IN THE SUPREME COURT OF GUAM

MICHAEL W. KENNEDY,
Plaintiff-Appellee,

v.

HUGH SULE,
Defendant-Appellant.

Supreme Court Case No.: CVA14-015
Superior Court Case No.: CV0499-02

OPINION

Cite as: 2015 Guam 38

Appeal from the Superior Court of Guam
Argued and submitted on June 4, 2015
Hagåtña, Guam

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BEFORE: ROBERT J. TORRES, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; ALEXANDRO C. CASTRO, Justice *Pro Tempore*.

CARBULLIDO, J.:

[1] Defendant-Appellant Hugh Sule appeals from an adverse judgment in a dental malpractice action filed by Plaintiff-Appellee Michael W. Kennedy. Dr. Sule contends Kennedy's claim is barred by Guam's statute of limitations set forth in 7 GCA § 11308. This argument was made at the trial level on a motion for summary judgment that was denied by the trial court. After a jury trial, the jury deemed Kennedy's action was allowable under the statute of limitations. Dr. Sule subsequently moved for judgment as a matter of law on this issue, but was unsuccessful. Dr. Sule appeals both the denial of his Motion for Summary Judgment and the denial of his Motion and Renewed Motion for Judgment as a Matter of Law. Dr. Sule also challenges the trial court's issuance of an "ultimate outcome" instruction that informed the jury of the legal effect of their apportionment of negligence. Dr. Sule contends Guam's mixed comparative/contributory negligence statute set forth in 7 GCA § 90108, was modeled after Wisconsin's, and that we should follow Wisconsin interpretive precedent barring "ultimate outcome" instructions under the "blindfold rule." For the foregoing reasons, we reverse the jury's verdict, vacate the damages award, and remand this matter to the trial court.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Procedural Background

[2] On April 5, 2002, Kennedy filed a dental malpractice case against Dr. Sule and Gentlecare Dental Associates, P.C. In response to the suit, the Defendants asserted the claim was subject to arbitration under Guam's Mandatory Medical Malpractice Arbitration Act

("MMMAA"). Record on Appeal ("RA"), tab 12 (Mot. Compel Arbitration, Aug. 2, 2002). Following several years of contentious litigation, the trial court compelled arbitration pursuant to the MMMAA. Kennedy appealed an adverse arbitration ruling and requested a *de novo* review by the Superior Court pursuant to 10 GCA § 10139.

[3] During the Superior Court proceedings, Dr. Sule moved for summary judgment, contending that Kennedy's claims were barred by the statute of limitations. The trial court dismissed the motion applying the "continuous treatment doctrine," and reasoned that the "ongoing attempts by Dr. Sule to treat and correct [Kennedy's] condition tolled the repose portion of the statute of limitation until a date after April 5, 1999." RA, tab 114 at 8 (Dec. & Order Mot. Summ. J., Mar. 29, 2011). As to the one-year discovery provision, the trial court was persuaded that Kennedy was not subjectively aware of malpractice until affirmatively told by another dental practitioner in May or July of 2001. .

[4] The trial court also bifurcated the statute of limitations issue from the issues of liability and damages. Facts concerning the statute of limitations were submitted to the jury first, and Dr. Sule moved for judgment as a matter of law on the ground that there was insufficient evidentiary basis for the jury to find Kennedy's claim timely. The court denied the motion, and the jury determined the claim was timely.

[5] The second phase of trial concerned liability and damages. At trial, Dr. Sule presented a written objection to Kennedy's proposed "ultimate outcome" instruction on the basis that it was an instruction that informed the jury of the legal effect of its comparative negligence apportionment. RA, tab 280 at 1-3 (Def.'s Obj. to "Ultimate Outcome" Jury Instructions, Sept. 24, 2013). Instruction 3G stated as follows: "If you find that Mr. Kennedy's negligence is more than 49%, the Court will enter judgment for Dr. Sule and Mr. Kennedy will not recover any

damages." RA, tab 287 at 26 (Jury Instruction (Nos. 3G), Sept. 26, 2013).[1] Dr. Sule made oral and written objections to the instruction at trial. After consideration, the trial court overruled the objection and instructed the jury as to the "ultimate outcome" under 18 GCA § 90108, and denied Dr. Sule's subsequent Motion for a New Trial on this ground. RA, tab 317 at 7-10 (Dec. & Order, Apr. 16, 2014).

[6] The jury returned a special verdict apportioning 45% of the negligence to Kennedy and 55% to Dr. Sule. Kennedy was awarded $62,236.35 in damages, and judgment was entered.

[7] Following entry of judgment, Dr. Sule brought a renewed motion for judgment as a matter of law on the grounds that no reasonable jury could have found for Kennedy on the statute of limitations issue. Dr. Sule also requested a new trial under Guam Rule of Civil Procedure 59, again challenging Instruction 3G as an inappropriate "ultimate outcome" instruction. RA, tab 300 at 1-6 (Mot. for New Trial, Dec. 13, 2013). The trial court denied Dr. Sule's motions. Citing *Fenwick v. Watabe Guam, Inc.*, 2009 Guam 1, the trial court reasoned it had "wide discretion as to what instruction to give the jury in any case." *Id.* at 10 (citing 2009 Guam 1 ¶ 9). Thus, "[a]fter careful consideration, [the trial court] exercised its discretion and gave the instruction in question to the jury." *Id.* Dr. Sule filed a timely notice of appeal. RA, tab 319 (Notice of Appeal, May 15, 2014).[2]

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[1] In his Excerpts of Record, Dr. Sule provides a printout of this instruction as "Instruction 3F." Excerpts of Record ("ER") at 92 (Jury Instruction 3F). However, the instruction appears as "Instruction 3G" in the record on appeal. RA, tab 287 at 26 (Jury Instruction 3G, Sept. 26, 2013).

[2] Defendant Gentlecare Dental Associates, P.C., filed a cross-appeal on September 2, 2014, but it was later dismissed pursuant to Guam Rule of Appellate Procedure 6(c)(2). Kennedy v. Sule, CVA 14-015 (Order at 1 (Sept. 12, 2014)).

B. Factual Background

[8] At trial, Kennedy testified that Dr. Sule provided him bridges and veneers in 1998, and began placing the implants in "January or February" of 1999. Transcripts ("Tr.") at 95 (Jury Trial – Day 2, Sept. 4, 2013). When Kennedy was in California in April of 2000 due to his father's declining health, he saw a different dentist, Dr. Hoffman, because the temporary caps on the front implants fell off. The caps had fallen off on another occasion before he left for California, but Kennedy testified that Dr. Sule informed him they were temporary and re-cemented them before he saw Dr. Hoffman.

[9] At trial, when asked by Dr. Sule's counsel if it was "true that one of the reasons you called [Dr. Hoffman] was that you wanted a second opinion of Dr. Sule's treatment plan and performance to date," Kennedy replied "yes." *Id.* at 49, 119-20; *see also* Trial Ex. E-2 (Client Intake Form, Apr. 25, 2000).[3] Moreover, on his client intake form for Dr. Hoffman's clinic, Kennedy wrote "[n]eed second opinion on current dentist's treatment plan and performance to date." Trial Ex. E-2 (Client Intake Form); *see also* Tr. at 54 (Jury Trial – Day 2). Kennedy testified that "[t]he only reason [he] asked for a second opinion was it was - - the second time they'd fallen out." Tr. at 100 (Jury Trial – Day 2). Kennedy recalled he thought it was "weird" when the caps fell out a second time, but was informed it was "okay" because it was temporary cement. *Id.* During his visit to Dr. Hoffman, Kennedy also noted that the front implant was getting infected. In Kennedy's recollection, Dr. Hoffman suggested Dr. Sule should establish a better bite using a stent, but did not suggest negligence.

[3] The Client Intake Form is dated April 23, 2000, and April 24, 2000. Trial Ex. E-2 (Client Intake Form). However, at trial, Kennedy testified he saw Dr. Hoffman on April 25, 2000. Tr. at 57 (Jury Trial – Day 2).

[10] Kennedy also told Dr. Hoffman that Dr. Sule was not a prosthodontist when asked, and Dr. Hoffman replied that a prosthodontist should "probably" or "possibly" handle his case. *Id.* at 61. Kennedy further acknowledged that Dr. Hoffman informed him he would have followed a different treatment plan, namely implanting all at once, allowing them to heal, and that he would have used a different style of implant. Later, Dr. Hoffman sent a follow-up letter to Kennedy inquiring whether he sought reevaluation from Dr. Sule and offered to treat Kennedy if he still suffered problems. Trial Ex. E-5 (Letter from Dr. Hoffman, Sept. 24, 2000).

[11] At trial, Kennedy represented he returned to Dr. Sule "pretty much weekly" from June or July of 2000 through October or early November of 2000 for "remedial work," and Dr. Sule reassured him he was "okay." Tr. at 102-03 (Jury Trial – Day 2). Throughout this time, Dr. Sule worked to improve Kennedy's bite and placed implants to assist his bridge. During treatment, Dr. Sule informed Kennedy he perforated his sinus resulting in infection and requiring new implants. There were multiple perforations, the majority of which took place in 1999. Kennedy later testified Dr. Sule told him the problems he experienced were "part of the process" and started "blaming [Kennedy's] body." *Id.* at 116.

[12] According to Kennedy's recollection, Dr. Sule referred him to Dr. Richardson, a maxillofacial surgeon, in October rather than August of 2000. The purpose of the referral was for "ongoing care" because Dr. Sule "seemed to be having some difficulty" that necessitated a specialist to perform a sinus lift. *Id.* at 105. He finally saw Dr. Richardson in February of 2001 because Dr. Richardson was previously off-island.

[13] During Kennedy's appointment with Dr. Richardson in February 2001, Dr. Richardson expressed "a little bit" of concern about Kennedy's shaking jaw and his bite. *Id.* at 106. Following the examination, Kennedy contends Dr. Richardson told him that either he (Dr.

Richardson) or Dr. Sule would contact him about the results of the examination, but neither did. Kennedy returned to Dr. Sule in March of 2001 for some bridge work, but Dr. Sule did not work on the implants. Kennedy testified that as of March 2001, he did not suspect negligence by Dr. Sule, and he had not heard from Dr. Richardson.

[14] Kennedy testified that nobody had mentioned the word "malpractice" to him as of April 2001. *Id.* at 109-10. Toward the end of April and May of 2001, Kennedy was "a little irritated" that Dr. Richardson was not returning his calls, so he stopped by Dr. Richardson's office in May of 2001. *Id.* at 110. Kennedy testified that Dr. Richardson referred him to Dr. Yasuhiro and told him that he would not continue to treat him if continued to see Dr. Sule.[4] Kennedy met with Dr. Yasuhiro in July or August of 2001, who treated him for a perforated sinus possibly resulting from the implants. Dr. Yasuhiro recommended a treatment plan which included removing all existing implants. Trial Ex. 5A (Yasuhiro Progress Notes, Aug. – Nov. 2001).

II. JURISDICTION

[15] This court has jurisdiction over appeals from a final judgment. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 114-61 (2015)); 7 GCA §§ 3105, 3107(b), 3108(a) (2005).

III. STANDARD OF REVIEW

A. Summary Judgment Denial

[16] Dr. Sule argues a denial of a summary judgment order is appealable after the entry of a final judgment. Appellant's Br. at 30 (Aug. 25, 2014) (citing *Comsource Indep. Foodservice Cos. v. Union Pac. R.R. Co.*, 102 F.3d 438, 441-42 (9th Cir. 1996)). To support his position, Dr. Sule contends that the denial of a motion for summary judgment is not immediately appealable

[4] Dr. Richardson denies telling Kennedy to not return to Dr. Sule, but acknowledges he did not suggest negligence or malpractice. Tr. at 8-9 (Jury Trial Extract, Sept. 5, 2013).

because it is generally not a final order. *See id.* at 441-42; *see also* 10A Fed. Prac. & Proc. Civ. § 2715 (3d ed.) (footnote omitted) ("[D]enial of a Rule 56 motion is an interlocutory order from which no appeal is available until the entry of judgment following the trial on the merits."). Kennedy, on the other hand, stresses that there is no applicable standard of review because a denial of summary judgment is unreviewable following a trial on the merits. Appellee's Br. at 29-31 (Oct. 7, 2014) (citing *Chesapeake Paper Prods. Co. v. Stone & Webster Eng'g Corp.*, 51 F.3d 1229, 1234-37 (4th Cir. 1995)).

[17] This court previously entertained an appeal from a denial of summary judgment following a trial on the merits and reviewed that denial *de novo*. *See Quan Xing He v. Gov't of Guam*, 2009 Guam 20 ¶ 22 (citing *Quichocho v. Macy's Dep't Stores, Inc.*, 2008 Guam 89 ¶ 13). Many jurisdictions, however, hold that denial of a motion for summary judgment following a trial on the merits is not appealable. *Locricchio v. Legal Servs. Corp.*, 833 F.2d 1352, 1359 (9th Cir. 1987); *see also Larson v. Benediktsson*, 152 P.3d 1159, 1170 (Alaska 2007); 10A Fed. Prac. & Proc. Civ. § 2715 (3d ed.). The majority of federal circuits do not allow review of a denial of a summary judgment motion following a full trial on the merits. *Chesapeake*, 51 F.3d at 1234. In *Chesapeake*, the Fourth Circuit adopted the rule that denial of summary judgment is not reviewable on appeal after a full trial and final judgment on the merits and observed that the First, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Federal Circuits held the same. *Id.* at 1234-37 (footnote omitted).[5] The rationale for restricting review under such circumstances is that "the

[5] *See Watson v. Amedco Steel, Inc.*, 29 F.3d 274, 277-78 (7th Cir. 1994); *Black v. J.I. Case Co.*, 22 F.3d 568, 570-72 (5th Cir. 1994); *Johnson Int'l Co. v. Jackson Nat'l Life Ins. Co.*, 19 F.3d 431, 434 (8th Cir. 1994); *Lama v. Borras*, 16 F.3d 473, 476 n.5 (1st Cir. 1994); *Whalen v. Unit Rig, Inc.*, 974 F.2d 1248, 1250-51 (10th Cir. 1992); *Jarrett v. Epperly*, 896 F.2d 1013, 1016 (6th Cir. 1990); *Locricchio v. Legal Servs. Corp.*, 833 F.2d 1352, 1358-59 (9th Cir. 1987); *Glaros v. H.H. Robertson Co.*, 797 F.2d 1564, 1573 & n.14 (Fed. Cir. 1986).

denial was based on an undeveloped, incomplete record, which was superseded by evidence adduced at trial." *Id.* at 1236.

[18] According to Kennedy, our *de novo* standard of review set forth in *Quan Xing He* relied solely on citations to prior cases that did not involve review of a denial of summary judgment. Appellee's Br. at 28 (citing 2009 Guam 20 ¶ 22). In Kennedy's assessment, the standard of review issue in *Quan Xing He* was not litigated or further discussed. Appellee's Br. at 29. Accordingly, these "assumptions on non-litigated issues are not precedential holdings binding future decisions." *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1288 (9th Cir. 1985) (citations omitted). Kennedy distinguishes the Ninth Circuit's holding in *Comsource* relied on by Dr. Sule because that case involved a stipulated judgment entered after a mistrial in which the defendant expressly reserved its right to challenge and appeal the court's pre-trial dismissal of its motion for summary judgment. Appellee's Br. at 29 (citing *Comsource*, 102 F.3d at 441). There was no comparable stipulation in this case.

[19] We agree with the majority of federal circuits and hold that denial of summary judgment is not reviewable on appeal after a full trial and final judgment on the merits. In *Quan Xing He*, the plaintiff appealed his award of damages as inadequate following a bench trial, while the defendant cross-appealed denial of its motion for summary judgment on the issue of the plaintiff's compliance with the Government Claims Act. 2009 Guam 20 ¶¶ 1, 15, 25. The issue of the reviewability of a denial of a motion for summary judgment following a full trial on the merits was not litigated in *Quan Xing He*. *See id.* Although we affirmed the trial court's denial of defendant's cross-appeal, the issue should not have been reviewed. *See id.*

[20] Today, we hold a challenge to denial of a motion for summary judgment should be made through an interlocutory appeal pursuant to Guam Rule of Appellate Procedure 4.2.

Accordingly, Dr. Sule's challenge to the trial court's denial of his motion for summary judgment is unreviewable because the challenge was brought following a full trial on the merits.

B. Judgment as a Matter of Law

[21] We review a ruling on a motion for judgment notwithstanding the verdict *de novo*. *Guam Top Builders, Inc. v. Tanota Partners*, 2012 Guam 12 ¶ 8 (citing *O'Mara v. Hechanova*, 2001 Guam 13 ¶ 6; *Leon Guerrero v. DLB Constr. Co.*, 1999 Guam 9 ¶ 11). "A motion for a directed verdict and a motion for judgment notwithstanding the verdict is the same as a motion for judgement [sic] as a matter of law." *O'Mara*, 2001 Guam 13 ¶ 6 (citations omitted). Judgment as a matter of law is appropriate "if the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, and that conclusion is contrary to that of the jury." *Id.* (citations omitted). The relevant inquiry when reviewing a jury verdict is "whether it is supported by substantial evidence or against the clear weight of evidence." *Id.* (citation omitted). We define "substantial evidence" as "such relevant evidence which reasonable minds might accept as adequate to support a conclusion even if it is possible to draw two inconsistent conclusions from the evidence." *Id.* (citation and internal quotation marks omitted).

C. Jury Instructions

[22] A trial court is afforded wide discretion as to what jury instructions to give in a case, and the relevant inquiries on appellate review are "whether the jury was likely misled by the instruction given and whether a different outcome would likely have resulted had the proposed instruction been given." *Fenwick v. Watabe Guam, Inc.*, 2009 Guam 1 ¶ 9 (quoting *B.M. Co. v. Avery*, 2002 Guam 19 ¶¶ 10, 31). Thus, a trial court's formulation of jury instructions is generally reviewed for an abuse of discretion. *See Guam Top Builders*, 2012 Guam 12 ¶ 52

(citations omitted). However, when the error claimed is based on a misstatement of the law, the standard of review is *de novo*. *See id.* (citations omitted).

IV. ANALYSIS

A. Whether the Trial Court Erred in Tolling the Medical Malpractice Statute of Limitations When it Denied Dr. Sule's Motion for Judgment as a Matter of Law

[23] This action was filed on April 5, 2002. RA, tab 3 at 1 (Compl., Apr. 5, 2002). Dr. Sule appeals the denial of his request for judgment as a matter of law based upon the applicable medical malpractice statute of limitations. Appellant's Br. at 33. Dr. Sule argues that the three-year repose provision of Guam's statute bars Kennedy's claims related to Dr. Sule's treatment prior to April 5, 1999, including the February 1999 implants. *Id.* at 32-33 (citing 7 GCA § 11308 (2005)). He also urges that the one-year discovery provision of the statute is not satisfied because a reasonable person would have suspected malpractice no later than Kennedy's visit to Dr. Hoffman in April 25, 2000, to repair a broken implant. *Id.* (citing 7 GCA § 11308); *see also* Tr. at 57 (Jury Trial – Day 2). Kennedy, however, maintains the action was timely because (1) Dr. Sule was Kennedy's sole treating dentist for several months following the initial February 1999 implant procedure, (2) Dr. Sule corrected the implants, (3) Dr. Sule assured Kennedy failures were expected, and (4) Dr. Sule's treatment continued until April 2001. Appellee's Br. at 33.[6] Thus, in Kennedy's assessment, the complaint filed April 5, 2002, fell within the three-year outer limit of 7 GCA § 11308. *Id.*

[24] Guam has a one-year discovery provision for malpractice actions, and a three-year outer bar from the date of "treatment, omission or operation:"

[6] Kennedy represents in his brief that Dr. Sule treated him in April of 2001. Appellee's Br. at 33. However, it appears this "treatment" consisted of phone calls from Dr. Sule to Kennedy from April 20-25, 2001, to follow up on Kennedy's examination with Dr. Richardson. Tr. at 108 (Jury Trial – Day 2); Tr. at 133-34 (Jury Trial – Day 3, Sept. 5, 2013). Dr. Sule's last treatment of Kennedy was for bridge work in March of 2001. Tr. at 59, 75, 107 (Jury Trial – Day 2).

> An action to recover damages for injuries to the person arising from any medical, surgical or dental treatment, omission or operation shall be commenced with [sic] one (1) year from the date when the injury is first discovered; provided, that such action shall be commenced within three (3) years from the date of treatment, omission or operation upon which the action is based.

7 GCA § 11308. We have said statutes of limitation "'promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'" *Taitano v. Calvo Fin. Corp.*, 2008 Guam 12 ¶ 55 (quoting *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 348-49 (1944)). The short time limit on malpractice actions encourages the plaintiff to act and provides the defendant notice and an opportunity to prepare a defense before evidence becomes stale. *Lamont v. Wolfe*, 190 Cal. Rptr. 874, 877 (Ct. App. 1983) (citations omitted).

[25] After trial, the court held Dr. Sule's motion for judgment as a matter of law failed to establish his burden that the verdict could not be supported by substantial evidence relating to the statute of limitations issue. RA, tab 317 at 5 (Dec. & Order, Apr. 16, 2014). Guam Rule of Civil Procedure 50(a)(1) sets forth the applicable standard for judgment as a matter of law:

> If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

Guam R. Civ. P. 50(a)(1). The relevant standard of review for a jury verdict is "whether it is supported by substantial evidence or against the clear weight of evidence." *O'Mara*, 2001 Guam 13 ¶ 6.

[26] Our analysis in *Custodio v. Boonprakong*, 1999 Guam 5, is instructive to determine whether Kennedy's claims are barred in whole or part. In that case, we considered (1) whether the plaintiff's claim fell within the one-year statute of limitations following discovery of

malpractice; (2) whether the existence of an ongoing physician-patient relationship tolled the statute of limitations throughout the pendency of the relationship; and (3) whether the continuous negligent treatment doctrine was applicable to the plaintiff's claims. *Id.* ¶¶ 26-35. We addressed the first two tolling methods, but noted that the facts of *Custodio* did not lend themselves to application of the continuous negligent treatment doctrine. *Id.* ¶¶ 31, 34-35. The applicability of each doctrine to the facts of this case will be discussed in turn.

1. The One-Year Statute of Limitations is Predicated on the Discovery Rule

[27] In *Custodio*, the plaintiff, Custodio, underwent a hysterectomy on February 7, 1994, and suffered a perforated bowel, which led to debilitating seizures starting in March of 1994. *Id.* ¶¶ 34. Another physician, Dr. Chen, became Custodio's primary neurological care physician on May 16, 1994. *Id.* at 4. Throughout 1994 and 1995, Custodio saw other physicians in Hawaii who informed her and her sister of the causes of her injuries and that the condition was permanent. *Id.* ¶¶ 5, 31. Dr. Chen resumed treatment of Custodio in May of 1995 through February 17, 1996. *Id.* ¶ 5. A malpractice suit was filed against Dr. Chen on December 2, 1996. *Id.* ¶ 7. Custodio claimed she first became aware of Dr. Chen's malpractice in February 1996 when a different physician opined that Dr. Chen's sub-standard care caused brain damage. *Id.*

[28] Dr. Chen successfully moved to dismiss the suit as untimely under the statute of limitations. *Id.* ¶ 8. On appeal, we held that Custodio's claim did not satisfy 7 GCA § 11308 because the statute provides a "clear directive" that medical malpractice suits must be filed "within one year from the date that an injury is discovered or, at the outside, three years from the date of treatment." *Id.* ¶ 27 (footnote omitted). We noted the "discovery rule" builds upon section 11308 by "delaying the accrual date of a cause of action until the plaintiff is aware of the injury and its negligent cause." *Id.* (footnote omitted) (citing *Jolly v. Eli Lilly & Co.*, 751 P.2d

923, 926-27 (Cal. 1988) (en banc)). Under the discovery rule, a party is deemed aware of an injury not only "when he has actual knowledge" but "when he could have reasonably discovered both the injury and the negligent cause through the exercise of reasonable diligence." *Id.*

[29] The discovery period begins running when the injured party "'has suffered appreciable harm and knows or suspects that professional blundering is its cause.'" *Id.* (quoting *Gutierrez v. Mofid*, 705 P.2d 886, 889 (Cal. 1985) (en banc)). Suspicion of wrongdoing starts the clock because "[i]gnorance of legally significant facts [does] not toll the statute of limitations." *Id.* (citing *Gutierrez*, 705 P.2d at 889). "Consequently, if a suspicion exists, the plaintiff cannot sit back and wait for the facts to find him as the burden of finding the facts falls upon his shoulders." *Id.* (citing *Jolly*, 751 P.2d at 928).

[30] We upheld the trial court's assessment that the suit, filed approximately two years and eight months later on December 2, 1996, did not satisfy the one-year statute of limitations requirement set forth in section 11308. *Id.* ¶ 28. The discovery rule did not save Custodio's case because her injuries should have reasonably been discovered soon after her treatment by Dr. Chen because she was given reason to suspect wrongdoing. *See id.* ¶ 29. In addition to the nature of her injuries, the intervening consultation with another physician in Hawaii put Custodio on notice of wrongdoing because he informed Custodio of the causes of her injuries and that her condition was permanent. *Id.* ¶ 31. Thus, it was "irrelevant whether [Custodio's guardians ad litem] knew Dr. Chen was the cause of the injury as the facts before them should have reasonably lead [sic] them to investigate whether his actions were also negligent." *Id.*

a. Kennedy's injuries prior to April 25, 2000

[31] Dr. Sule argues that like Custodio, Kennedy "had the benefit of a second opinion from Dr. Hoffman, a specialist in implants, which he obtained in April 2000." Appellant's Br. at 36.

This opinion, coupled with the problems he was experiencing, was sufficient to put Kennedy on notice of wrongdoing. *Id.* at 36-37. As in *Custodio*, "if a suspicion exists, the plaintiff cannot sit back and wait for the facts to find him as the burden of finding the facts falls upon his shoulders." *Custodio*, 1999 Guam 5 ¶ 27 (quoting *Jolly*, 751 P.2d at 928).

[32] We were not persuaded in *Custodio* that a subsequent physician's failure to explicitly mention sub-standard care was sufficient for tolling purposes. 1999 Guam 5 ¶¶ 7, 27. In this case, Kennedy likewise failed to act in a reasonably prudent manner because the issues he faced would have put a reasonably prudent person on notice even if Dr. Hoffman did not overtly mention the term "malpractice." *See* Tr. at 100 (Jury Trial – Day 2). The alleged injuries were readily apparent no later than April 2000 when he consulted with Dr. Hoffman. *Id.* at 98-101. Kennedy went to Dr. Hoffman seeking a second opinion on "Dr. Sule's treatment plan and performance to date." *Id.* at 49, 119-20; Trial Ex. E-2 (Client Intake Form). Dr. Hoffman asked Kennedy if Dr. Sule was a prosthodontist, to which he replied no, and Dr. Hoffman informed him that a prosthodontist should possibly or probably handle his case. Tr. at 61 (Jury Trial – Day 2).

[33] Further trial testimony established that Kennedy noted his front implant was getting infected during his visit with Dr. Hoffman. *Id.* at 120-22. The fact that the caps fell out caused Kennedy to think it was "weird." *Id.* at 100. Kennedy was also aware of multiple perforations to his sinus resulting in infection which required new implants, most of which occurred in 1999. *Id.* at 123. Dr. Hoffman informed Kennedy that he would have followed a different treatment plan, namely implanting all at once, allowing the implants to heal, and that he would have used a different style of implant. *Id.* at 62. Dr. Hoffman also sent a follow-up letter to Kennedy dated September 24, 2000, inquiring whether Kennedy sought reevaluation from Dr. Sule and offering

to treat Kennedy if he still suffered problems. Trial Ex. E-5 (Letter from Dr. Hoffman). Accordingly, Dr. Sule maintains that as a matter of law, the discovery period for injuries prior to April 25, 2000, began to run when Kennedy obtained a second opinion on April 25, 2000. Appellant's Br. at 37.

[34] In light of evidence on the record, the trial court should have granted Dr. Sule's motion for judgment as a matter of law regarding injuries sustained prior to April 25, 2000. Due to the discovery provision within 7 GCA § 11308, Kennedy should have filed his claim by April 25, 2001, rather than April 5, 2002, to recover damages for any pre-April 25, 2000 injuries. *See* RA, tab 3 at 1 (Compl.). The jury's verdict that Kennedy's injuries prior to April 25, 2000, were not barred by the discovery rule was against the clear weight of evidence. *See O'Mara*, 2001 Guam 13 ¶ 6. Because the facts show Kennedy should have had a suspicion of wrongdoing before being explicitly informed of malpractice, Kennedy did not act in a reasonably prudent manner, and he is barred from recovering damages for these injuries.

[35] The propriety of the trial court's reliance on the "continuous negligent treatment doctrine" to toll the statute for injuries prior to April 25, 2000, is discussed more fully below, following discussion of the "ongoing physician-patient relationship" doctrine. First, however, we must address injuries resulting from any negligence subsequent to April 25, 2000.

b. Kennedy's post-April 25, 2000 injuries

[36] Dr. Sule claims he last installed, removed, or adjusted Kennedy's implants in July 2000. Tr. at 21 (Jury Trial – Day 3). Kennedy, however, testified that he returned to Dr. Sule almost weekly from June or July of 2000 through October or early November of 2000 for remedial work, and was repeatedly assured he would recover. Tr. at 102-03 (Jury Trial – Day 2). The purposes of these visits were to improve Kennedy's bite and to place implants to assist his

bridge. *Id.* at 102. During this period, Dr. Sule perforated Kennedy's sinus multiple times and informed Kennedy that those problems were "part of the process." *Id.* at 116.

[37] Kennedy concedes being referred to Dr. Richardson, a maxillofacial surgeon, by October of 2000. *Id.* at 104-05. Dr. Sule referred Kennedy to Dr. Richardson because Dr. Sule explained he was having some difficulty that necessitated a specialist to perform a sinus lift. *Id.* at 103-05. Kennedy finally saw Dr. Richardson in February of 2001. *Id.* at 104-06.

[38] During Kennedy's appointment with Dr. Richardson in February 2001, Dr. Richardson expressed "a little bit" of concern about Kennedy's shaking jaw and his bite. *Id.* at 106. Following the examination, Kennedy contends Dr. Richardson told him that either he (Dr. Richardson) or Dr. Sule would contact him about the results of the examination, but neither did. *Id.*

[39] Dr. Sule saw Kennedy in March 2001 for bridge work, but Dr. Sule did not work on the implants. *Id.* at 75, 107. Kennedy began meeting with Dr. Yasuhiro in July or August of 2001 for treatment for a perforated sinus resulting from Dr. Sule drilling too deep. *Id.* at 116.

[40] The Complaint in this case is extremely broad, and states Kennedy "has suffered injuries, including but not limited to injuries to his teeth, jaw, sinuses and other dental related areas, which have caused and will continue to cause pain and suffering" during his course of treatment with Dr. Sule. RA, tab 3 at 2-3 (Compl.). Unlike the injuries prior to April 25, 2000, there was substantial evidence introduced that could lead reasonable minds to conclude that any negligent treatment by Dr. Sule subsequent to April 25, 2000, was not discovered by Kennedy. *See O'Mara*, 2001 Guam 13 ¶ 6. The visit to Dr. Richardson in February 2001 was insufficient to trigger a second discovery rule. Hence, we determine that the evidence introduced in this case does not establish as a matter of law that any injury sustained by Kennedy subsequent to April

25, 2000, would have put a reasonably prudent person on notice of wrongdoing. Dr. Richardson only expressed "a little bit" of concern over Kennedy's shaking bite in May of 2001, and the Complaint was filed within one year of Kennedy's consultation with Dr. Yasuhiro. RA, tab 3 at 1 (Compl., Apr. 5, 2002).

[41] On remand, Kennedy will need to prove both Dr. Sule's liability and the amount of damages sustained for any negligent services and treatment rendered subsequent to April 25, 2000. Recovery for post-April 25, 2000 may be recoverable, if damages and liability are proven, because those claims are not barred by the discovery rule and fall within the three-year outer limit of 7 GCA § 11308.

2. Ongoing Physician-Patient Relationship

[42] The plaintiff in *Custodio* next asked this court to adopt an exception tolling the statute of limitations until "the physician-patient relationship ends." *Custodio*, 1999 Guam 5 ¶ 33 (citing *Greninger v. Fischer*, 184 P.2d 694, 697 (Cal. Dist. Ct. App. 1947)). This ongoing physician-patient relationship doctrine provides that a "patient will not ordinarily be put on notice of a physician's negligent conduct" while the physician-patient relationship continues. *Id.* (citing *Hundley v. St. Francis Hosp.*, 327 P.2d 131, 135 (Cal. Dist. Ct. App. 1958)). The justification for the doctrine is that "during the relationship, the physician is in a position to urge upon the patient the prognosis that he will recover over time." *Id.* (citing *Huysman v. Kirsch*, 57 P.2d 908, 911 (Cal. 1936)).

[43] We stated, however, that an ongoing physician-patient relationship "will not benefit a patient if the injury is discovered or through the use of reasonable diligence, should have been discovered." *Id.* (citing *Petrucci v. Heidenreich*, 111 P.2d 421, 422 (Cal. Dist. Ct. App. 1941)). Tolling based upon the physician-patient relationship did not save the Custodio's action because

(1) she knew or should have known through reasonable diligence that her injuries resulted from negligence; (2) she was subsequently examined by a Hawaii physician showing "that she was not solely reliant upon Dr. Chen's skill, judgment, and treatment"; and (3) the Hawaii physician advised her that her injuries were permanent. *Id.* ¶ 34. Accordingly, Custodio and her representative were "on notice that she had suffered injuries requiring investigation of all physicians involved," and her claims were not tolled by the physician-patient relationship. *Id.*

[44] In this case, the physician-patient relationship does not benefit Kennedy for injuries prior to April 25, 2000, because the injuries either were discovered, or should have been discovered, through the use of reasonable diligence under the requirements of *Custodio*. *See id.* ¶ 33. As stated above, evidence was introduced at trial that Kennedy approached Dr. Hoffman for assistance with resealing an implant, and to get a second opinion on Dr. Sule's treatment plan and performance to date. Tr. at 49, 119-20 (Jury Trial – Day 2); *see also* Trial Ex. E-2 (Client Intake Form). Thus, the facts of this case would put a reasonable person on notice of the claim for injuries prior to April 25, 2000, despite any continued professional relationship, and the ongoing physician-patient relationship doctrine does not toll the statute for Kennedy's injuries prior to April 25, 2000.

3. Continuous Negligent Treatment

[45] The final issue raised in *Custodio* was whether this court should adopt the "continuing negligent treatment" rule to toll the statute based on the argument that subsequent treatment by Dr. Chen of the plaintiff through 1996 caused further brain damage. 1999 Guam 5 ¶ 35. We looked to other jurisdictions and held that the facts of the case did not lend themselves to application of that doctrine. *Id.*

[46] "The continued course of treatment exception is a limited one. Several courts have held that the statute begins to run at the time the patient knew or should have known of his injury, even if this occurs prior to the severance of the doctor-patient relationship." *Ballenger v. Crowell*, 247 S.E.2d 287, 294 (N.C. Ct. App. 1978) (citations omitted). The purpose of this doctrine is to "aid victims of medical malpractice who are unable to pinpoint the exact date of their injury due to the continuing nature of their medical treatment." *Forshey v. Jackson*, 671 S.E.2d 748, 756 (W. Va. 2008) (citing *Gilbert v. Bartel*, 144 S.W.3d 136, 140-41 (Tex. App. 2004)) (doctrine inapplicable when plaintiff's "injury did not result from a continuing course of treatment that rendered him unable to identify the precise date of his injury").

[47] Dr. Sule contends the trial court erroneously relied on the continuous negligent treatment doctrine because (1) this court has not expressly adopted the doctrine; (2) the doctrine is at odds with Guam's statutory scheme; and (3) the doctrine is not applicable to Kennedy. Appellant's Br. at 39-44. Dr. Sule points to other jurisdictions that have considered, but ultimately rejected the continuing treatment doctrine. *Id.* at 40-41 (citations omitted); *see, e.g.*, *Carpenter v. Rohrer*, 714 N.W.2d 804, 814 (N.D. 2006) (citations omitted) (declining to adopt the continuous treatment rule, recognizing it would not save plaintiff's claim after acknowledging North Dakota had "not adopted the continuous treatment rule in medical malpractice cases, although [the court had] alluded to the rule in several of [its] past decisions."). In Dr. Sule's view, this court should reject the continuing treatment doctrine because Guam's statute of limitations for medical malpractice actions includes a separate discovery limitation, and, therefore, the doctrine is unnecessary in this jurisdiction. *See* Appellant's Br. at 41.

[48] Dr. Sule highlights that in many jurisdictions, the "continuing negligent treatment" doctrine has been abrogated by judicial and legislative adoption of the one-year discovery rule.

Id. (citing *Stanbury v. Bacardi*, 953 S.W.2d 671, 676-77 (Tenn. 1997)); *see also Stanbury*, 953 S.W.2d at 676 ("The rule has outlived its necessity in light of the comprehensive medical malpractice statute of limitations which requires that suit be brought within one year of the negligent act or within one year of discovery."); *Ratcliff v. Graether*, 697 N.W.2d 119, 125 (Iowa 2005) (the court did not decide whether it rejected the doctrine altogether, but noted it would be inapplicable when the plaintiff was on "inquiry notice"). Thus, Dr. Sule argues that because Guam legislation includes a one-year discovery rule for malpractice actions, and also an outside limit of three years from the date of treatment, the continuing treatment doctrine should not be adopted in Guam. Appellant's Br. at 43.

[49] Kennedy, however, points to a survey of multiple state decisions performed by the Supreme Court of Appeals of West Virginia suggesting the majority of jurisdictions recognized "some form" of the continuous medical treatment doctrine. Appellee's Br. at 37 (citing *Forshey*, 671 S.E.2d at 757 n.16). However, *Forshey* also clarifies that the purpose of the doctrine is to "aid victims of medical malpractice who are unable to pinpoint the exact date of their injury due to the continuing nature of their medical treatment." 671 S.E.2d at 756 (citations omitted).

[50] The continuous medical treatment doctrine is not applicable to this case because as discussed above, Kennedy either was aware, or reasonably should have been aware, of any injuries he sustained prior to April 25, 2000. The injuries prior to April 2000 are barred by the discovery rule, and treatment after April 25, 2000, falls within the three-year repose provision of 7 GCA § 11308. Hence, the trial court erroneously reasoned the three-year statute of repose portion of 7 GCA § 11308 was tolled by Dr. Sule's continued treatment of Kennedy for approximately ten months following the February 1999 implant procedure. *See* RA, tab 317 at 4-5 (Dec. & Order, Apr. 16, 2014).

[51] A careful reading of California's medical malpractice statute and interpretive precedents shows the flaw in the trial court's reliance on California decisions to toll the statute of limitations in this case. California Civil Procedure Code section 340.5, like 7 GCA § 11308, has a one-year discovery bar to actions, and a three-year repose provision under which an action must be commenced within three years of treatment. Cal. Civ. Proc. Code § 340.5 (1975). The three-year repose provision of California's statute can be tolled only in three circumstances: (1) upon proof of fraud; (2) upon proof of intentional concealment; and (3) if the treatment results in the presence of a foreign body that provides no therapeutic or diagnostic purpose or effect. *Id.*

[52] The trial court reasoned the continuous negligent treatment doctrine tolled the three-year repose period by relying on California decisions that predate the 1975 California statute, and involve claims that would be permitted under the statute's tolling exceptions. *See* RA, tab 114 at 6-8 (Dec. & Order Mot. Summ. J.) (citing *Huysman*, 57 P.2d 908 (failure to remove rubber drainage tube); *Trombley v. Kolts*, 85 P.2d 541 (Cal. Dist. Ct. App. 1938) (skin clip left in plaintiff's body); *Petrucci*, 111 P.2d 421 (claim not outside three-year period)). The three situations in California Civil Procedure Code section 340.5 are not enumerated in 7 GCA § 11308, and they are not at issue in this case.[7] Thus, the trial court erroneously relied on these California decisions to extend the three-year repose provision for pre-April 25, 2000 treatment.

[53] Limiting tolling of the three-year repose provision is supported by other jurisdictions. *See* 61 Am. Jur. 2d *Physicians, Surgeons, Etc.* § 299 ("In some jurisdictions, the medical malpractice statute of repose, unlike the statute of limitations, may not be tolled for any reason."

[7] Although there does not appear to be *proof* of fraud or concealment in this case, Kennedy argues fraudulent concealment. Appellee's Br. at 40-42. We note, however, that notwithstanding a defendant's efforts to conceal, the limitations period commences if the plaintiff is independently put on inquiry notice. *Sanchez v. S. Hoover Hosp.*, 553 P.2d 1129, 1134 (Cal. 1976). Furthermore, the implants were placed for treatment purposes.

(footnote omitted)). For example, Louisiana enforces the three-year bar to malpractice suits in jurisdictions with a limit comparable to 7 GCA § 11308. *See* La. Rev. Stat. Ann. § 9:5628 (2001); *see also Gurdin v. Dongieux*, 468 So. 2d 1241, 1246 (La. Ct. App. 1985) (April 20, 1983 lawsuit against orthodontist barred because appliances were placed on her teeth on March 19, 1980); *Chaney v. State*, 432 So. 2d 256, 257-60 (La. 1983) (claims for damages resulting from injuries sustained in 1977, but discovered January 1981, were time-barred and appropriately dismissed when filed in May 1981, while injuries sustained from 1978-1979 treatment created an independent cause of action that should not have been dismissed).

[54] Furthermore, the trial court erroneously reasoned that Kennedy's unilateral phone calls and March 2001 visit to Dr. Sule's office were "treatment" for continuing negligent treatment purposes because there was no mutual agreement or expectation for a future consultation. *See Peters v. Asarian*, 936 N.Y.S.2d 206, 208 (App. Div. 2011); *see generally* RA, tab 114 at 8 (Dec. & Order Mot. Summ. J.). In *Peters*, a single visit to plaintiff's plastic surgeon nearly 19 months after her treatment was insufficient to establish a continuous course of treatment to overcome a statute of limitations because there was no mutual agreement or expectation for a future consultation. 936 N.Y.S.2d at 208; *see also Adams v. Kohan*, 963 N.Y.S.2d 342, 343 (App. Div. 2013) (two phone calls between plaintiff and defendant physician did not demonstrate that plaintiff was undergoing an actual course of treatment, or that plaintiff and defendant physician contemplated future treatment). Likewise, Kennedy's phone calls to Dr. Sule did not constitute "treatment" as reasoned by the trial court.

[55] As in *Custodio*, "[t]he facts before the court do not lend themselves to an application of [the continuous negligent treatment] doctrine." 1999 Guam 5 ¶ 35. Accordingly, we decline to expressly adopt or reject the "continuing negligent treatment" doctrine at this time. We are not

persuaded that the continuous negligent treatment doctrine, if adopted, would toll the three-year repose provision of 7 GCA § 11308. Thus, Kennedy's injuries *prior to* April 25, 2000, are barred; the judgment in Kennedy's favor for $62,236.35 is vacated; and the matter is remanded for a new trial to determine liability and damages for any *post*-April 25, 2000 injuries sustained by Kennedy resulting from Dr. Sule's treatment. *See* RA, tab 292 (Judgment, Dec. 6, 2013).

B. Whether the Trial Court Erred by Instructing the Jury on the Legal Effect of their Comparative Negligence Apportionment

[56] As we have reversed and vacated the trial court's judgment, this court need not address the remaining issues on appeal. *See People v. Kim*, 2015 Guam 25 ¶ 28; *Presto v. Lizama*, 2012 Guam 24 ¶ 54.

V. CONCLUSION

[57] We hold that a denial of summary judgment is unreviewable following a full trial on the merits. We also hold that all damages suffered by Kennedy prior to April 25, 2000, are barred by the discovery rule. Kennedy may recover some damages on remand if he can prove at trial that Dr. Sule's treatment subsequent to April 25, 2000, was negligent. For the foregoing reasons, we **REVERSE** the jury's verdict, **VACATE** the damages award, and **REMAND** this matter to the trial court for further proceedings not inconsistent with this opinion.

Original Signed By: F. Philip Carbullido

F. PHILIP CARBULLIDO
Associate Justice

Original Signed By: Alexandro C. Castro

ALEXANDRO C. CASTRO
Justice *Pro Tempore*

Original Signed By: Robert J. Torres

ROBERT J. TORRES
Chief Justice