IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

KEN SNOW and ALLENE SNOW,

Plaintiffs-Appellants,

vs.

District Ct. No. D-101-CV-2011-02530

Court App. No. 32335

WARREN POWER & MACHINERY, INC.,
d/b/a WARREN CAT and BRININSTOOL
EQUIPMENT SALES,

Defendants-Appellees.

APPELLANTS' BRIEF IN CHIEF

Appeal from the First Judicial District Court, County of Santa Fe
The Honorable Sheri A. Raphaelson, Presiding

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Oral Argument is Requested

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NATURE OF THE CASE

This case arose out of a serious work injury suffered by Ken Snow at the Navajo Refinery ("Navajo") in Lovington, New Mexico on January 20, 2009. At the time of the occurrence in question, Navajo employees – including Mr. Snow and others – were performing a "turnaround." A turnaround is a process by which the refinery is shut down and all the parts and connections are cleaned or replaced. Additionally, this particular turnaround was in preparation for a plant expansion. Employees of contractors, like Gandy Corporation and Repcon, Inc., were present during turnaround preparation and the turnaround itself. Contractors, like Midwest Hose & Specialty, Inc., Brininstool Equipment Sales, and Warren CAT, supplied parts such as hoses, connections and pumps for use during the turnaround.

On January 20, 2009, during an initial stage of the turnaround which is called a decontamination procedure, a hose assembly broke loose and struck Ken Snow. Mr. Snow's left femur was fractured as a result. As a result, Mr. Snow suffered serious, life-changing injuries from which he continues to suffer.

The applicable statute of limitations for injury to a person is three years pursuant to §37-1-8 NMSA 1978.

3 yrs
2009 - 10 - 11 - 12

COURSE OF PROCEEDINGS

On August 15, 2011, Ken Snow and Allene Snow filed their Complaint for Personal Injury, Loss of Consortium and Punitive Damages (RP 1-24). On September 8, 2011, the Snows filed their First Amended Complaint for Personal Injury, Loss of Consortium and Punitive Damages, correcting a date in the original complaint (RP 37-60). Plaintiffs' First Amended Complaint was filed before any Defendant had answered and was done without leave of court (RP 1-60). The named Defendants were Midwest Hose & Specialty, Inc., Gandy Corporation, Repcon, Inc. and Holly Corporation (RP 1-24; 37-60).

On January 30, 2012, Ken Snow and Allene Snow filed their Second Amended Complaint for Personal Injury, Loss of Consortium and Punitive Damages (hereinafter "Second Amended Complaint") (RP 219-252). The Second Amended Complaint added Warren Power & Machinery, Inc. d/b/a Warren Cat (hereinafter "Warren Cat") and Brininstool Equipment Sales (hereinafter "BES") (RP 219-252) as defendants.

On March 7, 2012, Warren Cat filed a Motion for Summary Judgment, alleging that the addition of Warren Cat as a Defendant in this matter in Plaintiffs' Second Amended Complaint violated the applicable statute of limitations (RP 337-363). On May 4, 2012, BES filed a Motion for Summary Judgment, also alleging that the addition of BES as a Defendant in this matter in Plaintiffs' Second

Amended Complaint violated the applicable statute of limitations (RP 479-506). On June 4, 2012, the District Court heard oral argument on Warren Cat's Motion for Summary Judgment (RP 476-478). On June 18, 2012, the District Court entered two Orders in which it granted both Warren Cat's and BES' Motions for Summary Judgment (RP 669-671; 667-668). The District Court ruled that the statute of limitations barred Plaintiffs' claims against Warren Cat and BES. (RP 669-671; 667-668). Plaintiffs-Appellants appeal both June 18, 2012 Orders.

Plaintiffs-Appellants filed a Notice of Appeal on July 18, 2012 (RP 679-686); this appeal is timely. This appeal is taken by Plaintiffs, Ken Snow and Allene Snow, pursuant to Rule 12-202 NMRA. Plaintiffs preserved the issues raised in this appeal by raising the existence of genuine issues of material fact and by establishing that Defendants were not entitled to judgment as a matter of law (RP 388-412; 519-531).

STANDARD OF REVIEW

The Supreme Court of New Mexico has found that "[i]n a motion for summary judgment, the party claiming that a statute of limitations should be tolled has the burden of alleging sufficient facts that if proven would toll the statute." *Ocana v. American Furniture Company*, 2004-NMSC0018, ¶ 12, 135 N.M. 539, 91 P.3d 58. The standard of review applicable to appeals from the grant of summary judgment is *de novo*. *Farmers Insurance Co. v. Sedillo*, 129 N.M. 674,

11 P.3d 1236 (N.M. Ct. App. 2000). The standard of review applicable to statute of limitations issues is also *de novo*. *Haas Enterprises, Inc. v. Davis*, 2003-NMCA-143, 134 N.M. 675, 82 P.3d 42.

STATEMENT OF FACTS

On January 20, 2012, the Snows filed a Motion for Leave to File Plaintiffs' Second Amended Complaint, which sought to add Warren Cat and BES to the lawsuit (RP 178-216). Plaintiffs-Appellants sought to amend their Complaint as evidence had surfaced which indicated that Warren Cat and/or BES were involved in the sale or lease of the equipment which malfunctioned, injuring Mr. Snow (RP 179). That Motion was filed with the approval of all parties to the lawsuit at that time (RP 181). A copy of Plaintiffs' proposed Second Amended Complaint was attached to the Motion (RP 183-216). The Order granting the Snows leave to file their Second Amended Complaint was signed by the District Court on Friday, January 27, 2012 at 4:05 p.m. (RP 217-218). The Snows filed their Second Amended Complaint on Monday, January 30, 2012 at 10:56 a.m. (RP 219-252). Warren Cat was served with the Second Amended Complaint on February 2, 2012 (RP 280-283). BES was served with the Second Amended Complaint on February 6, 2012 (RP 284-287).

On March 7, 2012, Warren Cat filed a Motion for Summary Judgment, alleging that Plaintiffs' Second Amended Complaint violated the applicable statute

of limitations (RP 337-363). On May 4, 2012, BES filed a Motion for Summary Judgment, also alleging that Plaintiffs' Second Amended Complaint violated the applicable statute of limitations (RP 479-506). In their Motions for Summary Judgment, Defendants both argued that Plaintiffs' claims against them were barred by the statute of limitations (RP 337-363; 479-506). The briefing by the Snows in response to these Motions argued that summary judgment based on statute of limitations was not appropriate (RP 388-412; 519-531). The basis for the Snows' position was that the Motion for Leave to File Plaintiffs' Second Amended Complaint tolled the statute of limitations, or, in the alternative, that the claims against Warren Cat and BES related back to the date of the filing of the original complaint (RP 388-412; 519-531). On June 4, 2012, the District Court heard oral argument on Warren Cat's Motion for Summary Judgment (RP 476-478). On June 18, 2012, the District Court entered Orders granting both Warren Cat's and BES' Motions for Summary Judgment (RP 669-671; 667-668). The District Court ruled that the statute of limitations barred Plaintiffs' claims against Warren Cat and BES. (RP 669-671; 667-668).

ARGUMENT

I. THE DISTRICT COURT ERRED IN FINDING THAT PLAINTIFFS-APPELLANTS' CLAIMS AGAINST WARREN POWER & MACHINERY, INC. d/b/a WARREN CAT AND BRININSTOOL EQUIPMENT SALES VIOLATED THE APPLICABLE STATUTE OF LIMITATIONS

Plaintiffs' Second Amended Complaint added Warren Cat and BES as parties to the lawsuit. Warren Cat and BES filed Motions for Summary Judgment alleging that Plaintiffs' claims against those entities were barred by the statute of limitations. The District Court determined that summary judgment was appropriate and dismissed Plaintiffs' claims against those Defendants. The District Court erred in granting summary judgment as Plaintiffs' filing of the Motion for Leave to File Plaintiffs' Second Amended Complaint tolled the statute of limitations and because Plaintiffs' claims against those Defendants relate back to the date of the filing of the original complaint.

A. Plaintiffs' Motion for Leave to File Plaintiffs' Second Amended Complaint Tolled the Statute of Limitations

Rule 15(A) states that "a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Rule 1-015(A) NMRA. As such, Plaintiffs-Appellants filed their Motion for Leave to File Plaintiffs' Second Amended Complaint on Friday, January 20, 2012 (RP 178-216). Plaintiffs-Appellants obtained the consent of all parties to this Motion (RP181). Plaintiffs also included their Second

Amended Complaint as Exhibit A to that Motion (RP 183-216). All that remained was the formality of the Court's signature on the Order accompanying the Motion, which had also been approved by all parties by January 23, 2012 (RP 217-218). Plaintiffs' Motion for Leave to Amend tolled the statute and, as such, Defendants are not entitled to summary judgment.

Both Warren Cat and BES argued that Plaintiffs' claims against them must have been filed by January 20, 2012 or else were barred on the grounds that the statute of limitations had expired (RP 337-363; 479-506). Warren Cat and BES argued that, because Plaintiffs' Second Amended Complaint was not officially filed until January 30, 2012, the claims against them must be dismissed (RP 219-252; 337-363; 479-506).

No New Mexico court has appeared to address this issue. However, other states find that the filing of a motion to amend tolls the statute of limitations from the date of filing until the motion is ruled upon. The New York Court of Appeals has found that because leave of court was required to add a party defendant,

> a plaintiff seeking to add a defendant in most cases must first apply for, and then await, judicial permission. Where the motion, including the proposed supplemental summons and amended complaint, is filed with the court within the applicable limitations period, but the ruling by the court does not occur until after expiration, dismissal is inappropriate and would offend the [Civil Practice Law and Rules]'s liberal policies of promoting judicial economy and preventing a multiplicity of suits.

Perez v. Paramount Communications, Inc., 92 N.Y.2d 749, 753-754, 709 N.E. 2d 83, 85, 686 N.Y.S.2d 342, 344 (N.Y. 1999). This approach seems reasonable. Any number of factors could delay the Court's approval of a Motion for Leave to Amend, including scheduling a hearing, a Judge being reassigned, retiring or absent for an extended period of time for medical reasons.

This Court should allow tolling of the statute of limitations for the period of time between the filing of a motion to amend and a court's ruling on that motion, because during that passage of time Plaintiffs are unable to file an amended complaint adding a party. Plaintiffs should not be penalized for their inability to file a motion to amend adding a party within the statute of limitations period absent court permission. The Seventh Circuit has expressed agreement with this policy, finding that,

> as a party has no control over when a court renders its decision regarding the proposed amended complaint, the subject of a motion for leave to amend, properly accompanied by the proposed amended complaint that provides notice of the substance of those amendments, tolls the statute of limitations, even though technically the amended complaint will not be filed until the court rules on the motion.

Moore v. State of Ind., 999 F.2d 1125, 1131 (7th Cir. 1993).

Similarly, the Eighth Circuit found that "[a] number of courts have addressed the situation where the petition for leave to amend the complaint has been filed prior to the expiration of the statute of limitations, while the entry of the

court order and filing of the amended complaint have occurred after the limits period has expired" and "[i]n such cases, the amended complaint is deemed filed within the limitations period." *Mayes v. AT&T Information Systems, Inc.*, 867 F.2d 1172, 1173 (8th Cir. 1989)(*per curiam*)[*citing Rademaker v. E.D. Flynn Export Co.*, 17 F.2d 15, 17 (5th Cir. 1927); *Longo v. Pennslyvania Elec. Co.*, 618 F.Supp. 87, 89 (W.D.Pa. 1985), *aff'd* 856 F.2d 183 (3rd Cir. 1988); *Eaton Corp. v. Appliance Valves Co.*, 634 F.Supp. 974, 982-83 (N.D.Ind. 1984), *aff'd on other grounds*, 790 F.2d 874 (Fed. Cir. 1986); *Gloster v. Pennsylvania R.R.*, 214 F.Supp. 207, 208 (W.D.Pa. 1963)]. The Massachusetts Supreme Court surveyed laws of other states, finding "considerable supporting authority in other jurisdictions" for the "position that the filing of a motion to amend, not the court's later ruling on that motion or the even later filing of the complaint following allowance of that motion, is the date on which the new action is commenced." *Nett v. Belluci*, 437 Mass. 630, 641, 774 N.E.2d 130, 138-139 (Mass. 2002).

The District Court erred in granting summary judgment to Warren Cat and BES. While New Mexico appellate courts have not addressed the issue, jurisdictions have and have uniformly recognized that Plaintiffs should not be penalized for the passage of time outside their control. This Court, in conducting its *de novo* review, should reach the same conclusion and determine that the statute

of limitations was tolled as of January 20, 2012. Thus, the statute of limitations does not bar Plaintiffs' claims against Warren Cat and BES.

B. Plaintiffs' Claims Against Warren Power & Machinery, Inc. d/b/a Warren Cat and Brininstool Equipment Sales Related Back to the Date the Original Complaint was Filed

The District Court also erred in determining that the "relation back" doctrine of Rule 15(C) does not apply. Rule 15(C) states that

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment:
> (1) has received notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits; and
> (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

Rule 1-015(C) NMRA. The Supreme Court of New Mexico has found that "[t]he required notice [under Rule 15(C)(1)] may be formal or informal." *Romero v. Ole Tires, Inc.*, 101 N.M. 759, 762, 688 P.2d 1263 (N.M. App. 1984). The District Court failed to recognize that genuine issues of material fact exist which precluded summary judgment under the relation back doctrine. In its *de novo* review, this

Court should conclude that summary judgment based on statute of limitations is precluded by the existence of genuine issues of material fact.

1. Facts Regarding Relation Back as to Warren Cat

The record from the District Court is replete with substantial evidence that the relation back doctrine applied to their claims against Warren Cat. Warren Cat had notice of the incident injuring Ken Snow the day after it occurred (RP 404-405). Plaintiffs-Appellants sent Warren Cat a subpoena on December 13, 2011, which referenced "an incident involving injury to Ken Snow at the Navajo Refinery in Lovington, NM on January 20, 2009." (RP 401-402). Warren Cat provided documents in response to that subpoena which indicate that it attempted to investigate the incident involving Ken Snow on January 21, 2009 (RP 404-405). Warren Cat knew or reasonably should have known that a lawsuit would follow when they received information that Mr. Snow had "fracture[d] [his] leg." (RP 405). Furthermore, the subpoena sent by Plaintiffs to Warren Cat requested documents regarding parts or services that had been provided by Warren Cat to the Navajo Refinery around the time Mr. Snow was injured (RP 401-402). Plaintiffs' subpoena also referenced an injury to Mr. Snow at the Navajo Refinery (RP 401-402). Thus, Warren Cat knew or reasonably should have known that there was a lawsuit pending regarding an injury to Mr. Snow which may or may not have involved Warren Cat's equipment or services, prior to the expiration of the statute

of limitations.

Additionally, evidence was presented regarding the lack of prejudice to Warren Cat. Warren Cat argued that it had not heard of the lawsuit until served with the subpoena on December 13, 2011 (RP 342-343). Further, Warren Cat argued that, despite receiving notice of the lawsuit, it did not notify its insurance carrier or think that it would be part of the lawsuit (RP 343). However, Warren Cat knew of the injury to Mr. Snow as early as January 21, 2009 (RP 404-405) and knew or should have known that litigation was imminent. Warren Cat attempted to investigate the incident on or around that date (RP 404-405). Evidence was presented regarding the lack of prejudice to Warren Cat sufficient to establish a genuine issue of material fact (RP 388-412).

Finally, Plaintiffs presented evidence to the District Court that Warren Cat knew that but for a mistake in the identity of parties it would have been named a defendant in the lawsuit earlier. The focus of Plaintiffs' subpoena to Warren Cat was to obtain information on what equipment, if any, Warren Cat provided to the Navajo Refinery in Lovington for use during the relevant time period (RP 401-402). Clearly Plaintiffs sought this information to determine who provided the parts which ultimately injured Ken Snow. Warren Cat knew that an equipment failure or malfunction caused Snow's injury (RP 405). As such, Warren Cat knew or reasonably should have known – prior to the expiration of the statute of

limitations – that Plaintiffs were seeking the identity of the proper party to this case.

This Court, in its *de novo* review, should reverse the grant of summary judgment by the District Court. Plaintiffs have shown that either the relation back doctrine under Rule 15(C) applies as a matter of law, or, at a minimum, that genuine issues of material fact exist regarding the applicability of the doctrine. In either event, this Court should conclude summary judgment is inappropriate.

2. Facts Regarding Relation Back as to Brininstool Equipment Sales

The Plaintiffs have also presented evidence that the relation back doctrine also applied to their claims against BES. BES had notice of the incident injuring Ken Snow the day it occurred (RP499-502). As an exhibit to its Motion for Summary Judgment on this issue, BES presented an affidavit stating that BES's president received a phone call from the Navajo Refinery on January 20, 2009 (RP 499-502). Additionally, in that conversation, BES was informed that someone had been injured due to a hose connection failure "involving the water pump owned by Warren Cat and rented by BES to Navajo Refinery." (RP 500). Furthermore, BES is not prejudiced by the filing of Plaintiffs' Second Amended Complaint as BES knew of the injury to Mr. Snow as early as January 20, 2009 and knew or should have known that litigation was imminent. Finally, BES knew that but for a mistake in the identity of parties it would have been named a defendant in this lawsuit

earlier. BES knew that it was equipment rented by BES to Navajo Refining which was involved in the incident injuring Ken Snow (RP 500). BES also knew that it was the failure of that equipment that caused Plaintiff's injury (RP 500). BES knew it was a proper party from the beginning.

In its *de novo* review, this Court should conclude that the grant of summary judgment by the District Court was inappropriate. Plaintiffs have shown that either the relation back doctrine under Rule 15(C) applies as a matter of law, or, at a minimum, that genuine issues of material fact exist regarding the applicability of the doctrine. In either event, this Court should reverse the grant of summary judgment.

CONCLUSION

This Court, in conducting its *de novo* review, should determine that summary judgment based on the failure of Plaintiffs to make a claim against Warren Cat or BES within the statute of limitations is inappropriate. As a matter of law, the statute of limitations was tolled beginning with Plaintiffs' filing of their Motion for Leave to Amend to add those two parties. Thus, the Second Amended Complaint was timely in asserting claims against Warren Cat and BES. Alternatively, this Court should determine that the relation back doctrine under Rule 15(C) of the New Mexico Rules of Civil Procedure applies or, at a minimum, genuine issues of material fact exist as to its applicability. Thus, the grant of

summary judgment to Warren Cat and BES is precluded. This Court should reverse the decisions of the District Court and allow Plaintiffs to proceed with their claims against Warren Cat and BES.

ORAL ARGUMENT STATEMENT

Plaintiffs-Appellants believe that Oral Argument would be helpful to the Court given that the argument regarding the tolling of the statute of limitations with the filing of a motion for leave to amend to add parties is an issue of first impression in New Mexico.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to NMRA 12-306(D), I hereby certify that on this 21st day of November, 2012, the original and requisite number of copies of the foregoing brief were hand-delivered to:

Clerk of Court
New Mexico Court of Appeals
Albuquerque Satellite Office
2211 Tucker NE
Albuquerque, NM 87106

Further, I hereby certify that on this 21st day of November, 2012, a true and correct copy of the foregoing brief was forwarded by first class mail to the following counsel for the Defendants-Appellees:

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