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,

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

O'REILLY AUTOMOTIVE STORES, INC.,

Defendant-Petitioner,

and

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

Defendants.

PETITIONER O'REILLY AUTOMOTIVE STORES, INC.'S BRIEF-IN-CHIEF

Oral Argument Requested

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STATEMENT OF COMPLIANCE

Undersigned counsel states that this brief complies with Rule 12-318(F)(3) NMRA in that the body of the brief is prepared in proportionally-spaced typeface and contains 10,993 words. This word count was obtained using Microsoft Word for Mac Version 16.95.3.

CITATIONS TO TRANSCRIPTS

Pursuant to the Court's Order dated February 26, 2025, citations to the unofficial stenographic transcript of the district court's hearing held on February 21, 2024, are in the following format: **[2-21-24 Tr. at ___]**

Stenographic transcripts of several Examinations Under Oath (EUOs) appear in the record proper. To assist the Court, citations to those transcripts are in the following format:

EUO of Jose Ortiz-Muñoz	**[1 RP __ (Muñoz EUO at ___)]**
EUO of Freddie Sanchez	**[1 RP __ (Sanchez EUO at ___)]**
EUO of Jason Sardella	**[1 RP __ (Sardella EUO at __)]**

I. INTRODUCTION

In addressing "an issue of fundamental importance[,]" this Court has held that "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, 390 P.3d 965. The reasons are self-evident and include the prejudice to those whose information is obtained without notice and without an opportunity to object. *Id.* ¶ 22. This appeal asks the Court to reaffirm *In re Chavez's* vital holding to protect the integrity of the judicial process under New Mexico law.

Specifically, the Court must determine whether a personal representative appointed under the Wrongful Death Act, NMSA 1978, §§ 41-2-1 et seq. (the "Act"), is authorized to issue subpoenas to obtain discovery: (1) *after* the appointment proceeding has concluded, (2) *before* filing and serving a wrongful death action, and (3) *without notice* to the target of the discovery. Stated differently, is a concluded appointment proceeding a "pending action" from which the personal representative can invoke the district court's subpoena power? The Court should declare emphatically, as it did in *In re Chavez*, that the answer is "no."

Absent the rare circumstances contemplated under Rule 1-027 NMRA, the Rules of Civil Procedure generally do not allow pre-suit discovery – much less discovery without notice to the target. The Rules of Professional Conduct similarly prohibit the use of "methods of obtaining evidence that violate the legal rights of

[third persons]." Rule 16-404(A) NMRA. Nothing in the Act creates an exception for personal representatives or their counsel. To the contrary, allowing pre-litigation discovery as part of the limited, *ex parte* appointment procedure serves no legitimate purpose and lends itself to abuse. This case presents a prime example.

Here, counsel for Plaintiffs-Appellees ("Plaintiffs") petitioned for and obtained the appointment of a personal representative under the Act. **[1 RP 134-139]** Although the petition was granted and the appointment proceeding had concluded, and before commencing the present wrongful death action, Plaintiffs' counsel issued subpoenas for testimony and documents under the caption of the appointment proceeding. **[1 RP 140-145]** The subpoenas were directed to two managerial employees of Defendant-Petitioner O'Reilly Automotive Stores, Inc. ("O'Reilly"). **[Id.]** Counsel did this without notice to O'Reilly, who was not a party to the appointment proceeding. The managerial employees complied with the subpoenas and appeared for examinations under oath ("EUOs") without counsel present – again without O'Reilly's knowledge, consent or participation. **[1 RP 230-251]**

Plaintiffs then filed the present wrongful death action against O'Reilly based on the information they improperly obtained from the EUOs. **[1 RP 1-21]** O'Reilly moved to dismiss the action or to disqualify Plaintiffs' counsel and to exclude the improperly obtained evidence. **[1 RP 120-159]** The district court denied the requested relief but expressed doubt that Section 41-2-3 authorizes pre-suit

discovery. **[5 RP 1138-1141; 2-21-24 Tr. at 25:18 – 26:16, 39:6-15]** The district court therefore certified for interlocutory appeal the issue of "whether a concluded wrongful death personal representative appointment action under the [Act] 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]** Again, this Court should answer this question in the negative and clarify that the Act *does not* authorize pre-suit discovery through the appointment procedure.

II. SUMMARY OF PROCEEDINGS

A. Factual Background

This case arises from a fatal automobile accident that occurred on September 12, 2020. **[1 RP 2 ¶ 8]** Defendant Jose Ortiz-Muñoz ("Muñoz"), who at the time was an employee of O'Reilly, was driving his personal vehicle on a personal errand when he collided with the vehicle driven by the Decedent, Erika Chavez.[1] **[1 RP 111-112]** Plaintiffs allege, among other things, that Muñoz was negligent in causing the crash and that O'Reilly was negligent in its supervision and retention of Muñoz and in its alleged control of Muñoz's personal vehicle, which Plaintiffs characterize as a

[1] The parties dispute whether Muñoz was acting in the course and scope of his employment with O'Reilly at the time of the collision. **[5 RP 1055-1075, 6 RP 1142-1163, 6 RP 1167-1186]** However, that dispute is irrelevant in this appeal.

dangerous instrumentality. **[1 RP 6-18]** As explained below, Plaintiffs' theories of liability against O'Reilly are derived from the improperly obtained pre-suit EUOs.

B. Procedural History

1. Dennis Murphy is appointed as personal representative.

On January 25, 2021, Plaintiffs' counsel filed a "Petition for Appointment of Personal Representative of the Wrongful Death Estate of Erika Chavez[]" in Cause No. D-101-CV-2021-00159 (the "Appointment Proceeding").[2] **[1 RP 134-137]** The petition sought the appointment "for the purpose of investigating and bringing claims on behalf of the estate for the benefit of the statutory beneficiaries[.]" **[1 RP 134]** The following day, the district court in the Appointment Proceeding entered an order (the "Appointment Order") appointing Dennis P. Murphy as personal representative of the Wrongful Death Estate of Erika Chavez (the "WDE"). **[1 RP 138-139]** Among other things, the Appointment Order recited that Mr. Murphy was appointed "for the purpose of investigating and pursuing a wrongful death action . .

[2] This Court should take judicial notice of the docket in the Appointment Proceeding given its inextricable relationship with the present case. *Cf. Miller v. Smith*, 1955-NMSC-021, ¶ 23, 59 N.M. 235, 282 P.2d 715 (observing that a district court may take judicial notice of proceedings in another case on its docket when "the cause of which judicial notice is taken [is] 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."); *State v. Gutierrez*, 2011-NMSC-024, ¶ 53, 150 N.M. 232, 258 P.3d 1024 (taking judicial notice of record in a separate case to assist with the Court's analysis).

. [and] shall have all the powers of appointment pursuant to the [Act]." **[1 RP 138 ¶¶ 1-2]**

2. After the appointment and before filing a wrongful death complaint, Plaintiffs' counsel conducts three EUOs over the course of nineteen months.

a. EUO of Jose Ortiz-Muñoz

On March 15, 2021, under the caption of the Appointment Proceeding, Plaintiffs' counsel took the EUO of Muñoz with Muñoz's counsel present. **[1 RP 98-119]** Muñoz was not a "party" to the Appointment Proceeding and the record does not disclose the circumstances of whether or how Plaintiffs' counsel originally communicated with Muñoz's counsel to arrange for the EUO. Instead, the record only shows that Muñoz's counsel made Muñoz available to testify because, he said, "we want to cooperate. We understand the situation." **[1 RP 118 (Muñoz EUO at 83:7-12)]**

Consistent with that sentiment, during the EUO, Plaintiffs' counsel assured Muñoz that "we don't have any kind of lawsuit filed against you" and that "[w]e're just investigating at this point to try and figure out what happened on that day." **[1 RP 98 (Muñoz EUO at 3:13-17)]** Muñoz proceeded to testify about his work at O'Reilly, including that O'Reilly trained him on how to sell auto parts and how to run the store, but not on how to repair cars. **[1 RP 102 (Muñoz EUO at 17:25 – 18:12)]** Muñoz did learn some about car repairs from his interactions with customers

and from watching YouTube, but he acknowledged that O'Reilly does not perform repairs. **[Id. at 18:13 – 20:8)]**

Regarding his 2010 Mustang that was involved in the crash, Muñoz testified that it was having transmission problems for a couple of weeks before the crash. **[1 RP 107 (Muñoz EUO at 38:8-11)]** The problems included the Mustang not engaging in reverse and failing to shift gears automatically while in drive. **[1 RP 106 (Muñoz EUO at 34:21 – 35:25)]** Muñoz testified that, even though the Mustang was an automatic, he drove it like a standard transmission vehicle until it reached 40-45 miles per hour, when it would then drive "normal." **[1 RP 107 (Muñoz EUO at 38:12 – 39:16)]** He testified that he was able to brake normally, although sometimes the Mustang would stall if he could not stop slowly enough. **[Id. (Muñoz EUO at 39:17 – 40:16)]**

If the Mustang stalled, Muñoz would disconnect and reconnect the vehicle's battery to reset the error codes to continue driving. **[Id. (Muñoz EUO at 39:20 – 40:3)]** Muñoz also owned two OBD2 scanners that enabled him to reset the error codes more quickly than by disconnecting and reconnecting the battery. **[1 RP 108 (Muñoz EUO at 43:14 – 39:16)]** He testified that he obtained one of his scanners from O'Reilly when the store switched to new OBD scanners and "had to get rid of it[.]" **[1 RP 108-109 (Muñoz EUO at 44:44 – 45:16)]** Muñoz testified that his

manager, Freddie Sanchez, did not know Muñoz was using the scanner to keep the Mustang running. **[1 RP 109 (Muñoz EUO at 47:16 – 48:9)]**

Muñoz testified that he had a private mechanic inspect the Mustang to diagnose the transmission problems. **[1 RP 104-105 (Muñoz EUO at 27:3 – 29:5)]** He also took it to a Ford service department for diagnosis and was told that he needed a new transmission. **[1 RP 105 (Muñoz EUO at 30:15 – 32:2)]** Muñoz decided to purchase a new transmission from O'Reilly, but he had not had the new transmission installed by the time of the accident. **[1 RP 106 (Muñoz EUO at 33:10-15, 36:1-15)]**

On the day of the accident, Muñoz was heading to the bank to cash a check for his brother. **[1 RP 110 (Muñoz EUO at 51:25 – 52:8)]** He was going up a hill when the Mustang "bogged down." **[Id. (Muñoz EUO at 52:9-11)]** He testified that he did not override the computer system that day. **[1 RP 114 (Muñoz EUO at 68:13-15)]** Instead, he tried turning the Mustang off and on to get going again, but he was not successful initially. **[1 RP 112 (Muñoz EUO at 57:25 – 58:6)]** Then the Mustang started and began accelerating; Muñoz testified "it just started taking off on me." **[Id. (Muñoz EUO at 59:8-19)]** He testified that the accelerator "got stuck down[,]" which had happened once before. **[1 RP 115 (Muñoz EUO at 69:12 – 70:12)]** Muñoz testified that by the time he realized what was going on, the accident happened. **[1 RP 113 (Muñoz EUO at 61:1-19)]**

b. EUO of Freddie Sanchez

More than a year after taking Muñoz's EUO,[3] and before commencing the present wrongful death action, Plaintiffs' counsel issued a subpoena for testimony and documents to O'Reilly Store Manager Freddie Sanchez. **[1 RP 140-144]** The subpoena contained the caption and case number from the Appointment Proceeding. **[1 RP 140]** The subpoena also explicitly warned that "IF YOU DO NOT COMPLY WITH THIS SUBPOENA, you may be held in contempt of court and punished by fine or imprisonment." **[Id. (capitalization in original)]** The subpoena sought documents relating to the transmission Muñoz ordered from O'Reilly and "the OBD2 scanner given to [Muñoz] by [O'Reilly]." **[Id.]**

Plaintiffs' counsel took Sanchez's EUO without notice to O'Reilly and with no counsel present for Sanchez or for O'Reilly. **[1 RP 230-239; 2-21-24 Tr. at 14:23 – 16:3]** As he did with Muñoz, Plaintiffs' counsel told Sanchez that he was investigating the case, and that Sanchez was "not a defendant here today[.]" **[1 RP 231 (Sanchez EUO at 5:20-23)]** Plaintiffs' counsel then proceeded freely to ask Sanchez questions probing into the following topics: (1) Sanchez's knowledge of the accident, (2) whether Muñoz was on his way to work when the accident

[3] If the Court takes judicial notice of the Appointment Proceeding, the Court will observe that a Notice of Inactivity was filed on March 31, 2022. The next action in the docket is the subpoena to Mr. Sanchez that was filed on April 8, 2022, and served on April 12, 2022. **[1 RP 144]**

happened, (3) Sanchez's knowledge of the defects of Muñoz's Mustang, (4) Muñoz's purchase of a new transmission from O'Reilly, (5) Muñoz's acquisition and use of an OBD2 scanner from O'Reilly and Sanchez's knowledge (or lack thereof) regarding the same, (6) O'Reilly's policies regarding employee tardiness, attendance and personal transportation, and (7) Muñoz's disciplinary record with O'Reilly. **[See generally 1 RP 230-239]** As explained below, Sanchez's testimony – which was procured without a pending action and which lacked any preparation, advice or potential objections from defense counsel – formed the basis of Plaintiffs' allegations against O'Reilly.

c. EUO of Jason Sardella

On June 30, 2022, Plaintiffs' counsel served a subpoena for testimony on former O'Reilly Assistant Store Manager Jason Sardella. **[1 RP 145]** The certificate of service indicates that, like the subpoena to Sanchez, the subpoena to Sardella was issued under the caption and case number of the Appointment Proceeding. **[Id.]** And, as with Sanchez, Plaintiffs' counsel took Mr. Sardella's EUO without notice to O'Reilly and with no counsel present for Mr. Sardella or for O'Reilly. **[1 RP 240-251; 2-21-24 Tr. at 14:23 – 16:3]**

Sardella's EUO took place on August 26, 2022. **[1 RP 240]** Plaintiff's counsel assured Sardella, as he had the two other O'Reilly employees, that he was investigating the accident and that "there's no lawsuit against you; you're not a

defendant; you're not being sued in this case[.]" **[1 RP 241 (Sardella EUO at 4: 10-20)]** Counsel instead described the EUO as "an interview that's like a deposition, but there's no active litigation at this moment." **[Id. (Sardella EUO at 3:12-16)]** Counsel then asked Sardella about all the same topics he covered with Sanchez: (1) Sardella's knowledge of the accident, (2) whether Muñoz was on his way to work when the accident happened, (3) Sardella's knowledge of the defects of Muñoz's Mustang, (4) Muñoz's purchase of a new transmission from O'Reilly, (5) Muñoz's acquisition and use of an OBD2 scanner from O'Reilly and Sardella's knowledge (or lack thereof) regarding the same, (6) O'Reilly's policies regarding employee tardiness, attendance and personal transportation, and (7) Muñoz's disciplinary record with O'Reilly. **[See generally 1 RP 240-251]** As with Sanchez's testimony, Sardella's testimony also formed the basis of Plaintiffs' allegations against O'Reilly.

3. Plaintiffs file a wrongful death complaint under a new docket number.

Nine months after Sardella's EUO, on June 2, 2023, the WDE and other plaintiffs filed the present wrongful death action against O'Reilly, and against Muñoz and his insurance carrier, under a new case number and caption.[4] **[1 RP 1-**

[4] If the Court takes judicial notice of the Appointment Proceeding, the Court will observe that an Order of Administrative Closure was entered on February 27, 2023. Thus, no further relief beyond Murphy's appointment was ever sought or obtained in the Appointment Proceeding.

21] The claims against O'Reilly include detailed recitations of facts derived entirely from the EUOs of Muñoz, Sanchez and Sardella that were improperly carried out without notice to O'Reilly through the Appointment Proceeding. **[1 RP 6-11]** For example, Plaintiffs alleged that O'Reilly: (1) was on notice of the danger Muñoz and his Mustang posed to the motoring public and therefore had a duty to protect the motoring public from that danger, (2) enabled Muñoz to "inflict his dangerous instrumentality, the Mustang, on the motoring public . . . by negligently supervising [Muñoz]," (3) failed to prohibit Muñoz from using the Mustang to travel to and from work, (4) failed to enforce its requirement that employees have safe and reliable transportation, (5) allowed Muñoz to have an OBD2 scanner, which allowed Muñoz to override the Mustang's mechanical error codes, and failed to supervise his use of the scanner, and (6) "[d]iscipline[ed] or threatened to discipline [Muñoz] if he arrived at work late or missed work, knowing he was using the defective vehicle to comply with these demands."[5] **[1 RP 7-8 ¶¶ 46-49]**

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[5] O'Reilly emphasizes that these allegations are disputed and, in many instances, are contradicted by the EUOs themselves. For example, the complaint alleges that "but for [O'Reilly] allowing [Muñoz] to . . . use the . . . OBD2 scanner . . . Muñoz would not have been able to drive the Mustang on the day of the fatal crash[.]" **[1 RP 6-7 ¶ 45]** Yet all three EUOs reflect that O'Reilly had no knowledge of Muñoz's using an OBD2 scanner to bypass error codes on his Mustang. **[1 RP 109 (Muñoz EUO at 47:16 – 48:9); 1 RP 235 (Sanchez EUO at 18:21 – 21:16; 1 RP 247 (Sardella EUO at 26:17-20)]** Moreover, Muñoz testified that he did not use the OBD2 scanner on the day of the accident and that he could bypass the Mustang's error codes by disconnecting and reconnecting the battery. **[1 RP 107, 114 (Muñoz EUO at 39:20 – 40:3, 68:13-15)]**

To further capitalize on the improperly obtained EUOs, Plaintiffs served extensive discovery requests to O'Reilly along with the complaint. **[1 RP 178-189]** The discovery requests included, among other things, 41 requests for admissions pursuant to Rule 1-036 NMRA seeking to bind O'Reilly to the testimony (as restated by Plaintiffs' counsel) that was improperly obtained through the EUOs. **[1 RP 179-183]** Plaintiffs also relied heavily on the EUOs in seeking partial summary judgment on whether Muñoz was acting within the course and scope of his employment at the time of the accident. **[5 RP 1055-1061]**

4. O'Reilly files a motion to dismiss or, in the alternative, for sanctions due to Plaintiffs' use of improperly obtained pre-litigation discovery. The district court denies the motion due to uncertainty about the appropriate remedy and certifies the denial for interlocutory appeal to obtain guidance from the appellate courts.

O'Reilly filed a "Motion to Dismiss with Prejudice or Alternatively [to] Disqualify Counsel and [to] Exclude Improperly Obtained Pre-Litigation Discovery" (the "Motion to Dismiss"). **[1 RP 120-159]** Among other things, O'Reilly argued that: (1) the Act does not provide pre-suit subpoena powers to personal representatives or to their attorneys as part of the personal representative appointment process, **[1 RP 123-124]** (2) an appointment procedure under the Act is not a "suit" or a "pending action" to which the Rules of Civil Procedure apply, **[1 RP 125-126]** (3) under New Mexico precedent, it is unlawful for an officer of the court to issue a subpoena in the absence of a pending judicial action, **[1 RP 126-129]**

and (4) the authorized and proper method of conducting pre-suit discovery is through Rule 1-027 NMRA, which among other things requires notice to the expected adverse party. **[1 RP 129-131]** O'Reilly pointed out 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 Plaintiffs' counsel issued in another case. **[1 RP 130]** Specifically, Judge Wilson ordered that the subpoena was "invalid as it constitutes improper pre-suit discovery[.]"[6] **[1 RP 158]**

Plaintiffs filed a response in opposition to the Motion to Dismiss. **[1 RP 211-251]** Among other things, Plaintiffs argued that: (1) New Mexico law permits appointment of a personal representative to investigate claims, **[1 RP 214-215]** (2) O'Reilly's contention that the Rules of Civil Procedure do not apply to the appointment of a wrongful death personal representative is incorrect, **[1 RP 215-217]** (3) the present case is distinguishable from the authority O'Reilly cited concerning the issuance of subpoenas without a pending judicial action because the Appointment Proceeding was a pending judicial action, **[1 RP 217-218]** (4) Plaintiff's counsel was not required to use Rule 1-027 to conduct pre-suit

[6] Significantly, the subpoena in the case before Judge Wilson was directed to the Larry H. Miller Casa Chrysler Jeep Service Department rather than to an individual employee of that company. **[1 RP 147]** Unlike O'Reilly here, the company therefore had notice of the subpoena and successfully filed a motion to quash it. **[1 RP 158]**

investigation because the district court in the Appointment Proceeding expressly authorized such investigation in the Appointment Order, **[1 RP 219-221]** and (5) O'Reilly's requests for dismissal or the exclusion of evidence should be rejected. **[1 RP 221-222]**

O'Reilly filed a reply in support of its Motion to Dismiss. **[2 RP 306-342]** Among other things, O'Reilly noted that: (1) the plain language of the Act and of the other authorities Plaintiff cited do not support Plaintiff's argument that a personal representative may conduct pre-suit investigations using court process, **[2 RP 308-311]** (2) the language in the Appointment Order authorizing the WDE to investigate was submitted and approved *ex parte* and did not convert the already-concluded Appointment Proceeding into a civil suit or a pending action, **[2 RP 311-313]** (3) even if the WDE had investigative powers, which O'Reilly disputes, it was still improper for the WDE to invoke Rule 1-045 to issue subpoenas to obtain pre-suit discovery about O'Reilly without notice to O'Reilly. **[2 RP 313-315]**

The district court held a hearing on O'Reilly's Motion to Dismiss on February 21, 2024. **[2-21-24 Tr. at 1-40]** At the hearing, counsel for Plaintiffs implicitly acknowledged that there is no clear authority supporting Plaintiffs' conduct in issuing pre-suit subpoenas in the Appointment Proceeding. For example, he argued that the issue "isn't settled . . . [m]eaning there's not precedent, there's not a rule[]" establishing that anything Plaintiffs did in the Appointment Proceeding was

improper. **[Id. at 22:22 – 23:4]** He added, "unless and until the Court of Appeals or Supreme Court say[] you guys can't be doing this," then it is inappropriate for O'Reilly to ask for "the most extreme" sanctions to "punish somebody for doing something that isn't clearly against [any rule]." **[Id. at 26:17 – 27:10]** Nevertheless, Plaintiffs' counsel admitted that "there was nothing that prevented [Plaintiffs] from just suing [Muñoz], and in that case, sending the exact same subpoenas to the exact same [individuals]." **[Id. at 25:3-7]**

The district court responded by noting that it understood the case of *Henkel v. Hood*, 1945-NMSC-006, 49 N.M. 45, 156 P.2d 790, to hold that a petition for an appointment of a personal representative under the Act is for the appointment only. **[Id. at 25:16-22]** The district court shared that it had, "within the last year, an attorney who got a personal representative appointed for wrongful death purposes, apparently investigated the facts, settled the case, and then tried to turn the appointment into an interpleader action. That didn't go." **[Id. at 25:22 – 26:1]** The district court added that, while the Act may authorize pre-suit investigations, "it doesn't say you can issue subpoenas. And in this case, we certainly had a different action filed by the personal representative for the purpose of pursuing a claim." **[Id. at 26:3-9]**

Nevertheless, the district court expressed concern about awarding severe sanctions against Plaintiffs and asked O'Reilly's counsel what prejudice O'Reilly

suffered. **[Id. at 34:18 – 35:17]** O'Reilly's counsel pointed out that Plaintiffs served O'Reilly with requests for admissions seeking to bind O'Reilly to the testimony of Sanchez and Sardella. **[Id. at 35:18 – 36:21]** He argued that it was prejudicial to O'Reilly to have to answer those requests when O'Reilly had no notice of the subpoenas and "didn't have a chance to participate, defend, object, [or] do anything with respect to those examinations under oath." **[Id.]** He also noted that, had O'Reilly had notice of the subpoenas, it could have sought to quash them within the Appointment Proceeding. **[Id. at 37:22 – 38:1]** Thus, O'Reilly's counsel argued, even if the district court were not inclined to dismiss the case or to disqualify Plaintiffs' counsel, the court at a minimum should exclude the improperly obtained examinations under oath because "there [have] to be some consequences for the plaintiffs for [using] this procedure." **[Id. at 38:2-14]**

The district court ruled from the bench that it would deny the sanctions of dismissal and disqualification. **[Id. at 39:16 – 40:7]** The district court also expressed that, in other cases before the court, "other counsel have attempted to use the appointment proceedings [under the Act] beyond what I think the statute allows. That does raise a question, and maybe reasonable minds differ." **[Id. at 39:6-15]** On that point, the district court stated:

> I understand we're at a very narrow question here, though: Can you use process in [an] 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 [sic] interlocutory language so that the Court of Appeals can tell me whether I'm wrong, or not, on this.

[Id. at 39:25 – 40:7]

The district court entered its written order denying the Motion to Dismiss on May 13, 2024 (the "Order"). **[5 RP 1138-1141]** The Order recites that:

> Although the narrow issue of whether a concluded wrongful death personal representative appointment action under the [Act] 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 may not immediately dispose of the case in its entirety, interlocutory review is appropriate because the at issue examinations under oath form the basis of Plaintiffs claims against O'Reilly and resolution of this issue on interlocutory appeal might well alter the nature and scope of this case in a manner that "may materially advance the ultimate termination of the litigation," as stated in NMSA 1978, § 39-3-4 (A) and Rule 12-203(B) NMRA.

[5 RP 1139 ¶ 5] O'Reilly thereafter filed an application for interlocutory appeal, which the Court of Appeals denied on November 12, 2024. **[6 RP 1271-1272]** O'Reilly then timely filed a petition for writ of certiorari in this Court on December 12, 2024 (the "Petition"). The Petition identified the following questions presented for review:

1. Whether a concluded personal representative appointment action under the Act is a pending civil action, which affords the personal representative subpoena powers under the New Mexico Rules of Civil Procedure?

2. A 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?

Petition at 2. This Court granted the Petition "on all questions as presented" in the Petition. *See* Order dated January 17, 2025, at 2.

The Court should answer the first question in the negative and hold that the Act does not modify the general rule that formal, pre-suit discovery is prohibited. This is particularly important when, as here, the subpoena power is invoked in a manner designed to conceal the activity from the true target of investigation, thereby depriving the target of its basic procedural rights under the Rules of Civil Procedure. Regarding the second question, for the same reasons, the Court should hold that the circumstances of this case justify dismissal with prejudice or, at a minimum, exclusion of the evidence that was improperly obtained.

III. ARGUMENT

A. The Wrongful Death Act does not authorize pre-suit discovery.

1. Preservation.

This issue was preserved through the briefing and argument on O'Reilly's Motion to Dismiss. **[1 RP 123-129; 2 RP 308-313; 2-21-24 Tr. at 1-40]** The district court denied the Motion to Dismiss. **[5 RP 1138-1141]** Accordingly, O'Reilly successfully invoked a ruling sufficient to preserve the issue. *See* Rule 12-321(A) NMRA ("To preserve an issue for review, it must appear that a ruling or decision by the trial court was fairly invoked.").

2. Standard of review.

This appeal requires the Court to review the district court's interpretation of the Act de novo. *See Grisham v. Reeb*, 2021-NMSC-006, ¶ 12, 480 P.3d 852 ("We review questions of statutory interpretation de novo."). The Court must also interpret the Rules of Civil Procedure and the Rule of Professional Conduct in answering the questions presented, which requires de novo review. *Rawlings v. Rawlings*, 2024-NMSC-008, ¶ 8, 548 P.3d 43 (the Court interprets rules of procedure de novo); *Spencer v. Barber*, 2013-NMSC-010, ¶ 6, 299 P.3d 388 (applying de novo review when interpreting the Rules of Professional Conduct).

3. With limited exceptions, the Rules of Civil Procedure only contemplate discovery in the context of pending litigation.

The Rules of Civil Procedure, when viewed collectively, demonstrate that discovery is generally only authorized in *pending* civil actions among adverse parties. *See Workman v. United States Postal Serv.*, 127 F.4th 237, 240 (10th Cir. 2025) ("Under the Federal Rules of Civil Procedure, the 'doors of discovery' do not typically open before a plaintiff files a well-pleaded complaint showing entitlement to relief.") (quoted authority omitted).

Rule 1-001 NMRA provides, in relevant part, that "[t]hese rules govern the procedure in the district courts of New Mexico in all suits of a civil nature[.]" Rule 1-003 NMRA, in turn, provides that "[a] civil action is commenced by filing a complaint with the court." Rule 1-004 NMRA governs "the issuance and service of

process in all civil actions" and provides that a summons must "be directed to the defendant." Rule 1-004(A)-(B). Rule 1-005(A) NMRA provides that virtually every filing in the district court "shall be served upon each of the parties." Rule 1-007(A) states, in relevant part, that "[t]here shall be a complaint and an answer[.]" These rules generally contemplate an adversarial process in which the parties give each other notice of the procedural mechanisms they invoke.

Regarding the standard of diligence required to file a pleading, Rule 1-011(A) NMRA provides that "[t]he signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay." Unlike its federal counterpart, Rule 1-011 "creates a less stringent standard of subjective good faith" and "ought to be employed only in those rare cases in which an attorney deliberately presses an unfounded claim or defense." *Rivera v. Brazos Lodge Corp.*, 1991-NMSC-030, ¶¶ 12-13, 111 N.M. 670, 808 P.2d 955 (quoted authority omitted). No New Mexico authority provides that formal, pre-suit discovery is required (or even allowed) to satisfy the requirements of Rule 1-011.

Rule 1-017 NMRA, which is entitled "Parties plaintiff and defendant; capacity[,]" includes a special provision addressing the appointment of a personal representative under the Act. It provides that "[a]n action for wrongful death brought

under [the Act] shall be brought by the personal representative appointed by the district court for that purpose under [the Act]. A petition to appoint a personal representative may be brought before the wrongful death action is filed or with the wrongful death action itself." Rule 1-017(B). As explained below, the rule establishes a method for identifying and authorizing a person with capacity to sue on behalf of a wrongful death estate; 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.

Rule 1-026(B) NMRA defines the scope of discovery, in relevant part, by providing that "[p]arties may obtain discovery of any information, not privileged, which is relevant to the subject matter involved *in the pending action*." (Emphasis added).

Rule 1-027(A) provides the sole exception to the pending action requirement of Rule 1-026. It states that "[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 in the district court in the county of the residence of any expected adverse party." Rule 1-027(A)(1). The petitioner must show:

> (a) 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;
>
> (b) the subject matter of the expected action and his interest therein;

> (c) the facts which he desires to establish by the proposed testimony and his reasons for desiring to perpetuate it;
>
> (d) the names or a description of the persons he expects will be adverse parties and their addresses so far as known; and
>
> (e) the names and addresses of the persons to be examined and the substance of the testimony which he expects to elicit from each; and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

Id. "The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition." Rule 1-027(A)(2).

Rule 1-027 is to be used in limited circumstances to perpetuate testimony, not to conduct pre-suit investigation. *See Workman*, 127 F.4th at 241 (construing federal Rule 27(a) and concluding that the rule was designed to perpetuate testimony and to preserve evidence; it "was not intended as a means to *discover* facts.") (emphasis in original). Although "one might consider the lack of evidence to sustain a claim as creating an inability to file suit[,] that is emphatically not a reason on which a Rule 27 petition can be based[,]" and "it would be an abuse of the rule to use pre-suit depositions to discover additional evidence in preparation for litigation."[7] *Id.* at 242.

[7] In contrast to the New Mexico and federal rules, Texas Rule of Civil Procedure 202 provides a mechanism for seeking leave to conduct pre-suit depositions to

Finally, Rule 1-045 NMRA governs the issuance of subpoenas. It requires, among other things, that every subpoena must "state the title of the action and its civil action number" and issue from the district court "in which the matter is pending." Rule 1-045(A)(1)-(2). The rule also requires the party issuing the subpoena, "[p]rior to or at the same time as service of any subpoena commanding production of documents and things or inspection of premises before trial, [serve notice] on each party in the manner prescribed by Rule 1-005 NMRA." Rule 1-045(B)(2). "The purpose of the notice provision is to afford other parties an opportunity to object to the production[.]" Rule 1-045 Cmt. (2002 amendment) (quoted authority omitted). The rule also includes protections for those who have "a legal interest in or the legal right to possession" of materials or premises sought to be produced or inspected, respectively, in a subpoena, giving such persons the right to object to the subpoena or to file a motion to quash it. Rule 1-045(C)(2)(b)(i).

In *Wallis v. Smith*, 2001-NMCA-017, 130 N.M. 214, 22 P.3d 682, the Court of Appeals recognized the importance of providing parties a reasonable opportunity to object to a subpoena. There, the plaintiff sought medical records from the defendant. *Id.* ¶ 17. When the defendant refused to execute a medical release, rather

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investigate a potential claim or suit. *Hous. Indep. Sch. Dist. v. Durrell*, 547 S.W.3d 299, 305 (Tex. App. 2018). However, "Rule 202 depositions are not . . . intended for routine use. There are practical as well as due process problems with demanding discovery from someone before telling them what the issues are." *In re Jorden*, 249 S.W.3d 416, 423 (Tex. 2008).

than filing a Rule 1-037 motion to compel, the plaintiff issued subpoenas directly to the defendant's medical providers. *Id.* The defendant's counsel did not receive notice of the subpoenas for two days; the defendant's counsel then filed a motion to quash the subpoenas within another two days. *Id.* In the meantime, at least one medical provider delivered records to the plaintiff in response to the subpoena. *Id.*

The Court of Appeals held that the appropriate response to the defendant's objection would have been to move for relief under Rule 1-037 and that, "[w]ere we to conclude otherwise and allow the use of Rule 1-045 to circumvent the discovery objection, 'the discovery rules and the protections afforded by them [would be] rendered meaningless.'" *Id.* ¶ 19 (quoted authority omitted) (alterations in original). "Such a practice is fundamentally unfair and violates all sense of civility and decency." *Id.* ¶ 20 (quoted authority omitted).

In sum, the Rules of Civil Procedure authorize discovery in pending actions and require notice to all parties to give them a reasonable opportunity to object and to seek relief from the district court. Pre-suit discovery without notice, as occurred here, is not authorized.

4. The Rules of Professional Conduct prohibit the issuance of subpoenas in the absence of a pending judicial action.

Conduct that circumvents the discovery rules also raises ethical concerns. In *In re Chavez*, this Court squarely confronted the problems that arise when subpoenas are issued outside the context of a pending judicial action. In that case, a deputy

district attorney "engaged in a pattern of issuing investigative subpoenas unconnected to court or grand jury proceedings." 2017-NMSC-012, ¶ 1. The attorney signed and issued at least ninety-four subpoenas for cell phone subscriber information and call activity, as well as medical records, CYFD records and utility records. *Id.* ¶ 3. The subpoenas were filed in the district court and were assigned to a miscellaneous criminal file. *Id.* As here, "[b]ecause there were no cases, there were no parties, and so [the attorney] issued the subpoenas without notice to the individuals whose information was being sought." *Id.* This resulted in the initiation of disciplinary actions against the attorney and his supervisor, which resulted in a request for public censure for the attorney and formal reprimand for the supervisor. *Id.* ¶¶ 5, 8.

In reviewing the requests for discipline, this Court held that "it is unlawful for a court or an officer of the court to issue any subpoena in the absence of a pending judicial action." *Id.* ¶ 2. The Court first looked at the requirements of the criminal subpoena rule, Rule 5-511, and noted that it "plainly requires that subpoenas be issued only in connection with existing judicial actions." *Id.* ¶ 11. The Court observed that the use of unauthorized subpoenas "has been deemed coercive and intimidating. To the extent that an unknowing witness may feel compelled to attend or produce documents, the practice amounts to perpetrating a deceit on the witness." *Id.* (quoted authority omitted). Moreover, "not even a sitting district court judge

possesses the authority to compel a person to submit evidence when no complaint, information or indictment has been filed against the person and thus when no criminal prosecution has commenced." *Id.* The Court also discussed Rule 1-045, the civil counterpart to Rule 5-511, and observed that "both rules require that a subpoena state the title of the action and its case number[,]" and that "[i]t is impossible to include an accurate title and case number when no judicial action has been established." *In re Chavez*, 2017-NMSC-012, ¶ 15.

The Court also considered an argument, like one Plaintiffs have made here, that "in the absence of an express prohibition, the issuance of unilateral subpoenas should be permissible[.]" *Id.* ¶ 16. The Court disagreed because it read all laws the deputy district attorney relied on as requiring "a court's acquiescence to the issuance of a subpoena, and this in turn requires an existing judicial action." *Id.* "More importantly, as a matter of fundamental policy," the Court emphasized that "the absence of a prohibition does not equal permission." *Id.* The Court held that prosecutors owe a "duty of fairness extends to all parties to judicial actions, and in this case it extended to the recipients of subpoenas as well as the people whose information was being sought, none of whom were parties to judicial actions." *Id.* ¶ 17.

Given these principles, the Court held that the deputy district attorney violated Rule 16-404(A) by issuing the subpoenas in the absence of a judicial action. *In re*

Chavez, 2017-NMSC-012, ¶ 20. Rule 16-404(A) provides that "a lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person." The Court explained:

> [S]ending subpoenas that implied court authority, but lacked it, affected the rights of the subpoena recipients and third parties in two impermissible ways. First, the unauthorized subpoenas sent to communications providers unfairly deprived those providers of the right to conduct ordinary business and forced them to expend resources and personnel to respond before a response was required in the name of justice. Second, because the subpoenas were unconnected to pending judicial actions, *the third parties whose information was being sought were not parties, were not notified, and therefore had no opportunity to contest the release of their personal information*.

Id. ¶ 22 (emphasis added). The Court added that "[a] subpoena that issues improperly, but has the guise of authority and carries the threat of punishment, falsely suggests that the recipient is legally required to answer and has therefore lost the right not to respond. This is misleading and unfair, and represents an abuse of the government's substantial power and responsibility." *Id.*[8]

The present case raises the same concerns identified in *In re Chavez* due to the lack of a pending judicial action and the absence of notice to O'Reilly regarding the EUOs.

[8] Rule 16-402 NMRA, which prohibits communication with a represented person without their lawyer's consent, serves similar policy goals by protecting the integrity of the legal process and preventing overreaching by opposing counsel.

5. The Act does not modify the general rule that pre-suit discovery is improper.

This case presents a foundational question about whether the Act allows a personal representative to bypass the protections in the discovery rules. It is fundamentally unfair for a plaintiff to conduct discovery targeting a potential defendant without providing notice, and to then use that information to file a lawsuit against the defendant. *Cf. Pizza Hut of Santa Fe, Inc. v. Branch*, 1976-NMCA-051, ¶ 7, 89 N.M. 325, 552 P.2d 227 ("When a plaintiff in a civil action files a lawsuit, [their] adversaries are entitled to generally understand that [they] will proceed in a lawful manner and that compliance will be had with the Rules of Civil Procedure, including those relating to discovery." (internal authority omitted)). Here, Plaintiffs' counsel invoked the subpoena power in a manner designed to conceal the activity from the true target of investigation—O'Reilly—thereby depriving O'Reilly of basic procedural rights guaranteed by the Rules of Civil Procedure.

It is true that the Act does not expressly allow or disallow a personal representative to conduct pre-suit discovery as part of a concluded appointment proceeding. But just because a statute does not expressly prohibit something does not mean the statute authorizes everything it fails to prohibit. *Cf. Wood v. State Educ. Ret. Bd.*, 2011-NMCA-020, ¶ 17, 149 N.M. 455, 250 P.3d 881 ("[A]lthough the statute does not expressly prohibit the payment of interest, the plain language is clear and unambiguous about whether the balance of accumulated contributions includes

the payment of interest. It does not."). The canons of statutory construction require a court to determine and give effect to the intent of the Legislature, and that statutes must be interpreted according to their plain language unless the language is ambiguous. *Leger v. Leger*, 2022-NMSC-007, ¶¶ 26-27, 503 P.3d 349.

The relevant provision concerning appointment is found in Section 41-2-3, which is entitled "Personal representative to bring action; damages; distribution of proceeds." The statute provides, in relevant part, the following:

> Every action mentioned in Section 41-2-1 NMSA 1978 shall be brought by and in the name of the personal representative of the deceased person, and the jury in every such action may give such damages, compensatory and exemplary, as they deem fair and just, taking into consideration the pecuniary injury resulting from the death to the surviving party entitled to the judgment, or any interest in the judgment, recovered in such action and also having regard to the mitigating or aggravating circumstances attending the wrongful act, neglect or default. The proceeds of any judgment obtained in any such action shall not be liable for any debt of the deceased[.]

Section 41-2-3. The purpose of this language is to designate a person "who may prosecute this particular character of statutory action." *Henkel*, 1945-NMSC-006, ¶ 12. "No special rights are conferred" upon the personal representative; rather, "[t]he important thing is that the action shall not fail because of the absence of a party capable of suing." *Id.* ¶¶ 10, 12 (quoted authority omitted). A personal representative's duties under the Act "are merely to act as a nominal party for all the statutory beneficiaries in order to centralize the claims and prevent multiple and possibly contradictory lawsuits." *Chavez v. Regents of Univ. of N.M.*, 1985-NMSC-

114, ¶ 10, 103 N.M. 606, 711 P.2d 883. Accordingly, the purpose of Section 41-2-3 is satisfied once the personal representative has been appointed.

The fact that Section 41-2-3 does not go further to state that the personal representative "shall not engage in pre-suit discovery" no way supports Plaintiffs' suggestion that pre-suit discovery is authorized. Such discovery would do nothing to further the intent of the statute, which again is simply to name a person to prosecute the wrongful death case. Therefore, concluding that the statute authorizes pre-suit discovery would require reading language into the statute that is not already there. *Faber v. King*, 2015-NMSC-015, ¶ 15, 348 P.3d 173 (invoking the "long-established rule of construction prohibiting courts from reading language into a statute which is not there, particularly when it makes sense as it is written.").

Thus, to the extent a petition for the appointment of a personal representative can be considered an "action" in the district court, the action is concluded once the petition is granted, and a personal representative is named. At that point, there is no other relief the district court can be called upon to award.[9] Indeed, the district court's jurisdiction in a statutory appointment proceeding is only as broad as the statute provides. *Cf. Hartley v. Bd. of Cty. Comm'rs*, 1957-NMSC-028, ¶ 3, 62 N.M. 281, 308 P.2d 994 (holding that, in a statutory proceeding, the district court is without

[9] In fact, Plaintiffs never sought further relief in the Appointment Proceeding. *See supra*, n.4.

jurisdiction to decide matters not provided for in the statute). Accordingly, there is no basis in the text of Section 41-2-3 to conclude that a personal representative is empowered to engage in pre-suit discovery as part of a concluded appointment proceeding.

Concluding otherwise would confer upon the personal representative powers that the decedent would not have had, which is contrary to law. "[T]he same cause of action exactly as it would have been possessed by the decedent is what is transmitted to the personal representative, and any limitations on the decedent's personal right to maintain an action will survive as well." *Peck v. Laurel Healthcare Providers, LLC (In re Estate of Krahmer)*, 2014-NMCA-001, ¶ 6, 315 P.3d 298. In other words, the personal representative's rights are "derivative of the decedent's." *Id.* ¶ 8. It follows that, if a decedent would not have had the right to issue pre-suit subpoenas without following the requirements of Rule 1-027, a personal representative likewise lacks the power to do so.

While no reported New Mexico case has squarely addressed these questions, the Wyoming case of *Life Care Ctr. of Casper v. Barrett*, 462 P.3d 894 (Wy. 2020), is instructive. In that case, a personal representative was named to pursue a wrongful death claim on behalf of the decedent's wrongful death estate. *Id.* at 896. The personal representative, acting in the same appointment proceeding, served a subpoena on the long-term care facility where the decedent was injured. *Id.* The

facility denied that the personal representative was authorized to engage in pre-suit discovery under Wyoming's Wrongful Death Act (the "Wyoming Act"). *Id.* The personal representative filed a motion to compel discovery to which the facility objected on the ground that the district court lacked jurisdiction to compel discovery in the appointment proceeding. *Id.* The district court ordered the facility to respond to some of the personal representative's discovery requests and later held the facility in contempt for failing to comply with the order compelling discovery. *Id.* at 896-897.

On appeal, the Wyoming Supreme Court noted that the Wyoming Act specifically requires that the personal representative appointment "shall be made in a separate action brought solely for appointing the wrongful death representative[.]" *Id.* at 898 (citing Wyo. Stat. Ann. § 1-38-103). The Court concluded that the statute does not contemplate that the personal representative will engage in discovery within the appointment proceeding before filing a wrongful death action. *Id.* The Court observed: "After the appointment is made, the wrongful death representative certainly may investigate the claim and bring a wrongful death action, but the plain language of § 103(b) makes it clear that those functions are not part of the appointment proceeding." *Id.* at 899. Thus, even though Section 103(c) of the Wyoming Act specifically states that a personal representative is to "investigate and bring an action" for wrongful death, the Court held that the statute "is not a grant of

authority to act *within the appointment proceeding*." *Id.* (emphasis added). The Court went on to explain that "[i]nvestigations and discovery are plainly different things, and we will not expand the meaning of 'investigate' beyond its plain meaning to include pre-suit discovery." *Id.* at 900. "[H]ad the Wyoming Legislature intended to provide a mechanism for pre-suit discovery, it could have done so in explicit terms." *Id.*

The Court further observed that practical problems would arise if discovery were authorized as part of a stand-alone appointment proceeding. For example, because "a Rule 45 subpoena is a form of discovery[,]" the rule "is subject to Rule 26's limits on discovery, including its restriction on the timing of discovery, which requires the filing of a civil action and responsive pleading before commencing discovery." *Id.* Another problem with allowing pre-suit discovery is determining the scope of discovery, which, "although liberal, is governed by the claims pled in a complaint." *Id.* at 901. The Court noted that, because the personal representative had not yet made a claim, the facility had no opportunity to raise defenses; thus, there was no way to know what information the personal representative was entitled to discover. *Id.* For this reason, courts "must strictly limit and carefully supervise" pre-suit discovery. *Id.* (quoted authority omitted).

Lastly, as argued above, the Court observed that allowing a personal representative to engage in pre-suit discovery would confer greater rights to the personal representative than the decedent would have had:

> [W]e note that at the pre-suit stage, a living malpractice claimant could do no more than obtain the information available through a medical release, public sources of information, and whatever the care provider voluntarily provides. *We can think of no reason that the legislature would provide an opportunity for pre-suit discovery in a wrongful death case but not in other negligence cases.* It is more reasonable to interpret the statute as simply creating a mechanism by which the appointed representative could investigate a potential claim in the same manner as other claims—by executing medical releases, considering public sources, and obtaining expert review. Assuming that a good faith basis for a claim or claims could be developed, with the assistance of an expert witness if necessary, the next steps would be to file a claim . . . and then proceed to suit, *at which point full discovery would be available*.

Id. (emphasis added). The Court therefore held that the district court acted without jurisdiction when it compelled the facility to comply with a discovery subpoena. *Id.* at 902.

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. *See* Rule 1-017(B). That distinction makes no difference in the present case, where it is undisputed that Plaintiffs did not file the wrongful death action

contemporaneously with the petition for appointment. Therefore, the appointment proceeding here is akin to the one contemplated under the Wyoming Act.

Moreover, as noted above, the Wyoming Act – unlike the New Mexico Act – expressly states that the personal representative is to "investigate and bring an action" for wrongful death. *See* Wyo. Stat. Ann. § 1-38-103(c) ("The appointment of the wrongful death representative is a procedural device intended to provide a representative to investigate and bring an action under [the Wyoming Act]. Irregularities in the manner or method of appointment are not jurisdictional."). The Wyoming Supreme Court correctly held that this language does not authorize the personal representative to issue subpoenas within the appointment proceeding; the language instead describes the role of the personal representative and is meant to prevent jurisdictional challenges to the appointment. *Barrett*, 462 P.3d at 899. Plaintiffs reliance on similar language in the Appointment Order regarding the appointment being "for the purpose of investigating" is therefore unavailing. Plaintiffs are assuming that the terms "investigation" and "discovery" are interchangeable, but the terms are night-and-day different when it comes to basic procedural protections for the would-be defendant. Allowing this case to proceed in its current posture is tantamount to saying that those protections have no significance at all.

Finally, this Court should consider the question of prejudice as did the district court. Plaintiffs acknowledged that they could have filed a wrongful death suit against Muñoz in the first instance and then engaged in the same discovery through that lawsuit. It is clear, then, the Plaintiffs had **no legitimate need** to issue the subpoenas as part of the Appointment Proceeding. To the extent that Plaintiffs wished to conceal their activities from O'Reilly, their use of the *ex parte* Appointment Proceeding to achieve that illegitimate goal should not be sanctioned. Concealing discovery activity from the target of investigation is not a legitimate use of judicial power, and it is certainly not one contemplated under the Act.

Conversely, O'Reilly suffered great prejudice as a result of Plaintiffs use of subpoenas to obtain EUOs of O'Reilly's managerial employees without notice to O'Reilly. As explained above, Plaintiffs have served requests for admissions seeking to bind O'Reilly to the statements these employees made under oath without the benefit of counsel and without O'Reilly's counsel present.

In sum, neither the plain language of the Act nor its purpose authorized Plaintiffs to issue subpoenas as part of the Appointment Proceeding. This Court should hold that the pre-suit EUOs were improper, and that O'Reilly is entitled to relief as set forth below.

B. The appropriate remedy for illegally obtained pre-suit discovery is dismissal or, at a minimum, exclusion of the improperly obtained evidence.

1. Preservation.

This issue was preserved through the briefing and argument on O'Reilly's Motion to Dismiss. **[1 RP 122-123, 126, 131-132; 2 RP 308, 311, 315; 2-21-24 Tr. at 1-40]** The district court denied the Motion to Dismiss. **[5 RP 1138-1141]** Accordingly, O'Reilly successfully invoked a ruling sufficient to preserve the issue. *See* Rule 12-321(A) NMRA.

2. Standard of review.

New Mexico courts "review for abuse of discretion whether a court has erred in not sanctioning a party." *Crutchfield v. N.M. Dep't of Taxation & Revenue*, 2005-NMCA-022, ¶ 33, 137 N.M. 26, 106 P.3d 1273. However, "[i]f in exercising its discretion a court fails to properly interpret a statute or apply the law," the standard of review is de novo. *Id.*

3. Dismissal or exclusion of improperly obtained evidence are appropriate under the circumstances of this case.

"[T]rial courts have supervisory control over their dockets and inherent power to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Pizza Hut of Santa Fe, Inc.*, 1976-NMCA-051, ¶ 8. This includes the power to impose sanctions under Rule 1-037 NMRA and "the inherent power to dismiss for lack of compliance with a rule or order of court." *Id.* "Sanctions are

intended to preserve the integrity of the judicial process and the due process rights of the other litigants." *Weiss v. THI of N.M. at Valle Norte, LLC*, 2013-NMCA-054, ¶ 17, 301 P.3d 875 (internal quotation marks and quoted authority omitted). "Under appropriate circumstances . . . a court may use its inherent power to sanction prelitigation conduct that does not give rise to the underlying cause of action." *Rest. Mgmt. Co. v. Kidde-Fenwal, Inc.*, 1999-NMCA-101, ¶ 12, 127 N.M. 708, 986 P.2d 504. A court may "draw on Rule 1-037(B) for an appropriate sanction[]" when exercising its inherent authority if the circumstances are sufficiently analogous to those contemplated under the rule. *Id.* ¶ 21.

New Mexico caselaw contains scant authority addressing the circumstances here, where a plaintiff has conducted unauthorized pre-suit discovery using the imprimatur of the district court's authority and without notice to the target. In addressing a tangentially related scenario, the Court of Appeals in *Poorbaugh v. Mullen* considered the appellee's claim that the appellant "was guilty of fraud and gross error in procuring and introducing certain documentary evidence at trial . . . by means of an improper subpoena duces tecum[.]" 1982-NMCA-141, ¶ 6, 99 N.M. 11, 653 P.2d 511. The appellee noted that the subpoena was not properly endorsed and that it was issued after discovery was closed. *Id.* ¶ 7. The appellee "argue[d] that these alleged improprieties in obtaining evidence require[d] reversal of the judgment

against him." *Id.* The Court rejected these arguments as unpreserved or waived. *Id.* ¶¶ 10-18. Nevertheless, the Court in dicta suggested the following:

> We do not sanction the improper use of process of a court, but even if appellee's assertions are true, the remedy is not reversal. The avenues for redress of such an alleged error include a motion to quash the subpoena, inquiry into the matter under the Supreme Court disciplinary rules, a motion to set aside judgment under [Rule 1-060(B)(6) NMRA], or a determination of whether defendant's actions amount to facts giving rise to an action for abuse of process[.] Under proper circumstances, the matters may also constitute contempt of court.

Id. ¶ 18 (internal citations omitted). Although *Poorbaugh* is of little utility here because it involves an unpreserved claim of discovery abuse arising after the close of discovery in a pending action (rather than pre-suit), it nevertheless supports the notion that the improper use of process is a serious matter that is redressable in variety of ways.

A more analogous case dealing with pre-suit discovery abuse is *Xyngular v. Schenkel*, 890 F.3d 868 (10th Cir. 2018). There, the Tenth Circuit affirmed the district court's dismissal and exclusion of evidence sanctions against a litigant who improperly obtained documents from anticipated opposing parties prior to the commencement of litigation. *Id.* at 871. The case involved a dispute among shareholders in Xyngular Corporation. *Id.* Schenkel, a founding shareholder, believed Xyngular's directors were engaged in self-dealing and other acts of corporate malfeasance. *Id.* Schenkel worked with another shareholder to obtain, surreptitiously and without authorization, documentation of the suspected self-

dealing. *Id.* at 871-872. When Xyngular later filed suit against Schenkel, he responded by asserting counterclaims and third-party claims based on the documents he improperly obtained before the lawsuit. *Id.* at 871.

Xyngular moved for dismissal of Schenkel's claims based on his improper pre-suit conduct. *Id.* at 871-872. The district court found that Schenkel "obtained the documents in anticipation of litigation and used them to support his claims." *Id.* at 872. It also concluded that Schenkel "acted willfully, in bad faith, and with fault." *Id.* The district court dismissed Schenkel's claims, excluded the improperly obtained documents from evidence, and awarded Xyngular and the third parties their costs and fees in bringing the sanctions motions. *Id.*

On appeal, Schenkel argued that the district court lacked authority to sanction pre-litigation conduct. *Id.* The Tenth Circuit disagreed, holding that "a court may exercise its inherent powers to sanction bad-faith conduct that abuses the judicial process, including pre-litigation acts that directly affect a lawsuit." *Id.* at 873. The Court noted that, "[a]lthough it took place before litigation began, Schenkel's misconduct was intended to improperly influence the judicial process." *Id.*

Schenkel further contended that "the record lacks clear and convincing evidence that any document he received was confidential, privileged, or contained trade secrets." *Id.* at 874. But, the Court observed, "the inquiry that was essential to the imposition of sanctions was not whether the documents were confidential,

privileged, or trade secrets—but rather, whether Schenkel acted willfully, in bad faith, and with fault in a way that abused the judicial process in collecting them." *Id.*

Schenkel also argued that the district court in granting dismissal improperly applied the factors articulated in *Ehrenhaus v. Reynolds*, 965 F.2d 916 (10th Cir. 1992), which are: "(1) the degree of actual prejudice to the defendant, (2) the amount of interference with the judicial process, (3) the culpability of the litigant, (4) whether the court warned the party in advance that dismissal of the action would be a likely sanction for noncompliance, and (5) the efficacy of lesser sanctions." *Xyngular*, 890 F.3d at 873 (quoting *Ehrenhaus*, 965 F.2d at 921) (cleaned up).

Regarding the first factor, "[a]lthough some of the documents may have been subject to discovery . . . Schenkel's actions amounted to a circumvention of the discovery process and its built-in protections for parties' interests." *Id.* at 874. Schenkel's actions also "led the parties to expend significant time and resources resolving the issue of the misappropriated documents." *Id.*

For the second factor, Schenkel substantially interfered with the judicial process "because he had, in anticipation of pursuing legal remedies, opted out of the proper discovery procedures." *Id.* "Schenkel bypassed the judicial process while nevertheless seeking to take advantage of it[,]" which also met the third factor concerning Schenkel's culpability because he "acted with willfulness, bad faith, and

fault," and because he "made a calculated decision to obtain the documents for strategic use in litigation." *Id.*

The fourth factor concerning whether the litigant was warned about the possibility of dismissal was inapplicable because the district court "did not have an opportunity to warn Schenkel before he received the documents [pre-suit] [,]" and the factor is not dispositive in any event. *Id.*

Finally, on the question of whether lesser sanctions would be effective, the district court "reiterated the prejudice to the parties that resulted from Schenkel's circumvention of the discovery process, and noted that any sanction short of dismissal would incentivize future litigants to similarly misappropriate documents in anticipation of litigation." *Id.* at 875. The Tenth Circuit concluded that the district court did not abuse its discretion in its application of the *Ehrenhaus* factors and affirmed. *Id.*

The present case shares similarities with *Xyngular* because Plaintiffs obtained pre-suit discovery, without notice to O'Reilly, with the specific goal of using the improperly obtained information against O'Reilly in litigation. And, as noted above, Plaintiffs have used that information in asserting and supporting their claims and in pursuing further discovery from O'Reilly.

The district court concluded that the sanctions of dismissal and disqualification of Plaintiffs' counsel would be too harsh. **[5 RP 1138-1139 ¶¶ 1-3]**

However, the district court determined that "the at issue [EUOs] *form the basis of Plaintiffs claims against O'Reilly* and resolution of this issue on interlocutory appeal might well alter the nature and scope of this case in a manner that 'may materially advance the ultimate termination of the litigation[.]'" **[5 RP 1139 ¶ 5 (emphasis added)]** This Court is now in the position to provide guidance to the district court and to the bar regarding the appropriate sanction for this type of pre-litigation misconduct.

The sanction of dismissal, while harsh, is appropriate under these circumstances. Applying the *Ehrenhaus* factors, O'Reilly has shown that: (1) it has been prejudiced by Plaintiffs' improper use of process and acquisition of discovery without notice to O'Reilly, (2) Plaintiffs interfered with the judicial process, and damaged its integrity, by using the Appointment Proceeding as a pretext to conduct unauthorized discovery that deprived O'Reilly of the ordinary protections afforded in the Rules of Civil Procedure, (3) Plaintiffs are culpable, particularly when their counsel had been told by another district court judge that such pre-suit subpoenas are improper, (4) although Plaintiffs were not warned about the sanction of dismissal, they (like Schenkel) cannot be heard to complain when their conduct occurred pre-suit and in the absence of judicial oversight, and (5) any sanction short of dismissal "would incentivize future litigants to similarly misappropriate documents in anticipation of litigation." *Xyngular*, 890 F.3d at 873.

At a minimum, the Court should find that exclusion of evidence is an appropriate remedy. As the Kentucky Supreme Court has observed, with respect to statements wrongfully obtained, "the only satisfactory remedy is suppression." *Shoney's, Inc. v. Lewis*, 875 S.W.2d 514, 516 (Ky. 1994). "[O]nce the information is furnished it cannot be recalled." *Id.* (quoted authority omitted). Therefore, "if the improperly obtained statements are not suppressed, they may acquire an independent significance, such that irreparable prejudice may result." *Id.*; *Accord United States v. Hammad*, 858 F.2d 834, 839–42 (2d Cir. 1988) (The exclusionary rule mandates suppression of evidence to deter improper conduct by prosecuting parties, preserve judicial integrity, and maintain public trust, and it applies to both constitutional and non-constitutional violations, including breaches of statutes and ethical precepts enforced by courts' supervisory authority).

In short, there must be some consequence to Plaintiffs and/or some remedy for O'Reilly. Concluding otherwise means the rights and obligations relating to discovery in the Rules of Civil Procedure are unenforceable and, therefore, meaningless.

IV. CONCLUSION

The appointment procedure under the Act was never intended to create an opening for savvy litigants to circumvent the discovery rules. O'Reilly should have been afforded the rights and protections to which any defendant in a wrongful death action would be entitled under the Rules of Civil Procedure. Plaintiffs deprived O'Reilly of those rights, thereby damaging the integrity of the judicial process and tainting the proceedings below. The Court should reverse the district court's denial of the Motion to Dismiss, clarify that such conduct is not authorized under the Act, and remand the case with instructions to the district court to dismiss Plaintiffs' complaint as to O'Reilly or, at a minimum, exclude the improperly obtained evidence.

V. STATEMENT CONCERNING ORAL ARGUMENT

Given the unique issues presented in this appeal, O'Reilly believes oral argument would materially aid the Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on April 1, 2025, I served the foregoing Brief-in-Chief to the following counsel of record through the Court's electronic filing system:

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