IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

KEN SNOW and ALLENE SNOW,

Plaintiffs-Appellants,

D-101-CV-2011-02530

Court App. No. 32335

vs.

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

Defendants-Appellees.

APPELLEE BRININSTOOL EQUIPMENT SALES' ANSWER BRIEF
Appeal from the First Judicial District Court, County of Santa Fe
The Honorable Sheri A. Raphaelson, Presiding

Respectfully submitted by:

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Oral Argument is Requested

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STATEMENT CONCERNING RECORDED PROCEEDINGS

Oral arguments from the hearing on Defendant Warren Cats' Motion for Summary Judgments were provided in audio-recorded format by the Court on CD's in two formats. Testimony can be heard in Mp3 files or in the "For the Record" program. Defendant BES does not cite the oral arguments in its answer.

SUMMARY OF THE PROCEEDINGS

Appellee Brininstool Equipment Sales ("BES") generally agrees with the Appellants' Summary of the Proceedings. However, the statement of facts requires additional clarity. Specifically, BES was not before the court when Appellants Ken and Allene Snow (hereinafter "Appellants") filed their Motion for Leave to File Plaintiffs' Second Amended Complaint on January 20, 2012 at 4:23 p.m. RP 178-216. Thus, BES did not receive notice of the motion and did not have an opportunity to object or challenge the motion. In fact, at that time, BES was completely unaware of the lawsuit.

ARGUMENT

It is undisputed that the statutory period began to run on January 20, 2009 when Plaintiff Ken Snow was injured at the Navajo Refinery. RP 479-506. Additionally, it is undisputed that, unless tolled, the statutory period expired on January 20, 2012, the same day Appellants filed their Motion to Amend their Complaint. RP 479-506. Thus, there is no genuine issue of material fact in this case. Accordingly, BES is entitled to a judgment as a matter of law because Appellants failed to file their Second Amended Complaint within the time period authorized by law, three years from the time of the injury. § 37-1-8 NMSA (1978).

Appellants offer two arguments as to the application of the statute of limitation. First, Appellants argue the statute is tolled by the filing of the Motion to Amend the First Amended Complaint; alternatively, Appellants argue that under Rule 1-015(C) the claims against BES will *relate back* to the original pleading. Rule 1-015(C) provides:

> 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 such 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 (emphasis added).

As a matter of law, these two exceptions do not apply; therefore, BES is entitled to summary judgment based on the statute of limitations.

I. Standard of Review

When there are no material facts in dispute and the appeal presents only a question of law, the standard of review for appeals from the grant of summary judgment is *de novo*. *City of Albuquerque v. BPLW Architects & Engineers, Inc.*, 2009-NMCA-081, ¶ 7, 213 P.3d 1146, 1149. The two key issues presented involve tolling the statute of limitations and the relation back doctrine under NMRA Rule 1-015(C). The facts are not in dispute, but only their legal effect. When facts relevant to the statute of limitations are not in dispute, the standard of review applicable to statute of limitations issues is *de novo*. *Haas Enterprises, Inc. v. Davis*, 2003-NMCA-143, ¶ 9, 82 P.3d 42, 43. Accordingly, the Court is not required to view the appeal in the light most favorable to the party opposing summary judgment. *City of Albuquerque*, 2009-NMCA-081 at ¶ 7, 213 P.3d at 1149. In addition, the party claiming tolling of the statute of limitations bears the burden of alleging sufficient facts to toll the statute. *Ocana v. American Furniture Company*, 2004-NMSC-018, ¶ 12, 91 P.3d 58, 65.

Under New Mexico Law, actions for personal injury, such as the action asserted by Appellant Ken Snow, must be brought within three years, § 37-1-8 NMSA 1978. The same three-year limitation period applies to Appellant Allene Snow's loss of consortium claim. *Kilkenny v. Kenney,* 68 N.M. 266, 270, 361 P.2d 149 (1961).

II. Tolling the statute of limitations is inappropriate and prejudices Defendant BES

Appellants argue that their Motion for Leave to File Plaintiffs' Second Amended Complaint tolled the statute of limitations. To support this argument, Appellants rely on case law from other jurisdictions. However, Appellants' argument has four key flaws. First, the concept of tolling the statute of limitations is not appropriate because the court did not cause the delay. Second, this concept is a novel and outdated, one that has not been adopted in New Mexico, even when faced with an opportunity to do so. Third, the facts of the present case are not appropriate to support tolling the statute under the framework used in other jurisdictions. Fourth, this approach severely prejudices BES' ability to defend itself in the matter.

a. Tolling is not appropriate in this case where the Appellants have been dilatory in filing their motion to amend.

Appellants argue that the Court should allow tolling of the statute of limitations upon filing a motion to amend because they are unable to file an amended Complaint while waiting on the court's ruling. However, in places where

tolling has been used, the delay between filing the motion to amend and court approval is considerably longer than in this case. For example, in *Perez v. Paramount Communications, Inc.*, 92 N.Y.2d 749, 752, 709 N.E.2d 83, 84, 686 N.Y.S.2d 342 (N.Y. 1999), one of the key cases relied on by the Appellants, the court noted it took over four months to grant the plaintiff's motion. 92 N.Y.2d 749, 752, 709 N.E.2d 83, 84, 686 N.Y.S.2d 342, 343 (N.Y. 1999). *See also, Longo v. Pennsylvania Elec. Co.*, 618 F.Supp. 87, 89 (D.C. Pa. 1985) (where the delay between the motion and order was over four months); *Eaton Corp. v. Appliance Valves Co.*, 634 F.Supp. 974, 976 (N.D. Ind. 1984) (where the delay was over three months); and *Gloster v. Pennsylvania R.R. Co.*, 214 F.Supp. 207 (D.C. Pa 1963) (where the opinion ruling on the amended complaint was filed three months later). In the present case, the District Court granted Appellants' motion to amend within one week. RP 178-218. Such a short delay does not prejudice Appellants' ability to prosecute their case. It merely requires that they give the District Court time to approve the motion.

In addition, Appellants argue that it is unfair to require the filing of the Complaint to commence legal action because there could be many reasons that could delay the court's approval of a motion for leave to amend. The Appellants offer three such reasons:

1. Judge reassignment;

2. Scheduling a hearing; or

3. The assigned judge being unavailable because of "health issues etc."

See Appellants' Brief-in-Chief, p. 12. What Appellants neglect to mention is that none of these reasons apply to this case. The only reason for the delay in filing the Second Amended Complaint was Appellants' own failure. Appellants' Motion for Leave to Amend was granted on January 27 but the Amended Complaint was not filed until January 30, 2007. RP 219-252. By Appellants' reasoning, this novel exception to the rules of civil procedure, Appellants' Amended Complaint must be electronically filed by January 27th, not three days later when the tolling no longer applies. Appellants knew that the statute of limitations may bar their complaint but instead of vigilance, Appellants delayed and now argue that the delay was beyond their control. Thus, allowing tolling, in this situation, does not resolve an injustice on the Appellants, instead simply rewards them for waiting until the last minute to file their motion to amend. Accordingly, the statute of limitations should not be tolled in this situation.

b. Relation-back under Rule 15 has eliminated tolling.

Tolling is no longer necessary because the problem is addressed by relation-back doctrine of Rule 1-015(C) NMRA. The federal version of this rule, Fed. R. Civ. P. 15(C), altered the rules regarding the addition of new parties after the applicable limitations period expired. *McKowan Lowe & Co., Ltd. v. Jasmine,*

Ltd., 976 F.Supp. 293, 297 (D.N.J. 1997). Similarly in *Curry v. Turner*, 832 So.2d 508, 512-514 (Miss. 2002), the Supreme Court of Mississippi, when faced with the argument that a motion to amend tolls the statute, relied on Mississippi's version of Rule 15 instead. They found it significant that the new defendants were provided no notice of the suit and that there was no mistake as to the identity of the new defendants. *Id.* at 514.

The issue of notice is significant in New Mexico cases dealing with the statute of limitations, as well. When given the opportunity to consider how the statute of limitations should be interpreted, the New Mexico Court of Appeals reasoned that the trial court must determine if the affected defendant received reasonable notice that plaintiffs were asserting a claim against that defendant. *See Romero v. Ole Tires, Inc.*, 101 N.M. 759, 688 P.2d 1263 (Ct. App. 1984). Granted, this case deals with relation back under Rule 1-015, but the *Romero* court endorsed the general rule that plaintiffs have the burden of establishing that the new defendant had notice of the action.

In the 2001 decision, *Romero v. Bachicha*, 2001-NMCA-048, ¶ 14, 130 N.M. 610, 28 P.3d 1151, the New Mexico Court of Appeals declined to assume that a plaintiff's complaint provided sufficient notice of the institution of litigation. The *Bachicha* court reasoned that, at the time the motion to amend the complaint was filed, the defendant was not a party to the action and was not before the court. *Id.*

Thus, the *Bachicha* court required the plaintiff to "bear his burden of proving that adequate notice was given within the statutory period for commencing the action." *Id.* The original pleading did not suffice to give the defendant notice because the plaintiff filed the complaint against Frank Bachicha rather than Paul despite the fact that he knew of the accident, of the plaintiff's intention to hire counsel, and had received interrogatories on the matter. *Id.* at ¶ 3, 20-1. Nevertheless, the Court of Appeals found that the defendant was not notified of the action until he was served with the amended complaint. *Id.* at ¶ 21.

In the present case, just as in *Bachicha*, BES was not a party to the suit nor were they before the court when Appellants filed their motion for leave to amend their complaint. Thus, the motion did not provide BES with notice of the action. Similarly, BES did not have the opportunity to oppose the motion. Therefore, it would be inequitable to hold that Appellants' Motion for Leave to Amend tolled the statute of limitations.

While the *Bachicha* court did not rule on the precise question now before the court, *Bachicha* court's reasoning is instructive on the issue. The court points out that every case cited by the plaintiff involved the correction of a misnomer where the proper defendant was already before the court. *Id.* at 13. Further, they note that the real inquiry when an amendment changes the name of the party is whether the added party had adequate notice and knew or should have known, that but for mistake, the

action would have been brought against it. *Id.* at 12. Finally, the court concludes, "when the proper party was not served and therefore is not before the court, a plaintiff must demonstrate compliance with the rule." *Id.* These statements illustrate why the Rule 1-015(C) framework is preferable to tolling the statute of limitations. Rule 1-015(C) explicitly considers notice and potential prejudice to the added defendants, while the tolling concept does not expressly consider a defendant's concerns. Accordingly, the Court should not adopt the concept of tolling the statute of limitations based on Appellants' motion to amend. Instead, the Court should rely on Rule 1-015(C) to resolve this issue.

c. The facts of this case are not sufficient to support tolling the statute of limitations because the added defendants did not receive notice prior to the expiration of the statute of limitations.

Appellants' argument for tolling the statute of limitations fails for another reason. The added party must have received notice within the statutory period. *Rademaker v. E.D. Flynn Export Co*, 17 F.2d 15 (5th Cir. 1927) is the seminal case referenced for tolling the statute of limitations based on filing a motion to amend just before the expiration of the statute. In that case, the Fifth Circuit Court of Appeals allowed the motion to amend to stand in the place of an actual amendment. *Id.* at 17. In reaching this conclusion, they relied on the fact that "process was issued and served upon defendant, before any right of action against it was barred." *Id.* By contrast, the Seventh Circuit Court of Appeals found a plaintiff's request for leave to

amend was ineffective when it did not put the putative defendants on notice. *Moore v. State of Ind.*, 999 F.2d 1125, 1131 (7th Cir. 1993). In *Nett v. Bellucci*, 437 Mass 630, 641, 774 N.E.2d 130, 138 (Mass. 2002), the Supreme Court of Massachusetts found it significant that the "defendant had actual knowledge that the plaintiffs had taken the first step in court to pursue a malpractice claim." For this reason, the Massachusetts Supreme Court was able to use the motion to amend to establish commencement of the action as opposed to the later filing of the amended complaint. *Id.* Likewise, in *Gloster v. Pennsylvania R.R. Co.*, 214 F.Supp. 207 (D.C.Pa 1963), the added defendants had notice of the action and participated in the hearing on plaintiff's motion to amend. Appellants rely on each of these cases in their Brief-in-Chief.

In other jurisdictions that have applied tolling, notice to the added defendants has been found to be a key factor as well. In Colorado, the Court of Appeals decided that a motion to amend tolls the statute of limitations if the motion, amended complaint and summons are served on a defendant before the expiration of the statute of limitations. *Moore v. Grossman*, 824 P.2d 7, 10 (Colo. Ct. App. 1991). *See also, In re Metropolitan Securities Litigation*, 532 F.Supp.2d 1260, 1282 (E.D. Wash 2007) (finding that the added defendants received notice prior to the expiration of the statute of repose, thus, allowing the motion to amend to commence the action). In a recent case, the Supreme Court of Idaho addressed this issue, in depth, in the context

of a mechanic's lien. *Terra-West, Inc. v. Idaho Mut. Trust, LLC*, 247 P.3d 620, 621-2 (Idaho 2010). The court held that an important part of the analysis is whether the defendant had notice prior to the expiration of the statutory time period and found that the added defendant had notice. *Id.* at 399, 626. Accordingly, the court concluded the motion to amend commenced the action. *Id.* at 401, 628. In doing so, the court distinguished it from a third party complaint because the third party, not being before the court, would not be served with the motion for leave to amend. *Id.* at 626-7. Thus, the prevailing view, in jurisdictions that allow motions to amend to toll the statute of limitations, is that this type of tolling requires that the added defendants receive notice prior to the expiration of the statute.

In the present case, BES did not receive notice of the institution of the action against it prior to the expiration of the statute of limitations. BES was not a party to the action and not before the court at the time of the amendment. Thus, BES did not have the opportunity to oppose the motion. Additionally, before the lapse of the statute of limitations, Appellants knew that BES was a potential Defendant but did not give notice to BES that they intended to add BES as a party defendant. In *Moore v. State of Indiana* supra., the 7th Circuit Court of Appeals refused to toll the statute of limitations because the added defendants did not have notice. 999 F.2d at 1131. Similarly, this Court should affirm the district court's decision not to toll the

statute of limitations because BES did not have notice of the action and was not before the court.

d. Tolling the statute of limitations is not appropriate because it prejudices BES' ability to defend itself.

Appellants' argument for tolling the statute ignores the prejudice to Defendant BES. Before the lapse of the statute of limitations, Appellants knew that BES was a potential Defendant but said nothing to BES officers, agents, or employees. BES did not know that it was a Defendant until it was served, 17 days after the lapse of the statue of limitations. This delay prejudices BES in a number of ways. BES had no reason to suspect that it would be a Defendant in personal injury litigation and, therefore, did not investigate this accident and injury. BES had no reason to report this claim and the potential lawsuit to its risk managers or liability insurer companies for investigation. Thus, BES did not know the identity of the plaintiff, the identity of potential witnesses and the identity of potential exhibits. Similarly, BES did not take steps to preserve potential evidence, take photographs or guard against fading witnesses memories. Also, BES had no opportunity to determine the mechanism of injury and whether the mechanism of injury was related to the rented water pump. Meanwhile, Appellants kept BES in the dark about their filing plans, while they continued a pattern of investigation and discovery including interviews and discovery subpoenas. In Appellants' view of jurisprudence, prejudice to Defendant is irrelevant. That view is contrary to the New Mexico

Rules of Civil Produce which hold that prejudice to the defendant must be considered by this court. *See* Rule 1-015(C) (1) NMRA, which requires an analysis of the prejudice to the defendant in allowing the amendment to relate back.

It is not appropriate to toll the statute of limitations in this case. This is not a case where the motion to amend was filed several months before the expiration of the statute of limitations. Rather, Appellants were playing a dangerous game with the New Mexico Rules of Civil Procedure by waiting until 4:23 p.m. on the day the statute of limitation expired to file their motion to amend. In arguing that the statute should be tolled, the Appellants are attempting to blame the court for their failure to comply with the rules. Also, Appellants are requesting a novel exception to the Rules of Civil Procedure, one that has never been recognized in New Mexico. They ignore the fact that the purpose of relation-back doctrine is to deal with complaints filed after the expiration of the statute because, as discussed below, Appellants do not fulfill the requirements for relation-back. Specifically, BES never had notice of the action and is now prejudiced in its ability to defend. This lack of notice is also fatal to Appellants' request to toll the statute of limitations, as the consensus among jurisdictions that allow tolling is that the added party must still have notice prior to the expiration of the statute of limitations. This Court should not create a novel exception simply because Appellants cannot fulfill the provisions adopted in Rule 1-015(C). Any such exception would circumvent the provisions in the rule

designed to provide notice and prevent prejudice to the added defendants. Therefore, the District Court's Orders granting summary judgment to BES and Warren Cat should be affirmed.

III. Appellants' Second Amended Complaint does not relate back to the original Complaint because BES had no knowledge or reason to know of the legal action and no knowledge or reason to know that BES could be a party to the action.

Pursuant to Rule 1-015(C) NMRA, relation-back is only appropriate in certain circumstances. First, the claim must arise out of the same occurrence. Rule 1-015(C). Second, the party to be brought in must have received notice of the *institution of the action* such that he will not be prejudiced in maintaining his defense on the merits. Rule 1-015(C) (1) [Emphasis added]. Third, the party to be brought in must have constructive knowledge that, but for a mistake concerning the identity of the party, the action would be brought against him. Rule 1-015(C) (2). Each of these elements is required by the rule. Here, BES had no knowledge of the lawsuit prior to receiving service, 17 days after the lapse of the statue of limitations. Thus, BES does not meet the requirements of Rule 1-015(C)(1). Since BES lacked knowledge of the action, BES could not have constructive knowledge that, but for a mistake concerning the identity of the party, the action would be brought against them. Therefore, the requirements for relation-back under Rule 1-015(C)(2) are not met. Accordingly, BES is entitled to summary judgment as a matter of law.

Appellants argue that notice of an accident with personal injuries is notice that litigation will be instituted. *See* Appellants' Brief-in-Chief, p. 17. This argument is contrary to New Mexico law as set out in Rule 1-015 (C) which specifically requires that BES receive notice of the litigation as opposed to merely notice of the personal injury. The Rule, as interpreted by the New Mexico Court of Appeals, states that notice of a personal injury is not the same as notice of the probable institution of litigation sufficient for a relation back exception. *See Romero v. Bachicha* supra. at ¶ 20. This interpretation aligns with federal jurisprudence stating that notice of the institution of action, as used in Fed. R. Civ. P. 15(C), refers to the lawsuit, not the underlying incident. *Craig v. U.S.*, 413 F.2d 854, 858 (9th Cir. 1969). Furthermore, if knowledge of a personal injury claim is knowledge of probable litigation, there is no reason for a statute-of-limitation defense because all injuries are assumed to result in litigation. In order for Appellants' Second Amended Complaint to relate back to the original pleading, Appellants have the burden of proving two things:

1. That Joseph Brininstool's conversation on January 20, 2009 with Warren Cat regarding an accident involving a water pump rented to BES, which occurred at the Navajo refinery and resulted in an employee injury, is sufficient notice that Ken Snow and his wife would and did institute legal action against BES; and

2. That before January 20, 2011, BES knew or should have known that, but for a mistake concerning the identity or the proper party, Appellants would file a Second Amended Complaint against BES.

As a matter of law, Appellants cannot make that showing; therefore, the district court's decision to grant BES' motion for summary judgment was proper and should be affirmed.

a. Pursuant to Rule 1-015(C), the Second Amended Complaint against BES does not relate back to the original pleading because notice of an accident or injury is not notice of the institution of legal action arising from that accident or injury.

Under New Mexico law, notice of an accident or injury is never notice that legal proceedings will be instituted as a result of that accident or injury. In *Romero v. Bachicha*, 2001-NMCA-048, ¶ 20, 28 P.3d 1151, 1156, the New Mexico Court of Appeals held that under Rule 1-015(C)(1), notice of the existence of an accident or injury is not sufficient notice to allow a relation back under the Rule to avoid the imposition of the statute of limitation. In the *Bachicha* case, the plaintiff and defendant had a car accident resulting in personal injuries. The plaintiff told the defendant that he might hire a lawyer because of this accident. The plaintiff served financial interrogatories on the defendant, as well. Accordingly, the Court of Appeals found that defendant knew that plaintiff Romero was in a car accident with defendant Bachicha, that plaintiff had damages from that accident, that written discovery was served on defendant Bachicha because of the accident and that

plaintiff had said that he intended to hire an attorney. *Id.* at ¶ 21, 1156-7. However, the Court of Appeals, in noting it is not enough that a defendant is aware an action may be brought, held that these acts were legally insufficient to provide notice to the *Bachicha* defendant that plaintiff would institute legal proceedings against him. *Id.* at ¶ 20-21, 1156-7. The rule requires a plaintiff to prove the defendant actually received notice of the suit. *Id.* at ¶ 20, 1156. Thus, the amended complaint did not relate back to the original complaint and the defendant was first notified upon being served with the amended complaint. *Id.* at ¶ 21, 1157. Therefore, since there was no relation back, plaintiff Romero's amended complaint was dismissed as violating the statute of limitations.

Similarly, in the federal courts, notice refers to notice of the lawsuit, not simply notice of the accident. *Archuleta v. Duffy's Inc.*, 471 F.2d 33, 35-6 (10th Cir. 1973) [*citing Craig v. United States*, 413 F.2d 854, 858 (9th Cir. 1969)]. In *Wood v. Worachek*, 618 F.2d 1225, 1229-30 (7th Cir. 1980), the Seventh Circuit Court of Appeals found taking a deposition of a party did not suffice to provide that party with the notice contemplated under Fed. R. Civ. P. 15(C) (1) because it did not give notice that he would be named as a defendant. Since Rule 1-015(C) is substantially similar to Fed. R. Civ. P. 15(C), federal case law is most helpful in giving meaning to its language. *Albuquerque Nat. Bank v. Clifford Industries, Inc.*, 91 N.M. 178, 571 P.2d 1181 (1977).

In the case before this court, it is undisputed that BES had no knowledge that Appellants had hired an attorney, had sued other Defendants or had contemplated legal action. BES did not even know that Ken Snow was the injured party. Using the rule announced in *Romero v. Bachicha*, there is not sufficient notice to allow relation back. Similarly, under the federal court rule, notice of the accident is not the same as notice of the institution of action under Rule 1-015(C). Therefore, Appellants cannot avoid the imposition of the statute of limitations in this case. Accordingly, the Court should affirm the District Court's Order granting summary judgment.

b. In addition, the Second Amended Complaint does not relate back to the original Complaint because of the prejudice to BES caused by Appellants' failure to notify BES of the institution of legal proceedings.

Rule 1-015 (C) (1) does not allow relation back when it would prejudice the other party in maintaining its defenses on the merits. Specifically, prejudice is found when the party "who, for lack of timely notice that a suit has been instituted, must set about assembling evidence and constructing a defense when the case is already stale." *Fields v. Blake*, 349 F.Supp.2d 910, 917 (E.D. Pa. 2004). In this case, the failure of Appellants to notify BES of this litigation prejudices BES in maintaining a defense in a number of ways. First, BES had no reason to suspect that it would be a Defendant in personal injury litigation and, therefore, did not investigate this accident and injury. Second, because it did not investigate this accident and injury, BES did

not know the identity of the plaintiff, the identity of potential witnesses and the identity of potential exhibits. Third, because BES had no reason to investigate or prepare for potential litigation, BES did not take steps to preserve potential exhibits or guard against fading witnesses memories. Fourth, BES had no reason to report this claim and the potential lawsuit to its risk managers or liability insurance company for investigation. Fifth, BES had no opportunity to determine the mechanism of injury and whether or not the mechanism of injury was related or unrelated to the rented water pump. Sixth, BES had no reason to conduct tests, take photographs or preserve evidence that may be relevant to this litigation. Finally, while Appellants kept BES in the dark about its filing plans, Appellants continued a pattern of investigation and discovery including interviews and discovery subpoenas. All of these reasons illustrate the prejudice suffered by BES in its attempt to maintain a defense on the merits.

BES, because of lack of timely notice, faces the difficult task of assembling evidence and constructing a defense in a case that is already stale. Since allowing relation back would prejudice BES' ability to maintain a defense on the merits, the Court must affirm the District Court's Order granting summary judgment to BES.

c. **Pursuant to Rule 1-015(c)(2), the Appellants' Second Amended Complaint does not relate back to the original pleading because BES had no reason to know that but for a mistake they would have been a party to the action.**

In addition to Appellants' problems with Rule 1-015(C)(1), they fail to meet the requirements of Rule 1-015 (C)(2). It requires that BES have reason to know that but for Appellants' mistake it should have been a party to the Complaint for Personal Injury. Therefore, it is not enough to know that there will be litigation but Appellants must show that BES knew that it should be and would have been a Defendant in that litigation. Appellants cannot demonstrate that, thus, relation back is not available. Consequently, the statute of limitation applies barring Appellants' Second Amended Complaint for Damages.

In *Romero v. Ole Tires, Inc.*, 101 NM 759, 688 P.2d 1265 (Ct. App. 1984), the New Mexico Court of Appeals held that an amended complaint adding a new defendant did not satisfy Rule 1-015(C)(2), even though the new defendant knew of the lawsuit before the statute of limitations ran. The plaintiff filed a personal injury complaint against a defendant driver in a motor vehicle accident, but did not learn that the driver was on the job at the time of the accident until after the statute of limitations ran. *Id.* at 760. The plaintiff obtained leave to file an amended complaint to add a claim for respondeat superior against the employer, claiming it related back to the original complaint because the employer had reason to know it was a party that the plaintiff would have sued had the plaintiff known more facts. *Id.* The

defendant admitted that he knew about the lawsuit and that the employee commonly ran errands for the employer, but denied knowing the accident happened on the job or that the company would be sued. *Id.* at 763, 688 P.2d at 1267.

The court recognized that the employer "possessed facts from which, at least on further inquiry, it might have anticipated [the plaintiff's] attempt to add the respondeat superior claim." *Id.* They reasoned that defendant's knowledge of litigation alone does not amount to knowledge that a party should be a defendant in that litigation. *Id.* Further, knowledge of the litigation does not require the defendant to make further inquiry. *Id.* Thus, if the defendant has no knowledge that it should be a party defendant, then relation back doesn't apply. *Id.* at 762, 1266. Therefore, unless timely joined, the employer may rely on the statute of limitations to bar any claims the plaintiff might have. *Id.* at 763, 1267. *See also, Joseph v. Elan Motorsports Technologies Racing Corp.*, 638 F.3d 555, 560 (7th Cir. 2011) (discussing the federal rule that a "potential defendant who has not been named in a lawsuit by the time the statute of limitations has run is entitled to repose – unless it is or should be apparent to that person that he is the beneficiary of a mere slip of the pen, as it were").

BES in this case had no knowledge of the litigation. In *Romero*, the defendant at least had an awareness of the suit, yet this awareness was not sufficient to establish

that the defendant should have known that but for a mistake they would be a party to the suit. *Romero* at 763, 688 P.2d at 1267. BES only knew that an accident had occurred involving a water pump, which resulted in a leg injury. Further, BES relied on reports that investigation was not necessary. In addition, BES had no identity of interest with any other party to the suit. Thus, it was not until receipt of the Second Amended Complaint that BES realized a lawsuit had been filed over of this incident. Therefore, BES, being unaware that an action even existed, had no reason to know that, but for a mistake, the action would be brought against it. Accordingly, relation back does not apply.

In order for a claim to relate back to the original complaint, Rule 1-015(C) requires both that the defendant receive such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits; and that the defendant 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. BES did not receive notice of the action within the prescribed period. Additionally, this lack of notice prejudiced its ability to bring a defense on the merits. Finally, BES did not know that, but for a mistake, the action would have been brought against it. Thus, Appellants fail to satisfy the requirements for relation back under Rule 1-015(C). As such, the district court's judgment in favor of BES' Motion for Summary Judgment was proper and should be affirmed.

IV. CONCLUSION

Appellants' Second Amended Complaint should be deemed filed on January 30, 2012, because BES did not receive notice of the motion to amend. Thus, it violates the applicable three-year statute of limitations. Tolling is not an appropriate solution because the cause of the delay rests on the shoulders of the Appellants. In addition, New Mexico has not adopted this approach, but instead relied on relation-back doctrine in similar cases because it takes into consideration notice and prejudice to the added defendants. Even if tolling were available in New Mexico, it would not apply to this case because, as applied in other jurisdictions, this approach requires notice the added defendants. Here the added defendants did not receive this notice.

Furthermore, the Second Amended Complaint does not relate back to the original pleading. BES did not have sufficient notice of the suit and had no reason to believe that, but for a mistake in fact, Appellants intended to name BES as a defendant. Additionally, the lack of notice prejudices the ability of BES to present a defense. Accordingly, Appellants' Second Amended Complaint against BES is barred by § 37-1-8 NMSA 1978. For these reasons, the District Court's grant of summary judgment to BES was proper. Therefore, this Court should affirm the decision of the District Court.

ORAL ARGUMENT STATEMENT

Defendant-Appellant BES agrees that Oral Argument would be helpful to the Court because the argument for tolling the statute of limitations based on a motion for leave to amend 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 20th day of December, 2012, the original and requisite number of copies of the foregoing brief were hand-delivered to:

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CERTIFICATE OF COMPLIANCE WITH RULE 12-231F

Pursuant to NMRA 12-213(F), I certify that this brief is proportionately spaced in Times New Roman typeface, the point size is 14, and the word count is 5793, exclusive of tables, signature blocks and certificates, as measured by the document properties of my computer program.

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