

Opinion No. 33-704

December 22, 1933

BY: E. K. NEUMANN, Attorney General

TO: Hon. Alfonso Aguilar, Supt. of Insurance, State Corporation Commission, Santa Fe, New Mexico.

{*101} Your letter of December the 21st, requests an opinion as to whether or {*102} not the State of New Mexico should pay the \$ 2.00 required in connection with service of process, under Sec. 71-114 of the New Mexico Statutes, Annotated, 1929 Compilation.

In 59 C.J., Section 503 at page 332, we find the following:

"While a state may be excused from the payment of costs because of express statutory exemption, it is a general and well established rule, apart from statute, that costs are not recoverable from a state, in her own courts, whether she has brought suit as plaintiff or has properly been sued as defendant, or whether she is successful or defeated, and if a state has paid costs for which it is not liable, it may recover the amount paid from the party who is liable. Costs, however, may be awarded against a state when it is expressly permitted by statute; but only in a case coming clearly within the terms of the statute, and general statutes providing for taxation of costs in favor of the prevailing party or against the unsuccessful party do not authorize an award for costs against a state."

Also, we find, from a review of other texts and cases, that costs will not be assessed against the State in the absence of express statutory provision.

Apparently, the \$ 2.00 mentioned in the statute above cited stands in the same relation as any other service fees and, in our opinion, would be properly taxable as costs in any proceeding between individuals, but, in view of the foregoing, general rule of law, it is our belief that it cannot be taxed and assessed in the present instance as against the State of New Mexico and we suggest that you show this service on your books as being free process of the State of New Mexico.

By: FRANK H. PATTON,

Asst. Attorney General