IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

SUZANNE BURNS,

Plaintiff-Petitioner,

v.

No. S-1-SC-40434
Ct. App. No. A-1-CA-38594

PRESBYTERIAN HEALTHCARE SERVICES and NAVJEET KAUR, M.D.,

Defendants-Respondents.

BRIEF IN CHIEF OF PLAINTIFF-PETITIONER SUZANNE BURNS

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QUESTIONS PRESENTED

Our appellate courts deferentially review a district court's exercise of its broad discretion to address violations of discovery orders with a variety of "lesser" sanctions, including the exclusion of evidence. *Gonzales v. Surgidev Corp.*, 1995-NMSC-047, ¶ 33, 120 N.M. 151, 899 P.2d 594. But the severe sanctions of dismissal or default require "close[r] scrutin[y]." *Lewis ex rel. Lewis v. Samson*, 2001-NMSC-035, ¶ 13, 131 N.M. 317, 35 P.3d 972. Those sanctions are permissible only where the violation was willful, and only if the district court considered "meaningful alternatives" and reasonably concluded that they were inadequate. *Gonzales*, 1995-NMSC-047, ¶ 33. The questions presented are:

(1) What level of scrutiny applies when a nominally lesser sanction that excludes evidence denies the sanctioned party a determination on the merits by compelling dismissal on summary judgment?

(2) If the Court of Appeals applied insufficient scrutiny to the sanction in this case, did the Court of Appeals err in affirming the district court's exercise of its discretion?

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Other Authority

Bile, Merriam Webster Online Dictionary,
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STATEMENT OF THE CASE

Plaintiff Suzanne Burns respectfully asks this Court to hold that the district court abused its discretion by excluding the only evidence that would have enabled her case to withstand summary judgment as a sanction for Plaintiff's failure to comply with the court's scheduling order regarding expert disclosures. Because that sanction "entail[ed] the denial of an opportunity for a hearing on the merits," *United Nuclear Corp. v. General Atomic Co.*, 1980-NMSC-094, ¶ 202, 96 N.M. 155, 629 P.2d 231, the district court should have applied the analytical framework governing dismissals in deciding whether exclusion was warranted.

Under that framework, it would have been proper for the district court to exclude the pertinent evidence only if Plaintiff's noncompliance was willful, and only if the district court reasonably concluded that "meaningful alternatives" to exclusion were inadequate. *Gonzales v. Surgidev Corp.*, 1995-NMSC-047, ¶ 33, 120 N.M. 151, 899 P.2d 594 (internal quotation marks and citation omitted). But the district court failed to apply this analysis, and the Court of Appeals erroneously affirmed on the ground that it did not apply. This Court should vacate the judgment below either because the facts of this case would not have supported the sanction imposed under the correct analytical framework or because the district court abused its discretion by failing to apply the correct framework in the first instance.

SUMMARY OF PROCEEDINGS

It is undisputed that Plaintiff was discharged from the hospital the day after having her gallbladder removed and that she was diagnosed with a bile leak[1] during a hospitalization that began ten days later. **[1 RP 157, 171]** In this medical malpractice case, Plaintiff claimed that Defendants Presbyterian Healthcare Services and Dr. Navjeet Kaur caused her to suffer damages by negligently discharging her despite "signs and symptoms that indicated post-surgical complications." **[1 RP 2 ¶¶ 7, 9]** The complaint alleged that it took two subsequent hospitalizations before Plaintiff "was finally found to have a bile leak that caused a serious infection and other problems," forcing Plaintiff to "under[go] multiple medical procedures and treatments[] and spen[d] seven weeks in the hospital" as a result of this delay in reaching a diagnosis. **[1 RP 2 ¶ 10]**

a. Plaintiff files her expert disclosure, and Defendants take the deposition of her expert witness Dr. Walid Arnaout.

After the parties engaged in substantial discovery during the early stages of this case **[*see* 1 RP 30-50]**, the district court entered a scheduling order. *See generally* Rule 1-016 NMRA. Under the order, trial was set for the court's January 13, 2020, trailing docket, with discovery to close by June 28, 2019, and Plaintiff's

[1]Bile is an "alkaline fluid that is secreted by the liver, stored and concentrated in the gallbladder, and passed into the intestinal duodenum where it aids especially in the breakdown and absorption of fats." *Bile*, Merriam Webster Online Dictionary, https://www.merriam-webster.com/dictionary/bile (last viewed Sept. 29, 2024).

expert disclosure deadline set for April 1, 2019. **[1 RP 60-62]** The order directed Plaintiff to include in her disclosure the information described in Rule 1-026(B)(6)(a) NMRA—among other things, "the subject matter . . . and the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion," *id.* **[1 RP 60-61]**

In the disclosure she filed on the day of the deadline, Plaintiff identified Dr. Arnaout as "a general surgeon[who would] testify that [Defendants] failed to properly diagnose surgical complications and should not have discharged the plaintiff from the hospital in the absence of confirming diagnoses and treatment." **[1 RP 104]** Although the disclosure identified multiple treating physicians who would testify regarding the "damages caused" by or "proximately result[ing]" from Defendants' negligence, it did not specify that Dr. Arnaout, or any other disclosed expert, would be testifying that a delay in diagnosis had caused Plaintiff to suffer damages. **[1 RP 105-06]**

Defendants had taken Dr. Arnaout's deposition roughly two weeks earlier.[2] According to Dr. Arnaout, abnormally elevated results of laboratory tests conducted the day after Plaintiff's surgery indicated that Plaintiff had "either a bile duct injury or a bile duct leak." **[2 RP 266 (Tr. 58:10-21); 2 RP 444-45 (Tr. 101:25-102:14)]**

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[2]Plaintiff had previously identified Dr. Arnaout in an answer to an interrogatory. **[*See* 2 RP 328]**

He answered affirmatively when defense counsel asked whether those tests "in and of themselves require [a] patient to be continued to be hospitalized," explaining that "[t]he earlier you diagnose [a bile leak] and treat it, the better the patient's outcome." **[2 RP 444 (Tr. 101:3-11)]** But, he observed, Plaintiff had been discharged despite her concerning results, and it was Dr. Arnaout's "understand[ing] that [Plaintiff] eventually ended up with a late diagnosis of a missed bile leak." **[2 RP 332 (Tr. 19:17-20:7)]**

In a brief line of questioning at the end of his deposition, Dr. Arnaout expressed uncertainty regarding the timing of the onset of the leak. Asked by defense counsel whether he "believe[d] that there was a bile leak that was diagnosable even before [Plaintiff] was discharged[,]" Dr. Arnaout answered: "That's not what I'm saying. I said she had abnormal liver function tests postop. That should have been investigated to determine if there [was] a bile leak or bile duct obstruction or something else." **[1 RP 185 (Tr. 118:9-16)]** He testified that "he d[idn']t know" when Plaintiff first had a bile leak and "[couldn't] tell" defense counsel when he believed it should have been diagnosed. **[1 RP 185 (Tr. 118:17-19, 119:1-3)]** When asked whether he "believe[d] that [Plaintiff] had a bile leak that could have been diagnosed sooner than it was," he answered: "Well, she had a bile leak. We know it happened. When it happened, I don't know. I can't tell you." **[1 RP 185 (Tr. 118:20-25)]** And Dr. Arnaout agreed with defense counsel that "[t]he first treatment" for

Plaintiff's bile leak—"fix[ing]" the leak with a stent—would have been the same if the leak had been diagnosed earlier. **[1 RP 184-85 (Tr. 117:17-22, 119:5-10)]**

b. Defendants move for summary judgment and move to strike the affidavit by Dr. Arnaout attached to Plaintiff's response.

Presbyterian filed a motion for summary judgment on the issue of causation on July 17, and Dr. Kaur followed suit the next morning. **[1 RP 156-62 (Presbyterian's Motion); 1 RP 171-77 (Dr. Kaur's Motion)]** Both pointed to a July 15 email exchange in which Plaintiff's counsel, responding to queries about Plaintiff's expert disclosure, informed defense counsel that Dr. Arnaout "was really [Plaintiff's] causation expert." **[1 RP 163, 178]** Based on that statement and Dr. Arnaout's deposition testimony, Defendants contended that they were entitled to judgment as a matter of law because Plaintiff could not meet her burden of showing that her bile leak was present and diagnosable at the time she was discharged. **[*See, e.g.*, 1 RP 157, 161, 172, 175-76]**

Later during the day that Dr. Kaur filed her motion, Plaintiff filed an amended expert disclosure. **[1 RP 200]** Like Plaintiff's original disclosure, it indicated that Dr. Arnaout would testify that Defendants "failed to properly diagnose surgical complications and should not have discharged the plaintiff from the hospital in the absence of confirming diagnoses and treatment." **[1 RP 200]** But the amended disclosure included a new paragraph indicating that Dr. Arnaout would testify "that

by discharging Plaintiff . . . without following up on the abnormal results of her liver function tests, Defendants breached the standard of care and caused Plaintiff's injuries and damages, including sequelae of a bile leak including sepsis and kidney failure[.]" **[1 RP 200]**

Then, on August 12, Plaintiff filed her response to Defendant's motions. **[2 RP 259-63]** She did not dispute that Dr. Arnaout was her only causation expert. But rather than confining her arguments to Dr. Arnaout's deposition testimony alone, as Defendants had done, Plaintiff relied on an affidavit by Dr. Arnaout attached to her response.[3] In it, Dr. Arnaout stated that it was his opinion that the bile leak had occurred during or after Plaintiff's gallbladder surgery and before Plaintiff's discharge the next day and that he had reached this opinion by "[c]orrelating the elevation of Ms. Burns' [test results] with the . . . injury she sustained during the [surgery]." **[2 RP 283 ¶¶ 7-9]** Addressing the uncertainty regarding the timing of the leak that he had expressed at his deposition, Dr. Arnaout explained that he had "understood the question to be seeking a specific time and[that,] as [he had] testified[, he] could not pinpoint such a time." **[2 RP 283 ¶ 10]** But, he maintained, his "opinion during the deposition was, a[nd] it remain[ed], that the leak occurred at some point after the surgery and before [Plaintiff's] . . . discharge." **[2 RP 283-84 ¶**

[3]The record does not reflect that the affidavit was submitted as an attachment to Plaintiff's response. An accurate copy of the affidavit appears in the record as an attachment to Dr. Kaur's motion to strike. **[2 RP 282-84]**

10] Dr. Arnaout opined that "any reasonable investigation" of Plaintiff's test results "would have revealed the bile leak within a couple days at most, and in any case well before it was finally diagnosed[.]" **[2 RP 284 ¶ 12]** And while Dr. Arnaout still could not "pinpoint when the bile leak would have been diagnosed if Defendants had investigated the cause" of Plaintiff's test results, he opined that "the decision to discharge her without such an investigation unnecessarily delayed the diagnosis and treatment of her bile leak" and that "this delay caused her to suffer serious medical complications." **[2 RP 284 ¶ 13]**

Presbyterian and Dr. Kaur each filed a motion to strike Dr. Arnaout's affidavit pursuant to the "sham affidavit" rule, under which affidavits submitted to "nullify unambiguous [testimony] under oath will not create a factual dispute sufficient to evade summary judgment." *Rivera v. Trujillo*, 1999-NMCA-129, ¶ 12, 128 N.M. 106, 990 P.2d 219. **[2 RP 274-77 (Dr. Kaur's Motion); 2 RP 319-25 (Presbyterian's Motion)]** Defendants argued that rule applied here because the opinions in Dr. Arnaout's affidavit regarding the timing of the onset of Plaintiff's bile leak, when the leak was diagnosable, and whether a delay in diagnosis had caused medical complications contradicted his deposition testimony. **[*See, e.g.*, 2 RP 274-75, 320-21]** In response, Plaintiff asked the court to conclude that the sham affidavit rule did not apply or, in the alternative, that only those portions of the

affidavit specifically found to violate the rule should be excluded. **[2 RP 367-75 (Plaintiff's Response)]**

c. The district court strikes Plaintiff's expert affidavit as a sanction for deficient disclosure and grants Defendants' motions for summary judgment on the basis of that sanction.

The district court held a hearing on the motions on October 1, 2019. At the hearing, Defendants reiterated their arguments that the court should grant summary judgment regarding causation because Dr. Arnaout could not specify when Plaintiff's bile leak began or when it was diagnosable. **[*E.g.*, 10-1-19 Tr. 11:7-13; 20:25-21:4]** And, as in their written briefs, Defendants argued that the court should strike Dr. Arnaout's affidavit under the sham affidavit rule because it contradicted his deposition testimony. **[*See id.* at 11-12, 20-26]** When asked why it was improper for Plaintiff to submit Dr. Arnaout's affidavit when it would have been permissible to "clean up" Dr. Arnaout's deposition testimony to clarify his opinions, counsel responded that he did not agree that it would have been "okay to clean . . . up" the deposition testimony and that he would have "moved to strike that, as well." **[*Id.* at 26:23-27:10]** And, in the alternative, counsel distinguished the two situations by arguing that, because Dr. Arnaout's affidavit contained "new opinions" not provided in his deposition testimony, "another way to look at" the issue was "as a late disclosure of this expert's opinions." **[*Id.* at 27:11-24]**

The court then asked for Plaintiff's positions regarding the motions. **[*Id.* at 28:14-15]** Opposing the motions for summary judgment, Plaintiff's counsel explained that Dr. Arnaout would testify that Plaintiff had suffered an intraoperative injury to her bile duct;[4] that she had abnormally elevated test results the next day, and that, if those test results had been investigated, it would have been discovered that "the reason for the [results was that,] the day before, there had been an injury during the [surgery]." **[*Id.* at 34:19-25]** And counsel argued that the court should not strike the Dr. Arnaout's affidavit under the sham affidavit rule because, given the context around the questions underlying Defendants' motions, Dr. Arnaout had reasonably believed that defense counsel was asking him to "pinpoint [when] the

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[4]Plaintiff's theory of the case was that the injury that precipitated Plaintiff's bile leak (i.e., the injury through which the bile leaked) occurred during her gallbladder removal surgery, but the negligence she alleged related to Defendant's post-surgery acts and omissions, rather than to the surgery itself.

Defendants' prima facie case for summary judgment was premised on Plaintiff's asserted inability to prove that *the bile leak* began prior to her discharge. **[*See, e.g.*, 1 RP 157, 161, 172, 175-76]** Their positions regarding whether Plaintiff had suffered an intraoperative injury were equivocal at the motions hearing. Counsel for Presbyterian initially stated that she "didn't think it was undisputed" that the injury occurred during the surgery but went on to state that she "d[idn't] think there[was] an issue that it [was] a post-surgical complication . . . that . . . happened during surgery somehow." **[10-1-19 Tr. 46:21-47:6)]** Counsel for Dr. Kaur asserted that it was unknown "whether that bile leak manifested itself and was diagnosable during the first admission" or whether it was "a bile leak that was essentially asymptomatic that became much worse" after Plaintiff was discharged. **[*Id.* at 19:6-20:10]**

bile leak occurred" or "exactly when it should have been diagnosed." **[*Id.* at 32:22-33:8, 34:2-8; *see also id.* at 29:6-38:22]**

The district court suggested that it did not think the sham affidavit rule applied but believed Dr. Arnaout's affidavit might be subject to exclusion for a different reason. **[*Id.* at 44:6-12]** Referencing Dr. Kaur's assertion that "this [was] akin to a late disclosure," the court stated that it did not think that Plaintiff's expert disclosure "satisfie[d] the requirements of the scheduling order" and that that was "the problem [it] saw with this particular case." **[*Id.* at 42:21-44:3]** And, the court indicated, "if there [was] a reason to strike the affidavit," it was Plaintiff's noncompliance with the scheduling order, rather than the sham affidavit rule. **[*Id.* at 44:6-12]**

Plaintiff's counsel responded by agreeing that the disclosure was deficient but arguing that the court should not "exclud[e the affidavit] or grant summary judgment on that basis." **[*Id.* at 44:19-45:6; *see also id.* at 42:25-43:1, 44:4-5]** At that point, the court indicated that other parties were waiting to have matters heard by the court, but asked, "What else have you got?" **[*Id.* at 45:7-10]** Counsel then briefly concluded his argument by asking the court to deny summary judgment based on Dr. Arnaout's affidavit and the transcript of his deposition. **[*Id.* at 45:11-46:8]**

Two weeks after the hearing, the district court granted Defendants' motions by striking the affidavit and entering summary judgment for Defendants in a combined order. **[2 RP 478-86]** Citing *BUKE, LLC v. Cross Country Auto Sales,*

LLC, 2014-NMCA-078, 331 P.3d 942, the court based its decision to strike the affidavit on its conclusion that "Plaintiff's expert disclosure was deficient," rather than on the sham affidavit rule. **[2 RP 482]** It reasoned that the disclosure "did not identify any opinion testimony that would be offered [to prove] that Defendants' alleged negligence caused Plaintiff any injuries," and that it "did not adhere to the requirements of the . . . scheduling order to provide facts supporting the expert opinions offered." **[2 RP 479-80 (¶¶ 2-3)]**

In the court's view, Plaintiff's filing of the affidavit was the first time that Plaintiff had disclosed expert testimony indicating "that the bile leak at issue in this case . . . occurred prior to Plaintiff's discharge from the hospital . . . [or] could have been diagnosed within a few days of her discharge[,]" and those opinions "contradicted Dr. Arnaout's deposition testimony." **[2 RP 481 ¶ 7]** Consequently, the court reasoned, the affidavit "offered ***new*** opinion testimony not previously disclosed." **[2 RP 481 ¶ 7)]** And the court found that considering the affidavit would "cause undue delay and expense to Defendants," who "would suffer prejudice in re-deposing witnesses, re-filing dispositive motions, and postponing the jury trial if Plaintiff were allowed to supplement her expert opinions[.]" **[2 RP 482 ¶ 11, 483]**

The court expressly based its grant of summary judgment on the exclusion of the affidavit. It reasoned that, without the affidavit, there was "no expert opinion testimony to support [Plaintiff's] claims that [the] bile leak existed at the time of her

discharge from the hospital and [would] have been diagnosed earlier if Defendants had performed additional medical investigation prior to her discharge." **[2 RP 485]** "Therefore," the court concluded, "Plaintiff's claim . . . fail[ed] for lack of expert opinion testimony" on the issue of causation, and the court entered final judgment in Defendants' favor. **[2 RP 485-86]**

d. The Court of Appeals analyzes the affidavit's exclusion as a lesser sanction and affirms because Plaintiff cannot meet her summary judgment burden without the affidavit.

Plaintiff then sought review of the district court's order in the Court of Appeals. The central argument in Plaintiff's merits briefs[5] was that the district court had abused its discretion by striking Dr. Arnaout's affidavit. **[COA BIC 15-21; RB 2, 5-9]** Relying on the on-point opinion in *Zia Trust Co. v. San Juan Regional Medical Center*, A-1-CA-29358, mem. op. (N.M. Ct. App. Jan. 9, 2012) (non-precedential), Plaintiff argued that, because that sanction had compelled dismissal of her case on summary judgment, the court should apply the closer scrutiny applicable to sanctions of dismissal in analyzing whether the district court had

[5]The Court of Appeals initially assigned this case to its summary calendar and proposed to affirm by analyzing the exclusion of Dr. Arnaout's affidavit as a lesser sanction. Notice of Proposed Disposition, at 4, *Burns*, A-1-CA-38594 (N.M. Ct. App. Nov. 25, 2020). After Plaintiff filed a memorandum in opposition in which she contended that the "lesser sanction" framework was inapplicable, **[MIO 6-8]** the case was reassigned to the court's general calendar. Notice of Reassignment, *Burns*, A-1-CA-38594 (N.M. Ct. App. July 27, 2021)

abused its discretion. **[COA BIC 15-16 & n.5; RB at 3 n.2]** In *Zia Trust Co.*, the Court of Appeals had cited *State v. Harper*, 2011-NMSC-044, 150 N.M. 745, 266 P.3d 25, and *Allred ex rel. Allred v. Board of Regents*, 1997-NMCA-070, 123 N.M. 545, 943 P.2d 579, in applying closer scrutiny to an exclusionary sanction that was the "functional equivalent of dismissal." A-1-CA-29358, mem. op., at 4. Plaintiff argued that the record did not support the district court's decision to strike Dr. Arnaout's affidavit when viewed through the lens of the closer scrutiny applicable to dismissals and that, even if the record could have supported that decision, the district court had abused its discretion by failing to make the factual findings necessary to support it. **[COA BIC 18-21; RB 5-9]**

In their consolidated answer brief, Defendants urged the court to uphold the district court's exclusion of the affidavit even though that sanction had undisputedly formed the basis for the entry of summary judgment. Quoting *Lewis ex rel. Lewis v. Samson*, 2001-NMSC-035, ¶ 23, 131 N.M. 317, 35 P.3d 972, for the proposition that "the decision to impose a lesser sanction . . . is a discretionary ruling[,]" they argued that the district court had "applied the standard required by New Mexico law" in selecting a sanction. **[COA AB 13]** Under that standard, Defendants contended, the district court had not abused its discretion because Defendants had been prejudiced by the untimely filing of Dr. Arnaout's affidavit. **[*Id.* at 19-20]**

The Court of Appeals affirmed. *Burns v. Presbyterian Healthcare Services*, A-1-CA-38594, dec. (N.M. Ct. App. Jan. 9, 2024) (non-precedential). It agreed with the district court that Dr. Arnaout's affidavit "violated the Rule 1-016 NMRA scheduling order" and analyzed the affidavit's exclusion as a lesser sanction. *Id.* ¶ 3. Relying on *Lewis*, 2001-NMSC-035, the court expressly rejected Plaintiff's argument that the closer scrutiny governing dismissals applied:

> Plaintiff's contention that lesser sanctions that are relevant to or lead to summary judgment and dismissal are governed by the same standards as those of direct dismissal (or other dispositive judgment) is incorrect. *See Lewis*[, 2001-NMSC-035, ¶ 13] ("[W]hereas we more closely scrutinize, albeit still under an abuse of discretion standard, the severe sanction of dismissal, we entrust sanctions short of dismissal to the sound discretion of the trial court."). "Excluding a witness, while still a drastic remedy, is one of the lesser sanctions available to the court." *Id.* (internal quotation marks and citation omitted).

Burns, A-1-CA-38594, mem. op ¶ 3. Applying the lesser sanction framework, the Court of Appeals held that the district court had not abused its discretion because Dr. Arnaout's affidavit "was inconsistent with both Plaintiff's initial expert disclosure and [Dr. Arnaout's] deposition testimony and. . . permitt[ing] the [a]ffidavit would have unduly prejudiced Defendants." *Id.* ¶ 3. And because the court concluded that Dr. Arnaout's "admissible testimony" —i.e., his testimony "apart from that stated in [his] belated and stricken [a]ffidavit"—did not show the existence of a genuine issue of material fact regarding causation, it held that the district court had properly entered summary judgment.

After the Court of Appeals denied her motion for rehearing, Plaintiff filed a petition for a writ of certiorari, which this Court granted on August 15, 2024.

ARGUMENT

A trial court's discretion to dismiss a case for noncompliance with a court order is more limited than its discretion to impose a lesser sanction. Because it denies the sanctioned party an opportunity to be heard on the merits, dismissal is a "sanction of last resort." *Lopez v. Wal-Mart Stores, Inc.*, 1989-NMCA-013, ¶ 6, 108 N.M. 259, 771 P.2d 19. Imposing that sanction is appropriate only where the trial court reasonably finds that the sanctioned party's noncompliance was willful and cannot be adequately remedied with a less severe sanction. *Surgidev Corp.*, 1995-NMSC-047, ¶ 33.

The exclusion of a witness is ordinarily a lesser sanction than dismissal. *Lewis*, 2001-NMSC-035, ¶ 13. But where exclusion renders a case legally insufficient to withstand summary judgment, that sanction denies the sanctioned party a hearing on the merits just as dismissal would have. Under those circumstances, the same safeguards that govern dismissals should apply.

In this case, the district court's exclusion of Dr. Arnaout's affidavit denied Plaintiff an opportunity to be heard on the merits because it compelled the entry of summary judgment on her medical malpractice claim. The Court should hold that

the district court was required to apply the safeguards that apply to dismissals before excluding the affidavit. And because it was an abuse of discretion for the district court to impose that sanction, the Court should either reverse or vacate the decision of the Court of Appeals.

I. Standards of Review

A trial court's choice of discovery sanction is subject to abuse of discretion review. *Lewis*, 2001-NMSC-035, ¶ 13. However, the considerations that inform the district court's discretion are defined by law, and whether the court has proceeded under the correct analytical framework in deciding to impose sanctions is a legal issue reviewed de novo. *See N.M. Right to Choose/NARAL v. Johnson*, 1999-NMSC-028, ¶ 7, 127 N.M. 654, 986 P.2d 450; *Couch v. Williams*, 2016-NMCA-014, ¶ 15, 365 P.3d 45. Within the proper framework, a district court's exercise of its discretion will be reversed only where its ruling "is clearly against the logic and effect of the facts and circumstances of the case." *State v. Le Mier*, 2017-NMSC-017, ¶ 22, 394 P.3d 959 (internal quotation marks and citation omitted).

II. Preservation

The issues before the Court were preserved below for at least one of three reasons. First, Plaintiff's briefs in the Court of Appeals expressly asked the court to apply the scrutiny applicable to dismissal sanctions to the sanction in this case.

[COA BIC 15-16 & n.6; RB 3 n.2] Because the questions presented are whether the Court of Appeals erred in refusing to do so and consequently misapplied the abuse of discretion standard of review, that was sufficient to preserve those questions on certiorari review before this Court. The proper application of an appellate standard of review is an issue that can only be raised before an appellate court. *Cf. Lewis*, 2001-NMSC-028, ¶¶ 27-29 (reversing the Court of Appeals because of that court's improper application of the standard of review).

Second, the questions presented were preserved because a ruling regarding the propriety of the district court's sanction was fairly invoked below. In deciding to exclude Dr. Arnaout's affidavit, the district court necessarily concluded that striking the affidavit for untimely disclosure was a proper exercise of the court's discretionary authority notwithstanding that sanction's known dispositive consequences and Plaintiff's objection. **[2 RP 482; 10-1-19 Tr. 44:24-45:22]** Nothing more was required to preserve the questions presented pursuant to Rule 12-321. *See Madrid v. Roybal*, 1991-NMCA-068, ¶ 7, 112 N.M. 354, 815 P.2d 650 ("The principal purpose of the rule requiring a party to preserve error in the trial court of issues sought to be asserted on appeal is to alert the mind of the trial judge to the claimed error and to accord the trial court an opportunity to correct the matter.").

Finally, even if the Court concludes that the questions presented were not preserved, any failure in preservation should not prejudice Plaintiff. Under Rule 12-321(A) NMRA, issues may be preserved notwithstanding a party's failure to squarely raise them in the trial court if the party did not have an "opportunity to object to a ruling or order at the time it is made."

All else failing, that exception applies in this case. The briefs filed in support of Defendant's motions to strike did not address whether it would be proper for the district court to exclude Dr. Arnaout's affidavit because Plaintiff had not included his causation opinions in her expert disclosure.[6] **[2 RP 274-277 (Dr. Kaur's Motion to Strike); *id.* 319-24 (Presbyterian's Motion to Strike); *id.* 421-27 (Presbyterian's Reply); *id.* 429-38 (Dr. Kaur's Reply)]** That issue did not arise until the district court itself raised it during the motions hearing.[7] **[10-1-19 Tr. 42:21-**

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[6]The only argument that related to untimely disclosure appeared in Presbyterian's reply, which alluded to inapposite federal case law in arguing that Dr. Arnaout's affidavit should be stricken because it contained opinions not provided *during Dr. Arnaout's deposition* (rather than in Plaintiff's expert disclosure). **[2 RP 425]**

[7]Although counsel for Dr. Kaur asserted that "late disclosure" was "another way to look at" the issue before the court, the purpose of that assertion was to support Defendants' argument that Dr. Arnaout's affidavit should be excluded as a sham because it contradicted his deposition testimony, not to suggest a new and unbriefed basis for the motion to strike. **[10-1-19 Tr. 27:18-24]** Counsel referenced late disclosure in response to being asked about the difference between Plaintiff's supplemental affidavit and "clean[ed] up [deposition] testimony," which the district court had implied would not be excludable on the basis that it created a sham issue of fact. **[*Id.* 26:23-27:2; *see id.* 26:5-16; 27:3-28:10]**

24] And when counsel for Plaintiff began to argue that the court should not exclude the affidavit on that basis, the court noted that it had other matters waiting to be heard before asking "[w]hat else" Plaintiff had in the way of argument. **[10-1-19 Tr. 44:23-46:8]** Under these circumstances, the Court should hold that Rule 12-321(A)'s exception to the preservation requirement applies even if it believes that the questions presented were not preserved.

III. Exclusionary discovery sanctions that compel dismissal are subject to the same degree of scrutiny as sanctions of outright dismissal.

Although appellate courts "cannot . . . precisely delineate how trial courts are to exercise their discretionary authority [to impose sanctions] in the varied cases over which they must preside[,]" that authority is not "unfettered." *Le Mier*, 2017-NMSC-017, ¶ 17. A trial court's basic obligation in exercising its discretion is to choose a sanction that is reasonably "proportionate to the circumstances." *United Nuclear Corp.*, 1980-NMSC-094, ¶ 393 (citation omitted); *accord Gonzales v. N.M. Dep't of Health*, 2000-NMSC-029, ¶¶ 13-16, 129 N.M. 586, 11 P.3d 550; *Lewis*, 2001-NMSC-035, ¶ 23. *See generally* Rule 1-016(F) NMRA (empowering courts to impose sanctions by entering "such orders . . . as are just"); Rule 1-037(B)(2) NMRA (same). And because the sanctions of dismissal and default judgment are so severe, this Court has prescribed safeguards designed to ensure that those sanctions are not imposed "too lightly," *United Nuclear Corp.*, 1980-NMSC-094, ¶ 205 (citation

omitted), while preserving trial courts' discretionary authority to determine an appropriate sanction. *See Lewis*, 2001-NMSC-035, ¶ 13. An appellate court will affirm a sanction of dismissal or default only where the sanctioned party's conduct was "willful," and then only when the trial court "reasonably explored" "meaningful alternatives" before imposing it. *Surgidev Corp.*, 1995-NMSC-047, ¶ 33 (internal quotation marks and citation omitted).

The entire reason for this "close[r] scrutiny," *Lewis*, 2001-NMSC-035, ¶ 13, is that dismissals and defaults deny the sanctioned party "an opportunity for a hearing on the merits[.]" *United Nuclear Corp*, 1980-NMSC-094, ¶ 202. Because the same is true of exclusionary sanctions that render a case legally insufficient to withstand summary judgment, this Court should hold that the same safeguards apply. Where a sanction compels the entry of summary judgment by excluding evidence that would give rise to a triable issue of fact, the case is decided by the sanction, rather than on its merits. Under those circumstances, exclusion is "functional[ly] equivalent," *Harper*, 2011-NMSC-044, ¶ 21, and "tantamount," *Allred*, 1997-NMCA-070, ¶ 25, to an order of outright dismissal. And so it is not a "lesser sanction" than dismissal at all.

The Court of Appeals erred by reading this Court's opinion in *Lewis*, 2001-NMSC-035, to create a bright-line rule that exempts all exclusionary sanctions from the closer scrutiny applicable to dismissals. *See Burns*, A-1-CA-38594, mem. op ¶

3. As Plaintiff explained in her petition, *Lewis* involved a sanction that "did not deny the plaintiff a decision on the merits." **[Pet. 12]** Instead, the sanction there excluded two "relatively unimportant witnesses," and this Court emphasized that point in affirming the trial court's exercise of its discretion. *Lewis*, 2001-NMSC-035, ¶¶ 16-17. If anything, *Lewis* suggests that the importance of excluded evidence or witnesses bears on whether exclusion is proper *even when it is not dispositive*. But the opinion "nowhere implies that an exclusionary sanction should be analyzed as a lesser sanction" where it compels the termination of a party's case. **[Pet. 11]**

The safeguards that apply to dismissals would be of little value if they could be circumvented by dispositive sanctions that carry a different label. Because the legal sufficiency of every case turns on the presentation of evidence and witnesses, it is always possible to craft exclusionary sanctions that terminate a case as a matter of law. *See generally* Rule 1-037(B)(2)(b). And if those dispositive sanctions were less closely scrutinized than dismissals, then trial courts could always deny a sanctioned party an opportunity for a hearing on the merits without finding that less severe sanctions were inadequate or that the sanctioned party acted willfully. That would effectively give trial courts the authority to determine the extent of their discretion to terminate a party's case. It would encourage attorneys to seek case-ending sanctions that bypass the dismissal framework, leaving that framework to fall into disuse. And it would raise the unseemly specter of appellate reversal and remand

of a dismissal sanction followed by affirmance of a different dispositive sanction on the same record. The safeguards this Court has prescribed cannot be so toothless.

Whether an exclusionary sanction is subject to the closer scrutiny governing dismissals depends on its consequences in the case in which it is imposed, rather than a bright-line rule. Because exclusion "distort[s] . . . the fact-finding process," *McCarty v. State*, 1988-NMSC-079, ¶ 15, 107 N.M. 651, 763 P.2d 360, it is always "a drastic remedy." *Lewis*, 2001-NMSC-035, ¶ 13 (internal quotation marks and citation omitted). But a dispositive exclusionary sanction does not just distort the fact-finding process—like an outright dismissal, it dispenses with it altogether. Ignoring this equivalence by lumping all exclusionary sanctions together under the lesser sanction rubric results in a "rigid and mechanical" analysis, *Le Mier*, 2017-NMSC- 017, ¶ 16, inconsistent with both the principle that trial courts must consider "all the circumstances" before them in exercising their discretion, *State v. Anderson*, 2023-NMSC-019, ¶ 34, 536 P.3d 453 (internal quotation marks and citations omitted), and our State's "strong preference for resolving cases on their merits." *Freeman v. Fairchild*, 2018-NMSC-023, ¶ 25, 416 P.3d 264.

IV. The Court of Appeals erred by affirming the sanction in this case.

Plaintiff does not dispute that she violated the district court's scheduling order by failing to include the information described in Rule 1-026(B)(6)(a) in her expert disclosure. Her threadbare disclosure did not indicate that Dr. Arnaout would be

testifying about the subject matter of causation; it failed to clearly set out "the substance of the facts and opinions to which [Dr. Arnaout] was expected to testify"; and it did not contain "a summary of the grounds for each opinion." Rule 1-026(B)(6)(a) NMRA. It was not until Plaintiff submitted her untimely amended disclosure on July 18 and Dr. Arnaout's affidavit on August 12 that Plaintiff provided Defendants with information they had been entitled to since April 1.

But because the exclusion of Dr. Arnaout's affidavit compelled the dismissal of Plaintiff's case on summary judgment, the district court was required to analyze that sanction under the dispositive sanction framework. The court could not exclude the affidavit unless it found that Plaintiff's conduct was willful and reasonably concluded that lesser sanctions would have been inadequate to address Plaintiff's violation of the court's order. The facts of this case would not have supported those findings. And even if the district court could reasonably have concluded otherwise, it failed to make the factual findings necessary to support its choice of sanction.

A. Under the proper sanctions framework, the record did not support the district court's choice of sanction.

A district court's discretion to impose discovery sanctions is "fact-based," and the factual findings necessary to support the sanction imposed must be supported by substantial evidence. *Lopez*, 1989-NMCA-013, ¶ 6. Substantial evidence did not support the dispositive sanction in this case. The record would not have supported a

finding of willfulness. And although the lower courts properly considered the prejudice to Defendants in analyzing the sanction here,[8] they erred in concluding that this prejudice was sufficient to warrant the affidavit's exclusion. Because the only reasonable conclusion on this record is that a lesser sanction would have been adequate to remedy Plaintiff's failure to comply with the court's order, the district court abused its discretion by choosing a sanction that terminated Plaintiff's case.

1. Plaintiff did not willfully fail to comply with the district court's order.

A trial court may base a finding of willfulness on either "conscious or intentional" failure to obey a court's order, *Newsome v. Farer*, 1985-NMSC-096, ¶ 28, 103 N.M. 415, 708 P.2d 327 (internal quotation marks and citation omitted), or on a party's "gross indifference" to its obligation to comply, *Medina v. Foundation Reserve Ins. Co.*, 1994-NMSC-016, ¶ 6, 117 N.M. 163, 870 P.2d 125, 1994-NMSC-016, ¶ 6. Although a finding of willfulness does not depend upon "wrongful intent," it requires more than merely "accidental . . . non-compliance." *Kalosha v. Novick*, 1967-NMSC-076, ¶ 19, 77 N.M. 627, 426 P.2d 598.

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[8]*See, e.g.*, *Lewis*, 2001-NMSC-035, ¶ 23 ("Potential prejudice is . . . one factor in the balancing of interests under Rule 1-037(B)."); *Enriquez v. Cochran*, 1998-NMCA-157, ¶ 48, 126 N.M. 196, 967 P.2d 1136 ("[T]he trial court must balance the nature of the offense, the potential prejudice to the parties, the effectiveness of the sanction, and the [imperative to protect] the integrity of the court's orders and the judicial process[.]").

The record here does not support a finding of willfulness because it provides no basis for concluding that Plaintiff's failure to disclose Dr. Arnaout's causation opinions was anything other than an accidental oversight. Plaintiff did not wholly disregard the district court's order. She filed a disclosure in compliance with the district court's deadline that identified Dr. Arnaout and indicated, albeit vaguely, that he would be testifying that Defendants were negligent in failing to diagnose surgical complications and deciding to discharge Plaintiff.

It was clear from the outset of this case that Plaintiff was required to produce expert testimony regarding causation. *See generally Richter v. Presbyterian Healthcare Servs.*, 2014-NMCA-056, ¶ 59, 326 P.3d 50 (noting expert testimony is required to prove causation in medical malpractice cases). Plaintiff disclosed experts who would testify that Defendants had been negligent and who would testify about "damages caused" by or "proximately result[ing]" from Defendants' negligence without disclosing that an expert would testify that Defendants' negligence had, in fact, caused those damages. **[1 RP 105-06]** In light of the information she provided, Plaintiff could not plausibly have intended to submit a disclosure that, on its face, indicated that Plaintiff would not be calling an expert to testify that Defendants had, in fact, caused her damages. And although three and a half months passed before Plaintiff provided Dr. Arnaout's causation opinions in her amended disclosure, nothing in the record shows that Plaintiff was aware of the deficiency in her initial

disclosure during that time. **[1 RP 178 (July 15 email exchange); *id.* at 200 (July 18 amended disclosure)]**

2. The prejudice resulting from Plaintiff's late disclosure did not weigh in favor of dismissal.

Plaintiff acknowledges that her deficient disclosure prejudiced Defendants and caused a waste of scarce judicial resources. Plaintiff did not inform Defendants that Dr. Arnaout would be providing causation testimony until three and a half months after her disclosure deadline and roughly three weeks after the discovery deadline. And she did not provide Defendants with detail regarding the substance of Dr. Arnaout's testimony until she filed her summary judgment response. This delay left Defendants in the dark regarding Dr. Arnaout's causation opinions when they were entitled to those opinions to prepare for trial, and it denied them an opportunity to re-depose him until the discovery deadline had passed. As a result, both Defendants and the district court were forced to expend resources on summary judgment litigation that could have been avoided had Plaintiff simply complied with her obligation to make timely disclosures.

Nevertheless, this prejudice did not support the severity of the district court's sanction in view of the totality of the circumstances of this case. The opinions set out in Dr. Arnaout's affidavit did not come entirely out of the blue. Plaintiff's disclosure indicated that Dr. Arnaout would testify that Defendants "failed to properly diagnose surgical complications"—suggesting that there was, in fact, a

complication that went undiagnosed—and the only surgical complication at issue in this case was Plaintiff's bile leak. **[1 RP 104]** While in no way adequate, this at least indicated that Plaintiff would be asking Dr. Arnaout about the consequences of Plaintiff's discharge from the hospital, especially since Dr. Arnaout's deposition testimony itself indicated that Plaintiff had a "late diagnosis of a missed bile leak" **[2 RP 332 (Tr. 19:17-20:7)]** and that Plaintiff's test results showed "either a bile duct injury or a bile duct leak" on the day after her surgery. **[2 RP 266 (Tr. 58:10-21); 2 RP 444-45 (Tr. 101:25-102:14)]**

Moreover, trial was still roughly six months away when Plaintiff filed her amended expert disclosure; four months away when Plaintiff submitted Plaintiff's affidavit; and over three months away when the district court heard Defendants' motions. *See Lewis*, 2001-NMSC-035, ¶ 23 (observing that the degree of prejudice resulting from untimely witness identification six weeks before trial "diminished significantly" after trial was rescheduled, but reasoning that this delay was "unrelated" to the propriety of exclusion before the rescheduling). Dr. Arnaout's disputed testimony pertained to a single element of Plaintiff's case. Fairness to Defendants would have required a limited re-opening of discovery to permit a deposition of Dr. Arnaout regarding causation. But notwithstanding the district

court's contrary finding,[9] **[2 RP 482 ¶ 11]** there was no showing that this single retaken deposition would have required a trial that was still three months away to be reset. *Cf. Le Mier*, 2017-NMSC-017, ¶ 25 (affirming a finding of prejudice to the defendant where discovery order violations caused trial to be reset and the defendant still had not been able to communicate with an important witness a week before trial). The prejudice to Defendants in this case was time and effort expended and a reduced, though still substantial, window for trial preparation, not actual interference with trial preparation itself. *See generally Medina*, 1994-NMSC-016, ¶ 9 (holding that the "ultimate importance" of the relevant discovery is not a precondition for dismissal, but indicating that sanctions should nevertheless be "guided by the extent to which preparation for trial has been obstructed").

3. Less severe sanctions would have been sufficient to vindicate the district court's authority and remedy the prejudice to Defendants.

Given the state of the evidence regarding willfulness and prejudice, it was an abuse of discretion for the court to strike Dr. Arnaout's affidavit instead of imposing

[9]The court appears to have based its finding that trial would be delayed on the grounds that multiple witnesses would need to be re-deposed and that Defendants would need to file new dispositive motions if Dr. Arnaout's affidavit was admitted. **[2 RP 482 ¶ 11]** The record does not show that the re-deposition of any witness other than Dr. Arnaout would have been necessary. And if Dr. Arnaout's testimony at a new deposition supported Plaintiff's causation theory, there would have been no basis for Defendants to file new dispositive motions.

a lesser sanction. A trial court is under no obligation to exhaust lesser sanctions when a dispositive sanction is warranted, but it must consider whether "meaningful alternatives" would adequately address the violation, and the determination that a severe sanction is appropriate must be reasonable in light of the available alternatives. *See Surgidev Corp.*, 1995-NMSC-047, ¶ 33 (internal quotation marks and citation omitted); *see also Lowery v. Atterbury*, 1992-NMSC-001, ¶¶ 17-19, 113 N.M. 71, 823 P.2d 313 (reversing a sanction of dismissal notwithstanding the sanctioned plaintiff's willful failure to prepare for trial because the trial court had not sufficiently considered alternative sanctions). In this case, the district court erred by employing the sanction of exclusion as a first resort when the record demonstrates that a less severe sanction would have been sufficient.

The district court had a broad array of lesser sanctions at its disposal. Dr. Kaur herself suggested an alternative remedy in her motion to strike: "stay[ing the district court's] ruling on [the motions for summary judgment] until Defendants were afforded an opportunity to re-depose Dr. Arnaout about his new and inconsistent opinions at Plaintiff's expense." **[2 RP 275 (Motion, at 2 n. 2); *see also id.* at 438 (Reply)]** To address any potential impact on the trial, the court could have conditionally granted Defendants' motions unless Plaintiff arranged and covered the costs of re-deposition by a specific date. Or it could have ordered Plaintiff to pay the costs and attorney's fees incurred in litigating the motions for summary judgment

and motions to strike. Any or all of those sanctions would have preserved Plaintiff's opportunity for a hearing on the merits.

On this record, the only reasonable conclusion is that these alternatives, and others, would have been adequate to remedy the prejudice to Defendants and "sustain the trial court's authority to control the course of litigation." *Newsome*, 1985-NMSC-096, ¶ 30. Plaintiff's noncompliance affected only a narrow, though essential, aspect of the overall case, and trial was still months away when the court entered its order. The court had not previously sanctioned Plaintiff for noncompliance with her discovery obligations. *Cf. Le Mier*, 2017-NMSC-017, ¶ 28 (noting that, although "[p]rogressive sanctions may be impractical or infeasible in some cases," "evidence of their utilization most certainly bears on whether a court imposed the least severe sanction appropriate given the circumstances presented"). Neither Plaintiff's deficient disclosure nor her delay in correcting it reflect a "general recalcitrance to cooperate in the discovery process," *Surgidev. Corp.*, 1995-NMSC-047, ¶ 40, let alone "flagrant bad faith and callous disregard" for Plaintiff's discovery responsibilities. *Medina*, 1994-NMSC-016, ¶ 7. And because Plaintiff's conduct amounted to at most simple negligence, there is no basis for concluding that a lesser sanction would have been insufficient to ensure Plaintiff's scrupulous adherence to all extant and future orders of the court. Consequently, it would have been an abuse of discretion to conclude that the only sanction that adequately compensated

Defendants for Plaintiff's noncompliance and maintained the court's authority "to effectively and expeditiously manage its case load," *Lowery*, 1992-NMSC-001, ¶ 12, was one that denied Plaintiff an opportunity to be heard on the merits.

B. Alternatively, the Court of Appeals erred in affirming because the district court failed to make necessary factual findings under the proper sanctions framework.

If the Court concludes that the record could have provided legally sufficient support for the district court's exclusion of Dr. Arnaout's affidavit, it should nevertheless vacate the opinion below and remand with instructions for the district court to apply the dispositive sanction analysis in the first instance. *Cf. Le Mier*, 2017-NMSC-017, ¶ 20 ("Courts must evaluate . . . culpability, prejudice, and lesser sanctions[] when deciding whether to exclude a witness and must explain their decision to exclude or not to exclude a witness within [that] framework[.]"). Determinations regarding willfulness, prejudice, and proportionality are quintessentially factual inquiries that are ill-suited for appellate review. *See id.* ¶ 17 (observing that appellate courts "necessarily operate with imperfect information about the proceedings [they] review, and [that their] assessment of the propriety of the decision to impose or not to impose witness exclusion must reflect this reality"). If there are factual issues to be decided in this case, they should be decided by the district court. *See State ex rel. N.M. State Highway & Transp. Dep't v. Baca*, 1995-NMSC-033, ¶ 28, 120 N.M. 1, 896 P.2d 1148.

At a minimum, had the court considered this case in view of the safeguards applicable to dispositive sanctions, it would have been reasonable for the court to conclude that only a lesser sanction was warranted. But because the court did not apply those safeguards, its choice of sanction rested entirely on the court's finding that Defendants would be prejudiced if the court considered Dr. Arnaout's affidavit. That finding was insufficient to support the sanction of exclusion absent specific findings regarding Plaintiff's culpability and the adequacy of lesser sanctions, and the district court abused its discretion by failing to make those findings before excluding the affidavit. The proper remedy for this failure is to remand the case with instructions for the court to make findings under the dispositive sanction framework in deciding on an appropriate sanction. *See Baca*, 1995-NMSC-033, ¶ 28; *Lopez*, 1989-NMCA-013, ¶ 7 ("Specific findings are prerequisites for imposition of discovery sanctions.").

CONCLUSION

A trial court undoubtedly has the discretion to impose dispositive sanctions in an appropriate case. But whether the court has properly exercised that discretion does not turn on the means used to dispose of a case—instead, it turns on whether it is appropriate to dispose of the case at all. To answer that question, trial courts must apply the well-established framework this Court has prescribed to ensure that parties are not needlessly denied an opportunity for a hearing on the merits.

The Court of Appeals erred by failing to apply those safeguards in analyzing the exclusionary sanction imposed by the district court in this case, and this Court should therefore vacate the decision below. If the Court concludes that the record below did not support the district court's choice of sanction, it should either (1) reverse the Court of Appeals and remand for trial because the Court of Appeals indicated that its affirmance of summary judgment was based on the sanction or (2) vacate and remand to the Court of Appeals for that court to reconsider its of affirmance of the district court's entry of summary judgment. Alternatively, if the Court concludes that error in this case was the district court's failure to make required factual findings, the Court should remand this case to the district court with instructions for that court to apply the correct framework in deciding on an appropriate sanction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of October 2024, the foregoing brief in chief was filed through the Court's electronic filing system and transmitted to counsel of record identified below by electronic means.

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