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**ORDER AND JUDGMENT\* OF THE  
UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT  
(FEBRUARY 5, 2021)**

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UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

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ADVANTAGEOUS COMMUNITY SERVICES, LLC;  
ARMINDER KAUR; HARASPAL SINGH;  
HARCHI SINGH,

*Plaintiffs-Appellants,*

v.

GARY KING; AMY LANDAU;  
ELIZABETH STALEY; MARC WORKMAN;  
CATHY STEVENSON; ORLANDO SANCHEZ;  
WALTER RODAS,

*Defendants-Appellees.*

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No. 19-2211

(D.C. No. 1:17-CV-00525-LF-KK) (D.N.M.)

Before: MATHESON, LUCERO, and  
McHUGH, Circuit Judges.

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\* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Advantageous Community Services, LLC (“Advantageous”) had a contract with the New Mexico Department of Health (“NMDH”) to provide home health care to Medicaid recipients. The Office of Attorney General of New Mexico (“OAG”) brought a civil enforcement action against Advantageous concerning its billing practices, but the action was dismissed because an Assistant Attorney General used two inaccurately reproduced documents at a deposition.

Advantageous, its owner, and the owner’s sons (“Appellants”) sued seven current or former officials of NMDH and OAG (“Appellees”) in federal district court under 42 U.S.C. § 1983. The district court dismissed some claims and granted summary judgment to the Appellees on the remaining claims.

Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

## **I. Background**

### **A. Parties**

Appellant Advantageous was a Medicaid contractor for NMDH. The individual Appellants are Dr. Arminder Kaur, who owns Advantageous, and her sons Haraspal and Harchi Singh, who work there and “informally share” in Advantageous’s ownership. App., Vol. I at 24-25.

The Appellees are seven current or former New Mexico officers and employees sued in their individual capacities. Four were associated with the New Mexico Office of the Attorney General:

1. Gary King, former Attorney General;
2. Elizabeth Staley, former Director of the Medicaid Fraud and Elder Abuse Division, which was charged with reviewing and prosecuting claims of Medicaid fraud;
3. Amy Landau, former Assistant Attorney General (“AAG”), who prosecuted the enforcement action against Advantageous; and
4. Marc Workman, former investigator.

The three others held positions with NMDH:

5. Cathy Stevenson, the former Director of NMDH’s Developmental Disabilities Support Division and current Deputy Director of NMDH;
6. Orlando Sanchez, a former employee; and
7. Walter Rodas, another former employee.

## **B. Factual Background**

We draw the following facts from the district court record and the New Mexico Court of Appeals’ opinion in *State v. Advantageous Community Services, LLC*, 329 P.3d 738, 739 (N.M. Ct. App. 2014), which affirmed the state district court’s dismissal of the enforcement action against Advantageous.<sup>1</sup>

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<sup>1</sup> The federal district court took judicial notice of this opinion and accepted the truth of its factual recitations. Because no one disputes that judicial notice was appropriate, we do so too.

### **1. Advantageous's Work as a Medicaid Contractor**

Advantageous contracted with NMDH to provide home health care to Medicaid recipients and in turn contracted with individual caregivers to provide care. It billed the State of New Mexico's ("State") Medicaid administrators to pay the caregivers.

### **2. Background Check Requirement and Medicare Fraud Act**

NMDH requires home health care providers like Advantageous to submit a background check application to NMDH for each of their caregivers. After NMDH completes a background check, it sends a "clearance letter" to the provider stating whether the background check uncovered any disqualifying convictions. NMDH creates clearance letters using templates with blank fields that are populated with information drawn from a database.

### **3. Investigation of Advantageous and Commencement of Enforcement Action**

In January 2006, the State opened an investigation into Advantageous's billing practices. The investigation revealed that six Advantageous caregivers were not cleared through background checks before Advantageous started billing the State for their services.

In June 2007, OAG demanded that Advantageous repay the State for the payments it had received for services rendered by the six caregivers. Advantageous did not respond. NMDH placed a moratorium on Advantageous that prevented it from taking on new Medicaid patients.

In September 2009, the State—represented by OAG—sued Advantageous in New Mexico state court for (1) recovery of overpayments, (2) civil penalties, and (3) breach of contract.

#### **4. Deposition in the Civil Enforcement Action**

In the civil enforcement action, the State used “the date on the [NMDH’s] clearance letter for each of the six [Advantageous] caregivers . . . to support its claims that caregivers were providing services that were billed to Medicaid before” their background checks had been completed. *Advantageous Cmty. Servs., LLC*, 329 P.3d at 740. Thus, “the clearance letter issued for each caregiver [was] critical to the State’s theory of liability.” *Id.*

The State deposed Dr. Kaur in March 2011. In advance of the deposition, AAG Landau asked Mr. Workman, an OAG investigator, to prepare information packets for each of the six caregivers. For two of the caregivers, Mr. Workman was unable to locate original copies of the clearance letters that had been issued in 2006.

Mr. Workman called Mr. Rodas, an NMDH employee, to ask if NMDH had copies of the two 2006 clearance letters. After Mr. Rodas informed Mr. Workman that NMDH did not keep hard copies, Mr. Workman asked him to “reprint” the two clearance letters from its electronic database. Mr. Rodas warned Mr. Workman it was impossible to reprint accurate copies of the two letters because both the letter template and certain information in the database had changed in the five intervening years. Mr. Rodas generated the two letters anyway and faxed them to

Mr. Workman with a cover sheet explaining that the letters were inaccurate reproductions.

Mr. Workman placed the two reproduced letters in the packets he was preparing for AAG Landau, but he left out Mr. Rodas's cover sheet. Mr. Workman did not inform AAG Landau that the reproductions were not duplicates of the originals issued in 2006. AAG Landau presented one or both of the letters to Dr. Kaur at her deposition.

## **5. Dismissal of Enforcement Action and Appeal**

After the March 2011 deposition, Advantageous moved for sanctions against the State for using the two letters at Dr. Kaur's deposition. It also moved for summary judgment on the merits. The state district court dismissed the enforcement action as a litigation sanction. It also granted summary judgment on the merits.

The State appealed. In 2014, the New Mexico Court of Appeals affirmed the dismissal of the enforcement action as a litigation sanction. It did not review whether summary judgment was warranted.

## **C. Procedural Background**

### **1. Complaint**

The Appellants brought three damages claims under 42 U.S.C. § 1983 in federal court against all Appellees:

1. Malicious prosecution and malicious abuse of process in violation of the Fourth and Fourteenth Amendments;

2. Fabrication of evidence in violation of the Fourth and Fourteenth Amendments; and
3. Arbitrary and capricious conduct in violation of the Fourteenth Amendment.

## **2. Motion to Dismiss Order**

The Appellees filed a motion to dismiss. In its order, the district court dismissed the individual Appellants' malicious prosecution and fabrication of evidence claims with prejudice for failure to state a claim because they were not parties to the state enforcement action. The district court also dismissed with prejudice all of the Appellants' Fourteenth Amendment claims.

On the Fourth Amendment claims, the district court said Advantageous had alleged that the State had seized its property by (1) terminating and refusing to renew its Medicaid contract, and (2) withholding Medicaid reimbursements. The court held Advantageous (1) did not have a protected property interest in its Medicaid contract but (2) had sufficiently alleged that the withholding of Medicaid reimbursements was a Fourth Amendment seizure. It therefore declined to dismiss Advantageous's Fourth Amendment claims for malicious prosecution and fabrication of evidence.<sup>2</sup>

## **3. Motion for Summary Judgment Order**

The Appellees moved for summary judgment on Advantageous's remaining Fourth Amendment claims. The district court granted the motion. It held no clearly

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<sup>2</sup> The district court said these claims "merged" into a single claim because they were "indistinguishable." App., Vol. I at 106-07.



established law showed that the State's withholding of Medicaid reimbursements from Advantageous was a Fourth Amendment property seizure. Appellees were therefore entitled to qualified immunity on Advantageous's Fourth Amendment claims.

The district court also rejected Advantageous's request under Federal Rule of Civil Procedure 56(d) to conduct additional discovery to oppose summary judgment.

\* \* \* \*

The district court, having disposed of all claims, entered final judgment. The Appellants timely appealed.

## II. Discussion

On appeal, the Appellants argue the district court erred by (A) dismissing the individual Appellants' Fourth Amendment claims; (B) granting summary judgment against Advantageous's Fourth Amendment claims; and (C) denying Advantageous's request to conduct additional discovery pursuant to Federal Rule of Civil Procedure 56(d).<sup>3</sup> The following discussion concludes that:

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<sup>3</sup> The Appellants either do not appeal or do not present adequate briefing on the district court's dismissal of their Fourteenth Amendment claims. Aplt. Br. at 16, 32, 35 (making three "points" on appeal); *id.* at 16 (summary of argument). Fourteenth Amendment references appear on pages 38 to 46 of their opening brief. But the Appellants neither explain why the district court erred nor develop an argument why we should reverse. If the Appellants intended to appeal the dismissal of their Fourteenth Amendment claims, they waived the issue by inadequately briefing it. *See Burke v. Regalado*, 935 F.3d 960, 1014 (10th Cir. 2014) ("[A]n appellant may waive an issue by inadequately briefing it.").

- A. The individual Appellants did not state Fourth Amendment malicious prosecution and fabrication of evidence claims because they were not parties to the state enforcement action.
- B. Advantageous's challenge to the summary judgment ruling fails because it has not shown the State's withholding of Medicaid reimbursements was a Fourth Amendment seizure under clearly established law.
- C. The district court's denial of the Rule 56(d) motion should be upheld because further discovery would have been futile.

#### **A. Individual Appellants' Fourth Amendment Claims**

The district court dismissed the individual Appellants' Fourth Amendment malicious prosecution and fabrication of evidence claims with prejudice. It held the individual Appellants had failed to state a claim because they were not parties to the state enforcement action against Advantageous. We affirm.

"We review de novo a district court's Rule 12(b)(6) dismissal of a complaint for failure to state a claim." *Doe v. Woodard*, 912 F.3d 1278, 1299 (10th Cir. 2019). To survive a motion to dismiss, a plaintiff must plead sufficient factual allegations "to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). To state a malicious

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We note that almost the entire Argument section of the Appellants' opening brief is copy-pasted—with minor changes—from their district court briefs. *Compare* Aplt. Br. at 20-46, *with* App., Vol. I at 51-55, 61-64, 68-70, 196-97, 200-08.

prosecution claim, plaintiffs must show they were prosecuted. *See Mglej v. Gardner*, 974 F.3d 1151, 1170 (10th Cir. 2020). Likewise, to state a fabrication of evidence claim, plaintiffs must show that fabricated evidence was used against them in a proceeding. *See Warnick v. Cooley*, 859 F.3d 746, 753 (10th Cir. 2018); *see also McDonough v. Smith*, 139 S. Ct. 2149, 2156 (2019) (“the most analogous common-law tort” to fabrication of evidence is malicious prosecution).

The individual Appellants were not parties to the state enforcement action. They therefore did not state malicious prosecution or fabrication of evidence claims. The individual Appellants provide no valid argument to the contrary. Aplt. Br. at 35-46. We affirm the district court’s dismissal of these claims.

### **B. Advantageous’s Fourth Amendment Claims**

The district court granted summary judgment against Advantageous’s Fourth Amendment claims on numerous grounds, including the Appellees’ qualified immunity. We affirm because Advantageous fails to contest on appeal the district court’s determination that no clearly established law showed there was a Fourth Amendment seizure.

When a defendant in a § 1983 action moves for summary judgment based on qualified immunity, the plaintiff must show (1) the defendant violated a federal constitutional or statutory right, which (2) was clearly established at the time of the defendant’s conduct. *See Pearson v. Callahan*, 555 U.S. 223, 232 (2009); *Est. of Booker v. Gomez*, 745 F.3d 405, 411 (10th Cir. 2014). We have discretion to address the second element first and decline to address the first. *See Pearson*, 555 U.S. at 236-37.

In its summary judgment order, the district court held that the Appellees were entitled to qualified immunity because no clearly established law showed that the State's alleged withholding of Medicaid reimbursements from Advantageous was a property seizure under the Fourth Amendment. App., Vol. II at 372-74. The Appellants fail to dispute this holding in their opening brief and therefore waived the issue. *See Burke v. Regalado*, 935 F.3d 960, 1018 n.44 (10th Cir. 2019). We affirm the district court's grant of summary judgment against Advantageous's Fourth Amendment claims.<sup>4</sup>

### C. Advantageous's Rule 56(d) Request

The district court denied Advantageous's request under Federal Rule of Civil Procedure 56(d) for further discovery to oppose summary judgment. We review that decision for an abuse of discretion. *Gutierrez v. Cobos*, 841 F.3d 895, 908 (10th Cir. 2016). The district court mistakenly thought Advantageous had failed to submit a Rule 56(d) affidavit. Although the court erred by not considering Advantageous's Rule

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<sup>4</sup> We could also affirm on four other grounds. First, no clearly established law recognizes a Fourth Amendment malicious prosecution or fabrication of evidence claim based on a property seizure, as opposed to the seizure of a person. *See Mglej*, 974 F.3d at 1170 (for a malicious prosecution claim "a plaintiff must show . . . the defendant caused the plaintiff's continued confinement or prosecution" (quotations omitted)). Second, no clearly established law recognizes a malicious prosecution or fabrication of evidence claim relating to a civil enforcement action. Third, no evidence showed the state enforcement action was initiated and continued without probable cause. Fourth, no evidence showed a relationship between the State's withholding of Medicaid reimbursements and the state enforcement action. *See App.*, Vol. II at 371-72.

56(d) affidavit,<sup>5</sup> it did not abuse its discretion in denying Advantageous's Rule 56(d) request because additional discovery would have been futile. No amount of discovery would have overcome the lack of clearly established law on Advantageous's seizure claims. We therefore affirm the district court's denial of Advantageous's Rule 56(d) request.

### **III. Conclusion**

We affirm the district court's judgment. Entered for the Court.

Scott M. Matheson, Jr.  
Circuit Judge

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<sup>5</sup> The district court probably overlooked Advantageous's Rule 56(d) affidavit because Advantageous first invoked Rule 56(d) in its April 2019 opposition to the Appellees' summary judgment motion, and later filed its Rule 56(d) affidavit in a June 2019 docket entry—long after briefing had concluded on the summary judgment motion.

**MEMORANDUM OPINION AND ORDER  
OF THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO  
(NOVEMBER 19, 2019)**

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

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ADVANTAGEOUS COMMUNITY SERVICES, LLC,  
ARMINDER KAUR, HARASPAL SINGH,  
and HARCHI SINGH,

*Plaintiffs,*

v.

GARY KING, AMY LANDAU, ELIZABETH  
STALEY, MARC WORKMAN, CATHY  
STEVENSON, ORLANDO SANCHEZ,  
and WALTER RODAS,

*Defendants.*

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1:17-cv-00525-LF-KK

Before: Laura FASHING,  
United States Magistrate Judge.

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THIS MATTER comes before the Court on defendants Gary King, Amy Landau, Elizabeth Staley, Mark Workman, Cathy Stevenson, Orlando Sanchez, and Walter Rodas' (collectively "State Defendants") Motion for Summary Judgment (Doc. 95), filed April 12, 2019. Plaintiffs filed their Response to Defendants'

Motion (Doc. 98) on April 29, 2019. State Defendants filed their Reply in Support of Their Motion for Summary Judgment (Doc. 102) on May 20, 2019. The parties consented to my entering final judgment in this case. Docs. 6-14. Having read the submissions of the parties and being fully advised, and for the following reasons, the Court GRANTS the State Defendants' Motion for Summary Judgment.

## **I. Statement of Facts<sup>1</sup>**

The New Mexico Human Services Department ("HSD") is responsible for administering Medicaid and maintaining the managed care system for Medicaid recipients. UMF 8. The State Defendants assert, without any evidentiary support,<sup>2</sup> that the Medicaid Assistance Division ("MAD") is a division within HSD that is responsible for executing Provider Participation Agreements to ensure that Medicaid providers are qualified under the Medicaid Act. UMF 9. HSD works under an interagency agreement with the New Mexico Department of Health (DOH) to administer a portion of the Medicaid program. UMF 10. HSD had primary responsibility for accepting claims for services

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<sup>1</sup> For facts that Advantageous does not contest for the purposes of this motion, the Court cites to the Undisputed Material Fact ("UMF") in the State Defendants' Motion for Summary Judgment. Doc. 95 at 2-6. For facts that Advantageous disputes or partially disputes, or which are not cited in the materials, the Court cites to the underlying exhibits and other materials in the record or of which the Court may take judicial notice. *See* Fed. R. Civ. P. 56(c)(3) ("The court need consider only the cited materials, but it may consider other materials in the record.").

<sup>2</sup> Although the State Defendants do not provide any evidentiary support for this fact, it is immaterial to the Court's decision.

rendered, reviewing claims to ensure accuracy, then paying the claims. *Id.*

DOH provides program management and technical assistance to Medicaid programs, including enrolling providers and providing training to providers on how to provide services, as well as advising them of the rules and requirements of the Medicaid system. UMF 11. Plaintiff Advantageous Community Services, LLC, (“Advantageous”) is a New Mexico business that provided home-based care to Medicaid recipients pursuant to the Developmental Disabilities Waiver Program. Doc. 1-1 ¶ 16; Doc. 77 ¶ 16. Defendant Cathy Stevenson was the Acting Director of the Developmental Disabilities Supports Division (“DDSD”). UMF 12. DDSD reported to DOH. *Id.* The Division of Health Improvement—another division under DOH—was responsible for the criminal history screening of Medicaid providers’ employees. UMF 13. DDSD was not responsible for conducting this screening. *Id.*

The Medicaid Fraud Division is a division within the New Mexico Attorney General’s Office charged with reviewing and prosecuting referrals of potential claims of Medicaid fraud. UMF 14. During the relevant time period, defendant Gary King was the New Mexico Attorney General, and defendant Amy Landau was an attorney in his office. Doc. 1-1 ¶¶ 6, 7; Doc. 77 ¶¶ 6, 7. Defendant Elizabeth Staley also was an attorney at the Attorney General’s Office and was Director of the Medicaid Fraud and Elder Abuse Division there. Doc. 1-1 ¶ 8; Doc. 77 ¶ 8. Defendant Marc Workman was an investigator for the Attorney General’s Office. Doc. 1-1 ¶ 9; Doc. 77 ¶ 9. Defendants Orlando Sanchez and Walter Rodas both were



employees of DOH. Doc. 1-1 ¶¶ 11, 12; Doc. 77 ¶¶ 11, 12.

On January 10, 2006, after completing a review of suspected fraudulent behavior, MAD referred “the issue” to the Medicaid Fraud Division, which opened an investigation into Advantageous’ billing practices. UMF 1. On June 4, 2007, after approximately 15 months of investigation, the Medicaid Fraud Unit (“MFU”) of the New Mexico Attorney General’s Office demanded repayment to the State of payments made to Advantageous for services provided by six Advantageous employees whom the MFU believed did not have required background clearances. UMF 3; *see also* Doc. 95-1 (Hughes depo at 45:2-51:7; explaining the MFU’s claim for repayment); Doc. 95-2 (attachment showing MFU’s claim). Advantageous did not respond to MFU’s demand. UMF 3. DOH placed a moratorium on business with Advantageous. UMF 4; Doc. 98 at 2 (“Advantageous does not dispute that the Department of Health placed a moratorium on business with Advantageous,” but it does dispute the reason for doing so.).

More than three years after MAD made the referral to the Attorney General’s Medicaid Fraud Division, on September 28, 2009, the State of New Mexico filed suit against Advantageous for Recovery of Medicaid Overpayments, Civil Penalties, and Breach of Contract (hereafter sometimes referred to as the “underlying complaint”). UMF 6. The underlying complaint alleged that Advantageous “submitted false, fraudulent, excessive, or incomplete billings to the State’s Medicaid program” by submitting claims for services provided by individuals for whom Advantageous had not obtained criminal history screenings.

Doc. 95-2 at 2, ¶ 8. The underlying complaint alleged that billing for services provided by such individuals entitled the State to recover all amounts paid for those services as well as civil penalties. *See id.* at 2-3, ¶¶ 10-12. The underlying complaint also alleged that billing for services performed by individuals who “had not undergone a background check as required by state law” was a breach of Advantageous’ contract with the State, and the State sought damages for that breach. *Id.* at 3-4, ¶¶ 13-15.

On September 16, 2011, nearly two years after the State filed its lawsuit against Advantageous, Judge Shannon Bacon dismissed a similar lawsuit, *State of New Mexico v. Behavioral Home Care, Inc.*, D-202-CV-201008273, for failure to state a claim. *See* UMF 7 (mistakenly stating that the case was dismissed on September 30, 2011); *see also* Doc. 98-6 at 3 (docket entry showing dismissal on September 16, 2011). The New Mexico Court of Appeals affirmed the dismissal on June 9, 2014 in a published opinion. UMF 7; *see also State ex rel. King v. Behavioral Home Care, Inc.*, 2015-NMCA-035, 346 P.3d 377 (N.M. Ct. App. Jun. 9, 2014), *cert. granted*, 2014-NMCERT-008, 334 P.3d 425 (Aug. 15, 2014), *cert. dismissed*, 2015-NMCERT-004, 348 P.3d 695 (Apr. 3, 2015).

Meanwhile, on October 28, 2011, about six weeks after Judge Bacon dismissed the suit against Behavioral Home Care, Judge Valerie Huling dismissed the state’s case against Advantageous as a sanction for the Attorney General’s Office’s use of “document know to be false” in conjunction with a deposition.

Doc. 98-1 (Judge Huling’s opinion).<sup>3</sup> Judge Huling stated in her order that “[d]ismissal of the Complaint is warranted as a sanction considering the egregious nature of the actions of the State’s investigator.” Doc. 98-1 at 5. Judge Huling also stated, “Summary Judgment is granted,” but she did not analyze the merits of the State’s case under the summary judgment standard. *See id.*; *see also Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶¶ 7-11, 148 N.M. 713, 720-22, 242 P.3d 280, 287-89 (reviewing stringent summary judgment standard in New Mexico). On April 28, 2014, the New Mexico Court of Appeals affirmed Judge Huling’s imposition of the sanction of dismissal with prejudice for the State’s severe misconduct in using false documents to prosecute its case. *State ex rel. King v. Advantageous Community Services, LLC*, 2014-NMCA-076, 329 P.3d 738 (2014). The Court of Appeals did not address the State’s argument that Judge Huling erred in granting summary judgment. *Id.*, 2014-NMCA-076, ¶ 11, 329 P.3d at 741.

## II. Discussion

### A. Legal Standard for Summary Judgment

Summary judgment will be granted “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). A genuine dispute exists if “the evidence is such that a reasonable jury could return a verdict for the non-moving party” on the issue. *Anderson v. Liberty Lobby*,

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<sup>3</sup> The copy of the opinion attached to Advantageous’ response is unsigned. *See* Doc. 98-1. A signed copy of the opinion is attached to this order. *See* Attachment 1.

*Inc.*, 477 U.S. 242, 248 (1986). “Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” *Id.*

The movant bears the initial burden of establishing that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). “[T]he movant need not negate the non-movant’s claim, but need only point to an absence of evidence to support the non-movant’s claim.” *Kannady v. City of Kiowa*, 590 F.3d 1161, 1169 (10th Cir. 2010) (quoting *Sigmon v. CommunityCare HMO, Inc.*, 234 F.3d 1121, 1125 (10th Cir. 2000)). If this burden is met, the non-movant must come forward with specific facts, supported by admissible evidence, which demonstrate the presence of a genuine issue for trial. *Celotex*, 477 U.S. at 324. The non-moving party cannot rely upon conclusory allegations or contentions of counsel to defeat summary judgment. *See Pueblo Neighborhood Health Ctrs., Inc. v. Losavio*, 847 F.2d 642, 649 (10th Cir. 1988). Rather, the non-movant has a responsibility to “go beyond the pleadings and designate specific facts so as to make a showing sufficient to establish the existence of an element essential to [his] case in order to survive summary judgment.” *Johnson v. Mullin*, 422 F.3d 1184, 1187 (10th Cir. 2005) (alteration in original) (internal quotation marks omitted).

At the summary judgment stage, the Court must view the facts and draw all reasonable inferences in the light most favorable to the non-movant. *Scott v. Harris*, 550 U.S. 372, 378 (2007). The Court’s function “is not . . . to weigh the evidence and determine the

truth of the matter but to determine whether there is a genuine issue for trial.” *Anderson*, 477 U.S. at 249. There is no issue for trial “unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.” *Id.* Summary judgment may be granted where “the evidence is merely colorable, or is not significantly probative.” *Id.* at 249-50 (internal citations omitted).

## **B. Section 1983 Claims and Qualified Immunity Generally**

Section 1983 states in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983. To establish a claim under § 1983, a plaintiff must allege that a defendant acted under color of state law to deprive the plaintiff of a right, privilege, or immunity secured by the Constitution or the laws of the United States. *West v. Atkins*, 487 U.S. 42, 48 (1988). The plaintiff also must identify an “affirmative link” between the alleged constitutional violation and each individual defendant. *Gallagher v. Shelton*, 587 F.3d 1063, 1069 (10th Cir. 2009).

Qualified immunity shields government officials performing discretionary functions from liability for

civil damages unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would be aware. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Under the Tenth Circuit's two-part test for evaluating qualified immunity, the plaintiff must show (1) that the defendant's conduct violated a constitutional or statutory right, and (2) that the law governing the conduct was clearly established when the alleged violation occurred. *Baptiste v. J.C. Penney Co.*, 147 F.3d 1252, 1255 (10th Cir. 1998); *accord Tonkouich v. Kan. Bd. of Regents*, 159 F.3d 504, 516 (10th Cir. 1998). For a right to be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he [or she] is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Unless both prongs are satisfied, the defendant will not be required to "engage in expensive and time consuming preparation to defend the suit on its merits." *Siegert v. Gilley*, 500 U.S. 226, 232 (1991).

The Court is not required to address the two prongs of the test in order. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). The Supreme Court's decision in *Pearson* permits courts to grant qualified immunity without first deciding whether a constitutional violation occurred so long as the right claimed to be violated was not clearly established. *Id.* The right that is alleged to have been violated must be "clearly established" not just as a general proposition (for example, in the way the right to free speech is clearly established), but "in a more particularized . . . sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he [or she] is doing violates that right." *Anderson*, 483 U.S. at 640.

Stating the right too broadly would destroy the balance that the Supreme Court has sought to establish “between the interests in vindication of citizens’ constitutional rights and . . . public officials’ effective performance of their duties by making it impossible for officials reasonably to anticipate when their conduct may give rise to liability for damages.” *Id.* at 639 (quotation and citation omitted).

“Ordinarily, in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains.” *Fogarty v. Gallegos*, 523 F.3d 1147, 1161 (10th Cir. 2008) (internal quotations omitted). “The plaintiff is not required to show, however, that the very act in question previously was held unlawful . . . to establish an absence of qualified immunity.” *Weigel v. Broad*, 544 F.3d 1143, 1153 (10th Cir. 2008) (internal quotations omitted). The degree of specificity required depends on the egregiousness of the challenged conduct; “[t]he more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation.” *Pierce v. Gilchrist*, 359 F.3d 1279, 1298 (10th Cir. 2004). “Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions.” *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011). Qualified immunity therefore protects “all but the plainly incompetent or those who knowingly violate the law.” *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

### C. The State Defendants' Motion for Summary Judgment

The only remaining claim in this case—Count I of the complaint, brought under 42 U.S.C. § 1983—alleges that the State Defendants violated Advantageous' Fourth Amendment rights by maliciously prosecuting it and misusing judicial proceedings. Doc. 1-1 ¶¶ 46-60. This claim is based on Advantageous' allegation that the State Defendants<sup>4</sup> lacked probable cause to initiate and continue to pursue the State's lawsuit against it, and that the State Defendants fabricated evidence to support their prosecution. *See id.* Count I further alleges that the State Defendants used extra-judicial forfeiture proceedings against Advantageous to withhold and recoup funds owed to Advantageous for Medicaid services it had provided. *Id.* ¶ 59.

The State Defendants argue that Advantageous' malicious prosecution claim must fail for a variety of reasons. They argue that no defendant violated a clearly established right and that all the defendants' actions were objectively reasonable; therefore all the State Defendants are entitled to qualified immunity. Doc. 95 at 6-13. The State Defendants also argue that the State's underlying lawsuit against Advantageous was not dismissed on the merits, but instead was dismissed as a sanction for using false documents; therefore, Advantageous cannot prove that the action terminated in its favor. *See id.* at 10-12. The State Defendants further argue that the fabrica-

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<sup>4</sup> The parties don't differentiate among the different defendants in arguing this motion, and the Court agrees that the analysis is the same for all the State Defendants.



tion of evidence neither caused harm to Advantageous, nor did it result in the seizure of any of Advantageous' funds. *See id.* at 12-13.

In response, Advantageous correctly states that the Court already found that it had adequately stated a claim for malicious prosecution based on its allegation that the State Defendants "fabricated evidence, prosecuted Advantageous based on the fabricated evidence and without probable cause, and that the prosecution resulted in a seizure of money belonging to Advantageous." Doc. 98 at 8. At the summary judgment stage, however, Advantageous must come forward with sufficient evidence to support its claims. *Johnson*, 422 F.3d at 1187 (non-movant has a responsibility to "go beyond the pleadings and designate specific facts so as to make a showing sufficient to establish the existence of an element essential to [its] case in order to survive summary judgment"). Advantageous argues that the State Defendants are not entitled to qualified immunity because the State Defendants initiated the underlying lawsuit without probable cause and based on fabricated evidence, and that the State Defendants seized funds belonging to Advantageous based on the meritless lawsuit. *See* Doc. 98 at 8-15. Advantageous further argues that the rights the State Defendants violated were clearly established. *Id.* at 15-18. Lastly, Advantageous argues that the State Defendants' motion is premature because it needs additional time to conduct additional discovery. *Id.* at 18-20. For the following reasons, the Court will grant the State Defendants' motion.

## 1. Qualified Immunity

To support its claim for malicious prosecution under § 1983, Advantageous must present sufficient evidence to support the following elements: (1) the State Defendants caused Advantageous' continued prosecution<sup>5</sup>; (2) the original action terminated in favor of Advantageous; (3) no probable cause supported the original or continued prosecution of Advantageous; (4) the State Defendants acted with malice; and (5) Advantageous sustained damages. *See Sanchez v. Hartley*, 810 F.3d 750, 754 n.1 (10th Cir. 2016) (citing *Wilkins v. DeReyes*, 528 F.3d 790, 799 (10th Cir. 2008)). Advantageous also must show, of course, that it suffered a constitutional violation. *See Pierce*, 359 F.3d at 1289 (“Although the common law tort [of malicious prosecution] serves as an important guidepost for defining the constitutional cause of action, the ultimate question is always whether the plaintiff has [suffered] a constitutional violation.”). Advantageous' theory in this case has always been that the State Defendants unreasonably seized property belonging to Advantageous in violation of the Fourth Amendment. *See* Doc. 98 at 8 (“Defendants are not entitled to qualified immunity because they violated a clearly established right when they prosecuted Advantageous based on fabricated evidence and that prosecution led to a wrongful seizure of Advantageous' property.”).

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<sup>5</sup> As was made clear in my prior order denying the State Defendants' motion to dismiss, Advantageous is not proceeding on a theory that it was physically seized in violation of the Fourth Amendment. *See* Doc. 142 at 11-13. The Court therefore has eliminated references to “confinement” and “arrest” from the elements of a malicious prosecution claim as they are not pertinent to this case.

The State Defendants' first argument that they are entitled to qualified immunity is their claim that "unless the plaintiff is 'arrested, incarcerated, or otherwise placed under the direct physical control of the state,' there cannot be a malicious prosecution claim under the Fourth Amendment." Doc. 95 at 8. The Court already has rejected this argument in its order denying the State Defendants' motion to dismiss. *See* Doc. 142 at 11-13. Advantageous' claim is based on a seizure of property—not the seizure of a person—which the Supreme Court has held can support a Fourth Amendment malicious prosecution claim under § 1983. *See Soldal v. Cook County, Ill.*, 506 U.S. 56, 61 (1992).

The State Defendants' second argument for qualified immunity has merit. They argue that when the Attorney General's office filed its lawsuit against Advantageous in 2009 for Medicaid fraud, they did not know that the State's claim was invalid and not legally supportable. *See* Doc. 95 at 8-9; *see also* Doc. 95-2 (underlying complaint against Advantageous filed on September 28, 2009). In other words, on September 28, 2009, the day the State filed its lawsuit against Advantageous, the State Defendants reasonably believed they had "probable cause" to file the lawsuit because the state of the law in New Mexico at that time did not clearly establish that the case was without merit. Indeed, the State Defendants had no reason to know that their lawsuit was legally unsupportable until the New Mexico Court of Appeals affirmed Judge Bacon's decision on June 9, 2014, which was six weeks after the New Mexico Court of Appeals affirmed Judge Huling's dismissal of the lawsuit against Advantageous. *Compare State ex rel. King v.*

*Behavioral Home Care, Inc.*, 2015-NMCA-035, 346 P.3d 377 (Jun. 9, 2014) *with State ex rel. King v. Advantageous Community Services, LLC*, 2014-NMCA-076, 329 P.3d 738 (Apr. 28, 2014). Thus, because the lack of probable cause for the State's lawsuit was not clearly established until after the lawsuit against Advantageous was dismissed, the State Defendants are entitled to qualified immunity for initiating and continuing the lawsuit.

In *Behavioral Home Care, Inc.*, the court examined whether Behavioral Home Care's ("BHC") billing for services by certain caregivers for whom BHC had not fully complied with the Caregivers Criminal History Screening Act ("CCHSA"), N.M. STAT. ANN. 1978, §§ 19-17-2 to 29-17-5 (1998, as amended through 2005), constituted false, fraudulent, or excess payments under the Medicaid Fraud Act. *Behavioral Home Care, Inc.*, 2015-NMCA-035, ¶¶ 1-2, 346 P.3d at 380. According to the complaint against BHC, and similar to the allegations against Advantageous, BHC electronically submitted over 1800 billing claims for services provided by certain caregivers whose criminal history screening applications had not been submitted as required by the CCHSA. *Id.* ¶ 8, 346 P.3d at 381. The State asserted that BHC's claims for payment for these unscreened caregivers constituted falsification of documents or Medicaid fraud under the Medicaid Fraud Act (MFA). *Id.* ¶ 9, 346 P.3d at 382. The State also asserted that submitting these claims constituted a breach of BHC's contract with the State. *See id.* The New Mexico Court of Appeals described the legal issue raised by the State's allegations as "whether BHC's failure as a Medicaid provider to comply with certain DDHSA screening application requirements

constitutes billing and payment fraud under the MFA and exposes BHC to liability under the MFA.” *Id.* ¶ 13, 346 P.3d at 383. The court characterized this issue “as a matter of first impression in New Mexico.” *Id.*

The New Mexico Court of Appeals held that BHC’s “failure to comply with the CCHSA regulations does not support MFA liability,” and it affirmed Judge Bacon’s dismissal of the State’s lawsuit. *Id.* ¶ 3, 346 P.3d at 380. In doing so, the court compared the State’s claims to claims of Medicare fraud brought under the False Claims Act (“FCA”), which distinguishes between “conditions of participation’ in the Medicare program (which do not support an FCA claim)” and “conditions of payment’ from Medicare funds (which do support FCA claims).” *Id.* ¶ 20, 346 P.3d at 384-85. After analyzing the MFA statutory scheme and how it treats violations of the CCHSA, the court held that BHC’s practice of failing to comply with the CCHSA’s screening procedures was not in violation of the conditions for payment from Medicaid funds and therefore did not support a claim of Medicaid fraud. *Id.* ¶ 30, 346 P.3d at 388. The court also held that BHC’s conduct did not constitute a breach of its contract with the state. *Id.* ¶ 34, 346 P.3d at 389.

As noted above, the New Mexico Court of Appeals itself identified the State’s theory of liability “as a matter of first impression in New Mexico” on June 9, 2014, and also noted that the issue was “novel.” *Id.* ¶¶ 13, 16, 346 P.3d at 383, 384. Thus, there is no question that the law was not clearly established on September 28, 2009, the day the State filed its lawsuit against Advantageous, or even on April 28,

2014, when the New Mexico Court of Appeals affirmed the dismissal of the State’s suit against Advantageous as a sanction for creating false documents. Although Judge Bacon dismissed the State’s case against BHC for failure to state a claim about six weeks before Judge Huling dismissed the State’s case against Advantageous, Judge Bacon’s decision was not binding on Judge Huling. *State ex rel. Children, Youth and Families Dept. v. Djamila B.*, 2014-NMCA-045, ¶ 14, 322 P.3d 444, 448 (“One district court judge cannot set aside the order of another district court judge.”) (citing N.M. Const. art. VI, § 13). Because the law was unsettled until the New Mexico Court of Appeals issued its decision in *Behavioral Home Care* in June 2014, the State Defendants had no reason to know that their case against Advantageous was legally unsound not only when they filed it, but also when its dismissal was affirmed by the New Mexico Court of Appeals. The State Defendants are entitled to qualified immunity for filing the State’s case against Advantageous for Medicaid fraud, and for continuing to prosecute the case until its dismissal was affirmed by the New Mexico Court of Appeals in April 2014.

## 2. The Fabricated Evidence

Advantageous argues that the State Defendants “are not entitled to qualified immunity because they violated a clearly established right when they prosecuted Advantageous based on fabricated evidence and that prosecution led to a wrongful seizure of Advantageous’ property.” Doc. 98 at 8. Advantageous further argues that “liability attaches even where the lack of probable cause was not known at the outset of litigation.” *Id.* at 9 (citing *Pierce v. Gilchrist*, 359 F.3d 1279, 1291-92, 1297 (10th Cir. 2004)). The

undisputed evidence, however, does not support Advantageous' claim.

To support its claim that the State Defendants fabricated evidence, Advantageous relies on the findings made by Judge Huling when she dismissed the State's case against Advantageous as a sanction for using a false document in a deposition taken during the course of the underlying litigation as well as the affirmance of that dismissal by the New Mexico Court of Appeals. *See* Doc. 98 at 9-12. But those court rulings establish that the State Defendants did not create the false document until well after the State initiated its case against Advantageous, and that relatively soon after the false document was created and discovered, Judge Huling dismissed the lawsuit. Furthermore, there is no evidence that the creation of the false document led to the continuation of the lawsuit or the seizure of any of Advantageous' property.

Although Advantageous relies primarily on the district court's findings, the New Mexico Court of Appeals' recitation of the facts is more complete. Because the facts relating to the fabrication of evidence are crucial to the resolution of this lawsuit, I have reproduced the New Mexico Court of Appeals' statement of those facts in its entirety.<sup>6</sup> In understanding those facts, it is

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<sup>6</sup> [F]ederal courts, in appropriate circumstances, may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue." *St. Louis Baptist Temple, Inc. v. Federal Deposit Ins. Corp.*, 605 F.2d 1169, 1172 (10th Cir. 1979). Furthermore, because both the State Defendants and Advantageous had a full and fair opportunity to litigate the fabrication of evidence issue in the state case, both parties would be collaterally estopped from challenging the New Mexico state courts' findings in this case. *See Sil-Flo, Inc. v. SFHC, Inc.*, 917

important to know that Advantageous Community Services, LLC was doing business as Imagine, LLC, and the Court of Appeals referred to Advantageous as “Imagine” throughout its opinion. *See Advantageous Community Services, LLC*, 2014-NMCA-076, ¶ 1, 329 P.3d at 739.

Imagine contracts with individual caregivers to provide home-based healthcare services to Medicaid recipients through the Medicaid Developmental Disabilities Waiver Program. New Mexico Department of Health (DOH) regulations require home-based healthcare providers like Imagine to submit criminal history screening applications to DOH for each of its caregivers. Once the criminal application is submitted, DOH then conducts a state and nationwide criminal background check. Upon completion of the background check, DOH sends a “clearance letter” stating whether a caregiver has any reported disqualifying convictions. In its suit the State alleges that Imagine knowingly submitted bills for services provided by six caregivers whose criminal histories did not meet the screening requirements and that, therefore,

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F.2d 1507, 1520 (10th Cir. 1990) (“Under collateral estoppel, ‘once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.’”) (quoting *Allen v. McCurry*, 449 U.S. 90, 94 (1980)); *Shovelin v. Central New Mexico Elec. Co-op., Inc.*, 1993-NMSC-015, ¶ 10, 114 N.M. 293, 297, 850 P.2d 996, 1000 (“The doctrine of collateral estoppel fosters judicial economy by preventing the relitigation of ultimate facts or issues actually and necessarily decided in a prior suit.”) (internal quotation marks omitted).



Imagine violated [] the Medicaid Fraud Act, NMSA 1978, §§ 30-44-1 to-8 (1989, as amended through 2004). According to the State, the Medicaid payments Imagine received from the State and paid to the six caregivers constituted overpayments, which the State had a right to recoup as damages, in addition to civil penalties. The State compared the date on the clearance letter for each of the six caregivers to the date each caregiver was hired to support its claims that caregivers were providing services that were billed to Medicaid before DOH confirmed that they had a clear criminal history. Thus, the clearance letter issued for each caregiver is critical to the State's theory of liability. On the other hand, Imagine contends that DOH regulations permit caregivers to work under conditional supervised employment while DOH conducts the screening and that the regulations only require that criminal history screening applications be submitted for each caregiver within the first twenty days of employment. Therefore, according to Imagine, the dates Imagine submitted the criminal history screening applications and/or whether applications were submitted at all would have been relevant to whether any violations occurred, not the date on the clearance letters marking completion of the screening process.

The Assistant Attorney General (the AAG)<sup>7</sup> prosecuting the case asked an investigator for the Attorney General's Office (the investigator)<sup>8</sup> working in the [M]edicaid fraud unit to prepare packets of documents relating to each of the six caregivers to be used at the deposition of Dr. Arminder Kaur, the owner and corporate representative of Imagine. She specifically asked the investigator to include a copy of the clearance letter from DOH for each caregiver to be included in the packet. However, the investigator was unable to locate copies of the actual clearance letters Imagine had previously produced for two of the caregivers, so he called Walter Rodas at DOH to see if DOH had copies. Mr. Rodas told the investigator that DOH did not keep hard copies of the letters on file, so the investigator asked Mr. Rodas to "reprint" copies of the 2006 clearance letters from its electronic data base. Mr. Rodas told the investigator that it would not be possible to reprint accurate copies of the letters because the computer system had updated several fields in the clearance letter template. The investigator nevertheless told Mr. Rodas to go ahead and print the letters with the updated data. Mr. Rodas faxed the letters to the investigator with a cover sheet stating,

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<sup>7</sup> According to Judge Huling's opinion, the responsible AAG was State Defendant Amy Landau. Doc. 98-1 at 3, ¶ 10.

<sup>8</sup> According to Judge Huling's opinion, the investigator was State Defendant Mark Workman. Doc. 98-1 at 3-4, ¶¶ 9-14, 16-20.

Per your request, attached find copies of the clearance letters for [the two caregivers]. These letter[s] were issued for Imagine back in 2006. In addition to the discrepancies I mentioned to you already over the phone, our letter template pulls information current on our system. That is why the letters are issued and addressed to Melissa McCue, but she may have not been the contact person at Imagine back then. Also, the letters are signed by Gil Mendoza, but he was not the manager of this department in 2006; nor was Ms. Martinez the governor at that time either. Unfortunately, we do not have access to the original letters any longer and this is the best I can do to assist you from our computer records.

The investigator put the false letter in the packet for each caregiver and delivered the packets to the AAG. However, he left the fax cover sheet explaining that the letters were not authentic copies on his desk, and he did not tell the AAG that he had been unable to locate copies of the actual clearance letters that were sent to Imagine. One of the created letters is attached to this Opinion as Appendix 1, and a copy of the actual clearance letter sent to Imagine in 2006 for the same employee is attached to this Opinion as Appendix 2. Though the dates of the two letters are the same, and the "Control No." for the employee match, the letters are

obviously otherwise very different. At Dr. Kaur's deposition<sup>[9]</sup> she testified that, as far as she knew, Imagine was in compliance with the criminal history screening requirements at the time of the alleged violations. Her former business partner's son, Karan Sangha, and former employee, Diane Nunn, were in charge of ensuring compliance with the criminal history screening requirements, and they had assured her that Imagine was at all times in compliance. Dr. Kaur added that Karan Sangha and Diane Nunn later left to form their own home healthcare business, taking with them the documentary evidence of Imagine's compliance. After they left, Melissa McCue, another employee at Imagine, took over the caregiver criminal history compliance duties. When presented with Exhibit 15 (Appendix 1) and asked why it was addressed to Melissa McCue in October of 2006, Dr. Kaur's reaction was surprise. A clearance letter sent to Imagine in 2006 should have been addressed to Karan Sangha, and Exhibit 15 also had Imagine's new office address rather than the address it had in 2006.

Imagine filed a motion for sanctions against the State for using a fabricated document at the deposition, as well as a motion for

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<sup>9</sup> Dr. Kaur's deposition took place on March 9, 2011, a little more than 17 months after the State filed its lawsuit against Advantageous in 2009. *See* Doc. 98-1 at 2, ¶ 3.

summary judgment on the merits.<sup>[10]</sup> The district court held an evidentiary hearing to address the motion for sanctions at which the foregoing facts were developed. The AAG also answered questions posed by the district court, denying that she knew the letter was false when she utilized it in the deposition and admitting she did not observe the discrepancy of the incorrect governor on the letterhead. The district court then filed detailed findings of fact and conclusions of law. In pertinent part, the district court made findings of fact that Exhibit 15 is a purported letter from DOH to Imagine, care of Melissa McCue, but it is a false document, and was created by the State for this litigation. Specifically, the text of the letter, the addressee, and the signature line are inaccurate. Further, the district court found, while the investigator was told that Exhibit 15 is not a true and correct copy of the original document, the investigator did not disclose that information to the AAG, and the AAG failed to observe the obvious discrepancy in the document that Susana Martinez was not the Governor in 2006, which would have alerted her that it could not be an accurate copy of a 2006 document. The district court added that the investigator knew the docu-

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<sup>10</sup> Advantageous, a/k/a Imagine, filed its motion for sanctions on March 29, 2011, and its motion for summary judgment on June 1, 2011. *See* Attachment 2 (Docket sheet *for State ex rel. King v. Advantageous Community Services, LLC*, Case No. D-202-CV-2009-11396).

ment was false and that it was going to be used at Dr. Kaur's deposition, but he did not disclose his knowledge to the AAG, who then attempted to impeach Dr. Kaur with the document. Importantly, the district court also found that, "[c]onsidering his position as an investigator for the Attorney General's Office, [the investigator]'s testimony that he did not believe the information was important is not credible."

All of the investigator's actions were done in the course and scope of his employment with the Attorney General's Office of the State of New Mexico. Moreover, the district court found, "[c]onsidering the immense power of the Attorney General's Office, the public must be able to rely on the truth of documents produced in litigation by the Attorney General's office, its attorneys and investigators" and that "[a]n investigator allowing an assistant attorney general to utilize a document known to be false in discovery is an egregious offense subject to sanctions." The district court accordingly concluded as a matter of law that "[d]ismissal of the Complaint is warranted as a sanction considering the egregious nature of the actions of the State's investigator." The district court also concluded that Imagine's motion for summary judgment should be granted. A formal order was entered dismissing the case with prejudice, and the State appeals. Because we affirm dismissal of the case as a sanction, we do not discuss the State's

argument that the court erred in granting summary judgment.

*Advantageous Community Services, LLC*, 2014-NMCA-076, ¶¶ 2-11, 329 P.3d at 739-41.

These facts make plain that the State Defendants did not fabricate any evidence to support the initiation of the State’s lawsuit against Advantageous. The underlying complaint was filed approximately 17 months before Mr. Workman asked DOH to “reprint” the two clearance letters he received from DOH shortly before Dr. Kaur’s deposition on March 9, 2011. These facts further make clear that the fabricated evidence did not serve to perpetuate the lawsuit, nor do they show that the State Defendants used the fabricated evidence to seize Advantageous’ property.

As the New Mexico Court of Appeals made clear, the fabricated evidence led to the dismissal of the case against Advantageous, not its continuation. Further, the fabricated evidence did not show that the State lacked probable cause to continue its case against Advantageous. As the court explained, the two fabricated clearance letters were important to the State’s case because the State contended that a particular caregiver-employee could not provide Medicaid services under Advantageous’ contract with the State until that caregiver was screened for criminal convictions and cleared. *See Advantageous Community Services, LLC*, 2014-NMCA-076, ¶ 3, 329 P.3d at 740. Thus, the important aspects of the letters from the State’s perspective was the date of the letter, and that the particular caregiver was cleared. *See id.* On these points, the State’s “reprinted” letter was consistent with the true letter. *Compare id.*, Appendix 1 (“reprinted” letter) *with id.*, Appendix 2 (true letter);

*see also id.*, 2014-NMCA-076, ¶ 33, 329 P.3d at 746 (Bustamante, J., concurring) (“The State maintained that caregivers could not be paid until they had cleared their criminal background screening. Imagine asserted that caregivers could be hired and paid pending completion of the screening process. Thus, for the State’s purpose, the most salient information on the falsely reproduced letters was the identity of the caregiver and the date the approved screening issued. There is no issue that these ‘critical fields’—as the State terms them—were accurate.”). Thus, the two fabricated letters did not create probable cause where none existed.

Importantly, this case bears little resemblance to *Pierce*, 359 F.3d at 1291-92, 1295-96 on which Advantageous relies for the proposition that “liability for malicious prosecutions extends to those who continue prosecutions when they obtain knowledge that there is no probable cause to proceed against the defendant.” Doc. 98 at 13 (internal quotation marks omitted). In *Pierce*, the plaintiff spent 15 years in an Oklahoma state prison for a rape he did not commit. 359 F.3d at 1281. The plaintiff finally was exonerated and released as a result of a DNA analysis. *Id.* He later brought a § 1983 malicious prosecution case against, among others, a forensic chemist for the Oklahoma City Police Department who fabricated inculpatory evidence against the plaintiff and disregarded exculpatory evidence, which led prosecutors to indict, prosecute and ultimately convict the plaintiff for the rape. *Id.* The forensic chemist sought to have the malicious prosecution case against her dismissed on the ground that she was not involved in the initiation of the prosecution against the plaintiff, but only became



involved later, after the plaintiff was arrested and charged. *See id.* at 1291. The Tenth Circuit rejected this claim, holding that “when the fabrication of evidence results in a constitutional deprivation, the official’s responsibility for that deprivation does not hinge on the exact stage of investigatory or prosecutorial process at which the fabrication occurred.” *Id.* at 1296.

In other words, the fabrication of evidence in *Pierce* resulted in the continued prosecution and conviction of an innocent man, who then spent 15 years in jail for a crime he did not commit. In contrast, the fabrication of evidence in this case resulted in the dismissal of the lawsuit against Advantageous, and there is no evidence that it resulted in any seizure of Advantageous’ funds. The only evidence of any “seizure” of Advantageous’ funds are three exhibits attached to Advantageous’ response which show denials of some payments to Advantageous for various reasons between July 23, 2007 and September 30, 2011. *See* Docs. 98-2, 98-3, 98-4. Only the September 30, 2011, denials post-date the State’s initiation of its lawsuit against Advantageous and the creation of the fabricated evidence. *See* Doc. 98-4. Thus, the earlier denials of payment cannot have resulted from either the initiation of the lawsuit against Advantageous or the fabricated evidence. Further, for each denial of payment that post-dates the initiation of the lawsuit and the fabrication of evidence, there is an explanatory “EOB” code associated with the denial, which states the reason why each claim was denied. *See id.* The explanations range from requiring Advantageous to “[v]erify the modifier on the claim matches the modifier authorized,” to stating that “[p]rior author-

ization has been used or the units/amount billed are greater than the units/amount remaining on the authorization.” Doc. 98-4 at 17. There is no evidence that links these denials to the fabricated evidence.

Perhaps more important, however, is that *Advantageous* has not cited, and the Court has not found, any case that holds that the wrongful denial of payment for services rendered constitutes a seizure of property under the Fourth Amendment. The Fourth Amendment, made applicable to the States by the Fourteenth Amendment, *Ker v. California*, 374 U.S. 23, 30 (1963), provides in pertinent part that the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . .” U.S. Const. amend. IV. As the Supreme Court has explained, “[a] ‘seizure’ of property occurs when there is some meaningful interference with an individual’s possessory interests in that property.” *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). Thus, the Supreme Court has held that the forcible removal of a couple’s trailer home from its lot was a “seizure” within the meaning of the Fourth Amendment. *See Soldal*, 506 U.S. at 72. The Tenth Circuit has held that the killing of a pet dog was a seizure of property within the meaning of the Fourth Amendment because “[k]illing a dog meaningfully and permanently interferes with the owner’s possessory interest.” *Mayfield v. Bethards*, 826 F.3d 1252, 1256 (10th Cir. 2016). Similarly, an undersheriff’s assistance in removing a person’s property from her farm was a seizure within the meaning of the Fourth Amendment, *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1115-19 (10th Cir. 2008), as was the removal of 70 derelict vehicles from a person’s property,

*Lawrence v. Reed*, 406 F.3d 1224, 1227, 1235-36 (10th Cir. 2005). City ordinances that regulated the sale and display of art on city-owned property did not, however, violate the Fourth Amendment as there was no seizure of either the artist or his artwork. *Travis v. Park City Mun. Corp.*, 565 F.3d 1252, 1257 (10th Cir. 2009).

Unlike the cases in which the Supreme Court and the Tenth Circuit have found seizures of property, there is no evidence in this case that the State Defendants seized funds that were already in Advantageous' possession. Even if the State Defendants wrongfully denied payment to Advantageous, they did not interfere with Advantageous' possessory interest in these payments because Advantageous was not yet in possession of the funds. There is no evidence that the State Defendants seized any of Advantageous' bank accounts or otherwise took control of money that already was in Advantageous' possession.<sup>11</sup> And there

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<sup>11</sup> Advantageous attached a barely legible exhibit to its Rule 56(d) Supplement to Response, filed on November 11, 2019. *See* Doc. 161-1 at 33 (Exhibit 5). Exhibit 5 is a remittance advice summary prepared by the Human Services Department dated July 25, 2011 (?—date is somewhat unclear) showing net claimed transactions of \$104,099.57, payouts of \$65,000, receivable recoupments of \$65,000, and a remittance cycle total of \$39,099.57. Doc. 161-1 at 33. It shows that a check was issued for \$65,000, and an “EFT” (electronic funds transfer?—last two letters are illegible) was issued for \$39,099.57. *Id.* Advantageous does not explain exactly what this document shows. It states only that “HSD withheld money due to Advantageous after Landau asked Apodaca and another HSD employee why Advantageous was still being paid,” and cites Exhibit 5 as an example of this. Doc. 161 at 3. But again, even if this is true, the Court has found no Tenth Circuit or Supreme Court case that holds that the wrongful withholding of money owed constitutes a “seizure”

is no Tenth Circuit or Supreme Court case that holds that the wrongful denial of a payment constitutes a seizure of property under the Fourth Amendment. Thus, even if the wrongful denial of payments constituted a seizure under the Fourth Amendment, it was not a right that was clearly established on or before September 30, 2011. *See Fogarty*, 523 F.3d at 1161 (“for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point. . . .”).

### 3. The State Defendants’ Motion Is Not Premature<sup>12</sup>

Advantageous argued at the end of April that it was “entitled to additional time and opportunity to take discovery” because the State Defendants had systematically obstructed Advantageous’ discovery efforts. *See* Doc. 98 at 18-20. But Advantageous made no effort to outline what additional discovery it needed in order to adequately respond to the State

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under the Fourth Amendment. Advantageous also asserts that “[l]ess than two weeks after Ms. Landau’s requests, Defendant Cathy Stevenson informed Advantageous that its provider agreement was being terminated.” *Id.* The Court already has held, however, that Advantageous did not have a protected property interest in its continued status as a Medicaid provider, and that the State’s termination of its contract could not form the basis of its malicious prosecution claim. Doc. 31 at 12.

<sup>12</sup> Rule 56(b) provides that “[u]nless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.” Fed. R. Civ. P. 56(b). The Court set a deadline of April 24, 2019 for the filing of pretrial motions. *See* Doc. 68 at 1. The State Defendants filed their motion on April 12, 2019, twelve days before the deadline.

Defendants' motion. *See id.* On November 11, 2019, Advantageous filed a supplement to the response it had filed in April which included additional information which generally showed that HSD—the State entity responsible for paying Advantageous for the Medicaid services it rendered—may have coordinated with the Attorney General's MFU in deciding whether to pay Advantageous and ultimately to end its contract with the State. However, as outlined above, even if the State Defendants wrongfully withheld payments to Advantageous, this does not amount to a clearly established constitutional violation. And the Court already has held that Advantageous did not have a protected property interest in its continued status as a Medicaid provider; therefore the State's termination of its provider contract cannot form the basis of its malicious prosecution claim whether or not the MFU was involved in terminating that contract. *See* Doc. 31 at 12. In short, the additional materials do not create a disputed issue of material fact that warrants a denial of summary judgment.

More importantly, Rule 56(d) provides that “[i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition [to a motion for summary judgment], the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order.” Fed. R. Civ. P. 56(d) (emphasis added). Advantageous did not submit any affidavit or declaration in conjunction with its response that specifically explained why it could not adequately respond to the State Defendants' motion without further discovery, nor did it make any effort to

comply with the Tenth Circuit's requirements for obtaining additional discovery under Rule 56(d). *See generally* Doc. 98; *see also Gutierrez v. Cobos*, 841 F.3d 895, 908 (10th Cir. 2016) (outlining requirements for obtaining additional discovery under Rule 56(d)). The State Defendants' motion for summary judgment is not premature, and Advantageous is not entitled to additional discovery under Rule 56(d).

### III. Conclusion

For the foregoing reasons, the Court GRANTS the State Defendants' Motion for Summary Judgment (Doc. 95).

IT IS SO ORDERED.

/s/  
\_\_\_\_\_  
Laura Fashing  
United States Magistrate Judge  
Presiding by Consent

OPINION OF THE COURT OF APPEALS  
OF NEW MEXICO  
(APRIL 28, 2014)

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COURT OF APPEALS OF NEW MEXICO

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STATE OF NEW MEXICO,  
EX REL. GARY KING, ATTORNEY GENERAL,

*Plaintiff-Appellant,*

v.

ADVANTAGEOUS COMMUNITY SERVICES, LLC,  
A NEW MEXICO LIMITED LIABILITY COMPANY,

*Defendant-Appellee.*

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No. 31,782

Before: Linda M. VANZI,  
Michael D. BUSTAMANTE, VIGIL, Judges.

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VIGIL, Judge.

[1] The district court dismissed the State's medicaid fraud claims against Defendant Advantageous Community Services, LLC, doing business as Imagine, LLC, (Imagine) after the State's investigator procured a false and fictitious document relating to a central issue in the case. The investigator provided the document to the State's lawyer without disclosing that the document was false, and the lawyer then used it in a deposition of Imagine's owner and corporate

representative. Concluding that the district court did not abuse its discretion, we affirm.

## **I. Background**

[2] Imagine contracts with individual caregivers to provide home-based healthcare services to Medicaid recipients through the Medicaid Developmental Disabilities Waiver Program. New Mexico Department of Health (DOH) regulations require home-based healthcare providers like Imagine to submit criminal history screening applications to DOH for each of its caregivers. Once the criminal application is submitted, DOH then conducts a state and nationwide criminal background check. Upon completion of the background check, DOH sends a “clearance letter” stating whether a caregiver has any reported disqualifying convictions. In its suit the State alleges that Imagine knowingly submitted bills for services provided by six caregivers whose criminal histories did not meet the screening requirements and that, therefore, Imagine violated the Medicaid Fraud Act, NMSA 1978, §§ 30-44-1 to -8 (1989, as amended through 2004). According to the State, the Medicaid payments Imagine received from the State and paid to the six caregivers constituted overpayments, which the State had a right to recoup as damages, in addition to civil penalties.

[3] The State compared the date on the clearance letter for each of the six caregivers to the date each caregiver was hired to support its claims that caregivers were providing services that were billed to Medicaid before DOH confirmed that they had a clear criminal history. Thus, the clearance letter issued for each caregiver is critical to the State’s theory of liability. On the other hand, Imagine contends that DOH



regulations permit caregivers to work under conditional supervised employment while DOH conducts the screening and that the regulations only require that criminal history screening applications be submitted for each caregiver within the first twenty days of employment. Therefore, according to Imagine, the dates Imagine submitted the criminal history screening applications and/or whether applications were submitted at all would have been relevant to whether any violations occurred, not the date on the clearance letters marking completion of the screening process.

[4] The Assistant Attorney General (the AAG) prosecuting the case asked an investigator for the Attorney General's Office (the investigator) working in the medicaid fraud unit to prepare packets of documents relating to each of the six caregivers to be used at the deposition of Dr. Arminster Kaur, the owner and corporate representative of Imagine. She specifically asked the investigator to include a copy of the clearance letter from DOH for each caregiver to be included in the packet. However, the investigator was unable to locate copies of the actual clearance letters Imagine had previously produced for two of the caregivers, so he called Walter Rodas at DOH to see if DOH had copies. Mr. Rodas told the investigator that DOH did not keep hard copies of the letters on file, so the investigator asked Mr. Rodas to "reprint" copies of the 2006 clearance letters from its electronic data base.

[5] Mr. Rodas told the investigator that it would not be possible to reprint accurate copies of the letters because the computer system had updated several fields in the clearance letter template. The investigator nevertheless told Mr. Rodas to go ahead

and print the letters with the updated data. Mr. Rodas faxed the letters to the investigator with a cover sheet stating,

Per your request, attached find copies of the clearance letters for [the two caregivers]. These letter[s] were issued for Imagine back in 2006. In addition to the discrepancies I mentioned to you already over the phone, our letter template pulls information current on our system. That is why the letters are issued and addressed to Melissa McCue, but she may have not been the contact person at Imagine back then. Also, the letters are signed by Gil Mendoza, but he was not the manager of this department in 2006; nor was Ms. Martinez the governor at that time either. Unfortunately, we do not have access to the original letters any longer and this is the best I can do to assist you from our computer records.

The investigator put the false letter in the packet for each caregiver and delivered the packets to the AAG. However, he left the fax cover sheet explaining that the letters were not authentic copies on his desk, and he did not tell the AAG that he had been unable to locate copies of the actual clearance letters that were sent to Imagine.

[6] One of the created letters is attached to this Opinion as Appendix 1, and a copy of the actual clearance letter sent to Imagine in 2006 for the same employee is attached to this Opinion as Appendix 2. Though the dates of the two letters are the same, and the "Control No." for the employee match, the letters are obviously otherwise very different.

[7] At Dr. Kaur's deposition she testified that, as far as she knew, Imagine was in compliance with the

criminal history screening requirements at the time of the alleged violations. Her former business partner's son, Karan Sangha, and former employee, Diane Nunn, were in charge of ensuring compliance with the criminal history screening requirements, and they had assured her that Imagine was at all times in compliance. Dr. Kaur added that Karan Sangha and Diane Nunn later left to form their own home healthcare business, taking with them the documentary evidence of Imagine's compliance. After they left, Melissa McCue, another employee at Imagine, took over the caregiver criminal history compliance duties. When presented with Exhibit 15 (Appendix 1) and asked why it was addressed to Melissa McCue in October of 2006, Dr. Kaur's reaction was surprise. A clearance letter sent to Imagine in 2006 should have been addressed to Karan Sangha, and Exhibit 15 also had Imagine's new office address rather than the address it had in 2006.

[8] Imagine filed a motion for sanctions against the State for using a fabricated document at the deposition, as well as a motion for summary judgment on the merits. The district court held an evidentiary hearing to address the motion for sanctions at which the foregoing facts were developed. The AAG also answered questions posed by the district court, denying that she knew the letter was false when she utilized it in the deposition and admitting she did not observe the discrepancy of the incorrect governor on the letterhead.

[9] The district court then filed detailed findings of fact and conclusions of law. In pertinent part, the district court made findings of fact that Exhibit 15 is a purported letter from DOH to Imagine, care of

Melissa McCue, but it is a false document, and was created by the State for this litigation. Specifically, the text of the letter, the addressee, and the signature line are inaccurate. Further, the district court found, while the investigator was told that Exhibit 15 is not a true and correct copy of the original document, the investigator did not disclose that information to the AAG, and the AAG failed to observe the obvious discrepancy in the document that Susana Martinez was not the Governor in 2006, which would have alerted her that it could not be an accurate copy of a 2006 document. The district court added that the investigator knew the document was false and that it was going to be used at Dr. Kaur's deposition, but he did not disclose his knowledge to the AAG, who then attempted to impeach Dr. Kaur with the document. Importantly, the district court also found that, "[c]onsidering his position as an investigator for the Attorney General's Office, [the investigator]'s testimony that he did not believe the information was important is not credible."

[10] All of the investigator's actions were done in the course and scope of his employment with the Attorney General's Office of the State of New Mexico. Moreover, the district court found, "[c]onsidering the immense power of the Attorney General's Office, the public must be able to rely on the truth of documents produced in litigation by the Attorney General's office, its attorneys and investigators" and that "[a]n investigator allowing an assistant attorney general to utilize a document known to be false in discovery is an egregious offense subject to sanctions."

[11] The district court accordingly concluded as a matter of law that "[d]ismissal of the Complaint is

warranted as a sanction considering the egregious nature of the actions of the State’s investigator.” The district court also concluded that Imagine’s motion for summary judgment should be granted. A formal order was entered dismissing the case with prejudice, and the State appeals. Because we affirm dismissal of the case as a sanction, we do not discuss the State’s argument that the court erred in granting summary judgment.

## II. Discussion

### A. Authority of the District Court to Dismiss as a Sanction

[12] Since at least 1939, our courts have asserted an inherent power, independent of any statute or rule, to regulate the proceedings before them, which includes imposing sanctions when appropriate. *See City of Roswell v. Holmes*, 1939-NMSC-062, ¶ 6, 44 N.M. 1, 96 P.2d 701 (“[I]t is an inherent right of the courts and therefore one existing independently of any statute to dismiss a suit for failure to prosecute it with diligence.”). This authority stems from “the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.” *Beverly v. Conquistadores, Inc.*, 1975-NMCA-070, ¶ 6, 88 N.M. 119, 537 P.2d 1015 (quoting *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31, 82 S. Ct. 1386, 8 L.Ed.2d 734 (1962)).

In *State ex rel. New Mexico Highway & Transportation Department v. Baca*, 1995-NMSC-033, 120 N.M. 1, 896 P.2d 1148, our Supreme Court declared that “a court’s inherent power is at the core of judicial authority,” and reaffirmed that courts in New Mexico

possess “inherent power to impose a variety of sanctions on both litigants and attorneys in order to regulate their docket, promote judicial efficiency, and deter frivolous filings.” *Id.* ¶¶ 11, 20 (internal quotation marks and citations omitted); see *Lujan v. City of Albuquerque*, 2003-NMCA-104, ¶ 10, 134 N.M. 207, 75 P.3d 423 (stating the general proposition that courts have “authority to dismiss claims with prejudice for a party’s failure to . . . comply with procedural rules or court orders”). Therefore, our Supreme Court concluded in *Baca*, a New Mexico court has inherent authority, independent of any statute or rule, to award attorney fees “in order to vindicate its judicial authority and compensate the prevailing party for expenses incurred as a result of frivolous or vexatious litigation.” 1995-NMSC-33, ¶ 12, 120 N.M. 1, 896 P.2d 1148.

[14] Historically, sanctions have been imposed most often in the context of misconduct associated with discovery. Dismissal of a complaint with prejudice was held to be warranted when a party willfully refused to obey a direct court order to supply the name of a witness. *Beverly*, 1975-NMCA-070, ¶¶ 7, 16, 88 N.M. 119, 537 P.2d 1015. In addition, a default judgment against a party was upheld when a party failed to provide discovery “due to the willfulness, bad faith or fault of the disobedient party.” *United Nuclear Corp. v. Gen. Atomic Co.*, 1980-NMSC-094, ¶ 202, 96 N.M. 155, 629 P.2d 231. In this context, our Supreme Court has declared that “willfulness” means “any conscious or intentional failure to comply therewith, as distinguished from accidental or involuntary non-compliance, and no wrongful intent need be shown to make such a failure willful.” *Id.* ¶ 203 (alteration,

internal quotation marks, and citations omitted); *see Reed v. Furr's Supermarkets, Inc.*, 2000-NMCA-091, ¶ 9, 129 N.M. 639, 11 P.3d 603 (discussing the requirements to justify dismissal as an appropriate sanction); *Gonzales v. Surgidev Corp.*, 1995-NMSC-047, ¶ 31, 120 N.M. 151, 899 P.2d 594 (stating that failure to comply with a court order only provides grounds for dismissal if the failure was due to willfulness, bad faith, or fault of the disobedient party); *Medina v. Found. Reserve Ins. Co.*, 1994-NMSC-016, ¶ 6, 117 N.M. 163, 870 P.2d 125 (stating that a finding of “willfulness” may be based on a “gross indifference to discovery obligations”).

[15] Deception or reliance in fact by the other party is not a prerequisite to dismissal, and “the ultimate importance of the false or deceptive information” is not a requirement for dismissal. *Medina*, 1994-NMSC-016, ¶ 9, 117 N.M. 163, 870 P.2d 125. In *Reed*, we applied *Medina* and concluded that dismissal as a sanction for discovery abuse does not require: “(1) that the party seeking dismissal be deceived in fact or that the party relied on the misrepresentations; (2) that the information misrepresented be critical to preparation for trial; and (3) that dismissal be preconditioned upon the ultimate importance of the false or deceptive information.” *Reed*, 2000-NMCA-091, ¶ 28, 129 N.M. 639, 11 P.3d 603 (internal quotation marks and citation omitted).

[16] Importantly, our Supreme Court has held that attorney fees may be imposed against the State when it is a party because other considerations, such as the depletion of public revenues and the punishment of innocent taxpayers, “must be subordinate to a court’s authority to control the parties and the litigation

before it.” *Baca*, 1995-NMSC-033, ¶ 25, 120 N.M. 1, 896 P.2d 1148. Thus, in *Harrison v. Board of Regents*, we stated, “a court’s inherent authority extends to all conduct before the court and to all parties appearing before the court, regardless of the party’s status as a private litigant or as a governmental/public entity.” 2013-NMCA-105, ¶ 16, 311 P.3d 1236, *cert. granted*, 2013-NMCERT-010, 313 P.3d 251. We therefore concluded that the district court in that case had inherent authority to impose a non-compensatory, punitive sanction against the board of regents, notwithstanding that it is a public entity. *Id.* ¶ 27.

[17] From what we have said, it is apparent that the district court had inherent authority to dismiss the State’s complaint with prejudice. We now turn to whether the district court properly did so.

## **B. Standard of Review**

[18] We review a district court’s dismissal of a complaint for engaging in abusive litigation practices for an abuse of discretion. *See id.* ¶ 14 (“We generally review a district court’s imposition of sanctions under its inherent power for an abuse of discretion.”); *Reed*, 2000-NMCA-091, ¶ 10, 129 N.M. 639, 11 P.3d 603 (stating that we review dismissal of a complaint as a sanction for an abuse of discretion); *see also Baca*, 1995-NMSC-033, ¶¶ 11-12, 120 N.M. 1, 896 P.2d 1148 (applying an abuse of discretion standard to review a district court’s imposition of sanctions under its inherent power); *State v. Candelaria*, 2008-NMCA-120, ¶ 12, 144 N.M. 797, 192 P.3d 792 (reviewing the sanction of dismissal of a criminal case by a trial court under its inherent power for an abuse of discretion).



[19] Under the abuse of discretion standard of review, we do not determine whether we, as a reviewing court, would have arrived at the same result as the district court. *See United Nuclear Corp.*, 1980-NMSC-094, ¶ 385, 96 N.M. 155, 629 P.2d 231; *Emerick v. Fenick Indus., Inc.*, 539 F.2d 1379, 1381 (5th Cir. 1976); *see also Candelaria*, 2008-NMCA-120, ¶ 12, 144 N.M. 797, 192 P.3d 792 (stating that appellate review of trial court’s discretion does not turn on whether the appellate court would have arrived at the same result). Rather, we only determine “whether the trial court’s decision is without logic or reason, or clearly unable to be defended.” *Enriquez v. Cochran*, 1998-NMCA-157, ¶ 20, 126 N.M. 196, 967 P.2d 1136. Moreover, “[b]ecause the trial court’s decision must be based on its conclusions about a party’s conduct and intent, implicit in the standard of review is the question of whether the court’s findings and decision are supported by substantial evidence.” *Id.*; *see Reed*, 2000-NMCA-091, ¶¶ 24-25, 129 N.M. 639, 11 P.3d 603 (stating that in a hearing on a motion for discovery abuse sanctions, the district court sits as a fact finder). Thus, we review the evidence, and its inferences, in the light most favorable to the district court’s decision. *See Candelaria*, 2008-NMCA-120, ¶ 12, 144 N.M. 797, 192 P.3d 792.

### C. Analysis

[20] On appeal, the State first contends that the created letters are not “false.” The State attempts to minimize the obvious differences between the created letters and actual letters by asserting that the letterhead, addressee, signatory, and body of the letters are not “critical” fields. According to the State, the “critical” fields on the created letter relate to the

caregiver: the name of the provider, the provider number, and the date of clearance. The State asserts that these fields remained the same in the 2006 copy and the 2011 “printout,” that the information in the created letter was independently verifiable by Imagine through the online registry system, and that none of the updated fields in the letters “contained evidence relevant to the State’s claims.”

[21] The State also argues that dismissal was an inappropriate sanction because its actions were not “willful.” The State blames DOH’s failure to keep copies of the 2006 letters and its computer limitations for its “mistake,” asserting that the criminal history screening program’s “inherent computer limitations and inability to ‘reprint’ exact copies of the original two 2006 [criminal history] clearance letters sent to Imagine” caused the “inadvertent error.” The State asserts that “there was no testimony to support Imagine’s contentions that [the investigator] intentionally fabricated and/or falsified [the letters]” blaming his lack of law office experience and training in evidence for causing the “inadvertent error.”

[22] We reject these arguments as contrary to the findings of fact made by the district court. The created letters were falsely represented as accurate copies of actual clearance letters sent to Imagine in 2006. A cursory visual inspection of the documents quickly discloses that they are not even close to being similar. Arguments about “critical” fields do not, and cannot, alter the undisputed fact that the State created, presented, and used a false document at the deposition of Dr. Kaur, the owner and corporate represent-

ative of Imagine, the defendant it was suing.<sup>1</sup> The State fails to appreciate that DOH's computer system limitations are not the issue. Rather, the issue is the consequence of the investigator instructing DOH to create the false documents, and knowing they were false, giving them to the AAG to use in the deposition without telling the AAG why or how the false document was created. The immediate consequence to Dr. Kaur was that after she testified in her deposition that former employees Karan Sangha and Diane Nunn were in charge of criminal history screening requirements for Imagine in 2006, she was confronted with one of the created documents and asked why it was addressed to someone else. The State seemingly overlooks the district court's explicit finding of fact that the investigator's testimony that he thought the information about the falsity of the letters was "not important" was "not credible," considering his position as an investigator for the Attorney General's Office. This finding is more than ample support to conclude that his actions were "willful."

[23] Finally, the State argues that Imagine was not entitled to a dismissal because the false exhibit "did not prejudice Imagine and/or adversely impact its ability to prepare for, and present its case at trial." This argument of a lack of prejudice overlooks our precedent. *See Medina*, 1994-NMSC-016, ¶ 9, 117 N.M. 163, 870 P.2d 125 (stating that deception or reliance in fact by the other party is not a prerequisite to dismissal, and "the ultimate importance of the false or deceptive information" is not a require-

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<sup>1</sup> The State does not contest the district court's conclusion of law that the investigator's actions were performed in the course and scope of his employment with the Attorney General's office.

ment for dismissal); *Reed*, 2000-NMCA-091, ¶ 19-20, 129 N.M. 639, 11 P.3d 603 (stating that dismissal as a sanction does not require that the other party be deceived in fact, that the information be critical to preparation for trial, or that dismissal be conditioned on the ultimate importance of the false or deceptive information).

[24] Moreover, if we were to accept the State's argument of no prejudice, a district court would be powerless to dismiss a case for misconduct during the pretrial discovery phase of a case. And that is clearly contrary to our well-settled precedent, which we have already pointed out, allows for sanctions, including dismissal with prejudice, for misconduct in discovery. Moreover, our Supreme Court has pointed out, "It would be ridiculous to allow a party who completely thwarts discovery to escape penalty simply because it could not be proven that other litigants were in fact deceived by such misconduct or actually relied upon it." *Medina*, 1994-NMSC-016, ¶ 9, 117 N.M. 163, 870 P.2d 125.

[25] Finally, the State's argument overlooks what took place here. Preservation of the integrity of the judicial process is crucial to ensuring that our courts can properly perform their constitutional duty. When conduct perverts the very process used by courts for ascertaining the truth, the core reason for their very existence evaporates. The constitutional integrity of our courts demands that no party may fabricate "evidence," represent it to be something which it is not, and then use it in connection with a judicial proceeding. When this occurs, the entire judicial system is "prejudiced," and dismissal with prejudice is warranted. *See United Nuclear Corp.*, 1980-NMSC-

094, ¶ 397, 96 N.M. 155, 629 P.2d 231 (stating that the interest protected when a party has displayed a willful, bad faith approach to discovery is “to preserve the integrity of the judicial process and the due process rights of the other litigants”); *Harrison*, 2013-NMCA-105, ¶ 24, 311 P.3d 1236 (“The policy behind a district court’s inherent authority is the need to prevent abusive litigation practice and preserve the integrity of the judicial process.”); *Reed*, 2000-NMCA-091, ¶ 9, 129 N.M. 639, 11 P.3d 603 (“ ‘When a party has displayed a willful, bad faith approach to discovery, it is not only proper, but imperative, that severe sanctions be imposed to preserve the integrity of the judicial process and the due process rights of the other litigants.’” (quoting *United Nuclear Corp.*, 1980-NMSC-094, ¶ 397, 96 N.M. 155, 629 P.2d 231)); *Sandoval v. Martinez*, 1989-NMCA-042, ¶ 21, 109 N.M. 5, 780 P.2d 1152 (“[A] false response to a discovery request, unlike other violations of the discovery rules, is a clandestine violation” and that “[i]t is not enough to say that such a party will gain no advantage if the lie is uncovered.”).<sup>2</sup> Such misconduct is so egregious

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<sup>2</sup> Other courts confronted with similar circumstances have reached the same result. In *Vargas v. Peltz*, 901 F.Supp. 1572, 1574-75, 1581 (S.D.Fl. 1995), the court utilized its “firmly established” inherent power to dismiss the plaintiff’s sexual harassment claim against the defendant when she produced panties to corroborate her substantive claim, and it was learned they were not even manufactured at the time of the alleged harassment. In doing so, the court referred to and relied upon *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46-48, 111 S. Ct. 2123, 115 L.Ed.2d 27 (1991) (stating that the inherent power of federal courts to impose sanctions extends to a full range of litigation abuses). See *Pope v. Fed. Express Corp.*, 138 F.R.D. 675, 677, 683 (W.D.Mo. 1990), *aff’d in part*, 974 F.2d 982 (8th Cir. 1992) (stating that the plaintiff’s action for sexual harassment

that even a single instance warrants dismissal. *Beverly*, 1975-NMCA-070, ¶ 15, 88 N.M. 119, 537 P.2d 1015 (“The fact that persistent misconduct provides the basis for dismissal does not mean that one instance of misconduct may not be sufficiently extreme to warrant dismissal.”).

[26] We acknowledge that dismissal with prejudice is a severe sanction. However, the district court was presented with severe misconduct, prejudicial to the administration of justice. The circumstances are ironic in that the State was prosecuting a claim of fraud using created, false documents to do so. Under the circumstances, we cannot conclude that the district court abused its discretion in imposing the sanction of dismissal with prejudice.

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was dismissed where the plaintiff manufactured an alleged note containing improper remarks from her supervisor); *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1118 (1st Cir. 1989) (stating that the cause of action was dismissed for “fraud on the court” where the plaintiff attached a bogus agreement to the complaint); *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987) (per curiam) (stating that a default was entered where the defendant engaged in an elaborate scheme involving perjury designed to willfully deceive the court); *Sun World, Inc. v. Lizarazu Olivarría*, 144 F.R.D. 384, 389-90 (E.D.Cal. 1992) (stating that default judgment was appropriate where the plaintiff submitted a false document and committed perjury in furtherance of fraud); *Eppes v. Snowden*, 656 F.Supp. 1267, 1279 (E.D.Ky. 1986) (stating that the defendant’s answer and counterclaim were stricken where the defendant committed “fraud on the court” by producing backdated letters).

**CONCLUSION**

[27] The order of the district court dismissing the State's complaint with prejudice is affirmed.

[28] IT IS SO ORDERED.

I CONCUR: LINDA M. VANZI, Judge. MICHAEL D. BUSTAMANTE (specially concurring).

**SPECIALLY CONCURRING OPINION  
BY JUSTICE BUSTAMANTE**

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[29] I concur in the Majority Opinion and most of its rationale. I agree, for example, that the State should bear the consequences of the remarkably obtuse actions of its investigator in not informing the attorney in the case that the letters he included in the package were not exact duplicates of the letters issued in 2006. The State's arguments trying to minimize the investigator's fault for what he did fly in the face of the record and the district court's finding of fact.

[30] I write separately only because the Majority Opinion does not adequately address the State's argument that dismissal is too harsh a sanction absent a showing of prejudice to Imagine. The Majority Opinion provides a partial response in ¶ 23, citing *Medina* and *Reed* for the proposition that actual deception and reliance need not be demonstrated in order to affirm dismissal as a sanction. I agree with the proposition, but the question of prejudice here makes the outcome a close thing and in my view merits more detailed scrutiny. The notions of actual deception and reliance are relevant to the question of prejudice, but do not necessarily displace the concerns inherent in the prejudice analysis. *Reed*, after all, noted that "[n]onetheless, prejudice may be a factor for the district court to consider when evaluating the propriety of dismissal for discovery abuse." *Reed*, 2000-NMCA-091, ¶ 28, 129 N.M. 639, 11 P.3d 603. *Reed* also noted that "the non-deceiving party must show that the misrepresentations were significant to the discovery process." *Id.* ¶ 29. I also believe that consideration of prejudice is the better practice in



cases such as this because it prompts a broader review of the circumstances surrounding the events and the district court's decision. This broader review would be of aid in assessing whether the offending party's acts suffice to meet the level of extraordinariness we look for when the ultimate sanction of dismissal has been imposed. It would seem particularly appropriate in cases such as this where a single incident led to the sanction.

[31] The State relies heavily on criminal cases discussing appropriate considerations for sanctions when the prosecutor has lost, destroyed, or withheld evidence. *See State v. Harper*, 2011-NMSC-044, ¶ 19, 150 N.M. 745, 266 P.3d 25; *State v. Bartlett*, 1990-NMCA-024, ¶ 4, 109 N.M. 679, 789 P.2d 627. These cases are not helpful here if only because of the very different considerations inherent in the criminal law.

[32] The State also relies on a civil prelitigation spoliation case which makes clear that prejudice to the opposing party should be considered when evaluating whether dismissal as a sanction is warranted. *See Rest. Mgmt. Co. v. Kidde-Fenwal, Inc.*, 1999-NMCA-101, ¶ 13, 127 N.M. 708, 986 P.2d 504. Though this case involved prelitigation destruction of evidence, its analytical framework was grounded in the inherent authority of the courts to regulate their dockets, promote judicial efficiency, and deter frivolous claims. *Id.* ¶¶ 11, 12. Thus, the rationale underlying the existence and exercise of inherent powers—the necessity to be able to command the obedience of litigants and their attorneys in order to protect the integrity of the litigation process—has been applied to both prelitigation and litigation-based conduct. As such, con-

sideration of prejudice to the non-offending party is also appropriate here.

[33] As suggested by *Kidde-Fenwal*, the State organizes its prejudice argument around the relevance of the evidence to the cause of action in the case and the effect the “created” documents might have on Imagine’s ability to prepare and present its case. *Id.* ¶ 15. As noted in ¶¶ 2 and 3 of the Majority Opinion, the State and Imagine disagreed about when a caregiver could be hired and paid. The State maintained that caregivers could not be paid until they had cleared their criminal background screening. Imagine asserted that caregivers could be hired and paid pending completion of the screening process. Thus, for the State’s purpose, the most salient information on the falsely reproduced letters was the identity of the caregiver and the date the approved screening issued. There is no issue that these “critical fields”—as the State terms them—were accurate.

[34] Based on the fact that the “critical fields” information was accurate, the State argues with some force that there could be no effect on Imagine’s defense in any event. The State also asserts that once the error was discovered it agreed that the false letters would not be used for any purpose; thus there could be no prejudice shown. Viewed in isolation these arguments could be persuasive.

[35] But prejudice is not a controlling factor. Courts should also consider the degree of fault of the offending party. *Id.* ¶ 14. The district court clearly found great fault in the actions of the investigator. Courts should balance the degree of fault against the magnitude of prejudice in designing a sanction. *Id.* ¶ 17. If the reasonably potential effect of the offending

party's action on the administration of justice is severe enough, the court can opt for the severest sanction to deter such conduct by others in the future. *Id.*

[36] I construe the district court's decision as a judgment by it that the creation and use made of the false, recreated letters was simply not to be tolerated. Given the "immense power" of the Attorney General and its position as the attorney for the State of New Mexico, I cannot disagree with the district court's conclusion. I conclude that this is one of those cases in which the degree of fault can fairly trump a showing of relatively minimal prejudice.

## **RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS**

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### **U.S. Const., amend. IV**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

### **U.S. Const. amend. XIV § 1**

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**42 U.S.C. § 1983—Civil Action for Deprivation of Rights**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.