IN THE SUPREME COURT OF
THE STATE OF NEW MEXICO

JESUS MORENO,

Plaintiff-Petitioner,

S-1-SC-40442

v.

RANGER ENERGY SERVICES, LLC,
and WILDCAT OIL TOOLS, LLC,

Defendants-Respondents.

On Writ of Certiorari to the New Mexico Court of Appeals

PETITIONER'S CONSOLIDATED REPLY BRIEF

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Statement of Compliance

Pursuant to Rule 12-318(G) NMRA, this brief complies with the type-volume limitations set forth in Rule 12-318(F)(3) NMRA, because it is prepared in a proportionally-spaced typeface, 14-point Century Schoolbook, and the body of the brief contains 3,192 words, according to Microsoft Word.

/s/ Caren I. Friedman

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Introduction

Despite their best efforts, Defendants cannot rewrite *Zangara* or the Savings Statute to rescue the opinion below.

Zangara held that the Savings Statute's phrase "negligence in [ ] prosecution" means a plaintiff's total "failure to prosecute" or "take the steps necessary to bring the suit to a close." That failure is established when a plaintiff takes *no* action or adduces *no* evidence for at least six months. But nothing of the sort happened here. Expressly relying on New Mexico's three-year statute of limitations (which had not expired), Mr. Moreno filed his first suit in Texas and diligently engaged in discovery. The Texas court then dismissed his case in little more than *one month* after Defendants moved for summary judgment. Defendants' answer briefs—like the opinion of the Court of Appeals—fail to show that Mr. Moreno was negligent in his prosecution.

Defendants similarly ignore that *Zangara* dooms the opinion below for another, independent reason: it pervasively rests on the very decisions *Zangara* expressly overruled (*Barbeau*, *Amica*, and *Foster*).

Shifting course, Defendants focus on other language in the Savings Statute. They argue that the statute's predicate—"If, after the

commencement of an action"—implicitly excludes actions that are *timely commenced under New Mexico law*, but filed in another state. But no such requirement can be found in the plain text of the Savings Statute or its neighboring provision, the Limitations Statute. Indeed, the Legislature could have followed other states' Savings Statutes and expressly addressed a plaintiff's first filing in another state. Declining to do so, the Legislature instead has spoken through the Limitations Statute itself, which provides the period the Savings Statute assumes: an action "for an injury to the person" must be brought "within three years."

Nor does *Zangara* preclude application of New Mexico's limitations period to the Savings Statute, as Defendants claim. To the contrary, *Zangara* and its antecedents *support* that application by emphasizing the "important purpose" and "policy" "embodied in the savings statute" itself: to facilitate resolution of disputes on their merits.

Defendants thus fail to contradict what follows from the text, policy, and purpose of the Savings Statute: The statute saves those cases that were originally timely filed under New Mexico law, and that were not dismissed for negligence in prosecution. This Court should so hold, and reverse and remand for further proceedings.

Argument in Reply

1. *Zangara* resolves this appeal.

Defendants cannot whitewash *Zangara*.[1] *Zangara*'s plain holding—and express overruling of the cases extensively relied upon by the Court of Appeals—require reversal.

a. Under *Zangara*, Mr. Moreno was not negligent in prosecuting his case as a matter of law.

Not surprisingly, Defendants minimize *Zangara*'s holding. This Court could not have been clearer: "We hold the phrase *negligence in its prosecution*" in the Savings Statute "is the same as a dismissal for failure to prosecute." *Zangara*, 2024-NMSC-021, ¶¶ 1, 10 (citing NMSA 1978, § 37-1-14) (emphasis in original); *accord id.* ¶¶ 1, 9, 13, 28. Put otherwise, "negligence in [ ] prosecution" means "failure to take the steps necessary to bring the suit to a close." *Id.* ¶ 12; *accord id.* ¶¶ 1, 25, 27.

To show such a failure to prosecute, this Court cited Rule 1-041(E) NMRA, which permits dismissal when a party "has failed to take any significant action in connection with the action or claim within the previous one hundred and eighty (180) days" (cited in *Zangara*, 2024-

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[1] *Zangara v. LSF9 Master Participation Trust*, 2024-NMSC-021, 557 P.3d 111.

NMSC-021 ¶ 12). *Zangara* also cited with approval *Emmco Insurance Co. v. Walker*, where this Court affirmed the trial court's dismissal for failure to prosecute after the plaintiff "adduced *no* evidence in support of [his] complaint" after "eight months" despite "repeated warnings and admonitions of the Court[.]" 1953-NMSC-074, ¶¶ 2, 7, 57 N.M. 525, 260 P.2d 712 (cited in *Zangara*, 2024-NMSC-021 ¶ 12) (emphasis added).

Contrary to Defendants' claims **[Ranger AB 8; Wildcat AB 8]**, no such failure happened here. Mr. Moreno diligently filed his first suit in Texas state court before the New Mexico limitations period had expired. **[RP 38]** To that end, he stated that New Mexico law—including its three-year statute of limitations—governed the case. *Id.* Mr. Moreno then took timely steps to bring the first suit to a close, including by engaging in substantial discovery. **[RP 77–79, 82–88, 92–97]**

True, Defendants successfully argued to the Texas trial court that Texas's two-year statute applied, resulting in the suit's dismissal little more than a month after they moved for summary judgment. **[RP 58, 102]** But under *Zangara*, the dispositive point is this: Mr. Moreno's first lawsuit was not dismissed because he failed to timely take the steps necessary to bring it to a close. *Cf.* Rule 1-041(E) NMRA; *Emmco*, 1953-

NMSC-074, ¶¶ 2, 4, 7. Rather, it was dismissed because it was filed outside of Texas's statute of limitations—but critically, not outside of New Mexico's (*see infra* Part 2). And as *Zangara* emphasized, "the *only* exception to an action which fails for any other cause" is "negligence in prosecution." *Zangara*, 2024-NMSC-021, ¶ 11 (emphasis added). The facts here plainly place this case outside of that exception and thus squarely within the Savings Statute.

By any measure, the Court of Appeals' conclusion that Mr. Moreno was "negligent in the prosecution of the Texas case" cannot stand. *Moreno v. Ranger Energy Servs., LLC*, 2024-NMCA-065, ¶ 15, 554 P.3d 737, *cert. granted*, 2024-NMCERT-008, 555 P.3d 785 (table).

b. The opinion below pervasively rests on opinions *Zangara* expressly overruled.

Reversal is necessary for another, independent reason: the opinion below pervasively rests on now-overruled rationales from *Barbeau*, *Amica*, and *Foster*.[2] *See Zangara*, 2024-NMSC021, ¶¶ 20–27 (overruling

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[2] *Barbeau v. Hoppenrath*, 2001-NMCA-077, 131 N.M. 124, 33 P.3d 675; *Amica Mut. Ins. Co. v. McRostie*, 2006-NMCA-046, 139 N.M. 486, 134 P.3d 773; *Foster v. Sun Healthcare Group, Inc.*, 2012-NMCA-072, 284 P.3d 389. *See Moreno*, 2024-NMCA-065, ¶¶ 3, 4, 5, 7, 8, 10, 14, 15, 16 (citing and relying on *Barbeau*, *Amica*, and *Foster*).

Barbeau, *Amica*, and *Foster* under the heading "*BARBEAU* AND ITS PROGENY ARE NO LONGER GOOD LAW").

The rationales upon which the Court of Appeals relied to conclude that the Savings Statute did not apply include what Mr. Moreno knew when he filed his first action in Texas (*Moreno*, 2024-NMCA-065 ¶ 15 (applying *Barbeau*)); whether he provided a factual "basis to conclude" a limitation period had not expired (*id.* ¶ 7 (distinguishing *Amica*)); and whether his Texas filing was an innocent mistake (*id.* ¶ 15; *see also id.* ¶ 16 (distinguishing *Foster*)). *Zangara* rejected those rationales because they improperly "extended the negligence in prosecution exception to circumstances beyond a party's failure to timely take the steps necessary to bring the first-filed suit to a close." *Id.* ¶ 27. Yet in its nearly 35 pages of briefing, Wildcat declines to acknowledge those cases—or that *Zangara* overruled them. **[Wildcat AB 6–34]**

For its part, Ranger rightly admits that "*Zangara* overrul[ed] *Barbeau* and other cases that have required a fact-intensive and case-by-case approach[.]" **[Ranger AB 12]** But Ranger nonetheless ignores that the opinion below is exactly the kind of "case-by-case determination of whether there was negligence of any sort *in the filing* of the first action"

that *Zangara* prohibits. 2024-NMSC-021, ¶ 14 (emphasis added); *see also id.* (eschewing an approach that would force courts "to confront confounding questions of which suit-ending mistakes were sufficiently negligent to trigger the exception to the savings clause"). For proof, one need look no further than the Court of Appeals' concluding paragraph, which—again relying on *Barbeau* and *Foster*—"balance[d] [ ] policy considerations in the context of the present case" and emphasized that "another claim [could] survive under different facts." *Moreno*, 2024-NMCA-065, ¶ 16.

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Both the Court of Appeals' holding and underlying analysis directly contradict *Zangara*. No matter how much Defendants try to ignore *Zangara*, it compels reversal.

2. Defendants' principal argument seeks to rewrite the Savings Statute's plain text.

Implicitly acknowledging that *Zangara* repudiates any argument that Mr. Moreno was negligent in the prosecution of his first lawsuit, Defendants focus primarily on other language in the Savings Statute. They argue that its predicate—"If, after the commencement of an action" (NMSA 1978, § 37-1-14)—implicitly excludes actions *timely commenced*

under New Mexico law that are filed in another state. **[Ranger AB 9; Wildcat AB 5, 18]** Thus in Defendants' view, the first action must be "timely commenced" under the laws of *both states* in which it was filed (here, Texas and New Mexico) to fall within the Savings Statute. *See id.*

That argument is incorrect. To the contrary, the Savings Statute, the Limitations Statute, and *Zangara* indicate that the *New Mexico* limitations period governs the "commencement" of an action under the Savings Statute, regardless of where the first lawsuit was filed.

a. The Savings and Limitations Statutes apply New Mexico law, regardless of where a first lawsuit is filed.

To begin, one will search the Savings Statute's 45 words in vain for a requirement that an action must be "timely commenced" under the laws of both states in which it was filed.[3] *See Zangara*, 2024-NMSC-021, ¶ 10 ("ordinary and plain meaning" of statute is generally dispositive).

Rather, the statute confines itself to what happens "*after* the commencement of an action"; it is blind to what occurred *at* or *before*.

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[3] NMSA 1978, § 37-1-14 ("If, after the commencement of an action, the plaintiff fail therein for any cause, except negligence in its prosecution, and a new suit be commenced within six months thereafter, the second suit shall, for the purposes herein contemplated, be deemed a continuation of the first.").

NMSA 1978, § 37-1-14 (emphasis added). And this Court rightly "will not read into a statute any words that are not there[.]" *Autovest, L.L.C. v. Agosto*, No. S-1-SC-38834, — P.3d —, ¶ 14, 2024 WL 3822765 (N.M. Aug. 15, 2024) (citation and quotation marks omitted). Rather, this Court should look to the limitations provision itself, which simply provides—without qualification—that an action "for an injury to the person" must be brought "within three years." NMSA 1978, § 37-1-8.

Indeed, this Court recognizes that the "Legislature knows how to include language in a statute if it so desires." *State v. Ramirez*, 2018-NMSC-003, ¶ 53, 409 P.3d 902 (citation and quotation marks omitted). The Legislature could have followed the language of other states' Savings Statutes, which expressly address a plaintiff's first filing in another state, as Defendants demand.[4] But this Court may not read into the Savings

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[4] *See, e.g.*, Colo. Rev. Stat. § 13-80-111(1)–(2) (an involuntarily-dismissed action "commenced within the *period allowed by this article*" may be refiled within the savings period; period is "applicable to *all* actions which are first commenced . . . in the courts of Colorado or of *any other state*") (emphases added); N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (2023) (voluntary-dismissal-and-refiling period applies to "a plaintiff who has once dismissed in any court of this or *any other state*") (emphasis added); Va. Code § 8.01–229(E)(3) (tolling provision "shall apply irrespective of whether the action is originally filed in a federal or a state court and recommenced in any other court").

Statute what the Legislature omitted. After all, as this Court recently reminded, changing the "reach of the savings statute" is "the prerogative of the Legislature, not this Court." *Zangara*, 2024-NMSC-021, ¶ 19.

Nor do Defendants' arguments find any support in *Zangara*, which imposes no requirement that an action be timely under the laws of *both states* for the Savings Statute to apply. To be sure, *Zangara* observed that the Saving Statute may apply "when an action is timely commenced[.]" 2024-NMSC-021, ¶ 1 (cited in **Ranger AB 2, Wildcat AB 7**). But it nowhere considered a case first filed in another state, dismissed on non-merits grounds, and refiled in New Mexico within six months. *See generally id.* ¶¶ 1–28. Nor did the cases on which it relied in interpreting the Savings Statute, which each involved cases brought and re-filed solely in New Mexico state courts.[5]

Still, *Zangara* and its antecedents *support* the conclusion that the "commencement" time of an action under the Savings Statute is

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[5] *See Zangara*, 2024-NMSC-021, ¶ 24 (relying "particularly [o]n *Harris*, *G-M Architects*, and *Aeronautics*" for the proper "analys[i]s of Section 37-1-14"); *Harris v. Singh*, 1933-NMSC-091, 38 N.M. 47, 28 P.2d 1; *Gathman-Matotan Architects & Planners, Inc. v. State, Dep't of Fin. & Admin.*, 1990-NMSC-013, 109 N.M. 492, 787 P.2d 411; *U.S. Fire Ins. Co. v. Aeronautics, Inc.*, 1988-NMSC-051, 107 N.M. 320, 757 P.2d 790.

measured by the *New Mexico* limitations period. They do so by applying "the important purpose of our savings statute, which is to facilitate resolution of disputes on their merits." *Zangara*, 2024-NMSC-021, ¶ 1. That "steady focus on protecting plaintiffs' substantive rights" is not judicially derived. *Id.* ¶ 19. Rather, "New Mexico's policy favoring access to judicial resolutions" is "*embodied in [the] savings statute*" itself, and "has been the applicable law for almost 150 years." *Id.* (emphasis added); *see also id.* ¶¶ 1, 25.[6] Accordingly, this Court "will not construe a statute to defeat [its] intended purpose." *Baker v. Hedstrom*, 2013-NMSC-043, ¶ 21, 309 P.3d 1047 (alteration in original) (citation and internal quotation marks omitted); *accord Anderson v. State*, 2022-NMSC-019, ¶ 50, 518 P.3d 503. Defendants' arguments wrongly invite the Court to do just that.

Even so, Wildcat argues that the Savings Statute cannot apply here because Mr. Moreno's *Texas* suit "was dismissed with prejudice[,]" while *Zangara* broadly stated that the Savings Statute saves cases dismissed

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[6] *Zangara* and its antecedents thus refute Wildcat's misguided claim that the Savings State was actually "meant to *limit*, and not to *expand*, when lawsuits may be brought in this state." [**Wildcat AB 21** (emphases in original)]

"without prejudice." [**Wildcat AB 22–23** (citing 2024-NMSC-021, ¶ 11)] But the Texas court here applied only Texas law and barred refiling *in Texas*. In dismissing Mr. Moreno's case, it obviously never considered whether he could refile in New Mexico under the Savings Statute. **[RP 120]**

What is more, Wildcat's reliance on *Zangara*'s "without prejudice" language overlooks this Court's "steady focus": to construe the Savings Statute consistent with its purpose of ensuring that "controversies [will] be[] decided on their merits" instead of merely "on procedural technicalities." 2024-NMSC-021, ¶ 19. The Texas court's decision is thus more akin to a decision *without* prejudice, as a decision "without prejudice" "indicate[s] that there has been no resolution of the controversy *on its merits*"—precisely as here. *Schultz for Schultz v. Pojoaque Tribal Police Dep't*, 2013-NMSC-013, ¶ 50, 484 P.3d 954, 963 (citation and quotation marks omitted) (emphasis added).

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Try as they might, Defendants cannot overcome what follows from the text, purpose, and policy of the Savings Statute: New Mexico law saves a second lawsuit that is filed in New Mexico within six months of

the dismissal of the first when, as here, the first is timely filed within the New Mexico limitations period.

b. Defendants' nonbinding, pre-*Zangara* cases are unpersuasive.

Straining for any way to avoid *Zangara*, Defendants exclusively rely on nonbinding cases that are easily distinguishable or directly conflict with *Zangara*.

For example, both Defendants (like the Court of Appeals) rely on *DeVargas v. Montoya*, 796 F.2d 1245 (10th Cir. 1986), *overruled on other grounds by Newcomb v. Ingle*, 827 F.2d 675 (10th Cir. 1987). **[Ranger AB 9–10; Wildcat AB 15–16, 25]**; *Moreno*, 2024-NMCA-065 ¶¶ 12–13. But *DeVargas* is readily distinguishable: the first-filed suit there was brought *in New Mexico* and barred *by New Mexico law* from the outset. *See* 796 F.2d at 1247–48. Not so here, where it is undisputed that Mr. Moreno's suit was filed in Texas well before the New Mexico statute of limitations had expired. **[RP 38]**

Nor do *Devon Energy* or *Roberts* help Defendants.[7] The *Devon Energy* court explicitly "*d[id] not decide*" "whether the law of New Mexico or Texas should apply to govern whether Plaintiff's original lawsuit was timely commenced for purposes of applying Section 37-1-14[.]" 2023 WL 6199807, at *3 n.2 (emphasis added). Similarly, the federal district court and Tenth Circuit in *Roberts* (a nonprecedential case even within the federal courts) never considered arguments that the Savings Statute applies the New Mexico limitations period to a case first filed in another state. *See* 2019 WL 1291349, at *6 (pro se plaintiff "offer[ed] no discussion" on the issue); *Roberts v. Generation Next, LLC*, 853 F. App'x 235, 243 (10th Cir. 2021) (unpublished) (same).

Rather, all three courts relied on *Barbeau* to support a negligent-prosecution disposition. *Devon Energy*, 2023 WL 6199807, at *5 (citing *Barbeau*, 33 P.3d at 679); *Roberts*, 2019 WL 1291349, at *6–7 (citing *Barbeau*, 131 N.M. at 127); *Roberts*, 853 F. App'x at 243 (citing *Barbeau*,

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[7] *See* **Wildcat AB 27–31** (discussing *Moreno v. Devon Energy Corp.* ("*Devon Energy*"), No. 122CV00345MISJHR, 2023 WL 6199807 (D.N.M. Sept. 22, 2023) and *Roberts v. Generation Next, LLC*, No. 18-CV-00975-WJ-LF, 2019 WL 1958115, (D.N.M. May 2, 2019)).

33 P.3d at 679). But under *Zangara*, *Barbeau* and its progeny are "no longer good law." *See supra* Part 1.b; *Zangara*, 2024-NMSC-021, ¶ 20.

3. Wildcat's hodgepodge of other arguments are equally unavailing.

That leaves only Wildcat's scattered additional arguments for affirmance, which are likewise unpersuasive.

For example, Wildcat argues that the Texas court's dismissal "acts as *res judicata* concerning Plaintiff's claims against Wildcat." **[Wildcat AB 23]** Wildcat relies on *Murphy v. Klein Tools, Inc.*, 935 F.2d 1127 (10th Cir. 1991), which in turn relied on *DeVargas*. *See Murphy,* 935 F.2d at 1129 (citing *DeVargas*, 796 F.2d at 1250). **[Wildcat AB 24–26]** But as shown, *DeVargas* never considered the posture here, where the plaintiff's first-filed suit—though filed in another state—was timely under New Mexico law. *See* 796 F.2d at 1247–48; *supra* Part 2.a.

Wildcat alternatively argues that *Zangara* dooms this case because the Texas court made "complete findings of fact and conclusions of law," placing Mr. Moreno outside the Savings Statute. [**Wildcat AB 32** (citing *Zangara*, 2024-NMSC-021, ¶ 16)] The Texas court's two-sentence, summary order—dismissing Mr. Moreno's first-filed case not on the merits, but on limitations grounds—refutes Wildcat's claim. **[RP 102]**

Last, Wildcat seeks affirmance under the "right for any reason" doctrine if the opinion below is not "entirely correct[.]" **[Wildcat AB 33]** Yet Wildcat does not even hint at an alternative reason that would render the Court of Appeals' opinion "right." *Id.* Understandably so: For the many reasons shown, the opinion below cannot be salvaged.[8]

Conclusion

The Court should hold that, under *Zangara*, the lower courts erred in declining to apply the Savings Statute to Mr. Moreno's second lawsuit. Consistent with the statute's text, policy, and purpose, it should hold that the Savings Statute saves those cases that were originally timely filed under New Mexico law, and that were not dismissed for negligence in prosecution. Because this is such a case, the Court should accordingly reverse the Court of Appeals' opinion and remand to the district court for further proceedings.

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[8] Wildcat also "incorporates" the arguments contained in Ranger's answer brief. **[Wildcat AB 33]** But incorporation by reference "is not an acceptable briefing practice." *State v. Aragon*, 1990-NMCA-001, ¶¶ 3-4, 109 N.M. 632, 788 P.2d 932.

Respectfully submitted,

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Certificate of Service

I hereby certify that on this 6th day of February 2025, I electronically filed this document with the Clerk of Court using the Odyssey efile and serve system, which caused a copy to be served on counsel of record and any other service contacts.

/s/ Caren I. Friedman