

ATTAWAY V. JIM MILLER, INC., 1972-NMCA-058, 83 N.M. 686, 496 P.2d 746 (Ct. App. 1972)

**EM'LY ATTAWAY, Plaintiff-Appellee,
vs.
JIM MILLER, INC., d/b/a PAUL THORP HEALTH SPAS and NADINE
LOVELADY, d/b/a LOVELADY REALTY AND CONSTRUCTION
COMPANY, Defendants-Appellants**

No. 750

COURT OF APPEALS OF NEW MEXICO

1972-NMCA-058, 83 N.M. 686, 496 P.2d 746

April 14, 1972

Appeal from the District Court of Lea County, Neal, Judge

COUNSEL

R. E. RICHARDS, GIRARD & RICHARDS, Hobbs, New Mexico, Attorneys for Appellant Lovelady.

L. GEORGE SCHUBERT, Hobbs, New Mexico, Attorney for Appellant Miller.

WILLIAM J. HECK, Hobbs, New Mexico, Attorney for Appellee.

JUDGES

SUTIN, Judge, wrote the opinion.

WE CONCUR:

Joe W. Wood. C.J., William R. Hendley, J.

AUTHOR: SUTIN

OPINION

{*687} SUTIN, Judge.

{1} Defendants appeal from judgment entered on a jury verdict against them for personal injuries awarded Attaway.

{2} We affirm.

{3} Each defendant raises separate grounds for reversal.

A. LOVELADY

{4} Lovelady contends, (1) the trial court erred in requiring her counsel to make peremptory challenges and challenges for good cause which were made in the hearing of the jury; (2) the trial court erred in requiring her counsel to make his motion to dismiss in the hearing of the jury.

{5} The record does not support Lovelady's contentions. It is void of any proceedings for which error is claimed. To obtain a review, the record on appeal must show such portions of the proceedings below necessary to raise claimed error on appeal. Section 21-2-1(17)(1), N.M.S.A. 1953 (Repl. Vol. 4). *Seinsheimer v. Jacobson*, 24 N.M. 84, 172 P. 1042 (1918); *State ex rel. State Highway Commission v. Sherman*, 82 N.M. 316, 481 P.2d 104 (1971). Since the record does not show that challenges were exercised, or that they were exercised in the hearing of the jury, or that the motion to dismiss in the hearing of the jury was actually heard by the jury, the judgment is affirmed.

B. MILLER

{6} Miller contends "all the evidence" shows the relationship between Miller and Attaway to be that of master/servant and the relationship of Lovelady to Miller was that of an independent contractor. Miller claims he is not responsible for Lovelady's negligence. We do not have to decide this issue. Independent of Lovelady's negligence, substantial evidence of negligence on the part of Miller supports the determination of Miller's liability. The judgment against Miller is affirmed.

{7} At oral argument, Attaway asked that damages for delay be assessed in her favor under Supreme Court Rule 17(3) [§ 21-2-1(17)(3), N.M.S.A. 1953 (Repl. Vol. 4)]. However, Attaway did not, thereafter, file a motion with brief in support thereof. Nevertheless, Attaway failed to meet the conditions set forth in *Anderson v. Jenkins Construction Company*, 83 N.M. 47, 487 P.2d 1352 (Ct. App. 1971).

{8} AFFIRMED.

{9} IT IS SO ORDERED.

WE CONCUR:

Joe W. Wood, C.J., William R. Hendley, J.