Bartlett Revisited: The Impact of Several Liability on Pretrial Procedure in New Mexico - Part Two

Ted Occhialino

Recommended Citation
Available at: https://digitalrepository.unm.edu/nmlr/vol35/iss1/4

This Article is brought to you for free and open access by The University of New Mexico School of Law. For more information, please visit the New Mexico Law Review website: www.lawschool.unm.edu/nmlr
I. INTRODUCTION

The New Mexico Supreme Court knew that the adoption of comparative negligence and several liability would require significant adjustments to the rules of civil procedure in order to accommodate the changes in the substantive law. The court's decision substituting comparative negligence for contributory negligence noted that opponents of the change "assert that existing statutes, doctrines, and uniform jury instructions will be subject to confusion, uncertainty, and revision if we adopt comparative negligence." The court accepted this as inevitable, signaled that it might have to make changes in court rules or jury instructions, and declared its "great faith in the ability of our state's trial judges to sort out any problems that may arise." Soon after New Mexico replaced joint and several liability with several liability based on comparative fault, the court again acknowledged that "the rules must be adjusted and made suitable to fit the changes in the substantive law."

The adjustment process has been ongoing for more than twenty years. The supreme court has drafted new uniform jury instructions to reflect the proper interaction of several liability and civil procedure but has not rewritten any civil procedure rules in response to the changes in substantive law. Instead, New Mexico courts have confronted the resulting procedural issues on an ad-hoc basis in the ordinary course of litigation. A series of cases has reconstrued rules of civil procedure to authorize changes required by the adoption of several liability. This common law process is slower than the wholesale modification of procedure rules, but the courts benefit from concrete problems in the natural setting of actual litigation. Many procedural problems have been addressed and resolved; some have
been considered but not finally determined. Still others have not yet arisen in
reported cases but inevitably will in the future.

As the courts seek to strike a just balance between substance and procedure,
litigants seek to gain procedural advantages from the developing law. Problems and
opportunities abound for both plaintiffs and defendants. In the pretrial phase of
several liability litigation, plaintiffs must consider the impact of several liability on
the decision of how many tortfeasors to sue, and how to plead the fault of many
persons without having defendants use those pleadings as admissions that benefit
a defendant’s attempt to lay off fault on third parties. Plaintiffs also must anticipate
that defendants may seek to lay off fault on tortfeasors initially unknown to the
plaintiff and must have a strategy for identifying and suing the additional tortfeasors
before the applicable statute of limitations has run.

Defendants must decide which of the three available alternatives offers the best
means to raise the defense of the fault of others, weighing the tactical benefits and
detriments of each. Because defendants bear the burden of proving the fault of
others and plaintiffs often oppose their attempts to do so, defendants also must be
prepared for the possibility that plaintiffs or other defendants might seek summary
judgments of non-liability of other defendants, leaving one defendant as the sole
wrongdoer, fully liable to the plaintiff. Defendants sometimes must decide whether
to defend at all, and all parties must consider the problems that arise when a
defendant defaults rather than defending against a claim of liability.

The process of fully integrating procedural jurisprudence with the substantive
doctrine of several liability is not complete. There is, however, a sufficient body of
case law to permit an initial assessment of judicial attempts to adjust the procedural
rules to accommodate the changed substantive law and to identify issues that have
yet to be addressed.

II. PLEADING: PLAINTIFF’S PERSPECTIVE

A. The Need to Identify All Tortfeasors

The adoption of several liability complicates the plaintiff’s pre-litigation
planning. When joint and several liability applied, the plaintiff could obtain full
recovery by suing only one of several possible tortfeasors if that tortfeasor were

aff’d sub nom. Borrego v. Cunningham, 164 U.S. 612 (1896), overruled in part on other grounds by Territory v.
McGinnis, 10 N.M. 269, 61 P. 208 (1900).
8. See infra notes 13-23, 48-71 and accompanying text.
9. See infra notes 24-47 and accompanying text.
10. See infra notes 195-283 and accompanying text.
11. See infra note 24.
12. See infra notes 76-194 and accompanying text.

In causes of action to which several liability applies, any defendant who establishes that the fault
of another is a proximate cause of a plaintiff’s injury shall be liable only for that portion of the
total dollar amount awarded as damages to the plaintiff that is equal to the ratio of such
defendant’s fault to the total fault attributed to all persons, including plaintiffs, defendants, and
persons not party to the action.

Id.
provably liable and had sufficient assets to pay the judgment.\textsuperscript{14} The task of identifying and suing other tortfeasors fell upon the targeted defendant who might seek contribution\textsuperscript{15} or indemnity\textsuperscript{16} from them if held liable for all the plaintiff’s injuries.

Several liability requires that the plaintiff engage in a different strategy: to obtain full recovery, the plaintiff now must sue each tortfeasor. The plaintiff must try to identify all tortfeasors before filing the lawsuit and must determine if one or more of them are jointly and severally liable for all of the plaintiff’s injuries pursuant to the exceptions to the general rule of several liability.\textsuperscript{17} If no tortfeasor is jointly and severally liable, the plaintiff usually should sue each identified tortfeasor to assure full recovery. Sometimes, however, a plaintiff may choose not to sue a known potential tortfeasor who would be severally liable. A plaintiff might forego a claim against a potential tortfeasor whose liability is doubtful, whose percentage of fault is likely to be very low, or who lacks assets to pay its percentage of the total damages.\textsuperscript{18}

A plaintiff who identifies and plans to sue numerous severally-liable tortfeasors must decide whether to join them in a single lawsuit or sue them in separate actions.\textsuperscript{19} Joining all in a single lawsuit is the norm.\textsuperscript{20} Where, however, a tortfeasor is not subject to personal jurisdiction in the plaintiff’s chosen forum or would destroy subject matter jurisdiction in a federal diversity action, the plaintiff might choose to file separate actions against some tortfeasors. A plaintiff also might forego joining multiple tortfeasors as co-defendants if their presence would create procedural problems more daunting than the gains to be realized from joining them.\textsuperscript{21} The decision whether to join defendants or sue them separately can be influenced by tactical disadvantages to a plaintiff that flow from the doctrine of collateral estoppel if the plaintiff sues multiple tortfeasors separately. For example, in subsequent litigation, the plaintiff may be bound by an earlier defeat but will not be able to use a victory in the first lawsuit to preclude relitigation of common issues in the subsequent litigation.\textsuperscript{22} Moreover, when separate actions are a sound tactical

\textsuperscript{14} "[J]oint and several liability'...mean[s] that either of two persons whose concurrent negligence contributed to cause plaintiffs' injury and damage may be held liable for the entire amount of the damage caused by them." Bartlett v. N.M. Welding Supply, Inc., 98 N.M. 152, 154, 646 P.2d 579, 581 (Ct. App. 1982).

\textsuperscript{15} See NMSA 1978, §§ 41-3-1 to 41-3-8 (1987).


\textsuperscript{18} A plaintiff may be obligated to identify in the complaint persons who are potential tortfeasors but have not been joined and to state the reasons for not joining them. See Rule 1-019(C) NMRA; infra notes 243–283 and accompanying text.

\textsuperscript{19} See Rule 1-020(A) NMRA (providing that plaintiff “may” join multiple defendants severally liable if there is a common question of law or fact and the claims arise from the same occurrence or series of occurrences).

\textsuperscript{20} See Tipton v. Texaco, Inc., 103 N.M. 689, 693, 712 P.2d 1351, 1355 (1985) (emphasizing that all known tortfeasors who can be joined should be made parties).

\textsuperscript{21} For example, multiple defendants in several liability cases may be entitled to separate peremptory challenges during jury selection. Sewell v. Wilson, 101 N.M. 486, 492–93, 684 P.2d 1151, 1157–58 (Ct. App. 1984), while a single plaintiff is limited in the number of challenges it may exercise. See Rule 1-038(E) NMRA; Gallegos v. Citizens Ins. Agency, 108 N.M. 722, 734, 779 P.2d 99, 111 (1989) (listing considerations). Multiple defendants may also be able to each exercise one peremptory challenge to the trial judge while a single plaintiff only gets one such challenge. See Rule 1-088.1(A)–(B) NMRA; NMSA 1978, § 38-3-9 (1985).

choice for the plaintiff, defendants sued separately may use procedural devices to gather the separate cases into a single action.23

B. The Statute of Limitations Problem

A critical factor in the plaintiff’s planning is the applicable statute of limitations. If the plaintiff files the lawsuit shortly before the statute of limitations will run, the plaintiff’s failure to identify and sue all possible defendants can have disastrous consequences. The defendant might raise the affirmative defense24 of the “fault of others” without naming the other tortfeasors in the answer.25 The plaintiff then must engage in discovery to learn the identity of the additional alleged tortfeasors and decide whether to join them in the action. If the statute of limitations runs before the plaintiff learns the identity of the additional tortfeasors, the plaintiff may be unable to join them in the lawsuit.26

Some states provide a remedy by rule or statute for plaintiffs who discover the identity of additional tortfeasors after the applicable limitations period passes. Alaska’s third-party practice rule provides that, in a several liability case, the plaintiff can recover a judgment against a third-party defendant even if the plaintiff has not amended the complaint to seek affirmative relief from the third-party defendant.27 In Alaska General Alarm, Inc. v. Grinnell,28 the Alaska Supreme Court construed the rule to allow recovery by the plaintiff against the third-party defendant even though the statute of limitations had run on the plaintiff’s claim when the defendant filed the third-party complaint.29 Hawaii provides by statute that for thirty days after a defendant impleads a third-party defendant, the plaintiff may amend the complaint to assert a claim against the third-party defendant if an action against the third-party defendant would have been timely had the plaintiff initially joined it as a co-defendant in the action.30 In Tennessee, the plaintiff may amend the

23. See, e.g., Rule 1-042(A) NMRA (consolidation); Rule 1-019 NMRA (necessary and indispensable parties); Rule 1-014 NMRA (third-party practice); see also, e.g., Tipton, 103 N.M. at 693, 712 P.2d at 1355.

24. The fault of others is an affirmative defense. See UJI 13-302C NMRA; NMSA 1978, § 41-3A-1(B) (1987) (providing that defendant must establish the fault of others to be eligible for apportionment).

25. The plaintiff must also anticipate that a potential tortfeasor that the plaintiff knew of but chose not to sue for tactical reasons might nonetheless be the subject of a defendant’s affirmative defense. When this occurs, the plaintiff must reconsider the initial decision not to sue that person and may choose to add the person as a defendant.

26. It is not clear whether a defendant can lay off fault on a tortfeasor who was not sued by the plaintiff or brought into the lawsuit by the defendant until after the statute of limitations had run on the plaintiff’s claim against the tortfeasor. The several liability statute provides only that a defendant “who establishes that the fault of another is a proximate cause of a plaintiff’s injury” may lay off fault on that person. NMSA 1978, § 41-3A-1(B) (1987). There is no suggestion in the statute that the existence of an affirmative defense such as the statute of limitations would bar the defendant from laying off fault on a tortfeasor who is a proximate cause of the plaintiff’s injury. See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § B19 cmt. e (2000) (stating that tortfeasors with statute of limitations defense should be assigned percentage of fault). In an analogous situation, New Mexico permits a defendant to lay off fault on a tortfeasor even though that tortfeasor is immune from suit by the plaintiff. See St. Sauver v. N.M. Peterbilt, Inc., 101 N.M. 84, 678 P.2d 712 (Ct. App. 1984) (enrolled tribal member); Collins ex rel. Collins v. Tabet, 111 N.M. 391, 806 P.2d 40 (1991) (quasi-judicial immunity); see also RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § B19 cmt. e (2000) (indicating that defendant may lay off fault on tortfeasors who are immune from liability).

27. ALA. R. Civ. P. 14(b).


29. Id. at 103.

complaint within ninety days of service of the defendant’s answer to add as a defendant any alleged tortfeasor named in the defendant’s answer even if the statute of limitations has run on the claim.\textsuperscript{31} In several liability actions in Iowa, the filing of a complaint against any one wrongdoer “tolls the statute of limitations for the commencement of an action against all parties who may be assessed any percentage of fault.”\textsuperscript{32}

New Mexico has no equivalent statute protecting plaintiffs from the statute of limitations defense when the named defendant identifies additional alleged tortfeasors after the statute of limitations has run on the plaintiff’s claims against them. The obvious solution is for the plaintiff to sue the target defendants long before the applicable statute of limitations runs, so that there is ample time to conduct discovery and identify additional tortfeasors who should be joined as defendants. This option, however, is not always available to counsel who are retained shortly before the limitations period runs.

An inappropriate alternative solution would be for the plaintiff to sue everyone who could conceivably be at fault. This approach is inadequate for two reasons. First, the plaintiff may still fail to include all actual tortfeasors because the defendant may have exclusive access to information that would identify them. Second, this solution could constitute a violation of Rule 1-011, which requires that attorneys sign all pleadings, thus signifying “that to the best of the signer’s knowledge, information and belief there is good ground to support” the pleading.\textsuperscript{33} Rule 1-011 seeks to prevent deliberate advancement of unfounded claims or defenses.\textsuperscript{34} Although the rule imposes only a subjective good faith standard upon the signer,\textsuperscript{35} an attorney who helps a plaintiff to sue defendants without any ground for doing so other than to assure that every potential tortfeasor is named as a defendant would violate Rule 1-011.\textsuperscript{36}

Federal Rule 11 is more stringent than the New Mexico rule. The attorney’s signature on the complaint certifies “that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances...the allegations and other factual contentions have evidentiary support

\textsuperscript{31.} TENN. CODE ANN. § 20-1-119 (2004). The statute provides the plaintiff the option to file a new lawsuit against the named person instead of joining that person in the pending action. \textit{id.} § 20-1-119(a)(2). “The statute is intended to provide an injured party with a fair opportunity to bring before the court all persons who caused or contributed to the party’s injuries.” Townes v. Sunbeam Oster Co., 50 S.W.3d 446, 451 (Tenn. Ct. App. 2001).

\textsuperscript{32.} IOWA CODE ANN. § 668.8 (2003).

\textsuperscript{33.} Rule 1-011 NMRA.


\textsuperscript{35.} Rivera, 111 N.M. at 675, 808 P.2d at 960.

\textsuperscript{36.} The subjective standard would not allow a party to “pursue a claim on nothing more than the unreasonable hope that he may discover a basis for the lawsuit.” \textit{id.} at 680, 808 P.2d at 965 (quoting Gilbert v. Bd. of Med. Examiners, 745 P.2d 617, 629 (Ariz. Ct. App. 1987)). To do so would be evidence of subjective bad faith. \textit{id.} (citing Gilbert, 745 P.2d at 629).

In Kinee v. Abraham Lincoln Federal Savings & Loan Ass’n, 365 F. Supp. 975 (E.D. Pa. 1973) (decided under an earlier, more stringent version of Rule 11 under which the signer had to certify that there was good ground to support the claim), the court stated that “[i]t is an abuse of process to use the issuance of a complaint to discover which of a number of parties is the proper party to be sued,” \textit{id.} at 983, and explicitly disapproved of randomly filing suit as an alternative to conducting an investigation to determine the proper parties.
or... are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. 37 Faced with an impending statute of limitations problem, an attorney might be able to avoid Rule 11 sanctions for suing a defendant whose liability is questionable, as long as there is some basis for bringing a claim against that defendant, 38 due to the rule’s emphasis on reasonableness “under the circumstances.” 39 Furthermore, the federal rule’s safe harbor provision 40 decreases the likelihood 41 that a sanction will be imposed on a plaintiff’s attorney faced with the impending expiration of the statute of limitations through no fault of the attorney.

A lawyer who must file suit close to the running of the statute of limitations needs an alternative that will allow joinder of all responsible parties and is not dependent on counsel’s ability to hastily ascertain their identity. 42 A New Mexico statute adopted in 1897 43 provides that if a plaintiff does not know the identity of a defendant, the plaintiff may identify the person in the complaint by any name “and when his true name is discovered, the pleading or proceeding may be amended accordingly.” 44 This statute, authorizing “John Doe” defendants, is no panacea for plaintiffs, however. Despite the language broadly authorizing amendment of the pleading upon learning the identity of the defendant, New Mexico courts hold that amendments to “John Doe” pleadings are effective only when the provisions of Rule 1-015 dealing with relation back of amendments are met. 45 The plaintiff who wants to substitute a newly-identified tortfeasor for “John Doe” after the statute of limitations has run must demonstrate that (1) prior to the time for service of process upon a defendant after filing a timely action, 46 the alleged tortfeasor had such notice

37. FED. R. CIV. P. 11(b).
38. A plaintiff can make allegations for which there is no current evidentiary support if the attorney specifically identifies such allegations and maintains that they “are likely to have evidentiary support after a reasonable opportunity for further investigation.” FED. R. CIV. P. 11(b)(3).
39. FED. R. CIV. P. 11(b).
40. Before a party can obtain sanctions for violation of Rule 11, the party must give the other side twenty-one days to withdraw or modify the challenged pleading. FED. R. CIV. P. 11(c)(1)(A).
41. When the sanction request comes from a party, the twenty-one-day “safe harbor” provision appears to be mandatory. The court, however, may itself institute a show-cause proceeding to sanction a party for violation of Rule 11, because the “safe harbor” provision is not applicable to court-instituted sanction proceedings. See FED. R. CIV. P. 11(c)(1)(B).
42. Though New Mexico sometimes applies a “discovery rule” that provides that the statute of limitations does not begin to run until certain facts are known to the plaintiff, e.g., Martinez v. Showa Denko, K.K., 1998-NMCA-111, ¶ 19, 964 P.2d 176, 181, New Mexico has not extended the discovery rule to situations where it is the identity of the tortfeasor rather than the existence of the injury that is the undiscovered fact. Apparently a majority of courts that have considered the matter have ruled that the discovery rule, when applicable, delays the date of accrual of the statute of limitations until the identity of the defendant is knowable. See, e.g., Tarnowsky v. Socci, 856 A.2d 408, 411-13 (Conn. 2004) (surveying state law and extending discovery rule to include identity of defendant). But see Jackson v. Vill. of Rosemont, 536 N.E.2d 720, 722 (Ill. App. Ct. 1988) (“[C]ourts have refused to extend the discovery rule to apply to cases where the undetermined fact is not the existence of the injury, but rather the identity of the tortfeasor.”).
43. Act of March 18, 1897, ch. 73, § 84, 1897 N.M. Territory Acts, 175.
44. NMSA 1978, § 38-2-6 (1953).
46. The notice must be received “within the period provided by law for commencing the action against him.” Rule 1-015(C) NMRA. Literally, this would require that the defendant to be substituted or added must have received notice prior to the date the statute of limitations expired. In Galion v. Comanco International, Inc., 99 N.M. 403, 658 P.2d 1130 (1983), however, the court construed the language liberally so “that the period in which notice must be received includes the reasonable time allowed under the rules of civil procedure for service of
of the lawsuit that prejudice in defending the action will not result if the amendment is allowed, and (2) the alleged tortfeasor knew or should have known that but for a mistake in identification, the plaintiff would have brought the action against him or her.\footnote{47}

Plaintiffs who do not wish to rely upon the vagaries of Rule 1-015(C) should avoid being in the position of learning of additional tortfeasors after the statute of limitations has run. This can best be accomplished by conducting thorough factual investigation prior to commencing the action and by filing the lawsuit well before the statute of limitations has run. The plaintiff can then conduct discovery of the defendant who asserts the generic defense of the “fault of others” and can add the newly discovered wrongdoers as parties before the statute of limitations runs.

\textbf{C. Drafting the Complaint}

The intricacies of several liability create complications for attorneys when drafting complaints. Plaintiffs must be careful to avoid inadvertent admissions against interest in their pleadings.\footnote{48} Whether a plaintiff sues one defendant or many, a defendant might seek to use the plaintiff’s pleadings as an admission that supports that defendant’s affirmative defense of the fault of others. The decision to sue a single defendant may be premised on the belief that the defendant is the only tortfeasor.\footnote{49} If so, the complaint will assert that the chosen defendant is liable for all of the plaintiff’s injuries. If the defendant’s answer identifies another possible tortfeasor when pleading the \textit{Bartlett} defense, the plaintiff may decide to amend the complaint to add the additional tortfeasor as a defendant.\footnote{50} The amended pleading

\begin{itemize}
\item \textit{Bartlett} was adopted by the New Mexico Supreme Court in \textit{United States v. NRCS}, 76 N.M. 296, 416 P.2d 644 (1966), as a permissible defense to a negligence action.
\item The requirement that should not pose a problem in most several liability cases is met, see Heffern v. First Interstate Bank, 99 N.M. 531, 534, 660 P.2d 621, 624 (Ct. App. 1983) (adopting the “logical relationship test” for determining whether the same transaction or occurrence test is met for purpose of determining whether counterclaims are compulsory under Rule 1-013(A)).
\item Alternatively, the plaintiff may forego suing others because the plaintiff concludes that the targeted defendant is jointly and severally liable, see NMSA 1978, § 41-3A-1(C) (2004), and has sufficient resources to fully compensate the plaintiff.
\item If the plaintiff instead sues the additional defendant in a separate suit, the problem of inadvertent admissions still exists because pleadings in one case can be used as admissions in other cases. See, e.g., Albright v. Albright, 21 N.M. 606, 623-24, 157 P. 662, 667 (1916); Daimler-Benz Aktiengesellschaft v. Olson, 21 S.W.3d 707, 719-20 (Tex. Ct. App. 2000); DeChristofaro v. Machala, 685 A.2d 258, 265–66 (R.I. 1996).
\end{itemize}
will allege that the added defendant is a tortfeasor and is wholly or partially liable for the plaintiff's injuries. The new defendant will seek to use the original pleading, which asserted that the initial defendant was the sole proximate cause of the plaintiff's injuries, as an admission that the new defendant is not liable.

A plaintiff who sues multiple defendants faces a similar pleading problem. Because one defendant may be exonerated, the plaintiff will allege that each defendant is fully liable to the plaintiff and will allege, alternatively, that each is a tortfeasor severally liable for a portion of the plaintiff's injuries. Each defendant will assert that the plaintiff's allegation that the other was negligent is an admission that supports the defendant's Bartlett defense laying off fault on the other.

The plaintiff's dilemma is not only theoretical. In Dreier v. Upjohn Co., a case decided prior to Connecticut's adoption of several liability, the plaintiff initially joined the prescribing doctor and the drug manufacturer in an action, alleging each was liable for injurious side effects of a drug. The plaintiff decided to drop the lawsuit against the manufacturer and filed an amended complaint leaving only the doctor as a defendant. The trial court permitted the doctor to introduce the initial complaint, containing plaintiff's assertion that the drug company was at fault, as an admission tending to exonerate the doctor. The Supreme Court of Connecticut affirmed the use of the superseded pleading as an admission. The court rejected the plaintiff's argument that liberal pleading rules allowing alternative pleadings precluded a finding that the plaintiff's allegation of the drug company's liability constituted an admission against interest: "While alternative and inconsistent pleading is permitted, it would be an abuse of such permission for a plaintiff to make an assertion in a complaint that he does not reasonably believe to be the truth." The fact that the plaintiff drafted the complaint before it was possible to conduct discovery and while the facts were still uncertain did not preclude use of the pleading as an admission, though these circumstances could be relevant to the issue of the weight given to the admission and could be explained to the jury.

Dreier's treatment of alternative allegations in superseded pleadings as admissions has not been affected by Connecticut's subsequent adoption of several liability. In Danko v. Redway Enterprises, Inc., the defendant sought to reduce its liability by asserting in a pleading that, if the defendant was at fault, another entity's fault combined with the fault of the defendant to cause the plaintiff's injury. The Connecticut Supreme Court held that the plaintiff could introduce the pleading at trial as an admission despite its hypothetical nature. Though Danko involved the

51. 492 A.2d 164 (Conn. 1985).
52. Id. at 166.
53. Id.
54. Id.
55. Id. at 169.
56. Id. at 167. In contrast to the Connecticut rule, which forbids allegations made "without reasonable cause," CONN. GEN. STAT. ANN. § 52-99 (West 1991), New Mexico requires only that the pleader have a subjective belief that there is ground to support the pleading. Rule 1-011 NMRA; Rivera, 111 N.M. at 674, 808 P.2d at 959.
57. Dreier, 492 A.2d at 168; see id. at 168 n.1 ("[T]he impeached party must be given an opportunity to explain the admissions in the superseded pleading.").
58. 757 A.2d 1064 (Conn. 2000).
59. Id. at 1066.
60. Id. at 1071.
use of the defendant’s pleading by the plaintiff, the court reaffirmed that the plaintiff who permissibly pleads alternatively and inconsistently in multiple tortfeasor cases cannot avoid having the pleadings deemed admissions even though “one or more of the plaintiff’s claims fairly may be described as contingent on the discovery of...additional facts.”

New Mexico should not follow the Connecticut approach. Before discovery is complete, both the plaintiff and defendant must plead based on imperfect knowledge against a background of substantive law that compels alternative and possibly inconsistent pleading. New Mexico’s rules of procedure permit such pleading, command that pleadings be construed to do substantial justice, and aspire to foster just determinations. The New Mexico Supreme Court has already recognized that “admissions...unavoidably contained in one defense cannot be used against a defendant in another. To hold otherwise, would greatly impair, if not totally destroy, the right to plead inconsistent defenses” provided by Rule 1-008(E). The same rule should apply to the initial pleadings of all parties in several liability cases. Penalizing parties for properly pleading alternative scenarios when operating under imperfect knowledge undercuts the goals of the procedural rules. Instead, the trial court should enter a scheduling order setting an appropriate time for completing discovery and amending pleadings. Thereafter, at a pretrial conference, the trial court can require the parties to amend pleadings to add and drop allegations concerning the fault of the parties and other tortfeasors. At the end of this process, the contents of the pleadings can and should serve as admissions to the extent authorized by law.

There is a solution to the problem of statements in initial pleadings being used against plaintiffs. If statements in a pleading are equivocal, they do not constitute an admission. To protect against the possibility of inadvertent admissions, plaintiffs who lack full knowledge of the facts should qualify statements in pleadings that assert that other parties are wholly or partially at fault. Borrowing language from

61. Id.
62. Not all courts agree that alternative pleadings are admissions. A leading treatise and some cases take the position that early pleadings, especially those written before discovery occurs, should not be treated as admissions as a matter of course. E.g., Pierce v. Cen. Me. Power Co., 622 A.2d 80 (Me. 1993); Curtis v. Canyon Highway Dist. No. 4, 831 P.2d 541 (Idaho 1992); MCCORMICK ON EVIDENCE § 257 (John W. Strong ed., 5th ed. 1999).
63. Rule 1-008(E)(2) NMRA.
64. Rule 1-008(F) NMRA.
65. Rule 1-001 NMRA.
67. See Rule 1-016(B) NMRA.
68. See Rule 1-016(A) NMRA; Rule 1-016(C)(1)–(3) NMRA.
69. Some courts hold that admissions in pleadings are not only admissible but also constitute “judicial admissions” that are binding on the party making the admission. E.g., Brooks v. Ctr. for Healthcare Servs., 981 S.W.2d 279, 283 (Tex. Ct. App. 1998) (finding that statements of fact not pled in the alternative, in “live,” not superseded pleadings, are conclusive); Anderson v. Cumpton, 606 N.W.2d 817, 823 (Neb. 2000). New Mexico does not give conclusive effect to admissions in live pleadings. See S. Union Exploration Co. v. Wynn Exploration Co., 95 N.M. 594, 624 P.2d 536 (Ct. App. 1981) (finding that admission in pleadings is one factor to be considered with other evidence but is “by no means conclusive”).
70. E.g., John B. Conomos, Inc. v. Sun Co., 831 A.2d 696, 713 (Pa. Super. Ct. 2003) (“The fact must have been unequivocally admitted and not be merely one interpretation of the statement that is purported to be a judicial admission.”).
Federal Rule 11, the plaintiff might state that the allegations and factual contentions are based only on information and belief and "are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery."  

III. PLEADING: DEFENDANT'S PERSPECTIVE

Like any defendant, the defendant in a several liability case has the option of defaulting or responding to the complaint. Default judgment practice has been significantly affected by the adoption of several liability in ways that benefit the defaulting defendant at the expense of the plaintiff and non-defaulting defendants. To compensate for these changes, non-defaulting parties must adjust their tactics and the judiciary will have to make additional modifications to default judgment practice to ensure fairness to all parties.

The defendant who does not default must determine how to raise the issue of the fault of others. The New Mexico Supreme Court has provided a variety of ways in which the defendant may do so. Differing tactical benefits to defendants that flow from the choice may be inconsistent with the goals of the several liability doctrine. Thus, the courts need to evaluate current practice and decide whether one of the existing options is superior and should be adopted as the sole method.

A. Default Judgment

When joint and several liability applied, the defaulting defendant conceded liability but not the amount of unliquidated damages. Before entering a default judgment, the court would hold a hearing to determine the unliquidated damages. If the defaulting defendant appeared at the damages hearing, the defaulter could cross-examine the plaintiff's witnesses and could also present witnesses dealing with the proper amount of damages, though not with liability issues.

Comparative negligence and several liability seek to assure that no defendant pays more than its fair share based upon its percentage of fault. If the defaulting defendant were not allowed to demonstrate that the plaintiff and other tortfeasors were partially to blame, full liability would be assessed to the defaulter, who might actually be responsible for only a portion of the plaintiff's injuries. The central premise of several liability would be sacrificed in order to sanction the defendant for its default.

New Mexico initially determined that sanctioning the defaulting defendant was a greater priority than assuring that the defaulter paid only its share of the total

71. FED. R. CIV. P. 11(b)(3).
72. See infra notes 137–178 and accompanying text.
73. See infra notes 137–178 and accompanying text.
74. See infra notes 167–178 and accompanying text.
75. See infra notes 167–178 and accompanying text.
77. Id. at 123, 547 P.2d at 1165.
78. Id.
79. Id. at 125, 547 P.2d at 1165.
80. "[T]he law of comparative negligence in New Mexico requires that the trier of fact determine negligence proportionately, and holds that a tortfeasor be held liable for damages only to the extent of his percentage of negligence." St. Sauver v. N.M. Peterbilt, Inc., 101 N.M. 84, 87, 678 P.2d 712, 715 (Ct. App. 1984).
damages. In Passino v. Cascade Steel Fabricators, Inc., the court of appeals ruled that the defaulting defendant could not reduce its liability by seeking to prove at the damages hearing that plaintiff or others were partially at fault. The court reasoned that to allow the defaulter to do so "would seriously weaken, and could even abolish the efficacy of default judgments." Instead, the defaulting defendant was fully liable for the plaintiff's injuries and, as in the past, could only dispute the scope and value of the plaintiff's unliquidated damages.

Ten years later, the Supreme Court of New Mexico reached the opposite conclusion. In Burge v. Mid-Continent Casualty Co., a divided court overruled Passino and held that the adoption of comparative negligence and several liability required a change in default judgment law. In comparative fault cases, the court held, "a defaulting party admits only to the liability aspect of the complaint, thus reserving for the damages hearing a determination of damages in accordance with the application of comparative negligence and apportionment of damages." This shift in default judgment practice in several liability cases requires reconsideration of the procedure by which courts enter default judgments. The new procedures will differ depending on whether the defaulting party is the only defendant or there are multiple defendants, not all of whom default.

1. Default Judgment Practice: In General

Some aspects of former New Mexico default judgment practice are unaffected by the adoption of comparative negligence and several liability. When a plaintiff sues a single defendant who fails to plead or otherwise defend, the plaintiff

82. Id. at 459, 734 P.2d at 237.
83. Id.
84. Id.
86. "[T]he general rule on default judgments...must be adapted to apply the doctrine of comparative negligence." Burge, 1997-NMSC-009, ¶ 24, 933 P.2d at 217.
87. Id. ¶ 22, 933 P.2d at 217.
88. Rule 1-055 is not limited to situations where the defendant fails to answer or otherwise initiate a defense, as by filing a Rule 1-012 motion. In Kutz v. Independent Publishing Co., 101 N.M. 587, 686 P.2d 277 (Ct. App. 1984), the defendants entered an appearance and filed answers but, thereafter, failed to attend a pretrial conference or to comply with a court order concerning the hiring of substitute counsel. Id. at 588, 686 P.2d at 278. The court entered a default judgment pursuant to Rule 1-055: "The failure to attend the pretrial conference and the failure to obtain counsel as ordered by the court were failures to 'otherwise defend.'" Id. at 589, 686 P.2d at 279; see also Chase v. Contractors' Equip. & Supply Co., 100 N.M. 39, 42, 665 P.2d 301, 304 (Ct. App. 1983) ("Even though defendant had entered an appearance and filed pleadings, defendant could be in default for failure to 'otherwise defend....'"); Schmider v. Sapir, 82 N.M. 355, 357, 482 P.2d 58, 60 (1971) (stating that a party may suffer a default judgment for "failure to appear at the trial or some other failure 'to take some step required by some rule of practice or some rule of court' [or if] 'either of the parties omits or refuses to pursue, in the regular method, the ordinary measures of prosecution or defense'") (citations omitted).

In contrast, in Rancher's Exploration & Development Co. v. Benedict, 63 N.M. 163, 315 P.2d 228 (1957), when the defendant failed to appear at the trial, the court heard evidence from the plaintiff and then entered judgment for plaintiff. Id. at 166, 315 P.2d at 229–30. The supreme court ruled that a judgment entered as a result of the failure to appear in court at the time of trial "was not in a strict sense a judgment by default within the meaning of Rule 55(b) of the Rules of Civil Procedure but rather a final judgment on the merits, after the introduction of evidence to sustain [plaintiff's] pleadings." Id. at 167, 315 P.2d at 231.
obtains from the clerk an "entry of default."® The plaintiff then requests that the court enter a judgment of default.© If counsel for the defendant has entered an appearance® but then failed to answer or defend, the defendant is entitled to notice of the application for default judgment.© If no appearance was entered, notice of the application for default judgment need not be given to the defendant.®

Rule 1-055 authorizes the court to hold a hearing to determine "the truth of any averment"™ prior to granting a judgment by default. Before the adoption of comparative fault, there was seldom occasion to hold a hearing concerning the substantive merits of plaintiff's claim because "[b]y virtue of the default, the defendants have admitted the allegations of the complaint" and "[t]hese averments are taken as true.... The allegations of the complaint, in effect, become findings of fact."™ Though allegations concerning the merits were deemed to be true, the plaintiff's assertion of the amount of unliquidated damages was not binding.® Instead, "[w]here damages are unliquidated and uncertain, Rule 55(b)... requires plaintiff to prove the extent of the injuries established by the default."™

Whether the defaulting defendant receives formal notice of the application for default judgment or learns of it in some other way, the defaulting defendant has the right to participate in the mandatory hearing to determine the amount of unliquidated damages.® At the hearing, the defendant has the right to cross-examine witnesses and to present evidence that might mitigate the amount of damages.®
2. The Effect of Comparative Negligence and Several Liability on Default Judgment Practice

The adoption of comparative negligence and several liability led to reconsideration of whether the defaulting party could raise issues other than the amount of damages at the unliquidated damages hearing. In adopting comparative negligence, the supreme court emphasized that the purpose of the doctrine is to assure "apportionment of the total damages...in proportion to the fault of each party." The court noted that new procedural problems would inevitably arise from the adoption of the new doctrines and stated that "the rules must be adjusted and made suitable to fit the changes in the substantive law." In Passino v. Cascade Steel Fabricators, Inc., the court of appeals considered whether the adoption of comparative negligence and several liability required adjustment of the scope of the damages-determination hearing in default judgment cases. Passino sued Cascade and Timberman's, alleging that their negligence caused him to suffer personal injuries. Cascade defaulted and Timberman's settled. Cascade asserted that, at the hearing to determine its liability for unliquidated damages, the court should permit Cascade to present evidence not only as to the dollar amount of plaintiff's damages, but also as to the comparative negligence of plaintiff and the comparative fault of the settling co-defendant. The trial court allowed this expansion of the scope of the hearing. The court of appeals reversed, holding that a defaulting defendant could dispute the extent and the dollar value of the plaintiff's damages but could not reduce its liability for those damages by laying off fault on the plaintiff or other wrongdoers. Citing the leading New Mexico pre-several liability case on default judgments, the court held that, "[b]y defaulting, defendant has waived its rights to the application of comparative negligence and the apportionment of damages under Scott v. Rizzo and Bartlett." Without grappling with the policy implications of Scott and Bartlett, the court of appeals concluded that disallowing evidence of the fault of others was necessary because "any other holding would seriously weaken, and could even abolish the efficacy of default judgments."
Other jurisdictions have reached the same result. A Pennsylvania court, for example, noted that while comparative fault has relevance to the assessment of the proper amount of damages, it "is primarily a substantive defense going to a plaintiff's right to recover and, therefore, is not available as a defense to a defendant against whom a default judgment has been entered." The Rhode Island Supreme Court justified a similar result by noting the unfairness to the plaintiff of allowing the defendant to contest comparative fault in the damages hearing: "[T]he plaintiffs would have the burden of proving liability without the benefit of discovery at a hearing on what traditionally has been designed to be only for proof of the plaintiffs' damages."

The New Mexico Supreme Court changed the law in 1997 in Burge v. Mid-Continent Casualty Co. In Burge, the plaintiff's complaint alleged that the defaulting defendant was the sole and proximate cause of the plaintiff's injuries. Consistent with existing law, the trial court ruled that the effect of the default was to transform the factual allegation that the defendant's negligence was the sole cause of the plaintiff's injuries into a finding of fact. Overruling Passino, the supreme court held that a defaulting defendant who appears at the unliquidated damages hearing can not only dispute the dollar value of the plaintiff's damages, but may also seek to prove the comparative fault of the plaintiff and the fault of other tortfeasors in order to reduce the defaulter's liability: "A defaulting party admits only to the liability aspect of the complaint, thus reserving for the damages hearing a determination of damages in accordance with the application of comparative negligence and apportionment of damages under Scott v. Rizzo... and Bartlett v. New Mexico Welding Supply..." In effect, the court ruled that a defendant's default admits only that it is liable for some portion of the damages suffered by the plaintiff but preserves the right to dispute "the dollar amount of the damages suffered by the injured party and the portion of those damages to be awarded against the defaulting party based upon the extent of the percentage of its negligence."

The Burge court's decision is not unique. Other jurisdictions also allow the defaulting defendant to raise comparative negligence and several liability defenses at the damages hearing. Others go further, allowing the defaulting defendant to
prove that its negligence was not a proximate cause of the injury, that damages should be reduced due to plaintiff's failure to mitigate and permitting proof of "related issues." 

*Passino* focused on the need to sanction the defaulting defendant. The *Burge* court found stronger countervailing policies that justified a less harsh penalty—comparative negligence and several liability. In effect, the court decided that it is more important that liability be based on the defendant's actual percentage of fault than that the full responsibility for a plaintiff's injuries be visited upon a defendant as a sanction for failure to answer or otherwise defend.

3. Procedural Ramifications of *Burge*

Accommodating the goal of "apportionment of the total damages... in proportion to the fault of each party" in default judgment cases will require adjustments in default judgment procedure to assure that the plaintiff receives advance notice of the specific issues the defaulter will raise and the witnesses and evidence the defaulter will present at the hearing.

*Burge* puts a plaintiff on notice that the defaulting defendant might appear and present evidence of the plaintiff's comparative negligence and the fault of others, but this alone does not provide the plaintiff and the non-defaulting defendants with adequate notice to prepare for the damages hearing. They can be surprised by the unannounced appearance of the defaulting defendant who now can present witnesses proving the misconduct of plaintiff, the other defendants, and non-party tortfeasors. Rule 1-055 does not require that the defaulting defendant serve a

---


New Mexico has not yet ruled on whether the defaulting defendant can avoid any liability by demonstrating that plaintiff cannot prove that the defaulter's conceded negligence was a proximate cause of the plaintiff's injury. Nothing in *Burge* suggests that a defaulting defendant can dispute proximate cause. To the contrary, the court held that the defaulter "admits only to the liability of his or her portion of the damages," leaving only the dollar amount of damages and "the extent of its percentage of negligence" to be resolved by the jury. *Burge*, 1997-NMSC-009, ¶ 24, 933 P.2d at 217.

124. *Olsten Staffing Servs., Inc.*, 921 P.2d at 600; *Jordan*, 611 N.E.2d at 855. New Mexico has always allowed the defendant to reduce damages by showing plaintiff's failure to mitigate damages. *Gallegos*, 89 N.M. at 123, 547 P.2d at 1165 (stating that defaulting defendant may "introduce affirmative testimony on his own behalf in mitigation of damages").


129. It is not clear what role the non-defaulting defendants would play in a liquidated damages hearing that took place before the trial on the merits. To assure consistency of results between the damages hearing and the trial, the percentages of fault established at the hearing would have to be binding on the plaintiff and the non-defaulting defendants. To bind the non-defaulting defendants would require giving them a full and fair opportunity to participate in the damages hearing. If, however, all parties participate in and are bound by the results of the damages hearing, the effect would be to transform that hearing into the trial on the merits, obviating the need for a trial. For this reason, it is preferable that, where there are non-defaulting defendants, there should be no damages hearing; instead, the trial on the merits should also serve the function of the damages hearing. *See infra* notes 146–186 and accompanying text.

130. The plaintiff may enter the hearing without any notice that the defaulting defendant will seek to prove the fault of others and without any hint that there are other potential wrongdoers. When the defaulting defendant seeks to lay off fault on non-defaulting co-defendants, the plaintiff should be less surprised because the plaintiff
tardy entry of appearance or serve an answer to the complaint prior to appearing at the hearing to determine damages. Under the existing rules, therefore, the plaintiff and non-defaulting defendants will not know in advance whether the defaulter will appear at the hearing, and, if so, which of the available issues the defaulter will raise or what witnesses and evidence the defaulter will present at the hearing. The defaulting defendant might appear and lay off fault on a non-party whose existence was unknown to the plaintiff. The plaintiff thus could be worse off having obtained an entry of default than if the defaulting defendant, instead of defaulting, had filed a timely answer identifying disputed issues and raising affirmative defenses prior to trial.

Some jurisdictions permit the defaulting defendant to conduct discovery as a necessary corollary to the right to appear and present evidence at the damages hearing. The process for getting a default judgment would be greatly complicated if a defaulting defendant could insist that the damages hearing be delayed until the defaulter had completed discovery regarding comparative fault and the fault of others, matters made relevant by Burge. New Mexico courts will have to determine whether the quest for liability based on comparative fault is so important that the defaulting party should be free to engage in discovery prior to the unliquidated damages hearing despite the ramifications: delay, added expense, and the diminished impact of the sanction for failure to defend that will inevitably follow if the courts permit discovery.

Even if the courts conclude that the defaulter has forfeited its right to engage in discovery, the plaintiff will have a legitimate claim to be allowed discovery prior to a damages hearing at which the defaulter may appear and defend. The plaintiff might need discovery in order to rebut the defaulting defendant’s anticipated defenses of comparative negligence and the negligence of non-parties. Discovery to determine the extent of the defaulting defendant’s breach of duty also will be appropriate. Though the defendant concedes fault by defaulting, the determination of comparative fault will require that plaintiff seek to prove the percentage of the

has identified those wrongdoers and must prove their fault in any case. So too, plaintiff will not suffer the same degree of surprise if the defaulting defendant charges the plaintiff with comparative negligence when that defense has been raised by non-defaulting defendants.

131. Rule 1-089 requires that, with a single exception, “[w]henever an attorney undertakes to represent a party, the attorney shall file a written entry of appearance,” Rule 1-089(A) NMRA, but sets no time for filing the notice of appearance. An attorney representing a defaulting party at the unliquidated damages hearing thus might not enter the appearance until the date set for the default judgment hearing.

132. See Rule 1-055 NMRA.


134. New Mexico’s discovery rules allow a “party” to engage in discovery without distinguishing between parties in default and other parties. See, e.g., Rule 1-026(A) NMRA. Rule 1-055 identifies the defaulting defendant as a “party.” Rule 1-055(A) NMRA.

135. Presumably the need for discovery to rebut a claim that plaintiff is comparatively negligent will be less compelling than the need to prepare to rebut evidence that others are at fault, because the relevant evidence of plaintiff’s negligence often will consist of the testimony of the plaintiff and others of whom the plaintiff may be aware.
defaulting defendant’s fault compared to that of the plaintiff or other alleged wrongdoers.\footnote{136} The transformation of the damages hearing into a near-replica of a normal trial is further fostered in New Mexico by the requirement that, at the damages hearing, the court “shall accord a right of trial by jury to the parties entitled thereto.”\footnote{137} If the plaintiff or a non-defaulting defendant makes a timely demand for a jury trial,\footnote{138} the issues of the amount of damages, the fault of plaintiff, and the fault of others must be tried to a jury unless the remaining parties withdraw the demand for jury trial.\footnote{139} A party may waive the right to trial by jury in writing or orally,\footnote{140} but a demand for jury trial “may not be withdrawn without the consent of the parties” to the action.\footnote{141} Although Rule 1-038 provides that a party waives the right to trial by jury by failure to appear at the trial,\footnote{142} the rule does not address the different issue of whether a defaulting defendant who does appear at the damages hearing can claim a right to jury trial based upon another party’s demand. Florida courts have concluded that a plaintiff may not unilaterally withdraw its jury demand even if the defendant is in default.\footnote{143} The Utah Court of Appeals has ruled that its version of the relevant rule allows the plaintiff to waive its prior demand for jury trial without the concurrence of a defaulting party.\footnote{144} The issue was raised, but not resolved, in a recent case decided by the New Mexico Court of Appeals.\footnote{145}

\footnote{136} The plaintiff will often have an interest in the allocation of fault between the defaulting tortfeasor and others. When the other tortfeasors are non-defaulting defendants, and the defaulting defendant lacks assets to pay the judgment, the plaintiff will seek to minimize the degree of fault of the defaulting defendant. Where the defaulter has sufficient assets to pay any judgment, or where the defaulter may seek to lay off fault on persons who are not parties to the lawsuit, it may be in plaintiff’s interest to maximize the fault of the defaulting defendant.

\footnote{137} Rule 1-055(B) NMRA. Federal Rule of Civil Procedure 55(b)(2) provides that, in cases of default, there must be a jury trial on damages only “when and as required by any statute of the United States.” Courts have construed the provision to not require a jury trial generally even if the plaintiff made timely demand for jury trial; a jury trial is required only when, as in 28 U.S.C. § 1874 (2000) (recovery on bonds and covenants), a federal statute specifically requires a jury trial after default has occurred. See Benz v. Skiba, Skiba & Glomski, 164 F.R.D. 115 (D. Me. 1995). The federal courts, influenced by different language in Federal Rule 55, have concluded that “[n]either the Seventh Amendment nor the Federal Rules of Civil Procedure require a jury trial to assess damages after entry of default.” Graham v. Malone Freight Lines, Inc., 314 F.3d 7, 16 (1st Cir. 1999). Nonetheless, one federal court has concluded that “it is the better practice, if not actually compelled, that the issue as to damages be submitted to the jury” when the plaintiff has made a timely demand for a jury trial. Barber v. Turberville, 218 F.2d 34, 37 (D.C. Cir. 1954) (footnote omitted).

\footnote{138} Plaintiff must serve a jury demand “not later than ten (10) days after service of the last pleading directed to such issue.” Rule 1-038(A) NMRA. When the sole defendant defaults by failing to answer the complaint, plaintiff must make the demand within ten days of the service of the complaint.

\footnote{139} Rule 1-038(D) provides that a party may waive the right to trial by jury in writing or orally, see Rule 1-038(D)(4)-(5) NMRA. However, a demand for jury trial “may not be withdrawn without the consent of the parties” to the action. Rule 1-038(D) NMRA. It is not clear whether the consent of a party who is in default for failure to answer or defend is entitled to the protection afforded by this rule. Although Rule 1-038(D) provides that a party waives the right to trial by jury by failure to appear at the trial, the rule does not address the different issue of a defaulting defendant who does appear at the damages hearing.

\footnote{140} See Rule 1-038(D)(4)-(5) NMRA.

\footnote{141} Rule 1-038(D) NMRA.

\footnote{142} Id.

\footnote{143} Baron Auctioneer, Inc. v. Ball, 674 So. 2d 212 (Fla. Dist. Ct. App. 1996); Loiselle v. Gladfelter, 160 So. 2d 740 (Fla. 1964).

\footnote{144} Amica Mut. Ins. Co. v. Schettler, 768 P.2d 950 (Utah Ct. App. 1989) (stating that, unlike other jurisdictions, Utah does not explicitly preserve right to jury trial in any default judgment case).

\footnote{145} DeFillippo v. Neil, 2002-NMCA-085, ¶ 35, 51 P.3d 1183, 1191 (“We leave for another day the decision regarding whether a jury trial on damages is required when a default judgment is entered on liability due to the failure to timely answer the complaint.”).
When the defaulting party is the only defendant, the damages hearing is the sole forum for the determination of damages and fault. Where, however, plaintiff sues multiple defendants and at least one defendant has not defaulted, the issues become more complicated. After the default of one of multiple defendants, the trial of the plaintiff’s claims against the remaining defendants provides an alternative forum for resolving issues that arise in the unliquidated damages hearing. In *Frow v. De La Vega*, the plaintiff sued eight defendants charging that each was jointly liable with the others for conspiracy to commit fraud. When one defendant defaulted, the court immediately entered a final judgment for full liability against the defaulter. At the subsequent trial, the other seven defendants were found not liable on a ground that was equally applicable to the defaulting defendant. The U.S. Supreme Court reversed the judgment against the defaulting defendant. The Court noted the “incongruity” of holding one defendant liable when the trial demonstrated that none should be liable, and declared the result to be “unseemly and absurd, as well as unauthorized by law.” Instead, “[t]he true mode of proceeding” is to enter only a default against the non-responding defendant, to proceed with the trial of the remaining defendants in that party’s absence, and to give the benefit of a victory by the remaining defendants to the defaulting defendant if the defendants’ victory is based on a ground equally applicable to the defaulting defendant. If the remaining defendants were found liable, the court

---

146. One such issue is whether the admission of liability that results from the default benefits not only the plaintiff but also any non-defaulting co-defendants. For example, can the co-defendant who seeks to lay off fault on the defaulting co-defendant use the fact of default to establish that the defaulting defendant is liable to the plaintiff, thus making proof of liability by the co-defendant unnecessary? Clearly, where the co-defendant raised the issue of the fault of the defaulting defendant by way of a cross claim and the defaulting party failed to answer either the complaint or the cross-claim, the co-defendant can rely on the default to establish liability. See Rule 1-007(A) NMRA (providing that defendant must file an answer to a cross claim); Rule 1-008(D) NMRA (providing that failure to deny in a pleading responding to a cross-claim constitutes an admission to all averments in the pleadings except as to damages). Less clear is whether the defendant who raises the fault of the defaulting co-defendant as an affirmative defense without filing a pleading against the co-defendant, see *Tipton v. Texaco, Inc.*, 103 N.M. 689, 692, 712 P.2d 1351, 1354 (1985) (stating that the fault of others “may be raised as an affirmative defense”), is entitled to take advantage of the admission of liability that results from the defaulting party’s failure to respond to the plaintiff’s complaint.

147. 82 U.S. (15 Wall.) 552 (1872).
148. *Id.* at 553.
149. *Id.*
150. *Id.*
151. *Id.* at 555.
152. *Id.* at 554.
153. *Id.*
154. *Id.*
155. The trial court should:

> Enter a default and a formal decree pro confesso against him, and proceed with the cause upon the answers of the other defendants.... If the suit should be decided against the complainant on the merits, the bill will be dismissed as to all the defendants alike—the defaulter as well as the others.

*Id.*

156. *E.g., In re First T.D. & Inv., Inc.*, 253 F.3d 520, 532 (9th Cir. 2001). The New Mexico Supreme Court considered the applicability of *Frow* to tort cases involving joint and several liability in *United Salt Corp. v. McKee*, 96 N.M. 65, 628 P.2d 310 (1981). Plaintiff sued two employees and their employer, asserting that the employer was vicariously liable for the tort of the employees. *Id.* at 67, 628 P.2d at 312. When the employees defaulted, the court entered a final judgment for the plaintiff against the employees based on the demand in the complaint and without a hearing on liability or damages. *Id.* The supreme court concluded that it was error to enter
would enter judgment against both defaulting and non-defaulting parties for the amount determined in the trial of the non-defaulting parties.¹⁵⁷

Federal courts have not limited Frow to cases involving defendants who are jointly and severally liable. In Shanghai Automation Instrument Co. v. Kuei,¹⁵⁸ the court reviewed the cases applying Frow and concluded that the common factor is not joint and several liability, but rather “whether under the theory of the complaint, liability of all the defendants must be uniform,”¹⁵⁹ and whether “uniformity of liability is...required by the facts and theories of the case.”¹⁶⁰ Because the central premise of New Mexico’s doctrine of several liability is that all parties would be liable in keeping with their relative fault,¹⁶¹ allocations of fault that exceed one hundred percent would be inconsistent and illogical,¹⁶² and thus Frow should be applied.

The defaulting party should get the benefits and suffer the consequences of the decisions at trial that are common to the liability of the defaulting and the non-defaulting parties.¹⁶³ Because the dollar value of compensatory damages suffered by the plaintiff is the same as to each defendant in a tort case, the amount of damages determined at the trial should be binding on the defaulting defendant as it is on the non-defaulting defendants. Because the fault of all tortfeasors, both defendants and non-parties, is litigated at the trial,¹⁶⁴ and because the total fault assessed should equal one hundred percent,¹⁶⁵ it would be logically inconsistent with the trial results if the defaulting defendant suffered a judgment reflecting a percentage of fault different from that assessed to it at the trial. To assure symmetry, the trial of the non-defaulting parties should serve as the Rule 1-055 hearing for the defaulting party. If the trial defendants escape all liability based on a defense common to all defendants, the defaulting defendant should share in that victory.¹⁶⁶ If the plaintiff is victorious at trial, the amount of damages awarded the plaintiff and

---

¹⁵⁷ Id. at 69, 628 P.2d at 314. This portion of the opinion is consistent with Frow. The court concluded, however, that, though the employer could seek to prove that the employees were not negligent, the trial court correctly entered judgment against the employees. Id. This portion of the opinion effectively deprived the defaulting defendants of the benefits of a possible victory at trial by the employer based on a finding that the employees were not negligent. This portion of the opinion is inconsistent with the reasoning in Frow. In City ofAlbuquerque v. Huddleston, 55 N.M. 240, 230 P.2d 972 (1951), the court refused to allow a defaulting defendant to have the advantage of a ruling at the trial of the remaining defendants that the statute of limitations provided a valid affirmative defense to the plaintiff’s claims to the defendants’ separate parcels of land. Id. at 55, 230 P.2d at 274. The court suggested that if the defaulting party had been a joint owner of the same property as the non-defaulting party, the court would have extended the benefits of the successful defense to the defaulting party. Id.

¹⁵⁸ 10A WRIGHT ET AL., supra note 95, § 2690, at 75.


¹⁶⁰ Id. at 1008.

¹⁶¹ See supra note 15.

¹⁶² Fault percentages must total one hundred percent. UJI 13-2219 NMRA.


¹⁶⁵ UJI 13-2219 NMRA.

¹⁶⁶ But see United Salt Corp. v. McKee, 96 N.M. 65, 628 P.2d 310 (1981); City ofAlbuquerque v. Huddleston, 55 N.M. 240, 230 P.2d 972 (1951) (decided prior to adoption of several liability).
the percentage of fault attributable to the defaulting party should determine the amount of the judgment awarded against the defaulter.

This result was foreshadowed in a ruling of the New Mexico Court of Appeals in a case not involving several liability for tortious conduct. In Blea v. Sandoval, the parties disputed title to land. The court had to determine the effect of an earlier proceeding in which defendants were husband and wife, the husband defaulted, and the wife successfully defended on the merits. The court of appeals ruled that the wife's prior victory on the merits should have resulted in judgment for the defaulting husband. The court set forth two principles that are equally applicable to tort cases involving several liability: first, "when there are multiple parties involved in a single suit, entry of a default as to one party will not result in a default judgment prior to termination of the matter with the non-defaulting parties," and second, "the defaulting defendants are entitled to take advantage of a successful defense interposed by the non-defaulting defendants...unless the defense interposed was personal to the non-defaulting defendant."

The right of participation for the defaulting party at the trial of non-defaulting defendants is not clear. Frow held that the defaulting defendant had forfeited the right to participate in pretrial proceedings or at the trial of the remaining defendants. In Burge, unlike Frow, there were no non-defaulting defendants. Burge ruled only that the defaulting defendant can participate in the unliquidated damages hearing held in lieu of a trial. When there are remaining defendants who will contest liability and the extent of plaintiff's damages, there is less need for the presence and participation of the defaulting defendant. In such cases, the participation rights of the defaulter at the trial of the remaining defendants should depend upon the extent to which the interests of the defaulter and the remaining defendants diverge. When, as in Frow, the remaining defendants and the defaulting defendants have common defenses and interests, it might be appropriate to bar the defaulting party from the trial as a sanction for having defaulted. The remaining defendants will represent and pursue the interests of the defaulting party as they defend their own interests.

The doctrine of several liability, however, introduces an element of conflict between the defaulting and defending parties. Both have the same interest in minimizing the amount of plaintiff's damages and maximizing the percentage of

---

168. Id. at 555, 761 P.2d at 433.
169. Id. at 556, 761 P.2d at 434.
170. Id. at 560, 761 P.2d at 438.
171. Id. at 559, 761 P.2d at 437.
172. Compare id. with City of Albuquerque v. Huddleston, 55 N.M. 240, 230 P.2d 972 (1951) (finding that defendants' victory based on statute of limitations does not redound to benefit of defaulting defendant because statute of limitations defense is a "personal defense" that must be raised by defaulting defendant).
173. "The defaulting defendant has merely lost his standing in court. He will not be entitled to service of notices in the cause, nor to appear in it in any way. He can adduce no evidence, he cannot be heard at the final hearing." Frow, 82 U.S. at 554. Where the only defendant is the defaulting party, the defaulter can appear at the damages hearing to prove all defenses except defenses regarding its own liability for some portion of the damages. See Burge, 1997-NMSC-009, 933 P.2d 210.
175. Id. ¶ 21, 933 P.2d at 216.
fault attributable to the plaintiff, and non-party tortfeasors, but the defendant wants to lay off as much fault as possible on the defaulter and the defaulter wants to achieve the opposite result. At the trial, therefore, the defaulting party should be allowed to cross-examine defendants’ witnesses and to present evidence to prove the comparative negligence of non-defaulting defendants.\(^1\)\(^7\) As to these issues, the defaulting party can “make [a] material contribution in aiding the trier of fact in the search for truth,”\(^1\)\(^7\)\(^7\) and thus perhaps should be allowed to participate at the trial.\(^1\)\(^7\)\(^8\)

In theory, then, in multiple defendant cases the defaulting defendant logically could be barred from separately contesting the amount of plaintiff’s damages, the plaintiff’s comparative fault, and the fault of non-party tortfeasors, because the remaining defendants will vigorously pursue those issues. In contrast, the court should consider allowing the defaulting party to introduce proof seeking to minimize its own fault and to maximize the fault of the other defendants. The trial court has ample authority to try the issues separately,\(^1\)\(^7\)\(^9\) thus cabining the defaulting defendant’s participation rights. In reality, the court may be unable to separate trial of the issues in which the defaulter can and cannot participate.\(^1\)\(^8\) If the court cannot do so, the logic of Burge suggests that the court should opt to allow the defaulting party greater rather than fewer participation rights at the trial of the non-defaulting defendants.

Even limited participation of the defaulting party at the trial will be unfair to the non-defaulting defendants, and possibly to the plaintiff,\(^1\)\(^8\) unless they are given adequate notice of the defenses to be asserted and the evidence to be produced by the defaulting party at trial. The court also will have to determine whether it is fair to non-defaulting parties to allow the defaulting party to engage in discovery.\(^1\)\(^8\)

---

176. Id. ¶ 22, 933 P.2d at 217; Gallegos v. Franklin, 89 N.M. 118, 123, 547 P.2d 1160, 1165 (Ct. App. 1976).
178. One issue that might affect the decision whether to expand the participation rights of the defaulter at the trial of other defendants is the question of whether the defaulting party must be allowed to participate in pretrial discovery proceedings. Permitting discovery by the defaulting party concerning the fault of other tortfeasors would seem to be a necessary precondition to effective presentation at trial of the defaulting party’s evidence establishing fault of the other tortfeasors. But Frow, 82 U.S. at 554, would bar the defaulting defendant from participating in discovery after defaulting, and parties who are in default for failure to appear need not be served with discovery documents. Rule 1-005(A) NMRA. If discovery rights must accompany trial-participation rights, a court may be reluctant to extend participation rights to a defaulting party.
179. Rule 1-042(B) NMRA; Bolton v. Bd. of County Comm’rs, 119 N.M. 355, 890 P.2d 808 (Ct. App. 1994).
180. The issue of the plaintiff’s comparative negligence cannot be isolated from that of the defendants and defaulting party, for example, because the percentage of fault attributable to the plaintiff is determined in part by the percentage of fault attributed to the tortfeasors.
181. Even if limited to contesting its fault compared to the fault of other wrongdoers, the defaulting party’s participation at trial might have a negative impact on the plaintiff. The plaintiff will not care how fault is allocated among the tortfeasors and thus will have no stake in the defaulting defendant’s attempt to allocate a large portion of the fault to co-tortfeasors if all wrongdoers are before the court and each has assets sufficient to pay whatever portion of the damages are allocated to it. When some wrongdoers are not defendants or some defendants lack assets, however, the plaintiff may want to allocate fault among the tortfeasors differently from the preference of the defaulting defendant.
182. Frow, 82 U.S. at 554, would bar the defaulting defendant from participating in discovery after defaulting, but discovery by the defaulting party relevant to the fault of other tortfeasors would seem to be a necessary precondition to effective presentation at trial of evidence establishing fault of other tortfeasors.
attend depositions conducted by other parties, and receive notice of and participate in proceedings brought by the other parties.

The court also must consider the possibility that the trial of the non-defaulting defendants may not take place. The remaining defendants may obtain a summary judgment of non-liability or they may settle with the plaintiff. Where no non-defaulting defendants remain, the scheduled trial will revert to the damages hearing that occurs when the defaulting party is the only defendant.

4. Proposed Modification of Current Default Judgment Practice

Certain aspects of the existing system for dealing with defaulting defendants in several liability cases need change. The root of the problem is the Gallegos court’s ruling that a defaulting party has an absolute right to show up, apparently unannounced, and to participate in the damages hearing. The problem is exacerbated by the expansion of the issues that the defaulting party may litigate pursuant to Burge. The existing premise is that the quest for a determination of the merits is so strong that any defaulting party, no matter the reason for the default, must be allowed to dispute not only the amount of damages but also the defaulter’s percentage of fault at the hearing. This goes too far when the defaulter has no excuse for failing to answer or otherwise defend. The right of the defaulter to participate should be conditioned on a demonstration by the defaulting party that the default was not intentional but in some fashion excusable. By thus conditioning participation rights, the court can strike a balance between the desire to reach the merits and the need to enforce the rules of civil procedure.

There is no need to change any rule of procedure to accomplish this reform. Rule 1-055(C) already provides that the court can set aside an entry of default before entering final judgment for “good cause shown.” The defaulting party who seeks

183. Service of discovery notices need not be made on parties who are in default for failure to appear. Rule 1-005(A) NMRA.
184. Motions and other written notices normally need not be served on a party in default for failure to appear. Rule 1-005(A) NMRA.
185. In Passino v. Cascade Steel Fabricators, Inc., 105 N.M. 457, 734 P.2d 235 (Ct. App. 1986), overruled by Burge v. Mid-Continent Cas. Co., 1997-NMSC-009, 933 P.2d 210, the trial court initially decided that the defaulting defendant’s liability would be determined at the trial of the non-defaulting defendant. Id. at 457, 734 P.2d at 235. When the remaining defendant settled with the plaintiff, the plaintiff requested and the court ordered an evidentiary hearing to determine the liability of the defaulting defendant. Id.
186. See id. In Passino, Judge Bivins wrote separately to discuss a question not reached by the majority: how should the amount of the damages assessed against the defaulting defendant be adjusted in light of the amount of the settlement by the non-defaulting party? Id. at 459, 734 P.2d at 237. Because Passino ruled that the defaulting party could not lay off fault on others, the Passino court anticipated that the defaulting defendant would be fully liable for all of the damages the plaintiff suffered, with a setoff only of the amount received in settlement of the claim against the other tortfeasor. Id. at 459, 734 P.2d at 239 (Bivins, J., concurring); see NMSA 1978, § 41-3-4 (2004). Because Burge allows the defaulting defendant to lay off fault on other tortfeasors, see Burge, 1997-NMSC-009, ¶ 22, 933 P.2d at 217, the defaulting defendant is no longer fully liable, but is only severally liable for its percentage of fault, and there is no setoff of the defaulting defendant’s liability by the amount of the non-defaulting party’s settlement. See Wilson v. Gait, 100 N.M. 227, 668 P.2d 1104 (Ct. App. 1983).
187. Gallegos, 89 N.M. at 123, 547 P.2d at 1165.
188. See supra notes 86–88 and accompanying text.
189. A showing “that the trial attorney’s neglect was excusable, that there was a meritorious defense, and that there were no intervening equities” provides a basis for setting aside a default. Chase v. Contractors’ Equip. & Supply Co., 100 N.M. 39, 43, 665 P.2d 301, 305 (Ct. App. 1983).
190. Rule 1-055(C) NMRA.
to participate in proceedings subsequent to defaulting should file a motion seeking to set aside the entry of default. The liberal standard for granting a Rule 1-055(C) motion will often be met except in egregious cases. If the court grants the motion unconditionally, the movant loses the status of a defaulting party and becomes a party for all purposes. This will avoid the need for any separate damages hearing. Alternatively, the court can set aside the default conditionally, imposing certain requirements or restraints on the party who seeks to be relieved of default. The conditions imposed can take the form of limitations on the substantive issues that the party can thereafter litigate or procedural limitations on the party. For example, the court could require the party seeking to set aside the default to file a proposed pleading, to agree to abide by completed discovery, to meet reasonable deadlines for its own discovery, and to follow existing pretrial orders including deadlines contained therein.

No New Mexico case rejects the applicability of Rule 1-055(C) to parties in default who want to participate in subsequent proceedings. Rather, the cases have failed to consider its applicability. The benefits of applying the provision are several. Requiring that the defaulting party file a motion to set aside the default would provide the court with an opportunity to distinguish between defaulting parties who did and did not have an acceptable reason for defaulting. The court could grant the motion conditionally, setting conditions on the movant's participation in subsequent proceedings. It would also provide a welcome measure of flexibility to the court and an opportunity for an orderly reintroduction of the defaulting party into the lawsuit with the resulting elimination of issues that arise when the substantive law of several liability intersects with existing law concerning the procedural rights of defaulting parties.

B. Defendant’s Response

The defendant’s usual response to a complaint alleging that the defendant is fully liable for the plaintiff’s injuries is to deny any liability to the plaintiff and to assert the comparative fault of the plaintiff as an affirmative defense. A defendant who also wants to lay off fault on a tortfeasor not joined as a co-defendant has three

---

191. The focus is on whether the defaulter’s conduct “constituted contumacious conduct, intentional tactical delay, or willful disregard for deadlines and procedural rules. Trial judges should set aside non-final default judgments when the movant’s conduct constitutes marginal and negligent failures to comply with the applicable rules of procedure.” De Fillippo v. Neil, 2002-NMCA-085, ¶ 29, 51 P.3d 1183, 1190; see also Gandara v. Gandara, 2003-NMCA-036, ¶ 9, 62 P.3d 1211, 1214 (“Because default judgments are generally disfavored, ‘[a]ny doubts about whether relief should be granted are resolved in favor of the defaulting defendant...’”) (quoting Dyer v. Pacheco, 98 N.M. 670, 673, 651 P.2d 1314, 1317 (Ct. App. 1982)) (alteration in original); Enron Oil Corp. v. Diakuhara, 10 F.3d 90, 96 (2d Cir. 1993).

192. See De Fillippo, 2002-NMCA-085, ¶ 36, 51 P.3d 1183, 1191 (reversing entry of default judgment and remanding “for a trial on the merits”).

193. 10A WRIGHT ET AL., supra note 95, § 2700, at 170, 172.

194. A defendant who wants to lay off fault on co-defendants can do so by raising the affirmative defense of the fault of the co-tortfeasors. See UJI 13-302C NMRA (providing that fault of others is an affirmative defense). Alternatively, or in addition, the defendant might file a cross claim against the co-defendant. Though the court did not have occasion to discuss cross claims in Tipton v. Texaco, Inc., 103 N.M. 689, 712 P.2d 1351 (1985), the ruling allowing the defendant to implead a non-party tortfeasor suggests that the court would allow one defendant to file a cross claim against a co-defendant. The counterargument is that the use of impleader in several liability cases fosters the goal of having all tortfeasors as parties, id. at 693, 712 P.2d 1355, in contrast to filing a cross claim against an alleged tortfeasor who is already a party.
options for doing so. In *Tipton v. Texaco, Inc.*, the New Mexico Supreme Court ruled that the defendant can use Rule 1-014 to implead additional wrongdoers, and suggested that the defendant alternatively can seek to join them as necessary parties under Rule 1-019, or can raise their fault as an affirmative defense without joining them as parties. Each option carries with it tactical benefits and detriments for the parties and impacts the judicial process in different ways.

1. Third-Party Practice

Soon after the supreme court decided *Bartlett*, the injured plaintiff in *Tipton v. Texaco, Inc.* sued only Texaco. Texaco raised the issue of the fault of non-party tortfeasors by impleading them under Rule 1-014. The trial court dismissed the third-party complaints on the ground that Rule 1-014 was inapplicable in the absence of joint and several liability. The supreme court reversed. The court acknowledged that the abolition of several liability technically made Rule 1-014 unavailable to raise the defense of the fault of non-parties, but allowed the use of Rule 1-014 as part of the attempt "to tailor the theory of comparative negligence to our legal system." The court expressed its desire that there be a single lawsuit to apportion the fault of all tortfeasors, and its preference for including all tortfeasors in the lawsuit. An approved method of raising the *Bartlett* defense in New Mexico, therefore, is for the defendant to implead alleged tortfeasors not joined as defendants by the plaintiff even though the defendant may be seeking only to lay

---

196. *Id.* at 692–93, 712 P.2d at 1354–55.
197. *Id.*
198. *Id.* at 692, 712 P.2d at 1354. Some jurisdictions bar defendants from laying off fault on non-parties, thus precluding use of the affirmative defense approach when the other alleged wrongdoers are not parties. The effect is to encourage the defendants to join non-party tortfeasors. *Reimbursement (Third) of Torts: Apportionment of Liability § B19 cmt. c (2000).*
200. *Id.* at 690, 712 P.2d at 1352.
201. *Id.* at 692, 712 P.2d at 1354.
202. *Id.* at 693, 712 P.2d at 1355.
203. *Id.* at 690, 712 P.2d at 1352.
204. Normally, impleader is reserved for use against a defendant who is "secondarily liable" to the defendant for the plaintiff's injuries and is usually premised upon a right of contribution or indemnity in favor of a defendant found liable for the full amount of plaintiff's damages. *Id.* at 691–92, 712 P.2d at 1353–54. Because the defendant in a several liability case pays only its share of the judgment, "strict application of Rule 14 would not allow a defendant to bring in third parties merely on the grounds that they are concurrent tortfeasors." *Id.* at 692, 712 P.2d at 1354.
205. *Id.*
206. *Id.* at 693, 712 P.2d at 1355.
207. Even if the defendant chooses to raise the issue by use of a third-party complaint, the defendant probably should also raise the *Bartlett* issue as an affirmative defense in response to the plaintiff's complaint. In *Tipton*, the defendant did not accompany the use of impleader with an assertion of the fault of others in the answer. *Id.* at 692, 712 P.2d at 1354. The court found that, "[c]onsidering the uncertain state of comparative negligence pleading during that period," the defendant's failure to raise the issue in the answer, in addition to in the third-party complaint, "should not have been fatal in itself." *Id.* The court may now be less forgiving, and the failure to raise an affirmative defense in the answer constitutes a waiver of the defense unless the court allows a later amendment to the pleadings. See, e.g., *Fredenburgh v. Allied Van Lines, Inc.*, 79 N.M. 593, 446 P.2d 868 (1968).
off fault on them rather than to recover from them on a theory of contribution or indemnity.

The use of Rule 1-014 to assert the partial defense of several liability places the third-party defendant in an anomalous position. Unlike the typical situation in which the third-party plaintiff seeks a money judgment for contribution or indemnity, the third-party plaintiff who impleads a third-party defendant does not seek affirmative relief. Instead, the pleading normally will allege only that the third-party plaintiff seeks to reduce the plaintiff's verdict against it by the percentage of fault attributable to the negligence of the third-party defendant. Because no affirmative relief is sought, the third-party defendant has little reason to defend vigorously, or indeed, even to reply to the third-party complaint. Only if the plaintiff amends the complaint to add the third-party defendant as a defendant in the plaintiff's action will the third-party defendant be subjected to the risk of suffering a money judgment.

A wrongdoer who has settled with the plaintiff likewise has no incentive to participate in litigation when joined as a third-party defendant. In several liability cases, settlement not only protects the settling tortfeasor from further liability to the
plaintiff, but also precludes an action for contribution by co-defendants. For that reason, the New Mexico Court of Appeals has held that Rule 1-014 is not available as a means for a defendant to raise the defense of the fault of a settling tortfeasor. In Wilson v. Gillis, the defendants sought to implead alleged tortfeasors who had settled with the plaintiff prior to the plaintiff's lawsuit against the defendants. The trial court granted the settling parties' motion to dismiss the third-party complaint. The court of appeals affirmed the dismissal. The court reasoned that, because settling defendants cannot be liable to the plaintiff beyond the amount of the settlement, no matter what percentage of fault the factfinder attributes to the settler, the settling wrongdoers "cannot reasonably be expected to participate as parties in the lawsuit." Moreover, to force settling tortfeasors to participate in the litigation would reduce their incentive to settle the dispute. The court held that "Tipton is properly limited to cases in which the third-party defendant is potentially liable. Instead of using impleader, the defendant may assert comparative fault as an affirmative defense without joining the settling tortfeasor as a party, thus preserving the defendant's right to lay off fault.

The scope of the Wilson ruling is uncertain. There are other alleged tortfeasors who, like the settling parties in Wilson, are not "potentially liable" to the plaintiff and thus might share the settling tortfeasor's freedom from Rule 1-014 joinder even though making them parties will not discourage settlements. Tortfeasors who are immune from liability or employers who are protected from common law liability to a third person when their employees sue a third person, for example, are not "potentially liable" to the injured plaintiff. Though the policy of fostering settlements will not be frustrated by allowing the joinder of these types of tortfeasors, the substantive doctrines that free them from liability to plaintiffs might likewise be frustrated if they can be joined as third-party defendants. Immunity sometimes protects against the rigors of litigation as well as against liability, and the protection of employers from most common law liability is in part motivated by reluctance to force the employer to engage in costly lawsuits asserting common law immunity.

216. Wilson v. Galt, 100 N.M. 227, 232, 668 P.2d 1104, 1109 (Ct. App. 1983); see RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § B19 cmt. k (2000) ("Because each tortfeasor is liable only for its comparative share of the plaintiff's damages, there are no contribution claims.").
218. Id. at 260, 731 P.2d at 956.
219. Id. at 261, 731 P.2d at 957.
220. Id. at 263, 731 P.2d at 959.
221. Id. at 262, 731 P.2d at 958 (citing Wilson v. Galt, 100 N.M. 227, 668 P.2d 1104 (Ct. App. 1983)).
222. "A settling tortfeasor ought to enjoy the benefit of his settlement; joinder as a third party, after settlement, eliminates a major benefit of settlement." Id. at 262, 731 P.2d at 958.
223. Id. at 261, 731 P.2d at 958.
224. "In this case, defendant's answer contained a sufficient statement to raise an affirmative defense, and we see no reason why a defendant cannot raise the Bartlett defense in the same manner as other affirmative defenses." Id. at 261, 731 P.2d at 957.
225. "At 261, 731 P.2d at 958.
claims. If the sole test for disallowing joinder under Rule 1-014 is lack of potential liability, sovereign immunity and the exclusivity provision of the Workers’ Compensation Act will bar sovereigns and employers from being joined. If, instead, lack of potential liability must be accompanied by an independent policy reason for refusing to allow a tortfeasor to be joined, the courts will have to decide whether sovereign immunity protects against litigation as well as liability and whether employers who cannot be sued by their employees can be made third-party defendants when a tortfeasor sued by an injured employee asserts that the employer’s negligence should reduce the tortfeasor’s liability to the injured employee.

The better rule would be to preclude use of Rule 1-014 whenever the third-party defendant has no potential liability to the plaintiff and lacks an incentive to defend against the defendant’s claim that the third-party defendant’s negligence contributed to the plaintiff’s injuries. The defendant can still lay off fault by raising the affirmative defense of the fault of the absent tortfeasor without making the tortfeasor a nominal party who, lacking an incentive to litigate, would probably default rather than defend.

2. The “Empty Chair” Approach

_Tipton_ permits but does not compel the defendant to use Rule 1-014 to raise the Bartlett defense. The _Tipton_ court suggested that a defendant may also raise the Bartlett issue without making the other tortfeasors parties merely by asserting the fault of others as an affirmative defense in the answer. Indeed, in _Bartlett_, the court allowed the defendant to lay off fault on an alleged tortfeasor who was unknown and thus could not be made a party to the lawsuit. Subsequent cases

---

229. See Morales v. Reynolds, 2004-NMCA-098, ¶ 13, 97 P.3d 612, 617 (strictly construing exception to general rule that employee cannot sue in a common law action against employer because to allow liberal construction would “eviscerate the essential provisions of the Act,” which is designed to protect employers from most common law litigation). In _Tipton v. Texaco, Inc._, 103 N.M. 689, 712 P.2d 1351 (1985), the supreme court approved of the use of Rule 1-014 against an employer of the plaintiff but did not focus on the status of the employer as an entity that was not potentially liable to the plaintiff.

230. This “test” adopted from _Wilson v. Gillis_, 105 N.M. 259, 731 P.2d 955 (Ct. App. 1986), is not free from difficulty in application. For example, a tortfeasor whose negligence will not result in liability if the defendant can successfully assert the affirmative defense of the statute of limitations, see Rule 1-008(C) NMRA (providing that statute of limitations is affirmative defense), is perhaps potentially liable at least until the affirmative defense is raised and proven. See _Fredenburgh v. Allied Van Lines_, 79 N.M. 593, 446 P.2d 868 (1968) (providing that affirmative defenses not pled are waived); _RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY_ § B19 cmt. e (2000) (“Persons for whom the statute of limitations bars suit should...be treated as immune parties.”).

Occasionally, the third-party defendant will not be subject to liability but might have an incentive to defend against a Bartlett defense. For example, a negligent employer is not potentially liable to the employee-plaintiff but has an incentive to minimize its own fault in order to maximize the amount the employee must reimburse the employer from the employee’s recovery against the defendant. See NMSA 1978, § 52-1-10.1 (2004). _Contra_ _RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY_ § B19 cmt. 1 (2000) (analogizing employer who paid Workers’ Compensation benefits to a settling tortfeasor, both of whom have paid only their share to the plaintiff and neither of whom should benefit from plaintiff’s recovery against third parties).

231. _Tipton_, 103 N.M. at 692, 712 P.2d at 1354. The court noted that the fault of others was not a listed affirmative defense, _id._, but that is not determinative because Rule 1-008(C) provides that, in addition to those specifically listed, affirmative defenses include “any other matter constituting an avoidance or affirmative defense.” Rule 1-008(C) NMRA. The Uniform Jury Instructions now list the partial fault of others as an affirmative defense. See UJI 13-302D NMRA.

232. _Bartlett_, 98 N.M. 152, 646 P.2d 579. The opinion in _Bartlett_ states that the “[d]efendant contended that the negligence of the unknown driver ‘caused or contributed to cause’ the accident” but does not specify whether
have allowed the use of the affirmative defense of comparative fault without joinder of the alleged tortfeasor, even when the other tortfeasors were known and could have been brought into the lawsuit. In Segura v. K-Mart Corp., for example, the defendant alleged in its answer the fault of a non-party, whom the defendant later identified as Keck. The trial court ruled that defendant could not lay off fault on Keck without joining him as a third-party defendant. The court of appeals reversed, ruling that New Mexico law allowed the defendant to present an "empty chair" defense by asserting the affirmative defense of the fault of other tortfeasors without joining them as parties. The defendant is thus able to lay off fault on an alleged tortfeasor who is not a party to the lawsuit, who is not participating in the trial, and who thus has no reason to defend vigorously.

The defendant's tactical choice to raise the fault of another as an affirmative defense without making the alleged tortfeasor a party sometimes might be satisfactory to the plaintiff as well. The plaintiff may be confident that the other alleged tortfeasor is not liable and will not be assigned any fault. The plaintiff also might prefer to await the outcome of the trial with the defendant and then sue the additional wrongdoer in a separate lawsuit, if necessary, to achieve full compensation, thus avoiding the increased procedural problems that arise when additional parties are present. When the plaintiff is not satisfied with the defendant's choice of an "empty chair" defense, the plaintiff normally can amend the complaint to add the alleged tortfeasor as a defendant, thus preventing the defendant from taking advantage of the "empty chair" defense.

In the rare situation in which the non-party would prefer to be in the litigation between the plaintiff and the defendant, the non-party can seek to intervene.

The defendant made the assertion as a defense in the answer. Id. at 153, 646 P.2d at 580. With a single exception, the Restatement would not allow a defendant to lay off fault on a tortfeasor "who is not sufficiently identified to be either subject to service of process or discovery." RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § B19 cmt. f (2000).


236. See id.

237. See id. ¶ 17, 62 P.3d at 288.

238. Id. The court relied on Wilson v. Gillis, 105 N.M. 259, 261, 731 P.2d 955, 957 (Ct. App. 1986), which held that a defendant could lay off fault on an alleged tortfeasor who had settled tortfeasor who had settled with the plaintiff.

239. For example, multiple defendants in a several liability case will almost always each get separate peremptory jury challenges while the plaintiff's challenges will be limited. See Rule 1-038(E) NMRA; Gallegos v. Citizens Ins. Agency, 108 N.M. 722, 734, 779 P.2d 99, 111 (1989) (listing considerations in determining the number of peremptory challenges for each party); Sewell v. Wilson, 101 N.M. 486, 491–93, 684 P.2d 1151, 1156–58 (Ct. App. 1984); see also Apodaca v. AAA Gas Co., 2003-NMCA-085, 73 P.3d 215 (holding that spouse seeking consortium must share peremptory challenges with husband).

240. A plaintiff cannot wait too long to file the subsequent action. If the statute of limitations has run for an action against the additional tortfeasor, plaintiff's subsequent action will be subject to dismissal. See supra note 46.

241. Rule 1-024 NMRA.
3. Rule 1-019 Joinder of Persons Needed for Just Adjudication

The Tipton court suggested a third procedural mechanism for raising the Bartlett issue: the defendant might assert that non-party tortfeasors should be joined in the action in accordance with Rule 1-019.242 Commenting on the need to broadly construe the rules to effectuate the doctrine of several liability, the court called for liberal construction of Rules 1-019 and 1-014: "[I]t will be necessary that the rules of third-party practice and joinder of missing parties, whether those parties be permissive or necessary, be liberally applied when comparative fault or liability of multiple parties surfaces in the pleadings."243 No other New Mexico appellate case has discussed the use of Rule 1-019 in this context, suggesting that it is not now a preferred method for defendants to raise the Bartlett defense. It nonetheless is the most satisfactory method if properly applied.

The plaintiff initially chooses the parties to the lawsuit.244 For tactical reasons, the plaintiff may omit a person from the litigation who meets the Rule 1-019 criteria for joinder. The plaintiff must then identify the omitted person and state the reasons for non-joinder.245 This requirement provides the defendant with notice and an opportunity to move to add the person as a party. It also informs the court of the absence of such persons so that the court may notify them of the pending litigation and invite them to intervene,246 or move, sua sponte, to join them as parties pursuant to Rule 1-019.247

Rule 1-019 sets criteria for determining which persons should be joined in a pending action248 and requires that the court join them unless procedural barriers to joinder exist.249 If non-parties are persons who should be joined under the rule, but cannot be joined, the court must apply listed criteria250 to determine whether the action can proceed in their absence or whether the action should be dismissed because their presence is critical to the case.251

242. Rule 1-019 NMRA ("Joinder of persons needed for just adjudication").
244. See Rule 1-020 NMRA.
245. Rule 1-019(C) NMRA. The rule does not require the plaintiff to identify persons whose existence or identity are unknown to the plaintiff. Id. One commentator notes that "[t]he provision has not proved useful because of the perceived widespread failure of counsel to comply with the requirements." 4 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 19.07[1] (3d ed. 1999). Any pleading asserting a claim for relief must comply with the rule. See Rule 1-019(C) NMRA. Thus, a defendant filing a counterclaim or cross claim is subject to the same requirement.
246. 4 MOORE ET AL., supra note 245, ¶ 19.07[1].
247. "The matter of a party’s absence can be raised at any time and should be raised by a court sua sponte.... We must protect the interests of an absent necessary party, and have a duty to ensure that the best possible parties litigate this suit." United States Cellular Inv. Co. v. Southwestern Bell Mobile Sys., Inc., 124 F.3d 180, 182 (10th Cir. 1997); see Faunce v. Bird, 210 F.R.D. 725, 727 (D. Or. 2002).
248. Rule 1-019(A) NMRA.
249. Persons who meet the Rule 1-019(A) criteria “shall” be joined if “subject to service of process.” Rule 1-019(A) NMRA.
250. Rule 1-019(B) NMRA. The listed factors are not the only ones that may be considered. State ex rel. Coll v. Johnson, 1999-NMSC-036, ¶ 5, 990 P.2d 1277, 1279 (stating that factors are “nonexclusive”).
251. When the court concludes that the case must be dismissed because a person who should be joined cannot be joined, the person is labeled “indispensable.” If the court concludes that the action can continue even in the absence of that person, the person is a party to be joined if feasible but not an indispensable party. See Holguin v. Elephant Butte Irrigation Dist., 91 N.M. 398, 575 P.2d 88 (1975), overruled in part by C.E. Alexander & Sons v. DEC Int'l, Inc., 112 N.M. 89, 91, 811 P.2d 899, 901 (1991).
There are three situations in which an absentee is a party to be joined if feasible: where complete relief cannot be accorded among those already parties, where the absent person’s interests may be impaired in his or her absence, and where a party may be subjected to inconsistent obligations unless the absent person is joined.\footnote{252}

The most likely of these three to apply to several liability cases is the first, where “in [the missing person’s] absence complete relief cannot be accorded among those already parties.”\footnote{253} If the absent person is partially liable for plaintiff’s injuries, the plaintiff will not receive full compensation from the remaining defendants who are only liable for their percentages of fault. Joining the missing tortfeasor as a party would provide the possibility of complete relief, suggesting that the missing tortfeasor is a person to be joined if feasible.\footnote{254}

Applying Indiana’s several liability doctrine, the court held in \textit{Alvarez v. Donaldson Co.} that non-parties alleged by the defendant to be additional tortfeasors were persons to be joined in order to afford complete relief to the plaintiff.\footnote{255} The court reasoned that “[u]nder the Indiana Comparative Fault Act, nonparties are assessed fault but not liability. If fault were found the [plaintiff] would be unable to recover damages from them, requiring the [plaintiff] to follow up in [a separate action].”\footnote{256}

Two rationales emerge from \textit{Alvarez}: first, the non-party should be joined to afford complete relief to the plaintiff; and second, judicial efficiency is best served by resolving all liability with all tortfeasors present in a single lawsuit.\footnote{257} There is irony, however, in allowing the defendant to insist on the presence of a non-party to assure complete relief to the plaintiff. The defendant has no need for Rule 1-019 to protect its own interests. It can lay off fault using either the “empty chair” defense or joinder pursuant to Rule 1-014.\footnote{258} The defendant’s motion ostensibly seeks to benefit the plaintiff by assuring that the plaintiff can collect all its damages in a single lawsuit. But the plaintiff is master of its lawsuit and chose not to join the absent alleged tortfeasors. The plaintiff might prefer to forego an attempt to establish the non-party’s liability. Even if the plaintiff was not aware of the additional alleged tortfeasor until the defendant identified the alleged tortfeasor as a person to be joined if feasible, the plaintiff has the option of amending the

\begin{footnotes}
\item[252] Rule 1-019(A)(1)-(2) NMRA.
\item[253] Rule 1-019(A)(1) NMRA.
\item[254] In contrast, when tortfeasors are jointly and severally liable, those not sued will not be persons to be joined if feasible. Because the plaintiff can get complete relief from any one tortfeasor who is jointly and severally liable, \textit{Bartlett}, 98 N.M. 152 at 646 P.2d at 581 (Ct. App. 1982), the presence of non-party tortfeasors is not necessary to afford complete relief to plaintiff. Thus, they are not persons to be joined under Rule 19(A)(1). \textit{E.g.}, \textit{Temple v. Synthes Corp.}, 498 U.S. 5, 7 (1990) (“It has long been the rule that it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit.”); see \textit{Fed. R. Civ. P. 19(a) advisory committee notes} (“[A] tortfeasor with the usual ‘joint-and-several’ liability is merely a permissive party to an action against another with like liability.”).
\item[255] 213 F.3d 993 (7th Cir. 2000).
\item[256] \textit{id}. at 995.
\item[257] \textit{id}.
\item[258] \textit{id}.
\end{footnotes}
complaint and adding the person as a defendant if the plaintiff wants to assure complete relief.  

The defendant’s decision to use the Rule 1-019(A)(1) motion instead of using Rule 1-014 to implead additional wrongdoers might be motivated by a desire to reap a procedural benefit for itself rather than to assist the plaintiff in getting complete relief. If the additional wrongdoer cannot be joined pursuant to Rule 1-019, the court might find the absent party indispensable and dismiss the action against the defendant. Courts should thus be particularly wary of a defendant’s motion to join additional parties under this provision of Rule 1-019 when the absent persons are not subject to the court’s jurisdiction.

The alternative “judicial economy” rationale for assuring complete relief by joining all tortfeasors in a single action protects the courts from the inefficiencies of multiple lawsuits. This is the strongest reason for liberal application of Rule 1-019(A). The courts and the public have an “interest in the comprehensive resolution of disputes and avoidance of duplicative litigation” that is best served by joining all persons who have an interest in the litigation. Joinder ensures “that any relief to be awarded will effectively and completely adjudicate the dispute.” This goal meshes perfectly with the goal of Tipton “that all tortfeasors should be joined in the jury’s determination of apportionment of damages.”

A missing tortfeasor would also qualify as a person to be joined if feasible if that tortfeasor has an interest in the subject matter of the litigation and is so situated that non-joinder “may...as a practical matter impair or impede his ability to protect that interest.” This provision will almost never be relevant in several liability cases. Limitations on the doctrine of collateral estoppel assure that any judgment entered in the absence of a non-party tortfeasor will not result in a judgment against that tortfeasor and any findings of fault in the initial litigation will not be binding upon the absent tortfeasor in subsequent litigation.  

260. A plaintiff may amend its complaint to add new parties but delay in doing so may subject plaintiff to the defense of the statute of limitations when raised by the newly-joined party. E.g., Clark v. Lovelace Health Sys., Inc., 2004-NMCA-119, 99 P.3d 232; see Rule 1-015(C) NMRA; Romero v. Bachicha, 2001-NMCA-048, 28 P.3d 1151.

261. E.g., Estate of Alvarez v. Donaldson Co., 213 F.3d 993 (7th Cir. 2000) (case dismissed because absent severally liable tortfeasors were both necessary and indispensable but could not be joined due to subject matter jurisdiction limitations). The dismissal for lack of an indispensable party is not on the merits and does not prevent plaintiff from filing in another forum where all tortfeasors can be joined in a single action. Rule 1-041(B) NMRA (providing that dismissal for failure to join an indispensable party is not an adjudication on the merits). Even if the statute of limitations has run for actions against the original defendants at the time of dismissal, a New Mexico statute allows a plaintiff to file a second lawsuit against them within six months of the dismissal. See NMSA 1978, § 37-1-14 (2004). It is not clear, however, whether courts of other states would honor this provision if the second lawsuit is filed in a different state court. See, e.g., Sun Oil Co. v. Wortman, 486 U.S. 717 (1988) (stating that forum is free to apply its own statute of limitations in preference to any other).

262. “The interests that are being furthered here are not only those of the parties, but also that of the public in avoiding repeated lawsuits on the same essential subject matter.” Fed. R. Civ. P. 19 advisory committee notes.

263. 4 MOORE ET AL., supra note 245, ¶ 19.03[2][a].


266. Rule 1-019(A)(2)(a) NMRA.

267. “It is an elementary, if not oft-stated, principle that judgment may not be entered against one not a party to the action.” Lava Shadows Ltd. v. Johnson, 1996-NMCA-043, ¶ 6, 915 P.2d 331, 332–33.

268. Only when a person was a party or in privity with a party in the initial litigation can findings in that action be used against the person in subsequent litigation. State v. Silva, 106 N.M. 472, 745 P.2d 380 (1987).
Only if the absent tortfeasor was also injured by the fault of a defending party who lacks sufficient resources to satisfy both the plaintiff’s and the absent tortfeasor’s claims could the absent person’s interests be impaired by non-joinder.\textsuperscript{269} Even then, the absent party, if aware of the pending lawsuit, could seek to intervene in the lawsuit.\textsuperscript{270} Thus, the absent tortfeasor would get to decide whether participation in the litigation would best protect that tortfeasor’s interests.\textsuperscript{271}

The third category of persons to be joined if feasible consists of those whose absence would leave an existing party subject to a “substantial risk of incurring double, multiple or otherwise inconsistent obligations” by reason of the absent person’s interest in the subject of the action.\textsuperscript{272} The usual focus of this provision is on whether the defendant in the pending action might suffer double or inconsistent obligations in the absence of the other person.\textsuperscript{273} Because defendants in New Mexico can lay off fault on absent tortfeasors without joining them as parties,\textsuperscript{274} defendants will not suffer from the absence of missing tortfeasors.\textsuperscript{275} Even if an absent person also had a personal injury claim against the defendant, the defendant this reason, the plaintiff in the original action cannot use collateral estoppel against a tortfeasor who was not a party in the first lawsuit when suing that tortfeasor in a subsequent action.

Whether the defendant in the subsequent action can use issue preclusion against the plaintiff in the original and subsequent action is a more complicated question. In subsequent litigation involving an absent person who was aware of the initial lawsuit and chose not to intervene in it, the absent person probably cannot take advantage of findings in the initial lawsuit that are unfavorable to the plaintiff. In Silva, the court stated that a person who chose not to intervene in the initial action, and later was a plaintiff in a different action brought by a party to the first lawsuit could not use collateral estoppel offensively against that party.\textsuperscript{276} This ruling does not address the question of whether the result should be different when the person who could have intervened seeks to use the results of the first lawsuit defensively in the second lawsuit. The rationale for limiting collateral estoppel is that a person should not be encouraged to sit out the first lawsuit in order to potentially benefit from collateral estoppel in the second lawsuit. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 330 (1979). This rationale would apply equally to an absent tortfeasor who chose not to intervene as a defendant in the initial lawsuit. Barring the defensive use of collateral estoppel by the defendant who could have intervened in the first lawsuit will benefit the plaintiff who is then free to relitigate percentages of fault unfavorable to the plaintiff that were established in the initial lawsuit. This would undermine one of the goals of the modern doctrine of defensive collateral estoppel, which “gives a plaintiff a strong incentive to join all potential defendants in the first action if possible.” Id. at 329–30.\textsuperscript{276}


In theory, the absent tortfeasor also could have its interests impaired by the stare decisis effect of an appellate ruling in the initial litigation that would establish a precedent for the subsequent litigation involving the absent tortfeasor. But the decision whether the absent person should be joined in the initial litigation is made at the trial stage, and it is then purely speculative whether there will be an appeal and whether any appeal will result in a legal ruling that would harm the interests of the absent party. See Janney Montgomery Scott, Inc. v. Shepard Niles, Inc., 11 F.3d 399 (3d Cir. 1993) (declining to rule that any potential effect the doctrine of stare decisis may have on an absent party’s rights makes the absent party’s joinder compulsory under Rule 19(a) whenever feasible).\textsuperscript{278} Rule 1-024 NMRA.

278. Rule 1-024 NMRA.

279. “[A]ny harm to the plaintiff caused by its structuring of the litigation is self-inflicted. Thus, such potential harm to the plaintiff is rarely relevant.” 4 MOORE ET AL., supra note 245, ¶ 19.03[4][a].

279. “[A]ny harm to the plaintiff caused by its structuring of the litigation is self-inflicted. Thus, such potential harm to the plaintiff is rarely relevant.” 4 MOORE ET AL., supra note 245, ¶ 19.03[4][a].


281. In Wilson v. Gillis, 105 N.M. 259, 731 P.2d 955 (Ct. App. 1986) the defendant argued that the absence of the other tortfeasor would impair the defendant’s ability to do full discovery and might confuse the jury. The court rejected both arguments. Id. at 262, 731 P.2d at 958.
would not suffer the type of harm contemplated by this section. Differences in liability of a defendant to different persons for separate injuries cannot result in the type of multiple liability required to satisfy this section. Although the defendant’s percentage of assessed fault may differ in the first case from that established in a later case brought by the absent person, this is not the type of inconsistency that the rule contemplates: “The rule protects against obligations that are inconsistent rather than adjudications that are inconsistent....Rule 19 is not triggered by the possibility of a subsequent adjudication that may result in a judgment that is inconsistent as a matter of logic.”

If the absent tortfeasor is to be joined if feasible and is subject to the court’s jurisdiction, the court will order the person’s joinder. If the person cannot be joined, as for example if the alleged tortfeasor is not subject to personal jurisdiction or is immune from suit, the court must decide whether to proceed in the person’s absence or to dismiss the lawsuit in accordance with guidelines in Rule 1-019(B). If the court concludes that the non-party who cannot be joined is so important that, in its absence, the case should not go forward, the non-party is deemed indispensable and the case is dismissed. The court may conclude, however, that the action may proceed in the person’s absence, in which case the absent tortfeasor, though a person to be joined if feasible, is not an indispensable party.

4. Raising the Bartlett Defense: A Proposal

For tactical reasons, the defendant may prefer one of the three alternatives over another to raise the Bartlett defense. But from a jurisprudential and procedural point of view, the best method is that least used to date—Rule 1-019. Asserting Bartlett only as an affirmative defense results in the “empty chair” phenomenon, in which the defendant casts fault on a person who is not present to respond, while the plaintiff takes on the defense of the absent person in order to maximize the liability of the defendant. This can cause confusion for the jury and unfairness to the plaintiff.

---

278. See Rule 1-019(A)(2)(b) NMRA.
279. E.g., Srader v. Verant, 1998-NMSC-025, ¶ 28, 964 P.2d 82, 90 (stating that Indian governments are immune from most suits in state court).
280. Rule 1-019(B) NMRA; see, e.g., Srader, 1998-NMSC-025, ¶¶ 30-39, 964 P.2d at 90-92 (applying criteria for determining whether to dismiss due to inability to join an entity that should be joined if feasible).
282. When “persons to be joined if feasible” were labeled “necessary parties” in earlier versions of Rule 1-019, see 25 FEDERAL PROCEDURE: LAWYER’S EDITION § 59:97, at 428 (2001), New Mexico erroneously equated “necessary” and “indispensable” parties. Sellman v. Haddock, 62 N.M. 391, 400, 310 P.2d 1045, 1051 (1957). The New Mexico Supreme Court has broken that link, acknowledging that “deeming a party ‘indispensable’ is a conclusion the court reaches after weighing various factors,” rather than automatically concluding that persons who should be joined if feasible are inevitably indispensable parties. Holguin, 91 N.M. at 401, 575 P.2d at 91.
283. The plaintiff is put in the position of defending against a claim that the non-party is at fault, while the jury would expect that a defendant should be trying to prove the fault of all tortfeasors who caused injury to the plaintiff. The court of appeals has rejected this argument. Wilson v. Gillis, 105 N.M. 259, 262, 731 P.2d 955, 958.
Moreover, the absence of the alleged tortfeasor means that additional litigation will occur if the plaintiff later decides to sue the absent party after achieving disappointing results in the initial action brought in that tortfeasor's absence.

Rule 1-014 impleader is more satisfactory than the "empty chair" affirmative defense, though it has serious flaws. The advantage is that the defendant both identifies additional wrongdoers and makes them parties to the lawsuit. The disadvantage is that the alleged tortfeasor becomes a party, but lacks incentive to appear and defend because the defendant seeks only to lay off fault rather than to obtain affirmative relief. Only if the plaintiff chooses to amend the complaint to add the third-party defendant as a defendant in the plaintiff's action is there a clear incentive for the third-party defendant to present a defense.

The use of Rule 1-019 prevents the "empty chair" defense and assures that the absent person, once brought into the lawsuit, will have motivation to defend. Rule 1-019 brings additional benefits as well. The plaintiff, as a party asserting a claim for relief, must identify by name, if known, any person who should be joined as a party if feasible but who was not joined, and must explain why the person was not joined. This requirement saves the defendant the time and expense of searching for such persons and provides the defendant with an early opportunity to request their joinder. Once the persons who should be joined if feasible are identified, neither the plaintiff nor the defendant has the final say as to whether they are made parties. Instead, the court "shall" order that they be made parties.

(Ct. App. 1987). The court's view is that juries possess "significant abilities and talents...to carefully sift through conflicting positions and ascertain the true facts." Id. at 262, 731 P.2d at 958.

284. Many discovery devices are only available against a party. E.g., Rule 1-033 NMRA (interrogatories); Rule 1-034 NMRA (requests for production); Rule 1-035 NMRA (physical examination); Rule 1-036 NMRA (requests for admissions). The court of appeals rejected this claim of unfairness, finding that the depositions and subpoenas duces tecum that are available against non-parties provide sufficient opportunities for discovery. Wilson, 105 N.M. at 262, 731 P.2d at 958.

285. See supra notes 211-214 and accompanying text.

286. See supra notes 215-217 and accompanying text.

287. A plaintiff is under no obligation to file a claim against the third-party defendant and preclusion doctrines will not prevent a plaintiff from proceeding against the third-party defendant in a separate action. 3 MOORE ET AL., supra note 245, ¶ 14.06[3].

288. There is a slight possibility that the third-party defendant will be subject to liability to the plaintiff even if the plaintiff does not move to amend the complaint before trial to add the third-party defendant as a defendant. Even if the plaintiff does not formally amend to add the third-party defendant as a defendant in the plaintiff's action, if all the parties actually litigate the issue of the third-party defendant's liability and the third-party defendant is not prejudiced in its defense, the court might conclude that the pleadings had been amended by implied consent of the parties pursuant to Rule 1-015(B). See, e.g., Jack Frost, Inc. v. Engineered Bldg. Components Co., 304 N.W.2d 346 (Minn. 1981); Wasik v. Borg, 423 F.2d 44 (2d Cir. 1970).

289. Rule 1-019(C) NMRA.

290. The defendant may make a motion to dismiss the plaintiff's lawsuit for failure to join a person who should be joined if feasible or can include the defense in its answer. Rule 1-012(B)(7) NMRA. If the defendant asserts that the absent party is indispensable to the continuation of the lawsuit, the defendant can make that motion at any time, including at the trial on the merits, Rule 1-012(H)(2) NMRA, or for the first time on appeal. E.g., C.E. Alexander & Sons, Inc. v. DEC Int'l Inc., 112 N.M. 89, 811 P.2d 899 (1991). Though normally framed as a motion to dismiss, the appropriate remedy is for the court to order joinder of the person rather than dismissal of the case. Rule 1-019(A)(2)(b) NMRA ("If [the person] has not been so joined, the court shall order that [the person] be made a party."); e.g., Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers Union No. 63 v. Glaziers Local Union No. 27, 40 F. Supp. 2d 997 (N.D. Ill. 1999); English v. Seaboard Coast Line R.R. Co., 465 F.2d 44 (5th Cir. 1970).

291. Rule 1-019(A)(2)(b) NMRA.
can raise the issue of necessary parties sua sponte and can order the joinder of parties on its own initiative at any stage of the proceedings. Rule 1-019 thus enhances the power of the court to configure the lawsuit in the most efficient manner rather than leaving entirely to the parties the final decision on whether to bring all alleged tortfeasors into the lawsuit.

Despite these benefits, there are potential problems with the use of Rule 1-019. First, the mandatory nature of the rule calling for joinder of persons diminishes the court’s flexibility to omit marginal parties—those who may be tortfeasors but who are so unlikely to be held liable that the plaintiff chose not to join them. The result could be bulky multiple-party litigation of doubtful benefit to the judicial system or to the parties to the lawsuit.

In addition, some tortfeasors may lack any incentive to participate actively in the litigation if made parties to the lawsuit pursuant to Rule 1-019 just as they may lack incentive if joined pursuant to Rule 1-014. Immune tortfeasors, negligent employers who are protected from common law liability to their employees, and persons who have already settled with the plaintiff will add little to the litigation process because they cannot be held liable to the plaintiff. These persons should not qualify as persons to be joined if feasible. The plaintiff can obtain all the relief the law allows without their presence, and their interests cannot be impaired by their absence because they are not liable to the plaintiff.

Nor would the interests of the named and joined defendants suffer due to the absence of immune tortfeasors, because defendants could still lay off fault on them without joining them as parties under Rule 1-019. As long as defendants are allowed to raise the fault of absent tortfeasors as an affirmative defense without joining them as parties, defendants’ interests will be protected. In Wilson v. Gillis, the defendant sought to implead an absent tortfeasor who had settled with the plaintiff and thus had no incentive to litigate if made a party. The court of appeals held

---


293. Rule 1-021 NMRA.

294. Nothing in Rule 1-019 grants the court authority to forego non-joinder of a person needed to afford complete relief who can be joined merely because that person’s liability is not clear. See Rule 1-019(A)(2)(b) NMRA; Hodgson v. Sch. Bd., New Kensington-Arnold Sch. Dist., 56 F.R.D. 393, 394 (W.D. Pa. 1972). Where, however, the ground for joinder is that the non-party has an interest in the litigation that may be impaired in its absence, the non-party can disclaim the interest and thus avoid joinder. E.g., Alltmann v. Republic of Austria, 317 F.3d 954, 971 (9th Cir. 2002); Amico v. New Castle County, 571 F. Supp. 160, 165–66 (D. Del. 1983).

295. In Estate of Alvarez v. Donaldson Co., 213 F.3d 993 (7th Cir. 2000), the defendant successfully argued that forty-eight additional defendants should be joined in a tort action because each allegedly was partially liable to plaintiff under the Indiana law of several liability. Id. at 995.

296. See, e.g., Collins v. Tabet, 111 N.M. 391, 806 P.2d 40 (1991) (in legal malpractice action alleging poor settlement of minor’s action, guardian ad litem may be immune from liability even though any fault of guardian ad litem may reduce the liability of the defendant).


299. See generally Tipton, 103 N.M. at 922–93, 712 P.2d at 1354–55 (discussing alternative means for raising the Bartlett defense).

300. 105 N.M. 259, 731 P.2d 955 (Ct. App. 1986).

301. In a several liability action, once the tortfeasor settles with the plaintiff, the tortfeasor cannot be liable to the plaintiff and is not liable for contribution or common law indemnity to other tortfeasors. Wilson, 105 N.M. at 261, 731 P.2d at 957.
that it made no sense to allow impleader of the settling tortfeasor and authorized an "empty chair" affirmative defense as an alternative.\textsuperscript{302} To join the settling tortfeasor as a party would discourage settlements,\textsuperscript{303} just as to join immune tortfeasors would undercut one purpose of the grant of immunity—protection of the tortfeasor from the necessity of defending lawsuits when the tortfeasor is immune from liability.\textsuperscript{304} The \textit{Tipton} rationale allowing joinder "is properly limited to cases in which the third-party defendant is potentially liable"\textsuperscript{305} to the plaintiff. The same rationale applies to joinder under Rule 1-019 of persons who cannot be held liable to the plaintiff, and, thus, joinder of such tortfeasors should not be required.

When alleged tortfeasors should be joined but cannot be because of jurisdictional problems, courts should avoid an overly rigid application of the factors used to determine whether to dismiss the action for lack of an indispensable party. Rule 1-019 works best when it results in the continuation of the pending action with all alleged tortfeasors present. Courts should be hesitant to dismiss an action for lack of an indispensable party in several liability cases. When an alternative forum is available in which the plaintiff can sue all tortfeasors, the court must balance the goal of having all wrongdoers in a single lawsuit in the alternative forum\textsuperscript{306} against the inconvenience and tactical difficulties that confront a plaintiff who is deprived of its preferred forum.\textsuperscript{307} Also relevant is the probable absence of prejudice to the unjoinable tortfeasor who is not likely to be bound by preclusion principles if the lawsuit proceeds.\textsuperscript{308}

In determining whether to dismiss or continue the lawsuit in the tortfeasor's absence, the court must consider if there are ways to diminish the prejudice to the other defendants if the absent tortfeasor is not made a party and the action proceeds.\textsuperscript{309} An obvious means for preventing prejudice to the remaining defendants exists: the court can permit the defendants to raise the "empty chair" defense when joinder of the additional tortfeasor is not feasible.\textsuperscript{310} Though the "empty chair"

\textsuperscript{302} Id. at 261, 731 P.2d at 957.
\textsuperscript{303} Id. at 262, 731 P.2d at 958.
\textsuperscript{304} See, e.g., Carrillo v. Rostro, 114 N.M. 607, 845 P.2d 130 (1992) (distinguishing immunity from liability and immunity from suit). When there is no possibility that the absent tortfeasor will be held liable, as is true when the tortfeasor has settled, has sovereign immunity, or has statutory immunity, it would undermine one purpose of the grant of immunity to subject the tortfeasor to the litigation process.
\textsuperscript{305} Wilson, 105 N.M. at 262, 731 P.2d at 958.
\textsuperscript{306} See Tipton, 103 N.M. at 693, 712 P.2d at 1355.
\textsuperscript{307} Explaining why the trial court should be hesitant to grant a dismissal for forum non conveniens, the supreme court stated that
\textit{the court's intervention in the management of litigation should not interfere with a party's legitimate choice of tactics designed to persuade the fact finder. Venue is the legitimate choice of the plaintiff who has the burden of proof....Forum-non-conveniens considerations turn not on the existence of advantageous choices, but on the illegitimate or unreasonable impact those choices have on a fair trial—on the ends of justice.}
\textsuperscript{308} See Occhialino, supra note 22.
\textsuperscript{309} Rule 1-019(B) NMRA.
\textsuperscript{310} E.g., Bartlett v. N.M. Welding Supply, Inc., 98 N.M. 152, 646 P.2d 579 (Ct. App. 1982) (unknown tortfeasor). When a settling party's percentage of fault will be determined by the factfinder in its absence, "the defendant will not incur any prejudice" resulting from the absence of the tortfeasor as a party. Wilson, 105 N.M.
defense is less satisfactory than joinder of the non-party tortfeasor, New Mexico’s appellate courts approve of its use, and it can continue to serve as a second-best alternative.

Where there is no alternative forum in which all tortfeasors can be joined as defendants, courts should be especially hesitant to declare the absent tortfeasor an indispensable party and to dismiss the lawsuit. A plaintiff’s constitutional right of access to courts is compromised when a court dismisses an action for lack of an indispensable party and there is no other forum available in which to sue all the tortfeasors. The New Mexico Supreme Court has not always acknowledged this basic proposition. For example, Indian tribes and pueblos are usually immune from lawsuits in state court. The New Mexico Supreme Court has held that whenever an immune Indian tribe or pueblo is an entity to be joined if feasible, it is not only a necessary party but also an indispensable party. The court acknowledged that the resulting dismissal of the lawsuit might leave the plaintiff without a remedy but ruled that the absence of an adequate remedy in another forum was not a sufficient reason to allow the action to proceed in the Tribe’s absence. This absolutist reasoning does not take into account the plaintiff’s right to access a court for relief. It also is inconsistent with the court’s view that the indispensability decision is a factual question involving a functional analysis of the Rule 1-019(B) factors and that the trial court exercises considerable discretion in making the decision.

Beginning with Bartlett itself, New Mexico courts have allowed a lawsuit to proceed in the absence of some tortfeasors who cannot be joined. Recognition that all tortfeasors should be joined if feasible pursuant to Rule 1-019(A) should not be transformed into a command to dismiss any action where joinder is not feasible. To do so would effectively resurrect New Mexico’s discredited practice of equating

311. See Tipton, 103 N.M. at 692, 712 P.2d at 1354; Bartlett, 98 N.M. 152, 646 P.2d 579.
312. "[I]f no remedy in an alternative forum exists, the action probably should not be dismissed even though other factors tend to indicate that dismissal would be appropriate." 25 FEDERAL PROCEDURE: LAWYER’S EDITION § 59:119, at 454 (2001).
314. See Tipton, 103 N.M. at 692, 712 P.2d at 1354; Bartlett, 98 N.M. 152, 646 P.2d 579.
315. As a matter of public policy, the public interest in protecting tribal sovereign immunity surpasses a plaintiff’s interest in having an available forum for suit.” Srader, 1998-NMSC-025, ¶ 33, 964 P.2d at 91; see also Washoe Tribe v. Brooks, 175 F. Supp. 2d 1255, 1259 (D. Nev. 2001) (United States was immune from liability and was held to be an indispensable party even though no alternative forum was available to the plaintiff).
316. “[T]he adequacy of remedy remaining for the Plaintiffs in the event of dismissal provides no basis for permitting this case to proceed without the tribes.” Srader, 1998-NMSC-025, ¶ 33, 964 P.2d at 91.
317. See id. ¶¶ 29–31, 964 P.2d at 91; State ex rel. Blanchard v. City Comm’rs, 106 N.M. 769, 770, 750 P.2d 469, 470 (Ct. App. 1988) (stating that Rule 1-019 determinations are guided by the “context of the particular litigation”).
318. See Bartlett, 98 N.M. 152, 646 P.2d 579 (holding that the jury should consider the negligence of the unknown driver).
“necessary” and “indispensable” parties when applying Rule 1-019 in several liability cases.

The best of the three methods approved in *Tipton* for defendants to raise the *Bartlett* defense is Rule 1-019. Liberal application of the criteria for determining that absent tortfeasors should be joined if feasible fulfills the supreme court’s goal that “all tortfeasors should be joined in the jury’s determination of apportionment of damages...as parties to the action if they are known, within the court’s jurisdiction, and can be served...[even if] plaintiff has elected not to join them.” When some tortfeasors cannot be joined or will choose not to participate in the proceedings if joined, courts should normally permit the defendant to raise the *Bartlett* defense as an affirmative defense and should proceed to apportion fault among all tortfeasors, including those who were not made parties to the action. Only where there is a convenient alternative forum in which all tortfeasors can be made parties should the court dismiss an action because it was unable to join a severally liable tortfeasor in the plaintiff’s lawsuit.

5. The Burden of Pleading the Fault of Others

The defendant’s answer to the complaint should raise the affirmative defense that the fault of others contributed to the plaintiff’s injuries even when the defendant plans to implead other tortfeasors or to seek their joinder pursuant to Rule 1-019. Merely pleading the fault of unidentified others, however, does not assure the right to present evidence of the fault of specific other persons. In *Fahrbach v. Diamond Shamrock, Inc.*, the plaintiff sued several defendants including Petrolane. Petrolane’s answer contained the generic affirmative defense of the fault of “others” without specifying who the other tortfeasors were. From the pleadings and Petrolane’s responses to discovery, plaintiff was under the impression that Petrolane and Suburban Propane were a single entity. This impression was

---


320. “[I]t will be necessary that the rules of...joinder of missing parties, whether those parties be permissive or necessary, be liberally applied when comparative fault or liability of multiple parties surfaces in the pleadings.” *Tipton*, 103 N.M. at 693, 712 P.2d at 1354.

321. Id. at 693, 712 P.2d at 1355.

322. Persons who are immune from liability to the plaintiff, or have settled with the plaintiff, or who, because of a lack of assets, are judgment proof, will likely default rather than actively participate in the proceedings if made a party.

323. Rule 1-008(C) does not list several liability as an affirmative defense but, after listing specific affirmative defenses, states that the party shall also allege “any other matter constituting an avoidance or affirmative defense.” Rule 1-008(C) NMRA. The supreme court has suggested that the *Bartlett* defense is properly raised as an affirmative defense, *Tipton*, 103 N.M. at 693, 712 P.2d at 1355, and the Uniform Jury Instructions list the fault of others as an affirmative defense. *UJI 13-302D* NMRA.

324. See supra note 207.

325. 1996-NMSC-063, 928 P.2d 269.

326. Id.

327. Id. at 272.

328. Id. at 276.
bolstered when Petrolane did not ask that the pretrial order list Suburban Propane as a non-party whose fault was to be litigated. At trial, plaintiff introduced evidence of the fault of certain employees for the purpose of showing the fault of Petrolane. The employees were actually in the employ of Suburban Propane. At the close of the evidence, the trial court granted the motion of Petrolane to place Suburban Propane on the special verdict form for apportionment of fault.

The New Mexico Supreme Court ruled that the fault of Suburban Propane should not have been before the jury. The court focused on "whether Plaintiffs had sufficient notice...that Suburban Propane would be an entity against whom Defendants might assert comparative fault." The court noted that the answer contained only general language attributing fault to "others," and that the pretrial order also failed to identify Suburban Propane by name. Because the pretrial order controls the issues that will be considered at trial, the supreme court concluded that Petrolane's failure to identify Suburban Propane as a non-party tortfeasor in the answer or the pretrial order led the plaintiffs to expect that its negligence would not be an issue at trial.

The lesson for defendants is clear. The generic affirmative defense of the fault of "others" does not provide carte blanche for the defendant to try the issue of the negligence of all other non-parties who might have played a role in causing the plaintiff's injuries. To the contrary, at the time of the final pretrial order, or at some time sufficiently before trial to allow the plaintiff an opportunity to prepare a defense, the defendant must provide details concerning the identity of the additional tortfeasors upon whom it will seek to lay off fault at trial. If, as in Fahrbach, the tortfeasor's identity is known, it must be divulged. In the case of alleged tortfeasors whose identify cannot be ascertained, as occurred in Bartlett, the court should obligate the defendant to provide as much identifying information

329. Id.
330. Id.
331. Id.
332. Id. at 272.
333. Id. at 278.
334. Id.
335. Id. at 272. Fahrbach can be contrasted with Segura v. K-Mart Corp., 2003-NMCA-013, 62 P.3d 283, in which the plaintiff unsuccessfully asserted that the defendant did not adequately raise the Bartlett defense. In Segura, the court of appeals ruled that K-Mart had sufficiently presented the Bartlett defense when it "clearly raised" the issue of Keck's fault in its pleadings even though it did not join Keck as a third-party defendant. Id. ¶ 17, 62 P.3d at 288.
336. Rule 1-016(E) NMRA. A final pretrial order may be amended "only to prevent manifest injustice." Id.
337. The court further concluded that the plaintiffs did not try the issue without objection at trial and, thus, the rule allowing for amendments to conform to the evidence was not applicable. 1996-NMSC-063, 928 P.2d at 277. Despite this ruling, the supreme court affirmed the jury verdict for the defendants. The court reasoned that, because the jury found none of the defendants negligent, it was immaterial that the verdict form authorized laying off fault on Suburban Propane. Id. at 278.
338. See Rule 1-016(D)–(E) NMRA.
339. Rule 1-016 does not compel the court to hold a pretrial conference, see Rule 1-016(A) NMRA, so there may not be a final pretrial conference. In the absence of a final pretrial conference, the logic of Fahrbach suggests that the defendant should fulfill the requirement of putting the plaintiff on notice of the persons upon whom the defendant will seek to lay off fault at some reasonable time before trial, probably before discovery is closed.
as is reasonably available, and a description of the allegedly negligent conduct of the alleged tortfeasor.  

Missing from Fahrbach is any discussion of whether the plaintiff has an independent obligation to ascertain the identity of the tortfeasors upon whom the defendant will seek to lay off fault and the conduct that allegedly constitutes their negligence. Defendants are unlikely to volunteer this information early in the litigation process and New Mexico’s liberal pleading rules do not require defendants to divulge this information in the answer. The plaintiff who first learns the names of the non-party alleged tortfeasors only at the final pretrial conference or at trial risks the possibility that the statute of limitations will have run on an action by plaintiff against the late-identified alleged tortfeasors, or that there will be little or no time or opportunity for discovery to rebut the defendant’s claim that the non-party was negligent.

A plaintiff should aggressively conduct discovery to learn early in the proceedings the identity of the “others” referred to in the defendant’s generic affirmative defense. Upon receiving the defendant’s answer, the plaintiff should serve the defendant with an interrogatory or schedule a deposition to learn the identity of each person that the defendant intends to include in the affirmative defense and the specific acts of negligence that the defendant asserts each non-party tortfeasor committed. If the defendant declines to answer because it lacks sufficient information pending further discovery, the plaintiff might rely on the rule binding defendants to “reasonably” supplement discovery responses as further discovery takes place. Those less trusting of the defendant’s construction of the rule calling for unsolicited supplementation may make periodic requests for supplementary responses or may seek a court order that the defendant supplement responses by a given date. However accomplished, it is imperative that the plaintiff force the

343. See supra notes 27–50 and accompanying text.
344. Interrogatories may be served on a defendant at any time after service of the summons and complaint on the defendant. Rule 1-033(B) NMRA. The normal time for responding to interrogatories is thirty days after they are served, but when the plaintiff serves the interrogatories with the summons and complaint, the defendant has forty-five days to respond to the interrogatories. Rule 1-033(C)(3) NMRA.
345. Unless the court allows otherwise, a plaintiff must normally wait thirty days after service of the summons and complaint on the defendant before taking a deposition. Rule 1-030(A) NMRA.
346. The plaintiff may obtain discovery of matters relevant to the defense of any party. Rule 1-026(B)(1) NMRA.
347. See Rule 1-008(B) NMRA (allowing this response in pleadings).
348. The party responding to discovery has a duty to supplement earlier responses when “the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.” Rule 1-026(E)(2)(b) NMRA; see Allred v. Bd. of Regents of the Univ. of N.M., 1997-NMCA-070, 943 P.2d 579 (stating that failure to comply with duty to supplement answers to interrogatories can lead to sanctions pursuant to Rule 1-037).
349. See, e.g., Shamalon Bird Farm, Ltd. v. United States Fid. & Guar. Co., 111 N.M. 713, 809 P.2d 627 (1991) (stating that party filed interrogatory asking that plaintiff supplement answers to all previous interrogatories).
350. See Rule 1-026(E)(3) NMRA.
defendant to divulge the identities or, if the identities are not known, the 
descriptions of the alleged additional tortfeasors so that the plaintiff may join them 
as defendants or prepare to rebut the defendant’s attempt to diminish its own 
liability by laying off fault on the non-parties.

6. The Burden of Proof of the Fault of Others

The plaintiff who sues only one tortfeasor will assert that the defendant is wholly 
liable for the plaintiff’s injuries. The defendant who asserts that other tortfeasors 
contributed to the plaintiff’s injuries must raise the affirmative defense of the fault 
of others. As with other affirmative defenses, the defendant has the burden of 
proof that the fault of another was a contributing cause of the plaintiff’s injuries. To satisfy this burden, the defendant must prove that (1) the other person owed a duty of care to the plaintiff, (2) the other person breached that duty of care, and (3) the breach of duty proximately caused the plaintiff’s injuries.

The plaintiff should challenge the sufficiency of the defendant’s Bartlett defense 
early in the proceedings. If the defense survives challenge, the plaintiff may choose 
to amend the pleadings to add the non-party alleged to be a tortfeasor as a co-
defendant in order to assure complete recovery. The procedural means for 
challenging the Bartlett defense is a combination of two motions. The plaintiff can 
make a motion to strike the defense as insufficient and can then seek a partial 
summary judgment to that effect. Rule 1-012(F) states that the plaintiff must 
make the motion to strike within thirty days of service of the answer. Despite this 
time limit, the court can strike an inadequate defense at any time, and courts have 
construed this power to allow a court to rule on motions to strike filed by a plaintiff 
after the time provided in the rule. Thus, if the plaintiff needs time to conduct 
discovery to determine the identity and to assess the culpability of additional

---

351. This assertion may be premised on the belief that one of the exceptions to the general rule eliminating joint and several liability applies, making the defendant wholly liable despite the presence of other tortfeasors. See NMSA 1978, § 41-3A-1(C) (1987) (four statutory exceptions); Lujan v. Healthsouth Rehab. Corp., 120 N.M. 422, 902 P.2d 1025 (1995) (successive tortfeasor exception). Alternatively, the plaintiff may be alleging that the defendant is fully liable because the plaintiff believes that the defendant is the only tortfeasor whose conduct contributed to plaintiff’s injuries.

352. Though the rules of civil procedure do not expressly list several liability as an affirmative defense, the applicable rule is broad enough to encompass several liability. Rule 1-008(C) NMRA (providing the general category of “any other matter constituting an avoidance or affirmative defense” in a list of affirmative defenses). Cases refer to the matter as an affirmative defense. E.g., Wilson v. Gillis, 105 N.M. 259, 261, 731 P.2d 955, 957 (Ct. App. 1986). The Uniform Jury Instructions list the comparative fault of others as illustrative of an affirmative defense, UJI 13-302C NMRA, and the Several Liability Act provides that the defendant must establish that the fault of another is a proximate cause of the plaintiff’s injury in order to lay off fault on another tortfeasor. NMSA 1978, § 41-3A-1(B) (1987).

353. UJI 13-302D NMRA.


355. Rule 1-012(F) NMRA.

356. Rule 1-056(C) NMRA.

357. Rule 1-012(F) NMRA.

358. Id.

tortfeasors, the court can entertain a motion to strike the defense after discovery is complete.

The motion to strike an inadequate defense is normally resolved on the pleadings as a matter of law and thus would not, by itself, be an effective tool for a plaintiff to assert that, though the pleading was proper, the court should strike the defense for lack of evidence to support the claim that the non-party is partially liable for the plaintiff’s injuries. Unlike other Rule 1-012 motions, there is no provision explicitly permitting transformation of the motion to strike into a summary judgment motion. Nonetheless, courts often allow the parties to introduce materials outside the pleadings in conjunction with Rule 1-012 motions and have treated the motion to strike an inadequate defense as one for partial summary judgment. In for example, the plaintiff and court dealt with a motion to strike the Bartlett defense as a motion for partial summary judgment and the parties introduced information outside the pleadings in support of their respective positions.

The normal rules apply when testing the sufficiency of the Bartlett defense. To establish medical negligence, for example, a party usually must present evidence in the form of expert testimony setting the professional standard of care and demonstrating that the alleged tortfeasor failed to meet the standard. In the defendant asserted that a non-party physician was guilty of negligence contributing to the plaintiff’s injury, but the defendant failed to present the requisite expert testimony at trial. The court of appeals affirmed a trial court ruling that the defendant’s failure to introduce expert testimony justified the court’s refusal to place the issue of the alleged tortfeasor’s fault on the special verdict.

361. See Rule 1-012(B) NMRA (motion to dismiss for failure to state a claim); Rule 1-012(C) NMRA (motion for judgment on the pleadings).
364. Id. ¶ 4, 62 P.3d at 285.
365. In some of the cases discussed in this section, the issue was the sufficiency of the evidence at trial to support placing a non-party on the special verdict form on which the jury allocated fault rather than the sufficiency of the evidence to overcome a summary judgment motion. Jaramillo v. Kellogg, 1998-NMCA-142, ¶ 5, 966 P.2d 792, 794; see Bowman v. County of Los Alamos, 102 N.M. 660, 662–63, 699 P.2d 133, 135–36 (Ct. App. 1985). If the tests are the same, these cases are directly applicable to the summary judgment discussion that follows. If the tests are not exactly the same, the cases nonetheless provide assistance in determining the proof required at the summary judgment stage to strike the defense of the fault of others. New Mexico has not definitively decided whether the test for granting a summary judgment is the same as the test for granting a directed verdict. See Christopher David Lee, Note, Summary Judgment in New Mexico Following Bartlett v. Mirabal, 33 N.M.L. REV. 503 (2003). Compare Blauwkamp v. Univ. of N.M. Hosp., 114 N.M. 228, 836 P.2d 1249 (Ct. App. 1992), with Bartlett v. Mirabal, 2000-NMCA-036, 999 P.2d 1062 (disagreeing on whether standard for directed verdict is the same as standard for the grant of summary judgment).
366. UJI 13-1101 NMRA. An expert is not necessary when the negligence of the physician is so obvious that a lay jury can perceive the breach of duty. Pharmaseal Labs., Inc. v. Goffe, 90 N.M. 753, 758, 568 P.2d 589, 594 (1977) (discussing a “common knowledge” exception to expert witness rule).
368. Id. ¶ 9, 966 P.2d at 794.
form.\textsuperscript{369} The \textit{Jaramillo} court did not limit its opinion to cases in which required expert testimony was absent, broadly declaring that “[g]eneral statements alluding to comparative negligence do not merit a jury instruction on the theory.”\textsuperscript{370} The court also stated that an instruction concerning the \textit{Bartlett} defense was appropriate only “where evidence supports it.”\textsuperscript{371}

\textit{Bowman v. County of Los Alamos}\textsuperscript{372} illustrates the application of this principle where expert testimony is not required but the defendant fails to present sufficient evidence to allow the factfinder to lay off fault on an alleged tortfeasor. Bowman fell because a grate that normally covered a ground-level window well was not in place.\textsuperscript{373} The defendant was responsible for maintaining the grates, which were removable to facilitate cleaning.\textsuperscript{374} At trial, there was no testimony as to how or by whom the grate had been removed, though the defendant presented hearsay testimony that “occasionally kids...will take them off.”\textsuperscript{375} The factfinder allocated one-third of the fault to the defendant’s negligence and the remaining two-thirds to an “unknown person or persons.”\textsuperscript{376} The plaintiff appealed, asserting that it was error for the factfinder to attribute two-thirds of the fault to unknown others.\textsuperscript{377} The court of appeals agreed.\textsuperscript{378} The court ruled that there was no evidence as to who removed the grate and that hearsay testimony that children sometimes did so was not sufficient to overcome testimony that the defendant’s employees regularly removed grates to clean the wells.\textsuperscript{379} Finding that, on the evidence presented, “[d]efendant’s employees had equal, or greater, access to the grates,” the court concluded that “[t]he record only provides conjecture as to the cause of the grate removal”\textsuperscript{380} and ruled that there was insufficient evidence that any non-party was negligent.\textsuperscript{381}

If the plaintiff amends the complaint to join the person whom the defendant named as a \textit{Bartlett} tortfeasor, the burden of proof issue becomes more complicated.\textsuperscript{382} The defendant, having initially raised the fault of that person as an affirmative defense, has the burden of proof that the person’s negligence was a contributing cause of the plaintiff’s injuries.\textsuperscript{383} The plaintiff, by joining the person as a co-defendant, takes on the burden of proving the same thing—that the person’s negligence contributed to the plaintiff’s injuries.\textsuperscript{384} Both parties now bear the burden of proof as to the other person’s fault. Whatever theoretical problems this may raise, there is one practical proposition: the plaintiff and the defendant should

\begin{thebibliography}{99}
\bibitem{369} \textit{Id.} \textsection 18, 966 P.2d at 796.
\bibitem{370} \textit{Id.} \textsection 10, 966 P.2d at 794.
\bibitem{371} \textit{Id.} \textsection 11, 966 P.2d at 795.
\bibitem{372} 102 N.M. 660, 699 P.2d 133 (Ct. App. 1985).
\bibitem{373} \textit{Id.} at 661, 699 P.2d at 134.
\bibitem{374} \textit{Id.}
\bibitem{375} \textit{Id.} at 662, 699 P.2d at 135.
\bibitem{376} \textit{Id.} at 661, 699 P.2d at 134.
\bibitem{377} \textit{Id.} at 662, 699 P.2d at 135.
\bibitem{378} \textit{Id.} at 662-63, 699 P.2d at 135-36.
\bibitem{379} \textit{Id.} at 662, 699 P.2d at 135.
\bibitem{380} \textit{Id.} at 662-63, 699 P.2d at 135-36.
\bibitem{381} \textit{Id.} at 663, 699 P.2d at 136.
\bibitem{382} The problem described here also arises when the plaintiff initially sues both defendants.
\bibitem{383} UJI 13-302D NMRA.
\bibitem{384} \textit{See} Pack v. Read, 77 N.M. 76, 419 P.2d 453 (1966); UJI 13-302B NMRA.
\end{thebibliography}
both lose or both win their respective claims that the person was negligent and a contributing cause. It would be illogical for a court to grant a summary judgment to the new defendant, dismissing the plaintiff’s claim against it, and then allow the original defendant to lay off fault on the added defendant at trial. So too, if the plaintiff succeeds in establishing the new defendant’s potential liability, the original defendant should not be precluded from laying off fault on the new defendant.

To assure symmetry of results, parallel procedural devices should be utilized. If the new defendant moves for summary judgment against the plaintiff, the plaintiff should file motions to strike and to obtain a partial summary judgment dismissing the original defendant’s affirmative defense asserting the Bartlett defense as to the new defendant. Similarly, if the plaintiff moves to strike the Bartlett defense from the original defendant’s answer, the new defendant should file a motion seeking summary judgment as to the plaintiff’s claim against the new defendant.

The motions should be consolidated for hearing at the same time, and the court should consider all the evidence concerning the alleged fault of a defendant, whether presented by the plaintiff or by any defendant, before ruling. In Skeet v. Wilson, for example, the court stated that “a defendant may take advantage of plaintiff’s testimony if the defense is established thereby.” In like manner, a plaintiff and one defendant should be able to take advantage of each other’s evidence to defeat or support a claim asserting that another defendant was at fault.

IV. CONCLUSION

Significant changes in substantive law inevitably affect procedure. Even as it adopted comparative negligence and several liability, the New Mexico Supreme Court recognized the need to reconsider the operation of the rules of procedure in order to adapt the litigation process to the new substantive doctrines. The court wisely chose to deal with procedural problems as they arose rather than through a wholesale modification of the rules of civil procedure. The process has been a slow one and is not yet complete, but the contours of pretrial practice have undergone needed change and will continue to do so.

The core issue in pretrial practice is the proper means for raising the issue of the fault of others. It is now time to reconsider the need for three alternatives and to decide whether Rule 1-019 is the preferred method for raising the Bartlett defense. The courts also have gained sufficient experience in default judgment practice to return to the fundamental procedural practices that already exist in Rule 1-055. Finally, the courts must sort out issues of pleading and burdens of persuasion while assuring that consistent results are reached when an alleged tortfeasor seeks to escape liability by a pretrial motion to dismiss the complaint or for summary judgment.

385. See discussion supra notes 357–366 and accompanying text.
387. Id. at 701, 417 P.2d at 891; see Jaramillo, 1998-NMCA-142, ¶ 15, 966 P.2d at 795.