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' REPLY BRIEF

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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INTRODUCTION

In its *de novo* review of this appeal, this Court will find sufficient evidence to support a reversal of the District Court's grant of summary judgment for Warren Power & Machinery, Inc. d/b/a Warren Cat (hereinafter "Warren Cat") and Brininstool Equipment Sales (hereinafter "BES"). 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.

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

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 Defendants Warren Cat and BES relate back to the date of the filing of the original complaint. Defendants-Appellees argue in their Answer Briefs that Plaintiffs blame the District Court for a

delay in signing the Order and feign ignorance as to their knowledge that litigation was pending. This is incorrect for several reasons.

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 Plaintiffs-Appellants were required to seek leave of the court to amend their lawsuit, they filed a Motion for Leave to File Plaintiffs' Second Amended Complaint, with the proposed amended complaint attached (RP 183-216). Plaintiffs' Motion for Leave to Amend tolled the statute and, as such, Defendants are not entitled to summary judgment.

Defendant-Appellee BES argues in its Answer Brief that the cases cited by Plaintiffs-Appellants allow tolling because of the extreme lengths of time between the filing of a Motion to Amend and the court's decision on the matter. Plaintiff-Appellants do not take issue with the length of time it took the District Court to sign the Order in question. BES' argument misses the point. Plaintiffs-Appellants argue that, procedurally, it makes sense for an amended complaint to be deemed filed on the day the motion for leave to amend is filed. While other courts may have taken four months to hear or rule on a motion to amend, the fact remains that Plaintiffs-Appellants filed their motion seeking permission of the court to file an

amended complaint before the statute of limitations expired and their amended complaint should be deemed filed that day.

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.

Defendant-Appellee Warren Cat relies on *Butler v. Deutsche Morgan Grenfell, Inc.*, 2006-NMCA-084, 140 N.M. 111, 140 P.3d 532, in support of its assertion that New Mexico jurisprudence has already rejected the idea that statute of limitations can be tolled. *Butler* was a class action lawsuit brought by a corporation's shareholders involving fraud, misrepresentation, etc. *See generally id.* In that case, Appellant Butler argued that the statute of limitations was tolled by either an Order entered by the Judge or under the rule allowing the statute of limitations to be tolled pending class certification. *Id.* at ¶ 7. First, an Order was entered by the Judge staying proceedings until the motions to dismiss were heard. *Id.* at ¶ 10. No such order or procedural background exists in this case; this rationale does not apply. Second, Butler claims the statute of limitations was tolled under the *American Pipe* rule. *Id.* at ¶ 20. This rule is specifically addressed to

class actions and operates to toll the statute of limitations "during the pendency of the class certification decision." *Id.* The Court of Appeals of New Mexico ultimately found that Butler did not meet the requirements under the *American Pipe* rule and that many of his claims were substantially different from those of the class. *Id.* at ¶ 22-24. This case is not a class action and Plaintiffs-Appellants' claims against Defendants-Appellees are substantially similar to its claims against the remaining defendants.

Warren Cat argues that *Butler* stands for the proposition that Plaintiffs-Appellants must prove that Warren Cat had notice of the litigation and that Plaintiffs-Appellants had some "extraordinary circumstances to excuse [them] from sleeping on their rights." Warren Cat's Answer Brief at p. 13. *Butler* does not stand for such a proposition. Rather, 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 Co.*, 2004-NMSC-0018, ¶ 12, 13 N.M. 539, 91 P.3d 58. This is the standard facing Plaintiffs-Appellants; this is the standard Plaintiffs-Appellants have met.

Defendants-Appellees take issue with the fact that Plaintiffs-Appellants did not institute a separate action against them. Plaintiffs filed a motion under Rule 15(A) as there was already a pending lawsuit with substantially similar claims

against other defendants. It simply does not make sense that a plaintiff would be required to institute another action – expending both his and the court's time and resources – when a procedural remedy can be found through Rule 15(A). In fact, the New York Court of Appeals found that the rule of allowing the filing of a motion to amend to toll the statute of limitations "promot[es] judicial economy and prevent[s] 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).

Defendants-Appellees also criticize Plaintiffs-Appellants' rationale in arguing that allowing equitable tolling under these circumstances makes sense because of judge reassignment, medical issues, etc. They miss the point. The examples provided by Plaintiffs-Appellants are samples of different ways that a ruling on a motion could be delayed because of circumstances outside of Plaintiffs, or even the court's, control. Because Rule 15(A) requires that leave of court is sought to amend a pleading, a plaintiff must take that step and then wait before he can take another.

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. 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

Warren Cat argues that the relation back doctrine under Rule 15(C) does not apply. However, the record from the District Court is replete with substantial evidence that the relation back doctrine applied to Plaintiffs' claims against Warren Cat. In its Answer Brief, Warren Cat pretends that it did not know litigation was imminent or pending. To the contrary, Plaintiffs-Appellants have presented extensive evidence showing otherwise.

Plaintiffs-Appellants have shown that Warren Cat knew of the incident injuring Ken Snow the day after it occurred and that Warren Cat attempted to investigate the incident. Further, Plaintiffs-Appellants have shown that at least by

December 13, 2011, Warren Cat knew that litigation was pending regarding the incident and that Plaintiffs-Appellants were attempting to investigate the origin of the equipment or parts involved because Warren Cat received a subpoena from Plaintiffs. Warren Cat argues that, even after receiving the subpoena, it had no reason to know Warren Cat was involved. However, 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). 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.

Plaintiffs-Appellants have also presented sufficient evidence to show that Warren Cat is not prejudiced. Warren Cat's general counsel knew a lawsuit was pending regarding this incident because he responded to the subpoena himself (RP 403). At that point, Warren Cat knew or reasonably should have known that it was a proper party to the lawsuit and that Plaintiffs sent a subpoena to confirm that fact.

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*

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 and that the incident involved a part supplied to the Navajo Refinery by BES. For these reasons, BES had notice of the incident, knew or reasonably should have known that litigation was imminent, and knew the incident involved a part supplied by BES.

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.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to NMRA 12-306(D), I hereby certify that on this 11th day of February, 2013, 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 11th day of February, 2013, 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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