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CIVIL PROCEDURE

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I. INTRODUCTION

This Survey highlights selected opinions of general interest decided during the Survey year. No attempt is made to discuss each judicial decision which interpreted a procedural rule. Omitted are cases dealing with the judicial disqualification statute[1] and decisions seeking to unravel the implications of *Maurer v. Thorpe*,[2] the 1980 supreme court opinion holding that insurance companies sometimes should be joined as co-defendants in tort actions brought against insured parties. Each issue is the subject of an appeal now pending in the New Mexico Supreme Court,[3] and opinions in these cases are likely to render existing law obsolete. Discussion of cases interpreting the statutes of limitation has been omitted this year because of space limitations.

II. SUBJECT MATTER JURISDICTION

Questions concerning the scope of state court jurisdiction in cases involving Indians continue to arise in New Mexico.[4] In *Lonewolf v. Lonewolf*,[5] the supreme court reconfirmed its view that a state court may grant a divorce to an Indian who seeks relief in that forum.[6] The court also decided that although state courts lack jurisdiction to determine the property rights of spouses in land located within reservation boundaries,[7]

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1. N.M. Stat. Ann. §§ 38-3-9 to 38-3-11 (1978).

2. 95 N.M. 286, 621 P.2d 503 (1980).

3. State *ex rel.* Gesswein v. Galvan, *petition for writ of prohibition* (Jan. 13, 1983) (No. 14,7831); (constitutionality of judicial disqualification statutes); United States Fidelity Guaranty Co. v. Safeco Ins. Co. of America, 22 N.M. St. B. Bull. 62 (Ct. App. Nov. 4, 1982), *cert. granted*, 23 N.M. St. B. Bull. 169 (Feb. 16, 1984). On March 1, 1984, the New Mexico Supreme Court decided the *Gesswein* case. The court, finding that practitioners had abused the disqualification statute, issued a new rule to govern the disqualification of judges. The new rule requires those seeking to disqualify a judge "to present factual information showing bias, prejudice or special interest on the part of the judge," and took effect on March 5, 1984. The Albuquerque Journal, Mar. 2, 1984, at A-6, col. 5.

4. *See, e.g.*, Hartley v. Baca, 97 N.M. 441, 640 P.2d 941 (Ct. App. 1981).

5. 99 N.M. 300, 657 P.2d 627 (1982), *petition for cert. filed*, 52 U.S.L.W. 3069 (U.S. March 22, 1983) (No. 82-1564).

6. Tenorio v. Tenorio, 44 N.M. 89, 103, 98 P.2d 838, 847 (1940). In *Tenorio*, both spouses were Indian but the marriage ceremony was performed outside of Indian lands. The court noted that neither party demonstrated that Indian law provided a remedy of divorce, but did not premise state court jurisdiction on the absence of a remedy in Indian tribal courts. *Id.* at 104, 98 P.2d at 847.

7. 99 N.M. 300, 301, 657 P.2d 627, 628 (1982). *See* Chino v. Chino, 90 N.M. 204, 561 P.2d 476 (1977).

New Mexico courts have jurisdiction to apply state law to determine the interests of the spouses in personal property located on or off the reservation.

Lonewolf involved a non-Indian wife who sued in state court for a legal separation from her Indian husband. The husband filed a counterclaim for divorce but initially denied the jurisdiction of the court to determine the property rights of the parties. Thereafter, the husband entered into stipulations concerning the division of a portion of the personal property acquired during the marriage. The trial court held that it was empowered to apply New Mexico's community property law to the division of personal property wherever located. The supreme court affirmed. In its decision, the supreme court determined that the trial court had jurisdiction to grant the divorce because the Indian husband submitted to the jurisdiction of the court by filing the counterclaim for divorce.[8] The court further held that by entering into the stipulation covering some personal property, the husband waived his claim that the court lacked jurisdiction to divide the marital property.[9]

The court's reliance on consent or waiver by the individual Indian litigant as a basis for obtaining jurisdiction seems to be inconsistent with the fundamental premise of Indian law that restrictions upon a state court's power over Indian matters take the form of limitations upon the subject matter jurisdiction of the state courts.[10] Subject matter jurisdiction, when absent, cannot be conferred by the consent of the litigants.[11] In future opinions, the court should explain more fully[12] why an individual Indian's consent to state court jurisdiction supplies a justification for the waiver of an Indian government's power "to make their own laws and be ruled by them."[13]

Even if jurisdiction exists, the court might have considered whether, as a choice of law matter, Indian law should apply to determine the property rights of an Indian who acquires personal property while living on Indian lands.[14] New Mexico courts do not apply local community property law when determining the rights of married persons to property

8. 99 N.M. 300, 302, 657 P.2d 627, 628 (1982).

9. *Id.*

10. *See* F. Cohen, Handbook of Federal Indian Law, 349-57 (1982).

11. Capron v. Van Noorden, 6 U.S. 126 (1803). *See* Kalosha v. Novick, 84 N.M. 502, 505 P.2d 845 (1973).

12. In Tenorio v. Tenorio, 44 N.M. 89, 103, 98 P.2d 838, 847 (1940), the court stated only that "in bringing a suit in a state court an Indian is subject to the same laws relating to the prosecution of suits which govern any citizen of the state. . . ."

13. Williams v. Lee, 358 U.S. 217, 220 (1959).

14. Apparently in *Lonewolf*, no party raised the issue of whether the state court should apply Indian substantive law instead of New Mexico law. In such circumstances, it is not error for the court to apply the law of the forum. *See* Restatement (Second) Conflict of Laws § 136 (1971) (states free to require party relying on foreign law to raise the issue and to demonstrate content of foreign law).

acquired while domiciled in another state.[15] Perhaps the courts should apply Indian property law to Indian spouses who acquire personal property while living on Indian lands in this state.[16] If a state court asserts jurisdiction over consenting Indian litigants in order to assure them the right to access to state courts,[17] the court should in turn apply Indian substantive law to prevent infringement of the right of reservation Indians "to make their own laws and be ruled by them."[18]

The difference between an absence of jurisdiction and the absence of a valid cause of action is a subject normally of greater interest to academics than to practicing lawyers. In *Valenzuela v. Singleton*,[19] however, the court of appeals demonstrated that significant practical ramifications flow from the distinction. An employee was injured in the course of her employment. She filed a common law negligence action against her employer instead of filing a Workmen's Compensation claim. The employee asserted that the employer's failure to file a certificate of insurance with the state stripped the employer of protection under the Workmen's Compensation laws and exposed it to a common law negligence action.[20] The employer correctly noted that if the employee had actual knowledge that the employer had coverage, the failure to file appropriate forms is irrelevant.[21]

The employer moved to dismiss because the employee had actual knowledge that coverage existed. The trial judge characterized the issue as one involving the subject matter jurisdiction of the court to grant the common law remedy. The trial judge ordered a hearing, heard testimony and decided, based on conflicting evidence, that the plaintiff's exclusive remedy was in the Workmen's Compensation Act because plaintiff had actual knowledge of the existence of insurance. The judge conceded that had the issue been presented as a motion for summary judgment on the merits, the court might have denied the motion and left the resolution of the issue to the jury because there were disputed issues of fact.[22]

15. Hughes v. Hughes, 91 N.M. 339, 573 P.2d 1194 (1978).

16. *Lonewolf* involved one Indian and one non-Indian spouse. Possibly, the choice of law analysis in such circumstance might differ from the result when both spouses are Indian because among the criteria to be considered is "whether the parties are Indians or non-Indians." Chino v. Chino, 90 N.M. 204, 206, 561 P.2d 476, 478 (1977).

17. "[A]n Indian may maintain an action in a state court to enforce his right to the enjoyment of property, real or personal, or for personal injuries since the courts of a state as a rule are open to persons irrespective of race, color or citizenship." Tenorio v. Tenorio, 44 N.M. 89, 103, 98 P.2d 838, 847 (1940).

18. Williams v. Lee, 358 U.S. 217, 220 (1959). *See, e.g.*, Jim v. CIT Financial Services Corp., 87 N.M. 362, 533 P.2d 751 (1975) (Indian law entitled to full faith and credit in state court).

19. 100 N.M. 84, 666 P.2d 225 (Ct. App.), *aff'd*, 100 N.M. 84, 666 P.2d 225 (1983).

20. N.M. Stat. Ann. § 52-1-4 (Cum. Supp. 1983).

21. Baldwin v. Worley Mills, Inc., 95 N.M. 398, 622 P.2d 706 (Ct. App. 1980), *cert. quashed*, 95 N.M. 426, 622 P.2d 1046 (1981).

22. 100 N.M. at 89, 666 P.2d at 230.

The court of appeals reversed. The majority opinion carefully distinguished between "jurisdictional facts," the absence of which requires that the action be dismissed for lack of subject matter jurisdiction, and the substantive issue of whether the plaintiff has stated or proven a claim for relief. "Jurisdictional facts" are "[f]acts showing that the matter involved in a suit constitutes a subject-matter consigned by law to the jurisdiction of that court . . . [or] showing that a particular judgment is rendered in compliance with all existing mandatory law in that regard. . . ."[23] The court of appeals decided that the issue of whether the plaintiff had actual knowledge of the existence of insurance did not affect the jurisdiction of the district court because the district court undoubtedly has authority to decide both negligence claims and workmen's compensation actions.[24] Instead, "[p]laintiff's knowledge only determines whether or not she [had] a cause of action under common law negligence."[25] The trial court erred, therefore, when it resolved the disputed question. Factual issues addressing the merits must be resolved at trial by the factfinder unless the stringent standards for the grant of summary judgment are met.[26] Only if the issue is one of "jurisdictional fact" is the court authorized to weigh conflicting evidence and itself determine the disputed issue of fact.

Valenzuela is correctly decided. Whether plaintiff's remedy is based on the Workmen's Compensation Act or common law negligence is irrelevant to the subject matter jurisdiction of the district court. The district court has the constitutional authority to hear and decide both claims.[27] Only when resolution of a factual dispute determines whether another forum has the exclusive power to decide the matter is the factual issue a jurisdictional fact to be resolved by the court.[28]

III. PERSONAL JURISDICTION

The scope of New Mexico's long-arm statute was explored in *Roberts v. Piper Aircraft Corp.*[29] A plane departed from Nevada after the pilot

23. *Id.* at 87, 666 P.2d at 228 (quoting Abraham v. Homer, 102 Okla. 12, 226 P. 45 (1924)).

24. 100 N.M. at 87-90, 666 P.2d at 228-30. In contrast, the determination of whether a sailor was a "member of the crew," and thereby entitled to recover under a statute that limited recovery only to crew members, was not a jurisdictional fact but only went to whether the plaintiff had stated a valid claim for relief. *Id.* at 91, 666 P.2d at 229; *see, e.g.*, Schantz v. American Dredging Co., 138 F.2d 534 (3rd Cir. 1943).

25. 100 N.M. at 89, 666 P.2d at 230.

26. *Id.*

27. N.M. Const. art. VI, § 13.

28. *Compare* Branch v. Mays, 89 N.M. 536, 554 P.2d 1297 (Ct. App. 1976) (defense of failure to state a claim "raised a jurisdictional question.") *with In re* Doe III, 87 N.M. 170, 531 P.2d 218 (Ct. App. 1975) (failure to state claim for relief in court of limited jurisdiction "is insufficient to confer jurisdiction on that court").

29. ___ N.M. ___, 670 P.2d 974 (Ct. App. 1983).

purchased fuel there from a Nevada dealer. The plane crashed in New Mexico. The pilot, a non-New Mexican, was killed. A wrongful death action was brought in New Mexico against the two foreign corporations, which had previously repaired the plane in Kansas and Oklahoma, and the Nevada dealer who supplied the fuel. The trial judge decided that the district court lacked personal jurisdiction over any of the defendants and dismissed the action. In a decision carefully analyzing the New Mexico long-arm statute[30] and the most recent United States Supreme Court opinion defining the constitutional limits on the assertion of state court jurisdiction,[31] the court of appeals held that one of the three defendants was subject to New Mexico jurisdiction.

The court first considered whether the requirements of the long-arm statute had been met, and then determined whether the assertion of jurisdiction pursuant to the statute would be consistent with the constraints imposed by the due process clause of the United States Constitution. Only if both questions are answered in the affirmative does a court have long-arm jurisdiction.[32]

The statute authorizes jurisdiction over a defendant who engages in "the commission of a tortious act within this state."[33] The defendants argued that a tortious act occurs only where the defendants engage in negligent conduct—in this case, Nevada, Kansas, and Oklahoma. The court of appeals disagreed. It held that where negligent acts done outside of New Mexico cause injury in New Mexico, the tortious act occurs in New Mexico where the injury is suffered.[34] This ruling is in accord both with the majority of decisions that have considered similar provisions of other long-arm statutes[35] and with dictum in an earlier New Mexico opinion.[36] It is noteworthy that the court did not hold that the tortious act requirement is met *only* when the injury occurs in this state. The *Roberts* opinion does not preclude a future determination that the tortious act requirement *also* may be met where negligent conduct occurs in New Mexico, but the injury occurs in some other jurisdiction.

Though the long-arm statute encompassed the conduct of all three defendants, the court of appeals concluded that due process limitations precluded the assertion of jurisdiction over two of the defendants. Correctly applying the United States Supreme Court opinion in *World-Wide Volkswagen Corp. v. Woodson,*[37] the court of appeals held that the mere

30. N.M. Stat. Ann. § 38-1-16 (1978).
31. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).
32. Worland v. Worland, 89 N.M. 291, 551 P.2d 981 (1976).
33. N.M. Stat. Ann. § 38-1-16(A)(3) (1978).
34. ___ N.M. at ___, 670 P.2d at 977.
35. *E.g.*, Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961).
36. Tarango v. Pastrana, 94 N.M. 727, 728, 616 P.2d 440, 441 (Ct. App. 1980).
37. 444 U.S. 286 (1980).

fact that the defendants could foresee that the plane they serviced or refueled might crash in New Mexico was not enough to establish sufficient minimum contacts with this state: "[W]ithout minimum contact with the forum state, foreseeability alone does not warrant personal jurisdiction over a non-resident defendant."[38] A defendant must purposefully avail himself of the benefits and protection of state laws[39] and the assertion of jurisdiction must be "fair"[40] before jurisdiction of the New Mexico courts is proper. The defendants were not subject to personal jurisdiction because the record did not demonstrate that two of the defendants engaged in this level of activity.[41] In contrast, the record reflected that the third defendant had advertised for business in national trade journals distributed in New Mexico and had performed repair work for New Mexico residents who shipped aircraft components to its Oklahoma plant for servicing. The court of appeals decided that this purposeful availment of the benefits of New Mexico was sufficient to satisfy the constitutional requirements of minimum contacts and fairness, and concluded that the trial court had jurisdiction over this defendant.

Roberts defines the phrase "tortious act" in the New Mexico long-arm statute and correctly interprets and applies the current constitutional test for the assertion of personal jurisdiction. *Roberts* also clarifies another aspect of long-arm jurisdictional analysis. Prior to this decision it was not clear whether, in determining minimum contacts and fairness, the court could consider contacts of the defendant with New Mexico other than those used to demonstrate that the long-arm statute had been satisfied. *Roberts* grounds the constitutional analysis on advertising and servicing, which were totally unrelated to the tortious act that satisfied the long-arm statute. The decision demonstrates that, although the statute requires the suit to arise out of the tortious act,[42] the contacts considered when determining whether the constitutional requirements are met may be totally unrelated to the activities that satisfy the long-arm statute.

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38. ___ N.M. at ___, 670 P.2d at 978 (Ct. App. 1983).

39. Hanson v. Denckla, 357 U.S. 235, 253 (1958); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

40. ___ N.M. at ___, 670 P.2d at 979.

> [D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'.

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

41. There is a suggestion in the decision that data not relied on by the trial court and not made part of the record on appeal supported the assertion of jurisdiction over one of the defendants. The court of appeals refused to consider the information. ___ N.M. at ___, 670 P.2d at 979.

42. N.M. Stat. Ann. §38-1-16(A) (1978). *See, e.g.*, Winward v. Holly Creek Mills, Inc., 83 N.M. 469, 493 P.2d 954 (1972).

IV. VENUE

Two opinions dealing with venue were decided during the Survey year. In *Naumburg v. Cummins*,[43] the court of appeals held that an action seeking rescission of a real estate contract affected interests in real property. The venue statute, therefore, required that the action be brought in the county where the land that was the subject of the contract was located.[44] The court distinguished an earlier opinion holding that when damages alone were sought for breach of a land contract, no interest in land was implicated and the general venue provisions controlled.[45]

In *State of New Mexico ex rel. Human Services Department v. Levario*,[46] the court of appeals reconfirmed the general rule[47] that the court first obtaining jurisdiction retains it as against a court of concurrent jurisdiction in which a similar action is subsequently instituted between the same parties seeking similar remedies involving the same subject matter. Lawyers are beginning to see the forum shopping possibilities that result from this "first-filed" rule.[48] The supreme court has acknowledged that the present rule encourages potential parties to race to file in a forum favorable to them and thereby force the opponent to file a counterclaim in the first-filed action,[49] but has proposed no solution to the problem. The court should modify the "first-filed" rule to permit changes of venue to the place where the second action is filed when it is clear that the purpose of filing the first action is to prevent the opponent from choosing a more appropriate forum.[50]

V. SERVICE OF PROCESS

In a roundabout way, the supreme court this year signalled that in personam jurisdiction cannot be obtained by service of process through publication even if the defendant is otherwise subject to jurisdiction under the long-arm statute. The Medical Malpractice Act[51] requires that potential

43. 98 N.M. 274, 648 P.2d 313 (1982).

44. N.M. Stat. Ann. § 38-3-1(D) (Cum. Supp. 1983). Since the decision in Kalosha v. Novick, 84 N.M. 502, 505 P.2d 845 (1973), the venue statute has been construed to require timely objection to improper venue even in cases affecting land. Prior to *Kalosha*, the land-situs requirement was considered to be jurisdictional and thus not waivable. *See, e.g.*, Lucus v. Ruckman, 59 N.M. 504, 287 P.2d 68 (1955), *overruled by*, Kalosha v. Novick, 84 N.M. 502, 505 P.2d 845 (1973).

45. Rito Cebolla Investments, Ltd. v. Golden West Land Corp., 94 N.M. 121, 607 P.2d 659 (Ct. App. 1980).

46. 98 N.M. 442, 649 P.2d 510 (Ct. App. 1982).

47. *E.g.*, Historical Soc'y of N.M. v. Montoya, 74 N.M. 285, 393 P.2d 21 (1964).

48. The Albuquerque Journal, Jan. 27, 1984, at B-7, col. 3-6.

49. Franco v. Federal Bldg. Serv., Inc., 98 N.M. 333, 648 P.2d 791 (1982).

50. The current venue statute is broad enough to incorporate a judicial ruling to that effect. *See* N.M. Stat. Ann. § 38-3-3(A)(2)(d) (1978): "The venue in all civil and criminal cases shall be changed, upon motion, to some county free from exception . . . [for] any . . . cause. . . ."

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

plaintiffs present their claims before a medical malpractice panel prior to filing suit in district court.[52] In *Jiron v. Mahlab*,[53] plaintiff filed a malpractice suit in district court without first presenting his claim to the panel. Defendant moved to dismiss the action for failure of plaintiff to comply with the statute. Plaintiff alleged that the statutory scheme violated his constitutional right of access to the courts. The plaintiff explained that Dr. Mahlab, a non-resident of New Mexico, was about to leave on an extended tour of Asia. Plaintiff feared that if Dr. Mahlab were not sued and served with process immediately, service of process might be impossible after the malpractice panel rendered a decision. The supreme court agreed, holding that the Act's mandate that litigation await the outcome of the panel decision was unconstitutional as applied here because "[a]s a practical matter, service of process on Dr. Mahlab in Southeast Asia would be difficult or impossible to achieve."[54]

Service by publication on Dr. Mahlab while he was in Asia would, of course, not be difficult.[55] Thus, the decision implies that service by publication is not a valid means for obtaining in personam jurisdiction pursuant to the long-arm statute.[56] Nothing in the constitutional requirements for service of process bars the use of publication notice in in personam actions.[57] Nonetheless, New Mexico precedent[58] and rules[59] do support

52. *Id.* § 41-5-15.

53. 99 N.M. 425, 659 P.2d 311 (1983).

54. *Id.* at 427, 659 P.2d at 313.

55. Notice by publication "in some newspaper published in the county where the cause is pending" is required. N.M. R. Civ. P. 4(g)(3).

56. Service of process in long-arm cases "may be made . . . by personally serving the summons upon the defendant outside this state. . . ." N.M. Stat. Ann. § 38-1-16(B) (1978). This provision suggests that service by publication is never permitted in long-arm cases. Another section of the long-arm statute, however, provides that "[n]othing contained in this section limits or affects the right to serve any process in any other manner now or hereafter provided by law." *Id.* § 38-1-16(D). Therefore, the long-arm statute does not itself preclude service by publication. *See* Vann Tool Co. v. Grace, 90 N.M. 544, 566 P.2d 93 (1977) (substituted service as well as personal service authorized by statute). N.M. R. Civ. P. Rule 4(g), the general rule authorizing publication, is thus controlling in long-arm cases.

Rule 4(g) appears to bar service by publication in in personam actions except when defendant is a New Mexico resident who had deliberately concealed himself to avoid personal or substituted service of process. N.M. R. Civ. P. 4(g). *See* Chapman v. Farmers Ins. Group, 90 N.M. 18, 558 P.2d 1157 (Ct. App. 1976), *cert. denied*, 90 N.M. 254, 561 P.2d 1347 (1977); Clark v. LeBlanc, 92 N.M. 672, 593 P.2d 1075 (1979).

57. The leading case is Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). The Supreme Court there stated:

> This Court has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning. Thus it has been recognized that in the case of persons missing or unknown employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights.

Id. at 317.

58. *E.g.*, State *ex rel.* Truitt v. District Court, 44 N.M. 16, 96 P.2d 710 (1939); Chapman v. Farmers Ins. Group, 90 N.M. 18, 558 P.2d 1157 (Ct. App. 1976), *cert. denied*, 90 N.M. 254, 561

the court's conclusion in *Jiron* that state law prohibits service by publication to obtain in personam jurisdiction over a non-resident defendant.

The New Mexico Supreme Court should consider modification of Rule 4(g) to authorize service by publication in in personam actions when neither personal nor substituted service can be effectuated.[60] Exempting the plaintiff in *Jiron* from the requirements of the Medical Malpractice Act afforded him an adequate remedy in this case. Other potential plaintiffs with claims against disappearing non-resident defendants may not be as fortunate. If a defendant has left the jurisdiction before the suit is filed and cannot be served personally or by substituted service, *Jiron* leaves the plaintiff without a remedy other than that provided by the statute that tolls the statute of limitations during the absence of the defendant from the jurisdiction.[61] Given the strained finances of most accident victims and the inevitable loss of evidence occasioned by the passage of time, it is surely preferable to permit the plaintiff to serve process by publication and obtain a valid judgment[62] than to delay, perhaps forever, the trial of plaintiff's claim.

VI. PLEADINGS

The doctrine of election of remedies mandates that "where two inconsistent or alternative rights or claims are presented to the choice of a party, by a person who manifests the clear intention that he should not

P.2d 1347 (1977). *But see* Clark v. LeBlanc, 92 N.M. 672, 593 P.2d 1075 (1979) (service by publication sometimes appropriate in in personam actions against resident defendants).

59. N.M. R. Civ. P. 4(g).

60. One section of the publication rule suggests that if plaintiff files an affidavit proving that "defendant . . . resides or has gone out of the state" publication may be ordered. N.M. R. Civ. P. 4(g)(1). This seems to cover the situation presented had the defendant in *Jiron* embarked on his trip prior to the filing of an action against him.

The provisions of Rule 4(g), however, are only applicable "in actions where the relief sought does not require personal service . . . or in situations where the party to be served is a New Mexico resident who, by deliberately concealing himself to avoid service of process, has effectively prevented service of process on him. . . ." N.M. R. Civ. P. 4(g). It is this language that must be amended expressly to authorize service by publication in the situations described in Rule 4(g)(1) when service by publication would be consistent with the constitutional test set forth in *Mullane*.

61. N.M. Stat. Ann. § 37-1-9 (1978). Even this provision may be inapplicable to the plaintiff in a medical malpractice action. The statute provides extensions of the statute of limitation for absence of the defendant from the state whenever "computing any of the periods of limitation above provided." This language suggests that the statute is applicable only to statutes of limitation contained in Chapter 37 of the New Mexico Statutes Annotated. The statute of limitations for medical malpractice is contained in a separate chapter of the statutes, N.M. Stat. Ann. §§ 41-5-1 to 41-5-28 (Repl. Pamp. 1982), therefore, § 37-1-9 may be inapplicable to extend or toll the statute of limitations for medical malpractice actions. *Cf.* Perry v. Staver, 81 N.M. 766, 473 P.2d 380 (Ct. App. 1970) (a different tolling provision in Chapter 23 (the predecessor to current Chapter 57) held not applicable to statutes of limitation not contained within the chapter).

62. In some circumstances, the defendant who suffers a default judgment because notice was not received will be able to reopen the judgment and defend on the merits after learning of the entry of default judgment. N.M. R. Civ. P. 55(c) and 60(b).

enjoy both, then he must accept or reject one or the other."[63] In the distant past, the doctrine was applied to the pleadings and created traps for the unwary pleader.[64] Procedural reform undercut the application of the doctrine to pleadings by expressly authorizing the parties to plead inconsistently[65] and by commanding the court to grant whatever relief was appropriate whether or not the party had requested a particular form of relief in the pleadings.[66]

In 1974, the court of appeals acknowledged the deficiencies of the doctrine and declared that it no longer should be applied in New Mexico.[67] Unfortunately, in *Three Rivers Land Co., Inc. v. Maddoux*,[68] the supreme court resurrected the doctrine of election of remedies. The opinion of the court neither explains the workings of the doctrine nor provides persuasive evidence that the availability of the doctrine is necessary to accomplish justice. The supreme court also did not explain the proper relationship between the doctrine of election of remedies and the procedural rules permitting inconsistent pleadings and judicial discretion in providing remedies not requested by the parties. Moreover, existing doctrines, better defined and understood by modern jurists and lawyers,[69] adequately accomplish the expressed purpose of election of remedies, "to eliminate 'vexatious and multiple litigation of causes of action arising out of the same subject matter'."[70] For now, lawyers should be aware that election of remedies once again lurks in the jurisprudence of New Mexico, and should struggle to comprehend this "obscured and misunderstood"[71] doctrine.

Appellate court decisions concerning the relationship of the statutes of limitation and the rules permitting amendments to pleadings have been more progressive. In *Prieto v. Home Education Livelihood Program*,[72]

63. Three Rivers Land Co., Inc. v. Maddoux, 98 N.M. 690, 693, 652 P.2d 240, 243 (1982) (citing Peters v. Bain, 133 U.S. 670, 695 (1890)).

64. *See, e.g.*, Hine, *Election of Remedies, A Criticism*, 26 Harv. L. Rev. 707 (1913); Note, *Election of Remedies: A Delusion?*, 38 Colum. L. Rev. 292 (1938).

65. N.M. R. Civ. P. 8(e)(2).

66. N.M. R. Civ. P. 54(c). Only when a default judgment is entered must the judgment "not be different in kind from or exceed in amount that prayed for in the demand for judgment." *Id.*

67. Buhler v. Marrujo, 86 N.M. 399, 524 P.2d 1015 (Ct. App. 1974).

68. 98 N.M. 690, 652 P.2d 240 (1982).

69. The doctrine of waiver adequately covers those situations in which application of election of remedies might otherwise be appropriate. *See* Brown v. Jimerson, 95 N.M. 191, 619 P.2d 1235 (1980) (defining waiver). In Romero v. J. W. Jones Constr. Co., 98 N.M. 658, 651 P.2d 1302 (Ct. App. 1982), the court of appeals' opinion demonstrates the obvious relationship between the doctrine of election of remedies and the doctrine of waiver. *Id.* at 662, 651 P.2d at 1306. The doctrine of waiver is a satisfactory substitute for election of remedies and is free from much of the historical baggage and jargon associated with the doctrine of election of remedies.

70. Honaker v. Ralph Pool's Albuquerque Auto Sales, Inc., 74 N.M. 458, 466, 394 P.2d 978, 984 (1964) (quoting Dial Press, Inc. v. Phillips, 23 N.J. Super. 543, ___, 93 A.2d 195, 197 (1952), *cert. denied*, 12 N.J. 248, 96 A.2d 454 (1953)).

71. Three Rivers Land Co., Inc. v. Maddoux, 98 N.M. 690, 693, 652 P.2d 240, 243 (1982).

72. 94 N.M. 738, 616 P.2d 1123 (Ct. App. 1980).

the court of appeals made it easier for a plaintiff to comply with the statutes of limitation by deciding that it was necessary only to file a complaint before the statutory period ran: Service of process on the defendant after the action is commenced and the limitation period has expired does not run afoul of the statute of limitations. This year, the supreme court similarly liberalized the rule which permits a new party to be added to a pending lawsuit after the statute of limitations has run. Rule 15 provides that an amendment changing the defendant after the statute has run relates back to the date of the original complaint if, "within the period provided by law for commencing the action," the new party received notice of the suit and was aware that but for a mistake by the plaintiff the action would have been brought against him.[73] In *Galion v. Conmaco International, Inc.*,[74] the supreme court construed the rule to permit bringing in a new defendant who did not receive notice before the limitation period expired, so long as he received notice within the time after commencement of the action that service is permitted to be made on the initial defendant. The effect of *Galion* is to bring the interpretation of Rule 15(c) into conformance with the holding in *Prieto* that notice to and service of process on a defendant after the statute of limitations has run is permissible so long as the action is commenced within the limitation period.

VII. DISCOVERY

The court of appeals reviewed the history of the "attorney work product" discovery rule in New Mexico and illustrated its current scope in an important decision rendered this year. Initially, the discovery rules provided protection only for matters that were privileged under the rules of evidence.[75] The evidentiary attorney-client privilege afforded insufficient protection to the attorney preparing for litigation. For example, discovery of the trial preparation materials gathered by the attorney from sources other than his client were not protected from discovery by the attorney-client privilege.[76] Discovery of this non-privileged attorney work product could frustrate rather than further the goal of elimination of the "poker hand" concept of trial. Rather than turn over their work product, lawyers might not conduct thorough investigation, or might decline to preserve the fruits of their efforts in discoverable form.[77]

In 1947, the Supreme Court judicially created a conditional privilege for the work product of an attorney created in preparation of trial and not encompassed within the attorney-client privilege.[78] New Mexico in-

73. N.M. R. Civ. P. 15(c).
74. 99 N.M. 403, 658 P.2d 1130 (1983).
75. N.M. Stat. Ann. § 21-1-1(26)(b) (1953) (current version at N.M. R. Civ. P. 26(B)(1)).
76. *See, e.g.*, Hickman v. Taylor, 329 U.S. 495 (1947).
77. *Id.* at 511.
78. Hickman v. Taylor, 329 U.S. 495 (1947).

corporated this common law doctrine into its jurisprudence,[79] and in 1979, modified the rules of procedure explicitly to provide limited protection from discovery of materials prepared in anticipation of litigation.[80] The 1979 amendment did not merely incorporate the common law work product doctrine: Rule 26 differs from the attorney work product doctrine in significant ways. *Knight v. Presbyterian Hospital Center*[81] highlights the differences between the attorney work product doctrine and its counterpart in Rule 26. The case also provides guidelines for the interpretation of the new rule.

Shortly after Knight was treated in the emergency room of the defendant's hospital, hospital personnel informed their attorney that litigation might ensue. The attorney asked a hospital employee to obtain statements from individuals involved in the treatment of Knight. In compliance with this request, the employee obtained several statements and forwarded them to the lawyer. Additional statements, which had been spontaneously recorded by individuals prior to the attorney's request, also were obtained and sent to the attorney. After suit was commenced, plaintiff sought to obtain all the statements made by hospital personnel that were in the attorney's possession.[82] The trial court ordered the hospital to turn over all the statements. The hospital appealed from the portion of the order compelling discovery of the statements created by employees at the request of the attorney.

The court of appeals held that Rule 26 protected the statements from discovery as a matter of course and that the plaintiff had not shown the exceptional circumstances required by Rule 26 to warrant discovery. Rule 26 protects materials prepared in anticipation of litigation as well as for trial.[83] The reports thus were protected even though litigation had not yet begun when the statements were gathered. The rule protects not only an attorney's work product, but also material prepared "by or for another party or by or for that other party's representative."[84] That an employee of the defendant, rather than the attorney, obtained the statements, therefore, did not negate the conditional privilege. Rule 26 protects more than the individual work product of the attorney.

79. Carter v. Burn Constr. Co., Inc., 85 N.M. 27, 508 P.2d 1324 (Ct. App.), *cert. denied*, 85 N.M. 5, 508 P.2d 1302 (1973).

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

81. 98 N.M. 523, 650 P.2d 45 (Ct. App. 1982).

82. N.M. R. Civ. P. 34 provides the procedure for obtaining documents from another party to the lawsuit. In *Knight*, the documents were in the possession of the party's attorney. Nonetheless, discovery pursuant to Rule 34 is appropriate. The rule permits a party to obtain documents "which are in the possession, custody or control of the party." N.M. R. Civ. P. 34(a). Materials in the lawyer's file are within the control of the party. Discovery pursuant to Rule 34 is therefore appropriate. *See* C. Wright & A. Miller, Federal Practice and Procedure § 2210 (1970).

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

84. *Id.*

The showing required for discovery of material conditionally protected by Rule 26 also differs from that required to overcome the common law work product doctrine. New Mexico required a showing of "good cause" to obtain discovery of an attorney's work product.[85] Rule 26 substitutes an explicit requirement that the party seeking discovery demonstrate a showing of substantial need for the information and an inability to obtain the substantial equivalent without undue hardship.[86] The statements generated by hospital employees at the request of the defendant's attorney in anticipation of litigation were protected from discovery because plaintiff failed to make the required showing of need and hardship.

Knight demonstrates that Rule 26 is not the clone of the common law work product rule. Both the definition of protected materials and the showing required to overcome the conditional privilege set forth in the rule are different in some respects from the common law doctrine. New Mexico's Rule 26(B)(2) is the same as the Federal Rule.[87] Federal opinions interpreting the language in the federal rules[88] should now provide better guidance to the New Mexico practitioner than New Mexico case precedent, which predates the 1979 amendments that brought New Mexico into conformity with the federal rule.

VIII. JURY TRIAL

The right to a jury trial in civil actions in New Mexico state courts is set forth in the state constitution.[89] The historical distinction between legal and equitable claims is often determinative of whether a right to jury trial exists: "If the remedy sought is legal, parties are entitled to a jury trial; if the remedy sought is equitable, there is no jury trial as of right."[90] When one party seeks legal relief and the other seeks equitable relief, the issue arises whether either party is entitled to a jury trial.

In 1924, the supreme court held that where plaintiff sought only equitable relief, defendant was not entitled to a jury trial on the issues raised by his counterclaim even though the counterclaim sought legal relief.[91] In *Evans Financial Corp. v. Strasser,*[92] the supreme court reversed its

85. Carter v. Burn Constr. Co., Inc., 85 N.M. 27, 508 P.2d 1324 (Ct. App.), *cert. denied,* 85 N.M. 5, 508 P.2d 1302 (1973).

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

87. Fed. R. Civ. P. 26(b)(3).

88. *E.g.,* C. Wright & A. Miller, Federal Practice and Procedure §§ 2021-2028 (1970); 4 J. Moore, W. Taggert & J. Wicker, Moore's Federal Practice ¶ 26.64 (2d ed. 1983).

89. N.M. Const. art. II, § 12.

90. Evans Fin. Corp. v. Strasser, 99 N.M. 788, 789, 664 P.2d 986, 987 (1983).

91. Young v. Vail, 29 N.M. 324, 222 P. 912 (1924), *overruled,* 99 N.M. 791, 664 P.2d 989 (Ct. App. 1982), *cert. quashed,* Oct. 19, 1982 (No. 5585).

92. 99 N.M. 788, 664 P.2d 986 (1983).

position and held that a defendant with a compulsory counterclaim[93] seeking legal relief is entitled to a jury trial of his legal claim even though the plaintiff sought only equitable relief in the complaint. This decision brings New Mexico in line with both federal law[94] and the law of several other states,[95] and reflects an awareness "that the right to jury trial should not be governed by who wins the race to the courthouse."[96] A litigant with an equitable claim to which a legal counterclaim is expected can no longer preclude jury trial by filing the equitable claim before the other side files its legal claim. A necessary corollary of this holding is that when the legal and equitable claims overlap, the legal issues almost always should be tried to the jury first, and the jury's factual determinations should bind the trial judge who subsequently resolves the equitable claim.[97]

Although the supreme court expanded the scope of the right to a jury trial, the court of appeals showed less solicitude for trial by jury when it strictly construed Rule 38, which requires a party to make a formal demand for a jury trial when the right exists.[98] Failure to make a timely demand constitutes a waiver of the right.[99] In *El Paso Electric v. Real Estate Mart, Inc.*,[100] the court of appeals held that in an eminent domain proceeding in which several owners of different parcels are joined as defendants, each defendant must individually demand a jury trial. A defendant cannot always rely upon the jury demand of a co-defendant to satisfy the demand requirement of Rule 38. Only when a defendant has an interest in the issues as to which a co-defendant has filed a jury demand may the defendant forego the filing of a separate demand.[101] The court concluded that because each defendant owned separate property and sought separate damages, the interests of the defendants were not close enough

93. In *Evans*, the supreme court limited its holding to situations in which a counterclaim to an equitable claim involves "any claim . . . [defendant] has against the plaintiff if it arises out of the subject matter of the original action." *Id.* at 791, 664 P.2d at 989. This language covers only a compulsory counterclaim as defined in N.M. R. Civ. P. 13(a). The decision should be extended to permissive counterclaims as well. If a defendant chooses to file a permissive counterclaim when the plaintiff has filed an action seeking only equitable relief, no good reason exists for preventing the defendant from receiving a jury trial on his permissive counterclaim. If the permissive counterclaim relates only tangentially to the plaintiff's claim, the court should consider ordering separate trials, pursuant to N.M. R. Civ. P. 42(b). This provision explicitly provides authority to grant separate trials, "always preserving the right of trial by jury given to any party as a constitutional right." *Id.*

94. Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959); Myers v. U.S. Dist. Court, 620 F.2d 741 (9th Cir. 1980).

95. *E.g.*, Dugan v. Jones, 615 P.2d 1239 (Utah 1980); Sanguinetti v. Strecker, 94 Nev. 200, 577 P.2d 404 (1978).

96. 99 N.M. 788, 790, 664 P.2d 986, 988 (1983).

97. *E.g.*, Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510-11 (1959); Dairy Queen, Inc. v. Wood, 369 U.S. 469, 472-73 (1962).

98. N.M. R. Civ. P. 38(a).

99. N.M. R. Civ. P. 38(d).

100. 98 N.M. 490, 650 P.2d 12 (Ct. App.), *cert. denied*, 98 N.M. 478, 649 P.2d 1391 (1982).

101. *Id.* at 497, 650 P.2d at 19.

to permit a single jury demand to suffice for all. To assure that unintentional waiver is not found, each co-party should always file a separate jury demand.

IX. DEFAULT JUDGMENT

Two significant decisions concerning default judgment procedures were rendered during the Survey year. In each, trial court decisions refusing to reopen defaults were reversed by the appellate court. The cases suggest that trial courts, concerned about judicial efficiency and the need to assert firm control over trial dockets, are willing to enter default judgments when authorized by the letter of the law to do so. In contrast, the appellate decisions express a strong preference for decisions on the merits and insist that default judgments be sparingly granted and freely reopened. One of the opinions suggests innovative means for assuring trial on the merits while at the same time providing trial courts with adequate power both to move dockets along and to assure compliance with procedural deadlines.

Franco v. Federal Building Service, Inc.[102] is significant for two reasons. First, the supreme court reaffirmed its view that "defaults are not favored and cases should be decided on their merits."[103] Second, the court carefully distinguished between the entry of default and the separate procedure for obtaining a judgment of default. The court also explained the different standards for reopening the entry of default and the default judgment. Entry of default occurs when a party fails to plead or otherwise defend on the merits.[104] This fact is entered into the court record. Entry of default is the first step in obtaining a judgment by default. Rule 55 provides that after entry of default, but before the grant of a judgment by default, the court may set aside the entry of default for "good cause" and permit the party to defend on the merits.[105]

After entry of default, the party seeking a judgment of default must apply to the court for a default judgment.[106] A three day notice must be

102. 98 N.M. 333, 648 P.2d 791 (1982).

103. *Id.* at 334, 648 P.2d at 792. *See, e.g.*, Marberry Sales, Inc. v. Falls, 92 N.M. 575, 592 P.2d 175, *cert. quashed*, 92 N.M. 578, 592 P.2d 175 (1979).

104. N.M. R. Civ. P. 55(a). *Franco* is the first case in New Mexico to hold that the language of Rule 55(a) which authorizes default judgment when a party "failed to plead or otherwise defend" applies not only when a party fails to answer or file motions in opposition to the complaint, but also when the party fails to attend the trial or otherwise defend subsequent to the pleading stage of the proceedings. The leading federal case suggests that entry of default judgment pursuant to Rule 55 is inappropriate where an answer has been filed. Bass v. Hoagland, 172 F.2d 205 (5th Cir.), *cert. denied*, 338 U.S. 816 (1949); see 6 J. Moore, W. Taggert & J. Wicker, Moore's Federal Practice ¶55.02[3], n.12 (2d ed. 1983). This treatise suggests that the preferable procedure "is for the district court to go forward at the time set for trial, receive evidence and enter a judgment based on the record." *Id. See, e.g.*, Tartaglia v. Delpapa, 48 F.R.D. 292 (E.D. Pa. 1969).

105. N.M. R. Civ. P. 55(c).

106. N.M. R. Civ. P. 55(b).

served on the defaulting party if the party had entered an appearance in the action.[107] Once default judgment is entered, it may be set aside only in accordance with the rules for reopening any judgment pursuant to Rule 60.[108]

Franco held that trial courts should be more liberal in setting aside an entry of default than in setting aside a judgment of default. Only after a judgment of default does the "policy in favor of the finality of judgments" clash with the policy favoring decisions on the merits.[109] Thus, the "good cause" requirement for setting aside an entry of default is more easily established than the grounds, pursuant to Rule 60(b), for reopening a default judgment.

In *Chase v. Contractor's Equipment and Supply Co., Inc.*,[110] the court of appeals applied these distinctions in reviewing a trial court decision entering a default and then a default judgment for failure of defendant's attorney to appear at the time set for trial. In *Chase,* neither defendant nor defendant's lawyer was present at the scheduled 9:00 a.m. time set for trial. The trial court entered a default, heard plaintiff's testimony as to damages,[111] and set a date for a hearing on plaintiff's motion for default judgment. Defendant filed a motion to set aside the default. The trial judge found that counsel's absence from trial was occasioned by the failure of a motel clerk to carry out a requested early-morning wake up call, but concluded that this was insufficient reason to set aside the default. Default judgment for plaintiff was granted.

The court of appeals reversed. Judge Wood held that at the hearing the trial court should have applied the "good cause" standard for reopening because only an entry of default and not a judgment of default had been entered. The court of appeals concluded that inadvertent tardiness under the circumstances presented was "[u]nder the applicable 'more liberal' standard," sufficient showing of good cause to have reopened the entry of default.[112] The court of appeals acknowledged that the plaintiff would be inconvenienced by a reversal of the default judgment and remand for trial, but rejected the argument that mere "adverse financial consequence to plaintiff resulting from delaying the final disposition of the case" constituted sufficient reason to deny the motion to set aside the default.[113]

107. *Id.*

108. N.M. R. Civ. P. 55(c).

109. 98 N.M. 333, 334, 648 P.2d 791, 792 (1982).

110. 100 N.M. 39, 665 P.2d 301 (Ct. App. 1983).

111. N.M. R. Civ. P. 55(b) provides that the court "may" conduct a hearing on damages if it is necessary to do so in the context of a default judgment. New Mexico case law provides that it is an abuse of discretion to decline to hold a hearing on the issue of damages when the damages sought are unliquidated. Armijo v. Armijo, 98 N.M. 518, 650 P.2d 40 (Ct. App. 1982); Gallegos v. Franklin, 89 N.M. 118, 547 P.2d 1160 (Ct. App.), *cert. denied,* 89 N.M. 206, 549 P.2d 284 (1976).

112. 100 N.M. 39, 44, 665 P.2d 301, 306 (Ct. App. 1983).

113. *Id.* at 46, 665 P.2d at 308.

To prevent prejudice to the plaintiff from the decision to withdraw the default judgment, and perhaps to deter delaying tactics of the defaulting party, the court of appeals imposed sanctions and established conditions for the grant of the motion to reopen. Trial counsel was obligated to pay attorney's fees to plaintiff for counsel's time in preparing for the aborted trial and defendant was required to post bond for the amount of the judgment obtained by plaintiff.[114]

Judge Wood's decision in *Chase* is an admirable synthesis of the competing policies involved in determining whether to grant or reopen defaults. The trial court's authority was vindicated by the decision to award attorney's fees as a condition to reopening, and the offending lawyer rather than the innocent party was required to make the payments. The bond requirement assured that the party obtaining default judgment would have no greater difficulty collecting on a judgment after trial than he would have had the default judgment not been reopened. If trial judges have inherent authority to attach similar conditions in an order permitting reopening of default,[115] the court of appeals' decision in *Chase* serves as a model of the flexible approach that can be used to assure a trial on the merits while discouraging delay and dilatory tactics by a party.

X. TRIAL PROCEDURE

Notice pleading,[116] broad discovery rights,[117] and liberal rules authorizing amendments to the pleadings[118] promote flexibility when the theory of the case and possible defenses are being developed in the pretrial stages of litigation. To prevent unfair surprise at trial, however, there is a need for a pretrial device to determine the precise issues and the evidence to be produced at the trial. The pretrial conference serves that purpose in New Mexico. Rule 16 provides that the court may call a pretrial conference to simplify the issues to be tried, limit the number of witnesses, and otherwise act to achieve the efficient disposition of the action at trial. The culmination of the pretrial conference is a court order which "controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice."[119]

In *El Paso Electric Co. v. Real Estate Mart, Inc.*,[120] the court of appeals upheld the right of the trial judge to modify the pretrial order in the

114. *Id.* at 47, 665 P.2d at 309.

115. *See* Link v. Wabash R.R. Co., 370 U.S. 626 (1962).

116. *See, e.g.*, Las Luminarias of the N.M. Council of the Blind v. Isengard, 92 N.M. 297, 587 P.2d 444 (1978) (concurring opinion).

117. *See, e.g.*, Griego v. Grieco, 90 N.M. 174, 561 P.2d 36 (Ct. App.), *cert. denied*, (Mar. 15, 1977) (No. 2582) (Wood C.J., specially concurring).

118. N.M. R. Civ. P. 15.

119. N.M. R. Civ. P. 16.

120. 98 N.M. 570, 651 P.2d 105 (Ct. App. 1982), *cert. denied*, 98 N.M. 590, 651 P.2d 636 (1982).

interests of justice where no unfairness would result to the party insisting on strict compliance with the order. The trial court's pretrial order listed the witnesses to be called at trial. On Friday, the plaintiff asked the court to amend the order to permit an unlisted witness to substitute for a listed expert witness who was scheduled to testify in the case-in-chief[121] on the following Monday. The court agreed, on the condition that plaintiff make the witness available to defendants for discovery over the weekend.[122]

The court of appeals affirmed. The court of appeals conceded that absent advance notice or an opportunity for the opponent to use discovery devices to prepare for the testimony, it might be appropriate to prevent a surprise witness from testifying.[123] In *El Paso Electric*, however, the trial judge modified the pretrial order three days prior to the date the witness was to testify and granted the opposing party an opportunity to conduct discovery. These protections adequately prevented unfair surprise. Amendment of the pretrial order under these circumstances was not an abuse of discretion.

The court also held that defendant's failure to object at trial when plaintiff presented testimony from an additional witness never listed on the pretrial order constituted a waiver of the objection and precluded appellate review.[124] The decision demonstrates the appropriate balance between the function of the pretrial order to set the course of the trial and the need for flexibility where the exigencies of trial require a change of plans that can be accomplished without undue prejudice to other parties to the action.

El Paso Electric demonstrates that pretrial orders are subject to change when justice requires. *State v. Doe*[125] serves as a reminder that until the

121. The rule that only witnesses listed in the pretrial order may testify applies primarily to witnesses presented in the case in chief. Normally, rebuttal witnesses need not be listed if the necessity of their testimony could not have reasonably been anticipated at the time of the pretrial conference. Martinez v. Rio Rancho Estates, Inc., 93 N.M. 187, 598 P.2d 649 (Ct. App. 1979).

122. In cases where weekend recesses are not available for conducting discovery, the court is authorized to grant a short continuance. This enables one party to engage in discovery prior to the other party presenting a witness at trial who is not on the pretrial list of approved witnesses. *Cf.* Wallin v. Fuller, 476 F.2d 1204, 1210 (5th Cir. 1973); (A pretrial order may be changed when plaintiff raises new issues at trial and defendant impliedly consented to introduction of evidence). Albuquerque Nat'l Bank v. Albuquerque Ranch Estates, Inc., 99 N.M. 95, 654 P.2d 548 (1982). (The decision to grant a continuance is within the sound discretion of the trial court).

123. 98 N.M. 570, 572, 651 P.2d 105, 107 (Ct. App.), *cert. denied*, 98 N.M. 590, 651 P.2d 636 (1982). *See, e.g.*, State of N.M. *ex rel.* Highway Dep't v. Branchau, 90 N.M. 496, 565 P.2d 1013 (1977); El Paso Elec. Co. v. Pinkerton, 96 N.M. 473, 632 P.2d 350 (1981).

124. 98 N.M. 570, 573, 651 P.2d 105, 108 (Ct. App.), *cert. denied*, 98 N.M. 590, 651 P.2d 636 (1982). The court of appeals did not articulate the standard for when it would apply the doctrine of waiver to the failure to object to the testimony of an additional witness. Other jurisdictions have analogized to Rule 15(b), which provides for amendments to the pleadings in the course of a trial when evidence is admitted without objection from a witness who is not listed in the pretrial order. *E.g.*, Wallin v. Fuller, 476 F.2d 1204 (5th Cir. 1973).

125. 99 N.M. 460, 659 P.2d 912 (Ct. App. 1983).

entry of a final judgment, *every* decision of the trial judge during the course of proceedings is subject to reconsideration. In *Doe*, a seventeen-year-old was charged in children's court with the commission of serious criminal acts. A statute authorized the trial judge to hear the case or to order it transferred to district court for criminal trial.[126] After a hearing to consider the issue, the court ruled that the case would not be transferred to district court. Eight days later, the state moved for reconsideration of the decision and presented additional evidence not presented at the initial hearing.[127] The court withdrew its earlier decision and ordered transfer to the district court. The court of appeals affirmed because trial court judges have inherent power to "alter an interlocutory order at any time prior to a judgment concluding the litigation."[128]

XI. DISMISSAL FOR FAILURE TO PROSECUTE

Voluntary and involuntary pretrial dismissals are the subject of Rule 41.[129] Subdivision (b), copied from the Federal Rules of Civil Procedure,[130] provides generally that plaintiff's action may be dismissed for failure to prosecute. When the New Mexico rules were adopted, the provisions of an existing statute[131] containing specific requirements for dismissals for failure to prosecute were added to Rule 41.[132] This subdivision now provides that if plaintiff fails "to take any action" to bring the action to its final determination for three years after filing, defendant "may have the same dismissed with prejudice."[133]

For years, the courts attempted to render coherent and consistent decisions defining the type of action required to avoid dismissal[134] and determining the scope of judicial discretion in the application of the rule.[135] In 1972, the supreme court decided that rather than attempt to make sense of the existing precedent, it would start anew in the interpretation of the rule. In *State ex rel. Reynolds v. Molybdenum Corp.*,[136] the court con-

126. N.M. Stat. Ann. §§ 32-1-29 and 32-1-30 (1978).

127. 99 N.M. at 862, 659 P.2d at 914 (Ct. App. 1983). The evidence presented at the second hearing dealt both with events that had occurred prior to the first hearing but were unknown to the state at the time of the hearing and with events transpiring after the initial hearing. *Id.* The court did not rest its decision on the fact that the evidence presented was not available to the state at the time of the initial hearing. When a rehearing is requested because a party failed to obtain information that was readily available at the time of the first hearing, however, one can expect that the trial court will show less willingness to conduct a rehearing.

128. *Id.* at 863, 659 P.2d at 915.

129. N.M. R. Civ. P. 41.

130. *See* N.M. R. Civ. P. 41 compiler's notes.

131. 1937 N.M. Laws ch. 121.

132. N.M. R. Civ. P. 41(e)(1).

133. *Id.*

134. *E.g.*, Escoliar v. Montoya, 82 N.M. 640, 485 P.2d 974 (Ct. App. 1971).

135. *E.g.*, Baca v. Burks, 81 N.M. 376, 467 P.2d 392 (1970).

136. 83 N.M. 690, 496 P.2d 1086 (1972).

cluded that "narrow constructions placed on the rule have unjustly resulted in the termination of any cases in which diligence in the prosecution thereof could have been shown."[137] The court did not carefully articulate new standards. Instead, it ruled that the matter should be left to the discretion of the trial judge to determine whether appropriate action had been taken or a legitimate excuse for non-action given.[138]

In *Sewell v. Wilson,*[139] the court of appeals found an abuse of discretion in the trial court's dismissal of a claim pursuant to Rule 41(e). The trial court determined that merely conducting extensive discovery during the three years between commencement of the action and the motion for dismissal was insufficient to constitute action to bring the proceeding to a final determination. The trial judge also held that difficulty in obtaining an expert witness to testify was not an adequate excuse for failure to comply.

The court of appeals disagreed with both conclusions. The court agreed that merely initiating discovery during the three year period is not sufficient action "because such activity is routine and almost reflexive."[140] In this case, however, the extensive discovery engaged in by plaintiff qualified as proof that plaintiff attempted to bring the action to final determination. Moreover, plaintiff's inability after diligent search to obtain a medical expert to testify in the malpractice action constituted an adequate explanation for delay in proceeding toward final determination because it would have been "futile" to go to trial without an expert.[141] Although additional factors may have played a role in the decision,[142] *Sewell* demonstrates that, except in extraordinary cases, Rule 41(e) will not be construed to authorize dismissals for failure to prosecute. Rule 41(b) already authorizes dismissals in the few situations when dismissals would be appropriate under Rule 41(e). It may be time to repeal Rule 41(e) and thereby finally terminate the confusing line of cases that the rule has spawned.

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137. *Id.* at 694, 496 P.2d at 1090.

138. *Id.* at 697, 496 P.2d at 1093.

139. 97 N.M. 523, 641 P.2d 1070 (Ct. App.), *cert. denied,* 98 N.M. 50, 644 P.2d 1039 (1982).

140. 97 N.M. at 527, 641 P.2d at 1074. *See* State *ex rel.* Reynolds v. Molybdenum Corp. of Am., 83 N.M. 690, 695, 496 P.2d 1086, 1091 (1982) (initiation of discovery is insufficient activity to preclude the application of Rule 41(e)).

141. 97 N.M. 523, 528-29, 641 P.2d 1070, 1075-76 (Ct. App.), *cert. denied,* 98 N.M. 50, 644 P.2d 1039 (1982).

142. The court also considered the fact that there was a substantial delay between the time the Rule 41(e) motion was filed and the time the court heard argument on the motion. *Id.* at 530, 641 P.2d at 1077. Also considered significant was the fact that the plaintiff had not delayed filing his action until just before the statute of limitations had run, but filed soon after the cause of action arose. The court noted that the total time elapsed between the time of the accrual of the cause of action and the date on which the dismissal was sought was not much greater than would have occurred had the plaintiff filed the lawsuit just before the statute ran and then proceeded normally. *Id.*

The court of appeals demonstrated in *Kinetics, Inc. v. El Paso Products Co.*[143] that the denial of a directed verdict is not always what it seems. Rule 50 provides that when a request for directed verdicts is denied, the court is deemed not to have denied the motion, but "to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion."[144] Usually, the directed verdict issue is resurrected as a request for a judgment n.o.v. following a jury verdict for the opponent of the motion.[145] In *Kinetics,* the trial court twice denied motions for a directed verdict made by defendants during the trial. When the jury reported itself deadlocked, defendant again asked for a directed verdict. This time the court agreed that a directed verdict was appropriate. The significance of the opinion lies in its holding that directed verdicts may be granted in New Mexico when there is a jury deadlock as well as after a verdict is rendered and a judgment entered.

XII. POST-TRIAL MOTIONS

The internal operation of the jury process has long been shielded from public view. So strong is the belief that secrecy of jury deliberations is fundamental to the operation of the jury system that New Mexico courts once refused to consider a juror's affidavit that the verdict was the result of a toss of a coin.[146] The court of appeals, however, has determined that in some instances this common law rule has been superceded by a Rule of Evidence that expressly authorizes the admission of a juror's affidavit to impeach the jury's verdict in some circumstances. In *Duran v. Lovato,*[147] a verdict was rendered for defendant-motorist in an action brought by a pedestrian who had been struck by the defendant's vehicle. After trial, plaintiff interviewed the jurors and learned from one juror that, contrary to the court's instructions, several jurors had conducted speed tests on a highway in order to better evaluate the testimony presented at trial. Armed with the affidavit of this juror, plaintiff moved for a new trial. The trial judge, following existing precedent,[148] refused even to grant a hearing on the motion. The court of appeals reversed the decision of the trial court, held the affidavit was admissible, and remanded the case for a hearing to determine whether the evidence warranted a new trial.

143. 99 N.M. 22, 653 P.2d 522 (Ct. App. 1982).

144. N.M. R. Civ. P. 50(b).

145. *See, e.g.,* Tapia v. McKenzie, 85 N.M. 567, 514 P.2d 618 (Ct. App. 1973).

146. Goldenberg v. Law, 17 N.M. 546, 131 P. 499 (1913).

147. 99 N.M. 242, 656 P.2d 905 (Ct. App. 1983).

148. It is "the long established rule in New Mexico that affidavits of jurors presented after the jury has been discharged cannot be considered for purposes of impeaching a verdict." City of Clovis v. Ware, 96 N.M. 479, 481, 632 P.2d 356, 358 (1981).

The court of appeals acknowledged the "long standing" New Mexico doctrine that jurors could not impeach their own verdict, but determined that the adoption of Evidence Rule 606(b) in effect overruled many of the decisions barring the use of juror affidavits to obtain a new trial. Rule 606(b) perpetuates the general rule that affidavits describing statements made during the course of jury deliberations or the impact of any matter presented to the jury may not be admitted to impeach the verdict.[149] The Rule creates two exceptions: "[A] juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror."[150] The court of appeals decided that the profferred affidavit was admissible because it did not address the deliberation process, but instead went to the issue of prejudicial information or conduct occurring before deliberations began. Establishing the admissibility of the affidavit, however, is only one step in the process of obtaining a reversal. The court noted that the admissible evidence must also establish that the misconduct occurred and that the extraneous information acquired by this misconduct was prejudicial.

Duran correctly interprets the impact of the adoption of Rule 606(b) upon contrary precedent.[151] Experience with the application of this new rule will determine whether the inevitable resultant increase in investigation of the jury process by losing parties will undermine the "freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment"[152] that the older rule was designed to promote.

The effect of post-trial motions on the timing of appeal continues to pose problems for the courts and parties. The basic rule is relatively simple. Timely filing of a motion for a new trial or judgment n.o.v. suspends the time for filing a notice of appeal.[153] The full thirty days for filing of notice of appeal[154] is available after orders addressing the motions have been made.[155] The problem arises when a party forgets that a New Mexico statute[156] provides that failure of the court to decide the motion

149. N.M. R. Evid. 606(b).

150. *Id.*

151. In Goldenberg v. Law, 17 N.M. 546, 131 P. 499 (1913), the court expressly noted that its decision prohibiting the use of juror affidavits was valid in the absence of a statute to the contrary. *Id.* at 556, 131 P. at 502. Thus *Goldenberg* is consistent with the decision in *Duran* that a rule of procedure could supercede common law precedent. *See* Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 551 P.2d 1354 (1976), *cert. denied*, 436 U.S. 906 (1978) (evidence rules are procedural; the supreme court, and not the Legislature, has authority to promulgate rules of evidence).

152. Fed. R. Evid. 606 advisory committee note.

153. N.M. App. R. Civ. P. 3(d).

154. N.M. App. R. Civ. P. 3(a).

155. N.M. App. R. Civ. P. 3(d).

156. N.M. Stat. Ann. § 39-1-1 (1978).

for thirty days constitutes a denial of the motion. Thus, when the court fails to grant a post-trial motion within thirty days, the motion is denied by operation of law on the thirtieth day and the parties must file a notice of appeal from the judgment and the denial of the motion within thirty days thereafter.[157]

In *Chavez-Rey v. Miller*,[158] it was the trial judge who failed to comprehend the jurisdictional implications of the thirty day time limit for deciding post-trial motions and a party who thereby lost an opportunity for appeal. More than two and one-half months after the defendant filed timely motions for a new trial or remittitur and a judgment n.o.v., the trial court purported to grant the remittitur. Plaintiff then filed a notice of appeal, claiming that the court lacked power to grant the motion because of the passage of more than thirty days from the date the motion was made. The defendant filed a notice of cross-appeal. The court of appeals upheld plaintiff's claim that the trial court's grant of a remittitur was void because the trial court lost jurisdiction to grant the motion thirty days after the motion was made. Defendant's cross-appeal was then dismissed because defendant should have filed a notice of appeal within thirty days of the denial of its post-trial motion, which by operation of law, occurred one month after the motion had been filed.

The confusion engendered by the "denial by silence" statute is exacerbated by the decision in *Harrison v. Illinois-California Express, Inc.*[159] There, the plaintiff's motion for a new trial was denied in an oral ruling by the court. Plaintiff filed a notice of appeal prior to the rendition of a formal written order. The court of appeals held that the appeal must be dismissed because appeal lies only from a formal written order signed by the judge and filed or entered in the case.[160] Obviously, no written order is signed and entered when motions are deemed denied by the passage of time in accordance with the "denial by silence" statute. *Chavez-Rey* sets the date for appeal at thirty days after the motion is made and not granted. *Harrison* suggests that no appeal is possible then because a written order denying the motion has not yet been signed and filed. The prudent attorney should file a notice of appeal after the expiration of thirty days without a decision on the post-trial motion, and again after the court rules in writing on the motion if a written order denying the motion is ever entered.

The supreme court has the power to clarify the confusion engendered by the "denial by silence" statute. The supreme court should decide whether the benefits flowing from the provision are worth the numerous

157. N.M. App. R. Civ. P. 3(d).
158. 99 N.M. 377, 658 P.2d 452 (Ct. App.), *cert. denied*, 99 N.M. 358, 658 P.2d 433 (1983).
159. 98 N.M. 247, 647 P.2d 880 (Ct. App.), *cert. denied*, 98 N.M. 336, 648 P.2d 794 (1982).
160. *Id.* at 249, 647 P.2d at 882.

problems it poses. If the court concludes that the mechanical application of the thirty day requirement is no longer appropriate, it should promulgate a new rule of court modifying this statute, which attempts to regulate the procedures to be followed in the district court.[161]

XIII. APPEAL

The most significant change in New Mexico appellate practice this Survey year was the transformation of the New Mexico Supreme Court from an appellate court with considerable mandatory appellate jurisdiction over appeals from district court judgments[162] to an appellate court whose workload will largely be confined to discretionary review of appellate decisions of the New Mexico Court of Appeals. By a combination of statute[163] and rule,[164] the court of appeals has been given jurisdiction over most appeals from district court, with the supreme court overseeing the work of the court of appeals through the process of discretionary review by means of petition for certiorari.[165] In addition, the court of appeals may certify cases pending before it directly to the supreme court if the nature of the case merits immediate authoritative review by the supreme court.[166]

The change is a welcome correction of the pre-existing division of jurisdiction, which resulted from the creation of the court of appeals in 1965[167] and the legislative decision to assign to the new court appellate jurisdiction only over limited subject matters.[168] The supreme court kept initial review responsibility for a substantial body of cases, including appellate jurisdiction of a burgeoning number of domestic relations cases. The change-over should bring a semblance of rationality to the appellate process and should result in an increase in the quality of the written opinions of the supreme court. Unburdened of much of the massive case

161. *See, e.g.*, Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 551 P.2d 1354, *cert. denied*, 436 U.S. 906 (1978) (adoption of rules of procedure are a judicial, as opposed to a legislative, function).

162. Until 1983, the appellate jurisdiction of the New Mexico Supreme Court extended to all cases appealed from the district court, with only six exceptions in which the appeal from a district court opinion directly was to the New Mexico Court of Appeals. N.M. Stat. Ann. § 34-5-14 (Repl. Pamp. 1981) and N.M. Stat. Ann. § 34-5-8 (Cum. Supp. 1983).

163. 1983 N.M. Laws ch. 333, § 1. Now codified in N.M. Stat. Ann. § 34-5-8 (Cum. Supp. 1983).

164. N.M. App. R. Crim., Child. Ct., Dom. Rel. & Work. Comp. Cases 8000 Misc. (June 17, 1983).

165. *See* N.M. Stat. Ann. § 34-5-14(B) (Repl. Pamp. 1981).

166. *Id.* § 34-5-14(C).

167. The New Mexico Constitution was amended in 1965 to provide for an intermediate court of appeals. N.M. Const. art. VI, §§ 28-29.

168. 1967 N.M. Laws ch. 24, § 1 (presently codified in N.M. Stat. Ann. § 34-5-8(A)(1)-(6) (Cum. Supp. 1983)).

load it faced under the prior system and now able to rely largely upon the court of appeals to identify and correct error and injustices at trial, the supreme court is now free to control its own docket and to focus on cases involving significant questions of public policy.

Some problems have been created by the reformation.[169] Among the problems not addressed by the Legislature or supreme court is that the court of appeals is currently forbidden from reversing a decision of the supreme court.[170] Thus, the court of appeals is not free to develop its own coherent view of subject matters such as family law and community property for which it now will be primarily responsible. The court of appeals must either follow supreme court precedent with which it disagrees or it must certify such cases to the supreme court for determination.[171] A more efficient solution might be for the supreme court to authorize the court of appeals to overrule supreme court precedent in those subject areas now within the exclusive original jurisdiction of the court of appeals.[172] The supreme court's power to review such decisions by certiorari[173] would provide adequate assurance that the supreme court will have ultimate control over the development of the law, while allowing the court of appeals to take a fresh look at issues now delegated initially to it for resolution.

A second problem flows from the court of appeals' inability to issue extraordinary writs,[174] and the possibilities for appellate court-shopping that this engenders. Only the supreme court can issue writs of mandamus and prohibition to district court judges,[175] or issue writs of superintending control to oversee the operation of the district courts.[176] In the recent past the supreme court has relaxed the requirements for granting of these writs,[177] especially in cases where interlocutory review of non-final trial decisions is deemed appropriate. Now parties have an additional reason

169. For example, litigants have had difficulty determining whether to file in the court of appeals or in the supreme court during the transitional period between the old and the new division of jurisdiction. Section 34-5-10 solves this problem. It provides that no case shall be dismissed for filing in the wrong appellate court. Instead, a transfer of jurisdiction to the proper court shall occur. N.M. Stat. Ann. § 34-5-10 (Repl. Pamp. 1981).

170. Alexander v. Delgado, 84 N.M. 717, 507 P.2d 778 (1973).

171. N.M. Stat. Ann. § 34-5-14(C) (Repl. Pamp. 1981).

172. The cooperative relationship between the supreme court and the court of appeals during the process in which comparative negligence was adopted provides an example. In Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234 (1981), the supreme court delegated authority to the court of appeals to determine, free from existing supreme court precedent, whether to adopt comparative negligence. The court of appeals decided to reverse existing precedent and the supreme court affirmed the court of appeals' decision adopting comparative negligence. *Id.*

173. N.M. Stat. Ann. § 34-5-14(B) (Repl. Pamp. 1981).

174. *See* N.M. Const. art. VI, § 3 (supreme court alone authorized to issue writs).

175. *Id.*

176. *Id.*

177. *See, e.g.*, State Racing Comm'n. v. McManus, 82 N.M. 108, 476 P.2d 767 (1970).

to seek interlocutory review by use of the writs. The forum for the appeal will change when a writ is sought in the supreme court to review an issue which, through the ordinary appellate process, would normally be heard only in the court of appeals. A constitutional amendment authorizing the court of appeals to issue writs of prohibition and mandamus[178] is necessary to permit the court of appeals to resolve issues within its normal appellate jurisdiction when appellate review by extraordinary writ is sought. Until this reform is accomplished, the supreme court should carefully scrutinize petitions for writs and deny those in which appellate court-shopping is the motivating force for seeking the writ.

XIV. RES JUDICATA

The doctrine of res judicata prevents a second suit between the same parties on the same cause of action after a final judgment has been rendered in the first action.[179] Defining the phrase "cause of action" has long been a problem in other jurisdictions,[180] though the issue had not been squarely presented to the New Mexico Supreme Court until this Survey year. In *Three Rivers Land Co., Inc. v. Maddoux,*[181] the court rejected as "perfunctory," previous attempts to supply a conceptual definition of a cause of action. Instead of asking whether the nature of the substantive right asserted in each case is the same, or whether the remedy sought is the same,[182] the supreme court explicitly adopted the "transactional" test set forth in the recently promulgated Restatement (Second) of Judgments.[183] To the extent that the subject of the second lawsuit involves or arises from "all or any part of the transaction, or series of connected transactions, out of which the [first] action arose," the cause of action in the two suits is the same, and the doctrine of res judicata may be applied if the other requirements of the doctrine are met.[184]

The same "transaction or series of transactions" test now applicable in the res judicata context has been applied in New Mexico in other

178. The power of superintending control delegated explicitly to the supreme court in article VI, § 3 of the New Mexico Constitution and the "writ of superintending control" by which it carries out this function probably should remain solely the prerogative of the New Mexico Supreme Court.

179. *E.g.,* Three Rivers Land Co., Inc. v. Maddoux, 98 N.M. 690, 652 P.2d 240 (1982). In New Mexico, the elements of res judicata are: "(1) identity of parties or privies, (2) identity of capacity or character of persons for or against whom the claim is made, (3) same cause of action, and (4) same subject matter." *Id.* at 694, 652 P.2d at 244.

180. *See, e.g.,* Schopflocher, *What is a Single Cause of Action for the Purpose of the Doctrine of Res Judicata?,* 21 Ore. L. Rev. 319 (1942).

181. 98 N.M. 690, 652 P.2d 240 (1982).

182. *See* J. Pomeroy, Code Remedies §§ 346-56 (5th ed. 1929).

183. Restatement (Second) of Judgments § 24 (1982).

184. *Id.* § 24(1).

185. *See, e.g.,* N.M. R. Civ. P. 13(a), 15(c), 20(a).

contexts.[185] Moreover, the Restatement provides guidelines, if not a test,[186] for determining whether the same transaction test has been met. The relationship of the facts "in time, space, origin, or motivation"[187] is to be considered, as are the questions of whether the factual grouping would have formed a convenient single trial unit and whether such treatment would conform to the parties' expectations.[188] The Restatement rule, adopted by the supreme court, flatly rejects the notion that mere differences in the evidence introduced, the legal grounds pursued, or the remedy sought precludes a finding that the cause of action in each suit is the same.[189]

The court's decision to adopt the Restatement position is a welcome rejection of the confusing and mechanistic definitions of "cause of action" often applied in the past by other jurisdictions. It permits a court to determine pragmatically whether res judicata should be applied, and thus provides the court with flexibility to determine the question in each case in light of the underlying principle behind res judicata "[to] relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, [prevent] inconsistent decisions. . . ."[190]

Unfortunately, the supreme court's application of the newly adopted Restatement approach to the facts presented in *Maddoux* was itself mechanistic and unnecessarily harsh. In the first lawsuit, plaintiff initially sought only specific performance. Prior to trial, plaintiff twice sought to amend the claim for relief to include a request for damages. Each time the trial judge denied the request because he "did not want to confuse questions of law and equity."[191] At the culmination of the first trial, the court declined to grant specific performance, not because plaintiff failed to prove his case, but because the remedy of specific performance was deemed inappropriate. Plaintiff then filed a second suit, alleging the same facts, but seeking damages.

The supreme court, applying the new Restatement test, held that the transactions alleged in the two suits were the same and that the second suit was barred. Relying on language in the Restatement,[192] and accompanying committee commentary,[193] the court declared that a plaintiff who is denied the right to amend his pleadings in an initial lawsuit, has a duty

186. Professor Wright has described the Restatement (Second) as defining "a process rather than an absolute concept." C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4407 (1981).

187. Restatement (Second) of Judgments § 24(2) (1982).

188. *Id.*

189. *Id.* § 25.

190. Allen v. McCurry, 449 U.S. 90, 94 (1980).

191. 98 N.M. 690, 692, 652 P.2d 240, 242 (1982).

192. Restatement (Second) of Judgments § 26(1)(b) (1982).

193. "The plaintiff's . . . recourse against an incorrect refusal of an amendment is direct attack by means of appeal from an adverse judgment." *Id.* § 26, comment b.

to appeal the denial of that motion rather than to expect that the denial of the request to amend carried with it an implied[194] right to file a subsequent suit. Application of this Restatement comment to events which occurred prior to the adoption of the Restatement approach was unfair.

Despite the actual holding of *Maddoux*, it is clear that the thrust of the Restatement approach is to provide flexibility and encourage policy-based decisions rather than mechanical application of a single rule. Parties should err on the side of inclusion of all potentially related claims in the first suit rather than take the chance that another court will later conclude that the second suit impermissibly seeks relief for the same cause of action as the first suit.

194. 98 N.M. at 696, 652 P.2d at 246. The court conceded that if there were an express reservation by the court of the right of the party to file a subsequent lawsuit, then the Restatement would permit the filing of the second law suit. In *Maddoux*, the supreme court did not construe the court's denial of the right to amend in the first lawsuit as an express reservation of the party's right to file a second lawsuit. *Id.*