IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

COPY

KRISTOPHER MAY,

Plaintiff-Appellant,

v.

No. 29,331
(consolidated with No. 29,490)

DCP MIDSTREAM, L.P. f/k/a
DUKE ENERGY FIELD SERVICES, L.P.,
and DUKE ENERGY FIELD SERVICES, INC.,

Defendants-Appellees.

Appeal from the Fifth Judicial District Court
Lea County
The Honorable Gary L. Clingman

REPLY BRIEF

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TABLE OF CONTENTS

Statement Regarding Transcript Citations

Transcript citations refer to two unofficial transcripts filed with the Court, pursuant to the Court's Order dated August 3, 2009. The first transcript is the January 6, 2009 hearing on the motion for summary judgment. The second transcript is the March 10, 2009 hearing on the cost bill. In order to distinguish between the two transcripts, the citation form will contain a reference to the hearing. Thus, "SJ Tr." will denote the summary judgment transcript and "CB Tr." will denote the cost bill transcript.

Statement of Compliance

Pursuant to Rule 12-213(G), NMRA, this brief complies with the type-volume limitations set forth in Rule 12-213(F)(3), NMRA, because it is prepared in 14-point Times New Roman, and the body of the brief contains 4,087 words, according to WordPerfect 12.

TABLE OF AUTHORITIES

NEW MEXICO CASES

FEDERAL CASES

NEW MEXICO STATUTES

NEW MEXICO RULES

ARGUMENT

I. The District Court Erred in Granting Summary Judgment Because Plaintiff Raised Genuine Issues of Material Fact as to Defendants' Willful Misconduct, Bringing the Case Outside the Scope of the Workers' Compensation Act.

A. There are Genuine Issues of Material Fact as to the First Two *Delgado* Elements.

Under the first prong of the *Delgado* test, the Court must decide if there are genuine issues of material fact about whether Defendants engaged in "an intentional act or omission, without just cause or excuse, that is reasonably expected to result in the injury suffered by [Plaintiff]." *Delgado v. Phelps Dodge Chino, Inc.*, 2001-NMSC-034, ¶ 26, 131 N.M. 272, 34 P.3d 1148. Under the second prong of the *Delgado* test, the Court must decide if there are genuine issues of material fact about whether Defendants "expect[ed] the intentional act or omission to result in the injury, or [have] utterly disregarded the consequences of the intentional act or omission." *Id.* In his opening brief, Plaintiff identified the disputed material facts that preclude summary judgment. *See* BIC 17-23.

The statement of facts in Defendants' answer brief confirms that there are genuine issues of material fact for a jury to decide. As outlined below, for every fact that Defendants assert in their brief, there is record evidence supporting a countervailing view of the facts. This Court must view the facts in the light most favorable to Plaintiff and draw all reasonable inferences in his favor. *See Morales*

v. Reynolds, 2004-NMCA-098, ¶ 22, 136 N.M. 280, 97 P.3d 612; *Salas v. Mountain States Mut. Cas. Co.*, 2009-NMSC-005, ¶ 12, 145 N.M. 542, 202 P.3d 801. The judgment must therefore be reversed.

First, Defendants state that they did not know that pigs could get stuck in the receiver or that the receiver as reconfigured was dangerous. *See* AB 1 (Defendants "did not know that pigs were becoming stuck in the Receiver or that the Receiver was dangerous"); AB 6 (nobody informed Defendants that pigs were becoming lodged or that receiver was dangerous).

According to Mr. Gilchrest, a field supervisor with over a decade of experience with pigging operations, it is common knowledge in the industry that pigs can get lodged in a receiver, creating an extraordinarily dangerous condition. RP 315 (at 56-57). In addition, there is evidence that Defendants harshly criticized plant operators when it took them a long time to retrieve a pig that had gotten lodged during a test run. RP 624 (at 173); RP 631 (at 198). Finally, Defendants' own design plans for the smart pigging operation discuss the problem of lodged pigs. RP 665. Thus, regardless of whether one is talking about smart pigs, dummy pigs, or regular pigs, there is a genuine issue of material fact about whether Defendants knew that they could get stuck.

In his opening brief, Plaintiff pointed to his expert's opinion that

Defendants knew that operating the modified pig receiver for normal pigging operations exposed operators to an extreme degree of risk, Defendants knew that the modified pig receiver was not equipped with a pressure gauge or a vent to release trapped pressure, and Defendants knew that this configuration did not comply with its own Required Practice. BIC 11, 21 (citing RP 655-56, 659). Defendants argue that the affidavit of Plaintiff's expert is "incompetent" and does not satisfy the requirements of Rule 1-056, NMRA. AB 6. Under Rule 1-056(F), NMRA, an affidavit opposing summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

Mr. Johnston's affidavit states that he has "education, experience and training of over 39 years in industrial safety engineering." RP 654. Mr. Johnston relied on various sources of information to form his opinions, including the TapRoot report and the deposition testimony of several witnesses. *Id.* The district court never concluded that Dr. Johnston's affidavit was lacking in any way, even though Defendants invited the district court to reach that conclusion. RP 1057-59. Dr. Johnston's affidavit is one of several competent and admissible pieces of evidence that raises a genuine issue of material fact. Based on all or part of that

evidence, a reasonable jury could find that Defendants knew that operating the modified receiver to retrieve regular pigs posed an extreme risk of injury or death but nevertheless utterly disregarded the consequences.

Defendants next argue that Plaintiff has relied on inadmissible hearsay on the issue of their knowledge that pigs can become lodged. AB 8. In particular, Defendants find fault with evidence that Mr. Gilchrest and other employees offered to take down the modified receiver due to its dangerousness, but they refused. *Id.* Defendants' argument misses the mark because this evidence is not hearsay, or it is otherwise admissible under an exception to the hearsay rule. In addition, as discussed above and in Plaintiff's opening brief, there is other evidence that Defendants knew that pigs can become lodged, yet they utterly disregarded the consequences by requiring plant operators to stand in the "line of fire" to pull regular pigs from the modified receiver. RP 298; *see also* RP 379, 449, 566 (photographs illustrating what it means for a plant operator to have to stand in the "line of fire"); RP 388 (schematic illustrating same).

The evidence that Mr. Gilchrest and other employees offered to take down the dangerous modified receiver after the smart pig operation was completed is not hearsay because it is not offered for the truth of the matter asserted. *See* Rule 11-801(C); *cf. Zamora v. Creamland Dairies, Inc.*, 106 N.M. 628, 631-32, 747 P.2d

923, 926-27 (Ct. App. 1987) (statements in affidavit, made by manager of defendant company, not offered for truth of matter asserted but instead to show that manager had probable cause to believe that subordinate had committed crime). It is also not hearsay because it is an admission by a party opponent. *See id.* at 11-801(D)(2)(d). Mr. Gilchrest and the other employees asked Mr. Holt if they could reconfigure the receiver to make it safe. RP 608 at 108-09; RP 661-62. These men are Defendants' servants within the meaning of Rule 11-801(D)(2)(d), and their statements concern a matter within the scope of their employment.

Even if the Court concludes that these statements of Mr. Gilchrest and his fellow employees are hearsay, they are nevertheless admissible to show the declarant's existing mental or emotional condition. *See* Rule 11-803(C). Specifically, these statements are offered to show that the declarants felt that continuing to use the modified receiver was exposing them to danger and that they planned or intended to get permission from their boss to remedy the situation. Furthermore, this Court has stated that even if hearsay is offered on summary judgment, if there is no objection, the evidence may still be considered. *See Rekart v. Safeway Stores, Inc.*, 81 N.M. 491, 495, 468 P.2d 892, 896 (Ct. App. 1970). Defendants discussed Mr. Forest's affidavit in their reply on summary judgment, but they did not argue that it contained hearsay. *See* RP 1068.

Finally, even if the Court concludes that these statements are inadmissible, there is sufficient admissible evidence that Defendants knew of the danger but disregarded it. *See Seal v. Carlsbad Ind. Sch. Dist.*, 116 N.M. 101, 105, 860 P.2d 743, 747 (1993) (deposition or affidavit that may not be admissible for some reason is still a sworn statement that may contain sufficient specific facts admissible into evidence to raise genuine issue of material fact). For example, Mr. Gilchrest testified that it is common knowledge in the industry that pigs can get lodged, and Defendants' own design plans acknowledge the problem and the severity of the resulting danger. RP 315 (at 56-57); 665.

In his opening brief, Plaintiff argued that Defendants failed to follow their own Required Practice, which mandates that there be vents and pressure gauges upstream of a pig. *See* BIC 18 (citing RP 297; RP 304-06 at 11, 15, 18; RP 316 at 60-61; RP 656; RP 666, 700; SJ Tr. 10). Defendants respond that their Required Practice does not apply to the instant case because the receiver was installed prior to February 19, 2001. AB 4. Whether the Required Practice applies is a material fact that is in dispute.

In support of their contention that the Required Practice does not apply, Defendants cite the deposition testimony of Marty Summers. *See* RP 466-67. Mr. Summers' testimony establishes nothing more than that there is a dispute about

whether the Required Practice applies because the receiver was installed prior to the effective date, but it was modified after the effective date. *See id.* The Required Practice applies to "temporary installations" installed after February 19, 2001. RP 666, 700. The Eddy receiver was modified to accept the smart pig in 2005. RP 295. The TapRoot Report expressly found that the modifications to the Eddy receiver "were intended to be temporary." RP 295.

Mr. Summers himself is one of the investigators who authored the TapRoot Report. Tr. 23-24. The TapRoot Report faults Defendants for failing to follow the Required Practice. RP 295. Not once does the TapRoot Report suggest that the Required Practice does not apply to the modifications at issue here. A reasonable jury could find that the 2005 modifications to the Eddy receiver for accommodation of the smart pig constituted a "temporary installation," and, accordingly, the Required Practice does apply. Defendants' Required Practice is yet another piece of evidence that they were aware of the extreme danger of lodged pigs combined with incorrect receiver configurations.

In this same vein, Defendants contend that the Management of Change and Process Safety Hazard Requirements also do no apply to the Eddy pig receiver because it was "not a process safety management facility." AB 10 n.5. But again, the TapRoot Report harshly criticizes Defendants for failing to execute a

Management of Change and for failing to conduct a process safety hazard analysis for resuming normal pigging operations with the modified receiver. RP 295, 296, 298. Nowhere does the TapRoot Report suggest that a Management of Change and a process safety hazard analysis do not apply to the incident. The TapRoot Report's conclusions in this respect, coupled with evidence that employees repeatedly asked Mr. Holt to allow them to reconfigure the receiver because it was dangerous for resuming normal pigging operations, demonstrate that the district court erred in granting summary judgment.

On the issue of training, Defendants admit that there was no formal training in pig receiving, but only on-the-job training. AB 3 (citing RP 147) (Mr. Gilchrest testified that there is no formal training but only on-the-job training in pig receiving). Regardless whether Defendants can point to evidence that there was some training, the TapRoot Report itself states that even if plant operators received some training, it was inadequate, inconsistent, and not in conformity with company procedures and policies. RP 295-96. Furthermore, it is undisputed that there was no training whatsoever on how to retrieve a regular pig from the receiver as configured to receive a smart pig. *Id.* The failure to train is not about negligence, as Defendants contend, but instead is about whether Defendants expected injury to result but nevertheless utterly disregarded the consequences.

AB 20. A reasonable jury could find that Defendants knew of the danger but willingly allowed untrained personnel to perform a potentially deadly job function. *See, e.g.*, RP 572-74 (illustrating the deadly nature of pig receiving using the modified receiver, including distance pig traveled under pressure, work shirt Plaintiff was wearing when pig blasted into him, and fragment of Plaintiff's arm bone, a part of which remains buried in the pig).

Defendants next contend that Plaintiff "admitted" that when pigs became stuck in the receiver, it was due to insufficient pressure. AB 6 (citing RP 138). Needless to say, the record also reflects that when pigs become stuck, an intense amount of pressure can build up behind the pig, which is precisely what happened in the instant case. RP 296. The TapRoot Report itself states that there are numerous reasons why a pig could become stuck and acknowledges the dangerous condition of pressure trapped behind a lodged pig. RP 297. Mr. Gilchrest testified that this was common knowledge in the industry. RP 315 at 57. Finally, Defendants' handwritten engineering note confirms that if a pig becomes stuck, gas can build up behind it, creating a deadly situation. RP 665. Thus, the fact that pigs may have also become stuck due to insufficient pressure does not alter the analysis.

Defendants next argue that Plaintiff never requested assistance with pig

receiving. AB 9. The facts are in dispute about whether Defendants denied assistance. First, Plaintiff testified that Defendants forced him to retrieve regular pigs from the modified receiver and "every operator will testify to that." RP 625 (at 175-76). Second, Plaintiff testified about how Mr. Holt, from whom he took his orders, "rul[ed] with an iron fist." RP 603 (at 87-88). The evidence that Mr. Holt was told about – but refused to correct – the dangerous situation (RP 608 at 108-9; 661-62), coupled with evidence that he had fired operators for far less than refusing to retrieve a pig (RP 625 at 175), would allow a reasonable jury to find that Plaintiff had no choice but to pull the pig on the day of the incident. After all, the plaintiff in *Delgado* could also have refused to perform a deadly task but obviously did not refuse because he knew it would cost him his job. An employee should never have to choose between being killed or maimed on the one hand, and losing his job on the other.

Defendants also argue that Plaintiff declined an unsolicited offer to retrieve the pig on the day of the incident. AB 9, 19. Saying that a fellow employee volunteered to perform a dangerous task in Plaintiff's stead is not the same as having Defendants excuse Plaintiff from performing it. The fact that Plaintiff did not want to rely on a fellow employee to do his job does not exonerate Defendants from acting in a manner that was reasonably expected to result in injury or death

and utterly disregarding the consequences of their intentional actions.

B. Subsequent Case Law Interpreting *Delgado* Demonstrates That There are Genuine Issues of Material Fact Precluding Summary Judgment.

According to Defendants, Plaintiff contends that the pig receiver "was not equipped with adequate safety devices." AB 1; *see also* AB 5 (referring to "blow-down valve safety devices"). Nowhere in the record, nor in his brief in chief, did Plaintiff assert that what happened to him was the result of an inadequate safety device. Defendants also argue that a *Delgado* plaintiff cannot survive summary judgment based on negligent provisioning of safety devices. AB 20. The instant case is not about a negligent provisioning of safety devices. The issue is that Defendants willfully allowed regular pigging operations to resume without reconfiguring the receiver that had been modified to accept a smart pig, knowing of the extreme danger. For that reason, Defendants' suggestion that Plaintiff may be entitled to additional compensation under the Act's safety device penalty provision does not address the issues before this Court. *See* AB 28.

Because this case is not about inadequate safety devices, cases such as *Dominguez v. Perovich Properties*, 2005-NMCA-050, 137 N.M. 401, 111 P.3d 721, and *Cordova v. Peavey Company*, 111 F. App'x 992 (10th Cir. 2004) are inapposite. In *Dominguez*, the plaintiff operated gravel-processing machinery

with screens that needed periodic cleaning. The plaintiff climbed onto a conveyor belt to perform this maintenance when his supervisor started the equipment, resulting in serious injury. *Dominguez*, at ¶¶ 2-4. The plaintiff argued that the employer could have utilized a device to prevent the conveyor belt from moving while a person was standing on it, but the employer did not use such a device. *Id.* at ¶ 8. The Court concluded that the failure to provide safety devices was not reasonably expected to result in injury and that the employer's actions did not cause the injury. *Id.* at ¶ 21. The Court therefore affirmed summary judgment for the employer. *Id.* at ¶ 25.

Cordova is also about a failure to provide safety devices and a lack of proximate cause and is likewise inapposite. In *Cordova*, the Tenth Circuit held that the employer's failure to install safety devices and to insist on certain safety practices amounted to negligence at most, and, therefore, the court affirmed summary judgment for the employer. *Id.*, 111 F. App'x at 995. The plaintiff in *Cordova* had lost his arm in a grain auger when he reached into it, and a co-worker happened to engage it at just that moment. *Id.* at 993. The evidence showed that nobody had instructed the plaintiff to reach into the auger, and he testified that he knew it was dangerous to do so. *See id.* at 995; *see also Cordova v. Peavey Co.*, 273 F. Supp. 2d 1213, 1216 (D. N.M. 2003). Given this set of facts, the Tenth

Circuit concluded that "there is no proximate cause between any intentional conduct by [the employer] and [the plaintiff's] injury." *Id.* at 995.

In the case at bar, unlike in *Dominguez* and *Cordova*, Defendants' willful failure to reconfigure the receiver after the smart pigging operation was complete, even after being told that it was dangerous to conduct normal pigging with the modified receiver, has nothing to do with an inadequate safety device. As to proximate cause, in his opening brief, Plaintiff argued that the evidence is undisputed that Defendants' intentional acts or omissions caused him to suffer injury. *See* BIC 23-24. In their answer brief, Defendants do not offer argument that Plaintiff's injury was caused by anything other than their own acts or omissions, and the TapRoot Report alone is enough to establish proximate cause. *See* RP 295-98. Accordingly, *Dominguez* and *Cordova* do not provide support for affirming the judgment.

This Court's latest pronouncement on *Delgado* is likewise inapposite. In *Chairez v. James Hamilton Construction Co.*, 2009-NMCA-093, ¶¶ 9-10, 146 N.M. 794, 215 P.3d 732, the employer modified a rock crushing machine, including removing a metal shield covering a flywheel, and while the plaintiff's decedent was using the machine, he sustained a serious injury and later died. The Court refused to apply the *Delgado* exception because there was no evidence that

the employer intended the decedent to be in a position that would expose him to the flywheel. *Id.* at ¶ 31. Indeed, the Court concluded that "it was [the decedent's] own choice and conduct that placed him in harm's way." *Id.* at ¶ 32. Thus, the injury and death in *Chairez* was not caused by the employer's modification of the rock crusher, as Defendants contend. *See* AB 20. Additionally, the *Chairez* Court was unwilling to conclude that the modifications to the rock crusher amounted to the removal of a safety device. *Chairez*, at ¶ 24.

The *Chairez* Court concluded that, as a matter of law, the plaintiff failed to introduce evidence of the employer's intentional conduct. *Id.* at ¶ 33. The Court rested this conclusion on two separate failures of proof. First, the plaintiff had not come forward with any evidence that it was common for workers to try to clear rock jams from the added lower step while the machine was running. *Id.* Second, the plaintiff had not come forward with any evidence that it was common for workers to kneel on the lower step to attempt to clear rock jams by hand. *Id.* This lack of evidence was fatal to the plaintiff's *Delgado* claim.

There is no such failure of proof in the instant case. The Tap Root Report concluded that plant operators had no choice but to place themselves in front of a loaded cannon to perform their jobs. RP 298; *and see* RP 379, 388, 449, 566 (illustrating deadly configuration and inability of plant operators to perform job

without standing in line of fire). In contrast to the evidence that the *Chairez* plaintiff caused his own injury and death, there is no such evidence in the instant case. Plaintiff's injury was caused by Defendants' willful refusal to reconfigure the receiver, knowing the danger that could result. This highlights why the incident was not an accident and why, therefore, the Workers' Compensation Act exclusivity provision does not apply. *See* BIC at 14 (citing NMSA 1978, § 52-1-9).

Defendants next argue that the Court should affirm summary judgment under *Morales v. Reynolds*, 2004-NMCA-098, 136 N.M. 280, 97 P.3d 612. In particular, they argue that the Court should affirm summary judgment because under *Morales*, the availability of better safety equipment does not establish that a reasonable employer could anticipate that performing a "routine job using routine equipment" would cause injury. AB 22; *see also* AB 26; 18 (arguing that Plaintiff engaged in a "regular and routine" task that he had performed ten times without incident). Defendants' arguments that Plaintiff was engaging in a "regular and routine activity" and that the incident was "unlooked for and unexpected" fall flat. AB 14.

In the case at bar, the TapRoot Report establishes that Plaintiff was neither performing a routine task nor using routine equipment, and *Morales* is therefore

distinguishable. The TapRoot Report found that the receiver as modified to accept a smart pig was not safe to use for regular pigging operations. RP 295-98. The Report also found that there was no training on how to retrieve a regular pig from the modified receiver. RP 295-96. Thus, severe injury or death was an inevitability. The fact that plant operators were able to retrieve several pigs without incident does not affect the analysis. The fact remains that plant operators were required to stand in front of a loaded cannon because Defendants willfully ignored warnings of danger and pleas to reconfigure the receiver. RP 661-62; RP 608 at 108-09.

Morales is further distinguishable on its facts. In *Morales*, one of the plaintiffs was injured when his co-employee dropped a metal sheet on him. *Morales*, at ¶ 4. The other plaintiff in *Morales* was injured when a chemical was released during repair of a pump, and the hood of his protective gear popped up. *Id.* at ¶ 2. In both of those incidents, there was no act of the employer that could reasonably be expected to result in injury. *Id.* at ¶ 23. Here, on the other hand, the failure to reconfigure the receiver and the failure to offer any training on retrieving regular pigs from the modified receiver could reasonably be expected to – and did in fact – result in serious injury. Post-*Delgado* case law does not provide authority for affirming the judgment but instead demonstrates that the district court erred in

granting summary judgment.

II. The Award of Costs Should Be Reversed Either Because Summary Judgment was Improperly Granted or Because the District Court Abused Its Discretion in Awarding Costs Under the Particular Circumstances of This Case.

In his opening brief, Plaintiff argued that he is unable to pay the award of costs, and, therefore, the award is unjust. BIC 33-34. Defendants respond that Plaintiff has "excess annual household income." AB 30. However, Plaintiff's affidavit outlining some of his family's basic monthly expenses does not demonstrate that he has excess income. RP 1121. His affidavit outlines only his fixed monthly expenses for his family's most basic necessities: food, clothing, shelter, medical care, and transportation. *See id.* His affidavit does not take any other expenses into consideration, including incidentals or unusual expenses that a family may face in any given month. *See id.* Plaintiff does not have excess income from which the award of costs may be paid.

Defendants also claim that information about their gross revenue is "unsubstantiated" and "non-evidentiary." AB 31. Defendants' own website states that its parent companies are Spectra Energy and ConocoPhillips. *Available at* http://www.dcppartners.com; http://www.dcpmidstream.com. Defendants themselves post their earnings on their website. *Available at*

http://www.dcppartners.com. The Court may take judicial notice of Defendants' financial statements in deciding whether an award of costs would be unjust. *Cf. Rearden LLC v. Rearden Commerce, Inc.*, 597 F. Supp. 2d 1006, 1013 n. 3 (N.D. Cal. 2009) (taking judicial notice of contents of company website where company was party to litigation).

CONCLUSION

For the foregoing reasons, and for the reasons stated in the brief in chief, the Court should reverse the judgment and the award of costs and should remand the case for trial on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of November 2009, I caused to be delivered a true and correct copy of the foregoing on the following, by first class U.S. mail, postage prepaid:

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