IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

KEN SNOW and ALLEN SNOW,

Petitioners-Plaintiffs,

v. **No. 34,501**

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

Respondents-Defendants.

On Writ of Certiorari to the New Mexico Court of Appeals

BRIEF OF AMICUS CURIAE NEW MEXICO DEFENSE LAWYERS ASSOCIATION

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I. INTRODUCTION

This appeal arises out of the District Court granting summary judgment in favor of Respondents based on a statute of limitations defense. Petitioners filed a Motion for Leave to File Plaintiffs' Second Amended Complaint (the "Motion") with the District Court on January 20, 2012. [RP 178] Therein, Petitioners sought to add Warren Power & Machinery, Inc. ("Warren") and Brininstool Equipment Sales ("BES") (collectively "Respondents") as defendants in the lawsuit. [RP 179-80] The District Court granted the Motion on January 27, 2012. [RP 217] Petitioners then filed the Second Amended Complaint for Personal Injury, Loss of Consortium and Punitive Damages (the "Second Amended Complaint") on January 30, 2012. [RP 219] On March 7, 2012, Warren moved for summary judgment on the basis that the statute of limitations for Petitioners' claims ran on January 20, 2012[1], ten days prior to the filing of the Second Amended Complaint. [RP 337] BES subsequently sought summary judgment based on the same position on May 4, 2012. [RP 479] On June 18, 2012, the District Court entered orders granting summary judgment in favor of Respondents. [RP 667-69]

Following the entry of summary judgment in favor of Respondents, Petitioners filed a Notice of Appeal to the Court of Appeals. [RP 679] Petitioners, in their appeal, argued that the mere filing of the Motion should have tolled the applicable statute of

[1] It is undisputed that the injury forming the basis of Petitioners' claims occurred on January 20, 2009 and that the applicable statute of limitations is three (3) years.

limitations and that the Second Amended Complaint should relate back to the filing of the original complaint based on the relation-back theory found in Rule 1-015(C) NMRA. The Court of Appeals disagreed and affirmed the District Court, holding there was no evidence to support application of equitable tolling or relation-back theory and that any tolling was limited to the date the order granting the Motion was entered. *See Snow v. Warren Power & Mach., Inc.*, 2014-NMCA-054, ¶ 25. The Court of Appeals further held that since Petitioners did not file the Second Amended Complaint until three (3) days after the Motion was granted, any tolling expired and the Second Amended Complaint was filed beyond the applicable statute of limitations with respect to its claims against Respondents. *Id.* at ¶ 21.

The Petitioners next filed a Petition for Writ of Certiorari (the "Petition") with this Court, seeking review of the opinion issued by the Court of Appeals. However, following the filing of the Petition, Petitioners and Respondents reached an agreement on the settlement of all claims. As a condition of the settlement, Petitioners agreed to withdraw the Petition. This Court has declined Petitioners' request and has invited the New Mexico Trial Lawyers' Association and the New Mexico Defense Lawyers' Association ("NMDLA") to file amicus briefs.

NMDLA, appearing as *amicus curiae* at the request of this Court, advocates that the Petition should be quashed as moot or, in the alternative, the opinion of the Court of Appeals should be affirmed because New Mexico law provides adequate remedies

for a plaintiff filing of a motion to amend to add new parties on the eve of the statute of limitations expiring. In the event this Court chooses to adopt a rule specific to the filing of a motion to amend to add new parties on the eve of the statute of limitations expiring, NMDLA urges advanced written notice to the proposed new parties and the adoption of a strict deadline for the filing of the amended complaint. NMDLA will, to a large extent, not address the specific facts of the present case because the parties have settled, thereby making any potential factual dispute moot.

II. ARGUMENT

A. This Court should quash the Petition for Writ of Certiorari as moot.

This Court should quash the Petition because the issue before this Court is now moot. "As a general rule, this Court does not decide moot cases." *Gunaji v. Macias*, 2001-NMSC-028, ¶ 9, 130 N.M. 734, 31 P.3d 1008. "A case is moot when no actual controversy exists and the court cannot grant actual relief." *Id.* (internal citation and quotes omitted). "One of the underlying precepts of the doctrine of mootness is a limitation upon jurisdiction or decrees in cases where no actual controversy exists." *Mowrer v. Rusk*, 1980-NMSC-113, 95 N.M. 48, 51, 618 P.2d 886, 889. No actual controversy exists in this case because Petitioners resolved their legal claims against Respondents by way of a mutually agreeable settlement following the filing of the Petition. This Court should, therefore, quash the Petition as moot.

The fact specific nature of the applicable inquiry and well-reasoned opinion authored by the Court of Appeals alleviate the need for this Court to issue an opinion. NMDLA recognizes there are exceptions to the mootness doctrine. "[T]his Court may review moot cases that present issues of substantial public interest or which are capable of repetition yet evade review." *Gunaji*, 2001-NMSC-028, ¶ 10. "Among the criteria considered in determining the existence of the requisite degree of public interest are the public or private nature of the question presented, the desirability of an authoritative determination for future guidance of public officers, and the likelihood of future recurrence of the question." *Mowrer*, 1980-NMSC-113, 95 N.M. at 51, 618 P.2d at 889. "[A]n issue can be capable of repetition ... even though the parties are unlikely to litigate the same issue again." *Garcia v. Dorsey*, 2006-NMSC-052, ¶ 16, 140 N.M. 746, 149 P.3d 62 (citation omitted). "It is sufficient that the issue be capable of repetition in some future lawsuit; the identity of the parties is irrelevant." *Id.* (citation omitted).

Equitable tolling and application of the relation-back theory are fact specific inquiries unlikely to be repeated beyond the general legal principles provided by the Court of Appeals. Though the merits of the opinion issued by the Court of Appeals will be addressed in-depth in subsequent sections of this brief, it is sufficient to state at this juncture that the inquiry conducted by the Court of Appeals was fact specific. For example, the Court of Appeals had to determine the following issues of fact. Were

Petitioners mistaken in identifying the defendants? *See Snow*, 2014-NMCA-054, ¶ 14 ("[T]here was no attempt [by Petitioners] to assert that a mistake was made concerning the identity of Warren CAT ... ."). Did Petitioners exercise due diligence in identifying Respondents? *See id.* ("Plaintiffs failed to present evidence that they exercised due diligence in regard to their investigation and identification of Warren CAT as an additional defendant earlier in the proceedings."). Did Petitioners diligently pursue their rights? *See id.* at ¶ 23 ("Plaintiffs failed to present the district court with evidence that they have diligently pursued their rights or that extraordinary circumstances stood in their way."). Were Respondents aware of the lawsuit prior to filing of the amended complaint? *See id.* at ¶ 12 ("Since Brininstool had no notice of the institution of the action prior to being served with the second amended complaint, we conclude that Plaintiffs failed to satisfy the requirements of Rule 1-015(C)(1)."). Since the inquiry performed by the Court of Appeals was fact specific, it is unlikely to present a "future recurrence of the question" or be "capable of repetition." In other words, while the general legal issue may arise again, it is unlikely to do so under the exact set of facts considered by the Court of Appeals. Moreover, the opinion issued by the Court of Appeals, which is sound, provides sufficient "authoritative determination for future guidance of public officers." It is, therefore, not necessary for this Court to issue an opinion on the moot issues presented in the Petition.

Moreover, issuing a ruling on an issue that has been resolved via a voluntary settlement will discourage settlements. "Public policy favors settlement of cases." *King v. Allstate Ins. Co.*, 2007-NMCA-044, ¶ 17, 141 N.M. 612, 159 P.3d 261 "[I]t is imperative that the judiciary encourage settlement when at all possible." *Wilson v. Gillis*, 1986-NMCA-112, 105 N.M. 259, 262, 731 P.2d 955, 958. There are a myriad of reasons a party elects to settle a claim. For example, a party may seek finality from settlement. *See Hovet v. Allstate Ins. Co.*, 2004-NMSC-010, ¶ 26, 135 N.M. 397, 89 P.3d 69 (Refusing to "allow a third-party claimant who settles to later bring a claim against the insurance company for not settling" because it would "frustrate the policy reasons, like finality, that encourage settlement."). Another reason a party may elect to settle is to avoid further costs of litigation. *See Wilson*, 1986-NMCA-112, 105 N.M. at 262, 731 P.2d at 958 ("The essence of settlement is that a tortfeasor will pay a sum certain ... and the accompanying lawsuit and expenses will terminate as far as that tortfeasor is concerned."). Avoiding an adverse determination under the law is yet another reason to settle. *King*, 2007-NMCA-044, ¶ 17 ("Settling a case does not necessarily involve establishment of liability that carries the weight of a judicial determination.").

This Court issuing a ruling on a topic made moot via a voluntary settlement would discourage future settlements. NMDLA does not know the reasons Petitioners and Respondents chose to settle; however, such reasons presumably include fear of an

adverse ruling on the issues presented in this appeal (especially for Respondents, who were effectively dismissed from the case via the District Court's ruling). Moreover, Petitioners and Respondents presumably chose to settle in order to avoid any further fees or costs. By this Court declining to quash the Petition, as requested by the parties, neither party may enjoy the benefit of the bargain. Both parties must now expend fees and costs on a matter thought closed via settlement. Both parties also lose the benefit of finality. Given the lack of public interest in a fact specific issue and the potential to discourage settlements, this Court should quash the Petition as moot.

B. Existing New Mexico law provides adequate options for a plaintiff seeking to add a new party to a lawsuit on the eve of the expiration of an applicable statute of limitations.

This Court should decline to adopt any new rule specifically addressed to the filing of a motion to amend tolling the statute of limitations because New Mexico law already provides ample options to a plaintiff. The essential question presented to the Court of Appeals in this case was whether or not the filing of the Motion should have automatically tolled the applicable statute of limitations. *See Snow*, 2014-NMCA-054, ¶ 1. Petitioners argued, generally, that the mere act of filing the Motion should toll the statute. *See id.* at ¶ 19. This Court, however, should reject such an argument because New Mexico law provides ample options for a plaintiff seeking to add a new party to a lawsuit on the eve of an expiring statute of limitations.

Equitable tolling is one option available to a plaintiff who is prevented from bringing suit against the proper party for reasons beyond his or her control. "New Mexico directly recognizes the distinct legal theory of equitable tolling." *Slusser v. Vantage Builders, Inc.*, 2013-NMCA-073, ¶ 13, 306 P.3d 524. "Equitable tolling is a nonstatutory tolling theory which suspends a limitations period." *Ocana v. American Furniture Co.*, 2004-NMSC-018, ¶ 15, 135 N.M. 539, 91 P.3d 58. It "typically applies in cases where a litigant was prevented from filing suit because of an extraordinary event beyond his or her control." *Id.* A "litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Slusser*, 2013-NMCA-073, ¶ 13 (citation omitted). The Court of Appeals, in the present case, correctly held, based on a detailed analysis of the undisputed material facts, that Petitioners did not satisfy the necessary elements of an equitable tolling claim.[2] Nonetheless, equitable tolling is one option available under New Mexico law to a

[2] NMDLA presumes the Court of Appeals properly "view[ed] the facts in a light most favorable to the party opposing the motion and [drew] all reasonable inferences in support of a trial on the merits." *Bernalillo BCC v. Chavez*, 2008-NMCA-028, ¶ 11, 178 P.3d 828. However, since Petitioners and Respondents have settled their claims, a detailed analysis of the facts in this brief is unnecessary.

plaintiff seeking to add a new party to an existing lawsuit before the statute of limitations runs.[3]

The relation-back theory is a second option available in certain circumstances to a plaintiff seeking to add a new party to the lawsuit.

> 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. "Relation back in Rule 1-015(C) is permissible where the nature of the claim in the amended complaint would remain unchanged from that asserted in the original complaint and would arise out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, and where the party opposing the amendment cannot show prejudice if the amendment is allowed."

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[3] In unusual situations, due process considerations may serve to extend an applicable statute of limitations. *See Garcia on Behalf of Garcia v. La Farge*, 1995-NMSC-019, 119 N.M. 532, 541, 893 P.2d 428, 437 ("We reaffirm the principle that considerations of fairness implicit in the Due Process Clauses of the United States and New Mexico Constitutions dictate that when the legislature enacts a limitations period it must allow a reasonable time within which existing or accruing causes of action may be brought.").

Martinez v. Segovia, 2003-NMCA-023, ¶ 24, 133 N.M. 240, 62 P.3d 331 (internal quotes omitted). "For relation back to apply, the added party, within the limitation period, must know or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him." *DeVargas v. State, ex rel. New Mexico Dept. of Corrections*, 1981-NMCA-109, 97 N.M. 447, 451, 640 P.2d 1327, 1331. As with equitable tolling, the Court of Appeals correctly held, based on a detailed analysis of the undisputed material facts, that Petitioners had not satisfied the elements of relation-back theory. In other words, Petitioners failed to show BES had "notice of the institution of the action" or Warren was not named as a defendant "but for a mistake concerning the identity of the proper party." The relation-back theory, however, is another option available to a plaintiff seeking to add a new party on the eve of or beyond expiration of an applicable statute of limitations.

A plaintiff, beyond equitable tolling and relation-back theory, could also simply file a new lawsuit against the new party before the statute of limitations runs. Though such a choice might place a burden on the plaintiff to prosecute two lawsuits arising out of essentially the same occurrence and injury, principles of fairness make such a burden just. *See Butler v. Deutsche Morgan Grenfell, Inc.*, 2006-NMCA-084, ¶ 19, 140 N.M. 111, 140 P.3d 532 (Court rejects "vague policy argument" that promotion of singular lawsuits should preclude filing of a separate lawsuit in the face of an expiring

statute of limitations). As stated previously, in the event the addition of a new party was the result of events beyond the plaintiff's control, equitable tolling would provide protection. *See Ocana*, 2004-NMSC-018, ¶ 15. However, a plaintiff who is not diligent as to claims against the new party should have to bear the burden of potentially litigating two lawsuits.

Moving for consolidation of the two lawsuits would place the courts in position to protect the interests of the parties. "When actions involving a common question of law or fact are pending within a judicial district, the court may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay." Rule 1-042 NMRA. A plaintiff who seeks to add a new party to a lawsuit on the eve of the expiration of the statute of limitations could move to consolidate a new lawsuit into the existing one rather than filing an amended complaint. By requiring a plaintiff to seek consolidation, it would permit the courts to evaluate whether or not the new party will suffer any prejudice as a result of being added to an existing lawsuit at the eleventh hour. *See Roark v. Farmers Group, Inc.*, 2007-NMCA-074, ¶ 55, 142 N.M. 59, 162 P.3d 896 ("While it is clear that actions pending at different stages of discovery may be consolidated, consolidation further along in the proceedings will result in diminished savings of time and expense.") (citation omitted).

In the *Roark* case, the Court of Appeals reversed an order of consolidation because "consolidation will not save the parties from having to conduct further discovery on the claims [since] trial preparation by the parties and trial court in the first lawsuit was finished long before the second suit was even filed." *Roark*, 2007-NMCA-074, ¶ 55. Permitting the filing of a motion to amend to automatically toll the applicable statute of limitations results in no protection to the rights and interests of the proposed new party. Instead, requiring a plaintiff to pursue the existing option of filing a new lawsuit against the new party, and seeking to consolidate, protects the new party by giving it an opportunity to oppose consolidation if it would be prejudiced due to the status of the original lawsuit.

This Court does not need to adopt a new rule in order to protect the interests of a plaintiff seeking to add a new party to a lawsuit on the eve of the expiration of the statute of limitations. Equitable tolling, the relation-back theory, and the ability of a plaintiff to file a new lawsuit and move to consolidate provide a plaintiff with multiple, viable options for addressing such a situation. Absent a plaintiff acting less than diligently, which this Court should not reward, all of these options are potentially available to a plaintiff under existing New Mexico law. This Court should, therefore, affirm the opinion of the Court of Appeals or quash the Petition.

C. Any new rule addressed to the tolling of the statute of limitations upon the filing of a motion to amend should include written notice to the proposed new party and a strict deadline for filing the amended complaint.

This Court, in the event it chooses to adopt a specific rule permitting tolling of a statute of limitations upon the filing of a motion to amend, should require notice to the proposed new party and impose a strict deadline for filing the amended complaint. "[T]he purpose of a statute of limitations is to put defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights." *Butler*, 2006-NMCA-084, ¶ 23 (citation and internal quotes omitted). By requiring written notice to the proposed new party, this Court would ensure the new party is "put ... on notice of adverse claims" prior to the running of the applicable statute of limitation even though plaintiff may not yet have permission to file the amended complaint. *See* Rule 1-015(A) NMRA ("[A] party may amend his pleading only by leave of court ... .").[4] This Court, for example, could require a plaintiff to mail both the motion to amend and proposed amended complaint to the new party. "[I]n the few cases where the plaintiffs filed their amended complaints after their motions to amend were granted, those plaintiffs had diligently provided notice of their complaints to the defendants they were seeking to add." *Snow*, 2014-NMCA-054, ¶ 20. By requiring written notice to the new party, this Court would permit the new party an opportunity to intervene in

[4] Rule 1-015(A) NMRA also permits the filing of an amended complaint without leave of court so long as plaintiff has the "written consent of the adverse party;" however, many scheduling orders require leave of court to file an amended complaint beyond a specified date.

granting leave being entered. Such a rule would protect plaintiffs from the "factors for

[5] Opposition to an eleventh hour motion to amend could include arguments regarding potential prejudice similar to those available in opposition to a motion to consolidate, which were discussed in the prior section of this brief.

delay" cited by Petitioners, such as "scheduling a hearing, a judge being reassigned, retiring, or absent for an extended period of time for medical reasons," since a plaintiff would have ten (10) days to file the amended complaint even if the statute of limitations ran due to unreasonable delay by the court in granting a motion to amend. *See Snow*, 2014-NMCA-054, ¶ 20. For example, in the event a plaintiff filed a motion to amend two months prior to expiration of the applicable statute of limitations, but the motion is not granted until after the running of the statute, that plaintiff would have ten (10) days from entry of the order to file the amended complaint.

A plaintiff who sits on his or her rights, however, as Petitioners did in this case, should not be rewarded for such a delay. A plaintiff who files a motion to amend to add a new party less than ten (10) days before the running of the statute of limitations should not be given the full ten (10) days to file the amended complaint. Instead, that plaintiff should only have the number of days remaining under the statute to file the amended complaint upon entry of the order. For example, in the present case, Petitioners filed the Motion on the day the statute of limitations ran. Under the rule being proposed by NMDLA, the Court of Appeals was correct in concluding Petitioners had to file the amended complaint on the date the order granting leave to do so was entered.

Since Petitioners were "sleeping on their rights," it would be unjust to permit them an extra ten days to file the amended complaint simply because they filed a

motion to amend. Rather, justice dictates that a plaintiff who waits until the last moment to file a motion to amend should be given very little time to file the amended complaint upon entry of the order.[6] Though NMDLA urges this Court to quash the Petition as moot, any rule adopted by this Court specifically addressed to tolling upon the filing of a motion to amend should include both written notice to the proposed new party and a limited deadline to file the amended complaint.

III. CONCLUSION

For the foregoing reasons, the New Mexico Defense Lawyers' Association respectfully requests this Court quash the Petition for Writ of Certiorari as moot. In the alternative, the New Mexico Defense Lawyers' Association respectfully requests this Court affirm the opinion of the Court of Appeals. Finally, in the event this Court chooses to adopt a specific rule permitting tolling of a statute of limitations upon the filing of a motion to amend, New Mexico Defense Lawyers' Association respectfully requests this Court require advance written notice to the proposed new party and a strict deadline for the filing of the amended complaint.

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[6] As stated previously herein, Petitioners could avail themselves of equitable tolling or other options in the event they can show the delay was a result of some factor beyond their control.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have mailed a true copy of the Brief of *Amicus Curiae* New Mexico Defense Lawyers Association to the following counsel of record this 14th day of July, 2014.

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