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1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 **KERI WILLIAMS and RAYMOND**
3 **WILLIAMS,**

4 Plaintiffs-Appellants,

5 v.

No. 34,239

6 **SHELDON HARRIS, CAROLYN MORENO,**
7 **and NEVADA GENERAL INSURANCE CO.,**

8 Defendants-Appellees.

9 **APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**

10 **Nan G. Nash, District Judge**

11 Cheryl K. McLean
12 Albuquerque, NM

13 for Appellants

14 Law Office of Nathan Winger
15 Nathan Winger
16 Albuquerque, NM

17 for Appellees

1 **MEMORANDUM OPINION**

2 **BUSTAMANTE, Judge.**

3 {1} Plaintiff-Appellant Raymond Williams (Plaintiff)¹ has appealed from an order
4 of the district court denying his motion to reinstate and dismissing his complaint with
5 prejudice. We issued a notice of proposed summary disposition proposing to reverse.
6 Defendants have filed a memorandum in opposition. After due consideration, we
7 remain unpersuaded. We therefore reverse and remand.

8 {2} The pertinent background information was previously summarized the notice
9 of proposed summary disposition. Although the memorandum in opposition contains
10 a paragraph-by-paragraph response to the recitation of facts contained within the
11 docketing statement, [MIO 2-8] Defendants do not dispute the accuracy of the
12 summary in our notice of proposed summary disposition. We will therefore avoid
13 lengthy and undue factual recitation here, and proceed directly to the merits.

14 {3} In a case such as this where the district court has entered an order of dismissal
15 on its own motion pursuant to Rule 1-041(E)(2) NMRA, the court should reinstate the
16 case if good cause is shown. *Summit Elec. Supply Co., Inc. v. Rhodes & Salmon, P.C.*,
17 2010-NMCA-086, ¶ 7, 148 N.M. 590, 241 P.3d 188. Good cause is established by a

18 ¹Although Plaintiff Keri Williams joined in the filing of the notice of appeal,
19 the parties agree that she has settled, [DS 1, 10; MIO 8] such that she is no longer an
20 active participant in the appeal.

1 showing that the delay in prosecution is not wholly without justification, and that the
2 party is ready, willing, and able to proceed with the prosecution of his claim. *Id.*

3 {4} In this case, insofar as the nine-month period of inactivity which precipitated
4 the dismissal of the action was occasioned by the unforeseen death of one of the
5 parties, insofar as the record reflects that reasonable efforts were made to proceed
6 once the death was confirmed, and insofar as the estate ultimately appears to have
7 been ready, willing, and able to proceed, [RP 254] good cause for reinstatement was
8 demonstrated. *See generally id.* ¶¶ 7-9 (observing that good cause for reinstatement
9 is demonstrated upon a showing that the delay in prosecution is not wholly without
10 justification, and the party is ready willing and able to proceed).

11 {5} In their memorandum in opposition Defendants contend that the delay was
12 wholly without justification insofar as Plaintiff could have done more *before* the
13 unforeseen death and the resultant period of inactivity preceding the dismissal. [MIO
14 10-13, 17-19] However, this is not the relevant unit of analysis. “[A] district court
15 that dismisses a case on its own motion following a 180-day period of inactivity
16 should reinstate the case if good cause is shown *for the [period of] inactivity.*” *Id.* ¶
17 7 (emphasis added). We are therefore unpersuaded that Plaintiff’s failure to more
18 aggressively prosecute the action at earlier stages of the litigation supplies a basis for
19 affirmance pursuant to Rule 1-041(E)(2).

1 {6} Relative to the 180-day period of inactivity that preceded the sua sponte
2 dismissal, Defendants suggest that counsel for Plaintiff could have requested a stay
3 from the district court while verifying the death, and should have contacted defense
4 counsel. [MIO 11] Although we agree that these or other actions could have been
5 taken, the fact remains that the prosecution would still have been justifiably delayed
6 by the death. As such, our analysis pursuant to Rule 1-041(E)(2) remains unchanged.

7 {7} To the extent that Rule 1-041(E)(1) might supply an alternative basis for the
8 decision rendered below, a two-part test requires the district courts to first determine
9 whether action has been timely taken by the plaintiff, and to second determine
10 whether the plaintiff has been excusably prevented from taking such action. *Summit*
11 *Electric*, 2010-NMCA-086, ¶ 10. In this case, we previously observed that Plaintiff’s
12 prompt motion for reinstatement, together with the initiation of probate proceedings,
13 the ensuing appointment of personal representative, and the affirmation that the estate
14 was ready to proceed, constituted significant actions designed to bring about a final
15 disposition. *See generally id.* ¶¶ 13-14 (observing that our cases have “declined to
16 outline precisely what action is sufficient to satisfy Rule 1-041(E)(1),” but in any
17 event, dismissal constitutes an abuse of discretion where “special circumstances” have
18 impeded the prosecution of a claim, “or where a claim has been pursued actively after
19 a prior lapse in activity”).

1 {8} In their memorandum in opposition Defendants once again attempt to shift the
2 focus to the entire course of the proceedings, arguing that Plaintiff's failure to
3 aggressively prosecute the action at its earlier stages supplies a basis for the district
4 court's ultimate action. [MIO 14-19] However, this is not the relevant timeframe for
5 purposes of Rule 1-041(E)(1). As the Court explained in *Summit Electric*, in cases
6 such as this, where the plaintiff takes good faith action to prosecute *before the*
7 *defendant files a motion to dismiss*, Rule 1-041(E)(1) does not supply a basis for
8 dismissal, notwithstanding a prior lapse in activity. *Id.* ¶¶ 12-14.

9 {9} Defendants further suggest that certain factors and considerations discussed in
10 the case of *Lowery v. Atterbury*, 1992-NMSC-001, 113 N.M. 71, 823 P.2d 313,
11 support the district court's disposition in this case. [MIO 15-116] However, insofar
12 as *Lowery* addresses Rule 1-041(B), as opposed to Rule 1-041(E), it is inapplicable.
13 We therefore remain unpersuaded.

14 {10} Accordingly, for the reasons stated in the notice of proposed summary
15 disposition and above, we reverse the ruling of the district court and remand for
16 further proceedings.

17 {11} **IT IS SO ORDERED.**

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MICHAEL D. BUSTAMANTE, Judge

1 **WE CONCUR:**

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3 **TIMOTHY L. GARCIA, Judge**

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5 **M. MONICA ZAMORA, Judge**