IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

DENNIS P. MURPHY, Personal Representative of the ESTATE OF ERIKA CHAVEZ, ERIC CHAVEZ, Individually, and as Next Friend to SERENITY CHAVEZ, a minor, ERIK CHAVEZ, a minor, and IZAIAH CHAVEZ, a minor,

Plaintiffs-Respondents,

vs. **No. S-1-SC-40703**

O'REILLY AUTOMOTIVE STORES, INC.,

Defendant-Petitioner,

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and JOSE ORTIZ-MUNOZ,

Defendants.

Court of Appeals No. A-1-CA-41177
District Court No. D-101-CV-2023-01185
(Honorable Francis J. Mathew)

PLAINTIFFS-RESPONDENTS' ANSWER BRIEF

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Statement of Compliance with Type-Volume Limitations: The body of the attached brief exceeds the thirty-five (35) page limit set forth in Rule 12-318(F)(2), NMRA. Pursuant to Rule 12-318(G), NMRA, Plaintiffs/Appellants certify that this brief complies with Rule 12-318(F)(3), NMRA, in that this brief uses 14-point proportionately spaced Times New Roman font and contains **10,962** words in the body of the brief as defined by Rule 12-318(F)(1). The word count was generated using Microsoft Word 365.

Citations to Transcript of Proceedings: Pursuant to the Court's February 26, 2025, Order, Plaintiffs-Respondents cite to the unofficial transcript of the February 21, 2024, district court hearing, in the same manner used by Defendant-Petitioner: [2-21-2024 Tr. at ____].

Similarly, Plaintiffs-Respondents cite to the Examinations Under Oath, which are included in the record proper, in the same manner used by Defendant-Petitioner:

[1 RP __(Munoz EUO at _____)]

[1 RP __(Sanchez EUO at _____)]

[1 RP __(Sardella EUO at _____)]

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INTRODUCTION

This appeal arises from a dispute over investigation conducted by the Wrongful Death Estate of Erika Chavez ("WDE") under a separate civil action appointing the WDE personal representative. Specifically, the dispute centers on subpoenas issued by counsel for the WDE to two (2) employees of Defendant-Petitioner O'Reilly Automotive Stores, Inc. ("O'Reilly"). The subpoenas were issued under the civil action number for the appointment of the wrongful death personal representative. *See* [1 RP 140–145]. Following service of the Complaint for Wrongful Death in the underlying action, O'Reilly filed a Motion to Dismiss with Prejudice or Alternatively Disqualify Counsel and Exclude Improperly Obtained Pre-Litigation Discovery ("MTD"). *See* [1 RP 120–159]. The MTD was fully briefed by O'Reilly and Plaintiffs-Respondents ("Plaintiffs"), and the district court heard oral arguments on O'Reilly's MTD on February 21, 2024. *See generally* [1 RP 120–159; 211–251]; [2 RP 306–342]; [2-21-2024 Tr. at 3:16–40:18]. The district court denied O'Reilly's MTD, but authorized O'Reilly to seek interlocutory appeal. *See* [5 RP 1138–1141]. The Court of Appeals denied O'Reilly's application for interlocutory appeal. *See* [6 RP 1271–1272]. This Court then granted O'Reilly's Petition for a Writ of Certiorari. *See* court file, Order (filed January 17, 2025).

Below, the district court certified a singular, and narrow, question for interlocutory appeal: "[W]hether a concluded wrongful death personal

representative appointment action under the Wrongful Death Act ("WDA"), NMSA 1978, § 41-2-1, *et seq.* is a pending civil suit or pending action, which affords the wrongful death personal representative subpoena powers under the New Mexico Rules of Civil Procedure." [5 RP 1139, ¶ 5]. O'Reilly, however, does not simply request clarification of our Rules of Civil Procedure. *See* BIC, at 45 (stating the case should be remanded "with instructions to the district court to dismiss Plaintiffs' complaint as to O'Reilly or, at a minimum, exclude the improperly obtained evidence"). O'Reilly maintains it is entitled to drastic sanctions against Plaintiffs, despite conceding the law needs to be clarified, and conceding the law does not support the sanctions requested. *See* [2-21-2024 Tr. at 11:19-21; 39:1–5].

As discussed below, the at-issue conduct did not violate the Rules of Civil Procedure and New Mexico law. Nevertheless, even if this Court were to clarify the law in O'Reilly's favor, the district court did not abuse its discretion in denying O'Reilly's request for sanctions. Therefore, Plaintiffs respectfully ask the Court to affirm the district court's order denying O'Reilly's MTD.

BACKGROUND

I. Relevant Facts

This lawsuit arises from a fatal motor vehicle crash on September 12, 2020, wherein Defendant Jose Ortiz-Munoz ("Ortiz-Munoz") violently crashed into Erika Chavez's vehicle, killing her and injuring her daughter. *See* [1 RP 5, ¶ 37]. Ortiz-

Munoz was driving a vehicle with known mechanical defects. *See* [1 RP 6, ¶¶ 38–40]. The mechanical defects included gears malfunctioning in the automatic transmission, the reverse gear not engaging, and the gas pedal would stick and cause uncontrolled acceleration. *See* [1 RP 3, ¶ 13]. The Mustang's computer safety system would also intermittently fail, which would cause the vehicle to become inoperable. *See* [1 RP 4, ¶ 24].

At all times material, Ortiz-Munoz was an employee of O'Reilly. *See* [1 RP 3, ¶ 16]. Ortiz-Munoz's supervisor was aware of the Mustang's mechanical issues because the mechanical problems had caused Ortiz-Munoz to be late to work on at least four (4) to five (5) occasions. *See* [1 RP 3, ¶ 18–19]. On the day of the fatal crash, Ortiz-Munoz was facing a second written warning if he was late for work. *See* [1 RP 4, ¶ 21]. O'Reilly District Manager, Johnathan Meeks, and another manager, Adriana, were also aware of the tardiness issues, as well as the Mustang's mechanical issues. *See* [1 RP 4, ¶ 27]. O'Reilly also had a policy, as a condition of employment and continued employment, that O'Reilly employees have reliable transportation to, and from, work. *See* [1 RP 3, ¶ 19].

Ortiz-Munoz's supervisor, Freddie Sanchez ("Mr. Sanchez"), was aware that the Mustang's antilocking brake system ("ABS") and transmission were failing. *See* [1 RP 4, ¶ 22]. In fact, Mr. Sanchez was aware that another manager had warned Ortiz-Munoz he should not be driving the Mustang, as it posed a danger to himself

and the motoring public. *See* [*id.*]. Ortiz-Munoz also purchased a new transmission for the Mustang, using his O'Reilly employee discount, which required management approval. *See* [1 RP 4, ¶ 23].

Additionally, O'Reilly and Mr. Sanchez were aware that Ortiz-Munoz had been given an OBD2 scanner, which was the property of O'Reilly. *See* [1 RP 4, ¶¶ 25–26]. The OBD2 scanner allowed Ortiz-Munoz to override transmission error codes and safety features of the Mustang, which allowed Ortiz-Munoz to continue driving the dangerous vehicle. *See* [1 RP 4, ¶ 25]. O'Reilly managers warned Ortiz-Munoz of the dangers of continued use of the Mustang. *See* [1 RP 5, ¶ 28]. Notwithstanding, O'Reilly selectively enforced its own policies and procedures when it came to Ortiz-Munoz. *See* [1 RP 5, ¶ 29]. Specifically, O'Reilly was actively enforcing its attendance policy against Ortiz-Munoz, but O'Reilly did not demand compliance with its policy to have reliable transportation to and from work. *See* [*id.*].

On September 12, 2020, at or near the time of the crash, Ortiz-Munoz was scheduled for a shift at O'Reilly. *See* [1 RP 111 (Munoz EUO at 54:14–21)]; [1 RP 245, (Sardella EUO at 20:7–21:4)]. Ortiz-Munoz's Mustang stalled on the side of the road near Sage, in Albuquerque, and he was waving traffic passed, as he attempted to get the Mustang going. *See* [1 RP 5, ¶ 31]. Ortiz-Munoz was eventually able to get the Mustang going, but once he was driving again, the Mustang's gas pedal got stuck close to the floor and Ortiz-Munoz was traveling at an excessive

speed. *See* [1 RP 5, ¶¶ 32–33]. Prior to the crash, Erika Chavez ("Erika") was driving with her daughter Serenity, and was traveling west on Tower, completing a left turn through the intersection at Unser. *See* [1 RP 5, ¶ 30]. Multiple witnesses saw Ortiz-Munoz traveling at an extreme speed just prior to the crash. *See* [1 RP 5, ¶ 34]. Ortiz-Munoz observed the traffic signal at Unser and Tower turning yellow, but proceeded through the intersection after the light turned red. *See* [1 RP 5, ¶ 35]. In doing so, Ortiz-Munoz violently t-boned Erika's vehicle. *See* [1 RP 5, ¶ 37]. Erika died as a result of the crash, and Serenity sustained injuries. *See* [*id.*]. Erika was married to Eric Chavez, and they had three (3) children, Erik, Izaiah, and Serenity. *See* [1 RP 1, ¶ 4].

II. Relevant Procedural History

As a preliminary matter, O'Reilly spends nearly seven (7) pages of its Brief addressing the procedural history of a separate civil district court case which was in front of a different district court judge. *See* BIC, at 4–10. Some of the docket filings from that case are contained in the record proper as they were attached as exhibits to briefing. However, the entirety of the record of this separate civil action is not before this Court. *See e.g.*, [1 RP 134–145]. Nonetheless, O'Reilly asks the Court to take judicial notice of the docket in this separate civil action. *See* BIC, at 4, n.2.

Plaintiffs question the propriety of O'Reilly's request, which serves to highlight a foundational issue on appeal. Specifically, whether O'Reilly raised its

objections in the wrong district court. *See infra*, Section II.b. Each case cited by O'Reilly on judicial notice suggests judicial notice may only be taken of another case currently or previously before it. *See* BIC, at 4, n.2. (citing *Miller v. Smith*, 1955-NMSC-021, ¶ 23, 59 N.M. 235, 282 P.2d 715 (stating: "[T]here are cases in which the district court may in one case take judicial notice of the proceedings in another **on its docket**; but the cause of which judicial notice is taken must be so closely interwoven or so closely interdependent with the case on trial before the court as to require judicial notice when that notice is requested.")(bolding added) and citing *State versus Gutierrez*, 2011-NMSC-024, ¶¶ 52–53, 150 N.M. 232, 258 P.3d 1024 (where this Court took judicial notice of a prior case **before it** to assist the Court in its analysis))(bolding added). Likewise, this Court, in *Richardson Ford Sales versus Cummins*, 1964-NMSC-128, 74 N.M. 271, 393 P.2d 11, rejected the notion it would take judicial notice of a lower court proceeding. *See Richardson Ford Sales*, 1964-NMSC-128, ¶ 5 (stating: "Any fact not so established is not before the Supreme Court on appeal, nor will we take judicial notice of proceedings in a lower court. We cannot be expected to originally search the records of the various lower courts."). The fact there is a question regarding whether judicial notice is appropriate underscores Plaintiffs' arguments regarding whether O'Reilly's MTD was properly before the district court in the wrongful death action. *See* [2-21-2024

Tr. at 23:22–24:1; 24:9–16]. Notwithstanding, Plaintiffs provide the following procedural history based on what is contained in the record proper.

On January 25, 2021, Eric Chavez, through counsel, petitioned for the appointment of a personal representative of the wrongful death estate of Erika Chavez. *See* [1 RP 134–137]. The case was assigned a civil ("CV") case number, D-101-CV-2021-00159 ("Appointment Action"), and was assigned to the Honorable Maria Sanchez-Gagne ("Judge Sanchez-Gagne"). *See* [*id.*]. The Petition requested the appointment of Dennis P. Murphy as personal representative of the wrongful death estate of Erika Chavez, "for the purpose of investigating and bringing claims on behalf of the estate for the benefit of the statutory beneficiaries." [1 RP 134]. On January 26, 2021, Judge Sanchez-Gagne entered the Order Appointing Personal Representative of the Wrongful Death Estate of Erika Chavez. *See* [1 RP 138–139]. The Order stated, in pertinent part: "Dennis P. Murphy is appointed Personal Representative of the Wrongful Death Estate of Erika Chavez, Deceased, *for the purpose of investigating and pursuing a wrongful death action*". [1 RP 138] (italics added).

On March 15, 2021, under the caption of the Appointment Action, an Examination Under Oath ("EUO") was taken of Ortiz-Munoz, by counsel for the WDE. *See generally* [1 RP 98–119 (Munoz EUO at 1-86)]. Ortiz-Munoz was represented by counsel at the EUO. *See* [1 RP 98 (Munoz EUO at 2:7–11)].

On April 13, 2022, counsel for the WDE filed a Certificate of Service in the Appointment Action stating that, on April 12, 2022, a Subpoena Duces Tecum for an Examination Under Oath, including witness fee, was served on Mr. Sanchez. *See* [1 RP 144]. A copy of the subpoena served on Mr. Sanchez was attached to O'Reilly's MTD. *See* [1 RP 140–143]. The subpoena bears the caption and case number of the Appointment Action, is dated April 7, 2022, and was signed by counsel for the WDE. *See* [*id.*]. The subpoena further included all requisite language required under Rule 1-045. *See* [*id.*]. *See also* Rule 1-045, NMRA. As O'Reilly confirmed in the underlying briefing, the address on the subpoena for Mr. Sanchez was an O'Reilly store location, and Mr. Sanchez was served while at work for O'Reilly. *See* [1 RP 121, at n.1]. The EUO of Mr. Sanchez was taken on May 27, 2022. *See generally* [1 RP 230–239 (Sanchez EUO)].

On July 26, 2022, counsel for the WDE filed a Certificate of Service in the Appointment Action stating that on June 30, 2022, a Subpoena for Appearance at Examination Under Oath, along with the witness fee, was served on Jason Sardella ("Mr. Sardella").[1] *See* [1 RP 145]. The EUO of Mr. Sardella was taken on August 26, 2022. *See generally* [1 RP 240–251 (Sardella EUO)].[2]

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[1] A copy of the subpoena for Mr. Sardella is not included in the record proper.

[2] O'Reilly incorrectly states that "Plaintiff's counsel was aware that the issuance of pre-suit subpoenas in an appointment proceeding was improper because First Judicial District Judge Mathew Wilson had quashed such a subpoena that Plaintiff's counsel issued in another case. *See* BIC, at 13. However, the record does not support

On June 2, 2023, Plaintiffs filed their Complaint for Wrongful Death ("Complaint"), and it was assigned case number D-101-CV-2023-01185 ("WD Action"). *See* [1 RP 1–21]. Plaintiffs asserted claims arising out of the September 12, 2020, crash against O'Reilly, State Farm Mutual Automobile Insurance Company, and Ortiz-Munoz. *See generally* [1 RP 1–21].

On August 16, 2023, O'Reilly filed its Answer to Plaintiffs' Complaint and Jury Demand. *See* [1 RP 55–79].

On August 30, 2024, O'Reilly filed its MTD. *See* [1 RP 120–159]. O'Reilly's MTD focused on the subpoenas issued in the Appointment Action to take the EUOs of Mr. Sanchez and Mr. Sardella. *See* [1 RP 120–122]. O'Reilly argued the WDA does not provide either the Wrongful Death Personal Representative, or counsel, the authority to obtain pre-suit discovery through the use of a subpoena. *See* [1 RP 123–124]. O'Reilly argued the Appointment Action was not a civil suit or pending action which authorized the use of the Rules of Civil Procedure to conduct discovery. *See* [1 RP 125–126]. O'Reilly argued Plaintiffs' counsel's conduct was unlawful and violated the Rules of Professional Conduct. *See* [1 RP 126–129]. Finally, O'Reilly

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O'Reilly's statement. *Compare* [1 RP 230–239 (Sanchez EUO)] (taken May 27, 2022) and [1 RP 240–251 (Sardella EUO)] (taken August 26, 2022) *with* [1 RP 158–159] (The Honorable Mathew Wilson's ("Judge Wilson") order is entered on September 27, 2022, while oral argument occurred on September 13, 2022). **As such, O'Reilly's assertions that Plaintiffs' counsel had already received Judge Wilson's ruling when it took Mr. Sanchez's and Mr. Sardella's EUOs, is contrary to the record.**

argued that the only proper vehicle for pre-suit discovery was Rule 1-027. *See* [1 RP 129–131] (citing Rule 1-027, NMRA).

On September 12, 2023, Plaintiffs filed their Response. *See* [1 RP 211–251]. Plaintiffs argued the district court order appointing the WDE personal representative authorized investigation, and that the Appointment Action was a civil action which allowed the use of the Rules of Civil Procedure. *See* [1 RP 214–218]. Plaintiffs also argued O'Reilly was not making a proper challenge to Plaintiffs' counsel use of the appointment order, as the order was entered by another district court judge. *See* [1 RP 216]. Plaintiffs argued Rule 1-027 was inapplicable under the circumstances. *See* [1 RP 216, 219–221]. Plaintiffs also argued O'Reilly's personal attacks on counsel were baseless and urged the district court to deny the sanctions requested. *See* [1 RP 217–218; 221–222].

On October 2, 2023, O'Reilly filed its Reply. *See* [2 RP 306–342]. O'Reilly argued the WDA and Rule 1-017 do not confer the right to issue subpoenas within the appointment proceeding. *See* [2 RP 307; 308–311]. O'Reilly argued that, even if the Appointment Action was a pending civil action, Rule 1-045 was not the proper mechanism to obtain testimony from O'Reilly's personnel. *See* [2 RP 307; 311–312; 314–315]. O'Reilly also argued it was not required to challenge the conduct in the Appointment Action and instead could make its arguments within the wrongful death action. *See* [2 RP 312–313].

The district court set a hearing on O'Reilly's MTD for February 21, 2024. *See* [4 RP 706–707]. At the hearing, O'Reilly argued the subpoenas issued to Mr. Sanchez and Mr. Sardella were improper and that sanctions were warranted, including dismissal, exclusion of evidence, or disqualification of counsel. *See* [2-21-2024 Tr. at 5:3–6:17]. O'Reilly argued there was no pending civil action, and that the law did not support Plaintiffs' counsel's use of the Rules of Civil Procedure. *See* [2-21-2024 Tr. at 7:16–10:6].

O'Reilly argued that *In re Chavez*, 2017-NMSC-012, 390 P.3d 965, was analogous to the facts of this case. *See* [2-21-2024 Tr. at 10:7–22]. The district court noted the sanctions O'Reilly requested were severe compared to *In re Chavez*, and that the district court was not aware of any case that allowed an ethical violation to result in dismissal. *See* [2-21-2024 Tr. 10:25–11:10]. To which O'Reilly's counsel responded:

> **I'm not aware of any case law either, Your Honor.** And trust me, we have looked. We understand the differences. But I think the key factor there is that both -- in that matter, as well as, I think, the -- our New Mexico Supreme Court has agreed that you have to have a pending civil action before you can conduct the type of pre-suit discovery that they have. So I think that supports the general argument that we're making.
>
> **We understand that there's no case law for what we're asking for and what I'll be asking the Court to do at the end of this.** My argument is, you know, what we've asked is what we see as being fair to our clients based on what has happened. If the Court has other ideas for how we can deal with it, we, of course, are open for different ways of dealing with this situation, as well.

[2-21-2024 Tr. at 11:11–25](bolding added).

The district court asked O'Reilly's counsel what the difference was between what occurred here and when a non-party is deposed and, based on the non-party's deposition testimony, is then sued and brought in as defendant. *See* [2-21-2024 Tr. 14:5–22]. O'Reilly's counsel argued the difference is in having a pending action, and that Plaintiffs' counsel should have proceeded under Rule 1-027. *See* [2-21-2024 Tr. at 14:23–16:3]. The district court also questioned O'Reilly's counsel regarding the fact the subpoenas contained the required language, and yet Mr. Sanchez and Mr. Sardella did not take it upon themselves to ask O'Reilly whether they needed an attorney involved. *See* [2-21-2024 Tr. at 16:4–25]. O'Reilly's counsel responded that Rule 1-027 should have been utilized, that Mr. Sanchez and Mr. Sardella are not litigation savvy, and that O'Reilly never had a chance to object during the EUOs. *See* [2-21-2024 Tr. at 17:1–18:17].

The district court then asked O'Reilly's counsel whether Plaintiffs' counsel had the right to interview Mr. Sanchez and Mr. Sardella. *See* [2-21-2024 Tr. at 18:18–19]. O'Reilly's counsel responded that Plaintiffs' counsel could have asked, but that subpoenas carry the "effect of the Court behind it". *See* [2-21-204 Tr. at 18:20–19:6]. The district court suggested that because O'Reilly was not present for the EUOs, the EUOs would be inadmissible at trial, other than for impeachment. *See* [2-21-2024 Tr. at 20:24–21:5]. O'Reilly's counsel discussed rulings from other

district court judges, to which the district court cautioned counsel of the risks of citing rulings from other district court judges. *See* [2-21-204 Tr. at 21:6–22:10].

Plaintiffs' counsel began his argument by highlighting that there is a risk in citing other district court judges, "because whatever you're talking about obviously isn't settled." *See* [2-21-2024 Tr. at 22:23–23:4]. Plaintiffs argued that "no one has cited anything to you that said anything Mr. Romero did was improper. Instead, what [O'Reilly] did was [O'Reilly] tried to piece together concepts, puzzle pieces from different puzzles that don't fit together." [2-21-2024 Tr. at 23:3–4]. Plaintiffs' counsel also argued that *In re Chavez* did not fit the circumstances of the case and was distinguishable. *See* [2-21-2024 Tr. at 23:7–21].

Plaintiffs argued O'Reilly's objections were raised in the "wrong courtroom," as the MTD focused on how Plaintiffs' counsel utilized Judge Sanchez-Gagne's order, which "authorized investigation and pursuit of the wrongful death claims." [2-21-2024 Tr. at 23:22–24:11]. Plaintiffs argued O'Reilly was making a collateral attack on another judge's order, that Plaintiffs' counsel's conduct was in pursuit of the investigation of claims, that Plaintiffs' counsel has a duty to conduct a reasonable investigation prior to filing suit, and that sanctions were not appropriate where O'Reilly cannot point to any clear rule or law which was violated. *See* [2-21-2024 Tr. at 24:9–25:15].

The district court questioned Plaintiffs' counsel regarding the scope of *Henkel versus Hood*, 1945-NMSC-006, 49 N.M. 45, 156 P.2d 790, and situations which exceed the scope of the appointment proceeding. *See* [2-21-2024 Tr. at 25:18–26:16]. Plaintiffs' counsel responded by arguing that there is ambiguity in Rule 1-017 due to the manner in which the appointment of a wrongful death personal representative can proceed, and that as there is "no clear law that says you can't use subpoenas in the PR action to investigate the wrongful death claim", it is "a stretch to say that this extreme sanction should be levied when there's no clear rule." *See* [2-21-2024 Tr. at 26:17–27:3].

Plaintiffs also argued against the imposition of sanctions and argued that dismissal would be an extreme sanction which was not warranted, specifically in the absence of a clear rule violation. *See* [2-21-2024 Tr. at 27:4–28:6]. Plaintiffs argued against O'Reilly's suggestion that Rule 1-027 would have been proper because Plaintiffs' counsel could not certify the requirements of Rule 1-027 were satisfied. *See* [2-21-2024 Tr. at 30:5–19].

Plaintiffs also argued that it was improper to fault Plaintiffs for Mr. Sanchez's and Mr. Sardella's failure to notify O'Reilly about the subpoenas. *See* [2-21-2024 Tr. at 31:4–13]. Plaintiffs also referred back to the district court's earlier comment that Plaintiffs could have sued Ortiz-Munoz and issued the subpoenas to Mr. Sanchez and Mr. Sardella, and because both were pending actions, there would not

have been any difference in the outcome. *See* [2-21-2024 Tr. at 25:3–15; 29:11–19]. Finally, Plaintiffs argued against O'Reilly's request that Geoffrey Romero be disqualified from the case. *See* [2-21-2024 Tr. at 31:14–32:9]. Ultimately, Plaintiffs reiterated that because there was no clear rule violation, it would be improper to impose any sanctions. *See* [2-21-2024 Tr. at 32:10–16].

In rebuttal, O'Reilly argued that while Judge Sanchez-Gagne's order allowed investigation, Plaintiffs did not have the "authority of the Court" to issue subpoenas. *See* [2-21-2024 Tr. at 32:18–33:3]. While O'Reilly argued that it was indeed complaining of a rule violation, and that the Rules should be followed, O'Reilly could not point the district court to a specific rule which was violated. *See* [2-21-2024 Tr. at 33: 4–8]. O'Reilly's counsel argued that, while O'Reilly is a national corporation, the employees in the local businesses are not sophisticated and should not be faulted for not advising O'Reilly they received the subpoenas. *See* [2-21-2024 Tr. at 33:9–18]. O'Reilly argued the statements should be excluded under a similar principle to "fruit of the poisonous tree." *See* [2-21-2024 Tr. at 33:19–34:10]. Additionally, O'Reilly conceded it understood the rules for disqualification of counsel but was simply trying to find a remedy that was fair to both parties, specifically if the district court was not inclined to grant dismissal. *See* [2-21-2024 Tr. at 34:11–17].

The district court questioned O'Reilly's counsel about prejudice and sanctions, in the context of what ultimately transpired. *See* [2-21-2024 Tr. at 34:18–35:17]. O'Reilly's counsel responded that because it was not present for the EUOs it has been prejudiced in its ability to respond to written discovery served in this case. *See* [2-21-2024 Tr. at 35:18–36:21]. The district court noted that Plaintiffs now have the right to depose Mr. Sanchez and Mr. Sardella, and to serve written discovery on O'Reilly. *See* [2-21-2024 Tr. at 36:25–37:5]. The district court continued that, whether or not he agreed with the procedure, the answers given by Mr. Sanchez and Mr. Sardella "were to be given under oath truthfully," and that while O'Reilly's counsel could have objected, if present, the discovery rules would still require the deponent to provide an answer, unless the question sought privileged information. *See* [2-21-2024 Tr. at 37:6–21].

O'Reilly conceded dismissal and disqualification were not likely to be granted. *See* [2-21-2024 Tr. at 38:2–10]. However, O'Reilly requested a remedy, including the exclusion of the EUOs and withdrawal of written discovery requests served on O'Reilly, but acknowledged Plaintiffs could retake the depositions. *See* [2-21-2024 Tr. at 38:2–21].

The district court suggested another alternative, which would be denial of the MTD but to certify the question for interlocutory appeal. *See* [2-21-2024 Tr. at 38:22–25]. O'Reilly's counsel stated: "I think that would be a fair point. I think we

do need some clarification on this from the Court of Appeals. As Mr. Vargas agrees, I think, we don't have a clear indication of whether this is appropriate or not." [2-21-2024 Tr. at 39:1–5].

The district court then issued its ruling:

> Thank you. All right. Counsel, I have, as I said, been thinking about this since I was preparing for this hearing. And I may disagree with whether the statute and the case law that we presently have provides sufficient direction for this type of issue to be resolved. But clearly, because of the example I gave to Mr. Vargas, other counsel have attempted to use these appointment proceedings beyond what I think the statute allows. That does raise a question, and maybe reasonable minds differ.
>
> Mr. Sedillo, you're absolutely right. I don't think, given what we have, given the case law, including the Chavez case, I certainly don't think dismissal of this action would be appropriate. That would be too draconian and punish the plaintiff. I don't believe that that's appropriate.
>
> I don't believe that the disqualification of Mr. Romero is appropriate in these circumstances. Because as I said, the rules do allow for investigation. And any good attorney is going to go out and investigate. I understand we're at a very narrow question here, though: Can you use process in that investigation if you don't have a suit filed, a claim pending? And because we don't, maybe the Court of Appeals needs to step in here and give us that clarification. So I am going to deny your motion but give you an interlocutory language so that the Court of Appeals can tell me whether I'm wrong, or not, on this.

[2-21-2024 Tr. at 39:6–40:7].

On May 13, 2024, the district court entered its Order. *See* [5 RP 1138–1141]. O'Reilly then filed its application for interlocutory appeal and Plaintiffs filed a response in opposition. *See* [6 RP 1271]. The Court of Appeals denied O'Reilly's

application. *See* [6 RP 1271–1272]. O'Reilly then filed a Petition for Writ of Certiorari on December 12, 2024. *See generally* Pet. On December 26, 2024, Plaintiffs filed their Response in Opposition to the Petition. *See generally* Response. On January 17, 2025, this Court granted O'Reilly's Petition on all questions presented. *See* 1/17/2025 Order.

ARGUMENT

I. New Mexico law did not prohibit the issuance of the at-issue subpoenas.

a. Standard of Review

"Interpretation of our rules of civil procedure and statutes is a question of law that we review de novo." *Albuquerque Redi-Mix, Inc. v. Scottsdale Ins. Co.*, 2007-NMSC-051, ¶ 6, 142 N.M. 527, 168 P.3d 99. Plaintiffs disagree that resolution of this appeal requires this Court to interpret the Rules of Professional Conduct. *See* BIC, at 19. Nevertheless, to the extent the Court disagrees, Plaintiffs acknowledge a de novo standard of review is applied. *See In re Marshall*, 2023-NMSC-006, ¶ 11, 528 P.3d 653 (stating: "Our interpretation of the [R]ules [of Professional Conduct] and our review of disciplinary bodies' legal conclusions is de novo.").

b. The Appointment Action was a civil action.

The Rules of Civil Procedure "govern the procedure in the district courts of New Mexico in all suits of a civil nature whether cognizable as cases at law or in equity," except as otherwise stated. Rule 1-001(A), NMRA. O'Reilly does not argue

that any of the stated exceptions in Rule 1-001 apply here. *See generally* BIC, 19–24. Additionally, under the definitions: "'[P]laintiff' includes a petitioner." Rule 1-001(B)(2), NMRA.

Here, Plaintiffs filed a petition to appoint a wrongful death personal representative in the First Judicial District Court. *See* [1 RP 134–137]. A civil, "CV", case number was assigned, and Judge Sanchez-Gagne was appointed as the district court judge. *See* [1 RP 134]. The Petition was filed pursuant to the Rules of Civil Procedure. *See* Rule 1-017(B), NMRA (stating: "An action for wrongful death brought under Section 41-2-1 shall be brought by the personal representative appointed by the district court for that purpose under Section 41-2-3 NMSA 1978 NMSA. A petition to appoint a personal representative may be brought before the wrongful death action is filed or with the wrongful death action itself."). The order appointing the personal representative occurred within the same civil action and stated: "Dennis P. Murphy is appointed Personal Representative of the Wrongful Death Estate of Erika Chavez, for the purpose of investigating and pursuing a wrongful death action." [1 RP 138–139]. As the Rules of Civil Procedure provide the mechanism for appointment of a wrongful death personal representative, and as the case was assigned a civil case number, the Rules of Civil Procedure applied to the Appointment Action.

Again, while O'Reilly cites Rule 1-001, O'Reilly makes no argument for why the Rules do not apply to an appointment action. *See* BIC, at 19. O'Reilly also cites Rule 1-003, which states that "[a] civil action is commenced by filing a complaint with the court." *See* BIC, at 19 (quoting Rule 1-003, NMRA). However, O'Reilly makes no argument, and cites no law, which interprets Rule 1-003 to exclude petitions, specifically as the Rules of Civil Procedure refer to petitions in several contexts. *See* BIC, at 19. *See also e.g.*, Rule 1-017(B), NMRA and Rule 1-027, NMRA. Similarly, O'Reilly merely cites Rules 1-004, 1-005, and 1-007, and argues that they show the Rules "generally contemplate an adversarial process," but fails to provide any legal authority or analysis to support its argument. *See* BIC, at 20.

Next, O'Reilly cites Rule 1-011, to argue that because an attorney's Rule 1-011 obligations are less stringent than under the federal rules, no pre-suit discovery is required to satisfy an attorney's Rule 1-011 obligations. *See* BIC, at 20 (quoting *Rivera v. Brazos Lodge Corp.*, 1991-NMSC-030, ¶¶ 12–13, 111 N.M. 670, 808 P.2d 955). *See also* Rule 1-011(A), NMRA (discussing an attorney's or a party's obligation when signing a pleading and stating that disciplinary action may occur "[f]or a willful violation of this rule"). However, it would be improper to require a personal representative, or its counsel, to file a wrongful death action, without ensuring they have met the Rule 1-011 standard. Additionally, Rule 1-001, states that "[t]hese rules shall be construed and administered to secure the just, speedy and

inexpensive determination of every action." Rule 1-001(A), NMRA. Requiring the wrongful death personal representative to file suit in order to determine whether a wrongful death action is warranted, runs contrary to the Rule 1-001, mandate.

O'Reilly cites Rule 1-017, and argues that while the Rule "establishes a method" for authorizing the appointment of a wrongful death personal representative, it "does not purport to convert the personal representative appointment proceeding into its own, one-sided 'civil action' that remains pending after the appointment but before the filing of a wrongful death action." BIC, at 21. Again, O'Reilly ignores the appointment action occurs under Rules of Civil Procedure, is assigned a civil action case number, and, as contemplated by Rule 1-001, the Rules of Civil Procedure should apply.

O'Reilly next cites Rule 1-026, which defines the scope of allowable discovery, and highlights the phrase, "in the pending action." BIC, at 21 (quoting Rule 1-026(B), NMRA). As O'Reilly does not further analyze the Rule, it is unclear what point O'Reilly is trying to make. *See Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶ 70, 309 P.3d 53 (stating: "We will not review unclear arguments, or guess at what [a party's] arguments might be."). Notwithstanding, there can be no dispute, as evidenced by the endorsed certificates of service for the subpoenas, the subpoenas were served in a pending action. *See* [1 RP 144–145].

O'Reilly also addresses Rule 1-027. *See* BIC (citing Rule 1-027, NMRA). Rule 1-027 may be used when "[a] person who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable in any court may file a verified petition[3] in the district court in the county of the residence of any expected adverse party." Rule 1-027(A)(1), NMRA. However, Rule 1-027, requires a party show it satisfies the five (5) enumerated requirements, including "that the petitioner expects to be a party to an action cognizable in a court but is presently unable to bring it or cause it to be brought." Rule 1-027(A)(1)(a), NMRA. As Plaintiffs argued below, Plaintiffs' counsel could not certify that they wanted to bring a lawsuit related to the crash involving Ortiz-Munoz but could not presently do so. *See* [2-21-2024 Tr. at 30:5–13]. Plaintiffs argued: "So if we would have filed that Rule 27 petition . . . we would have had to lie to the Court. And that's something we do not do. . . . That, I submit, would be sanctionable conduct. Not what we're talking about today." [2-21-2024 Tr. at 30:14–19].

Finally, O'Reilly cites Rule 1-045, regarding the issuance of subpoenas. *See* BIC, at 23. While O'Reilly cites some of the requirements in issuing a subpoena, O'Reilly does not explain how the at-issue subpoenas were facially deficient. *Compare* [1 RP 140–143] (including all information required under the Rule) *with*

[3] Despite O'Reilly's reference to Rule 1-003, it is clear that the Rules of Civil Procedure contemplate petitions, and not simply Complaints. *See* BIC, at 19 (citing Rule 1-003, NMRA).

Rule 1-045(A)(1)(a)–(d), NMRA. O'Reilly also ignores that, pursuant to Rule 1-045, "[a]n attorney authorized to practice law in New Mexico and who represents a party, as an officer of the court, may also issue and sign a subpoena on behalf of the Court." Rule 1-045(A)(3), NMRA. O'Reilly argues that there was improper notice of the subpoena but ignores the concession it made in the underlying briefing. O'Reilly stated: "It is critical to note that 9750 Tower Rd SW, Albuquerque NM is the O'Reilly Automotive Stores, Inc. store location and Mr. Sanchez was evidently served while he was at work at O'Reilly." *See* [1 RP 121, at n.1] (citing [1 RP 140–143]).

Lastly, O'Reilly's cites *Wallis versus Smith*, 2001-NMCA-017, 130 N.M. 214, 22 P.3d 682, to argue the at-issue subpoenas were improper. *See* BIC, at 23–24. While the facts and legal analysis are distinguishable, there are some interesting comparisons, specifically in light of the district court's denial of sanctions here. In *Wallis*, the parties disputed how the Rules of Civil Procedure were utilized, and whether the $1,000 sanction the Court imposed was proper. *See Wallis*, 2001-NMCA-017, ¶¶ 17–18. While the Court of Appeals stated the district court correctly interpreted the law in quashing the subpoena, the Court of Appeals reversed the sanction award. *See id.* ¶ 21 (stating that because the Rules of Civil Procedure "are not expressly clear on this point", "we conclude it would be unfair to uphold the sanction awarded in this case under the circumstances."). A similar outcome should

happen here, where there is a reasonable dispute over the application of the Rules of Civil Procedure to the facts of this case. Even if this Court clarifies the application of the Rules of Civil Procedure in O'Reilly's favor, the district court's decision to deny O'Reilly's requested sanctions should be affirmed.

c. *In re Chavez* is inapplicable.

O'Reilly's reliance on *In re Chavez*, 2017-NMSC-012, 390 P.3d 965, is misplaced. First, this appeal does not arise out of a disciplinary proceeding. Additionally, this Court stated in *In re Chavez*: "This opinion clarifies an issue of fundamental importance: it is unlawful for a court or an officer of the court to issue any subpoena in the absence of a pending judicial action." *In re Chavez*, 2017-NMSC-012, ¶ 2. Here, the subpoenas were issued under a pending judicial action, as evidenced by the certificates of service for the service of the subpoenas, which are endorsed by the Court. *See* [1 RP 140–145]. Further, while reasonable minds may differ on the law and whether the subpoenas should have been issued, there can be no dispute that Plaintiffs' counsel made a public record that the subpoenas were issued under the civil case caption and number for the Appointment Action. *See id.*[4]

[4] Plaintiffs maintain that resolution of the appeal does not require the Court to interpret the Rules of Professional Conduct. Nevertheless, Plaintiffs must respond to O'Reily's suggestion that Plaintiffs' counsel violated the Rules. Again, this appeal does not arise out of a disciplinary proceeding. Notwithstanding, O'Reilly argues Plaintiffs' counsel violated Rule 16-404(A). *See* BIC, at 26–27. The subpoenas were issued under a pending action and contained all the required information under Rule 1-045. While there is disagreement about whether the Rules allowed the subpoenas,

Finally, even if this Court considers *In re Chavez*, which is unnecessary, Plaintiffs must highlight the discussion between the district court and O'Reilly during the underlying hearing. *See* [2/21/2021 Tr. at 10:23–11:25]. The district court specifically reiterated the sanction of dismissal was far more severe than what occurred in *In re Chavez*, that the court was unaware of any case law in which dismissal was granted for conduct similar to what occurred here, O'Reilly's counsel conceded the differences between *In re Chavez* and this case, and O'Reilly's counsel conceded "there's no case law for what we're asking for and what I'll be asking the Court to do at the end of this." *See* [*id.*]. Again, the present case comes down to the parties reasonably interpreting the Rules of Civil Procedure differently. *See* [2-21-2024 Tr. 39:1–5] (O'Reilly's counsel stating: "I think that would be a fair point. I think we do need some clarification on this from the Court of Appeals. As Mr. Vargas agrees, I think, we don't have a clear indication of whether this is appropriate or not.").

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there is no evidence Plaintiffs' counsel acted in bad faith or exhibited an intent to deceive and that "no substantial purpose other than to embarrass, delay or burden a third person, or [to] use methods of obtaining evidence that violate the legal rights of such a person." Rule 16-404(A), NMRA. *See also In re Chavez*, 2017-NMCA-012, ¶ 24 (addressing mitigating factors, including no evidence of bad faith or an intent to deceive). Likewise, while O'Reilly suggests a violation of Rule 16-402, *see* BIC, at 27, n.8, O'Reilly ignores the language of the Rule requires knowledge that a person was represented. *See* Rule 16-402, NMRA. There is no evidence Plaintiffs' counsel knew Mr. Sanchez and Mr. Sardella were represented, and as noted above, Mr. Sanchez was served while at work at O'Reilly.

d. The WDA does not expressly prohibit the conduct at-issue in this case.

O'Reilly begins its argument on the WDA by decrying the alleged lack of notice to O'Reilly regarding the at-issue subpoenas. *See* BIC, at 28. However, as discussed above, O'Reilly conceded that Mr. Sanchez was served while at work at O'Reilly. *See* [1 RP 121, 140]. The continued attempt to fault Plaintiffs for what occurred *after* service of the subpoenas is improper deflection. There is no evidence Plaintiffs' counsel impeded Mr. Sanchez or Mr. Sardella from informing O'Reilly of the subpoenas. Thus, this continued argument is simply improper.

O'Reilly further concedes, as it did to the district court, that the WDA does not expressly prohibit what occurred in this case. *See* BIC, at 28. O'Reilly's arguments on the WDA are premised entirely on piecing together concepts from distinguishable cases, as well as authority from other jurisdictions, in an effort to paint Plaintiffs' counsel's conduct as nefarious. However, the issue on appeal is truly a reasonable disagreement which both sides and the district court agreed needs clarification.

O'Reilly cites *Wood versus State of New Mexico Educational Retirement Board*, 2011-NMCA-020, 149 N.M. 455, 250 P.3d 881, to argue that simply because a statute does not expressly prohibit something, does not mean the statute is to be read to allow or require it. *See* BIC, at 28–29 (quoting *Wood*, 2011-NMCA-020, ¶

17, regarding whether a statute prohibited the payment of interest). It would seem the opposite would also be true. That, where a statute does not expressly allow something, it does not mean the statute should be read to prohibit it.

Nevertheless, Plaintiffs acknowledge the language of Section 41-2-3 of the WDA principally provides that a wrongful death action must "be brought by and in the name of the personal representative", and that if there is a judgment, how the proceeds are to be distributed. NMSA 1978 § 41-2-3. Here, no one disputes that the wrongful death personal representative was lawfully appointed to bring the claims in this lawsuit. Again, the question on appeal is whether the Rules of Civil Procedure applied in the context of the Appointment Action, and whether the subpoenas were properly issued.

Thus, while Plaintiffs acknowledge O'Reilly's citations to *Henkel versus Hood*, 1945-NMSC-006, 49 N.M. 45, 156 P.2d 790 and *Chavez versus Regents of University of New Mexico*, 1985-NMSC-114, 103 N.M. 606, 711 P.2d 883, and the role of a personal representative as a nominal party, these cases do not answer the question on appeal. *See* BIC, at 29–30. Plaintiffs further acknowledge the case law, which states the wrongful death personal representative's "sole task under the Act is to distribute any recovery in strict accordance with the statute." *Lebya v. Whitley*, 1995-NMSC-066, ¶ 21, 120 N.M. 768, 907 P.2d 172. However, even in the context of the wrongful death action itself, this does not mean that a wrongful death personal

representative's counsel is prohibited from serving written discovery or taking depositions.

The point being, reference to the WDA, standing alone, does not answer the question on appeal. The WDA must be read in conjunction with the Rules of Civil Procedure, specifically as the Rules of Civil Procedure provide the mechanism for the appointment of the wrongful death personal representative. *See* Rule 1-017(B), NMRA. *See also* [2-21-2024 Tr. at 26:17–28:6].

Finally, O'Reilly relies on non-binding foreign law to argue Respondent's conduct was improper. *See* BIC, 31–36 (citing *Life Care Center of Casper v. Barrett*, 2020 WY 57, 462 P.3d 894 (Wyo. 2020)). While there are similarities between *Barrett* and this case, there are also significant distinguishing factors. First, in *Barrett*, the objection to the discovery was made in the appointment action. *See* 2020 WY 57, ¶¶ 1-11. Here, O'Reilly challenges Plaintiffs' use of an order which was entered by a different judge. *See State v. Ngo*, 2001-NMCA-041, ¶ 25, 130 N.M. 515, 27 P.3d 1002 (stating: "However, because each judge has inherent power to control his or her own courtroom, then it follows that when judges of the same judicial district hold coordinate positions, one judge cannot infringe on another judge's power to control his or her own courtroom."). As argued to the district court, O'Reilly's collateral attack on the use of another judge's order is improper. *See* [2-21-2024 Tr. at 23:22–25:2].

O'Reilly also argues "Plaintiffs have attempted to distinguish *Barrett* on the ground that the Wyoming Act expressly provides that the appointment proceeding should be separate from the wrongful death action, while New Mexico law allows the appointment proceeding and the wrongful death action to be brought at the same time." BIC, at 34. O'Reilly mischaracterizes Plaintiffs' argument. Wyoming's statute states: "[t]he appointment shall be made in a separate action brought **solely** for appointing the wrongful death representative." *Life Care Center of Casper*, 2020 WY 57, ¶ 14 (quoting Wyo. Stat. Ann. § 1-38-103(b)) (bolding added). The Wyoming statute is explicit that the appointment action is *solely* for the appointment of a wrongful death personal representative. *See* Wyo. Stat. Ann. § 1-38-103(b). New Mexico's WDA and Rule 1-017 contain no such limitation on what may be accomplished within the appointment proceeding. *See generally* NMSA 1978, § 41-2-3; Rule 1-017(B), NMRA. The lack of a similar limitation under New Mexico law serves to highlight why reasonable minds differ on whether Plaintiffs' conduct was proper, and as discussed below, why the district court did not err in denying O'Reilly's request for sanctions.

II. The district court did not abuse its discretion in denying O'Reilly's request for sanctions.

a. Standard of Review

O'Reilly argues the district court's decision *not to sanction* Plaintiffs is reviewed for an abuse of discretion, and that the interpretation of law is de novo. *See*

BIC, at 37 (quoting *Crutchfield v. N.M. Dep't of Taxation & Revenue*, 2005-NMCA-022, ¶ 33, 137 N.M. 26, 106 P.3d 1273). Plaintiffs acknowledge this Court has stated, in other contexts, that, when reviewing for an abuse of discretion, "[the Court's] review of the application of the law to the facts is conducted de novo", and "may characterize as an abuse of discretion a discretionary decision that '[is] premised on a misapprehension of the law". *N.M. Right to Choose/NARAL v. Johnson*, 1999-NMSC-028, ¶ 7, 127 N.M. 654, 986 P.2d 450 (citations and quotation marks omitted). *Crutchfield* and *New Mexico Right to Choose/NARAL*, however, involved situations where there was a question about whether a statute applied which would authorize the imposition of penalties, or whether an exception to the "American Rule" should be adopted which would allow attorney's fees to be awarded. *See Crutchfield*, 2005-NMCA-022, ¶ 34 (citing NMSA 1978, § 14-2-11(C) which allowed penalties under the statute to be imposed); *N.M. Right to Choose/NARAL*, 1999-NMSC-028, ¶ 10 (asking for the adoption of the private attorney general doctrine, which would provide an exception to the American Rule, for imposition of attorney's fees). This is not the case here, and why, the standard of review should simply be whether the district court abused its discretion in denying O'Reilly's request for sanctions.

Additionally, O'Reilly makes no argument regarding what law was misinterpreted by the district court as to the issue of sanctions, such that the sanction

of dismissal, exclusion of evidence, or disqualification of counsel was required. *See* BIC, 37–44. Indeed, in other cases involving the Court's inherent power to sanction, this Court has referred solely to an abuse of discretion standard. *See Gonzales v. Surgidev Corp.*, 1995-NMSC-047, ¶ 30, 120 N.M. 151, 899 P.2d 594 (stating: "We now address whether the trial court abused its discretion in awarding sanctions in the present case. We will find an abuse of discretion when the court's decision is 'without logic or reason, or . . . clearly unable to be defended.'")(quoting *Newsome v. Farer*, 1985-NMSC-096, ¶ 24, 103 N.M. 415, 708 P.2d 327). Consequently, the decision of the district court to not sanction Plaintiffs should only be reviewed for abuse of discretion.

b. The district court's inherent power to sanction does not extend to conduct occurring before another court.

O'Reilly argues the district court's ability to sanction Plaintiffs for the conduct at issue in this case arises from its inherent power. *See* BIC, at 37–38 (citing *Pizza Hut of Santa Fe, Inc. v. Branch*, 1976-NMCA-051, ¶ 8, 89 N.M. 325, 552 P.2d 227; *Weiss v. THI of N.M. at Valle Norte, LLC*, 2013-NMCA-054, ¶ 17, 301 P.3d 875; *Rest. Mgmt. Co. v. Kidde-Fenwal, Inc.*, 1999-NMCA-101, ¶ 12, 127 N.M. 708, 986 P.2d 504). Plaintiffs do not disagree that the district court has inherent power to sanction litigants. However, there are limitations on a district court's exercise of its inherent power, including the limitation of the district court to sanction a litigant for conduct occurring in a different court. *See State ex rel. N.M. State Highway &*

Transp. Dep't v. Baca, 1995-NMSC-033, 120 N.M. 1, 896 P.2d 1148.

In *Baca*, this Court was confronted with the question of "whether a district court may award attorney's fees against the State as a sanction for bad-faith litigation." *Id.* at ¶ 1. The case involved a claim of wrongful termination, and the case proceeded in front of the State Personnel Board and the district court, before an appeal to the Court of Appeals, and ultimately, this Court. *See id.* at ¶¶ 2–8. The district court affirmed the Personnel Board's decision and determined "that the Department's bad faith justified an award of attorney's fees" and awarded Baca "for fees incurred during both the administrative and district court proceedings". *Id.* at ¶ 7. On appeal, the Court of Appeals "vacated the portion of the fee award that reimbursed Baca for fees incurred during the administrative proceedings." *Id.* at ¶ 8. This Court then stated:

> The Court of Appeals struck down the administrative component of the award on the ground that a trial court's inherent powers do not extend to proceedings not occurring before that court or in defiance of that court's authority. We agree with the Court of Appeals on this issue. In awarding fees under the bad-faith exception, a court cannot sanction conduct occurring before another tribunal unless that conduct is in direct defiance of the sanctioning court's authority.

Id. at ¶ 13 (citations omitted).

Below, Plaintiffs argued O'Reilly was in the wrong courtroom. *See* [2-21-2024 Tr. at 23:22–24:11; 24:9–25:15; 29:11–30:5; and 30:20–23]. Thus, the district court's decision to deny O'Reilly's request for sanctions should be affirmed,

pursuant to *Baca*, as the at-issue conduct occurred in a different court and was not in defiance of the authority of the district court in this case. *Baca*, 1995-NMSC-033, ¶ 13.[5]

O'Reilly also cites the Court of Appeals decision in *Restaurant Management Company versus Kidde-Fenwal, Inc.*, 1999-NMCA-101, 127 N.M. 708, to argue the district court may exercise its inherent power to sanction pre-litigation conduct which does not give rise to the underlying claims. *See* BIC, at 38 (quoting *Rest. Mgmt. Co.*, 1999-NMCA-101, ¶ 12). However, *Restaurant Management Company* is distinguishable, as it relates to pre-litigation spoliation of evidence occurring outside the confines of a separate action. *See Rest. Mgmt. Co.*, 1999-NMCA-101, ¶¶ 11–12 (stating: "A remedy for the destruction of evidence may be available pursuant to the inherent power of the courts", and thus, "[u]nder appropriate circumstances . . . a court may use its inherent power to sanction prelitigation conduct that does not give rise to the underlying cause of action".). Under the facts of this case, which involve the use of another district court's order, *Baca* controls. *See Baca*, 1995-NMSC-033, ¶ 13. Consequently, the district court's order denying O'Reilly's request for sanctions should be affirmed.

[5] *See also State v. Ngo*, 2001-NMCA-041, ¶ 25.

c. Alternatively, the district court did not abuse its discretion in denying O'Reilly's request for sanctions.

Even if this Court determines that the district court could exercise its inherent authority to sanction the conduct at issue here, this Court should still find the district court did not abuse its discretion in ruling against the imposition of sanctions. As discussed, O'Reilly argues the district court's denial of sanctions is reviewed for abuse of discretion and de novo based on the misapplication of the law. *See* BIC, at 37. *See also supra*, at Section II.a. (Standard of Review). However, in arguing dismissal or exclusion of evidence[6] should be the consequence for Plaintiffs' alleged misconduct, O'Reilly never bothers to develop its argument that the district court abused its discretion through a misapplication of law. *See* BIC, at 37–44.

> This Court requires that the parties adequately brief all appellate issues to include an argument, the standard of review, and citations to authorities for each issue presented. We will not review unclear arguments, or guess at what [a party's] arguments might be. To rule on an inadequately briefed issue, this Court would have to develop the arguments itself, effectively performing the parties' work for them. This creates a strain on judicial resources and a substantial risk of error. It is of no benefit either to the parties or to future litigants for this Court to promulgate case law based on our own speculation rather than the parties' carefully considered arguments.

Elane Photography, LLC, 2013-NMSC-040, ¶ 70 (internal citations and quotation marks omitted). O'Reilly has likewise cited no New Mexico law which would

[6] It is notable that while O'Reilly argued for disqualification of Respondents' counsel, Geoffrey R. Romero, below, O'Reilly has abandoned this request in its Brief in Chief. *See* [1 RP 132].

mandate the district court enter a sanction of dismissal or exclusion of evidence under the circumstances present here. *In re Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M 764, 676 P.2d 1329 (stating: "We assume where arguments in briefs are unsupported by cited authority, counsel after diligent search, was unable to find any supporting authority. We therefore will not do this research for counsel. Issues raised in appellate briefs which are unsupported by cited authority will not be reviewed by us on appeal.")(internal citations omitted).

Consequently, the only relevant question is whether the district court abused its discretion in ruling *not to* sanction Plaintiffs. *See* [5 RP 1138–1139, at ¶¶ 1–3] (ruling that the sanctions requested by O'Reilly were "extreme", "too draconian" and "not appropriate under these circumstances").

As this Court confirmed in *Baca*, the courts have "inherent power to impose a variety of sanctions on both litigants and attorneys in order to regulate their docket, promote judicial efficiency, and deter frivolous filings." 1995-NMSC-033, ¶ 11 (quotation marks and citation omitted). This Court further stated that "[i]t has long been recognized that a court must be able to command the obedience of litigants and their attorneys if it is to perform its judicial functions. Such powers inhere in judicial authority and exist independent of statute." *Id.* This Court has also stated that "whereas 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." *Lewis ex rel. Lewis v. Samson*, 2001-NMSC-035, ¶ 13, 131 N.M. 317, 35 P.3d 972. Additionally, a district court's decision should not be disturbed, unless the decision "is clearly untenable or contrary to logic and reason." *Id.* (quotation marks and citation omitted).

Here, the district court denied O'Reilly's sanction request and stated that this was an issue that "maybe reasonable minds differ." [2-21-2024 Tr. 39:6–15]. *See* also [5 RP 1139, at ¶ 4] (stating the order "involves a controlling question of law as to which there is substantial ground for difference of opinion"). O'Reilly's counsel also conceded the same when he stated: "I think we do need some clarification on this from the Court of Appeals. As Mr. Vargas agrees, I think, we don't have a clear indication of whether this is appropriate or not." [2-21-2024 Tr. 39:1–4]. Additionally, and specifically as to the request for sanctions, O'Reilly conceded: "I am not aware of any case law either. Your Honor. And trust me, we have looked. . . . We understand that there's no case law for what we're asking for and what I'll be asking the Court to do at the end of this." [2-21-2024 Tr. at 11:11–12; 11:19–21]. Here, the parties and the Court all acknowledged there is a difference of opinion on what the law does or does not allow, and an understanding of a need for clarification by our appellate Courts. Thus, the district court's decision to *not* impose the sanction of dismissal, exclusion of evidence, or disqualification of counsel, cannot be said to be "clearly untenable" or "contrary to logic or reason." *Lewis ex rel. Lewis*, 2001-

NMSC-035, ¶ 13.

Plaintiffs acknowledge this Court granted certiorari on all questions presented, including O'Reilly's "corollary question, which was not expressly certified by the district court but which implicitly arises, is what should be the appropriate remedy for wrongfully invoking the district court's subpoena power under the act?" *Compare* Petition for Writ of Certiorari to the New Mexico Court of Appeals (filed December 12, 2024), at Section III, Questions Presented for Review, at 2, ¶ 2 *with* 1/17/2025 Order. However, even assuming this Court were to rule that Plaintiffs' counsel's conduct was improper, which Plaintiffs do not concede, O'Reilly has failed to come forward with any New Mexico authority which *mandates* a sanction be imposed, specifically in the absence of statute, law, or rule requiring the same.

Under New Mexico law, district courts have a full range of sanctions available, up to and including dismissal, if warranted, and our appellate courts have long given deference to the district courts in deciding whether to sanction, and if so, to what extent.[7]

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[7] *See United Nuclear Corp. v. General Atomic Co.*, 1980-NMSC-094, ¶¶ 385, 387, 96 N.M. 155, 629 P.2d 231 (stating: "It is well-settled that the choice of sanctions under Rule 37 lies within the sound discretion of the trial court. . . . Although the severest of sanctions should be imposed only "when the court in its discretion determines that none of the 'lesser sanctions available to it,' would truly be appropriate," the court need not exhaust the lesser sanctions."); *Newsome v. Farer*, 1985-NMSC-096, ¶ 29 (stating: "There are of course a wide variety of other

Thus, there is no need to clarify what sanctions are available to the district court under its inherent power, because there is ample case law indicating that a full range of sanctions is available, should the circumstances warrant. *See supra*, at n.7. What O'Reilly is truly seeking is a mandate from this Court requiring the imposition of a specific sanction in this case, and to deprive the district court of its inherent power to determine whether a sanction is appropriate. Again, O'Reilly has failed to properly develop, or even analyze, how the district court allegedly abused its discretion in denying sanctions. *See generally* BIC, at 37–44. O'Reilly has also failed to articulate any basis under New Mexico law that would mandate the district court enter a specific sanction. *In re Adoption of Doe*, 1984-NMSC-024, ¶ 2.

None of the New Mexico cases cited by O'Reilly require the district court to impose a specific sanction and instead allows the district court to exercise its discretion to impose a sanction, if warranted.

O'Reilly first cites *Pizza Hut of Santa Fe, Incorporated versus Branch*, 1976-

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sanctions short of dismissal****The [trial court], however, need not exhaust them all before finally dismissing a case. The exercise of his discretion to dismiss requires only possible and meaningful alternatives be reasonably explored.")(citation omitted); *Gonzales*, 1995-NMSC-047, ¶ 33 (stating: "Where a lesser sanction is granted, we defer to the trial court's decision absent an abuse of discretion."); *Rest. Mgmt. Co.*, 1999-NMCA-101, ¶ 13 (stating: As we have already suggested, 'inherent powers must be exercised with restraint and discretion.'")(quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991)); *Lopez v. Wal-Mart Stores, Inc.*, 1989-NMCA-013, ¶ 15, 108 N.M. 259, 771 P.2d 192 (stating: "Dismissal is a sanction of last resort to be used only in extreme circumstances.").

NMCA-051, 89 N.M. 325, 552 P.2d 277, regarding the court's inherent power. *See* BIC, at 37. The Court of Appeals statements do not impose a mandate. *See Pizza Hut of Santa Fe, Inc.*, 1976-NMCA-051, ¶¶ 8, 30 (stating: "The trial judge has such inherent supervisory control that he **can** initiate proceedings under Rule 37", and that "[s]anctions **may be light or drastic** depending on the facts and circumstances of each case".)(bolding added). O'Reilly next cites *Weiss versus THI of New Mexico at Valle Norte, LLC*, 2013-NMCA-054, 301 P.3d 875, regarding the purpose of sanctions. *See* BIC, at 38. In addressing the sanctions at issue, the Court of Appeals noted that a "'district court **could** properly sanction under its inherent power to control the litigation and the conduct of the parties before it.'" *Weiss*, 2013-NMCA-054, ¶ 14 (quoting *Seipert v. Johnson*, 2003-NMCA-119, ¶ 9, 134 N.M. 394, 77 P.3d 298)(bolding added). The Court in *Weiss* further stated that "[d]iscovery sanctions '**may** only be imposed when the failure to comply is due to the willfulness, bad faith or fault of the disobedient party.'" *Weiss*, 2013-NMCA-054, ¶ 17 (quoting *United Nuclear Corp.*, 1980-NMSC-094, ¶ 202)(bolding added).

O'Reilly also refers to *Restaurant Management Company*, cited previously, and concedes the non-mandatory nature of the sanctions by stating that "[a] court **may** 'draw on Rule 1-037(B) for an appropriate sanction[ ]'". *See* BIC, at 38

(quoting *Rest. Mgmt. Co.*, 1999-NMCA-101, ¶ 21)(bolding added).[8] Indeed in *Restaurant Management Company*, the Court discusses available sanctions, and what a district court may choose, depending on the circumstances. *See* 1999-NMCA-101, ¶¶ 18–20 (stating: "One of the sanctions a court **might** appropriately impose is a 'spoliation inference'", "[a]lternatively, a court **may** exclude certain of the spoliator's evidence", and that "[o]utright dismissal of a spoliator's case **might** sometimes be appropriate")(bolding added). While the ruling in *Restaurant Management Company* dealt with spoliation of evidence, the Court of Appeals recognized the necessity that each case be judged independently when determining whether to impose sanctions, and if so, what sanction would be the most appropriate. *See id.* ¶ 14 (stating: "As we have indicated, '[d]estruction of potentially relevant evidence . . . occurs along a continuum of fault.'")(citation omitted).

O'Reilly's last citation to New Mexico law is a case in which O'Reilly recognized was "only a tangentially related scenario." BIC, at 38 (citing *Poorbaugh v. Mullen*, 1982-NMCA-141, ¶ 6, 99 N.M. 11, 653 P.2d 511). O'Reilly correctly points out that the issue related to the subpoena duces tecum was unpreserved and waived due to a failure to object at trial. *See Poorbaugh*, 1982-NMCA-141, ¶ 17.

[8] Even under Rule 1-037, where there is "shall" language with respect to the sanction of attorney's fees, there are exceptions where the district court is not required to award attorneys' fees. *See* Rule 1-037(A)(4), (B)(2), (C), (D)(3), NMRA (exceptions to the award of attorney's fees as a sanction).

However, even the dicta cited by O'Reilly recognized the possible remedies available, not that a remedy was mandatory. *See* BIC, at 39 (quoting *Poorbaugh*, 1982-NMCA-141, ¶ 18, and noting multiple potential "avenues for redress.").

Thus, it is clear there is no one-size fits all rule when determining whether sanctions are appropriate, and if so, what sanction to impose. Here, O'Reilly has not articulated any basis under New Mexico law which would mandate the district court enter a specific sanction against Plaintiffs.

O'Reilly next cites several foreign law cases, but these cases are distinguishable and do not require reversal of the district court's order. *See* BIC, 39–44. First, O'Reilly cites *Xyngular versus Schenkel*, 890 F.3d 868 (10th Cir. 2018), wherein the Tenth Circuit Court of Appeals affirmed a district court's order dismissing a party's claim as a sanction for pre-litigation misconduct. *See id.* However, again, the Tenth Circuit's analysis was on the use of the district court's inherent power and the findings necessary to support the imposition of a sanction, not that a sanction was mandatory. *See Xyngular*, 890 F.3d at 872–875. Here, the district court clearly considered similar issues as the trial court in *Xyngular*, including prejudice, the alleged culpability of Plaintiffs' counsel, how the district court viewed other district court judge's orders, and alternative remedies, including allowing O'Reilly to seek interlocutory appeal. *See e.g.*, [2-21-2024 Tr. at 10:23–11:10; 13:3–19; 14:5–22; 16:4–25; 20:24–25:22:2; 34:18–35:17; 36:25–37:21;

38:22–25; 39:6–40:7]. As discussed above, O'Reilly also included an erroneous argument in its analysis of the factors used in *Xyngular*, when O'Reilly argued "Plaintiffs are culpable, particularly when their counsel had been told by another district court judge that such pre-suit subpoenas are improper." *See* BIC, at 43. As discussed above, the at-issue EUOs were taken *before* the other district court ruling cited by O'Reilly. *See supra*, at n.2. Further, the district court appropriately cautioned O'Reilly about relying solely on what another district court has done. *See* [2-21-2024 Tr. at 21:19–22:2]. This is especially true whereas here, the parties and the district court recognized the need for appellate guidance on the issues presented. *See* [2-21-2024 Tr. 38:22–40:7].

O'Reilly's citation to *Shoney's Incorporated versus Lewis*, 875 S.W.2d 514 (Ky. 1994), is also distinguishable. *See* BIC, at 44. In that case, an attorney for a sexual harassment claimant was advised that the company was represented by counsel, the claimant's attorney spoke with the company's counsel, and then still went out and obtained statements from two (2) company's managers. *See Shoney's, Inc.*, 875 S.W.2d at 514–515. While the Kentucky Supreme Court directed the suppression of evidence and disqualification of counsel for this conduct, there is no analysis of the district court's inherent power or whether the district court abused its discretion in declining to impose sanctions. *See generally id.* Additionally, the facts are clearly distinguishable from the present case.

Finally, O'Reilly's cites *United States versus Hammad*, 858 F.2d 834 (2d Cir. 1988), related to suppression of evidence, albeit in a criminal matter. However, in *Hammad*, the Second Circuit overturned the district court's suppression of evidence for an alleged ethical violation. 858 F.2d at 842. The Second Circuit stated the district court had improperly believed that "suppression is a necessary consequence of a DR-7-104(A)(1) violation" and then ruled exclusion of evidence "is not required in every case." *Id.* The Second Circuit further ruled that the "government should not have its case prejudiced by suppression of its evidence when the law as previously unsettled in this area. Therefore, in light of the prior uncertainty regarding the reach of DR7-104(A)(1), an exclusionary remedy is in appropriate in this case." *Id.* Here, the parties and the district court all acknowledged the law needs clarification. Therefore, similar to *Hammad*, it would be inappropriate to mandate Plaintiffs be sanctioned. For all these reasons, Plaintiffs respectfully urge the Court to affirm the district court's order denying O'Reilly's requested sanctions.

CONCLUSION AND REQUEST FOR RELIEF

For the foregoing reasons, the Court should affirm the district court's Order denying O'Reilly's Motion, [5 RP 1138–1141], and remand the case back to the district court for further proceedings.

ORAL ARGUMENT STATEMENT

The Supreme Court may find oral argument assists the Court in its decision and Plaintiff-Respondents request oral argument.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 12-318(F)(3) NMRA, I certify that the foregoing Answer Brief uses 14-point proportionately spaced Times New Roman font and contains **10,962** words in the body of the brief as defined in Rule 12-318(F)(1). This word count was generated using Microsoft Word 365.

/s/ Christopher P. Winters
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CERTIFICATE OF SERVICE

I hereby certify that, on April 21, 2025, the foregoing Answer Brief was filed electronically through the Odyssey File and Serve System in the Supreme Court, which caused the parties or counsel listed below to be served by electronic means, as more fully reflected on the Notice of Electronic Service:

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