IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

JESUS MORENO,

Plaintiff-Appellant,

v. **No. S-1-SC-40442**

RANGER ENERGY SERVICES, LLC,
And WILCAT OIL TOOLS, LLC,

Defendants – Appellees.

APPELLEE WILDCAT OIL TOOLS, LLC'S ANSWER BRIEF

Oral Argument Is Requested

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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 and the typeface requirements in Rule 12-305(D) NMRA. This brief is prepared in a proportionally spaced 14-point typeface with serifs, and the body of the brief contains 7,088 words, according to Word.

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I. INTRODUCTION

This Court should deny Plaintiff-Appellant's (Plaintiff) appeal in the above-captioned matter. Plaintiff's claims as to Wildcat Oil Tools, Inc. ("Wildcat") were dismissed *with prejudice* in Texas. **[RP 102]** Fleeing to New Mexico to subsequently file the same case, stemming from the same nucleus of facts, cannot undo this significant bar to litigation. New Mexico should not be the Court of Second Opinion.

Even if the case as to Wildcat was not already dismissed by Texas with prejudice, the New Mexico's savings statute, NMSA 1978, § 37-1-14 (1880, as amended through 1978) ("savings statute"), does not, and should not, extend to a party who intentionally files a lawsuit after the applicable statute of limitation has expired. This becomes especially true where a party repeats this practice in two successive forums. Here, Plaintiff failed to meet the predicate requirement of the New Mexico savings statute; namely, that the first lawsuit must be timely filed. See, *King v. Lujan*, 1982-NMSC, ¶ 8, 98 N.M. 179, 646 P.2d 1243 ("A party who has slept on his rights should not be permitted to harass the opposing party with a pending action for an unreasonable amount of time…furthermore, the courts should not distinguish between a plaintiff who takes no action before the limitation period expires and a plaintiff who files a complaint before the period expires but who thereafter takes no action"); *Gathman-Matotan Architects & Planners, Inc. v. State Dep't of Fin. & Admin.* 1990-NMSC-013, ¶ 8, 109 N.M. 492, 787 P.2d 411 ("G-M

Architects") ("The Statute is a tolling statute , which operates to suspend the running of an otherwise applicable statute of limitations when an action is timely commenced and later dismiss…"); *Zangara v. LSF9 Master Participation Tr.*, 2024-NMSC-021, ¶ 1, 557 P.3d 111 (stating "[t]he savings statute suspends the running of an otherwise applicable statute of limitations when an action is timely commenced but later dismissed…"); *see also Moreno v. Devon Energy Corp.*, No. 1:22-cv-00345, 2023 WL 6199807 at *3 (D.N.M. Sep. 22, 2023) ("New Mexico courts have repeatedly endorsed the view…that the Savings Statute applies only if a plaintiff's originally filed action was commenced 'timely'…[with]in the forum state's statute of limitation"). Specifically, Plaintiff elected to first file his personal injury lawsuit, against the same defendants named in the present New Mexico suit, in Texas,[1] but did so seven months after the Texas statute of limitation for personal injury matters had already expired ("Texas Lawsuit"). The Texas Lawsuit was null the moment it was filed in Texas. Plaintiff did not offer an excuse, did not cite to any tolling allowance, and did not otherwise defend against Wildcat's dispositive summary judgment motion in Texas. As such, the Texas trial court dismissed all of Plaintiff's claims against Wildcat Oil Tools, with prejudice on Wildcat's motion for summary

[1] A more complete discussion of Appellant's naming of the original defendants in the Texas Lawsuit separately in New Mexico State Court matters is addressed herein.

judgment. Plaintiff did not file a motion for reconsideration or for any subsequent relief following the dismissal by the Texas trial court in Texas.

Instead, months later, Plaintiff filed the same personal injury lawsuit in New Mexico ("New Mexico Lawsuit").[2] The New Mexico Lawsuit arose from the same nucleus of facts as the Texas Lawsuit. However, Plaintiff again filed *after* the applicable statute of limitation for personal injury cases, this time New Mexico's statute, had already expired. Thus, both the Texas and the New Mexico lawsuits were untimely filed. For the reasons stated herein, this Court should deny Plaintiff's appeal. Plaintiff's appeal is improper as it ignores the Texas trial court's dismissal with prejudice. Further, Plaintiff's appeal should be denied because Plaintiff cannot resurrect the Texas Lawsuit through the savings statute when both the first and second lawsuits were untimely filed. Moreover, this Court should not indulge Plaintiff's appeal as Plaintiff was negligent in the prosecution of his claims against Wildcat. A plain language reading of the New Mexico saving statute, supported by this Court's precedent, requires Plaintiff's case to be dismissed.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Plaintiff's personal injury claims arise out of an alleged October 2017, oilfield-related incident at an oil rig located in Lea County, New Mexico. **[RP 2]**

[2] As is more fully described below, Plaintiff did not name the Devon Defendants in the New Mexico Lawsuit that included Ranger Energy and Wildcat. They were named in a concurrent New Mexico State court action.

Plaintiff alleges he fell from an oil rig platform. **[RP 2-3, 53]** Notably, despite the foregoing facts, Plaintiff filed the Texas Lawsuit first—not a suit here in New Mexico. **[RP 1, 53, 55-56]**

In both his Texas Petition and New Mexico Complaint, as described herein, Plaintiff alleged personal injuries, medical expenses, lost earnings, and loss of earning capacity.[3] **[RP 6; RP 56]**

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[3] Plaintiff's Texas Lawsuit included "Devon Energy Corporation" and "Devon Energy Production Company, L.P " as defendants and as owners/operators of the subject wellsite (Collectively, "The Devon Defendants") The Devon Defendants were incorporated in the State of Delaware and Headquartered in the State of Oklahoma. The Texas Lawsuit indicates that the situs of the underlying accident was a wellsite in New Mexico. No facts were alleged that Moreno ever did work for the Devon Defendants within the State of Texas. The Court of Appeals for the First District of Texas issued a Memorandum Opinion holding that the State of Texas lacked both general and specific jurisdiction over the Devon Defendants becauseDevon was not at home in Texas (general personal jurisdiction) and the Plaintiff's claims did not arise out of Devon's contact with the State of Texas (specific personal jurisdiction). Plaintiff's claims against the Devon Defendants in the Texas lawsuit were dismissed. Plaintiff did not appeal. **[*See Plaintiff's* BIC, Page 5]** Plaintiff did not include the Devon Defendants in the New Mexico Lawsuit with Ranger Energy and Wildcat Oil Tools, both of whom had been defendants in the Texas Lawsuit. After the Texas Court of Appeals issued its opinion regarding the Texas Lawsuit, Plaintiff filed a separate lawsuit against the Devon Defendants in New Mexico State Court, on March 9, 2022, (Cause No. D-101-CV-2022-00534). Plaintiff's New Mexico state court action against the Devon Defendants was removed to Federal Court on May 5, 2022. The issue of the New Mexico Savings Clause was also at issue in that federal district court matter. Judge Strickland granted Devon's motion to dismiss. Plaintiff appealed. The appeal was set to be heard by the U.S. 10th Circuit Court of Appeals. The parties settled prior to the matter being addressed by the Circuit Court. Plaintiff/Appellant's brief omits any reference to the action against the Devon Defendants in New Mexico/federal court, or the federal court's dismissal of his New Mexico Lawsuit as to Devon ("Devon Lawsuit").

A. TEXAS LAWSUIT

Plaintiff filed his first lawsuit, the Texas Lawsuit, stemming from the same nucleus of operative facts present before this Court, in Harris County, in the State of Texas, on July 6, 2020. **[RP 53]** This lawsuit was filed two years and eight months after the alleged incident giving rise to this case. **[RP 53; RP 58-59; RP 61-62; BIC 5]** In the Texas Lawsuit, Plaintiff named the following parties as defendants: Devon Energy Corporation, Devon Energy Production, L.P., Ranger Energy Services, LLC, and Wildcat. **[RP 54]** Wildcat filed an answer in the Texas Lawsuit on November 3, 2020 **[RP 72]** and, subsequently, filed a motion for summary judgment on December 8, 2020, based in part on the fact that Plaintiff filed the Texas Lawsuit eight months after the Texas statute of limitations had expired ("Wildcat's Texas MSJ"). **[RP 58, 102]**. Wildcat's Texas MSJ was based on Plaintiff's failure to file the Texas Lawsuit before the expiration of Texas' two-year statute of limitations. **[RP 58 – 59]** Plaintiff defaulted on Wildcat's Texas MSJ, filing no response.

The Texas court subsequently held a hearing on Wildcat's Texas MSJ. At that hearing, Plaintiff, in addition to having filed no response, also did not argue against Wildcat's Texas MSJ. Ultimately, the Texas court entered an *Order Granting Wildcat's Motion for Summary Judgment* on January 12, 2021, wherein his claims were dismissed *with prejudice* as to Wildcat. **[RP 102]** Plaintiff did not motion the Texas court for reconsideration nor appeal the Texas court's order dismissing

Wildcat from Plaintiff's case in the Texas lawsuit. Rather than pursue anything further as to Wildcat in Texas, Plaintiff instead filed effectively the same lawsuit four months later in New Mexico. **[RP 1]**

B. NEW MEXICO LAWSUIT

On May 20, 2021, four months after the Texas court granted Wildcat's Texas MSJ and dismissed all of Plaintiff's claims against Wildcat in the Texas Lawsuit, with prejudice, Plaintiff filed the New Mexico Lawsuit against Wildcat (and Ranger Energy Services) in New Mexico.[4] **[RP 1; BIC 8]** In the New Mexico Lawsuit, Plaintiff filed in Santa Fe County for an injury that is alleged to have occurred in Lea County, New Mexico. Plaintiff alleged he was a Texas Resident, and that both Wildcat and Ranger Energy Services had registered agents within Santa Fe County, New Mexico. **[RP 1-2]** The New Mexico Lawsuit arose out of the same nucleus of operative facts as the Texas Lawsuit, but once Plaintiff sought the protections of the New Mexican courts, the New Mexico Statute of Limitation (of three years) had already passed. **[RP 2; BIC 6]**

Because the New Mexico Lawsuit was filed after the New Mexico Statute of Limitation had passed, Wildcat filed its motion to dismiss the New Mexico Lawsuit on June 28, 2021. **[RP 18]** Plaintiff filed a response to the motion to dismiss on July

[4] Plaintiff did not include either Devon Energy Corporation or Devon Energy Production, L.P. in the New Mexico Lawsuit. *See* note 3, supra.

13, 2021. **[RP 31]** Wildcat filed a reply brief on July 28, 2021. **[RP 44]** The New Mexico trial court eventually conducted a hearing on Wildcat's motion to dismiss on February 22, 2022. **[Tr. 1]** At the hearing, the district court ruled:

> Plaintiff filed too late in Texas. If he wanted to file in Texas, he should have complied with the Texas statute of limitation and then he filed too late in New Mexico and the savings clause of Section 37-1-14 does not save him here. It's not a question of notice, it's a question of jurisdiction and whether or not it was properly filed in the first instance. I think the cases cited by Plaintiff are distinguishable, so therefore the motion is granted. It was filed outside the statute of limitation in New Mexico. **[Tr. 10]**

Following this ruling from the bench, the district court dismissed Plaintiff's claim "with prejudice, with all parties to bear their own attorneys' fees and costs." **[RP 139 – 40]**

C. New Mexico Court of Appeals Ruling

Plaintiff filed a Notice of Appeal April 14, 2022. Plaintiff filed his brief-in-chief on March 6, 2023. Both Defendants field their respective Answer Briefs on June 21, 2023. The New Mexico Court of Appeals published its Opinion on March 20, 2024. *Moreno v. Ranger Energy Services, LLC*, 2024-NMCA-065, 554 P.3d 737. In its opinion, the Court of Appeals affirmed the trial court determination that Plaintiff's personal injury complaint was untimely filed. *Id.* ¶ 1. On appeal, Plaintiff contended the New Mexico's savings statute, Section 37-1-14, was a continuation of the first-filed, but dismissed Texas case. *Moreno*, 2024-NMCA-065, ¶ 1. However, the New Mexico Court of Appeals concluded that the New Mexico

Lawsuit cannot be deemed a continuation of the first, expired case, and affirmed the decision of the trial court. *Id.* The New Mexico Court of Appeals ultimately affirmed the district court's dismissal.

III. DISCUSSION

A. LEGAL STANDARD

This Court reviews a Court of Appeal's decision to dismiss a case for failure to state a claim, under Rule 1-012(B)(6) NMRA, *de novo. Delfino v. Griffo*, 2011-NMSC-15, ¶ 9 150 N.M. 97, 257 P.3d 917, (citing *Valdez v. State*, 2002-NMSC-28, ¶ 4, 132 N.M. 667, 54 P.3d 71). Plaintiff is asking this Court to construe the meaning of the savings statute which will entail statutory interpretation. *See Leger v. Leger*, 2022-NMSC-007, ¶ 63, 503 P.3d 349 (citing *Lujan Grisham v. Reeb*, 2021-NMSC-006, ¶ 12, 480 P.3d 852). In interpreting statutes, courts must first begin with the plain language of the statute and uphold the intent of the Legislature. *Id.*

New Mexico savings statute provides as follows:

> 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.

Section 37-1-14. (Emphasis added.)

B. ARGUMENT

1. *The Court of Appeals Properly Upheld the District Court's Decision – The Savings Statute Does Not Apply.*

The New Mexico Court of Appeals properly upheld the district court's decision to grant Wildcat's motion to dismiss—conforming with the decades of this Court's precedent. The Court of Appeals ruled that the Savings Statute does not extend to Plaintiff in this case. Plaintiff filed his Texas Lawsuit late and so there was nothing for a New Mexico court to resurrect.

The Court of Appeals observed that the Texas "limitation periods" offer "'basic fairness' to defendants by 'encouraging promptness in instituting a claim, suppressing stale or fraudulent claims, and avoiding inconvenience, [and] encourag[ing] plaintiffs to bring their actions while the evidence is still available and fresh." *Moreno*, 2024-NMCA-065, ¶ 9 (citing *Roberts v. Sw. Cmty. HealthServs.*, 1992-NMSC-042, ¶ 25, 114 N.M. 248, 837 P.2d 442). The Court of Appeals further noted that limitations periods also "reflect a policy decision regarding what constitutes an adequate period of time for a person of ordinary diligence to pursue [a] claim" *Id.* (internal quotations and citations omitted). The *Moreno* Court determined that "Plaintiff's filing late in Texas and subsequent late filing in New Mexico defeated each of these stated purposes—Plaintiff argued no need for additional time and no equitable basis to toll the limitation period, while the claim and evidence to support it became increasingly stale." *Id.* ¶ 9.

The Court of Appeals further concluded that Plaintiff's effort to have the New Mexico Lawsuit deemed a continuation of the Texas Lawsuit would not serve the

purposes of the savings statute. *Id.* ¶ 10. The Court of Appeals properly applied *G-M Architects,* 1990-NMSC-013, in reaching its determination. In *G-M Architects*, this Court, stated "[t]he statute is a tolling statue, which operates to suspend the running of an otherwise applicable statute of limitation *when action is timely commenced* and later dismissed, except when the dismissal is based on a failure to prosecute the action with reasonable diligence." *Id.* ¶ 8 (Emphasis added).

In denying Plaintiff's appeal, the Court of Appeals reasoned that Plaintiff's late filing of the Texas action could not toll the running of the New Mexico limitation period under the savings statute. *Moreno*, 2024-NMCA-065, ¶ 10. The expiration of the Texas limitation period barred the Texas lawsuit before it was filed. Therefore, "there was no valid action to save in New Mexico–after New Mexico's limitation period had also expired." *Id.* ¶ 10 (citing Section 37-1-14; *see also U.S. Fire Ins. Co. v. Aeronautics, Inc.* 1988-NMSC-051, ¶ 5, 107 N.M. 320, 757 P.2d 7900).

The Court of Appeals held Plaintiff accountable by noting that "Plaintiff does not acknowledge 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 had also expired." *Moreno*, 2024-NMCA-065, ¶ 10. The New Mexico Court of Appeals noted that the 10th Circuit has issued determinations interpreting the Savings Statute which reflect the precedent of this Court and which create consistent law on the matter in both New Mexico state and U.S. Federal Court. *See id.* (citing *DeVargas*

v. Montoya, 796 F.2d 1245, 1247 (10th Cir. 1986), overruled on other grounds by *Newcomb v. Ingle*, 827 F.2d 675 (10th Cir. 1987)). In the *DeVargas* case before the 10th Circuit, the federal appellate court observed that the New Mexico Supreme Court had affirmed the New Mexico Court of Appeals, holding that the Plaintiff's underlying claims were time-barred. *See id.*; *see also DeVargas v. State ex rel. New Mexico Department of Corrections*, 1982-NMSC-025, ¶6, 97 N.M. 563, 642 P.2d 166 (1982).

The Court of Appeals observed that, as in *DeVargas*, the savings statute "could not resurrect what never existed." *Moreno*, 2024-NMCA-065, ¶13. In *DeVargas*, the 10th Circuit found that the prior state court action had been dismissed with prejudice which constituted an "adjudication on the merits and is thus *res judicata* of the issues between the parties and their privies." *DeVargas*, 796 F.2d at 1249 (internal quotations and citation omitted). With respect to the *DeVargas* plaintiff's request to have the savings statute apply to his last late filing, the 10th Circuit further held:

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

Id. at 1250.

In this case, the Plaintiff contends he was diligent in filing the Texas Lawsuit before the New Mexico Statute of limitation had passed. *Moreno*, 2024-NMCA-065, ¶ 13. However, the New Mexico Court of Appeals rejected Plaintiff's position that the Texas litigation was diligently pursued. *Id.* ¶ 14. Plaintiff's Texas Lawsuit was "already barred by Texas law" when filed. *Id.* ¶ 13. The Court compared the facts from *DeVargas* as analogous to this case since the plaintiffs in both *DeVargas* and here "rely on a first expired suit to deem the second suit timely." *Id.* As in *DeVargas*, the Court of Appels held that the "savings statute cannot resurrect a suit that Plaintiff does not dispute was untimely as a matter of Texas law when it was first filed in Texas." *Id.*

In this case, the Court of Appeals concluded "[t]he present case does not involve whether . . .Plaintiff's claim, which indisputably expired when it was filed, can be saved by Section 37-1-14." *Id.* ¶ 14. The Court went on to add that Plaintiff had been negligent in the prosecution of the Texas case. The Court of Appeals ultimately concluded, saying: "[r]egardless, under these circumstances, we must conclude that first pursuing the claim in Texas was a 'failure to prosecute the action with reasonable diligence' under the circumstances, and the New Mexico saving statute does not apply." *Id.* ¶ 16 (citing *G-M Architects*, 1990-NMSC-013, ¶ 8.)

2. *This Court's Precedent is Clear and Consistent and Does Not Support Plaintiff's Unreasonably Expansion of the Savings Statute.*

This Court has long held that a "party who has slept on his rights should not be permitted to harass the opposing party with a pending action for an unreasonable time." *King*, 1982-NMSC-063, ¶ 8. More directly, this Court has repeatedly instructed that New Mexican courts "should not distinguish between a plaintiff who takes no action before the limitations period expires and a plaintiff who files a complaint before the period expires but who thereafter takes no action." *Id.*; *see also G-M Architects.*, 1990-NMSC-013, ¶ 8 (i.e., "when an action is timely commenced and later dismissed[.]"). Further, this Court has long held that the "savings" aspect of Section 37-1-14 will not apply in cases where the dismissal was based on the "plaintiff's failure to pursue his claim." *U.S. Fire Ins.*, 1988-NMSC-051, ¶ 5. Where the first cause of action is dismissed for negligence in the prosecution, the second case cannot be considered as a continuation of the first case. *See Benally v. Pigman*, 1967-NMSC-148, ¶12, 429 P.2d 648.

More recently, this Court in *Zangara*, 2024-NMSC-021, clearly upheld the long-established limitation of the potential application of New Mexico's savings statute to cases that are "timely commenced." *Id.* ¶ 1. In this case, Plaintiff did not timely file his original lawsuit in Texas state court. Plaintiff did not timely commence any cause of action in New Mexico prior to the expiration of New Mexico's applicable statute of limitation.

The facts of *Zangara* are distinguishable from those of this case. In *Zangara*, there was no challenge to the timeliness of the Trust's first foreclosure filing. *Id.* ¶ 4. The balance of this Court's discussion in *Zangara* largely focuses on an analysis of what "negligence in the prosecution" comprises, for cases that were timely filed in the first instance. Since this case was dismissed with prejudice, was not timely filed, and plaintiff was negligent in the prosecution, he does not qualify for the tolling benefits of the savings statute.

Considering the above law, the opinion in this case by the New Mexico Court of Appeals, correctly observed that Plaintiff had slept on his rights by failing to act in the Texas Lawsuit until after the Texas statute of limitations had passed and noted that the Texas Court dismissed the case with prejudice–because Plaintiff had failed to timely pursue his claim. As such, the Court of Appeals rightly upheld the district court's dismissal of Plaintiff's claims against Wildcat. New Mexico's Saving Statute did not toll the New Mexico statute of limitation when Plaintiff filed his untimely lawsuit in New Mexico—after already being dismissed with prejudice in Texas. There was nothing to continue.

Plaintiff contends that since the New Mexico statute of limitation had not expired when he filed his first lawsuit in Texas, his subsequent filing in New Mexico resurrects the dismissed Texas lawsuit. It bears repeating that not only was the Texas Lawsuit dismissed with prejudice, but Plaintiff did not file a response to the

dispositive motion, filed by Wildcat, in that case and did not defend against Wildcat's Motion at argument regarding the same. Instead, Plaintiff completely defaulted, as to Wildcat, in the Texas Lawsuit. With these facts in mind, it is clear that Plaintiff's interpretation of how the savings statute operates does not follow the plain language of the statute.

As filed in Texas, Plaintiff's Texas lawsuit was not timely commenced. New Mexico savings statute provides as follows:

> 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.

Section 37-1-14. In this instance, the first suit cannot reasonably be deemed a commencement of the action when initially filed.

The first step of a statutory construction review is to determine the intent of the Legislature. *See Leger*, 2022-NMSC-007, ¶ 26 (internal citation omitted). In construing the intent of the Legislature when interpreting a statute, the Court is to examine the plain language of the statute as well as the context in which it was promulgated, including the history of the statute and the object and purpose the Legislature sought to accomplish. *Id.* The Court's first and most obvious guide to statutory interpretation is the wording of the statute itself. *Id.* ¶ 27. Courts are to "give the words of a statute their ordinary meaning in the absence of clear express legislative intent to the contrary." *Id.* Unless ambiguity exists, the Court "must

adhere to the plain meaning of the language" of the statute. *Id.* The *Leger* court noted that it "will not depart from the plain language of the statute unless it is necessary to resolve an ambiguity, correct a mistake or an absurdity, or…deal with an irreconcilable conflict among statutory provisions. *Maestas v. Zager*, 2007-NMSC-003, ¶ 91, 41 N.M. 154, 152 P.3d 141 (internal quotation marks and citation omitted). In applying the plain meaning approach to statutory construction, this Court has held "if the meaning of a statute is truly clear—not vague, uncertain, ambiguous, or otherwise doubtful—it is of course the responsibility of the judiciary to apply the statute as written and not to second-guess the [L]egislature[.]" *State ex rel. Helman v. Gallegos* 1994-NMSC-023, ¶ 22, 117 N.M. 346, 871 P.2d 1352.

The "Savings Statute" was enacted in 1880 in a chapter exclusively devoted to matters affecting the limitations of lawsuits. *See Benally*, 1967-NMSC-148. Focusing here for just a moment on the placement of the statute from the outset in a chapter on limitations of lawsuits, the reasonable interpretation is that the Savings Statute was meant to *limit,* and not to *expand,* when lawsuits may be brought in this state.

Importantly, here, where Plaintiff himself admits that he filed "a materially identical suit" in New Mexico where he "*re*asserted his claims" this situation is clearly one where the word "commenced" applies to show that this case was commenced in Texas and then merely reasserted in New Mexico. **[BIC 5]** The plain

language and the location of this statute in the code operate to show that Plaintiff's case should be barred.

This Court has long held that:

> [w]here an action is dismissed *without prejudice* because of a failure to prosecute, the action will be deemed not to interrupt the running of an otherwise applicable statute of limitation, and a subsequent suit filed on the same claim as the first after the statute has run will be barred.

G-M Architects, 1990-NMSC-013, ¶ 12. (Emphasis added.)[5] In *G-M Architects*, the underlying matter was dismissed without prejudice.

In this case, Plaintiff made a strategic decision to file this matter in Texas despite acknowledging in the Texas Petition, and even in the brief to the New Mexico Court of Appeals, that the underlying accident occurred in New Mexico and that New Mexico law applied. Plaintiff's legal stratagem failed in Texas and so Plaintiff then turned to New Mexico to refile his case in this new forum.

In his brief, Plaintiff contends that the bulk of this Court's decision in the recent *Zangara* matter (outlining "negligence in the prosecution") saves him **[BIC 15-17]**. Plaintiff's contentions are wrong on multiple fronts. First, the *Zangara* Court held: "We conclude *any cause* as used in our savings statute means **any disposition without prejudice** that produces results in the failure of the first filed action."

[5] The *Gathman* court expressly expounded the analytical framework set forth in the New Mexico Supreme Court's earlier case in *Bracken v. Yates*, 107 N.M. 463, 760 P.2d 155 (1988).

Zangara, 2024-NMSC-021, ¶11. (Italics in the original; bold and underline emphasis added.) Plaintiff's first lawsuit was dismissed with prejudice. Second, the *Zangara* Court expressly limited the savings statute to cases that were "timely commenced" and which, if dismissed, were dismissed without prejudice. This case is distinguishable on both accounts. *See id.* ¶ 1. Third, by Zangara's definition, Plaintiff was in fact negligent in the prosecution of his case. Plaintiff filed his Texas lawsuit outside of the Texas statute of limitations. Plaintiff was further negligent in the prosecution of his case when he failed to contest Wildcat's motion for summary judgment. As a result, the Texas court dismissed all of Plaintiff's claims against Wildcat in his Texas lawsuit, *with prejudice*. Plaintiff did not pursue any additional relief or remedy as against Wildcat in Texas thereafter. Finally, when Plaintiff filed his New Mexico Lawsuit, it too was untimely.

The factual context in *Zangara* is vastly different from the facts here. In *Zangara*, in the underlying lawsuit, Plaintiff's claims were not dismissed with prejudice on a motion for summary judgement. The dismissal in this case acts as *res judicata* concerning Plaintiff's claims against Wildcat. Moreover, in *Zangara*, the parties did not challenge the timeliness of the filing of the Trust's first lawsuit. *Id.* ¶ 12. This fact creates a fundamentally different context here where the Texas Lawsuit was not only challenged, with Wildcat objecting to the timeliness of the Texas Lawsuit, but also where Plaintiff defaulted in responding to the challenge and the

Texas Lawsuit was therefore dismissed with prejudice. While *Zangara* clarified the definition, scope and application of the phrase "negligent in the prosecution[,]" in cases where the first case was dismissed without prejudice, *Zangara* does not save Plaintiffs case here under any proper reading of this Court's opinion. *Id.* ¶ 13.

In short, this Court has limited the application of the savings statute to cases that are timely filed. *See King*, 1982-NMSC, ¶ 8; *see also G-M Architects*, 1990-NMSC-013; *Zangara*, 2024-NMSC-021. Plaintiff cannot deny that he failed to timely file both lawsuits in the respective forum. The savings statute does not (and should not) extend to him in this case.

3. *The United States 10th Circuit and the United States District Court for the District of New Mexico Also Limit the Savings Statute to Cases Where the Original Lawsuit Was Timely Filed.*

In *Murphy v. Klein Tools*, 935 F.2d 1127 (10th Cir. 1991), the plaintiff allegedly fell from an electrical tower near Farmington, New Mexico. *Id.* at 1127. The *Murphy* plaintiff alleged a defective swivel hook designed and manufactured by the *Murphy* defendants was the cause. *Id.* The *Murphy* plaintiff was a Kansas resident. *Id.* The defendant was a Delaware corporation. *Id.* The *Murphy* plaintiff filed his first lawsuit in the United States District Court of the District of Kansas nearly three years after the accident. *Id.* The *Murphy* defendant moved to dismiss based on filing occurring after the Kansas state two-year statute of limitation. *Id.* The *Murphy* plaintiff moved to transfer venue to the United States District Court of

the District of New Mexico, which the court denied. *Id.* The court further denied the *Murphy* plaintiff's motion to amend the complaint. *Id.* Moreover, prior to entry of the final judgment, the court also denied plaintiff's request for the dismissal to be entered "without prejudice[.]" *Id.* The Kansas federal district court entered final judgment, dismissing eth case with prejudice. *Id.* Plaintiff failed to appeal any of these decisions.

The *Murphy* plaintiff then filed his second lawsuit in New Mexico state court and later amended that suit, but neither suit was served on the *Murphy* defendant. *Id.* at 1127-28. Upon what the *Murphy* court portends was dismissal at the state case, the *Murphy* plaintiff filed yet another New Mexico state court action which the *Murphy* defendant removed to federal court for the District of New Mexico and moved for dismissal under grounds of res judicata. *Id.* at 1128. The New Mexico federal court concluded the Kanas federal court's dismissal on statute of limitation grounds was an adjudication on the merits, and therefore, the dismissal with prejudice carried with it preclusive effects per Rule 1-041(b) NMRA. *Id.*

The 10th Circuit Court of Appeals, in *Murphy*, agreed with the New Mexico federal trial court. It held that consequence of the court's dismissal of the first lawsuit "with prejudice" barred the subsequent filings in New Mexico state court per the principle of *res judicata*. *Id.* at 1129. The *Murphy* court affirmed the findings and rulings of the New Mexico federal district court and observed "[a]s we have

determined that plaintiff's claim is barred on res judicata grounds, he cannot invoke the savings statute to claim continuation of an action which never existed." *Id.*; *see also DeVargas,*796 F.2d at 1250.

There are many striking and compelling similarities between this case and *Murphy*. First, the plaintiffs of both cases filed their first lawsuits in a forum state other than where the situs of the accident was alleged to have occurred (The alleged accident in both cases occurred in the State of New Mexico, however, the *Murphy* plaintiff filed in Kansas, and Plaintiff, here, filed in Texas). Second, both the *Murphy* plaintiff and Plaintiff here filed in the forum state of where they resided rather than the state where the alleged accident occurred. Third, both the *Murphy* plaintiff and Plaintiff here filed in states where the trial court of the forum state applied the laws of the respective forums regarding the applicable personal injury statutes of limitations. Fourth, in both instances, the statutes of limitations of the forum stated of the first lawsuit for personal injury cases was two years. Fifth, in both instances, the plaintiffs filed their respective lawsuits untimely–both being filed after the expiration of the forum state's Statute of Limitations. Sixth, the trial court over the first lawsuits in both cases dismissed each lawsuit on the grounds that the filing exceeded respective state's two-year statute of limitations for personal injury. Seventh, the trial courts over the first lawsuits dismissed the plaintiffs' claims "with prejudice." Eighth, the *Murphy* plaintiff and Plaintiff here failed or refused to contest

the trial court's rulings in the first lawsuit. Neither plaintiff filed a motion to reconsider nor did either plaintiff appeal the decision from the first trial court's ruling. In fact, here Plaintiff's inaction was even more grievous in that Plaintiff did not even respond to the pending dispositive motion filed by Wildcat, nor did Plaintiff argue before the trial court against that motion—in sum, Plaintiff completely failed to prosecute.

More recently, and more relatedly, the United States District Court for the district of New Mexico granted defendant Devon's Motion to Dismiss in *Moreno*, 2023 WL 6199807 ("the *Devon* Case"). In the *Devon* Case, the New Mexico Federal District Court ruled that Plaintiff's "claim [was] barred by the New Mexico statute of limitations unless the New Mexico Savings Statute . . . applie[d]." *Id.* at *2. The *Devon* Court determined that Moreno's filing late in New Mexico could not be rescued by his initial filing in Texas, because that case was also untimely. *Id.* at *3. In the *Devon* Case, Plaintiff filed his New Mexico lawsuit against the Devon Defendants on March 29, 2022, in New Mexico State Court–17 months after the New Mexico Statute of limitation had passed. There, as in this case, Plaintiff attempted to argue that his initial filing of the Texas Lawsuit on July 6, 2020, qualified to be rescued by New Mexico the saving statute.

The *Devon* Court ruled that plaintiff was not allowed to apply the tolling provisions of the savings statute "because Plaintiff filed his original lawsuit in Texas

state court after the applicable Texas statute of limitation had run." *Id.* at *3. The *Devon* Court further observed that "New Mexico courts have repeatedly endorsed the view, in dicta, that the Savings Statute applies only if a plaintiff's originally filed action was commenced 'timely.'" *Id.* at *3.

The *Devon* Court also cited to another New Mexico Federal District Court ruling on nearly identical issue and which court also held that New Mexico's savings statute did not apply to rescue a second filed lawsuit from New Mexico statute of limitations where plaintiffs filed their original lawsuit outside of the forum state's statute of limitations, even though the original lawsuit was filed within New Mexico's statute of limitation. *Id.* at *3 (citing *Roberts v. Generation Next, LLC*, No.18-cv-00975-WJ-LF, 2019 WL 1958115, at *5 (D.N.M. May 2, 2019).

The *Devon* Court concluded that the applicable statute of limitation was Texas's two-year statute of limitation. *Id.* (citing to Tex.Civ.Prac. & Rem. Code Ann. Section 16.003(a)). Alternatively, the *Devon* Court ruled that the New Mexico savings statute did not apply to rescue Plaintiff's late filing in New Mexico because Plaintiff was negligent in his prosecution of his original lawsuit by filing it outside of the applicable Texas statute of limitation. *Id.* *4. The Devon Court went on to conclude that at the time Plaintiff filed his original lawsuit in Texas, "he did not have a good faith basis for believing that the case would not be barred by the applicable statute of limitations." *Id.* at *5.

In the New Mexico Federal District Court case cited by the *Devon* Court, *Roberts*, 2019 WL 1958115, the dispute related to the hunt for buried treasure on Black Mesa a hill area located in the State of New Mexico. *Id.* at *1. The events that gave rise to the lawsuit occurred through February 2014. *Id.* at *1-2. The *Roberts* plaintiff filed his first lawsuit four years later in February 2018. *Id.* at *3-4. The *Roberts* plaintiff was the sole resident of the State of Wyoming. *Id.* at *4-8. The *Roberts* plaintiff filed his first lawsuit in the Wyoming Federal District Court regarding disputes involving multiple causes of action not limited to tort, conspiracy, conversion, fraud, breach of contract, etc. *Id.* Since none of the defendants were residents of Wyoming and since all of the pertinent events that formed the basis of the *Roberts* plaintiff's lawsuit allegedly transpired in the State of New Mexico, the Wyoming federal court dismissed all of the *Roberts* plaintiff's claims in the first lawsuit on the basis of lack of personal jurisdiction over the parties and dismissed the lawsuit for lack of subject matter jurisdiction. *Id.*

The *Roberts* plaintiff filed his second lawsuit in October 2018 in the New Mexico Federal District Court. *Id.* at *5. The *Roberts* defendants moved to dismiss all claims as either time-barred or for failure to state a claim. *Id.* The New Mexico federal district court initially dismissed all of Plaintiff's claims except for those

pertaining to breach of contract.[6] On appeal to the 10th Circuit, Roberts maintained the October 2018 filing was timely filed since the New Mexico federal case was filed within six months after the Wyoming federal district court dismissed his first lawsuit. But both the New Mexico Federal District Court and the 10th Circuit disagreed. The federal courts concluded that most of Plaintiff's causes of action were already time-barred when he filed the first lawsuit. *See generally id.* Moreover, the New Mexico federal trial court rejected the *Roberts* plaintiff's argument that New Mexico's Saving Statute applied because plaintiffs' filing the first lawsuit in the Wyoming constituted "negligence in the prosecution." *Id.* Even though the *Roberts* plaintiff was *pro se*, the Court ruled he could not have reasonably believed Wyoming had personal jurisdiction of any of the defendants or that it had subject matter jurisdiction of a lawsuit when all relevant events happened in the state of New Mexico. *Id.* The *Roberts* court further noted that plaintiff's "flawed choice of forum was not an "innocent mistake or erroneous guess at an elusive jurisdictional fact known only to defendants or any other circumstance that might serve to excuse what otherwise appears clearly to be negligence." *Id.* Moreover, the court ruled that the *Roberts* plaintiff abandoned any arguments he might have made regarding aspects

[6] All of the causes of action had statutes of limitations of either three or four years, except for breach of contract. The New Mexico federal court ultimately dismissed the breach of contract claim in motion for summary judgment.

of the dismissal and summary judgement he did not expressly challenge or appeal. *Id.*

In applying the 10th Circuit's reasoning in *Roberts* to this case, it is clear plaintiffs in both cases had no reasonable belief the court for the first lawsuit would have subject matter jurisdiction when the basis of the first lawsuit transpired in a different state. The events underlying both cases occurred in the State of New Mexico. Yet the plaintiffs inexplicably elected to file in the states in which they lived: Wyoming (Roberts) and Texas (Plaintiff). Moreover, both plaintiffs filed their first lawsuits after the expiration of the forum state's statutes of limitations.[7]

The above cases all support this Court's historical interpretation of the savings statute and the Court of Appeal's decision below— Plaintiff does not qualify for the benefit of New Mexico's saving statute. Plaintiff failed to timely file his original lawsuit within Texas' two-year statute of limitation. The effects of that first lawsuit appropriately resulted in a dismissal with prejudice. This failure to commence the lawsuit timely further denies Plaintiff access to the benefits of New Mexico's saving statute. There was nothing to resurrect when Plaintiff filed his New Mexico Lawsuit after the New Mexico statute of limitation had already expired. He filed late in both forums.

[7] In *Roberts*, only some of the statutes of limitations of certain causes of action had expired. In this case, all of Plaintiff's causes of action had surpassed the Texas Statutes of Limitations when filed.

4. *Alternatively, Plaintiff's Dismissal Does Not Qualify for the Tolling Provisions of the Savings Statute – The Dismissal is Based on the District Court's Inherent Power to Dismiss Stale Claims and the District Court Provided Sufficient Findings of Facts and Conclusions of Law.*

In *Zangara*, this Court concluded that when a district court exercises its inherent discretion to dismiss a stale claim and makes complete findings of fact and conclusions of law, a plaintiff cannot avail themselves of the savings statute. *Zangara*, 2024-NMSC-021, ¶16 (citing *Benally*, 1967-NMSC-148, ¶11).

Further, as discussed above, the *Devon* Court ruled that the New Mexico savings statute did not apply to rescue Plaintiff's late filing in New Mexico because Plaintiff was negligent in his prosecution of his original lawsuit by filing it outside of the applicable Texas statute of limitation. *Moreno*, 2023 WL 6199807, at *3. . The *Devon* Court went on to find that at the time plaintiff filed his original lawsuit in Texas, "he did not have a good faith basis for believing that the case would not be barred by the applicable statute of limitations." *Id.* at *5. .

In the original attempt by Plaintiff to file this action as against Wildcat, the district court of Texas had the inherent power to dismiss Plaintiff's Texas claim for violating the statute of limitation. In this case, Plaintiff's attempt for a second opinion, the New Mexico district court dismissed the Plaintiff's claim, also for violating the statute of limitations, and set forth the facts and legal basis explaining why Plaintiff was not entitled to the tolling provisions of the Savings Statute. As such, Plaintiff is not entitled to avail himself of the benefits of the savings statute as

a means of escaping his tactical choices to first file untimely in Texas, then not properly defend against dispositive motions in Texas, and ultimately file untimely again in New Mexico.

5. *The Court of Appeals was Otherwise Right for Any Reason—It Should be Affirmed.*

Should this Court be inclined to otherwise reverse the district court, Wildcat asserts that alternatively, the Court of Appeals should be affirmed under the "right for any reason" doctrine. Even if the Court of Appeals is found to not have been "entirely correct" a Court of Appeals decision may be upheld if this Court determines it was right for any reason. *State v. Beachum*, 1972-NMCA-023, ¶ 8, 83 N.M. 526, 527, 494 P.2d 188, 189.

Wildcat incorporates argument contained in the Answer Brief of Appellee Ranger Energy Services, LLC.

IV. CONCLUSION

With respect to the New Mexico Lawsuit, it is undisputed Plaintiff filed the New Mexico complaint late—seven months *after* the New Mexico statute of limitation had expired. Plaintiff's decision to file first in Texas (and not in New Mexico) was based on Plaintiff's intentional legal strategy as to the forum and timing. Plaintiff now seeks this Court broaden the Savings Statute well beyond what its intended purpose was meant to be and allow New Mexico to be the State of Second Opinions—gutting res judicata. This Court should not indulge Plaintiff's

disregard of rules of procedure, nor should it succumb to Plaintiff's over-expansive interpretation that is contrary to the statute's plain language. Denying Plaintiff's proposed expansion of the applicability of the savings statute will discourage future litigants from performing Plaintiff's unreasonable sequential forum shopping spree. *Zangara*, 2024-NMSC-021, ¶ 17; *see also Team bank v. Meridian Oil, Inc.*, 1994-NMSC—083, ¶ 11-13, 118 N.M. 147.)

The New Mexico Court of Appeals correctly upheld the trial court's dismissal of Plaintiff's claims against Wildcat. Plaintiff filed late in Texas. He filed late in New Mexico. New Mexico's savings statute is for those who timely file and prosecute their cases. That is not what Plaintiff did here.

In sum, the Savings Statute cannot be made to save Plaintiff's decision to knowing bring a lawsuit in Texas in the first instance, and which was untimely, only to turn around upon dismissal and file virtually the same lawsuit in New Mexico, *also* untimely. Bad legal strategy should not be turned into precedential law and unnecessarily expand the meaning of the Savings Statute which, since its origin, was intended by our Legislature to provide a limit—a bar—to this precise type of case. This appeal should be denied.

Defendant/Appellee Wildcat Oil Tools respectfully asks that this Court deny this appeal and affirm the New Mexico Court of Appeals and the district court.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of January, 2025, 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 other service contacts

/s/ Brian L. Shoemaker
Brian L. Shoemaker