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-MUÑOZ,

Defendants.

PETITIONER O'REILLY AUTOMOTIVE STORES, INC.'S REPLY BRIEF

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 4,396 words. This word count was obtained using Microsoft Word for Mac Version 16.96.2.

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 ___]**

I. INTRODUCTION

This appeal challenges a course of conduct that should never have occurred. Plaintiffs' counsel issued subpoenas and conducted compelled examinations under oath ("EUOs") of O'Reilly employees—without notice to O'Reilly—under the caption of a concluded Appointment Proceeding that was never intended to serve as a vehicle for adversarial discovery. Plaintiffs' counsel knew or should have known that such conduct was wrong.

Plaintiffs defend their actions by arguing that the Wrongful Death Act ("WDA") does not expressly prohibit such conduct. **[AB 26-29]** But the absence of an explicit prohibition does not make this conduct permissible. As *In re Chavez* makes clear, court officers may not invoke judicial process to compel discovery outside the bounds of a pending action. 2017-NMSC-012, ¶ 2, 390 P.3d 965.

Plaintiffs' insistence that the concluded Appointment Proceeding *was* a pending action cannot be sustained; it disregards the spirit and structure of the discovery rules, and it defies common sense. As this Court recently reaffirmed in *Lopez v. Presbyterian Healthcare Services*, ___-NMSC-___, ¶¶ 4-5, ___ P.3d ___ (S-1-SC-40416, May 1, 2025), the appointment of a personal representative under the WDA is a purely ministerial act. And here, the ministerial act had already been completed when Plaintiffs' counsel conducted pre-suit discovery under the caption of the Appointment Proceeding. To suggest that the proceeding remained "pending"

strains credulity. Most attorneys would step back and recognize that pre-suit discovery of this kind undermines fairness, taints the litigation that follows, and threatens the integrity of the judicial process. No amount of window dressing can excuse what is, at bottom, an improper and prejudicial end-run around the rules.

The seriousness of Plaintiffs' pre-suit misconduct demands a meaningful remedy. This was not an inadvertent procedural misstep—it was a deliberate use of judicial process to compel testimony without notice and in circumvention of the rules that govern pre-suit discovery. Plaintiffs continue to defend that conduct in their answer brief, albeit under the guise of reasonable disagreement. **[AB 24 n.4, 26]** Allowing them to retain the benefit of counsel's improper actions would set a dangerous precedent and invite future litigants to exploit the appointment process as a back door to adversarial pre-suit discovery. The district court's failure to impose *any* sanction—despite recognizing the impropriety—was not merely discretionary leniency; it was legal error. Even if this Court concludes that dismissal is too harsh, at a minimum, exclusion of the improperly obtained evidence is necessary to remedy the prejudice to O'Reilly and to reaffirm that rule-based procedural safeguards are not optional.

II. RESPONSE TO PLAINTIFFS' STATEMENT OF RELEVANT FACTS AND PROCEDURAL HISTORY

O'Reilly is compelled to address several mischaracterizations in Plaintiffs' answer brief. These issues must be addressed to clarify the procedural context and dispel any suggestion that Plaintiffs' conduct was justified. To the contrary, some of Plaintiffs' use of the improperly obtained EUOs further demonstrates the importance of prohibiting pre-suit discovery as occurred here.

First, Plaintiffs' "Relevant Facts" section relies almost entirely on allegations in their complaint, which in turn are based on information obtained through the improperly compelled EUOs. **[AB 2-5]** The only exception is the assertion that Muñoz was scheduled to work at O'Reilly "at or near the time of the crash"—a claim Plaintiffs support by citing directly to the EUOs themselves. **[AB 4]** Plaintiffs suggest that Muñoz was on his way to work when the accident occurred, but as O'Reilly pointed out in its brief in chief, Muñoz testified that he was headed to the bank on a personal errand. **[BIC 7]** Plaintiffs' implication that Muñoz was acting in the course and scope of his employment is misleading.

Second, the EUOs focused not on the facts of the accident, but on the managers' knowledge of the condition of the Mustang and on O'Reilly's internal policies—subjects requiring compliance with both the discovery rules and the ethics

rules.[1] Plaintiffs overstate what the EUOs show about O'Reilly's managers' knowledge of the mechanical issues with Muñoz's Mustang; the testimony reflects only limited awareness. **[See e.g. BIC 11 n.5]** Similarly, Plaintiffs do not dispute that Muñoz did not use the OBD2 scanner on the day of the accident—undermining the centrality of that issue to their liability theory. **[Id.]**

Plaintiffs' assertion that O'Reilly selectively enforced its workplace policies similarly distorts the record. **[AB 4]** Plaintiffs did not obtain this information through a properly noticed Rule 1-030(B)(6) NMRA deposition, which would have allowed O'Reilly to designate and prepare a corporate representative to speak to official company policies. Instead, they elicited testimony about those policies through improperly compelled pre-suit EUOs of individual managers, without notice to O'Reilly and without any opportunity for counsel to participate or prepare the witnesses.

Moreover, Plaintiffs overstate the significance of these internal policies. The attendance policy and the reliable transportation policy serve the same basic function: to ensure employees are punctual and dependable. Yet Plaintiffs portray

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[1] Plaintiffs did not question line-level employees; they examined O'Reilly managers about official company policies and operations—topics clearly implicating the organization itself. *See* Rule 16-402 NMRA cmt. 8–9 (noting that counsel "cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.").

the transportation policy as a duty to ensure the roadworthiness of employees' personal vehicles. **[AB 2-5]** They then suggest that O'Reilly breaches this alleged duty whenever it enforces—or merely threatens to enforce—its attendance policy against employees who choose to commute in vehicles with mechanical problems. **[Id.]** While the merits of that novel theory are not directly before this Court, Plaintiffs' reliance on the EUOs to advance the theory illustrates how their misuse of the Appointment Proceeding tainted the litigation and distorted the factual record.

Fourth, Plaintiffs note that the subpoenas were directed to O'Reilly employees at their work address, **[AB 8, 26]** as if that somehow satisfied the requirement of notice to O'Reilly itself. It does not. O'Reilly received no notice that any testimony was being compelled. Plaintiffs then shift blame to Mr. Sanchez and Mr. Sardella for not informing O'Reilly. **[AB 26]** But that responsibility lies squarely with Plaintiffs. As this Court has recognized, subpoenas are inherently coercive legal instruments. *Chavez*, 2017-NMSC-012, ¶¶ 11, 22. An unrepresented employee may reasonably be intimidated or uncertain about whether they can disclose the subpoena to their employer. Plaintiffs' effort to offload their obligation to provide notice onto others only highlights the unfairness of the process Plaintiffs employed.

Fifth, Plaintiffs suggest that O'Reilly's counsel conceded the pre-suit discovery issue was merely a reasonable legal disagreement between the parties. **[AB 2, 25, 36]** That is incorrect. O'Reilly has consistently maintained that the EUOs

were improper and unlawful. The only point where O'Reilly acknowledged a lack of controlling authority was on the question of remedy—specifically, whether dismissal, exclusion of evidence, or other sanctions were the appropriate response to Plaintiffs' misconduct. **[2-21-2024 Tr. at 11:7-25, 34:3-17, 38:2 – 39:5.]** But there was never any concession that the conduct itself was permissible.

Finally, Plaintiffs correctly note that the order quashing a similar subpoena by Judge Wilson post-dates the Sanchez and Sardella EUOs. **[AB 8-9 n.2]** O'Reilly stands corrected and regrets the misstatement in its brief in chief. Nevertheless, Plaintiffs' counsel should have known that using an ex parte appointment proceeding to conduct undisclosed pre-suit discovery was improper. For the reasons set forth in O'Reilly's brief in chief and further explained herein, the lack of an express judicial prohibition does not excuse conduct that contravenes the rules governing discovery.

III. ARGUMENT

A. Plaintiffs' pre-suit discovery was illegal because the Appointment Proceeding was not a pending action.

Plaintiffs' defense of their pre-suit discovery hinges on a formalistic view of the Appointment Proceeding that ignores the substance of what occurred. They assert that because the proceeding bore a civil docket number and was subject to the Rules of Civil Procedure, it authorized them to issue subpoenas and compel testimony. **[AB 19]** But that reasoning elevates appearance over legal authority and fundamental principles of fairness. The proceeding had already concluded, and the

sole purpose of the docket—to appoint a personal representative—had been fulfilled. As this Court reaffirmed in *Lopez*, that appointment is a purely ministerial act. __-NMSC-__, ¶¶ 4-5. It is not the initiation of an adversarial civil action. The Rules of Civil Procedure do not permit litigants to invent discovery powers by exploiting the formal trappings of an effectively closed case. Plaintiffs' approach contradicts the structure and safeguards built into the discovery process and cannot be sustained.

1. Whether the Appointment Proceeding was a civil action is irrelevant because it was not a *pending* action authorizing pre-suit discovery without notice.

Plaintiffs argue that the Appointment Proceeding was a civil action subject to the Rules of Civil Procedure, suggesting that it functioned like any other pending lawsuit. **[AB 18-24]** Even if it was technically a "civil action" for docketing purposes, it was not a *pending* action within the meaning of the discovery rules once the appointment was complete. *Cf. Kellogg Brown & Root Servs. v. United States ex rel. Carter*, 575 U.S. 650, 662 (2015) ("The term 'pending' means '[r]emaining undecided; awaiting decision.'") (quoting Black's Law Dictionary 1314 (10th ed. 2014)). The district court agreed, observing that Plaintiffs did not "have a suit filed, [or] a claim pending[]" when they used court process to obtain discovery from O'Reilly's employees. **[2-21-2024 Tr. at 40:2-5]**

The Rules of Civil Procedure bear this out. Plaintiffs are correct that the rules encompass the filing of petitions like the one filed in the Appointment Proceeding.

[AB 20, 22 n.3] It is also true that the Appointment Proceeding was temporarily a "pending action" until the district court made the appointment. But those facts do not address whether the Appointment Proceeding *remained* a pending action—with the full panoply of discovery procedures available—*after* the appointment was completed.

Rule 1-026(B) NMRA answers the question firmly in the negative. It provides 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). The subject matter of the Appointment Proceeding (the purported pending action) was the appointment of a personal representative and nothing more. The appointment was already completed when Plaintiffs' counsel undertook pre-suit discovery in preparation for a *separate* wrongful death action. Thus, if there were ever a circumstance in which the appointment of a wrongful death personal representative required discovery, this was not it.

Rule 1-027 NMRA sets forth the exclusive method for obtaining pre-suit discovery, and the parties agree that Plaintiffs could not meet its requirements. **[BIC 1, 21-22; AB 14, 22]** Yet the parties have polar opposite views about what that means. To O'Reilly, the unavailability of Rule 1-027 means that *any* pre-suit discovery was categorically prohibited. **[BIC 1, 21]** Plaintiffs, in contrast, view the inapplicability of Rule 1-027 justifying their use of other discovery rules as part of

a pre-suit "investigation." **[AB 10, 13, 22]** Plaintiff's approach obviates Rule 1-027 and eviscerates the procedural safeguards that rule and other discovery rules are supposed to provide.

2. *Chavez* is directly on point.

Plaintiffs argue that *Chavez* is inapplicable because it arose in the context of a disciplinary proceeding instead of the WDA. **[AB 25–27]** That argument misses the point. This Court held unequivocally 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." *Chavez*, 2017-NMSC-012, ¶ 2. That rule is rooted not in the nature of the underlying proceeding, but in the procedural safeguards that must accompany any use of the court's compulsory process.

Plaintiffs' attempt to limit *Chavez* to its facts ignores the broader principle it reaffirmed: litigants and their counsel may not use the trappings of a concluded or ex parte proceeding to circumvent the rules governing discovery. Here, as in *Chavez*, the attorney used a nominal court caption to issue subpoenas without a pending judicial action and without notice to the affected party. *See id.* ¶ 3 (noting that the subpoenas were "assigned to a miscellaneous criminal file"). The result is the same—compelled discovery obtained outside the framework of Rule 1-026 and without the protections afforded by a live adversarial proceeding. In *Chavez*, this Court emphasized the integrity of the judicial process and the need to prevent misuse

of court authority. 2017-NMSC-012, ¶¶ 22, 24. Those concerns are just as pressing here.

To accept Plaintiffs' narrow reading of *Chavez* would be to reduce its central holding to a footnote and leave the door open for precisely the kind of abuse the Court sought to prevent. The reasoning of *Chavez* applies squarely here, and its core principle—that discovery requires a pending action—should be enforced in this context as well.

3. The WDA's silence does not authorize conduct that the Rules of Civil Procedure prohibit.

Plaintiffs argue that because the WDA does not expressly prohibit pre-suit discovery in an appointment proceeding, their conduct was permissible. **[AB 26–29]** But that argument flips the governing framework on its head. Litigants are not permitted to use discovery tools like subpoenas unless the Rules of Civil Procedure affirmatively authorize such use—and they do not here.

This Court squarely rejected this type of reasoning in *Chavez*. The prosecutor there conducted research and concluded that subpoenas issued in the absence of a pending case were permissible because no statute or rule expressly prohibited them. *Chavez*, 2017-NMSC-012, ¶ 12. This Court disagreed, holding that "the absence of a prohibition does not equal permission," and 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, 16. The Court emphasized that this rule is essential to protecting the rights

of those affected by compelled discovery, ensuring that parties are not subjected to the coercive power of judicial process without the safeguards of notice, oversight, and an active adversarial context. *Id.* ¶ 22. Thus, even if the WDA is silent about pre-suit discovery, that silence cannot override the Rules of Civil Procedure or license end-runs around them.

The Court's unpublished opinion in *In re Indahl*, S-1-SC-40367, dec. (N.M. Dec. 19, 2024) (nonprecedential), reinforces the same point. There, the respondent-attorney secretly recorded and misled an unrepresented individual to elicit damaging admissions before a lawsuit was filed. *Id.* ¶¶ 2-5. Like Plaintiffs here, the attorney argued that because the rules did not explicitly prohibit his conduct, it was acceptable. *Id.* ¶ 11. The Court rejected that rationale, holding that ethical and procedural safeguards prohibit attorneys from manipulating pre-litigation interactions to obtain unfair advantage. *Id.* ¶¶ 11–12.

The Rules of Civil Procedure provide a specific mechanism for conducting pre-suit discovery under Rule 1-027—but Plaintiffs admittedly could not meet its requirements. Instead, Plaintiffs exploited the Appointment Proceeding to issue subpoenas and compel testimony without notice to O'Reilly. That is exactly the kind of coercive misuse of process that this Court has condemned. The fact that the WDA is silent on the issue is no defense.

Plaintiffs also suggest that O'Reilly's arguments constitute an impermissible collateral attack on the order issued in the Appointment Proceeding, and that any objections should have been raised in that court. **[AB 13, 28]** But O'Reilly has no quarrel with the order appointing a personal representative; O'Reilly's objection is to Plaintiffs' use of the EUOs in the present case.

To the extent Plaintiffs suggest that their pre-suit discovery was permissible because the appointment order authorized the personal representative to "investigate," that argument falls flat. **[AB 7, 10, 13, 19]** As the Wyoming Supreme Court correctly observed in *Life Care Ctr. of Casper v. Barrett*, 462 P.3d 894, 900 (Wy. 2020), "[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." The district court here agreed, telling Plaintiffs' counsel "You can investigate. But [the statute] doesn't say you can issue subpoenas." **[2-21-2024 Tr. at 26:6-7]**

Thus, O'Reilly agrees that Plaintiffs' counsel could conduct a pre-suit *investigation* consistent with his duty under Rule 1-011 NMRA. **[AB 20-21]** But counsel went far beyond investigation—he invoked judicial process to compel sworn testimony in the absence of a pending action and without proper notice to the target of discovery. Although that wrongdoing commenced in the Appointment Proceeding, it was completed in the present case when Plaintiffs used the improperly

obtained testimony as the basis of their complaint against O'Reilly. This action is therefore the appropriate one in which to raise O'Reilly's objection and request for sanctions.

4. Reasonable minds cannot differ on whether discovery requires a pending action.

Plaintiffs repeatedly claim that "reasonable minds differ" about whether their pre-suit discovery was improper, and they suggest O'Reilly conceded the point. **[AB 2, 25-26, 36]** O'Reilly never conceded that reasonable minds could differ on the threshold question of whether pre-suit discovery without a pending action and without notice to the party being targeted is permissible. Indeed, that is why O'Reilly filed its motion to dismiss and for sanctions in the first place and why it sought this Court's review.

What O'Reilly did acknowledge is that reasonable minds might differ on the appropriate remedy for Plaintiffs' misconduct. **[2-21-2024 Tr. at 11:7-25, 34:3-17, 38:2 – 39:5.]** O'Reilly explained that although it believed dismissal or disqualification was warranted, it was open to alternative remedies that would meaningfully address the harm caused. **[Id. at 34:11-17, 38:2-14]** This was not a concession of legality—it was an attempt to focus the district court on the real-world consequences of the misconduct and the need for some form of sanction. Plaintiffs' effort to recast that position as a concession on the underlying legal issue is misleading.

There is no reasonable legal disagreement about whether discovery may be conducted in the absence of a pending action. The Rules of Civil Procedure and *Chavez* make clear that it may not. Plaintiffs' effort to reframe the issue as a reasonable disagreement downplays the seriousness of their actions in the hopes that the Court will be less inclined to impose a meaningful sanction. That strategy should not succeed. As explained below, the sanction must reflect the gravity of the misconduct and reaffirm that rule-based procedural safeguards are not optional.

B. The district court erred in failing to award any sanction. A meaningful remedy is required to cure the prejudice to O'Reilly and to deter future abuse.

1. The district court's inaction was not an exercise of discretion—it was a failure to apply the law.

Plaintiffs assert that the district court's refusal to impose a sanction is reviewed only for abuse of discretion, as if that forecloses meaningful review. O'Reilly acknowledges the general rule that a district court's decision regarding sanctions is reviewed for an abuse of discretion. *Crutchfield v. N.M. Dep't of Taxation & Revenue*, 2005-NMCA-022, ¶ 33, 137 N.M. 26, 106 P.3d 1273. A court abuses its discretion when it fails to apply the law correctly or when it declines to act despite clear rule violations. *Id.*

Here, the district court recognized that Plaintiffs' pre-suit discovery was improper but failed to impose any remedy at all. Instead, it suggested shifting responsibility to the appellate courts, asking O'Reilly's counsel: "What about if I

deny you the relief you've asked for, but grant you an interlocutory right to appeal that decision?" **[2-21-2024 Tr. at 38:22–25.]** That was not an exercise of discretion—it was a deferral of it. While O'Reilly appreciates the district court's willingness to facilitate appellate review, the Rules of Civil Procedure required the court to do more than acknowledge the impropriety; it was obligated to address it meaningfully. In short, when a violation of the rules is clear, the failure to act is not leniency—it is legal error.

2. The district court had inherent authority to remedy misconduct that infected the proceedings before it.

Plaintiffs argue that the district court lacked authority to impose sanctions because the discovery conduct at issue occurred in a separate proceeding—the Appointment Proceeding—and was thus purportedly outside the court's supervisory power. **[AB 31-32]** Relying on *State ex rel. N.M. State Highway & Transp. Dep't v. Baca*, 1995-NMSC-033, 120 N.M. 1, 896 P.2d 1148, they claim that a court may not use its inherent power to sanction conduct that occurs in another forum unless the conduct was in "direct defiance" of that court's authority. **[AB 32]** But their reading of *Baca* ignores both the scope of their misconduct and the posture of this case.

O'Reilly did not seek sanctions for what occurred in the Appointment Proceeding in isolation. It sought sanctions because Plaintiffs used improperly obtained testimony *in the present case*—pleading facts in their complaint derived from compelled EUOs. That conduct directly affected the fairness and integrity of

the case before the district court here. Plaintiffs' decision to inject tainted discovery into *this* proceeding placed the matter squarely within the district court's authority to supervise the conduct of litigants and enforce compliance with the rules.

Nothing in *Baca* forecloses that result. The Court there held that a district court lacked inherent authority to impose attorney fees for conduct that occurred before an administrative agency, in proceedings not subject to the court's jurisdiction. *Id.* ¶¶ 12–13. In contrast, the misconduct here culminated in the filing of a civil complaint that relied on improperly obtained discovery—an act that took place under the jurisdiction of the would-be sanctioning court. That is conduct "in direct defiance" of the court's authority in the most practical and immediate sense.

Moreover, New Mexico courts have recognized that a trial court's inherent authority extends to sanctioning misconduct that undermines the integrity of its proceedings, even if the conduct began before the case was formally filed. *See Restaurant Mgmt. Co. v. Kidde-Fenwal, Inc.*, 1999-NMCA-101, ¶¶ 12–14, 127 N.M. 708 (upholding trial court's authority to sanction pre-litigation misconduct that affected the fairness of subsequent litigation). That principle applies here. Plaintiffs' use of improper pre-suit discovery to shape their claims and factual narrative in this case was precisely the kind of procedural abuse courts must have the authority to address once it manifests in their cases. Concluding otherwise would lead to the absurd result that litigants may engage in undisclosed, coercive discovery outside

the rules, use the improperly obtained information in a new action, and then insulate themselves from consequence simply by declaring their initial misconduct beyond the reach of the district court's inherent power. The Court should reject that outcome.

3. A sanction was required to preserve the integrity of the judicial process, and exclusion is the appropriate remedy to cure the prejudice to O'Reilly.

Plaintiffs assert that no sanction was required because district courts have broad discretion, and they contend that O'Reilly failed to cite authority "mandating" a sanction under these circumstances. **[AB 34-43]** But that misstates both the nature of the abuse and the governing standard. While courts have discretion in choosing an appropriate sanction, they do not have discretion to ignore a clear violation of the Rules of Civil Procedure. *Cf. Crutchfield*, 2005-NMCA-022, ¶ 33.

Here, Plaintiffs' counsel conducted compelled, pre-suit discovery under the caption of a concluded proceeding and without notice to O'Reilly. Yet the district court imposed no remedy—not even exclusion of the evidence obtained through that process. That inaction cannot be reconciled with the central purpose of sanctions, which is to deter abuse and preserve the integrity of judicial proceedings. *Weiss v. THI of N.M. at Valle Norte, LLC*, 2013-NMCA-054, ¶ 17, 301 P.3d 875. When, as here, a party improperly compels discovery outside the rules and then uses that discovery to shape the factual and legal foundation of its claims, exclusion is the minimum remedy necessary to level the playing field.

Exclusion is particularly appropriate here for three reasons. First, it restores procedural fairness by ensuring that Plaintiffs do not benefit from information they should never have obtained in the first place. Second, it is proportional to the harm: O'Reilly did not have the opportunity to prepare witnesses, assert objections, or even be present for the compelled examinations. Third, it vindicates the rule-based safeguards that Plaintiffs circumvented—especially the requirements of Rule 1-026 (limiting discovery to pending actions), Rule 1-027 (providing the only authorized procedure for pre-suit depositions), and Rule 16-402 (requiring consent of counsel before communicating with represented organizational parties). Allowing Plaintiffs to retain the benefit of that discovery would effectively reward the very conduct the rules are designed to prevent.

Plaintiffs argue that because no New Mexico case mandates exclusion in precisely this context, the district court's failure to impose any remedy must be affirmed. **[AB 34-37]** But that is not the legal standard. Sanctions are inherently fact specific. The relevant question is whether the district court's refusal to impose any sanction—despite a violation of the rules and prejudice to the opposing party—was "untenable or contrary to logic and reason." *Lewis v. Samson*, 2001-NMSC-035, ¶ 13, 131 N.M. 317, 35 P.3d 972 (quoted authority omitted). That standard is met here.

While no prior case may have presented this exact factual scenario, the lack of a published opinion mandating a sanction does not justify inaction. Courts are not

powerless when litigants exploit procedural loopholes to gain unfair advantage. As the Court of Appeals recognized in *Kidde-Fenwal, Inc.*, 1999-NMCA-101, ¶¶ 12–14, and as other jurisdictions have affirmed, courts have both inherent and rule-based authority to craft remedies where misconduct undermines the fairness of pending proceedings. *See also Xyngular v. Schenkel*, 890 F.3d 868, 872-873 (10th Cir. 2018) (illustrating that pre-suit abuses of process that distort later litigation are well within a court's disciplinary reach). In this case, exclusion is not only fair—it is necessary to remedy the prejudice to O'Reilly and to uphold rule-based procedural safeguards.

IV. CONCLUSION

Plaintiffs' attempt to frame their conduct as a reasonable disagreement cannot obscure reality: they deliberately misused the appointment process to compel sworn testimony without a pending action, without notice, and without adherence to the safeguards required by the Rules of Civil Procedure. O'Reilly was denied the protections to which any defendant is entitled, and the resulting prejudice tainted the proceedings in this case. The district court therefore erred in awarding no remedy. This Court should reverse the district court, reaffirm that such conduct is impermissible, and remand with instructions to dismiss Plaintiffs' complaint as to O'Reilly or, at a minimum, to exclude the improperly obtained evidence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 5, 2025, I served the foregoing Reply Brief to the following counsel of record through the Court's electronic filing system:

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