IN THE COURT OF APPEALS

OF THE STATE OF NEW MEXICO

Ct. App. No. 32,335

KEN SNOW and ALLENE SNOW,

Plaintiffs-Appellants,

vs.

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

Defendants-Appellees.

On Appeal from the First Judicial District Court, Santa Fe County, New Mexico
The Honorable Sheri A. Raphaelson
No. D-101-CV-2011-02530

ANSWER BRIEF

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I. SUMMARY OF PROCEEDINGS

A. Nature of the Case

This lawsuit arises from an injury sustained by Appellant Ken Snow ("Snow") on January 20, 2009, while he was working as an operator for Navajo Refinery in Lovington, New Mexico. On January 30, 2012, Snow and his wife, Allene Snow, ("Appellants") filed claims against Warren Power & Machinery, Inc. ("Warren CAT") as the supplier of a hose and pump that allegedly contributed to Snow's injuries. (*See* RP 219-52.) The district court dismissed Appellants' claims against Warren CAT on summary judgment because those claims were not timely under the applicable three-year statute of limitations. (*See* RP 669.)

B. Statement of Facts

Appellants claim that Snow was injured at Navajo Refinery when "a hose, clamp, fitting and/or valve came loose [from a pump] under [] high pressure, striking [Snow] in the left leg and knee, causing serious injuries from which he continues to suffer." (RP 225, ¶ 28.) There is no dispute that the date of injury was January 20, 2009. (RP 224, ¶ 21.) The hose in question had been manufactured by Midwest Hose & Specialty, Inc. ("Midwest Hose") and sold to Warren CAT. (RP 430.) Warren CAT rented the hose, along with a pump, to Brininstool Equipment Sales ("BES"), which in turn supplied both the pump and hose to Navajo Refinery. (*See id.*)

The day after the incident, Joe Brininstool of BES notified Warren CAT's representative, Rick Vestal, of the accident. (*See* RP 405.) Mr. Vestal went to Navajo Refinery that same day to meet with Navajo Refinery supervisor, Charles Hutchins. (*See* RP 436, Interrog. No 5.) Mr. Hutchins informed Mr. Vestal that the pump and hose were no longer in the same area. (*See id.*) Mr. Hutchins stated that he did not know how the hose or pump could have caused the injury and that he did not believe Warren CAT would be involved. (*See id.*) Mr. Vestal inspected the pump and hose and found both to be operational and without defect. (*See id.*) Midwest Hose representatives also went to the refinery after the accident and confirmed that the accident site had already been cleared and that the hose and pump were still onsite. (*See* RP 425, Interrog. No. 8.)

Appellants filed their Complaint for Personal Injury, Loss of Consortium and Punitive Damages ("Original Complaint") on August 15, 2011, approximately two years and eight months after the accident. (RP 1-24.) The Original Complaint named as defendants Midwest Hose, Gandy Corporation, Repcon, Inc., and Holly Corporation. (*See id.*) Warren CAT was not named as a defendant at that time. (*See id.*) On September 8, 2011, Appellants filed their First Amended Complaint for Personal Injury, Loss of Consortium and Punitive Damages. (*See* RP 37-60.) Again, Warren CAT was not named as a defendant. (*See id.*)

On November 18, 2011, Midwest Hose served on Appellants its Answers, Responses and Objections to Plaintiff Ken Snow's First Set of Interrogatories and First Requests for Production. (*See* RP at 132.) There, Midwest Hose informed Appellants that Warren CAT purchased the hose in question from Midwest Hose. (*See* RP 426-30, Interrog. Nos. 10, 11, 17.) As a result, Appellants were aware at that time that Warren CAT was in the supply chain.

Appellants served Warren CAT with a Subpoena for Production or Inspection on December 13, 2011. (*See* RP 349-56.) Warren CAT responded formally to the subpoena on January 5, 2011, providing documentation of what Appellants already knew from Midwest Hose—that Warren CAT was in the supply chain. (*See* RP 401-12.) Specifically, Warren CAT produced invoices for the pump and hose rented to BES. (*See id.*)

Appellants filed their Motion for Leave to File Plaintiffs' Second Amended Complaint ("Motion to Amend") on January 20, 2012, at 4:23 p.m. (*See* RP 178.) By the Motion to Amend, Appellants sought to add Warren CAT and BES as defendants for the first time. In the Motion to Amend, Appellants conceded that the statute of limitations expired on January 20, 2012, the very day the Motion to Amend was filed. (RP 180, ¶ 10 ("The statute of limitations in this matter runs on January 20, 2012. As such, Plaintiffs must amend their complaint now.").)

Appellants did not serve Warren CAT with the Motion to Amend or the proposed amended complaint.

The Court granted Appellants' Motion to Amend on January 27, 2012. (*See* RP 217-18.) Appellants filed their Second Amended Complaint for Personal Injury, Loss of Consortium and Punitive Damages ("Second Amended Complaint") on January 30, 2012, ten days after the statute of limitations expired. (*See* RP 219-52.)

II. ARGUMENT AND AUTHORITIES

The statute of limitations applicable to personal injury claims is three years. NMSA 1978, § 37-1-8 (1976). This same limitations period also applies to Appellants' loss of consortium claim. *Kilkenny v. Kenney*, 68 N.M. 266, 270, 361 P.2d 149, 151 (1961). Rule 1-003 NMRA provides that an action is not commenced until "filing a complaint with the court." Appellants do not dispute that their complaint against Warren CAT was filed after the statue of limitations expired. Instead, Appellants argue for two exceptions to the statute of limitations.

First, Appellants argue that Rule 1-015(C) NMRA circumvents the statute of limitations by relating the claims against Warren CAT back to the Original Complaint. Second, Appellants argue that New Mexico law should be changed to recognize a new rule that would toll the statute of limitations where a motion to amend is filed within the statutory period. Appellants fail to demonstrate any facts

that would satisfy Rule 1-015(C) or the requirements for tolling as set forth in New Mexico law. Accordingly, summary judgment was proper and should be upheld.

A. Standard of Review

The standard of review applicable to this appeal is de novo. There is no dispute that the claims against Warren CAT were filed after the statute of limitations expired. Instead, the dispute lies in whether the district court correctly applied New Mexico law regarding Rule 1-015(C) and equitable tolling. "When facts relevant to a statute of limitations issue are not in dispute, the standard of review is whether the district court correctly applied the law to the undisputed facts." *Haas Enters., Inc. v. Davis*, 2003-NMCA-143, ¶ 9, 134 N.M. 675, 82 P.3d 42; *see also Ocana v. Am. Furniture, Co.*, 2004-NMSC-018, ¶ 12, 135 N.M. 539, 91 P.3d 58.

In order to overcome 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*, 2004-NMSC-018, ¶ 12 (quoting *Stringer v. Dudoich*, 92 N.M. 98, 99, 583 P.2d 462, 463 (1978)). Similarly, the party seeking to apply Rule 1-015(C) to overcome the statute of limitations bears "the burden of showing the existence of facts that would satisfy the requirements of Rule 15(C)." *Romero v. Ole Tires, Inc.*, 101 N.M. 759, 761, 688 P.2d 1263, 1265 (Ct. App. 1984).

B. The claims against Warren CAT do not relate back to the previous complaints because Appellants have failed to meet the requirements of Rule 1-015(C)(1) & (2).

Rule 1-015(C) NMRA sets forth New Mexico's "relation back" policy. In order for claims against new parties to relate back to the original pleading, specific requirements must be met:

> 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.

(Emphasis added).

There is no dispute that the claims against Warren CAT arose out of the occurrence set forth in the Original Complaint. However, because the Second Amended Complaint "change[es] the party against whom [the] claim is asserted" by adding Warren CAT, the record must demonstrate that both numbered requirements in the rule are met. *Ole Tires*, 101 N.M. at 761, 762, 688 P.2d at

1265, 1266 ("[A]mendments adding or dropping parties as well as amendments that substitute parties fall within the Rule."). Therefore, Appellants must show that

(1) Warren CAT had received notice of the institution of the action such that it would not be prejudiced in maintaining its defense on the merits; *and*

(2) Warren CAT knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against it.

Rule 1-015(C). The record demonstrates that Appellants cannot meet these requirements and summary judgment was therefore appropriate.

1. There are no facts to satisfy the notice requirement of Rule 1-015(C)(1).

Appellants argue that Warren CAT had notice of the action sufficient to satisfy Rule 1-015(C)(1) because Mr. Vestal learned of Snow's injury the day after the accident and because Appellants served a subpoena on Warren CAT after the action was pending. Both of these arguments fail under New Mexico law.

With regard to Rule 1-015(C)(1), this Court has held that "it is not enough that a defendant is aware that an action may be brought by the plaintiff." *Romero v. Bachicha,* 2001-NMCA-048, ¶ 20, 130 N.M. 610, 28 P.3d 1151. Instead, there must be "notice of the institution of the action." *Id.* (internal quotation marks & citation omitted). In other words, the plaintiff must have commenced the action and the unnamed party must have been made aware of the suit. When Mr. Vestal visited Navajo Refinery, the day after the accident, Appellants' suit was over two

years and eight months away. Plainly, there was no way Mr. Vestal could have received "notice of the institution of the action" where no action was yet pending.

Rule 1-015(C)(1) also requires that "notice of the institution of the action" be such that the new party "will not be prejudiced in maintaining his defense on the merits." While the subpoena, issued almost two years and eleven months after the accident, finally did notify Warren CAT of a pending action, this notice was far too late and did not provide enough information to prevent prejudice to Warren CAT. Appellants issued their subpoena on December 13, 2011. (*See* RP 349.) Prior to that time, Warren CAT had never heard of the suit and had not investigated the claim other than Mr. Vestal's brief visit to the refinery the day after the accident. (*See* RP 358, ¶¶ 5, 10, 12.) Even after receiving the subpoena, Warren CAT had no reason to believe it would be joined to the law suit. Warren CAT was never provided a copy of the Original Complaint and had no knowledge of Appellants' specific claims. (*See* RP 358, ¶¶ 7-8.) Warren CAT did not retain counsel and did not notify its insurer of any potential claim because it had no reason to do so. (*See* RP 358-59, ¶¶ 11, 12.)

Statutes of limitations exist in part "to protect prospective defendants from the burden of defending against stale claims while providing an adequate period of time for a person of ordinary diligence to pursue lawful claims." *Garcia v. La Farge*, 119 N.M. 532, 537, 893 P.2d 428, 433 (1995). It was not until after service

of the Second Amended Complaint on February 2, 2012, that Warren CAT had any notice that it would be sued. By that time, Appellants' claims against Warren CAT had become "stale" as a matter of law.

The subpoena did not give Warren CAT adequate notice to prepare its defense within the time contemplated by the statute of limitations. By the time Warren CAT learned it would be sued, over three years had passed since the incident. After three years, memories of the individuals involved were diminished. Documents and other items that may have been critical to the defense may no longer be available. Had Warren CAT received notice that it would be a party to the suit, it could have conducted a more timely investigation of the matter, as well as involved counsel and insurance representatives. Appellants' subpoena did not provide the notice contemplated by Rule 1-015(C)(1) because it did not prevent prejudice to Warren CAT's defense.

2. *There was no mistake or misnomer as required by Rule 1-015(C)(2).*

Even if Appellants could clear the notice hurdle of Rule 1-015(C)(1), the record is empty of support for their argument that Warren CAT "knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against [Warren CAT]." Rule 1-015(C)(2). There are no facts in the record showing that Appellants mistook another defendant for Warren CAT or visa versa. Nor would it have been reasonable for Appellants to

have made such a mistake. Midwest Hose had clearly identified Warren CAT to Appellants in its answers to interrogatories. (*See* RP 426-30, Interrog. Nos. 10, 11, 17.) Furthermore, Appellants' subpoena to Warren CAT demonstrates there was no confusion on the part of Appellants as to Warren CAT's identity.

Appellants argue that the "mistake" is evidenced by Appellants' efforts through discovery and subpoena to find out "who provided the parts which ultimately injured Ken Snow." (Appellants' Br. in Chief at 16.) This is not the type of "mistake" contemplated by Rule 1-015(C)(2). Mistake under Rule 1-015(C)(2) does not entail failure to name a potential party that a plaintiff did not initially know about. *Ole Tires*, 101 N.M. at 762, 688 P.2d at 1266 ("The word 'mistake,' as used in Rule 15(c), does not ordinarily encompass failure to include a proper party as a result of lack of knowledge that the party exists."). Appellants must show "more than the absence of a potentially liable party." *Id.* There must be evidence of mistaken identity or "misnomer". *Id.*

This Court's analysis in *Ole Tires* is instructive for and even determinative of this appeal. 101 N.M. at 763, 688 P.2d at 1267. In that case, the plaintiff initially filed his personal injury complaint against a defendant driver in a motor vehicle accident. *Id.* at 760, 688 P.2d at 1264. Later, after the limitations period had expired, the plaintiff learned that the defendant driver was working at the time of the accident. *Id.* Thereafter, the plaintiff amended his complaint to add the

employer, arguing that the amended complaint should relate back because the employer had reason to know it would have been sued had the plaintiff known more facts. *Id.* Indeed, the employer well knew about the existence of the suit as the defendant employee had notified the president of his company of the accident and even provided the president with the complaint. *Id.* at 763, 688 P.2d at 1267. The president admitted that he knew about the suit within the limitations period. *Id.*

This 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." This was not, however, the type of mistake contemplated by Rule 1-015(C)(2) NMRA. *Id.* "On these facts, [the employer] was entitled to assume that, unless joined within the limitations period, the statute would bar any claims that [the plaintiff] might have against [the employer]." *Id.*

As in *Ole Tires*, there is no mistaken identity or misnomer here. Appellants knew Warren CAT's identity well enough to serve a subpoena. Appellants did not misname Warren CAT, nor did they mistake Warren CAT for some other entity or some other entity for Warren CAT. Like the employer in *Ole Tires*, Warren CAT knew there was litigation, but had no reason to believe that Appellants had mistakenly failed to name it as a defendant. Under these circumstances, Warren CAT "was entitled to assume that, unless joined within the limitations period, the

statute would bar any claims that [Appellants] might have against [Warren CAT]." *Id.*

Because the facts on record do not satisfy the requirements of Rule 1-015(C)(1) and (2), Appellants' claims fail to relate back to the Original Complaint and are subject to dismissal under the statute of limitations.

C. Appellants have failed to satisfy the requirements under New Mexico law for tolling the statute of limitations.

Having failed to meet the requirements of Rule 1-015(C), Appellants next argue that the statute of limitations was equitably tolled by the filing of the Motion to Amend. By their argument, Appellants are asking the Court to adopt a bright-line rule whereby statutes of limitations are tolled "for the period of time between the filing of a motion to amend and a court's ruling on that motion." (Appellants' Br. in Chief at 12.) Appellants correctly acknowledge that New Mexico has never recognized such a specific exception, making it an issue of first impression. (*See id.* at 11-14.) What Appellants fail to address, however, is that New Mexico's clearly-stated policy with regard to equitable tolling amounts to a rejection of Appellants' argument.

New Mexico has adopted the United States Supreme Court's policy with regard to statutes of limitations: "[T]he purpose of a statue of limitations is to 'put defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights.'" *Butler v. Deutsche Morgan Grenfell, Inc.*, 2006-NMCA-084, ¶ 23,

140 N.M. 111, 140 P.3d 532 (quoting *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 352 (1983)). Accordingly, the two key considerations for tolling the statute of limitations are whether (1) there was adequate notice of the suit to Warren CAT and (2) whether there were any extraordinary circumstances to excuse Appellants from sleeping on their rights. The record supports neither consideration.

1. Equitable tolling of the statute of limitations is improper because Warren CAT did not have sufficient notice of Appellants' claims.

The first tolling consideration is whether there was adequate notice to the potential defendant. *See Butler*, 2006-NMCA-084, ¶ 23. Under New Mexico law, the timely notice of suit provided by a statute of limitations is important "to protect prospective defendants from the burden of defending against stale claims." *Garcia*, 119 N.M. at 537, 893 P.2d at 433. This policy consideration is built into the requirements of Rule 1-015(C)(1) discussed at length in Part II.B.1 of this brief. Rule 1-015(C)(1) requires that the potential defendant have "received such notice of the institution of the action that [it] will not be prejudiced in maintaining [its] defense on the merits." This same notice analysis is appropriate in considering whether equitable tolling is warranted. *See Curry v. Turner*, 832 So. 2d 508, 512-14 (Miss. 2002) (applying Rule 15 and its notice requirement when asked to consider whether a motion to amend tolls the statute of limitations).

Because the requirements of Rule 1-015(C)(1) mirror New Mexico's notice policy with regard to the statute of limitations, the same arguments set forth in Part II.B.1 of this brief apply here. Mr. Vestal's visit to Navajo Refinery did not provide any notice of a pending lawsuit, nor did it give Mr. Vestal any reason to believe that Warren CAT would be sued in this case. Mr. Hutchins could not provide any information as to how the accident occurred and did not give any indication that the pump or the hose was defective. (*See* RP 436, Interrog. No 5.) Mr. Vestal inspected the pump and hose for himself and did not find any defect. (*See id.*) For their part, Appellants gave no actual or constructive notice of the suit to Warren CAT at any time prior to their third party Subpoena to Warren CAT.

That subpoena did not provide Warren CAT with notice that it would be part of a lawsuit. *See supra* Part II.B.1. The subpoena did not indicate that the hose or pump was defective or that Appellants believed Warren CAT was responsible for the injury. (*See* RP 349-56.) The fact that Appellants served Warren CAT with a subpoena and not a complaint only confirmed to Warren CAT that Appellants had no interest in suing Warren CAT. If Appellants had intended to sue Warren CAT, they easily could have done so, as they had already done with the four defendants appearing on the caption of the subpoena. (*Id.*)

By the time Warren CAT was served with the Second Amended Complaint on February 2, 2012, Warren CAT was saddled with the burden of "defending

against stale claims." *Garcia*, 119 N.M. at 537, 893 P.2d at 433. There was no opportunity for Warren CAT to prepare its defense in a timely manner. New Mexico policy does not favor such an outcome. *Butler*, 2006-NMCA-084, ¶ 23.

Many of the cases cited by Appellants from other jurisdictions stress the importance of notice to potential defendants prior to the expiration of the limitations period. In *Moore v. Indiana*, the statute of limitations was enforced because the plaintiff's motion to amend did not timely notify the potential defendants that they would be added to the suit. 999 F.2d 1125, 1131 (7th Cir. 1993). Following the same reasoning, in *Gloster v. Pa. R.R. Co.*, the court found a motion to amend satisfied the statute of limitations where the potential defendant had notice of the motion to amend before the limitations period expired and even had a chance to be involved in a hearing opposing the motion. 214 F. Supp. 207, 209 (W.D. Pa. 1963). In *Nett v. Bellucci*, we learn that Massachusetts requires plaintiffs to serve a potential defendant with a motion to amend, even though the potential defendant is not yet a party to the action. 774 N.E.2d 130, 138 (Mass. 2002). There, the court found that treating a motion to amend as the commencement of an action was appropriate because Massachusetts's unique rule ensures timely notice. *Id.* Of course, no such rule exists in New Mexico, and Appellants did not serve Warren CAT with their Motion to Amend. Similarly, in *Rademaker v. E.D. Flynn Export Co.*, the court found it compelling that the

plaintiff's application to amend was more than a mere motion for leave to amend, but was a "complete amendment" for which "process was issued and served upon defendant, before any right of action against it was barred." 17 F.2d 15, 17 (5th Cir. 1927).

Appellants never provided notice of their motion to amend to Warren CAT within the limitations period, a critical finding in each of the above referenced cases. In short, allowing Appellants' motion to amend to toll the limitations period would thwart the policy behind enforcement of statutes of limitations in New Mexico and other jurisdictions of ensuring timely notice of suit to a potential defendant.

2. *The statute of limitations should not be tolled because there is no extraordinary circumstance to excuse Appellants for not diligently pursuing their claims against Warren CAT.*

The second consideration under New Mexico law for tolling the statute of limitations is whether there is an exceptional circumstance excusing a plaintiff's failure to diligently pursue his or her claims. The statute of limitations is to "prevent plaintiffs from sleeping on their rights." *Butler*, 2006-NMCA-084, ¶ 23 (internal quotation marks & citations omitted).

In New Mexico, "[e]quitable tolling typically applies in cases where a litigant was prevented from filing suit because of an extraordinary event beyond his or her control." *Ocana*, 2004-NMSC-018, ¶ 15 (citing *Martinez v. Orr*, 738

F.2d 1107, 1110 (10th Cir. 1984)). Similarly, the Federal Tenth Circuit has held that equitable tolling of a statute of limitations applies only in "rare and exceptional circumstances." *Laurson v. Leyba*, 507 F.3d 1230, 1232 (10th Cir. 2007) (internal quotation marks & citation omitted). Specifically, the Tenth Circuit requires the following elements: "'(1) that [the litigant] has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way.'" *Yang v. Archuleta*, 525 F.3d 925, 928 (10th Cir. 2008) (quoting *Lawrence v. Florida*, 549 U.S. 327, 336 (2007)).

Other jurisdictions also look to whether circumstances beyond a plaintiff's control justify late filing. In most of the cases cited by Appellants, the plaintiffs filed motions to amend to add new parties well *before* the limitations period expired, but the trial courts delayed ruling on the motions until well *after* the limitations period. In other words, the trial courts, not the plaintiffs, caused the delay. *See Longo v. Pa. Elec. Co.*, 618 F. Supp. 87 (W.D. Pa. 1985) (motion to amend filed two months before end of limitations period, but ruling delayed for over four months) *aff'd mem.*, 856 F.2d 183 (3d Cir. 1988); *Eaton Corp. v. Appliance Valves Co.*, 634 F. Supp. 974 (N.D. Ind. 1984) (motion to amend filed a month and a half before end of limitations period, but ruling delayed for almost four months) *aff'd*, 790 F.2d 874 (Fed. Cir. 1986); *and Nett v Bellucci*, 774 N.E.2d 130 (Mass. 2002) (motion to amend filed over a month before statute of repose, but

ruling was delayed five weeks). Further, some of the cases cited by Appellants involve extremely short limitations periods making it difficult for the parties to amend pleadings through the trial court in time. *See Mayes v. AT & T Info. Sys. Inc.*, 867 F.2d 1172 (8th Cir. 1989) (limitations period of only six months); *Gloster v. Pa. R.R. Co.*, 214 F. Supp. 207 (W.D. Pa. 1963) (limitations period of only one year).

The case Appellants find most illustrative is *Perez v. Paramount Communications, Inc.*, 686 N.Y.S.2d 342 (N.Y. 1999). (*See* Appellants' Br. in Chief at 11, 12.) There, the plaintiff filed a motion to amend *five months* prior to the end of the limitations period. *Id.* at 343. The trial court waited nearly five months to grant the motion, preventing the plaintiff from timely filing the amended complaint. *Id.* The appellate court allowed the motion to amend to toll the statute of limitations, reasoning that the court's approval of the motion was outside the plaintiff's control, thus creating an exceptional circumstance justifying late filing. *See id.* at 344-45.

None of these cases illustrates a scenario like the one here. Appellants had three years to file a claim, but waited until 4:23 p.m. on the day the limitations period expired to file their Motion to Amend. (*See* RP 178.) The District Court had *no* opportunity to rule on the motion within the limitations period. It should be noted that the district court promptly granted Appellants' request within a week.

(*See* RP 217-218.) Had Appellants given the district court a chance, there is no doubt Appellants could have timely filed its claims against Warren CAT. Appellants, not the district court, caused the delay.

There is no excuse for Appellants' decision to postpone filing the Motion to Amend until the day the statute expired. Appellants had three years to investigate and discover each entity in the supply chain. New Mexico is not sympathetic to a plaintiff's failure to timely discover a potential party. *See Ole Tires.*, 101 N.M. at 762, 688 P.2d at 1266. Regardless, Appellants actually knew about Warren CAT and its place in the supply chain as early as November 18, 2011, two months before the statutory period expired. (*See* RP 426-30, Interrog. Nos. 10, 11, 17.) Nothing prevented Appellants from filing a separate complaint or a motion to amend at that time. Instead, Appellants served a subpoena on December 13, 2011, knowing that the end of the limitations period was only five weeks away. Warren CAT's January 5, 2011, response to the subpoena did not provide any new information to Appellants regarding Warren CAT's position in the supply chain. Even if it had, Appellants had over two weeks after the response to file a separate action to preserve their claim.

At no point did the district court or any party prevent or delay Appellants filing a claim against Warren CAT within the statutory period. Appellants can

point to no "extraordinary event beyond [their] control" to excuse their failure to diligently pursue their claims. *Ocana*, 2004-NMSC-018, ¶ 15.

3. *Under New Mexico law, Appellants could have filed a separate cause of action to preserve their claims and ensure timely notice to Warren CAT.*

Nothing prevented Appellants from timely filing a separate cause of action against Warren CAT to preserve their claims. In so doing, Appellants could have ensured full compliance with the statute of limitations and timely notice to Warren CAT. Thereafter, Appellants easily could have joined the new action to the preexisting action. Failing to take this simple step demonstrates that Appellants were "sleeping on their rights" and not diligently pursuing their claims. *Butler*, 2006-NMCA-084, ¶ 23 (internal quotation marks & citation omitted).

While some of the jurisdictions cited by Appellants do not favor the option of simply filing a separate action, Appellants have failed to alert the Court as to New Mexico's policy in this regard. In *Butler*, the appellant argued that filing a separate suit may have preserved his claim, but "courts and the Rules of Civil Procedure generally promote the litigation of similar issues affecting similarly situated parties in one piece of litigation, rather than promoting piecemeal litigation." *Id.* ¶¶ 18, 19 (internal quotation marks & citation omitted). This Court flatly rejected this "vague policy argument," finding that there was nothing preventing appellant from filing a separate cause of action. *Id.* ¶ 19. The Federal

District Court of New Mexico has likewise rejected this argument. *See Lymon v. Aramark Corp.*, 728 F. Supp. 2d 1207, 1221 (D.N.M. 2010) (holding that there is no extraordinary circumstance to justify tolling the statute of limitations when a plaintiff could have filed a cause of action separate from the pending action to preserve his claims), *aff'd*, No. 11-2210 2010 U.S. App. Lexis 21186 (10th Cir. Oct. 11, 2010).

III. CONCLUSION

For the foregoing reasons, Appellee Warren Power & Machinery, Inc. d/b/a Warren CAT respectfully asks this Court to affirm the order of the district court in all respects.

Respectfully submitted,

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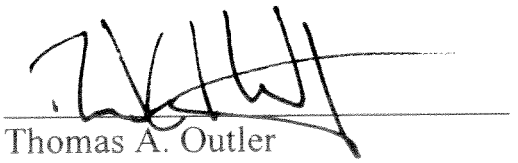
By: 

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I hereby certify that a true copy of the foregoing Answer Brief was sent by regular First Class Mail to the following counsel of record this 22nd day of January, 2013:

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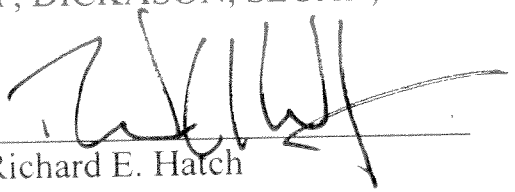
By: 
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