IN THE COURT OF APPEALS
OF THE
STATE OF NEW MEXICO

SHANNON SPOON, individually and as Personal representative of Daniel Spoon, Deceased.
Plaintiff/Appellee

v.

ARTURO MATA AND
BURN CONSTRUCTION COMPANY, INC.
Defendants.

v.

KORINA FLORES, as Parent, Guardian, And Next Friend of minor Noah Spoon,
Intervenor/Appellant

§

Court of Appeals # 32,674

Eddy County District Court
No. CV-2012-00983
Judge Jane Shuler-Gray

APPELLANT'S BRIEF IN CHIEF

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ORAL ARGUMENT
IS REQUESTED

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Appellant – Korina Flores ("**Flores**"), on behalf of her son, Noah Spoon ("**Noah**").

Appellee – Shannon Spoon, represented by her relative Dick Blenden ("**Blenden**").

Decedent – Daniel Spoon, Noah's natural father and Shannon's deceased husband.

I. INTRODUCTION

This is a wrongful death lawsuit arising out of the death of Noah's father, Daniel Spoon. Appellant contests the appointment of Shannon Spoon – Decedent's ex-wife -- as the sole personal representative of the wrongful death recovery. Appellant requests intervention to protect Noah's rights. As Daniel's only child, Noah has a right to half of the wrongful death recovery. In addition, Noah has his own loss of consortium claim that should be asserted in this case. Someone must protect Noah's interests. And, in New Mexico, when a child is involved, the "best interests" of the child take priority in all decisions.

Importantly, intervention is mandatory if there is a "**possibility**" of inadequate representation. The appointed personal representative, Appellee, is not related to Noah and has her own competing loss of consortium and bystander claims, which are independent of the wrongful death claim. According to a recent decision by our Supreme Court, Spencer v. Barber, No. 33,133, --- P.3d ----, 2013 WL 1339667 (N.M. Feb. 23, 2013), Appellee and her attorney, Blenden, are clearly conflicted from representing Noah. In the words of this Court, "To ignore this inherent conflict would result in an absurdity." Oldham v. Oldham, 2009-NMCA-126, 222 P.3d 701, aff'd in relevant part, 2011-NMSC-007, 247 P.3d 736. Accordingly, Korina, as representative on behalf of Noah, is entitled to intervene as a

matter of right. N.M.R.A. 1-024(A). Alternatively, Appellant may intervene under the permissive rules. N.M.R.A. 1-024(B). Appellant, as Noah's mother and legal guardian, should be appointed wrongful death co-personal representative to prosecute Noah's interests in the wrongful death recovery. At a minimum, Appellant should be allowed to choose the counsel who will prosecute this case in her infant's best interests.

II. SUMMARY OF THE PROCEEDINGS

A. NATURE OF THE CASE

The nature of the case is described in the Introduction. Ultimately, the primary issue is whether two strangers to the child (Shannon Spoon and her relative attorney, Blenden) may exclusively control the litigation, control the financial fate of the child and even take 33% of Noah's recovery before he pays his own attorney against the will of his natural mother and where they have clear conflicts of interest. Equity should abhor that result.

The Judgment at issue is the judgment of the Trial Court denying Appellant's right to intervene: the ***Order Denying Application to be Appointed Personal Representative of the Estate of Daniel Spoon by Korina Flores and Denying her Petition to Intervene ("Order").*** (RP84).

B. RECORD ON AND PRESERVATION OF APPEAL

The record consists of the record proper ("**RP**"), and one disc from the hearing on 10/23/12 ("**T**"). The disc will be cited based on chronological time – i.e., the disc has the

actual time on it. The issues were preserved through written motions, all of which will be identified in the headings by RP number. NMRA, Rule 12-216(A).

C. Course of the Proceedings and Summary of Relevant Facts.[1]

1. On October 15, 2011, Noah Spoon was born to Korina Flores. Accordingly, Noah is a one-year old child. Appellant is his mother and legal guardian. (RP10).
2. Daniel Spoon is Noah's natural father. (RP10).
3. On July 30, 2012, Daniel Spoon died in a motorcycle crash. (RP10).
4. Arturo C. Mata was driving a truck owned by Burn Construction, Inc. on July 30, when he turned directly in front of Daniel, causing his death. (RP18-22). Appellee admits liability is clear. (RP40).
5. Shannon Spoon was Daniel's wife at the time of the accident. She is not related to Noah and has no personal stake in his life. (RP10).
6. On August 8, 2012, Shannon filed this lawsuit against Mr. Mata and his employer, Burn. (RP1). Shannon sought recovery for wrongful death for all of the heirs, her own personal loss of consortium, and her own personal bystander liability. (RP1-3). The last two claims – loss of consortium and bystander liability – are claims personal to Shannon, and will diminish the insurance available to Noah.
7. Shannon's Complaint seeks recovery of punitive damages based solely on the conduct of the driver, Mr. Mata, without alleging reckless entrustment or lack of training by his

[1] Appellant did not include a separate summary of the facts because, given the nature of this intervention proceeding, all of these facts are relevant herein.

employer, Burn. The Complaint also fails to allege recklessness as grounds for punitive damages, instead only pleading "willful and wanton." Finally, the Complaint fails to plead negligence per se, despite the clear violations of New Mexico statutes in turning in front of oncoming traffic. (RP1-3).

8. At the time Appellee filed her Complaint, Shannon Spoon had not been appointed the wrongful death representative for Daniel Spoon. (RP1,11). Nevertheless, she purported to file the lawsuit on behalf of all of Daniel's legal heirs. (RP1).

9. In fact, Noah is an infant and has his own loss of consortium claim. (RP11,47).

10. Prior to when Mr. Dugan was hired herein, Blenden contacted Korina Flores regarding her son's claim. (TR10:34). Blenden indicated he knew Daniel may have a son (i.e., Noah), but that he could not recover without proof. (TR10:34). Nevertheless, Blenden told Appellant they did not need a lawyer. (TR10:35).

11. Contrary to Blenden's advice, Ms. Flores sought personal counsel for Noah to protect his interests. (TR10:35).

12. On September 13, 2012, Korina Flores, as mother and legal guardian to Noah, hired Kenneth D. Dugan and his firm, Martin, Dugan and Martin, to represent Noah in this proceeding. (RP11;TR10:35).

13. Korina hired Dugan on a contingency fee basis, because she does not have the financial ability to hire an attorney hourly. (TR10:36). Appellant is a single-mother with a total net worth of less than $50,000. (TR10:35-36).

14. Korina Flores does not want Blenden to represent Noah. (TR10:35).

15. On September 14, 2012, Dugan informed Blenden that he represented Noah, and that he would like to join in the lawsuit to represent Noah. (RP71). Blenden noted he would resist Noah's claim on the grounds Noah was not Daniel's son. (RP71). Subsequently, on September 17, 2012, Mr. Dugan proposed a plan to Blenden by which Noah and Shannon could prosecute the action together in Santa Fe.

16. Rather than agreeing to that plan, however, on September 18 Blenden instead filed a separate probate proceeding and procured an *ex parte* order appointing Shannon Spoon as personal representative of Decedent's "estate." (RP63). Appellee did not provide Appellant or Noah notice of that proceeding. The probate proceedings are a part of the record. (RP63).

17. Notably, Appellee represented to the Court under oath on September 18, that she has "carefully searched for all of the decedent's heirs and I have found he has no living heirs other than myself and his mother, Marla Duck...." (Ex. A, p. 2).

18. Just days earlier, Dugan had informed Appellee's attorney, Blenden, in writing Noah was Daniel's child. (RP71-72). Dugan told Blenden the paternity test would come back the very next week. (RP53). In fact, Mrs. Spoon had known that Noah was Daniel's son for months, and even tried to get Noah and Daniel together. (RP53).

19. Noah is entitled to have someone represent his best interests herein.

20. Accordingly, on September 28, Appellant filed her Motion to Intervene and Petition to Be Appointed Wrongful Death Personal Representative And/Or Co-Representative of Wrongful Death Claim ("**Motion**"). (RP9).

21. Appellant filed the Motion to protect the best interests of Noah, the Decedent's only child. Appellant was understandably concerned strangers were trying to determine Noah's financial fate. (RP9-11).

22. On October 16, 2012, Appellee filed her Response to the Motion to Intervene ("**Response**"). (RP40).

23. On October 19, 2012, Appellant filed her Reply to the Response ("**Reply**"). (RP48).

24. Pursuant to the Motion and the Reply, Appellant sought intervention on two independent bases. (RP9). First, Appellant sought to intervene to assert Noah's separate loss of consortium claim arising out of the loss of his father, Daniel. Notably, Appellee had filed her own loss of consortium claim. However, she and her counsel failed to file a consortium claim for Noah. (RP1). In fact, in the Response, although acknowledging Noah has a consortium claim, Appellee expressly disparaged that claim, alleging it lacks merit and would harm Appellee's other claims. (RP47).

25. Second, Appellant sought intervention to be appointed the co-representative of the wrongful death estate, to represent Noah's interests. Appellant alleged Appellee and Blenden could not provide "adequate representation" of Noah's interests and that impermissible conflicts precluded their representation. (RP9-16). Appellant objected to

appointment of Shannon Spoon as the sole personal representative and representation by Blenden on the grounds they had a conflict of interest, that they otherwise could not adequately represent Noah's interests, and/or on the basis that Noah had the right to counsel of his own choosing. (RP12-16). Appellee had already filed competing claims for her own loss of consortium and bystander liability. (RP1). Because there likely would only be one solvent defendant and finite insurance policy limits, Appellant argued Shannon and Noah are competing claimants for a limited fund. (RP12-15).

26. Appellant requested the Court appoint co-personal representatives: One to represent Shannon's interests (Appellee) and another to represent Noah's interests (Appellant). The attorneys for each of the respective personal representatives could then file and prosecute each of the respective consortium claims, while jointly pursuing the wrongful death claim. Appellant noted that any other outcome would result in Noah having no personal representation and/or having to forfeit 70% of his recovery. Importantly, Blenden was claiming 33% of the recovery through his contract with Shannon Spoon – which Appellant has never seen and certainly has not agreed to. In fact, Appellant had already signed a contract with Martin, Dugan and Martin, granting them 37% of Noah's recovery in this wrongful death action. Accordingly, if Blenden were able to claim 33% of the recovery away from Noah – against his will – Noah could lose 70% of his recovery. Appellant pointed out the egregiousness of such an outcome. (RP9;48).

27. Importantly, in the Response and during the hearing, counsel for Ms. Spoon, Blenden, contended that he did not represent Noah Spoon at all. (RP43). Appellant noted the apparent problems that position creates. (RP48).

28. Appellant also argued Appellee and/or Blenden may have desires for greater recoveries and a higher risk threshold, and thereby refuse a settlement Noah would have desired. (RP57). Or, conversely, they may settle too low. Either way, Noah stands to lose substantial sums. Appellant's counsel, Dugan, related a prior experience as co-counsel with Blenden where Blenden and Dugan disagreed on a multi-million dollar settlement offer, the settlement offer was not accepted contrary to Dugan's opinion, and the clients received nothing when the case was tried to the jury. (RP57). "Rolling the dice" did not work out so well. Certainly, Appellant argued Noah has the right to separate counsel to seek a reasonable settlement. (RP9-15).

29. Appellant pointed out that Blenden and Appellee are related; whereas, Blenden is not related to Noah. (RP56). In fact, before the intervention was filed, Appellee and her counsel sought to exclude Noah from any recovery by denying that Daniel had any other heirs. (RP63). Only after the paternity test proved otherwise, did Blenden agree Noah would be entitled to share in the recovery. However, that was too late. The conflict was already created. The bottom line according to Appellant was that Appellee and her counsel cannot and do not represent Noah's best interests, and the child's best interests must be the Court's primary concern. (RP9-16).

30. Despite all of these arguments, the District Court denied intervention. Judge Shuler-Gray appointed Shannon as the sole personal representative of the wrongful death estate. She ruled there was no evidence Appellee or Blenden could not adequately represent the estate. She further ruled Blenden does not represent Noah and does not have any conflict of interest. (RP84-86). Accordingly, apparently no one is going to represent Noah in this suit. That is a travesty of justice.

31. The District Court further ruled Noah could assert his loss of consortium claim in a separate lawsuit. (RP87). She did not say who would pay for that lawsuit, or when or where it should be filed. She simply ruled Noah's mother, Appellant, should file the claim in another suit. (Id.). Notably, Appellant testified she does not have the financial wherewithal to hire an hourly attorney or experts to pursue such a claim. (TR10:36:20-50).

32. This Appeal followed.

D. CHALLENGE TO JUDGMENT AND SPECIFIC FINDINGS

Appellant challenges the following findings in the Order as not being supported by substantial evidence:

1. The Court Improperly Ruled on Inadequate Representation. (RP86,¶12,7).

The trial court erred in ruling there was no evidence of any inadequate representation of the estate by either Shannon Spoon or her attorney. As shown below under Issues 2 and 3, Appellee and her attorney cannot adequately represent Noah Spoon.

2. The Court Improperly Ruled Blenden Does Not Represent Noah (RP86,¶3).

The Trial Court ruled Blenden does not represent Noah. As noted in Issue 3 below, that contradicts established New Mexico law. Whatever lawyer represents Noah's portion of the wrongful death recovery, also necessarily must represent the best interests of Noah.

3. The Court Erred in Ruling Blenden and/or Appellee are Not Conflicted (RP86,¶5,8)

Appellant will prove below Appellee and her attorney are conflicted from representing Noah's share of the wrongful death recovery.

III. GENERAL STANDARD OF REVIEW ON APPEAL

This Court has noted a ruling denying intervention will be upheld absent an abuse of discretion. Nellis v. Mid-Century Ins. Co., 2007-NMCA-0090, ¶ 4, 163 P.3d 502. However, in due respect to that ruling, the proper rule, and the one followed by the federal courts, is that only permissive intervention is adjudged by discretion; mandatory intervention is reviewed *de novo*. City of Colo. Springs v. Climax Molybdenum Co., 587 F.3d 1071, 1078 (10th Cir.2009) (holding mandatory intervention is reviewed *de novo*); Ligas ex rel. Foster v. Maram, 478 F.3d 771, 773 (7th Cir. 2007)(noting elements other than timeliness to mandatory intervention are reviewed *de novo*). "When our state court rules closely track the language of their federal counterparts, ... federal construction of the federal rules is persuasive authority for the construction of New Mexico rules." Albuquerque Redi–Mix, Inc. v. Scottsdale Ins. Co., 2007–NMSC–051, ¶ 9, 168 P.3d 99. Our New Mexico Supreme Court has, in fact, cited federal cases to argue the standard of review is more circumspect in

mandatory intervention, than permissive intervention, because "a denial of intervention of right may be more harmful than a denial of permissive intervention." Apodaca v. Town of Tome Land Grant, 86 N.M. 132, 520 P.2d 552 (N.M. 1974).

Regardless, the appropriateness of intervention is a question of law this court reviews *de novo* when the facts are not in dispute. Chino Mines Co. v. Del Curto, 114 N.M. 521, 523, 842 P.2d 738, 740 (N.M.App.1992) (applying *de novo* review to a denial of intervention motion where underlying facts are not in dispute). The relevant facts are not in dispute. Likewise, this Court reviews *de novo* the meaning and application of statutes. State v. Cleve, 1999–NMSC–017, ¶ 7, 980 P.2d 23. Similarly, conflicts of interest are reviewed by this Court *de novo*. Churchman v. Dorsey, 1996–NMSC–033, ¶ 11, 919 P.2d 1076; State v. Vincent, 2005-NMCA-064, ¶4, 112 P.3d 1119. Certainly, when the conflict of interest relates to appointment of a personal representative, this Court reviews the matter *de novo*. Oldham, 2009-NMCA-126, ¶5.

Notably, if a discretionary standard applies, "[a]n abuse of discretion occurs when a ruling is clearly contrary to the logical conclusions demanded by the facts and circumstances of the case." Sims v. Sims, 1996–NMSC–078, ¶ 65, 930 P.2d 153. "[W]hen a trial court misapprehends the law, the court abuses its discretion." Armijo v. Wal-Mart Stores, Inc., 2007-NMCA-120, ¶ 19, 168 P.3d 129. Also, "if the facts essential to the trial court's judgment are not established by substantial evidence in the record, [the court] will

necessarily find an abuse of discretion." Apodaca v. AAA Gas Co., 2003-NMCA-085, ¶ 60, 73 P.3d 215.

IV. ARGUMENTS AND AUTHORITY ON APPEAL

Issue One: **The District Court erred in refusing to permit Appellant to intervene to assert Noah's loss of consortium claim.**

(Preserved by written pleadings, RP9,48)

As noted above, this should be a *de novo* review for mandatory intervention (NMRA 1-024A), and abuse of discretion review for permissive intervention (NMRA 1-024B).

Appellant is entitled to intervene to protect Noah's consortium claim.

1. The Rules on Intervention

N.M.R.A. 1-024 governs intervention. That Rule provides in relevant part:

> A. **Intervention of Right**. Upon timely application anyone shall be permitted to intervene in an action:
>
> ...
>
> (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
>
> B. **Permissive Intervention**. Upon timely application anyone may be permitted to intervene in an action:
>
> ...

(2) when an applicant's claim or defense and the main action have a question of law or fact in common. ...

In exercising its discretion pursuant to this paragraph the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Section A(2) governs mandatory intervention. Section B(2) controls permissive intervention.

1. Noah Has a Separate Loss of Consortium Claim That Must Be Protected.

In New Mexico, "upon the death of a parent, a minor child may pursue a separate claim for loss of parental consortium outside of a wrongful death action." State Farm Mutual Auto. Ins. Co. v. Luebbers, 138 N.M. 289, 119 P.3d 169, ¶ 18 (N.M.App.,2005). According to the Pattern Jury Charges, this damage item is to be separately set out in a special verdict. N.M.R.A. Civ. U.J.I. 13-1830. Appellee has not asserted this claim for Noah. In fact, she has no legal right to assert that claim for Noah, since she is not related to Noah. Appellant, as the mother, is the only one who may assert that claim. Accordingly, Appellant should be permitted to intervene.

2. Noah Satisfies the Standards for Permissive Intervention.

Permissive intervention under N.M.R.A. 1-024B(2) is appropriate. Noah's and Shannon's consortium claims clearly arise out of the same facts and circumstances – Daniel's death in the motorcycle accident. Noah's action not only has common questions of fact and law – it has the same questions of fact and law as this lawsuit. Moreover, this case was just recently filed and no one will be prejudiced by intervention.

3. The Possibility of *Res Judicata* or Collateral Estoppel Applying Mandates Intervention.

The Trial Court's solution is to permit Noah to file a separate consortium action. However, "[t]he right to intervene is not barred by the existence of another remedy ... [if] those rights may well be substantially prejudiced if they cannot be presented at this time." Clark v. Sandusky, 205 F.2d 915, 919 (7th Cir.1953); Utah Ass'n of Counties v. Clinton, 255 F.3d 1246, 1252 (10th Cir.2001) ("[T]he mere availability of alternative forums is not sufficient to justify denial of a motion to intervene" because "at most," participating in a new proceeding "would not provide the level of protection to the intervenors' interests that the current plan offers.").

Importantly, if the current personal representative, Appellee, and her attorney lose in this litigation, in all likelihood Noah's separate claims for loss of consortium will be barred by *res judicata* and/or collateral estoppel. Parties in privity are barred by *res judicata* and collateral estoppel. Mascarenas v. City of Albuquerque, 2012-NMCA-031, ¶ 30, 274 P.3d 781 (noting collateral estoppel bars parties "and their privies" on all "ultimate issues and facts shown to have been actually and necessarily determined"). The personal representative of a wrongful death suit is the "trustee" for the beneficiaries – i.e., Noah. Stang v. Hertz Corporation, 81 N.M. 348, 467 P.2d 14 (N.M. 1970). Accordingly, any verdict in this case likely will be binding on Noah on liability issues, at least. Hansberry v. Lee, 311 U.S. 32, 41-42, 61 S.Ct. 115, 117-118 (1940) (holding in "representative" action parties represented are

bound by judgment). That would be true, even though Noah was forbidden from joining in or even having a say in this lawsuit.

As pleaded more thoroughly in Issue 2 below, under N.M.R.A. 1-024B(2), any party who is not adequately represented in the litigation and whose interests will be affected by the litigation has an absolute right to intervene. Noah is clearly not adequately represented herein with respect to his separate consortium claim – a claim Appellee and Blenden refuse to assert. And, because disposition of this case may jeopardize his consortium rights, mandatory intervention is proper. Thriftway Marketing Corp. v. State, 111 N.M. 763, 810 P.2d 349, 351 (N.M.App.,1990)(holding party whose interests will be "jeopardized" may intervene).

4. Denying Intervention Will Practically Impair Noah's Interests.

Notably, intervention is permitted where the action "may *as a practical matter* impair or impede" the applicant's rights. N.M.R.A. 1-024A(2). The court "may consider any significant legal effect in the applicant's interest and is not restricted to a rigid res judicata test." Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n, 578 F.2d 1341, 1345 (10th Cir.1978). That is because the decision whether to allow intervention is governed by equitable principles. O'Hare v. Valley Utilities, Inc., 89 N.M. 105, 547 P.2d 1147 (N.M. App. 1976), reversed in part, 89 N.M. 262, 550 P.2d 274 (1977). The equitable test of the right to intervene in a suit is, "Does intervenor stand to gain or lose by judgment?" Stovall v. Vesely, 38 N.M. 415, 34 P.2d 862. (N.M. 1934).

The Trial Court's ruling ignores the *practicalities* of litigation. WildEarth Guardians v. U.S. Forest Service, 573 F.3d 992, 995 (10th Cir. 2009) (allowing intervention if "absentee would be substantially affected in a practical sense"). Appellant does not have the financial wherewithal to separately pursue Noah's consortium claim. (TR10:36). Practically, that would require hiring separate experts, incurring deposition costs, and otherwise expending tens of thousands and perhaps hundreds of thousands of dollars in unnecessary expenses – the same expenses incurred against Noah's will in this litigation by Appellee and Blenden. Notably, even if Appellant could afford it, it is unfair to require Noah to pay those expenses twice: Once through reimbursement of Blenden, and second in his own consortium suit. Equity would dictate conserving litigation resources by consolidating the two actions. Also, separate lawsuits would create a great danger of contradictory judgments. Accordingly, judicial efficiency and equity dictate permitting Noah to file his consortium claim in this suit.

Notably, the point of having a "personal representative" to bring a wrongful death suit is to "prevent multiple and possibly contradictory lawsuits." Chavez v. Regents of the Univ. of N.M., 103 N.M. 606, 609, 711 P.2d 883, 886 (N.M. 1985). It makes no sense to require Noah to file a separate lawsuit – thereby generating two lawsuits on identical facts – when all of the claims could be decided in this one lawsuit.

Issue Two: **The District Court erred in naming Shannon Spoon as the sole personal representative of the wrongful death action despite her lack of relation to Noah and despite the clear conflicts of interest.**

(Preserved by written pleadings, RP9;48)

This question presents issues of law, which this Court reviews *de novo*. (See citations above); Oldham, 2009-NMCA-126, ¶5 (applying *de novo* standard to appointment of wife with inherent conflict). Alternatively, the Trial Court abused its discretion.

The Trial Court erred in ruling Appellee may adequately represent Noah's interests as the personal representative. In fact, Appellee has a clear conflict of interest. Moreover, Noah has his own interests in assuring that any settlement or judgment is to his best interests, which Shannon again cannot adequately represent – even if she had authority to do so, which she does not.

Appellant will cite many decisions and provide several arguments that should be considered by this Court. However, this Court probably need look no further than a 2013 decision by our New Mexico Supreme Court: Spencer, 2013 WL 1339667. In that case, the Court addressed the very question at issue herein and sided with Appellant's position, stating the personal representative has "**an improper incentive to allocate the settlement to claims for which she was the only beneficiary**." That decision controls this case.

1. **Intervention Is Mandatory If There Is a "Possibility" Noah's Interests Are Not "Adequately Represented."**

N.M.R.A. 1-024(A) provides a party who claims an interest in the subject of the litigation a mandatory right to intervene, unless that party's rights are "adequately represented" by

existing parties. It is undisputed Noah, as the child of the deceased, has an interest to the wrongful death proceeds. N.M.S.A. § 41-2-3. That is sufficient to establish Noah's interest to intervene as a matter of law. Dominguez v. Rogers, 100 N.M. 605, 607, 673 P.2d 1338, 1340 (N.M.App.,1983). Accordingly, unless the Court finds Noah's interests are adequately represented, intervention is mandatory.

Notably, to establish the inadequate representation prong, a prospective intervenor "must only make a showing that the representation 'may be' inadequate and 'the burden of making that showing should be treated as minimal.'" Ligas ex rel. Foster v. Maram, 478 F.3d 771, 774 (7th Cir.2007)(quoting Trbovich v. United Mine Workers of Am., 404 U.S. 528, 538 n. 10, 92 S.Ct. 630, 30 L.Ed.2d 686 (1972)). "The possibility that the interests of the applicant and the parties may diverge need not be great in order to satisfy this minimal burden." Utahns For Better Transp. v. DOT, 295 F.3d 1111, 1117 (10th Cir.2002). Appellant must only show there is a "serious possibility" that the representation may be inadequate and "all reasonable doubts should be resolved in favor of allowing the absentee, who has an interest different from that of any existing party, to intervene so that he may be heard in his own behalf." Cooper v. Albuquerque City Commission, 85 N.M. 786, 518 P.2d 275 (N.M. 1974)(quoting Wright and Miller, Federal Practice and Procedure: Civil, § 1916 at 543 (1972)). Adequacy of representation generally turns on (1) "whether there is an identity or divergence of interest between the potential intervenor and an original party" and (2)

"whether that interest is diligently represented." Lima v. Chambers, 657 P.2d 279, 283 (Utah,1982).

2. **A Wrongful Death Heir Is Not "Adequately Represented" When The Proposed Personal Representative Has An Adversity of Interest**.

N.M.S.A. § 41-2-3 provides that the wrongful death action "shall be brought by and in the name of the personal representative of the deceased person...." That section presumes the personal representative will represent the beneficiaries: I.e., the personal representative becomes the "statutory trustee for the discoverable and identifiable beneficiaries named in the statute." Stang, 467 P.2d 14. That section does not, however, address the issue of whether a personal representative may be appointed who has a conflict of interest or whether the heir may intervene in the event of inadequate representation due to a conflict. Appellant seeks to prove wrongful death heirs have a right to mandatory intervention when they can show their interests are "not adequately represented." N.M.R.A. 1-024(A); Solon v. WEK Drilling Co., Inc., 113 N.M. 566, 829 P.2d 645 (N.M. 1992).

New Mexico courts hold representation is not "adequate" when there is an "adversity of interest." New Mexico Right to Choose/NARAL v. Johnson, 1999-NMSC-005, ¶ 20, 975 P.2d 841 (holding representation may be proven inadequate "by showing, for example, an adversity of interest, collusion, or nonfeasance"); Chino Mines Co. v. Del Curto, 114 N.M. 521, 524, 842 P.2d 738, 741 (N.M.App. 1992)(citing cases holding "an adverse interest" establishes inadequate representation).

In Spencer, 2013 WL 1339667, the court acknowledged the personal representative and the beneficiary "**should have**" the "identical" interest – "to recover as large an award as possible." Spencer at ¶ 8. That, however, is not always the case. The Court went on to hold that an "adversarial exception" exists when the personal representative has her own claims that could compete with the wrongful death recovery. Id. at ¶ 25-29. That adversarial exception creates an insurmountable conflict of interest. And, in that case, there is no discretion: "An agent cannot place herself in a position in which her duty and interests conflict with those of her principal." Id. at ¶ 29 (quoting Home Insurance Co.).

3. Shannon Spoon Has a Clear Conflict of Interest.

The Trial Court failed entirely to consider whether a conflict exists when the personal representative also has personal claims in the same lawsuit for which the other beneficiaries will not share in the recovery. The Court ruled Blenden was not conflicted. (RP84). However, the Trial Court's Order expressly fails to consider whether the proposed personal representative has a conflict of interest with the heirs due to her separate bystander and consortium claims. Clearly, she does.

Appellant acknowledges Plaintiff has every incentive to get as large an award as possible – for herself! If she recovers $2 million, she gets half of that (or $1 million) if it is all in the wrongful death recovery. However, if the $2 million is split 50-50 with her personal claims, such that the settlement or jury award is divided between the consortium and wrongful death claims, she will get $1.5 million, whereas Noah would only get $500,000.

Plaintiff has every incentive to recover more of the money in her personal claims. To deny that fact, is to deny reality. In fact, that is exactly what our Supreme Court said in Spencer.

4. *Spencer v. Barber* Controls This Case.

In Spencer v. Barber, 2013 WL 1339667, our Supreme Court recently considered the duties of a lawyer when the personal representative and a prospective statutory beneficiary to the wrongful death recovery disagree. The Court ruled a conflict of interest exists as a matter of law when "the interests of the personal representative and the beneficiaries are adverse, or become adverse...." The Court further held that, if an attorney finds himself in such a "conflicted situation," it is a breach of his duty to not resolve the conflict. Id., ¶ 27. Appellant simply asks this Court resolve the "conflicted situation" by allowing Appellant to intervene and appointing her co-personal representative.

In Spencer, our Supreme Court quoted with approval the Georgia Court of Appeal's opinion in Home Insurance Co. v. Wynn, 493 S.E.2d 622, 626 (Ga. Ct. App. 1997). Id. at ¶ 29. Home Insurance Co., in fact, involves facts identical to this case. In that case, the court upheld a jury verdict against a widow and her attorney for breach of fiduciary duty for bringing and settling wrongful death claims and her own loss of consortium and other personal claims in the same lawsuit. Our Supreme Court, construing Home Insurance Co, noted, "**When she settled the lawsuit, she had an improper incentive to allocate the settlement to claims for which she was the only beneficiary**." Id. at ¶ 29. The Georgia Court identified the conflict clearly:

> **An agent cannot place herself in a position in which her duty and interests conflict with those of her principal.** ... The agent is not permitted to acquire rights in the settlement antagonistic to the principal's interests. ... "It is generally, if not always, humanly impossible for the same person to act fairly in two capacities and on behalf of two interests in the same transaction. **Consciously or unconsciously [s]he will favor one side as against the other, where there is or may be a conflict of interest. If one of the interests involved is that of the trustee personally, selfishness is apt to lead [her] to give [her]self an advantage**. If permitted to represent antagonistic interests the trustee is placed under temptation and is apt in many cases to yield to the natural prompting to give [her]self the benefit of all doubts." ... **The trustee must avoid being placed in such a position**,...

Home Insurance Co., 493 S.E.2d at 626 (citations omitted)(quoted in part in Spencer).

Home Insurance Co. and its construction by our Supreme Court in Spencer are binding. When the personal representative has her own personal consortium claims, she has an "improper incentive" to recover more money in the personal claims than in the wrongful death claims, which she must share with the designated heirs. Spencer, ¶ 29.

5. Appellee Should Be Removed As Personal Representative.

Appellant should not be required to sit back and pray that Shannon Spoon will do the right thing and be fair in the settlement or presentation of the case before the jury. It is a conflict. And, the trustee has a duty to avoid that conflict. Moreover, when the conflict is timely raised – as it was in this case – this Court has a duty to remove the trustee or otherwise resolve the conflict by appointing Appellant as the co-personal representative. Oldham v. Oldham, 2011-NMSC-007, ¶38, 247 P.3d 736; Chisholm v. Rueckhaus, 124 N.M. 255, 948 P.2d 707 (N.M.App. 1997)("In fact, courts have a duty to assure that the interests of a child are legally represented.").

In Oldham, this Court and subsequently the Supreme Court ruled that a district court lacks authority to appoint a personal representative with a conflict of interest. 2011-NMSC-007, ¶36, 247 P.3d 736 (holding "wife cannot be appointed ... because of inherent conflict of interest"); 2009-NMCA-126, ¶7. In that case, the conflict arose because the wife was pursuing her own interests in a divorce while simultaneously serving as personal representative of the estate. This Court stated, "To ignore this inherent conflict would result in an absurdity." Id. Accordingly, this Court simply cannot confirm Appellee's appointment.

Numerous courts in other states have ruled a person with a conflict may not be appointed personal representative in a wrongful death action. See Continental National Bank v. Brill, 636 So.2d 782 (Fla. 3rd Dist. Ct. App. 1994) (holding personal representative with stake in allocation of settlement proceeds may have an adverse interest that precludes service as personal representative); Smith v. Holmes, 921 So.2d 283 (Miss. 2005) (holding conflict with heir precludes appointment as sole personal representative); In Matter of Estate of Brandon, 902 P.2d 1299 (Alaska, 1995) (holding dual representation in wrongful death suit of decedent's minor child and parents may have been impermissible conflict).

In fact, several courts have held specifically that, where the personal representative seeks personal recovery from the same funds as the proposed intervenor, the intervenor's interests are not adequately represented and intervention should be permitted. Swift v Swift, 61 FRD 595, (E.D. N.Y. 1973) (holding interest of daughter could not be adequately represented by her father because of their conflicting interests); United States v Eilberg, 89

FRD 473 (E.D. Pa.1980) (holding intervenor not adequately represented where conflicting claims to fund); In Re David M. Hunt Constr. Co., 3 Bankr. 256 (Bankr. E.D. Pa. 1980); Werbungs Und Commerz Union Austalt v Collectors' Guild, Ltd. 782 F. Supp. 870 (S.D.N.Y. 1991).

In Smith v Clark Sherwood Oil Field Contractors, 457 F.2d 1339 (5th Cir. 1972), cert. den. 409 U.S. 980, the court held the widow and four legitimate children of a deceased seaman could intervene as of matter of right in a suit filed by the seaman's personal representative to recover death benefits. The personal representative had filed suit for the legitimate children, as well as the decedent's illegitimate daughter. The court held the conflicting nature of the beneficial interests prevented the personal representative from acting for the benefit of all the alleged beneficiaries and thus the interests of the proposed intervenors were not adequately represented. Accordingly, the court reversed the district court and remanded with directions that the court permit the intervention.

Based on all of this authority, Appellee should be disqualified. As noted above, Appellant only has to prove the "possibility" of inadequate representation. Cooper, 518 P.2d 275. Appellant requests this Court resolve the conflict by removing Appellee as personal representative vis-à-vis Noah's claims, and appoint Appellant co-personal representative on behalf of Noah.

Issue Three: The District Court erred in ordering Blenden may adequately represent Noah's interests.

(Preserved by written pleadings, RP9;48).

This court reviews decisions regarding conflicts of interest *de novo* – especially when a child is involved. (Supra, p.10-11); State ex rel. Children, Youth & Families Dept. v. Tammy S., 1999-NMCA-009, 974 P.2d 158 ("Whether the appointment of a single attorney in this case created a conflict of interest is a question of law that this court reviews de novo.").

The Trial Court erred in ruling Blenden could represent Noah's interests through his retention by Appellee. That contradicts Noah's right to choose his own counsel and creates impermissible conflicts of interest.

1. Noah Has a Right to Choose His Own Counsel.

The first question is whether Noah has a right to choose his counsel to represent his portion of the wrongful death recovery. The Trial Court ruled below that Blenden does not represent Noah Spoon. That is true. However, indirectly that counsel must represent the best interests of the beneficiaries. "[A]ny agreement to pursue a wrongful death lawsuit will, by definition, be for the benefit of the statutory beneficiaries." Spencer, ¶ 22. The question then is whether, when the heir objects to the appointment of counsel by the personal representative, whether that heir can appoint their own counsel to represent their interests in the wrongful death recovery. If they cannot, that lawyer may take a huge percentage of the heir's recovery against his will.

"[A]n attorney is required for an infant not otherwise represented in an action." Wasson v. Wasson, 92 N.M. 162, 584 P.2d 713, 714 (N.M.App.,1978). It is "plain error for the court to proceed in the absence of counsel for the children." Id. (citing People In Interest of M. B. v. J. B., 535 P.2d 192 (Colo.1975)). "As a matter of public policy, in every proceeding in which minor children are involved, a court's primary obligation is to further the best interests of the child." Id. "It is the duty of a trial court and this Court to protect legal rights of children." Id. A court of equity, if cognizant of the necessary facts, "should on its own motion protect the rights of minors." Id. Although minor children have a right to sue and be sued, children do not possess the requisite legal capacity to participate in litigation in their own names. 43 C.J.S. Infants § 215 (1978). Due to their incapacity, children must bring or defend a legal proceeding through an adult representative. In fact, "a trial court in an action involving minor children has a special obligation to see that they are properly represented, not only by their own representatives, but also by the court itself." Garcia v. Middle Rio Grande Conservancy Dist., 99 N.M. 802, 664 P.2d 1000 (N.M.App. 1983), overruled on other grounds by Montoya v. AKAL Sec., Inc., 114 N.M. 354, 356–57, 838 P.2d 971, 973–74 (N.M. 1992); Chisholm, 948 P.2d 707.

Notably, a party has a right to be represented by an attorney of his or her own choosing, and a court may only override that right when there is a compelling reason. Chappell v. Cosgrove, 1996-NMSC-020, 916 P.2d 836, 838. In this case, Blenden's sole authority to represent Noah's interests is through his retention by Appellee. However, she

has no vested stake in Noah's well-being. Harper v. New Mexico Dept. of Human Services, Income Support Division, 95 N.M. 471, 623 P.2d 985, 987 (N.M., 1980)(supporting conclusion that a step-parent has no duty to support a non-adopted step-child). And, "the authority of an attorney representing infants is limited to that possessed by the guardian ad litem or next friend." Garcia, 664 P.2d 1000 (citing In Re Wretlind, 225 Minn. 554, 32 N.W.2d 161 (1948)).

Our courts have noted the attorney for a child must have undivided loyalty to the child:

> [T]he child's attorney ... not only [has] the power but the responsibility to represent his client zealously and to the best of his ability. Like any other attorney he should, upon appointment, investigate the facts thoroughly * * * [and] should exercise his best professional judgment on what disposition would further the best interests of the child, his client....
> ... **The basic premise of the adversary system is that the best decision will be reached if each interested person has his case presented by counsel of unquestionably undivided loyalty**.
> ... [T]he attorney for the children ... must perform his duties in accordance with the standards of professional responsibility adopted by this court. **Nominal representation that fails to assure that children are treated as parties to the action is insufficient and constitutes a breach of the duties of professional responsibility**.

Collins on Behalf of Collins v. Tabet, 111 N.M. 391, 806 P.2d 40 (N.M. 1991) (quoting Veazey v. Veazey, 560 P.2d 382 (Alaska 1977)). That law is controlling. And, in his response, Blenden clearly showed he does not have "undivided" loyalty toward Noah Spoon. In fact, he expressly disparaged Noah's consortium claim for loss of his father. (RP47).

In this case, Appellant hired Mr. Dugan and his firm to represent Noah's interests. However, the Court refused Mr. Dugan's attempt to intervene. It is undisputed Appellee did

not want Blenden representing Noah's interests. The question for this court – for which there appears no direct answer under New Mexico law – is whether the personal representative may impose its will upon the unwilling heir in selecting counsel for the wrongful death recovery. Appellant requests this Court to rule that it cannot, and that the unwilling heir is entitled to hire his/her own counsel to assist in the prosecution of the case. Certainly, that should be the case with a minor heir and single mother required to support him. Alternatively, Appellant requests the Court rule the attorney appointed by the personal representative may not take any portion of the unwilling heir's recovery as part of his fee or otherwise. Notably, the Rules of Professional Responsibility do not permit a lawyer a contingency fee unless the client signs the contract. N.M.R.A. 16-104(C)(requiring contingent fee to be "in writing signed by the client"). Appellant refused to sign any contract with Blenden. It would be unfair and improper for a court to give him a contingency fee (taking 33% of Noah's recovery) by legal fiat.

2. Attorney Blenden Is Conflicted by Appellee's Conflict.

Regardless of whether the personal representative in general may hire counsel for an unwilling heir, in this case Blenden's retention was improper due to the impermissible conflicts. Trial counsel has a duty to avoid a conflict of interest. State v. Talley, 103 N.M. 33, 702 P.2d 353 (N.M.App.1985).

In Spencer, our Supreme Court addressed, not only the conflicts of the personal representative, but also the conflicts of the attorney hired to represent the conflicting

interest. Our Supreme Court noted that, in Home Insurance Co., the court upheld the verdict not only against the personal representative, but also against the "woman's lawyer." Spencer, ¶ 29. The Spencer Court cited two foreign decisions to support its conclusion that a lawyer may not engage in dual representation of the conflicted personal representative. See id. ¶ 29 (citing McTaggert v. Lindsey, 509 N.W.2d 881 (Mich. Ct. App. 1993)("[D]ual representation [of one person as claimant and personal representative] is improper if representation of the claimant would adversely affect representation of the fiduciary."); In re Birnbaum, 460 N.Y.S.2d 706, 707 (Sur. Ct. 1983)("[W]here the attorney represents his client in both capacities [as a beneficiary and a fiduciary], he may not act to advance the *personal* interests of a fiduciary in such a way as to harm ... the estate.")). A lawyer who finds himself in such a conflicted situation and takes no action to resolve the conflict breaches his fiduciary duties. Id. at ¶ 27.

Notably, "the Rules of Professional Conduct may form the basis for disqualification." Roy v. Mercer, 2013—NMSC—002, ¶ 30, 292 P.2d 466; Spencer, ¶ 4 (noting Rules are relevant to whether attorney hired by personal representative in wrongful death action violated duties to statutory beneficiaries). N.M.R.A. 16-107 provides a "lawyer **shall not** represent a client if the representation involves a concurrent conflict of interest...." **And, although a trial judge retains some discretion in deciding motions to disqualify, a district court cannot "trump the plain language of a rule, especially when that rule concerns the duty of loyalty."** Id at ¶ 39. Spencer and Home Insurance Co. simply forbid

a lawyer from representing the personal representative as both the representative and on behalf of the competing consortium and bystander claims.

Notably, Blenden admitted below he "did not represent Noah Spoon." (RP42-43). That is a problem. That is exactly what Blenden believes. N.M.R.A 16-102A provides a lawyer "shall abide by a client's decision whether to settle a matter." Blenden's client in this case is Shannon Spoon. See Spencer, ¶ 9 (stating, "the client is the personal representative"). In all settlement discussions and decisions, he apparently believes he and Shannon get the sole decision-making authority in this case. And, he does not even consider Noah to be his "client." If Shannon Spoon is Blenden's only client, he will be required to abide by her wishes, despite contrary desires expressed by Appellant on behalf of Noah.

Comment 23 to Rule 16-107 further provides a conflict may exist by ... "the fact that there are substantially different possibilities of settlement of the claims or liabilities in question." Clearly, that is the case in this action. There was only one defendant driver, and one insurance coverage. Defendant has no vested interest in how the settlement sum, if any, is divided among the claimants. But, Appellee does. And, Blenden, as her attorney, will be duty-bound to honor her wishes, even if it means placing the majority of the settlement (or effort and argument at trial) on her personal consortium and bystander claims.

Rules of conflict are to be applied with the goal of avoiding even "the appearance of impropriety" and to accomplish the "ultimate goal of maintaining confidence in the integrity of the judicial system." State v. Gonzales, 2005-NMSC-025, ¶ 37, 119 P.3d 151. In fact, even absent an actual conflict of interest, a court in New Mexico has inherent authority to disqualify counsel in the best interests of the involved child. Sanders v. Rosenberg, 122 N.M. 692, 930 P.2d 1144, ¶ 10 (N.M.,1996). If ever a case screamed to protect the system and a child from abuse from conflicts, this one does.

Shannon was married to the Decendent for only a few months before he died. Now, together with her relative attorney, Blenden, she has gained complete control of the wrongful death lawsuit to the exclusion of Daniel's natural son, Noah. The Trial Court has expressly ordered Blenden does not represent Noah, and has even precluded Noah from asserting his own consortium claim. Shannon effectively has *carte blanche* authority to settle the case however she chooses, even to the point of paying herself 75% or more of the recovery by simply attributing half or more to her separate claims. She may choose not do that. But, the law is set up to avoid even giving her that opportunity. Appellee and her attorney are both conflicted from representing Noah's interests in the wrongful death estate.

3. Appellee and Her Attorney Are Conflicted By Their Conduct.

Appellee and her counsel are also conflicted by their conduct below. The facts on how Mrs. Spoon became the personal representative of the estate, in particular, show a clear conflict. (Facts, *supra*, ¶12-19).

After Mr. Dugan advised Blenden that Appellant had hired his firm to intervene and that Noah had rights to the recovery, Blenden and Appellee immediately proceeded to the Probate Court to procure an *ex parte* order appointing Shannon as personal representative of the Estate. Appellee and Blenden failed to provide notice to Appellant and her counsel of that proceeding. More importantly, Appellee (through Blenden) represented to the Court under oath on September 18, that she has "carefully searched for all of the decedent's heirs and I have found he has no living heirs other than myself and his mother, Marla Duck...." (RP63). That is a complete falsehood. Just days earlier, Dugan informed Blenden in writing Noah was claiming to be Daniel's child. (RP71-72). Dugan told Blenden that the paternity test would come back the very next week. (RP53). In fact, Mrs. Spoon had known that Noah was Daniel's son for months, and even tried to get Noah and Daniel together. (RP53). Notably, Appellant had named him Noah "Spoon" – after his father Daniel Spoon. (RP53). The paternity test had not come in by that date. But, it was on the way, and Appellee knew it. Mrs. Spoon procured her appointment as personal representative of the Estate based upon a fraud upon the Court. That conduct proves an irreconcilable conflict.

Notably, the appointment as representative of the Estate – as opposed to the wrongful death recovery -- does not control herein. In re Sumler, supra. However, Mrs. Spoon's misrepresentations and her and her attorney's actions clearly disqualify them. Blenden and Mrs. Spoon admitted in their Response that they filed the probate on September 18 "because of some frivolous claim such as this might be made." (RP41). That

shows their intent to defeat Noah's claim. Appellee and Blenden definitively took the position in court that Noah was not an heir and should not be entitled to any recovery of the estate. (RP63). That necessarily creates a conflict. Blenden and Appellee may not simultaneously represent Noah and, at the same time, try to defeat his claim. The law cited above is clear on that point. See also Diaz v. Southern Drilling Corp., 427 F.2d 1118 (5th Cir. 1970) ("Where the supposed representative actually represents an interest adverse to the intervenor, the representation is obviously not adequate.")(cited in Apodaca, 520 P.2d 552, 553).

Clearly, Blenden was trying to procure all of the wrongful death recovery for Shannon, to the exclusion of Noah. Now that the paternity test has come back positive, Blenden may not now claim 33% of Noah's recovery, allegedly because the client who hired him to try to exclude Noah (Shannon Spoon), somehow signed away Noah's rights in a contingency fee agreement. The law simply is not that blind. Blenden and Appellee are disqualified to represent Noah in any capacity, and certainly lack the power to sign away 33% of his recovery against his mother's will.

In fact, Blenden and Appellee took positions in the Response that are directly adverse to Noah Spoon. For instance, Blenden expressly raised specific facts he apparently believes refute the value of Noah's consortium claim. (RP48). N.M.R.A. 16-107 makes clear a lawyer may not take a position adverse to his own client. That is a conflict of interest. Comment 6 to Rule 16-107 notes a conflict exists when a lawyer may pursue one

client's case less effectively out of deference to the other client. Blenden expressly claims that pursuing Noah's consortium claim will weaken his niece's claims. (RP48). That proves a conflict. Also, Comment 6 notes "a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit." N.M.R.A. 16-107, cmt. 6. Shannon Spoon – as Daniel's ex-wife – will testify on issues relating to Noah's consortium claim. Blenden and/or Appellee obviously anticipate procuring testimony detrimental to Noah's claim. Clearly, Blenden and Appellee should be disqualified.

4. The Representation Is Otherwise Inadequate.

Moreover, the representation below has been inadequate, regardless of any conflicts. Representation is inadequate if the "representative has not been diligent in prosecuting the litigation." Hoots v. Com. of Pa., 672 F.2d 1133, 1135 (3rd Cir. 1982).

Within a few months of filing this suit, Blenden pleaded this case is "ready to go to trial." (RP41). That is scary, to say the least. The Defendant had not been served, no discovery had occurred, and the driver who killed Mr. Spoon has not even been deposed. The fact Blenden apparently thinks the case is ready for trial, *ipso facto*, demonstrates inadequate representation. These types of cases inherently depend upon extensive written and other discovery to properly prepare for trial. Experts are only a small part of a head-on collision. There are issues pertaining to course and scope of employment, proper credentialing and

entrustment, statutory regulations, negligence per se, and a myriad of issues that are not being addressed. Appellant seeks to retain counsel herein who will seek the proper and complete discovery in this case and, hence, add considerably to the value and likely success of this litigation.

Notably, Appellee and Blenden failed to plead at least the following relevant matters:

a. Negligence Per Se – Appellee failed to plead negligence per se. The Defendant driver violated several New Mexico motor vehicle statutes. See N.M.S.A. 1978 §§ 66-7-301(B)(1)(failing to control speed to avoid collision); 66-7-308(driving on wrong side); 66-7-325(A) (unsafe turn). New Mexico courts hold "it is negligence per se for one to operate a motor vehicle in this state in a manner that violates a statute enacted for the protection of persons using highways." See, e.g., Turrietta v. Wyche, 54 N.M. 5, 212 P.2d 1041 (1949) (driving vehicle left of the center of the road). In fact, failing to yield to oncoming traffic in a left-hand turn is negligence per se. N.M.S.A. § 66-7-329; Danz v. Kennon, 63 N.M. 274, 276, 317 P.2d 321, 323 (N.M. 1957).

b. Recklessness or Malice – Appellee failed to plead recklessness or malice, only pleading willful and wanton. Reckless and/or malicious conduct varies from wanton and willful conduct, permitting recovery of punitive damages with a lower threshold of *mens rea*. See N.M.R.A., Civ. UJI 13-861 (defining reckless for punitive damages). This is a substantial oversight.

c. Grounds to Hold Burns Liable for Punitive Damages – Appellee has failed to plead any grounds upon which to hold the corporate entity, Burns Construction, liable for punitive damages in this case, and has certainly not taken any discovery on the issue. Reckless entrustment, reckless failure to train or supervise, and other reckless or malicious conduct by the employer Burns should be pleaded and discovery procured to prove the claims. Notably, culpable corporate conduct by separate employees may be aggregated to satisfy the *mens rea* requirements and uphold a multi-million dollar verdict. Grassie v. Roswell Hosp. Corp., 2011-NMCA-024, ¶30-36, 258 P.3d 1075 (upholding $10 million punitive damage award in wrongful death of single individual where cumulative conduct of corporate staff was willful, reckless, or wanton).

d. Other Potential Parties – Appellee apparently believes no discovery is necessary to determine if there are other proper parties. That is a substantial oversight. See Taylor v. Alston, 79 N.M. 643, 447 P.2d 523 (N.M.App. 1968) (holding managers can be held liable for negligent management and supervision of the corporate affairs causing or contributing to the injury).

The bottom line is Dugan and his firm can provide substantial assistance in the discovery and prosecution of this case, and Noah has a right to have them provide that assistance.

Issue Four: **The Trial Court erred in refusing to appoint Appellant as the wrongful death co-personal representative and permit her and Noah's counsel to intervene to protect Noah's interests.**

(Preserved by written pleadings, RP9;48).

This is a question of law, as noted above. Alternatively, the Trial Court abused its discretion in refusing to appoint Appellant the wrongful death personal representative or co-representative.

1. This Court Has Authority to Appoint Appellant.

A wrongful death action is a creature of statute. N.M.S.A. § 41-2-3 provides the action "shall be brought by and in the name of the personal representative of the deceased person." The Wrongful Death Act does not define "personal representative." In fact, our courts have held that the wrongful death representative is different from the estate personal representative. Chavez, 711 P.2d 883. Appointment as personal representative of a decedent's estate is neither necessary nor sufficient authority for a person to serve as personal representative under the Wrongful Death Act. In re Estate of Sumler, 133 N.M. 319, 62 P.3d 776 (N.M. 2000). Also, there are no statutory rules as to who should be the wrongful death representative. Essentially, the court decides who best fills that position. Chavez, 711 P.2d at 885-886.

Notably, our courts have acknowledged that a court may appoint co-personal representatives. Dominguez, 673 P.2d 1338. As recently as September 27, 2012, in fact, this Court held "more than one personal representative can be designated." See Estate of

Reuben Lajeuenesse v. Board of Regents of the University of New Mexico, 2013-NMCA-004, ¶ 17, 292 P.3d 485. In Lajeuenesse, the Court noted "the personal representative may not be the person to recover for a loss of consortium...." Id. at p. 10. Presumptively, that is why the Court ruled a court may appoint co-representatives. The Court noted, "co-representatives ... serve the singular purpose of bringing the wrongful death action." Id. at p. 11.

As proven above, a person may not be appointed sole personal representative of the wrongful death estate if that person has a conflict with an heir. (*Supra*, Issue 2). In that instance, dual appointment of representatives is likely required to avoid conflicts of interest. Oldham, 2011-NMSC-007, ¶36-38 (holding in estate case, "[a] representative who is unimpaired by a conflict of interest must therefore be appointed..."). Accordingly, if there is a conflict – which there is – Appellant should be appointed co-representative, and Mr. Dugan permitted to represent her and Noah, to remove the conflict.

2. The Interests of the Child Should Be This Court's Primary Obligation.

In deciding who would best serve as the personal representative in this case, the court's primary concern should be Noah. Our courts recognize that, "[a]s a matter of public policy, in every proceeding in which minor children are involved, a court's primary obligation is to further the best interests of the child." Wasson, 584 P.2d 713, 714. In fact, an attorney is required for an infant not otherwise represented in an action. Id. It would be "plain error for

the court to proceed in the absence of counsel for the children." Wasson, supra. That is because a court of equity is required to protect the rights of minors involved in litigation. Id.

3. Only Appellant Can Adequately Represent Noah's Interests.

Appellee claims the personal representative naturally has the right to hire the attorney to bring the action. That simply is not true. The only person who should have the right and duty to prosecute this action for Noah and hire counsel to protect his interests is his mother, Appellant, not Shannon Spoon, a non-relative and apparent adversary.

"Public policy dictates that the primary obligation for support and care of a child is by those who bring a child into the world...." Martinez v. Martinez, 98 N.M. 535, 650 P.2d 819 (N.M.,1982). "Therefore, parents have a duty to support their children and cannot rid themselves of it by transferring the duty to someone else." Id; Petition of Quintana, 83 N.M. 772, 497 P.2d 1404, 1406 (N.M. 1972). That duty obligates the mother "to exhaust ... every reasonable resource to meet this obligation." Id. (quoting Wilson v. Wilson, 45 N.M. 224, 114 P.2d 737 (1941)). This "duty" brings with it inherent rights in the parent to exhaust every reasonable resource to meet that obligation. In re Quantius' Will, 58 N.M. 807, 277 P.2d 306 (N.M. 1954)(holding a parent's duty to support her child "is interlocked with [her] right to enjoy and see to and know of the acceptance and use of the support furnished"). Notably, one of the main purposes of a wrongful death recovery is to provide the children with the lost financial support they would have received from the decedent. Romero v. Byers, 117 N.M. 422, 872 P.2d 840, 846-47 (N.M.,1994). Accordingly, the mother has a

paramount right (and duty) to prosecute a case for her child. In exercising that right (and duty), that parent has an absolute right to choose counsel for the child. (See supra, p. 26).

According to N.M.R.A. 1-017C, when a child has a general guardian – i.e., a parent – that general guardian is the only one who may bring an action on behalf of the child. The rule states:

> C. Infants or Incompetent Persons. When an infant or incompetent person has a representative, such as a general guardian, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may sue by next friend or by a guardian ad litem. ...

That second sentence proves that, only if the infant does not have a general guardian, may the court appoint someone else to represent the infant in litigation. Id. In this case, Noah has a general guardian – Korina Flores. Accordingly, only Ms. Flores has authority to act on Noah's behalf in this lawsuit. See also N.M.S.A. 45-5-312B(4)(a) (providing a guardian has authority "institute proceedings to compel any person under a duty to support the protected person or to pay sums for the welfare of the protected person to perform that duty"). And, until some court removes Appellant as Noah's legal guardian, she alone should have authority to prosecute Noah's claims. Accordingly, the Trial Court lacked authority to appoint anyone other than Korina to pursue Noah's claims. In re KC Greenhouse Patio Apartments, LP, 2012 WL 3525615 (Tex.App.-Houston [1st Dist.] 2012)(court lacked authority to replace mother with grandparents as child's next friend in wrongful death suit).

In this case, Korina hired Kenneth Dugan and the Martin, Dugan and Martin firm to represent Noah and his interests. Mrs. Flores is clearly in the best position to represent Noah. Shannon, on the other hand, is conflicted from representing Noah, as is Blenden. The best and perhaps only legal outcome would be to appoint co-personal representatives. Certainly, Blenden cannot represent Noah.

Importantly, dual appointment may be necessary to avoid duplication of legal fees. Blenden was hired on a 33% contingency fee. Appellant hired Dugan on a contingency fee. It would be unfair and improper for Blenden to take a full contingency out of the wrongful death recovery prior to distribution to Noah and his counsel. Appellant, as Noah's mother, has the right to hire counsel of her choosing for Noah. She did not hire Blenden or agree to pay his fee. She hired Mr. Dugan. Accordingly, to assure that Noah is not charged excessive legal fees, dual personal representatives (with separate counsel) should be appointed. Then, each attorney will only recover a portion of the sums distributed to his respective client – i.e., for the work they actually did for their respective clients.

Moreover, settlement potential in this lawsuit can greatly impact Noah. If Shannon and her attorney are the sole representative, they will control settlement negotiations and decisions. Those decisions will inevitably be made based upon Shannon's desires – not the best interests of Noah. Noah has needs now. He lost his only father. Noah has no independent source of income. Shannon, on the other hand, can support herself. Presumably, her demands may differ from Noah's needs and demands. Also, Noah has a

vested interest in a structured settlement in this case to maximize the recovery and assure that funds are available for college and many years from now. Shannon does not have those same interests. The bottom line is Appellee cannot and does not represent Noah's best interests, and the child's best interests should be this Court's primary concern.

V. CONCLUSION

A hypothetical proves the injustice in this case: A parent has two children, a daughter and a son. There are ten cookies on the plate. There are two cookie jars, one blue and one red. The mother tells the daughter she may divide up the cookies however she likes into the two cookie jars. However, she also tells the daughter all of the cookies in the blue jar go to the daughter, but that the son and daughter will share the remaining cookies in the red jar. How would one expect the daughter to divide the cookies? If they are divided "evenly" between the jars, 5 and 5, the daughter gets 7.5 cookies or 75% (half of the red jar and all of the blue jar). If she puts 8 in the blue jar, she gets 9 cookies, or 90%. What do we expect the girl to do? Surely, we can all agree the daughter has a "conflict of interest."

Now, replace the cookies with millions of dollars, and ask how do we expect the personal representative to divide a settlement when she knows whatever portion she attributes to her own consortium claim need not be shared with the heirs. Clearly, there is a conflict of interest. As luck would have it, our New Mexico Supreme Court recently ruled on this very issue, stating the personal representative has "**an improper incentive to allocate**

the settlement to claims for which she was the only beneficiary." Spencer, ¶ 29. That decision controls this case and mandates reversal of the Trial Court.

Accordingly, Appellant requests this Court,

1. Reverse the Trial Court;
2. Strike the appointment of Shannon Spoon as sole personal representative;
3. Disqualify Blenden from representing Noah's portion of the wrongful death claim and/or preclude him from taking any contingency fee out of Noah's share;
4. Order Appellant's request to intervene is granted;
5. Order Appellant is appointed co-personal representative of Noah's share of the wrongful death claim;
6. Order Dugan and his firm may represent Appellant and Noah herein;
7. Order Appellant may plead and present Noah's consortium claim;
8. Remand this case with the above instructions; and/or
9. Grant Appellant other relief she is entitled.

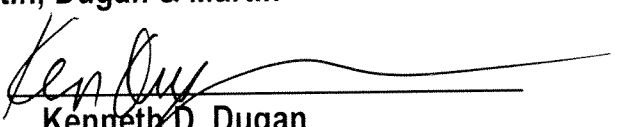
VI. COMPLIANCE WITH N.M.R.A. 12-213(G)

By Microsoft Word 2008 for Mac, Version 12.2.3, processing word counter the body of this Brief contains 10,995 words in a proportionally typed space, Arial Narrow.

VII. REQUEST FOR ORAL ARGUMENT

Appellant requests oral argument. The issues are complex. Also, the case involves conflicts of interest involving the designated personal representative and her hired attorney. The public interest dictates that this case be resolved correctly. Guest v. Allstate Ins. Co., 2010-NMSC-047, ¶47, 244 P.3d 342 (stating, our legal professional "values are our lifeblood, critical to our professional survival. Without them, we put at risk the trust and respect of the public and of our clients—past, present, and future."). Also, the matter is of sufficient personal importance to the infant, Noah, to justify careful consideration of the issues. If Appellee and Blenden try this case to the jury and suffer a defense verdict, Noah will have lost his entire financial support from his father without having a say in the outcome – none. Oral argument will likely add to the Court's understanding and correct resolution of those issues.

Martin, Dugan & Martin

By: 

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CERTIFICATE OF SERVICE

Martin, Dugan & Martin certifies that a true and correct copy of the foregoing Brief-in-Chief was forwarded via First Class Mail, on this 26th day of April, 2013 to the following parties:

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