COPY

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED
DEC 14 2011
Wendy F. Jones

DAN LOPER, d/b/a RIO LECHE DAIRY, CO.,

Plaintiff-Appellant,

Court of Appeals No. 31357

v.

JMAR, a New Mexico General Partnership,

Defendant-Appellee.

ON DIRECT APPEAL FROM
THE NINTH JUDICIAL DISTRICT COURT
NO. D-0905-CV-2007-0013
THE HONORABLE DAVID P. REEB, JR., DISTRICT JUDGE

APPELLEE'S ANSWER BRIEF

APPELLANT HAS REQUESTED ORAL ARGUMENT

Counsel for Defendant-Appellee: Gregory L. Biehler
Beall & Biehler
6715 Academy Road, N.E.
Albuquerque, NM 87109
Telephone: (505) 828-3600
Fax: (505) 828-3900

TABLE OF CONTENTS

RULE 12-213(A)(1)(b) NMRA STATEMENT

References to the recorded transcript are by elapsed time from the start of the recording, so that "Tr. 10:25" indicates a point occurring ten minutes and twenty-five seconds after the start of the recording.

TABLE OF AUTHORITIES

Page

New Mexico Decisions

Decisions from other Jurisdictions

Statutes and Rules

Other Authorities

I. SUMMARY OF THE PROCEEDINGS AND STATEMENT OF FACTS

In his Summary of the Facts (ABC at 6 to 16), Appellant often relies upon the unproven assertions of his complaint and of his retained expert witnesses (see Footnote 1 below). However, he does not show facts of record, as opposed to his own assertions or allegations, to demonstrate that the trial court's decision on testimony by Professor LaVerne Stetson was manifestly erroneous.

In this case, Appellee JMAR, a New Mexico General Partnership, agreed to have a dairy facility built for Appellant, Dan Loper d/b/a Rio Leche Dairy, Co. Following its completion, Appellant leased the facility from Appellee, with an option to purchase. Appellant's herd provided less milk production than he expected. Consequently, Appellant sued Appellee, Stanley Jones, and Kyle Snider d/b/a Snider Electric for the reduced milk production, claiming Appellee negligently designed and specified the dairy facility, and did so in a way that caused, or contributed to subcontractor, Snider Electric's inadequate wiring of the facility and claiming Appellee breached its contract in failing to provide Appellant a turn-key dairy (RP 1 through 15; RP 3350). Defendant Jones was dismissed and that dismissal was not appealed. Snider Electric settled the claims against it.

The direct negligence claims against Appellee were for its dairy design, misrepresentation, and negligent hiring and supervision of the contractors performing the work at the dairy. Appellant relied upon his expert, Professor LaVerne Stetson, to provide evidence that Snider Electric and Appellee's negligence

caused stray voltage at the dairy which cased a reduction of milk production at the Rio Leche Dairy.[1]

Professor Stetson was deposed on four different occasions; he gave several affidavits (RP 1294 to 1295; RP 3191 to 3198 (also at RP 3104 to 3105)). Professor Stetson did not opine that Appellee designed a defective dairy, negligently supervised the subcontractors or hired an inexperienced subcontractor, or that such negligence resulted in stray voltage, and Appellant points to no evidence in that record that Professor Stetson developed such opinions (*see* ABC at 7 and 10 to 14). Professor Stetson's opinion related to stray voltage and its effect on dairy cows; his opinion was that cows' milk production is not affected until stray voltage reaches at least 2 volts (RP 3105 and RP 3193 at ¶ 7.5). However, he could not and did not opine that stray voltage existed at cow contact points at Rio Leche at voltages of 2 to 4 volts (RP 3105 and RP 3193 at ¶¶ 8 to 11).

---

[1] Appellant's long description of Professor Stetson's credentials does not address any issues in this appeal. As such, it should neither be included in Appellant's "Summary of Facts" (ABC at 8 to 10) nor considered by this Court. *See Rule 12-213(A)(3) NMRA*. Appellee also improperly describes as facts numerous things that clearly are not facts supported by evidence of record (ABC at 6 to 8). The allegations of his complaint are not "facts" (ABC at 6) and they should not be viewed by this Court as anything other than the contentions that they are. Appellant further claims that he "considered and eliminated all other possible causes of the decreased [milk] production" (ABC at 6). However, he cites to a report by one of his experts that was prepared in 2008, rather than at the time Appellant claims to have first noticed decreased production (*Id.*, citing RP 1269-1275 which is the "Expert Witness Report of Dr. Robert H. Corbett" dated May 30, 2008). Clearly, the report resulted from litigation; it was not a prophylactic or investigatory measure undertaken at the time Appellant claims to have been experiencing milk losses. Appellant also states as "facts" what are actually generalized statements by LaVerne Stetson about common characteristics of stray voltage, but he does not relate them to the conditions at Rio Leche Dairy (ABC at 10). As such, they did not create any factual issue precluding summary judgment.

Following Professor Stetson's February 18, 2009, deposition, Appellee renewed its earlier motion for summary judgment (RP 3081 to 3141). The basis for the Appellee's renewed motion was two pronged: (1) an expert's opinion must be based in provable facts, pursuant to *State v. Downey*, 2008-NMSC-061, 145 N.M. 232, 195 P.3d 1244, and (2) and there was no evidence to establish the requisite factual predicate for assuming the existence of stray voltage at 2 volts or greater at any cow contact point in the Rio Leche Dairy. Appellee asserted as an undisputed material fact (RP 3264) that the only evidence of stray voltage developed of record was the alleged failure of Snider Electric to ground electrical components at the dairy. Appellant did not dispute this fact in the summary judgment proceedings or present any evidence that failure to ground resulted from Appellee's design or Snider Electric's experience (RP 3297 to 3305). Appellant asserted that it had developed evidence of record that there was no drawn design plan for the Diary's mechanical and electrical systems, no design or no record made for grounding the electrical system, the National Building Code's requirements for agricultural buildings were not followed, and the contractors had only wired one other dairy and were not aware that stray electricity posed risks in a dairy (RP 3350-3351; and ABC at 11). However, Professor Stetson did not opine that stray voltage resulted from any design flaw or the experience of the contractors who built the facility (RP 3191 to RP 3194).

Appellee also moved for summary judgment based upon Appellant's settlement with Defendant Snider Electric (RP 3262). Appellee was entitled to

the work at the dairy (RP 3468 to 3469; RP 3470 to 3471). Following a jury verdict in Appellee's favor, this appeal was taken.

II. ISSUES RAISED ON APPEAL

Appellant raises two issues in this appeal (ABC at pp. 2-3). They are:

a. Whether the trial court erred in granting summary judgment on the ground that Professor Stetson's testimony was not sufficient to prove causation (ABC at 2).

b. Whether the trial court precluded Appellant from presenting claims based in Appellee's negligence by incorrectly granting summary judgment on the basis of the Doctrine of Circuity of Actions (ABC at 3).

III. RESPONSE TO APPELLANT'S ARGUMENT AND AUTHORITIES

A. RESPONSE TO APPELLANT'S POINT B:

THE TRIAL COURT DID NOT ERR GRANTING SUMMARY JUDGMENT PURSUANT TO ITS OCTOBER 5, 2009 ORDER

1. Applicable Standard of Review

a. Summary Judgment

Summary judgment is proper when there is no evidence sufficient to raise a reasonable doubt that a genuine issue of material fact exists. *See e.g. Cates v. Regents of N.M. Inst. of Mining & Tech.,* 1998–NMSC–002, ¶ 9, 124 N.M. 633, 954 P.2d 65. Questions of whether there are no genuine issues of material fact and

whether a summary judgment movant is entitled to judgment as a matter of law are reviewed *de novo* as questions of law. *See Self v. United Parcel Serv., Inc.*, 1998-NMSC-046,¶ 6, 126 N.M. 396, 970 P.2d 582. To prevail, Appellant here must identify a genuine issue or issues of material fact that require a trial on the merits. *Dow v. Chilili Coop. Ass'n*, 105 N.M. 52, 54-55,728 P.2d 462, 464-465 (1986).

b. Expert Witnesses Testimony

The trial court has wide discretion in determining whether an expert witness is competent or qualified to testify. *Lopez v. Reddy,* 2005–NMCA–054, ¶ 14, 137 N.M. 554, 558, 113 P.3d 377, 381; *State v. Alberico,* 116 N.M. 156, 169, 861 P.2d 192, 205 (1993); *State v. Downey*, 2008-NMSC-061, ¶ 24, 145 N.M. 232, 237, 195 P.3d 1244, 1249 (2008). A trial court's decision on expert testimony "should be sustained 'unless [it is] manifestly erroneous.'" *Parkhill v. Alderman-Cave Milling and Grain Co.*, 2010-NMCA-110, ¶ 46, 149 N.M. 140, 149, 245 P.3d 585, 594 citing *State v. Alberico,* 116 N.M. at 169

2. Summary of Appellee's Response to Point B

Here, the trial court's decision was not manifestly erroneous. According to Professor Stetson's own testimony, his opinion concerning stray voltage and its effect on a cow's milk production was not supported by any scientifically acceptable evidence that stray voltage in amounts sufficient to harm cows' milk production – a minimum of 2 to 4 volts – were present at cow contact points at the Rio Leche Dairy. Thus, the required factual predicate from which Professor Stetson could opine that stray voltage harmed the Rio Leche Dairy cows' milk output does not

exist in this case. Accordingly, summary judgment on claims supported by Professor Stetson's testimony was proper. *See State v. Downey, supra.* The trial court's ruling in this regard forms no basis for reversal.

3. Response to Appellant's Point B

a. There Are no Facts to Support an Opinion by Professor Stetson that Stray Voltage Harmed the Rio Leche Dairy Cows

Appellant identified Professor Stetson to testify about whether stray voltage at Rio Leche Dairy, if it existed, affected the Dairy's cows (ABC at 18). Because Professor Stetson is highly qualified and vastly experienced in stray voltage, Appellant argues that his opinions were relevant and reliable and the jury should have been allowed to hear and weigh his testimony (*Id.*). Appellant, therefore, urges this Court to reverse the trial court's determination that claims supported by his opinion were subject to summary judgment. (ABC at 18). Appellant is correct that, to be admissible, an expert's opinion must be "sufficiently tied to the facts of the case such that it will aid the jury in deciding factual disputes" (ABC at 19). In circumstances like here however, where there is no tie between the expert opinion and the facts of the case, the expert's opinion should not reach the jury. *Parkhill v. Alderman-Cave Milling and Grain Co.*, 2010-NMCA-110 at ¶ 37; *State v. Downey*, 2008-NMSC-061, ¶ 30 and ¶¶ 32 to 34 (expert testimony must be sufficiently tied to the facts of the case so that it can aid the jury in resolving a factual dispute; thus "the reasoning or methodology underlying the testimony must not only be scientifically valid, it also must be properly applied to the facts in issue."); *State v. Anderson,* 118 N.M. 284, 291, 881 P.2d 29, 36 (1994) (expert's scientific technique

must be "capable of supporting opinions based upon reasonable probability rather than conjecture.").

The issue is not, as Appellant argues, that the jury can hear the expert's opinion and give it such weight as the jury deems appropriate (ABC at 25). Rather, the issue is whether the opinion can properly be given at all. New Mexico law is clear, if an expert's opinion is not based in the facts of the case, it cannot be presented to the jury at all. *Id.* The fact that Professor Stetson's opinions might be expressed to an "engineering probability" (ABC at 24) does not make them admissible or add any additional weight to them. The opinions are either admissible because they have a sufficient factual predicate as determined by well-established New Mexico law, or they are not admissible.

Appellee brought its summary judgment motion, not because Professor Stetson is not credible or because he is unqualified, but because his stray voltage opinion lacked foundation in the facts of this case. In the context of Appellee's summary judgment motion, Professor Stetson's credentials were irrelevant. Even the most highly regarded and credentialed scientist may not testify unless his or her opinion is shown to be based in the facts of the case.

Evaluating an expert's factual predicate and his or her methodology is wholly within the gate keeping function of this Court. *See State v. Downey*, 2008-NMSC-061, ¶ 1. A trial court does not commit manifest error, but acts appropriately within its required gate keeping, when it excludes an opinion that is not tied to the facts of the case. Here, despite his qualifications and credentials, no evidence existed from

which Professor Stetson could opine that stray voltage existed at the Rio Leche Dairy in amounts that would harm milk production of the Dairy's cows.

Professor Stetson acknowledged that a scientific conclusion is something that can be reviewed and scrutinized and tested by another scientist (RP 3119 (page 79)). And, he specifically testified that there was no scientifically reliable data which showed that more than .5 volts of stray voltage was measured at the Rio Leche Dairy (*Id.* (pages 76 and 77). When the conditions which were described as existing at the Rio Leche Dairy (mixing grounds and neutrals) are found, Professor Stetson believes it is impossible to determine the amount of stray voltage which might result (*Id.* (pages 82 and 83)). The wiring at the Rio Leche Dairy could cause stray voltage at a cow contact point or not cause such voltage (*Id.* (page 78)). Professor Stetson's own testimony places his opinion squarely within the holdings of *Parkhill v. Alderman-Cave Milling and Grain Co., State v. Downey* and *Leon Ltd. v. Carver*, 104 N.M. 29, 35, 715 P.2d 1080, 1086 (1986), and makes it inadmissible.

In *Parkhill*, several of the Parkhills' horses died after being fed ACMG horse feed. The feed was found to contain monensin, a livestock antibiotic known to be toxic to horses. Within weeks of discontinuing the feed, the Parkhills began experienced physical ailments. The Parkhills wanted their treating doctor and Dr. James Dahlgren to give expert testimony that, to a reasonable degree of medical probability, their health problems were caused by exposure to monensin. 2010-NMCA-110 at ¶ 7. Dr. Dahlgren agreed that the dosage plaintiffs received was critical in determining whether exposure to monensin could have caused their

symptoms. Yet, he did not know how much monensin they had ingested. The Court of Appeals found that in the absence of such a quantification, Dr. Dahlgren's opinion would be mere conjecture. 2010-NMCA-110 at ¶¶ 37 to 38 The Court, relying upon *Downey, supra.*, that "[e]xperts may, and often do, base their opinions upon factual assumptions, [nevertheless] those assumptions in turn must find evidentiary foundation in the record" upheld exclusion of the doctors' testimony. In doing so, the Court reiterated the *Downey* requirements: that expert testimony proffered in a case must be sufficiently tied to the facts of the case so that it will aid the jury in resolving a factual dispute; that the scientific methodology fit the facts of the case so that it proves what it purports to prove; and that the reasoning or methodology underlying the testimony be scientifically valid and also properly applied to the facts in issue. *Id.* at ¶ 36.

The Parkhills also urged that Dr. Dahlgren's testimony was admissible because of the temporal relationship between the onset of their symptoms and their exposure to monensin. They argued that this association which made it unnecessary for Dr. Dahlgren to determine the dosage they received before he could render a scientifically reliable opinion about the effect of their exposure. 2010-NMCA-110 at ¶ 38. Both the trial and the appellate courts rejected this idea. Even though it was difficult for Dr. Dahlgren to establish the monensin dose plaintiffs had received, he was not excused from having to do so; his opinion was still required to fit the facts of the case. *Id.* at ¶¶ 39 to 44. Likewise here, Professor Stetson's opinion cannot establish the facts that support Appellant's stray voltage claims. Rather he must

have scientifically reliable evidence upon which he can base an opinion that stray voltage harmed the milk output of Rio Leche's cows. He did not have such evidence. Accordingly, it was proper for the trial court to preclude Appellant from presenting stray voltage claims based upon his testimony.

The expert in *Downey* was improperly allowed to testify because his testimony was predicated upon factual assumptions unsupported by the evidence. This lack of evidentiary support made the testimony unreliable and inadmissible under *Daubert* and *Alberico*. 2008-NMSC-061, ¶ 1. Defendant in *Downey* did not challenge the reliability of blood alcohol retrograde science, but he argued that the factual basis of the testimony was insufficient to permit application of the doctrine. 2008-NMSC-061, ¶ 29. Ultimately, the Court determined that the expert was lacking information critical to making retrograde extrapolation calculations – the time when defendant had consumed his last drink and where in the absorption continuum defendant was when the blood alcohol test was administered. Given the inadequate factual predicate, the expert could "not express a reasonably accurate conclusion regarding the fact in issue." 2008-NMSC-061, ¶ 32.

Here, as in *Parkhill* and *Downey*, Professor Stetson had no reliable scientific predicate on which to base his opinion. Appellant attempts to sidestep the requirement of a factual predicate by setting out principles governing admissibility of expert evidence, with which Appellee does not disagree, and focusing on the *Alberico* factors for determining whether scientific testimony is reliable (ABC at 19 to 21). Appellant's argument is off the mark. It is clear from Appellant's own recitation

that the crucial component which could tie Professor Stetson's opinion to the Rio Leche Dairy is missing. Appellant says that stray voltage (1) can be tested and detected, (2) existed at the dairy at a fan and a transformer (but according to Appellant's expert, these are places where the cows were not present (RP 3113, page 52), and (3) can adversely impact a cow's milk production (ABC at 21). Clearly missing from this list are two indispensible pieces of evidence - evidence of stray voltage at points which cows could come into contact with it and evidence of such voltage in amounts adverse to dairy cows' milk output.[2] Appellant's Brief in Chief points to no such evidence. Appellant does point to a temporal relationship between rewiring at the dairy and increased milk production (ABC at 23). However, like the temporal association in *Parkhill*, any temporal association that might exist in this case between increased milk production and electrical remediation is not evidence that stray voltage ever existed at cow contact points in sufficient quantities to reduce milk yield. Because Professor Stetson did not possess facts that enabled him to express a reasonably accurate conclusion, his opinion was nothing more than sheer conjecture. As such, it was appropriate for the trial court to preclude all stray voltage claims based upon his testimony.

Bustos v. Hyundai, 2010-NMCA-090, 149 N.M. 1, 243 P3d 440, *cert granted*, 2010-NMCERT-10, 149 N.M. 65, 243 P.3d 1147 (October 18, 2010), does not make Mr. Stetson's opinion admissible, as Appellant argues (ABC at 22). In *Bustos*, this Court determined that the expert's opinion was sufficiently anchored to the facts of

[2] Professor Stetson only opined that the low level of .5 volts can "impact dairy cows;" however he did not opine that such a low level adversely affects milk production (RP 3197 ¶ 4). His testimony is that voltage must be at or above 2 to 4 volts to adversely affect milk production (*see e.g.* RP 1931).

the rollover accident that it was properly admitted at trial. While the expert relied upon results of tests conducted by the vehicle manufacturer, the expert did much more. Among many other things, he personally inspected the vehicle four times; was involved in a tear down by the manufacturer; inspected the elements of the car to assess how they had performed in the accident; examined all pre and post production materials on the vehicle; and performed his own farrowing analysis on the vehicle. 2010-NMCA-090 at ¶¶ 18 to 22.

In contrast, Professor Stetson had to rely upon the voltage measurements taken by Precision Electric, measurements that he did not participate in or oversee. Unlike the manufacturer in *Bustos*, Precision Electric did not document its results (RP 3124, page 62). Professor Stetson testified that, like any scientist, he could not properly rely upon undocumented evidence of stray voltage readings (RP 3114; RP 3118 (pages 73 to 74) - an expert cannot reach scientifically valid opinions relying upon inaccurate or unreliable evidence (RP 3114). Professor Stetson further testified that the methodology used by Precision Electric is not a proven testing procedure for analysis and detection of stray voltage (RP 3115, page 61). While Professor Stetson did rely upon what Precision Electric had written down (RP 3118, pages 73 to 74), there was nothing written down that could provide scientifically reliable evidence of voltages at or above .5 volts (RP 3119, pages 76 to 77). Moreover, unlike the *Bustos* expert who found physical evidence of structural weaknesses in the vehicle which could explain plaintiff's damages (2010-NMCA-090 at ¶¶ 20 to 22), Precision Electric found no voltages at any cow contact point in the

range Professor Stetson testified must be present to affect milk production (*see e.g.* RP 3105 and 3193 at ¶ 7.5; RP 1931 at lines 9 through 19).

Even if Professor Stetson relied upon Precision Electric's undocumented voltage measurements greater than 2 volts, they do not provide a factual basis for an opinion that stray voltage affected the cows' milk production. Donald Degray, of Precision Electric, testified only to two measurements at or above the 2 volt level. One was at a fan and one was at a transformer box (RP 3125). However, Professor Stetson specifically testified that these voltages were not stray nor at a cow contact point (RP 3113).

Professor Stetson is not at fault for Appellant's failure to obtain and document reliable voltage measurements at Rio Leche Dairy before remediation. Nevertheless, the unreliable methodology employed by Precision Electric leaves Professor Stetson with no evidence of unacceptable levels of stray voltage at Rio Leche Dairy. Without such evidence, there was no reason for Professor Stetson to give the jury any testimony about stray voltage.

New Mexico courts do not blindly accept expert opinion testimony, no matter how qualified the expert. If an expert does not or cannot obtain evidence that would support his or her opinion, the opinion is not helpful to the trier of fact and it is not admissible. *See Rule 11-702 NMRA; Downey*, 2008-NMCS-061, ¶¶ 33 through 36. There was neither an evidentiary foundation for a finding of at least 2 volts at the Rio Leche Dairy at a place where a cow could come into contact with it, nor a reliable basis for any scientific conclusion that it ever did exist. Appellant was

entitled to summary judgment. The trial court's summary judgment should be affirmed.

b. Appellant's Causation Argument Need Not be Considered

Appellant argues that trial court was wrong in determining that Plaintiff had to show both general and specific causation (ABC at 26). However, this Court need not address Appellant's argument on that issue in resolving this appeal. There is no evidence that the trial court made any ruling regarding causation (RP 3411). The trial court did not find that without the testimony of Stetson, Loper could not prove causation. Rather, the trial court found that Appellant could not present claims which were based on the testimony of Professor Stetson. The trial court never prohibited plaintiff from attempting to prove his case on the basis of other testimony or other experts; Appellant does not challenge or point to any ruling in the record that precluded him from presenting other evidence or other witnesses to support his claims.

Appellant argues that Dr. Robert Corbett's opinion should not have been ignored in the trial court's summary judgment decision because Dr. Corbett performed a "differential diagnosis" to determine the cause of Rio Leche's diminished milk production and attendant financial losses (ABC at 27); from this differential diagnosis Dr. Corbett determined that undetected stray voltage caused by deficient electrical wiring and grounding existed (ABC at 27; RP 1274 ¶ 24). This argument is without any legal effect. Appellant did not present Dr. Corbett's opinion in opposition to Appellee's renewed summary judgment (RP 3142 to 3198). The

trial court's grant of summary judgment did not prevent Appellant from presenting Dr. Corbett's opinion at trial (RP 3411 to 3412). It only granted summary judgment as to "stray voltage claims supported by the testimony of Mr. Stetson" (*Id.*). Yet, Appellant did not call Dr. Corbett as a trial witness (RP 3468 to 3469). Appellant failed to present, or even attempt to present, his opinion, perhaps understanding its inherent weaknesses and inadmissibility. Dr. Corbett's intended opinion – that *undetected* stray voltage caused harm – is nothing more than rank speculation. Speculative opinions and mere conjecture are not allowed from a Rule 11-702 NMRA expert. *See Downey, supra.; Parkhill, supra.; Leon Ltd., supra.* Moreover, Dr. Corbett's alleged "differential diagnosis" is actually a differential etiology which would have been subject to an *Alberico/Daubert* challenge. *See Parkhill,* 2010-NMCA-110 at ¶¶ 21, 23 to 24 and 32 through 46 (explaining the differences between differential diagnosis, which is determining which disease is causing a patient's symptoms, and differential etiology, which is determining the external cause of the disease; upholding exclusion of expert medical doctor's opinion because it actually was an attempted differential etiology assessment that required scientific investigation and analysis which the doctor was not qualified to undertake). Clearly, as a veterinarian, Dr. Corbett is not qualified to give financial loss or electrical wiring opinions. *Id.* However, the trial court never ruled on the admissibility of Dr. Corbett's opinion.

Whatever the reason, Appellant did not call Dr. Corbett or present his opinions at trial, Appellant's trial strategies or decisions cannot be corrected on

appeal. *See e.g. Lytle v. Jordan*, 2001-NMSC-016, ¶ 43, 130 N.M. 198, 210, 22 P.3d 666, 678 ("On appeal, we will not second guess the trial strategy and tactics of the defense counsel."). Moreover, Appellant had to "fairly invoke a ruling" from the trial court on this issue, to allow it an opportunity to correct the alleged errors before such errors can be addressed on appeal. *See e.g. Chapel v. Nevitt*, 2009 -NMCA-017, ¶ 53, 145 N.M. 674, 690, 203 P.3d 889, 905 and cases cited therein. Here, Appellant did not do so. Appellant's appeal on this issue must be dismissed.

B. RESPONSE TO APPELLANT'S POINT C:

APPELLANT CHOSE TO SUBMIT HIS CASE TO THE JURY SOLELY ON HIS BREACH OF CONTRACT CLAIM, RATHER THAN ON ANY NEGLIGENCE CLAIMS, AS SUCH, APPELLANT WAIVED ALL ISSUES RELATED TO ANY CLAIMS FOR DIRECT NEGLIGENCE AGAINST APPELLEE

1. Applicable Standard of Review

To preserve error for review, a party must fairly invoke a ruling of the district court on the same grounds argued in this Court. *Rule 12-216 NMRA*; *see also Woolwine v. Furr's, Inc.*, 106 N.M. 492, 496, 745 P.2d 717, 721 (Ct.App.1987) ("To preserve an issue for review on appeal, it must appear that appellant fairly invoked a ruling of the trial court on the same grounds argued in the appellate court."). This allows the district court an opportunity to correct error, and possibly avoid the need for an appeal, while at the same time creating a record from which the appellate court can make an informed decision. *Diversey Corp. v. Chem–Source Corp.*, 1998–NMCA–112, ¶ 38, 125 N.M. 748, 965 P.2d 332. An appellant must also specifically point out where in the record the trial court's ruling on the issue was invoked.

Crutchfield v. N.M. Dep't of Taxation & Revenue, 2005–NMCA–022, ¶ 14, 137 N.M. 26, 106 P.3d 1273.

2. Summary of Appellee's Response to Appellant's Point C

The trial court's summary judgment order did not prohibit Appellant from attempting to prove his negligence claims case on the basis of other testimony or experts (RP 3343). No motions by Appellee after remand attempted to limit Appellant from introducing negligence evidence or theories at the trial (RP 3482 to 3485; RP 3630 to 3664; RP 3673 to 3677; and RP 3678 to 3682). Appellant's failure to attempt to present evidence on his negligence claims results, not from error in the trial court, but from Appellant's own decisions or trial strategies.

3. Response to Appellant's Point C

Appellant's argument as to summary judgment on Doctrine of Circuity of Action is twofold: (1) that Appellant should have been able to proceed against JMAR on his direct negligence claims (ABC at 32 and 34), and (2) the Doctrine of Circuity has not been applied in New Mexico and is not generally used outside insurance context (ABC at 31). Appellant also argues principal-agent issues (ABC at 32 to 33). However, the authorities cited do not address what effect there would be if the principal had been entitled to indemnification from the agent. As such, they do not address the circular indemnification at issue in this appeal.

a. The Doctrine of Circuity

Any liability Appellee might have for stray voltage would necessarily result from Snider's conduct because the only explanation for the existence of any stray

voltage was Snider Electric's alleged failure to ground. Appellee is entitled to indemnification by Snider Electric for such failure to ground. *Otero v. Jordan Restaurant Enterprises.*, 1996-NMSC-047, 122 N.M. 187, 922 P.2d 569. Thus, if Appellant prevailed against Appellee on his electrical claims, then Appellee would be able to look to Snider Electric for payment of any such judgment. In turn, under its settlement agreement with Appellant, Snider Electric would look to Appellant for payment or reimbursement of money it paid in indemnifying Appellee.

Clearly, judicial resources are not well spent to assist in collecting money that would simply be paid back to the one from whom the money was collected. The Doctrine of Circuity of Action, or circular indemnity, has been recognized and applied for decades in jurisdictions around the country to prevent these types of situations. Not a single appellate case was found in which application of the doctrine was rejected.

Basically, the doctrine addresses situations where a plaintiff would end up indemnifying another party for plaintiff's own original claim, thus prevent plaintiff from obtaining any meaningful relief for his or her cause of action. *See e.g. Refinery Holding Co., L.P. v. TRMI Holdings, Inc.* (In *re El Paso Refinery, L.P.*), 302 F.3d 343, 349–350 (5th Cir.2002) (citing *Phillips Pipe Line Co. v. McKown,* 580 S.W.2d 435, 440 (Tex.Civ.App. 1979, writ ref'd n.r.e.)). *See also Moore v. Southwestern Electric Power Co.*, 737 F.2d 496 (5th Cir. 1984); *Ward v. IHC Health Services, Inc.*, 173 P.3d 186 (Utah Ct. App. 2007); *RFR Indus., Inc. v. Rex-Hide Indus., Inc.,* 222 Fed. Appx. 973 (Fed. Ct. App. 2007); *Wal-Mart Stores, Inc. v. RLI Insurance Co.*, 292 F.3d 583

(8th Cir. 2002); *Waddle v. Galen of Kentucky, Inc.*, 131 S.W.3d 361 (Ky. Ct. App. 2004); *Toyota Motor Sales, Inc. v. Farr*, 320 F.Supp.2d 496 (S.D. Miss. 2003); *Nat'l Hydro Sys., a Div. of McNish Corp. v. M.A. Mortenson Co.*, 529 N.W.2d 690 (Minn. 1995); *Lee v. Huttig Building Prods., Inc.*, 2005 WL 2266591 (M.D. Ga. 2005).

The doctrine has been applied outside the insurance context. *See, e.g., In re Guardianship of Lane*, 994 So.2d 757 (Miss. 2008); *Moore v. Southwestern Electric Power Co., supra.; Ward v. IHC Health Services, Inc., supra. Lane* was a medical malpractice case involving indemnification of a medical clinic by the treating physician for claims related to a premature birth. 994 So.2d at FN4. *Moore* addressed the interplay of statutory indemnification and plaintiffs' indemnification in the settlement agreement with the employer of plaintiffs' decedent. 737 F.2d at 497 and 501-02. Like *Lane, Ward* was a medical malpractice case. The ultimate resolution of the litigation would have no effect other than to place the parties back in the same position in which they began. Noting that "[g]enerally, courts will not allow parties to engage in circuitous action when the foreseeable end result is to put the parties back in the same position in which they began[,]" the Utah Supreme Court, in a matter of first impression, determined that the trial court had correctly entered summary judgment based on the circular indemnification present in the case. *Id.* at 192.

Appellant complains that the doctrine has not been adopted in New Mexico (ABC at 29-30). This is not a basis for reversing the trail court's summary judgment order on circular indemnity. The New Mexico Supreme Court noted the doctrine

without rejecting it *Trujillo v. CS Cattle Co.*, 109 N.M. 705, 710, 790 P.2d 502, 507 (1990). The Utah Supreme Court when recently faced with application of the doctrine for the first time had no difficulty upholding the trial court's dismissal of plaintiff's claim. *Ward v. IHC Health Servs., Inc., supra.* As the court stated:

> This concept of circular litigation being a bar to further proceedings, although new to Utah, likely has its roots in the mootness doctrine: 'A case is deemed moot when the requested judicial relief cannot affect the rights of the litigants.'

173 P.3d at 191 citing *Burkett v. Schwendiman,* 773 P.2d 42, 44 (Utah 1989). New Mexico adheres to the doctrine of mootness. *See e.g. ACLU of NM v. City of Albuquerque*, 2006-NMCA-078, ¶ 7, 139 N.M. 761, 137 P.3d 1215 (2006). Thus, the foundation exists for circular indemnity to bar a plaintiff's claim where indemnification agreements will simply return the litigating parties to the position they would have been in had there been no litigation. In such cases, there is no controversy for the court to resolve. The district court did not err in applying the doctrine in the present case.

b. Appellant was not Precluded from Trying his Direct Negligence Claims

Appellant also complains that application of the doctrine should not have precluded him from trying his direct negligence claims against Appellee: claims for negligent design, negligent misrepresentation and negligent hiring and supervision (ABC at 33). Without setting out specific causes of action, the district court's September 9, 2009, Order on the Doctrine of Circuity of Action granted summary judgment as to "claims related to electrical matters" and denied summary judgment "as to any remaining claims" (RP 3343 to 3344). Appellant states that, based upon

the Doctrine of Circuity of Actions, "the trial court *apparently* determined, in error, that Dr. Loper's settlement with Snider Electric included both design flaws, which were the basis for the claims against JMAR, and Snider's flawed workmanship in wiring the dairy." (ABC at 2.) The trial court's summary judgment order on the Doctrine of Circuity (RP 3343-3344) does not preclude direct claims against Appellee which were not barred by the Doctrine of Circuity of Actions. As the order states:

> THE COURT, having before it the Motion for Summary Judgment on the Basis of the Doctrine of Circuity of Action . . . finds the motion is well taken as to claims arising out of the conduct of Snider Electric. . . . .
>
> IT IS THEREFORE ORDERED, that JMAR's Motion for Summary Judgment on the Basis for the Doctrine of Circuity of Action is granted in part and denied in part. The motion is granted with regard to any claims related to the electrical matters and denied as to any remaining claims. This decision does not practically dispose of the merits of the action . . . .

Clearly, the Order did not preclude Appellant from presenting claims against Appellee JMAR for negligent design, misrepresentation, negligent hiring or negligent misrepresentation.

If, however, Appellant was unsure of the scope of the trial court's ruling and order, and if Appellant believed that the trial court erroneously barred claims for Appellee's own direct negligence, he should have sought clarification with the trial court. However, Appellant did not do so. Appellant approved the form of the Summary Judgment Order granting summary judgment on the Doctrine of Circuity of Actions (RP 3344), despite this being a clear opportunity for Appellant to alert the trial court to his position that his direct claims were not barred by the settlement with Snider Electric. Prior to this, Appellant should have presented evidence of direct

negligence in opposition to Appellee's summary judgment motion; Appellant did not (RP 3297-3305). While Appellant mentioned the type of direct claims he asserted against Appellee (RP 3297-3298), he did not submit any evidence supporting such claims (RP 3297-3305).

This Court, in resolving Appellant's September 24, 2009, Application for Interlocutory Appeal, remanded the case for resolution of Appellant's outstanding claims for negligence and breach of contract (RP 3454 and 3461). However, after remand from this Court, Appellant entirely failed to present or to seek to present any evidence at trial related to Appellee's direct negligence claims, even though Appellee did not move to limit theories or claims at trial, other than those that were barred by the indemnification provision in Appellant's settlement with Snider Electric or by those previously dismissed on the statute of limitations (RP 3468 to RP 3678). Appellant submitted no jury instructions on negligence (RP 3786 to 3787) and withdrew the negligence language in his proposed 13-302 instruction (RP 3786 to 3787 (Plaintiff's Requested Jury Instruction 2) and TR: 3:41:50 to 3:43:50, CD dated April 6, 2011).[3] In doing so, Appellant informed the trial court that the language was there due to a typographical error (TR 3:41:50 to 3:43:50, CD dated April 6, 2011). As a consequence, the issue was not preserved for appeal, because the issue was not brought to the attention of the trial court and because of Appellant's trial strategy and decisions.

[3] This is the Court's and parties' finalization of jury instructions and, in particular, Appellant's discussion of his requested Rule 13-302 instruction setting out his claims.

IV. CONCLUSION

Appellant has shown no basis for this Court to reverse either Order from which he appeals. The trial testimony of LaVerne Stetson lacked the requisite factual predicate to make it relevant to Appellant's claims. As such, Professor Stetson's evidence was not admissible and could not prove Appellant's claims or preclude summary judgment in Appellee's favor.

The Doctrine of Circuity of Action precluded Appellant from presenting at trial evidence as to claims for which Appellant had entered into a settlement and indemnification agreement with Defendant Snider Electric. Such claims did not include direct negligence claims against Appellee, and the trial court's summary judgment order did not cover such claims. Nevertheless, Appellant chose not to present such claims at trial or seek certainty from the trial court that his direct negligence claims were in fact precluded by the court's summary judgment determination. Having not brought the alleged error to the trial court's attention, this issue has not been preserved and may not be reviewed by this Court.

THEREFORE, Appellee JMAR respectfully requests that the trial court's Summary Judgment Order of September 9, 2009, and October 5, 2009, be affirmed.

Respectfully Submitted,

BEALL & BIEHLER
Original Signed by Gregory L. Biehler
BY: _____

GREGORY L. BIEHLER
6715 Academy Road, N.E.
Albuquerque, NM 87109
Attorney for Defendant/Appellee
(505) 828-3600

I hereby certify that a true and correct copy of the foregoing was mailed to:

Felicia C. Weingartner
P.O. Box 7627
Albuquerque, NM 87194-7627

David A. Domina, Esq.
2425 S. 144th Street
Omaha, NE 68144

Randy Knudson
212 W. First St.
Portales, NM 88130-5920

This 13th day of December, 2011.

Original Signed by Gregory L. Biehler

GREGORY L. BIEHLER