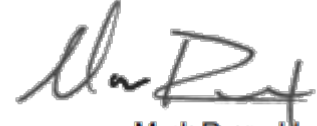


1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

Court of Appeals of New Mexico
Filed 1/9/2024 10:04 AM

2 **SANDRA MARIE BRIGNONI,**

3 Plaintiff-Appellant,



Mark Reynolds

4 v.

No. A-1-CA-40661

5 **JERONIMO DEL BOZQUE,**

6 Defendant-Appellee.

7 **APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY**

8 **James T. Martin, District Court Judge**

9 **Atler Law Firm, P.C.**

10 Timothy J. Atler

11 Jazmine J. Johnston

12 Albuquerque, NM

13 **Cardenas Law Firm LLC**

14 Christopher K.P. Cardenas

15 Las Cruces, NM

16 for Appellant

17 **Mynatt Springer P.C.**

18 Bradley A. Springer

19 Robert A. Cabello

20 Las Cruces, NM

21 for Appellee

22 **MEMORANDUM OPINION**

23 **YOHALEM, Judge.**

24 {1} Plaintiff appeals from the district court's order granting Defendant's motion

25 to dismiss Plaintiff's complaint. We issued a calendar notice proposing to reverse.

1 Defendant has filed a memorandum in opposition, and Plaintiff has filed a
2 memorandum in support, which we have duly considered. Having given due
3 consideration to Defendant’s arguments, this Court reverses the district court’s order
4 dismissing Plaintiff’s complaint.

5 {2} In our calendar notice, we proposed to summarily reverse on the grounds that
6 Plaintiff had filed her complaint within the statute of limitations under the Wrongful
7 Death Act (WDA), NMSA 1978, §§ 41-2-1 to -4 (1882, as amended through 2001),
8 and that even though her case was dismissed for lack of prosecution, Plaintiff timely
9 moved to have it reinstated such that her case was reactivated “at the same point in
10 the proceedings where it was dismissed” and that the statute of limitations was not
11 an issue. [CN 5-6] In his memorandum in opposition, Defendant “concedes the case
12 law is settled that once a case is reinstated, pursuant to Rule 1-041(E)(2) NMRA, it
13 is reactivated ‘at the same point in the proceedings where it was dismissed.’” [MIO
14 1 (quoting *Wershaw v. Dimas*, 1996-NMCA-118, ¶ 4, 122 N.M. 592, 929 P.2d 984)].
15 As such, Defendant acknowledges that “the statute of limitations was no longer at
16 issue in this matter.” [MIO 1]

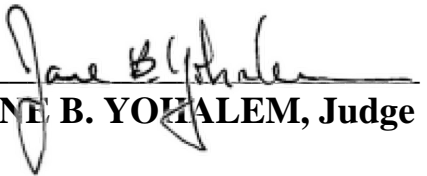
17 {3} Although Defendant concedes the statute of limitations issue, he argues that
18 the district court’s order dismissing Plaintiff’s complaint is “still correct because any
19 amendment would be highly prejudicial” and that this Court can affirm a district
20 court ruling that is right for any reason. [MIO 1] Specifically, Defendant argues that

1 if Plaintiff is allowed to amend her complaint, he will be “prejudiced by [the] shift
2 in focus of defense from a loss of consortium claim to a wrongful death claim
3 especially considering [his] advanced age.” [MIO 4]

4 {4} We remain unpersuaded, however, that the district court’s order was not
5 erroneous. Under Rule 1-015(A) NMRA, “[a] party may amend its pleading once as
6 a matter of course at any time before a responsive pleading is served.” Here,
7 Defendant did not file a responsive pleading to Plaintiff’s original complaint. Rather,
8 Defendant filed a motion to dismiss, which our case law instructs is not a responsive
9 pleading. [RP 37-41] *See Moffat v. Branch*, 2002-NMCA-067, ¶ 22, 132 N.M. 412,
10 49 P.3d 673 (stating that “[m]otions to dismiss . . . are not responsive pleadings for
11 purposes of Rule 1-015”). Because Defendant did not file a responsive pleading,
12 Plaintiff should have been allowed to amend her complaint once as a matter of right
13 before entry of the final order. Accordingly, we conclude that Plaintiff was entitled
14 to amend her complaint as a matter of right. *See Malone v. Swift Fresh Meats Co.*,
15 1978-NMSC-007, ¶ 6, 91 N.M. 359, 574 P.2d 283 (stating that because “[the
16 d]efendants had not filed a responsive pleading at the time [the plaintiff] filed his
17 amended claim,” “[t]here was no necessity for obtaining the trial court’s order
18 granting leave to file [the] amended claim”); *see also* Rule 1-015(A) (stating that “a
19 party may amend its pleading only by leave of court or by written consent of the
20 adverse party”).


1 {5} For the reasons stated in our notice of proposed disposition and herein, we
2 reverse the district court's order granting Defendant's motion to dismiss.

3 {6} **IT IS SO ORDERED.**

4 
5 **JANE B. YOHALEM, Judge**

6 **WE CONCUR:**

7 
8 **ZACHARY A. IVES, Judge**

9 
10 **KATHERINE A. WRAY, Judge**