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6 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

7 **MICHAEL CULLEN, CYNTHIA CULLEN,**
8 **JOHN POLK, and ARTHA POLK,**

9 Plaintiffs-Appellants,

10 v.

NO. 28,557

11

Consolidated with NO. 28,868

12 **DAVID AUBREY and JOYSREE AUBREY,**

13 Defendants-Appellees.

14 **APPEAL FROM THE DISTRICT COURT OF RIO ARRIBA COUNTY**

15 **Barbara J. Vigil, District Judge**

16 Law Office of Jeffrey E. Jones

17 Jeffrey E. Jones

18 Santa Fe, NM

19 for Appellees

20 David A. Archuleta

21 Albuquerque, NM

22 for Appellants

23 John R. Polk

24 Albuquerque, NM

1 Pro Se Appellants

1 **MEMORANDUM OPINION**

2 **ROBLES, Judge.**

3 Michael Cullen, Cynthia Cullen, John Polk, and Artha Polk (Plaintiffs) appeal
4 the district court’s granting of summary judgment in favor of David Aubrey and
5 Joysree Aubrey (Defendants) on the claims of trespass, intentional infliction of
6 emotional distress, negligent hiring, and injunctive relief, all under the doctrine of
7 respondeat superior (No. 28,557). On appeal, they allege that (1) the district court
8 erred in finding, as a matter of law, that the poisoning of Plaintiff Cullens’ dogs was
9 not causally connected to Anthony Jurca’s relationship with Defendants; (2) the
10 district court erred in granting summary judgment on Plaintiffs’ negligent hiring
11 claim; and (3) there was a contested issue of fact concerning whether Jurca had
12 apparent authority to act as Defendants’ employee in maintaining their property.
13 Seven days after the district court entered its judgment, Defendants filed a cost bill.
14 While the issue of costs was pending, Plaintiffs appealed the order on the motion for
15 summary judgment (No. 28,577). *See generally Kelly Inn No. 102, Inc. v. Kapnison,*
16 *113 N.M. 231, 824 P.2d 1033 (1992), limited on other grounds by Trujillo v. Hilton*
17 *of Santa Fe, 115 N.M. 397, 851 P.2d 1064 (1992).* Under the district court’s collateral
18 jurisdiction, costs were awarded to Defendants, which Plaintiffs likewise appealed
19 (No. 28,868). We have consolidated both cases in this Opinion and, after discussing

1 Plaintiffs’ first point within the context of employer-employee relations and scope of
2 employment, we conclude that this issue is dispositive on the summary judgment issue
3 and requires affirmance. Accordingly, we address Plaintiffs’ second appeal, which
4 we develop later in this Opinion. On the issues of costs, we affirm in part, reverse in
5 part, and remand in part for entry of costs not inconsistent with this Opinion.

6 **I. BACKGROUND**

7 In 2005, Plaintiff Polk and his neighbors sued Defendants for easement rights
8 over the use of a road on Defendants’ property. The case was “particularly
9 acrimonious.” On June 2, 2006, while the easement suit was pending, Plaintiff
10 Cullens’ dog, Goose, died. After conducting an autopsy and forensic testing for
11 poisoning at the Veterinary Diagnostic Service located in the office of the medical
12 examiner in Albuquerque, it was determined that Goose died from consuming elk
13 meat poisoned with “gopher bait.” After searching Plaintiffs’ property, similar
14 poisoned meat was discovered which, after DNA testing at the Black Hills State
15 University, was determined to be from the same elk with a one in twenty-four billion
16 chance that the sample would match another animal by coincidence. Several days
17 later, Plaintiff Cullens’ other dog, Spooner, was also poisoned by elk meat and
18 required veterinary care.

1 Plaintiffs alleged that Defendants hired Jurca as a handyman, who was
2 responsible for the placement of the poisoned elk meat on Plaintiffs' property. During
3 deposition, Defendants admitted that they made no inquiries into Jurca's background
4 and were unaware that he had previously been convicted of poaching and driving
5 while intoxicated. Instead, Defendants stated that Jurca lived in the area, and they met
6 him while walking the boundaries of their property one day. On occasion, Jurca did
7 odd jobs for Defendants, such as working on a fence, cutting wood, and demolishing
8 an old cabin. By affidavit, Defendants averred that they paid Jurca by the job, but did
9 not provide him with benefits, a uniform, or set hours for him to work. Likewise, they
10 did not direct the method by which he performed the work that he did, nor did they
11 order or suggest that he kill anyone's dogs or "harm anyone or anything." A
12 witness for Plaintiffs, James Franklin House, who also lives in the area, was deposed
13 and provided an affidavit. In his deposition, he stated that he gave Jurca two packages
14 of elk meat just a couple of days before the poisoning. In his affidavit, he stated that
15 Jurca had told him on several occasions that he was employed by Defendants and that
16 he and Defendants had "great plans" for developing Defendants' property.

17 Plaintiff Polk provided an affidavit in which he stated that he acted as the
18 attorney in the easement lawsuit. He claims that at a hearing in that case, Jurca

1 appeared as a witness, and counsel for Defendants represented that Jurca was
2 Defendants' employee.

3 On January 17, 2008, Defendants moved for summary judgment, alleging that
4 Jurca was not an employee, nor was he instructed within the scope of his employment
5 to place poison on Plaintiffs' property. Excerpts of depositions and affidavits were
6 attached in support of their motion. Plaintiffs responded in opposition with affidavits
7 and excerpts of depositions, and a hearing was held on the motion on March 3, 2008.
8 At the conclusion of the hearing, the district court found that no material facts were
9 in dispute, and there was no admissible evidence that would support a cause of action
10 against Defendants. Further, the district court found that Jurca was not an employee
11 of Defendants, nor did Defendants have any control over his actions. There was no
12 showing that any wrongdoing of Jurca was "remotely connected to [Defendants']
13 relationship with him." On March 14, 2008, the district court entered an order
14 dismissing Plaintiffs' suit with prejudice and entering a judgment in favor of
15 Defendants "as a matter of law."

16 **II. DISCUSSION**

17 **A. Summary Judgment**

18 On appeal, summary judgment will be affirmed if there is no evidence creating
19 a reasonable doubt about a genuine issue of material fact, and the moving party is

1 entitled to judgment as a matter of law. *Cain v. Champion Window Co. of*
2 *Albuquerque, LLC*, 2007-NMCA-085, ¶ 6, 142 N.M. 209, 164 P.3d 90. Reasonable
3 inferences are resolved in favor of the non-moving party, and pleadings, affidavits,
4 depositions, answers to interrogatories, and admissions are viewed in a light most
5 favorable to a trial on the merits. *See Carrillo v. Rostro*, 114 N.M. 607, 615, 845 P.2d
6 130, 138 (1992). Once the moving party has made a prima facie showing of the
7 absence of a genuine issue of a material fact, the burden shifts to the non-moving
8 party to show a reasonable doubt as to the existence of a genuine issue for a trial on
9 the merits. *Hansler v. Bass*, 106 N.M. 382, 383, 743 P.2d 1031, 1032 (Ct. App.
10 1987). The non-moving party cannot simply rely on allegations in their complaint or
11 on the argument of counsel to defeat summary judgment. *Ciup v. Chevron U.S.A.,*
12 *Inc.*, 1996-NMSC-062, ¶ 7, 122 N.M. 537, 928 P.2d 263. The standard of review on
13 summary judgment is de novo. *Self v. United Parcel Serv., Inc.*, 1998-NMSC-046,
14 ¶ 6, 126 N.M. 396, 970 P.2d 582.

15 **1. Employer-Employee Relationship**

16 As a threshold issue, we must review the evidence presented by Defendants and
17 determine if they made a prima facie case. *See Savinsky v. Bromley Group, Ltd.*, 106
18 N.M. 175, 176, 740 P.2d 1159, 1161 (Ct. App. 1987) (observing that the defendant
19 established a prima facie case for purposes of summary judgment by showing that it

1 did not have the ability to control the work of the alleged employee). We employ
2 agency analysis to determine if an individual is an independent contractor or an
3 employee. *Celaya v. Hall*, 2004-NMSC-005, ¶ 11, 135 N.M. 115, 85 P.3d 239.
4 Under this analysis, we consider whether the supposed employer has the right to
5 control the supposed employee. *Id.* New Mexico has adopted the Restatement
6 (Second) of Agency § 220 (1958) factors into the calculus of determining the right
7 to control. *Celaya*, 2004-NMSC-005, ¶ 14. This approach considers the degree of
8 control exercised over the details of the work being performed, but it is not exclusive.
9 *Id.* ¶ 15.

10 Other considerations include: 1) the type of occupation and whether it
11 is usually performed without supervision; 2) the skill required for the
12 occupation; 3) whether the employer supplies the instrumentalities or
13 tools for the person doing the work; 4) the length of time the person is
14 employed; 5) the method of payment, whether by time or job; 6) whether
15 the work is part of the regular business of the employer; 7) whether the
16 parties intended to create an employment relationship; and 8) whether
17 the principal is engaged in business. Furthermore, a complete analysis
18 may require an assessment not only of the relevant factors enumerated
19 in the Restatement, but of the circumstances unique to the particular
20 case.

21 *Celaya*, 2004-NMSC-005, ¶ 15 (citation omitted).

22 The above factors are viewed as a whole with no individual factor receiving
23 greater weight than another, and the presence or absence of a factor is not dispositive
24 of our analysis. *Id.* As we noted above, Defendants supplied depositions and

1 affidavits in support of their motion that supported a legal conclusion that Jurca was
2 not an employee, but an independent contractor. These undisputed facts demonstrated
3 that Jurca was paid by the job, was doing work unrelated to Defendants’ business, and
4 that Defendants never intended to create an employment relationship. As they stated,
5 “[w]e did not engage . . . Jurca as an employee.” Additionally, the type of work that
6 Jurca was asked to perform is not the type that is typically done with supervision, nor
7 does it require a high level of skill. “One who employs an independent contractor is
8 not liable to others for the wrongful acts or omissions of the contractor[.]” UJI 13-404
9 NMRA; *see* UJI 13-406 NMRA (“However, if you find that _____ (*name of*
10 *employee*) was not the employee of _____ (*name of employer*) . . . then
11 _____ (*name of employer*) is not liable to [the] plaintiff for any such act or
12 omission[.]”). Defendants’ motion for summary judgment adequately provided the
13 district court with facts that showed a lack of an employer-employee relationship.

14 Plaintiffs failed to rebut the prima facie showing of no employer-employee
15 relationship between Defendants and Jurca. As Defendants point out in their answer
16 brief, Plaintiffs never presented any evidence in opposition to summary judgment that
17 showed Jurca was supplied with the instrumentalities of work—whether it be tools or
18 poison—by Defendants. Plaintiffs contend that they provided evidence to create a
19 genuine issue of material fact regarding the relationship between Defendants and

1 Jurca, specifically that Jurca stated that he was an employee of Defendants. An
2 individual is not legally defined as an employee simply because he declares himself
3 as such. *See Celaya*, 2004-NMSC-005, ¶ 14 (concluding that right to control analysis
4 requires an inquiry into “many factors into the calculus of employee versus
5 independent contractor”); Restatement (Second) of Agency: Definition of Servant §
6 220(2)(a-j) (1958). Similarly, Plaintiffs’ affidavit which claims that Defendants’
7 counsel, prior to a hearing on an unrelated case, stated that Jurca was an employee in
8 explanation as to why he was being called as a witness in that case, is insufficient to
9 resist summary judgment. Defendants argue that had such a statement by their other
10 attorney in the unrelated easement case occurred, it would be inadmissible hearsay and
11 irrelevant in this case. However, even assuming that Defendants’ other attorney made
12 some type of statement about Jurca being employed by Defendants, and assuming it
13 would be admissible in this case, such facts would not change our analysis. Whether
14 an individual is defined as an employee or an independent contractor presents a mixed
15 question of law and fact. *Cf. State v. Foulentfont*, 119 N.M. 788, 790, 895 P.2d 1329,
16 1331 (Ct. App. 1995) (holding that whether a fence constituted a structure for
17 purposes of the burglary statute presented a legal question of statutory construction
18 in light of the definition/concept of a fence). We note that there is no claim that any
19 such statement was made in response to formal discovery or on the record in open

1 court. We therefore reason that an off-the-cuff remark that an individual is an
2 “employee” as opposed to the technically correct definition of an “independent
3 contractor,” cannot be expected to implant the qualities that make an employee an
4 employee. As the Restatement (Second) of Agency § 220 factors demonstrate, at best,
5 this evidence lends itself to “whether the parties intended to create an employment
6 relationship.” *Celaya*, 2004-NMSC-005, ¶ 15. When viewed through the lens of the
7 totality of the circumstances, and considering that the right to control factors are
8 assigned equal weight, we decline to see this fact as being dispositive of an employer-
9 employee relationship, let alone substantial enough to create a question of fact that
10 rises to the level of a reasonable doubt. *See Spencer v. Health Force, Inc.*,
11 2005-NMSC-002, ¶ 7, 137 N.M. 64, 107 P.3d 504 (“A movant for summary judgment
12 need only make a prima facie showing that there is no genuine issue of material fact,
13 and that on the undisputed material facts, judgment is appropriate as a matter of law;
14 *the burden then shifts to the opponent to show at least a reasonable doubt, rather than*
15 *a slight doubt*, as to the existence of a genuine issue of fact.” (emphasis added)
16 (internal quotation marks and citation omitted)).

17 In this case, Defendants’ pleadings established that Jurca was not an employee.
18 Plaintiffs failed to present any admissible evidence that would rebut this conclusion.

1 Thus, the district court’s entry of summary judgment in favor of Defendants as to this
2 issue was proper.

3 **2. Scope of Employment/Scope of Duties**

4 Even were we to determine that Jurca was an employee of Defendants, we
5 would still affirm because Plaintiffs did not rebut Defendants’ prima facie case
6 showing that Jurca’s actions were not sufficiently connected to the work he
7 performed, such that Defendants could be held liable for his actions. Generally,
8 “[l]iability . . . requires some nexus or causal connection between the principal’s
9 negligence in selecting or controlling an actor, the actor’s employment or work, and
10 the harm suffered by the third party.” Restatement (Third) of Agency § 7.05 cmt. c,
11 at 180 (2006).

12 In regard to the scope of Jurca’s work being somehow related to property
13 maintenance, it is an inferential leap to state that Jurca’s individual projects involving
14 wood and brush can somehow translate to “[t]aking action against neighborhood dogs
15 [being] within the scope of [his] duties.” See *Hansler*, 106 N.M. at 386, 743 P.2d at
16 1035 (“While a party opposing summary judgment is entitled to have reasonable
17 inferences drawn from the facts to reach [the] plaintiffs’ conclusions the trial court
18 would have had to stack one inference upon another inference. This is not permitted.”
19 (citation omitted)). “Generally, whether an employee is acting in the course and scope

1 of employment is a question of fact.” *Narney v. Daniels*, 115 N.M. 41, 48, 846 P.2d
2 347, 354 (Ct. App. 1992). However, “if, from the facts presented, only one reasonable
3 conclusion can be drawn, summary judgment is properly granted.” *Id.* at 47, 846 P.2d
4 at 353. The same rules that apply to scope of employment apply to the question of
5 scope of duties. *Medina v. Fuller*, 1999-NMCA-011, ¶ 22, 126 N.M. 460, 971 P.2d
6 851 (filed 1998). This Court has previously noted that the scope of an individual’s
7 duties encompasses what the employee is requested, required, or authorized to
8 perform. *Id.* ¶¶ 9-10. There must be some connection to the employee’s actions at the
9 time of the incident and the scope of the employee’s duties. *Celaya*,
10 2004-NMSC-005, ¶ 26. Here, Plaintiffs’ mere assertion that Jurca’s individual
11 projects on Defendants’ property is connected to the poisoning of Plaintiff Cullens’
12 dogs on Plaintiffs’ property is insufficient to establish a connection to Jurca’s scope
13 of duties.

14 The evidence that Defendants presented, as outlined above, established as a
15 matter of law that there was no nexus between contracting with Jurca and his
16 independent actions of placing poisoned meat on Plaintiffs’ property. *See F & T Co.*
17 *v. Woods*, 92 N.M. 697, 698, 594 P.2d 745, 746 (1979) (holding that an employer was
18 entitled to a directed verdict on the plaintiff’s negligent hiring and retention claims
19 based upon an employee’s rape of the plaintiff when the evidence showed that “[a]t

1 the time of the incident [the employee] was on his own time, was not acting within the
2 scope of his employment, was not in [the] defendant's business vehicle, and had no
3 authority from [the] defendant to enter [the] plaintiff's apartment"); *Cain*,
4 2007-NMCA-085, ¶ 18 (affirming summary judgment in favor of the defendant on the
5 basis that there was no negligent supervision where there was no nexus between an
6 employee who was on his own time and installing a stove in the plaintiff's home
7 without his employer's knowledge and his regular work which involved installing
8 windows).

9 Finally, in their brief-in-chief, Plaintiffs assert that Jurca videotaped, at
10 Defendants' request, Plaintiff Polk walking his dogs on Defendants' property. This
11 is not what the record shows. Defendants' deposition states that Jurca was loaned a
12 video camera while he was working on a fence and was asked to videotape to make
13 sure that a road that was being constructed by a contractor did not cross onto someone
14 else's property and to videotape if anyone harassed the contractor while he was
15 building. Jurca was not hired to videotape and, according to the record, only
16 videotaped the fire chief. This evidence does not provide the logical nexus that Jurca
17 was acting within the scope of his duties when poison was placed on Plaintiffs'
18 property.

1 **3. Plaintiffs' Other Claims**

2 As we have already held that Jurca was not an employee, and the evidence
3 presented was insufficient to establish a connection between Jurca's labor and the
4 injury suffered, we conclude that it is unnecessary to address Plaintiffs' negligent
5 hiring or apparent authority claims. Without a showing of any connection between
6 the work authorized and the harm suffered, Plaintiffs cannot hold Defendants liable
7 for contracting with Jurca, nor can they hold them responsible for this injury. *See* UJI
8 13-404 ("An independent contractor is one who agrees to do certain work where the
9 person who engages the contractor may direct the result to be accomplished but does
10 not have the right to control the manner in which the details of the work are to be
11 performed. *One who employs an independent contractor is not liable to others for the*
12 *wrongful acts or omissions of the contractor.*" (emphasis added)); *Lessard v.*
13 *Coronado Paint & Decorating Ctr., Inc.*, 2007-NMCA-122, ¶ 28, 142 N.M. 583, 168
14 P.3d 155 ("Negligence in hiring or retention is based on the employer's negligent acts
15 or omissions *in hiring or retaining an employee* when the employer knows or should
16 know, through the exercise of reasonable care, that the employee is incompetent or
17 unfit." (emphasis added)).

1 **B. Costs**

2 After an order on summary judgment was entered on March 14, 2008,
3 Defendants filed a costs bill amounting to \$2,140.77 which, after the hearing, was
4 granted in full by the district court. On appeal, Plaintiffs allege the district court erred
5 in granting costs with respect to (1) jury fees; (2) copies of exhibits; (3) depositions
6 used in support of summary judgment; (4) depositions not used in the trial or in
7 support of summary judgment; and (5) costs of medical records. We address each
8 issue in turn and develop the facts as needed.

9 A district court typically has the discretion to award costs to a prevailing party.
10 *Dunleavy v. Miller*, 116 N.M. 353, 362, 862 P.2d 1212, 1221 (1993). “The district
11 court should exercise this discretion sparingly when considering expenses not
12 specifically authorized by statute and precedent.” *Id.* at 363, 862 P.2d at 1222. “The
13 right of a prevailing party to recover costs incurred in litigation is by virtue of
14 statutory authority, or by rule of the court as authorized by statute.” *Jimenez v. Found.*
15 *Reserve Ins. Co.*, 107 N.M. 322, 327, 757 P.2d 792, 797 (1988); *see* Rule 1-054(D)(2)
16 NMRA (“Costs generally are recoverable only as allowed by statute, Supreme Court
17 rule and case law.”). Costs are typically reviewed under an abuse of discretion
18 standard. *See H-B-S P’ship v. Aircoa Hospitality Servs., Inc.*, 2008-NMCA-013, ¶ 24,
19 143 N.M. 404, 176 P.3d 1136 (filed 2007). However, the interpretation of a statute

1 or rule of the court that allows a district court discretion is a task we undertake de
2 novo. *See State ex rel. State Eng'r v. Comm'r of Pub. Lands*, 2009-NMCA-004, ¶ 7,
3 145 N.M. 433, 200 P.3d 86 (filed 2008), *cert. granted*, 2008-NMCERT-011, 145
4 N.M. 531, 202 P.3d 124.

5 **1. Jury Fees**

6 Jury fees are typically recoverable costs if they are filed pursuant to Rule 1-038
7 NMRA. Rule 1-054(D)(1)(c). Rule 1-038(B)(3) provides:

8 If any party initially demands a six-person jury, any other party
9 may demand a twelve-person jury by serving upon the other party or
10 parties a demand therefor in writing after the commencement of the
11 action and not later than ten (10) days after service of a six-person jury
12 demand or after service of the last pleading directed to such issue,
13 whichever is later.

14 Plaintiffs served a six-person jury demand on Defendants by facsimile on
15 March 15, 2007. Defendants filed a twelve-person jury demand on April 2, 2007.
16 Rule 1-006(A) NMRA allows that the first day “of the act” shall not be counted in
17 computation of time, the last day shall, and Saturdays, Sundays, and holidays are not
18 counted if the proscribed time to act is less than eleven days. Here, Defendants had
19 ten days to respond to Plaintiffs’ demand for a six-person jury not including the first
20 day and weekends. Defendants were simply late. In their answer brief on costs,
21 Defendants claim that Rule 1-006 allows for an extra three days for service. However,
22 Rule 1-006(D) states:

1 *Whenever a party has the right or is required to do some act or take*
2 *some proceedings within a prescribed period after the service of a notice*
3 *or other paper upon the party and the notice or paper is served upon the*
4 *party by mail, three (3) days shall be added to the prescribed period.*

5 (Emphasis added.)

6 As stated above, Plaintiffs faxed Defendants notice of their jury demand.
7 Defendants were one day late in responding. As a consequence, Defendants are not
8 entitled to recover the jury fees.

9 **2. Copies of Exhibits**

10 In their cost bill, Defendants requested reimbursement for “[i]n-house copying”
11 of exhibits attached to their motion for summary judgment. The total came to \$22.50.
12 While this is a minimal amount considering the briefing and research that the parties
13 have done on this issue, we nonetheless conclude that the district court was incorrect
14 in allowing this cost.

15 Defendants argue that this cost was proper because Rule 1-054(D)(2)(i) allows
16 for “reasonable expenses involved in the production of exhibits which are admitted
17 into evidence.” Specifically, eighteen pages attached to Defendants’ motion for
18 summary judgment included excerpts of affidavits and depositions as well as receipts.
19 Defendants made five copies of their motion for summary judgment. Thus, they
20 requested reimbursement for ninety pages of copying. Rule 1-054(D)(3)(a) allows for
21 the photocopying and reproduction of exhibits if they are admitted into evidence. *Id.*

1 (stating that “except as provided in Paragraph D(2)(i) of this rule, photocopying and
2 other reproduction expenses” are not considered recoverable costs).

3 Plaintiffs argue that the exhibits were not identified or moved into evidence,
4 and photocopies are not recoverable expenses. Defendants’ bill of costs clearly
5 identifies that the exhibits are the eighteen pages attached to the motion for summary
6 judgment and, under Rule 1-056(E) NMRA, it was not improper for the district court
7 to consider the supporting documents when deliberating ruling on whether an issue
8 of material fact existed. *See* Rule 1-056(E) (“Supporting and opposing affidavits shall
9 . . . set forth such facts *as would be admissible in evidence.*” (emphasis added)).

10 However, the bill of costs requests ninety pages of in-house copying. Defendants
11 state that this is because one copy had to be served upon the court, the clerk, Plaintiffs,
12 and one copy for Defendants’ records. All five copies cannot be considered moved
13 into evidence. Only the copy before the court can be considered as such, and
14 Defendants fail to cite any case law that would allow us to consider otherwise. We
15 thus reduce the amount recoverable by Defendants from ninety pages at twenty-five
16 cents per page to eighteen pages at twenty-five cents per page for a total of \$4.50.

17

1 **3. Depositions Used in Support of Summary Judgment**

2 Rule 1-054(D)(2)(e) allows for “the cost of a deposition if any part is used at
3 trial; [or] in successful support or defense of a motion for summary judgment pursuant
4 to Rule 1-056[.]” Plaintiffs note that the depositions attached by Defendants to the
5 motion for summary judgment were actually depositions taken pursuant to discovery
6 in the earlier easement lawsuit and not this case. Therefore, according to Plaintiffs,
7 Defendants cannot get reimbursed for the costs because the title of the case is
8 different, and Defendants may be the prevailing party in the other case, and there
9 would be a risk of double recovery. We make several observations.

10 First, the order on costs was entered on May 1, 2008. On May 23, 2008, Rule
11 1-054 was amended by Supreme Court Order 08-8300-011, which added the category
12 that allowed for deposition costs “when the court determines the deposition was
13 reasonably necessary to the litigation.” Rule 1-054(D)(2)(e)(iii). While not in effect
14 at the time of this case, we are cognizant that our Supreme Court has recognized rules
15 not in effect at the time of a case when conducting their analysis. *See Fernandez v.*
16 *Española Pub. Sch. Dist.*, 2005-NMSC-026, ¶ 11, 138 N.M. 283, 119 P.3d 163
17 (stating in the context of expert witness fees, “[a]lthough we recognize, as did the
18 Court of Appeals, that this rule does not directly apply to the present matter because
19 [the a]ppellants filed their claim in November of 1998, and this portion of the rule was

1 amended in 2000, effective February 2001, we conclude that it correctly sets out the
2 law, and we view it as relevant to our interpretation of the statute at issue”).

3 Second, during the hearing on costs, Defendants’ counsel told the district court
4 that both parties had agreed to allow questions about both this case and the easement
5 case to occur within the scope of the same depositions for efficiency and economy.
6 Plaintiffs did not dispute this fact. In fact, Plaintiffs attached excerpts from the same
7 depositions to their memorandum in opposition of summary judgment that they now
8 argue are improper for Defendants to recoup costs on.

9 Finally, we note that Plaintiffs have the burden to establish that the granting of
10 costs were improper. *H-B-S P’ship*, 2008-NMCA-013, ¶ 30 (“We agree that Rule
11 1-054(D)(2) is ambiguous regarding the meaning of ‘use’ at trial. However, it is [the
12 plaintiffs], not [the defendants], that ha[ve] the burden in [their] appeal to provide
13 authority for [their] argument.”). Additionally, it is speculative whether Defendants
14 will win the easement suit and be awarded costs and that Plaintiffs will not inform the
15 district court that Defendants have already been reimbursed for the depositions. The
16 record demonstrates that there was agreement between the parties to kill two birds
17 with one stone. As a consequence of the depositions being used for both cases, it
18 would be an exercise in futility for this Court to determine which lines of questioning
19 in the depositions were used in support of which cause of action or defense. Under

1 the circumstances before us, it was not improper for Defendants to be awarded costs
2 for these depositions.

3 4. Depositions Not Used and Costs of Obtaining Medical Records

4 Plaintiffs argue that neither one of these items were used by Defendants in
5 support of summary judgment or trial and that, by definition, these costs are not
6 recoverable. As we noted above, the new rule would allow for the district court to
7 have discretion in regards to the depositions if it were to conclude that “the deposition
8 was reasonably necessary to the litigation.” Rule 1-054(D)(2)(e)(iii). A short time
9 ago in *H-B-S Partnership*, this Court stated that it would affirm district courts when
10 awarding unusual items as costs if the district court explained the circumstances
11 justifying the award. 2008-NMCA-013, ¶¶ 24, 28. In this case, the district court
12 specifically stated, at the end of the costs hearing, that the court would use its
13 discretion in regards to the depositions not used and the costs in obtaining the medical
14 bills. The district court concluded that both items were reasonably necessary to
15 preparing a defense and were thus appropriate costs for Defendants to recoup.
16 “Because the district court affirmatively explained its reasons justifying any deviation
17 from Rule 1-054(D)(2), we affirm its allowance of the . . . costs.” *H-B-S P’ship*,
18 2008-NMCA-013, ¶ 28. Although a district court should exercise its discretion
19 sparingly when considering expenses not specifically authorized by statute or

1 precedent, when the district court provides an affirmative and acceptably reasonable
2 explanation for its actions, this Court will not disturb those actions on appeal absent
3 contrary rule, statute, case law, or an abuse of discretion.

4 **III. CONCLUSION**

5 We affirm the district court's entry of summary judgment as to Plaintiffs'
6 claims against Defendants. As to the cost bill, we remand to the district court to
7 amend the Order regarding costs to eliminate the recovery for jury fees and to reduce
8 the recovery for in-house copying from \$22.50 to \$4.50 for a total reduction of
9 \$118.00.

10 **IT IS SO ORDERED.**

11 _____
12 **ROBERT E. ROBLES, Judge**

13 **WE CONCUR:**

14 _____
15 **CELIA FOY CASTILLO, Judge**

16 _____
17 **RODERICK T. KENNEDY, Judge**