

**COLLINS V. ST. VINCENT HOSPITAL, INC.**

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**WANDA COLLINS, as Personal  
Representative of the Estate of  
WILLIAM "MACK" VAUGHAN,  
Plaintiff-Appellee,  
v.  
ST. VINCENT HOSPITAL, INC.,  
Defendant-Appellant.**

No. A-1-CA-35460

COURT OF APPEALS OF NEW MEXICO

December 20, 2017

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY, Sarah M. Singleton,  
District Judge

**COUNSEL**

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Cohen and Zedalis, LLC, Seth T. Cohen, Santa Fe, NM, for Appellee

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Albuquerque, NM, for Appellant

**JUDGES**

JONATHAN B. SUTIN, Judge. WE CONCUR: LINDA M. VANZI, Chief Judge, HENRY  
M. BOHNHOFF, Judge

**AUTHOR:** JONATHAN B. SUTIN

**MEMORANDUM OPINION**

**SUTIN, Judge.**

{1} The district court denied Defendant St. Vincent Hospital's motion to award costs after the jury returned a verdict favoring the Hospital in this wrongful death and medical negligence action. The Hospital appeals the district court's denial of its motion. We hold that the district court did not err in denying the motion.

## BACKGROUND

{2} The facts of the medical negligence case are to be found in *Collins v. St. Vincent Hospital, Inc.*, No. A-1-CA-35247, filed simultaneously with this opinion. Plaintiff is the personal representative of the estate of William "Mack" Vaughan. The jury in *Collins* determined that the Hospital was negligent but that the Hospital's negligence did not cause Vaughan's injuries and damages.

{3} Following the district court's judgment on the verdict in favor of the Hospital, the Hospital filed a motion pursuant Rule 1-054 NMRA seeking costs of \$41,610.07. Collins opposed the motion. The district court denied the motion on the ground that evidence at trial showed that nothing existed in the estate to satisfy a cost award.

{4} The Hospital's appellate points are that (1) Plaintiff, as personal representative, may be held personally liable for costs under Rule 1-054; (2) the district court abused its discretion by refusing to award costs against Vaughan's probate estate, based on an erroneous determination that the estate was unable to pay; and (3) the district court abused its discretion by denying the Hospital's request for limited discovery into the financial assets of the estate.

## DISCUSSION

{5} We review the denial of a motion for costs for abuse of discretion. *Mascarenas v. Jaramillo*, 1991-NMSC-014, ¶ 24, 111 N.M. 410, 806 P.2d 59. "An abuse of discretion will be found when the trial court's decision is clearly untenable or contrary to logic and reason." *Rivera v. Brazos Lodge Corp.*, 1991-NMSC-030, ¶ 16, 111 N.M. 670, 808 P.2d 955. "The trial court has discretion in assessing costs, and its ruling will not be disturbed on appeal unless it was an abuse of discretion." *Pioneer Sav. & Tr., F.A. v. Rue*, 1989-NMSC-079, ¶ 12, 109 N.M. 228, 784 P.2d 415.

{6} Some evidence existed at trial indicating that Vaughan's estate lacked resources to pay a cost award. Collins testified at trial that after Vaughan's death, she closed out his affairs, dealt with his home/studio, mailed his rocks and kitchen tools to her home, and provided Vaughan's "little car" and some art to Vaughan's son. Lack of financial assets is recognized as a proper consideration in whether to award costs. See *Key v. Chrysler Motors Corp.*, 2000-NMSC-010, ¶ 13, 128 N.M. 739, 998 P.2d 575; *Gallegos ex rel. Gallegos v. Sw. Cmty. Health Servs.*, 1994-NMCA-037, ¶¶ 30-31, 117 N.M. 481, 872 P.2d 899 (holding that the district court properly considered the plaintiff's and her parents' ability to pay as one factor in determining whether to award the defendants' costs). The district court determined that evidence showed that the estate would have no money to pay the cost bill.

{7} The district court's determination in reliance on the evidence at trial was not clearly untenable or against logic and reason. And we are not persuaded that the court was required to permit, or otherwise abused its discretion in not permitting, the Hospital to engage in discovery of the estate's assets. We therefore affirm the court's denial of the motion for costs.

{8} Further, we reject the Hospital's attempt made for the first time on appeal to persuade this Court that its motion was aimed at the personal representative's personal responsibility for costs as well as the estate's responsibility for costs. Although the motion for award of costs was directed at "Plaintiff," neither the Hospital's motion, the argument at the hearing on the motion, nor the Hospital's reply focused on the personal representative's personal responsibility. The distinction the Hospital now makes was not made in the district court and cannot be reasonably inferred from the motion or arguments in the district court, and the distinction was therefore not preserved. See Rule 12-321(A) NMRA ("To preserve an issue for review, it must appear that a ruling or decision by the trial court was fairly invoked."); *Nellis v. Farmers Ins. Co. of Ariz.*, 2012-NMCA-020, ¶ 23, 272 P.3d 143 ("To preserve an issue for review on appeal, it must appear that appellant fairly invoked a ruling of the trial court on the same grounds argued in the appellate court." (internal quotation marks and citation omitted)). We therefore will not address the question whether Wanda Collins as personal representative can be held personally liable for costs in this case. See *Crutchfield v. N.M. Dep't of Taxation & Revenue*, 2005-NMCA-022, ¶ 14, 137 N.M. 26, 106 P.3d 1273 (stating that this Court will not review unpreserved arguments). Because we affirm the district court's denial of costs based on the evidence presented at trial, we need not and do not address the Hospital's argument that the district court abused its discretion in denying the Hospital's request for discovery regarding Vaughan's probate estate.

## **CONCLUSION**

{9} We affirm the district court's denial of the Hospital's motion for costs against the estate.

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

**JONATHAN B. SUTIN, Judge**

**WE CONCUR:**

**LINDA M. VANZI, Chief Judge**

**HENRY M. BOHNHOFF, Judge**