IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO
No. 31,607

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

Plaintiffs,

v.

HAROLD BERNIER, deceased, by WILLIAM DOUGLAS BERNIER, substituted representative,

Defendant.,

BRIEF IN CHIEF

Civil Appeal from the First Judicial District Court
County of Santa Fe No. D-0101-CV-02007-01046
The Honorable Barbara Vigil

ILYSE D. HAHS, ATTORNEY AT LAW, LLC
Ilyse Hahs-Brooks, Esq.
2014 Central Avenue SW
Albuquerque, NM 87104
505-224-9661

G. HOLDT GARVER CHARTERED
G. Holdt Garver, Esq.
2701 San Pedro NE, Ste. 1
Albuquerque, NM 87110
505-888-5100

L. Helen Bennett
Attorney at Law
P.O. Box 4305
Albuquerque, NM 87196-4305
(505) 321-1461

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STATEMENT OF RULE 12-313 PAGE/WORD COUNT COMPLIANCE:

This Brief is longer than the 35 pages permitted. Counsel used NeoOffice Writer 2012 by Sun Microsystems for Mac OS X, with a proportionally spaced Times New Roman typeface. The body of the document consists of 10,309 words total.

STATEMENT OF CITATION TO THE TRANSCRIPT

The written transcripts are cited by date, page, and line reference.

Nature of the Case:

This case was filed as an action in replevin and for damages for unjust retention of a stock certificate belonging to Mrs. Therese Bernier (Mrs. Bernier).

Summary of Proceedings and Relevant Facts:

Mrs. Bernier was 91 years old when this case was filed. She was at all relevant times the owner of 25,696 shares of stock in Walgreen Company, evidenced by a stock certificate. [RP 7] Mrs. Bernier alleged that Defendant-Appellee Harold Bernier (Defendant) unjustly withheld the certificate to prevent Mrs. Bernier from liquidating the stock.[1] [RP 2] Mrs. Bernier first demanded return of her stock on or about October 31, 2006, and made a second demand on January 26, 2007. [RP 986] Because Defendant refused to return the stock certificate, this action was filed in replevin, and Mrs. Bernier sought damages for the unjust retention. [RP 1]

Defendant answered the Complaint for Replevin and filed a Counterclaim in Interpleader. [RP 17 - 22] When Defendant filed his responsive pleadings, Mrs. Bernier, through her counsel, informed Defendant that the case would be dismissed with prejudice if he simply returned the stock certificate to Mrs. Bernier. [RP 468, 987] Defendant refused to return the stock and his interpleader was granted by then-Judge James Hall. [RP 92] Defendant deposited the certificate in the Court

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1 Harold Bernier died while this case was pending. Mrs. Bernier requested a substituted party under Rule 1-025 NMRA. William Bernier, Defendant's son, entered as the substituted party.

Registry on October 15, 2007. [RP 115].

On October 4, 2007, Mrs. Bernier filed a Motion for Partial Summary Judgment on her replevin and declaratory relief counts. [RP 33] Judge Hall requested more information about the titling of the stock in the name of Mrs. Bernier's trust, as the trust had been revoked by subsequent instrument. [RP 176]

Mrs. Bernier obtained a copy of the investment file from UBS Financial, which showed that the stock should have been transferred into Mrs. Bernier's individual name. The UBS file was sent to counsel for Defendant and a copy of a Renewed Motion for Summary Judgment with another request to return the stock to Mrs. Bernier. [RP 988] At this point, Mrs. Bernier again offered to resolve the Counterclaim for Interpleader if Defendant would return her stock certificate. [RP 988] Defendant refused to return the certificate, so Mrs. Bernier filed her Renewed Motion for Summary Judgment. [RP 178].

The Renewed Motion for Summary Judgment

On February 7, 2008, Mrs. Bernier filed a Renewed Motion for Partial Summary Judgment on her counts for Replevin and Declaratory Relief, attached relevant portions of the UBS file, and asked the Court to return her stock from the Court Registry. [RP 178] Judge Hall granted this relief at the May 7, 2008 hearing on the motion. [RP 363; Tr. May 7, 2008]. The Order granting partial summary judgment to Mrs. Bernier was entered on June 23, 2008, and her stock was returned to her. [RP 364]

The Sequestered Case Against Mrs. Bernier

While the matter *sub judice* was pending, Mrs. Bernier's daughter, Beverly Kedzior, brought a sequestered case before Judge Barbara Vigil, seeking a guardian and conservator for Mrs. Bernier. [RP 254[2]] Kedzior failed to prove her allegations against her mother after three years of litigation, and the sequestered case was dismissed. Judge Hall's order referenced the sequestered case [RP 363, 364], and ordered that the Guardian ad Litem and Judge Vigil be apprised of the disposition, if any, of the stock. The GAL and Judge Vigil were thus aware of the stock's disposition when the sequestered case was dismissed. [RP 364]

Mrs. Bernier's Motion to Amend

Based on evidence discovered in the sequestered case, Mrs. Bernier moved on January 23, 2009 to amend and supplement her original Complaint for Replevin, to add claims against Kedzior. [RP 370]. Mrs. Bernier learned during litigation of the sequestered matter that Kedzior was paying Defendant's attorney fees, despite Defendant's sworn interrogatory answer that Kedzior was not paying his fees. [RP 372 at para.7; RP 322, 323; RP 325; RP 989-90; Trial Tr. 10-14-09, 44:6-9]

At the hearing on Mrs. Bernier's motion to amend, Judge Hall stated that both sides presented "compelling" arguments for granting and against the Motion

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2 This is evidenced by a Motion to Consolidate that was filed in this case under the caption and case number of the sequestered case [RP 254]. That motion was filed, briefed and decided in the sequestered case and Judge Barbara Vigil (who presided over the sequestered case) denied the motion to consolidate.

to Amend. [Tr. 3-28-09 at 16:1-3] However, because return of Mrs. Bernier's stock certificate disposed of "90%" of the issues presented by the case, Judge Hall denied the motion on April 14, 2008. [Tr. 3-28-09 at 12:22-24; 13:16-25, 14:1-2]

Mrs. Bernier's Claim for Damages

Mrs. Bernier's Walgreen Company stock lost substantial value during the time the stock certificate was withheld. Historic stock values from the Walgreen Company investor website were admitted as evidence [Tr. 10-14-09], and showed that, as of February 7, 2007 (the stipulated date of Mrs. Bernier's demand for return of stock) the stock value was $45.53 per share. [RP 999; Tr. Exh. 4A]. When Judge Hall ordered the stock returned on June 23, 2008, the stock had declined in value to $34.70 per share. [RP 1001 Tr. Exh. 4B]. Mrs. Bernier lost approximately $275,718.00 in value during litigation because she was unable to sell the stock.

On October 14, 2009, Judge Hall held a one-half day trial on Mrs. Bernier's damages claims. [*See generally* Tr. 10-14-09] Judge Hall held that, although damages to Mrs. Bernier resulted from the retention of her stock [Tr. 10-14-09, 68:24], Defendant's retention of the stock was not unjust, so no damages were awarded. [Tr. 10-14-09, 68:25 – 60:1-2]

Judge Hall's Judgment against Mrs. Bernier on her damages claim was entered November 13, 2009. [RP 443] Before Judge Hall announced his decision, he instructed counsel to confer about an appeal; if an appeal was planned, proposed

findings of fact and conclusions of law were needed. [Tr. 10-14-09 at 63:23-25 – 1-8]. The parties conferred and agreed that no appeal would be filed regarding Judge Hall's decision on damages. Thus no findings of fact or conclusions of law were requested; the Judgment was entered. [RP 443]. Defendant never informed Plaintiff that he intended to seek attorney fees post-trial under Rule 1-011 NMRA or any other theory. Had Defendant indicated that he would seek sanctions under Rule 1-011, Mrs. Bernier would have asked that Judge Hall, who presided over the trial, hear the motion prior to his retirement.

Prior to and during the damages trial, Defendant never raised the issue of his alleged entitlement to attorney's fees under any theory. Defendant never filed any dispositive motion challenging the legal basis of Mrs. Bernier's claims nor the sufficiency of Mrs. Bernier's evidence to support her claim for damages. Defendant did not include the issue of his alleged entitlement to attorney fees in the Pretrial Order. [RP 430]

The Lack of Record Evidence to Support Defendant's Attorney Fee Claim

According to Judge Hall, the replevin action was "90%" of the case. [Tr. 3-28-09 at 12:22-24; 13:16-25, 14:1-2] Defendant never made any claim or allegation that Mrs. Bernier engaged in sanctionable conduct by filing the case, or during the litigation. The fact that Mrs. Bernier prevailed on the primary objective of the case (return of her stock) is dispositive that this case was properly grounded in law and in fact. [RP 363; *see also* Trial Tr. 10-14-09] If Mrs. Bernier had not

filed this case, she would likely not have regained custody and control over her property. Judge Hall retired from the bench on or about December 31, 2009, and this matter was assigned to Judge Barbara Vigil. [Docket Sheet for 1/4/10 "No Paper" record] Prior to Judge Hall's retirement, there was no finding - and none can be construed in Judge Hall's decision - that Mrs. Bernier engaged in endlessly repetitive argumentation, discovery abuse, malicious conduct, or meritless litigation.

The fact that Defendant never filed a motion to dismiss, motion to strike, motion for summary judgment, or motion regarding discovery abuse, establishes that Mrs. Bernier properly pleaded cognizable claims, properly litigated her claims according to the rules of civil procedure, and supported her claims with evidence sufficient to withstand pre-trial dispositive motions. This is so even though Mrs. Bernier ultimately did not carry the day at the damages hearing.

Defendant's Motion for Attorney Fees

On December 10, 2009, Defendant filed a Motion for Award of Attorney's Fees, citing Rules 1-054 and 1-011 as grounds. [RP 455-460] The motion failed to articulate a theory for recovery of fees under statute, contract, or other basis; it merely cited Rules 1-054 and 1-011. [*Id.*] The motion did not specifically identify any objectionable conduct allegedly engaged in by Mrs. Bernier or her counsel during the litigation. [*Id.*] The motion did not state the amount of fees demanded, and no documentation of the fees allegedly incurred was attached. [*Id.*]

Mrs. Bernier informed Defendant that the motion was untimely under Rule-054 (requiring such a motion to be filed within 15 days of entry of judgment). [RP 502] Mrs. Bernier also informed Defendant that the motion was defective because it did not state an amount sought. [RP 502] Mrs. Bernier requested that Defendant withdraw the Motion. [RP 502]

Instead, without leave of the district court or the knowledge of Mrs. Bernier, Defendant filed an Amended Motion for Attorneys' Fees on December 31, 2009. [RP 479] Defendant deleted reference to Rule 1-054, but maintained that fees were owed as a sanction under Rule 1-011. [*Id.*] The amended motion still lacked any articulation of Mrs. Bernier's allegedly sanctionable conduct. [*Id.*] The amended motion lacked any specific amount requested or attachment showing the activities that required expenditure. [*Id.*] The amended motion was filed more than 30 days after the final judgment was filed. [*Id.*]

Mrs. Bernier responded to the amended motion [RP 501], arguing, inter alia, that the amended motion should be denied because a substantive basis for the amended motion was lacking. Mrs. Bernier objected that the amended motion failed to set forth a specific amount requested, and in any event, that the district court lost jurisdiction to consider the untimely amended motion. [RP 501]

In his Reply brief, Defendant - for the first time - stated a specific amount requested for attorney fees via an affidavit of Defendant's counsel, referencing twenty (20) pages of time entries. [RP 563, 571-593] On February 29, 2010, Mrs.

Bernier objected, arguing that the attorney fee affidavit was untimely, and that consideration of any evidence presented for the first time in a reply brief was improper and unfair. [RP 598] Mrs. Bernier further objected that the attorney fees requested in Defendant's Reply:

> (a) were unreasonable in time and scope;
>
> (b) included fees not incurred in the instant case but in the sequestered case, to which Defendant was not a party and where Defendant's counsel was not counsel of record;
>
> (c) included not merely attorneys fees but paralegal expenses (which are expressly not recoverable under Rule 1-054(D)(3)(f) NMRA and were not requested in any cost bill);
>
> (d) included fees that were not incurred by Defendant himself; and
>
> (e) included fees that were incurred by at least four attorneys in a case that did not have complicated or novel issues of law.

[RP 598] The district court did not rule on Mrs. Bernier's objections.

Defendant's Cost Bill

On November 30, 2009, Defendant filed his Cost Bill under Rule 1-054. [RP 445] The Cost Bill claimed travel expenses for substituted party William Bernier [RP 446 at para. 3], actual travel expenses for Defendant's fact witnesses [RP 445 at para. 1, 2], and "miscellaneous costs" [RP 446 at para. 4] that were not supported by receipts, specificity, or demonstration that they were allowable costs. The Cost Bill contained at least one fictitious entry: claiming reimbursement for Beverly Bernier, a fact witness at the damages trial, expenses for an airline ticket,

rental car and hotel costs. [RP 445 at para. 2] In fact, Beverly Bernier traveled to New Mexico in a motor home and stayed in campsites. [RP 450] Credit card statements were attached to the Cost Bill, but it was not clear whose credit card was used or what line item correlated with Beverly Bernier. [RP 449]

On December 7, 2009, Defendant submitted an Amended Cost Bill, without leave of the court and without the knowledge or consent of Mrs. Bernier. [RP 451] The Amended Cost Bill did little to change the original Cost Bill, except to attach additional credit card statements that did not correlate to the requested costs. [RP 453, 454] The Amended Cost Bill did nothing to change the aversions regarding Beverly Bernier's fictitious travel expenses[3].

On December 11, 2009, Mrs. Bernier filed her Motion to Tax Costs/ Objection to Defendant's Cost Bill and Amended Cost Bill. [RP 461] Mrs. Bernier argued, inter alia, that:

1. The costs claimed were unrecoverable under Rule 1-054 NMRA (which disallows a party's travel expenses);

2. No subpoena was issued for any fact witness to put parties on notice of such cost;

3. Fact witnesses are limited to a per diem expense of $95.00 plus mileage and did not provide for actual travel expenses;

4. "Miscellaneous costs" were so vague and unsupported that they were unrecoverable;

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3 Mrs. Bernier points out in her Reply to Defendant's Response to Motion to Tax Costs Defendant's failure to make any record or present any credible evidence that Beverly Bernier could not travel or any need to appear by telephone. See RP 538, 539

5. Beverly Kedzior's airline, hotel and rental car expenses were not recoverable; and

6. The travel expenses of Beverly Bernier were fictitious.

[RP 463 at para. 8; Tr. 1-20-10 15:7-11] Moreover, Mrs. Bernier argued for equitable grounds to deny costs, inasmuch as Mrs. Bernier lost over $250,000.00 in value while her stock was withheld from her, she prevailed on her replevin and declaratory relief counts, her advanced age and income status. [RP 465 – 467; *see generally* Tr. 1-20-10].

After receiving Mrs. Bernier's Motion to Tax Costs, Defendant filed a Second Amended Cost Bill on or about December 17, 2009, without leave of court and without the knowledge of Mrs. Bernier. [RP 472] This cost bill changed the amount of costs claimed, and Defendant "corrected" the nature of the costs for Beverly Bernier's travel expenses, claiming it was a "typographical error" to state sums for an airline ticket, rental car and hotel, when, in fact, she had driven and camped. [RP 489 at para. 9; *see also* RP 450] Defendant complained that Mrs. Bernier did not agree to allow his fact witness, Beverly Bernier, to appear by telephone. [RP 490] The record contains no evidence that Defendant requested this relief prior to trial. [RP 538 – 539]

Mrs. Bernier argued that, had she not filed Objections detailing the erroneous claims in Defendant's Motion to Tax Costs, the court clerk would have entered costs based on false information. [Tr. 1-20-10, p. 17:13-18] Mrs. Bernier

continued to argue that she had prevailed on the primary objective of the replevin action, and therefore costs should be denied to Defendant. [RP 536]

The District Court's First Order

At the hearing on January 20, 2010, the district court -- without deduction -- granted Defendant all costs contained in the three cost bills he filed. [RP Tr. 1-20-10; 691] Over Mrs. Bernier's objection, the district court awarded Defendant all claimed "miscellaneous costs", which were not supported by law or receipts. [RP 630, 691] There is no provision for "miscellaneous costs" in Rule 1-054 NMRA. There is no provision in Rule 1-054 for travel expenses, except that witnesses are entitled to per diem witness fees and mileage, if they were paid. There is no provision in Rule 1-054 for an award of a party's travel expenses, but these were granted without deduction. [*Compare* RP 472 (cost bill) *with* RP 691 (court's order)]

After the February 24, 2010 hearing on Defendant's Amended Motion for Attorneys Fees, the district court awarded all attorneys fees that had been requested by Defendants, from Defendant's counsel's entry of appearance up the date of the hearing. [RP 688] The order nowhere stated what Mrs. Bernier had done to warrant the extreme remedy of Rule 1-011 sanctions. The district court made the conclusory statement that, based upon Mrs. Bernier's course of conduct in this litigation, good grounds exist to impose Rule 1-011 NMRA sanctions against Mrs. Bernier . [CD Tr. 2-24-20 10:52:15 – 10:53:50]

The Court imposed all of Defendant's fees and ordered they be paid within 30 days of the hearing date. [RP 679, Tr. 2-24-20 at 10:52:15 – 10:53:50] These statements were the sole record evidence in support of the district court's award. [*See also* RP 689 at para. 3] The district court indicated that it was "familiar" with the parties in the case, presumably referring to her adjudication of the sequestered proceedings. [Tr. 2-24-20 at 10:52:15 – 10:53:50] But Mrs. Bernier prevailed on her replevin and declaratory relief claims, and Judge Hall ordered the return of her stock from the Court Registry. [RP 363] Judge Hall's judgment was only that Mrs. Bernier did not support her damages claim with sufficient evidence.

This Court's First Limited Remand

Mrs. Bernier appealed to this Court on April 15, 2010. [RP 713, and see Court of Appeals file No. 30,401] This Court remanded to the district court for consideration of pending motions on Defendant's amended motion(s) for attorney's fees to be heard on August 6, 2010. [RP 813]

The deficiencies in the record, and the failure to demonstrate entitlement to sanctions under Rule 1-011, were not cured upon the limited remand. After this Court remanded the matter, Defendant filed additional amended motions asking for additional attorney fees, and a motion to enforce the judgment and order. [RP 697] Mrs. Bernier filed objections to the supplemental affidavits for additional attorney fees. [RP 635, 649, 726, 821; *see also* CD Tr. 2-24-20, Tr. 8-6-10] Mrs. Bernier repeated her objections throughout the post-trial proceedings that – as a matter of

law -- there was no basis to award Rule 1-011 fees in this case. [RP 821] Mrs. Bernier objected to Defendant's fax-filed supplemental affidavit and second supplemental affidavit of attorney fees, which were transmitted without motions setting forth supporting facts or legal argument. [RP 649]

Defendant continued to file amended affidavits; the day before the August 6, 2010 hearing, Defendant filed a fourth supplemental affidavit of attorney's fees and costs. [RP 816] Defendant's fourth supplemental affidavit not only lacked any accompanying motion, but was fax-filed at 2:20 p.m., and sent via email to Mrs. Bernier's counsel at 4:15 on August 5, the day before the hearing scheduled for August 6, 2010 at 9:00 a.m. [RP 816] Mrs. Bernier was deprived of sufficient notice and a meaningful opportunity to prepare her objections.

Moreover, the supplemental fees were plainly excessive and contained manifestly false, duplicative, or erroneous entries. [RP 821] The evidence showed that counsel for Mrs. Bernier spent 43.50 hours (excluding hours spent on preparing the docketing statement for appeal) between March 11, 2010 and August 3, 2010. Counsel for Defendant claimed to have spent 119.1 hours during that period, without filing anything in any court or attending any hearings. [RP 821 - 829]

The district court awarded Defendant attorney fees from February 24, 2010 through April 16, 2010, without giving Mrs. Bernier any opportunity to file objections or oppose the quality or quantity of fees. [RP 822, 649] Mrs. Bernier

was allowed to oppose supplemental affidavits filed after April 16, 2010, after the district court's original award. [Tr. 8-6-2010, 19:19-23]. Additional fees were requested on supplemental affidavits for the period of time after April 16, 2010. Mrs. Bernier filed her objections to the supplemental affidavits for fees after April 16, 2010 [RP 821]. The district court then entered an order on Defendant's Motion to Modify Fees, without any reduction, on August 23, 2010 [RP 850-53]. The district court made a wholesale order of all fees presented in Defendant's supplemental affidavits. [Compare RP 679 with RP 850] At the August 6 hearing, the district court merely remarked that fees continue, are ongoing, and may be increased or modified as time goes by. [Tr. 8-6-10, 17:19-25 – 18:1-3]. This suggests that Mrs. Bernier should pay Defendant's attorney's fees without question or recourse, and that the attorney fee award could remain open indefinitely.

Mrs. Bernier made the following specific objections, among others, which illustrate the errors and the district court's abuse of its discretion in awarding fees and costs:

> a. The entry on 3/15/10 is a duplication of an entry contained on the supplemental affidavit. [RP 825]
>
> b. An entry on 4/09/10 regarding research on costs and three conferences with two attorneys regarding cost objections is not about attorneys fees or the award of fees. [RP 825]
>
> c. Entries on 4/14/10 and 4/15/10 belie the assertions -- made by Defendant in his motion to modify -- that his counsel was unaware that Mrs. Bernier faxed the approved orders to the Court on 4/15/10. [RP 825] When Plaintiff's counsel challenged the need to prepare for an unnecessary

presentment hearing, Defendant's counsel claimed lack of communication in their office. [RP 826]

d. The second and third affidavits indicate that four attorneys were working this file, which is clearly excessive. [RP 826]

e. Paralegal time is not recoverable under Rule 1-054(D)(3)(f). [See RP 826]

f. Entries on 4/15/10 in both the second and third supplemental affidavits are clearly duplicative. [RP 826]

g. The entry on 4/16/10 is excessive. The orders were approved and Defendant had attempted to have a new Judgment entered on that date without notice and without filing any motion. [RP 826]

h. The entry on April 19, 2010 requested fees for work on this appeal, which is the province of this Court under Rule 12-403. [See RP 826] An award of such fees is improper without some finding or indication by this reviewing Court that this appeal should subject Mrs. Bernier to sanctions. [RP 826]

i. As set forth above, Defendant's fourth supplemental affidavit was fax-filed at 2:20 p.m. on August 5, 2010, and sent by email to Plaintiff's counsel at about 4:15 p.m., the day before the August 6th hearing, scheduled for 9:00 a.m. [See RP 816] The entire affidavit should have been disallowed based on the manner of service and notice.

j. Defendant's claim that 43.70 hours were expended on this case from April 19, 2010 through July 31, 2010 is manifestly excessive, given that during this period, Plaintiff was preparing the notice of appeal and docketing statement, neither of which requires response by the appellee. [RP 827] Indeed, to date, Defendant has filed nothing in this Court regarding the appeal. [See Court file]

k. Mrs. Bernier was permitted under the rules to move to stay enforcement of the judgment, and the request was prima facie not sanctionable, and fees should not have been awarded. [RP 827]. Mrs. Bernier was charged with attorneys fees for Defendant to oppose her Motion to Stay, which was granted with conditions. Mrs. Bernier filed a supersedeas bond to stay enforcement of the judgments pending this appeal [RP 869]

l. In an entry on 4/30/10, Defendant's counsel confirmed a misstatement by Defendant in the Motion to Modify that counsel was not notified of Court receiving order by fax. [RP 827] This claim, corrected by counsel for Mrs. Bernier and conceded by Defendant, could not properly be charged to Mrs. Bernier as a sanction.

See also ; Tr. 8-20-10. The district court did not evaluate or adjust the attorney fees claim in any way, and simply awarded Defendant all fees requested regardless of legal or factual support. [Compare RP 679 with RP 850]

At the hearing on August 6, 2010, Defendant continued to make conclusory statements that Mrs. Bernier had engaged in sanctionable impropriety, but continued to fail to support the allegations by demonstrating any improper action, pleading, paper, tactic, or argument advanced by Mrs. Bernier or anyone connected to her. [Tr. 8-6-2010] The district court entered an order awarding an additional $14,025.85 for all of the attorney fees and costs Defendant requested – without deduction – and entered no findings or conclusions to support the determination that Mrs. Bernier engaged in sanctionable conduct by filing her replevin action or litigating that action. [RP 850] The district court awarded fees for work Defendant allegedly performed on this appeal, despite the fact that this Court has the discretion to award fees on appeal, and has not yet passed upon the merits of Mrs. Bernier's appeal. [RP 827, 850]

Added to the previous award of $42,542.59, the district court awarded a total of $56,575.44 in Rule 11 sanctions against a 95 year old woman, for legal actions

she took that were mostly successful. [850-53] This award of additional fees on limited remand perpetuated and compounded the district court's initial error of awarding fees. It also rewarded Defendant's actions in filing repeated amended affidavits and pleadings, in disregard for the rules of civil procedure and any notion of fair play and equal justice.

This Court's Second Remand

After the district court modified the attorneys fees award [RP 850], Mrs. Bernier filed an Amended Docketing Statement on September 22, 2010 [RP 870], demonstrating the absence of any evidence to support the fees and costs awarded. This Court again remanded on May 23, 2011 [RP 958], instructing the district court to make findings of fact and conclusions of law to support an award of attorney fees and costs under Rule 1-011. The Court of Appeals also asked if the cost award was done pursuant to Rule 1-054 or Rule 1-011. The record is clear that the district court ordered costs pursuant to Rule 1-054 NMRA [RP 1043 at para. 54, 55; 940 at para. 48, 49]

Following this Court's second remand, Mrs. Bernier and Defendant filed proposed findings of fact and conclusions of law. [RP 931, 1003] The district court adopted virtually all of Defendant's findings of fact and conclusions of law, specifically finding that Ronald Bernier (Mrs. Bernier's son) had engaged in sanctionable conduct, not Mrs. Bernier. This appeal followed. [RP 1032, 1064]

ARGUMENT AND AUTHORITY:

ISSUE 1: The imposition of attorney fees against Mrs. Bernier for Ronald Bernier's allegedly sanctionable conduct is unsupported by the facts and is contrary to law.

Standard of Review:

A judgment entered without notice or service is constitutionally infirm.... Failure to give notice violates the most rudimentary demands of due process of law. *Peralta v. Heights Medical Ctr., Inc.*, 485 U.S. 80, 84 (1988). The "determination of whether jurisdiction exists is a question of law which an appellate court reviews *de novo*". *Armijo v. Pueblo of Laguna,* 2011–NMCA–006, ¶ 9, 149 N.M. 234, 247 P.3d 1119.

Preservation:

The arguments made herein were raised before the district court in Plaintiff Therese Bernier's Amended Requested Findings of Fact and Conclusions of Law, filed July 6, 2011. [RP 1003]

Argument and Authority:

A. The district court erred in imposing sanctions on Mrs. Bernier based on the district court's finding that Ronald Bernier engaged in sanctionable conduct.

Defendant opposed the inclusion of Ronald Bernier in this case [*see* RP 375; 383; 387], yet for purposes of his Rule 1-011 motion, Defendant seems to argue some identity of interest or "virtual representation" by or of Ronald Bernier. Mrs. Bernier cannot reasonably or fairly be held liable for any alleged actions of Ronald

Bernier. *Compare Samedan Oil Corp. v. Neeld*, 91 N.M. 599, 603, 577 P.2d 1245, 1249 (1978) (stating that there is no "vicarious liability for punitive damages on the part of a master or principal absent participation, authorization or ratification of the tortious conduct.")

Whether an agent acts on behalf of an undisclosed principal is a question of fact. 2 *Restatement (Third) of Agency* § 6.03 cmt. c, at 42. There was no demonstration in the proceedings or in the record that Ronald Bernier and Mrs. Bernier had an employee or agent relationship, such that she should be vicariously liable for his alleged actions. *See Blea v. Fields*, 2005-NMSC-029, 138 N.M. 348, 120 P.3d 430 (discussing vicarious liability of an employer for an employee); *Albuquerque Concrete Coring Co. v. Pan Am World Servs., Inc.*, 118 N.M. 140, 143, 879 P.2d 772, 775 (1994) (holding that in New Mexico, a principal may be held vicariously liable for punitive damages when it "has in some way authorized, ratified, or participated in the wanton, oppressive, malicious, fraudulent, or criminal acts of its agent.")

Mrs. Bernier is nowhere mentioned in the district court's Conclusions. The district court's Findings numbers 11, 12, 20, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 48, 49, 50, 51, 56 and 61 illustrate the district court's error. [RP1032] There is no evidence in the record before Judge Hall in the proceedings below to support any of these findings. The district court specifically found that Mrs. Bernier's conduct was not sanctionable [RP 1035 at para. 16], but improperly

ordered her to pay for the alleged wrongdoing of a non-party to the case, which was not established in the record. [RP 852 at para. 3] The district court's Findings recite conclusory statements of opinion without support in the record. [RP 1044 - 1046] The Conclusions improperly justify an award of sanctions against Mrs. Bernier by saying they are intended to punish Ronald Bernier for his alleged improper litigation tactics [RP 1044 at para 61].

B. The district court erred to the extent that it attempted to impose a judgment for sanctions against Ronald Bernier, who was not a party to the action.

It is an elementary principle that judgment may not be entered against one not a party to the action. *Wirtz v. State Educational Retirement Bd.*, 1996-NMCA-085, ¶ 17, 122 N.M. 292, 923 P.2d 1177; *see also Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969) (parent of counter-defendant corporation named in counterclaim but not served; judgment invalid against parent even though counter-defendant stipulated that for purposes of the litigation it would be considered liable for the acts of its parent). A person does not become a party subject to liability merely by receiving notice of the action. *Wirtz*, 1996-NMCA-085, ¶ 17. The pleading that provides notice must seek relief against the person. *Id.; Lava Shadows, Ltd. v. Johnson,* 121 N.M. 575, 576, 915 P.2d 331, 332 (Ct.App.1996), *citing Restatement (Second) of Judgments* § 2 cmt. B (1980). A "party" to litigation is "[o]ne by or against whom a lawsuit is brought." *Black's Law Dictionary* 1154 (8th ed. 2004).

"It is elementary that one is not bound by a judgment *in personam* resulting from litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969). A district court's order imposing sanctions against a non-party must be vacated. *Capco Acquisub, Inc. v. Greka Energy Corp.*, 2008-NMCA-153, ¶¶ 50-51 145 N.M. 328, 198 P.3d 354; *U.S. v. Koenig*, 856 F.2d 843, 850 (7th Cir. 1988) (holding that mere knowledge of another's independent action does not produce vicarious responsibility absent some manifestation of consent and the ability to control).

A person does not become a party subject to liability merely by receiving notice of the action. The pleading that provides notice must seek relief against the person. *Lava Shadows*, 121 N.M. at 576, 915 P.2d at 332. A district court's order imposing discovery sanctions against a non-party must be vacated. *Capco Acquisub, Inc. v. Greka Energy Corp.*, 2008-NMCA-153, ¶¶ 50-51; *see also Smith v. FDC Corp.*, 109 N.M. 514, 523, 787 P.2d 433, 442 (1990) (holding that, under Rule 1–037 NMRA, only contempt is available as a discovery sanction against a nonparty).

In the district court's Findings and Conclusions [RP 1032], and indeed throughout Defendant's arguments, Ronald Bernier is cited as the person who engaged in sanctionable conduct. Nowhere in the record does Defendant or the district court find that Mrs. Bernier herself engaged in conduct that would support

sanctions against a 95 year-old woman whose goal in litigation was the return of her property and compensatory damages. Mrs. Bernier prevailed on the primary motive of her replevin action, though not on her claim for damages. There was no basis to sanction Mrs. Bernier for Ronald Bernier's alleged conduct, which nowhere appears in the record.

The United States Supreme Court has stated,

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950); *see also Polygenex Int'l, Inc. v. Polyzen, Inc.*, 515 S.E.2d 457, 460 (N.C. App. 1999) (vacating Rule 11 sanctions against a corporate officer, in his individual capacity, where he was not a party to the action and was never served with a summons).

Mrs. Bernier filed a Motion to Amend asking that Ronald Bernier be added as a party plaintiff representing the interests of his mother, Mrs. Bernier, as her attorney in fact. [RP 370] Defendant opposed the motion [RP 383] and the district court denied it [RP 403]; Mrs. Bernier remained the sole plaintiff. Awarding attorneys fees for the alleged conduct of a non-party, where the Defendant himself rejected party status for the sanctions target, is error and must be reversed.

ISSUE 2: The district court's imposition of sanctions pursuant to Rule 1-011 NMRA against anyone associated with Mrs. Bernier's case is unsupported by the facts and contrary to law under the circumstances.

Standard of Review:

The "good ground" provision of Rule 11 is measured by a subjective standard and is appropriate only in those rare cases in which an attorney deliberately presses an unfounded claim or defense. *Rangel v. Save Mart, Inc.*, 2006-NMCA-120, 140 N.M. 395, 142 P.3d 983. Generally, a district court's imposition of sanctions pursuant to Rule 1-011 NMRA is reviewed for an abuse of discretion. *Rivera v. Brazos Lodge*, 111 N.M. 670, 674-75, 808 P.2d 955, 959-60 (1991). "[A] district court necessarily abuses its discretion if it bases its ruling on an erroneous view of the law [.]" *Id.* at 675, 808 P.2d at 960; s*ee also Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) (holding a district court necessarily abuses its discretion if it bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence).

Preservation:

The arguments made herein were raised before the district court in Mrs. Bernier's Response to the Amended Motion for Attorney Fees under Rule 1-011 [RP 501]; in Plaintiff's Objection to Defendant's Reply regarding the Amended Motion [RP 598]; in Plaintiff's Objection to Entry of Attorneys Fees [RP 635],

Plaintiff's Motion to Tax Costs/Objection to Defendant's Cost Bill and Amended Cost Bill [RP 461]; in Plaintiff's Objection to Second Amended Bill of Costs [RP 474], Reply to Response to Motion to Tax Costs [RP 535]; in Plaintiff's Special/ Limited Response To Defendant's Motion To Modify Judgment And Orders On Defendant's Amended Motion For Award Of Attorneys Fees [RP 726]; in Plaintiff's Objections to Defendant's Supplemental Affidavit Of Attorney Fees [RP 821]; in Plaintiff's objections and responses to Defendant's numerous amended Cost Bills [RP 461, 474, 535]; in Plaintiff's objections to Defendant's multiple supplemental affidavits of attorney fees [RP 821]; and in oral arguments before the district court [RP Tr. 1-20-10, CD Tr. 2-24-10, Tr. 8-6-10]; and in Plaintiff Therese Bernier's Amended Requested Findings of Fact and Conclusions of Law [RP 1003].

Argument and Authority:

A. The district court's findings of fact are insufficient to support an award of sanctions under Rule 1-011 NMRA, where they are not based on evidence in the record.

A district court must enter particularized findings and conclusions before entering an award of attorney fees as a sanction under Rule 1-011. *Rivera*, 111 N.M. 670, 808 P.2d 955 (1991). Vague and conclusory statements do not justify a finding of bad faith sufficient to support sanctions under Rule 1-011. *Rivera,* 111 N.M. at 676-77, 808 P.2d at 961-62. Findings that a litigant "acted in bad faith, vexatiously, wantonly and for oppressive reasons" in pursuing litigation are

generalized conclusions, and do not represent a finding of bad faith sufficient to support an attorney's fee award. *State ex rel. New Mexico State Highway and Transp. Dept. v. Baca*, 120 N.M. 1, 8, 896 P.2d 1148, 1155 (1995). A reviewing court must be able to look to information in the record that justifies the imposition of sanctions articulated by the district court. *See Pacific Dunlop Holdings, Inc. v. Barosh*, 22 F.3d 113, 118 (7th Cir.1994).

The district court abused its discretion in finding that Mrs. Bernier's failure to prevail on the damages aspect of the case amounted to sanctionable conduct for the entire case under Rule 1-011 NMRA. [RP 1044, Court's finding of fact No. 60] The district court failed to identify with particularity any sanctionable conduct by Mrs. Bernier. The district court compounded this error by awarding fees as a sanction that included fees Defendant allegedly incurred in defending Mrs. Bernier's meritorious claims and by awarding fees incurred during the sequestered case involving Mrs. Bernier and Kedzior. [RP 573, slips 10/30/07, 10/31/07; RP 576, slip 2/19/08; RP 577, slip 3/3/08, 3/7/08, partial time for 3/10/08; RP 578, slips 4/17/08, 5/6/08; RP 579, slip 5/15/08, 5/21/08; RP 580, slip 6/9/08; RP 581, slip 1/27/09[4]] Kedzior was not a party to this case and Defendant's counsel was not counsel of record in the sequestered case. Defendant opposed having Kedzior added as a party on Mrs. Bernier's Motion to Amend. As stated above, Judge Hall denied the Motion to Amend without prejudice.

[4] James Rubin and Brendan Murphy were the attorneys of record for Beverly Kedzior in the sequestered case.

Unlike Rule 11 of the Federal Rules of Civil Procedure, New Mexico's Rule 1-011 contains no "safe harbor" provision corresponding to that provided in the Federal Rules of Civil Procedure. *Compare* Rule 1-011 NMRA *with* Fed.R.Civ.P 11. New Mexico law requires showing of subjective, actual knowledge to support Rule 1-011 sanctions, as opposed to the objective (knew or should have known) standard established by the Federal rule. Under New Mexico law, Defendant was required to establish that Mrs. Bernier actually knew that her conduct in filing the replevin action or in some aspect of the litigation of the replevin action was improper and could result in sanctions. *Rangel*, 2006-NMCA-120. Defendant never did any discovery in the case. No showing of this subjective knowledge appears in the record below.

New Mexico has the same interest the federal courts in mitigating Rule 1-011 NMRA's chilling effect on litigants. As a matter of policy, where a party moving for Rule 1-011 NMRA sanctions at the end of the case has never previously complained of the alleged legal insufficiency, alleged frivolous nature of the case, or alleged sanctionable conduct, a court abuses its discretion in awarding sanctions under New Mexico's subjective standard.

Defendant failed to make an adequate showing under either State or Federal Rule 11 jurisprudence. "A troublesome aspect of a trial court's power to impose sanctions ... is that the trial court may act as accuser, fact finder and sentencing judge, not subject to restrictions of any procedural code and at times not limited by

any rule of law governing the severity of sanctions that may be imposed." *Mackler Prods., Inc. v. Cohen*, 146 F.3d 126, 128 (2d Cir.1998). Due process requires that the attorney be given notice of the imposition of Rule 11 sanctions, may require specific notice of the reasons for the imposition of sanctions, and mandates that the accused be given an opportunity to respond. *Dona Ana Sav. and Loan Ass'n, F.A. v. Mitchel*l, 113 N.M. 576, 829 P.2d 655 (Ct.App. 1991), *citing Donaldson v. Clark,* 819 F.2d 1551, 1559-61 (C.A.11 (Ga.) 1987).

There was no finding by either Judge Hall or Judge Vigil in the instant case that Mrs. Bernier engaged in endlessly repetitive argumentation, abusive motions practice, discovery abuse, malicious conduct, or that Mrs. Bernier had filed meritless litigation. *Rangel*, 2006-NMCA-120. Indeed, Defendant never argued this, nor was any evidence introduced by Defendant to support such a claim. Even in the post-trial proceedings and the motion requesting fees under Rule 1-011, Defendant never articulated any particularized basis for a fee award, beyond conclusory allegations against Ronald Bernier. Prior to trial, Defendant never filed a motion to dismiss, motion to strike, or motion for summary judgment. Defendant's failure to contest the pleadings before incurring the attorney fees he now claims as damages suggests waiver, failure to mitigate, or acquiescence to the litigation of the case. *Jackson National Life Insurance Co. v. Receconi*, 113 N.M. 403, 412, 827 P.2d 118, 127 (1992) (holding that a "waiver is the intentional relinquishment or abandonment of a known right,"); *Black's Law Dictionary* 24

(8th ed.2004). The district court abused its discretion in awarding attorney fees under Rule 1-011 on the record below, and should be reversed.

B. The district court's order granting attorney fees as a sanction for bringing the action against Defendant conflicts with the American Rule.

The American Rule provides that both parties to litigation are ordinarily required to pay their own attorney fees, absent a contractual provision or statute that shifts fees. *NARAL v. Johnson*, 1999-NMSC-028, ¶¶ 12-13, 127 N.M. 654, 986 P.2d 450. The Rule "promotes equal access to the courts for the resolution of bona fide disputes" and "tends to preserve judicial resources". *Id.* The "equal access" policy is based upon the underlying rationale that "one should not be penalized for merely defending or prosecuting a lawsuit." *Paz v. Tijerina,* 2007-NMCA-109, ¶ 12, 142 N.M. 391, 165 P.3d 1167.

Federal R. Civ. Pro. 11(c)(2) was amended to limit the extent that attorneys' fees may be used as a measure of sanctions, so as to more precisely focus on the Rule's primary goal of deterrence. See Fed.R.Civ.P. 11, Advisory Committee's Notes (1993 Amendments) ("Since the purpose of Rule 11 sanctions is to deter rather than to compensate, the rule provides that, if a monetary sanction is imposed, it should ordinarily be paid into the court as a penalty.")

In this case, no statute or contractual provision entitled a party to attorneys fees. Defendant improperly pressed his claim for attorneys fees under Rule 1-011 NMRA without expressing particular conduct of Mrs. Bernier warranting the

extreme penalty of paying his attorneys fees. The district court erred in awarding Defendant's fees without deduction. It was clearly error to award fees to Defendant for defending actions where Mrs. Bernier prevailed. The Rule 1-011 sanctions award in this case must be reversed.

C. The district court's entry of Rule 1-011 sanctions again Mrs. Bernier is not supported by sufficient evidence.

1. Where Mrs. Bernier prevailed on the primary objective of her case (obtaining return of her stock certificate), Rule 1-011 sanctions based upon alleged impropriety in bringing a case cannot be supported.

The primary purpose of a replevin action is the immediate restoration of plaintiff's property. *Novak v. Dow*, 82 N.M. 30, 474 P.2d 712 (Ct. App. 1970). The secondary purpose is damages. *Id.;* NMSA 1978, § 42-8-2. Mrs. Bernier prevailed on the primary purpose of her case when Judge Hall granted her Renewed Motion for Summary Judgment and awarded her stock certificate returned to its rightful owner. The district court abused its discretion in imposing Rule 1-011 sanctions in the absence of evidence that Mrs. Bernier brought a frivolous, unfounded suit, or that she litigated in bad faith.

2. There is no evidence of Mrs. Bernier's subjective bad faith in bringing the action.

In contrast to the standard in federal courts, the New Mexico test for the propriety of Rule 1-011 sanctions is subjective. Any violation depends on what the attorney or litigant knew and believed at the relevant time and involves the question of whether the litigant or attorney was aware that a particular pleading

should not have been brought. *Rivera*, 111 N.M. at 675, 808 P.2d at 960. Sanctions should be entered against an attorney rather than a party only when a pleading or other paper is unsupported by existing law rather than unsupported by facts. *Id.* Where no subjective evidence of a willful violation of Rule 11 exists, a judgment awarding attorney's fees constitutes an abuse of discretion and must be reversed. *Lowe v. Bloom,* 112 N.M. 203, 204, 813 P.2d 480, 481 (1991).

"Rule 11 was 'designed to encourage honesty in the bar when bringing and defending actions [and] ought to be employed only in those rare cases in which an attorney deliberately presses an unfounded claim or defense.'" *Id., citing Rivera*, 111 N.M. at 674, 808 P.2d at 959. "The record lacks any factual showing that appellants acted for some collaterally improper purpose warranting the imposition of sanctions for a willful violation of Rule 11." *Lowe*, 112 N.M. at 205, 813 P.2d at 482.

Mrs. Bernier prevailed on the primary motive of her case - - the return of her Walgreen stock in the replevin action. [RP 363, para. 3] Mrs. Bernier prevailed on her count for declaratory relief, where she was found to be the owner of the stock and entitled to immediate possession of it. [RP 363, para. 2] That Mrs. Bernier prevailed on the primary motive of her case should be *prima facie* evidence that the case was properly brought as a result of Defendant's refusal to return her certificate. Such evidence should be dispositive on the issue of sanctions. Defendant made demonstration of any pleading, paper or document

filed with the district court that was in bad faith under the standards of Rule 1-011 NMRA or the case law construing Rule 1-011. No specific findings support the award beyond the district court's conclusory and wholly inadequate statement that no good ground existed to ever file this case. [CD Tr. 2-24-09, *supra;* RP 1033] The record below does not support the district court's award and must be reversed.

3. There is no evidence that Defendant objected to Mrs. Bernier filing the action or to her tactics in proceedings before Judge Hall.

Federal Rule 11(c)(1)(A) requires that a motion for Rule 11 sanctions "shall not be filed with or presented to the court unless, within 21 days after service of the motion ..., the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected." The "Safe Harbor" provision of F.R.Civ.P. 11(c)(1)(A) is intended to:

> protect[ ] litigants from sanctions whenever possible in order to mitigate Rule 11's chilling effects, formaliz[e] procedural due process considerations such as notice for the protection of the party accused of sanctionable behavior, and encourag[e] the withdrawal of papers that violate the rule without involving the district court."

5A Wright and Miller, *Federal Practice and Procedure* § 1337.2 at 723 (3rd ed. 2004). Failure to comply with the safe harbor provisions requires rejection of a motion for sanctions. *Id.* [S]ervice of a sanctions motion after the district court has dismissed the claim or entered judgment prevents giving effect to the safe harbor provision or the policies and procedural protections it provides, and it will be rejected." *Roth v. Green*, 466 F.3d 1179, 1193 (10th Cir. 2006).

Defendant never alerted the district court or Mrs. Bernier that he intended to call into question the merits of her case within the parameters of Rule 1-011. Defendant never filed any dispositive motion, did no discovery in the case, did not argue the point at the damages trial, and did not include the point in the final pretrial order. Defendant did not place the district court or Mrs. Bernier on notice at any point prior to filing his Motion for Attorney's Fees that he intended to seek sanctions under Rule 1-011, much less that he believed sanctionable conduct occurred in the case. The district court erred in awarding fees under Rule 1-011.

4. There is no evidence that Judge Hall, before whom the case was actually litigated, found Mrs. Bernier's actions to be sanctionable.

Rule 1-011 NMRA requires a district court to assess an attorney's conduct from the standpoint of the attorney at the time counsel committed the sanctionable conduct. *Lowe*, 112 N.M. at 204-205, 813 P.2d at 481-2. Where no subjective evidence of a willful violation of Rule 11 exists, the judgment awarding attorney's fees constitutes an abuse of discretion and will be reversed. *Id.* In contrast with the situation in Lowe, there is no evidence that Judge Hall thought the damages case was a "slam dunk" in Defendants' favor. Judge Hall carefully considered Mrs. Bernier's claims and found them not to be meritorious, but nowhere indicated he thought her case for damages was frivolous, much less her case for replevin, on which she prevailed. As in *Lowe*, the record demonstrates no subjective evidence of a willful violation of Rule 11, and the district court's award must be reversed.

D. The district court's judgment that Mrs. Bernier had violated Rule 1-011 NMRA impermissibly sanctioned Mrs. Bernier because she did not prevail on the merits of her damages claim in the litigation.

The primary goal of Rule 11 is to deter baseless filings in district court by testing the conduct of counsel. *Rivera*, 111 N.M. at 674-75, 808 P.2d at 959-60. Although Rule 11 should be read in light of concerns that it will spawn satellite litigation and chill vigorous advocacy, any interpretation must give effect to the rule's central purpose of deterrence. *Id.*

Any violation of Rule 11 governing sanctions depends on what the attorney or litigant knew and believed at the relevant time and involves the question of whether the litigant or attorney was aware that a particular pleading should not have been brought. *Landess v. Gardner Turf Grass, Inc.*, 2008-NMCA-159, ¶ 16, 145 N.M. 372, 198 P.3d 871. New Mexico law requires a party seeking Rule 1-011 sanctions to establish the subjective bad faith of the opposing attorney or litigant. *Id.* Sanctions under the "good ground" requirement of the Rule 11 are appropriate only in those rare cases in which a party deliberately presses an unfounded claim or defense. *Id.*

Judge Vigil, who did not preside over the trial or the pre-trial proceedings, could properly have observed no subjective bad faith by Mrs. Bernier. Quite the contrary, Mrs. Bernier was the prevailing party on "90%" of the case. [Tr. 3-18-09,

13:25-14:1-2; 12:22-25] After Defendant failed and refused to return her property after due demand, Mrs. Bernier had no reasonable expectation that it would be returned to her voluntarily. [RP 503] A replevin action was required for the return of her stock; certainly Judge Hall agreed in granting her relief in replevin and declaratory relief. There was no reasonable basis for the district court to find that Mrs. Bernier never should have filed the case, and the decision should be reversed.

E. The district court abused its discretion in ordering Mrs. Bernier to pay attorney fees incurred by Defendants for the entire litigation, without deduction for the motions and issues on which Mrs. Bernier prevailed.

An award of attorney's fees pursuant to Rule 11 must rest upon a finding by the court that "the actions for which fees are sought reasonably were necessary to defend [or prosecute the] claim." *Rivera*, 111 N.M. 670, 675, 808 P.2d 955, 960 (1991). Federal Rule 11(c)(2) expressly limits the award of attorneys' fees to those that directly result from a party or attorney's sanctionable conduct. *Divane v. Krull Elec. Co., Inc.*, 200 F.3d 1020, 1030 (C.A.7 (Ill.) 1999). An award of sanctions should be the least severe that is adequate to serve the purposes of deterrence. *Id.*

Fundamental fairness requires that basic protections of due process be followed before attorney is fined under Rule 11 for prosecuting frivolous case. *Rivera*, 111 N.M. at 675, 808 P.2d at 960. Due process requires an evaluation of all the circumstances and an appropriate accommodation of the competing interests involved. *Id.* Competing interests in a Rule 11 analysis include, but are not

limited to, the interests of attorneys and parties in having a specific sanction imposed only when justified; the risk of an erroneous imposition of sanctions under the procedures used and the probable value of additional notice and hearing; and the interests of the court in effectively monitoring the use of the judicial system and the fiscal and administrative burdens that additional procedural requirements would entail. *Dona Ana Sav. and Loan*, 113 N.M. 576, 829 P.2d 655 (Ct. App. 1991).

Mrs. Bernier was ordered to pay all of Defendant's fees, including fees for matters upon which she was the prevailing party. Mrs. Bernier was ordered to pay Defendant's fees incurred to oppose her summary judgment motion to have her stock returned. Mrs. Bernier was not apprised of how much Defendant was asking for until Defendant's reply brief containing contained twenty unexplained pages of fee slips. Mrs. Bernier had no meaningful opportunity to oppose those fees, which the district court ordered to be paid without deduction.

Mrs. Bernier offered to dismiss or resolve the case if Harold Bernier would simply return her certificate. When Defendant's counsel entered his appearance, Mrs. Bernier relayed to counsel that the case would be dismissed with prejudice if the stock was returned, but counsel declined to do so. [RP 468] When the UBS Financial file was sent to Defendant's counsel to show Mrs. Bernier was the sole owner of the stock, she again offered to resolve Defendant's counterclaim if he returned her stock, but was rebuffed. [RP 469] Defendant could have avoided

litigation if he returned Mrs. Bernier's property. The district court erred in awarding attorneys fees and should be reversed.

ISSUE 3: The district court's award of costs was arbitrary and capricious, contrary to law, and not supported by substantial evidence.

Standard of Review:

An award of costs is subject to an abuse of discretion standard. *See Davis v. Severson,* 71 N.M. 480, 490, 379 P.2d 774, 780 (1963) (superseded on other grounds). A district court abuses its discretion when its decision is contrary to law. *Rivera*, 111 N.M. at 674, 808 P.2d at 959.

Preservation:

The arguments made herein were raised before the district court in Mrs. Bernier's Motion to Tax Costs/Objection to Defendant's Cost Bill and Amended Cost Bill [RP 461]; in Plaintiff's Objection to Defendant's Second Amended Bill of Costs [RP 474], Reply to Response to Motion to Tax Costs 535]; in Plaintiff's Objection to Entry of Judgment on Costs [RP 630], in Plaintiff Therese Bernier's Amended Requested Findings of Fact and Conclusions of Law, filed July 6, 2011 [RP 1003]; and in oral arguments before the district court [Tr. 1-20-10].

Argument and Authority:

A. The Court abused its discretion in awarding costs to Defendant.

1. There is no provision in Rule 1-054 NMRA that a party be awarded travel expenses.

On remand, this Court asked if costs were awarded under Rule 1-054

NMRA or Rule 1-011 It is undisputed that costs were awarded under Rule 1-054. [RP 940 at para. 48 and 49; RP 1043, para. 54, 55]. Costs generally are recoverable only as allowed by statute, Supreme Court rule, and case law. Rule 1-054(D)(2) NMRA provides a list of costs that are generally allowable. The "travel expenses of a party" is absent from this list and therefore are not recoverable. The district court's award of costs for Defendant's alleged travel must be reversed. [RP 695]

2. Fact witnesses' actual travel expenses are not recoverable.

Recoverable costs for fact witnesses are covered by Rule 1-054(D)(2)(f) and limited by statute. NMSA 1978 §38-6-4(A) provides that "[w]itnesses shall be allowed no fees for services, but shall receive *per diem* expense and mileage specified . . . in the Per Diem Mileage Act [NMSA 1978, §10-8-1] for that time in which attendance is required, with certification of the clerk of the Court". The witness fee is $95.00 *per diem* pursuant to Section 10-8-1 NMSA 1978 plus mileage.

There is no record that Defendant paid any *per diem* to either Kedzior or Beverly Bernier, and no record of the mileage of either witness to appear at trial. There is no record that Defendant served subpoenas on these fact witnesses to appear at trial. The list of recoverable expenses in Rule 1-054(D)(2) do not include actual travel expenses, such as airline tickets, rental cars, hotel rooms, motor home expenses, gasoline, campsite rentals, meals, and other sundry expenses. The

district court abused its discretion in awarding these travel expenses. [RP 461, 474, 535, 630]

3. "Miscellaneous Costs" are not recoverable.

The list of recoverable expenses in Rule 1-054(D)(2) do not include "miscellaneous expenses", yet the district court awarded these to Defendant. [RP 685] Even if these costs were recoverable, no receipts or other documentation were presented to support "miscellaneous costs". This item of costs is so vague and unsupported that it was an abuse of discretion to award them, and this Court should reverse the district court's award.

4. General Offices expenses are not recoverable.

Rule 1-054(D)(3) provides a list of unrecoverable expenses. Rule 1-054(g) specifically and clearly provides that general offices expenses are not recoverable. The district court's award of claimed general office expenses [RP 463 at para. 9] is unsupported by any evidence, was contrary to law, and was an abuse of discretion.

B. Equity should have resulted in denial of all costs.

The trial court is given a large measure of discretion under Rule 1-054 to award costs. *See Davis,* 71 N.M. at 490, 379 P.2d at 780. The trial court may disallow costs in a civil action based on equitable grounds. *Marshall v Providence Washington Insurance Co.*, 124 N.M. 381, 951 P.2d 76 (Ct.App. 1976).

It is appropriate for the court to consider equitable principles and a party's ability to pay when determining whether to award costs in a case. *See Gallegos v*

*Southwest Community Health Service*s, 117 N.M. 481, 872 P.2d (Ct.App. 1994). In *Cafeteria Operators v Coronado - Santa Fe Assocs.*, 1998-NMCA-005, ¶ 37, 124 N.M. 440, 952 P.2d 435, this Court held that, even though the plaintiff won a majority of its claims, the trial court's decision that each party should bear its own costs was not an abuse of discretion, based on its consideration of the complexity of the case, the issues involved, the legitimacy of some of the disputes, and the fact that the plaintiff had requested more damages than it ultimately received.

Mrs. Bernier was 91 years old when this case was filed; she is now 95. She had an annuity that was a part of her monthly income, but that annuity expired. Mrs. Bernier was the subject of a nearly three-year long sequestered litigation process involving her personal rights before Judge Barbara Vigil, which was filed by her daughter, Kedzior. Mrs. Bernier's defense of the sequestered case depleted her assets, and she lost more than $275,000.00 in value of her stock between the time of her demand from Defendant and when the stock was returned to her by Judge Hall. Mrs. Bernier lives on a fixed income and without being able to liquidate the stock, it was difficult for her to support herself and defend herself against the sequestered case filed against her by Kedzior.

Defendant's Cost Bill and Amended Cost Bill contained manifestly fictitious costs for travel expenses of Beverly Bernier for airfare, hotel and rental car expenses. Upon proper review of the evidence, the district court should have seen and understood that it was Defendant and his witnesses who were mis-stating the

record and engaging in over-reach for fees and costs to which they were clearly not entitled. Defendant's claim of "typographical errors" is simply incredible. His repeated filings of amended affidavits with no motion in support was an abuse of the district court's process, for which he would have been rewarded if Mrs. Bernier had not objected; the clerk would have entered an award of costs based on "typographical" mistakes. The equities were so overwhelmingly in Mrs. Bernier's favor that the failure to order the parties to bear their own costs amounts to an abuse of discretion. In addition to the costs improperly entered as a matter of law, the cost award should be reversed is its entirety and the parties be ordered to bear their own costs.

CONCLUSION:

For the foregoing reasons, the district court's decision must be reversed.

Respectfully submitted,

ILYSE D. HAHS, ATTORNEY AT LAW, LLC
Ilyse Hahs-Brooks, Esq.
2014 Central Avenue SW
Albuquerque, NM 87104
505-224-9661

G. HOLDT GARVER CHARTERED
G. Holdt Garver, Esq.
2701 San Pedro NE, Ste. 1
Albuquerque, NM 87110
888-5100

and

L. Helen Bennett
Attorney at Law
P.O. Box 4305
Albuquerque, NM 87196-4305
(505) 321-1461

I certify that a true copy of the foregoing was sent via electronic service this 2nd day of April 2012, to:

Aaron Wolf
Jun Roh
Cuddy McCarthy