

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Court of Appeals of New Mexico

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Mark Reynolds

No. A-1-CA-40464

**IN THE MATTER OF THE ESTATE
OF SALOCHNA D. GROVER, Deceased,**

REENA ROMAN and DAVID ROMAN,

Petitioners-Appellants,

v.

SEEMA CHRISTENSEN,

Interested Party-Appellee.

**APPEAL FROM THE DISTRICT COURT OF CURRY COUNTY
David Reeb, Jr., District Court Judge**

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for Appellants

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Doerr & Knudson, P.A.
Randy Knudson
Portales, NM

for Appellee

OPINION

ATTREP, Judge.

{1} Petitioner Reena Roman appeals the district court's dismissal with prejudice of her creditor's claim against the probate estate of her mother as a sanction for her noncompliance with a scheduling order. Petitioner argues the district court abused its discretion in imposing the sanction of dismissal on the grounds that the scheduling order at issue was ambiguous, her noncompliance was not willful, and the totality of the circumstances did not warrant such a harsh sanction. Because Petitioner understood her obligations under the scheduling order, any ambiguity on the face of that order is not a bar to sanctions in this case. Further, Petitioner has not adequately impeached the district court's finding of willful noncompliance or otherwise convinced us that the district court committed a clear error of judgment in imposing the sanction of dismissal under the totality of the circumstances. We accordingly affirm.

BACKGROUND

{2} Petitioner was appointed the personal representative of the Estate of Salochna Grover (Decedent), Petitioner's mother. Approximately two months later, in May 2016, Petitioner also asserted a creditor's claim against the Estate, seeking reimbursement for caregiving and financial assistance she allegedly provided to Decedent prior to her death, as well as unpaid guardian, conservator, and legal fees.

1 See NMSA 1978, § 45-3-804(A) (1983). Petitioner was represented by different
2 attorneys when acting as personal representative versus creditor. A notice of
3 disallowance of claim was filed by the attorney representing Petitioner in her
4 capacity as the personal representative. Petitioner then petitioned the district court
5 in August 2016 for allowance of her creditor's claim.¹ See NMSA 1978, § 45-3-
6 806(A) (1993). Interested Party Seema Christensen, Petitioner's sister and
7 Decedent's only other living child, objected to the petition.² Pursuant to Decedent's
8 last will and testament, Petitioner and Interested Party are the devisees of equal
9 shares of the residuary estate.

10 {3} The first scheduling conference on Petitioner's creditor's claim was held on
11 December 13, 2016. After discussing discovery and dispositive motions deadlines,
12 the district court judge stated, "[A]fter today, you guys can select a time for your
13 trial and just contact my secretary and pencil that in." Three weeks later, the district
14 court entered a Rule 1-016(B) NMRA scheduling order, which provided deadlines
15 for discovery, motions, and proposed findings of fact and conclusions of law, and
16 ordered the parties to participate in mediation, but did not set a trial date. Over the

¹Petitioner filed an amended petition approximately one month later to correct an inaccurate factual recitation and to add a claim for attorney fees. Petitioner was joined in her creditor's claim by her husband, David Roman.

²On appeal, Interested Party repeatedly cites Petitioner's dual role as creditor and personal representative and suggests this created a conflict of interest. It appears Interested Party never brought this matter to the district court's attention, and we decline to address it for the first time on appeal.

1 next fourteen months, the parties engaged in discovery and two unsuccessful
2 mediations. In April 2018, Petitioner moved the district court to extend the expert
3 witness disclosure deadline and to set a trial date. After Interested Party did not
4 respond to that motion, counsel for Petitioner submitted a proposed order to the
5 district court, which the judge signed, extending the deadlines for expert disclosures
6 and dispositive motions. As for a trial setting, the order simply stated, “There is no
7 trial scheduled at this time.” Petitioner timely disclosed her expert witness on
8 July 31, 2018.

9 {4} The matter then languished for nearly fifteen months until Petitioner filed a
10 request for trial setting on October 24, 2019. Approximately one hour later,
11 Interested Party moved the district court to dismiss Petitioner’s claim with prejudice
12 for lack of prosecution pursuant to Rule 1-041(E)(1) NMRA. In an order dated
13 November 20, 2019, the district court denied Interested Party’s motion, ruling that
14 “Petitioner is not in violation of the existing Rule [1-0]16 [s]cheduling [o]rder
15 entered in this cause and has otherwise taken significant action to bring her claims
16 to trial, including, without limitation, attending two mediation sessions, obtaining an
17 extension of certain disclosure and discovery deadlines and retaining an expert
18 witness, filing the expert witness[’s] report in this cause and requesting a trial
19 setting.” See Rule 1-041(E)(1) (providing that a claim shall not be dismissed

1 pursuant to that rule “if the party opposing the motion is in compliance with an order
2 entered pursuant to Rule 1-016”).

3 {5} Another lull in the case then occurred—this time for seven months—until
4 June 24, 2020, when Petitioner filed a request for scheduling conference. A
5 scheduling conference was held on July 29, 2020 (July 2020 Scheduling
6 Conference), at which Petitioner and Interested Party indicated they were ready for
7 trial and only needed a trial date, as well as some final pretrial deadlines. Regarding
8 the trial date, the district court judge told counsel, “You guys are going to have to
9 contact . . . my [trial court administrative assistant (TCAA)] for that. . . . She’ll have
10 to give you the dates when you can do it.” While reviewing pretrial deadlines, the
11 judge further directed, “Counsel will contact my TCAA and get a bench trial date.”
12 Later, the judge told the parties that trial would need to happen in the spring of 2021
13 due to certain family obligations. At the end of the conference, the judge reminded
14 counsel that he would “leave it up to you guys to contact my TCAA for the trial
15 date.” The new scheduling order, which was prepared by Petitioner’s counsel and
16 entered on October 21, 2020 (Scheduling Order), provided, “Trial on [Petitioner’s
17 creditor’s claim] shall be set for *the [s]pring of 2021 for a date after March 15, 2021.*
18 *The trial date will not be continued except in truly exceptional circumstances.*”

19 {6} After both parties filed witness lists, nothing further happened in the case for
20 nearly another year—until August 24, 2021—when Petitioner filed another request

1 for trial setting. The following day, having not seen the request, the district court
2 filed an order administratively closing the case due to inactivity. The case was
3 reopened when Petitioner filed a notice of case status in which counsel stated that he
4 had requested a trial setting because none had been set pursuant to the Scheduling
5 Order.

6 {7} The district court noticed a status conference for October 13, 2021. Interested
7 Party then filed another motion to dismiss Petitioner’s creditor’s claim (Motion to
8 Dismiss), arguing that “there was no significant action taken by . . . Petitioner to
9 pursue the claim for more than two (2) years” and “Petitioner is not in compliance
10 with the Scheduling Order.” In support, Petitioner cited Rule 1-041. Prior to the
11 October 13, 2021, status conference, Petitioner filed a response to the Motion to
12 Dismiss (Initial Response).³ The gist of Petitioner’s Initial Response was that she
13 was waiting for the district court to set the trial because, according to her, the court
14 stated at the July 2020 Scheduling Conference that “it will issue the trial dates sua
15 sponte.” Additionally, Petitioner claimed, “There is absolutely nothing more that
16 Petitioner and/or her counsel could have done to expedite the matter. Petitioner
17 and/or her counsel cannot set the trial date on their own. The [district c]ourt clearly
18 stated that it would not set the matter until May or June 2021.”

³Petitioner filed a response on October 12, 2021, and an amended response on October 13, 2021, which corrected a factual inaccuracy. Our citations to the Initial Response are to the October 13, 2021, filing.

1 {8} During the October 13, 2021, status conference, counsel for Petitioner
2 persisted in this position. The district court judge then stated that he would listen to
3 the recording of the July 2020 Scheduling Conference, but noted, “It would be unlike
4 me to say ‘counsel I’m going to set this.’ That’s not typically how I would ever run
5 my docket. Normally, I’d say that you all need to contact my TCAA.” Counsel for
6 Petitioner then interrupted, stating,

7 In fact, your honor, the court did say contact the TCAA. And what we
8 did was we submitted the scheduling order that had the language in it
9 that said the court shall set the trial setting. And so it may very well be
10 that what happened was I just misread the effect of that language. But
11 the way that I read that language is that we were going to get a trial
12 setting issued by the court.

13 The judge concluded the status conference by asking the parties to notify him when
14 the briefing on Interested Party’s Motion to Dismiss was complete.

15 {9} The next day, Petitioner filed a “substituted response” to Interested Party’s
16 Motion to Dismiss (Substituted Response), in which Petitioner acknowledged,
17 “During the [July 2020 S]cheduling [C]onference . . . , the [c]ourt mentioned that
18 the judge’s [TCAA] should be contacted to get the trial date.” Similarly, Petitioner
19 no longer claimed that there was “absolutely nothing” she could have done to
20 expedite the matter. Instead, Petitioner claimed, “While [counsel] could have
21 reached the [c]ourt for setting the trial in February or March 2021, [counsel] was
22 under the impression that the [c]ourt would set the matter” based on the language of
23 the Scheduling Order, which, Petitioner incorrectly asserted, “stated that the [c]ourt

1 shall set the matter for trial.” Shortly thereafter, Interested Party filed her reply brief,
2 arguing that the district court “ordered Petitioner’s counsel to obtain the trial setting
3 in spring of 2021.” Interested Party also alerted the district court to the fact Rule
4 1-041 may not apply to this case since it was commenced pursuant to the Probate
5 Code. *See* Rule 1-041(F)(3) (providing that Rule 1-041 does not apply to
6 “proceedings commenced pursuant to the provisions of the Probate Code”).
7 Nonetheless, Interested Party argued that the district court could dismiss the case
8 pursuant to Rule 1-016(F), which permits sanctions for noncompliance with
9 scheduling orders.

10 {10} Over five and a half years after Petitioner initiated her creditor’s claim, the
11 district court entered a decision letter (First Decision Letter) dismissing Petitioner’s
12 creditor’s claim pursuant to Rule 1-016(F). The district court found that it had
13 repeatedly told counsel during the July 2020 Scheduling Conference to contact the
14 TCAA to obtain a trial setting and that it had told counsel as early as the December
15 13, 2016, scheduling conference to do the same. The district court additionally
16 viewed Petitioner’s counsel’s argument that “the [c]ourt is the cause of delay due to
17 failure to schedule the matter for trial [as] quite disingenuous and arguably dishonest
18 since counsel was specifically instructed on the record to select a date for trial and
19 failed to do so.” Shortly thereafter, the district court entered its order of dismissal,
20 which incorporated the First Decision Letter.

1 {11} Petitioner timely moved the district court for reconsideration. Petitioner
2 primarily argued in her motion that dismissal of her claim was unwarranted because
3 counsel did not violate the written Scheduling Order, and because counsel's actions
4 in failing to call the TCAA were not willful. Petitioner claimed, "Counsel simply
5 forgot the verbal statements from the bench when the [July 2020] Scheduling
6 Conference was held" and, as a result, simply "waited for the trial setting from the
7 [c]ourt to be filed after [s]pring 2021." During the hearing on Petitioner's motion for
8 reconsideration, counsel for Petitioner acknowledged that the district court had
9 directed counsel to contact the TCAA for a trial setting but repeatedly asserted that,
10 by the time spring of 2021 came around, he simply had forgotten he was supposed
11 to do so.

12 {12} The district court denied Petitioner's motion for reconsideration in a decision
13 letter (Second Decision Letter). The district court found that, since the inception of
14 the case, "no attorney has called my [TCAA] to follow up on acquiring a trial
15 setting." The district court further found that Petitioner's statement in her Initial
16 Response that the court said it would sua sponte set the trial had been removed from
17 her Substituted Response because it was "false."⁴ The district court did not credit

⁴Petitioner does not directly acknowledge this finding in her briefing but attempts to avoid it by claiming she "hurriedly filed a timely response to the Motion [to Dismiss,] which was amended to correctly reflect the factual background." Petitioner's counsel goes on to claim that he listened to the July 2020 Scheduling Conference prior to the October 13, 2021, status conference, which "triggered the

1 Petitioner’s counsel’s explanation that he had “forgotten” the court’s directive to call
2 the TCAA and instead found that Petitioner had exhibited “a willful failure to follow
3 the court’s directive to schedule a trial followed by an attempt to blame the court for
4 inaction.” An order adopting the Second Decision Letter was entered, and Petitioner
5 appealed.

6 **STANDARD OF REVIEW**

7 {13} “Sanctions are intended to preserve the integrity of the judicial process and
8 the due process rights of the other litigants.” *Weiss v. THI of N.M. at Valle Norte,*
9 *LLC*, 2013-NMCA-054, ¶ 17, 301 P.3d 875 (internal quotation marks and citation
10 omitted). In dismissing Petitioner’s creditor’s claim as a sanction for her
11 noncompliance with the Scheduling Order, the district court relied on Rule 1-016(F).
12 Rule 1-016 is a rule “geared toward managing and expediting civil litigation to a
13 final disposition.” *Rodriguez ex rel. Rodarte v. Sanchez*, 2019-NMCA-065, ¶ 20,
14 451 P.3d 105. To that end, Subsection (F) empowers the district courts to impose

memory pertaining to the trial judge’s comments of calling his TCAA.” We first observe that these factual assertions are made without citation to the record; and based on our review, Petitioner never made these assertions below. We therefore do not rely on them. *See Muse v. Muse*, 2009-NMCA-003, ¶ 51, 145 N.M. 451, 200 P.3d 104 (“It is not our practice to rely on assertions of counsel unaccompanied by support in the record. The mere assertions and arguments of counsel are not evidence.”). Furthermore, these factual assertions do not explain why Petitioner’s counsel only acknowledged the district court’s directive to call the TCAA when the judge expressed disbelief with counsel’s suggestion that the court said it would sua sponte set the trial.

1 sanctions when, as is relevant here, “a party or party’s attorney fails to obey a
2 scheduling . . . order.” Rule 1-016(F). In particular, “the judge . . . may make such
3 orders with regard thereto as are just, including any of the orders provided in
4 Subparagraphs (b), (c) or (d) of Subparagraph (2), of Paragraph B of Rule 1-037
5 [NMRA],” the rule governing failures to make discovery. Rule 1-016(F). The district
6 court’s First Decision Letter specifically cited Rule 1-037(B)(2)(c), which, in turn,
7 allows for “an order . . . dismissing the action or proceeding or any part thereof.”
8 Rule 1-037(B)(2)(c). Although we have little case law in New Mexico directly
9 dealing with Rule 1-016(F) sanctions, we apply the same standards developed for
10 Rule 1-037(B)(2) sanctions, as directed by Rule 1-016(F).⁵ See *Carter v. Jablonsky*,
11 121 F. App’x 888, 889 (2d Cir. 2005); see also *Lowery v. Atterbury*, 1992-NMSC-

⁵Additionally, although the district court in this case did not base its decision on Rule 1-041(B), we find case law construing the same persuasive. Similar to Rules 1-037(B)(2) and 1-016(F), Rule 1-041(B) permits the district court to dismiss a claim for failure to obey a court order. The standards in these contexts overlap significantly and the same considerations are at play when considering a sanction that denies an adjudication on the merits. Compare, e.g., *Newsome v. Farer*, 1985-NMSC-096, ¶¶ 27-29, 103 N.M. 415, 708 P.2d 327 (requiring, in the Rule 1-041(B) context, that a party’s conduct be willful and the trial court consider lesser sanctions to sustain dismissal of an action), with *Sandoval v. Martinez*, 1989-NMCA-042, ¶¶ 13, 22, 109 N.M. 5, 780 P.2d 1152 (requiring, in the Rule 1-037 context, that a party’s conduct be willful and the trial court consider lesser sanctions to sustain dismissal of an action); see also *United Nuclear Corp. v. Gen. Atomic Co.*, 1980-NMSC-094, ¶ 387, 96 N.M. 155, 629 P.2d 231 (relying on case law construing Fed. R. Civ. P. 41(b) in evaluating N.M. R. Civ. P. 37(b)(2) sanctions); *Malone v. U.S. Postal Serv.*, 833 F.2d 128, 130 (9th Cir. 1987) (“The standards governing dismissal for failure to obey a court order are basically the same under [Fed. R. Civ. P. 16(f), Fed. R. Civ. P. 37(b)(2)(C), and Fed. R. Civ. P. 41(b).]”).

1 001, ¶ 12 n.2, 113 N.M. 71, 823 P.2d 313 (“We cite federal cases only to the extent
2 that we find them instructive and not as binding precedent.”).

3 {14} We thus review a district court’s imposition of sanctions issued pursuant to
4 Rule 1-016(F), as well as Rule 1-037(B)(2), for an abuse of discretion. *See Lewis ex*
5 *rel. Lewis v. Samson*, 2001-NMSC-035, ¶ 13, 131 N.M. 317, 35 P.3d 972 (“We
6 review a trial court’s decision to impose discovery sanctions under Rule 1-037(B)(2)
7 for an abuse of discretion.”); *Sanchez v. Borrego*, 2004-NMCA-033, ¶¶ 10-12, 135
8 N.M. 192, 86 P.3d 617 (providing, in the context of a scheduling order violation,
9 that “[o]n appeal, we review sanctions imposed by the trial court for discovery
10 violations and violations of court orders for an abuse of discretion”); *see also*
11 *Newsome v. Farer*, 1985-NMSC-096, ¶ 22, 103 N.M. 415, 708 P.2d 327 (“New
12 Mexico trial courts also have the power to dismiss cases *sua sponte* for disregard of
13 court orders directed toward case management. Such dismissal is discretionary with
14 the court and therefore subject to review only to determine whether there was an
15 abuse of discretion.” (internal quotation marks and citations omitted)).

16 {15} “The choice of sanctions lies within the sound discretion of the trial court.”
17 *Gonzales v. Surgidev Corp.*, 1995-NMSC-047, ¶ 33, 120 N.M. 151, 899 P.2d 594
18 (text only) (citation omitted). Dismissal with prejudice, however, “is a drastic
19 sanction that is [to be] used sparingly.” *Newsome*, 1985-NMSC-096, ¶ 27. We
20 accordingly “more closely scrutinize, albeit still under an abuse of discretion

1 standard, the severe sanction of dismissal,” *Lewis*, 2001-NMSC-035, ¶ 13, insuring
2 that its imposition is the result of willful noncompliance with a court order,
3 *Gonzales*, 1995-NMSC-047, ¶ 31; *see also United Nuclear Corp. v. Gen. Atomic*
4 *Co.*, 1980-NMSC-094, ¶ 202, 96 N.M. 155, 629 P.2d 231 (providing that “the denial
5 of an opportunity for a hearing on the merits[] may only be imposed when the failure
6 to comply is due to the willfulness, bad faith or fault of the disobedient party”).
7 “Because the trial court’s decision must be based on its conclusions about a party’s
8 conduct and intent, implicit in the standard of review is the question of whether the
9 court’s findings and decision are supported by substantial evidence.” *Enriquez v.*
10 *Cochran*, 1998-NMCA-157, ¶ 20, 126 N.M. 196, 967 P.2d 1136. *See generally*
11 *McDonald v. Zimmer Inc.*, 2020-NMCA-020, ¶ 23, 461 P.3d 930 (“Substantial
12 evidence is such relevant evidence as a reasonable mind might accept as adequate to
13 support a conclusion.” (internal quotation marks and citation omitted)).
14 {16} “We will not reverse a dismissal [as a sanction] unless, after reviewing the
15 full record and the reasons the district court gave for its order, we are left with a
16 definite and firm conviction that the court below committed a clear error of judgment
17 in the conclusion it reached upon a weighing of the relevant factors.” *Sandoval v.*
18 *Martinez*, 1989-NMCA-042, ¶ 23, 109 N.M. 5, 780 P.2d 1152 (internal quotation
19 marks and citation omitted). That is, “[i]t is not our responsibility as a reviewing
20 court to say whether we would have chosen a more moderate sanction. Instead, we

1 merely address whether we are convinced that the trial court’s decision is irrational
2 or clearly against logic.” *Lewis*, 2001-NMSC-035, ¶ 23 (internal quotation marks
3 and citation omitted). Finally, “[w]e emphasize . . . that it is the appellant’s burden
4 to persuade us that the district court erred” because “there is a presumption of
5 correctness in the rulings and decisions of the district court.” *Hall v. City of*
6 *Carlsbad*, 2023-NMCA-042, ¶ 5, 531 P.3d 642 (internal quotation marks and
7 citation omitted); see also *Premier Tr. of Nev., Inc. v. City of Albuquerque*, 2021-
8 NMCA-004, ¶ 10, 482 P.3d 1261 (“[I]t is the appellant’s burden to demonstrate, by
9 providing well-supported and clear arguments, that the district court has erred.”).

10 **DISCUSSION**

11 {17} We distill Petitioner’s various arguments why the district court erred by
12 dismissing her creditor’s claim with prejudice into three main points. First, Petitioner
13 asserts that the Scheduling Order was ambiguous and the sanction of dismissal is
14 only appropriate for a violation of an unambiguous order. Second, Petitioner argues
15 that substantial evidence does not support a finding that any violation of the
16 Scheduling Order was willful. Third, Petitioner contends that the totality of the
17 circumstances does not warrant the sanction of dismissal.⁶ For the reasons we
18 discuss below, we reject Petitioner’s arguments.

⁶Petitioner additionally argues that the district court erred to the extent it dismissed her creditor’s claim under Rule 1-041(E)(1) for lack of prosecution. The district court acknowledged the limitation in Rule 1-041, providing that the rule does

I. Any Ambiguity in the Scheduling Order Does Not Bar Sanctions in This Case

{18} Relying on federal law, Petitioner argues that a court may impose sanctions under Rule 1-016(F) only if the order at issue is unambiguous.⁷ *See Act Now to Stop War & End Racism Coal. & Muslim Am. Soc’y Freedom Found. v. Dist. of Columbia*, 846 F.3d 391, 414 (D.C. Cir. 2017) (“[A] court may award sanctions under [Fed. R. Civ. P.] 16(f) only where a party violates an unambiguous order.”). Petitioner continues by arguing that the Scheduling Order was ambiguous because

not apply to “proceedings commenced pursuant to the provisions of the Probate Code,” Rule 1-041(F)(3), and ultimately relied on Rules 1-016(F) and 1-037(B)(2)(c) in dismissing Petitioner’s claim. We thus do not read the district court’s decision letters as dismissing Petitioner’s claim under Rule 1-041(E)(1) for lack of prosecution. We do note that the district court referenced this rule as persuasive authority in its assessment of the totality of the circumstances, and cited the fact that this case had “stalled” for “more than three (3) years” in deciding that dismissal, and not a lesser sanction, was appropriate. As discussed below, we find no error in the district court’s consideration of this delay in its selection of a sanction in this case.

⁷Petitioner does not point to where in the record she preserved the issue that the Scheduling Order’s purported ambiguity was an impediment to sanctions under Rule 1-016(F). *See Crutchfield v. N.M. Dep’t of Tax’n & Revenue*, 2005-NMCA-022, ¶ 14, 137 N.M. 26, 106 P.3d 1273 (“[O]n appeal, the party must specifically point out where, in the record, the party invoked the court’s ruling on the issue. Absent that citation to the record or any obvious preservation, we will not consider the issue.”); Rule 12-318(A)(4) NMRA (mandating that the brief in chief contain “an argument which, with respect to each issue presented, shall contain . . . a statement explaining how the issue was preserved in the court below”). Nor, based on our review of the record, does it appear this particular issue was presented to the district court for its consideration. *See* Rule 12-321(A) NMRA (“To preserve an issue for review, it must appear that a ruling or decision by the trial court was fairly invoked.”). Nevertheless, even assuming this issue was properly preserved, we conclude for the reasons that follow that it presents no basis for reversal.

1 it did not contain the district court’s verbal directive to counsel, made at the July
2 2020 Scheduling Conference, to call the TCAA for a trial setting. Specifically,
3 Petitioner contends that “the written order resulting from the July [2020 S]cheduling
4 [C]onference made no mention of the phone requirement, who was to make the call,
5 when the call must be made or what would happen if the call was not placed.” We
6 are not convinced that any ambiguity in the Scheduling Order precluded sanctions
7 in this case.⁸

8 {19} As a general proposition, we agree with Petitioner that a party cannot be
9 sanctioned for violating an ambiguous order. Case law in New Mexico already
10 recognizes as much. *See, e.g., Newsome*, 1985-NMSC-096, ¶ 28 (providing, in the
11 Rule 1-041(B) context, that “[m]isunderstanding a court order may excuse non-
12 compliance if the order is vague or ambiguous”); *cf. Marchman v. NCNB Tex. Nat’l*
13 *Bank*, 1995-NMSC-041, ¶ 52, 120 N.M. 74, 898 P.2d 709 (providing that “any
14 clearly articulated order requiring or permitting discovery can provide the basis of
15 sanctions for noncompliance” under Rule 1-037(B)). That an order must be clear and
16 unambiguous is grounded in the requirement that the sanctioned party must have

⁸Although Petitioner frames her argument that the Scheduling Order was ambiguous in terms of a substantial evidence challenge, whether an order is ambiguous and the meaning of a court order are questions of law reviewed de novo. *See Schueller v. Schueller*, 1994-NMCA-014, ¶ 7, 117 N.M. 197, 870 P.2d 159 (considering de novo whether a district court decree was ambiguous); *Fed. Nat’l Mortg. Ass’n v. Chiulli*, 2018-NMCA-054, ¶ 14, 425 P.3d 739 (“The interpretation of a court order presents a question of law which we review de novo.”).

1 notice or knowledge of what is expected of them to sustain a sanction. *See Carlsbad*
2 *Hotel Assocs., L.L.C. v. Patterson-UTI Drilling Co.*, 2009-NMCA-005, ¶ 25, 145
3 N.M. 385, 199 P.3d 288 (providing that a party sanctioned for violating a court order
4 may challenge the sanction on the ground that the order was ambiguous and, as such,
5 deprived the party of “fair or reasonable notice of what conduct was sanctionable”);
6 *see also State v. Cherryhomes*, 1992-NMCA-111, ¶ 10, 114 N.M. 495, 840 P.2d
7 1261 (providing, in the contempt context, that the reviewing court “must first
8 determine whether an order existed that was sufficient to put [the party] on notice of
9 what was required of [them]”).

10 {20} By the same token, however, it makes little sense to permit a party to seek
11 refuge in an order that arguably is ambiguous on its face where it nonetheless is clear
12 from the record that the party understood its meaning. *See Cherryhomes*, 1992-
13 NMCA-111, ¶¶ 1, 4, 10, 12, 13, 19 (rejecting the attorney’s argument that an oral
14 order of the court to wear a “tie” was ambiguous because the attorney believed his
15 bandanna was a tie when it was clear from the record that the attorney understood
16 the court interpreted the term to not include a bandanna); *Newsome*, 1985-NMSC-
17 096, ¶¶ 18-19 (rejecting the appellant’s argument that “he was not required to attend
18 production of documents because the court did not affirmatively order him to do so”
19 when “common sense dictates” that such required attendance is inherent in the
20 court’s order to produce documents). That is, “even an order that [is vague on its

face] may form the basis of a sanction if the record establishes that, notwithstanding the lack of such clarity, the party sanctioned in fact understood the trial court’s intended meaning.” *Millbrook Owners Ass’n, Inc. v. Hamilton Standard*, 776 A.2d 1115, 1126 (Conn. 2001). Such is the case here.

{21} The Scheduling Order provided, “Trial . . . shall be set for the [s]pring of 2021 for a date after March 15, 2021. The trial date will not be continued except in truly exceptional circumstances.” The question, then, is how did the district court intend for trial to be set for the spring of 2021? The answer could not be clearer given the district court’s repeated directives at the July 2020 Scheduling Conference, resulting in the Scheduling Order, that counsel needed to call the TCAA to get a trial setting. *See Jeantete v. Jeantete*, 1990-NMCA-138, ¶ 11, 111 N.M. 417, 806 P.2d 66 (providing that “the reviewing court may consider the trial court’s verbal comments in order to clarify or discern the basis for the order or action of the court below”). More importantly, though, neither can it be clearer that Petitioner’s counsel understood the district court’s intention. At the hearing on Petitioner’s motion for reconsideration, counsel for Petitioner repeatedly acknowledged that the district court had directed him to call the TCAA to get a trial setting. As just a few examples, counsel for Petitioner stated the following:

I do . . . recognize that the court asked counsel to call the TCAA and get a trial date.

1 I . . . simply did not give the instruction to my legal assistant that we
2 needed to call the trial court’s assistant.

3 I do acknowledge that [the instruction for us to contact the trial court
4 assistant for a trial date] was said in [the July 2020 Scheduling
5 Conference].

6 Based on the statements by the court, we were supposed to reach out to
7 the trial assistant in the spring for the trial setting.

8 [T]here have not been any orders that we have violated other than the
9 court’s request that we contact the court’s TCAA for a trial setting.

10 That the “written order resulting from the July [2020 S]cheduling [C]onference
11 made no mention of the phone requirement,” as Petitioner argues, is thus of no
12 import on the issue of ambiguity, given counsel understood his obligation to call the
13 TCAA.⁹ *See Cherryhomes*, 1992-NMCA-111, ¶¶ 1, 4, 10, 12, 13, 19; *Newsome*,
14 1985-NMSC-096, ¶¶ 18-19; *see also Millbrook Owners Ass’n, Inc.*, 776 A.2d at
15 1126.

16 {22} We likewise are not persuaded by Petitioner’s argument that the Scheduling
17 Order was fatally ambiguous because it did not provide “who was to make the call.”
18 Again, counsel for Petitioner repeatedly acknowledged below that he was to make
19 the call. Moreover, contrary to Petitioner’s suggestions, it was Petitioner’s—not
20 Interested Party’s—obligation to expedite the resolution of her claim. *See, e.g.*,

⁹Although Petitioner’s counsel acknowledges the district court’s directive to call the TCAA, counsel claimed below and claims on appeal that he forgot this directive and, as a result, his failure to make the call evinces that he did not act willfully—a matter we take up below.

1 *Pettine v. Rogers*, 1958-NMSC-025, ¶ 6, 63 N.M. 457, 321 P.2d 638 (“The duty
2 rests upon the claimant at every stage of the proceeding to use diligence to expedite
3 [their] case.”); *Featherstone v. Hanson*, 1959-NMSC-040, ¶ 9, 65 N.M. 398, 338
4 P.2d 298 (“There is no duty on the part of the defendant to bring the case to trial,
5 this responsibility being entirely upon the plaintiff, and the plaintiff failed to do so.”),
6 *overruled on other grounds by State ex rel. Reynolds v. Molybdenum Corp. of Am.*,
7 1972-NMSC-027, ¶¶ 10, 25, 83 N.M. 690, 496 P.2d 1086.

8 {23} Finally, we reject Petitioner’s argument that the Scheduling Order was
9 ambiguous because it did not state by when the TCAA needed to be called, nor what
10 would happen if Petitioner did not make the call. At the July 2020 Scheduling
11 Conference, the district court stated that trial would need to occur in the spring of
12 2021, i.e., approximately nine months later. The Scheduling Order made this
13 mandatory—that “[t]rial . . . shall be set for the [s]pring of 2021 for a date after
14 March 15, 2021.” Petitioner and her counsel hardly needed any more guidance to
15 understand that the TCAA needed to be called sufficiently in advance of spring 2021
16 to get the case calendared within the timeframe mandated in the Scheduling Order.
17 *See Newsome*, 1985-NMSC-096, ¶¶ 18-19 (explaining that the plaintiff was held
18 accountable for the obvious consequence of the district court’s order—i.e., the
19 plaintiff was required to inspect the records at the date and time provided in the
20 order—even if the order was not explicit in its instruction). Likewise, the Scheduling

Order clearly set forth the consequences of Petitioner’s inaction—i.e., that trial would not be continued but for “truly exceptional circumstances.”¹⁰ That is, if no such circumstances existed and the time for the trial setting passed, the creditor’s claim would not be adjudicated on the merits. *See id.*

{24} For these reasons, Petitioner’s argument that the Scheduling Order could not provide the basis for the district court’s sanction of dismissal because it was ambiguous is not well taken.

II. The District Court’s Finding That Petitioner’s Noncompliance Was Willful Is Supported by Substantial Evidence

{25} The district court found that Petitioner’s noncompliance was willful such that dismissal with prejudice was warranted. Specifically, the court found, “Here, . . . there is a willful failure to follow the court’s directive to schedule a trial followed by an attempt to blame the court for inaction.”¹¹ On appeal, Petitioner contends the district court’s finding of willfulness is not supported by substantial evidence, arguing that, “at worst,” her attorney exhibited “an excusable neglect and misunderstanding resulting from a lapsed memory and not a willful or intentional

¹⁰We separately address below Petitioner’s claim that the district court failed to give her advance warning that it would impose the sanction of dismissal and that this weighs against such a sanction under the totality of the circumstances.

¹¹The district court made this finding, as well as other pertinent findings, in its decision letters, which were incorporated into the court’s orders. *See Blea v. Sandoval*, 1988-NMCA-036, ¶ 5, 107 N.M. 554, 761 P.2d 432 (construing a district court’s decision letter as containing “findings of fact and conclusions of law, although they were not denominated as such”).

violation of a trial court order.” *See Allred ex rel. Allred v. Bd. of Regents of the Univ. of N.M.*, 1997-NMCA-070, ¶¶ 24, 28, 123 N.M. 545, 943 P.2d 579 (observing that the district court’s finding of willful noncompliance with a court order is reviewed for substantial evidence). For the reasons that follow, we are not persuaded.

{26} First, Petitioner suggests that her or her attorney’s conduct had to rise to the level of “bad faith” or “deceitful or fraudulent conduct,” or entail a “series of violations of orders,” to amount to “willfulness” supporting dismissal. *See Gonzales*, 1995-NMSC-047, ¶ 31 (requiring that the sanction of dismissal for failure to comply with a court order be supported by “willfulness”). Petitioner misapprehends the applicable standard. As our Supreme Court explained, while the type of egregious conduct identified by Petitioner certainly is sufficient to support a sanction of dismissal, *see id.*, it is not necessarily required; instead, “fault of the disobedient party” also suffices, *id.* (internal quotation marks and citation omitted), as does “gross indifference to [a party’s] obligations,” *Medina v. Found. Rsrv. Ins. Co.*, 1994-NMSC-016, ¶ 6, 117 N.M. 163, 870 P.2d 125. *See United Nuclear Corp.*, 1980-NMSC-094, ¶ 382 (“[W]hether [the] failures to make . . . discovery were the result of a willful, intentional and bad faith attempt to conceal evidence, as the trial court found, or were due to a gross indifference to its discovery obligations, is immaterial. The willfulness required to sustain the severe sanctions of

1 [N.M. R. Civ. P.] 37(b)(2)(iii) may be predicated upon either type of behavior.”);
2 *Thornfield v. First State Bank of Rio Rancho*, 1983-NMCA-149, ¶ 10, 103 N.M. 229,
3 704 P.2d 1105 (providing that “[a]lthough the plaintiff in this case apparently did
4 not act in bad faith as did the defendant in *United Nuclear*,” the facts of the case
5 nonetheless “indicate a ‘conscious or intentional failure to comply[,]’ which
6 amounts to willfulness under *United Nuclear*”); *see also Allred*, 1997-NMCA-070,
7 ¶ 27 (observing that “‘willfulness,’ used alone, is shorthand for willfulness, bad faith,
8 or other fault”). In other words, willfulness in this context does not have to rise to
9 the level of bad faith or other wrongdoing but instead is a “conscious or intentional
10 failure to comply” “even where there is ‘no wrongful intent.’” *Gonzales*, 1995-
11 NMSC-047, ¶ 31; *see Lowery*, 1992-NMSC-001, ¶¶ 13-15 (providing that, under
12 Rule 1-041(B), where the plaintiff “was aware of the trial date and failed to prepare
13 for trial,” the plaintiff’s “conduct was willful” and separately examining, under the
14 totality of the circumstances, whether there was a reasonable explanation for this
15 willful violation). In contrast, “accidental or involuntary non-compliance” does not
16 amount to “willfulness.” *See Gonzales*, 1995-NMSC-047, ¶ 31 (internal quotation
17 marks and citation omitted). Additionally, and contrary to Petitioner’s contentions,
18 repeated or serial violations of court orders are not necessary to sustain a sanction of
19 dismissal. *See Beverly v. Conquistadores, Inc.*, 1975-NMCA-070, ¶ 15, 88 N.M.
20 119, 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.”); *cf. State v. Le Mier*, 2017-NMSC-017, ¶ 24, 394 P.3d 959 (providing that “a single violation of a discovery order may suffice to support a finding of culpability” in the context of excluding the state’s essential witnesses in a criminal prosecution).

{27} Second, Petitioner does not advance a substantial evidence challenge in line with the mandates of our standard of review. Contrary to our substantial evidence standard, Petitioner does not “marshal all of the evidence in support of” the district court’s willfulness finding and “then demonstrate that even if the evidence is viewed in a light most favorable to the decision reached below, together with all reasonable inferences attendant thereto, the evidence is insufficient to support the finding[.]” *See Maloof v. San Juan Cnty. Valuation Protests Bd.*, 1992-NMCA-127, ¶ 18, 114 N.M. 755, 845 P.2d 849; *see also* Rule 12-318(A)(3) NMRA (providing that “[a] contention that a verdict, judgment, or finding of fact is not supported by substantial evidence shall be deemed waived unless the summary of proceedings includes the substance of the evidence bearing on the proposition”); Rule 12-318(A)(4) (requiring a “specific attack on any finding, or the finding shall be deemed conclusive”); *Martinez v. Sw. Landfills, Inc.*, 1993-NMCA-020, ¶ 18, 115 N.M. 181, 848 P.2d 1108 (providing that “an appellant is bound by the findings of fact made below unless the appellant properly attacks the findings”). Instead, Petitioner

1 complains repeatedly that the district court did not credit her counsel’s explanation
2 for failing to obtain a trial setting—that he forgot to call the TCAA.¹² The district
3 court, however, was under no obligation to accept this explanation. *See Griffin v.*
4 *Guadalupe Med. Ctr., Inc.*, 1997-NMCA-012, ¶ 22, 123 N.M. 60, 933 P.2d 859
5 (“When the trial court’s findings of fact are supported by substantial evidence, . . .
6 refusal to make contrary findings is not error.”); *Lerma v. Romero*, 1974-NMSC-
7 089, ¶ 2, 87 N.M. 3, 528 P.2d 647 (holding that, where the appellants argued the
8 district court erred in refusing requested findings but did not directly attack the
9 district court’s findings, the findings would not be reviewed on appeal); *see also*
10 *N.M. Tax’n & Revenue Dep’t v. Casias Trucking*, 2014-NMCA-099, ¶ 20, 336 P.3d
11 436 (“The question is not whether substantial evidence exists to support the opposite
12 result, but rather whether such evidence supports the result reached.” (internal
13 quotation marks and citation omitted)); *Sanchez v. Saylor*, 2000-NMCA-099, ¶ 12,
14 129 N.M. 742, 13 P.3d 960 (“There may be other facts that, if believed, might

¹²On appeal, although counsel for Petitioner continues to maintain that he forgot the district court’s directives to call the TCAA for a trial setting, he also suggests he may have purposely waited until August 2021 to file the request for trial setting because “COVID-19 had played havoc with trial court scheduling.” Based on our review of the record, Petitioner has never before cited COVID-19 as a reason why her attorney did not timely attempt to obtain a trial setting. *See Muse*, 2009-NMCA-003, ¶ 51; *Crutchfield*, 2005-NMCA-022, ¶ 14. Moreover, as we discuss below, the district court was tasked with assessing the credibility of Petitioner’s explanations. Counsel’s ever-evolving explanations for his failure to follow the district court’s directive to call the TCAA to obtain a trial setting, even on appeal, do little to make us question the district court in this regard.

1 support a different result, but we disregard them.”). Further, the district court’s
2 decision not to accept counsel’s explanation is a finding against Petitioner on this
3 matter. *See In re Yalkut*, 2008-NMSC-009, ¶ 18, 143 N.M. 387, 176 P.3d 1119
4 (“[F]ailure to make a finding of fact is regarded as a finding against the party seeking
5 to establish the affirmative.”). Thus, the question before us is not whether substantial
6 evidence supports Petitioner’s claim that her attorney forgot the district court’s
7 directive, but instead whether substantial evidence supports the district court’s
8 finding that there was “a willful failure to follow the court’s directive to schedule a
9 trial.”

10 {28} Viewing the record in the light most favorable to the district court, as we must,
11 we conclude that it does. As the district court explained in its Second Decision
12 Letter, at the July 2020 Scheduling Conference, the judge “directed counsel three
13 (3) times to contact [his TCAA] for a trial date.” This, the district court observed,
14 was not the first time such a directive had been given—at the December 13, 2016,
15 scheduling conference, the judge also directed counsel to obtain a trial date from his
16 assistant.¹³ Counsel’s inaction in the face of these repeated directives supports the

¹³Petitioner seems to contend that the directive from 2016 should not be considered. First, Petitioner notes the case was being handled by an associate attorney in 2016 and that the attorney resisting dismissal in 2021 and 2022 “was aware of the scheduling order that was entered [in 2016] but was not aware of any conversations concerning the trial scheduling.” The district court, however, rejected this explanation for noncompliance, and Petitioner advances no argument why this was error. *See, e.g., Hall*, 2023-NMCA-042, ¶ 5; *Premier Tr. of Nev., Inc.*, 2021-

1 district court’s finding of willfulness. *See Thornfield*, 1983-NMCA-149, ¶¶ 10, 17
2 (concluding that the plaintiff’s acknowledgement that he had not responded to the
3 request for production, despite a court order to do so, “indicate[s] a ‘conscious or
4 intentional failure to comply’ which amounts to willfulness under *United Nuclear*,”
5 even though the plaintiff “did not act in bad faith” and notwithstanding counsel’s
6 explanation that he “wanted to cooperate but was having trouble assembling
7 documents because of his move to Texas and his pending divorce”); *Lowery*, 1992-
8 NMSC-001, ¶¶ 13-15 (providing that where the plaintiff “was aware of the trial date
9 and failed to prepare for trial,” the plaintiff’s “conduct was willful”); *see also Rabb*
10 *v. Amatex Corp.*, 769 F.2d 996, 1000 (4th Cir. 1985) (providing that in context of a
11 dismissal under Fed. R. Civ. P. 16 and Fed. R. Civ. P. 37(b)(2)(C), the “failure to
12 comply where counsel clearly should have understood his duty to the court
13 constituted professional negligence of a degree amounting to fault” (internal

NMCA-004, ¶ 10. Second, Petitioner contends the directive from 2016 was not previously cited by Interested Party or the district court. Petitioner, however, does not explain why the district court’s reliance on this directive was erroneous and ignores the established principle that the court may rely on the record in the case before it. *See Baca v. Catron*, 1917-NMSC-074, ¶¶ 13, 15, 24 N.M. 242, 173 P. 862 (citing the “well established” rule that “the trial court will take judicial notice of all of the record in a case before it”). Finally, Petitioner suggests that the district court’s determination on November 20, 2019, that Petitioner was not in violation of the original scheduling order, somehow precludes reliance on the 2016 directive. Given the interlocutory nature of the court’s November 2019 ruling, we are not convinced. *See Sims v. Sims*, 1996-NMSC-078, ¶ 59, 122 N.M. 618, 930 P.2d 153 (providing that “[d]istrict courts have plenary power over their interlocutory orders,” which “may be revised at any time prior to final judgment”).

1 quotation marks and citation omitted)). We stress that the violation here was not
2 simply a missed deadline. Instead, pursuant to the Scheduling Order, trial was to
3 occur on Petitioner’s creditor’s claim in the spring of 2021. Petitioner’s disregard of
4 the district court’s directive on how to make that happen resulted in the trial setting
5 being missed and the proceedings essentially coming to a halt. *See Bay Corrugated*
6 *Container, Inc. v. Gould, Inc.*, 609 F. App’x 832, 835 (6th Cir. 2015) (providing, in
7 the Fed. R. Civ. P. 41(b) context, that “a plaintiff’s delay in prosecuting a claim
8 evinces willfulness, bad faith, or fault if it displays a reckless disregard for the effect
9 of the plaintiff’s conduct on the district court proceedings” (text only) (citation
10 omitted)).

11 {29} Beyond this, Petitioner’s counsel’s shifting explanations for why Petitioner
12 never obtained a trial setting provides additional support for the district court’s
13 finding of willfulness. We explain. Petitioner claimed in her Initial Response to
14 Interested Party’s Motion to Dismiss that the district court affirmatively stated at the
15 July 2020 Scheduling Conference that it would sua sponte set the trial—a statement
16 the district court judge later found was “false.” At the status conference held on
17 October 13, 2021, counsel for Petitioner acknowledged that the district court judge
18 had in fact told him to contact the TCAA. Counsel did so, however, only *after* the
19 judge expressed skepticism that he would have said he was going to set the trial date
20 himself and stated he would review the recording of the hearing. The next day,

1 Petitioner filed her Substituted Response in which counsel acknowledged the court’s
2 directive, but again claimed that counsel “was under the impression that the [c]ourt
3 would set the matter” based on the language of the Scheduling Order, which,
4 Petitioner incorrectly asserted, “stated that the [c]ourt shall set the matter for trial.”¹⁴

5 {30} Based on this chronology, the district court found in its First Decision Letter
6 that Petitioner’s argument that “the [c]ourt is the cause of delay due to failure to
7 schedule the matter for trial is quite disingenuous and arguably dishonest since
8 counsel was specifically instructed on the record to select a date for trial and failed
9 to do so.” Nowhere in Petitioner’s briefing does she directly challenge this finding
10 or the related finding, cited above, regarding a “false” statement in Petitioner’s Initial
11 Response to Interested Party’s Motion to Dismiss. As a result, such findings are
12 binding on appeal. *See Lerma*, 1974-NMSC-089, ¶ 2; *Martinez*, 1993-NMCA-020,
13 ¶ 18. Moreover, we leave such credibility determinations to the trial courts. *See Reed*
14 *v. Furr’s Supermarkets, Inc.*, 2000-NMCA-091, ¶ 23, 129 N.M. 639, 11 P.3d 603
15 (providing that the district court can evaluate credibility at motions hearings); *cf.*
16 *Sanchez*, 2000-NMCA-099, ¶ 12 (“It is for the trial court to weigh the testimony,
17 determine the credibility of witnesses, reconcile inconsistent statements, and

¹⁴Petitioner’s initial insistence that the district court would sua sponte set the trial date is not only in conflict with the district court’s directives, but also, as Interested Party notes, appears contrary to a local rule in the Ninth Judicial District Court, providing that all “[r]equests for settings for trial . . . shall be directed to the calendar clerk who will make the setting.” LR9-115(A) NMRA.

determine where the truth lies. The appellate court may not reweigh the evidence or substitute its judgment for that of the trier of fact.” (text only) (citations omitted)).

{31} Only after the district court expressed disbelief about Petitioner’s explanations in its First Decision Letter did Petitioner finally assert that her counsel had inadvertently forgotten the court’s directive. Specifically, in her motion for reconsideration, Petitioner claimed that her counsel “simply forgot” that the district court told him to contact the TCAA. Then, at the hearing held on Petitioner’s motion for reconsideration, counsel repeatedly suggested that his lack of memory was due to the lapse in time between the July 2020 Scheduling Conference and the spring of 2021. As just two examples, Petitioner’s counsel stated early in the hearing: “I do . . . recognize that the court asked counsel to call the TCAA and get a trial date. . . . But *when the spring came around*, Your Honor, I just completely forgot.” Similarly, counsel later stated, “Based on the statements by the court, we were supposed to reach out to the trial assistant in the spring for the trial setting. When we didn’t get it, because I had forgotten that that even occurred, when we didn’t get the trial setting, we independently filed another request in August.”¹⁵ Counsel’s explanation,

¹⁵On appeal, Petitioner suggests counsel’s filing of the request for trial setting in August 2021 somehow rebuts a showing of willfulness, arguing it was done in “good faith” and in compliance with Rule 1-040(B) NMRA. *See id.* (providing that “[u]nless a pretrial scheduling order is entered, any party may submit a request for trial on the merits”). We are not persuaded that this request for trial setting negates the district court’s willfulness finding. As an initial matter, this request was made long after trial was supposed to be held, pursuant to the Scheduling Order, and

1 however, fails to account for the fact that the district court ordered that trial was to
2 *happen in the spring of 2021*. To ensure that trial occurred in the spring of 2021,
3 counsel needed to call the TCAA well before that time. The issue thus is not whether
4 Petitioner’s counsel remembered in the spring of 2021 what the district court ordered
5 at the July 2020 Scheduling Conference, but why counsel did not quickly follow up
6 after that conference to get the trial scheduled for the spring of 2021.

7 {32} Simply put, Petitioner never, from the outset or otherwise, straightforwardly
8 explained to the district court why counsel failed to heed the district court’s repeated
9 directives to call the TCAA to get the trial set for the spring of 2021. While we,
10 ourselves, make no determination as to Petitioner’s evolving but ultimately
11 incomplete explanations, we perceive no error in the district court’s finding that
12 Petitioner acted with “a willful failure to follow the court’s directive to schedule a
13 trial.” See *Reed*, 2000-NMCA-091, ¶¶ 32-33 (upholding the dismissal of the
14 plaintiff’s case and rejecting the plaintiff’s assertion that “the presence of her
15 explanations prevents a finding that she misrepresented information during

contrary to the district court’s directive about how to obtain a trial setting. *Cf. Stoll v. Dow*, 1986-NMCA-134, ¶ 12, 105 N.M. 316, 731 P.2d 1360 (“[The p]laintiff may not, as he attempts to do here, shift the burden of bringing a case to trial to the court if it becomes obvious that his request for a trial setting is unavailing.”). Further, it appears the request was not actually in compliance with Rule 1-040(B)—which on its face does not apply to cases where, as here, a scheduling order was entered—or, as previously noted, in compliance with LR9-115(A)—which provides that all “[r]equests for settings for trial . . . shall be directed to the calendar clerk who will make the setting.”

discovery” because she “failed to persuade the district court” with these explanations); *see also* Weiss, 2013-NMCA-054, ¶¶ 14, 19 (concluding that “substantial evidence existed below for the district court to impose sanctions on [the d]efendants for their discovery violations and misrepresentations to the court” where the district court found, among other things, that “[the d]efendants’ counsel ‘misrepresented several pertinent facts’ during [a] hearing, characterizing the attorney’s statements as ‘careless and sloppy at best and intentional[ly] unethical at worst’”).

III. The Totality of the Circumstances Supports the Sanction of Dismissal

{33} Lastly, Petitioner argues that the totality of the circumstances does not warrant the sanction of dismissal. Specifically, Petitioner argues that (1) Interested Party suffered no actual prejudice, (2) Petitioner did not interfere with the judicial process, (3) Petitioner was not personally culpable, (4) the district court gave no advance warning before dismissal, and (5) the district court made no effort to impose lesser sanctions. In support, Petitioner cites federal case law involving sanctions for discovery violations. *See Ehrenhaus v. Reynolds*, 965 F.2d 916, 921 (10th Cir. 1992) (listing five nonexclusive factors for federal district courts to consider when imposing sanctions pursuant to Fed. R. Civ. P. 37(b)(2)(C)).¹⁶ There, however, is

¹⁶Based on our research, *Ehrenhaus* has never been cited by New Mexico appellate courts.

1 New Mexico case law already on point—setting out factors trial courts must balance
2 in imposing sanctions—that differs somewhat from the federal authority relied on
3 by Petitioner. *Compare Ehrenhaus*, 965 F.2d at 921, with *Enriquez*, 1998-NMCA-
4 157, ¶ 48 (providing in the context of Rule 1-037 sanctions, that “the trial court must
5 balance the nature of the offense, the potential prejudice to the parties, the
6 effectiveness of the sanction, and the imperative that the integrity of the court’s
7 orders and the judicial process must be protected”); and *Lewis*, 2001-NMSC-035,
8 ¶ 23 (same). Petitioner has not argued why we ought not apply on-point New Mexico
9 case law and instead adopt the federal standard. We therefore decline to do so. *See*
10 *Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶ 70, 309 P.3d 53 (“We will
11 not . . . guess at what a party’s arguments might be.” (text only) (citation omitted)).
12 We proceed with considering Petitioner’s arguments with respect to the totality of
13 the circumstances to the extent they overlap with established New Mexico precedent.

14 {34} First, Petitioner asserts that Interested Party suffered “no actual prejudice.” As
15 an initial matter, we observe that under New Mexico law, “the party seeking
16 dismissal is not required to show prejudice as a precondition to dismissal, . . .
17 [n]onetheless, prejudice may be a factor for the district court to consider when
18 evaluating the propriety of dismissal for discovery abuse.” *Reed*, 2000-NMCA-091,
19 ¶ 28; *see also Sanchez*, 2004-NMCA-033, ¶ 19 (“Contrary to counsel’s arguments,
20 whether prejudice to [the d]efendant resulted is not the issue; the issue is counsel’s

1 abuse of the discovery process.”). Nevertheless, the district court found in its Second
2 Decision Letter that Interested Party indeed was prejudiced because she had “been
3 held in a ‘legal limbo’” and deprived of any benefit of the Estate for several years
4 due to Petitioner’s failure to bring her creditor’s claim to trial. On appeal, Petitioner
5 asserts this was error because, according to her, the Estate was not subject to final
6 distribution since “much of the Estate funds were tied up in numerous investment
7 vehicles that had yet to mature.” Petitioner misconstrues the record. At the hearing
8 relied on by Petitioner for this point, counsel for Petitioner, acting in her capacity as
9 the personal representative, told the district court that the personal representative had
10 liquidated all of the Estate assets except for a number of savings bonds that had not
11 yet matured. Counsel for the personal representative then told the district court, “As
12 soon as the creditor’s claim is resolved, the Estate is subject to distribution *other*
13 *than* . . . wanting to hold on to these bonds until maturity.” Counsel specifically told
14 the district court that there could be a “partial distribution” of the Estate if the
15 Petitioner’s creditor’s claim was resolved before the bonds matured. We accordingly
16 reject Petitioner’s argument that Interested Party suffered “absolutely no prejudice”
17 from the lengthy delay in resolving Petitioner’s creditor’s claim that prevented
18 distribution of the Estate. *See D’Antonio v. Garcia*, 2008-NMCA-139, ¶ 17, 145
19 N.M. 95, 194 P.3d 126 (“We stress, however, that when a party willfully fails to
20 comply with a court order, dismissal may be appropriate. Under such circumstances,

1 we have stated that a dismissal serves to protect a diligent party from continual delay
2 and uncertainty as to [their] rights.” (alteration, internal quotation marks, and
3 citations omitted)); *McNeal v. Papasan*, 842 F.2d 787, 790 (5th Cir. 1988) (cited
4 favorably by *Lowery*, 1992-NMSC-001, ¶ 12, providing that “the defendant’s actual
5 prejudice because of the delay” may serve as an “aggravating factor” justifying the
6 sanction of dismissal under the federal equivalent to Rule 1-041(B)).

7 {35} Turning to the second and third considerations cited by Petitioner, the district
8 court determined the following:

9 Petitioner[’s] counsel’s argument that no “interference with the judicial
10 process” exists aside from failure to follow the July 29, 2020 verbal
11 orders of the court is inaccurate. Petitioner[’s] attorneys also failed to
12 follow the court’s verbal order of December 13, 2016 to contact my
13 [TCAA] to set this matter for trial. Now, [five and a half] years after
14 the December 13, 2016 order, still no one has contacted my [TCAA] to
15 schedule the trial. Again, at this juncture, I believe this factor weighs in
16 favor of dismissal.

17 With regards to the “culpability of the litigant,” while Petitioner[herself
18 is] not at fault, Petitioner[’s] attorneys failed to set this matter for trial.
19 Accordingly, this factor weighs in favor of dismissal, although it is not
20 given as much weight due to Petitioner[’s] lack of personal blame.¹⁷

¹⁷It is not entirely clear the extent to which the lack of personal culpability on the part of the sanctioned party comes into play under the totality of the circumstances in New Mexico. Petitioner cites *Lowery*, 1992-NMSC-001, a Rule 1-041(B) case, which lists three “aggravating factors,” borrowed from *McNeal*, 842 F.2d 787, to consider when determining whether a litigant’s conduct is “extreme” such that dismissal under Rule 1-041(B) is warranted. See *Lowery*, 1992-NMSC-001, ¶ 11. *McNeal* in turn sets out the following standard:

[B]ecause of our reluctance to visit such a harsh sanction upon a party solely because of the sins of [their] counsel, in close cases we have often looked for proof of one of the following “aggravating factors”— (1) the plaintiff’s personal contribution to the delay, (2) the defendant’s actual prejudice because of the delay, and (3) delay that can be characterized as intentional.

842 F.2d at 790. Viewed within the lens of *McNeal*, a party’s lack of personal culpability does not necessarily make the sanction of dismissal improper; instead, it appears the existence of such culpability (or one of the other *McNeal* aggravating factors, including actual prejudice, which the district court found here) could justify dismissal. *See id.* Moreover, to the extent *Lowery* could be read to hold that a party’s lack of personal culpability could avoid the sanction of dismissal when other factors and considerations weigh in favor of the sanction, this appears contrary to subsequent New Mexico authority. *See, e.g., Allred*, 1997-NMCA-070, ¶ 33 (rejecting the argument that the sanction of dismissal against “the real party in interest who was not directly involved in the actions of [the p]laintiffs . . . , would be unjust” because such argument “would require this Court to determine that a client is not bound by the actions of [their] attorney”); *Padilla v. Est. of Griego*, 1992-NMCA-021, ¶ 17, 113 N.M. 660, 830 P.2d 1348 (“‘There is certainly no merit to the contention that dismissal of [the] petitioner’s claim because of his counsel’s unexcused conduct imposes an unjust penalty on the client. [The p]etitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of [their] lawyer-agent and is considered to have notice of all facts, notice of which can be charged upon the attorney.’” (quoting *Link v. Wabash R.R. Co.*, 370 U.S. 626, 633-34 (1962) (internal quotation marks and citation omitted))); *id.* (“‘[K]eeping this suit alive merely because [defendant] should not be penalized for the omissions of his own attorney would be visiting the sins of [defendant’s] lawyer upon the [plaintiff].’” (alterations in original) (quoting *Link*, 370 U.S. at 634 n.10)); *cf. Marchman*, 1995-NMSC-041, ¶ 56 (providing in the context of Rule 1-037(B) monetary sanctions that “[t]he clients are principals, the attorney is an agent, and under the law of agency the principal is bound by [their] chosen agent’s deeds” and that “[a] principal thus is liable for the wrongful acts of [their] subagent committed within the scope of the agency relationship”).

1 Instead of explaining why the foregoing is not supported by substantial evidence or
2 is otherwise erroneous, Petitioner simply rehashes the exact same arguments she
3 made to the district court that the court rejected. Such an approach on appeal does
4 not persuade us that the district court erred. *See, e.g., Hall*, 2023-NMCA-042, ¶ 5;
5 *Premier Tr. of Nev., Inc.*, 2021-NMCA-004, ¶ 10.

6 {36} Fourth, Petitioner contends that the district court was required to provide
7 “advance warning of dismissal” that her “claim would be dismissed if the TCAA
8 was not contacted” and that no such warning was given. Petitioner cites no
9 persuasive New Mexico authority that advance warning is required prior to entry of
10 the sanction of dismissal. And we have authority to the contrary. *See, e.g.,*
11 *Thornfield*, 1983-NMCA-149, ¶ 18 (“Nothing on the face of Rule 37 requires notice
12 before imposition of sanctions. The fact that the sanctions are spelled out in the rule
13 provides ample notice.”); *Beverly*, 1975-NMCA-070, ¶ 7 (recognizing a trial court’s
14 authority to sua sponte dismiss a complaint “for failure to comply with orders of the
15 court”). Regardless, Petitioner had notice that dismissal might be possible. As
16 already discussed, the Scheduling Order plainly set out the consequences of
17 Petitioner’s inaction—i.e., that trial would not be continued but for “truly
18 exceptional circumstances.” Furthermore, this was not a sua sponte dismissal—i.e.,

1 the sanction of dismissal in this case was occasioned by Interested Party’s Motion
2 to Dismiss.¹⁸

3 {37} Finally, Petitioner argues that the district court erred because it made “no
4 effort to impose lesser sanctions.” Contrary to Petitioner’s suggestion, however,
5 “[t]rial courts are not required to exhaust lesser sanctions before acting.” *Enriquez*,
6 1998-NMCA-157, ¶ 48; *see also Medina*, 1994-NMSC-016, ¶ 7 (“The district court
7 is not required to impose lesser sanctions before it imposes the sanction of
8 dismissal.”). Instead, the district court need only “reasonably explore[]” “meaningful
9 alternatives” before imposing the sanction of dismissal. *See Gonzales*, 1995-NMSC-
10 047, ¶ 33; *Newsome*, 1985-NMSC-096, ¶ 29 (same). The district court did so here.
11 The court considered whether lesser sanctions, “such as awarding attorney’s fees,”
12 would be appropriate but determined they were not since the case essentially had
13 been dormant for three years. Petitioner contends the district court’s finding of
14 dormancy is not supported by substantial evidence because her counsel filed requests
15 for trial settings in October 2019 and August 2021 and there was a scheduling

¹⁸To the extent Petitioner asserts that she was denied due process, i.e., notice and the opportunity to be heard, such argument is not well taken. Again, Petitioner received notice of the possibility of dismissal through Interested Party’s Motion to Dismiss, and she was given the opportunity to be heard both in her written filings with the district court and at hearings before the court. *See, e.g., Lowery*, 1992-NMSC-001, ¶ 8 (providing that the plaintiff “was not denied her right to due process by the trial court’s dismissal of her action” where she received notice and a hearing prior to dismissal with prejudice).

1 conference held in July 2020. However, these requests for trial settings were made
2 contrary to the district court’s directive on how to obtain a trial setting, and the
3 referenced scheduling conference resulted in the Scheduling Order that Petitioner
4 ultimately violated by failing to obtain a trial setting as directed. In light of this, we
5 do not fault the district court in finding the case “essentially dormant” during this
6 period or in considering this delay when selecting a sanction under the totality of the
7 circumstances.¹⁹ See *D’Antonio*, 2008-NMCA-139, ¶ 17; *McNeal*, 842 F.2d at 790.
8 Lastly, Petitioner does not identify any particular alternative sanction it contends the
9 district court ought to have considered. Given all this, we conclude the district court
10 “reasonably explored” meaningful alternative sanctions and did not abuse its

¹⁹Petitioner further contends that Interested Party could not relitigate, and the district court could not revisit, whether there was significant activity on Petitioner’s creditor’s claim before 2019 in light of the district court’s ruling on November 20, 2019, denying Interested Party’s original motion to dismiss Petitioner’s claim for lack of prosecution. In support of the preclusive effect of the district court’s November 2019 ruling, Petitioner cites the doctrines of issue preclusion and law of the case. By definition, issue preclusion, or collateral estoppel, has no applicability here because it is “designed to bar relitigation of ultimate facts or issues actually and necessarily decided *in a prior suit in which the decision is final*.” *Reeves v. Wimberly*, 1988-NMCA-038, ¶ 8, 107 N.M. 231, 755 P.2d 75 (emphasis added). “[T]he law of the case doctrine is *flexible and discretionary*, . . . [and] allows—but does not require—courts to refuse to consider matters already decided in the case.” *Kucel v. N.M. Med. Rev. Comm’n*, 2000-NMCA-026, ¶ 17, 128 N.M. 691, 997 P.2d 823 (emphasis added). Further, “[t]he law of the case generally applies to questions of law, not ‘purely fact’ questions.” *State ex rel. King v. UU Bar Ranch Ltd. P’ship*, 2009-NMSC-010, ¶ 21, 145 N.M. 769, 205 P.3d 816. Thus, the law of the case doctrine did not serve to restrict the district court’s ability to revisit the factual findings underlying its November 2019 ruling. See *Sims*, 1996-NMSC-078, ¶ 59.

1 discretion in determining lesser sanctions were not adequate in this case. See
2 *Gonzales*, 1995-NMSC-047, ¶ 33; *Newsome*, 1985-NMSC-096, ¶ 29.

3 {38} In light of the totality of the circumstances facing the district court, including
4 the court's unimpeached determination that Petitioner acted willfully, the fact that
5 the creditor's claim was pending for almost six years without resolution, as well as
6 the prejudice to Interested Party in having distribution of the Estate delayed even
7 further, we cannot say the district court's selection of the sanction of dismissal was
8 "a clear error of judgment." See *Sandoval*, 1989-NMCA-042, ¶ 23; see also *Link v.*
9 *Wabash R.R. Co.*, 370 U.S. 626, 627-28, 633-35 (1962) (affirming the district court's
10 sua sponte dismissal of the complaint where plaintiff's counsel failed to appear at
11 the pretrial conference without adequate explanation and the case had been pending
12 for six years and had languished for more than three years prior to dismissal).

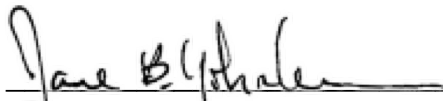
13 CONCLUSION

14 {39} For the foregoing reasons, we affirm the district court's dismissal of
15 Petitioner's creditor's claim.

16 {40} **IT IS SO ORDERED.**

17
18 
JENNIFER L. ATTREP, Judge

1 **WE CONCUR:**

2 
3 **JANE B. YCHALEM, Judge**

4 
5 **GERALD E. BACA, Judge**