IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

THERESE BERNIER, individually and as Trustee of the Therese Bernier Trust,

Plaintiff-Appellant,

No. 31,607

and

SANTA FE COUNTY
D-0101-CV-2007-01046

v.

HAROLD BERNIER, deceased, replaced by WILLIAM DOUGLAS BERNIER, as a substitute representative,

Defendant-Appellee.

APPEAL FROM THE FIRST JUDICIAL DISTRICT COURT
SANTA FE COUNTY
THE HONORABLE BARBARA J. VIGIL PRESIDING

APPELLEE'S ANSWER BRIEF

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STATEMENT OF COMPLIANCE

Pursuant to NMRA Rule 12-213, Defendant/Appellee states that the total word count contained in the body of the brief is 9,095 words, using Microsoft Office Word 2003.

May 17, 2012
Dated

Aaron J. Wolf
AARON J. WOLF, Esq.

I. STANDARD OF REVIEW

The district court's imposition of sanctions pursuant to NMRA Rule 1-011 is reviewed for abuse of discretion. Rivera v. Brazos Lodge Corp., 111 N.M. 670, 675, 808 P.2d 955, 960 (1991).

This is because:

> The trial judge is in the best position to view the factual circumstances surrounding an alleged violation and must exercise sound judgment concerning the imposition of sanctions. Because Rule 11 gives courts discretion to fashion sanctions to fit specific cases, no mechanical rules can be stated.

Id.

The Court also reviews the district court's order granting or denying an award of costs for abuse of discretion. See Marchman v. NCNB Tex. Nat'l Bank, 120 N.M. 74, 94, 898 P.2d 709, 729 (1995); Gallegos v. Southwest Community Health Services, 117 N.M. 481, 489, 872 P.2d 899, 907 (Ct. App. 1994).

II. LEGAL ARGUMENT

A. PLAINTIFF FAILED TO PRESERVE APPELLATE ISSUE NO. 1.

In her Brief in Chief ["BIC," pp. i-iii], Plaintiff-Appellant ("Plaintiff") listed three (3) issues. One of the three issues presented to this Court was Issue 1: "The imposition of attorney fees against Mrs. Bernier [herein referred to as "Therese"] for Ronald Bernier's [herein referred to as "Ronald"] allegedly sanctionable conduct is unsupported by the facts and is contrary to law."

According to Plaintiff, the district court erred in imposing Rule 11 sanctions against Therese, who was not a party in this case, based on Ronald's sanctionable conduct pursuant to Rule 11.

Plaintiff never raised or preserved this issue during the district court proceeding nor did she raise or preserve it in her two previous appeals to this Court. Even assuming the court needs to address the argument, as set forth in Argument B below, this argument is without merit. See Plaintiff's First Docketing Statement filed on May 7, 2010 ("First Docketing Statement') [RP 736–760]; and Appellant's Amended Docketing Statement filed on September 22, 2010 [RP 870-905]. ("Second Docketing Statement"). The first time Plaintiff raised this issue was when she filed her Docketing Statement After Remand ("Third Docketing Statement") filed on September 30, 2011 [RP 1106] and her BIC in this Court. Plaintiff argued that her first attempt to preserve this issue was when she filed her Amended Requested Findings of Fact and Conclusions of Law ("FOF & COL") on July 6, 2011 – almost four years after she filed the lawsuit against Defendant-Appellee ("Defendant"). See BIC, p. 18.

This statement is incorrect and misleading because Plaintiff referenced RP 1003 in her BIC when preserving this issue, but nowhere on that page is the issue stated. See Rule 12-213(A)(4) ("...how the issue was preserved in the court below,...record proper, transcript of proceedings or exhibits relied on....")

The Court should not consider Issue No. 1 because it was not properly preserved in the district court for this Court's appellate review. See Muse v. Muse, 2009-NMCA-3, ¶ 50, 145 N.M. 451, 465, 200 P.3d 104, 118.

In a similar case, this Court held that a trial court, as well as an appellate court in any subsequent appeal, should refuse to consider issues that could have been raised in a prior appeal but were not. See DiMatteo v. County of Doña Ana, 109 N.M. 374, 379, 785 P.2d 285, 290 (Ct. App. 1989) (noting that under the law of the case doctrine, "the law applied on the first appeal of a case is binding on the trial court on remand and on the appellate court if there are further appeals" and "the doctrine extends not only to questions raised upon the former appeal[,] but also to those that could have been raised"); see also Ferrell v. Allstate Ins. Co., 2007-NMCA-17, ¶ 50, 141 N.M. 72, 86, 150 P.3d 1022, 1036 (reversed on other grounds in Ferrell v. Allstate Ins. Co., 2008-NMSC-42, ¶ 65, 144 N.M. 405, 424, 188 P.3d 1156, 1175); see also Fed'n of Adver. Indus. Representatives, Inc. v. City of Chicago, 326 F.3d 924, 929 (7th Cir. 2003) ("Under the doctrine of the law of the case, a ruling by the trial court, in an earlier stage of the case, that could have been but was not challenged on appeal is binding in subsequent stages of the case." (internal quotation marks and citation omitted)).

Ronald was the attorney in fact for Therese when she first filed her Complaint for Replevin, Declaratory Judgment, Temporary and Preliminary Injunction, Fraud,

Breach of Contract, Resulting Trust and Prima Facie Tort (In the Alternative) on April 30, 2007 ("Complaint"), [RP 1, ¶ 4]; ([Ronald as a durable power of attorney for Therese] "To commence, prosecute, defend and oppose all actions ... to which the Principal [Therese] is now or may hereafter becomes a party, and to compromise and settle claims, whether by litigation or otherwise") [RP 85, 3.7], and Plaintiff admitted this fact numerous times during the 2007-2011 district court proceeding. ([Plaintiff's counsel, Ms. Ilyse Hahs-Brooks] ("... Ronald Bernier, Therese Bernier's attorney-in-fact, and her son") [Tr. 10/14/09, p. 3, ll. 24-25]; ([Ms. Hahs-Brooks to Ronald] ("are you here acting on [Therese's] behalf under a power of attorney? A. Yes. I am") [Tr. 10/14/09, p. 15, ll. 15-17]; ([Defendant's counsel, Mr. Aaron J. Wolf] "Ronald Bernier, acting for his mother, decided he didn't have to follow [the court's] order") [Tr. 08/06/10, p. 3, ll. 24-25].

The district court could not decide Issue No. 1 because Defendant never raised it before that court. See State v. Jacobs, 2000-NMSC-26, ¶ 12, 129 N.M. 448, 456, 10 P.3d 127, 135 ("In order to preserve an issue for appeal, it is essential that a party must make a timely objection that specifically apprises the trial court of the claimed error and invokes an intelligent ruling thereon.")

The Court should not consider Plaintiff's "new" argument as stated in Issue 1 as it was never preserved for appeal, but as *infra*, this "new" argument is without merit. See Rule 12-213(A)(4) and Muse and DiMatteo.

B. EVEN ASSUMING THAT PLAINTIFF PRESERVED ISSUE NO. 1, THERESE IS A DISCLOSED PRINCIPAL AND LIABLE FOR RONALD'S SANCTIONABLE CONDUCT.

Plaintiff relies on the Restatement (Third) of Agency, § 6.03 which states that when "an agent acts on behalf of an undisclosed principal [it] is a question of fact." Plaintiff also relies on the claim that there was no evidence that Ronald was Therese's agent. [BIC, p.19]. As stated before, Plaintiff's reliance on Section 6.03 is misplaced because Ronald declared himself as the attorney in fact for Therese as shown in the "power of attorney" document providing that he is authorized to commence a lawsuit against Defendant on behalf of Therese. [RP 85, 3.7] [Tr. 10/14/09, p. 15, ll. 11-20]; see also Restatement (Third) of Agency, § 1.04(2)(a) "A principal is disclosed if ... the third party has notice that the agent is acting for a principal.").

Therefore, when Ronald used his power of attorney for Therese to commence the lawsuit against Defendant, he made Therese liable for his actions in this litigation . See Restatement (Third) of Agency, § 7.03 ("A principal is subject to direct liability to a third party harmed by an agent's conduct"); See also Roller v. Smith, 88 N.M. 572, 573, 544 P.2d 287, 288 (Ct. App.), *cert. denied*, 89 N.M. 6, 546 P.2d 71 (1975) (When an agent with the authority to do so negotiates a contract for a disclosed principal, the agent is not liable personally unless the agent expressly is made a party to the contract or the agent acts in a manner indicating an intent to be

bound personally.); Gallegos v. Citizens Ins. Agency, 108 N.M. 722, 730, 779 P.2d 99, 107 (1989); see also Ryan v. Volpone Stamp Co., 107 F. Supp. 2d 369, 387 (S.D.N.Y.2000). (An agent for a disclosed principal who is not personally liable on a contract is not a necessary party to breach-of-contract litigation.)

The Court should reject the claim that Therese may not be sanctioned for Ronald's conduct.

C. RULE 1-011 SANCTIONS WERE PROPER AND APPROPRIATE.

1. Plaintiff has engaged in sanctionable conduct.

The district court based its imposition of sanctions on specific findings of fact and conclusions of law ("FOF & COL") supported by the evidentiary record. See Benavidez v. Benavidez, 2006-NMCA-138, ¶ 17, 140 N.M. 637, 641, 145 P.3d 117, 121. Here, the district court intended to specifically sanction Ronald's subject knowledge and conduct in the district court under Rule 11. [RP 1032-1046]; [RP 1039-1040]. In her BIC, Plaintiff fails to present any evidence to support her position against the district court's findings regarding Ronald's sanctionable conduct; rather, she argues that the district court has never found Therese's conduct sanctionable pursuant to Rule 1-011. [BIC, pp. 25-36]; see also Rule 12-213(A)(4) ("The argument shall set forth a specific attack on any finding, or such finding shall be deemed conclusive").

On the other hand, there is substantial detailed evidence to support the district court.

Specifically, the district court found:

(1) In or around 2006, Defendant Harold Bernier ("Harold") was asked by Ronald and Beverly Kedzior (Ronald's sister and Therese's daughter) ("Beverly") to hold a Walgreens stock certificate ("stock certificate") for Therese because Ronald and Beverly were fighting over their mother's [Therese] potential estate. [RP 1033, FOF 6]. (Q: [Court] "And before the stock certificate was sent to your uncle, Harold, you had talked to your sister about that and she had, am I right, that she had agreed that would be a good place to send the certificate? A. [Ronald] Yes.) [Tr. 10/14/09, p. 38, ll. 1-5].

(2) The specific dispute between Ronald and Beverly, Harold's niece and nephew, was over whether Therese was able to manage her own affairs and whether Ronald was or was not properly handling her affairs, [RP 1033, FOF 9] [Tr. 10/14/09, p. 10, ll. 10-12]; ([Ronald] "I called up Uncle Harold and asked him ... Uncle Harold would be a good choice as a disinterested party....")[Tr. 10/14/09, p. 21, ll. 29-23]; (A. Beverly "My brother, Ron, called me – actually, he left a message

on my machine, saying that he was going to send the stock certificate to my uncle, Harold") [Tr. 10/14/09, p. 47, ll. 18-20].

(3) Harold agreed to hold on to the stock certificate until his niece and nephew resolved their dispute. [RP 112-113, ¶¶ 9-10]; (Letter from Beverly to Harold on October 30, 2006); [RP 324]. ("A. [Beverly Bernier, Harold's wife] [Harold] was under the understanding that Ron[ald] and [Beverly] would be coming to an agreement, together, that it should be returned to [Therese]") [Tr. 10/14/09, p. 42, ll. 9-12]; [Tr. 10/14/09, p. 11, ll. 15-20].

(4) Harold never claimed ownership, right to possession, nor a financial interest in the stock certificate, [RP 1034, FOF 11]; [RP 113, ¶ 17];

(5) When Ronald instructed G. Holdt Garver, Esq. to write a letter to Harold on or about January 31, 2007, demanding that Harold return the stock certificate to Therese, Harold knew that Beverly and Ronald were still in litigation and that a guardianship proceeding had been filed in the First Judicial District Court, D-101-PQ-2006-00052 ("Guardianship proceeding") to decide whether Therese was competent to handle her affairs and whether she needed a substitute guardian, [RP 1033-1034, FOF 7 and 9]; (Q. [Wolf] So as of February 11th, 2007,

Harold was aware there was a dispute between you and Beverly, correct? A. [Ronald] Yes.") [Tr. 10/14/09, p. 31, ll. 17-19; p. 32, ll. 1-2]; (Letter from Ronald to Harold on February 11, 2007: "Congratulations! You snuck right under my radar.") [RP 499].

(6) Harold questioned Ronald's management of Therese's assets. [RP 113, ¶ 12];

(7) Ronald knew that Therese specifically refused to allow Ronald to diversify the stock underlying the certificate and, therefore, there would no damage in value from having a third party hold possession of the certificate during the district court's guardianship proceeding. [RP 1036, FOF 21]; (Ronald's affidavit: "My mother told me that she wanted to keep all of her [stock certificate] and not sell it to diversify.") [RP 247, ¶ 4]; (Ronald's affidavit: "My mother instructed me to take the certificate and place in a safe or other safe place.") [RP 248, ¶ 6]; (Wolf: Ronald "not only can't prove he would have sold [the certificate]... but, in fact, would have had probably been banned by [the Guardianship proceeding....]) [Tr. 10/14/09, p. 13, ll. 10-14].

(8) Ronald demanded the return of the stock certificate from Harold so that he could sell stock to obtain proceeds to fund his defense against the guardianship litigation initiated by his sister Beverly which sought

to remove him from controlling their mother's assets. [RP 1034, FOF 9]; [RP 498].

(9) This confession is inconsistent with Ronald's representations in the causes of action alleged in the Complaint, *i.e.*, that Harold wrongfully withheld the stock certificate preventing Therese from spending or investing proceeds of the stock certificate for her own care. [RP 3, ¶ 20]; [Tr. 10/14/09, p. 60, ll. 21-25];

(10) Ronald knew that his contentions in the Complaint were patently false: [RP 1034, FOF 12 and 13], such as: (a) Harold "may conceal, dispose of, waste the property or the dividends therefrom or remove the stock certificate," (b) Ronald "asked Defendant to hold the stock for safekeeping upon Defendant's promise and representations if Defendant was required to return to the stock certificate, that he would promptly do so. Defendant's representation was false," (c) "Defendant harbored a secret intention not to return the stock, the falsity of was known only to Defendant ...." and "the representation was made with the intent to deceive [Ronald] and Plaintiffs to rely upon the representation and [Plaintiffs] did in fact rely upon the representation by sending the stock certificate to Defendant." [RP 1041, FOF 45]; [RP 21-22]; [Tr. 10/14/09, p. 13, ll. 6-14];

(11) Ronald knew that Harold did not claim any ownership of the stock certificate and Harold was only holding it by agreement because there was pending litigation between Ronald and Beverly, [RP 1034, FOF 11; 1035 FOF 15]; [RP 113, ¶ 17]; [RP 498];

(12) After the Court granted Harold's Counterclaim for Interpleader on October 17, 2007 and took possession of the stock certificate, Ronald refused to dismiss the Complaint, [RP 1035, FOF 15]. In fact, Ronald attempted to join Beverly as a co-defendant because he knew that this litigation was, in fact, a dispute between him and Beverly, not Harold, [RP 1035, FOF 17]; ("[Harold] unlawfully placed the stock ... [Beverly] aided, perpetuated, ... the wrongful detention of Plaintiff's stock") [RP 379, ¶ 25];

(13) Even after Harold passed away on April 26, 2009, Ronald insisted that William Bernier, Harold's son, be substituted in the litigation and William was forced to be substituted in the midst of his mourning, [RP 1036, FOF 18, RP 1042, ¶ 51];

(14) Ronald had no reasonable basis to sue Harold because Ronald believed that the actual party in interest was Beverly, (William Bernier, a substitute party for Harold after he passed away on April 26, 2009 ("William"): Q. (Wolf) "Would you tell the Court what Ronald told

you? A. (William) "Well, it started off with condolences for my father dying and that. And then ... he said that the case was a sad thing going on, and if I would admit or just say that Beverly... was the one behind the case, that, basically, this case would go away.") [Tr. 10/14/09, p. 51, ll. 12-17].

(15) On October 14, 2009, the district court dismissed Plaintiff's claims of Temporary and Preliminary Injunction, Fraud, Breach of Contract, Resulting Trust and Prima Facie Torts, and awarded her zero damages for her Replevin claim, finding that Ronald "put [Harold] in an almost impossible situation ... I've handled several cases involving [Therese], never met her ... It's always brought by [Ronald or Beverly] ... I do not think this was an unjust detention of this stock certificate ... [Harold] knew that there was clear conflict between [Ronald and Beverly] and ... 'Judge, let me give it you, I don't want to,' was perfectly reasonable." [RP 1036, FOF 20];

(16) The district court found that Ronald's conduct in this litigation was in bad faith or frivolous in nature. [RP 1043, FOF 56]; ("What I find here is that Harold was not the real problem in the family. He was not doing anything but to try to protect and act in a fiduciary manner in the role that he was asked to") [Tr. 01/20/10, p. 12, ll. 18-21]; (the

district court's specific finding that Harold acted reasonably and that good grounds existed to find Rule 11 sanctions against Plaintiff) [RP 671, Ex. A];

(17) Even after the district court entered an oral ruling from the bench directing Plaintiff to pay Harold's attorneys' fees pursuant to the Rule 11 sanction, Plaintiff refused to agree on the proposed order prepared by Defendant. Instead, Plaintiff filed lengthy Objections to the Entries of Attorneys' Fees, attempting to rehash her failed argument. The afternoon before the presentment hearing, Plaintiff's counsel cancelled the hearing and agreed to Defendant's proposed orders. [RP 1042-43, FOF 52 and 53]; (Ms. Hahs-Brooks to Mr. Wolf "we do not agree with your form of order. The findings you proposed were not stated by the Court at hearing ... I'll re-review your order when we receive the transcript.") [RP 672, Ex. B]; See *infra* Argument E of Appellee's Answer Brief (regarding the detailed post-trial procedures and arguments made in the district court.)

(18) Plaintiff engaged in a bad faith dilatory purpose in an attempt to circumvent the district court's February 24, 2010 oral ruling from the bench. [RP 1043, FOF 53]; (Mr. Wolf to Ms. Hahs-Brooks stating that Defendant will seek additional attorneys' fees for having to respond to

unnecessary motions and additional work) [RP 704, Ex. B]; (Plaintiff's ignoring the district court's order by arguing that the district court lost its jurisdiction because of her filing an appeal) [RP 912-913] [RP 814, ¶ 3]; (Defendant incurred additional attorneys fees because Plaintiff failed to properly stay the district court's judgments) [RP 801-803]; (the district court's finding that Plaintiff did not properly stay the judgments) [Tr. 08/06/10, ll. 19-24]; (Defendant's incurring additional attorneys' fees because of Plaintiff's raising the same denied arguments repeatedly, and raising meritless arguments) [RP 793-796, 800-803, 821-828, 841-845]; (the district court's holding that the additional attorneys' fees are related to Defendant's effort to enforce the previous orders from the court) [RP 851, ¶ 4]; (the district court's finding that unless Plaintiff properly stays the judgments, Defendant is entitled to enforce the judgment from the orders, and Plaintiff did not properly stay the judgments and did not follow the previous order) [Tr. 08/06/10, p. 13, ll. 6-11];

Plaintiff does not dispute the above findings nor does she provide any evidence to support her position. The evidence supports the district court's findings, and the district court clearly did not abuse its discretion in finding Ronald in

violation of Rule 11. This Court should affirm the district court's decision that Plaintiff has engaged in sanctionable conduct.

2. Plaintiff is not a Prevailing Party.

In the Complaint, Plaintiff claimed Count I: Replevin, Count II: Declaratory Judgment, Count III: Temporary and Preliminary Injunction, Count IV: Fraud, Breach of Contract and Resulting Trust, and Count V: Prima Facie Torts against Defendant, including punitive and compensatory damages. [RP 1- 6]. Harold filed a Counterclaim for Interpleader on June 12, 2007 [RP 17], which was opposed. Harold prevailed on his Counterclaim for Interpleader on October 15, 2007. [RP 92-93]. Harold prevailed at trial when Judge Hall dismissed all claims except the Replevin claim, and the Court awarded zero damages for the replevin claim finding that Harold did not wrongfully retain the stock certificate. [RP 443]; [Tr. 10/14/09, p. 68, l. 17-p. 69, l. 2]. "The 'prevailing party' is the one that wins the suit." South v. Lucero, 92 N.M. 798, 804, 595 P.2d 768, 774 (Ct. App. 1979). According to Dunleavy v. Miller, 116 N.M. 353, 360, 862 P.2d 1078, 1219 (1979), the prevailing party is "... a defendant who avoids an adverse judgment." Defendant here avoided an adverse judgment. The fact the district court granted plaintiff's renewed partial summary judgment on one of the claims she alleged in her Complaint (replevin and declaratory judgment) does not alter the fact that Defendant was the prevailing party in light of the fact that Harold never claimed ownership of the certificate and

interpleaded it into the court, and the district court found that there was no wrongful detention of the stock certificate that was the subject of the replevin claim.

New Mexico recognizes that a party need not obtain absolutely all relief requested in order to be deemed the prevailing party. "Prevailing party is also defined as '[t]he party to a suit who ... successfully defends against it, prevailing on the main issue...." Hedicke v. Gunville, 2003-NMCA-032, ¶ 26, 133 N.M. 335, 343, 62 P.3d 1217, 1224. On October 2, 2007, the court granted Harold's Interpleader and accepted the possession of the stock certificate. [RP 1035, FOF 15]. On October 17, 2007, the district court denied Plaintiff's Motion for Partial Summary Judgment for Replevin and Dismissal of Interpleader filed on September 26, 2007 because Plaintiff could not prove that she, as opposed to her trust, was the owner of the stock certificate.

On February 8, 2008, Plaintiff filed a Renewed Motion for Partial Summary Judgment for Replevin and Dismissal of the Counterclaim. [RP 1035, FOF 16]. The district court granted the Renewed Motion, satisfied that Therese was the true owner of the stock certificate and "pleadings before Judge Barbara Vigil [the sequestered guardianship proceeding] address any concerns that might exist as to whether the stock certificate would be used for the benefit of Mrs. Bernier. I will require that counsel for the Plaintiff file or inform Judge Vigil of this determination," [Tr. 05/07/08, p. 11, l. 18-p.12, l. 8], and ordered that the "distribution of the stock

certificate from the Court registry shall be done in a manner consistent with the Guardian Ad Litem's responsibilities in the sequestered case." [RP 1035, FOF 16]; [Tr. 05/07/08, p. 13, ll. 4-9]. As to the Counterclaim for Interpleader, the district court specifically denied Plaintiff's request that the counterclaim be dismissed. ("I guess procedurally I disagree with dismissal of the counterclaim for Interpleader because I actually believe we are achieving the interpleader by the submission of the stock certificate into the Court.... So I don't think dismissal of that claim is appropriate") [Tr. 05/07/08, p.11, ll. 12-18]; [RP 364]. In summary, the court dismissed the entire complaint, Harold won his Counterclaim for Interpleader, Plaintiff was awarded zero damages in her replevin action, and the district court found that Harold did not wrongfully retain the stock certificate in the replevin action. Defendant successfully defended the claims in the Complaint and is the prevailing party in the case.

Moreover, the general determination of a Rule 11 sanction is whether the district court can find good grounds for imposing sanctions. There is no requirement that a party seeking a Rule 11 sanction must prevail on all issues. See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 396, 110 L. Ed. 2d 359, 376, 110 S. Ct. 2447, 2456 (1990) ("Like the imposition of costs, attorney's fees, and contempt sanctions, a Rule 11 sanction is not a judgment on the action's merits, but simply requires the determination of a collateral issue, which may be made after the principal suit's

termination."); Hedrick v. Comptroller of Currency, Washington, D.C., CIV No. 94-3713, 1995 U.S. App. Lexis 28365, *13 (7th Cir. Oct. 12, 1995) ("dismissal of the underlying case alone does not moot the question of Rule 11 sanctions"); Mercy v. Suffolk County, New York, 748 F.2d 52, 56 (2d Cir. 1984) ("The sanctions provided in the Federal Rules of Civil Procedure are designed to prevent any litigant, whether or not he ultimately prevails, from being put to discovery expense that is unjustified."); Penthouse International, Ltd. v. Playboy Enter., Inc, 663 F.2d 371, 392 (2d Cir. 1981) (case remanded to district court for determination of Rule 37 sanctions despite dismissal of the complaint); Merritt v. International Bro. of Boilermakers, 649 F.2d 1013, 1018 (5th Cir. 1981) (interpreting Roadway Express v. Piper, 447 U.S. 752, 763 (1980) as implicit recognition of the district court's authority to assess attorney's fees and discovery expenses under Rule 37 post-judgment). Plaintiff's claim that she won 90% of the litigation is not supported by the record.

3. NMRA Rule 1-011 intentionally deleted the safe harbor provision, does not have a time limit and allows awarding attorneys' fees as sanctions.

Plaintiff argues that Rule 1-011 requires a "safe-harbor" period for advance notice. [BIC, p. 27.] However, unlike FRCP Rule 11, Rule 1-011 prescribes no time period in which to file a motion for sanctions. NMRA Rule 1-011; Benavidez, 2006-NMCA-138, ¶ 6 (sanctioning plaintiff pursuant to Rule 1-011 after dismissing

the case with prejudice, and there was no prior notice to dismiss the case); see also Wagner v. AGW Consultants, 2005-NMSC-16, ¶ 81, 137 N.M. 734, 746, 114 P.3d 1050, 1061 (noting that "New Mexico uses a different standard to determine whether an individual is a "worker" within the meaning of "the Workers' Compensation Act."); see *e.g.* Gonzales v. State Pub. Emples. Ret. Ass'n, 2009-NMCA-109, ¶ 13, 147 N.M. 201, 204, 218 P.3d 1249, 1252 ("if the meaning of a statute is truly clear – not vague, uncertain, ambiguous, or otherwise doubtful – it is of course the responsibility of the judiciary to apply the statute as written and not to second-guess the [L]egislature's selection from among competing policies.") (internal quotation marks and citation omitted); Muthig v. Brant Point Nantucket, Inc., 838 F.2d 600, 604 (1st Cir. 1988) (holding that a motion filed two months after a voluntary dismissal was made "within reasonable time"). The district court has already found that Ronald did not have good grounds to file the Complaint and engage in his subsequent bad faith litigation conduct. [RP 1032-1044 FOF].

Through numerous phone calls and/or emails, Defendant's counsel requested that Plaintiff withdraw her Complaint. ([Defendant's counsel, Ms. M. Karen Kilgore] "I asked Ms. Hahs-Brooks to dismiss us from the case") [Tr. 05/10/08, p. 10, ll. 20-21]. Plaintiff alleges that Defendant did not file any motions to alert the district court to the frivolous nature of Plaintiff's motion practice. Harold's counsel did not file such motions because of Harold's limited financial resources.

("Defendant did not initiate any actions against Plaintiff [, but] only defended himself in this litigation.") [RP 1043, FOF 59].

Plaintiff knew of the frivolous nature of her Complaint and that Plaintiff's counsel attempted to defend the case in the least expensive form. She cannot truthfully state now "we did not know the frivolous nature of the Complaint because you did not tell me otherwise." Further, as clearly expressed by New Mexico courts, Rule 1-011 specifically allows the award of attorneys' fees as sanctions. Benavidez, Landess v. Gardner Turf Grass, Inc., 2008-NMCA-159, 145 N.M. 372, 198 P.3d 871, supra.

D. THE DISTRICT COURT APPLIED THE CORRECT LEGAL STANDARD AND SUBSTANTIAL EVIDENCE SUPPORTS THE DISTRICT COURT'S FINDINGS

1. Plaintiff failed to explain why evidence related to the findings of Ronald's sanctionable conduct is not sufficient.

Plaintiff has failed to explain why the evidence related to the district court's FOFs regarding Ronald's conduct is not sufficient. Plaintiff attempts to support her challenge with rationale that is not relevant or specific to the findings, such as stating that the district court has never found Therese's conduct sanctionable. [BIC, p. 27] ("Defendant never articulated any particularized basis" except Ronald). Plaintiff did not claim in her BIC that she had any good basis to file the Complaint and proceed the litigation in the manner stated in the district court's FOFs. Rather, Plaintiff argues that there is no evidence to support the district court's findings that Therese

rather than Ronald engaged in bad faith litigation. [BIC, p. 25.] Plaintiff does not argue that Ronald had good grounds to file the Complaint and to proceed with the litigation in this case. See Aspen Landscaping, Inc., v. Longford Homes of N.M., Inc., 2004-NMCA-63, ¶¶ 28-29, 135 N.M. 607, 614, 92 P.3d 53, 60 (explaining that a party challenging a finding for lack of substantial evidence must refer to "all of the evidence, both favorable and unfavorable, followed by an explanation of why the unfavorable evidence does not amount to substantial evidence, such as is necessary to inform both the appellee and the Court of the true nature of the appellant's arguments"); Clayton v. Trotter, 110 N.M. 369, 373, 796 P.2d 262, 266 (Ct. App. 1990) (explaining that an appellate court need not consider unclear arguments).

However, the district court did made specific findings of bad faith litigation practice against Ronald and the evidence supports such findings. Plaintiff has also waived her argument that Ronald's status in the litigation is "non-party." The Court should affirm the district court's findings.

2. Plaintiff does not argue that the district court incorrectly applied the law to the facts when formulating its conclusions of law when awarding attorneys' fees.

It is not clear if Plaintiff is challenging all of the district court's conclusions of law or just the district court's award of Defendant's cost bill, [BIC, p. 36], but in her BIC Plaintiff cites case law relied on by the district court, [BIC, pp. 23, 33]. Additionally, Plaintiff does not argue that the district court incorrectly applied the

law to the facts when formulating its conclusions of law when awarding attorneys' fees. See Golden Cone Concepts, Inc. v. Villa Linda Mall, Ltd., 113 N.M. 9, 12, 820 P.2d 1323, 1326 (1991) (stating that the Court must review challenges to legal conclusions by determining whether the law was correctly applied to the facts). [RP 1044, COL 1 and 2, 1045-1046]. In fact, Plaintiff did not come up with any supporting evidence to argue against the district court's FOFs. This Court must uphold the district court's findings of fact and conclusions of law when awarding attorneys' fees.

E. THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN DETERMINING THE AMOUNT OF FEES AWARDED AS SANCTIONS.

Plaintiff argues that since she was a prevailing party, which is incorrect, she should not pay the entire amount of Defendant's attorneys' fees in this litigation or pay Defendant's attorneys' fees which are not related to this case. Plaintiff also argues that she was not given due process and was not allowed to argue in response to Defendant's Rule 11 motions. [BIC, pp. 25, 31 and 34]; [RP 567-568]. As fully stated above, Plaintiff is not a prevailing party and award of Rule 11 sanctions do not require prevailing on all issues before the district court.

As to the amount of the attorneys' fees, Plaintiff has distorted procedural aspects of the proceeding at the district court level and continues to argue some of the issues which have already been denied by this Court in its remand. First, the

district court fully reviewed and considered Plaintiff's responses and arguments regarding the amount of attorneys' fees awarded, and Plaintiff has had sufficient opportunity to oppose Defendant's requested fee amounts through pleadings and hearings. In the Notice of Proposed Summary Disposition filed on January 27, 2011, this Court denied Plaintiff's argument regarding the district court's consideration of the affidavits filed and explained, in great detail, the manner in which Plaintiff filed lengthy objections to each and every Defendant's motions related to the award of attorneys' fees. [RP 911-912]. Judge Sutin held, "There is no indication in the record or in the amended docketing statement that Plaintiff has demonstrated to this Court as to why or how her ability to defend against Defendant's request for attorneys fees were impaired by the timing of the request." [RP 912].

Defendant filed his Amended Motion for Award of Attorney's Fees on December 31, 2009, explaining why sanctions were being sought and showing that all attorneys' fees incurred in defending the action were appropriate. [RP 479-484]. Plaintiff filed a thirty page Response to Defendant's Amended Motion on January 20, 2010 [RP 501-534] making virtually the same arguments that she has made in her BIC. Defendant filed his reply in support of his Amended Motion on February 5, 2010 [RP 563-570] and attached an affidavit of attorneys' fees ("Original Affidavit") incurred from May 21, 2007 to January 29, 2010 which

totaled $39,406.50, plus NM Gross Receipts Tax of $3,136.09, for a total of: $42,542.59. [RP 593].

Plaintiff, without permission from the Court or concurrence from Defendant, filed her Objection to Defendant's Reply brief on February 19, 2010, arguing that the affidavits attached to Defendant's reply violated Plaintiff's due process rights [RP 598-602]. Defendant then filed his Supplemental Affidavit of Attorneys' Fees ("Supplemental Affidavit") on March 17, 2010 for the time spent on this litigation from February 1 to March 15, 2010 which totaled $4,155.00. [RP 616-621]. Plaintiff filed a Motion to Strike Defendant's Supplemental Affidavit of Attorneys' Fees on March 31, 2010 [RP 649-654] arguing that the supplemental affidavit was procedurally "infirm" and untimely. [RP 652-653]. Defendant also filed his Response to Motion to Strike on April 19, 2010 indicating that he would file a Motion to Modify the two judgments. [RP 694-695, ¶ 2].

At the February 24, 2010 hearing, Plaintiff's counsel made specific objections to the amount of attorneys' fees, the number of attorneys working on this case, and the paralegal's time spent on this case. [RP 665, ¶ 12]. The district court considered all evidence and found:

> Being familiar with the parties in the case before Judge Hall and now before me, it is clear in my mind that good grounds exist to find Rule 11 sanctions against the Plaintiff in this case. In examining the history of this case, the relationship of the parties and the actions taken, I find that it is appropriate to award Harold Bernier his entire attorneys' fees incurred in this case. Harold Bernier acted reasonably and I believe the

> attorneys' fees are more than reasonable. For three years of litigation the total amount of $43,000 plus change is extremely reasonable in this day and age to defend this type of litigation. So I will grant the Defendant's Motion for award of attorneys' fees under Rule 11 as a sanction against the Plaintiff for this litigation and the strategy taken in pursuing it and ask that that fee be paid within 30 days from entry, from my announcement of this decision. I will ask the Defendant to prepare an order, submit it to Ms. Hahs Brooks for her approval and send it to the Court for entry.

[RP 671]

The attorneys' fees would not have increased if Plaintiff had simply appealed the district court's decision to this Court after properly requesting a stay of the order pending appeal. After the Court entered its oral ruling from the bench on February 24, 2010, Defendant's counsel sent two proposed orders on the award of attorneys' fees and costs to Plaintiff for review and approval. Instead, Plaintiff's counsel, Ms. Hahs-Brooks, stated that she did not agree with the proposed form of the orders because they did not reflect the district court's oral ruling from the bench and she promised that she would "re-review [the orders] after [she] received the transcript.") [RP 672, Ex. B.]

After having heard nothing from Ms. Hahs-Brooks for almost nine days, on March 5, 2010, Defendant requested a presentment hearing on the proposed orders regarding attorneys' fees and costs. [RP 607]. In response, Plaintiff filed a lengthy Objection to Entry of Judgment on Attorneys Fees on March 30, 2010. In the brief, Plaintiff made the same arguments which had already been considered and rejected

by the district court. Her brief did not really address the form of the proposed orders as Plaintiff alleged it did. [RP 630-648].

Defendant filed his Response on April 13, 2010 [RP 655-673] arguing that Plaintiff deliberately acted in bad faith regarding the proposed forms of order in an attempt to delay her obligation to pay the attorneys' and costs ordered by the district court. Defendant specifically stated:

> We [Defendant] sent the proposed form of order on fees weeks ago. You [Ms. Hahs-Brooks] refused to approve it, and filed an unnecessary Objection, to which we had to respond ... you filed a motion to strike. Now, the afternoon before the morning hearing, you approve the proposed orders we submitted weeks ago. Please understand that we fully intend to seek from Judge Barbara Vigil the additional fees incurred by our client in March and April, 2010 due to the additional work we had to do. I am letting you know this now in case you feel the need to appear tomorrow to argue your motion to strike.

[RP 704, Ex. B.] (email from Mr. Wolf to Ms. Hahs-brooks on April 15, 2010).

On April 16, 2010, Defendant filed his Second Supplemental Affidavit of Attorneys' Fees ("Second Supplemental Affidavit") which totaled $3,117.60 from March 15 to April 15, 2010. This included the time spent responding to Plaintiff's objection, motion to strike and the presentment hearing. [RP 674-678].

Plaintiff filed her Notice of Appeal on April 16, 2010 [RP 682] regarding the two attorneys' fees and costs orders from the district court. However, she did not properly stay the two orders. On May 10, 2010, Mr. Wolf sent an email to Ms. Hahs-Brooks stating that Plaintiff had violated the district court's order and

Defendant would have no choice but to file a Motion to Enforce. [RP 764]. Having no response from Plaintiff, Defendant filed the Motion to Enforce which specifically argued that Plaintiff had failed to follow Rule 1-062(D) by not requesting a stay upon appeal nor had she given a supersedeas bond. [RP 762, ¶ 3].

Defendant filed the Motion to Modify Judgment and Order on his Amended Motion for Award of Attorneys' Fees on April 20, 2010. [RP 697-712]. In this Motion, Defendant explained in detail Plaintiff's bad faith litigation practices and asked the Court to modify the current judgment of Rule 11 attorneys' fees ($42,542.59) to include the time spent responding to Plaintiff's unnecessary motions and/or bad faith litigation tactics. Defendant attached the previous two affidavits (Supplemental and Second Supplemental Affidavits) and a Third Supplemental Affidavit of Attorneys' Fees totaling $1,245.42 from April 15 to April 19, 2010. These fees were incurred because Defendant had to attend the vacated presentment hearing, to file the Motion to Modify Judgment, and to respond to Plaintiff's Motion to Strike. This Court held "we see no reason why the affidavits were untimely or why the motion to modify was infirm ... Also, the motion seems to contain appropriate supporting factual and legal authority." [RP 914.]

Plaintiff filed a Special/Limited Response to Defendant's Motion to Modify stating that the district court lost its jurisdiction to entertain Defendant's Motion when she filed her appeal. [RP 726-728.] Defendant filed his reply in support of the

Motion to Modify on June 9, 2010, reiterating Plaintiff's bad faith litigation tactics. [RP 793-796]. This Court decided that Plaintiff's jurisdictional argument was wrong and contrary to established legal precedent. [RP 814, ¶ 3 and RP 912-13].

Plaintiff then belatedly filed a Motion to Stay Judgments on May 27, 2010, alleging that the "interesting-bearing account" and "$50,000" is sufficient to protect Defendant's interest pending the appeal. [RP 801, ¶¶ 2, 3]. Defendant responded that Plaintiff did not properly follow Rule 1-062(D) and the alleged amount could not protect Defendant's interest. [RP 801-803.] Again, Plaintiff filed a lengthy Reply to Defendant's response incorrectly stating "Defendant is spending needless attorneys fees ... [the district court] has no jurisdiction (admittedly due to Defendant's inadvertence"). [RP 811, ¶ 14]. Plaintiff's apparent position was that since she filed a Notice of Appeal, she could ignore the district court's order. Subsequently, Defendant filed his Fourth Supplemental Affidavit of Attorneys' Fees totaling $5,507.83 for work from April 19, 2010 to July 31, 2010 [RP 816] which was incurred by filing the Motion to Modify and the Motion to Enforce. [RP 851].

At the August 6, 2010 hearing, the district court reviewed and heard argument from both parties. The Court specifically noted that Plaintiff had not paid the attorneys fees and costs, had not paid the appropriate bond and, in fact, it was Defendant's counsel, Mr. Wolf, who suffered financially because Mr. Wolf was the one who funded the lawsuit in this case and who actually honored Harold's last

desire to hold onto the stock certificate, and William, Harold's son, did not have the money to pay Defendant's counsel. [Tr. 08/06/10, p. 5, ll. 21-25; p. 6, ll. 17-25].

The district court stated, "I would assume that by now [Plaintiff's counsel] would know that approving an order doesn't mean you forego your arguments on the merits of the appeal ... The amount of attorneys' fees, up and through that hearing, have been approved by the Court." [Tr. 08/06/11, p. 10, ll. 19-24]. The Court found that Plaintiff had not properly stayed the two judgments. ("[Plaintiff has] the right to appeal, but you don't have the right not to pay the judgment unless you place a supersedeas bond.") [Tr. 08/06/11, p. 13, ll. 1-2].

The district court granted Plaintiff's Motion to Modify and gave Plaintiff an opportunity to file her objections to the additional affidavit (Fourth Supplement Affidavit) filed by Defendant stating that it would enter the appropriate attorneys' fees after reviewing the objections. The district court doubled the attorneys' fees to $116,292.70 deeming it an appropriate supersedeas bond amount in anticipation of the amount of attorneys' fees Defendant would incur during the Court of Appeals proceeding. [RP 847]; [Tr. 08/06/10, p. 24, l. 21-p. 25, l. 1].

On August 16, 2010, Plaintiff filed her objections to the original and the first through fourth Supplemental Affidavits of Attorneys' Fees asserting the same arguments which she had presented before and which had been denied before by the district court. [RP 821-828]. On August 17, 2010, Defendant filed his response to

Plaintiff's objections and noted that her argument only rehashed her previously denied arguments. Defendant fully responded to each of Plaintiff's arguments even though most of them were caused by Plaintiff's poor reading of the affidavits. [RP 841-842, ¶ 8(a), (b) and (d); RP 842, ¶ 10(a) and (c); RP 843, ¶ 10(e)], vexatious litigation tactics [RP 841, ¶ 8, RP 843, ¶ 10(d)], paralegal time [RP 842, ¶ 8(e) and RP 843, ¶ 11(a)], and the time spent in response to Plaintiff's argument that the district court's lacked jurisdiction and the Court's remand authorizing the district court to entertain Defendant's motion to modify, and Plaintiff's motion to stay. [RP 844, ¶ 11(c)(1), (2) and (3), RP 845, ¶ 11(d)].

Plaintiff has once again attempted to misguide this Court by stating that the district court awarded attorneys' fees which were not related to this case, [BIC, p. 25]. Plaintiff, however, never argued this in district court. Additionally, Plaintiff's arguments listed below(left column of the chart below) are without merit:

RP 573, slips 10/20, 10/31/07	No entries were made on 10/20 and 10/31 in [RP 573].
RP 576, slips 2/19/08 RP 577, slips 3/3 and 3/7/08	Statutes governing the sequestered guardianship proceeding was in defending Plaintiff's motion for summary judgment. [RP 267-270]; [RP 364].
RP 577, slips 3/10/08 RP 578, slips 4/17/08, 5/6/2008, RP 580, slip 6/9/08, RP 581, slip 1/27/09	Telephone calls to Beverly were made due to her personal knowledge of the agreement with Harold and pending guardianship proceeding initiated by her. [RP 267-270]; [RP 364].
RP 579, slips 5/15, 5/21/08	Telephone calls to GAL and the counsel for Beverly were made due to the district court's oral ruling from

	the bench that the GAL and Judge Vigil must be informed of this decision and consistent with Judge Vigil's proceeding. [RP 363-365].

After reviewing Plaintiff's objections and Defendant's responses, on August 23, 2010 the district court entered the Order on Defendant's Motion to Modify [RP 850], and awarded Defendant $14,025.85 in addition to Defendant's original award which totaled $56,575.44 in fees. [RP 852]. The district court made it clear that the additional amount of $14,025.85 was awarded due to Defendant's efforts "to enforce the previous Order of the Court." [RP 851, ¶ 4.]

This order solidified the district court's findings that Defendant incurred substantial attorneys' fees because of Plaintiff's bad faith litigation tactics including violating Rule 11 by filing her initial complaint and her subsequent conduct. [RP 1042-1043, FOF 52 and 53]. The district court specifically found that the total award of $56,575.44 was an extremely reasonable sum to defend this type of litigation, that the hourly fees charged by Mr. Wolf ($200), Mr. Y. Jun Roh ($125-$175) and the paralegal ($80) were more than reasonable considering the local rates, and Mr. Wolf substantially cut his and Mr. Roh's time and assigned most of the work to Mr. Roh while he supervised the case without fully charging Defendant for his time. [RP 1043, FOF 57-59]. Further, the district court found that the amount of attorneys' fees awarded pursuant to Rule 11 "might deter future Rule 1-011 violations" by Plaintiff. [RP 1044, FOF 61]; see also Benavidez, 2006-

NMCA-138, ¶ 24 (holding that the district court's findings "are supported by substantial evidence based on the attorneys' itemized statement of fees").

F. THE DISTRICT COURT'S AWARD OF COSTS PURSUANT TO RULE 1-054(D) IS APPROPRIATE.

The district court properly awarded Defendant's amended cost bill which totaled $3,141.82. The amended cost bill specifically set out recoverable costs associated with the successful litigation. [RP 716-717]. Defendant was the prevailing party at trial as he successfully defended case against Plaintiff, won his counterclaim for Interpleader and Plaintiff received zero damages in the replevin claim. See Lucero, *supra*. There is a strong presumption that a prevailing party is entitled to costs which the losing party must overcome by a showing of misconduct, bad faith, or abusive tactics. See Martinez v. Martinez, 1997-NMCA-96, ¶ 20, 123 N.M. 816, 945 P.2d 1034. Rule 1-054(D) specifically states that costs "shall be allowed to the prevailing party" and provides recoverable costs in Rule 1-054(D)(2). Defendant only requested costs recoverable under subsection (D)(2).

First, as to witness costs, Plaintiff argues that these costs are not recoverable because Defendant did not show that *per diem* payments were made to his witnesses, William Bernier is a party to the litigation, and there was no showing that subpoenas were issued. Defendant included the witnesses in the Pre-Trial Order filed on September 29, 2009 (at p. 8) for that reason. [RP 487, ¶ 5]. Beverly Kedzior, Beverly Bernier (Harold's widow, aunt of Ronald and Beverly, hereinafter "Beverly

B.") and William testified regarding the circumstances surrounding Ronald's admission of the frivolous nature of the litigation. [RP 487-488, ¶ 5].

Plaintiff did not cite any legal authority to support her allegations regarding the subpoenas and, to Defendant's knowledge, there were no such legal authorities. A critical fact in this case was when Defendant's counsel, Mr. Aaron Wolf, asked Plaintiff's counsel on August 5, 2009 and again on August 6, 2009 if she would agree to Beverly B. appearing by telephone at the trial due to her age and the long distance to travel to the trial. Plaintiff's counsel opposed this request. [RP 495-496, Ex. A]; [RP 488, ¶ 6].

Beverly B. was forced to travel to the Court in Santa Fe from her home in Florida because of Plaintiff's opposition to her appearing by telephone. [RP 488, ¶ 6]. This was vexatious and an example of the bad faith litigation tactics employed by Plaintiff throughout the district court proceeding. On January 20, 2010, the district court heard argument by Mr. Wolf regarding Plaintiff's opposition and decided to award the travel expenses of the three witnesses. ("[Beverly Bernier] could not appear by telephone because [Plaintiff] wouldn't agree. So [William] drove out here cross country for several days and that incurred costs.") [Tr. 01/20/10, p. 9, ll. 15-23].

Plaintiff has cited NMSA § 38-6-4 regarding mileage and *per diem* for witnesses. Contrary to Plaintiff's argument, Section 38-6-4 is not applicable to

travel fare for witnesses. Rule 54(D)(2)(f) specifically allows witness "mileage or travel fare and *per diem* expenses... and as limited by Section 38-6-4(A) ...." Since Section 38-6-4 only governs *per diem* and mileage for witnesses, the section does not apply to Defendant's travel costs which are separately addressed in Rule 54(D)(2)(f). Further, nowhere in Rule 54 does it state that a party witness should not be allowed to recover travel costs. Rather, the federal district court in the Tenth Circuit stated that "[u]nderlying this rule appears to be the concept that it is the plaintiff who brings the lawsuit and who exercises the first choice as to the forum. The defendant, on the other hand, is not before the court by choice." ICE Corp. v. Hamilton Sundstrand Corp., Case No. 05-4135-JAR, 2007 U.S. Dist. LEXIS 90678 *18 (D. Kan. Dec. 6, 2007) (citing Farquhar v. Shelden, 116 F.R.D. 70, 72 (E.D. Mich. 1987)); see *e.g.* Lopez v. Am. Airlines, Inc., 1996-NMCA-88, ¶ 12, 122 N.M. 302, 305, 923 P.2d 1187, 1190, (holding that travel expenses for attorneys should ordinarily not be taxed as costs; the opposing party should be taxed for travel expenses only when the expenses are caused by vexatious or bad faith conduct by the opposing party or its attorney.) Defendant and his witnesses were forced to appear and testify before the Court in New Mexico even though they did not reside in New Mexico, and it was Plaintiff's choice to bring the lawsuit against Defendant in New Mexico. Therefore, William, as a substitute for his late father Harold, is entitled to recover his travel costs to New Mexico, including travel costs for his

witnesses. Furthermore, the travel costs for the witnesses are reasonable since they are out of pocket expenses.

Beverly B. incurred $844.30 for her airplane ticket, rental car and hotel room. [RP 489, ¶ 7]. Due to Beverly B.'s medical condition, William and Beverly B. had to drive from Florida to New Mexico [RP 497, Ex. B] and the amount they incurred, $2,229.42, is reasonable as shown in the attachment to Defendant's Amended Bill of Costs and Bill of Costs.

Plaintiff continuously raises the issue of Defendant's counsel's typographical errors by including the air fare of Beverly B. during the district court's proceeding and this Court, but such errors can be easily discerned by reviewing the exhibits attached to Defendant's Bill of Costs. [RP 489-90, ¶ 9]. This inclusion was a mistake, and Defendant's counsel filed an amended bill of costs and the district court heard Defendant's counsel's argument that he made a typographical error. ("... there was a typographical error that we did claim on paper [as to Beverly Bernier] ... we corrected it by sending a second amended bill of costs....") [Tr. 01/20/10, p. 18, l. 24-p. 19, l. 13].

The mistake has been corrected and the district court considered this argument from both sides and determined that it was excusable neglect. See Resolution Trust Corp. v. Ferri, 120 N.M. 320, 325, 901 P.2d 738, 743 (1995).

Again, it was Plaintiff who refused to allow Beverly B. to appear by telephone at the trial. Plaintiff knew that Beverly B. is elderly and has special needs when traveling.

Further, the $68.10 included as miscellaneous costs (such as parking fees), which are not office expense fees as misstated by Plaintiff in her BIC, are recoverable pursuant to Rule 54 as William and Beverly B. had to travel by car to appear at the trial. [RP 490, ¶ 10]. Copies of the receipts are attached to Defendant's Bill of Costs filed on November 30, 2009. [RP 450].

Finally, Plaintiff's argument that it "would be inequitable to require Plaintiff to pay the overreaching costs claimed by Defendant and his witness" is misleading. According to Plaintiff, she "lost more than $275,000" in value of her stock and was difficult to "support herself and defend herself." [BIC, p. 39]. This record and the admitted evidence clearly shows that Plaintiff incurred zero damages by entrusting the stock certificate to Defendant and, further, Ronald admitted that Therese would not diversify the stock certificate. *Supra* Argument C.1.7).

Moreover, Plaintiff cites Marshall v. Providence Washington Insurance Co., 124 N.M. 381, 951 P.2d 76 (Ct. App. 1997), but the basis for awarding costs in this case was related to discovery abuse pursuant to Rule 37, not Rule 54. Plaintiff's citation of Gallegos v. Southwest Community Health Servs., 117 N.M. 481, 872 P.2d 899 is also not applicable. In Gallegos, the Court reiterated the presumption in

favor of awarding costs to the winning party, and non-prevailing party's showing "bad faith" or "misconduct" of the winning party to overcome the presumption, but the Court stated that it might consider the "indigency of the losing plaintiff, coupled with good faith of the indigent and the non-frivolous nature of the case." Id. at 489, 907. None of these factors are applicable to Plaintiff's equity argument. Defendant prevailed on all damage counts which are the key issues of the case, and Defendant did not request more damages than it ultimately received. Finally, the costs are apportionable as clearly shown in Defendant's Bill of Costs contrary to Cafeteria Operators v. Coronado, 1998-NMCA-5, 124 N.M. 440, 952 P.2d 354.

G. ATTORNEYS' FEES SHOULD BE AWARDED FOR THE APPEAL.

Defendant is not only entitled to recovery of reasonable attorneys' fees for the work done in successfully defending his case at the district court level, but also for the fees incurred for work done on appeal pursuant to NMRA 12-403(B)(3) (allowable costs to be recovered by a prevailing party on appeal include "reasonable attorneys fees for services rendered on appeal in cases where the award of attorney fees is permitted by law"). See Hash v. Basin Motor Co., 110 N.M. 314, 321, 795 P.2d 1006, 1014 (1990); Chavez v. Bd. of County Comm'rs, 2001-NMCA-065, ¶ 47, 130 N.M. 753, 31 P.3d 1027. Plaintiff simply does not want to pay the attorneys fees ordered by the district court and has raised irrelevant or new arguments which have not been raised in the district court or the two previous appeals. See *supra* Argument

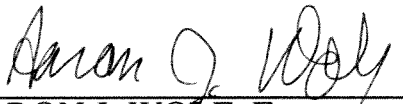
A & B; see also Landess, 2008-NMCA-159, ¶ 21. The district court has already doubled the attorneys' fees to $116,292.70 and this bond amount was deposited in a bank account approved by the Court. This Court must order Plaintiff pay Defendant's attorneys' fees associated with defending Plaintiff's appeals.

III. CONCLUSION

Wherefore, for all of the foregoing reasons, Defendant/Appellee William Bernier, substitute party for Harold Bernier, deceased, respectfully requests that this Court issue an Order Dismissing Plaintiff/Appellant's Appeal, and awarding reasonable attorneys' fees and costs to Defendant/Appellee pursuant to NMRA Rule 12-213(D).

Respectfully submitted,

CUDDY & McCARTHY, LLP

By: 

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing *Appellee's Answer Brief* was mailed to following opposing counsel on the 17th day of May 2012.

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