IN THE SUPREME COURT OF
THE STATE OF NEW MEXICO

JESUS MORENO,

Plaintiff-Petitioner,

v. S-1-SC-40442

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

Defendants-Respondents.

PETITIONER'S BRIEF IN CHIEF

Oral Argument Is Requested

Andrew R. Gould (*pro hac vice*)
Noah M. Wexler
Trenton "Trent" Shelton (*pro hac vice*)
Arnold & Itkin LLP
6009 Memorial Drive
Houston, Texas 77007
Tel: 713.222.3800
agould@arnolditkin.com
nwexler@arnolditkin.com
tshelton@arnolditkin.com

Caren I. Friedman
Justin R. Kaufman
Rosalind B. Bienvenu
Durham, Pittard & Spalding LLP
505 Cerrillos Road, Suite A209
Santa Fe, New Mexico 87501
Tel: 505.986.0600
cfriedman@dpslawgroup.com
jkaufman@dpslawgroup.com
rbienvenu@dpslawgroup.com

Counsel for Jesus Moreno

Table of Contents

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 3,332 words, according to Microsoft Word.

/s/ Caren I. Friedman

Table of Authorities

New Mexico Cases

Other Cases

Statutes

Rules

Other Authorities

Introduction

After a quarter-century of jurisprudential confusion in the lower courts, this Court recently restored clarity to the meaning of the "negligence in its prosecution" exception in the New Mexico Savings Statute. That statute, which is titled "When second suit deemed continuation of first action," provides:

> 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). Thus the Savings Statute saves all cases that fail "for any cause" except for a narrow set of cases: those that fail based on negligence in prosecution.

Although this Court had long equated negligent prosecution with dismissal for want of prosecution, the Court of Appeals had steadily expanded the exception beyond that limited circumstance. Opinions from the Courts of Appeals—like the one here—required a subjective, fact-intensive inquiry into the plaintiff's diligence in bringing or pursuing the first suit.

In *Zangara v. LSF9 Master Participation Trust*, 2024-NMSC-021, 557 P.3d 111, the Court rightly rejected that case-by-case approach to the negligent-prosecution exception. There, this Court reiterated that the Savings Statute's only exception was for "negligence in its prosecution." Applying that phrase's plain language and earlier precedent from this Court, the Court defined "negligence in its prosecution" as a party's failure to timely take the steps necessary to bring the first-filed suit to a close. In so doing, *Zangara* overruled all prior Court of Appeals opinions that had interpreted the negligent-prosecution exception as encompassing some other type of negligence by the party in bringing or pursuing the first-filed case.

Zangara resolves this case. Jesus Moreno's first-filed suit in Texas state court did not fail because he neglected to prosecute the case to completion. It failed for "any other cause": the suit's untimeliness under Texas (but not New Mexico) law, a nonjurisdictional defect. Despite Mr. Moreno's position that New Mexico's three-year statute of limitations governed, the Texas state court determined that Texas's two-year statute applied. The suit was not dismissed for want of prosecution. Mr. Moreno

thus properly relied on the Savings Statute in promptly filing his materially identical case in New Mexico state court.

Like the district court, the Court of Appeals erred in holding otherwise. Relying on the very cases that *Zangara* overruled, the Court of Appeals conducted the fact-specific, case-by-case inquiry that *Zangara* condemned. But under *Zangara*, the only inquiry should have been whether Mr. Moreno's first suit failed because he did not timely take the steps necessary to bring it to a close. The answer to that inquiry is "no."

Under *Zangara*, the district court and Court of Appeals erred by refusing to apply the Savings Statute to find Mr. Moreno's second suit a continuation of the first. This Court should reverse and remand.

Summary of Proceedings

1. Mr. Moreno, a Texas resident, is severely injured while working on a New Mexico land rig for two Texas companies.

On October 31, 2017, Jesus Moreno, a Texas resident, was working on a land rig at a drilling site in Lea County, New Mexico. **[RP 2]** He was employed and supervised by Defendant Ranger Energy Services, LLC. **[RP 3]** Defendant Wildcat Oil Tools, LLC helped manage, control, and operate the drilling operations. *See id.* Both entities are headquartered in Texas. **[RP 1–2]**

Because of Defendants' failures to use any fall harness protection, Mr. Moreno was thrown off the oil rig platform, fell some twenty feet downward, and hit the rig floor. **[RP 3; Tr. 4:3–6; *id.* 4:13–17]**[1] Mr. Moreno suffered severe and permanent injuries to his head, back, left ankle, and right shoulder. **[RP 3–4]**

2. Mr. Moreno files suit in Texas state court within New Mexico's three-year statute of limitations, but outside Texas's two-year statute.

Roughly two-and-a-half years later (July 6, 2020), Mr. Moreno sued Defendants in Texas state court. **[RP 38]**[2] He brought claims for negligence, negligence per se, and gross negligence, alleging that his injuries resulted from Defendants' failures to properly manage the rig's operations, inspect and maintain the rig, and train their employees and

---

[1] Citations to the February 22, 2022 motion hearing are to the unofficial written transcript, which was filed in the appellate record according to the Court of Appeals order dated January 18, 2023.

[2] Mr. Moreno also sued Devon Energy Corporation and Devon Energy Production Company (collectively, "Devon Entities"). **[RP 38]** Although the Texas trial court denied the Devon Entities' special appearance based on lack of personal jurisdiction, the First Court of Appeals reversed and rendered judgment for the Devon Entities. *See Devon Energy Corp. v. Moreno*, No. 01-21-00084-CV, 2022 WL 547641 (Tex. App.—Houston [1st Dist.] Feb. 24, 2022, no pet.). Mr. Moreno did not further appeal that ruling.

contractors. **[RP 40–41]** He also specifically stated that the case was governed by New Mexico law, which has a three-year statute of limitations. **[RP 38]**

Defendants separately moved for summary judgment, raising the same argument: although Mr. Moreno brought suit under New Mexico law for an injury in New Mexico, his claims were barred by Texas's two-year statute of limitations. **[RP 58–59, 61–62]**[3]

The Texas state court granted Defendants' motions on January 12, 2021. **[RP 102]** Mr. Moreno did not appeal.

3. Mr. Moreno promptly refiles in New Mexico state court under the Savings Statute.

About four months later (May 20, 2021), Mr. Moreno refiled a materially identical suit against Defendants in New Mexico state court, reasserting his claims for negligence, negligence per se, and gross negligence. **[RP 1-6]** He also stated that although this second lawsuit was brought after New Mexico's three-year statute of limitations had

---

[3] The Court may take judicial notice of the Texas district court's case file. *See State v. Gutierrez*, 2011-NMSC-024, ¶ 53, 150 N.M. 232, 258 P.3d 1024 (taking judicial notice of record in separate case); Rule 11-201(B) NMRA (allowing court to take judicial notice of an adjudicative fact "that is not subject to reasonable dispute").

run, it was timely under the Savings Statute. **[RP 2]**; *see also* NMSA 1978, § 37-1-8 (three-year statute of limitations for New Mexico personal-injury claims).

Wildcat moved to dismiss Mr. Moreno's complaint, asserting that he filed his New Mexico suit after the three-year statute of limitations had lapsed. **[RP 18-22]** Ranger joined Wildcat's motion. **[RP 29]** According to Defendants, the Savings Statute did not apply because Mr. Moreno's first lawsuit fell within the statute's exception for negligent prosecution. **[RP 20-22]** In opposition, Mr. Moreno responded that his prosecution of his claims was not negligent under Section 37-1-14, and explained why his second suit was timely under the Savings Statute. **[RP 32-35]**

4. Refusing to apply the Savings Statute, the district court dismisses the case.

At a hearing on Defendants' motion, the district court was skeptical of Mr. Moreno's initial decision to file in Texas while maintaining that New Mexico law applied. **[Tr. 4:22–25]** It believed that the decision emanated from impermissible forum-shopping: "You wanted it in Texas, but you wanted New Mexico law." **[Tr. 7:24-25]**

At the hearing's conclusion, the court ruled for Defendants. It reasoned that the Savings Statute did not apply based on the suit's untimeliness under Texas law. **[Tr. 10:3]** The court accordingly dismissed the case. **[RP 127–28]**

5. Following cases like *Barbeau*, the Court of Appeals affirms.

Agreeing with the district court's refusal to apply the Savings Statute, the Court of Appeals affirmed in a published opinion. *See Moreno v. Ranger Energy Servs., LLC*, 2024-NMCA-065, ¶¶ 1, 17, 554 P.3d 737, *cert. granted*, 2024-NMCERT-008, 555 P.3d 785 (table). The Court of Appeals held that its precedent (including cases like *Barbeau v. Hoppenrath*, 2001-NMCA-077, 131 N.M. 124, 33 P.3d 675) required it to "consider whether the error under these circumstances constitutes negligent prosecution based on the policy considerations implicated by the expiration of the statute of limitations, the purposes of the savings statute, and our preference in favor of access to judicial resolution of disputes." *Id.* ¶ 8 (quotation marks omitted). It then "balance[d]" these "policies" to hold that Mr. Moreno's decision to file suit in Texas constituted negligence in prosecution. *Id.* ¶ 15. The Court of Appeals

emphasized that "another claim [could] survive under different facts." *Id.* ¶ 16.

Mr. Moreno petitioned this Court for a writ of certiorari, which this Court granted. *Moreno*, 2024-NMCERT-008.

Question Presented for Review

In *Zangara v. LSF9 Master Participation Trust*, 2024-NMSC-021, the Court held that the phrase "negligence in its prosecution" in the New Mexico Savings Statute (NMSA 1978, § 37-1-14)—the only exception to the statute's applicability—means a party's failure to timely take the steps necessary to bring the first-filed suit to a close. Here, Mr. Moreno's first-filed suit did not fail for want of prosecution, but for another cause.

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 erred in affirming the district court's dismissal of Mr. Moreno's lawsuit based on the Savings Statute's exception for "negligence in its prosecution." Mr. Moreno's first lawsuit did not fail for want of prosecution—the sole inquiry under *Zangara*. Thus, contrary to both lower courts' conclusions, the Savings Statute

applies such that Mr. Moreno's second lawsuit is deemed a continuation of the first.

1. The issue is preserved and reviewed de novo.

Mr. Moreno preserved the issue for review in the district court through his response to Defendants' motion to dismiss and argument at the motion hearing. **[RP 31–35; Tr. 4–10]** He also preserved the issue in the Court of Appeals, specifically arguing that the negligent-prosecution exception applies only when a plaintiff fails to diligently pursue his or her lawsuit to completion. **[CoA BIC 12–17; CoA RB 4–6]** To that end, he explained why the Court of Appeals should overrule *Barbeau* as inconsistent with the Savings Statute's text and purpose. **[CoA BIC 21–27; CoA RB 21–24]**[4]

As the Court of Appeals accurately noted, "[t]he parties agree" that the standard of review of the district court's order of dismissal (whether treated under Rule 1-012 or Rule 1-056) "is de novo." *Moreno*, 2024-NMCA-065, ¶ 3. De novo review also applies because the issue here turns

---

[4] Mr. Moreno alternatively argued that the negligent-prosecution exception did not apply under the Court of Appeals' expanded interpretation because his Texas lawsuit was dismissed based on a nonjurisdictional defect. **[CoA BIC 17–21; CoA RB 7–10]**

on statutory construction—*i.e.*, the meaning of the Savings Statute's "negligence in its prosecution" exception. *State v. Almanzar*, 2014-NMSC-001, ¶ 9, 316 P.3d 183; *accord Zangara*, 2024-NMSC-021, ¶ 10. In construing a statute, the Court's "primary goal is to ascertain and give effect to the intent of the Legislature." *State v. Nick R.*, 2009-NMSC-050, ¶ 11, 147 N.M. 182, 218 P.3d 868. "When statutory language is clear and unambiguous"—as with the Savings Statute's negligent-prosecution exception—courts must "give effect to that language." *Zangara*, 2024-NMSC-021, ¶ 10.

2. The negligent-prosecution exception applies only when a party fails to diligently prosecute his or her case to conclusion.

a. The Savings Statute broadly permits refiling whenever a case fails for "any cause" except for one: "negligence in its prosecution."

New Mexico has a three-year statute of limitations for personal-injury actions, such as the lawsuit here. *See* NMSA 1978, § 37-1-8. But filing outside the three-year limitations period does not automatically render a lawsuit untimely. The Legislature has enacted a Savings Statute, which broadly provides an additional six-month grace period for filing a second lawsuit. *See* NMSA 1978, § 37-1-14. The statute serves an "important purpose" under New Mexico law: "to facilitate resolution of

disputes on their merits." *Zangara*, 2024-NMSC-021, ¶ 1. It "supports the goal of judicially resolving controversies based on the substantive questions they present, not on procedural technicalities." *Id.*

The Savings Statute affords "leniency" to plaintiffs whose first case fails. *Id.* ¶ 15. It permits a plaintiff to file a second lawsuit within six months after the first "fail[s]" "for *any* cause" except one: "negligence in its prosecution." NMSA 1978, § 37-1-14 (emphasis added). For nearly a century, this Court "equated negligence in prosecution with dismissal for failure to prosecute." *Zangara*, 2024-NMSC-021, ¶ 12 (citing *Gathman-Matotan Architects & Planners, Inc. v. Dep't of Fin. & Admin. (G-M Architects)*, 1990-NMSC-013, ¶ 8, 109 N.M. 492, 787 P.2d 411); *see also id.* ¶ 24 (citing *G-M Architects*; *U.S. Fire Ins. Co. v. Aeronautics, Inc.*, 1988-NMSC-051, 107 N.M. 320, 757 P.2d 790; and *Harris v. Singh*, 1933-NMSC-091, 38 N.M. 47, 28 P.2d 1).

b. The Court of Appeals expands the negligent-prosecution exception beyond failure to prosecute.

But a decade after this Court's opinion in *G-M Architects*, the Court of Appeals introduced jurisprudential "confusion" through a novel interpretation of the negligent-prosecution exception. *Id.* ¶ 21. In *Barbeau*, the Court of Appeals adopted the Iowa Supreme Court's

"expansive and fact-intensive interpretation of its exception to their statute[.]" *Zangara*, 2024-NMSC-021, ¶ 23. Iowa's interpretation of its exception turned not on whether the plaintiff's first lawsuit failed for want of prosecution, but on whether it failed because of some negligence by the plaintiff in bringing or pursuing the suit in the first place. *Id.* (discussing *Sautter v. Interstate Power Co.*, 563 N.W.2d 609, 611 (Iowa 1997)).

Having expanded the negligent-prosecution exception's meaning, the Court of Appeals extended its newfound interpretation in two subsequent cases: *Amica Mutual Insurance Company v. McRostie*, 2006-NMCA-046, 139 N.M. 486, 134 P.3d 773; and *Foster v. Sun Healthcare Group*, 2012-NMCA-072, 284 P.3d 389. *See Zangara*, 2024-NMSC-021, ¶¶ 25–26. Trying to distinguish *Barbeau*, *Amica* asked whether the dismissal was based on "a waivable or nonwaivable defense." *Id.* ¶ 25 (citing *Amica*, 2006-NMCA-046, ¶¶ 15–17). *Foster*, meanwhile, "followed *Barbeau*'s directive" and sought to define "due diligence in prosecution[.]" *Id.* ¶ 26 (citing *Foster*, 2012-NMCA-072, ¶¶ 23–24).

c. *Zangara* restores the negligent-prosecution exception to only those cases when the party fails to diligently prosecute his or her case to conclusion.

Returning the Savings Statute to its plain statutory meaning, this Court's recent opinion in *Zangara* ended this longstanding confusion. As the Court rightly noted, "[a] legal action can fail for many causes, including lack of subject matter jurisdiction, service of process problems, improper joinder, improper venue, lack of standing, and even simply a failure to attach requisite documents." *Zangara*, 2024-NMSC-021, ¶ 11. But under the statute's clear text, the only cause that will render the Savings Statute inapplicable is negligence in prosecution. *Id.*

Citing the "plain language of the phrase" and this Court's consistent precedent, *Zangara* held that "the term *negligence in its prosecution* in Section 37-1-14 means dismissal for failure to prosecute." *Id.* ¶¶ 12, 13 (emphasis in original); *see also id.* ¶ 28 ("the term *negligence in its prosecution* in Section 37-1-14 is functionally the same as a dismissal for failure to prosecute" (emphasis in original)). "A dismissal for failure to prosecute is also referred to as dismissal for want of prosecution"—in other words, a dismissal based on the plaintiff's "'failure to pursue the case diligently toward completion.'" *Id.* ¶ 12 (quoting

Dismissal, *Black's Law Dictionary* (12th ed. 2024)); *see also id.* ("failure to take the steps necessary to bring the suit to a close") (citing *Emmco Ins. Co. v. Walker*, 1953-NMSC-074, ¶ 4, 57 N.M. 525, 260 P.2d 712; Rule 1-041(E) NMRA)).

In so holding, this Court expressly overruled the Court of Appeals' opinions in *Barbeau*, *Amica*, and *Foster*. *Id.* ¶¶ 24–28. As the Court explained, those opinions 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. That expanded interpretation strayed from the Savings Statute's plain language and this Court's caselaw. *Id.* ¶¶ 13–14. Rather, it impermissibly required "a case-by-case determination of whether there was negligence of any sort in the filing of the first action." *Id.* ¶ 14. Doing so placed "no limits on a litigant's ability to challenge an opposing party's reliance on Section 37-1-14." *Id.* ¶ 13.

The Court acknowledged that its lenient interpretation of the New Mexico Savings Statute's negligent-prosecution exception differed from Iowa's "more expansive and fact-intensive interpretation of its exception to their savings statute[.]" *Id.* ¶ 23; *see also id.* ¶ 15 (referring to the

"leniency in our savings statute"). But the Court determined that the statute "embodie[s]" "'New Mexico's policy favoring access to judicial resolutions'"—part of this Court's "steady focus on protecting plaintiffs' substantive rights." *Id.* ¶ 19. As a result, any extension of the Savings Statute's negligent-prosecution exception must come from "the Legislature, not this Court[.]" *Id.*

3. The negligent-prosecution exception does not apply to Mr. Moreno's first lawsuit.

Zangara resolves this case in favor of Mr. Moreno. Under *Zangara*, the Savings Statute allows his second-filed lawsuit to proceed unless he "fail[ed] to timely take the steps necessary to bring the first-filed suit to a close." *Id.* ¶ 1; *accord, e.g.*, *id.* ¶ 27.[5] No such failure occurred 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.* Defendants, however, successfully argued to the

---

[5] It is undisputed that Mr. Moreno filed his second lawsuit within six months of the first suit's dismissal. **[RP 1, 102]**

Texas trial court that Texas's two-year statute applied, thereby resulting in the suit's dismissal. **[RP 58–59, 61–62, 102]**

Accordingly, Mr. Moreno's first lawsuit was not dismissed because he failed to timely take the steps necessary to bring that first lawsuit to a close. Indeed, neither Wildcat nor Ranger have ever argued to the contrary—not in the trial court, not in the Court of Appeals, and not in this Court. Rather, Mr. Moreno's first suit failed for *another* cause: it was filed outside of Texas's statute of limitations (but not outside of New Mexico's). But, again, "the *only* exception to an action which fails for any other cause" is "negligence in prosecution." *Zangara*, 2024-NMSC-021, ¶ 11 (emphasis added).

Under *Zangara*, the Court of Appeals' decision cannot stand. The opinion expressly rested on the now-overruled rationales from *Barbeau*, *Amica*, and *Foster*. *See Moreno*, 2024-NMCA-065, ¶¶ 20–27. For example, the Court of Appeals considered what Mr. Moreno knew when he filed his first action in Texas (*id.* ¶ 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*)). The opinion

below is precisely the type of "case-by-case determination of whether there was negligence of any sort *in the filing* of the first action" that *Zangara* condemned. 2024-NMSC-021, ¶ 14 (emphasis added). Indeed, the Court of Appeals admitted as much, characterizing its holding as based on a "balance of policy considerations in the context of the present case" and emphasizing that "another claim [could] survive under different facts." *Id.* ¶ 16.

To its credit, the Court of Appeals (like the district court) lacked the benefit of *Zangara* when issuing its opinion. But that does not render the Court of Appeals' misguided reliance on since-overruled opinions any less erroneous. Under *Zangara*, what matters is whether Mr. Moreno's first suit failed for want of prosecution—the sole basis for the negligent-prosecution exception. *Id.* ¶¶ 12, 13, 28. Because Mr. Moreno's first suit did not fail on that ground, the Savings Statute properly applies to his second suit. The district court and Court of Appeals erred in holding otherwise.

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.

It should accordingly reverse the Court of Appeals' judgment and remand for further proceedings.

Respectfully submitted,

DURHAM, PITTARD & SPALDING LLP

/s/ Caren I. Friedman
Caren I. Friedman
Justin R. Kaufman
Rosalind B. Bienvenu
505 Cerrillos Road, Suite A209
Santa Fe, New Mexico 87501
Tel: 505.986.0600
cfriedman@dpslawgroup.com
jkaufman@dpslawgroup.com
rbienvenu@dpslawgroup.com

/s/ Andrew R. Gould (pro hac vice)
ARNOLD & ITKIN LLP
Andrew R. Gould (*pro hac vice*)
Texas Bar No. 24102713
Noah M. Wexler
NM Bar No. 149045
Trenton "Trent" Shelton (*pro hac vice*)
Texas Bar No. 24121119
6009 Memorial Drive
Houston, Texas 77007
Tel: 713.222.3800
agould@arnolditkin.com
nwexler@arnolditkin.com
tshelton@arnolditkin.com

Counsel for Jesus Moreno

Statement Regarding Oral Argument

Mr. Moreno respectfully requests oral argument. This appeal presents an important issue about the proper interpretation of the New Mexico Savings Statute (NMSA 1978, § 37-1-14), as recently clarified by this Court's opinion in *Zangara v. LSF9 Master Participation Trust*, 2024-NMSC-021. Argument will substantially assist the Court in exploring the contours of the Savings Statute's negligent-prosecution exception after *Zangara*.

Certificate of Service

I hereby certify that on this 11th day of November 2024, 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