

**EVANS V. BARBER SUPER MKTS., INC., 1961-NMSC-092, 69 N.M. 13, 363 P.2d 625
(S. Ct. 1961)**

**Jack N. EVANS and Grace D. Evans, Plaintiffs-Appellants,
vs.
BARBER SUPER MARKETS, INC., and The Green Giant Company,
Defendants-Appellees**

No. 6877

SUPREME COURT OF NEW MEXICO

1961-NMSC-092, 69 N.M. 13, 363 P.2d 625

July 12, 1961

Action wherein a motion to dismiss for failure to state a claim upon which relief could be granted was filed. The District Court, San Juan County, Clyde C. McCulloh, D.J., granted the motion and an appeal was taken. The Supreme Court, Compton, C.J., held that in absence of an order granting an appeal following the motion for an appeal, the appeal could not be entertained.

COUNSEL

Koogler & Smith, Aztec, for appellants.

Tansey & Rosebrough, Farmington, for appellees.

JUDGES

Compton, Chief Justice. Chavez and Moise, JJ., concur. Carmody and Noble, JJ., not participating.

AUTHOR: COMPTON

OPINION

{*14} {1} Unfortunately this appeal cannot be disposed of on the merits due to appellants' failure to comply with the provisions of Sec. 21-2-1(5) (1), 1953 Comp., being our Appellate Rule (5) (1), which reads:

"Within thirty days from the entry of any final judgment in any civil action any party aggrieved may appeal therefrom to the Supreme Court * * *."

{2} Pursuant to a motion filed by the defendant, Barber Super Markets, Inc., the complaint was dismissed for failure to state a claim upon which relief could be granted. The order of dismissal was entered August 29, 1960. The appellants moved for an appeal; however, the transcript fails to disclose an order granting an appeal.

{3} While this jurisdictional question is not raised by the parties, the failure to do so is inconsequential. This court will notice the state of the record to determine whether it has jurisdiction and may from its own discovery question that fact. *State v. Arnold*, 51 N.M. 311, 183 P.2d 845; *Flores v. Duran*, 68 N.M. 42, 357 P.2d 1091.

{4} The order granting an appeal is the basis of our jurisdiction; jurisdiction cannot be conferred by waiver or consent of the parties. *William K. Warren Foundation v. Barnes*, 67 N.M. 187, 354 P.2d 126. Also, see *Adams v. Tatsch*, N.M., 362 P.2d 984.

{5} The appeal must be dismissed, and it is so ordered.