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

Court of Appeals of New Mexico
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2 Opinion Number: _____

3 Filing Date: February 28, 2025



Ramon J. Maestas
Chief Clerk

4 **No. A-1-CA-40240**

5 **VALENE BELL,**

6 Plaintiff-Appellant,

7 v.

8 **ALLSUP ENTERPRISES, INC. d/b/a**
9 **ALLSUP'S CONVENIENCE STORES, INC.;**
10 **ALLSUP'S CONVENIENCE STORES, INC.**
11 **d/b/a ALLSUP'S CONVENIENCE STORES;**
12 **LONNIE D. ALLSUP, Director & President;**
13 **and HOWARD BRISTER, local store manager,**

14 Defendants-Appellees.

15 **APPEAL FROM THE DISTRICT COURT OF CURRY COUNTY**

16 **David P. Reeb, Jr., District Court Judge**

17 Cooper Appeals, P.L.L.C
18 Kirk Cooper
19 El Paso, TX

20 Lovett Law Firm
21 Robert Lovett
22 Jeffery W. McElroy
23 El Paso, TX

24 for Appellant

1 Lindsey Law Firm, L.L.C.

2 Daniel R. Lindsey

3 Clovis, NM

4 for Appellees

1 **OPINION**

2 **IVES, Judge.**

3 {1} Plaintiff Valene Bell appeals the dismissal of her personal injury lawsuit
4 against Defendants Allsup Enterprises, Inc., Allsup’s Convenience Stores, Inc.,
5 Lonnie D. Allsup, and Howard Brister. The district court dismissed Plaintiff’s
6 complaint on its own motion pursuant to Rule 1-041(E)(2) NMRA. We hold that this
7 was error because Rule 1-041(E)(2) does not authorize dismissal when, as in this
8 case, a scheduling order has been entered. We therefore reverse and remand for
9 reinstatement of Plaintiff’s case.

10 **BACKGROUND**

11 {2} This case began on July 21, 2016, when Plaintiff filed her complaint seeking
12 damages to compensate her for personal injuries that she alleged she suffered after
13 slipping and falling in a gas station and convenience store owned and operated by
14 Defendants. In August of 2016, Plaintiff served Defendants with her complaint along
15 with several interrogatories and requests for production. Defendants filed their
16 answer to the complaint in October 2016, and later that year they issued
17 interrogatories and requests for production, which Plaintiff responded to in
18 December 2016. The record does not reveal whether further discovery occurred
19 between December 2016 and the next entries on the district court’s docket: a series
20 of deposition notices filed in September, November, and December 2017.

1 {3} On April 3, 2018, Plaintiff requested a scheduling conference pursuant to Rule
2 1-016(B) NMRA, and, after holding a scheduling conference on May 14, 2018, the
3 district court entered a scheduling order on June 4, 2018. The order set trial for
4 March 2019 and imposed various pretrial deadlines, including completion of
5 discovery by September 14, 2018.

6 {4} On September 11, 2018, Plaintiff filed an unopposed motion to extend the
7 discovery deadline until December 31, 2018. In support of the motion, Plaintiff
8 asserted that she needed more time to depose a physician who had treated her and
9 who would testify as an expert witness. The district court granted the motion,
10 extending the deadline to December 31, 2018.

11 {5} On December 21, 2018, Plaintiff moved to extend the discovery deadline for
12 an additional two months, until February 28, 2019. Plaintiff asserted that her treating
13 physicians were unwilling to testify as expert witnesses; that she had designated Dr.
14 Jeffrey D. Reuben as her expert witness; that Dr. Rueben was in the process of
15 reviewing Plaintiff's medical records and would then provide a report explaining his
16 expert opinions; and that the requested extension would allow Plaintiff and
17 Defendants to participate in a deposition of Dr. Reuben. Defendants opposed the
18 motion but did not file a response. The district court did not rule on the motion.

19 {6} On February 4, 2019, Plaintiff filed an unopposed motion to continue the
20 March 2019 trial for at least ninety days. Plaintiff repeated the argument she had

1 made in her motion to extend the discovery deadline, and she added that Dr. Reuben
2 would not be available for deposition until March. Plaintiff stated that she would
3 like to reschedule trial for a later date. On February 5, 2019, the district court entered
4 an order granting the motion, vacating the March 2019 trial, and stating that the case
5 “will be set on the docket on the next available trial date.” No trial date was ever set.

6 {7} Over two years later, on February 25, 2021, the district court dismissed the
7 case on its own motion. The court found that no action had been taken in the case
8 since October 30, 2019, (a reference to docket entries regarding Plaintiff’s
9 substitution of counsel) and that there had been no compliance with Rule 1-041(E).
10 The court stated that the matter should be dismissed without prejudice unless within
11 thirty days “a party shall file a notice of intent to prosecute the matter to completion,”
12 in which case the order of dismissal would be stayed.

13 {8} Plaintiff moved to reinstate the case within thirty days. Plaintiff stated that
14 “[t]o date” the parties had not requested a scheduling conference to obtain a new
15 trial setting. In response, Defendants argued that Plaintiff failed to plead “any facts
16 which would provide the court with good cause to excuse the extreme neglect to
17 prosecute her case for over one year.” The district court denied Plaintiff’s motion
18 and provided this rationale:

19 Plaintiff has failed to plead good cause as is required by Rule
20 1-041(E)(2) for her failure to take action to prosecute her case
21 essentially since May 2, 2018, when a scheduling conference was held.
22 Additionally, during the May 2, 2018, scheduling conference, a trial

1 date of March 18th, 19th, and 20th, 2019 was set, but the trial setting
2 was continued by Plaintiff. Now, more than two years after the trial
3 date, no action has been taken to conclude this matter.

4 The court dismissed the case without prejudice.

5 {9} Plaintiff sought relief from the judgment by filing a motion pursuant to Rule
6 1-060(B) NMRA. Plaintiff made the argument at the heart of this appeal: “[A]
7 scheduling order was entered and active,” as modified by the order continuing trial,
8 and the district court therefore was not permitted to dismiss the case pursuant to Rule
9 1-041(E)(2). The parties made various other arguments not relevant to the
10 dispositive issue on appeal. The district court denied the motion for relief and
11 dismissed Plaintiff’s case.

12 **DISCUSSION**

13 {10} Plaintiff’s appeal presents a purely legal question about how to interpret Rule
14 1-041(E)(2). Although the overarching standard of review for Rule 1-041(E)
15 dismissals is abuse of discretion, an abuse of discretion occurs when a ruling is based
16 on a misunderstanding of the law, *Rodriguez ex rel. Rodarte v. Sanchez*, 2019-
17 NMCA-065, ¶ 11, 451 P.3d 105, and because the meaning of a rule of civil procedure
18 is a legal question, our review here is exclusively de novo. *See N.M. Uninsured*
19 *Emp.’s Fund v. Gallegos*, 2017-NMCA-044, ¶ 15, 395 P.3d 533. We interpret rules
20 exactly as we do statutes; critically, when the plain meaning of the text is
21 unambiguous, our interpretation begins there and ends there too. *See id.*

1 {11} We perceive no ambiguity in the plain meaning of Rule 1-041(E)(2) with
2 respect to the question before us: whether the district court—having entered a
3 scheduling order—had the authority to dismiss Plaintiff’s case pursuant to Rule 1-
4 041(E)(2). The text of the rule tells us that the answer is no. The first phrase of the
5 first sentence of Subsection (E)(2) makes clear that the subsection applies only if a
6 pretrial scheduling order has *not* been entered:

7 *Unless a pretrial scheduling order has been entered pursuant to Rule*
8 *1-016 NMRA*, the court on its own motion or upon the motion of a party
9 may dismiss without prejudice the action or any counterclaim, cross-
10 claim or third party claim if the party filing the action or asserting the
11 claim has failed to take any significant action in connection with the
12 action or claim within the previous one hundred and eighty (180) days.

13 (Emphasis added.) In this case, the district court erred by dismissing the case
14 pursuant to Rule 1-041(E)(2) because it had previously entered a Rule 1-016
15 scheduling order.

16 {12} We are not persuaded by Defendants’ argument that precedent allows
17 dismissal pursuant to Rule 1-041(E)(2) after entry of a scheduling order if a party
18 has failed to comply with that order. Defendants do not explain how their position
19 can be reconciled with the straightforward reading of the text of Rule 1-041(E)(2).
20 Defendants rely exclusively on a brief passage in *Rodriguez*, 2019-NMCA-065,
21 ¶ 22, about the relationship between scheduling orders and dismissals: “[f]rom [the
22 entry of the scheduling order] forward, under both Rule 1-041(E)(1) and (E)(2), the
23 district court was without discretion to dismiss Plaintiff’s complaint unless it first

1 found that Plaintiff was not in compliance with the scheduling order.” One problem
2 with Defendants’ reliance on this passage is that *Rodriguez* was an “appeal from a
3 dismissal under Rule 1-041(E)(1),” *Rodriguez*, 2019-NMCA-065, ¶ 11—not Rule
4 1-041(E)(2)—and *Rodriguez* is therefore not authority on the question presented in
5 this appeal. See *Maralex Res., Inc. v. Gilbreath*, 2003-NMSC-023, ¶ 21, 134 N.M.
6 308, 76 P.3d 626 (“[C]ases are not authority for propositions not considered.”). To
7 the extent that the quoted passage addresses the meaning of Subsection (E)(2), it is
8 dicta. And, in any event, we do not interpret the passage in the same way Defendants
9 do. We decline to accept their interpretation because, as we have explained, it is
10 contrary to the plain meaning of Rule 1-041(E)(2). We instead interpret the passage
11 in a manner consistent with the plain meaning—that is, after the district court in
12 *Rodriguez* entered a scheduling order, neither Subsection (E)(1) nor Subsection
13 (E)(2) granted the court the authority to do what it did: dismiss the case without a
14 showing of noncompliance with the scheduling order.

15 {13} *Rodriguez* underscores the important point that Rule 1-041(E) does provide a
16 tool for dismissing a case after a scheduling order has been entered. That tool is
17 Subsection (E)(1), but it was not used in this case. Subsection (E)(1) applies to cases
18 with and without scheduling orders, and it permits dismissal only if the nonmoving
19 party “has failed to take any significant action to bring [their] claim to trial or other
20 final disposition within two (2) years from the filing of such action or claim.” In

1 cases with scheduling orders, an additional requirement must be met before a case
2 may be dismissed. As this Court recognized in *Rodriguez*, the plain language of
3 Subsection (E)(1) “prohibits a district court from dismissing a party’s action or claim
4 on an opposing party’s motion to dismiss for failure to prosecute if the party
5 opposing dismissal is in compliance with an order entered under Rule 1-016.”
6 *Rodriguez*, 2019-NMCA-065, ¶ 13; *see also* Rule 1-041(E)(1) (“An action or claim
7 shall not be dismissed if the party opposing the motion is in compliance with an
8 order entered pursuant to Rule 1-016.”). In the case before us, the district court did
9 not rely on Subsection (E)(1).¹

10 {14} The scheduling order remained in effect at the time of the dismissal and
11 therefore barred dismissal under Subsection (E)(2), contrary to the final argument
12 made by Defendants. Defendants argue that the scheduling order had somehow
13 expired because of the amount of time that passed between the entry of that order
14 and the entry of the order of dismissal. In support of this argument, Defendants do
15 not cite any precedent or any language in the Rules of Civil Procedure.² We reject

¹Even if the district court had invoked Subsection (E)(1), that subsection does not authorize the procedure that was used to dismiss Plaintiff’s case. Unlike Subsection (E)(2), Subsection (E)(1) does not allow a district court to act on its own motion; it only allows dismissal after a party files a motion. *Compare* Rule 1-041(E)(2) (allowing a district court to dismiss “on its own motion” or “upon the motion of a party”), *with* Rule 1-041(E)(1) (allowing “[a]ny party” to “move to dismiss”).

²Defendants cite only this Court’s summary calendar memorandum opinion in *Del Curto v. Deschamps*, A-1-CA-39314, mem. op. (N.M. Ct. App. Dec. 30,

1 Defendants’ argument because it is contrary to Rule 1-016(E), which states that a
2 scheduling order “shall control the subsequent course of the action unless modified
3 by a subsequent order.” In this case, the district court entered two orders that
4 modified the scheduling order—an order extending the discovery deadline and an
5 order continuing the trial setting—and under Rule 1-016(E) the scheduling order
6 remained in effect, as modified, and continued to control the course of the litigation.
7 The scheduling order controlled the course of the litigation because it included the
8 deadlines that would have been used to determine compliance with the scheduling
9 order if Defendants had moved to dismiss pursuant to Rule 1-041(E)(1) or if either
10 party had moved for sanctions pursuant to Rule 1-016(F). The scheduling order also
11 controlled the course of the litigation by barring the district court from dismissing
12 Plaintiff’s case pursuant to Rule 1-041(E)(2).

2021) (nonprecedential). *Del Curto* is not precedent. See *Hennessy v. Duryea*, 1998-
NMCA-036, ¶¶ 23-25, 124 N.M. 754, 955 P.2d 683 (reiterating that memorandum
opinions are not precedent and urging caution in relying on summary calendar
memorandum opinions). And we are not persuaded by Defendants’ argument that
we should rely on it to affirm the district court. In *Del Curto*, A-1-CA-39314, mem.
op. ¶¶ 2-4, this Court issued a summary calendar notice proposing to affirm the
dismissal of the plaintiff’s case, and although the plaintiff filed a memorandum in
opposition, the plaintiff did not brief the issues presented to us in that appeal, and
this Court therefore concluded that any argument about those issues had been
abandoned. In contrast, in this appeal, both Plaintiff and Defendants have briefed
those issues, and we have analyzed those issues and reached our holding with the
benefit of full briefing.

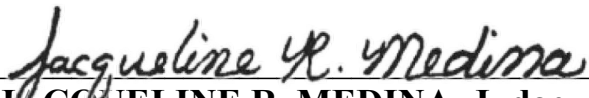
1 **CONCLUSION**

2 {15} We reverse the dismissal of Plaintiff's claims and remand this case to the
3 district court for further proceedings consistent with this opinion.

4 {16} **IT IS SO ORDERED.**

5 
6 _____
ZACHARY A. IVES, Judge

7 **WE CONCUR:**

8 
9 _____
JACQUELINE R. MEDINA, Judge

10 
11 _____
SHAMMARA H. HENDERSON, Judge