence, a jury could conclude that the negligent failure to maintain the fence was a proximate cause of his death.[67]

---

62. *Id.* ¶ 21, 792 P.2d at 43 (Ransom, J., dissenting).

63. *Id.* ¶ 28, 792 P.2d at 45 (Ransom, J., dissenting).

64. *Id.* ¶ 29, 792 P.2d at 45 (Ransom, J., dissenting). Justice Ransom was concerned that without such a limitation on the duty, the majority's approach would unduly expand the general common law duty of landlords to reasonably maintain the common areas of rental property to encompass a duty to restrain young tenants from leaving the apartment complex and confronting risks of danger well beyond the complex. *See id.*

65. Justice Ransom emphasized that "[t]he doctrine of remoteness is not necessarily dependent upon considerations of time and space; although in the instant case, our policy determination involves those considerations." *Id.* ¶ 27, 792 P.2d at 45 (Ransom, J., dissenting).

66. *Id.* ¶ 22, 792 P.2d at 44 (Ransom, J., dissenting). Had he persuaded a majority to his view, Justice Ransom might have taken the New Mexico law of negligence in a different direction. He repurposed Judge Andrews' formulation of public policy into "the crux of the duty analysis" that he identified as the policy of remoteness, which "delimits the risk of injury that reasonably may give rise to the existence of duty." *Id.* Use of the doctrine in that way would empower judges to determine the outer limits of the hazards that the Rule or statute is designed to protect against. If the hazard encountered is beyond those limits, no duty is owed. If the hazard is within those limits the jury may determine whether a breach of duty is a proximate cause of a plaintiff's injury.

67. Justice Ransom's approach finds support in early academic writing advocating that judges must impose limits on the scope of cognizable tort liability before questions of breach and causation are properly submitted to juries for resolution. *See, e.g.,* Leon Green, *Causal Relation in Legal Liability—In Tort*, 36 YALE L.J. 513 (1927). Professor Green asserted that appellate courts in tort cases must focus on whether the plaintiff's interest is protected by statute or common law "against the *particular hazard* encountered by the plaintiff. *Id*. at 514 (emphasis added). If the court concludes the particular hazard encountered was not one the law sought to protect against, the court must bar recovery as a matter of law. Professor Green sought thereby to limit the scope of the jury's relatively unguided determination of proximate cause. *Id.* at 518. This is the same goal Justice Ransom pursued when he sought to transform a portion of Judge Andrews' proximate cause formula into the policy of remoteness by which judges can determine whether as a matter of law the duty imposed affords no protection against the hazard encountered by the plaintiff.

c. Bober v. New Mexico State Fair

In *Bober v. New Mexico State Fair*,[68] Justice Montgomery authored his first opinion in a case raising *Palsgraf*-like issues. He wrote for a unanimous panel that did not include Justice Ransom. *Bober* involved a concert that drew thousands to the State Fairgrounds. A concert goer exited a parking lot on the grounds, turned left onto a heavily travelled street adjoining the fairgrounds, and struck a vehicle in which Bober was a passenger, seriously injuring him.

Bober sued several defendants, including the State Fair, for negligence. He alleged that the crash resulted because the State Fair failed to take reasonable measures to control the flow of traffic exiting the fairgrounds onto the street. The District Court granted summary judgment for the State Fair, ruling that it owed no duty to a passerby on the adjoining street who was neither an invitee nor licensee on the State Fair premises.[69] Justice Montgomery reversed the grant of summary judgment and remanded the case to the district court for trial.[70]

Referring to *Calkins*, Justice Montgomery characterized the issue as raising "again whether a landlord's duty to avoid creating a dangerous condition on the land" is limited by the physical boundaries of the land.[71] To resolve the issue, he did not apply the foreseeable plaintiff test he approved as a member of the majority in *Calkins* to determine if the State Fair owed a duty of care to a person on a road adjacent to its land. Instead, Justice Montgomery found the source of the State Fair's duty to Bober in a New Mexico precedent, *Mitchell v. C&H Transportation Co.*,[72] where lessees of land failed to maintain their driveway adjacent to a highway, causing a truck and tractor leaving the premise to get stuck, with a portion of the tractor in the highway. Plaintiff was a passenger in a vehicle on the highway injured when the vehicle collided with the tractor. *Mitchell* held that a person obligated to maintain property in a safe condition "has a duty to the travelling public to exercise reasonable care in maintaining property adjacent to a public road or street."[73] *Mitchell* thus provided what *Calkins* described as "a specific . . . common law standard that creates the affirmative duty to a party."[74]

Having determined that the State Fair owed a duty to Bober, Justice Montgomery turned to the separate question of the articulation of the duty that the State Fair owed Bober. Justice Montgomery could not use the usual Uniform Jury Instruction stating a landowner's duty because it applies only to visitors on the land.[75] Rather, he applied the statement of the duty owed in UJI 13-1604 that "[e]very person has a duty to exercise ordinary care for the safety of the person and property of others,"[76] supported further by UJI 13-1603, which provides:

---

68. 1991-NMSC-031, 111 N.M. 644, 808 P.2d 614.

69. *Id.* ¶ 1, 808 P.2d at 616.

70. *Id.* ¶ 34, 808 P.2d at 624.

71. *Id.* ¶ 1, 808 P.2d at 616.

72. *See* 1977-NMSC-045, ¶ 16, 90 N.M. 471, 565 P.2d 342.

73. *Id.* ¶ 30, 565 P.2d at 347.

74. *Calkins*, 1990-NMSC- 044, ¶ 8, 792 P.2d at 38 n.1.

75. "An [owner] [occupant] *owes a visitor* the duty to use ordinary care to keep the premises safe for use by the visitor." UJI 13-1309 NMRA (emphasis added).

76. *Bober*, 1991-NMSC-031, ¶ 10, 808 P.2d at 618.

> What constitutes "ordinary care" varies with the nature of what is being done.
>
> As the risk of danger that should reasonably be foreseen increases, the amount of care required also increases.[77]

Thus, although the usual definition of the duty owed—ordinary care—remains constant, the instruction provides that what is ordinary care may vary depending upon the degree of danger the defendant can foresee from its conduct.

Foreseeability, therefore, played multiple roles in a negligence action: The *Calkins foreseeable plaintiff* test is relevant to whether the defendant owed a duty of care; *Bober* noted the Uniform Jury Instruction provides the *foreseeability of the extent of danger to the foreseeable plaintiff* is a factor in determining whether the defendant breached the duty owed; and the majority in *Calkins* ruled determining the foreseeability of the *manner of harm* is "integral" to the determination of proximate cause.[78] Subsequent decisions discussed in this article reconsider and reconfigure these disparate roles of foreseeability in the New Mexico law of negligence.[79]

d. Solon v. WEK Drilling Co.

Two years after *Calkins*, Justice Montgomery and Justice Ransom authored separate opinions in *Solon v. WEK Drilling Co*.,[80] in which they expressed their evolving but differing views about *Palsgraf* and the Court's interpretation of *Palsgraf* in *Calkins*. In *Solon,* Ivan Ponce died in an oil rig accident while working at a site owned and operated by WEK. The personal representative of his estate sued WEK for wrongful death on behalf of Ponce's daughter, his sole statutory beneficiary.[81] At the time of his death, Ponce was living at his parents' home where he provided assistance in maintaining their home and vehicles.

The parents filed a motion to intervene in the wrongful death action, asserting a cause of action against WEK for the value of their deceased son's household services and for loss of consortium. The trial court denied their motion to intervene on the ground that their complaint failed to state a cause of action. The

---

77. *Id*.

78. "In determining proximate cause, an essential element of foreseeability is also present—the question of whether the injury to petitioner was a foreseeable result of respondent's breach—i.e., what manner of harm is foreseeable." *Calkins*, 1990-NMSC-044, ¶ 5, 792 P.2d at 39. In *Calkins*, Justice Ransom disagreed, stating that foreseeability was relevant to proximate cause only in situations where the issue involved a possible independent intervening cause. *Id.* ¶¶ 20, 21, 792 P.2d at 43 (Ransom, J. dissenting).

79. *See Herrera v. Quality Pontiac*, 2003-NMSC-018,134 N.M. 43, 73 P.3d 181; *Rodriguez v. Del Sol Shopping Ctr. Assoc.*, 2014-NMSC-014, 326 P.3d 465.

80. 1992-NMSC-023, 113 N.M. 566, 829 P.2d 645. Just prior to *Solon*, in *Klopp v. Wackenhut Corp.*, 1992-NMSC-008, 113 N.M. 153, 824 P.2d 293, another three-judge panel addressed aspects of the *Calkins* case in an opinion authored by Justice Ransom and joined in by Justice Baca and Justice Franchini. The case involved the proper construction of a Uniform Jury Instruction dealing with when a duty is owed by a land occupier to protect a business visitor from open and obvious dangers on the premises. Perhaps because the jury instruction upon which it was based, UJI 13-1310 NMRA, was later withdrawn, and an amended instruction incorporating the *Klopp* rule, UJI 13-1309 NMRA, was adopted in 1996, the case did not play a significant role in the subsequent development of the law of duty in New Mexico.

81. N.M. STAT. ANN, § 41-2-3(C) (2001).

parents appealed, claiming a right to damages as parents, apart from those awarded to the decedent's daughter under the Wrongful Death Act.

Justice Montgomery, writing for the Court, with Justice Baca concurring, affirmed the trial court's dismissal of the motion to intervene and dismissal of the parents' complaint.[82] Justice Ransom concurred in the result but wrote a separate opinion explaining his disagreements with Justice Montgomery's opinion.

Justice Montgomery's majority opinion viewed the appeal as "a *Palsgraf* case," and stated the issue as follows: "Whether one who owes a duty to another . . . in breaching that duty causes the death of the other, also owes a duty to the other's parents so that they may sue the tortfeasor, in their own right, for damages sustained as a result of their son's death."[83] He concluded that the parents had no cause of action against WEK and upheld the district court's ruling denying the parents' request to intervene in the wrongful death action. [84]

Justice Montgomery acknowledged that in *Calkins*, the opinion for the Court (in which he joined as a member of the panel) seemed to approve the "foreseeable plaintiff" test as the sole basis for determining whether the defendant owed a duty of care to the plaintiff when it quoted with approval from *Ramirez v. Armstrong*: "If it is found that a plaintiff, and injury to that plaintiff, were foreseeable, then a duty is owed to that plaintiff by the defendant."[85] But he then expressed his doubt on the exclusivity of, and even on the requirement, that there can be no duty owed to a plaintiff who falls outside the zone of foreseeable victims. Justice Montgomery noted that "[t]he law need not have evolved this way. It could have evolved along the lines suggested by Judge Andrews in *Palsgraf*, where Judge Andrews argued that an actor owed a duty not only to those within "the danger zone," but "to the world at large" to refrain from conduct that unreasonably threatened the safety of others.[86]

Justice Montgomery also found support in Professor Prosser's critique of Judge Cardozo's opinion in *Palsgraf*[87] and Prosser's assertion that the solution for cutting off unlimited liability for harm caused by defendant's unreasonable conduct is not the foreseeable plaintiff test but "one of social policy."[88] Having highlighted the criticism of the foreseeable plaintiff test for limiting liability, Justice Montgomery found it inappropriate to decide in *Solon* whether the Court should abandon the test because "we are not writing a clean slate, and we do not perceive this case to be a good one to address the issue."[89] Instead, he applied the test and

82. *Solon*, 1992-NMSC-023, ¶ 19, 829 P.2d at 651.

83. *Id.* ¶ 1, 829 P.2d at 645.

84. *Id.*

85. *Id*. ¶ 9, 829 P.2d at 648 (quoting *Ramirez v. Armstrong*, 1983-NMSC-104, ¶ 9, 100 N.M. 538, 673 P.2d 822).

86. *Id.* ¶10, 829 P.2d at 648 (quoting *Palsgraf*, 248 N.Y. at 350 (Andrews, J., dissenting)).

87. *Id.* ¶ 10, 829 P.2d at 648. Prosser argued that as between an actor who negligently puts one person at risk and a totally innocent but not foreseeable victim, the negligent defendant and not the unforeseeable victim should bear the loss. PROSSER & KEETON ON THE LAW OF TORTS, § 43 at 287 (William Lloyd Prosser, W. Page Keeton, Dan B. Dobbs, Robert E. Keeton, David G. Owen eds., 5th ed. 1984).

88. *Id.* ¶ 10, 829 P.2d at 648.

89. *Id.* ¶11, 829 P.2d at 649.

ruled: "[T]he existence and interests of the Ponces and the relationship with their son were unforeseeable to the defendant, WEK Drilling."[90]

Nonetheless, he signaled the future course he anticipated for New Mexico law when he pointedly left open the question of whether the foreseeable plaintiff test was "a factor—if it is a factor —or the prerequisite—if it is that."[91] In applying the foreseeable plaintiff test, and ruling it was not met in *Solon*, Justice Montgomery left for another day the question whether "to reexamine the social policy that limits a tortfeasor's liability to the foreseeable plaintiff and excludes [liability] where the plaintiff is unforeseeable."[92]

Justice Ransom wrote a concurring opinion agreeing with the result affirming the grant of summary judgment. He stated, however, contrary to Justice Montgomery, that Ponce's parents were foreseeable victims of WEK's conduct[93] and that the Court should have proceeded to determine "as a matter of public policy," whether a duty of care existed.[94] Justice Ransom did not apply his remoteness doctrine to determine if public policy supported extending WEK's duty of care to Ponce's parents. Instead, he borrowed from Justice Baca and Justice Montgomery's sources of public policy.[95] Because the Wrongful Death Act assigned all the recovery in the action to Ponce's daughter and did not include Ponce's parents among those entitled to recover for his death, Justice Ransom reasoned that the legislature determined the parents' loss of companionship and economic assistance were not hazards the legislature intended to protect against.[96] Justice Ransom therefore concluded the parents "are denied a claim for relief, not because risk of harm to them is unforeseeable, but because of policy set by the legislature."[97]

---

90. *Id.* ¶ 17, 829 P.2d at 650. He did not endorse the view in *Ramirez* that the foreseeable plaintiff test was the only criterion for determining duty.

91. *Id.* ¶ 16, 829 P.2d at 650. Justice Montgomery also quoted Prosser and Keeton's treatise's suggestion that "the foreseeability of harm to the plaintiff should be but one factor in determining the existence of a duty and not always conclusive" because an inflexible foreseeable plaintiff rule does not allow for "situations that will more or less inevitably arise which do not fit within any fixed and inflexible rule." *Id.* ¶ 12, 829 P.2d at 649.

92. *Id.* ¶ 11, 829 P.2d at 649. Perhaps recognizing the tenuousness of his conclusion that harm to Ponce's parents was not foreseeable when WEK acted, Justice Montgomery acknowledged that "[t]he social policy of cutting off the liability that would otherwise extend to these family members, seems sound, at least in a case in which they allege no more palpable injury that that claimed here." *Id.* ¶ 17, 829 P.2d at 650. He buttressed his conclusion by invoking existing New Mexico case law that at the time barred even spousal consortium, thus presenting a "formidable barrier to recover for loss of consortium—spousal, filial, parental or other." *Id.* ¶ 15, 829 P.2d at 650.

The law denying consortium has since changed. In 1994, the Supreme Court in *Romero v. Byers*, 1994-NMSC-031, ¶ 27, 117 N.M. 422, 872 P.2d 840, authorized a cause of action for spousal consortium. Since then, the court of appeals has upheld a consortium cause of action in favor of adult parents for the death of their child. *Fitzgerald v. City of Gallup*, 2003-NMCA-125, 134 N.M. 492, 79 P.3d 836.

93. *Id.* ¶ 24, 829 P.2d at 652 (Ransom, J., concurring).

94. *Id.* ¶ 25, 829 P.2d at 652 (Ransom, J., concurring).

95. *See id.* ¶ 21, 829 P.2d at 651 (Ransom, J., concurring) ("I agree with the majority in the instant case that whether a duty was owed must be decided as a matter of law using existing legal policy.") (quoting Calkins v. Cox Estates, 1990-NMSC-044, ¶ 25, 110 N.M. 59, 792 P.2d 36).

96. *See* N.M. STAT. ANN. § 41-2-3(C) (2001).

97. *Solon*, 1992-NMSC-023, ¶ 25, 829 P.2d at 652 (Ransom, J., concurring).

e. Torres ex rel. Torres v. State

Justice Montgomery retired in late 1994. A year later, writing for the Court in *Torres ex rel. Torres v. State*,[98] Justice Ransom again did not apply his remoteness doctrine because a statutory policy supported the plaintiffs' claims that a duty existed. In *Torres*, an armed man randomly shot and killed three people in Albuquerque. That evening and the next morning, police received tips that Nathan Trupp was the likely killer. The police delayed acting on the tips until the following day when they staked out the airport, bus, and train stations searching for Trupp. Before the police arrived, Trupp had boarded a bus to Los Angeles, and the next evening he randomly selected, shot, and killed Torres and Beeks in Los Angeles.

Their personal representatives brought a wrongful death action in New Mexico against the Albuquerque Police Department and the State Department of Public Safety under the New Mexico Tort Claims Act.[99] The suit alleged that the Defendants' failure to exercise reasonable care to capture Trupp in New Mexico allowed him to travel to Los Angeles and kill Torres and Beeks. The trial court granted the Defendants' motion to dismiss for failure to state a claim, on the basis that no duty was owed to the deceased because they "were not foreseeable plaintiffs" of Defendants' actions. [100] The court of appeals agreed the complaint should be dismissed but grounded its holding in public policy rather than ruling that Torres and Beaks were not foreseeable plaintiffs.[101]

Justice Ransom's opinion for the Court reversed the judgment dismissing the complaint and remanded the case to the district court. He concluded that the trial court erred in ruling as a matter of law that Torres and Beaks were not foreseeable victims of the Defendants' conduct in investigating the murders in New Mexico.[102] Expansively evaluating whether it is foreseeable that persons would be randomly murdered in California if a murder investigation were botched in New Mexico, Justice Ransom found it "not unlikely" that a jury might conclude that a murderer in New Mexico might travel to other states and commit other murders there.[103] He concluded, therefore, that it was for the jury to determine if Torres and Beaks were foreseeable victims put at risk by the arguably negligent investigation of the New Mexico murders.[104]

However, there would be no need to send the foreseeable plaintiff question to the jury if the Court determined that policy considerations barred a duty even if

98. 1995-NMSC-025, 119 N.M. 609, 894 P.2d 386.

99. *Id.* ¶ 1, 894 P.2d at 388.

100. *Id.* ¶ 8, 894 P.2d at 389.

101. *Id.* ¶ 12, 894 P.2d at 390.

102. Without explicitly overruling *Calkins'* determination that the court is the sole arbiter of whether plaintiffs are foreseeable victims of a defendant's conduct, consistent with his dissent in *Calkins*, Justice Ransom ruled that the foreseeable plaintiff question is reserved for the jury to decide unless the court determines that no reasonable jury could conclude that they were foreseeable: "*The issue of foreseeability is a question for the jury*. . . . Foreseeability is a question of law when a court, in reviewing whether a duty exits, can determine that the victim was unforeseeable to any reasonable mind." *Id*. ¶ 15, 894 P.2d at 390.

103. *Id.* ¶ 19, 894 P.2d at 391.

104. "[F]oreseeability is a question for the jury to determine by giving thought to, among other things, the time, space, and distance between the alleged failure to investigate and the deaths of the two security guards." *Id.*

the plaintiffs were foreseeable. Justice Ransom thus found it necessary to evaluate the court of appeals' reasoning that policy concerns precluded imposing a duty of care and found it unsound. In *Calkins*, he had stated the applicable policy consideration was the "doctrine of remoteness." In *Solon*, he had found it unnecessary to apply the remoteness doctrine to determine the relevant public policy concerning the scope of a duty owed because the legislature had set the limit of the persons the statutory duty sought to protect in the Wrongful Death Act.[105] In *Torres*, too, he looked to statutes and case precedents to determine if policy considerations should foreclose finding the Defendants owed a duty to the foreseeable plaintiffs.

Turning to the Tort Claims Act as the relevant expression of policy, Justice Ransom concluded the Act expressed a legislative policy that law enforcement officers owe a duty to investigate crime, should be liable for injuries caused by their negligent breach of that duty,[106] and that the legislature intended to protect all members of the public, without limitation to time or place.[107]

Acceding to Justice Montgomery's view that "duty is a question of policy to be determined with reference to legal precedent, statutes, and other principles comprising the law,"[108] Justice Ransom in essence created a hierarchy of sources for determining policy, giving primacy to the legislature, and case precedents, with the policy of remoteness serving as a residual "principle[] comprising the law" for courts to apply when neither the legislature nor precedent had clearly established the controlling policy:

> It is the particular domain of the legislature [and sometimes the executive branch], as the voice of the people, to make public policy . . . . Courts should make policy in order to determine duty only when the body politic has not spoken and only with the understanding than any misperception of the public mind may be corrected shortly by the legislature.[109]

Justice Ransom thereby positioned the policy of remoteness as a possible, but often unnecessary, analytical aid for use only when statutes and case law failed to provide the sources of policy for determining the scope of duty.[110]

Justice Ransom seemed to have prevailed in his view that Cardozo's foreseeable plaintiff test is a prerequisite to the imposition of a duty, surviving despite Justice Montgomery's suggestion in *Solon* that he would reduce that test to

---

105. *Solon*, 1992-NMSC-023, ¶ 25, 829 P.2d at 652 (Ransom, J., dissenting).

106. *Torres*, 1995-NMSC-025, ¶ 11, 894 P.2d at 389.

107. *Id.* ¶ 17, 894 P.2d at 391.

108. *Calkins*, 1990-NMSC-044, ¶ 8, 792 P.2d at 39 (citation omitted).

109. *Torres*, 1995-NMSC-025, ¶ 10, 894 P.2d at 389.

110. Justice Ransom's remoteness doctrine did not survive the transformation of the law of duty in Rodriguez v. Del Sol Shopping Ctr. Ass'n, L.P., 2014-NMSC-014, 326 P.3d 465. In its sweeping rejection of any role of foreseeability in determining duty, the *Rodriguez* court determined that though Justice Ransom labelled remoteness "not a fact [but] policy," the policy of "remoteness often leads toward a discussion of facts in a particular case; insofar as it does so, it is not a discussion of policy . . . ." "[N]o duty based upon the foreseeability, improbability, or remote nature of the risk is inconsistent with the Restatement approach." *Id.* ¶ 13, 326 P.3d at 471 (citation omitted). *Rodriguez* is more fully discussed *infra* notes 164–79.

merely one factor among many in the determination of duty.[111] Justice Montgomery's view, as a member of the *Calkins* majority, that it is for the court to determine if the plaintiff was a foreseeable victim of the defendant's conduct,[112] seems to have given way to Justice Ransom's insistence in *Torres* that in all but the most obvious cases, juries must determine whether an injured plaintiff was a foreseeable victim of the defendant's conduct.[113]

Justice Montgomery was, however, a master at setting the stage for changing the law in the future. He did this in *Solon* when he conceded that New Mexico had adopted Judge Cardozo's foreseeable plaintiff test as a limit on duty but reminded the reader that the law could have evolved differently had Judge Andrews' view been adopted, under which there would be no foreseeable plaintiff limit on duty. Instead "[e]very one owes to the world at large a duty of refraining from those acts that may unreasonably threaten the safety of others . . . even if he be outside what would generally be thought the danger zone."[114] Having raised the Andrews approach as an alternative, he saved serious discussion of its merits for another day.[115] That day did not come for him or for Justice Ransom. But other Justices in later cases would take up the question whether Judge Andrews' view of a general duty to all should prevail in New Mexico after both Justice Ransom and Justice Montgomery ended their service on the Court.

3. The Post-Ransom-Montgomery Era: New Justices and New Perspectives

Justice Montgomery retired in 1994. Justice Ransom retired three years later. In their years together on the Court, they framed the New Mexico negligence law of duty as they worked from the seminal *Palsgraf* case though they had not come to a collaborative resolution of their differences. A new generation of New Mexico justices would challenge and change the edifice substantially but not totally built by their joint efforts.

In 2003, in *Herrera v. Quality Pontiac*,[116] the revamped New Mexico Supreme Court[117] had its first significant opportunity to consider the retired Justices' contributions to the law of duty in negligence actions and to evaluate and build on

111. *Solon* also demonstrated that the foreseeable plaintiff prerequisite for the existence of a duty is subject to different interpretations and thus can provide varying outcomes depending on which judge makes the determination. 1992-NMSC-023, ¶ 12, 829 P.2d at 649. "Harm to [decedent]'s parents is just too glaringly absent to convince us to recognize a cause of action in their favor." *Id.* ¶ 16, 829 P.2d at 650. Compare with the dissent, "I believe financially dependent parents indeed are foreseeable." *Id.* ¶ 24, 829 P.2d at 652 (Ransom, J., dissenting).

112. *Calkins*, 1990-NMSC-044, ¶ 5, 792 P.2d at 38.

113. *Torres*, 1995-NMSC-025, ¶ 15, 894 P.2d at 390.

114. *Solon*, 1992-NMSC-023, ¶ 10, 829 P.2d at 648 (citation omitted).

115. "[W]e are not writing on a clean slate, and we do not perceive this case to a be a good one to reexamine" the wisdom of adopting Judge' Cardozo's "foreseeable plaintiff" limit on duty. *Id.* ¶ 11, 829 P.2d at 649.

116. 2003-NMSC-018, 134 N.M. 43, 73 P.3d 181.

117. Justice Pamela B. Minzner succeeded Justice Montgomery in 1994. Justice Petra Jimenez Maes succeeded Justice Ransom in 1998. The Court that decided Herrera, was composed of these Justices and Justices Richard C. Bosson and Patricio Serna. Justice Edward Chavez joined the Court in March 2003, two months before the decision in Herrera but did not participate in its resolution.

their body of work. The owner of a vehicle took it to Quality Pontiac for repairs. The dealership instructed him to leave the keys in the car and the door unlocked. That evening, a thief stole the car. The next day, police spotted the stolen vehicle and gave chase, during which the thief collided with the plaintiff's vehicle killing one occupant and injuring another. The plaintiffs sued Quality Pontiac for negligence and the trial court dismissed the case for failure of the complaint to state a valid claim.[118]

In an opinion authored by Justice Serna, the high court reversed the judgment for Quality Pontiac, determined that Quality Pontiac owed the victims a duty of due care,[119] and remanded to the trial court to determine issues of breach and proximate cause. The Court confirmed that both the foreseeable plaintiff test and public policy were essential components of New Mexico's duty analysis.[120] Without acknowledging Justice Ransom's statement in *Torres* that the jury normally determines the foreseeable plaintiff issue,[121] Justice Serna ruled the issue was reserved for the court to determine.[122] The policy requirement was to be "answered by reference to legal precedent, statutes and other principles of law."[123]

The foreseeable plaintiff requirement posed an apparent barrier for the plaintiffs, which they were able to overcome. Influenced by an expert's affidavit submitted by the plaintiffs,[124] the Court overruled *Bouldin v. Sategna*,[125] which had held it was not foreseeable that leaving keys in an unattended, running vehicle would result in the theft of a vehicle and subsequent traffic accident.[126]

The public policy component of duty confronted the Court with two additional apparent barriers to the imposition of a duty of care on Quality Pontiac. First, a statute requiring removal of car keys from a vehicle barred use of a violation from being used in any civil action.[127] The Supreme Court construed the statute narrowly as providing only a bar to the admissibility of the violation of the *statute* in civil litigation[128] and not a legislative determination precluding a common law cause of action for the same conduct.[129] Finding that the *Bouldin* court primarily was

118. *See Herrera*, 2003-NMSC-018, ¶ 1, 73 P.3d at 185. When Plaintiffs appealed, the court of appeals certified the matter to the Supreme Court. *See* N.M. STAT. ANN. § 34-5-14(C) (1972).

119. *Herrera*, 2003-NMSC-018, ¶ 32, 73 P.3d at 194.

120. *Id.* ¶¶ 10, 20, 73 P.3d at 187, 190.

121. *See Torres*, 1995-NMSC-025, ¶ 15, 894 P.2d at 390.

122. *Herrera,* 2003-NMSC-018, ¶ 10, 73 P.3d at 187 (quoting Calkins v. Cox Ests., 1990-NMSC-044, ¶ 5, 110 N.M. 59, 792 P.2d 36).

123. *Id.* ¶ 7, 73 P.3d at 186 (citation omitted).

124. Plaintiffs presented an expert's affidavit providing data showing that leaving keys in unlocked vehicles frequently led to theft, the accident rate in stolen vehicles was almost 200 times that of accidents not involving stolen vehicles and "there is a high probability that a stolen car will be involved in traffic accidents . . . hours or days after their theft . . . [often when] police pursuit was involved." *Id.* ¶ 3, 73 P.3d at 185 (quotations omitted).

125. *Id.* ¶ 18, 73 P.3d at 189.

126. Bouldin v. Sategna, 1963-NMSC-017, ¶ 17, 71 N.M. 339, 333, 378 P.2d 370, 373 ("We do not perceive theft of a car as a natural event to be foreseen by a person who is negligent in leaving his car unattended with the key in the ignition. Much less can it be believed that such a state of facts as gave rise to the instant litigation could be remotely considered to be a natural or probable result of defendant's having left his car unlocked, or that they could have been reasonably foreseen.").

127. N.M. STAT. ANN. § 66-7-353 (1978).

128. *Herrera*, 2003-NMSC-018, ¶ 13, 73 P.3d at 188 (emphasis added).

129. *Id.* ¶ 13, 73 P.3d at 188.

concerned that under the then-existing doctrine of joint and several liability, the vehicle owner could be held fully liable for damages caused in significant part by the acts of the thief,[130] the *Herrera* Court determined the subsequent adoption of comparative fault in New Mexico alleviated that concern by making each tortfeasor liable only for the percentage of fault attributable to its misconduct.[131] Because the adoption of comparative fault undercut the rationale for *Bouldin*, the Court overruled *Bouldin* as "a mere remnant of an abandoned doctrine."[132] The Court concluded that Quality Pontiac owed a duty of care to the plaintiffs and remanded the case to the district court to resolve issues of breach and proximate cause.[133]

Justice Serna's opinion demonstrated that the legacy left by Justices Ransom and Montgomery could result in significant advancements of the law of duty despite, and perhaps because, their efforts had not solidified into a unified restructuring of the law of duty when they left the Court. His opinion wove strands of both their views into an impressive decision that overturned a long-standing precedent, firmly established that the existence of a duty is a question of law for the court, and skillfully demonstrated that the change of New Mexico law from contributory negligence to comparative fault constituted a shift in policy that called for imposing a duty where a "no duty" rule had existed for forty years.

Justice Serna provided an additional insight that resonated in Justice Bosson's concurring opinion and in later cases. While policy concerns may come into play with respect to both duty and proximate cause,[134] the policies relevant to duty creation deal with matters more "global and general in nature" while those concerning proximate cause derive from a focus on "the specific facts of the [particular] case."[135] This dichotomy undercuts the premise that to impose a duty, the factfinder must analyze the specific facts of each case to determine whether the plaintiff was a foreseeable victim of defendant's conduct.[136]

Justice Bosson's concurring opinion agreed with the majority's reasoning and result but went further in calling for a reconsideration of the role of the "foreseeable plaintiff" requirement for determining whether a duty of care exists. He noted criticism that it is merely a "legal fiction" used by New Mexico courts "for restricting or expanding liability,"[137] and conceded that "when we attempt to define duty in terms of a foreseeable plaintiff, it is all too tempting to use 'foreseeability' as a surrogate for result-oriented conclusions."[138] He acknowledged that in *Solon*, Justice Montgomery first suggested the Supreme Court should consider jettisoning

130. *Id.* ¶ 26, 73 P.3d at 193.

131. *Id.* ¶ 27, 73 P.3d at 193 (citing *Scott v. Rizzo*, 1981-NMSC-021, ¶ 29, 96 N.M. 682, 634 P.2d 1234).

132. *Id.* ¶ 27, 73 P.3d at 193.

133. *Id.* ¶ 37, 73 P.3d at 196.

134. *Id.* ¶ 17, 73 P.3d at 189.

135. *Id.*

136. Justice Serna's insight is reflected in Justice Bosson's concurring opinion questioning the use of the foreseeable plaintiff test as a consideration in determining the existence of a duty. *See id.* ¶¶ 40–41, 73 P.3d at 196 (Bosson J., concurring).

137. *Id.* ¶ 40, 73 P.3d at 196 (Bosson, J., concurring) (quoting Nancy Desiderio, *Tort Law—Evolution of Duty in New Mexico: Torres v. State*, 26 N.M. L. REV. 585, 585 (1996)).

138. *Id.* ¶ 42, 73 P.3d at 196 (Bosson, J., concurring).

the test as a prerequisite for the imposition of a duty and pointedly noted "Justice Montgomery's query lingers."[139] Justice Bosson advanced several proposals the Court should address for reforming existing New Mexico law,[140] ending with the "hope we will hear more of this issue in the future as attitudes change toward *Palsgraf*."[141]

Seven years later, that hope was partially fulfilled when the Court decided *Edward C. v. City of Albuquerque*.[142] In *Edward C.*, a child was injured while attending a baseball game at a city-owned baseball park. He was seated in a picnic area beyond the left field fence in fair ball territory when, without warning, batting practice began and the batter struck a ball over the fence that hit the two-year old child.[143] The parents sued the City and others for negligence[144] claiming that, as a visitor in the ballpark, the child was owed a duty of ordinary care.[145]

In the district court, the City conceded it owed a duty to the child[146] but argued that the court should modify the duty of care from ordinary care to require only compliance with the "limited-duty baseball rule" that shrinks the duty of the owner of a baseball park to only putting up screening in the area behind home plate.[147] The trial court sided with the City, ruled that the duty of ordinary care should be superseded by the limited-duty baseball rule, and granted summary judgment for the City.[148] The court of appeals reversed, holding it was error to modify the general

---

139. *Id.* ¶ 40, 73 P.3d at 196 (citing *Solon v. WEK Drilling Co.*, 1992-NMSC-023, ¶¶ 10–11, 113 N.M. 566, 829 P.2d 645).

140. Justice Bosson noted the Court might consider abandoning the foreseeability test and impose a universal duty of care, as Judge Andrews advocated in *Palsgra*f. Alternatively, perhaps there should be a presumption that the plaintiff is a foreseeable victim that is overcome only if no reasonable jury could find otherwise. He also invited consideration of Justice Ransom's focus on legal and social policy as possibly overriding the foreseeable plaintiff component of duty formation. Finally, he noted that a currently circulating draft of the *Restatement (Third) of Torts: Liability for Physical Harm,* questioned whether the foreseeable plaintiff requirement should continue as a component of duty formation or, instead, become a consideration for the jury when determining proximate cause. *See id.* ¶¶ 40–43, 73 P.3d at 196.

141. *Id.* ¶ 44, 73 P.3d at 197.

142. 2010-NMSC-043, 148 N.M. 646, 241 P.3d 1086.

143. The tables in the picnic area were perpendicular to the field of play and no screening protected the picnickers from batted balls. In contrast, the City placed protective screening in in the area behind and around home plate. *Id*. ¶¶ 5–6, 241 P.3d at 1088.

144. Other defendants were the home team Albuquerque Isotopes, the Houston Astros, and the Houston player who struck the baseball. The district court granted summary judgment for the Houston club and player, and the court of appeals affirmed the ruling. The Plaintiffs did not seek to overturn the judgments in favor of the batter and the Astros. The Court did not distinguish between the City and the Isotopes in its opinion.

145. "An [owner] . . . owes a visitor the duty to use ordinary care to keep the premises safe for use by the visitor." UJI 13-1309 NMRA; Ordinary care "is that care which a reasonably prudent person would use in the conduct of the person's own affairs." UJI 13-1603 NMRA.

146. "Defendants do not dispute that a duty is owed: they simply argue that the scope of that duty should be limited." *Edward C.*, 2010-NMSC-043, ¶ 16, 241 P.3d at 1090.

147. The limited-duty baseball rule "is satisfied when the owner/occupant of a baseball stadium provides a screened area behind home plate with adequate seating for those seeking protection." *Id*. ¶ 10, 241 P.3d at 1089.

148. *Id.* ¶ 2, 241 P.3d at 1088.

rule of ordinary care for visitors on land[149] and ordered a remand for a trial to determine whether the City breached the duty of ordinary care. In a unanimous opinion authored by Justice Edward Chavez, the Supreme Court rejected the duty-owed formulations of both the district court and the court of appeals, adopted a third iteration of the duty owed by the owner of a ballpark to a visitor, and remanded the case to the district court for evaluation under the proper standard.[150]

The issue was not whether the City owed a duty to the plaintiffs but rather the nature of the duty the City owed. The Court had occasionally modified the duty a defendant owed from ordinary care to some other standard;[151] indeed, it had done so in the past when determining the duty owed by a land owner to persons on the land.[152] This time, Justice Chavez's opinion for the Court found support for modifying the statement of a duty owed in Section 7(b) of the *Restatement (Third) of Torts*.[153] The *Restatement* provides a new paradigm both for determining when a duty is owed and, relevant to *Edward C.*, for determining when it is appropriate to diverge from the normal statement that the duty owed is reasonable or ordinary care. Section 7(b) provides: "In exceptional circumstances, when an articulated countervailing principle or policy warrants . . . limiting liability in a particular class of cases, a court may decide that . . . the ordinary duty of reasonable care requires modification."[154]

The *Restatement* also makes clear that when a court modifies the duty of reasonable care, it should identify and explain its concerns and the principles or policies that lead it to provide an alternative formulation of the duty owed.[155] The *Restatement* Comments provide a thorough but not exclusive list of the considerations that might justify modifying the normal duty of care.[156] A significant advantage of modifying the generic statement of the duty owed is that creation of categorical exceptions to the general rule of ordinary care "has the benefit of providing clearer rules of behavior for actors . . . who structure their behavior in response to that potential liability."[157]

After a thorough review of the history and development of various baseball rules,[158] and of the abolition of contributory negligence and assumption of the risk

149. *Id.* ¶ 3, 241 P.3d at 1088.

150. *Id.* ¶ 45, 241 P.3d at 1098.

151. *E.g.*, Kabella v. Bouschelle, 1983-NMCA-125, 100 N.M. 461, 672 P.2d 290 (using a different standard for contact sports); UJI 13-1104(B) NMRA (doctor's duty to inform patient must include specific categories of information).

152. *See* Ford v. Bd. of Cnty. Comm'rs of Cty. of Dona Ana, 1994-NMSC-077, 118 N.M. 134, 879 P.2d 766 (describing different duties owed by a landlord to invitees, licensees and trespassers, equating the duty owed to "visitors," and maintaining a separate statement of the duty owed a trespasser).

153. *See* 2010-NMSC-043, ¶ 21, P.3d at 1092 (citing RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 7 cmt. i (2010).

154. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 7(b).

155. *Id.* § 7 cmt. a.

156. *Id.* § 7 cmts. c–g.

157. Edward C. v. City of Albuquerque, 2010-NMSC-043, ¶ 21, 148 N.M. 646, 241 P.3d 1086 (quoting RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 7 cmt. i.).

158. *Edward C.*, 2010-NMSC-043, ¶¶ 22–39, 241 P.3d at 1092–97.

as complete defenses,[159] the *Edward C.* Court concluded that owners of commercial baseball stadiums "owe a duty to their fans that is justifiably limited given the unique nature of their relationship, as well as the policy concerns implicated by this relationship."[160] Based on these considerations, the Court crafted its own unique modification of the duty owed baseball fans by owners of commercial stadiums: "Spectators must exercise ordinary care to protect themselves from the inherent risk of being hit by a projectile that leaves the field of play and the owner/occupant must exercise ordinary care not to increase that inherent risk."[161]

Edward C. is important for three reasons. First, the Court's approving references to a portion of Section 7 of the *Restatement (Third)* signaled openness to adopting the entirety of Section 7 of *Restatement (Third)*, which would radically transform the law of duty creation. Second, the Court approved the use of public policy considerations to modify the statement of the duty owed, thus affording the Court flexibility to determine that a duty was owed while adjusting the duty owed to reflect policy concerns that did not alone justify the denial of a duty. Third, the flexibility also allowed the Court to impose a duty but modify the duty owed in light of policy considerations that "might escape the jury's attention in a particular case, such as the overall social impact of imposing a significant precautionary obligation on a class of actors."[162]

Four years after *Edward C*., the Supreme Court completed its fundamental revamping of the law of duty in *Rodriguez v. Del Sol Shopping Center Associates, L.P.*[163] Customers in a store in a shopping center died and were injured when a driver lost control of her vehicle in the parking lot and crashed into the store. In two lawsuits, Plaintiffs sued the owners and operators of the shopping center, alleging they negligently failed to take adequate precautions to prevent out-of-control vehicles from encroaching into the store. The trial courts granted summary judgment for Defendants, finding that the accident was not foreseeable as a matter of law, and thus the shopping center owed no duty of care to the Plaintiffs.[164] Plaintiffs appealed,[165] and the court of appeals affirmed the summary judgments. The court rejected the trial courts' reliance on a foreseeability analysis to deny the existence of a duty but affirmed the absence of a duty, purportedly on the basis of "a policy-driven duty analysis advanced by the *Restatement (Third) of Torts* . . . and recently embraced . . . in *Edward C.*" [166]

159. *Id.* ¶ 27, 241 P.3d at 1094.

160. *Id.* ¶ 40, 241 P.3d at 1097.

161. *Id.* ¶ 41, 241 P.3d at 1098.

162. *Id.* ¶ 21, 241 P.3d at 1091. The Court noted a compensating benefit for defendants from the diminishment of the jury's normal broad freedom to determine breach: "Such a categorical determination . . . has the benefit of providing clearer rules of behavior for actors who may be subject to tort liability and who structure their behavior in response to the potential liability." *Id.* (citing RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 7 cmt. i (AM. L. INST. 2010)).

163. 2014-NMSC-014, 326 P.3d 465.

164. *Id.* ¶ 2, 326 P.3d at 467.

165. The court of appeals consolidated the two appeals. *Id.* ¶ 3, 326 P.3d at 468.

166. *Id.*

The Supreme Court adopted the entirety of Section 7 of the *Restatement (Third) of Torts*,[167] which bars foreseeability of harm to the plaintiff from consideration when determining if a duty is owed.[168] The Court "expressly [held] that foreseeability is not a factor for courts to consider when determining the existence of a duty," and is likewise not relevant "when deciding to limit . . . an existing duty in a particular class of cases,"[169] holding further that "[f]oreseeability determinations are reserved for a jury because such determinations require the jury's common sense, common experience, and its consideration of community behavioral norms."[170]

The Court's embrace of the *Restatement (Third)* approach to duty formation has the effect of adopting a portion of Judge Andrew's approach to duty in his *Palsgraf* dissent where he stated, "Every one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others. . . . Harm to someone being the natural result of the act, not only that one alone, but all those injured may complain."[171] Section 7(a) of the *Restatement (Third)* adopts this as the presumptive test for whether a duty is owed: "An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm."[172] Policy issues remain a critical factor in determining whether a duty is owed. Instead of searching for a policy justification for imposing a duty, however, courts will focus on whether policy issues justify overcoming the presumption of a duty [173] "to exercise ordinary care."[174]

---

167. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 7 (AM. L. INST. 2010).

168. "A no-duty ruling represents a determination, a purely legal question [applicable] in a category of cases . . . based on articulated policies or principles . . . These reasons of policy and principle do not depend on the foreseeability of harm based on the specific facts of the case. They should be articulated directly without obscuring references to foreseeability." *Id*. cmt. j.

169. *Rodriguez*, 2014-NMSC-014, ¶ 1, 326 P.3d at 467. The Court overruled that portion of Edward C. "which noted that foreseeability plays some role, although it is limited, in the determination of duty." *Id.* ¶ 3, 326 P.3d at 467.

170. *Id*. ¶ 22, 326 P.3d at 473.

171. Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 350, 162 N.E, 99, 103 (1928) (Andrews, J., dissenting).

172. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 7(a) (AM. L. INST. 2010).

173. *Id.* § 7(b). *Edward C.* had already ruled that when a defendant owes a duty, the duty is one of ordinary care unless policy considerations justify a different formulation of the duty owed. Edward C. v. City of Albuquerque, 2010-NMSC-014, ¶¶ 20, 21, 148 N.M. 646, 241 P.3d 1086.

174. *Rodriguez*, 2014-NMSC-014, ¶ 5, 326 P.3d at 468–69. The defendant has the procedural burden to raise the issue and to demonstrate that the court should not impose a duty or should modify the usual statement of the duty owed. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 7 cmt. b (AM. L. INST. 2010). The Court provided examples from prior New Mexico cases where the court of appeals properly applied policy considerations in determining duty issues. *Rodriguez,* 2014-NMSC-014, ¶¶ 8–11, 326 P.3d at 469–70. The Court also considered whether Justice Ransom's concept of remoteness would be a valid policy to apply to deny or limit a duty but concluded that it was not because "remoteness often leads toward a discussion of the facts in a particular case; insofar as it does so, it is not a discussion of policy." *Id.* ¶ 13, 326 P.3d at 470–71. The Court reemphasized that "no duty based upon the foreseeability, improbability, or remote nature of the risk" is inconsistent with the Court's adoption of the RESTATEMENT (THIRD). *Id.*

In adopting Section 7 of the *Restatement (Third)*, the Court abolished foreseeability as a factor in determining duty but reaffirmed its continuing importance in determining if a defendant breached the duty of care.[175] In New Mexico, foreseeability also may play a role in the jury's determination of proximate cause.[176]

4. Summary of the Duty Issue

Justices Ransom and Montgomery learned from, questioned, and built upon the efforts of Judge Cardozo and Judge Andrews in the *Palsgraf* case. Just as the New York judges disagreed respectfully while presenting sharply divergent views of the law of duty, Justices Ransom and Montgomery did the same. Always in the spirit of colleagues sharing a common goal but often not agreeing as to the proper course to follow, they sometimes proposed different solutions. But the one constant was that each thoughtfully considered the views of the other and displayed an openness to modify his view in the face of persuasive arguments presented by the other.

That they did not always agree, just as Cardozo and Andrews did not, is not surprising, but their joint efforts exposed the core issues and policies that underlie the law of duty. They debated the role of foreseeability in duty formation, firmly established that policy factors were crucial to duty formation, ultimately forged a consensus about the source of the relevant policies, and discussed whether the jury should have a role in determining duty creation. Justice Montgomery introduced the idea that Judge Andrews' universal duty of care might be the norm, thus eliminating foreseeability issues from duty creation, an insight central to Section 7 of the *Restatement (Third)* and adopted in *Rodriguez*. That some of their positions ultimately were rejected in *Edward C*. and *Rodriguez* does not diminish the value of their contributions to the development of the New Mexico law.[177] Their efforts, and the contributions of their colleagues on the Court, were essential to the ultimate transformation of New Mexico law that began with *Calkins* and culminated in *Rodriguez*. [178]

175. *Rodriguez*, 2014-NMSC-014, ¶ 19, 326 P.3d at 473.

176. UJI 13-306 NMRA.

177. In *Rodriguez*, for example, Justice Chavez concluded that Justice Ransom's doctrine of remoteness, which Justice Ransom characterized as a policy, actually compelled a determination of the facts of each case and thus was inconsistent with the exclusion of fact issues in determining duty. 2014-NMSC-014, ¶ 13, 326 P.3d at 470–71.

178. The transformation of the common law in this area necessarily remains an ongoing process. In *Morris v. Giant Four Corners, Inc*., the Court recently concluded the vendor of gasoline at a gas station owed a duty of reasonable care to decline to sell gasoline to the driver of a vehicle who the vendor "know[s] or has reason to know is intoxicated." 2021-NMSC-028, ¶ 47, 498 P.3d 238. Dissenting, Justice Barbara Vigil argued that application of the standard is unclear in its scope and application. *Id.* ¶ 77, 498 P.3d at 259 (Vigil, J., dissenting). The majority opinion conceded that determining whether the vendor failed to exercise reasonable care may be difficult but is "left for the jury in individual cases. *Id*. ¶ 46, 498 P.3d at 252–53.

Neither opinion in *Morris* considered the solution adopted in *Edward C*.—that a duty may be imposed, but the statement of the duty may be modified for policy reasons. *Edward C*., 2010-NMSC-043, ¶ 4, 241 P.3d at 648. Imposing a duty but modifying the standard of care from "knew or should have known" to, perhaps, "knew or acted with utter indifference to the consequences." *See* UJI 13-1827 NMRA (defining reckless conduct in the punitive damage instruction), might have addressed Justice Vigil's

B. The Jurisdiction of the New Mexico Appellate Courts and the Tension between Certainty and Flexibility in the Law

One might expect little debate about whether an appellate court has jurisdiction to hear an appeal, whether the legislature or the courts can regulate the process for gaining access to an appellate court, and whether courts can forgive an appealing party who fails to follow strictly the requirements governing the filing of an appeal. Yet, in a series of cases, Justices Montgomery and Ransom engaged in an extended dialogue concerning these issues, demonstrating their differing commitment to the values of certainty and flexibility in this area of the law.

The New Mexico Constitution mandates exclusive Supreme Court appellate jurisdiction in only one narrow category of cases.[179] It empowers the legislature, however, to confer additional appellate jurisdiction to both the Supreme Court and the court of appeals.[180] In turn, the Supreme Court has an inherent power to adopt Rules of procedure that govern the operation of all New Mexico courts,[181] which includes matters that relate to the process for obtaining appellate review.[182] The constitution also grants the Supreme Court "superintending control over all inferior courts," and authority to issue "writs necessary or proper for the complete exercise of its jurisdiction."[183]

Inevitably, these overlapping provisions—involving the constitution, statutes, and court Rules—create tension between the Court and the legislature concerning the power of each in determining appellate jurisdiction and in resolving their respective roles in crafting non-jurisdictional provisions for perfecting appeals. After a brief summary of the historical developments leading to the current structure dealing with appellate jurisdiction, this section analyzes the cases in which Justices

---

concerns by providing a standard that would appropriately cabin the range of conduct that could lead to liability for vendors under the unusual circumstances of this case.

179. *See* N.M. CONST. art. VI, § 2 (granting the Supreme Court jurisdiction over criminal cases imposing sentence of death or life imprisonment). Provisions in the 1911 constitution addressing appellate court jurisdiction were substantially amended in 1965, when the constitution authorized creation of the New Mexico Court of Appeals. For a discussion of the 1965 changes, see *infra* notes 196–203 and accompanying text.

180. The constitution provides that additional appellate jurisdiction shall be "as provided by law." *See* N.M. CONST. art. VI, § 2 (granting such jurisdiction to the Supreme Court); *id.*, § 29 (granting such jurisdiction to the court of appeals). The phrase empowers the legislature to determine appellate jurisdiction. State v. Smallwood, 2007-NMSC-005, ¶ 6, 152 P.3d 821, 823 ("The phrase 'as may be provided by law' means that our Constitution or Legislature must vest us with appellate jurisdiction—we cannot create jurisdiction ourselves through our rule-making authority."); New Mexico v. Armijo, 2016-NMSC-021, ¶ 19, 375 P.3d 415, 420 ("A court's jurisdiction derives from a statute or constitutional provision. . . . The right to appeal is also a matter of substantive law created by constitutional or statutory provision." (internal quotation marks and citation omitted)).

181. State v. Roy, 1936-NMSC-048, 40 N.M. 395, 60 P.2d 646; *see* Michael B. Browde & M. E. Occhialino, *Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Constraints*, 15 N.M. L. REV. 407 (1985).

182. Rule 12-101(A) NMRA (2016) ("These rules govern procedure in the Supreme Court and the Court of Appeals.").

183. N.M. CONST. art. VI, § 2; *see, e.g.*, Rhein v. ADT Auto., Inc., 1996-NMSC-066, ¶ 11, 122 N.M. 646, 930 P.2d 783 (using superintending control authority to allow an immediate appeal to the court of appeals from the district court to allow that case to be consolidated with a similar case then pending in the appeals court).

Ransom and Montgomery engaged in their extensive debates arising from these intersecting realms of authority. The section concludes with a summary of the justices' contributions to the later-developed law of appellate jurisdiction.

1. The Historical Developments Leading to the Current Structure Regarding Appellate Jurisdiction

The federal Organic Act establishing the Territory of New Mexico[184] served as a surrogate constitution of the territory prior to statehood,[185] and Section 10 of the Act gave the Supreme Court appellate authority over "final decisions" of the district courts, "under such regulations as may be prescribed by law. . . . "[186]

New Mexico's first constitution, adopted in 1911, retained from the Organic Act the grant to the Supreme Court of appellate jurisdiction over final judgments from the district court.[187] It also provided that the Court "shall have such appellate jurisdiction of interlocutory orders[188] as may be conferred by law"—that is, enacted by the legislature. [189] The constitution further authorized the Supreme Court to issue a variety of writs and provided that the Court "shall have a superintending control" over all inferior courts.[190]

The growth of the state's population and the resulting increase in litigation created concern for the Supreme Court's ability to satisfy the appellate needs of the judiciary.[191] In the early 1960s, a Constitutional Revision Commission was created to recommend constitutional changes, including a proposal for adoption of an intermediate appellate court, and led to a debate over whether the constitution should delegate to the legislature or to the Supreme Court the power to set the jurisdiction of the appellate courts.[192] One side endorsed the view of the Model Judicial Article for State Constitutions, supported by the American Bar Association and the

184. Act of September 9, 1850, ch. 49, 9 Stat. 446.

185. *See* In re Attorney-General of New Mexico, 1881-NMSC-001, ¶ 28, 2 N.M. 49, 58 ("In a territory the constitution and laws of the United States and especially the organic act of the territory itself, stands exactly in the relation a state constitution occupies in a state.").

186. Act of September 9, 1850, ch. 49 9 Stat. 446, 450.

187. N.M. CONST. art. VI, § 2 (1911) ("The appellate jurisdiction of the New Mexico Supreme Court … shall extend to all final judgments and decisions of the district courts….").

188. *Id.* This provision overcame the ruling of the Territorial Supreme Court in *Jung v. Myer,* 1902-NMSC-013, 11 N.M. 378, that the Organic Act precluded Supreme Court jurisdiction over interlocutory orders.

189. *See supra* note 180.

190. N.M. CONST. art. VI, §3. The provision also gave the Court original jurisdiction over writs of quo warranto and mandamus. *Id*.

191. The need giving rise to the 1965 constitutional amendment creating the New Mexico Court of Appeals is explained in Thomas A. Donnelly & Pamela B. Minzner, *History of the New Mexico Court of Appeals,* 22 N.M. L. REV. 595, 596 (1992).

192. For a further discussion of the details of that debate, see Montgomery & Montgomery, *supra* note 6 at 233.

American Judicature Society,[193] providing that state supreme courts should "prescribe rules governing appellate jurisdiction."[194]

Counsel to the Revision Commission, however, disagreed and presented a draft to the state senate that adhered to the jurisdiction "as provided by law" principle that was first articulated in the Organic Act and continued in the 1911 constitution delegating the task to the legislature.[195] That proposal, retaining the authority over appellate jurisdiction in the legislature, became enshrined in the 1965 Constitutional amendment to the judicial article.[196] The amendment also created the court of appeals[197] and described the relation of the court of appeals to the Supreme Court.[198]

As a result, the Supreme Court no longer has appellate jurisdiction over all appeals from final judgments of the district court. As noted earlier, the constitution grants the high Court direct and exclusive review only of district court judgments imposing a sentence of death or life in prison.[199] For all other cases appealed from the district court, the Supreme Court's appellate jurisdiction is set by the legislature, with one critical limitation on the plenary legislative authority: In 1965, for the first time, the legislature's power was circumscribed by a new constitutional command that "an aggrieved party shall have an absolute right to one appeal."[200] The 1965 amendments also left unchanged the Supreme Court's "superintending control" over inferior courts and its authority to issue "all writs necessary or proper for the complete exercise of its jurisdiction."[201]

The 1965 amendments eliminated the requirement in the 1911 Constitution limiting the appellate jurisdiction of the Supreme Court to final judgments.[202] Only in Article VI, Section 27, governing appeals from inferior courts to the district court, is there now a constitutional provision limiting appellate jurisdiction to final

193. See *id.* at 229, suggesting that the ABA and the Judicature Society efforts were intended to protect judicial independence and to "insulate them from legislative meddling" in the wake of recent Congressional attempts to limit U.S. Supreme Court jurisdiction in the Warren Court era.

194. *Id.* The Model Judicial Article allocated broad powers to state supreme courts "to prescribe rules governing appellate jurisdiction, rules of practice and procedure, and rules of evidence for the judicial system." *Id*. In doing so, it evoked the similar national debate over the proper allocation of procedural rule-making power between the legislature and the courts led by Dean Roscoe Pound during the early years of the 20th century. *See generally* Browde & Occhialino, *supra* note 181.

195. Montgomery & Montgomery, *supra* note 6 at 230.

196. N.M. CONST. art. VI, §§ 2 (amended 1965), 27 (amended 1966).

197. *Id.* § 28 (amended 1965).

198. *Id.* § 2 (amended 1965).

199. *Id.*

200. Article VI, Section 2's grant of an "absolute right to one appeal" is focused on direct appeals from the district court to an appellate court. Article VI, Section 27, however, provides: "Appeals shall be allowed in all cases from the final judgments and decisions of the probate courts and other inferior courts as provided by law." Pursuant to this authority, the legislature has provided that appeals from magistrate court go to the district court, N.M. STAT. ANN. § 35-13-1 (1975). Most appeals of civil cases brought in metropolitan court go to the court of appeals. N.M. STAT. ANN. § 34-8A-6(B) (1979). Appeals from the metropolitan court in actions brought pursuant to the Uniform Owner-Resident Relations Act are brought in the district court. N.M. STAT. ANN. § 34-8A-6(C) (2019). The constitutional right to appeal does not include an appeal from a district court acting in its appellate jurisdiction. VanderVossen v. City of Espanola, 2001-NMCA-016, ¶ 11, 130 N.M. 287, 24 P.3d 319.

201. N.M CONST. art. VI, § 3.

202. *Compare* N.M. CONST. art VI, § 3 (1911), *with* current N.M, CONST. art. VI, § 3.

judgments and final decisions.[203] However, the legislature may, and has, with limited exceptions,[204] imposed a statutory final judgment/final decision requirement when exercising constitutional authority to determine appellate jurisdiction not explicitly provided for in the constitution.[205]

Article VI, Section 29, expressly grants the legislature authority to determine the appellate jurisdiction of the newly created court of appeals, including jurisdiction to review decisions of administrative agencies.[206] It also allows the Supreme Court by Rule to authorize the court of appeals to issue writs in aid of the court's appellate jurisdiction.[207] These constitutional provisions from the 1965 amendments provide the current framework for determining the appellate jurisdiction of the Supreme Court and the court of appeals. Although there are a few constitutional jurisdictional requirements that cannot be modified by the legislature,[208] or through rule-making by the Supreme Court, most authority over appellate jurisdiction continues to reside in the legislature.[209]

The constitution's delegation to the legislature the power to determine the jurisdiction of the appellate courts is in tension with a different strand of New Mexico law—that authorizing the Supreme Court to write procedural Rules controlling the course of lawsuits, including appeals. Many of the appellate jurisdiction issues confronting Justices Ransom and Montgomery involved the intersection between constitutionally-authorized legislative power over appellate jurisdiction and the Court's rule-making power, which extends to appellate court Rules. The question often involves which statutory provisions set jurisdictional requirements for, or limitations on, appellate court jurisdiction, and which simply provide procedures for

---

203. "Appeals shall be allowed in all cases from the final judgment and decisions of the probate courts and other inferior courts as provided by law." N.M. CONST. art. VI, § 27.

204. N.M. STAT. ANN. § 39-3-4 (1999) (granting interlocutory order appeals from district court); N.M. STAT. ANN. § 39-3-3(A)(2–3) (1999); N.M. STAT. ANN. 39-3-3(B)(1–2) (1999) (granting certain non-final orders in criminal cases); N.M. STAT. ANN. § 39-3-7 (1999) (granting interlocutory appeals in special statutory proceedings).

205. *See, e.g.*, N.M. STAT. ANN. §§ 39-3-1.1(C) (1999) (granting appeal of final decisions from some agency decisions); N.M. STAT. ANN. § 39-3-2 (1966) (appeals of final civil judgments in district court), N.M. STAT. ANN. § 39-3-3 (A)(1) (1972) (granting appeals of final criminal judgments in district court).

206. N.M. CONST. art. VI, § 29.

207. *Id.*

208. *E.g.*, N.M. CONST. art. VI, § 2 (direct appeal to Supreme Court of district court opinions imposing sentence of death or life imprisonment); N.M. CONST. art. VI, § 3 (original jurisdiction over writs); N.M. CONST. art. VI, § 27 ("appeals shall be allowed in all cases from final judgments and decisions" of inferior courts.).

209. With respect to the court of appeals, see, e.g., N.M. STAT. ANN. § 34-5-8 (1983) (granting and identifying broad areas of court of appeals jurisdiction); N.M. STAT. ANN. § 39-3-2 (1966) (granting civil appeals from district court); N.M. STAT. ANN. § 39-3-3 (1972) (granting appeals from district court in criminal cases); N.M. STAT. ANN. Sec, 39-3-4 (1999) (granting most appeals of interlocutory orders from district court); N.M. STAT. ANN. § 39-3-7 (1966) (granting appeals from district court in special statutory proceedings); N.M. STAT. ANN. § 39-3-15 (1966) (granting most appeals of district court judgments for civil or criminal contempt and grants of habeas corpus petitions); N.M. STAT. ANN. §39-3-1.1 (1999) (granting discretionary review of district court judgments that determine appeals from agency decisions). With respect to the Supreme Court, see, e.g., N.M. STAT. ANN. § 34-5-14(A) (1972) (granting the appellate jurisdiction of the Supreme Court extends to all cases where appellate jurisdiction is not specifically vested by law in the court of appeals."); N.M. STAT. ANN. § 34-5-14(B) (1972) (granting review of court of appeals decision by writ of certiorari).

perfecting appeals where jurisdiction exists. The former are the domain of the legislature; the latter are ultimately the responsibility of the Supreme Court.

Since the 1930s, the Supreme Court and the legislature have sparred over the relationship between the Court's rule-making power over matters of procedure and the legislature's power to enact statutes containing procedural provisions applicable in the judicial process.[210] The current Rule provisions that potentially clash with statutory jurisdictional authority include:

- Rule 12-202 (A) states a notice of appeal shall be filed in the district court within the time limit set in Rule 12-201, which requires a notice of appeal be filed within thirty days of the entry of the judgment or order appealed from.[211] Rule 12-201 (E) provides for motions seeking limited extensions of the thirty-day filing requirement.[212]
- Rule 12-202 (B) and (C) set forth the required content of the notice of appeal, and Rule 12-202(E) requires that the appellant give notice of filing the notice of appeal to listed persons.
- Rule 12-312 (C) provides that an appeal *filed within the time set by the Rules* shall not be dismissed for technical violations of Rule 12-202 that do not affect the substantive rights of the parties.[213]

As a result, of these cross currents of authority, the Ransom-Montgomery dialogue ultimately involves differences over the following questions:

- What is meant by the term appellate "jurisdiction" the constitution grants and the creation of which the constitution delegates to the legislature to determine?
- What requirements for invoking the jurisdiction of the appellate courts are truly jurisdictional and compel dismissal of the appeal if not complied with?
- What requirements for appealing are not jurisdictional but merely provide procedures for perfecting appeals?

---

210. *E.g.*, State v. Roy, 1936-NMSC-048, 40 N.M. 397, 60 P.2d 646; Ammerman v. Hubbard Broad., Inc., 1976-NMSC-031, 89 N.M. 307, 551 P.2d 1354; State ex rel. Anaya v. McBride, 1975-NMSC-032, 88 N.M. 244, 539 P.2d 1006; *see generally* Browde & Occhialino, *supra* note 181.

Alterations in the rule-making authority have added to the confusion. The 1974 version of the appellate Rules for civil appeals applied "[e]xcept . . . as may be otherwise provided by law" and added that the Rules "shall not be construed to extend or limit the jurisdiction of the appellate courts as provided by law." Rule 21-12-1(a)–(b) NMRA. In 1983, the legislature authorized the Court to provide a Rule allocating jurisdiction between the Court and the court of appeals. *See* N.M. STAT. ANN. § 34-5-8 (2007). The Court did so, listing appeals that would go to the Supreme Court and providing that all other appeals would go to the court of appeals unless the Constitution or a "specific provision of state law" provided differently. N.M. Sup Ct. Order No. 80000 Misc. (April 21, 1983). Then, in a more comprehensive 1986 Rules revision, the language in the 1983 order was fundamentally modified. It no longer provided that the Supreme Court's allocation of jurisdiction could be modified only by the constitution or legislation. Instead, Rule 12-102 stated that Supreme Court jurisdiction could be modified "by the New Mexico Constitution *or by supreme court order or Rule.*" Rule 12-102 (A)(6) NMRA (emphasis added).

211. Some appeals in criminal cases must be filed within 10 days after the decision or order is filed in the district court. Rule 12-201(A)(1) NMRA.

212. Rule 12-201(E) NMRA. In addition, Rule 12-201(D) NMRA provides for extension of the time for filing a notice of appeal when a party files certain post-judgment motions.

213. Rule 12-312 (C) NMRA.

- May the Supreme Court supersede non-jurisdictional statutory procedural requirements by adopting a contrary court Rule?
- Must New Mexico courts insist on strict compliance with non-jurisdictional statutory or Rule requirements for appealing or can the courts excuse non-compliance and allow the appeal to proceed? If so, what are the criteria for doing so?

2. The Ransom-Montgomery Cases

Shortly after Justice Montgomery joined the Court, he and Justice Ransom played pivotal roles as the Court decided the following flurry of cases attempting to define the "jurisdiction" of the appellate courts.[214]

a. Maples v. State (Conflicts Between Statutes and Rules)

Maples v. State,[215] involved an appeal of an award in a Workers' Compensation proceeding. A statute authorized an appeal within thirty days after the hearing officer *mailed* the final order to the parties.[216] An applicable court Rule required that notice of appeal be filed within thirty days of the *filing* of the order.[217] The petitioner missed the filing date required by the Rule but met the statutory requirement. Resolution of the matter engendered separate opinions from Justice Baca,[218] Justice Ransom, and Justice Montgomery concerning the relationship between procedural statutes and procedural Rules.

Justice Baca avoided a conflict between the statute and the Rule by concluding that after the hearing officer entered the final order, the statutes dealing

214. Justices Ransom and Montgomery first sparred over the issue of the subject matter jurisdiction of the *district* courts in *Sundance Mechanical & Util. Co. v. Atlas*, 1990-NMSC-031, 109 N.M. 683, 789 P.2d 1250. One issue in *Sundance* was whether a pleading that fails to state a valid cause of action is a jurisdictional defect even if the court has subject matter jurisdiction over the claim. *Id.* ¶ 1, 789 P.2d at 1251. New Mexico precedent identified three jurisdictional prerequisites for district court jurisdiction: "jurisdiction of parties, jurisdiction of subject matter and power or authority to decide the particular matter presented." Heckathorn v. Heckathorn, 1969-NMSC-017, ¶ 12, 77 N.M. 369, 371, 423 P.2d 410, 412 (1967). Justice Montgomery's opinion for the Court eliminated the third requirement because if subject matter jurisdiction exists, "the jurisdiction of a district court does not depend on how the court decides a contested issue submitted to it; the test 'is whether or not it had the power to enter upon the inquiry, not whether its conclusion . . . was right or wrong.'" *Sundance*, 1990-NMSC-031, ¶ 15, 789 P.2d at 1254. In a special concurrence, Justice Ransom expressed a preference for maintaining the third requirement: "I would not abandon so quickly the principle that a court lacks power to grant relief on a complaint that fails to state a cause of action." *Id.* ¶ 37, 789 P.2d at 1259 (Ransom, J., concurring). The opinions of Justice Montgomery and Justice Ransom set the stage for later cases in which they would agree, disagree, and sometimes revise their views on the scope and limits of jurisdictional requirements on appellate jurisdiction.

215. Maples v. State, 1990-NMSC-042, 110 N.M. 34, 791 P.2d 788.

216. N.M. STAT. ANN. § 52-5-8(A) (1989).

217. *Maples*, ¶ 2, 791 P.2d at 789; *see* Rule 12-601(B) NMRA (notice of appeal must be filed within thirty (30) days "from the date of the order.").

218. Justice Baca's separate opinion fully engaged with Justices Ransom and Montgomery over the legislature's and the court's role with respect to judicial procedures. *See Maples*, ¶¶ 1–12, 791 P.2d at 788–91.

with administrative procedures were no longer applicable.[219] The Court's Rules then take effect.[220] Nonetheless, he interjected dictum that occasioned separate opinions from Justice Ransom and Justice Montgomery. Citing *Ammerman v. Hubbard Broadcasting, Inc.*,[221] Justice Baca stated, "The *legislature has no power* to fix the time within which an appeal must be heard by the supreme court in appeals from the district court" nor "to set the time for all appeals from final orders including appeals from final orders of administrative agencies."[222]

Justice Ransom disagreed with Justice Baca's statement that the legislature has no role. Instead, he expressed "strong accord" with the doctrine embodied in *Ammerman*, and reiterated in a subsequent case, that the legislature and the Court share rule-making power but "any conflict between court Rules and statutes that relate to procedure are today resolved by the Court in favor of the Rules."[223]

Unlike Justice Baca's categorical rejection of any role for the legislature in determining procedures applicable to the courts,[224] Justice Montgomery perceived a role for the legislature in drafting procedural statues: "[S]ome sort of role-sharing between courts and legislatures is both necessary and beneficial."[225] A contrary view, Justice Montgomery declared, would be "pernicious in that it arrogates to the judiciary a power which is unnecessary to the maintenance of the judiciary's position as a co-equal branch of government."[226]

Unlike Justice Ransom, Justice Montgomery did not endorse the view that *Ammerman* required that every conflict between a procedural statute and a procedural Rule must be resolved in favor the Court's Rule.[227] Instead, if conflict

---

219. *Id.* ¶ 10, 791 P.2d at 790 ("An appeal from a final order to the judiciary is necessarily the point at which the judicial branch gains jurisdiction. When it does, it is inherently within the power of the court to set its own time limitations for appeals.").

220. *Id*.

221. Ammerman v. Hubbard Broadcasting Co. 1976-NMSC-031, 89 N.M. 307, 551 P.2d 1354, *cert. denied,* 436 U.S. 906 (1978).

222. *Maples*, 1990-NMSC-042, ¶ 10, 791 P.2d at 790 (emphasis added). Justice Baca also noted that Rule 12-601, dealing with statutory appeals to an appellate court from agency decisions, was amended in 1986 to provide explicitly that the Rule supersedes any inconsistent statute providing for the time or other procedures for filing or perfecting an appeal. *Id*. ¶ 8, 791 P.2d at 790.

Justice Baca also provided an alternative, less sweeping, rationale for choosing the Rule rather than the statute. When resolving conflicts concerning the time for filing appeals, he stated "a rule adopted by the supreme court supersedes an inconsistent statute." *Id.* ¶ 2, 791 P.2d at 788 (citing American Auto. Assoc. v. State, 1985-NMSC-037, ¶ 4, 102 N.M. 527, 697 P.2d 946) ("[O]n procedural matters such as time limitations for appeals, a rule adopted by the Supreme Court governs over an inconsistent statute.").

223. *Id.* ¶ 15, 791 P.2d at 791 (Ransom, J., dissenting) (quoting Southwest Community Health Services v. Smith, 1988-NMSC-035, ¶ 6, 107 N.M. 196, 755 P.2d 40). This view is consistent with Justice Baca's alternative ruling that court Rules trump inconsistent statutory procedural provisions. *Id.* ¶ 2, 791 P.2d at 788; *see supra* note 222.

224. *See Maples*, 1990-NMSC-042, ¶ 10, 791 P.2d at 790.

225. *Id*. ¶ 21 (Montgomery, J., dissenting) (quoting Jack B. Weinstein, *Reform of Federal Court Rulemaking Procedures*, 76 Colum. L. Rev. 905, 926–27 (1976)).

226. *Id.* ¶ 20, 791 P.2d at 792.

227. *Id.* ¶ 24, 791 P.2d at 794; *see* N.M. STAT. ANN. § 38-1-1 (1966)(legislature acknowledges Court the has power to write procedural rules); N.M. STAT. ANN. § 38-1-2 (1953) ("All statutes relating to pleading, practice and procedure, now existing, shall, from and after the passage of this act, have force and effect only as rules of court and shall remain in effect unless and until modified or suspended by rules promulgated pursuant hereto.").

exits, the choice between the statute and the Rule should be resolved on a case-by-case basis.[228]

Where an arguably "procedural," statute actually implements a policy external to the functioning of the courts,[229] the choice between the statute and the Rule should be resolved "by referring to the purpose of the particular statute and the extent of intrusion upon the courts' ability to discharge their functions."[230] The Court should respect the legislature's policy choice unless the statute "deprives the court of 'sufficient power to protect itself from indignities and to enable it effectively to administer its judicial functions.'"[231] Finding "no great clash of competing interests,"[232] Justice Montgomery concluded that the statutory time limit should control over the contrary Rule, in part because the petitioner's constitutional right to appeal would be fostered by application of the statutory accrual date to determine timeliness.[233]

Justice Montgomery carved out an exception to this general rule when the statutory provision places a limit on the jurisdiction of appellate courts, a topic that would become the subject of a continuing dialogue with Justice Ransom. He acknowledged that statutory steps required to be followed in perfecting an appeal may sometimes provide limits on the appellate court's jurisdiction;[234] such statutes are not subject to modification by Court Rule or relaxation by courts in their discretion.[235] Justice Montgomery identified some statutory subjects that are

228. *Maples*, 1990-NMSC-042, ¶ 21, 791 P.2d at 793 (Montgomery, J., dissenting).

229. *Id.* ¶ 25, 791 P.2d at 794. Justice Montgomery cited *Ammerman v. Hubbard Broad., Inc.*, 1976-NMSC-031, 89 N.M. 307, 551 P.2d 1354 and *Southwest Community Health Services v. Smith*, 107 N.M. 196, 755 P.2d 40 (1988)—both dealing with statutory evidentiary privileges—as statutes that may pursue policies not solely directed to the essential working of the courts. *Id.*

230. *Maples*, 1990-NMSC-042, ¶ 21, 791 P.2d at 793 (Montgomery, J., dissenting).

231. *Id.* ¶ 25, 791 P.2d at 794 (Montgomery, J., dissenting) (quoting State ex rel. Bliss v. Greenwood, 1957-NMSC-071, ¶ 19, 63 N.M. 156, 315 P.2d 223). Justice Montgomery derived two corollaries from *Bliss*: The first is that the Court may strike legislation that may undercut its ability to perform its essential functions. The second is that the court may negate statutory procedures which interfere with the effective and efficient operation of the courts. *Id*.

232. *Id.* ¶ 27, 791 P.2d at 795 (Montgomery, J., dissenting).

233. *See id.* ¶ 28, 791 P.2d at 795 (Montgomery, J., dissenting).

234. *Id.* ¶ 27, 791 P.2d at 795 (Montgomery, J., dissenting).

235. *Id.* In dictum, Justice Montgomery introduced a concept and a vocabulary that exemplified a continuing discussion in subsequent cases. Citing *State v. Arnold*, 1947-NMSC-043, 51 N.M. 311, 314, 183 P.2d 845, 846 (1947), he acknowledged that only the legislature can create a right to appeal. *Maples*, 1990-NMSC-042, ¶ 27, 791 P.2d at 795 (Montgomery, J., dissenting). But he temporized when discussing whether all statutory provisions addressing the requirements for implementing the right to appeal are themselves jurisdictional: "It *is generally* held that the timely filing of an appeal*, perhaps* along with other steps necessary to perfect it is 'jurisdictional.'" *Id.* (emphasis added). Jurisdictional statutory provisions that affect the right to appeal "in a fundamental way . . . it would *seem*" should control over court Rules which purport to regulate the manner for exercising the right to appeal. *Id.* (emphasis added).

jurisdictional[236] and considerations that might distinguish jurisdictional statutes from those that the Court may supersede by a contrary Rule or forgive compliance with.[237]

Maples set the stage for two debates that mark the Ransom-Montgomery dialogue about appellate court jurisdiction. First, it pits Justice Ransom's straightforward principle that conflicts between procedural statutes and Rules must be resolved in favor of the Rule, against Justice Montgomery's ad-hoc, policy-oriented approach to determining whether deference should be given to legislative procedural provisions over contrary procedural Rules. Second, it raises the question of how to determine what provisions in a statute are jurisdictional mandates beyond the power of the Court to modify and which are merely procedural provisions that guide the process by which the parties present the appeal to the Court. Both debates continue in the cases that follow.

b. Lowe v. Bloom (Is Place of Filing Jurisdictional?)

In *Lowe v. Bloom*,[238] the appellant filed a timely notice of appeal from a final judgment granting the appellee summary judgment. The notice of appeal contained the required copy of the judgment appealed from and was sent to those required to receive it. But the appellant filed the notice of appeal in the court of appeals instead of the district court as required by the applicable Rule.[239] The appellee moved to dismiss the appeal for lack of jurisdiction.

The Supreme Court had previously decided that the timely filing of a notice of appeal in accordance with the Court's Rules was a jurisdictional requirement for obtaining appellate review.[240] *Lowe* presented a different issue: whether the place of filing the notice of appeal, as required by Rule 12-202(A), is also a jurisdictional prerequisite for appealing a district court judgment. Challenging the motion to dismiss the appeal, the appellant contended that he "substantially complied with the requirements of the appellate rules, that appellees' substantive rights have not been prejudiced, and that his mistake constituted a technical violation of Rule 12-202 which, under Rule 12-312 should not result in dismissal of his appeal."[241]

Justices Ransom and Montgomery differed sharply in their responses to that argument. Writing for a four justice majority, Justice Ransom confirmed that compliance with the Rule setting the time for filing was a jurisdictional

236. Justice Montgomery acknowledged that the creation of a right to appeal is outside the province of the Court's rule making power and that New Mexico cases have held that "the timely filing of an appeal, perhaps along with other steps necessary to perfect it, is 'jurisdictional.'" 1990-NMSC-042, ¶ 27, 791 P.2d at 795.

237. 1990-NMSC-042, ¶ 24, 791 P.2d at 794 (Montgomery, J., dissenting). Justice Montgomery identified considerations that might raise a procedural statute beyond a "housekeeping rule" thus not subject to modification by a Court Rule or subject to relaxation by a court —jurisdictional statutes, procedural statutes seeking to accomplish substantive goals, and procedural statutes that impair courts from carrying out their ability to carry out their fundamental functions. *Id.*

238. 1990-NMSC-069, 110 N.M. 555, 798 P.2d 156.

239. Rule 12-202(A) NMRA.

240. *See* State v. Brinkley, 1967-NMSC-124, ¶ 4, 78 N.M. 39, 428 P.2d 13 ("[T]he notice of appeal was filed on the thirty-first day after the final order. This court, therefore, is without jurisdiction to hear appellant Brinkley's appeal."); *see also* Public Serv. Co. v. Wolf, 1967-NMSC-170, ¶ 15, 78 N.M. 221, 430 P.2d 379 (1967).

241. *Lowe*, 1990-NMSC-069, ¶ 1, 798 P.2d at 156.

prerequisite,[242] and held that the place of filing provision was likewise a jurisdictional requirement because "the very concept of a timely filing (Rule 12-201) includes the concept that the party has substantially complied with the applicable place of filing requirements (Rule 12-202(A))."[243] He also ruled that "the mere mailing of the notice to the [district court] judge as required by Rule[244] did not transform the jurisdictional defect of filing the notice of appeal in the wrong court into a technical one"[245] that might otherwise preclude dismissal because it did "not affect the substantive rights of the parties."[246]

Justice Montgomery dissented. He found the result reached by the Court "unsound" and its reasoning "emptily formalistic."[247] Rejecting the notion that the word "jurisdiction" has a fixed meaning that can be applied mechanically,[248] Justice Montgomery reprised his approach in *Maples,* insisting that the Court should instead "focus on the purpose and policies of appeals and the rules governing them," and decide what is jurisdictional after considering whether those purposes would be fostered or hindered by labeling a Rule requirement jurisdictional.[249] To contrast the majority's holding and reasoning, he articulated the rationale for his dissent:

> [J]urisdiction . . . is not something whose existence can be determined by looking through a microscope; . . . jurisdiction is an intensely practical concept used basically to tell lawyers and judges, and the general public, when a court will entertain a case and when it will not. The rules prescribing and delimiting jurisdiction should therefore be construed and applied in similarly practical ways—to accomplish the objective of defining those instances when a court will decide a controversy and when, presumably for good reasons, it will refuse to decide.[250]

Justice Montgomery conceded that the time requirement for filing a notice of appeal serves the valid purpose of notifying the court and parties that the appeal process has been invoked,[251] but he found no commensurate significance to the requirement that the notice of appeal be filed in the district court rather than in the court of appeals, especially when, as in this case, notice of the filing was sent by mail

---

242. *See id.*

243. *Id.* ¶ 4, 798 P.2d at 157. In so ruling, Justice Ransom overruled a court of appeals opinion that held that filing a timely notice of appeal in the wrong forum was not a jurisdictional defect but only a technical violation of the applicable Rule. *Id.* ¶ 6, 798 P.2d at 157 (overruling Martinez v. Wooten Construction Co, 1989-NMCA-074, 109 N.M. 16, 780 P.2d 1163).

244. He cited Rule 12-202(D)(3) NMRA. *Id.* ¶ 5, 798 P.2d at 157. The requirement is in current Rule 12-203(E)(3) NMRA.

245. *Lowe*, 1990-NMSC-069*,* ¶ 5, 798 P.2d at 157.

246. *See* Rule 12-312 (C) NMRA ("An appeal filed within the time limits provided in these rules shall not be dismissed for technical violations of Rule 12-202 which do not affect the substantive rights of the parties.").

247. *Lowe*, 1990-NMSC-069, ¶ 9, 798 P.2d at 157 (Montgomery, J. dissenting).

248. *Id.* ¶ 19, 798 P.2d at 160.

249. *Id.* ¶ 10, 798 P.2d at 158.

250. *Id.* ¶ 19, 798 P.2d at 160.

251. *Id.* ¶ 11, 798 P.2d at 158.

to counsel for the appellee and to the district court.[252] Because no prejudice resulted from misfiling,[253] no "abuse of the appellate process" occurred,[254] and because the court should attempt to foster the constitutional right to appeal,[255] Justice Montgomery concluded that the error was "a 'technical violation' of the rules . . . not giving rise to a jurisdictional defect,"[256] and the appeal should not have been dismissed.[257] Instead, he asserted the majority should have applied Rule 12-312(C), which provides an appeal that is timely filed should not be dismissed for technical Rule violations that do not affect the substantive rights of the parties.[258]

In *Lowe*, Justice Ransom decided that the Rule requirements for both the time and place of filing a notice of appeal are jurisdictional. By doing so, he relieved the appellate court of the need for burdensome ad-hoc reviews of the record to see if, on the facts of each case, the relevant policies supporting allowing the appeal outweigh those that would bar the appeal. In contrast, Justice Montgomery eschewed bright-line rules in both *Maples* and *Lowe* largely because they leave no room for careful consideration of the purpose sought to be achieved by the legal doctrine being applied in light of facts presented in each case.

Other justices might have been content to maintain and repeat their respective positions in later cases, sometimes winning the votes of colleagues and sometimes not. Justice Ransom and Justice Montgomery were different. Their mutual respect and willingness to learn from one another prompted each to rethink his view and often to modify a position after considering the views of the other. Their continuing dialogue in subsequent cases dealing with the seemingly mundane issue of the requirements for invoking the jurisdiction of New Mexico appellate courts illustrates the benefits that flow from such a collegial approach to shaping New Mexico law.

c. Marquez v. Gomez (Is Attaching the Notice of Appeal Jurisdictional?)

In *Marquez v. Gomez*,[259] a short opinion issued less than a month after *Lowe*, the Supreme Court addressed the scope of the Court's holding in *Lowe*. In *Lowe*, the appellant filed a timely notice of appeal in the wrong court. In *Marquez*, the appellants timely filed in the correct court but filed a docketing statement that referenced the notice of appeal rather than attaching the notice of appeal as required by Rule 12-202(A). The court of appeals concluded *Lowe* required dismissal of the appeal, holding that "serving only their docketing statement on the district court clerk" and not the notice of appeal was a jurisdictional defect.[260]

Writing for a unanimous three-judge panel that included Justice Montgomery, Justice Ransom ruled that this mistake did not constitute a

252. *See id.* ¶ 15, 798 P.2d at 159.

253. *See id.* ¶¶ 16–17, 798 P.2d at 159.

254. *Id.* ¶ 18, 798 P.2d at 159.

255. *Id.* ¶ 13, 798 P.2d at 158.

256. *Id.* ¶ 14, 798 P.2d at 158 (quoting Martinez v. Wooten Constr. Co., 1989-NMCA-074, ¶ 3, 109 N.M. 16, 708 P.2d 1163).

257. *See id.* ¶ 20, 798 P.2d at 160.

258. *Id.* ¶ 17, 798 P.2d at 159.

259. 1990-NMSC-101, 111 N.M. 14, 801 P.2d 84.

260. *Id.* ¶ 2, 801 P.2d at 84.

jurisdictional defect but was only a technical error that should not result in dismissal of the appeal.[261] Identifying the error in *Marquez* as filing the wrong document rather than filing late or in the wrong court, Justice Ransom distinguished *Marquez* from *Lowe*.[262] This allowed him in *Marquez* to embrace Justice Montgomery's approach in *Lowe* and in future cases not involving time or place deficiencies. Justice Ransom determined the time and place requirements for filing were met, the docketing statement "substantially complied" with the content requirements of Rule 12-202(B), and no party claimed the error was prejudicial.[263] Therefore, the error constituted only a technical violation of the Rule that did not require dismissal for lack of jurisdiction.[264]

In *Marquez*, Justice Ransom pivoted from requiring strict compliance with requirements for invoking appellate jurisdiction to a policy-based, case-specific analysis to determine whether requirements for perfecting an appeal are jurisdictional. He did so by acknowledging the influence of Justice Montgomery's dissent in *Lowe* and endorsing that approach in future cases without abandoning his opinion in *Lowe* that, like the time of filing requirement, the place of filing mandate is a jurisdictional requirement. Justice Ransom acknowledged that for all other requirements for perfecting an appeal, Justice Montgomery's dissent in *Lowe* "expressed the sentiments of this Court," going forward as well as "our liberal construction of rules in order that cases on appeal may be heard on their merits."[265]

Marquez illustrates the process by which the two Justices listened to, respected, and were influenced by the differing views each expressed. After *Marquez*, a question remained, however: How much further might Justice Ransom be willing to go in embracing Justice Montgomery's preference for an ad-hoc policy-oriented approach instead of clear, specific commands for perfecting appeals?

d. Lovelace Medical Center v. Mendez (Statutory Jurisdictional Requirements vs. Housekeeping Procedural Statutes)

Less than two months after *Marquez*, the Court decided *Lovelace Medical Center v. Mendez*,[266] addressing a statutory provision with jurisdictional implications. The issue involved a provision in a statute authorizing an interlocutory appeal[267] that stated if an application for interlocutory appeal was not accepted by

261. *Id.* ¶ 7, 801 P.2d at 85 (citing Johnson v. Johnson, 1964-NMSC-233, 74. N.M. 567, 396 P.2d 181).

262. "Any objection to the insufficiency of the filing must go to its content and not, as was the case in *Lowe*, to the place the notice was filed or delivered." *Id.* ¶ 4, 801 P.2d at 84.

263. *Id.* ¶ 6, 801 P.2d at 85.

264. *Id.* ¶ 4, 801 P.2d at 84 (The Court applied Rule 12-312(C) in support of its conclusion: "[A]n appeal within the time limits shall not be dismissed for technical violations of Rule 12-202 which do not affect the substantive rights of the parties.").

265. *Id.* ¶ 3, 801 P.2d at 84.

266. 1991-NMSC-002, 111 N.M. 336, 805 P.2d 603.

267. N.M. STAT. ANN. § 39-3-4 (1999). The 1911 Constitution explicitly granted the legislature power to provide for interlocutory appeals. N. M. CONST. art. VI, § 2 (1911). The current constitution does not contain an equivalent provision. Instead, it more expansively provides that the Supreme Court and the Court of Appeals "shall exercise jurisdiction as may be provided by law." N.M. CONST. art. VI, §§ 2, 29.

the court of appeals within twenty days after it is filed, the application was deemed denied.[268]

The trial court granted a partial summary judgment for the defendant and certified the order as appropriate for interlocutory appeal. The plaintiff filed a timely petition asking the court of appeals to accept the appeal, and twenty-eight days later the court of appeals accepted the petition for review. Over the objection of the defendant, the court of appeals ruled that it had jurisdiction despite non-compliance with the statute's twenty-day requirement.

The issue presented in the Supreme Court was whether the court of appeals had "jurisdiction . . . even though the application was granted more than twenty days after it was filed,"[269] contrary to the statute. The court of appeals had ruled that the statute's twenty-day limit for accepting the petition was a procedural provision that was void, asserting that under the rule in *Ammerman v. Hubbard Broadcasting, Inc.*,[270] only the Supreme Court had power to regulate procedure in the courts.[271]

In an opinion by Justice Montgomery, concurred in by Justice Ransom,[272] the Court affirmed that the court of appeals had jurisdiction but rejected the court of appeals' rationale that procedure is exclusively for the Court to determine.[273] The Court conceded that the twenty-day statutory limit might have qualified as a legitimate statutory jurisdictional limitation, and if it did, "presumably we would accord it that effect [because] the appellate jurisdiction of both this court and the court of appeals is within the legislative power to prescribe."[274] But Justice Montgomery identified two policy rationales calling for "construing it simply as a housekeeping rule to assist the courts with the management of their cases."[275] First, to do so would further the Court's goal of facilitating decisions on the merits.[276] Second, construing the time limit as a jurisdictional requirement might enmesh the Court in an unnecessary separation-of-powers constitutional challenge to the statute as interfering with the judiciary's control of "the appellate process itself."[277]

The Court concluded that the legislature did not intend the twenty-day requirement to limit the court of appeals' jurisdiction. It was only "intended to assist the court with the management of their cases in the absence of some other provision."[278] As a non-jurisdictional procedural statutory provision, the twenty-day

---

268. *Lovelace Med. Ctr.*, 1991-NMSC-002, ¶ 4, 805 P.2d at 605 (citing N.M. STAT. ANN. § 39-3-4 (Orig. Pamp.)).

269. *Id.* ¶ 1, 805 P.2d at 603.

270. *See* Ammerman v. Hubbard Broad., 1976-NMSC-031, 89 N.M. 307, 551 P.2d 1354.

271. *Lovelace Med. Ctr.*, 1991-NMSC-002, ¶ 5, 805 P.2d at 605.

272. Justice Ransom "fully concur[red]" in Justice Montgomery's opinion addressing the jurisdictional issue but wrote separately to express disagreement with one portion of the Court's opinion on the merits. *Id.* ¶ 46, 805 P.2d at 614 (Ransom, J., concurring).

273. *Id.* ¶ 10, 805 P.2d at 606 ("To resolve the jurisdictional issue in this case we need not go as far as the above-quoted statement in *Ammerman*.").

274. *Id.* ¶ 11, 805 P.2d at 606 (citing N.M. CONST. art. VI, §§ 2, 29).

275. *Id.* ¶¶ 10, 12, 805 P.2d at 606–07.

276. *Id.* ¶ 12, 805 P.2d at 606–07 (citing Olguin v. State, 1977-NMSC-034, 90 N.M. 303, 563 P.2d 97; Jaritas Live Stock Co. v. Spriggs, 1937-NMSC-094, 42 N.M. 14, 74 P.2d 722).

277. *Id.*

278. *Id.* ¶ 13, 805 P.2d at 606.

limit was valid, but the Court could supersede it by adopting a contrary Rule.[279] The applicable Rule 12-303, however, did not contain a contrary time limit; it was silent on the matter.[280] The Montgomery opinion for the Court noted the absence of an equivalent Rule provision might itself be considered contrary to the statutory time limit and thus would have superseded the statute's time limit.[281] But if the absence of a time limit in the Rule was not contrary to the statute's twenty-day requirement, "the statutory provision remains in effect as a rule of court but it may be waived or relaxed by the court . . . in the absence of abuse of discretion or prejudice to a party."[282] Finding no undue prejudice to the appellee,[283] the Supreme Court affirmed that the court of appeals had jurisdiction over the interlocutory appeal.[284]

Lovelace also marks another significant step in the gradual process by which Justice Ransom moved away from his preference in *Lowe* for specific jurisdictional requirements not subject to ad-hoc policy-based exceptions. By concurring in Justice Montgomery's opinion, he embraced the view that arguably jurisdictional statutes limiting appellate courts might often better be construed as only housekeeping procedures for perfecting an appeal; that the choice between a jurisdictional limitation and a housekeeping rule is seldom fixed; more often, it is determined by policy considerations that favor promoting the constitution's guarantee of a right to appeal and its concomitant preference that appeals be decided on the merits.

Justice Montgomery also signaled a desire to move even further away from rigid jurisdictional requirements. Though appellate jurisdiction "is within the legislative power to prescribe,"[285] he wrote that if the legislature intended a statute to have jurisdictional effect, "presumably" the Court would give it that effect "unless we were to hold it unconstitutional under *Ammerman*."[286] *Ammerman* might support rejecting the validity of a jurisdictional statute, he noted, if the statute would "intrude directly" into the doctrine of separation of powers.[287] Justice Montgomery thus provided a rationale for further limitations on legislative power to control appellate jurisdiction by subjecting "jurisdictional" statutes to constitutional scrutiny to determine if they violated separation of powers.

279. *See id.* ¶¶ 14–15, 805 P.2d at 607–08.

280. *Id.* ¶ 16, 805 P.2d at 608.

281. *See id.*

282. *Id.* ¶ 16, 805 P.2d at 606. Justice Montgomery conceded that the power to "relax" a procedural provision "applies mainly to . . . relaxation of its own rule, not a rule of a higher authority," but he expanded its application to a statue here as one "in which a directive has been adopted in large part for the benefit of the court which seeks to relax it." *Id.* ¶ 18, 805 P.2d at 608.

283. *Id.* ¶ 19, 805 P.2d at 608.

284. *Id.* ¶ 20, 805 P.2d at 608.

285. *Id.* ¶ 11, 805 P.2d at 606.

286. *Id.*

287. *Id.* ¶ 12, 805 P.2d at 606. The New Mexico Constitution explicitly provides for the separation of powers among the three branches of government, N.M. CONST. art. III, § 1.

e. Govich v. North American Systems, Inc. (Substantial Compliance with Procedural Rules)

In *Govich v. North American Systems Inc*.,[288] decided six months after *Lovelace,* Justice Ransom wrote for a unanimous three-judge panel that did not include Justice Montgomery. In *Govich,* Justice Ransom continued to reassess his expansive view of jurisdictional limits in *Lowe* that he began in *Marquez*.[289] The Goviches filed an action seeking damages for both personal injuries and lost wages, and their subrogated insurer joined as a co-plaintiff seeking recovery for property damage.[290] The trial court granted a partial summary judgment dismissing the personal injury claims. The Goviches filed a timely notice of appeal, to no avail because the partial summary judgment was not a final judgment and thus could not then be appealed.[291]

The trial court later entered a second order denying Defendants' discovery requests. That order also stated that all of Plaintiffs' claims had been dismissed by the first order and dismissed the Goviches from the lawsuit.[292] Plaintiffs filed a timely notice of appeal from this second ruling and only attached the second order denying discovery.[293] Defendants argued that Plaintiffs' failure to attach the first order dismissing their personal injury claims, as required by Rule 12-202(C),[294] "fails to confer jurisdiction over the partial summary judgment order."[295] Justice Ransom disagreed and held the appeal was properly before the Court.[296]

Justice Ransom did not simply apply his holding in *Marquez v. Gomez* that failure to attach the proper documents to a timely notice of appeal is not a jurisdictional defect and can be forgiven if the filed documents "substantially complied" with the Rule and the appellee was not prejudiced.[297] Rather, Justice Ransom explored the underlying rationales in *Marquez* and in Justice Montgomery's dissent in *Lowe v. Bloom*[298] to revisit, review, and significantly modify his own opinion in *Lowe.*

He acknowledged his statement in *Lowe* that "appellate rules for the time and place of filing a notice of appeal govern the proper invocation of our

288. 1991-NMSC-061, 112 N.M. 226, 814 P.2d 94.

289. *See* Marquez v. Gomez, 1990-NMSC-101, ¶ 3, 111 N.M. 14, 801 P.2d 84.

290. *Govich*, 1991-NMSC-061, ¶ 4, 814 P.2d at 96.

291. *Id.* ¶ 10, 814 P.2d at 97 ("[T]he partial summary judgment order left unresolved the Goviches' property claims and, thus . . . cannot be a final order from which appeal properly may be taken."); *see* Rule 1-054(C)(1) NMRA. Rule 1-054 was amended in 2016 and the relevant provision is now in Rule 1-054(B) NMRA.

292. *Govich*, 1991-NMSC-061, ¶ 8, 814 P.2d at 96.

293. *Id.*

294. "A copy of the judgment or order appealed from . . . shall be attached to the notice of appeal." Rule 12-202(B) NMRA (1986).

295. *Govich*, 1991-NMSC-061, ¶ 11, 814 P.2d at 97–98.

296. *Id.* ¶¶ 13–14, 814 P.2d at 98 ("The policies in this state, and the purpose of [Rule 12-312(C)], are vindicated if the intent to appeal a specific judgment fairly can be inferred from the notice of appeal and if the appellee is not prejudiced by any mistake . . . . Under these circumstances we will treat the Goviches' second notice of appeal as the functional equivalent of an appeal from the partial summary judgment order and the order of dismissal.").

297. Marquez v. Gomez, 1990-NMSC-101, ¶¶ 6–7, 111 N.M. 14, 801 P.2d 84.

298. 1990-NMSC-069, 110 N.M. 555, 798 P.2d 156.

jurisdiction."[299] But crediting Justice Montgomery with having "explored this concept eloquently in his dissent to *Lowe*,"[300] Justice Ransom stressed that in *Marquez* the Court expressed a strong policy preference for facilitating the constitutional right to appeal, a policy that is served by "liberally construing technical deficiencies in a notice of appeal otherwise satisfying the time and place of filing requirements."[301] That policy-based approach, developed by Justice Montgomery, provided Justice Ransom a rationale for moving away from his holding in *Lowe* that compliance with time and place requirements for perfecting an appeal are bright-line jurisdictional requirements.[302]

The semantic vehicle for his retreat from *Lowe* was the adoption of a new terminology. He discarded the term "jurisdictional" for describing the Court's Rules for perfecting appeals, ruling that "we properly should refer hereafter to the mandatory sections of our rules of appellate practice as 'mandatory'" preconditions.[303] However, the transformation was not merely cosmetic. It signaled that Rules that had been treated as jurisdictional imperatives were now subject to the Court's exercise of discretion to excuse non-compliance:

> Though we have stated in categorical terms that we cannot entertain an appeal when the notice does not satisfy the requirements for time and place of filing, what we in essence have held is simply that, with respect to the mandates for time and place of filing the notice of appeal, we decline to exercise discretion to excuse or justify any improper attempt to invoke our jurisdiction. It is probably imprecise to say we cannot exercise such discretion.[304]

Justice Ransom listed the factors an appellate court should consider when deciding whether to excuse non-compliance with mandatory preconditions:

> [U]nder Rule 12–312(C) an appeal timely filed is not to be dismissed for technical violations of Rule 12–202 that do not affect the substantive rights of the parties. The policies in this state, and the purpose of the rule, are vindicated if the intent to appeal a specific judgment fairly can be inferred from the notice of appeal and if the appellee is not prejudiced by any mistake.[305]

Finding "the Goviches' intent to appeal the [first] order can be inferred from their submissions," and because no defendant claimed being misled by the failure to attach the first order, the Court ruled that the appeal would proceed.[306]

---

299. *Govich*, 1991-NMSC-061, ¶ 12, 814 P.2d at 98.

300. *Id.*

301. *Id.*

302. *See Lowe*, 1990-NMSC- 069, ¶¶ 3–4, 798 P.2d at 157.

303. *Govich*, 1991-NMSC-061, ¶ 12, 814 P.2d at 98. The court adopted the phrase from Mann v. Lynaugh, 840 F.2d 1194, 1197 (5th Cir. 1988).

304. *Govich*, 1991-NMSC-061, ¶ 12, 814 P.2d at 98.

305. *Id.* ¶ 13, 814 P.2d at 98.

306. *Id.* ¶ 14, 814 P.2d at 98.

Thus, Justice Ransom retreated from his ruling in *Lowe* that filing in the proper court is a jurisdictional requirement and affirmed his ruling in *Mendez* that failure to attach required documents to the notice of appeal is not a jurisdictional requirement; rather they are mandatory prerequisites subject to the Court's discretionary power to excuse non-compliance for sound reasons. The opinion is ambiguous, however, about whether the timely filing of the notice of appeal likewise was converted from a jurisdictional requirement to a mandatory precondition. Justice Ransom's opinion seems to confirm timely filing is still a jurisdictional requirement,[307] while also alternatively suggesting that it is now a mandatory prerequisite subject to discretionary exemptions from strict compliance.[308]

An argument can be advanced that the time requirement for filing is a jurisdictional requirement because although Rule 12-201 contains a thirty-day time-of-filing requirement,[309] its roots are in the constitution. The 1965 amendments provide that both the Supreme Court[310] and the court of appeals[311] "shall exercise appellate jurisdiction as 'provided by law,'" which means provided by the enactment of statutes.[312] And in multiple statutes, the Legislature has enshrined the requirement that appeals be brought within thirty days of the final judgment or order appealed from.[313]

Nonetheless, Supreme Court Rule 12-202(A) provides that in appeals of right from the district court, the notice of appeal shall be filed "within the time allowed by Rule 12-201," rather than the time allowed by statute.[314] Rule 12-201 provides for extensions of the thirty-day Rule requirement[315] for filing that are not found in the statutes setting the jurisdiction of the appellate courts.

In sum, *Govich* transformed almost all Rule requirements for perfecting an appeal to mere preconditions that can be modified by Rule or excused by the court. Left unresolved was whether the time requirement for filing an appeal is a

307. "[*A*]*n appeal timely filed* is not to be dismissed for technical violations of Rule 12-202. . . . " *Id.* ¶ 13, 814 P.2d at 99 (emphasis added). Moreover, Rule 12-312(C) NMRA excludes untimely appeals from the grant of permission to excuse non-compliance with technical violations.

308. "[W]hat we in essence have held is simply that, with respect to the mandates for *time* and place of filing the notice of appeal, we decline to exercise discretion to excuse or justify any improper attempt to invoke our jurisdiction. It is probably imprecise to say we cannot exercise such discretion." *Govich*, 1991-NMSC-061, ¶ 12, 814 P.2d at 99 (emphasis added).

309. Rule 12-201(A)(1)(b) NMRA.

310. N.M. CONST., art.VI, § 2.

311. N.M. CONST., art. VI, § 29.

312. *E.g.*, State *ex rel.* N.M. Judicial Standards Comm'n v. Espinosa, 2003-NMSC-017, ¶ 28, 134 N.M. 59, 73 P.3d 197 (construing the phrase "provided by law" to mean "that law that must come from the Constitution or legislation."); State v. Griffin, 1994-NMSC-061, ¶ 3, n.2, 117 N.M. 745, 877 P.2d 551 ("Provided by law' generally means 'provided by statutes.'").

313. N.M. STAT. ANN. § 39-3-2 (2021) (civil appeals from district court); § 39-3-3(A)(1) (appeals from district court in criminal cases); § 39-3-7 (appeals from district court; special statutory proceedings); § 39-3-15 (appeals: contempt and habeas corpus); § 39-3-1.1(C) (appeal of final decisions by agencies to district court); § 34-5-14(B) (supreme court; review by certiorari to court of appeals) (20 days); *see also* § 39-3-4(B) (interlocutory order appeals from district court "fifteen days after entry of the order or decision").

314. Rule 12-202(A) NMRA.

315. Rule 12-201(E) NMRA (motions for extension of time). The Rule also allows additional time when notice is sent by mail or commercial carrier. Rule 12-201(F) NMRA.

jurisdictional requirement rooted in the constitution's delegation to the Legislature to provide by statute for the appellate jurisdiction or has been transformed by Rule 12-202(A) into a Court Rule that appellate courts can amend, expand, or dispense with for sound reasons.

f. Kelly Inn No. 102 v. Kapnison (The Final Judgment Requirement)

One subject has survived the Court's transformation of previous jurisdictional requirements into mandatory provisions subject to the Court's rule-making power and power to excuse non-compliance. Except for interlocutory appeals authorized by statute[316] and extraordinary writs,[317] a final judgment is a prerequisite for appellate court review.[318] In the absence of a generally-applicable statutory definition of a final judgment,[319] the Supreme Court in earlier cases provided a general test to determine whether a judgment is final—whether "all issues of law and fact have been determined and the case disposed of by the trial court to the fullest extent possible." [320] However, numerous Supreme Court cases construed judgments as final that did not meet the standard definition. The exceptions largely dealt with cases where the merits were resolved but the district court must take further actions to carry out the decree.[321]

In *Kelly Inn No 102, Inc. v. Kapnison*,[322] the Court sought to "clarify the confusing state of the law surrounding the finality of judgments,"[323] which "raises an issue of our jurisdiction to consider the . . . appeal."[324] *Kelly Inn* involved a contractual dispute arising over the terms of a lease that provided for attorney's fees

316. N.M. STAT. ANN. §§ 39-3-2; 39-3-3 (a)(2); 39-3-4; 39-3-7 (1966).

317. NM Const. art VI, § 3; *see id.* art. VI § 29; N.M. STAT. ANN § 39-3-5 (1966); Rules 12-501–505 NMRA.

318. Kelly Inn No. 102, Inc. v. Kapnison, 1992-NMSC-005, ¶ 10, 113 N.M. 231, 824 P.2d 1033 (Whether a judgment is final, "raises an issue of our jurisdiction to consider the . . . appeal."); *see also* Pacheco v. Pacheco, 1971-NMSC-049, ¶ 3, 82 N.M. 486, 484 P.2d 328; Quintana v. Quintana, 1971-NMSC-070, ¶ 5, 82 N.M. 698, 487 P.2d 126; Aetna Cas. & Sur. Co. v. Miles, 1969-NMSC-056, ¶ 6, 80 N.M. 237, 453 P.2d 757.

An explicit final judgment requirement in the 1911 constitution, N.M. CONST. art. VI, § 2 (1911) was retained in the 1965 constitution only for appeals from decisions of probate courts and other inferior courts. N.M. CONST. art. VI, § 27. Statutes authorizing appeals in various contexts continue to provide that, with the exceptions mentioned, only final judgments may be appealed. *See* N.M. STAT. ANN. § 39-3-2 (1966) ("any final judgment or decision"); N.M. STAT. ANN. § 39-3-3(A)(1) (1972) ("final judgment"); N.M. STAT. ANN. § 39-3-7 (1978) ("final judgments" or "final orders after entry judgment"); N.M. STAT. ANN. § 39-3-15 (1966) ("thirty days from the judgment of conviction); N.M. STAT. ANN. § 39-3-1.1 (1999) ("agency final decisions").

319. The legislature has defined "final decision" for purpose of review of administrative rulings to the district court, N.M. STAT. ANN. § 39-3-1.1 (H)(2) (1999), but then provides that the meaning of the phrase "shall be governed by the law regarding the finality of decisions by district courts." N.M. STAT. ANN. § 39-3-1.1 (G)(2) (1999).

320. B.L. Goldberg & Assocs., Inc. v. Uptown, Inc., 1985-NMSC-084, ¶ 3, 103 N.M. 277, 705 P.2d 683. The definition is "essentially the same as that set out in Sacramento Valley Irrigation Co. v. Lee, 1910-NMSC-049, 15 N.M. 567, 113 P. 834." *Kelly Inn*, 1992-NMSC-005, ¶ 14, 824 P.2d at 1038.

321. See the list of cases found in Kelly Inn No. 102, Inc. v. Kapnison, 1992-NMSC-005, ¶¶ 16–19, 113 N.M. 231, 824 P.2d 1033.

322. *Id.*

323. *Id.* ¶ 1, 824 P.2d at 1035.

324. *Id.*

for the winning party. The trial court ruled for the lessors and entered judgment, stating it would later hold a hearing to determine the amount of attorney's fees.[325] Before the hearing took place, the lessee filed a notice of appeal from the judgment. The trial court ruled that once the notice of appeal was filed, the district court lost jurisdiction to determine attorney's fees. The lessors appealed.[326] The "specific issue" presented was whether the judgment was final though attorney's fees had not yet been assessed.[327]

Writing for a unanimous three-judge panel that did not include Justice Ransom, Justice Montgomery conceded that "[t]o distill . . . a general principle that will provide an easy answer to the question when a judgment is final and when it is not is probably a hopeless undertaking," particularly in what he labelled "the twilight zone of finality."[328] Despite his pessimism, Justice Montgomery balanced "competing" interests with respect to efficiency[329] and adopted a specific definition of finality for cases in which the merits were resolved but issues such as attorney's fees remained:

> Where a judgment declares the rights and liabilities of the parties to the underlying controversy, a question remaining to be decided thereafter will not prevent the judgment from being final if resolution of that question will not alter the judgment or moot or revise decisions embodied therein.[330]

Justice Montgomery's approach in *Kelly Inn* contrasts with the ad-hoc approach he employed in his *Maples* dissent to determine if a statutory or Rule provision was a jurisdictional limitation on appellate jurisdiction or a modifiable housekeeping rule.[331] In *Kelly Inn*, he identified a recurring factual pattern—further

---

325. *Id.* ¶ 3, 824 P.2d at 1035.

326. *Id.* ¶ 1, 824 P.2d at 1035.

327. Kelly Inn No. 102, Inc. v. Kapnison, 1992-NMSC-005, ¶ 10, 113 N.M. 231, 824 P.2d 1033.

328. *Id.* ¶20, 824 P.2d at 1040. That phrase is often used to denote finality questions which are "frequently so close a question that decision of that issue either way can be supported with equally forceful arguments," and where "it is impossible to devise a formula to resolve all marginal cases." Cent.-Southwest Dairy Coop. v. Am. Bank of Com., 1967-NMSC-231, ¶ 17, 78 N.M. 464, 432 P.2d 820 (internal citation omitted).

329. Justice Montgomery noted the inefficiency that would result if the trial court's post-appeal rulings were to undermine the judgment on appeal and thus require dismissal of the first appeal, the entry of a new judgment by the district court and a new of appeal *Kelly Inn*, 1992-NMSC-005, ¶ 27, 824 P.2d at 1042 (citing with approval Banquest/First Nat. Bank of Santa Fe v. LMT, Inc., 1987-NMSC-021, ¶ 9, 105 N.M. 583, 734 P.2d 1266, in which the Court disapproved of accepting appeals where the Court "may be required to consider the same issues a second time."). But he also acknowledged an efficient, earlier resolution of the main appeal would result if the judgment on appeal were deemed final and could proceed promptly, thus facilitating the constitutional right to an appeal. *Kelly Inn*, 1992-NMSC-005, ¶¶ 27–28, 824 P.2d at 1042.

330. *Id.* ¶ 21, 824 P.2d at 1040.

331. In *Maples*, Justice Montgomery also identified and explored the competing policy rationales for choosing between the two alternatives, but he did not provide a specific, general test for resolving the question in different settings. Instead, he proposed an answer dependent on the unique facts presented in each appealed case. He implied that courts would have to reach an ad-hoc answer by applying the competing policies identified in *Maples* to the specific statutes, Rules and factual setting presented in each case. *See* Maples v. State, 1990-NMSC-042, ¶ 25, 110 N.M. 34, 791 P.2d 788.

proceedings in district court after a notice of appeal is filed. He then identified and weighed the relevant policies involved to help decide whether to create a specific definition of a final judgment in that category of cases. In doing so, Justice Montgomery noted that because the definition of finality has jurisdictional consequences, "a bright-line rule regarding the finality of a decision on the merits . . . is preferable to a case-by-case approach" in resolving the matter.[332] He thus melded aspects of his preference for policy-based rulings with Justice Ransom's advocacy in *Lowe* for specific, generally applicable rulings that provide needed certainty in determining whether jurisdictional requirements are met.

Justice Montgomery acknowledged that other cases would present different factual settings within the "twilight zone" to which the new rule in *Kelly Inn* would not apply.[333] Nonetheless, by attempting to synthesize existing case law and then formulating a general rule for defining a final judgment in the specific context presented in *Kelly Inn*, he moved a step closer to Justice Ransom's preference for clear rules governing access to the appellate courts that would obviate case by case policy-driven considerations to determine whether a requirement for appeal is met.

g. State v. Orosco (Jurisdiction and the Fundamental Error Doctrine)

In *State v. Orosco*,[334] defendants were convicted of the same criminal conduct in separate trials. After they appealed and briefing was complete in the court of appeals, the Supreme Court decided a different case holding that "unlawfulness" is an essential element of the crime.[335] Defendants then sought a reversal of their convictions, arguing failure to instruct their juries on an essential element of a crime constituted a "jurisdictional error" that can be raised for the first time on appeal and compelled reversal of their convictions.[336] Justice Montgomery wrote the Court's opinion that affirmed the convictions. Justice Ransom wrote a concurring opinion that sharply diverged from Justice Montgomery's reasoning.

The procedural issue concerned an appellate Rule containing exceptions to the general rule that issues not raised in the trial court cannot be raised for the first time on appeal.[337] One exception provides that challenges to subject matter jurisdiction may be raised for the first time on appeal;[338] another provides that the appellate court has discretion to review unpreserved allegations of error that qualify as a "fundamental error."[339]

---

332. *Kelly Inn*, 1992-NMSC-005, ¶ 13, 824 P.2d at 1037.

333. Kelly Inn No. 102, Inc. v. Kapnison, 1992-NMSC-005, ¶ 20, 113 N.M. 231, 824 P.2d 1033. Indeed, even the specific definition of a final judgment Justice Montgomery crafted could not later avoid slipping back into the "twilight zone" of finality. *See* Trujillo v. Hilton of Santa Fe, 1993-NMSC-017, 115 N.M. 397, 851 P.2d 1064, *infra* at text accompanying notes 382–90.

334. 1992-NMSC-006, 113 N.M. 780, 833 P.2d 1146.

335. State v. Osborne, 1991-NMSC-032, 111 N.M. 654, 808 P.2d 624.

336. *Orosco*, 1992-NMSC-006, ¶ 5, 833 P.2d at 1148. The court of appeals certified the appeal to the Supreme Court pursuant to N.M. STAT. ANN. § 34-5-14(C) (1972) to resolve the issues. *Id.* ¶ 1, 833 P.2d at 1147. That statute allows the court of appeals to certify to the Supreme Court a case for review undecided by the court under certain circumstances.

337. *Id.* ¶ 7, n.4 , 833 P.2d at 1149 (Rule 12-216(B) NMRA). The Rule has since been amended and recompiled as Rule 12-321 NMRA.

338. *Id.* ¶ 7, n.4, 833 P.2d at 1149.

339. *Id.*

The defendants first argued that the court of appeals' precedents established the failure to instruct on a necessary element of the crime constituted jurisdictional error compelling reversal of their convictions.[340] Not unexpectedly, Justice Montgomery objected to framing the matter in terms of "jurisdiction." He ruled that "'jurisdictional error' must be confined to instances in which the court was not competent to act," and overruled contrary precedents.[341] Here, the trial courts had subject matter jurisdiction of the criminal cases and thus were competent to rule on the failure to give a necessary instruction.[342]

Having confirmed his view of the narrow scope of "jurisdictional errors," Justice Montgomery addressed the Rule provision allowing an appellate court to review an unpreserved "fundamental error."[343] Unlike jurisdictional limits, the Rule's fundamental error exception expressly grants an appellate court discretion whether to address an unpreserved error.[344] This fits comfortably within Justice Montgomery's preference for ad-hoc policy-based analysis to determine that an appeal may proceed although appellate Rules are not complied with.

Consistent with prior cases, [345] Justice Montgomery determined that "[t]he rule of fundamental error applies only if there has been a miscarriage of justice, if the question of guilt is so doubtful that it would shock the conscience to permit the conviction to stand, or if substantial justice has not been done."[346]

In sum, even errors of "constitutional dimension" will only be reversed as fundamental error "when the interests of justice require," or the court has exceeded the scope of its powers.[347] The focus on whether the otherwise fundamental error constituted a miscarriage of justice justifies the court "in examining the facts in each case to determine whether the error in the instructions rose to the level of fundamental error so as to justify reversal."[348] To do otherwise, Justice Montgomery insisted, "would be a perversion of justice, a classic demonstration of profoundly inequitable results that follow when the judiciary worships form and ignores substance."[349]

---

340. State v, Orosco, 1992-NMSC-006, ¶¶ 6–7, 113 N.M. 780, 833 P.2d 1146 (citing State v. Walsh, 1969-NMCA-123, 463 P.2d 41; State v. Southerland, 1983-NMCA-131, 673 P.2d 1324).

341. *Id.* In an earlier case dealing with a similar issue, Justice Montgomery ruled that "the jurisdiction of a district court does not depend on how the court decides a contested issue submitted to it; the test 'is whether or not it had power to enter upon the inquiry; not whether its conclusion * * * was right or wrong.'" Sundance Mech. & Util. Corp. v. Atlas, 1990-NMSC-031, ¶ 15, 109 N.M. 683, 789 P.2d 1250 (internal citation omitted).

342. *Id.* ¶¶ 7–8, 833 P.2d at 1149.

343. *Id.* ¶ 7, n.4, 833 P.2d at 1149 (citing SCRA 1986, 21-216(B)). The Rule has since been amended and recompiled as Rule 12-321 NMRA.

344. Rule 12-321(B)(2) NMRA.

345. The Supreme Court had previously held that the fundamental error doctrine does not always compel the appellate court to reverse for failure to instruct on a necessary element of the crime charged. *See Orosco*, 1992-NMSC-006, ¶ 12, 833 P.2d at 1150–51 (citing State v. Ortega, 1991-NMSC-084, 112 N.M. 554, 817 P.2d 1196).

346. State v, Orosco, 1992-NMSC-006, ¶ 12, 113 N.M. 780, 833 P.2d 1146.

347. *Id.* ¶ 17, 833 P.2d at 1151–52.

348. *Id.*

349. *Id.* ¶ 13, 833 P.2d at 1151 (quoting State v. Bell, 1977-NMSC-013, ¶ 62, 90 N.M. 134, 560 P.2d 925).

After reviewing the trial proceedings, Justice Montgomery determined that "under the undisputed evidence of unlawfulness . . . upon which the juries relied to find that defendants committed the acts, the juries themselves effectively determined the existence of the omitted element."[350] He concluded, therefore, that the failure to instruct on the element did not prejudice the defendants and so was not fundamental error[351] and affirmed the defendants' convictions.

Justice Ransom wrote a concurring opinion. He agreed that the convictions should be affirmed but took issue with Justice Montgomery's reasoning. He asserted that whether labelled "jurisdictional" or some other term, there are bright-line legal doctrines that deprive a court of the power to proceed even when subject matter and personal jurisdiction exist.[352] He therefore disapproved of Justice Montgomery's tendency to allow "bright-line principles" to give way uniformly "to case-by-case analysis based upon principles of justice and conscience,"[353] preferring instead the retention of a "mechanistic approach" that previously had been applied by New Mexico courts, though not one that "worships form and ignores substance."[354]

Their movement toward consensus seemingly ended with *Orosco*. But even in the face of their apparently irreconcilable views,[355] Justice Ransom found a path permitting him to concur in Justice Montgomery's affirmance of the convictions. While he disagreed with Justice Montgomery's broad statement that in every case the fundamental error doctrine applies "only if . . . substantial justice has not been done,"[356] Justice Ransom had no objection to the creation of an exception to the rule that fundamental error requires reversal if the exception is cabined within clear parameters. He construed Justice Montgomery's opinion as providing a limited, specific exception to the fundamental error doctrine—a "necessarily established" exception, in which he acquiesced.[357] Even when the Justices disagreed on core principles, they creatively worked to achieve consensus of results consistent with their different views.[358]

h. Carrillo v. Rostro (Collateral Order Appeals and the Writ of Error)

Carrillo v. Rostro,[359] addressed a proposal to adopt the collateral order doctrine, developed by the U.S. Supreme Court in federal civil rights cases that are subject to the defense of "qualified immunity." The federal doctrine serves to protect government officials performing official functions not only from liability but also

350. *Id.* ¶ 19, 833 P.2d at 1152.

351. *Id.* ¶ 20, 833 P.2d at 1152.

352. *Id.* ¶ 35, 833 P.2d at 1154 (Ransom, J. concurring). Justice Ransom first expressed this view in a special concurrence to *Sundance Mechanical & Utility Co. v. Atlas*, where he stated, "I would not abandon so quickly the principle that the Court lacks power to grant relief on a complaint that fails to state a cause of action, and that 'power or authority' is a jurisdictional issue that may be raised for the first time on appeal." 1990-NMSC-031, ¶ 37, 109 N.M. 683, 789 P.2d 1250.

353. *Orosco*, 1992-NMSC-006, ¶ 36, 833 P.2d at 1154 (Ransom, J., concurring).

354. *Id.*

355. *Id.* ¶ 35, 833 P.2d at 1154.

356. *Id.* ¶ 12, 833 P.2d at 1150 (majority opinion).

357. *Id.* ¶ 37, 833 P.2d at 1155 (Ransom, J., concurring).

358. *See e.g.*, Lowe v. Bloom, 1990-NMSC-069, 110 N.M. 555, 798 P.2d 156.

359. 1992-NMSC-054, 114 N.M. 607, 845 P.2d 130.

from having to engage in extensive litigation.[360] To assure that defendants erroneously denied the protection of the immunity have early access to appellate courts, the U.S. Supreme Court created the "collateral order doctrine"[361] to permit immediate appeal of many summary judgments denying the defense of qualified immunity.[362] The Supreme Court has described the purpose of the collateral order doctrine and identified three requirements that must be met:

> The collateral order doctrine [applied in federal court] is a "narrow exception," whose reach is limited to trial court orders affecting rights that will be irretrievably lost in the absence of an immediate appeal. To fall within the exception, an order must at a minimum satisfy three conditions: It must "conclusively determine the disputed question," "resolve an important issue completely separate from the merits of the action," and "be effectively unreviewable on appeal from a final judgment."[363]

In *Carrillo*, the state district court had denied defendants' motion for summary judgment based on qualified immunity in a Section 1983 civil rights action. Following the court of appeals' denial of an interlocutory appeal pursuant to New Mexico Statutes Annotated Section 39-3-4,[364] Defendants filed a notice of appeal, asserting that the federal collateral order doctrine authorizing immediate appeal must be applied in Section 1983 lawsuits brought in state court.

In an opinion written by Justice Montgomery, the Supreme Court rejected that claim, with separate concurring opinions by Justice Ransom and Justice Baca. The Court decided that the Supremacy Clause of the United States Constitution did not compel the State to apply the federal collateral order doctrine in Section 1983 lawsuits brought in state court.[365]

The Court, however, created a collateral order doctrine that differs in a significant manner from the federal doctrine. The federal collateral order doctrine is not an exception to the statutory requirement that authorizes appeals from "final decisions" of the district courts. Rather, the U.S. Supreme Court determined it is an alternative definition of a final decision: "[D]enial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within

360. *See* Harlow v. Fitzgerald, 457 U.S. 800 (1982); Mitchell v. Forsyth, 472 U.S. 511 (1985).

361. *See* Cohen v. Beneficial *Indus.* Loan Corp., 337 U.S. 541, 546 (1949).

362. *See Forsyth*, 472 U.S. at 525–27.

363. Richardson–Merrell Inc. v. Koller, 472 U.S. 424, 430–31 (1985) (internal citations omitted).

364. The statute authorizes appeal of an interlocutory order "which does not practically dispose of the merits of the action [when the judge] believes the order or decision involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order or decision may materially advance the ultimate termination of the litigation." N.M. STAT. ANN. § 39-3-4(A) (1999).

365. Carrillo v. Rostro, 1992-NMSC-054, ¶ 30 n.10, 114 N.M. 607, 845 P.2d 130 ("We do not rest our holding in this case—that the trial court's denial of qualified immunity is reviewable—on the Supremacy Clause."). In 1997, the United States Supreme Court confirmed that the Supremacy Clause does not compel states to adopt the collateral order doctrine: "While some States have adopted a similar 'collateral order' exception when construing their jurisdictional statutes, we have never suggested that federal law compelled them to do so." Johnson v. Fankell, 520 U.S. 911, 917 (1997).

the meaning of 28 U.S.C. Section 1291 notwithstanding the absence of a final judgment."[366]

Had the New Mexico Supreme Court ruled similarly to the U.S. Supreme Court that the collateral order doctrine resulted in a "final decision,"[367] the number of appeals of right potentially would have increased exponentially, a result the Court sought to avoid. As the Court noted, "if applied in too many contexts, the doctrine will allow interruption of trial court proceedings by any party claiming hardship because of postponement of review—a result that the final-judgment rule seeks to prevent."[368] The federal "final decision" version would enmesh the court in continual "piecemeal appeals . . . despite this Court's . . . strong policy against them."[369]

Instead, Justice Montgomery's opinion transformed the collateral order doctrine from one creating a right to appeal to one that allows the appellate court discretion to determine whether to accept a request for appellate review.[370] Unable to fit the collateral order doctrine into the existing statute authorizing interlocutory appeals,[371] and concluding it would be an inappropriate use of its power of superintending control of the lower courts to impose the doctrine,[372] Justice Montgomery transformed the moribund writ of error[373] into the vehicle for incorporating the collateral order doctrine into the fabric of New Mexico appellate jurisdiction.[374]

Justice Montgomery identified two specific benefits of this new use of the writ of error. First, an aggrieved party must file a petition seeking issuance of the writ and no disruption of the trial court's proceedings will occur unless the district court issues a stay of proceedings pending the Court's decision whether to grant the

366. *Forsyth*, 472 U.S. at 530.

367. In New Mexico, appeals of right in civil cases are authorized from "the entry of any final judgment or *decision*." N.M. STAT. ANN. § 39-3-2 (1966) (emphasis added).

368. *Carrillo*, 1992-NMSC-054, ¶ 23, 845 P.2d at 139.

369. *Id.*

370. *Id.* ¶ 28, 845 P.2d at 140.

371. N.M. STAT. ANN. Section 39-3-2 applies only to interlocutory orders or decisions "which practically dispose of the merits," while the collateral order doctrine requires the order must resolve an issue "completely separate from the merits of the action." Richardson-Merrell Inc. v. Koller, 472 U.S. 424, 430–31(1985). Moreover, it is the Legislature that has authority to authorize interlocutory appeals. *See* N.M. CONST. art. VI, § 2 (Supreme Court appellate jurisdiction); N.M. CONST. art. VI, § 29 (court of appeals appellate jurisdiction).

372. Though the writ of superintending control, *see* N.M. CONST. art. VI, § 3, might occasionally encompass an appeal that meets the requirements of the collateral order doctrine, the Court concluded that its primary use – to prevent an "erroneous, arbitrary and tyrannical order" by a lower court, made it an unsuitable vehicle for incorporating the doctrine into New Mexico law. *Carrillo*, 1992-NMSC-054, ¶ 31, 845 P.2d at 141.

373. The writ of error at one time was the procedural device for appellate review of proceedings at law, and appeal was the means for reviewing equity decisions. *Carrillo*, 1992-NMSC-054, ¶ 31, 845 P.2d at 146. When law and equity merged, appeal became the means for review of all cases. *Id.* The Court explained in detail the history of the writ of error and the reasons for its virtual demise. *Id.* ¶¶ 31–56, 845 P.2d at 146–47. The Clerk of the Court reported that often, only one writ of error was filed annually "usually by an inmate seeking to exhaust every conceivable avenue of relief." *Id.* ¶ 29, 845 P.2d at 141.

374. *See id.* ¶ 25, 845 P.2d at 139. Because for a writ of error to issue the remedy by appeal must be inadequate, Justice Montgomery determined the writ "provides the touchstone for our adaptation of the writ of error as the procedural device for invoking the collateral order doctrine." *Id.* ¶ 27, 845 P.2d at 140.

writ.[375] Second, by rejecting the federal doctrine that the collateral order doctrine is a broadened definition of a "final decision" with a right to appeal, the Court can maintain control of its docket because "the aggrieved party will have to apply to this Court for a writ of error, which will be issued or not in our discretion."[376]

Justice Montgomery's decision to eschew treating the collateral order doctrine as a definition of a final judgment and his decision to treat it as a form of interlocutory appeal was consistent with his oft-repeated preference for shaping appellate jurisdiction requirements in light of policy goals and consideration of the facts of each case.[377] His decision to grant the Court unfettered discretion whether to accept appeals even where the requirements are arguably met is another example of his quest to limit bright-line rules.

It is surprising that Justice Ransom's special concurring opinion approved of Justice Montgomery's adoption of the writ of error and the use of the writ of error given his preference for bright-line rules involving arguable jurisdictional requirements.[378] Justice Baca's special concurrence may have allayed Justice Ransom's usual concern that broad discretionary standards for appellate review not replace specific requirements determining appellate jurisdiction. Justice Baca cabined the use of the writ of error as a means of interlocutory appeal. He extolled the values served by the final judgment rule[379] and wrote separately "to emphasize the extremely limited reach of the collateral order doctrine . . . in the hope of stemming the tide of appeals that I anticipate will flood this court in the wake of today's opinion."[380]

---

375. *Id.* ¶ 28, 845 P.2d at 140.

376. *Id.* There is a third benefit not explicitly addressed by the Court in the use of the writ of error to house the collateral order doctrine. By packaging the collateral order doctrine into the existing but seldom-used writ of error that the New Mexico Constitution explicitly provides for in Article 6, Section 3, Justice Montgomery functionally created a new form of interlocutory appeal without violating the constitutional provisions implicitly granting only the legislature the power to do so. *See* N.M. CONST. art. VI §§ 2, 29.

The use of the writ of error also raised an issue that Justice Montgomery failed to foresee. *Carrillo* anticipated that only the Supreme Court would issue writs of error. 1992-NMSC-054, ¶ 28, 845 P.2d at 140. In 1993, however, while Justice Montgomery was still on the bench, the Court amended Rule 12-503 to provide that the court of appeals could also issue writs of error, despite the fact that the constitution apparently authorized the Court to do so. *See* NMRA Rule 12-503(A); N.M. CONST. art. VI, § 29. Justice Montgomery later concluded that the Supreme Court lacked power to grant the court of appeals authority to issue the writ. *See* Seth D. Montgomery & Andrew S. Montgomery, *Jurisdiction as May be Provided by Law: Some Issues of Appellate Jurisdiction in New Mexico*, 36 N.M.L. REV. 215, 247–49 (2006). Nonetheless, Rule 12-503(A) remains unchanged, and the court of appeals now issues writs of error.

377. *See e.g.*, Lowe v. Bloom, 1990-NMSC-069, ¶¶ 9–20, 110 N.M. 555, 798 P.2d 156 (Montgomery, J., dissenting).

378. *Carrillo*, 1992-NMSC-054, ¶ 52, 845 P.2d at 147*; see* State v. Orosco, 1992-NMSC-006, ¶ 36, 113 N.M. 780, 833 P.2d 1146 (Ransom, J., concurring).

379. *Carrillo*, 1992-NMSC-054, ¶ 57, 845 P.2d at 148–49 (Baca, J., concurring).

380. *Id.* ¶ 56, 845 P.2d at 148. Justice Baca's concurring opinion presaged the further development of this area of the law. *See id.* ¶¶ 56–62, 845 P.2d at 148–50. In 2004, the Supreme Court took Justice Baca's concern to heart, severely limiting the use of the writ of error to review interlocutory orders. King v. Allstate Ins., 2004-NMCA-031, 135 N.M. 206, 86 P.3d 631. Emphasizing the limited scope of the collateral order doctrine, the Court noted its use in New Mexico had been confined to only two types of orders—denials of qualified immunity in federal Section 1983 litigation and denials of a sovereign immunity defense in certain lawsuits against the State. *Id.* ¶ 16, 86 P.3d at 634. The Court declared a blanket prohibition on use of the collateral order doctrine to review discovery orders compelling discover

i. Trujillo v. Hilton of Santa Fe (Ransom and Montgomery Coming Together)

In *Orosco v. State*, Justice Ransom had reaffirmed his prior conviction that bright-line jurisdictional limitations should not give way to the case-by-case policy-based flexible determinations Justice Montgomery espoused.[381] Given his view in *Orosco,* it would seem unlikely that the two Justices would find common ground when resolving disputes about the limits of appellate court jurisdiction. Ironically, in *Trujillo v. Hilton of Santa Fe*,[382] Justice Ransom carved out a policy-based exception from Justice Montgomery's bright-line rule in *Kelly Inn* that a judgment is final when the merits are resolved even though the trial court reserves an award of attorney's fees for later determination.[383] Not surprisingly, Justice Montgomery concurred in Justice Ransom's opinion.

In *Trujillo,* the Workers' Compensation judge entered an order awarding compensation, but, as in *Kelly Inn*, reserved until later the determination of attorney's fees. Trujillo did not appeal the compensation order within thirty days of its entry. Instead, she waited until the trial court entered the order setting attorney's fees, after which she filed a timely notice of appeal from the order affirming attorney's fees. The court of appeals dismissed her appeal from the compensation order as untimely because *Kelly Inn* held that a judgment determining the merits of a claim was final and thus immediately appealable despite the pendency of a hearing to set attorney's fees.[384]

The Supreme Court reversed the dismissal of the merits appeal. Writing for a unanimous court that included Justice Montgomery, Justice Ransom retreated from his forceful dissent supporting bright-line rules in *Orosco*,[385] as well as from Justice Montgomery's endorsement of a bright-line rule for final judgments and decisions in *Kelly Inn*.[386] Instead, he endorsed and applied the ad-hoc policy-oriented approach Justice Montgomery espoused in his dissent in *Lowe*:[387] "We now retreat from the language in *Kelly Inn* that suggested a bright-line rule for notices of appeal in cases involving attorney's fees."[388] Justice Ransom ruled, "In the twilight of marginal cases, the zone of appeal should be one of practical choice and not one of procedural danger."[389] "[W]hen the policies of facilitating meaningful appellate review and achieving judicial efficiency outweigh the policy against piecemeal appeals," he

---

or declining to grant a protective order limiting discovery orders. *But see* Breen v. State Tax'n & Revenue Dep't, 2012-NMCA-101, 287 P.3d 379 (permitting use of the collateral order doctrine to review a discovery order where no other means of appeal were available).

381. State v. Orosco, 1992-NMSC-006, ¶ 35, 113 N.M. 780, 833 P.2d 1146.

382. 1993-NMSC-017, 115 N.M. 397, 851 P.2d 1064.

383. *Id.* ¶ 5, 851 P.2d at 1065.

384. *Id.* ¶ 1, 851 P.2d at 1064; *see* Kelly Inn No. 102, Inc. v. Kapnison, 1992-NMSC-005, ¶ 21, 113 N.M. 231, 824 P.2d 1033.

385. *Orosco*, 1992-NMSC-006, ¶ 36, 833 P.2d at 1154 (Ransom, C.J., specially concurring).

386. *Kelly Inn*, 1992-NMSC-005, ¶ 21, 824 P.2d at 1040.

387. Lowe v. Bloom, 1990-NMSC-069, ¶ 13, 110 N.M. 555, 798 P.2d 156 (Montgomery, J., dissenting)

388. *Trujillo*, 1993-NMSC-017, ¶ 5, 851 P.2d at 1065.

389. *Id.*

declared, an appellate court should accept the appeal of the merits whether timely filed after the merits judgment was entered or after attorney's fees were assessed.[390]

Thus, in *Trujillo*, the two Justices were able to join in a single opinion but only because each endorsed principles held by the other. Justice Ransom suppressed his preference for bright-line rules and adopted Justice Montgomery's policy-based analysis in its place. In turn, by concurring in Justice Ransom's opinion, Justice Montgomery abandoned his brief foray into bright-line rules in *Kelly Inn*, and in the process, participated in functionally overruling his holding in *Kelly Inn*.

j. Trujillo v. Serrano (The Court's Synthesis of Ransom and Montgomery's Views)

The cases reviewed so far reflect attempts by Justices Ransom and Montgomery to steer among three sources for determining the appellate jurisdiction of New Mexico courts: The constitution, which delegates to the legislature the power to determine jurisdiction;[391] statutes passed pursuant to this authority that sets the jurisdiction of the courts;[392] and Supreme Court Rules that can supersede statutory provisions intended not as jurisdictional limits but merely procedures for perfecting the appeal.[393]

Trujillo v. Serrano[394] provides the path for navigating among those provisions. Justice Frost wrote the opinion for a unanimous three-judge court which included Justice Montgomery.[395] Trujillo sued Serrano in magistrate court concerning a contract dispute. Both parties were pro se. At the culmination of the trial, the magistrate judge announced he would take the case under advisement. He apparently stated he would call the parties back to court to announce his decision.[396] Instead, on March 30, he entered a final judgment in favor of Trujillo without notifying the parties to appear to hear his ruling. Serrano claimed he only received notice of entry of judgment by mail in May. He filed a notice of appeal on May 7.

Trujillo filed a motion to dismiss the appeal for untimeliness, noting the applicable statute required notice of appeal be filed within fifteen days after the judgment is rendered.[397] After a hearing, the district court concluded that the untimely notice of appeal constituted a jurisdictional defect that compelled dismissal of the appeal. The Supreme Court reversed.

---

390. *Id.* ¶ 4, 851 P.2d at 1065. The case might have been resolved by applying the rule in *Govich,* that a second notice of appeal that was timely would suffice to bring the issue of the first order (that was not appealed) to the appellate court if the intent to appeal both orders was apparent. Govich v. N. Am. Sys., Inc., 1991-NMSC-061, ¶ 13, 112 N.M. 226, 814 P.2d 94.

391. *E.g.*, N.M. CONST. art. VI, §§ 2, 29.

392. *E.g.*, N.M. STAT. ANN. § 34-5-8 (1983).

393. *E.g.*, Rule 12-101(A).

394. 1994-NMSC-024, 117 N.M. 273, 871 P.2d 369.

395. The panel included Justice Montgomery but not Justice Ransom.

396. *Serrano*, 1994-NMSC-024, ¶ 2, 871 P.2d at 371 (Affidavit of Defendant Serrano).

397. N.M. STAT. ANN. § 35-13-1 (1975) (A party may appeal "within fifteen days after judgment is rendered or the final order is issued in the magistrate court.").

Article VI, Section 26 of the Constitution required the legislature to create magistrate courts.[398] Article VI, Section 29 provides that "Appeals shall be allowed in all cases from the final judgments and decisions of . . . inferior courts as provided by law."[399] This command that the legislature determine the jurisdiction of a court to hear appeals from magistrate courts has two constitutional limitations: First, Section 27 authorizes the legislature to provide for appeals from final judgments.[400] Second, the legislature must provide an appeal from magistrate court consistent with the litigants' constitutional right to appeal.[401]

Acting within the constitutional parameters, the legislature has provided an aggrieved party may appeal to the district court "any judgment rendered or final order issued by the magistrate court . . . within fifteen days after judgment is rendered or final order is issued."[402] That statute acknowledges the constitutional limit to judgments and final orders but adds a requirement that the appeal must occur within fifteen days after the court renders the judgment or final order. The statute provides no details about how the appealing party must present the appeal to the district court.[403]

The Supreme Court adopted Rule 2-705, which deals with appeals from magistrate court to the district court. At the time of the *Serrano* appeal, it provided the appeal must occur within "fifteen (15) days *after entry of the judgment or final order*."[404] The Rule now also provides procedures for perfecting the appeal, including the content and service of the notice of appeal that are not provided in the statute.[405] Though Rule 2-104(B) authorized the magistrate court to extend many time provisions in the Rules, it then barred the court from extending "the time for . . . taking an appeal under Rule 2-705."[406] This exception was consistent with the view that the statutory fifteen-day time limit for appealing constitutes a jurisdictional requirement that is beyond the Court's power to modify by adopting a different Rule.[407]

The Supreme Court, in an opinion authored by Justice Frost, ruled that the district court judge erred when he concluded that he lacked power to extend the time for appeal, even if the late filing resulted from the magistrate judge's failure to call the parties to the court to announce his decision. Rules should be construed liberally,

---

398. N.M. CONST. art. VI, § 26 ("The legislature shall establish a magistrate court to exercise limited original jurisdiction as may be provided by law.").

399. N.M. CONST. art. VI, § 27.

400. *Id.*

401. N.M. CONST. art. VI, § 2.

402. § 35-13-1.

403. *See id.*

404. Trujillo v. Serrano, 1994-NMSC-024, ¶ 6, 117 N.M. 273, 871 P.2d 369 (emphasis in original) (quoting Rule 2-705(A) NMRA (1992)). While the case was pending on appeal, the Court modified the Rule to provide that the appeal must occur within fifteen days "after the judgment or final order appealed from *is filed* in the magistrate court clerk's office." *Serrano*, 1994-NMSC-024, ¶ 7, 871 P.2d at 372 (quoting Rule 2-705(A) NMRA (1993)). That language is in the current Rule 2-705(A) NMRA.

405. *Id.* 2-705(A)–(C).

406. *Serrano*, 1994-NMSC-024, ¶ 6, 871 P.2d at 371 (quoting Rule 2-104(B)(2) NMRA (1990)).

407. The current Rule provides that "A court shall not extend the time . . . for taking an appeal under Rule 2-705 NMRA, except to the extent and under the circumstances stated in [Rule 2-705]." Rule 2-104 (B)(2) NMRA.

the Court stated, so that appeals "may be determined on the merits, where it can be done without impeding or confusing administration or perpetuating injustice."[408]

The Court conceded that older New Mexico precedent held that timely filing of an appeal was a jurisdictional defect that compelled dismissal of the appeal.[409] But more recent cases, containing opinions by Justices Ransom and Montgomery,[410] "have intimated and even proclaimed that the word 'jurisdiction' connotes shades of meaning in addition to its common usage."[411] Influenced by Justice Montgomery's "persuasive arguments against the inflexible enforcement of jurisdictional prerequisites,"[412] the Court concluded that late filing of the notice of appeal has not inevitably resulted in dismissal of the appeal for lack of jurisdiction.[413] Instead, the Court embraced Justice Ransom's categorization of "mandatory preconditions to the exercise of jurisdiction" in place of "jurisdictional requirements" as better terminology for labelling "equivocal jurisdictional matters," such as filing a late notice of appeal.[414] Since prior decisions had transformed the statutory time limit for filing a notice of appeal from a jurisdictional requirement into a mandatory precondition to the exercise of appellate jurisdiction,[415] the Court was able to proclaim, "Because a mandatory precondition rather than an absolute jurisdictional requirement is at issue, a trial court may—under unusual circumstances—use its discretion and entertain an appeal even though it is not timely filed."[416]

The Court stated that exceptions to the timeliness requirement would be determined on a case-by-case basis,[417] in which the constitutional right to an appeal must be balanced against the need for efficient administration of justice.[418] At one point, the Court implied that the balance should tip toward forgiving non-compliance with the time requirement for filing an appeal.[419] Justice Frost, however, also signaled a presumption that tilts the balance toward strictly limiting the occasions when extensions will be granted: The administration of justice requires "the parties to strictly adhere to our clearly articulated rules of procedure . . . [o]nly the most unusual circumstances beyond the control of the parties—such as error on the part of the court—will warrant overlooking procedural defects.'"[420]

The Court reversed the dismissal of the appeal and remanded to the district court to determine whether, as Serrano's affidavit alleged, the magistrate judge

---

408. *Serrano*, 1994-NMSC-024, ¶ 9, 871 P.2d at 372 (quoting Jaritas Live Stock Co. v. Spriggs 1937-NMSC-094, ¶ 3, 42 N.M. 14, 74 P.2d 722).

409. *Serrano*, 1994-NMSC-024, ¶ 10, 871 P.2d at 372–73.

410. *Id.* (citing Govich v. N. Am. Sys, Inc., 1991-NMSC-061, 112 N.M. 226, 814 P.2d 94; State v. Orosco, 1992-NMSC-006, 113 N.M.780, 833 P.2d 1146 (Ransom, C.J., specially concurring); Lowe v. Bloom, 1990-NMSC-069, 110 N.M. 555, 798 P.2d 156 (Montgomery, J., dissenting)).

411. *Serrano*, 1994-NMSC-024, ¶ 10, 871 P.2d at 373.

412. *Id.* ¶ 13, 871 P.2d at 373.

413. *See id.* ¶ 12, 871 P.2d at 373.

414. *Id.* ¶¶ 13–14, 871 P.2d at 373.

415. Many of which, of course, were authored by Justices Ransom and Montgomery.

416. *Serrano*, 1994-NMSC-024, ¶ 15, 871 P.2d at 374.

417. *Id.*

418. *Id.* ¶ 9, 871 P.2d at 372.

419. *Id.* ¶ 15, 871 P.2d at 374 ("The decision to dismiss an appeal is extreme . . . .").

420. *Id.* ¶ 19, 871 P.2d at 374.

informed Serrano that no judgment would be entered until the judge summoned the parties to court to hear the ruling. If so, the appeal would be heard.

The Court now seems to look in two directions: first, calling for case-by-case analysis with the balance tipping toward forgiving non-compliance with the time requirement for filing appeals, thus fostering resolving appeals on the merits—consistent with Justice Montgomery's position; second, understanding that strict adherence should be given to "clearly articulated rules of procedure" which will be overlooked only in "the most unusual circumstances," which is consistent with the views of Justice Ransom.[421]

3. Summary of Appellate Jurisdiction

As explained previously,[422] the drafters of the constitutional amendments to the Judicial Article in the 1960s that addressed appellate jurisdiction, (including the creation of the court of appeals) debated only two possibilities—either appellate jurisdiction authority would be given to the legislature or the Court.[423] The final resolution in the 1965 amendments opted to leave that authority with the legislature,[424] where it had resided in the constitution of 1911.[425]

The cases in this section demonstrate how Justices Ransom and Montgomery and their colleagues crafted an approach between the stark choices presented to the constitutional drafters in 1965, transforming statutes written to fulfill the legislature's constitutional obligation to determine appellate jurisdiction into statutes mostly containing only procedural prerequisites to appeal. The Ransom-Montgomery Court emphasized that the same constitutional provision delegating authority to the legislature to determine the jurisdiction of the appellate courts tempered that authority by insisting that aggrieved parties "shall have an absolute right to one appeal."[426] Ruling that the protection of the constitutional right to appeal properly is a guiding principle in construing those statutes, the Court perceived many statutory provisions not as barriers to appeals but as mere guidance to litigants who seek to exercise their right to appeal. The Court exercised its authority,

421. Cases decided after *Serrano* continue to grapple with the tension between the goal of fostering the right to appeal and the competing value of fostering adherence to procedural Rules. For example, in Schultz ex rel. Schultz v. Pojoaque Tribal Police Dep't, Justice Maes ruled that the court of appeals abused its discretion in failing to excuse the late filing of notice of appeal due to an unanticipated mailing delay that was outside the control of the appealing party. 2010-NMSC-034, ¶ 25, 148 N.M. 692, 242 P.3d 259. Justice Chavez disagreed. *Id.* ¶ 27, 242 P.3d at 266. He emphasized that liberal exceptions to the time of filing requirement must not undercut the goal of strict compliance with procedural requirements. *Id.* ¶ 36, 242 P.3d at 268 (Chavez, J., concurring in part and dissenting in part); *see also*, Forsythe v. Ford Motor Co., No. S-1-SC 37761, S-1-SC 37762, 2020 WL 6611059, at *3 (N.M. Nov. 12, 2020) (unreported opinion) (allowing late notice of appeal where counsel erred in calendaring the date the notice of appeal was due).

Nonetheless, the vast majority of subsequently-decided court of appeals opinions on the subject have declined to grant waivers of the time requirements for filing the notice of appeal. A list of more than 50 such unreported memorandum opinions is on file with the New Mexico Law Review.

422. *See supra* note 194 and accompanying text.

423. *See supra* notes 192–95 and accompanying text.

424. *See supra* note 196 and accompanying text and N.M. CONST. art. VI, §§ 2, 27.

425. N.M. CONST. art. VI, § 2 (1911).

426. N.M. Const. art. VI, § 2.

acknowledged by the legislature in 1933,[427] to supersede portions of those statutes by adoption of a contrary Rule and empowered the courts to excuse non-compliance of such statutory provisions.

There remain a few vestiges of jurisdictional requirements rooted in the statutes the legislature adopted pursuant to its constitutional prerogative to determine appellate jurisdiction. For example, in *Kelly Inn*, Justice Montgomery identified the "final judgment or decision" requirement in statutes as having continuing jurisdictional significance.[428] Also, statutes authorizing interlocutory appeals may have continuing jurisdictional significance,[429] and the provision limiting the constitutional right to an appeal to "aggrieved parties" is of jurisdictional significance, requiring a determination of who is an aggrieved party.[430]

Justices Ransom and Montgomery's interpretive efforts provided the Court the means for assuring that the right to appeal need not be forfeited because of technical violations of statutory provisions for perfecting appeals. Their efforts also provided the Court flexibility to modify procedural "housekeeping rules" that the legislature adopted "to assist the courts with the management of their cases" when the Court concludes that different procedures are needed in light of changed circumstances.[431]

Justices Ransom and Montgomery did not proceed in a straight line in advancing the transformation of arguably jurisdictional statutes into malleable procedural provisions subject to the Court's power to supersede by contrary Rule and the courts' authority to forgive non-compliance. Their views initially differed, but largely coalesced as they worked together to develop a coherent approach to adjusting the relationship of the constitutional authority of the legislature to determine appellate jurisdiction, the constitutional right to an appeal, and the Court's inherent power to promulgate procedural Rules. This evolution of New Mexico law largely resulted from the synergy produced when these two distinguished judges

---

427. *See* Act of Mar. 13, 1933, ch. 84, 1933 N.M. Laws 148. The Act provided that all existing procedural statutes "shall, from and after the passage of this Act, have force and effect only as rules of court and shall remain in effect unless and until modified or suspended by rules promulgated pursuant" to the statute. For further discussion of the import of the 1933 Act, see Michael B. Browde & Mario E. Occhialino, *Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Constraints*, 15 N.M. L. Rev. 407, 425–27 (1985).

428. Kelly Inn No. 102, Inc. v. Kapnison, 1992-NMSC-005, ¶ 10, n.7, 113 N.M. 231, 824 P.2d 1033 (quoting *In re Quintana,* 1971-NMSC-070, 82 N.M. 698, 487 P.2d 126 (1971) ("appellate court has no jurisdiction to review judgment which is not final"). Even here, Justice Montgomery construed the requirement to give the Court flexibility to define what is "final" by the creation of a "twilight zone of finality." *Id*. ¶ 15, 487 P.2d at 1038.

429. *See* N.M. Stat. Ann. § 39-3-3 (1972) and N.M. STAT. ANN. § 39-3-4 (1971). The statutes merely provide an alternative time to exercise the constitutional right to appeal and thus are not mandated by the constitution. The Supreme Court, however, seemingly acknowledges that requirements for interlocutory appeals in Rule 12-203 are jurisdictional by referencing the statutes as the source of the right to seek an interlocutory appeal and by requiring that the order authorizing an interlocutory appeal contain district court findings required by the statute. Rule 12-203 also sets a time limit for filing an application for interlocutory appeal. The court of appeals has noted that interlocutory appeals "are subject to allowance only upon compliance with the [statute]." Candelaria v. Middle Rio Grande Conservancy Dist., 1988-NMCA-065, ¶ 6, 107 N.M. 579, 761 P.2d 457.

430. N.M. CONST. art. VI, § 2.

431. Lovelace Med. Ctr. v. Mendez, 1991-NMSC-002, ¶ 13, 111 N.M. 336, 805 P.2d 603.

expressed their differing perspectives, respected each other, learned from one another, and modified their positions when persuaded by the soundness of their colleague's reasoning.

The legislature has not objected to the gradual shift of authority to the Court over statutory provisions for perfecting appeals. If the legislature ever disapproves of the balance struck by the Court's decisions, it can, of course, exercise its constitutional authority to draft new statutes that explicitly declare what provisions are jurisdictional, thus reversing or modifying the current model.[432] That the legislature has not seen fit to do so is perhaps the best testament to the soundness of the approach that Justices Ransom and Montgomery forged during their tenure on the Court.

III. CONCLUSION

The authors began this enterprise because they knew and respected Justice Ransom[433] and Justice Montgomery[434] and because they shared some expertise in the subject matters that are the focus of this article. Michael taught classes on the New Mexico State Constitution; Ted taught Torts and still teaches Civil Procedure. Reviewing the justices' decisions on the tort law of duty creation[435] and the jurisdiction of appellate courts,[436] we noted a pattern in their opinions: They often disagreed, but respectfully, and they demonstrated a willingness to learn from the views of the other and often to modify their initial views when persuaded by the views of their colleague.

Justice Ransom's recent description of his relationship with Justice Montgomery captures that relationship: Though their practice areas as lawyers differed, this proved no barrier to their "collegial partnership [because] our mutual respect for the other seemed to bring about harmony in any conflict."[437] And there were obvious initial conflicts, particularly apparent in the cases addressing appellate jurisdiction. As Justice Ransom noted, with particular reference to the appellate jurisdiction cases: "I began by looking at the sanctity of process while he began by looking to the sanctity of fairness in the result of the case in controversy."[438] Those different starting points coalesced into a coherent synthesis of the law as each justice perceived the other's perspective and sought accommodation of their different views.

---

432. The legislature's authority over appellate jurisdiction is not without limits. The doctrine of separation of powers, *see* N.M. CONST. art. VI, § 1, may constrain the legislature's exercise of its authority to set the jurisdiction of the appellate courts. *Lovelace Med. Ctr*., 1991-NMSC-002, ¶ 12, 805 P.2d at 607. The legislature may not encroach on the Court's ability to effectively "administer its judicial functions," State ex rel. Bliss v. Greenwood, 1957-NMSC-071, ¶ 19, 63 N.M. 156, 315 P.2d 223, or on the Court's "inherent power to promulgate rules regulating pleading, practice and procedure," Southwest Underwriters v. Montoya, 1969-NMSC-027, ¶ 7, 80 N.M. 107, 452 P.2d 176.

433. Both Michael and Ted had worked with Justice Ransom on a few cases before he was elevated to the bench. After Justice Ransom's retirement, for several years, Ted taught a law school seminar with him, using some of the most challenging Ransom opinions for close analysis with the students.

434. Michael knew Seth Montgomery from Seth's early days as a strong supporter of the Legal Aid movement in New Mexico and appeared before both Justices in a few appellate cases.

435. *See supra* Part II(A).

436. *See supra* Part II(B).

437. *See supra* Part I(3) at 430.

438. *Id.*

The justices had fewer opportunities to interact in determining the direction of the New Mexico law of duty creation and its relationship to the other elements of a negligence claim. The cases raising these issues during their joint tenure on the Court were few but significant. Together they sought to update the historic *Palsgraf* case to create a modern New Mexico jurisprudence of negligence law. They disagreed on details but were moving toward a new paradigm of the law of duty that ended prematurely with their leaving the Court before they could complete their task. Their body of work, though, demonstrated an openness to change and served as an encouragement to their successors who completed the project by adopting and applying a portion of the *Restatement (Third) of Torts* in *Edward C.* and *Rodriguez*.

As indicated in the title of this work, and as stressed throughout the analysis of the cases, Justices Ransom and Montgomery engaged in a collegial enterprise to come to a common understanding of the law where they could, while maintaining their differences where they could not—all with grace and respect for each other. They did so publicly through concurring and dissenting opinions, which allowed the authors to understand their differences and view the process by which they often reached consensus.[439] While the authors came to appreciate the Ransom-Montgomery efforts as a model of collegiality that has positive implications for many professional enterprises, its particular value in appellate decision-making was best expressed by two former appellate judges who reviewed an earlier draft. One noted: "[T]his is an important piece of work . . . for the underlying lesson to appellate judges and others: the value of dialogue and engagement with each other. That is my biggest take away, making me realize my own shortcomings in that regard."

And with respect to the negligence discussion, that reviewer stressed:

> It is not an overstatement to say that *Rodriguez* would not have happened without their collaborative work. . . . [T]he coming together of their thoughtful, creative, and cooperative minds—and their willingness to engage with each other—informed subsequent generations of New Mexico jurists who continued the age old debate begun in *Palsgraf* and ending—at least for now—in *Rodriguez*. That partnership should be a model for others to emulate.

The other commentator opined:

---

439. Many appellate judges have rightly warned against injudicious use of concurring and dissenting opinions and stress the value of internal memos shared with all members of the court, to work out differences. Indeed, Justice Charles Daniels who was well known for his distaste for dissents made clear in *State v. Gutierrez*, 2021-NMSC-008, ¶¶ 105–08, 482 P.3d 700 (Daniels, J., concurring in part and dissenting in part)—his last opinion before his untimely death—that although he agreed with the majority's attempt to abolish the spousal communications privilege, he must dissent only because such "a significant change . . . should be handled through our established rules process, with input from the rules committee, with input from the larger legal community, and with input from the state we serve." *Id.* ¶ 107, 482 P.3d at 724. Justice Daniels did so, however, as was his wont "[w]ith my profound respect for my colleagues who view the issue otherwise." *Id.* ¶ 108, 482 P.3d at 724. His view and that of his dissenting colleague, Justice Barbara Vigil ultimately prevailed when the Court subsequently granted an Order on Rehearing. *Id.* ¶¶ 109–13, 482 P.3d at 724–25.

> [T]his law review article could be suggested reading for appellate judges who are new to the bench . . . and even for lawyers or trial judges who aspire to become appellate judges. It is an example of how two attorneys with different professional backgrounds . . . both with no prior judicial experience (maybe even different political affiliations) can become effective appellate judges by willingly sharing their different perspectives and approaches to the law in collegially drafted dissents or special concurrences.