IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

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No. A-1-CA-41635

BILLY FRANK WARMUTH and JENNY WARMUTH,

Plaintiffs-Appellants/Cross-Appellees,

v.

PACCAR INC. and INLAND KENWORTH (US), INC.,

Defendants-Appellees/Cross-Appellants.

APPEAL FROM THE DISTRICT COURT OF ROOSEVELT COUNTY
Donna J. Mowrer, District Court Judge

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OPINION

WRAY, Judge.

{1} Plaintiffs Billy Frank Warmuth and Jenny Warmuth brought suit against Defendants Paccar Inc., and Inland Kenworth (US), Inc., among others, under theories of strict products liability and negligence after Mr. Warmuth was injured while working for the New Mexico Department of Transportation (NMDOT). After the jury found in favor of Defendants, Plaintiffs moved for a new trial and argued that the jury had received prejudicial extraneous information because Defendants' exhibit binders included an index (the Index) that listed, by name, exhibits that the parties had agreed would not be—and were not—submitted to the jury. The district court denied Plaintiffs' motion as well as Defendants' request for $486,875.85 in costs. Both parties appeal. We affirm, because the district court did not abuse its discretion in determining that (1) Plaintiffs did not establish a reasonable probability that the Index affected the jury's verdict; and (2) Plaintiffs were unable to pay Defendants' cost bill.

BACKGROUND

{2} Mr. Warmuth suffered serious injuries when a colleague reversed a dump truck and ran over him twice. Plaintiffs brought suit against MCT Industries, Inc., MCT, Inc. (collectively, MCT), and Defendants. Defendants and MCT were each responsible for different aspects of the manufacture and sale of the dump truck,

which the complaint alleged was unsafe. The case was heavily litigated, and eventually, Plaintiffs settled with MCT. After an eight-day trial, the jury found in favor of Defendants. The district court denied Plaintiffs' motion for a new trial and Defendants' cost bill, which we will describe in greater detail within our analysis of these cross-appeals.

DISCUSSION

{3} We first address Plaintiffs' appeal, related to the denied motion for a new trial, followed by Defendants' challenge to the district court's denial of the cost bill.

I. Plaintiffs' Motion for a New Trial

{4} Plaintiffs argue that the district court should have granted their motion for a new trial because the jury received prejudicial extraneous materials when the Index was included with Defendants' exhibit binders. *See* Rule 1-059(A) NMRA (permitting a new trial "in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted"); *Kilgore v. Fuji Heavy Indus. Ltd.*, 2010-NMSC-040, ¶ 1, 148 N.M. 561, 240 P.3d 648 (describing the basis for a new trial when the jury receives extraneous evidence). We review the district court's denial of a motion for a new trial for abuse of discretion. *See State v. Mann*, 2002-NMSC-001, ¶ 17, 131 N.M. 459, 39 P.3d 124; *see also State v. Lymon*, 2021-NMSC-021, ¶ 12, 488 P.3d 610 ("An abuse of discretion occurs when the

ruling is clearly against the logic and effect of the facts and circumstances of the case." (internal quotation marks and citation omitted)).

{5} On the last day of trial, outside of the presence of the jury, the parties conferred about which exhibits would go back to the jury for deliberations. During the trial, all of the 447 exhibits that had been preadmitted were not used, but Defendant wanted the jury to have access to all of those preadmitted exhibits. Plaintiffs objected, and the district court ruled that only the exhibits that had been used with a witness would be available to the jury during deliberations. Despite that ruling, Defendants' exhibit binders went to the jury with the Index, which listed all 447 of the preadmitted exhibits and included a brief description of how Defendants intended to use the exhibits. Approximately two hours into deliberations, the jury sent a note asking to look at some of the exhibits that were on the Index but were not in the binders. The district court ordered that the Index be removed from the binders and gave a written curative instruction to the jury that directed them not to consider the Index. At a later point, before the district court read the verdict, Plaintiffs requested that the Index be made an exhibit, based on concerns that the descriptions of some of the exhibits that had not been used contained prejudicial references, including references to workers' compensation benefits. As part of the motion for a new trial, Plaintiffs offered an affidavit from the jury foreperson, which stated that he had reviewed the Index "in detail" and also saw other jurors reviewing the Index during deliberations. The

affidavit additionally asserted that "[i]t came to the jurors' attention during deliberations that [Mr.] Warmuth may have received workers[']compensation benefits."

{6} Plaintiffs argue that these facts demonstrate that a new trial was warranted. To prove that extraneous juror communications warrant a new trial, the moving party "bears the burden to prove that (1) material extraneous to the trial actually reached the jury, (2) the extraneous material relates to the case being tried, and (3) it is reasonably probable that the extraneous material affected the jury's verdict or a typical juror." *Kilgore*, 2010-NMSC-040, ¶ 1. Because Rule 11-606(B)(1) NMRA does not allow jurors to testify about matters or statements "made during the course of the deliberations or to the juror's mental processes," the three requirements make up "an objective test, which inquires into the probability of prejudice, to ascertain the impact that the extraneous material had upon the jury." *Kilgore*, 2010-NMSC-040, ¶ 21 (internal quotation marks and citation omitted). The district court concluded that Plaintiffs established the first two requirements but not the third, and on appeal the parties focus on the third requirement—the probability of prejudice.

{7} We determine whether the probability of prejudice requirement has been met by considering five factors: (1) how the jury received the extraneous material; (2) how long the jury had the extraneous material; (3) whether the extraneous material was received before or after the verdict; (4) at what point during the deliberations—

if the material was received before the verdict—did the jury obtain the extraneous material; and finally, (5) "[w]hether it is probable that the extraneous material affected the jury's verdict, given the overall strength of the opposing party's case." *Id.* ¶ 23. We agree with Plaintiffs that the first four probability factors support a new trial: (1) the district court's bailiff delivered the binders with the Index during deliberations; (2) the jury had access to the Index for almost two hours; (3) the jury received the Index before rendering the verdict based on the jury's note that asked for exhibits that were shown on the Index; and (4) the jury likely received the binders at the start of deliberations. We disagree, however, that the fifth probability factor weighs in favor of a new trial and conclude that under the specific facts of this case, the fifth probability factor outweighs the other four factors.

{8} Before we explain, we observe that Plaintiffs argue that they established the fifth probability factor by a preponderance of the evidence, because the Index reinforced Defendants' trial strategy and substantive defense. Our Supreme Court did not address the burden of proof question in *Kilgore*. Nor need we here. The question in the present case does not turn on how much evidence would be sufficient to meet the *Kilgore* burden and justify a new trial. Instead, based on the circumstances of the error, the nature of the verdict, and the strength of the evidence supporting the verdict, as we explain, we conclude that the record shows no objective

evidence that "it is reasonably probable that the extraneous material affected the jury's verdict or a typical juror." *See id.* ¶ 21.

A. The Circumstances of the Error

{9} The inadvertent submission of the Index was discovered before the jury rendered the verdict, and as a result, the district court had the opportunity to cure the inadvertent disclosure by written instruction. When evidence is erroneously admitted, "the general rule is that a prompt admonition to disregard and not consider inadmissible evidence sufficiently cures any prejudicial effect which might otherwise result." *Velasquez v. Regents of N. N.M. Coll.*, 2021-NMCA-007, ¶ 47, 484 P.3d 970 (internal quotation marks and citation omitted). We see no reason to depart from this approach when considering the curative impact of an instruction in the context of extraneous information that may have reached the jury. *See id.* ¶ 48 (assessing the possibility of prejudice "in the context of the entire trial, deferring to the district court judge, who observed all of the testimony as well as the jury's reactions to that testimony"); *Kilgore*, 2010-NMSC-040, ¶ 16 (observing that "[d]ue process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen" (internal quotation marks and citation omitted)). The district court instructed the jury not to use the Index to evaluate Defendants' arguments, and no evidence establishes that the jury

disregarded the instruction. *See Jolley v. Energen Res. Corp.*, 2008-NMCA-164, ¶ 28, 145 N.M. 350, 198 P.3d 376 ("There is a presumption that the jury understood and complied with the court's instructions." (internal quotation marks and citation omitted)); *see also United States v. Wiley*, 846 F.2d 150, 157-58 (2d Cir. 1988) (affirming the district court's decision that the jury's inadvertent exposure to the government's exhibit list was harmless and "[a]ny possible prejudice was cured by the district court's prompt inquiry and curative instruction" (omission, internal quotation marks, and citation omitted)). Because the error was caught and quickly corrected, we conclude that there is no "reasonable probability" that the Index would have affected the jury's verdict.

B. The Content of the Index and the Nature of the Jury's Verdict

{10} Plaintiffs nonetheless argue that the contents of the Index necessarily prejudiced the jury and impacted the verdict. Primarily, Plaintiffs focus on titles that reference workers' compensation benefits and argue that those titles exposed the jury to inadmissible collateral source evidence. The collateral source rule provides that "compensation received from a collateral source does not operate to reduce damages recoverable from a wrongdoer." *Gonzagowski v. Steamatic of Albuquerque, Inc.*, 2023-NMSC-016, ¶ 19, 533 P.3d 1068 (alteration, internal quotation marks, and citation omitted). In the present case, the district court granted Plaintiffs' pretrial motion to exclude evidence of collateral source payments, including workers'

compensation benefits, but several of the entries on the Index referred to such benefits. Plaintiffs argue that there is a reasonable probability that the references on the Index to workers' compensation benefits swayed the jury away from entering a verdict in the Plaintiffs' favor. We disagree.

{11} For multiple reasons, the record does not establish that the jury was affected by the collateral source information that was listed on the Index. Plaintiffs submitted at least one exhibit that referred to workers' compensation benefits.[1] On Plaintiffs' request, the district court instructed the jury mid-trial to disregard any evidence of insurance or benefits after Defendants asked Mr. Warmuth a question that Plaintiffs believed was leading to benefits-related information. The jury received only the Index, not the exhibits, and on reviewing the Index, the jury did not ask to see any exhibits related to workers' compensation benefits. To the extent that the juror affidavit suggested that the jury learned of possible workers' compensation benefits during deliberations, it does not establish that the Index was the exclusive source of that knowledge. Indeed, the record establishes that the jury was exposed to collateral source information before the Index was submitted to the jury, and the affidavit notes only that the Index was reviewed and that "[i]t came to the jurors' attention during deliberations that [Mr.] Warmuth *may* have received workers['] compensation

[1] Exhibit 50, the life care plan, includes several references to workers' compensation benefits (*see, e.g.*, pages 27, 30, 39, 44, and 46).

benefits." The language of the affidavit highlights that its purpose was to establish the first *Kilgore* requirement—that the Index reached the jury. The affidavit does not, because it cannot, speak to the third *Kilgore* requirement and whether the Index affected the jury. *See* 2010-NMSC-040, ¶ 21 (explaining that the *Kilgore* test is objective because Rule 11-606(B)(1) prevents jurors from testifying about deliberations or mental processes). Nor does the affidavit indicate *when* the potential for workers' compensation benefits came to the jury's attention and as a result, cannot rebut the curative impact of the district court's instruction. Not only could the affidavit have been referring to other evidence, but as the district court noted, jurors bring their common knowledge to deliberations, including existing information about employment benefits. *See Mann*, 2002-NMSC-001, ¶ 27 (explaining that a juror's "use of their extrinsic knowledge in the deliberative process does not fall into the category of extrinsic influence." (internal quotation marks and citation omitted)).

{12} The jury's decision that Defendants were not liable similarly supports the conclusion that the collateral source information referenced on the Index was not likely to have affected the jury's verdict, because collateral source evidence pertains to damages, which is an issue the jury did not reach in this case. The jury found no liability—that Defendants were not negligent and their product did not present an unreasonable risk of injury. *See* UJI 13-1601 NMRA (defining negligence); UJI 13-

1402 NMRA (defining the duty of a supplier for a products liability claim). Evidence of collateral source payments was relevant to damages and would have shown that Plaintiffs received compensation for the injuries that they alleged were at least partially caused by Defendants' acts. *See Gonzagowski*, 2023-NMSC-016, ¶ 19. But the jury was instructed "not to engage in any discussion of damages unless [it had] first determined that there [was] liability." The disconnect between the basis for the jury's verdict in this case and the collateral source information contained on the index supports the district court's ruling. *See Young v. Gila Reg'l Med. Ctr.*, 2021-NMCA-042, ¶ 32, 495 P.3d 620 (holding that an error pertaining to damages is harmless when "a plaintiff does not prevail on liability" (internal quotation marks and citation omitted)); *Gonzagowski*, 2023-NMSC-016, ¶ 19 (defining inadmissible collateral source evidence in terms of damages).

{13} We are not persuaded by Plaintiffs' argument that collateral source information is so prejudicial that courts assume that the impact extends beyond damages to infect the liability determinations of juries. In none of the cases cited by Plaintiffs was the jury either exposed to an Index of exhibits that referenced types of collateral sources of payment—not the exhibits themselves—or directly instructed to disregard the information at nearly the time that it was received. In some of these cases, collateral source information was admitted as evidence and no curative instruction was given. *See Tipton v. Socony Mobil Co.*, 375 U.S. 34, 35-36 (1963);

Phillips v. W. Co. of N. Am., 953 F.2d 923, 929-30 (5th Cir. 1992). In other cases, the question was purely evidentiary and the Court did not consider the impact of a curative instruction. *See Eichel v. N.Y. Cent. R.R. Co.*, 375 U.S. 253, 254-55 (1963); *Wilhelm v. Atlanta Gas Light Co.*, 380 S.E.2d 276, 277 (Ga. Ct. App. 1989); *Cates v. Wilson*, 361 S.E.2d 734, 737, 740 (N.C. 1987). In two cases, the district court communicated to the jury that the plaintiff received collateral source evidence payments. *See Doucet v. Gulf Oil Corp.*, 783 F.2d 518, 523 (5th Cir. 1986) (instructing the jury); *Wilcox v. Clinchfield R.R. Co.*, 747 F.2d 1059, 1060-62 (6th Cir. 1984) (responding to a jury note). In at least one case, a curative instruction was insufficient because a party repeatedly referred to collateral source information during trial, contrary to an earlier ruling by the district court. *Wilson v. IHC Hosp., Inc.*, 2012 UT 43, ¶¶ 2, 54-60, 289 P.3d 369. The circumstances of those cases are markedly different than the present context, and the broad principles set forth in these cases do not assist Plaintiffs' specific argument. Just because collateral source evidence is generally known to be prejudicial does not mean that the references to collateral source evidence on the Index must have impacted the jury's liability verdict. It cannot be escaped that collateral source information is tied to damages, that the jury did not reach the question of damages, and that the jury was instructed not to consider evidence about damages until after determining liability. For these reasons, the nature and circumstances of the no-liability verdict support the district

court's determination that it was reasonably probable that the references to collateral source evidence within the Index's titles did not impact the jury's verdict.

{14} Plaintiffs, however, do not rely only on the references to collateral source evidence but also point out that (1) many of the titles listed on the Index supported the evidence that Defendants relied on to shift the blame to other actors, including Mr. Warmuth, and to minimize their own roles and duties; and (2) the Index included a "mountain range of evidence" that reinforced Defendants' argument to the jury that they had provided more exhibits than Plaintiffs. Plaintiffs contend that the titles listed on the Index "could certainly have overwhelmed the jury with descriptions of information that supported the defense" and that therefore, "it is reasonably probable that the extraneous material affected the verdict or a typical juror." This argument suggests that *Kilgore*'s fifth probability inquiry requires us to look to the evidence and theories presented by the prevailing party at trial and conclude that if the extraneous material supported those theories, a reasonable probability arises that the extraneous material affected the jury. But this construction of *Kilgore* would focus entirely on prejudice—in the present case, that the Index unfairly reinforced Defendants' case—without any consideration of the strength of the evidence. The *Kilgore* Court instead framed the analysis to consider the probable prejudicial impact of the extraneous material in light of the strength of the prevailing party's case. 2010-NMSC-040, ¶¶ 21, 23. We thus consider the strength of the evidence and then

whether in light of that evidence, a reasonable probability arises that the extraneous material affected the jury's verdict.

C. The Strength of Defendants' Evidence and the District Court's Decision

{15} Defendants presented evidence to support its defense, and on appeal, Plaintiffs raise no challenge to the sufficiency of that evidence. Multiple experts testified that other parties, including Mr. Warmuth, acted negligently or were the primary cause of the accident. Another expert testified that Defendants met the requisite standards of care with regard to negligence and products liability. Nevertheless, Plaintiffs argue that the jury's exposure to the Index "encouraged" a decision "based on evidence that was not produced in open court, exactly the opposite of what the jury instructions require" and that the Index therefore unfairly reinforced Defendants' case. To the contrary, however, the trial record and the verdict suggest that the jury was persuaded by Defendants' evidence that they breached no duty and took no unreasonable risk rather than by the titles of documents that they were instructed not to consider. *See Jolley*, 2008-NMCA-164, ¶ 28 (presuming that juries understand and comply with instructions).

{16} Our inquiry is whether the denial of Plaintiffs' motion for a new trial, based on the jury's receipt of extraneous material, was an abuse of discretion. *See Kilgore*, 2010-NMSC-040, ¶ 20. To deny Plaintiffs' motion, the district court considered (1) the nature of the Index as a list of exhibits rather than the exhibits themselves; (2)

the relationship between the collateral source listings and the jury's no-liability verdict; (3) Plaintiffs' evidence that Mr. Warmuth was injured on the job; (4) Defendants' question suggesting that collateral source benefits may have been received, and the district court's midtrial follow-up instruction not to consider "employment related benefits"; and (5) the curative instruction that followed the discovery that the jury had received the Index. For the reasons we have explained, considering the strength of Defendants' case as supported by the evidence at trial, the district court's analysis was not "clearly against the logic and effect of the facts and circumstances of the case" and did not "misapprehend[] or misappl[y] the law." *See Lymon*, 2021-NMSC-021, ¶ 12.

{17} Plaintiffs remaining arguments do not dissuade us. Plaintiffs argue that the district court should have held an evidentiary hearing and that submission of the Index violated their constitutional right to a fair trial. As to the first, although Plaintiffs initially requested an evidentiary hearing, at the motion hearing, Plaintiffs agreed that the district court "ha[d] enough information . . . to make this decision" and did not "need an evidentiary hearing." Thus, though *Kilgore* recommends an evidentiary hearing to allow a party seeking a new trial the "opportunity to find out whether the intrusion affected the jury's deliberations and thereby its verdict," Plaintiff waived this opportunity. *See* 2010-NMSC-040, ¶ 28 (alteration, internal quotation marks, and citation omitted); *cf. State v. Chavarria*, 2009-NMSC-020, ¶ 9,

146 N.M. 251, 208 P.2d 896 (recognizing that even statutory and constitutional rights are subject to waiver). As for Plaintiffs' constitutional argument, the entire *Kilgore* test is rooted in due process protections. *See* 2010-NMSC-040, ¶ 13 ("[U]nauthorized communications to the jury in state courts must be judged by the federal requirements of due process." (internal quotation marks and citation omitted)). It is clear that "due process does not require a new trial every time a juror has been placed in a potentially compromising situation" but instead requires only "a jury capable and willing to decide the case solely on the evidence before it." *Id.* ¶ 28 (internal quotation marks and citation omitted). In *Kilgore*, to safeguard this right, our Supreme Court mandated that the three-part test that we have described be used to determine whether due process requires a new trial. *Id.* ¶¶ 21, 24-25, 28. Because we conclude that the district court used the appropriate test and did not otherwise abuse its discretion, we also conclude that no due process violation occurred.

{18} Plaintiffs argue that the district court strayed from the *Kilgore* analysis and improperly turned to *Mann*. We disagree. The district court analyzed Plaintiffs' argument and arrived at the final conclusion based on the *Kilgore* factors. The district court cited *Mann* to observe that "jurors may rely on their own backgrounds and common sense" and analogized the present case to the facts from *Mann*, in which a juror relied on his experience with probability calculations. *See* 2002-NMSC-001,

¶¶ 27, 30. In that context, our Supreme Court concluded that jurors who use experience in line with the expert testimony presented at trial do not bring "extraneous prejudicial information" before the jury. *Id.* ¶ 35. The district court considered this evaluation in *Mann* to be akin to the jurors using their life experience to interpret the references to worker's compensation that had been scattered throughout the trial. While *Kilgore* repudiated any presumption of prejudice that was referenced in *Mann*, our Supreme Court has not overruled *Mann*. *Kilgore*, 2010-NMSC-040, ¶¶ 1, 29. The *Mann* Court itself cast doubt on the presumption of prejudice. 2002-NMSC-001, ¶ 36. We therefore discern no error in the district court's analogy to *Mann*.

{19} In summary, Plaintiffs established the first two *Kilgore* requirements but not the third. The Index reached the jury and it related to the matter being tried. *See* 2010-NMSC-040, ¶ 21 (describing the first two *Kilgore* requirements as follows: "(1) material extraneous to the trial actually reached the jury, [and] (2) the extraneous material relates to the case being tried"). As to the third requirement, whether "it is reasonably probable that the extraneous material affected the jury's verdict or a typical juror," *id.*, several factors weigh in favor of a new trial. The Index was sent to the jury, likely at the start of deliberations, and the jury had access to and viewed the titles for at least two hours before reaching a verdict. *See id.* ¶ 23. But the fifth factor weighs very heavily against a new trial. Given the overall strength of

Defendants' evidence, the prompt curative instruction, the subject matter of the extraneous information, and the basis for the verdict, it is not probable that the Index affected the jury's verdict. *See id.* (describing the fifth *Kilgore* factor). In the present case, but maybe not every case, this fifth probability factor is the most persuasive to determine objectively that there is not a reasonable probability that the extraneous material affected the jury's verdict. *See id.* ¶ 21. The jury entered a no-liability verdict after hearing evidence over eight days, from dozens of witnesses, including multiple experts and Plaintiffs themselves. Under these circumstances, the district court did not abuse its discretion in denying the motion for a new trial.

II. Defendants' Cost Bill

{20} On cross-appeal, Defendants argue that the district court erred when it denied their cost bill. In relevant part, under Rule 1-054(D)(1) NMRA, "costs, other than attorney fees, shall be allowed to the prevailing party unless the court otherwise directs." *See Apodaca v. AAA Gas Co.*, 2003-NMCA-085, ¶ 103, 134 N.M. 77, 73 P.3d 215 ("The [r]ule, therefore, creates a presumption that the prevailing party is entitled to costs."). In order for an objecting party to overcome the presumption of paying costs to the prevailing party, the objecting party must show "bad faith on [the prevailing party's] part, misconduct during the course of the litigation, that an award to [the prevailing party] would be unjust, or that other circumstances justify the denial or reduction of costs." *Key v. Chrysler Motors Co*. (*Key II*), 2000-NMSC-

010, ¶ 6, 128 N.M. 739, 998 P.2d 575; *see also Helena Chem. Co. v. Uribe*, 2013-NMCA-017, ¶ 54, 293 P.3d 888 (noting that "[a]dditionally, the district court, upon a showing of equitable grounds, may restrict, apportion, or disallow costs" (alterations, internal quotation marks, and citation omitted)). This Court defers to the district court's "discretion in assessing costs, and its ruling will not be disturbed on appeal unless it was an abuse of discretion." *Key II*, 2000-NMSC-010, ¶ 7 (internal quotation marks and citation omitted). Evidence, however, must support the district court's determination that the presumption in favor of costs has been overcome. *See id.* ¶ 9 (concluding that no evidence supported the district court's findings that the cost presumption had been rebutted). Defendants argue that Plaintiffs did not overcome the presumption that the prevailing party is to be awarded costs, that the district court abused its discretion in finding that Plaintiffs did overcome the presumption, and that the district court otherwise "foreclosed" the opportunity for Defendants to conduct discovery to investigate Plaintiffs' financial situation. We turn to the record to evaluate these arguments. *See id.* (considering the evidence in the record to support the district court's findings related to the denial of costs).

{21} Following the entry of final judgment, Defendants requested recovery of costs. Plaintiffs sought an extension of time to file objections—essentially, Plaintiffs wanted the district court to rule on the motion for a new trial before they filed objections to the cost bill. The district court denied the motion for a new trial on

November 20, 2023, and Plaintiffs filed objections to the cost bill on December 4, 2023. In their objection to Defendants' cost bill, Plaintiffs argued that they could not pay the bill and that the disparity of resources between the parties counseled against a cost award. Plaintiffs included an affidavit from Mr. Warmuth as well as evidence about Defendants' financial achievements in 2022. The day after Plaintiffs filed the objections, the district court set a hearing for December 19, 2023.

{22} Defendants did not file a written response to Plaintiffs' objections, but at the hearing, argued that Plaintiff had not provided a complete financial picture—the affidavit about Plaintiffs' financial situation did not include pretrial settlements with two other parties or financial assistance that Plaintiffs had received. Defendants stated that if Plaintiffs "would insist in the argument that [Plaintiffs] have no money, [Defendants] will submit [they're] entitled to discovery on [Plaintiffs'] financial condition under Rule 1-069(A) [NMRA]." Plaintiffs argued costs should be denied based on Defendants' misconduct regarding the Index, financial inability to pay, disparity of income, and the chilling effect that a punitive costs award could have on the public's ability to test whether companies were meeting their duties regarding product quality.

{23} During Plaintiffs' argument, the district court asked why the settlements with other parties were not relevant, and Plaintiffs responded that if the court was "asking for the settlement agreement . . . it could be provided." Plaintiffs also noted that it

had been five months since the entry of judgment, and Defendants had not sought the settlement agreement. Defendants explained that no discovery about indigency had been conducted because they would not "possibly have imagined that [Plaintiffs] would claim indigency" when Defendants had "reason to believe" the settlement was "between two and three million." The district court rejected Plaintiffs' argument that Defendants engaged in any misconduct regarding the Index and instead determined that "financial disparity" and "the chilling effect on future litigation" justified denying costs to Defendants. Specifically, the district court stated,

> All right, the Court has reviewed all of the pleadings and the case law and—specifically in *Apodaca*—in *Apodaca*, the settlement with [a third party] was part of the litigation and the court had looked at that sealed agreement in camera regarding an evidentiary hearing. Here, we just don't have that. I'm not going to ask to inspect that settlement agreement. I'm also not going to find—regarding misconduct, I don't know that I think that it was any type of intentional. However, I am persuaded based on the financial disparity and the court's concern that—and it was addressed in several of the cases, specifically in some of the federal cases—the court can consider the chilling effect on future litigation. So, I am going to deny the cost bill at this time based on the financial disparity of the parties alone. And that's my sole reason.

After the oral ruling, the parties could not agree on the form of order.

{24} At the presentment hearing on the order, Plaintiffs argued that the district court's ruling on financial disparity encompassed their inability to pay, and Defendants maintained that district court's only basis for denying costs must have been the disparity of wealth between the parties because the district court declined to review the terms of the settlement agreement. The district court stated,

> Is it fair to say that neither party presented me with the settlement agreement? Because neither party did. You argued that it was a large settlement. You opined that it was several figures. I believe [Plaintiffs] objected because it was a sealed agreement and how would you know how many figures it was. So, neither party presented me with that settlement agreement to consider.

Defendants agreed that the district court had not seen the settlement agreement—and noted that they also had not seen the agreement and that the district court "declined at the hearing" to review the document in camera. The district court observed that "it was probably inherent in [the court's] statement that disparate resources includes an inability to pay." The district court continued and explained that it did not review the settlement agreement in camera because "no one else had seen it," the court did not "want any surprises," and the parties to the settlement "had not specifically given permission for the court to review it in camera." The written order denying Defendants' cost bill gives three reasons: inability to pay, disparity of income, and the threat of chilling future products liability litigation.

{25} These three bases for the district court's decision demonstrate that contrary to Defendants' argument, the district court did not conflate the ability to pay with disparity of income. It is well established that denial of costs is not justified by a disparity of resources without consideration of the objector's ability to pay. *Apodaca*, 2003-NMCA-085, ¶ 103. Despite the ambiguity of the oral ruling at the costs hearing, the district court explained at the presentment hearing that the intention had been to include an inability to pay within the concept of disparity of

resources. The written order reflected that the denial of costs was based on more than disparity of income alone but also included a finding that Plaintiffs could not pay, as approved by this Court in *Apodaca*.[2]

{26} The record and the evidence presented with the objections to Defendants' cost bill support the district court's determination that Plaintiffs could not pay. As the district court noted, neither party actually presented the settlement agreement for any type of review by the court. *See id.* (rejecting an argument that the district court abused its discretion by not considering a settlement when the party never requested that the court order the disclosure of the settlement). Before and throughout the trial, the district court heard evidence from both parties about collateral source benefits for both Plaintiffs, including workers' compensation and social security benefits. The district court knew that Plaintiffs settled with MCT. The parties provided notice to the district court of the MCT settlement and the settlement was raised during the litigation over collateral source payments. And as we have set forth, the parties discussed the fact of settlement during the litigation about costs. The district court received evidence in the affidavit that Mr. Warmuth would likely require nearly $1

[2]Because the district court found that Plaintiffs had an inability to pay, we are unpersuaded by Defendants' position that the disparity of financial resources did not correlate to a disparity of legal resources. The disparity of income is not irrelevant if Plaintiffs cannot pay a judgment, despite the availability of comparable legal resources. *See Key II*, 2000-NMSC-010, ¶ 15 ("[D]isparity of wealth between the parties, without additional evidence of the losing party's inability to pay or bad faith of the prevailing party, is not enough to justify a reduction in the cost award.").

million for future medical needs, that he had lost $41,206 per year in the ability to earn income, and that he and his wife's combined income would be between approximately $14,660 and $24,235. Mr. Warmuth's affidavit stated that he had difficulty maintaining employment after the accident, that his wife could not work because he needed care, that their income derived from disability benefits, and they used their $50,000 in savings for living expenses. Mr. Warmuth confirmed that he and his wife would need to file for bankruptcy if ordered to pay costs.

{27} Defendants' argument assumes that the district court disregarded all of this information. But the evidence also supports a contrary conclusion that even if Plaintiffs received these other sources of income, they still had insufficient funds to cover the cost bill and meet the ongoing medical and subsistence needs. Thus, we decline to hold that the district court must know the exact settlement amount to determine inability to pay—if the record otherwise supports inadequate income, which in the present case, it did. *See Apodaca*, 2003-NMCA-085, ¶¶ 106-108 (affirming the denial of costs based on evidence that the plaintiff could work only part time, had income a little over $15,000 a year, and expected to incur future medical costs); *Gallegos ex rel. Gallegos v. Sw. Cmty. Health Servs*., 1994-NMCA-037, ¶¶ 23, 31, 117 N.M. 481, 872 P.2d 899 (affirming the denial of costs when the plaintiffs argued that they would be forced to file for bankruptcy if ordered to pay costs); *cf. Key II*, 2000-NMSC-010, ¶ 9 (reversing the denial of costs when no

evidence supported the inability to pay); *State ex rel. Udall v. Wimberly*, 1994-NMCA-121, ¶ 18, 118 N.M. 627, 884 P.2d 518 (affirming the award of costs when the objector owned four companies and did not present evidence that separated personal from company finances).

{28} Defendants argue that "the district court lacked a key piece of evidence (the amount of the MCT settlement) when it made the necessary findings about Plaintiffs' finances." Defendants cite Chief Judge Hartz's separate opinion in *Key v. Chrysler Motors Corp.* (*Key I*), which noted the lack of evidence of the objecting party's "personal wealth" or "financial condition." 1999-NMCA-028, ¶ 25, 127 N.M. 38, 976 P.2d 523 (Hartz, C.J., concurring in part and dissenting in part), *rev'd in part* 2000-NMSC-010, ¶ 22. Our Supreme Court agreed that the objecting party in *Key* had provided no evidence at all, apart from an inaccurate characterization of the evidence, to establish the inability to pay. *Key II*, 2000-NMSC-010, ¶ 14. Neither Chief Judge Hartz nor our Supreme Court identified specific evidence that was necessary in order to substantiate the inability to pay. Defendants advocate for the stringent requirements set forth in federal cases, "a fair and accurate balance sheet" that reflects expenses, liabilities, assets, and income—but the district court credited Plaintiffs' evidence, including Mr. Warmuth's affidavit, that their available resources were insufficient to pay a cost award. Put another way, Defendants assumed that the settlement money changed Plaintiffs' financial picture but Mr.

Warmuth's affidavit attested to the contrary, and Defendants did not present any rebuttal evidence.

{29} Defendants respond that the district court foreclosed the opportunity to do so and suggest that Plaintiffs should have provided additional evidence at the presentment hearing. Defendants contend that they asked for "an opportunity to learn the amount of the MCT settlement" and that a five-minute recess could have resolved the matter. At the costs hearing, however, Defendants acknowledged the confidentiality of the settlement amount "between Plaintiffs and MCT" and Defendants submitted that they "were entitled to discovery" regarding Plaintiffs' "financial condition under Rule 1-069(A)." Rule 1-069 permits the court to issue a subpoena for in-court questioning of "any person with knowledge that will aid in enforcement of or execution on the judgment" or discovery "in any manner provided in these rules." Contrary to Defendants' position on appeal, the type of discovery they contemplated at the costs hearing involved a subpoena or a discovery request for confidential information and not merely a recess. Defendants requested no such subpoena and made no discovery request. The district court indicated only that the *court* would not ask to see the settlement but gave no indication that Defendants would be foreclosed from pursing the information. By the time of the presentment hearing, the district court had already credited Plaintiffs' evidence that they could

not pay, and Plaintiffs had no reason to supply more evidence nor did Defendants offer any rebuttal or request more time.

{30} Apart from the settlements and income, Defendants argue that the costs should not have been denied based on any chilling effect on litigation and that individuals should be discouraged from pursuing the type of untenable claims that they assert Plaintiffs brought. Because we conclude that the evidence supports the district court's findings related to Plaintiffs' inability to pay and the disparity of the parties' income, we need not consider Defendants' policy arguments.

{31} The district court based its reasoning on evidence of Plaintiffs' inability to pay and the disparate resources of the parties. As a result, we conclude that the district court did not abuse its discretion in denying Defendants' cost bill.

CONCLUSION

{32} We affirm.

{33} **IT IS SO ORDERED.**

Katherine A. Wray

KATHERINE A. WRAY, Judge

WE CONCUR:

Jacqueline R. Medina

JACQUELINE R. MEDINA, Chief Judge

ZACHARY A. IVES, Judge