A reviewing court examines and considers the instructions as a whole. In considering instructions as a whole, particular expressions should be considered as qualified by the context and other instructions. AT & T Co. v. Walker, 77 N.M. 755, 427 P.2d 267 (1967).

If trial court stated a reason upon which it could properly disallow the amendment to the complaint, its ruling is not to be reversed because it also stated another allegedly erroneous reason. Cantrell v. Dendahl, 83 N.M. 583, 494 P.2d 1400 (Ct. App. 1972).

Error was harmless where trial court's conclusion of law was that plaintiff's claim of title was barred solely upon a claim of adverse possession when actually it rested on other grounds as well. Heron v. Conder, 77 N.M. 462, 423 P.2d 985 (1967).

Erroneous finding of fact immaterial to decision in case is harmless error and cannot be basis for reversal. Board of County Comm'rs v. Little, 74 N.M. 605, 396 P.2d 591 (1964).

Error must necessarily have affected ultimate disposition of case. — Trial court's failure to adopt requested findings was not reversible error where had findings between adopted, they would not necessarily have affected the ultimate disposition of the case. Grants State Bank v. Pouges, 84 N.M. 340, 503 P.2d 320 (1972).

Judgment will not be reversed by reason of erroneous instruction unless upon consideration of the entire case, including the evidence, it shall appear that such error has resulted in a miscarriage of justice; usually there will be no cause for reversal unless evidence indicates that without such error in the instructions the verdict probably would have been different from the verdict actually returned by the jury. Since there was a conflict in the evidence as to degree of injury of plaintiffs and there was evidence that much of chiropractor's treatment may have been unnecessary and that he had a personal interest in prolonging treatment, jury had ample ground for deciding that plaintiffs had suffered no compensable injuries as a result of the collision, and therefore inclusion of an erroneous instruction as to contributory negligence of passenger was harmless and did not require reversal. Romero v. Melbourne, 90 N.M. 169, 561 P.2d 31 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

Erroneous findings of fact unnecessary to support judgment of the court are not grounds for reversal. Specter v. Specter, 85 N.M. 112, 509 P.2d 879 (1973).

There was no prejudice to appellant nor any error that would affect the ultimate result or substantial rights of the parties as a result of trial court's quieting title to the stock in defendant as against plaintiff where there was technically no pleading warranting granting of such relief, but the complaint sought an adjudication of ownership in the stock and the answer not only denied plaintiff's ownership but asserted ownership in defendant. Hyde v. Anderson, 68 N.M. 50, 358 P.2d 619 (1916).

Failure to instruct on a theory supported by substantial evidence is generally reversible error, but if jury has resolved question of liability in favor of defendant, failure to have given correct instructions on question of damages does not constitute reversible error. Britton v. Boulden, 87 N.M. 474, 535 P.2d 1325 (1975).

Exclusion of evidence deemed harmless error. — See Kleinberg v. Board of Educ., 107 N.M. 38, 751 P.2d 722 (Ct. App. 1988).

Court must state error did not affect jury to affirm erroneous ruling. — If the court is to affirm an erroneous ruling, it must say with a high degree of assurance that the error did not affect the jury and was therefore harmless. Mallard v. Zink, 94 N.M. 94, 607 P.2d 632 (Ct. App.), cert. denied, 94 N.M. 629, 614 P.2d 546 (1979).

Speculative effect not considered on appeal. — Even if trial court erred in denying plaintiffs' motions for summary judgment and for an instructed verdict on liability, plaintiffs were not harmed since jury found for plaintiffs on liability; assertion that an unnecessary battle by the jury on the question of liability led it to compromise on the award is pure speculation. Phillips v. Smith, 87 N.M. 19, 528 P.2d 663 (Ct. App.), cert. denied, 87 N.M. 5, 528 P.2d 649 (1974), overruled on other grounds, Baxter v. Gannaway, 113 N.M. 45, 822 P.2d 1128 (Ct. App. 1991).

No reversible error where substantial evidence on both sides. — Where evidence is conflicting, refusal to make findings and conclusions favorable to unsuccessful party cannot be sustained as error. Thus where requested findings would have been supported by substantial evidence, but trial court adopted contrary findings also supportable by substantial evidence, there was no reversible error. Grants State Bank v. Pouges, 84 N.M. 340, 503 P.2d 320 (1972).

Where reasons in record, failure to specify not reversible error. — Although trial court did not state of record reasons for modification of a uniform jury instruction on damages as is required by Rule 51(c) (see now Rule 1-051 NMRA), nonetheless there was evidence in the record to support modification, and defendant failed to show any prejudice resulting therefrom; thus modification was not reversible error. O'Hare v. Valley Utils., Inc., 89 N.M. 105, 547 P.2d 1147 (Ct. App.), rev'd in part on other grounds, 89 N.M. 262, 550 P.2d 274 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 5 Am. Jur. 2d Appellate Review § 690 et seq.; 47 Am. Jur. 2d Judgments § 786; 58 Am. Jur. 2d New Trial §§ 83 to 86.

Counsel's argument or comment stating or implying that defendant is not insured and will have to pay verdict himself as prejudicial error, 68 A.L.R.4th 954.

5 C.J.S. Appeal and Error § 825 et seq.; 66 C.J.S. New Trial § 13.

1-062. Stay of proceeding to enforce a judgment.

A. **Stay; in general.** Except as provided in these rules, execution may issue upon a judgment and proceedings may be taken for its enforcement upon the entry thereof unless otherwise ordered by the court. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action shall not be stayed during the period of its entry and until an appeal is taken or during the pendency of an appeal. The provisions of Paragraph C of this rule govern the suspending, modifying, restoring or granting of an injunction during the pendency of an appeal.

B. **Stay on motion for new trial or for judgment.** In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 1-059, or of a motion for relief from a judgment or order made pursuant to Rule 1-060, or of a motion for judgment in accordance with a motion for a directed verdict pursuant to Rule 1-050, or of a motion for amendment to the findings or for additional findings made pursuant to Paragraph B of Rule 1-052.

C. **Injunction and certain special proceedings.** When an appeal is taken from an interlocutory or final judgment granting, dissolving or denying an injunction, the court in its discretion may suspend, modify, restore or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. In all actions of contested elections, mandamus, removal of public officers, quo warranto or prohibition, it shall be discretionary with the court rendering judgment to allow a supersedeas of the judgment, and if the appeal is allowed to operate as a supersedeas it shall be upon such terms and conditions as the court deems proper.

D. **Stay upon appeal.** When an appeal is taken, the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in Paragraphs A and C of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the district court. The bond shall be conditioned for the satisfaction of and compliance with the judgment in full together with costs, interest and damages for delay if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest and damages as the appellate court may adjudge and award. The surety, sureties or collateral securing such bond, and the terms thereof, must be approved by and the amount fixed by the district court. If a bond secured by personal surety or sureties is tendered, the same may be approved only on notice to the appellee. Each personal surety shall be required to show a net worth at least double the amount of the bond. When the judgment is for the recovery of money, the amount of the bond shall be such sum as will cover the whole amount of the judgment remaining unsatisfied, plus costs, interest and damages for delay. In any event, in determining the sufficiency of the surety and the extent to which such surety shall be liable on the bond, or whether any surety shall be required, the court shall take into consideration the type and value of any collateral which is in, or may be placed in, the custody or control of the court and which has the effect of securing payment of and compliance with such judgment.

E. **Stay in special instances.** When an appeal is taken by the state or an officer or agency thereof, or by direction of any department of the state, or by any political subdivision or institution of the state, or by any municipal corporation, the taking of an appeal shall, except as provided in Paragraphs A and C of this rule, operate as a stay.

F. **Special rule for fiduciaries.** Where an appeal is taken by a fiduciary on behalf of the estate or beneficiary which the fiduciary represents, the amount of the bond and type of security shall be fixed by the court and, in fixing the same, due regard shall be given to the assets under the control of the fiduciary and any bond given by such fiduciary.

G. **Writs of error.** Upon allowance of a writ of error, the district court which adjudged or determined the cause shall, unless the Supreme Court or the justice thereof issuing the writ shall otherwise order, have the same powers, authority and duties with reference to the supersedeas and stay as in the case of an appeal. The time within which supersedeas bond may be filed shall be the same as in the case of appeals, and shall run from the date the writ of error is allowed in lieu of the date notice of appeal is filed. The authority of the district court to extend such time shall be the same, and subject to the same limitations, as in case of appeal.

Stay of judgment as to multiple claims or multiple parties. When final judgment has been entered under the conditions stated in Paragraph C of Rule 1-054, the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

[As amended, effective August 1, 1989; January 1, 1996.]

I. General Consideration.
II. Stay Upon Appeal.

I. GENERAL CONSIDERATION.

Cross references. — For execution on judgment, see 39-4-1 NMSA 1978. For supersedeas and stay, see Rule 12-207 NMRA. For writs of error, see Rule 12-503.

The 1996 amendment, effective January 1, 1996, made stylistic changes in Paragraphs A and C, substituted the second sentence of Paragraph D for "The bond may be given at any time within thirty (30) days after taking the appeal, except that the district court for good cause shown may grant the appellant not to exceed thirty (30) days' additional time within which to file such bond", and made a gender neutral change in Paragraph F.

Action during pendency of appeal. — The district court may act on matters of supersedeas and stay during the pendency of an appeal. In re Estate of Gardner, 112 N.M. 536, 817 P.2d 729 (Ct. App. 1991).

A bond or security is not mandatory when an application for a stay of execution is made and there has been no notice of appeal or motion to vacate. Trial court has inherent power under this rule to stay execution of a judgment temporarily in order to prevent injustice. Segal v. Goodman, 115 N.M. 349, 851 P.2d 471 (1993).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d Appellate Review § 85 et seq.; 30 Am. Jur. 2d Executions § 16 et seq.; 42 Am. Jur. 2d Injunctions § 348; 47 Am. Jur. 2d Judgments § 867 et seq.

Prohibition as proper remedy to prevent enforcement of judgment which has been reversed or modified on appeal, or from which an appeal, with supersedeas or stay, is pending, 70 A.L.R. 105.

Right to have enforcement of judgment for costs enjoined or stayed pending final determination of case, 78 A.L.R. 359.

Right to stay without bond or other security pending appeal from judgment or order against executor, administrator, guardian, trustee, or other fiduciary who represents interests of other persons, 119 A.L.R. 931.

Motion for new trial as suspension or stay of execution or judgment, 121 A.L.R. 686.

Condition of bond on appeal not in terms covering payment of money judgment, as having that effect by implication or construction, 124 A.L.R. 501.

Another state or country, stay of civil proceedings pending determination of action in, 19 A.L.R.2d 301.

Necessity that person acting in fiduciary capacity give bond to maintain appellate review proceedings, 41 A.L.R.2d 1324.

Federal court in same state, stay of civil proceedings pending determination of action in, 56 A.L.R.2d 335.

Arbitration disqualified by court or stay of arbitration proceedings prior to award, on ground of interest, bias, prejudice, collusion, or fraud of arbitrators, 65 A.L.R.2d 755.

Reviewability, on appeal from final judgment, of interlocutory order, as affected by fact that order was separately appealable, 79 A.L.R.2d 1352.

Power of court, in absence of statute, to require corporate surety on fiduciary bond in probate proceeding, 82 A.L.R.2d 926.

Mandamus, stay or supersedeas on appellate review in, 88 A.L.R.2d 420.

Effect of supersedeas or stay on antecedent levy, 90 A.L.R.2d 483.

Appealability of order staying, or refusing to stay, action because of pendency of another action, 18 A.L.R.3d 400.

4A C.J.S. Appeal and Error §§ 514, 626, 627; 33 C.J.S. Execution §§ 66, 139 to 164; 49 C.J.S. Judgments §§ 585 to 591.

II. STAY UPON APPEAL.

Time limitations must be complied with. — Although a district court has the inherent power to stay execution of a judgment rendered, the party must show the existence of exceptional, equitable grounds justifying the granting of a stay when the statute or rule does not otherwise provide for such relief. A party may not, however, disregard the time limitations of 39-3-22A NMSA 1978 and Paragraph D and then post a supersedeas bond or obtain a stay of execution. Long v. Continental Divide Elec. Coop., 117 N.M. 543, 873 P.2d 289 (Ct. App. 1994).

Where decision appealed from is for recovery other than fixed amount of money, and no damages have been adjudged against appellant, it is improper, upon affirmance, for the mandate to direct entry of judgment against sureties on the supersedeas bond. Perez v. Gil's Estate, 31 N.M. 105, 240 P. 999 (1925) (decided under former law).

Judgment being superseded not being money judgment, it was "inappropriate" upon affirmance to order judgment against the sureties on the bond. Burroughs v. United States Fid. & Guar. Co., 74 N.M. 618, 397 P.2d 10 (1964) (decided under Rule 9(1) of the former "Supreme Court Rules"), overruled on other grounds, Quintana v. Knowles, 113 N.M. 382, 827 P.2d 97 (1992).

Failure to file bond not prejudice to appellee. — Fact that no supersedeas bond was filed by appellant was not showing of prejudice to an appellee under former law sufficient to dismiss appeal. Young v. Kidder, 35 N.M. 20, 289 P. 69 (1930).

When remaining appellants unable to join in bond. — Where appeal was taken by all parties against whom joint and several judgment was rendered, and only one appellant filed cost or supersedeas bond, remaining appellants would not be permitted to join in such cost or supersedeas bond or file new bond after time limited by statute for giving of such bonds and appeal as to defaulting appellants would, on motion, be dismissed. Rogers v. Herbst, 25 N.M. 408, 183 P. 749 (1919) (decided under former law).

Fixing double amount of judgment. — Judgment in a mortgage foreclosure action for a total of $29,751.36, with interest from a certain date, and for

costs, with a further provision for the advertisement and sale by a special master, a report of the sale, the deposit of the proceeds in court and entry of judgment for any deficiency was a plain money judgment to which provision for fixing supersedeas at double amount of the judgment applied. Samples v. Robinson, 58 N.M. 701, 275 P.2d 185 (1954) (decided under former law).

Modification of judgment not discharge sureties. — The fact that a judgment is modified, though affirmed in principle, does not discharge the sureties on the supersedeas bond. Benderach v. Grujicich, 30 N.M. 331, 233 P. 520 (1924) (decided under former law).

The inability to post a supersedeas bond may not operate to deny the right to a stay of a forfeiture judgment under the Controlled Substances Act. Mitchell v. City of Farmington Police Dep't, 111 N.M. 746, 809 P.2d 1274 (1991).

Suit for damages on supersedeas bond is permitted and this right is cumulative. Burroughs v. United States Fid. & Guar. Co., 74 N.M. 618, 397 P.2d 10 (1964) (decided under Rule 9(1) of the former "Supreme Court Rules"), overruled on other grounds, Quintana v. Knowles, 113 N.M. 382, 827 P.2d 97 (1992).

Controlling consideration in determining liability turns on form of bond undertaking when considered in the light of the applicable statutes and rules. Burroughs v. United States Fid. & Guar. Co., 74 N.M. 618, 397 P.2d 10 (1964) (decided under Rule 9(1) of the former "Supreme Court Rules"), overruled on other grounds, Quintana v. Knowles, 113 N.M. 382, 827 P.2d 97 (1992).

Effect of declaratory judgment not superseded or stayed. — The trial court could base its summary judgment on the declaratory judgment in an independent proceeding, thus giving effect to a decision that was pending on appeal, because there was no showing that the declaratory judgment had been superseded or stayed. The judgment was in effect and could be enforced. Chavez v. Mountainair School Bd., 80 N.M. 450, 457 P.2d 382 (Ct. App. 1969).

No recovery had upon supersedeas bond given for declaratory judgment where it is not a money judgment. Savage v. Howell, 45 N.M. 527, 118 P.2d 1113 (1940) (decided under former law).

Rents covered, pending appeal, by bond. — A supersedeas bond covering damages and costs, if the parties failed to make good their plea, covered rents and profits, pending appeal, on real estate decreed to belong to plaintiff. Hart v. Employers' Liab. Assurance Corp., 38 N.M. 83, 28 P.2d 517 (1933) (decided under former law).

Appeal by highway department operates as stay of employment reinstatement order. State ex rel. New Mexico State Hwy. Dep't v. Silva, 98 N.M. 549, 650 P.2d 833 (Ct. App. 1982).

Defendant may not rely on separate judgment stayed pending appeal. — Defendant charged with violations of local sign ordinance could not rely on judgment pending appeal in a separate case which held the ordinance unconstitutional since city's appeal of judgment automatically stayed court's decision; hence, his sign that did not comply with ordinance was not lawfully erected. City of Albuquerque v. Jackson, 101 N.M. 457, 684 P.2d 543 (Ct. App. 1984).

1-063. Inability of a judge to proceed.

If a trial or hearing has been commenced and the judge is unable to proceed, any other judge may proceed with it upon certifying familiarity with the record and determining that the proceedings in the case may be completed without prejudice to the parties. The successor judge may recall any witness.

[As amended, effective January 1, 1995.]

The 1995 amendment, effective January 1, 1995, rewrote the rule heading which read "Disability of a judge" and rewrote the rule.

Successor judge's authority to enter findings of fact and conclusions of law prepared by predecessor. — A successor judge's lack of authority to enter findings of fact and conclusions of law prepared by his predecessor, when he had not heard any of the evidence, was not jurisdictional error nor could it be raised for the first time on appeal under the doctrine of fundamental error. Grudzina v. New Mexico Youth Diagnostic & Dev. Center, 104 N.M. 576, 725 P.2d 255 (Ct. App. 1986).

Replacement judge had judicial power to hear and determine defendant's motion for new trial where original judge had resigned after entering an order amending a decree of divorce. Gruber v. Gruber, 86 N.M. 327, 523 P.2d 1353 (1974).

Successor judge may not sign decision of initial judge. — Even though the initial trial judge prepared the findings of fact and conclusions of law, the successor judge had no power to sign and enter a decision in the case, where there was no decision written, signed or entered before the initial trial judge left the position. Pritchard v. Halliburton Servs., 104 N.M. 102, 717 P.2d 78 (Ct. App. 1986).

Law reviews. — For annual survey of civil procedure in New Mexico, see 18 N.M.L. Rev. 287 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges §§ 32 et seq., 248 et seq.

Journalization by judge of finding or decision of predecessor, 4 A.L.R.2d 584.

Power of successor judge taking office during term time to vacate, etc., judgment entered by his predecessor, 11 A.L.R.2d 1117.

Power of successor or substituted judge, in civil case, to render decision or enter judgment on testimony heard by predecessor, 22 A.L.R.3d 922.

48A C.J.S. Judges §§ 161 to 185.

85, effective September 1, 1998, no longer contains a Subsection C or D, or specific procedures for appeal of commission orders or decisions. For former provisions, see the 1995 Replacement Pamphlet.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 2 Am. Jur. 2d Administrative Law § 369 et seq.

73A C.J.S. Public Administrative Law and Procedure §§ 166 to 171.

70-2-27. Temporary restraining order or injuction [injunction]; grounds; hearing; bond.

A. No temporary restraining order or injunction of any kind shall be granted against the commission or the members thereof, or against the attorney general, or against any agent, employee or representative of the division, restraining the commission, or any of its members, or the division or any of its agents, employees or representatives, or the attorney general, from enforcing any statute of this state relating to conservation of oil or gas, or any of the provisions of this act, or any rule, regulation or order made thereunder, except after due notice to the director of the division, and to all other defendants, and after a hearing at which it shall be clearly shown to the court that the act done or threatened is without sanction of law, or that the provision of this act, or the rule, regulation or order complained of, is invalid, and that, if enforced against the complaining party, will cause an irreparable injury. With respect to an order to [or] decree granting temporary injunctive relief, the nature and extent of the probable invalidity of the state, or of any provision of this act, or of any rule, regulation or order thereunder involved in such suit, must be recited in the order or decree granting the temporary relief, as well as a clear statement of the probable damage relied upon by the court as justifying temporary injunctive relief.

B. No temporary injunction of any kind, including a temporary restraining order against the commission or the members thereof, or the division or its agents, employees or representatives, or the attorney general, shall become effective until the plaintiff shall execute a bond to the state with sufficient surety in an amount to be fixed by the court reasonably sufficient to indemnify all persons who may suffer damage by reason of the violation pendente lite by the complaining party of the statute or the provisions of this act or of any rule, regulation or order complained of. Any person so suffering damage may bring suit thereon before the expiration of six months after the statute, provision, rule, regulation or order complained of shall be finally held to be valid, in whole or in part, or such suit against the commission, or the members thereof, or the division, shall be finally dismissed. Such bond shall be approved by the judge of the court in which the suit is pending, and shall be for the use and benefit of all persons who may suffer damage by reason of the violation pendente lite of the statute, provision, rule, regulation or order complained of in such suit, and who may bring suit within the time prescribed by this section; and such bond shall be so conditioned. From time to time, on motion and with notice to the parties, the court may increase or decrease the amount of the bond and may require new or additional sureties, as the facts may warrant.

History: Laws 1935, ch. 72, § 18; 1941 Comp., § 69-224; Laws 1949, ch. 168, § 20; 1953 Comp., § 65-3-23; Laws 1977, ch. 255, § 61.

Bracketed material. - The bracketed word "or" in Subsection A was inserted by the compiler as the apparently intended term. The bracketed material was not enacted by the legislature and is not a part of the law.

Meaning of "this act". - The term "this act," referred to in this section, means Laws 1935, ch. 72, §§ 1 to 24, which appear as 70-2-2 to 70-2-4, 70-2-6 to 70-2-11, 70-2-15, 70-2-16, 70-2-21 to 70-2-25, 70-2-27 to 70-2-30, and 70-2-33 NMSA 1978.