Filed
Supreme Court of Guam, Clerk of Court

IN THE SUPREME COURT OF GUAM

ROSARIO S. BAUTISTA and MANUEL C. SHOLING,
Plaintiff-Appellants,

v.

FRANCISCO TORRES, Individually and as the Previous Special Administrator and Now Executor of the Estate of Jesus U. Torres, Deceased, and PETER F. PEREZ,
Defendant-Appellees.

DANIEL U. TORRES and BARBARA M. DeMELLO, Trustees under the Esteban Torres Family Trust Dated May 12, 1995,
Intervenor Plaintiff-Appellees/Cross-Appellants,

v.

ROSARIO S. BAUTISTA and MANUEL C. SHOLING,
Intervenor Defendant-Appellants/Cross-Appellees,

and

GLORIA C. SHOLING,
Third-Party Defendant-Appellee.

Supreme Court Case No. CVA16-020
Superior Court Case No. CV0471-07

OPINION

Cite as: 2019 Guam 18

Appeal from the Superior Court of Guam
Argued and submitted on February 12, 2018
Hagåtña, Guam

E-Received
10/9/2019 2:19:02 PM

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BEFORE: F. PHILIP CARBULLIDO, Presiding Justice; ROBERT J. TORRES, Associate Justice; and ALBERTO E. TOLENTINO, Justice *Pro Tempore*.[1]

CARBULLIDO, J.:

[1] Rosario S. Bautista and Manuel C. Sholing (collectively, "the Sholings") appeal from the Superior Court's entry of judgment. The Sholings sued Francisco Torres ("Francisco"), individually and as the previous special administrator and now executor of the Estate of Jesus U. Torres, and Peter F. Perez. The trial court granted summary judgment for Francisco and Perez, finding that the Sholings' claims were time-barred or moot and, alternatively, were barred by the doctrine of laches. We affirm the trial court's grant of summary judgment for Francisco in full and in favor of Perez on the Fifth through Seventh Counts of the Third Amended Complaint. However, we reverse the trial court's grant of summary judgment for Perez as to the Tenth through Twelfth Counts and the Eighth Count.

[2] Daniel U. Torres and Barbara M. DeMello, as trustees under the Esteban Torres Family Trust dated May 12, 1995 (collectively, "Intervenors"), cross-appeal from the entry of judgment. The Superior Court dismissed Intervenors' claims against Third-Party Defendant Gloria C. Sholing ("Gloria"), finding Intervenors lacked standing. We affirm, but on the alternative ground of waiver.

I. FACTUAL AND PROCEDURAL BACKGROUND

[3] This case arises from a dispute regarding an agreement between Jesus U. Torres ("J.U. Torres") and his clients—Ana Sholing and her three children, Rosario S. Bautista, Manuel C. Sholing, and Gloria C. Sholing—in connection with the negotiation of the lease of the Pacific Islands Club ("PIC") property belonging to the Sholing family. The 1987 Property Management

[1] Justice *Pro Tempore* Alberto E. Tolentino heard oral argument in this case. Prior to the issuance of this Opinion, he assumed the position of ethics prosecutor. This Opinion was decided by a quorum of this court under 7 GCA § 3108(c)(1).

and Retainer Agreement ("1987 Agreement") stipulated that J.U. Torres would provide legal services in exchange for 10% of the annual rental earnings from PIC for a period of 25 years, until September 30, 2012.

[4] J.U. Torres sent periodic rent statements to the Sholing family, informing them of the total rent amount collected and the amounts deducted for taxes and attorney's fees. After J.U. Torres's death, Perez began collecting rent payments for the PIC property and continued to notify the Sholing family about the 10% deductions by sending rent statements that showed the attorney-fee deductions from the rental disbursements.

[5] After their mother's death, the Sholings contacted their current counsel, Wayson Wong, to assist them with the deductions issue. On November 15, 2006, Wong sent another letter to Perez objecting to any further deductions under the 1987 Agreement. On April 23, 2007, the Sholings filed a complaint against: Francisco, individually and as previous special administrator and now executor of the Estate of J.U. Torres ("J.U. Torres Estate"); and Perez, individually. The complaint alleged causes of action for breach of fiduciary duty, rescission and restitution, deceptive trade practices, and negligence.

[6] Perez moved for summary judgment, alleging, among other things, that the Sholings' claims were time-barred by the statute of limitations. The trial court granted Perez's motion. Francisco then moved for summary judgment, alleging that the claims against him were time-barred for the same reasons that entitled Perez to summary judgment. The trial court granted summary judgment for Francisco.

[7] Intervenors moved to intervene and join third-party defendant Gloria, which the trial court granted. Intervenors alleged that the Sholing family breached the 1987 Agreement by refusing to remit payments owed, namely the 10% of rental earnings, to the J.U. Torres Estate. Gloria moved to dismiss Intervenors' complaint on the ground that Intervenors lacked

standing—an issue not raised in filings regarding the motion to intervene—which the trial court granted.

[8] After judgment was entered, the Sholings timely filed their Notice of Appeal, and Intervenors timely filed their Notice of Cross-Appeal.

II. JURISDICTION

[9] This court has jurisdiction over an appeal from a final judgment of the Superior Court. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 116-61 (2019)); 7 GCA §§ 3107(b), 3108(a) (2005).

III. STANDARD OF REVIEW

[10] We review a grant of summary judgment *de novo*. *Gayle v. Hemlani*, 2000 Guam 25 ¶ 20. When a statute of limitations began to run is a question of law reviewed *de novo*. *Id.* ¶ 22. "However, if the question turns on what a reasonable person should know," it is a mixed question of law and fact, and we review the lower court's conclusion for clear error. *Id.* We review a trial court's decision granting a motion to dismiss for lack of subject matter jurisdiction *de novo*. *Amerault v. Intelcom Support Servs., Inc.*, 2004 Guam 23 ¶ 9.

IV. ANALYSIS

A. The Trial Court Did Not Err in Granting Summary Judgment for Francisco

[11] A court may grant summary judgment when a party has established that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Guam R. Civ. P. 56(c); *see also Bank of Guam v. Flores*, 2004 Guam 25 ¶ 8. In deciding a summary judgment motion, "the court must draw inferences and view the evidence in a light most favorable to the non-moving party." *Flores*, 2004 Guam 25 ¶ 7.

[12] The Sholings sued Francisco for breach of fiduciary duty, breach of contract, and violation of the Deceptive Trade Practices Act. *See* Record on Appeal ("RA"), tab 72 at 2-13

(3d Am. Compl., July 10, 2009). The statute of limitations period applicable to each claim is three years for breach of fiduciary duty, *see* 7 GCA § 11305(d) (2005); *Gayle*, 2000 Guam 25 ¶ 23; four years for breach of contract, *see* 7 GCA § 11303(a) (2005); and three years for violating the Deceptive Trade Practices Act, *see* 5 GCA § 32121 (2005). The trial court found that the statute of limitations for the Sholings' claims against Francisco in Counts One through Three of their complaint "began to run as early as the 1980s." RA, tab 290 at 10 (Dec. & Order, Apr. 17, 2013). Because the Sholings waited until 2007 to file their claims, the court found that the claims were time-barred. *Id.* at 11.

[13] The Sholings contend the trial court erred because summary judgment was precluded by: (1) the existence of genuine issues of material fact as to when the statute of limitations began to run, Appellants' Am. Br. at 43-46 (Apr. 21, 2017); (2) the continuing claim doctrine, *id.* at 35-43; (3) equitable estoppel or the tolling doctrine, *id.* at 46-50; (4) the continuous representation rule, *id.* at 50-53; and (5) the unavailability of the bar of laches, *id.* at 53-54. For the reasons discussed below, we find that the trial court did not err in granting summary judgment for Francisco.

1. The applicable test for determining when a statute of limitations begins to run is an objective, reasonable person standard, not a "reasonable Guam resident" standard

[14] Generally, a statute of limitations begins to run when a plaintiff discovers, or with reasonable diligence should have discovered, facts giving rise to a cause of action. *See generally Kennedy v. Sule*, 2015 Guam 38 ¶ 28 (discussing discovery rule). "The existence of a fiduciary relationship between the parties is a fact to consider in determining whether a plaintiff has exercised reasonable diligence in the inquiry of the existence and cause of his injury." *Gayle*, 2000 Guam 25 ¶ 25 (citing *Bourland v. Salas*, DCA Civ. No. 82-0224A, 1986 WL 68918 (D. Guam App. Div. Oct. 24, 1986)). However, "[r]easonable diligence is tested by an *objective*

standard, and when the uncontroverted evidence irrefutably demonstrates that the plaintiff discovered or should have discovered the fraudulent conduct, the issue may be resolved by summary judgment." *Id.* (emphasis added). Where the question of when a statute of limitations began to run "turns on what a reasonable person should know," it is a mixed question of law and fact and, as such, we review the lower court's conclusion for clear error. *Id.* ¶ 22 (citation omitted). Under this standard, "this court will 'only look at whether the trial court's finding of fact is supported by substantial evidence,' and the trial court's decision will only be reversed if this court has a 'definite and firm conviction that a mistake has been committed [by the trial court].'" *In re Guardianship of Moylan*, 2011 Guam 16 ¶ 12 (alteration in original) (quoting *Fargo Pac., Inc. v. Korando Corp.*, 2006 Guam 22 ¶¶ 30, 32). "We will not substitute our judgment for that of the trial court." *Id.*

[15] The Sholings argue that the analysis of when a statute of limitations begins to run "should be grounded in what would be suspected in Guam . . . and be analyzed from the perspective of a reasonable Guam resident in the place of the Sholings." Appellants' Am. Br. at 44. The Sholings also ask this court "to take judicial notice that in Guam, especially in the Chamorro community, the people are very respectful to and trusting of their parents and professionals, like attorneys and doctors." *Id.* at 44-45. Under this standard, the Sholings argue that they had no knowledge of the breach of ethical and fiduciary duties of their attorneys until 2006 because they trusted their attorneys. *See id.* at 45. We reject this novel approach.

[16] The Sholings provide no relevant caselaw to support their contention that a local standard should be applied in determining how the discovery rule impacts the running of a statute of limitations. *See* Appellants' Am. Br. at 44. Rather, the Sholings cite to *Miller v. California*, 413 U.S. 15 (1973), and *Weil v. Federal Kemper Life Assurance Co.*, 866 P.2d 774 (Cal. 1994) (in bank), neither of which is relevant here. In *Miller*, the U.S. Supreme Court held that obscenity

should be defined under the First Amendment in accordance with local "community standards," not a uniform national standard. 413 U.S. at 32-33. The case did not deal with the discovery of a cause of action, which is at issue here. The Sholings cite to *Weil* for the contention that in insurance coverage cases involving the determination of what is an accident, the objective test is viewed from the perspective of a reasonable person "in the place of the insured." Appellants' Am. Br. at 47 n.11. This is inaccurate. In *Weil*, the court found that using only an objective or only a subjective test in determining what constitutes an accident had "significant drawbacks" and therefore instead applied "an analysis designed to combine the best of both and avoid the pitfalls of each." 866 P.2d at 809. The court was not simply refining the objective person standard, as the Sholings contend, but rather it adopted a hybrid approach.

[17] Given that the Sholings provide no relevant legal authority to support their contention and because of our holding in *Gayle*, we decline to apply the proposed "reasonable Guam resident" standard. We also decline to take judicial notice of the alleged fact that in Guam, people are respectful and trusting of their parents and professionals, as this is not the type of "fact" generally subject to judicial notice. *See generally* Guam R. Evid. 201(b).

[18] Applying an objective standard, we find that the trial court's findings of fact are supported by substantial evidence. In depositions, Manuel Sholing admitted that he knew of the 10% deductions as early as the 1980s and admitted to thinking that the deductions were "unreasonable" and "too much" when he "first learned" about them. RA, tab 183, Dep. Tr. of Manuel Sholing at 95, 103 (Berman Decl., May 10, 2010). He also admitted to thinking that his mother, Ana Sholing, was being "taken advantage of" by J.U. Torres. *Id.* at 98-99. Similarly, Rosario Bautista admitted that she thought that the 10% deductions were "too much" and that she had felt that way since the 1990s when she received the rent statements from J.U. Torres. *Id.*, Dep. Tr. of Rosario Bautista at 69. The trial court held that "because Plaintiffs received

periodic statements of the deductions and had access to independent counsel, they possessed the means and capacity to both discover and litigate these disputes as early as the 1980s." RA, tab 370 at 7-8 (Dec. & Order, Oct. 13, 2014). Given the evidence of the Sholings' knowledge of the deductions as early as the 1980s, their belief from the beginning that the deductions were unreasonable, and their access to independent counsel, the trial court's findings of fact were supported by substantial evidence. A reasonable person in the shoes of the Sholings would have been on notice that they had potential causes of action related to the 1987 Agreement much earlier than 2007. We do not have a definite or firm conviction that the trial court committed a mistake and therefore will not reverse on this basis.

2. The continuing claim doctrine does not apply

[19] Under the continuing claim doctrine—sometimes referred to as the continuing wrong doctrine—a limitations period does not begin to run until the date of the last injury. *Gayle*, 2000 Guam 25 ¶ 33. "In other words, the statute of limitations does not begin to run until the wrong is over and done with." *Id.* (quoting *Tiberi v. Cigna Corp.*, 89 F.3d 1423, 1430-31 (10th Cir. 1996)). The continuing claim doctrine "cannot be utilized where a plaintiff's injury is definite and discoverable, and nothing prevents him from coming forward to seek redress." *Id.* (citing *Tiberi*, 89 F.3d at 1431).

[20] The Sholings argue that the trial court should have applied the continuing claim doctrine to their claims against Francisco because, they allege, each of the six times that J.U. Torres was paid the 10% fee was an independent and distinct wrong. Appellants' Am. Br. at 40. We disagree. On these facts, our decision in *Gayle* is controlling. Here, the injury was definite and discoverable because the Sholings received periodic rent statements as early as the 1980s and the statements showed the 10% deductions. *See* RA, tab 183 at Exs. W, X, Y, Z, A-1, B-1, C-1 (Berman Decl.); *id.*, Dep. Tr. of Manuel Sholing at 103, 191-92 (Berman Decl.); *id.*, Dep. Tr. of

Rosario Bautista at 71, 73. The Sholings were not prevented from seeking redress. Indeed, the Sholings had access to independent counsel and admitted that they could have hired an attorney in the 1990s to represent them with respect to their ownership of PIC. *See id.*, Dep. Tr. of Rosario Bautista at 31, 71; *id.*, Dep. Tr. of Manuel Sholing at 193; *see also Burkhart v. Miranda*, 2013 Guam 2 ¶ 26. On these undisputed facts, the continuing claim doctrine does not apply.

3. Equitable estoppel does not apply

[21] The Sholings also attempt to save their claims against Francisco by arguing that whether Francisco is estopped from asserting the statute of limitations defense is an issue of material fact and summary judgment is thereby precluded. In support of this argument, the Sholings cite to the case of *Interdonato v. Interdonato*, 521 A.2d 1124 (D.C. 1987). There, the court noted that a defendant is "estopped from asserting the statute of limitations as a bar to plaintiff's action if he has done anything that would tend to lull the plaintiff into inaction and thereby permit the statutory limitation to run against him." *Interdonato*, 521 A.2d at 1135 (quoting *Prop. 10-F, Inc. v. Pack & Process, Inc.*, 265 A.2d 290, 291 (D.C. 1970)). We briefly discussed *Interdonato* in *Gayle*. *See Gayle*, 2000 Guam 25 ¶ 37.

[22] The Sholings analogize their case to *Ray v. Queen*, 747 A.2d 1137 (D.C. 2000). In *Ray*, the court noted that "a representation need not be effected by words in order to implicate the tolling doctrine. Indeed, actions may often speak louder than words." 747 A.2d at 1143. In reversing a grant of summary judgment, the court held that an impartial trier of fact could reasonably find that a lawyer's conduct in distributing a decedent's entire estate to a widow was a representation to the decedent's children that the widow was legally entitled to receive the money. *Id.* at 1145. The Sholings argue that, as their attorney, J.U. Torres's charging and collecting under the 1987 Agreement represented to them that he was legally entitled to do so. Appellants' Am. Br. at 49. The problem with this analogy is that there was no evidence that the

plaintiff in *Ray* suspected that there was any wrongdoing in his lawyer's distribution of the estate. *Ray*, 747 A.2d at 1143-45. Here, the Sholings, by their admissions, suspected that their mother was being "taken advantage of" by J.U. Torres. RA, tab 183, Dep. Tr. of Manuel Sholing at 98-99 (Berman Decl.).

[23] Nothing in the record excuses the Sholings' failure to investigate potential claims when they first became suspicious of J.U. Torres in the 1980s and 1990s, especially because they had access to independent counsel. *Id.*, Dep. Tr. of Manuel Sholing at 193; *id.*, Dep. Tr. of Rosario Bautista at 31, 71. Nor is there any evidence that J.U. Torres did anything to "lull" the Sholings into inaction. He provided the Sholing family with periodic rental statements that clearly showed his 10% deduction from rental fees. Given that J.U. Torres provided such rental statements and that the Sholings were suspicious of J.U. Torres and thought his fees to be unreasonable as early as the 1980s and 1990s, equitable estoppel does not apply here.[2]

4. We decline to adopt the continuous representation rule

[24] The Sholings ask this court to adopt the continuous representation rule and argue that, if adopted, the rule would preclude summary judgment. Appellants' Am. Br. at 50. Specifically, they ask this court to adopt the rule as enumerated in California Code of Civil Procedure section 340.6(a)(2). Section 340.6(a)(2) provides that the statute of limitations for claims against an attorney for a wrongful act or omission, other than for actual fraud, shall be tolled where "[t]he attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred." Cal. Code Civ. Proc. § 340.6(a)(2). In *Laird v.*

[2] We clarify that the discovery rule and equitable tolling, while related, are separate doctrines, despite our dicta to the contrary in *Taitano v. Calvo Finance Corp.*, 2008 Guam 12 ¶ 44 n.4. The distinction between the doctrines was made clear in *Gayle*. There, we noted that under the discovery rule, the statute of limitations would begin to run when a plaintiff, exercising reasonable diligence, suspected or should suspect that his injury was caused by wrongdoing. *See Gayle*, 2000 Guam 25 ¶¶ 24-25. We also addressed the appellant's equitable estoppel argument and noted that under this doctrine, a defendant is estopped from asserting the statute of limitations as a bar to a plaintiff's action if the defendant's conduct induced the plaintiff into inaction. *See id.* ¶ 37. Moreover, we have continued to apply the equitable estoppel doctrine even after our decision and dicta in *Taitano*. *See, e.g.*, *Bautista v. San Agustin*, 2015 Guam 23 ¶ 45; *Guam Police Dep't v. Superior Court (Lujan)*, 2011 Guam 8 ¶ 15.

Blacker, 828 P.2d 691 (Cal. 1992) (in bank), the California Supreme Court noted that the rule was "adopted in order to 'avoid the disruption of an attorney-client relationship by a lawsuit while enabling the attorney to correct or minimize an apparent error, and to prevent an attorney from defeating a malpractice cause of action by continuing to represent the client until the statutory period has expired.'" 828 P.2d at 698 (citation omitted).

[25] A number of courts have adopted the continuous representation doctrine as an exception to the discovery rule. *See, e.g.*, *R.D.H. Commc'ns, Ltd. v. Winston*, 700 A.2d 766, 775 (D.C. 1997); *Biomet, Inc. v. Barnes & Thornburg*, 791 N.E.2d 760, 767 (Ind. Ct. App. 2003); *Smith v. Stacy*, 482 S.E.2d 115, 122 (W. Va. 1996). However, many other courts have declined to adopt the doctrine. *See, e.g.*, *Barnes v. Turner*, 606 S.E.2d 849, 852 n.10 (Ga. 2004) (stating Georgia has rejected the rule except in personal injury cases (collecting cases)); *Channel v. Loyacono*, 954 So. 2d 415, 421 (Miss. 2007); *Zero Mfg. Co. v. Husch*, 743 S.W.2d 439, 441-42 (Mo. Ct. App. 1987); *Sharts v. Natelson*, 885 P.2d 642, 647 (N.M. 1994); *Merkley v. Beaslin*, 778 P.2d 16, 20 (Utah Ct. App. 1989). The court in *Merkley v. Beaslin*, 778 P.2d 16 (Utah Ct. App. 1989), reasoned that adopting the continuous representation doctrine "would permit a client with knowledge of the attorney's negligent act to say nothing during a perhaps protracted relationship in connection with the particular transaction they were involved in and, thus, needlessly prolong the attorney's potential exposure to suit long after the client had discovered the malpractice." 778 P.2d at 20.

[26] We decline to adopt the doctrine here. The rule that the Sholings are specifically requesting is based on a California statute to which there is no comparable Guam counterpart. In *M Electric Corp. v. Phil-Gets (Guam) International Trading Corp.*, 2012 Guam 23, we held that a California statute and caselaw interpreting that statute had "no effect in the present case because Guam ha[d] no comparable statute." 2012 Guam 23 ¶ 35. The same reasoning holds

here. Given that Guam does not have a statute comparable to section 340.6 of the California Code of Civil Procedure, we decline to adopt the continuous representation rule. Rather, the discovery rule, as explained in *Gayle*, is the appropriate rule to apply.

5. We need not reach the issue of the availability of the defense of laches to Francisco

[27] In Count Four, the Sholings alleged that Francisco breached his fiduciary duties as executor of the J.U. Torres Estate by distributing approximately ten million dollars of the Estate to their detriment as creditors. RA, tab 72 at 12-13 (3d Am. Compl.). Given that we are affirming the lower court's grant of summary judgment for Francisco because the Sholings' claims in Counts One through Three are time-barred, the Sholings possess no legally cognizable interest in the funds distributed by Francisco. *See, e.g.*, *Cont'l Bank & Tr. Co. v. Am. Bonding Co.*, 536 F. Supp. 1099, 1100 (E.D. Mo. 1982). Therefore, the trial court did not err in dismissing Count Four.

B. The Trial Court Did Not Err in Granting Summary Judgment for Perez on the Fifth Through Seventh Counts, But Did Err in Granting Summary Judgment on the Tenth Through Twelfth Counts and on the Eighth Count

[28] The Sholings argue that the trial court erred in granting summary judgment for Perez. Appellants' Am. Br. at 24-35. The Sholings contend that (1) the statute of limitations did not bar their claims against Perez, *id.* at 24-29, (2) the doctrine of laches should not have been available to Perez, *id.* at 29-33, and (3) the trial court erred in disregarding their breach of fiduciary duty claims against Perez for his actions in the Ana Sholing probate case, *id.* at 34-35.

1. Perez owed no duty to the Sholings with respect to the late filing of their underlying claims and had no conflict of interest

[29] The Sholings contend that their breach of fiduciary duty claims against Perez in the Fifth through Seventh Counts are not derivative of claims arising under the 1987 Agreement, as the trial court held. *See* RA, tab 290 at 8 (Dec. & Order, Apr. 17, 2013). Rather, the Sholings argue,

the claims arose from Perez breaching his fiduciary duties to them as their attorney by failing to protect them from paying unreasonable attorney's fees. *See* Appellants' Am. Br. at 28. Thus, the Sholings argue, the trial court erred in granting Perez's motion for summary judgment based on the statute of limitations having lapsed because their claims against Perez were separate and distinct from their claims against J.U. Torres and because Perez "failed to offer any facts or law to show when the claims against him arose and whether they were barred by any statute of limitations." *Id.* at 29.

[30] As the non-moving party, the Sholings were required to "set forth specific facts showing that there [was] a genuine issue for trial." Guam R. Civ. P. 56(e). A non-moving party cannot rely on unsupported or conclusory allegations but must present "some significant probative evidence tending to support the complaint." *Iizuka Corp. v. Kawasho Int'l (Guam), Inc.*, 1997 Guam 10 ¶ 8 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986)). The Sholings failed to do so.

[31] While the Sholings are correct in that their claims against Perez are indeed separate from claims against the J.U. Torres Estate, their claims against Perez necessarily depend on the existence of a valid claim against the J.U. Torres Estate arising under the 1987 Agreement. In counts Five through Seven, the Sholings allege that Perez violated the fiduciary duties he owed to them as their lawyer by not advising them: that the 10% in attorney's fees were unreasonable; that they had claims against the J.U. Torres Estate for reimbursement; that they were no longer required to pay the fees; of the deadline to timely file their claims against the J.U. Torres Estate; and that Perez had a conflict of interest. *See* RA, tab 72 at 14-16 (3d Am. Compl.). In his motion for summary judgment, Perez presumptively established the statute of limitations defense by showing that the Sholings' claims against the J.U. Torres Estate were time-barred before the

period in which Perez started representing the Sholings. *See* RA, tab 181 at 8-13 (Perez's Mot. Summ. J., May 10, 2010).

[32] When there is no attorney-client relationship or fiduciary duty before the expiration of the statute of limitations on an underlying claim, an attorney owes no duty to the client with respect to the late filing of the client's underlying, expired claim. *See Lenches-Marrero v. Law Firm of Averna & Gardner*, 741 A.2d 605, 608 (N.J. Super. Ct. App. Div. 1999); *see also Giron v. Koktavy*, 124 P.3d 821, 826 (Colo. App. 2005). The Sholings' underlying claims against Francisco were time-barred long before Perez became their attorney. Accordingly, Perez owed no duty to the Sholings to advise them with respect to the late filing of their underlying claims. Additionally, Perez did not have a conflict of interest because the Sholings' claims against Perez's other client, the J.U. Torres Estate, were time-barred before Perez became the Sholings' attorney. Therefore, the trial court did not err in granting summary judgment for Perez on the Fifth through Seventh Counts.

2. The Sholings' claims in the Tenth through Twelfth Counts, while related to the 1987 Agreement, were not a challenge to the 1987 Agreement itself

[33] The Sholings contend that their fraud claims against Perez in the Tenth through Twelfth Counts did not arise from the 1987 Agreement, as the trial court held. *See* RA, tab 290 at 8 (Dec. & Order, Apr. 17, 2013). Rather, the Sholings argue, the claims arose from Perez "lying to [them] as their attorney about what he was doing with the [10% fees]." Appellants' Am. Br. at 26-27. In the Tenth through Twelfth Counts, the Sholings alleged that Perez intentionally misrepresented to them that they were required to continue to pay the 10% in attorney's fees and that Perez was either entitled to such fees or that he would transmit such payments to the J.U. Torres Estate. RA, tab 72 at 22-25 (3d Am. Compl.). The latter of these allegations, while related to the 1987 Agreement, is not a challenge arising under the 1987 Agreement itself. The

Sholings are not arguing that they should not have had to pay the 10% fees under a breach of contract theory. Rather, they appear to be alleging that Perez mishandled and misrepresented to them what he was doing with the deductions based on his fiduciary relationship with the Sholings as their attorney. Therefore, the trial court erred in granting summary judgment on the basis that the claims against Perez in the Tenth through Twelfth Counts "[arose] from and [were] connected to the [1987] Agreement" and were, consequently, time-barred "for the same reasons they are time-barred against the Torres Estate." RA, tab 290 at 12 (Dec. & Order, Apr. 17, 2013).

[34] The trial court also held that even if the Sholings' claims were not time-barred, the claims were barred by laches. *Id.* at 13. The court's analysis in this regard also focused on the 1987 Agreement, *see id.* at 13-15, and is in error, as related to the Tenth through Twelfth Counts, because the Sholings' claims against Perez in these counts did not arise from the 1987 Agreement. Therefore, the trial court erred in holding that the defense of laches was available to Perez on the Tenth through Twelfth Counts and in granting summary judgment on these counts on that basis.

3. There were disputed issues of material fact as to the Eighth Count

[35] The Eighth Count is based on Perez's representation of Gloria, as executrix of the Sholing estate, in the probate of the Sholing estate. *See* RA, tab 72 at 18-20 (3d Am. Compl.). During the probate proceedings, the Sholings allegedly indicated to Perez that they had concerns about the attorney's fees for the probate and that they wanted to address the probate court about the issue. Appellants' Am. Br. at 34; *see also* RA, tab 72, Ex. A at 8 (3d Am. Compl.). The Sholings allege that despite them voicing their concerns, Perez caused the probate proceedings to be completed without notice to them and that Perez was liable to them for this breach of fiduciary duty. Appellants' Am. Br. at 34.

[36] The trial court found that the Eighth Count was "nothing more than a collateral attack on the final decree that was issued by the Probate Court in the Ana Sholing probate case." RA, tab 290 at 16 (Dec. & Order, Apr. 17, 2013). We disagree. The Sholings' allegation of concealment is a claim against Perez, not a collateral attack on the probate court's final decree. *See Pac. Rock Corp. v. Perez*, 2005 Guam 15 ¶ 24. Any judgment on this claim would be satisfied by Perez, not the J.U. Torres Estate. The grant of summary judgment on this basis was in error.

[37] Summary judgment is inappropriate where there remain disputed questions of fact. *See* Guam R. Civ. P. 56; *see also Flores*, 2004 Guam 25 ¶ 8. In addition to finding that Count Eight was a collateral attack on the probate judgment, the trial court also granted Perez's motion for summary judgment on the Eighth Count because the Sholings and their attorney, Wayson Wong, had notice of the probate proceedings. RA, tab 290 at 16 (Dec. & Order, Apr. 17, 2013). The record in this regard, however, is unclear. The trial court pointed to Wong's letter to Perez of November 15, 2006, as evidence that he knew that the probate court had granted the attorney's fee award to Perez. *Id.* However, the letter makes clear that Wong was *unaware* of the award. *See* RA, tab 72, Ex. A at 8 (3d Am. Compl.) ("Furthermore, notwithstanding the fact that the final order *has not been filed* for the Ana Sholing probate case . . . ." (emphasis added)). It is also unclear whether the Sholings had such notice of the probate proceedings. The probate court notified Perez of the entry on the docket on October 23, 2006. *In re Estate of Sholing*, PR0125-05 (Notice of Entry on Docket (Oct. 23, 2006)).[3] Given that Perez was the only counsel of record at the time and that the notice lists no other lawyer other than Perez, it is possible that the Sholing heirs were unaware of the notice because Perez concealed the fact.

[3] "[T]his court may take judicial notice of matters of public record," and we exercise our discretion to do so here. *Taitano v. Calvo Fin. Corp.*, 2009 Guam 9 ¶ 31.

[38] Given that there are disputed issues of material fact regarding whether the Sholings or their attorney, Wayson Wong, had notice of the relevant probate proceedings, it was improper for the trial court to grant summary judgment for Perez on this issue. *See generally* Guam R. Civ. P. 56.

C. We Decline to Review the Final Judgment and "Other Decisions and Orders," as Identified by the Sholings, Because the Sholings Have Failed to Argue Specifically Why This Court Should Review These Decisions and Orders

[39] The Sholings identify five other decisions and orders, as well as the final judgment, that they allege this court should review *de novo* because "their review is based on the review of the summary judgments upon which they were based." Appellants' Am. Br. at 5. We noted in *Guam Greyhound, Inc. v. Brizill*, 2008 Guam 13, that we generally review only issues that are argued "specifically and distinctly in a party's opening brief. We will not manufacture arguments for an appellant, and a bare assertion does not preserve a claim, particularly when, as here, a host of other issues are presented for review." 2008 Guam 13 ¶ 7 n.3 (quoting *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994)). The Sholings neither identify any legal issues implicated by the orders that they are challenging nor provide any citations to either the record or legal authorities in their briefs. *See generally* Guam R. App. P. 13. We decline to review any order or judgment, except to the extent discussed elsewhere in this Opinion.

D. Intervenors Have Waived Their Argument that They Have Standing to Sue Under a Common Law Exception to the General Rule that Heirs Cannot Sue for Personalty

[40] Intervenors appeal a Decision and Order issued by the trial court granting Gloria Sholing's motion to dismiss their complaint because Intervenors lacked standing. *See* RA, tab 294 at 6-10 (Dec. & Order, May 31, 2013). We review *de novo* a trial court's decision granting a motion to dismiss for lack of subject matter jurisdiction. *Amerault*, 2004 Guam 23 ¶ 9. Intervenors, for the first time on appeal, argue that they have standing to sue under a common

law exception to the general rule that heirs cannot sue for personalty. *See* RA, tab 239 (Intervenors' Opp'n Mot. Dismiss, July 13, 2010). As Intervenors did not make this argument below, it is waived. *See Tanaguchi-Ruth + Assocs. v. MDI Guam Corp.*, 2005 Guam 7 ¶ 82 ("Our exercise of discretion to review an issue raised for the first time on appeal is reserved for extraordinary circumstances where review is necessary to address a miscarriage of justice or clarify significant issues of law."); *see also Pluet v. Frasier*, 355 F.3d 381, 385 (5th Cir. 2004); *Huron v. Cobert*, 809 F.3d 1274, 1280 (D.C. Cir. 2016).

E. This Court Declines to Review the Probate Court's February 26, 2009 Decision and Order because Intervenors Have Provided No Reason for This Court to Conduct Such Review

[41] Intervenors request that this court review and reverse on appeal the probate court's decision and order that only a general administrator, and not a special administrator, has the power to publish a Notice to Creditors to start the claim period. *See* Intervenors' Br. at 38-39 (June 5, 2017). Intervenors give no reason for this court to review and reverse the probate court's decision; they merely state that they "take vigorous issue" with the probate court's holding. *Id.* at 38. Intervenors do not defend their request in their reply brief. *See* Intervenors' Reply Br. at 1-8. As Intervenors have provided no reason for this court to review and reverse the probate court's decision, we decline to exercise our discretion to consider the issue. *See Guam Greyhound*, 2008 Guam 13 ¶ 7 n.3.

[42] Given our disposition of the issues set forth above, we need not reach the other issues raised by the parties. *See Hemlani v. Hemlani*, 2015 Guam 16 ¶ 33 ("As a general appellate principle, a court will not address issues unnecessary to the resolution of the case before it.").

V. CONCLUSION

[43] We **AFFIRM** the trial court's grant of summary judgment for Francisco Torres in full and **AFFIRM** the trial court's grant of summary judgment for Perez on Counts Five through

Seven of the Third Amended Complaint. We **REVERSE** the trial court's grant of summary judgment for Perez on Counts Ten through Twelve and on Count Eight. We **AFFIRM** the trial court's grant of Gloria Sholing's motion to dismiss Intervenors' complaint because Intervenors have waived their argument that they have standing to sue under a common law exception to the general rule that heirs cannot sue for personalty. We **REMAND** for further proceedings not inconsistent with this Opinion.

/s/
F. PHILIP CARBULLIDO
Presiding Justice

/s/
ROBERT J. TORRES
Associate Justice