IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

NO. S-1-SC-40442

JESUS MORENO,

Plaintifff-Petitioner

v.

RANGER ENERGY SERVICES, LLC

and WILDCAT OIL TOOLS, LLC

Defendants-Appellees

APPELLEE RANGER ENERGY SERVICES, LLC'S ANSWER BRIEF

Pursuant to Rule 12-319(B) NMRA, oral argument is requested.

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STATEMENT OF COMPLIANCE

Per Rule 12-318(G) NMRA, I certify that this brief was prepared in 14-point Century Schoolbook font typeface and that the body of the brief contains 2,643 words, according to Microsoft Word.

/s/Stephanie Kane Demers
Stephanie Kane Demers

INTRODUCTION

The New Mexico Savings Statute, NMSA 1978, § 37-1-14 (1880), provides a codified exception to application of the New Mexico statutes of limitations, NMSA 1978, §37-1-8 (1880). Where applicable, it tolls the statute of limitations for six months when a timely-filed lawsuit is dismissed for any reason other than "negligence in [the] prosecution" of the first suit. § 37-1-14. The statute of limitations for personal injury torts provides a strict and necessary time limit within which a lawsuit can be filed. §37-1-8. Together, the statutory provisions create a balance between competing interests: Providing basic fairness to defendants while suppressing stale or fraudulent claims on one hand, and furthering a strong preference for judicial resolution of claims on the merits on the other.

In the recent case of *Zangara v. LSF9 Master Participation Tr.*, 2024-NMSC-021, 557 P.3d 111, this Court construed and clarified the scope of the "negligence in the prosecution" exception in the Savings Statute. The *Zangara* opinion is at the foreground of the issues brought before the Court in the instant case because Plaintiff has placed it there in his attempt find relief from the lower courts proper refusal to allow

him to rely on the Savings Statute to salvage his time-barred filings and not because it unequivocally brings anything to bear on this case that has not been considered and rejected already.

Importantly, the *Zangara* holding begins with the premise that "[t]he savings statute suspends the running of an otherwise applicable statute of limitations when an action is *timely commenced* but later dismissed for any cause except negligence in prosecution." *Id.* ¶ 1 (emphasis added). Given this statement at the outset of the *Zangara* opinion, it is difficult to comprehend Plaintiff's assertion that "*Zangara* resolves this case in [his] favor" without so much as referencing it in his Brief in Chief. **[BIC 15].**

What is more, a timely first-filed action was a well-established predicate for operation of the Savings Statute in case law before this case arose and it continues to be. *See, e.g., Gathman-Matotan Architects & Planners, Inc. v. Dep't of Fin. & Admin.*, 1990-NMSC-013, ¶8 109 N.M. 492, 787 P.2d 411 (savings statute is available to suspend the running of an otherwise applicable statute of limitations when an action is timely commenced and later dismissed….); *Four Winds Behav. Health v. State*, No. A-1-CA-40797, 2024 WL 4603177, at *1 (N.M. Ct. App. Oct. 28, 2024),

(unpublished), *cert. denied*, (citing *Zangara* for its holding that "[t]he savings statute suspends the running of an otherwise applicable statute of limitations when an action is timely commenced but later dismissed for any cause except negligence in prosecution" and equating "negligence in its prosecution" with "dismissal for failure to prosecute").

The *Zangara* opinion addressed some confusion that had developed in the lower courts over time, resulting in a myriad of holdings related to construction of the "negligence in prosecution" language in the Savings Statute. The *Zangara* Court removed related jurisprudential confusion through statutory construction, holding that "negligence in prosecution" equates with "dismissal for failure to prosecute." *Id.* The timely first-filed suit requirement still exists both independent of the "negligence in the prosecution" clarification and falls within it. Plaintiff contends that *Zangara's* rejection of a case-by-case approach to interpreting the "negligence in the prosecution" statutory language warrants reversal. *See generally*, Pl's Brief in Chief. It does not.

The Court should resist Plaintiff's request to contort the holding in *Zangara* while ignoring the timely filed complaint requirement. There has been and remains no meaningful jurisprudential confusion as to the

fundamental and logical premise that the first suit must be timely filed within the applicable statute of limitation period in order for the Savings Statute to be available.

SUMMARY OF PROCEEDINGS

1. Plaintiff chose to file a personal injury lawsuit in Texas, beyond the governing two-year Texas statute of limitations, and it was dismissed with prejudice

On July 6, 2020, Plaintiff filed his lawsuit in Texas, alleging injuries suffered on October 31, 2017. **[RP 38]** The Texas statute of limitations within which to file such claims is two years. Plaintiff's lawsuit was time-barred by the governing Texas statute of limitations and it was dismissed on this basis with prejudice on a defense motion on January 12, 2020. Plaintiff did not appeal the ruling **[RP 58-62, 102]**

2. Plaintiff then filed the lawsuit in New Mexico, beyond the New Mexico statute of limitations

On May 20, 2021, four months after the Texas dismissal of the untimely filing and some seven months beyond the governing New Mexico three-year statute, Plaintiff filed the lawsuit in New Mexico state court. NMSA 1978, § 37-1-8 **[RP 1-6]**

3. The district court granted a defense motion to dismiss the time-barred lawsuit, to which the savings statute did not

apply due to the absence of a timely filing in the first instance

Responding to a defense motion for dismissal based on violation of the three-year statute of limitations in the New Mexico district court **[RP 18-22, 29]**, Plaintiff argued that the New Mexico savings statute should operate to excuse the late New Mexico filing based his contention that it should be deemed a continuation of the first (also late) Texas filing because the late Texas filing was filed within the New Mexico time for filing. **[RP 32-35]** Following a full cycle of briefing and a hearing, the district court determined that the Savings Statute did not apply to save the late New Mexico filing due to the untimeliness of the first Texas lawsuit and granted the motion to dismiss. **[Tr. 4:22-26, 10:3] [RP 127-28]**

4. The Court of Appeals correctly affirmed the dismissal due to unavailability of the savings statute where the original lawsuit was itself untimely filed

Conducting a thorough review of the Savings Statute and case law applying the negligence in prosecution exception to it, the Court of Appeals issued a published opinion affirming the district court's dismissal of the claims as time-barred because there had been no timely first filing. *Moreno v. Ranger Energy Services*, LLC, 2024-NMCA-065,

554 P.3d 737, *cert. granted*, 2024-NMCERT-008, 555 P.3d 785. Plaintiff then petitioned this Court for writ of certiorari, which was fully briefed, and he also moved the Court to hold the petition in abeyance pending a ruling in *Zangara v. LSF9 Master Participation Trust*, 2024-NMSC-021, which motion, too, was briefed. Plaintiff's Petition was granted. *Moreno*, 2024-NMCERT-008.

QUESTION PRESENTED ON PETITION

Did the district court and Court of Appeals err in concluding that the Savings Statute did not apply to Mr. Moreno's second suit?

ARGUMENT

The Court of Appeals committed no error in affirming the district court's dismissal of Plaintiff's untimely lawsuit because there was no lawsuit in the first instance that the Savings Statute could operate to continue. Nothing in the text or effect of the subsequently issued *Zangara* opinion requires or warrants a different result.

1. The standard of review is de novo

The standard of review on the granting of a motion to dismiss is de novo. *Delfino v. Griffin*, 2011-NMSC-015, ¶ 10, 257 P.3d 917. Where the Court is called upon to construe applicable statutory law, the review is

de novo. *Romero v. Lovelace Health Sys., Inc.*, 2020-NMSC-001, ¶ 10, 257 P.3d 917.

2. The Court of Appeals did not err in affirming the district court's dismissal and the *Zangara* opinion does not support a different result

In his Brief in Chief, Plaintiff contends that this Court's opinion in *Zangara v. LSF9 Master Participation Trust*, S-1-SC-39679, that was unavailable when the *Moreno* opinion was issued, "resolves this case in his favor." **[BIC at 15].** It does not.

Zangara held that dismissal of a mortgage assignee's first, timely-filed foreclosure action for lack of standing did not constitute "negligence in the prosecution" of the first suit under the exception to the Savings Statute, and thus a second foreclosure action, filed within six months of that dismissal, was timely by application of Section 37-1-14. *Id.* *Zangara* did not upend the lower court's result but instead rejected the method and reasoning by which the result was reached in that case. The Court clarified certain jurisprudential confusion related to the meaning of the "negligence in its prosecution" language in NMSA 1978, § 37-1-14 and, in so doing, overruled the case of *Barbeau v. Hoppenrath*, 2001-NMCA-077,

131 N.M. 124, 33 P.3d 675 and others insofar as those opinions conflicted with its holding.

Zangara did not, however, disturb the sound reasoning and result reached by the Court of Appeals affirming the district court in this matter. The absence of a timely suit was the gravamen of the Court of Appeals' ruling in this case and it remains intact. The Court of Appeals held that Plaintiff's initial lawsuit filed in Texas "was untimely as a matter of law on the face of the pleadings and the motion responses, and as a result, the subsequent case filed in New Mexico cannot be 'deemed a continuation of the first,' expired case" and it affirmed the district court's dismissal of Plaintiff's claims as untimely. *Moreno v. Ranger Energy Servs., LLC,* 2024-NMCA-065, ¶ 1, 554.

While the Court of Appeals contended with the *Barbeau* case now overruled by *Zangara*, a careful review of the opinion makes plain that it did not hang its hat on the case. *See Id.* What is more, *Zangara* held that the "negligence in the prosecution" language in § 37-1-14 has the same meaning as "failure to prosecute" an action to completion, which still applies to Plaintiff's situation. *Zangara*, 2024-NMSC-021, ¶ 1. By way of further clarification, *Zangara* expressly rejected any previous extensions

of the negligence exception "beyond a party's failure to timely take the steps necessary to bring the first-filed suit to a close." *Id.* Plaintiff's late Texas filing constitutes exactly such a failure.

The *Zangara* ruling supports the lower courts' rulings in the whether the requirement for a first-filed timely action is characterized as a threshold to operation of the Savings Statute or a "negligence in its prosecution" exception to it, or both. It is the untimeliness of the first action that is dispositive of Plaintiff's claims.

The *Zangara* opinion begins with, "where a lawsuit is timely filed…" the statute offers relief. It goes on to narrowly define the meaning of the negligent prosecution clause. *Id.* What could fall more squarely within a "failure to take the necessary steps to bring a first-filed suit to a close" as *Zangara* described the application of the negligence the exception, than failing to file it timely? *Id.*

A case cited in the briefing below and relied on by the Court of Appeals hits our question head-on and includes language that aptly describes why timeliness is a threshold to application of the Savings Statute. In *DeVargas v. Montoya*, 796 F.2d 1245, 1247 (10th Cir. 1986), *overruled on other grounds,* a plaintiff attempted to file a second suit in

federal court under the Savings Statute following a state court dismissal of a lawsuit for violation of the statute of limitations. In a thorough and cogent opinion, the Tenth Circuit Court of Appeals stated, in pertinent part, as follows.

> This statute does not assist plaintiff. One need look no further than the statutory language stating that a second suit is deemed a 'continuation of the first.' As previously indicated, we recognize as valid and binding the New Mexico judgment that plaintiff had nothing to continue. His suit in state court was time-barred. The savings statute could not resurrect what never existed.

Id. (citing *Mercer v. Morgan*, 1974-NMCA-102, 86 N.M. 711). Plaintiff's time-barred suit, like the *DeVargas* time barred suit, created nothing to be continued and the savings statute should not even be in play. The *DeVargas* court continued on to articulate the harm inherent in allowing the very type of relief that Plaintiff requests in this case.

> Any holding to the contrary would lead to the absurd result that all limitations statutes are extended indefinitely by the savings statute. A barred action need only be filed, dismissed then refiled within six months of dismissal claiming 'continuation' under the savings statute.

Id. at 1250. Indeed, this would be an absurd result. The Court of Appeals noted that "Plaintiff did not acknowledge that that the Texas lawsuit was

already barred by Texas law and that by the time the suit was filed in New Mexico, the New Mexico limitation period has also expired." *Moreno*, 2024-NMCA-056, ¶ 10. Instead, Plaintiff argued that when he filed the untimely Texas action, the New Mexico statute had not yet run. *Id.* To be clear, what Plaintiff sought then, and seeks now from this Court, is a ruling that because he could have filed a timely suit in New Mexico but chose not to, the Court should excuse his own choice of a forum where he knew the statute had run and pretend that he filed in New Mexico so its Savings Statute can apply.

Plaintiff presents not a single case where a court has permitted a litigant having a first-filed suit that was dismissed for a statute of limitations violation to be allowed to take advantage of the Savings Statute to file a second lawsuit outside the statute of limitations. Even of those cases *Zangara* overruled as engaging in fact-bound inquiries about negligence as engaging in impermissible fact-bound inquiries in considering application of the savings statute had timely-filed actions in the first instance and timeliness in the first instance was not at issue. *See Amica v. Mutual Insurance Company v. McRotsie*, 2006-NMCA-046,

139 N.M. 489, 134 P.3d 773 (timely-filed first suit); *Foster v. Sun Healthcare Group*, 2012-NMCA-072, 284 P.3d 389 (timely filed first suit).

This Court should deny the relief Plaintiff seeks because any other result would be inconsistent with the purpose and intent of the Savings Statute, the statutes of limitations, *Zangara*, or basic logic. Instead, the baseline requirement for operation of the Savings Statute is that the lawsuit is timely where filed in order for the savings statute to be in play at all.

3. The dismissal of Plaintiff's time-barred suit should be affirmed

Neither the district court nor the Court of appeals erred in concluding that the Savings Statute did not apply to Plaintiff's claims. Plaintiff's reliance on this court's opinion in *Zangara* for a different result is misplaced and unavailing. Notwithstanding *Zangara* overruling *Barbeau* and other cases that have required a fact-intensive and case-by-case approach to construing the "negligence in prosecution" exception in § 37-1-14 as rejected in *Zangara*, principles of statutory interpretation as applied in both the Court of Appeals and the surviving case law confirm that the decision in this case is sound. Because the first suit was

untimely, there was nothing to continue or resurrect and the Savings Statute should not operate to save the late filing.

CONCLUSION

The Court should hold that the lower courts did not err in declining to apply the Savings Statute and, accordingly, should deny Plaintiff's appeal and affirm the Court of Appeals judgment.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 12-319(B) NMRA, Defendant Ranger Energy Services, LLC requests oral argument. The matter is of significance in its potential to affect the law governing timeliness of actions in this case and future cases. It may assist the Court to hear oral presentations and provide an opportunity for the Court to explore any areas of inquiry that remain following the recent *Zangara* opinion and briefing.

CERTIFICATE OF SERVICE

I certify that on this 20th day of January, 2024, I caused the foregoing document to be electronically filed with the Clerk of court using the Odyssey File and Serve System, which caused a copy to be served on Counsel of record and any service contacts.

/s/ Stephanie K. Demers
Stephanie K. Demers