



Fall 2013

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Recommended Citation

J. Walker Boyd, *Same As It Ever Was? Summary Judgement and Antitrust Suits in New Mexico after Romero v. Philip Morris*, 43 N.M. L. Rev. 553 (2013).

Available at: <http://digitalrepository.unm.edu/nmlr/vol43/iss2/8>

SAME AS IT EVER WAS? SUMMARY JUDGMENT AND ANTITRUST SUITS IN NEW MEXICO AFTER *ROMERO V. PHILIP MORRIS*

J. Walker Boyd*

I. INTRODUCTION

*Romero v. Philip Morris Inc.*¹ was a class-action lawsuit against various cigarette companies for an alleged conspiracy to raise the price of cigarettes in violation of New Mexico antitrust laws. In *Romero*, the New Mexico Supreme Court weighed its traditional role as the ultimate arbiter of New Mexico law² against a New Mexico statute requiring courts to follow federal courts in the antitrust context.³

This note argues that the effect of *Romero* is to muddy any distinction between the New Mexico and federal standards for summary judgment in the antitrust context. For this reason, *Romero* fails to provide clear guidance to lower courts because it neither adopts nor rejects the federal summary judgment standard in the antitrust context. This note further concludes that despite the New Mexico Supreme Court's rejection of the federal summary judgment standard, the holding in this case is in line with federal courts' summary dispositions in price-fixing cases, not an application of the higher New Mexico standard. In short, the New Mexico summary judgment standard, which generally favors jury trials, may be of little assistance to future antitrust plaintiffs when federal courts have already disposed of similar cases at the summary judgment stage.

* J.D. 2014, University of New Mexico. This article is dedicated to my parents—without their incredible support I would not be where I am today. I also thank Andy Schultz for providing access to a transcript of the trial court's bench ruling as well as both parties' briefing in support of and in opposition to the defendants' motions for summary judgment.

1. 2010-NMSC-035, 242 P.3d 280.

2. See N.M. CONST. art. VI, § 3.

3. See NMSA 1978, § 57-1-15 (“Unless otherwise provided in the Antitrust Act, the Antitrust Act shall be construed in harmony with judicial interpretations of the federal antitrust laws. This construction shall be made to achieve uniform application of the state and federal laws prohibiting restraints of trade and monopolistic practices.”).

II. BACKGROUND

A. Factual Background

The 1980s brought dramatic changes to the cigarette market. Liggett, a manufacturer whose market share had declined from 21.3 percent in 1947 to only 2.9 percent in 1982,⁴ developed in 1980 a “generic” cigarette, which it offered to consumers at a list price 25 to 40 percent lower than the list price of other companies’ premium-brand cigarettes.⁵ Liggett’s price cut caused turmoil in the cigarette market; Philip Morris’s market dominance began to erode, with its flagship Marlboro brand losing market share precipitously.⁶

In response to this new competitive pressure, on April 2, 1993, Philip Morris announced significant price decreases for its premium, discount, and deep-discount brands.⁷ The day of its announcement was dubbed “Marlboro Friday.”⁸ R.J. Reynolds Tobacco Co. (RJR), Brown & Williamson Tobacco Corp. (B&W), and other major cigarette companies implemented similar price cuts in their premium and discount cigarette lines.⁹ The price moves reduced the number of price levels for cigarettes in the American market from ten to two.¹⁰ Following this decline in retail prices, Philip Morris, B&W, and RJR incrementally increased the prices of their premium- and discount-brand cigarettes “in near lock-step fashion.”¹¹ By August 1999, the price of a pack of cigarettes—either generic or premium—was above pre-Marlboro Friday levels.¹²

Federal courts had already disposed of antitrust claims based on the cigarette companies’ post-Marlboro Friday behavior well before Ms. Romero filed her complaint in New Mexico. In *Holiday Wholesale Grocery*

4. FED. TRADE COMM’N, COMPETITION AND THE FINANCIAL IMPACT OF THE PROPOSED TOBACCO INDUSTRY SETTLEMENT 18 (1997), available at <http://www.ftc.gov/reports/tobacco/ndoc95.pdf>.

5. *Id.* at 2.

6. See *Romero*, 2010-NMSC-035, ¶ 3, 242 P.3d 280, 285.

7. *Id.* The supreme court accepted these facts as stated in the court of appeals’ decision. *Id.* n.1.

8. *Id.* ¶ 3, 242 P.3d at 285.

9. *Id.*

10. *Romero v. Philip Morris, Inc.*, 2009-NMCA-022, ¶ 10, 203 P.3d 873, 878. The price of a pack of cigarettes before Marlboro Friday varied because cigarette manufacturers made cigarettes at different lengths and under premium, branded and unbranded labels. *Id.* See *Williamson Oil Co., Inc. v. Philip Morris USA*, 346 F.3d 1287, 1292–93 (11th Cir. 2003) for a more detailed account of the consolidation in the number of different prices charged at retail outlets for a pack of cigarettes.

11. *Romero*, 2010-NMSC-035, ¶ 3, 242 P.3d 280, 285.

12. *Id.*

v. Philip Morris Inc.,¹³ a federal district court granted the cigarette companies' motions for summary judgment when it found that the testimony by plaintiffs' economic expert did not provide the required evidence tending to exclude the possibility of "conscious parallelism" based on oligopolistic behavior.¹⁴ The court made extensive findings of fact and conducted an in-depth analysis of relevant federal antitrust law as well as the dynamics of the cigarette market. The Eleventh Circuit affirmed the district court's ruling.¹⁵

B. *A Short History of Summary Judgment in New Mexico*

The New Mexico standard for summary judgment has been, from time to time, both conflated with and distinguished from the federal standard.¹⁶ In *Bartlett v. Mirabal*,¹⁷ the New Mexico Court of Appeals entertained arguments that the state should adopt a summary judgment standard identical to the prevailing federal standard.¹⁸ The court even considered whether New Mexico courts had already adopted the federal standard.¹⁹

In *Bartlett*, the court of appeals rejected the U.S. Supreme Court's primary holding in *Anderson v. Liberty Lobby, Inc.*²⁰ that a court ". . . must take into account the heightened burden of proof the plaintiff non-movant must satisfy at trial."²¹ In a special concurrence, Judge Alarid argued that New Mexico courts had previously applied the federal summary judgment standard and that the majority's characterization of

13. 231 F. Supp. 2d 1253 (N.D. Ga. 2002).

14. *Id.* at 1320–21 (providing as an example: "A firm in a concentrated industry typically has reason to decide (individually) to copy an industry leader. After all, a higher-than-leader's price might lead a customer to buy elsewhere, while a lower-than-leader's price might simply lead competitors to match the lower price, reducing profits for all. One does not need an agreement to bring about this kind of follow-the-leader effect in a concentrated industry." (internal citation omitted)).

15. *See Williamson*, 346 F.3d 1287.

16. *See* Christopher David Lee, *Summary Judgment in New Mexico Following Bartlett v. Mirabal*, 33 N.M. L. REV. 503 (discussing the genesis of summary judgment in New Mexico and deploring the supreme court's decision to quash certiorari in *Bartlett*).

17. 2000-NMCA-036, 999 P.2d 1062.

18. *Id.* ¶ 6, 999 P.2d at 1064.

19. *Romero*, 2009-NMCA-022, ¶ 15, 203 P.3d 873, 879 ("We at one time expressed the opinion that federal and our own state's constructions of summary judgment do not differ substantively[.]") (quotation omitted)).

20. 477 U.S. 242 (1986).

21. *Romero*, 2009-NMCA-022, ¶ 15, 203 P.3d 873, 879.

summary judgment was tenuous.²² Judge Alarid concluded that “adoption of *Anderson* or *Celotex* should be accomplished, if at all, by *express* directive of our [s]upreme [c]ourt.”²³

C. Trial Proceedings in New Mexico

The class of plaintiffs in *Romero* consisted of New Mexico consumers who purchased cigarettes between November 1, 1993 and April 10, 2000 (the date the lawsuit was filed).²⁴ The plaintiffs filed suit against Philip Morris, B&W, RJR, and other cigarette companies in New Mexico District Court, alleging violations of New Mexico antitrust and consumer protection laws.²⁵

After discovery, the cigarette firms filed motions for summary judgment, arguing that the plaintiffs had failed to provide evidence that tended to exclude independent, parallel behavior as a possible explanation for the price increases, as required by federal case law.²⁶ The plaintiffs submitted the testimony of an expert who concluded that the defendants’ conduct was the result of a conspiracy but who also noted that he could not rule out the possibility that lawful parallel conduct was the true cause of the price increases.²⁷ The defendants argued that the plaintiffs’ expert’s equivocal testimony did not satisfy the federal “tends to exclude” requirement and supported their motions with affidavits by their CEOs denying the existence of any conspiracy to fix the price of cigarettes.²⁸

The plaintiffs faced an uphill battle. They had to argue that although summary judgment for the cigarette manufacturers had been granted in near-identical cases before a federal court, it should be denied here because the New Mexico standard for summary judgment was more stringent than the federal standard. The defendants responded that the New Mexico standard for summary judgment in antitrust cases was identical to the federal standard because NMSA 1978, Section 57-1-15 requires New

22. *Bartlett*, 2000-NMCA-036, ¶ 41–42, 999 P.2d 1062, 1070 (Alarid, J., concurring) (“[New Mexico cases] are equally indicative of a tendency to treat federal and state summary judgment standards as interchangeable.”).

23. *Id.* ¶ 50, 999 P.2d at 1072 (Alarid, J., concurring) (citing to both *Anderson* and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)).

24. *Romero*, 2010-NMSC-035, ¶ 3, 242 P.3d 280, 285.

25. *Id.* ¶ 4, 242 P.3d at 286.

26. *Id.*

27. The supreme court concluded that the expert “actually thought it was just as likely that Defendants would have behaved in the same manner if they were acting independently and not under an illegal price-fixing agreement[.]” *Romero*, 2010-NMSC-035, ¶ 24, 242 P.3d 280, 293–294.

28. *Romero*, 2009-NMCA-022, ¶ 20, 203 P.3d 873, 880.

Mexico courts to construe state antitrust laws in harmony with federal courts' interpretation of federal antitrust laws, and the trial judge agreed.²⁹

The trial judge issued a bench ruling granting the defendants' motions.³⁰ The judge first considered whether New Mexico's higher summary judgment standard had any significance in this case, or if NMSA 1978, Section 57-1-15 required New Mexico courts to adopt the federal standard in antitrust cases. The trial judge said "I don't find [Section 57-1-15] particularly persuasive as it relates to a standard for summary judgment, because summary judgment, of course, is a procedural mechanism, the basis and standards of which would be set by our [s]upreme [c]ourt and not by our legislature."³¹ The trial judge continued:

[T]here is a real question here, because the federal standards [sic] for summary judgment as it relates to a price-fixing case or this type of case is obviously far more evolved; primarily, because we don't have a lot of law in New Mexico on antitrust cases, and I see no reason why the New Mexico courts wouldn't adopt the more evolved, procedural standard that's developed in the federal courts; in fact, I think it's almost a certainty that they will.

To the extent the New Mexico courts might have language in certain cases addressing different standards for summary judgment, none of those, in my view, apply to this type of a case. . . . I believe that . . . our Supreme Court will conclude that the appropriate standards are the same standards that have been applied in federal court So I believe that the standard I will apply here will be the same—or that was applied by the federal courts is the same that I'm obligated to apply here.³²

III. RATIONALE

A. *Court of Appeals*

The court of appeals reversed the trial courts' grant of summary judgment with respect to Philip Morris, B&W, and RJR.³³ The court rejected the defendants' argument that the Eleventh Circuit's grant of summary judgment in similar litigation³⁴ merited the same result in New

29. Transcript of Proceedings, D-0117-CV-200000972 at 66.

30. *Id.* at 70.

31. *Id.* at 65–66.

32. *Id.* at 66–67.

33. *Romero*, 2010-NMSC-035, ¶ 5, 242 P.3d 280, 286.

34. *Williamson*, 346 F.3d 1287 (11th Cir. 2003).

Mexico courts, finding that the Eleventh Circuit's ruling "necessarily incorporated a less rigorous federal summary judgment standard" than the New Mexico standard.³⁵

The court of appeals held that under the New Mexico standard, a "reasonable jury" could conclude that the defendants had violated New Mexico antitrust and consumer protection laws.³⁶ The court of appeals reached its conclusion primarily from the testimony of the plaintiffs' expert,³⁷ but it also rejected arguments that the alleged price-fixing conspiracy was implausible. The court noted that the "complex, multi-variable, multi-price-tier parallelism" that characterized the cigarette market in New Mexico during the alleged period of price fixing was not easily explained under the rubric of legal "conscious parallelism," and pointed to several federal court decisions supporting this conclusion.³⁸ The court then distinguished *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*,³⁹ in which the U.S. Supreme Court held that an antitrust plaintiff was required to produce evidence that "tended to exclude" the possibility that price increases were the result of permissible competitive conduct.⁴⁰ The New Mexico Court of Appeals held that *Romero* was factually distinguishable from *Matsushita* because *Matsushita* concerned predatory price decreases, not oligopolistic price increases.⁴¹ The court stated that "[w]here a claim is plausible and does not implicate facially procompetitive behavior, more liberal inferences from the evidence should be permitted than in *Matsushita* because the attendant dangers from drawing inferences recognized in *Matsushita* are not present."⁴²

B. The Supreme Court

On appeal, the New Mexico Supreme Court considered two issues: 1) the articulation of the New Mexico summary judgment standard and 2) whether applying state or federal case law would produce different summary judgment results.⁴³ Although the New Mexico Supreme Court agreed with the court of appeals' interpretation of the New Mexico sum-

35. *Romero*, 2009-NMCA-022, ¶ 15, 203 P.3d 873, 879.

36. *Id.* ¶¶ 27–29, 203 P.3d at 883–84.

37. *Id.* ¶ 39, 203 P.3d at 887.

38. *Id.* ¶ 40, 203 P.3d at 887.

39. 475 U.S. 574 (1986).

40. *Id.* at 597.

41. *Romero*, 2009-NMCA-022, ¶ 41, 203 P.3d 873, 887.

42. *Id.* ¶ 42, 203 P.3d at 887–88 (quoting *In re Flat Glass Antitrust Litigation*, 385 F.3d 350, 358 (3d Cir. 2004)) (internal quotations omitted).

43. *Romero*, 2010-NMSC-035, ¶ 6, 242 P.3d 280, 287.

mary judgment standard, it reversed the court of appeals on the second issue.⁴⁴

Addressing the appropriate summary judgment standard in New Mexico state court, the supreme court noted that “New Mexico courts, unlike federal courts, view summary judgment with disfavor, preferring a trial on the merits.”⁴⁵ The supreme court surveyed New Mexico and federal cases to illustrate the difference between the federal standards.⁴⁶ The court further noted that important U.S. Supreme Court cases such as *Anderson v. Liberty Lobby, Inc.*⁴⁷ had created a requirement that courts “consider the substantive evidentiary burden at the summary judgment stage, thus creating a heightened evidentiary burden for those opposing summary judgment.”⁴⁸ The supreme court accordingly affirmed the court of appeals’ conclusion that the New Mexico summary judgment standard is higher than the standard that prevails in federal courts.⁴⁹

The supreme court then aligned Rule 1-056(C) NMRA with the federal “plus factor” doctrine to require that the trial court “view the plaintiffs’ evidence in light of the defendants’ evidence to determine whether the plaintiffs’ evidence tends to exclude the possibility that defendants were acting independently.” The court further noted, “[w]hether the Court [of Appeals] want[s] to call them plus factors or not, the requirement that the plaintiffs tend to exclude independent conduct does not change.”⁵⁰

The supreme court concluded that the court of appeals’ holding “requires a different quantum of proof than the federal court and, as a result, fails to construe our law in harmony with federal law.”⁵¹ In other words, plaintiffs’ circumstantial evidence of a conspiracy was not enough to satisfy the requirements of New Mexico and (as incorporated by statute) federal antitrust law because the evidence was just as consistent with independent lawful action as it is with price fixing.⁵² The supreme court disagreed with the court of appeals’ conclusion that the plaintiff’s evidence excluded the possibility of independent action, because the evidence on the record was too ambiguous to satisfy the baseline federal

44. *Id.* ¶ 34, 242 P.3d at 296–99.

45. *Id.* ¶ 8, 242 P.3d at 287.

46. *Id.*

47. *Anderson*, 477 U.S. 242.

48. *Romero*, 2010-NMSC-035, ¶ 8, 242 P.3d 280, 287–88 (citing 11 James William Moore, *Moore’s Federal Practice* § 56.03[3] at 56–36 (3d ed. 2007)).

49. *Id.* ¶ 9, 242 P.3d at 288.

50. *Id.* ¶ 17, 242 P.3d at 291 (citing Rule 1-056(C) NMRA).

51. *Id.* ¶ 21, 242 P.3d at 292.

52. *Id.* ¶ 34, 242 P.3d at 296.

evidentiary requirement.⁵³ The supreme court reversed the court of appeals on this ground and affirmed the trial court's initial grant of summary judgment in favor of the defendants.⁵⁴

IV. ANALYSIS

A. *Benefits of a Bright-Line Rule*

The trial court rejected the defendants' argument that NMSA 1978, Section 57-1-15 required it to apply the federal standard for summary judgment in antitrust cases. It reached this conclusion because the summary judgment standard is a procedural standard set by the New Mexico Supreme Court, not the legislature.⁵⁵ Instead, the trial court decided that the federal standard applied in state antitrust actions because it was more "evolved" than the relatively small body of New Mexico antitrust case law and therefore more likely to be preferred by New Mexico appellate courts.⁵⁶ The court of appeals disagreed, holding that the well-established prejudice against summary judgment in New Mexico courts made the federal courts' summary disposition of similar litigation irrelevant to the summary judgment analysis.⁵⁷

The dispositions by the trial court and the reversal by the court of appeals called for the New Mexico Supreme Court to address whether the federal summary judgment standard should be applied in New Mexico antitrust suits for policy or statutory reasons. Instead, the supreme court affirmed the court of appeals' articulation of the summary judgment standard but reversed its application of the standard. Because it did not discuss the reasoning expressly employed by the trial court when it ruled on the defendants' motions for summary judgment, the supreme court left open the question of whether its discussion of summary judgment was actually necessary to its holding. If the court of appeals' error lay in its failure "to ensure uniform application of state and federal antitrust law,"⁵⁸ then the question of whether it (or even the district court) correctly applied New Mexico procedural rules was unnecessary. Moreo-

53. *Id.* ¶ 34, 242 P.3d at 296–98.

54. *Id.* ¶ 38, 242 P.3d at 299.

55. *See* N.M. CONST. art. VI, § 3.

56. *See* text accompanying *supra* note 32.

57. *See Romero*, 2009-NMCA-022, ¶ 16, 203 P.3d 873, 880 (The New Mexico summary judgment standard "requires us to engage in our own independent review of the record, and we are not relieved of this responsibility merely because some other court has granted summary judgment, or upheld a grant of summary judgment, applying analogous substantive law to a similar record.").

58. *Romero*, 2010-NMSC-035, ¶ 25, 242 P.3d 280, 294.

ver, the decision to use *Romero* as a vehicle for assessing the court of appeals' holding in *Bartlett v. Mirabal* for the first time seems curious, given the presence of complicated questions of federal substantive law and New Mexico's separate, non-procedural harmonization statute.

The New Mexico Supreme Court echoed the U.S. Supreme Court in *Anderson* by distinguishing the summary judgment analysis from the court's determination of whether a genuine issue of material fact exists under Rule 1-056 NMRA. In order to determine whether a fact is material, the court noted, a court should look to "whether, under substantive law, the fact is necessary to give rise to a claim."⁵⁹ As applied to this case, the court concluded that "substantive material antitrust law is the filter through which we must determine whether genuine issues of material fact exist."⁶⁰ The supreme court couched this analysis with its holding that it is a substantive requirement of federal law that reasonable inferences must be able to be drawn from ambiguous evidence.⁶¹

It is easy to confuse the federal evidentiary requirement (evidence that tends to exclude) with the procedural requirements of summary judgment at both the federal and state level (there must be a genuine issue as to a material fact). This is partly because the federal evidentiary requirement characterizes the type of evidence required, not merely evidence supporting an element of the plaintiff's claim. Even though the two requirements are different, they overlap. If the New Mexico standard is indeed more favorably disposed to jury trials than the federal standard, then even sparse evidence that could be reasonably characterized as tending to exclude the possibility of conscious parallelism would be sufficient to avoid summary judgment in New Mexico.

The fact that the supreme court agreed with the court of appeals about the correct standard but disagreed as to whether summary judgment was proper under this standard indicates the existence of just the kind of ambiguity that would justify summary judgment in federal court but that would preclude summary judgment in New Mexico state court.

This result militates in favor of acknowledging that the federal summary judgment standard should apply in antitrust cases in New Mexico. This is so because every close case decided at the summary judgment stage will lead to the inevitable quarrels about whether the district court correctly applied the New Mexico summary judgment standard. This problem is even larger in the antitrust context, where the federal substantive law, which must be followed, is inhospitable to ambiguity. It appears

59. *Id.* ¶ 11, 242 P.3d at 288 (quoting *Eoff v. Forrest*, 1990-NMSC-033, ¶ 20, 789 P.2d 1262, 1269).

60. *Id.* (citing NMSA 1978, § 57-1-15).

61. *Id.* ¶ 21, 242 P.3d at 292.

that this was the case in *Romero*, where the court of appeals' reversal of the district court was itself reversed based on differing opinions as to whether the expert's testimony was ambiguous under New Mexico procedural rules or substantive federal law.

The second argument for adopting the federal summary judgment standard in New Mexico antitrust cases centers around the same policy rationale referenced by the trial court and cited by the New Mexico legislature when it passed NMSA 1978, Section 57-1-15: federal courts have greater experience trying antitrust cases, and binding New Mexico courts with federal precedent, both substantive and procedural, makes for sound economic policy. Although the trial court refused to read Section 57-1-15 as requiring the application of federal procedural law, its decision to apply it was based on the same policy rationale adopted by the legislature when it passed the harmony statute in the first instance. The court of appeals and the supreme court were not required to address the trial court's rationale in granting summary judgment. Nonetheless, the trial court's rationale provides a more convincing reconciliation of the New Mexico summary judgment rule and Section 57-1-15.

On the other hand, the historical relationship between state and federal antitrust enforcement suggests that states should take a more innovative role in antitrust enforcement. Common law and statutory antitrust enforcement by the states predate federal laws.⁶² President Woodrow Wilson, who presided over the passage of the Clayton Act, objected to the creation of an antitrust authority with quasi-judicial authority to regulate interstate corporations.⁶³ The framework ultimately chosen by Congress leaves regulation of corporations in the hands of individual states and

62. See Douglas H. Ginsburg, *Comparing Antitrust Enforcement in the United States and Europe*, 1 J. COMP. L. & ECON. 427, 429 (2005) ("State involvement in antitrust actually predates federal involvement; in addition to the common law governing restraints of trade in every jurisdiction, 26 states had some form of antitrust statute on their books when the Sherman act was passed in 1890."). See also Daniel A. Crane, *Antitrust Antifederalism*, 96 CAL. L. REV. 1, 14-15 (2008) ("the [antitrust approach] actually adopted in the 1890 Sherman Act . . . divorce[d] antitrust law from corporate law and model[ed] it instead on the common law's prohibition on restraints of trade.").

63. See Crane, *supra* note 62, at 21 (" . . . [W]hen Senator Cummins issued a report proposing various powers for the soon-to-be created Federal Trade Commission, Wilson objected to only one of them: the power directly to structure interstate corporations through regulation. Although Cummins argued that such prophylactic 'quasi-judicial' power would allow the Commission to make competition policy 'vastly more effectual' than could the courts, Wilson saw this as merely Roosevelt's model of an unholy partnership between the Government and the trusts. Wilson declared that although 'the opinion of the country' supported a commission, 'it would not wish to see it empowered to make terms with monopoly or in any sort to assume control of busi-

envisions concurrent federal and state enforcement of antitrust regulations, implying that state courts ought to have the freedom to interpret antitrust law in different ways in order to protect the rights of those injured by anticompetitive behavior within their jurisdictions as well as experiment with new approaches to antitrust enforcement. This contrasts with the European approach, which puts greater stock in coordinated antitrust efforts and more centralized enforcement powers.⁶⁴

The argument in favor of adopting the federal summary judgment standard in New Mexico antitrust cases should win out because it ensures compliance with the command of Section 57-1-15 while reducing the chances that future “close cases” will clash with federal decisions with similar or identical facts and legal issues.

Regardless, deciding between a more activist role in enforcing antitrust laws in New Mexico by encouraging more jury trials on the one hand and, on the other, deferring to government policy requires the supreme court to answer a question it avoided in *Romero*: Is New Mexico required to adopt the federal summary judgment in antitrust cases, either by Section 57-1-15 or for the policy considerations mentioned above? If not, then wasn't summary judgment improper in this case, where it seems reasonable minds could differ as to whether the plaintiffs had produced evidence that tended to exclude the possibility of conscious parallelism?

B. Did Romero actually create a higher standard for summary judgment in New Mexico?

The supreme court's decision to reverse the court of appeals' application of the New Mexico summary judgment standard raises the question of which standard will apply in the future. Although a recitation of New Mexico's prejudice against pre-trial disposition of cases gives the impression that summary judgment should be granted rarely, the court's analysis provides little guidance to lower courts. Imagine, for example, the application of the holding in *Romero* in the medical malpractice context. If the plaintiff's expert testified that she believed an injury during surgery was the result of treatment that fell beneath the standard of care, but she could not eliminate the possibility of natural causes, would the defendant be entitled to summary judgment?

Defendant files a motion for summary judgment. Assuming both experts' testimony is admissible,⁶⁵ summary judgment is improper under the

ness, as if the government made itself responsible.' The Commission's powers would have to be prohibitory, not structural.") (internal citations omitted).

64. See generally Ginsburg, *supra* note 62 (comparing U.S. and E.U. antitrust regimes).

65. See *Zia Trust v. Aragon*, 2011-NMCA-076, ¶ 15, 258 P.3d 1146, 1150.

heightened standard articulated by the court of appeals in *Bartlett* and ostensibly adopted by the Supreme Court in *Romero*. The reason for this result is clear: two expert witnesses reach opposite conclusions. As long as either expert's conclusions can be reasonably believed, the determination of the case would be resolved by a finder of fact.⁶⁶

Faced with similar facts in *Romero*, the supreme court concluded that summary judgment was nonetheless appropriate, even under the more jury trial-friendly New Mexico summary judgment rule. Thus, although a putative antitrust plaintiff in New Mexico remains entitled to a more deferential summary judgment standard, the *Romero* court's rule does not provide much protection when the events giving rise to the plaintiff's claims are the same or similar to those that gave rise to earlier federal court litigation (as was the case in *Romero*). In other words, the federal summary judgment standard will continue to play a significant role in New Mexico antitrust cases, at least insofar as it influences the disposition of similar antitrust claims before trial in federal court.

V. CONCLUSION

It seems strange that the New Mexico Supreme Court would choose an antitrust case to clarify its summary judgment doctrine, and its disposition of the case seems stranger still. The trial judge concluded that Section 57-1-15 does not require that federal procedural law be applied to New Mexico antitrust suits, but that New Mexico courts should apply this standard anyway because federal case law in the antitrust area was more evolved than New Mexico's. The supreme court affirmed the trial court's conclusion but not its reasoning, ignoring the plausible argument that New Mexico courts should apply the federal summary judgment standard, at least in the antitrust context. By affirming the court of appeals' choice of the appropriate summary judgment standard while reversing the court's application of the same standard, the supreme court demonstrated that "reasonable minds"⁶⁷ could indeed differ as to whether the evidence before the trial court at the summary judgment stage tended to exclude the possibility of conscious parallelism as required by federal substantive law.

The supreme court's refusal to explicitly adopt or reject the federal summary judgment standard in the antitrust context leaves open the pos-

66. This hypothetical is a greatly simplified adaptation of the facts and holdings of the New Mexico Court of Appeals in *Blauwkamp v. Univ. of New Mexico Hosp.*, 114 N.M. 228, 836 P.2d 1249 (Ct. App. 1992).

67. *Romero*, 2010-NMSC-035, ¶ 7, 242 P.3d 280, 287 (quoting *Montgomery v. Lomos Altos, Inc.*, 2007-NMSC-002, ¶ 16, 150 P.3d 971, 976-77).

sibility that New Mexico courts will apply New Mexico's higher summary judgment in antitrust suits based not on whether the plaintiff has raised a genuine issue as to material fact but instead on whether the issues have previously been litigated in federal court. This could bring about perverse results: a plaintiff who raises claims already addressed by other federal courts will be at a disadvantage to a plaintiff who raises a novel claim, even though traditional doctrines of preclusion (i.e., *stare decisis*, *res judicata*, and collateral estoppel) do not apply.⁶⁸ Although this outcome will perhaps reduce the chance that plaintiffs will seek out New Mexico courts as favorable forums to litigate antitrust class actions, this policy consideration was not discussed by the *Romero* court. Instead, the court undermined its explicit policy rationale for a higher summary judgment standard⁶⁹ by preventing this case from going before a jury.⁷⁰

68. Indeed, if the Court of Appeals reversed the district court by rejecting federal procedural rules and instead “engag[ing] in independent and rigorous evaluation of the evidence” required by New Mexico’s heightened standard, one could argue that the Court of Appeals’ holding is a perfect illustration of the confusion the supreme court’s rule does nothing to address. *Romero*, 2009-NMCA-022, ¶ 5, 203 P.3d 873, 876.

69. *See, e.g., Romero*, 2010-NMSC-035, ¶ 8, 242 P.3d 280, 720–21 (“New Mexico courts, unlike federal courts, view summary judgment with disfavor, preferring a trial on the merits.”).

70. *See Romero*, 2009-NMCA-022, ¶ 15, 203 P.3d 873, 879–80 (“[W]e recognize that there may be cases where a New Mexico court will allow a case to go to trial on the same record on which a federal court would grant summary judgment.”).