IN THE SUPREME COURT OF GUAM

ROBERT KITTEL and LAURA KITTEL,
Plaintiffs-Appellants,

v.

GUAM MEMORIAL HOSPITAL AUTHORITY,
VINCENT A. DUENAS, M.D., and STEVEN HAYASHIDA, M.D.,
Defendants-Appellees.

Supreme Court Case No.: CVA17-003
Superior Court Case No.: CV1199-13

OPINION

Cite as: 2020 Guam 3

Appeal from the Superior Court of Guam
Argued and submitted on December 13, 2017
Hagåtña, Guam

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BEFORE: KATHERINE A. MARAMAN, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; ROBERT J. TORRES, Associate Justice.[1]

TORRES, J.:

[1] This case started as a medical malpractice action. During the pendency in this court, issues of sovereign immunity, capacity to sue, and unpresented evidence arose, requiring a factual hearing in the Superior Court and delaying the disposition of the appeal. For the following reasons, we grant the motion for substitution of parties plaintiff, vacate the Superior Court's dismissal for failure to prosecute, and remand for reconsideration, given evidence not previously presented by the parties.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] The Estate of Karen Ann Kittel ("Kittel Estate") filed a form entitled "Claim Against the Government," asserting that "Karen Ann Kittel wrongfully died on September 25, 2012 at [Guam Memorial Hospital] as a result of the negligent care and administration of medications, negligent supervision of medical staff, [and] medical care provided below the standard of care." Record on Appeal ("RA"), tab 61 (Br. Supp. Evid. Showing re Parties Pl., Feb. 11, 2019), at Ex. 2 (Claim Against Gov't, Nov. 19, 2012) [hereinafter "Claims Form"]. The hospital denied the claim.

[3] Following the denial, the Kittel Estate sued Vincent Duenas, M.D., Steven Hayashida, M.D., and the Guam Memorial Hospital Authority ("GMHA"). In the Superior Court, Dr. Duenas moved to stay the proceedings pending arbitration under 10 GCA § 10114 of Guam's Medical Malpractice Mandatory Arbitration Act. The Superior Court issued an order staying the proceedings: "IT IS HEREBY ORDERED THAT the above-captioned case [CV1199-13] is

[1] The signatures in this opinion reflect the title of the justices at the time this matter was argued and submitted.

stayed pending arbitration pursuant to 10 GCA, The Medical Malpractice Mandatory Arbitration Act." RA, tab 22 (Order Staying Proceedings, Aug. 26, 2014).

[4] After entry of this order, GMHA informed the Kittel Estate it would not be participating in the arbitration as claims against GMHA are governed by the Government Claims Act. Following the letter from GMHA, Dr. Hayashida also sent a letter stating that the stay did not apply to the claims against him. Dr. Hayashida asserted that the Government Claims Act, and not the Medical Malpractice Mandatory Arbitration Act, applied to the claims against him.

[5] During arbitration, Dr. Duenas settled with the Kittel Estate. Subject to the parties' stipulation, the Superior Court dismissed the Kittel Estate's claims against Dr. Duenas. After dismissal, the Kittel Estate circulated a Stipulation and Order to Lift the Stay to GMHA and Dr. Hayashida. GMHA signed the stipulation, but Dr. Hayashida did not. Seven months later, the Kittel Estate filed a request for further proceedings. The following month, the Kittel Estate circulated a Proposed Scheduling Order and Discovery Plan, which GMHA signed and Dr. Hayashida did not.

[6] Dr. Hayashida then moved to dismiss based on a failure to prosecute under Guam Rule of Civil Procedure 41(b). GMHA joined the motion. No party submitted to the Superior Court the letter from GMHA's counsel to the Kittel Estate's counsel regarding the inapplicability of mandatory arbitration to GMHA. The Superior Court granted the motion to dismiss, reasoning that the Kittel Estate unreasonably failed to pursue the action against GMHA and Dr. Hayashida when analyzed under the factors outlined in *Santos v. Carney*, 1997 Guam 4. The Superior Court found that the initial stay order applied only to Dr. Duenas and determined that failing to pursue the action in court both during arbitration and in the period after arbitration warranted dismissal. The Superior Court entered a judgment of dismissal. The Kittel Estate timely appealed.

[7] On appeal, GMHA submitted Supplemental Excerpts of Record that contained the letter from GMHA's attorney to counsel for the Kittel Estate not previously presented to the Superior Court. The letter stated:

> I write to advise that the Guam Memorial Hospital Authority ("GMHA") will not be participating in arbitration. My understanding is that the above-referenced litigation with GMHA was stayed pending Plaintiff's arbitration with Co-Defendants, Vincent A. Duenas, M.D. and Steven Hayashida, M.D., pursuant to the Medical Malpractice Mandatory Arbitration Act. As you know, proceedings with the GMHA follow the Government Claims Act.

See Suppl. Excerpts of Record at 2 (July 12, 2017) (Letter from Minakshi V. Hemlani, Esq. to Phillip Torres, Esq., Robert J Keogh, Esq. and Jeffrey A. Cook, Esq., Oct. 17, 2014).

[8] During the appeal, we *sua sponte* noticed potential issues with jurisdiction and capacity to sue. *See* Order (June 13, 2018). "The Estate of Karen Ann Kittel" was listed in the caption of the case and on the Claims Form as the claimant. The Kittel Estate moved to substitute the parties plaintiff. After briefing from the parties, we remanded this case to the Superior Court for an evidentiary hearing to determine "the identity of the parties on the Claims Form and whether the requirements of the Government Claims Act, including the service and notice provisions, were complied with so as to provide jurisdiction over the action." *See* Order at 2 (Jan. 16, 2019).

[9] The Superior Court entered Findings of Fact and Conclusions of Law. In its findings, the court concluded that "[t]he Claims Form designated a claimant that was not a legally recognizable entity." RA, tab 67 at 4 (Finds. Fact & Concl. L., Mar. 14, 2019). The court continued that the entity "was intended to be the heirs of the decedent Ms. Kittel in a claim for wrongful death." *Id.* at 5. The court also found there was "evidence presented to the Court that the Amended Complaint was served on the Office of the Attorney General."[2] *Id.*

[2] We acknowledge there is some ambiguity regarding service and, on remand, the parties should ensure that service of the Amended Complaint and any further complaints are made on the Attorney General.

II. JURISDICTION

[10] 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. 116-91 (2019)); 7 GCA §§ 3107(b), 3108(a) (2005).

III. STANDARD OF REVIEW

[11] This court reviews jurisdiction *de novo*. *See Pac. Rock Corp. v. Dep't of Educ.*, 2001 Guam 21 ¶ 13; *Castino v. G.C. Corp.*, 2010 Guam 3 ¶ 14. The Superior Court's factual findings are reviewed for clear error. *See Lujan v. Estate of Rosario*, 2016 Guam 28 ¶ 13. Dismissal for failure to prosecute under Guam Rule of Civil Procedure 41(b) is reviewed for abuse of discretion. *Lujan v. McCreadie*, 2014 Guam 19 ¶ 5. While this court is generally precluded from reviewing issues raised for the first time on appeal, we can exercise our discretion and review newly raised issues under certain circumstances, including "when review is necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process." *Tanaguchi-Ruth + Assocs. v. MDI Guam Corp.*, 2005 Guam 7 ¶ 80 (quoting *Dumaliang v. Silan*, 2000 Guam 24 ¶ 12 n. 1).

IV. ANALYSIS

[12] When this appeal started, Plaintiff sought review of the Superior Court's dismissal for failure to prosecute. We have straightforward legal standards governing such disputes. *See, e.g.*, *Santos v. Carney*, 1997 Guam 4. However, during this court's review, significant issues about jurisdiction and the appellate record made their way to the forefront. It is our *sua sponte* obligation to raise issues of jurisdiction, even when not raised by the parties. *See, e.g., Sky Enter. v. Kobayashi*, 2002 Guam 24 ¶ 5. In fulfilling this obligation, we also discovered that a material document submitted in the GMHA's Supplemental Excerpts of Record was never a part of the record below. The letter submitted in the supplemental excerpts contained an adverse

admission. While this court generally will not address issues raised for the first time on appeal, *see Tanaguchi-Ruth*, 2005 Guam 7 ¶ 80, this case requires us to determine whether the trial court abused its discretion, *McCreadie*, 2014 Guam 19 ¶ 5. We cannot on the facts here declare that the trial court abused its discretion when the parties failed to submit key documents in the court below and later submitted them to this court as though they had been a part of the record all along. *Cf. Irving v. Mazda Motor Corp.*, 136 F.3d 764, 769 (11th Cir. 1998) ("Too often our colleagues on the district courts complain that the appellate cases about which they read were not the cases argued before them."); *see also State v. Redick*, 414 P.3d 1207, 1217 (Kan. 2018) (Biles, J., concurring) ("Appellate practice is not a seat-of-the-pants business."). We also cannot ignore such admissions and omissions at the risk of undermining justice and the integrity of our judicial processes. *See, e.g.*, *Tonapetyan v. Halter*, 242 F.3d 1144, 1150-51 (9th Cir. 2001) (reversing because administrative law judge ignored key witness's equivocations and concerns over lack of complete record). The remedy in such an exceptional case as this is not to engage in appellate fact-finding. *See McNeil v. Pub. Def. Serv. Corp.*, No. 90-00044A, 1990 WL 320362, at *2 (D. Guam App. Div. Oct. 30, 1990) ("An appellate court has no fact-finding function. *It cannot receive new evidence from the parties, determine where the truth actually lies, and base its decision on that determination*."). Instead, since dismissal for failure to prosecute is fact-intensive, we are limited to sending the case back to the Superior Court to address the previously unpresented adverse evidence.

A. The Superior Court's Factual Determinations are Not Clearly Erroneous and Support a Finding of Jurisdiction under the Government Claims Act in this Case

[13] The first issue we confront relates to the identity of the Plaintiff. The claim and action were filed in the name of "The Estate of Karen Ann Kittel." As we explain below, an estate cannot sue in its own name. In a normal case, this flaw would simply require an analysis of

capacity to sue. However, this is a suit against a government agency, and sovereign immunity is implicated. If the government, as a factual matter, did not have adequate notice of the true claim and claimant, sovereign immunity may bar suit. *Cf. Ehlert v. Univ. of Guam*, 2019 Guam 27 ¶ 11 ("Sovereign immunity generally bars a litigant from subjecting the government to suit."). To resolve these factual issues, we remanded to the Superior Court. We read the Superior Court's Findings of Fact and Conclusions of Law as determining that the government had adequate notice of a wrongful death action and that the actual claimants were Robert and Laura Kittel—Karen's heirs. Based on the following analysis and a review of the record, we conclude these findings are supported by substantial evidence and are not clearly erroneous.

[14] "The Government of Guam enjoys broad sovereign immunity." *Guam Fed'n of Teachers ex rel. Rector v. Perez*, 2005 Guam 25 ¶ 18. Congress provided, in the Organic Act of Guam, a specific mechanism by which the legislature may waive sovereign immunity. *See Bautista v. San Agustin*, 2015 Guam 23 ¶ 18 (citing 48 U.S.C.A. § 1421a). Sovereign immunity applies to the Government of Guam and any of its instrumentalities or agencies. *Id.* Under the Government Claims Act, GMHA is considered a government agency. 5 GCA § 6102 (2005).

[15] Under the Government Claims Act, the government waives sovereign immunity from suit for "claims in tort, arising from the negligent acts of its employees acting for and at the direction of the government of Guam, even though occurring in an activity to which private persons do not engage." *Id.* § 6105. An individual seeking to make a claim under this waiver must file a claim with the Claims Officer for the agency involved. *Id.* § 6201. A claim "must be filed within 18 months from the date the claim arose." *Id.* § 6106(a). The filed action must be served on the Claims Officer and the Attorney General. *Id.* § 6209. For the Superior Court to have jurisdiction over an action filed against the government, a plaintiff must show they complied with all the requirements of the Claims Act and that the compliance with each requirement was substantial.

Quan Xing He v. Gov't of Guam, 2009 Guam 20 ¶¶ 34-35, *abrogated on other grounds by Kennedy v. Sule*, 2015 Guam 38 ¶¶ 17-19. Substantial compliance exists when there is "sufficient information disclosed on the face of the filed claim to reasonably enable the public entity to make an adequate investigation of the merits of the claim and to settle it without the expense of a lawsuit." *Id.* ¶ 33 (quoting *City of San Jose v. Superior Court*, 525 P.2d 701, 707 (Cal. 1974) (in bank)). "Failure to file a claim prior to filing a suit warrants dismissal on a jurisdictional ground." *Perez v. Guam Hous. & Urban Renewal Auth. (GHURA)*, 2000 Guam 33 ¶ 14.

[16] Medical malpractice claims against GMHA are governed by the Government Claims Act. 10 GCA § 10144 (2005); 5 GCA § 6102. Medical malpractice claims involving a patient's death are divided into two categories. First, there is a personal injury action to be prosecuted by the administrator of the deceased's estate. *See Newby v. Gov't of Guam*, 2010 Guam 4 ¶ 25; 19 GCA § 31104 (2005). Second, there is a wrongful death claim to be prosecuted personally by the heirs of the decedent. *Newby*, 2010 Guam 4 ¶ 25; 7 GCA § 12109 (2005).

[17] Naming the proper party in suits or claims—especially against the government—is not insignificant. It provides notice to the defending litigant—here, a government agency—of the plaintiff's ultimate identity and the true nature of the claims. Here, we are confronted with a jurisdictional question complicated by uncertainty over the identity of the claimant. The claim was filed in the name of "Estate of Karen Ann Kittel." An estate, however, is not a legal entity with the capacity to sue or be sued. *See, e.g.*, *Lujan v. J.L.H. Trust*, 2016 Guam 24 ¶¶ 25-29; *Spradley v. Spradley*, 213 So. 3d 1042, 1045 (Fla. Dist. Ct. App. 2017). An estate is merely "[t]he property that one leaves after death; the collective assets and liabilities of a dead person." *Estate*, *Black's Law Dictionary* (10th ed. 2014). Property is neither a real nor fictitious person capable of suing. An estate's personal representative in his or her representative capacity is the

proper party to the lawsuit. *Spradley*, 213 So. 3d at 1045. Additionally, the deceased's heirs hold wrongful death damages personally, and the heirs are distinct claimants. *Newby*, 2010 Guam 4 ¶ 26; *see also* 7 GCA § 12109.

[18] The Claims Form and the complaint named no administrator or other personal representative. The Kittel Estate is not a legal entity, and we cannot conclude this is a personal injury action. However, this does not end our inquiry. While the absence of an estate administrator would preclude a personal injury action, the Kittel Estate maintains that it was pursuing a wrongful death claim held by the heirs. *See Newby*, 2010 Guam 4 ¶ 25. Besides naming "The Estate of Karen Ann Kittel," the Claims Form also identified the "[h]eirs of the Estate of Karen Ann Kittel" as other parties who may have an interest in the claim. And the Claims Form stated that "Karen Ann Kittel wrongfully died on September 25, 2012 at GMH as a result of the negligent care and administration of medications, negligent supervision of medical staff, medical care provided below the standard of care." RA, tab 61, Ex. 2 (Claims Form). This language invokes both a personal injury action and a wrongful death action; but the claim identified only the Kittel Estate, and the damages claimed were $100,000—the cap for wrongful death cases against the government, *see* 5 GCA § 6301(b).

[19] On remand, following an evidentiary hearing, the Superior Court concluded that the evidence showed the claimant "was intended to be the heirs of the decedent Ms. Kittel in a claim for wrongful death." RA, tab 67 at 5 (Finds. Fact & Concl. L.). The Superior Court also found sufficient evidence the claim and original complaint were served on the Claims Officer and the Attorney General. *Id.*

[20] We review these factual determinations for clear error. *Estate of Rosario*, 2016 Guam 28 ¶ 13. Here, we find no clear error. The evidence presented to the Superior Court, largely uncontested by GMHA, would support the findings related to intent, notice, and service. Since

the Superior Court did not clearly err in its factual determinations, our role now is to determine whether these findings satisfy the test we laid out in *Quan Xing He* for determining compliance with the Government Claims Act. *See* 2009 Guam 20 ¶¶ 33-35. We conclude that it meets the minimum of that threshold. The identity of the claimants—the heirs—was listed on the Claims Form, and all portions required by the Government Claims Act were included. While more care should have been used in filling out the form here, the parts still contained sufficient information for GMHA to have investigated the incident and settled it without the expense of a lawsuit if the merits warranted. *See id.* ¶ 33.

[21] We conclude that the Plaintiffs have established jurisdiction under the Government Claims Act and shown sufficient notice of the heirs of Karen Ann Kittel as the true claimants. We will therefore grant the motion to substitute parties plaintiff and order Robert Kittel and Laura Kittel substituted as plaintiffs.

B. The Judgment Dismissing for Failure to Prosecute Must be Vacated Because the Superior Court was not Presented with All the Material Facts

1. A party's excerpts of record must comply with Guam Rule of Appellate Procedure 15

[22] In every appeal, the parties must prepare excerpts of record. Guam R. App. P. 15(a)(1). "The purpose of the excerpts of record is to provide each member of the panel with those portions of the record necessary to reach a decision." *Id.* For our purposes, "record" is defined as "[t]he official report of the proceedings in a case, including the filed papers, a verbatim transcript of the trial or hearing (if any), and tangible exhibits." *Record*, *Black's Law Dictionary* (11th ed. 2019). Submission of additional or new evidence to this court to consider is inappropriate, because an appellate court is generally not a fact-finder. *See Gov't of Guam v. Gutierrez*, 2015 Guam 8 ¶ 21 ("[R]esolution of factual issues not evaluated by the trial court is not an appropriate function of an appellate court."). Further, "[i]t is well settled that an appellate

court is precluded from considering evidence which is not part of the record." *State v. Pertuit*, 673 So. 2d 1055, 1057 (La. Ct. App. 1996); *see also Kirshner v. Uniden Corp. of Am.*, 842 F.2d 1074, 1077 (9th Cir. 1988) ("Papers not filed with the district court or admitted into evidence by that court are not part of the clerk's record and cannot be part of the record on appeal.").

[23] GMHA included in its supplemental excerpts of record a letter never presented to the trial court. Because of this inclusion, we issued an order to show cause. *See* Order Show Cause (Aug. 28, 2018). Counsel for GMHA responded by stating: "Attorney believed and believes that he has a duty of candor to the Court and must inform it, where he can, of any matter that is relevant to its consideration. Silence, when in possession of relevant information may be misleading and here, felt perilously close to deception." Resp. to Order Show Cause at 3 (Sept. 7, 2018). While this court appreciates any attorney's attempt at candor, relevant documents not included in the record should not be labeled as part of the record. If an attorney feels compelled to disclose facts to this court, those facts should also be disclosed to the Superior Court. *See, e.g.*, Guam R. Prof'l Conduct 3.3. Further, if such documents are submitted to the appellate court in the first instance—in the rare case when such submission may be appropriate—they should be clearly labeled and submitted in a separate filing. It was improper for GMHA to include a material document in its supplemental excerpts of record never presented to the Superior Court and not part of the record. This violates Guam Rule of Appellate Procedure 15.

2. Inclusion of material documents in the excerpts of record, not disclosed to the Superior Court and containing adverse admissions, warrants reconsideration of the dismissal for failure to prosecute

[24] Ordinarily, when a party files documents in an appellate court not part of the record below, the appropriate remedy is to strike the papers. *See Kirshner*, 842 F.2d at 1078. This remedy extends the rule that generally precludes an appellate court from considering an issue for the first time on appeal. *See Tanaguchi-Ruth*, 2005 Guam 7 ¶ 80.

[25] However, we can consider issues for the first time on appeal under exceptional circumstances. Those circumstances include situations that undermine the integrity of the judicial process or would cause a miscarriage of justice. *See id.* We find such circumstances here.

[26] We are called upon to review the Superior Court's dismissal for failure to prosecute under the standard enunciated in *Santos*, 1997 Guam 4. Reversal under that standard requires a finding of abuse of discretion. *Id.* ¶ 5. We are confronted with two attendant questions. First, can we excuse a party's submission to this court of a document containing an adverse admission related to the issue on appeal? Second, is it fair to declare that the trial court abused its discretion in ruling on a motion when the parties failed to include relevant evidence? The answer to both questions is no. These competing issues are what make this case exceptional and warrant our exercise of discretion to address this issue on appeal. The letter—i.e., the additional evidence—contained an admission contrary to the position GMHA took in moving to dismiss for failure to prosecute. We conclude that ignoring such an admission would cause a miscarriage of justice as an involuntary dismissal for failure to prosecute "operates as an adjudication upon the merits." Guam R. Civ. P. 41(b). A party cannot be excused from failing to submit evidence, the omission of which "may be misleading" or "perilously close to deception," and claim the benefits of Guam Rule of Civil Procedure 41(b) without further review. But the party to whom the admission benefits—here, the Kittels—cannot claim an automatic victory either. This letter was putatively in their possession, and they too failed to submit it to the Superior Court. If we declared that the Superior Court abused its discretion in these circumstances, we would undermine the integrity of the judicial process. The factual determinations required in a motion to dismiss for failure to prosecute and the abuse-of-discretion standard prevent us from simply

affirming or reversing the Superior Court's judgment outright. To do so would be to engage in appellate fact-finding.

[27] To avoid appellate fact-finding, we conclude that the proper remedy is to vacate the judgment of the Superior Court and remand for reconsideration, given the additional evidence. This remedy follows the practice of other appellate courts. *See, e.g.*, *United States v. Ameline*, 409 F.3d 1073, 1079 (9th Cir. 2005) (en banc); *State v. Timbs*, 134 N.E.3d 12, 39-40 (Ind. 2019). The trial court may rule upon the evidence and its impact on the alleged failure to prosecute.

V. CONCLUSION

[28] We **GRANT** Plaintiffs' Motion for Order Re Substitution of Parties Plaintiff and **ORDER** Robert Kittel and Laura Kittel substituted as plaintiffs.

[29] We **VACATE** the judgment of the Superior Court dismissing the claims against GMHA for failure to prosecute and **REMAND** for reconsideration of the Motion to Dismiss for Failure to Prosecute given the additional evidence submitted by GMHA in its Supplemental Excerpts of Record.

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
ROBERT J. TORRES
Associate Justice

/s/
KATHERINE A. MARAMAN
Chief Justice