

**IN THE SUPREME COURT OF GUAM**

**GUAM HOUSING AND URBAN RENEWAL AUTHORITY (GHURA),**  
**A Public Body Corporate And Politic,**  
Plaintiff-Appellant,

**vs.**

**DONGBU INSURANCE COMPANY, LTD.**  
**(fka KOREA AUTOMOBILE FIRE AND MARINE INSURANCE CO., LTD.)**  
Defendant-Appellee

Supreme Court Case No. CVA00-029  
Superior Court Case No. CV0183-95

**OPINION**

**Filed: December 3, 2001**

**Cite as: 2001 Guam 24**

Appeal from the Superior Court of Guam  
Argued and submitted on September 11, 2001  
Hagåtña, Guam

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BEFORE: PETER C. SIGUENZA, JR., Chief Justice, F. PHILIP CARBULLIDO, Associate Justice, and BENJAMIN J.F. CRUZ, Justice *Pro Tempore*.

**SIGUENZA, C.J.:**

[1] Plaintiff-Appellant Guam Housing and Urban Renewal Authority (hereinafter “GHURA”) filed suit against Defendant-Appellee Dongbu Insurance Company, Ltd. (hereinafter “Dongbu”) seeking payment on an insurance claim. The lower court granted Dongbu’s motion for summary judgment upon a finding that the policy’s provision, requiring all claims to be filed within one year after the inception of loss, barred GHURA’s claim. GHURA argues that the doctrine of equitable tolling prevented the contractual statute of limitations from running and therefore the filing of its claim was timely. We adopt the doctrine of equitable tolling and find that there are genuine issues of material fact in this case. Therefore, we reverse the trial court’s grant of summary judgment and remand the case for further proceedings.

**I.**

[2] On August 8, 1993, an earthquake measuring 8.1 on the Richter scale struck Guam. At the time of the earthquake, GHURA carried a fire insurance policy whose terms covered damage sustained in an earthquake. The policy was provided by Korea Automobile Fire and Marine Insurance Co., Ltd., now operating as Dongbu. The policy in effect, No. KMF-1820, contained two provisions that are in dispute in the instant case. The first required GHURA to file a sworn proof of loss, detailing the value and amount of damages being claimed, within sixty days of the date of loss. The second, and perhaps more important, was a contractual statute of limitations, requiring an insured to file suit against Dongbu within twelve months of the date of loss.

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[3] Eight days after the earthquake struck, GHURA submitted a signed proof of loss to Dongbu, giving Dongbu initial notice that GHURA was claiming damages suffered in the earthquake. Cresencio Anas, an adjuster for Dongbu, contacted GHURA and requested a listing of the specific areas and houses that sustained earthquake damage so that Dongbu could inspect them. On October 5, 1993, GHURA submitted a thirteen page report to Dongbu, identifying the individual buildings and briefly describing the nature of the damages. GHURA informed Dongbu that the listing was not final and that further unit-to-unit inspections of the houses would be conducted to detail the damages. Dongbu did not object or deny liability. Neither the submitted proof of loss or the supplemental report included a dollar claim.

[4] For the next ten months, Dongbu placed numerous phone calls to GHURA, requesting the final damages listing and an itemized dollar value for each of the losses. On August 18, 1994, GHURA submitted an updated damage assessment report to Dongbu. The update did not have final approval nor did it include itemized dollar amounts. Later in August, Dongbu conducted inspections on housing units located in Sinajana, Agana Heights, Mongmong, Toto, Yona, Talofof, Inarajan, Merizo, Umatac, Tumon, and Dededo. On November 22, 1994, Dongbu notified GHURA that it denied the claim due to GHURA's delay in providing a complete and itemized breakdown of damages claimed. On December 9, 1994, GHURA submitted a final damage listing to Dongbu, which included for the first time a dollar amount in the sum of \$302,900.00 for damage sustained in approximately 125 separate housing units.

[5] GHURA filed the underlying Complaint in the Superior Court of Guam seeking to recover the \$302,900.00 in damages that Dongbu's refused to pay. Dongbu responded by filing a Motion to Dismiss for Lack of Prosecution and a Motion for Summary Judgment. The trial court denied the Motion to Dismiss but fined GHURA for its failure to move the case forward.

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[6] Dongbu’s Motion for Summary Judgment alleged that: (1) GHURA failed to comply with the sixty day sworn proof of loss requirement and thereby could not recover under the policy; and (2) the twelve month contractual limitations period barred GHURA’s claim. The trial court granted summary judgment, holding that GHURA’s failure to submit a proof of loss as required under the sixty day provision prevented GHURA from taking advantage of equitable tolling. Therefore, the claim was barred under the policy’s one year limitations period. GHURA moved to alter or amend the trial court’s Decision and Order. After allowing additional briefing on the issue of whether Dongbu waived the sixty day sworn proof of loss provision, the trial court rendered a second Decision and Order upholding its grant of Dongbu’s Motion for Summary Judgment. This appeal followed.

## II.

[7] This court has jurisdiction over an appeal of final judgment of the Superior Court of Guam pursuant to Title 7 of the Guam Code Annotated §§ 3107 and 3108(a) (1998).

## III.

[8] There are two separate issues that must be addressed in this appeal. First, we must determine whether the trial court’s grant of summary judgment was improper because GHURA’s claim was preserved under the doctrine of equitable tolling. A trial court’s decision to grant summary judgment is reviewed *de novo*. *Iizuka Corp. v. Kawasho Int’l (Guam), Inc.*, 1997 Guam 10, ¶ 7. Summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a

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judgment as a matter of law.” Guam R. Civ. P. 56(c).

[9] We must also consider whether the trial court’s denial of Dongbu’s motion to dismiss for lack of prosecution is properly before this court. If so, then this court must determine whether the trial court erred in denying the motion. The denial of a motion to dismiss is reviewed for an abuse of discretion. *Santos v. Carney*, 1997 Guam 4, ¶ 4.

**A. Equitable Tolling**

[10] GHURA is asking the court to adopt the equitable tolling doctrine and apply it to the facts of this case. Equitable tolling suspends the running of a limitations period from the time an insured files a timely claim until the time that an insurer denies the claim. *Prudential*, 798 P.2d at 1242, 51 Cal. 3d at 693; *see also Jang v. State Farm Fire & Cas. Co.*, 95 Cal. Rptr. 2d 917, 925, 80 Cal. App. 4th 1291, 1302 (Ct. App. 2000); *see also Peloso v. Hartford Fire Ins. Co.*, 267 A.2d 498, 501 (N.J. 1970). Because the application of equitable tolling is a matter of first impression for our court, we take this opportunity to review the purpose and policy supporting the doctrine.

[11] The purpose of equitable tolling is to protect an insured’s claim during the time an insurer is conducting its investigation, thereby avoiding the premature filing of a suit before an insurer has even denied the claim. *Prudential*, 798 P.2d at 1238, 51 Cal. 3d at 687. It would be anomalous and inefficient for an insured to bring a lawsuit before the insurance company has had the opportunity to complete its inquiry and render its decision. In order to prevent excess litigation, the time a claimant has to bring a claim is tolled. This practice encourages the settlement of claims by requiring an insurer to investigate claims diligently before denying liability and simultaneously securing an insured’s rights. *Id.* at 1241, 51 Cal. 3d at 692.

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[12] Safeguarding the claim during this interim period also prevents an insurer from stalling the processing of a claim in order to invoke a technical forfeiture of the policy's benefits. *Id.* Without equitable tolling, an insurer may wait until the statute of limitations has expired before denying coverage. An insurer may also purposely conduct a lengthy investigation, hoping to lull the policy holder into thinking the claim will be settled, and then deny coverage after the twelve months have expired. The doctrine of equitable tolling protects the reasonable expectations of the insured by demanding good faith and fair dealing on behalf of the insurer. *Id.*

[13] Finally, the doctrine of equitable tolling remains consistent with the policies underlying the imposition of a limitations period. A statute of limitations prevents unfair surprise and promotes justice by leaving stale claims in slumber. *Id.* at 1236, 1242, 51 Cal. 3d at 684, 692. An insurer must receive prompt notice of a claim in order to properly adjust valid claims and guard against invalid ones. However, an insured is likewise entitled to the time necessary to initially prepare a claim and later pursue legal remedies. Equitable tolling runs the period of limitation at the time the insurer incurs the loss and after liability is formally declined; time only ceases when the claim is placed in the hands of the insured. Thus, the insured, whose rights are restricted within a limited time frame, is not penalized for time consumed by the insurance company in pursuing its contractual and statutory rights. *Peloso*, 267 A.2d at 501.

[14] Many jurisdictions that decline to adopt equitable tolling rely instead on principles of waiver and estoppel to allow a suit to be filed after the limitations period expired. *Prudential*, 798 P.2d at 1240, 51 Cal. 3d at 689-90. However, as noted by the *Peloso* court, "[equitable tolling] is more satisfactory, and more easily applied, than the pursuit of the concepts of waiver and estoppel in each of the many factual patterns which may arise." *Peloso*, 267 A.2d at 502. In light of this consideration and the above discussed

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policies, this court hereby follows the developing trend and adopts equitable tolling as law in this jurisdiction. Although the doctrine has been applied in varying forms across jurisdictions, *Prudential*, 798 P.2d at 1240-41, 51 Cal. 3d at 688-89, Guam adopts it in accordance with the majority. Thus, the timely filing of a claim triggers tolling and tolling stops once the claim is formally denied. The court must now determine whether equitable tolling saves GHURA's claim in the instant case.<sup>1</sup>

[15] Equitable tolling requires the insured to file a timely proof of loss. Under GHURA's policy, a proof of loss must be sworn, complete with an inventory of all damages and amounts being claimed, and filed within sixty days after the loss is incurred. It is undisputed that GHURA failed to strictly comply with these conditions. Therefore, the first step of this court's inquiry is to determine whether Dongbu waived strict compliance with the policy's sixty day sworn proof of loss provision. The trial court concluded that there was no evidence indicating waiver by Dongbu. We disagree.

[16] Waiver is the intentional relinquishment of a known right. *Id.* at 1240, 51 Cal. 3d at 689. Whether an insurer waived strict compliance with a policy's proof of loss provision is generally a question of fact for the jury to determine. *Estrada v. Queen Ins. Co.*, 290 P. 525, 526, 107 Cal. App. 504, 508 (Ct. App. 1930). However, where the facts are undisputed, waiver may be determined as a matter of law. *Scheetz v. IMT Ins. Co.*, 324 N.W.2d 302, 304 (Iowa 1982). Since the insurer is the party holding the right, it is the only party that can waive the right. Thus, when considering evidence of waiver, the fact finder should focus on the actions and conduct of the insurance company, and not the insured. *Id.*

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<sup>1</sup> While this court prefers the application of equitable tolling to the facts of this case, we also note that the more traditional doctrines of waiver and estoppel may provide an alternative ground upon which GHURA can lay its claim. It could be argued that conduct by Dongbu constituted a waiver of the policy's one year limitations period. It could also be argued that Dongbu's conduct estops it from seeking enforcement of the limitations provision. Although GHURA raises the waiver issue briefly at the appellate level, we find the record devoid of any reference to these issues at the trial court, thereby precluding our further review.

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[17] The parties here do not dispute the facts surrounding Dongbu's waiver of strict compliance with the proof of loss provision. GHURA submitted both a preliminary proof of loss and a thirteen page list of damaged homes to Dongbu within sixty days of the earthquake. However, GHURA failed to furnish Dongbu with a complete and final inventory that was sworn and that included respective dollar amounts. In its subsequent communications, Dongbu did not inform GHURA that failure to submit a sworn proof of loss with itemized dollar amounts within the sixty days would lead to a denial of the claim. Failure to specifically object to an inadequate proof of loss constitutes a waiver. Title 22 GCA §§ 18605, 18606 (2000); *State Mut. Ins. Co. v. Green*, 166 P. 105, 112 (Okla. 1915). Because Dongbu never expressed to GHURA that its preliminary submission was insufficient to satisfy the proof of loss requirements, it waived its right to seek strict compliance with that provision.

[18] A waiver can also be shown by the affirmative acts of a party or by conduct that supports the conclusion that waiver was intended. *See* 22 GCA § 18606; *see also State Mut.*, 166 P. at 111 (citation omitted); *see also Estrada*, 290 P. at 526, 107 Cal. App. at 507. Here, Dongbu continued to request a more complete listing of damages after the sixty days expired, fully expecting GHURA to comply and submit its final claim. If Dongbu intended to enforce strict compliance with the sixty day provision, then there would be no reason to request that GHURA further cooperate and complete its proof of loss. Clearly, Dongbu's conduct is inconsistent with a demand to exact strict compliance with the sixty day provision. *Cf. Green v. Gen. Accident Ins. Co.*, 746 P.2d 152, 155 (N.M. 1987) (finding that conduct by an insurer revealed its intention to waive policy restrictions and negotiate further).

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[19] In short, Dongbu failed to specifically object to the inadequacy of GHURA's proof of loss and later requested action by GHURA after the provision's time limit lapsed. Under both Guam statutory law and persuasive case law of other jurisdictions, these actions constitute a waiver of strict compliance of proof of loss requirements. Additionally, Dongbu conceded during oral arguments before this court that it waived enforcement of the sworn and sixty day requirements under that provision. Therefore, we find as a matter of law that Dongbu waived its right to demand GHURA strictly comply with the policy's proof of loss provision. In addition, we find that Dongbu completely waived the right to demand GHURA file a proof of loss be within sixty days and that the proof of loss be sworn.

[20] A finding that Dongbu waived its right to demand strict compliance with the policy's proof of loss provision does not resolve the central issue in this case. It remains unclear whether the proof of loss GHURA did provide is sufficient to trigger equitable tolling. Aside from the sixty day and notary requirements, the proof of loss provision has a content requirement. Specifically, the policy requires that the proof of loss contain a complete inventory of damaged and undamaged property, detailing quantities, costs, actual cash value, and amount of loss claimed. Although Dongbu waived the right to demand that the substance of GHURA's proof of loss strictly comply with the provision's requirements, GHURA must still show that it gave Dongbu some degree of notice. An insurance policy's notice requirements can be satisfied with substantial compliance. *See Green*, 746 P.2d at 154. Therefore, the next step in this court's inquiry is to determine whether, viewing all facts in a light most favorable to GHURA, there is sufficient evidence for a jury to find that GHURA substantially complied with the proof of loss requirements set forth in its policy.

[21] Substantial compliance occurs when the essential purpose of a contract is fulfilled. *Fehring v. Republic Ins. Co.*, 347 N.W.2d 595, 599 (Wis. 1984), *overruled on other grounds by Dechant v. Monarch Life Ins. Co.*, 547 N.W.2d 592 (Wis. 1996) (quoting *Davis v. Allstate Ins. Co.*, 303 N.W.2d 596 (Wis. 1981)). The essential purpose of a notice provision is to enable the insurer to promptly investigate the facts surrounding the claim while evidence is still fresh and witnesses are still available. *Fremichael v. Doe*, 472 S.E.2d 440, 443 (Ga. 1996); *see also Fehring*, 347 N.W.2d at 599 (citation omitted). Thus, an insured may establish substantial compliance with a notice provision by showing that the insured had actual knowledge of the claim and sufficient information by which to initiate its investigation. *See Fremichael*, 472 S.E.2d at 701 (finding the underlying purpose of the notice requirement fulfilled by insurer's actual knowledge of the claim); *see also Green*, 746 P.2d at 154 (holding that an insured substantially complied with the notice requirements of his policy when he notified the insurer of his loss and provided the insurer with a report of the items stolen).

[22] “[S]ufficiency of compliance with the notice provision, justification for non-compliance, and diligence are questions of fact which must be resolved by a jury.” *Fremichael*, 472 S.E.2d at 443; *see also Reed v. Pac. Indem. Co.*, 225 P.2d 255, 261, 101 Cal. App. 2d 151, 159 (Ct. App. 1950). In *Fremichael*, the court reversed the lower court's granting of summary judgment after concluding that the insured gave reasonable notice of his claim and that the insurance company had actual knowledge of the claim. *Fremichael*, 472 S.E.2d at 443. The court found these facts sufficient to raise several issues of material fact, such as the sufficiency of the notice, which the lower court erred in not submitting to the jury. *Id.* Likewise, in *Fehring* the court found that because the insured immediately notified the insurer of a loss and because the insurer was able to begin an investigation, there was sufficient evidence for a jury to

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conclude that the insured substantially complied with the policy's notice requirement. *Fehring*, 347 N.W.2d at 600.

[23] Similarly, there is sufficient evidence contained in the instant case by which a jury could conclude that GHURA substantially complied with its policy's notice provision. Within eight days of the earthquake, GHURA informed Dongbu that its housing units suffered damage and that it would be making a claim. Two months later, GHURA submitted to Dongbu a thirteen page report that listed the specific units that had suffered damaged and described the type of damage each sustained. Although GHURA delivered two revised reports over the course of the following year, neither differed significantly from the original report. Only the last and final report contained dollar amounts for each item of damage. Before receiving that final report, Dongbu conducted an inspection of several of the damaged properties. These facts reveal that Dongbu received actual and timely notice of the claim, and that Dongbu had the ability to investigate the claim absent itemized dollar amounts. Thus, a jury could find that GHURA fulfilled the underlying purpose of the notice requirement and substantially complied with the policy.

[24] Clearly, there is a genuine issue of fact whether GHURA filed a proof of loss sufficient to trigger equitable tolling. A finding by the jury that GHURA's thirteen page report was sufficient proof of loss would begin the tolling, preventing the one year statute of limitations from running and preserving GHURA's claim. Substantial compliance with a notice provision is an issue of fact and obviously material to the matter at hand. *See Fremichael*, 472 S.E.2d at 443. Therefore, the granting of Dongbu's motion for summary judgment was in error.

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**B. The trial court’s denial of Dongbu’s motion to dismiss for failure to prosecute will not be considered by this court because the issue was improperly raised on appeal.**

[25] Dongbu requested that this court consider its motion to dismiss for failure to prosecute as an alternative ground for affirming the lower court’s holding that GHURA is precluded from bringing its case. We decline to review the trial court’s decision denying Dongbu’s motion to dismiss. Under our Rules of Appellate Procedure, a party must file a timely notice of appeal in order to raise an issue on appeal. Guam R. App. P. 3(a), 4. Dongbu’s failure to file a cross-appeal with respect to this issue precludes our review. Therefore, this court will not consider it as an alternative ground for affirming the lower court.

**IV.**

[26] In summary, after considering the purpose and policies underlying the doctrine of equitable tolling, we adopt the doctrine as law in this jurisdiction. Its application to the facts of the instant case raises an issue of material fact that can only be appropriately addressed by a jury. Therefore, we hold that the instant case was not properly disposed of by summary judgment. The trial court’s decision is hereby **REVERSED** and the matter **REMANDED** to the trial court for further proceedings consistent with this opinion.

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BENJAMIN J.F. CRUZ  
Justice Pro Tempore

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F. PHILIP CARBULLIDO  
Associate Justice

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PETER C. SIGUENZA, JR.  
Chief Justice