IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

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

BRIEF IN CHIEF

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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 7,672 words, according to WordPerfect 12.

TABLE OF AUTHORITIES

NEW MEXICO CASES

NEW MEXICO STATUTES

NEW MEXICO RULES

SUMMARY OF PROCEEDINGS

I. Nature of the Case and Course of Proceedings

Plaintiff Kristopher May brought this tort claim against his employer to recover for catastrophic injuries that he suffered when a pipeline inspection gauge ("pig"), measuring three feet long and twelve inches in diameter and weighing about 45 pounds, exploded out of a pig receiver and blasted into him at a rate of speed of approximately 90 miles per hour. Defendants DCP Midstream and Duke Energy Field Services moved for summary judgment, arguing that the exclusivity provision of the Workers' Compensation Act precludes Plaintiff's claims. After a hearing on the motion, the district court granted summary judgment in favor of Defendants.

The district court erred in granting summary judgment because there are genuine issues of material fact as to whether Plaintiff's injuries were non-accidental, and therefore outside the scope of the Act under the teachings of *Delgado v. Phelps Dodge Chino, Inc.*, 2001-NMSC-034, 131 N.M. 272, 34 P.3d 1148. In particular, there is a factual dispute about whether Defendants engaged in an intentional act or omission, without just cause or excuse, which a reasonable person would expect to result in Plaintiff's injuries. There is also a factual dispute about whether Defendants expected their act or omission to result in Plaintiff's injuries but utterly disregarded the consequences. Because material facts are in

dispute, the district court's grant of summary judgment invaded the province of the jury. Plaintiff asks the Court to reverse the judgment so that a jury may properly decide these factual disputes. In the second of these two consolidated appeals, Plaintiff asks the Court to reverse the award of costs to Defendants.

II. Statement of Facts

A. Introduction

The incident occurred at the Duke Energy/DCP Linam Ranch Facility just west of Hobbs, New Mexico. The pipeline inspection gauge ("pig") at issue was launched from Artesia, New Mexico. RP 292. Once launched, a pig normally takes about six hours to arrive at the Eddy pig receiver. RP 294.

While Plaintiff was in the process of retrieving a "regular" pig from a receiver configured to receive a "smart" pig, the pig was forcefully expelled from the receiver barrel at a high rate of speed. The pig struck Plaintiff in the forearm, head, and jaw. His injuries include a crushed hand, fractured wrist, fractured and dislocated elbow, fractured ulna (minus two inches of bone), two transverse fractures of the neck, broken skull bone, and numerous lacerations to his face and body. RP 3, 164, 292. He has undergone, and will continue to undergo, reconstructive surgeries. RP 3, 164. He is being treated for nerve damage and post-traumatic stress disorder. *Id.* He is also continually undergoing pain

management treatment. *Id.* His supervisor agreed that Plaintiff is lucky to be alive. RP 361.

Defendants undertook an investigation of the incident, and the resulting report is known as the TapRoot Incident Investigation Report [hereinafter "TapRoot Report"]. RP 292-300. The team of investigators that produced the TapRoot Report was comprised of Defendants' own employees. [SJ Tr. 17]. The TapRoot Report is an admission by Defendants of their egregious wrongdoing, both in terms of their failure to reconfigure the receiver and their failure to train plant operators in pig retrieval.

B. Findings and Conclusions of the TapRoot Incident Investigation Report

Pigs are launched on a regular basis to sweep liquids out of the pipelines, to keep hydrates from forming, and to clean the lines. RP 306 (at 18).[1] A "smart" pig is different than a regular pig because it can detect anomalies and corrosion and locate thinning in the pipeline. RP 309 (at 32). In May 2005, the Eddy pig receiver was reconfigured to accommodate a smart pig. RP 292.

Smart pigs are extraordinarily expensive to run. [SJ Tr. 10]. Not

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[1]The depositions in the record proper are in condensed form, and, therefore, each page contains four pages of transcript. In order to assist the Court, when a record citation refers to a deposition transcript, it will direct the Court to the page of the record proper as well as to the page of the deposition itself.

surprisingly, then, the TapRoot Report found that Defendants took great pains to protect the smart pig. The TapRoot Report's Findings state that management engaged in planning prior to the smart pig operation "to ensure [that] preparations, receiver configuration, training, and communication were all properly executed." RP 295; *see also* RP 665 (handwritten engineering notes indicating the extra precautions taken by Defendants to ensure that the smart pig was not damaged).

The modifications for the smart pig operation included installation of a 12-foot spool (pup) and a 4-foot spool (barrel extension) downstream of the vent and blowdown valves. RP 292. The TapRoot Report specifically found that "the changes were intended to be temporary and not permanent." RP 295. After the smart pig operation was completed, the 4-foot barrel extension was removed, but the 12-foot pup was not removed. RP 292. The TapRoot Report found that there was "no documentation to support what the receiver configuration would actually be following termination of the smart pig project." RP 295. The Report also found "no documentation to support what level of planning, training, and documentation would be required in the event the receiver remained modified from its original design." RP 295.

The TapRoot Report found "several deficiencies regarding the modified receiver." RP 295. The reported deficiencies are as follows: 1) Defendants

executed no Management of Change for permanent change of the receiver; 2) Defendants developed no written procedures for operating the receiver in its modified configuration; 3) Defendants conducted no training regarding operation of the receiver; and 4) Defendants conducted no hazard analysis for conducting normal pigging operations in the receiver as modified for smart pigging. RP 295. The Report also found that "the permanent changes did not follow the [Duke Energy Field Services] [Required Practice] for receiver configuration." RP 295; *and see* RP 666, 700 (containing the Duke Energy Field Services Required Practice for Launcher and Receiver Design).

In 2005, prior to the modifications to the receiver, the task of retrieving pigs was transferred from field operations to plant operations. RP 294. Plaintiff was a plant operator. The TapRoot Report found that plant operators received some training on how to retrieve a pig from the original receiver, but not from the receiver as reconfigured for the smart pig operation. RP 295-96. According to the TapRoot Report, "[p]ig launching and/or receiving is not an element of plant operator training as it is for field operators." RP 296.

The TapRoot Investigation Team felt that plant operators were inexperienced with pig receiving operations, and that experienced operators "would have challenged the current configuration." RP 297. The TapRoot Report

concluded that during the incident the "receiver was not equipped with a vent to remove pressure behind the pig" and the "pig remained lodged with this energy trapped behind it." RP 296. The Report states that "[a]ll operators acknowledged having retrieved a pig still lodged in the pup section." RP 296.

According to the Report, "a hazard analysis would have given operating personnel the opportunity to question vent locations and the possibility of trapped pressure behind a pig." RP 296. Further, the "[Management of Change] process would have forced consideration to be given to written operating procedures, training and subsequent documentation." RP 296. The Report concluded that due to the modified configuration of the receiver, operators would have a problem ascertaining the pig's location and detecting trapped pressure prior to opening the receiver. RP 297.

The TapRoot Report states that one of the root causes of the incident is that "[a] non-standard receiver configuration was left in service for normal pigging, following modifications for smart-pigging operations." RP 297. The Report also states that Defendants did not follow the Required Practice for pig receiver configuration, and that if they had done so, it would have prevented trapped pressure or at least would have given the operator a way to detect trapped pressure. RP 297. The TapRoot Report concluded that factors contributing to the

incident included the failure to follow Management of Change procedures and the failure to provide adequate training. RP 298; *see also* RP 296 (concluding that "[t]he failure to execute and follow [Management of Change] procedures for permanent, not-in-kind changes is viewed as a significant contributor to this incident").

The TapRoot Report identified several key differences between the configuration mandated by the Required Practice and the configuration of the modified receiver. First, the receiver pup should have been 18 to 20 inches in length, but, as modified, it was 12 feet in length. RP 297. Second, the receiver as modified had no vent. RP 297. Third, there was no indicator to allow an operator to ascertain the location of the pig. RP 297.

Due to these deficiencies, the TapRoot Report summarized the situation as follows: "Prior to opening the receiver for pig retrieval, operations personnel were unable to know with certainty the location of the pig in the receiver, unable to detect pressure trapped behind the pig, and . . . unable to remove any pressure that may have become trapped." RP 297. The configuration was deadly because the operator must "place himself into the line of fire to ascertain the location of the pig." RP 298. Thus, at their peril, Defendants' employees were essentially required to stand in front of the barrel of a loaded cannon. [SJ Tr. 17].

Under "Immediate Corrective Actions," the TapRoot Report recommends "that the facility discontinue receiving pigs from this receiver (as it currently exists) until it is returned to original configuration, or modifications are made to improve the design in accordance with the [Duke Energy Field Services] Engineering Required Practice for Pig Launcher and Receiver Design." RP 295; *see also* RP 666, 700. The Report continued: "This should include following management of change (MOC) procedures which includes conducting a hazard analysis (PHA), developing and implementing operating procedures, and conducting formal training on the proper operation, paralleling the current training required for field operators." RP 295; *see also* RP 300.

C. Facts In Addition to Those Found by the Taproot Report

Ronnie Gilchrest, a field supervisor with thirty years of industry experience and over a decade of experience with pigging operations, testified that it was common knowledge in the industry that pigs can get lodged, and if there is no pressure gauge and no vent, then the operator retrieving the pig will have no way of knowing whether pressure has built up behind the pig, and no way to release pressure. RP 315 (at 56-57). It was so commonplace for pigs to get lodged that plant operators had to devise a makeshift hook mechanism to pull out pigs that were stuck. RP 473 (at 91-93). Plaintiff testified that upper management knew

that pigs got lodged because plant operators got "chewed out" when it took a long time to retrieve a lodged pig during a test run the day before the smart pig operation. RP 624 (at 173). Buddy Holt, Defendants' Linam Ranch Plant supervisor and Plaintiff's direct supervisor, told plant operators that Manager Tony Lee was "not happy" about a pig that got lodged in the pipe, and operators were told that "it better not happen today." RP 624 (at 173); *see also* RP 631 (at 198) (on the day of the test run, operators "were told not to have that problem again tomorrow").

Defendants' own design plans for the smart pig operation discuss the problem of lodged pigs. A handwritten note explaining the modifications necessary to receive a smart pig states: "*concern – If pig should stall at the 45° EL on the riser upstream of barrel, gas will pack behind pig building differential pressure which would cause pig to surge when it frees." RP 665. The plans explain how the risk could be mitigated for the smart pig operation, including "add[ing] temporary 12" spool to accommodate length of smart pig" and "add[ing] temporary 14" barrel extension to provide added length." RP 665. As the TapRoot Report found, there are no corresponding plans explaining how the receiver should be reconfigured so that regular pigging operations could be resumed safely. RP 295.

Mr. Gilchrest offered that he and his crew would take down the smart pig receiver and replace it with a receiver configured to receive regular pigs. RP 661-62. However, Mr. Holt refused the offer and told Mr. Gilchrest that he "would take care of it." RP 662. Plaintiff testified that several other gentlemen, in addition to Mr. Gilchrest, asked Mr. Holt if they could reconfigure the receiver because it was dangerous, but Mr. Holt said no and told them he would get to it. RP 608 at (108-09).

Mr. Holt admitted that there was no training on receiving regular pigs from the receiver as modified to accept the smart pig, and he admitted that there is virtually no training on pig receiving in general. RP 363 (at 120); RP 359-60 (at 105-06). Mr. Holt himself, who has worked for Defendants or their predecessors for almost 20 years, received no formal training in pig receiving. RP 338 (at 21); RP 365 (at 126) (stating that he received only on-the-job training).

Plaintiff testified that Mr. Holt "rul[ed] with an iron fist." RP 603 (at 87-88). He testified that management had a reputation for threatening employees who reported problems, and management was also known to isolate and interrogate employees suspected of calling a "confidential" ethics hotline. RP 603 (at 87-88). Plaintiff testified that you could go to Mr. Holt with good news and still not know whether you would "get[] your butt chewed out." RP 603 (at 87). Mr. Holt took

the position that "if you don't know how to pull a pig you don't belong in a gas plant." RP 603 (at 88). Plaintiff took his orders from Mr. Holt. [SJ Tr. 22].

In the opinion of Dr. Way Johnston, Plaintiff's expert, Defendants knew that operating the modified pig receiver for normal pigging operations exposed operators to an extreme degree of risk. RP 656, 659. Dr. Johnston agreed with the conclusion of the TapRoot Report that there was no way to remove trapped pressure behind a lodged pig. He expressed the opinion that Defendants knew that the modified pig receiver was not equipped with a vent to release trapped pressure, and that it did not comply with their Required Practice. RP 655-56, 659.

D. District Court Ruling

At the conclusion of the hearing on Defendants' motion for summary judgment, the district court opined that this is "probably . . . a negligence case and perhaps even gross negligence." [SJ Tr. 27]. However, in the court's view, "this case does not rise to the level of *Delgado*." *Id.* Without any further explanation, the district court granted summary judgment in favor of Defendants. *Id.* The district court's written Order granting summary judgment contains no analysis of the legal issues. RP 1102. The district court subsequently awarded $2,800.36 in costs to Defendants. RP 1147; CB Tr. 10.

QUESTIONS PRESENTED FOR REVIEW

1) Whether the district court erred in granting summary judgment because Plaintiff has raised genuine issues of material fact as to Defendants' willful misconduct, bringing the case outside the scope of the Workers' Compensation Act.

2) Whether 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.

STATEMENT REGARDING PRESERVATION

Plaintiff preserved the issues for appellate review by filing a memorandum in opposition to Defendants' motion for summary judgment [RP 258], objections to Defendants' cost bill [RP 1116], and by arguing his position at the hearings on the motion for summary judgment and on the cost bill.

STANDARDS OF REVIEW

1) "Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." *Morales v. Reynolds*, 2004-NMCA-098, ¶ 19, 136 N.M. 280, 97 P.3d 612; *see also* Rule 1-056, NMRA. When the movant makes a prima facie showing of entitlement to summary judgment, "the burden shifts to the party opposing the motion to

demonstrate the existence of specific evidentiary facts that require a trial on the merits." *Id.*

The Court reviews de novo a grant of summary judgment. *See Salas Mountain States Mut. Cas. Co.*, 2009-NMSC-005, ¶ 12, 145 N.M. 542, 202 P.3d 801. When reviewing a grant of summary judgment, the Court must view the evidence in the light most favorable to the party opposing the motion. *Morales*, at ¶ 22. In addition, "[a]ll reasonable inferences from the record are construed in favor of the non-moving party." *Salas*, at ¶ 12.

2) This Court reviews for an abuse of discretion the trial court's assessment of costs in a civil action. *Apodaca v. AAA Gas Co.*, 2003-NMCA-85, ¶ 103, 134 N.M. 77, 73 P.2d 215. "While it is clear that the trial court is invested with wide discretion in determining whether to award costs, . . . such discretion is not unlimited." *Key v. Chrysler Motors Corp.*, 2000-NMSC-010, ¶ 7, 128 N.M. 739, 998 P.2d 575.

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. The Workers' Compensation Act Exclusivity Provision Applies Only to Injuries Suffered as a Result of Work-Related Accidents, as Opposed to Plaintiff's Injury, Which Was Suffered as a Result of Intentional Conduct.

Benefits under the New Mexico Worker's Compensation Act are available only to a worker who is "injured by accident arising out of and in the course of his employment." NMSA 1978, § 52-1-2 . The Act provides that compensation is an exclusive remedy. *Id.* at § 52-1-9. However, the exclusivity provision applies only to "personal injury accidentally sustained." *Id.* Thus, the Act "makes an exception to the general rule of exclusivity of remedies for events that are not 'accident[s].'" *Morales v. Reynolds*, 2004-NMCA-098, ¶ 7, 136 N.M. 280, 97 P.3d 612.

In the seminal case of *Delgado v. Phelps Dodge Chino, Inc.*, 2001-NMSC-034, ¶ 26, 131 N.M. 272, 34 P.3d 1148, the Supreme Court "h[e]ld that willfulness renders a worker's injury non-accidental, and therefore outside the scope of the Act, when" three elements are met. The first element is satisfied where "the worker or employer engages in an intentional act or omission, without just cause

or excuse, that is reasonably expected to result in the injury suffered by the worker." *Id.* The second element is satisfied where "the worker or employer expects the intentional act or omission to result in the injury, or has utterly disregarded the consequences of the intentional act or omission." *Id.* The third element is satisfied where "the intentional act or omission proximately causes the injury." *Id.*

The *Delgado* Court noted that an "accident" is defined as "an unlooked-for mishap or some untoward event that is not expected or designed." *Id.* at ¶ 14. In the Court's view, "[t]he Legislature clearly intended to extend employers' privilege of immunity from tort liability . . . only to injuries accidentally sustained." *Id.* at ¶ 15. The Court "h[e]ld that when an employer intentionally inflicts or willfully causes a worker to suffer an injury that would otherwise be exclusively compensable under the Act, that employer may not enjoy the benefits of exclusivity, and the injured worker may sue in tort." *Id.* at ¶ 24; *see also Morales*, 2004-NMCA-098, ¶ 8, 136 N.M. 280, 97 P.3d 612 ("willful acts by an employer . . . result in the employer's loss of immunity from tort liability"); *Martin-Martinez v. 6001, Inc.*, 1998-NMCA-179, ¶ 6, 126 N.M. 319, 968 P.2d 1182 ("The *quid pro quo* in which the exclusivity provisions have their genesis does not sanction absolving an employer from its own intentional acts."). In the

instant case, there is no immunity from tort liability at this stage of the proceedings because a jury must first decide factual disputes about the intentional nature of Defendants' failure to reconfigure the pig receiver and their failure to train plant operators.

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

The first prong of the *Delgado* test asks whether the employer has engaged in "an intentional act or omission, without just cause or excuse, that is reasonably expected to result in the injury suffered by the worker." *Delgado*, at ¶ 26, 131 N.M. 272, 34 P.3d 1148. This prong of the test is objective and requires courts to "determine whether a reasonable person would expect the injury suffered by the worker to flow from the intentional act or omission." *Id.* at ¶ 27. The second prong of the *Delgado* test asks whether the "employer expects the intentional act or omission to result in the injury, or has utterly disregarded the consequences of the intentional act or omission." *Id.* at ¶ 26. This prong of the test "requires an examination of the subjective state of mind of the . . . employer." *Id.* at ¶ 28. If the employer "decided to engage in the act or omission without ever considering its consequences, this prong is satisfied." *Id.* The TapRoot Report, along with other evidence offered on summary judgment, raise genuine issues of material fact

on the first two *Delgado* elements, thus precluding summary judgment.

1. Defendants Intentionally Failed to Reconfigure the Pig Receiver, Without Just Cause or Excuse.

The TapRoot Report firmly establishes that Defendants failed to reconfigure the pig receiver once the smart pig had been run. RP 292-300. At the summary judgment hearing, Defendants argued that they had just cause to modify the receiver to accept a smart pig, in order to promote the safety of its employees and the public. [SJ Tr. 5]. Defendants did not, however, argue that they had just cause to fail to reconfigure the pig receiver after the smart pig operation was completed. There is no record evidence of a just cause or excuse for failing to reconfigure the pig receiver. At the hearing, defense counsel stated: "We're not sure why it was left that way." [SJ Tr. 26].

The fact is, it was left that way because Defendants refused to reconfigure it even after being told that it was dangerous. There is evidence that Mr. Gilchrest offered that he and his crew would reconfigure the smart pig receiver to accept regular pigs, but Mr. Holt refused the offer and told Mr. Gilchrest that he "would take care of it." RP 662. In addition, Plaintiff testified that several gentlemen, including Mr. Gilchrest, asked Mr. Holt if they could reconfigure the receiver because it was dangerous, but Mr. Holt said no and told them he would get to it.

RP 608 (at 108-09).

Mr. Holt agreed that it is common knowledge in the industry that a receiver configured to receive a smart pig needs to be reconfigured to receive a regular pig. RP 364 (at 125). Mr. Holt also testified that Defendants knew how to reconfigure pig receivers and did not need to rely on anyone else's expertise in the area of reconfiguring. RP 368 (at 139-40). Yet it is undisputed that Defendants never reconfigured the receiver to accept regular pigs. A reasonable person would expect this failure to result in serious injury because the smart pig configuration rendered operators unable to determine whether a regular pig had become lodged, unable to ascertain the location of the lodged pig, and unable to release pressure that had accumulated behind the lodged pig.

2. *Defendants Knew That Their Failure to Reconfigure the Pig Receiver Would Result in Injury, and They Utterly Disregarded the Consequences.*

Defendants knew that resuming regular pigging operations using a receiver that had been configured to receive a smart pig would result in serious injury. Defendants' Required Practice mandates that there be vents and gauges upstream of a pig in a receiver, but they failed to follow their Required Practice. RP 297; 304-06 (at 11, 15, 18); RP 316 (at 60-61); RP 656; *see also* RP 666, 700 ("Launcher and Receiver Design"); SJ Tr. 10. Mr. Gilchrest testified that it was

common knowledge in the industry that pigs can get lodged, and if there is no pressure gauge and no vent, then the operator retrieving the pig will have no way of knowing whether pressure has built up behind the pig, and no way to release pressure. RP 315 (at 56-57). Moreover, the TapRoot Report itself states that there is always a possibility of trapped pressure behind a pig, and, therefore, "adherence to proper operating procedures remains crucial." RP 297.

As Plaintiff's trial counsel argued at the hearing, when the receiver was configured for the smart pig, operators could tell whether there was pressure upstream. [SJ Tr. 14]. However, when the smart pig configuration was used to receive regular pigs, they would get lodged upstream of the pressure gauge, so there was no way to tell whether tons of pressure had built up. [SJ Tr. 14]; *see also* RP 297 (finding that because there was no pressure indicator upstream, no plant operator could detect whether pressure was trapped behind a lodged pig). More importantly, even if there was a way to detect pressure, there was no way to alleviate it because there was no blow-down valve upstream of where the regular pigs would get lodged in the smart pig receiver. *See* RP 297 (TapRoot Report expressly found that retrieving a regular pig from the modified receiver left no way for an operator to release pressure); *see also* [SJ Tr. 14].

There is evidence that pigs would often become lodged in the receiver. RP

315 (at 57). In fact, this condition became so commonplace that plant operators devised a mechanism to pull out pigs that were stuck. RP 473 (at 92-93). The widespread use of the makeshift hook and common knowledge about its use show that Defendants knew that pigs were getting stuck. RP 473, 624, 631; *see also* SJ Tr. 18. And as Defendants – and all industry personnel – are well aware, trapped pressure behind a lodged pig is a critical danger. RP 297, 665; *see also* RP 361 (at 113) (Mr. Holt testified that "[t]here is no question about a pig coming out of there under pressure, that it is dangerous").

Defendant manager Tony Lee was well aware that pigs would get lodged in the receiver. Mr. Lee watched as plant operators tried to dislodge a regular pig from the smart pig receiver.[2] Management then proceeded to criticize plant operators harshly and to threaten them that it better not happen again. *See* RP 624 (at 173) (operators were told that "it better not happen today"); RP 631 (at 198) (on the day of the test run, operators "were told not to have that problem again tomorrow").

There is evidence that Defendants knew that the Eddy pig receiver was dangerous. RP 665. Defendants' own plans for modifying the receiver to accept

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[2]When the record refers to a "dummy pig," this is a regular pig, as opposed to a smart pig. *See, e.g.*, RP 624 (at 173).

the smart pig states that if the pig should get lodged, pressure will build up behind it, causing it to surge when it becomes dislodged. RP 665. Thus, Defendants' plans for modifying the receiver to keep the costly smart pig safe acknowledge that trapped pressure behind a pig is deadly. RP 665. The plans also explain how the risk can be mitigated for the smart pig operation, but there are no corresponding plans that explain how the receiver will be reconfigured to resume regular pigging operations. RP 665; 295. As the TapRoot Report found, the smart pig configuration could not be used to resume regular pigging operations without exposing operators to a high degree of risk. RP 295, 297.

In the opinion of Dr. Way Johnston, Plaintiff's expert, Defendants knew that operating the modified pig receiver for normal pigging operations exposed operators to an extreme degree of risk. RP 656, 659. Dr. Johnston expressed the opinion that Defendants actually knew that the modified pig receiver was not equipped with a vent to release trapped pressure, and Defendants knew that this configuration did not comply with its own Required Practice. RP 655-656, 659. Since management knew that pigs became stuck, management also knew that a plant operator attempting to retrieve a lodged pig would necessarily have to place himself in the line of fire. The TapRoot Report expressly found as much. RP 298.

In Dr. Johnston's opinion, Defendants knew that a Management of Change

was required when the Eddy pig receiver was modified to accept the smart pig. RP 655, 658. A Management of Change would have required Defendants to conduct a Process Hazard Analysis and to provide operators with formal training on the use of the modified receiver, but Defendants did neither of those things. RP 295-96; RP 363 (at 120). Dr. Johnston's views are corroborated by corresponding findings of the TapRoot Report. *See* RP 295-97 (concluding that incident was caused by failure to execute Management of Change, failure to conduct process hazard analysis, failure to provide training, and failure to follow Defendants' Required Practice for receiver configuration).

At the conclusion of the hearing, Defendants stated that they do not claim to be without blame for the incident. [SJ Tr. 24]. Defendants admitted that "[c]ertainly [they] could have performed better." [SJ Tr. 24].

In *Delgado*, the Supreme Court stated that if an employer "decided to engage in the act or omission without ever considering its consequences, th[e second] prong is satisfied." *Delgado*, at ¶ 28, 131 N.M. 272, 34 P.3d 1148. That prong is satisfied here because there is a genuine issue of material fact regarding whether Defendants intentionally refused to reconfigure the receiver in utter disregard of the dangerous consequences. RP 608 (at 108-09); RP 662; *see also* SJ Tr. 12, 18-19, 21.

Defendants' willful conduct severely injured, and nearly killed, Plaintiff. [SJ Tr. 11]. Defendants maintain that the incident was a "tragic accident." [SJ Tr. 27]. What happened to Plaintiff was not an accident, and the tragedy lies in the fact that were it not for his employer's willful failure to reconfigure the pig receiver and to train the operators who were required to retrieve pigs, he would not have had to suffer such devastating injuries.

C. It is Undisputed That Defendants' Intentional Act or Omission Proximately Caused Plaintiff's Injuries.

While there are genuine factual disputes about the first two *Delgado* elements, the third element of *Delgado* is not in dispute. The third *Delgado* element is satisfied where "the intentional act or omission proximately causes the worker's injury." *Delgado*, at ¶ 1, 131 N.M. 272, 34 P.3d 1148. The TapRoot Report establishes that one of the root causes of the incident was the failure to reconfigure the pig receiver after completion of the smart pig operation. RP 297. The TapRoot Report concluded that other factors contributing to the incident were: 1) Defendants' failure to follow Management of Change Procedures and conduct process hazard analysis; 2) Defendants' failure to follow Required Practices for pig receiver configuration; and 3) Defendants' failure to provide adequate training. RP 297-98. Due to these intentional acts or omissions of

Defendants, Plaintiff was required to "place himself into the line of fire to ascertain the location of the pig." RP 298.

In addition to the undisputed conclusions of the TapRoot Report, Mr. Gilchrest stated that Plaintiff was injured because the smart pig configuration was left in place. RP 662. The evidence thus establishes that, if not for Defendant's intentional acts or omissions, Plaintiff would not have suffered injury. There is no record evidence that Plaintiff's injuries were caused by anything other than Defendant's acts or omissions.

D. Under the Teachings of *Delgado* and Its Progeny, a Jury Must Be Permitted to Resolve the Factual Disputes Herein.

In *Morales v. Reynolds*, 2004-NMCA-098, ¶ 17, 136 N.M. 280, 97 P.3d 612, this Court clarified that when there is evidence of an objective expectation of injury, the employer's subjective expectation of injury, and a causal relationship between intent and injury, then a worker can prevail under *Delgado*. The Court "h[e]ld that plaintiffs must plead or present evidence that the employer met each of the three *Delgado* elements through actions that exemplify a comparable degree of egregiousness as the employer in *Delgado* in order to survive a pre-trial dispositive motion." *Morales*, at ¶ 14. As demonstrated above, there are genuine issues of material fact as to the first two *Delgado* elements, and it is undisputed

that the third *Delgado* element has been satisfied.

It should be stressed that a plaintiff proceeding under *Delgado* need only establish a comparable degree of egregiousness where the employer's conduct is concerned. A plaintiff need not establish the same type of injury as the one that occurred in *Delgado*. In other words, a plaintiff does not need to die engulfed in flames in order to prevail under *Delgado*. The proper focus is on an employer's intentional conduct and the expectation that injury will result from that conduct. As this Court has stated: "The critical measure . . . is whether the employer has, in a specific dangerous circumstance, required the employee to perform a task where the employer is or should clearly be aware that there is a substantial likelihood the employee will suffer injury or death by performing the task." *Dominguez v. Perovich Properties, Inc.*, 2005-NMCA-050, ¶ 22, 137 N.M. 401, 111 P.3d 721. That is precisely what occurred in the instant case, namely that Defendants required Plaintiff to perform the dangerous task of retrieving a pig from an improperly configured receiver, knowing that such a task posed a substantial likelihood of death or great bodily harm.

In *Morales*, this Court observed that the holding in *Delgado* rests on "a combination of deadly conditions, profit-motivated disregard for easily implemented safety measures, complete lack of worker training or preparation, and

outright denial of assistance to a worker in a terrifying situation." *Id.*, at ¶ 10, 136 N.M. 280, 97 P.3d 612. That same combination of conditions exists in the instant case.

1. Defendants' Failure to Reconfigure the Pig Receiver and Failure to Train Plant Operators in Pig Receiving Created Deadly Conditions.

The TapRoot Report found that the modified receiver did not follow Defendants' Required Practice for receiver configuration. RP 295; *and see* RP 666, 700. In particular, as discussed, the modified receiver had no gauge to ascertain the location of the pig or to detect trapped pressure, and no valve or vent to relieve pressure behind a pig if it became lodged, as it frequently did. RP 296. In addition, the TapRoot Report found that plant operators had no training whatsoever on how to retrieve a regular pig from the receiver as modified to receive a smart pig. RP 295-96. The TapRoot Report concluded that experienced plant operators "would have challenged the current configuration." RP 297. Instead, plant operators performed their job under these deadly conditions, placing themselves in the line of fire to retrieve lodged pigs.

2. Defendants Disregarded an Easily Implemented Safety Measure.

It would have been simple to remove the barrel extension that had been

fitted onto the receiver for the smart pig operation. In fact, while Plaintiff was being airlifted to the hospital, Defendants did just that. RP 625 (at 176). In addition, Mr. Holt testified that it would not have been costly to put a vent and a pressure gauge upstream of the pig. RP 364 (at 122-23). Defendants disregarded these easily implemented safety measures that would have prevented the serious injuries that Plaintiff sustained.

As for whether Defendants' disregard for these easily implemented safety measure was motivated by profits, there is a factual dispute. There is evidence that Defendants went to great pains to protect the costly smart pig, in terms of receiver design and configuration. *See, e.g.*, RP 295, 665. There is also evidence that once the smart pig operation was complete, Defendants refused to reconfigure the receiver for regular pigging operations. RP 661-62; RP 608 (at 108-09). As discussed above, Defendants have offered no just cause or excuse for their failure to reconfigure the receiver. *See supra* Part I.B.1. A jury could reasonably find that Defendants did not want to further interrupt gas service to reconfigure the receiver. In other words, a jury could reasonably find that Defendants' reprehensible disregard for an easily implemented safety measure was motivated by the bottom line.

3. *The TapRoot Report Found a Complete Lack of Training of Plant Operators in Retrieving Regular Pigs From the Receiver Modified to Accept the Smart Pig.*

Mr. Gilchrest testified that whatever training Plaintiff received on pig retrieval was training that he received from plant operations. RP 311 (at 41). The TapRoot Report, however, found that pig receiving was not a formal topic of training for plant operations. RP 296; *see also* RP 472 (at 89) (field operations had training on pig receiving, but plant operations did not). Moreover, as discussed, the TapRoot Report found that plant operators had no training whatsoever on how to retrieve a regular pig from the receiver as modified to receive a smart pig. RP 295-96.

Mr. Holt admitted that there was no training on receiving regular pigs from the receiver as modified to accept the smart pig, and he admitted that there is virtually no training on pig receiving in general. RP 363 (at 120); RP 359-60 (at 105-06). In fact, Mr. Holt himself, who has worked for Defendants or their predecessors for almost 20 years, received no formal training in pig receiving. RP 338 (at 21); RP 365 (at 126) (stating that he received only on-the-job training); *see also* SJ Tr. 16 (arguing that failure to provide formal training on pig receiving directly violates Defendants own policies and procedures). Rather than ensuring that his crew was well-trained and prepared to perform a dangerous task, Mr. Holt

took the position that "if you don't know how to pull a pig you don't belong in a gas plant." RP 603 (at 88).

At the summary judgment hearing, Defendants changed their tune about training. There, they argued that since the incident happened, "everybody knows the training should have been better." [SJ Tr. 7]. Defendants also conceded that Plaintiff's "training may not have been ideal." [SJ Tr. 8]. There is ample evidence to raise a genuine issue of material fact about the lack of training or preparation. *See Morales*, at ¶ 10, 136 N.M. 280, 97 P.3d 612.

4. *Defendants Denied Assistance to a Worker in a Terrifying Situation.*

On summary judgment, Defendants argued that someone else offered to retrieve the pig on the day of the incident, but Plaintiff volunteered to do it. RP 119. Plaintiff, on the other hand, testified that Defendants forced him to retrieve the regular pig from the modified receiver. RP 625 (at 175-76). He stated that "every operator will testify to that." *Id.* He also knew that Mr. Holt had fired people for far less than refusing to retrieve a pig. RP 625 (at 175).

Plaintiff testified that Mr. Holt "rul[ed] with an iron fist." RP 603 (at 87-88). He testified that you could go to Mr. Holt with good news and still not know whether you would "get[] your butt chewed out." RP 603 (at 87). He testified that

plant operators were threatened by management when it took a long time to retrieve a lodged pig during a test run the day before the smart pig operation. RP 624 (at 173). Mr. Holt told plant operators that Manager Tony Lee was "not happy" about a pig that got lodged in the pipe, and operators were told that "it better not happen today." RP 624 (at 173); *see also* RP 631 (at 198) (on the day of the test run, operators "were told not to have that problem again tomorrow"). There is a genuine issue of material fact that Defendants denied assistance to Plaintiff in a terrifying situation by refusing to reconfigure the receiver to make it safe and by requiring operators to stand in the line of fire.

E. Applying the Correct Standard of Review, Summary Judgment Must Be Reversed.

The standard of review is of critical importance in a case such as this. The Court is not being asked to decide whether Defendants did, in fact, engage in intentional conduct that injured Plaintiff. Instead, the Court is called on to decide only whether there is a factual dispute about whether Defendants knew the failure to reconfigure the receiver would result in injury and utterly disregarded the consequences. *See Morales*, at ¶¶ 15-16, 136 N.M. 280, 97 P.3d 612 (analogizing to intentional infliction of emotional distress and stating that in the workers' compensation context, when reasonable minds may differ as to the employer's

willfulness, then it is for a jury to decide). In deciding whether material facts are in dispute, the Court must view the evidence in the light most favorable to Plaintiff and must draw all reasonable inferences in his favor. *Morales*, at ¶ 22, 136 N.M. 280, 97 P.3d 612; *Salas*, at ¶ 12, 145 N.M. 542, 202 P.3d 801. Reviewing the instant case under that standard should lead the Court to the conclusion that the district court improperly invaded the province of the jury. Summary judgment should be reversed.

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.

Defendants filed a cost bill seeking $2,800.36 in deposition costs. RP 1104. Plaintiff opposed the cost bill on the ground that he is unable to pay. RP 1116. Plaintiff argued that the serious and debilitating injuries that he has sustained at the hands of Defendants have sharply curtailed his ability to earn a living for his family. In support of his argument, Plaintiff submitted an affidavit explaining in detail his family's monthly expenses and demonstrating that his income is barely enough to take care of the needs of his family. RP 1120.

At a hearing on the cost bill, Plaintiff further argued that there is an extreme disparity in the resources of the two parties. Plaintiff pointed out that the parent

company of Defendant DCP Midstream posted 16.4 billion dollars in gross revenue in 2008. [CB Tr. 4]. Plaintiff, on the other hand, has an annual income of approximately $44,922.00 to support a family of four. *Id.* Due to the severity of his injuries, Plaintiff will also need to undergo additional surgery, which will affect his income. RP 1120-21.

In support of their request for costs, Defendants argued that Plaintiff's trial counsel engaged in "numerous unavailing litigation tactics" during discovery. RP 1127. At the hearing, Plaintiff's trial counsel defended her conduct during the course of the litigation and argued that "we've made every accommodation possible to be cooperative and extend professional courtesy" to opposing counsel. [CB Tr. 8]. The district court stated: "I'm not going to get into who's the good guy, who's the bad guy . . . that's not what it's about." [CB Tr. 9]. Plaintiff's trial counsel responded that Defendants' counsel had made it an issue by alleging improper conduct. [CB Tr. 9]. The judge replied that "it is not an issue that the Court puts very much stock in." [CB Tr. 9].

The district court expressly refused to make a finding of bad faith litigation tactics. *Id.* The court awarded $2,800.36 in costs to Defendants. RP 1147. In the court's view, Defendants are "entitled to [costs] under the rules." [CB Tr. 10].

Our Rules of Civil Procedure provide that "costs . . . shall be allowed to the

prevailing party unless the court otherwise directs." Rule 1-054(D)(1), NMRA; *see also* NMSA 1978, § 39-3-30 ("In all civil actions or proceedings of any kind, the party prevailing shall recover his costs against the other party unless the court orders otherwise for good cause shown."). There is a presumption that a prevailing party is entitled to costs, and the burden is on the losing party to overcome the presumption by showing that an award "would be unjust, or that other circumstances justify the denial . . . of costs." *Apodaca v. AAA Gas Co.*, 2003-NMCA-85, ¶ 103, 134 N.M. 77, 73 P.2d 215.

Plaintiff overcame the presumption because he demonstrated that he is unable to pay, and, therefore, an award of costs would be unjust. Where there is a disparity in resources between the parties, and the losing party presents evidence of inability to pay, a court may properly refuse to award costs. *Id.*; *see also Gallegos v. Southwest Community Health Servs.*, 117 N.M. 481, 490, 872 P.2d 899, 908 (Ct. App. 1994) ("[T]he losing party's ability to pay is a proper factor to consider in determining whether to award costs.") In exercising its discretion regarding an award of costs, courts should consider the equities of the situation. *Marchman v. NCNB Texas Nat'l Bank*, 120 N.M. 74, 94, 898 P.2d 709, 729 (1995). In the instant case, the district court abused its discretion in failing to consider the equities, in particular, Plaintiff's inability to pay, and the fact that he

suffered serious injuries at the hands of Defendants.

If the Court agrees with Plaintiff that summary judgment was improperly granted, then Defendants are no longer the prevailing parties. In that case, the award of costs must be reversed under the governing rule and statute. *See* Rule 1-054(D)(1), NMRA; NMSA 1978, § 39-3-30. Even if, however, the Court is inclined to affirm the grant of summary judgment, it should nevertheless reverse the award of costs. The district court's award of costs was an abuse of discretion because it worked a severe injustice. *Cf. Amkco, Ltd. v. Welborn*, 2001-NMSC-012, ¶ 20, 130 N.M. 155, 21 P.3d 24 (affirming this Court's reversal of award of $3,600.03 in costs where such an award "would result in severe injustice").

CONCLUSION

For the foregoing reasons, 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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I hereby certify that on this 10th day of August 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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