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.

REPLY BRIEF OF PLAINTIFF-PETITIONER SUZANNE BURNS

James Johnson
Mark Fine
Joseph Fine
Fine Law Firm
220 Ninth Street NW
Albuquerque, NM 87102
TEL: (505) 243-4541
Attorneys for Plaintiff-Petitioner

TABLE OF CONTENTS

STATEMENT OF COMPLIANCE

In accordance with Paragraphs (F)(3) and (G) of Rule 12-318 NMRA, I certify that the body of this reply brief, which was prepared using the Times New Roman typeface, does not exceed four thousand four hundred thousand (4,400) words. According to the word count function of Microsoft Word, the body of the brief consists of 4,275 words.

/s/ James Johnson

TABLE OF AUTHORITIES

New Mexico Cases

Cases from Other Jurisdictions

New Mexico Court Rules

Court Rules from Other Jurisdictions

INTRODUCTION

In their Answer Brief, Defendants employ two broad approaches in defense of the district court's dispositive exclusion of Dr. Arnaout's affidavit. First, Defendants attempt to avoid unfavorable New Mexico case law governing dispositive sanctions by arguing that the exclusion should be upheld either because it was not a sanction at all or because Dr. Arnaout was an expert witness. **[AB 18-22]** Second, Defendants exaggerate the record evidence of culpability and prejudice to argue that the courts below should be affirmed even if the exclusion of Dr. Arnaout's affidavit is analyzed as a dispositive sanction. **[AB 22-27]**

As argued below, Defendants' first approach fails because the New Mexico Rules of Civil Procedure make clear that the exclusion of Dr. Arnaout's affidavit was a sanction and New Mexico law provides no basis for exempting the exclusion of expert testimony from the dispositive sanction framework. Defendants' second approach fails because the record does not support finding willfulness or that lesser sanctions would have been inadequate to remedy the prejudice in this case, and the district court abused its discretion by failing to apply the dispositive sanctions framework in any event.

I. The exclusion of Dr. Arnaout's affidavit must be analyzed as a dispositive sanction.

It is settled law that a trial court cannot impose the sanctions of default and dismissal without finding that noncompliance was willful and that lesser sanctions

are an inadequate remedy. *Gonzales v. Surgidev Corp.*, 1995- NMSC-047, ¶ 33, 120 N.M. 151, 899 P.2d 594. Because the exclusion of Dr. Arnaout's affidavit denied Plaintiff an opportunity to be heard on the merits by compelling the dismissal of her case on summary judgment, the same safeguards apply. **[BIC 20 (text only) (citations omitted)]**

A. Exclusion was a sanction, rather than the denial of a modification to the scheduling order.

Seeking to sidestep the questions presented altogether, Defendants argue that the "district court did not strike Plaintiff's expert affidavit as a sanction for deficient disclosure." **[AB 18 (text only) (quoting BIC 8)]** Instead, Defendants now say, the district court merely "declined to extend the expert disclosure deadline contained in its scheduling order[,]" and the sanctions analysis is therefore inapplicable. [***Id.***] The Court should reject that argument as contrary to the procedural history of this case and the New Mexico Rules of Civil Procedure.

The district court expressly "str[uck Dr. Arnaout's affidavit] from the record" because Plaintiff's "expert disclosure was deficient" and she "failed to disclose an expert on medical causation" in accordance with the court's scheduling order. **[2 RP 479, 482]** This imposition of a remedy in response to a procedural violation plainly constitutes a sanction, and it has been treated as such throughout the appeal of this

matter up until the point Defendants filed their Answer Brief.[1] In attempting to paint the district court's exclusion of evidence as a denial of a motion to modify the scheduling order, Defendants do not, and cannot, offer any record citation indicating that Plaintiff ever sought to evade the imposition of sanctions by submitting a motion to modify.

Scheduling orders are governed by Rule 1-016 NMRA. Defendants argue that Paragraph (B) of Rule 1-016 authorized the Court to exclude the affidavit of Dr. Arnaout. **[AB 18-19]** But Rule 1-016(B) ("Scheduling and Planning") simply provides that district courts can establish and modify scheduling orders; it is utterly

---

[1]Defendants did not argue that the exclusion of Dr. Arnaout's affidavit was something other than a sanction before the Court of Appeals. **[*See* COA AB 13 ("The district court has broad discretion to impose discovery sanctions.")]** They did not make that argument before the district court, either—unsurprisingly, since their briefs before that court were based on the sham affidavit rule. **[2 RP 274-77, 319-25, 421-38)]** Defendants' newfound argument harkens back instead to the sua sponte reasoning in the district court's order, which cited *BUKE, LLC v. Cross Country Auto Sales, LLC*, 2014-NMCA-078, 331 P.3d 942, as support for the court's authority to enforce pretrial deadlines. **[2 RP 482]**

In *BUKE*, the Court of Appeals affirmed the denial of a motion to modify an expert witness deadline after the movant had failed to identify any expert witness. *Id.* ¶ 64. There, because no expert had been identified, the denial of the motion to modify operated to prevent the plaintiff from identifying an expert in the future. Here, in contrast, Plaintiff had identified an expert before the deadline and did not need, or seek, a modification of the scheduling order in order to do so. Here, unlike in *BUKE*, the district court excluded existing evidence as a consequence for Plaintiff's failure to provide a disclosure that substantively complied with the deadline. For the reasons explained above, the Court of Appeals was correct to implicitly reject the district court's reasoning by analyzing the exclusion of Dr. Arnaout's affidavit as a sanction.

silent on the question of how a court can or should remedy the violation of a scheduling order. It is Paragraph (F) of Rule 1-016 ("Sanctions") that describes how a court can enforce its scheduling orders: "If a party or party's attorney fails to obey a scheduling or pretrial order[, the court] may make such orders with regard thereto as are just, including any of the orders provided in Subparagraphs (b), (c) or (d) of Subparagraph (2), of Paragraph B of Rule 1-037." Rule 1-037(B)(2) governs the imposition of discovery sanctions, including the specific sanction imposed here: an order "prohibiting the disobedient party . . . from introducing designated matters in evidence" Rule 1-037(B)(2)(b).

In this appeal, Plaintiff has explicitly challenged the district court's choice of remedies for the violation of the scheduling order, which is governed by Rule 1-016(F) ("Sanctions"), and has not challenged the district court's authority to create, modify, or refrain from modifying a scheduling order, which is governed by Rule 1-016(B) ("Scheduling and Planning"). The district courts' Rule 1-016(B) authority to create or modify scheduling orders is simply not implicated. Here, the district court "prohibited [Plaintiff] from introducing" Dr. Arnaout's affidavit into evidence, Rule 1-037(B)(2)(b), because her attorneys had "fail[ed] to obey" the court's scheduling order. Rule 1-016(F). The Court should reject Defendants' effort to recast this sanction as the denial of a request for modification.

B. A sanction that compels dismissal on summary judgment by excluding expert testimony must be analyzed the same way as other dispositive sanctions.

As Plaintiff explained in her brief in chief, the Court of Appeals erred by reasoning that exclusion is a "lesser sanction" than dismissal or default when its effect is to deny the sanctioned party a trial on the merits. Defendants do not even attempt to defend that reasoning. Indeed, they concede that "heightened scrutiny may be justified where dispositive testimony of fact witnesses is excluded[.]" **[AB 20]** But Defendants ask the Court to craft an exception to the general rule that dispositive sanctions are subject to closer scrutiny in cases where a case is terminated by the exclusion of expert testimony.

The Court should not be persuaded. The dispositive exclusion of expert testimony denies the sanctioned party an opportunity for a hearing on the merits no less than the dispositive exclusion of lay testimony or other evidence. It too is "functionally equivalent" and "tantamount to" outright dismissal. **[BIC 20 (text only) (citations omitted)]** So, for the reasons explained in Plaintiff's brief in chief, the same safeguards should apply. "What matters is not *how* a sanction terminates a case, but *whether* it terminates the case." **[Pet. 3]**

Hanging their hats on supposed practical differences between experts and lay witnesses, Defendants claim that the adequacy of expert disclosure is always within the control of the disclosing party and observe that parties (or at least defendants)

need to timely learn the opinions of their opponents' experts. **[AB 20-21]** That argument does not support immunizing the exclusion of expert testimony from closer scrutiny where exclusion is dispositive. Parties have no unique ability to prevent "accidental or involuntary" mistakes or omissions in the disclosure of expert testimony. *Kalosha v. Novick*, 1967-NMSC-076, ¶ 19, 77 N.M. 627, 426 P.2d 598.[2] And while the timely disclosure of expert testimony is undoubtedly important, a failure to disclose should not result in the termination of a party's case where a less severe sanction would suffice to cure any prejudice to the opposing party and protect the integrity of the judicial process. *See Lopez v. Wal-Mart Stores, Inc.*, 1989-NMCA-013, 108 N.M. 259, 771 P.2d 192 ("Generally, causes should be tried on their merits; depriving parties of their day in court is a penalty that should be avoided in the absence of impeding administration or perpetrating injustice.").

Defendants contend that the draconian rule they propose is necessary to prevent parties from "remain[ing] silent while the judicial system and [opposing parties] are burdened with accommodating [their] conduct, misconduct, inaction, or laziness throughout discovery." **[AB 21]** Not so. Applying closer scrutiny to

---

[2] *See generally Springer Corp. v. Herrera*, 1973-NMSC-057, ¶ 12, 85 N.M. 201, 202, 510 P.2d 1072 ("[The law] looks with disfavor upon a party, who, regardless of the merits of the case, attempts to take advantage of the mistake, surprise, inadvertence, or neglect of his adversary." (citation omitted)), *overruled on other grounds by Sunwest Bank of Albuquerque v. Roderiguez*, 1989-NMSC-011, ¶ 12, 108 N.M. 211, 770 P.2d 533.

dispositive expert exclusion does not prevent courts from imposing that sanction in an appropriate case—it merely ensures that they do not "too lightly" deprive parties of their day in court. *United Nuclear Corp. v. General Atomic Co.*, 1980-NMSC-094, ¶ 202, 96 N.M. 155, 629 P.2d 231(citation omitted). And it in no way impairs courts' broad authority to address noncompliance with the myriad non-dispositive sanctions at their disposal. *Id.* ¶ 202 (noting that sanctions may be imposed for "any failure to comply").

The rules governing sanctions are designed to facilitate merits-based resolution whenever possible, not to provide litigants a means to unnecessarily close the courthouse door on opposing parties. Disregarding the dispositive consequences of expert exclusion "tilt[s] the balance unduly toward the orderly and expeditious disposition of cases to the detriment of the . . . preference [for deciding] cases on their merits," *Lowery v. Atterbury*, 1992-NMSC-001, ¶ 20, 113 N.M. 71, 823 P.2d 313 (text only). In point of fact, that imbalance is particularly pronounced when expert testimony is excluded because, as Defendants acknowledge, expert testimony is "often" dispositive. **[*See* AB 20]**

Unable to come up with any New Mexico authority for exempting expert exclusion from the rule requiring closer scrutiny of dispositive sanctions, Defendants assert that two federal cases and one from Utah support "lowering the sanctions threshold" for excluding expert testimony. **[AB 22]** The Court should reject that

argument out of hand because it rests on a reading of those authorities that is at odds with New Mexico law. All three of the cases cited by Defendants—*Harris*, *Vanderberg*, and *Brinkerhoff*—affirmed sanctions under procedural rules providing for the presumptive exclusion of untimely-disclosed witnesses unless the late disclosure was justified or harmless. *See Harris v. Remington Arms Co., LLC*, 997 F.3d 1107, 1112 (10th Cir. 2021) (applying Federal Rule of Civil Procedure 37(c)(1)); *Vanderberg v. Petco Animal Supplies Stores, Inc.*, 906 F.3d 698, 704-05 (8th Cir. 2018) (same); *Brinkerhoff v. Fleming*, 536 P.3d 156, 159 (Utah 2023) (applying an equivalent Utah procedural rule requiring exclusion unless the failure to disclose is harmless or excused by "good cause").[3] The language of these rules place a thumb on the scale in favor of exclusion irrespective of its probable impact on an adjudication on the merits or the adequacy of lesser sanctions. But there is no counterpart to those provisions in the New Mexico Rules of Civil Procedure. *See Lewis ex rel. Lewis v. Samson*, 2001-NMSC-035, ¶15 n.1, 131 N.M. 317, 35 P.3d

[3]Notably, the rules discussed in these cases do not draw the expert-lay distinction that Defendants ask this Court to make—they broadly apply to all witness disclosures. *See* Fed. R. Civ. P. 37(c)(1) (addressing failures to "provide information or identify a witness as required by Rule 26(a) or (e)"); Fed. R. Civ. P. 26(a) (imposing an obligation to disclose experts, "individual[s] likely to have discoverable information that the party may use to support its claims or defenses" and a pretrial witness list); Utah R. Civ. P. 26(a)(4)(A)(iii) (providing that a party may not use an "undisclosed witness" without drawing a distinction between lay and expert witnesses).

972 (noting that New Mexico has not adopted the presumptive exclusion provision in the federal rules).[4] Ignoring the consequences of excluding an expert in selecting a sanction is contrary to the principle of New Mexico law that courts exercising their discretion must consider all the circumstances before them, *see State v. Anderson*,

---

[4]Even in the federal system, the dispositive consequences of exclusion in a particular case may make it an abuse of discretion to impose that sanction for an untimely disclosure. Federal Rule 37(c)(1) at first blush appears to make exclusion an automatic sanction by stating that a party that fails to disclose information or a witness "is not allowed to use that information or witness." But the very next sentence of the rule expressly permits courts to impose sanctions "instead of" exclusion. Although the case law is neither unanimous nor clear on the issue, courts have indicated that at least some of the safeguards that apply to dismissals may constrain a court's discretion to choose a sanction under the rule when exclusion is dispositive. *See, e.g.*, *Vanderberg.*, 906 F.3d at 704-05 & n.4 (recognizing, in the context of a sanction that excluded an expert witness, that "[w]here the exclusion of evidence is tantamount to dismissal, a district court may need to first consider the possibility of lesser sanctions," but implying that a finding of willfulness was unnecessary because the court had never required one before); *id.* at 708 (Erickson, J., dissenting) (reasoning that, even if the sanctioned party's failure to disclose was not harmless, "the district court was obligated to consider a lesser sanction . . . when there was neither intentional misconduct nor surprise to the opposing party, and exclusion of the expert in effect directed a dismissal of the case"); *Esposito v. Home Depot U.S.A., Inc.*, 590 F.3d 72, 79 (1st Cir. 2009) ("Because all parties acknowledged that [the exclusion of the plaintiff's expert] carried the force of a dismissal, the justification for it must be comparatively more robust.").

Outside of the specific context of Rule 37(c)(1), a number of federal decisions have recognized that sanctions functionally equivalent to dismissal must be analyzed as dismissals. *See, e.g.*, *Hawkeye Gold, LLC v. China Nat'l Materials Indus. Imp. & Exp. Corp.*, 89 F.4th 1023, 1037 (8th Cir. 2023), *cert. denied*, 144 S. Ct. 2605 (2024); *United States v. Sumitomo Marine & Fire Ins. Co.*, 617 F.2d 1365, 1369 (9th Cir. 1980).

2023-NMSC-019, ¶ 34, 536 P.3d 453, and our State's preference for merits-based adjudication. *Lowery*, 1992-NMSC-001, ¶ 20.

II. The Court of Appeals erred by affirming the exclusion of Dr. Arnaout's affidavit.

The Court should conclude that reversal or vacatur and remand are required under the dispositive sanctions framework. The decision to exclude Dr. Arnaout's affidavit was unsupported by substantial evidence as a matter of law. But even if the Court concludes otherwise, remand is nevertheless required because the district court failed to apply the dispositive sanction analysis in reaching that decision.

A. As a matter of law, exclusion was unwarranted on the facts of this case.

Plaintiff has never denied that her expert disclosure violated the court's scheduling order or that some sanction was appropriate. Her claim is simply that the district court's decision to terminate her case was impermissibly disproportionate to the gravity of that violation. The record here demonstrates that Plaintiff's violation of the district court's scheduling order was not willful and that a lesser sanction would have sufficed to remedy the prejudice to Defendants and the court. Consequently, the exclusion of Dr. Arnaout's affidavit was an abuse of discretion.

1. Plaintiff's noncompliance was not willful.

Plaintiff did not "conscious[ly]" or "intentional[ly]" decide to omit Dr. Arnaout's opinion that the bile leak was present from her expert disclosure. *Kalosha v. Novick*, 1967-NMSC-076, ¶ 19, 77 N.M. 627, 426 P.2d 598. The order Plaintiff

failed to obey did not specifically pertain to Dr. Arnaout—it broadly required Plaintiff to make the disclosures required by Rule 1-026(B)(6)(a). **[1 RP 60-61]** That certainly does not excuse Plaintiff's noncompliance, but it does explain how Dr. Arnaout's causation opinions could accidentally be lost in the shuffle.

Context makes inadvertence the only plausible explanation for the omission of those opinions from Plaintiff's disclosure. It was apparent from the complaint's allegations that Plaintiff would need expert testimony regarding causation to prove her case. **[1 RP 2 ¶¶ 7, 9, 10]** Plaintiff identified Dr. Arnaout and her other experts in accordance with the court's disclosure deadline. Her disclosure indicated that Dr. Arnaout would testify that Defendants should not have discharged her from the hospital and that other experts would testify about the damages Defendants' negligence had caused. **[1 RP 104-05]** The failure to include Dr. Arnaout's opinion that the discharge had caused damages cannot reasonably be interpreted as the product of a conscious decision to omit this missing link.

It is true, as Defendants assert, that Plaintiff could have remedied her disclosure between April 1 and the filing of Dr. Arnaout's affidavit on August 12. But that fact falls far short of supporting a finding of "gross indifference or conscious failure to comply." **[AB 23]** The record does not show that the deficiency in the disclosure was brought to Plaintiff's attention before the July 15 email exchange in which Plaintiff's counsel clarified that Dr. Arnaout was Plaintiff's causation expert.

[1 RP 163] Plaintiff promptly responded three days later by filing an amended disclosure specifically indicating that Dr Arnaout would testify that Defendants had caused Plaintiff's damages "by discharging Plaintiff . . . without following up on [her] abnormal results." **[1 RP 200-01]** And nothing in the record contradicts Plaintiff's counsel's representation that the counsel first learned "how defense counsel was reading Dr. Arnaout's deposition testimony" from the motions for summary judgment Defendants filed in the interim. **[10-1-19 Tr. 38:11-14]** Rather than supporting a finding of willfulness, the record shows accidental oversight and inertia amounting to nothing more than simple, albeit regrettable, negligence. *See generally Kalosha*, 1967-NMSC-076, ¶ 19 (reasoning that willfulness requires more than merely "accidental . . . non-compliance").

2. The prejudice to Defendants did not support exclusion.

As Plaintiff explained in her brief, "[t]he prejudice to Defendants . . . was time and effort expended and a reduced, though still substantial, window for trial preparation, not actual interference with trial preparation itself." **[BIC 28]** From the time Plaintiff filed her complaint, Defendants were aware that Plaintiff intended to show that "post-surgical complications"—i.e., her bile leak—should have been discovered and treated prior to Plaintiff's discharge. **[1 RP 2 ¶¶ 7, 9, 10]** Plaintiff's disclosure of Dr. Arnaout, albeit deficient, "suggest[ed] that there was, in fact, a surgical complication that went undiagnosed." **[BIC 26 (citing 2 RP 27)]** And, as

Plaintiff has tried to explain throughout this litigation, Dr. Arnaout conveyed his opinion that Plaintiff's bile leak began prior to her discharge from the hospital well before it was included in his affidavit. **[*E.g.*, 2 RP 369 (motion to strike response); COA BIC 4, 8]**

During his March 15, 2019, deposition, Dr. Arnaout testified that Plaintiff's lab results *before her discharge* 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)]** There is no dispute that Plaintiff was, in fact, diagnosed with a bile leak around two weeks after she was discharged **[*See* BIC 2; AB 3]**, and Dr. Arnaout testified to his understanding that this diagnosis was "late" and had been "missed." **[2 RP 332 (Tr. 19:17-20:7)]** Since Plaintiff's test results were indicative of a bile leak and she was, in fact, diagnosed with a bile leak, the obvious import of Dr. Arnaout's testimony is that the reason Plaintiff's test results indicated that she had a bile leak was that she had a bile leak.

Defendants do not advance an alternative reading of this part of Dr. Arnaout's testimony. They do not even acknowledge it in their answer. Instead, Defendants assert that they prepared their case in reliance on Dr. Arnaout's admission that he did not know when the bile leak began or should have been diagnosed. But Defendants nowhere explain how this reliance actually affected their trial preparation. Their own expert disclosures demonstrate that Defendants were

prepared to meet the causation opinions in Dr. Arnaout's affidavit. **[*See* 1 RP 132 (disclosing an expert who would testify that "the delay alleged by Plaintiff did not . . . change . . . her overall outcome"); 2 RP (disclosing an expert who would testify that Plaintiff's discharge "was appropriate and met the standard of care" and that Defendant Kaur "did not cause damage to Plaintiff")]** And although Defendants assert that extensive "work would have had to be reconsidered and redone" if the district court had considered Dr. Arnaout's affidavit, they do not explain, and the record does show, how Plaintiff's inadequate disclosure affected their experts' opinions or the depositions of "Plaintiff's fact witnesses [and] hospitalist expert." **[AB 26 (citation omitted)]**

Plaintiff does not dispute that her disclosure did result in some prejudice. The omission of Dr. Arnaout's causation opinions hampered Defendants' ability to thoroughly explore those opinions before the discovery deadline. Although the record does not show that this impacted their trial preparation, Defendants were entitled to have an in-depth understanding of Dr. Arnaout's opinions to prepare for cross-examination. Defendants and the district court also suffered concrete prejudice by wasting time and effort on summary judgment litigation that would have been unnecessary had Defendants previously been alerted to the opinions in Dr. Arnaout's affidavit. *See Esposito*, 590 F.3d at 79. On balance, however, this prejudice did not support a sanction so severe that it terminated Plaintiff's case.

3. The only reasonable conclusion on this record is that a less severe sanction would have sufficed to remedy Plaintiff's noncompliance with the Court's order.

In her brief in chief, Plaintiff described a number of alternative sanctions available to the court. **[BIC 29-30]** Defendants' only response is to assert that "there is no evidence in the record" to show that these alternatives would have been adequate. **[AB 25]** As explained, however, the record shows culpability amounting to nothing more than simple negligence and only limited prejudice. Against that backdrop, a sanction imposing costs and expenses for the re-deposition of Dr. Arnaout and the summary judgment litigation would have fully compensated Defendants and vindicated the court's authority by sending the message that noncompliance would not be tolerated. In the unlikely event that Dr. Arnaout's re-deposition demonstrated that Plaintiff's noncompliance had caused Defendants additional prejudice in their trial preparation, further compensation could have been ordered. Especially since trial was still three months away when the district court struck Dr. Arnaout's affidavit, there were multiple lesser sanctions that would have protected Defendants' right to fully prepare for trial while ensuring minimal disruption to the judicial process. On the facts of this case, the district court's failure to select one of those lesser sanctions was an abuse of discretion.

B. Alternatively, the case should be remanded for application of the proper sanctions analysis.

If the Court concludes that the sanction here is not unsupported by substantial evidence as a matter of law, the proper remedy is to remand for the district court to apply the dispositive sanctions framework. **[*See also* BIC 31-32]** This Court is poorly placed to make factual determinations regarding willfulness, prejudice, and the adequacy of alternative sanctions, and the district court's order demonstrates that the court never made those findings here.[5] *See State v. Franks*, 1994-NMCA-097, ¶ 8, 119 N.M. 174, 889 P.2d 209 ("[O]rdinarily, it is improper for [an appellate court] to engage in fact-finding; that is a trial-court function."). The decision to exclude Dr. Arnaout's affidavit without making the findings required to sustain a dispositive sanction was itself an abuse of discretion requiring remand. *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; *see also N.M. Right to Choose/NARAL v. Johnson*, 1999-NMSC-028, ¶ 7, 127 N.M. 654, 986 P.2d 450 ("[W]e may characterize as an abuse of discretion a discretionary decision that is premised on a misapprehension of the law." (text only) (citation omitted)).

---

[5] Defendants assert that "[t]he district court recognized that a monetary sanction would be inadequate[,]" **[AB 25]** but the court's order contains no discussion of monetary sanctions whatsoever. **[2 RP 478-85]**

CONCLUSION

For the reasons explained in her brief in chief and herein, Plaintiff respectfully asks the Court to reverse or vacate the Court of Appeals and requests that this case be remanded to the district court for trial, that it be remanded to the Court of Appeals for further consideration of the propriety of summary judgment in light of the affidavit, or that it be to remanded for the district court to apply the correct sanctions framework, as the Court deems proper.

Respectfully submitted,

/s/ James Johnson
James Johnson
Mark Fine
Joseph Fine
james@thefinelawfirm.com
mark@thefinelawfirm.com
joe@thefinelawfirm.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of November 2024, the foregoing reply was filed through the Court's electronic filing system and transmitted to counsel of record identified below by electronic means.

Kathleen M. Wilson
Hari-Amrit Khalsa
Hinkle Shanor LLP
7601 Jefferson St. NE, Suite 180
Albuquerque, NM 87109
Attorneys for Defendant-Respondent Presbyterian Healthcare Services

M. Eliza Stewart
Jacqueline Olexy
Madison, Mroz, Steinman, Kenny & Olexy, P.A.
201 Third St. NW #1600
Albuquerque, NM 87102
Attorneys for Defendant-Respondent Navjeet Kaur, MD

Larry J. Montaño
Olga Serafimova
Holland & Hart LLP
110 N. Guadalupe, Suite 1
Santa Fe, NM 87501
Attorneys for Defendants-Respondents

By: */s/ James Johnson*
James Johnson