IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

LEONARD OLMSTEAD,

Plaintiff-Appellant,

v.

No. 31,131

SAN MIGUEL HOSPITAL CORP, d/b/a NORTHEASTERN REGIONAL HOSPITAL, WILLIAM CHAFFEE, MICHAEL GALLEGOS, JOSE TITO CHAVEZ, KEITH TUCKER, C.K. HALVERSON, NANCY DRONEN, G. MICHAEL LOPEZ, RUTH D. MARES, RICHARD GROGAN, JENNIFER TOWNSHEND, KINGSLEY OZOUDE, FRANKLIN MILLER, TIM HOWARD, ROBBY DANIEL, JOHN DOE, and JANE DOE,

Defendants-Appellees.

Appeal from the Seventh Judicial District, County of Torrance
The Honorable Edmund H. Kase III
D-722-CV-2007-00011

DEFENDANTS-APPELLEES' ANSWER BRIEF

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ORAL ARGUMENT REQUESTED

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STATEMENT OF COMPLIANCE

As required by Rule 12-213(G), undersigned counsel hereby certifies that this brief was prepared in 14-point Times New Roman typeface using Microsoft Office Word 2010, and that the body of the brief contains 7,017 words.

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SUMMARY OF PROCEEDINGS

Plaintiff's suit arises out of a "Physician Employment Agreement" entered into on or about December 18, 2002 between himself and San Miguel Hospital Corporation d/b/a Northeastern Regional Hospital. [RP 6-18] Plaintiff filed his Complaint for Breach of Contract, Misrepresentation, Intentional Interference, Defamation of Character and Prima Facie Tort on January 25, 2007. [RP 1-6] The last event underlying that complaint occurred nearly three years prior on January 27, 2004. [RP 85-86] The complaint was not served on any Defendant. On September 11, 2007, Plaintiff filed his Amended Complaint for Breach of Contract, Misrepresentation, Intentional Interference, Defamation of Character, Conversion, and Prima Facie Tort. [RP 19-23]

For a period exceeding two years between September 11, 2007 and February 11, 2010, Plaintiff took no action whatsoever in this case. [*See* RP 48-49, 76]

On December 21, 2007, Defendants served their answer on Plaintiff. [RP 74] Due to a clerical error, however, Defendants' answer was not filed with district court. [*Id.*] Defendants filed a Notice of Peremptory Excusal and a Jury Demand on January 4, 2007. [RP 39-42]

On July 31, 2008, the district court *sua sponte* entered an "Order Striking Cases from Trial Docket," which dismissed Plaintiff's case, presumably under Rule 1-041(E)(2) NMRA. [RP 47]

On February 11, 2010—two years and five months after Plaintiff's last activity in this lawsuit—Plaintiff made an *ex parte* letter request of the court that the case be reinstated. [RP 48-49] On February 18, 2010, Plaintiff made an *ex parte* letter request of the court to "subject" the case to mediation. [RP 50] On February 28, 2010, the court granted both pending *ex parte* requests in an Order not approved by, or served on, Defendants. [RP 51]

On November 4, 2010, Plaintiff filed a motion for a default judgment, which was served on Defendants. [RP 57-59] Defendants responded to the motion on November 19, 2010. [RP 62-72] In their response, Defendants pointed out that, according to relevant case law, they were not in default because, although the answer had not been filed with the district court, Plaintiff was timely served with the answer. [RP 62] Defendants further argued that Plaintiff could not demonstrate prejudice, that the failure to file the answer with the court was inadvertent, and that Defendants had numerous meritorious defenses to Plaintiff's claims—all of which militated against a default judgment. [RP 63-72]

Pursuant to Rule 1-041(E)(1) NMRA, Defendants moved to dismiss Plaintiff's claims on November 23, 2010. [RP 87-95] In their motion, Defendants observed that when a plaintiff fails to take any significant action to bring a claim to trial within two years, a defendant may move to dismiss under Rule 1-041(E)(1). [RP 90] Defendants established that Plaintiff had taken no significant action to

bring his claims to trial since the filing of his complaint in January 2007. [RP 87] As noted by Defendants in their motion, the procedural posture of the case made it impossible for them to move to dismiss under Rule 1-041(E)(1) at an earlier date:

> (1) when the two year period set forth in Rule 1-041(E) expired at the latest in November 2009, this case had already been dismissed by this Court so that Defendants could not move to dismiss an already dismissed case; and (2) Plaintiff failed to give Defendants notice and an opportunity to be heard when he moved to reopen the case. Had notice been provided as was owed, Defendants would have opposed said relief based on Plaintiff's failure to take any action on this case for more than the two years prior.

[RP 90] Defendants asserted that neither Plaintiff's *ex parte* communications nor his frivolous motion for default could be counted as "significant action" under Rule 1-041(E)(1) and urged the court to follow the factors outlined in *Jones v. Montgomery Ward & Company, Inc.*, 103 N.M. 45, 47, 702 P.2d 990, 992 (1985) in exercising its discretion to determine whether dismissal was proper. [RP 91-93] Finally, Defendants argued that Plaintiff had otherwise failed to meet the "good cause" requirement in Rule 1-041(E)(2) when he moved *ex parte* to reopen the case in February 2010. [RP 93-94]

Plaintiff filed an untimely response to Defendants' motion. [RP 106-08] In his response, Plaintiff asserted that "[n]either side has prosecuted this case." [RP 108] He added that Defendants should have moved to dismiss in the fall of 2009 (though the case had already been dismissed *sua sponte* by that time) and that the motion to dismiss should be rejected as untimely. [*Id.*] Plaintiff did not make any

arguments as to tolling, good cause, or any other grounds against dismissal other than those outlined above. [*See* RP 107-08]

In their reply, Defendants noted that Plaintiff failed to respond to any of the factors detailed in *Jones* regarding whether dismissal under Rule 1-041(E)(1) is proper. [RP 109] Defendants further pointed out that, contrary to Plaintiff's assertions, they did not bear the responsibility of bringing the case to trial and that Plaintiff did not provide any explanation for his lengthy period of inactivity in the case. [RP 110] Finally, Defendants also alerted the court to the absurdity of Plaintiff's assertion that they should have moved to dismiss the case during a time in which the case had already been dismissed:

> In order to file upon the conclusion of two years of Plaintiff's inactivity (in 2009), it would have been necessary for Defendants to move to reopen the case against them which had already been dismissed for failure to prosecute so that the case against them could then be re-dismissed for failure to prosecute.

[RP 110-11] Exercising its considerable discretion regarding such matters, the district court granted Defendants' motion to dismiss on February 7, 2011. [RP 120]

ARGUMENT

Plaintiff's arguments on appeal are novel, without precedent, illogical, and otherwise seek to reward his own bad behavior below. As demonstrated below, none of the three arguments raised by Plaintiff on appeal were preserved before the

district court. Moreover, even if this Court were to consider Plaintiff's arguments on their merits, they are unsupported by New Mexico case law or any case law elsewhere for that matter. Plaintiff has therefore failed to demonstrate that the district court's decision to dismiss his claims for failure to prosecute was an abuse of discretion. Accordingly, this Court should affirm the district court's order of dismissal.

1. Plaintiff's tolling argument was not preserved below, has no basis or support in New Mexico and, if adopted, will lead to absurd results.

In his opening argument in support of reversal, Plaintiff urges this Court to inject a tolling provision into Rule 1-041(E)(1) that will permit dilatory litigants to evade the purposes of a *sua sponte* dismissal under Rule 1-041(E)(2). This Court should reject this argument, however, because it was not preserved below and because it is otherwise unsupported by New Mexico law.

a. Plaintiff did not preserve his argument regarding tolling.

Below, Plaintiff made two arguments in his untimely response to Defendants' motion to dismiss: (1) "Neither side has prosecuted this case"; and (2) Defendants should have moved to dismiss in the fall of 2009. [RP 108] Plaintiff understandably does not raise the first argument on appeal, as New Mexico law is quite clear on the principle that defendants do not have the responsibility of bringing a case to trial. *Cottonwood Enters. v. McAlpin*, 109 N.M. 78, 80, 781 P.2d 1156, 1158 (1989). Notably, Plaintiff turns the second argument on its head on

appeal, arguing to this Court that Defendants' motion to dismiss was not filed too late, but was instead filed prematurely. Because this argument was not raised below, and is, in fact, the exact opposite of what he argued to the district court, it should not be considered by this Court. *See Andalucia Dev. Corp. v. City of Albuquerque,* 2010–NMCA–052, ¶ 25, 148 N.M. 277, 234 P.3d 929 ("Appellate courts will not consider issues that went unpreserved at the district court level.").

According to Rule 12-216(A) NMRA, "[t]o preserve a question for review it must appear that a ruling or decision by the district court was fairly invoked." An argument that was not "brought to the attention of the trial court cannot be raised for the first time on appeal." *Chrysler Credit Corp. v. Beagles Chrysler–Plymouth,* 83 N.M. 272, 273, 491 P.2d 160, 161 (1971); *see also Crutchfield v. N.M. Dep't of Tax. & Rev.*, 2005-NMCA-022, ¶ 14, 137 N.M. 26, 106 P.3d 1273 ("[O]n appeal, the party must specifically point out where, in the record, the party invoked the court's ruling on the issue. Absent that citation to the record or any obvious preservation, we will not consider the issue.").

In his brief, Plaintiff concedes that he did not raise his tolling argument below, but nonetheless maintains that "there is no waiver." [BIC 7] It is unclear what Plaintiff means by "waiver," but Defendants presume that Plaintiff intends to argue that the rules of preservation somehow do not apply in this appeal or that this Court should apply an exception to Rule 12-216(A). *See, e.g.*, Rule 12-216(B).

However, none of the authorities cited by Plaintiff in support of his "lack of waiver" argument excuse Plaintiff's failure to raise any arguments regarding tolling under Rule 1-041(E)(1) below.

As an initial matter, the fact that Plaintiff may have been *pro se* at times below[1] does not excuse Plaintiff from complying with preservation requirements. *See Bruce v. Lester*, 1999-NMCA-051, ¶ 4, 127 N.M. 301, 980 P.2d 84 ("[A] pro se litigant is not entitled to special privileges because of his pro se status."). Plaintiff is therefore bound by Rule 12-216(A) as are all other appellants before this Court. *See, e.g., Cedrins v. Shrestha*, No. 29,242, 2009 WL 6677940, at *1 (N.M. Ct. App. Apr. 24, 2009) (holding that a *pro se* litigant must comply with the preservation requirements of Rule 12-216(A)).

Rule 12-216(B) provides two exceptions to the preservation requirement in Rule 12-216(A) and permits an appellate court in its discretion to review unpreserved arguments where (1) there is a "general public interest" in the issue; or (2) the issue involves "fundamental error or the fundamental rights of a party." Rule 12-216(B). Plaintiff does not cite or mention Rule 12-216(B) in his brief, and otherwise makes no attempt to argue that either exception applies in this case.

Moreover, the cases cited by Plaintiff regarding preservation fail to support his "lack of waiver" argument. This is not a case, for example, where the

[1] Defendants note that an attorney did file a limited entry of appearance on Plaintiff's behalf in November 2010. [RP 60-61]

arguments below lacked clarity such that this Court can presume that Plaintiff intended to invoke the district court's ruling on tolling but failed to do so in an articulate or straightforward manner. *See, e.g.*, *Mayeux v. Winder*, 2006-NMCA-028, ¶¶ 16-17, 139 N.M. 235, 131 P.3d 85; *In re Estate of Baca*, 1999-NMCA-082, ¶¶ 15-16, 127 N.M. 535, 984 P.2d 782. Rather, Plaintiff quite clearly asserted that Defendants' motion to dismiss should be rejected on two separate grounds, neither of which involved tolling. [RP 108]

For similar reasons, Plaintiff's reliance on *Weststar Mortgage Corporation v. Jackson*, 2002-NMCA-009, 131 N.M. 493, 39 P.3d 710, *reversed on other grounds*, 2003-NMSC-002, 133 N.M. 114, 61 P.3d 823 to excuse his preservation obligations is also misplaced. In that case, the cross-appellant argued that he was entitled to post-judgment interest on a punitive damages award. *Id.* ¶ 50. The cross-appellant argued before the district court that case law barring pre-judgment interest on punitive damages was distinguishable because pre- and post-judgment interest are different. *Id.* On appeal, the cross-appellant identified one such difference between pre- and post-judgment interest that apparently was not asserted below, i.e., that post-judgment interest is mandatory while pre-judgment interest is not. *Id.* Because the argument was essentially the same as had been asserted below, this Court exercised its discretion to consider the argument. *Id.* By way of contrast, Plaintiff in this case seeks to introduce an entirely new argument on

appeal, one that is actually the complete opposite of what he asserted below. This Court's treatment of the preservation issue in *Weststar* does not provide any support for Plaintiff's "lack of waiver" argument in this case.

This is also not a case where "exceptional circumstances" exist such that this Court may, in its discretion, entertain consideration of an unpreserved argument. *See, e.g., Allen v. Tong*, 2003-NMCA-056, ¶ 37, 133 N.M. 594, 66 P.3d 693. Under New Mexico law, "exceptional circumstances" can require application of the doctrine of fundamental error, which is one of the exceptions to preservation recognized in Rule 12-216(B)(2). *Allen*, 2003-NMCA-056, ¶ 39. Plaintiff makes no argument that exceptional circumstances exist in this case or that the fundamental error doctrine is otherwise applicable.

For all of these reasons, Plaintiff failed to preserve the tolling argument that he now makes on appeal. Accordingly, this Court should decline to consider the issue.

b. In the alternative, neither the substance nor the spirit of Rule 1-041(E)(1) support the injection of a tolling provision to assist dilatory litigants in avoiding dismissals for failure to prosecute.

There are two possible bases for the involuntary dismissal of a case under Rule 1-041(E). Under Rule 1-041(E)(1),

> Any party may move to dismiss the action, or any counterclaim, cross-claim or third-party claim with prejudice if the party asserting the claim has failed to take any significant action to bring such claim

> to trial or other final disposition within two (2) years from the filing of such action or claim.

Under Rule 1-041(E)(2),

> Unless a pretrial scheduling order has been entered pursuant to Rule 1-016 NMRA, the court on its own motion or upon the motion of a party may dismiss without prejudice the action or any counterclaim, cross-claim or third party claim if the party filing the action or asserting the claim has failed to take any significant action in connection with the action or claim within the previous one hundred and eighty (180) days.

A litigant whose case has been dismissed under Rule 1-041(E)(2) may move for reinstatement upon good cause shown within thirty days of service of the dismissal order. *Id.*

Plaintiff argues that these subsections must be read together such that if a case is dismissed *sua sponte* by a district court under Rule 1-041(E)(2), the running of the two-year period in Rule 1-041(E)(1) is tolled until the dilatory litigant is able to get the case reinstated. This argument has no basis in the law and will create absurd results.

Courts "give effect to the plain meaning of a rule if its language is clear and unambiguous." *H-B-S P'ship v. Aircoa Hospitality Servs., Inc.*, 2008-NMCA-013, ¶ 10, 143 N.M. 404, 176 P.3d 1136. As quoted above, Rule 1-041(E)(1) allows a defendant to move to dismiss for failure to prosecute if the plaintiff has not taken any "significant action" in the case "within two (2) years *from the filing of such action or claim.*" (emphasis added). Under the plain language of the rule, the two-

year period is counted from the date of filing of the plaintiff's lawsuit. There is no provision in the rule for tolling. "As a matter of statutory construction, a court will not read into a statute language that is not contained therein, particularly if the statute makes sense as written." *Garcia v. Borden, Inc.*, 115 N.M. 486, 489, 853 P.2d 737, 740 (Ct. App. 1993). Accordingly, Plaintiff's attempt to inject a tolling provision into Rule 1-041(E)(1) should be rejected as contrary to the plain language of the rule.

This Court's decision in *Summit Electric Supply Co., Inc. v. Rhodes & Salmon, P.C.*, 2010-NMCA-086, 148 N.M. 590, 241 P.3d 188 does not support Plaintiff's tolling argument. Plaintiff relies on Summit to argue that "[t]here are times . . . when a satellite case makes it necessary to put a core case on hold indefinitely . . . through no fault of the plaintiff." [BIC 7] As an initial matter, *Summit Electric* does not address the question of tolling under Rule 1-041(E)(1). *See Ramirez v. Dawson Prod. Partners, Inc.*, 2000-NMCA-011, ¶ 10, 128 N.M. 601, 606, 995 P.2d 1043, 1048 ("[C]ases are not authority for propositions they do not consider." (citation omitted)). The issue in *Summit Electric* was not when the two-year period under Rule 1-041(E)(1) was exhausted, but whether the defendants had timely moved to dismiss before the plaintiffs had moved for reinstatement and requested a trial setting. 2010-NMCA-086, ¶ 11. The instant case is distinguishable because (1) Plaintiff's *ex parte* motions for reinstatement and

mediation are insufficient to avoid dismissal under Rule 1-041(E)(1); and (2) Defendants could not move to dismiss Plaintiff's case at the expiration of the two-year period in Rule 1-041(E)(1) because the case had already been dismissed under Rule 1-041(E)(2).

Further, to the extent that Plaintiff believes that *Summit Electric* is illustrative of possible circumstances in which tolling may be appropriate, such circumstances are not present in this case and do not therefore provide a basis for this Court to rule in favor of Plaintiff on this issue. *See, e.g., Advance Loan Co. v. Kovach*, 79 N.M. 509, 511, 445 P.2d 386, 388 (1968) (declining to issue an "advisory opinion" on potential circumstances raised by appellant that were not actually present in the case being litigated). In this case, Plaintiff took no action between September 2007 and February 2010, when he moved *ex parte* to reinstate the case. Unlike *Summit Electric*, there was no pending satellite case that could have arguably impacted Plaintiff's ability to take significant action in this case. Rather, Plaintiff provides no meaningful explanation for his failure to take any action in this case for a period of more than two years.

Tolling is an equitable remedy. *Ocana v. Am. Furniture Co.*, 2004-NMSC-018, ¶ 15, 135 N.M. 539, 91 P.3d 58. As such, the individual claiming equitable tolling must have clean hands. *Id.* ¶ 16. Even if this Court would determine that the two-year period in Rule 1-041(E)(1) could be tolled under certain

circumstances, it would not be appropriate to apply such an equitable remedy to benefit a dilatory litigant such as Plaintiff. *See id.* ¶ 17 (observing that tolling is generally limited to those "circumstances which were truly beyond the control of the plaintiff"). For these reasons, tolling is simply not available to Plaintiff in this case.

Finally, Plaintiff's tortured construction of Rules 1-041(E)(1) and 1-041(E)(2) will lead to absurd results. *See* NMSA 1978, § 12-2A-18(A)(3) (1997) (providing that a statute or rule is construed, if possible, to . . . avoid an . . . absurd or . . . result"). In most cases, the delay between a *sua sponte* dismissal under Rule 1-041(E)(2) and reinstatement will be approximately thirty days, as a litigant must move to reopen within thirty days after service of a dismissal under the rule. There are instances, however, when a district court, for whatever reason, does not serve the parties with the Rule 1-041(E)(2) dismissal notice. In this case, for example, the district court's order of dismissal was entered on July 31, 2008, though none of the parties were apparently served with copies of that order. In February 2010, almost eighteen months after the *sua sponte* dismissal, Plaintiff moved *ex parte* to reopen the case, claiming that he had just discovered the case was dismissed. Plaintiff claims on appeal that his inaction during that nearly eighteen-month period should not be counted against him for Rule 1-041(E)(1) purposes. Such an argument is absurd, as the inactivity during that period has nothing to do with the

earlier dismissal of the case. Plaintiff did not know the case was dismissed and, believing that the case was still active, he still took no action whatsoever to prosecute the case. Construing Rule 1-041(E)(1) as Plaintiff suggests inures to the benefit of dilatory plaintiffs, as it forgives their prejudicial inactivity indefinitely until such a time that they decide to take an interest in their case once again. This cannot be the result contemplated by the Supreme Court in approving Rules 1-041(E)(1) and (E)(2) and should not be the result adopted by this Court in this case.

For the foregoing reasons, Plaintiff's arguments regarding tolling fail to justify reversal in this case.

2. The district court did not abuse its discretion by dismissing Plaintiff's claim under Rule 1-041(E)(1) because Plaintiff failed to take any significant action in this case since September 2007.

In opposing dismissal below, Plaintiff made two arguments in his untimely response to Defendants' motion to dismiss: (1) "Neither side has prosecuted this case"; and (2) Defendants should have moved to dismiss in the fall of 2009. [RP 108] On appeal, Plaintiff now argues for the first time that he did take significant action to bring the case to trial. Because this was not argued below, however, this Court should decline to entertain this argument. Rule 12-216(A).

Even if this Court considers Plaintiff's unpreserved argument on the merits, his arguments regarding "significant action" do not justify reversal in this case.

The district court has discretion to dismiss a case for inactivity upon a motion by a defendant under Rule 1-041(E)(1) and that decision shall not be reversed on appeal unless the appellant can demonstrate an abuse of discretion. *Cottonwood Enters.*, 109 N.M. at 79, 781 P.2d at 1157. "An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case." *State v. Rojo*, 1999-NMSC-001, ¶ 41, 126 N.M. 438, 971 P.2d 829 (filed 1998) (internal quotation marks and citation omitted). An appellate court will not reverse a district court's ruling unless the ruling is "clearly untenable or not justified by reason." *Id.* (internal quotation marks and citation omitted). Under an abuse of discretion standard, an appellate court will "not reweigh the evidence nor substitute [its] judgment for that of the fact finder." *Bishop v. Evangelical Good Samaritan Soc'y*, 2009-NMSC-036, ¶ 28, 146 N.M. 473, 212 P.3d 361 (internal quotation marks and citation omitted).

Rule 1-041(E)(1) provides that where a plaintiff "has failed to take any significant action to bring such claim to trial or other final disposition within two (2) years from the filing of such action or claim," any party may move to dismiss the claim. There is no fixed standard of what constitutes "significant action" under this rule, "*for each case must be determined upon its own particular facts and circumstances.*" *Stoll v. Dow*, 105 N.M. 316, 319, 731 P.2d 1360, 1363 (Ct. App. 1986) (emphasis added) (citation omitted). As recognized in *Summit Electric*,

there is a two-pronged test used by district courts to evaluate whether dismissal under Rule 1-041(E)(1) is appropriate: (1) Whether significant action has been timely taken by the party against whom the motion to dismiss is directed; and (2) if not, whether the party against whom the motion is directed "has been excusably prevented from taking such action." 2010-NMCA-086, ¶ 10 (internal quotation marks and citation omitted). As demonstrated by Defendants below, Plaintiff's motion to reinstate and for mediation do not constitute "significant action" or compliance with a Rule 1-016 scheduling order, and Plaintiff failed to establish that he was otherwise "excusably prevented from taking such action" as required by Rule 1-041(E)(1).

Moreover, in exercising its discretion under Rule 1-041(E)(1), the district court had to consider two conditions that were beyond Defendants' control in this case: (1) when the two-year period set forth in Rule 1-041(E)(1) expired in September 2009, the case had already been dismissed by the district court under Rule 1-041(E)(2), which meant that Defendants could not move to dismiss at that time because the case was already dismissed; and (2) Plaintiff failed to give Defendants notice and an opportunity to be heard when he moved to reopen the case in February 2010. As Defendants argued to the district court, had Plaintiff provided proper notice in February 2010, they would have had the opportunity to

oppose his motion to reopen on the grounds that Plaintiff did not have good cause to reopen, as is required under Rule 1-041(E)(2).

In moving to dismiss, Defendants urged the district court to consider the factors outlined by the Supreme Court in *Jones v. Montgomery Ward & Company, Inc.*, 103 N.M. 45, 47, 702 P.2d 990, 992 (1985). According to *Jones*, a district court should weigh the following factors in ruling on a motion to dismiss under Rule 1-041(E)(1):

> (1) All written and oral communications between the court and counsel; (2) actual hearing by the court on motions; (3) negotiations and other actions between counsel looking toward the early conclusion of the case; (4) all discovery proceedings; (5) any other matter which arise and the actions taken by counsel in concluding the litigation.

Jones, 103 N.M. at 47, 702 P.2d at 992. No one factor is dispositive of the determination. *Id.*

Plaintiff took *no action* in this case between September 2007 and February 2010. Below, Plaintiff provided no meaningful explanation as to his more than two years of action although he vaguely asserted that at some point during those two years he was ill, had "work overload," and that the weather was "bad." [RP 49] On appeal, Plaintiff asserts that he was ill at the time the case was *sua sponte* dismissed in July 31, 2008, and thereafter, that he was too preoccupied with another legal matter to do anything in the case until February 2010. [BIC 3] None

of these conclusory and self-serving explanations sufficiently excuse the two years-plus of complete inaction by Plaintiff in this case.

All of the *ex parte* communications which Plaintiff had with the district court earlier this year should be disregarded, for to do otherwise would deprive Defendants of due process, as they received no notice from Plaintiff of the relief sought by and ultimately granted to him. *See, e.g., Skelton v. Gray*, 101 N.M. 158, 679 P.2d 826 (1984) (recognizing that *ex parte* orders often lead to the deprivation of due process). While Plaintiff may be *pro se*, he should have served Defendants with his Request to Reinstate, his Motion for Mediation, and his "Certificate of Service." *See, e.g. Woodhull v. Meinel*, 2009-NMCA-015, ¶ 30, 145 N.M. 533, 202 P.3d 126. Had Plaintiff properly served his filings, Defendants could have opposed reinstatement at that time by attacking whether Plaintiff had "good cause" to reopen, *see* Rule 1-041(E)(2), and by challenging whether Plaintiff properly moved within thirty days of learning that his case had been dismissed by the court.[2]

After obtaining *ex parte* reinstatement of the case, Plaintiff delayed another nine months, taking no action in the case, before filing a motion for default judgment. As argued below, however, this motion should not be considered

[2] If Plaintiff did not move within thirty days of learning his case had been dismissed, the only way in which Plaintiff could move for reinstatement is under Rule 1-060(B)(6), which requires a showing of "exceptional circumstances." *Meiboom v. Watson*, 2000-NMSC-004, ¶ 19, 128 N.M. 536, 994 P.2d 1154.

"significant action" because it was patently frivolous. Below, Plaintiff acknowledged being served with Defendants' answer. *See* Rule 1-012(A) ("A defendant shall *serve* his answer within thirty (30) days after the service of the summons and complaint upon him"). As a general matter, where a plaintiff moves for default because an answer has not been filed yet the plaintiff has otherwise received service of the answer, "it is inconceivable that any attorney could, in good faith, believe that a Court would enter default judgment against a defendant." *DeJesus v. Communications Workers of America*, 137 F.R.D. 213, 213 (S.D.N.Y. 1991); *see also Blank v. Bitker*, 135 F.2d 962, 965 (7th Cir. 1943) (holding under Rule 12(a) of the Federal Rules of Civil Procedure, which like Rule 1-012 NMRA requires "service" of an answer, that not "filing" on time does not mean defendant was "in default"). Under such circumstances, a court may award costs for bringing such a frivolous motion. *DeJesus*, 137 F.R.D. at 213.

Plaintiff relies on *Jones, Foundation Reserve Insurance Co. v. Johnston Testers, Inc.*, 77 N.M. 207, 421 P.2d 123 (1966), and *Jimenez v. Walgreens Payless*, 106 N.M. 256, 741 P.2d 1377 (1987), to argue that he engaged in "significant action" such that Defendants' motion to dismiss was improperly granted. These cases, however, are distinguishable in that all three cases rely on a different version of the rule than is at issue in this case.

All three cases involve a prior codification of Rule 1-041(E). *See Vigil v. Thriftway Mktg. Corp.*, 117 N.M. 176, 178–79, 870 P.2d 138, 140–41 (Ct. App. 1994) (observing that Rule 1-041(E) was "substantially rewritten" in 1990). Under the prior version of the rule,

> In any civil action or proceeding pending in any district court in this state, ... when it shall be made to appear to the court that the plaintiff therein or any defendant filing a cross-complaint therein has failed to take any action to bring such action or proceeding to its final determination for a period of at least three (3) years after the filing of said action or proceeding or of such cross-complaint unless a written stipulation signed by all parties to said action or proceeding has been filed suspending or postponing final action therein beyond three (3) years, any party to such action or proceeding may have the same dismissed with prejudice to the prosecution of any other or further action or proceeding based on the same cause of action set up in the complaint or cross-complaint by filing in such pending action or proceeding a written motion moving the dismissal thereof with prejudice.

Cagan v. Vill. of Angel Fire, 2005-NMCA-059, ¶ 9 n.4, 137 N.M. 570, 574, 113 P.3d 393, 397, *disapproved of on other grounds by Concerned Residents of Santa Fe North, Inc. v. Santa Fe Estates, Inc.*, 2008-NMCA-042, 143 N.M. 811, 182 P.3d 794.

Although there are a number of differences between the current Rule 1-041(E)(1) and its prior version, the most significant difference for the purposes of this case is that while the current rule precludes dismissal where a plaintiff has engaged in "significant action," the prior version of the rule simply required "*any* action." Given that the prior version of the rule required a lesser showing than the

current rule, the acts that were found sufficient to defeat a motion to dismiss for failure to prosecute in *Jones*, *Foundation Reserve*, and *Jimenez* do not constitute "significant action" under the current Rule 1-041(E)(1) and, therefore, do not support Plaintiff's position in this case.

Plaintiff's reliance on *Summit Electric* is also misplaced. In *Summit Electric*, the defendant moved to stay the case due to one of the plaintiff's bankruptcy proceedings. 2010-NMCA-086, ¶¶ 2-3. The day before the hearing, counsel for plaintiffs moved to vacate on the grounds that a potential conflict existed between his clients in the bankruptcy proceeding. *Id.* No order resulted from either motion and no further action took place for approximately two and a half years. *Id.* ¶ 3. Although the two-year period in Rule 1-041(E)(1) had expired during this time, the defendants did not take any action to dismiss the case. *See id.* Eventually, the district court dismissed the case *sua sponte*. *Id.*

In *Summit Electric*, the defendants had six full months in which to move for dismissal pursuant to Rule 1-041(E)(1) before the court closed the case. *Id.* In contrast, the procedural history of the present case is completely different. Plaintiff's last activity was in September 2007. Ten months later in July 2008, the district court *sua sponte* dismissed the case. Plaintiff's inactivity continued through and beyond September 2009—the requisite two years under Rule 1-041(E)—but unlike *Summit Electric,* Plaintiff's lawsuit had already been dismissed

on the court's own motion by that time. Thus, unlike *Summit Electric,* in order to invoke Rule 1-041(E) before Plaintiff filed motions in this case, Defendants would have had to move to reinstate an already dismissed lawsuit in order to move to re-dismiss it. Nothing in law or logic justifies such convoluted and counterintuitive practice.

This is precisely why, as previously noted, both the New Mexico Supreme Court and this Court have held that each case under Rule 1-041(E)(1) must be determined upon its own particular facts and circumstances. *See Martin v. Leonard Motor-El Paso,* 75 N.M. 219, 222, 402 P.2d 954, 956-57 (1965); *Stoll,* 105 N.M. at 319, 731 P.2d at 1363. On the unique facts and circumstances of this case—which are markedly different from those of *Summit Electric*—dismissal was and remains proper.

Not only were Plaintiff's actions untimely as previously established, Plaintiff offered no proof below that he was "prevented" from taking timely and significant actions to advance this case to trial. *See Summit Electric,* 2010-NMCA-086, ¶ 10. Below, Plaintiff argued that he was sick "in July 2008" and was not aware of the court's dismissal of his case. [RP 49] Plaintiff provided no excuse, however, for his failure to prosecute this case *prior* to dismissal in July 2008, nor has he ever attempted to explain in what ways or for how long if at all beyond that single month his sickness affected him.

Below, Defendants argued that Plaintiff's proffered excuses fell far short of justifiably explaining why he took no action on this case from September 2007 through February 2010 or why he again went dormant for another nine months after obtaining *ex parte* reinstatement of this case. Plaintiff's arguments below, i.e., that neither party acted in a timely and appropriate manner to prosecute the case and that Defendants should have moved to dismiss the case during the time the case had already been dismissed for failure to prosecute, failed to legitimately counter Defendants' arguments in favor of dismissal. Moreover, his assertion below that Defendants' motion to dismiss should have been filed earlier is incongruous as it would require Defendants to have moved to reopen the case in September 2009—a time at which the case had already been dismissed *sua sponte* by the district court—for the sole purpose of then asking the court to re-dismiss it. Such an argument has no basis in logic or the law.

Under such circumstances, the district court did not abuse its discretion in dismissing the case under Rule 1-041(E)(1).

3. Plaintiff's argument that a court order requiring mediation is the same as a Rule 1-016 scheduling order was not preserved below and otherwise has no support in New Mexico law.

Plaintiff concedes in a footnote that this argument was not raised below but nonetheless argues it should be considered by this Court because "finding waiver will not do substantial justice for this *pro se* plaintiff." [BIC 13 n.6] Defendants

again presume that by arguing "lack of waiver" Plaintiff really intends to argue that this Court should waive the preservation requirements in Rule 12-216(A). As noted in Section 1.a, *supra*, Plaintiff has not demonstrated that any of the possible exceptions to preservation are present in this case. Moreover, again, as previously pointed out by Defendants, the fact that Plaintiff may have been acting *pro se* during certain time periods below, does not itself excuse Plaintiff from complying with Rule 12-216(A). *See Cedrins*, 2009 WL 6677940, at *1; *Bruce*, 1999-NMCA-051, ¶ 4. For these reasons, this Court should decline to consider this argument.

If this Court nevertheless decides to consider Plaintiff's argument, Defendants point out that this Court previously rejected this argument as stated on pages two and three of the Notice of Proposed Summary Disposition. In rejecting this argument, this Court observed that the mediation order did not include anything that a Rule 1-016(B) scheduling order is required to include under the rule and could not therefore be considered analogous. This Court's analysis in that regard was correct.

Under Rule 1-041(E)(1), a defendant may move to dismiss an action where a plaintiff "has failed to take any significant action to bring such claim to trial or other final disposition within two (2) years from the filing of such action or claim." The rule further provides that such an action cannot be dismissed "if the party

opposing the motion is in compliance with an order entered pursuant to Rule 1-016 NMRA or with any written stipulation approved by the court." Although not argued below, Plaintiff incorrectly asserts on appeal that the *ex parte* mediation order entered by Court is an "order entered pursuant to Rule 1-016."

Rule 1-016 is entitled, "Pretrial conferences; scheduling; management." There are three subparts in Rule 1-016 specifically dealing with court orders. Rule 1-016(B) addresses scheduling orders, which "shall be filed as soon as practicable but in no event more than one hundred twenty (120) days after filing of the complaint." As stated in Rule 1-016(B), a scheduling order limits the time

> (1) to join other parties and to amend the pleadings;
>
> (2) to file and hear motions; and
>
> (3) to complete discovery.

Id. By rule, the scheduling order must also include:

> (4) provisions for disclosure or discovery of electronically stored information;
>
> (5) any agreements the parties reach for asserting claims of privilege or of protection as trial preparation material after production;
>
> (6) the date or dates for conferences before trial and a final pretrial conference;
>
> (7) a trial date not later than eighteen (18) months after the date the scheduling order is filed; and
>
> (8) any other matters appropriate in the circumstances of the case.

Id. As correctly observed by this Court, the *ex parte* mediation order entered by the district court includes none of these requirements and cannot possibly be considered a scheduling order under any stretch of the imagination.

The second subpart in Rule 1-016 that addresses court orders is (E), which addresses pretrial orders. Such orders are required to be entered after a pretrial conference is held pursuant to Rule 1-016 and may also be modified by subsequent order. Rule 1-016(E). As there was no pretrial conference held below, the *ex parte* mediation order in this case cannot be considered a pretrial order under subpart (E) of Rule 1-016.

The last subpart in Rule 1-016 addressing court orders is subpart (F), which deals with sanctions for failing to comply with Rule 1-016. The mediation order cannot be considered a Rule 1-016(F) order because it does not involve sanctions or anything else regarding a violation of Rule 1-016.

For these reasons, Plaintiff does not appear to argue that the mediation order in this case is a Rule 1-016(B), (E), or (F) order. Instead, Plaintiff asserts that the mediation order must be "a pretrial order for court-sponsored mediation under Rule 1-016(A)(5)." [BIC 14] Rule 1-016(A) deals with reasons why a court may require the parties to appear at a pretrial conference. One such reason, facilitating settlement of a case, is included in subpart (5) of Rule 1-016(A). In this case, and by definition, however, there was no pretrial conference in this case wherein the

both parties conferred regarding case settlement because the *ex parte* mediation order was entered without notice to and an opportunity to be heard by Defendants.

Plaintiff cites *Carlsbad Hotel Associates, LLC v. Patterson-UTI Drilling Co.*, 2009-NMCA-005, 145 N.M. 385, 199 P.3d 288 in support of his assertion that an order compelling mediation "must be a Rule 16 order." [BIC 14] *Carlsbad* actually undermines Plaintiff's argument. In that case, the parties attended a Rule 1-016 scheduling conference in which they both agreed to attend a settlement conference. *Id.* ¶ 8. The court then entered an order directing the parties to participate in a settlement conference. *Id.* The court's order was not a Rule 1-016 order, but a LR5-205(A) order, which provides that in the Fifth Judicial District, "[a] settlement conference will be ordered if the trial judge deems it to be appropriate or after agreement by counsel that such a conference may result in a settlement of some or all of the issues in the case." *Carlsbad Hotel Assocs., LLC*, 2009-NMCA-005, ¶ 8. Accordingly, *Carlsbad* lends no support to Plaintiff's argument, which is otherwise not supported by any New Mexico case law. *See Selmeczki v. N.M. Dep't of Corr.*, 2006-NMCA-024, ¶ 24, 139 N.M. 122, 130, 129 P.3d 158, 166 ("This Court will not consider an argument that lacks citation to any legal authority in support of that argument.").

One final reason to reject Plaintiff's unpreserved argument is that Plaintiff should not be rewarded for his inappropriate *ex parte* communications with the

district court. Plaintiff's failure to serve Defendants with his motions to reinstate and mediate deprived Defendants of the ability to respond to the motions, and actually bought Plaintiff another nine months of prejudicial inactivity during which memories further faded and evidence potentially lost before he decided to file and serve his frivolous motion for default judgment in November 2010. To hold that the mediation order arising from such inappropriate conduct is a Rule 1-016 order not only flies in the face of the plain language of the rule itself, but condones dilatory and inappropriate conduct by litigants. *Cf. Stein v. Alpine Sports, Inc.*, 1998-NMSC-040, ¶ 17, 126 N.M. 258, 968 P.2d 769 (holding that the doctrine of unclean hands barred a litigant's attempt to reopen her case under Rule 1-060(B)(6)).

For these reasons, if this Court considers the merits of Plaintiff's unpreserved argument, it should hold that the *ex parte* mediation order entered below cannot be considered a Rule 1-016 order.

CONCLUSION

This Court should not lose sight at what is at stake for Defendants should it reverse the district court's dismissal in this case. Because of Plaintiff's failure to live up to his obligations to prosecute this case, *see Cottonwood Enterprises*, 109 N.M. at 80, 781 P.2d at 1158, and to not communicate *ex parte* with the court, the facts underlying the litigation are over seven years old. Plaintiff's appeal should

not, therefore, be viewed solely through the prism of wanting to give him "his day in court," but also through the lens of ensuring that his failures do not deprive Defendants of due process of law and a full and fair opportunity to defend, a laudable objective of Rule 1-041(E)(1) that will be thwarted by reversal. Respectfully, Defendants therefore ask this Court to affirm the district court's order dismissing Plaintiff's case.

REQUEST FOR ORAL ARGUMENT

Pursuant to Rule 12-214(B) NMRA, Defendants hereby request oral argument. Defendants believe that oral argument will be helpful to the resolution of this case because the panel members may have questions concerning the factual underpinnings and procedural history of the case that can only be answered if oral argument is allowed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2011, I caused a true and correct copy of Defendants-Appellees' Answer Brief to be served via U.S. Mail, postage prepaid, to the following:

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