

**JONES V. NEW MEXICO STATE HWY. DEP'T, 1979-NMSC-033, 92 N.M. 671, 593
P.2d 1074 (S. Ct. 1979)**

**David E. JONES, Plaintiff-Appellee,
vs.
NEW MEXICO STATE HIGHWAY DEPARTMENT, New Mexico State
Highway Commission, Julian Garcia, Kenneth L. Towle,
Albert N. Sanchez, Robert C. Martin and James
W. Chaney, Defendants-Appellants.**

No. 12235

SUPREME COURT OF NEW MEXICO

1979-NMSC-033, 92 N.M. 671, 593 P.2d 1074

April 30, 1979

COUNSEL

Jeff Bingaman, Atty. Gen., V. Henry Rothschild, Deputy Chief Counsel, Asst. Atty. Gen.,
Santa Fe, for defendants-appellants.

Michael L. Gregory, Las Vegas, for plaintiff-appellee.

JUDGES

PAYNE, J., wrote the opinion. EASLEY and FEDERICI, JJ., concur.

AUTHOR: PAYNE

OPINION

PAYNE, Justice.

{1} David E. Jones brought a breach of contract action against the New Mexico State Highway Department and State Highway Commissioners. The complaint was filed in the District Court in San Miguel County. The State moved for dismissal asserting improper venue and insufficient service of process. The District Court in San Miguel County transferred the cause to the District Court in Santa Fe County. The State appealed.

{2} The controlling issue in this case is whether an action against a state officer may be brought in a district court other than the District Court in Santa Fe County, in the absence of a waiver of venue by the state officer.

{3} Section 38-3-1(G), N.M.S.A. 1978 states that "suits against any state officers as such shall be brought in the court of the county wherein their offices are located, at the capitol [capital] and not elsewhere."

{4} The State Highway Commissioners are state officers within the meaning of this statute. **See State ex rel. Bureau of Revenue v. MacPherson**, 79 N.M. 272, 442 P.2d 584 (1968); **Tudesque v. New Mexico State Board of Barber Exam**, 65 N.M. 42, 331 P.2d 1104 (1958). {672} The State Highway Commission's office is located at the state capital in Santa Fe. § 67-3-9, N.M.S.A. 1978. The Legislature, in enacting this statute, intended that actions against state officers be brought only in Santa Fe County. **State v. Quesenberry**, 74 N.M. 30, 390 P.2d 273 (1964).

{5} We have held that this venue statute is not to be equated with jurisdiction. **Kalosha v. Novick**, 84 N.M. 502, 505 P.2d 845 (1973). Although in **Kalosha** we held that proper venue may be waived, there is no evidence in this case that the State waived venue. To the contrary, the State moved for dismissal of the action alleging improper venue.

{6} Absent a statute giving it such authority, a trial court has no power to change the venue of a misfiled lawsuit. 1 **Moore's Federal Practice** para. 0.146[2], at 1660 (2d ed. 1978). Venue was improper in this case, and the District Court in San Miguel County could not properly issue an order for a change of venue.

{7} We need not discuss the issue of service of process raised by the State.

{8} The trial court is reversed. The matter is remanded with instructions to dismiss the action in the District Court in San Miguel County.

{9} IT IS SO ORDERED.

EASLEY and FEDERICI, JJ., concur.