FOR PUBLICATION

IN THE SUPREME COURT OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

MASARU FURUOKA, a.k.a. LEE KONGOK,
Plaintiff-Appellant,

v.

DAI-ICHI HOTEL (SAIPAN), INC., JAPAN TRAVEL BUREAU; TOKIO-MARINE INSURANCE COMPANY; and DOES 1-5,
Defendants-Appellees.

OPINION

Cite as: *Furuoka v. Dai-Ichi Hotel*, 2002 MP 5

Appeal No. 2000-002

Hearing held March 28, 2001

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BEFORE: ALEXANDRO C. CASTRO and JOHN A. MANGLONA, Justices,
MARTY W.K. TAYLOR, Justice Pro Tempore.

MANGLONA, Associate Justice:

¶1 Appellant Masaru Furuoka, a.k.a. Lee Kongok, (hereinafter "Furuoka") appeals the Superior Court's Order of December 13, 1999, granting defendant Japan Travel Bureau's motion for summary judgment. We have jurisdiction pursuant to Article IV, Section 3 of the Constitution of the Commonwealth of the Northern Mariana Islands, and 1 CMC § 3102 (a). N.M.I. Const. art. IV, § 3. We reverse the order granting summary judgment for the reasons set forth below.

ISSUES PRESENTED AND STANDARDS OF REVIEW

¶2 Furuoka presents the following issues for our review:

I. Whether the trial court erred in not treating the motion pursuant to Com. R. Civ. P. 12(b)(6)?
II. Whether the trial court erred in granting summary judgment on the ground that the defendant, as the movant, failed to carry its initial burden?
III. Whether the court failed to properly apply the substantive law in finding, as a matter of law, the defendant not negligent?
IV. Whether the court improperly decided the factual issue of proximate cause and contributory negligence as a matter of law?

¶3 These issues are raised with respect to the granting of summary judgment and are reviewed *de novo. Riley v. Public Sch. Sys.*, 4 N.M.I. 85, 87 (1994). We review the evidence in the light most favorable to the nonmoving party. *See Aguon v. Marianas Pub. Land Corp.*, 2001 MP 4 ¶23 (citations omitted). We affirm orders granting summary judgment if "there was no genuine issue of material fact and . . . the trial court correctly applied the substantive law." *Rios v. Marianas Pub. Land Corp.*, 3 N.M.I. 512, 518 (1993).

FACTUAL AND PROCEDURAL BACKGROUND

¶4 The following facts are taken from Furuoka's pleadings, supplemental materials, and a "statement of undisputed facts" offered by Japan Travel Bureau ("JTB"):[1]

¶5 In September 1995, Furuoka came to Saipan through a trip sponsored by Sanks Corporation ("Sanks"), the parent company of Furuoka's employer, Sun Plan. Satoshi Itahana ("Itahana"), a Sanks employee, and Takeshi Watanabe ("Watanabe"), an employee of JTB, arranged the trip. Itahana also arranged the previous year's company trip through JTB.

¶6 JTB is a corporation organized under the laws of Japan. It is not registered to do business in the Commonwealth of the Northern Mariana Islands ("CNMI") and asserts that it does not operate JTB offices in the CNMI. As a travel company, JTB arranges tours for its customers all over the world. Advertising brochures claim JTB provides carefree tours to Saipan and advises customers to leave all questions regarding reservations, meals, optional tours, etc., to the fifty eight JTB staff, who will take care of all their travel needs through JTB's eight offices located at major Saipan hotels, including the Dai-Ichi Hotel ("Dai-Ichi").[2] Itahana selected JTB for Sanks because he believed it was the largest and most prestigious travel company in Japan with a large presence in Saipan and he was confident that JTB would provide Sanks' employees with a safe and satisfying trip. Itahana and JTB began trip preparations more than six months in advance and, as a result, JTB became aware that Sanks had many young male participants who were sports-minded and would be using the pool at the hotel. Itahana was informed that

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[1] Furuoka agreed during oral argument that those facts were "for the most part . . . not in issue." *See* JTB's Supplemental Excerpts of Record at 61-62.

[2] Furuoka alleged, and JTB admitted at oral argument, that JTB had once owned the Dai-Ichi Hotel.

JTB would take care of all their needs through their numerous Saipan employees and Dai-Ichi office.

¶7 JTB proceeded to book Furuoka's accommodations at the Dai-Ichi through Pacific Micronesia Tours ("PMT").[3] PMT is a corporation organized under the laws of the CNMI. In 1995, its shareholders included, among others, JTB. The same shareholders owned the stock of PMT in 1996 and 1997. None of the shareholders, including JTB, owned a majority of PMT's shares. PMT had an office in the Dai-Ichi where JTB customers could get assistance. A sign stating "Pacific Micronesian Tours, Inc." appeared on the office door along with the initials "PMT" and "JTB."

¶8 During their stay in Saipan, the Sanks group attended a dinner party next to one of Dai-Ichi's pools. That evening, the pool was open for use, despite the absence of a lifeguard. The pool is kidney-shaped with no steps or ladder to indicate the shallow end of the pool and no sign was posted indicating the shallow water. Neither Furuoka, Itahana, nor Haruko Masuda, Furuoka's girlfriend, saw any markings indicating the pool's depth.

¶9 During the course of the evening, Furuoka stripped off his clothes, except a covering over his genitalia, and ran around the party. Furuoka then ran toward the pool and dove in, hitting his head on the bottom and sustaining spinal injuries.

¶10 It is undisputed that the hotel did not have a lifeguard on duty and that CNMI law required a lifeguard to be provided by the hotel,[4] *see* 3 CMC § 5501 et seq. [hereinafter

[3] PMT was not made a party in the lawsuit.

[4] Dai-Ichi and Furuoka have entered into a settlement agreement.

lifeguard statute].[5] Itahana was not informed that Dai-Ichi was operating its pool in violation of the safety statute. He was shocked to find out that JTB would book its customers into a hotel that violates a safety statute specifically intended to protect, among others, visitors to the CNMI using the pools.

¶11 Furuoka testified that he had been taught by his swimming teachers not to run in the area around a pool. It was a rule at the swimming classes he attended that a person could not dive into shallow water, and no diving was permitted at the shallow end of the swimming pool. He had been told that he should know the depth of the water before diving into it. Furuoka also testified that he wrongly thought the pool was deep rather than shallow where he dove, and that if he had known it was shallow, he would not have dived in. Furuoka also knew, before the accident happened, that it was dangerous to hit your head on the bottom of the pool. He knew that it was safer to go into the water first to determine its depth rather than diving under the presumption that it was deep. He did

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[5] Originally enacted by the Mariana Islands District Legislature, at the time of Furuoka's accident, 3 CMC § 5501 et seq. provided as follows:

> § 5501. Purpose.
>
> The purpose of this chapter is to protect the inhabitants of the Commonwealth as well as visitors in the use of ocean areas and swimming pools adjacent to commercial recreational areas.
>
> § 5502. Definitions.
>
> As used in this chapter:
>
> (a) "Commercial recreational purposes" means engaging in an activity for profit or gain and where guests and others are charged for services.
>
> (b) "Hotel" means a public house offering lodging, food and other facilities for travelers and others.
>
> (c) "Person" means every natural person, firm, partnership, association or corporation.
>
> (d) "Qualified lifeguard" means a person who holds a certificate from the American Red Cross certifying that he or she is qualified to save the lives of persons who are in the water and need help.
>
> § 5503. Use for Commercial Recreational Purposes: Lifeguard Required.
>
> All hotels and property owners in the Commonwealth using beachfront property and swimming pools for commercial recreational purposes shall employ a qualified lifeguard who shall be on duty during established hours for swimmers.
>
> § 5504. Penalty for Violation.
>
> Any person who violates any provision of this chapter shall, upon conviction thereof, be fined not more than $100 for each violation.

not think it was safe to dive head first into water if the depth is unknown. He knew he should have been more cautious about determining the depth of the water in a pool at night than during the day.

¶12 From his prior swimming experience, Furuoka knew that he should not dive head first into the shallow end of a swimming pool. He admitted that he did not look for any signs containing the rules for using the swimming pool. There was a sign posted around the pool stating in English "Dive only at deep end" and another one in Japanese "Dive carefully." Furuoka admits that he did not talk to Itahana or any Sanks representative about the trip to Saipan. He did not talk to any JTB or PMT representative. He admits that he never saw any JTB advertising about a trip to Saipan before the trip and that he would have participated in the Saipan trip even if he had been told that the hotel had no lifeguards to oversee the pool area.

THE PROCEEDINGS BELOW

¶13 In its motion for summary judgment, JTB argued that, contrary to Furuoka's allegation in his complaint, it has no legally recognizable duty to ensure Furuoka's safety, and even if such a duty existed, there was no breach of that duty; further, the proximate cause of Furuoka's injury was the actions of Furuoka himself, in failing to determine the depth of the water before diving in. Attached to JTB's motion was the affidavit of Watanabe, the JTB employee who arranged the trip, stating that he did not know of the *lifeguard statute.*

¶14 In response, Furuoka failed to present any evidence that Watanabe, or anyone else from JTB, had knowledge of the *lifeguard statute* or that Dai-Ichi was in violation of the statute. Furuoka argued that JTB did not adequately satisfy its initial burden.

¶15 The trial court found that JTB owed Furuoka a duty to render its services, as a tour agent, to the Plaintiff, with reasonable care. It further ruled that a tour operator has no duty to warn of every possible danger that any traveler to an unfamiliar place could encounter, where there is no such requirement in the contract between them, where the dangerous condition was obvious to the tour participant but unknown to the tour operator, and even where the tour operator's advertising represented that the destination was a safe place. The trial court also determined that, in viewing the facts surrounding the injury in the light must favorable to Furuoka, the proximate cause of Furuoka's injury was not Dai-Ichi's failure to comply with a statute, but was Furuoka's faulty assessment that the pool was deeper than it actually was. Thus, although the violation of the statute may have been negligence *per se*, as to the hotel, the violation was not the proximate cause of Furuoka's injury. The trial court also observed that even if the lifeguard's absence was the proximate cause of Furuoka's injury, Furuoka could not recover from JTB because the absence was a readily observable condition. The trial court granted JTB's motion for summary judgment and Furuoka initiated this timely appeal.

ANALYSIS

I. The trial court did not err in treating the motion pursuant to Com. R. Civ. P. 56, as opposed to Com. R. Civ. P. 12(b)(6).

¶16 Furuoka argues that JTB's motion on the issue of duty relies solely on his allegations contained in his complaint and that no affidavit or other evidence was offered in support. As such, JTB's motion is functionally equivalent to a motion to dismiss for failure to state a claim under Rule 12(b)(6) of the Commonwealth Rules of Civil

Procedure.[6] Therefore, Furuoka contends the motion for summary judgment must be denied if a claim has been pleaded.

¶17 Commonwealth Rules of Civil Procedure 12(b)[7] states, in pertinent part:

> (b) HOW PRESENTED. . . . the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted, . . . If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

On a motion to dismiss under Rule 12(b)(6), when matters outside the pleading are presented to, and not excluded by, the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 of the Commonwealth Rules of Civil Procedure. Com. R. Civ. P. 12(b); *Tanner v. Heise*, 879 F.2d 572, 577 (9th Cir. 1989). If matters outside the pleadings are presented to the court, but the court excludes them, a Rule 12 (b)(6) proceeding is appropriate. *See* Com. R. Civ. P. 12(b); *North Star Int'l v. Arizona Corp. Comm'n*, 720 F.2d 578, 582 (9th Cir. 1983) (A Rule 12(b)(6) motion need not be converted into a motion for summary judgment when matters outside the pleading are introduced, where the court did not rely on those extraneous materials).

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[6] A Rule 12(b)(6) analysis calls for the complaint to be liberally construed in favor of the complainant and that the facts in the complaint to be taken as true. *Govendo v. Marianas Public Land Corp*., 2 N.M.I. 482, 490 (1992) ("In considering a motion to dismiss for failure to state a claim . . . the trial court must take the well-pleaded facts as true and admitted.").

[7] Our Rule 12 is analogous to its federal counterpart. "Interpretations of counterpart federal rules are helpful in interpreting the Commonwealth Rules of Civil Procedure." Bank of Saipan v. Superior Court (Carlsmith), 2001 MP 7, n. 5 (citing *Ada v. Sadhwani's, Inc.*, 3 N.M.I. 304, 311 (1992); *Mafnas v. Commonwealth*, 2 N.M.I. 248, 264 (1991)).

¶18 In the instant case, it can hardly be questioned that matters outside the pleadings were presented to the trial court. Among the supporting papers is a three-page document, "Statement of Undisputed Facts", which sets forth eighteen undisputed facts with references to 22 pages of deposition testimony. Thus, for a Rule 12 (b)(6) proceeding to remain the appropriate course of action, the trial court must have excluded this document, as well as anything else presented to the court, except the pleadings.

¶19 It cannot be said that the trial court excluded the material. In fact, the Order, at footnote 1, shows that the court explicitly refers to material outside of the pleadings, when it stated:

> The Plaintiff complained in his moving papers, as well as at oral argument, about the lack of factual support for JTB's motion. However, on this issue JTB did attach page 25 of Mr. Watanabe's deposition to its motion. Wherein Mr. Watanabe, the JTB employee who organized Plaintiff's tour, states that he had no knowledge that lifeguards were required at hotel pools in Saipan at the time he organized the Plaintiff's tour. The Plaintiff offers no factual rebuttal in his opposing papers, instead Plaintiff argued at the hearing of this motion, that he may be able to refute this fact at trial of this matter. . . .

It is apparent that the trial court quite correctly attempted to utilize all the available information in making an informed decision.[8] Because materials outside the pleadings were presented to the trial court, and the trial court did not exclude the materials when making a decision, Furuoka's contention that a Rule 12 (b)(6) proceeding was the appropriate course of action is incorrect. The trial court correctly determined that a Rule 56 proceeding was the appropriate course of action.

II. The trial court erred in granting summary judgment because the movant failed to carry its initial burden.

[8] A commentator observes that "[i]n most cases the district judge will prefer to utilize all the available material and therefore opt to treat the motion as one for summary judgment." 10 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2713 (2nd ed. 1983).

¶20 Furuoka argues that JTB failed to carry its initial burden of demonstrating to the trial court an absence of a genuine issue as to any material fact. Also, Furuoka argues that JTB violated the Commonwealth Rules of Civil Procedure 56 requirement to inform the court of the basis of its motion and to identify those portions of the record supporting its motion.[9]

¶21 JTB argues it is entitled to summary judgment because, having had adequate time for discovery and having failed to produce adequate evidence in response to JTB's motion, Furuoka failed to make a showing sufficient to establish the existence of an element essential to his case. JTB contends that Furuoka has simply failed to come forth and prove, by specific facts, that JTB had knowledge, or should have had knowledge, of the lifeguard situation.

¶22 The Commonwealth's summary judgment procedures and standards are clear and well-developed. A moving party bears the "initial and the ultimate" burden of establishing its entitlement to summary judgment. *Santos v. Santos*, 4 N.M.I. 206, 210 (1995) (*citing Lopez v. Corporacion Azucarera de Puerto Rico*, 938 F.2d 1510, 1516 (1st Cir. 1991)). If a moving party is the plaintiff, he or she must prove that the undisputed facts establish every element of the presented claim. *Id*. If a movant is the defendant, he or she has the correlative duty of showing that the undisputed facts establish every element of an asserted affirmative defense. *Id*.

¶23 Further, according to the United States Supreme Court, FED. R. CIV. P. 56, by its terms, allows a moving party to discharge its initial burden by "'showing' – that is,

[9] We choose not to discuss this argument at this time as we find in Furuoka's favor on the issue of the movant's failure to carry its initial burden.

pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265 (1986).[10] The Court reasoned that Rule 56 was designed "to isolate and dispose of factually unsupported claims or defenses" and must be construed "in a way that allows it to accomplish this purpose." *Id*. at 323-34, 106 S. Ct. at 2553.

¶24 Once the moving party satisfies the initial burden, the nonmoving party must respond by establishing that a genuine issue of material fact exists. *Santos* at 210 (*citing Bias v. Advantage Int'l, Inc*., 905 F.2d 1558, 1561 (D.C. Cir. 1990)). "If the nonmoving party cannot muster sufficient evidence to make out its claim, a trial would be useless and the moving party is entitled to summary judgment as a matter of law." *Celotex* at 331, 106 S. Ct. at 2557.

¶25 JTB's assertion that this is a *Celotex*-type case is incorrect.[11] In *Celotex*, the plaintiff ("Catrett") sued 15 corporations (including Celotex Corporation, hereinafter "Celotex") for wrongful death on behalf of her late husband. *Id.* at 319, 106 S. Ct. at 2550. Catrett alleged her husband's death resulted from his "exposure to products containing asbestos manufactured or distributed by" Celotex. *Id* at 319, 106 S. Ct. at 2551. Celotex moved for summary judgment because Catrett had "failed to produce evidence that any [Celotex] product . . . was the proximate cause of the injuries alleged." *Id*. "In particular, petitioner noted that respondent had failed to identify, in answering interrogatories specifically requesting such information, any witnesses who could testify about the decedent's exposure to petitioner's asbestos products." *Id*. at 320, 106 S. Ct. at

[10] In his brief, Furuoka cited the dissenting opinion of Justice Brennan without proper attribution.

[11] A patent distinction is the fact that the movant in *Celotex* provided no affidavits to the court while in the present case, JTB provided affidavits.

2551. Catrett then produced a deposition transcript from her deceased husband, a letter from one of her husband's previous employers and a letter from an insurance company; she argued these documents demonstrated a material factual dispute. *Id.* Celotex then "argued that the three documents were inadmissible hearsay and thus could not be considered in opposition to the summary judgment motion." *Id.*

¶26 The district court granted Celotex's summary judgment motion. *Id*. The appellate court reversed, holding that "petitioner's summary judgment motion was rendered 'fatally defective' by the fact that petitioner 'made no effort to adduce *any* evidence, in the form of affidavits or otherwise, to support its motion.'" *Id*. at 321, 106 S. Ct. at 2551-52 (citation and parenthetical explanation omitted). In short, Celotex had not produced any information negating Catrett's claim; Celotex had merely pointed out Catrett's inability to prove an essential element of her case.

¶27 The Supreme Court interpreted Rule 56 and determined that "regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied." *Id.* at 323, 106 S. Ct. at 2553. *Celotex* does nothing to change the initial burden of the moving party; it merely clarifies the acceptable means available to the movant to discharge its initial burden.

¶28 Contrary to its assertion, JTB's summary judgment motion and accompanying documents did not satisfy its initial burden by "pointing out" to the trial court an absence of evidence to support an essential element of Furuoka's case. Among the undisputed evidence is Watanabe's lack of knowledge of the *lifeguard statute* when he arranged the

trip with Itahana.[12] There is nothing in the record that demonstrates that JTB *as an organization*, the party to the suit against whom negligent conduct is alleged, had no knowledge of the *lifeguard statute* or that it was being violated. JTB did not point out to the trial court that Furuoka had no evidence to prove an essential element of his case – knowledge that the Dai-Ichi regularly violated, and would violate, a safety statute intended to protect Furuoka. JTB merely established that Watanabe did not have the requisite knowledge.

¶29 Since JTB did not meet its initial burden of demonstrating a lack of material facts in dispute, Furuoka was under no obligation to bring forth any evidence refuting JTB's assertion. Furuoka was entitled to rest on his pleadings.[13] Summary judgment was improperly granted.

III. The trial court improperly applied the substantive law.

¶30 Because material facts remain in dispute, it is not necessary to analyze the second part of the summary judgment procedure - whether the trial court properly applied the substantive law. However, we choose to address this issue at this time, as it presents an important issue of first impression in the Commonwealth.

¶31 Furuoka argues that a travel agent has a duty to inform its customers of the dangers the agent knows, or reasonably should know, the customers will encounter on a trip booked by the agent.[14] JTB argues that a travel company is not liable for injuries to

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[12] The undisputed facts also include a statement from Itahana that he did not talk to anyone at JTB about lifeguards at Dai-Ichi, as it did not occur to him to inquire on the subject. This, however, is not sufficient to meet the movant's burden.

[13] Although proper, this tactic is disfavored by this Court and is not advised.

[14] For this proposition, Furuoka cites *Sova v. Apple Vacations*, 984 F. Supp 1136 (S.D. Ohio 1997); *Carley v. Theatre Development Fund*, 22 F. Supp. 2d 224 (S.D.N.Y. 1998); *Passero v. DHC Hotels and Resorts*, (footnote continued . . .)

travelers resulting from negligent acts of third parties which are not owned, managed, operated or controlled by the travel company; a travel company has no duty to advise a traveler regarding general safety precautions or safety risks on premises operated and controlled by third parties; a travel company has no duty to warn a traveler about a hazard about which a traveler has equal or greater knowledge.[15] The court below determined that JTB owed Furuoka a duty to render its services, as a tour agent, to the Plaintiff, with reasonable care. We agree.

¶32 The determination that a duty of care exists is an essential precondition to attaching liability for negligence. *McCollum v. Friendly Hills Travel Center*, 217 Cal. Rptr. 919, 922 (1985); RESTATEMENT (SECOND) OF TORTS §281(a) (1965).[16] The inquiry is primarily a question of law for the court to decide. *McCollum*, at 922; RESTATEMENT (SECOND) OF TORTS § 328 B(b) (1965) (The court determines "whether such facts give rise to any legal duty" on defendant's part.). A duty of care may arise through statute or by contract.[17] *McCollum*, at 922-23. "Whether a duty is owed is simply a shorthand way of phrasing . . . whether the plaintiff's interests are entitled to legal protection against

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Inc., 981 F. Supp. 742 (D. Conn. 1996); *Lavine v. General Mills, Inc.*, 519 F. Supp. 332 (N.D. Ga. 1981); *Wilson v. American Trans. Air, Inc.*, 874 F.2d 386 (7th Cir. 1989); *Manahan v. Yacht Haven Hotel*, 821 F. Supp. 1110 (D. V.I. 1992); *Fling v. Hollywood Travel and Tours*, 765 F. Supp. 1302 (N.D. Ohio 1990); *McCollum v. Friendly Hills Travel Center*, 217 Cal. Rptr. 919 (1985); *Rookard v. Mexicoach*, 680 F.2d 1257 (9th Cir. 1982).

[15] JTB cites *Honeycutt v. Tour Carriage, Inc.*, 997 F. Supp. 694 (W.D.N.C. 1996); *Sova v. Apple Vacations*, 984 F. Supp 1136 (S.D. Ohio 1997); *Marshall v. United Airlines*, 35 Cal. App. 3d 84, 110 Cal. Rptr. 416 (1993); *Fling v. Hollywood Travel and Tours*, 765 F. Supp. 1302 (N.D. Ohio 1990); *Loeb v. U.S. Dept. of Interior*, 793 F. Supp 431, (E.D.N.Y. 1992).

[16] The Restatements serve as substantive law in the absence of statutory or customary law. *See* 7 CMC § 3401; *Ito v. Macro Energy, Inc*., 4 N.M.I. 46, 55 (1993).

[17] The contract in which JTB agreed to act as a travel agent is not included in the record before us.

the defendant's conduct." *McCollum*, at 923; RESTATEMENT (SECOND) OF TORTS § 281(a) (1965).

¶33 Many courts in the United States, having occasion to decide the issue, hold a travel agent, "who arranges vacation plans and therefore acts as more than a mere 'ticket agent' is a special agent of the traveler for the purposes of that one transaction between the parties."[18] *McCollum*, at 923 (citations omitted); RESTATEMENT (SECOND) OF AGENCY § 3 (1958). "An agent is anyone who undertakes to transact some business, or manage some affair, for another, by authority of and on account of the latter, and to render an account of such transactions." *McCollum*, at 923; RESTATEMENT (SECOND) OF AGENCY § 1 (1958). The chief characteristic of the agency is that of representation, the authority to act for and in the place of the principal for the purpose of bringing him or her into legal relationships with third parties. *McCollum*, at 923. The significant test of an agency relationship is the principal's right to control the activities of the agent, but it is not essential that the right of control be exercised or that there be actual supervision of the work of the agent. *Id*.; *Aldan-Pierce v. Mafnas*, 2 N.M.I. 126, 146 (1991) ("An agent is a person who agrees to act for and is subject to the control of another.") (citation omitted).

¶34 As agents, tour operators have a duty to use reasonable efforts to inform the tour participant of information material to the agency which they had notice the traveler would desire. *See McCollum*, at 923; *Fling v. Hollywood Travel and Tours*, 765 F. Supp. 1302, 1305 (N.D. Ohio 1990) (An agent owes the principal a duty of good faith and obedience, a duty of loyalty, a duty of skill, care, and diligence, and a duty to disclose

[18] There appears to be a genuine issue of material fact as to whether JTB was a special agent for Furuoka or merely a ticket agent for Dai-Ichi.

certain information.); RESTATEMENT (SECOND) OF AGENCY §§ 379-81 (1958) (Agent owes principal, among other things, a duty of care and skill, duty of good conduct, and duty to give information.). The scope of this duty to disclose is limited to what is reasonable in any given circumstance, keeping in mind that a tour operator is not an insurer, nor can he be reasonably expected to predict and forewarn of the endless list of dangers inherent in foreign travel. *McCollum*, at 924 (*citing Rookard v. Mexicoach* 680 F.2d 1257 (9th Cir. 1982)).

¶35 As defined by other jurisdictions, the duty to disclose or inform does not include, as Furuoka claims, a duty to ensure that tour participants will be reasonably safe from harm caused by hotels where the participants are booked and a duty to ensure that hotels will maintain adequate safeguards for the safety of its guests. He correctly asserts, nevertheless, that a travel agent has a duty to advise and warn its principals, if the agent had knowledge that the hotel had not established and maintained particular safeguards.[19] We conclude that a travel agent has a duty to disclose known, or reasonably ascertainable, material information to the traveler unless that information is so clearly obvious and apparent to the traveler that, as a matter of law, the travel agent would not be negligent in failing to disclose it.

¶36 Applying the law to Furuoka's complaint, we note that Furuoka stated a claim for which relief could be granted.[20] In determining the proper standard of care to which JTB

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[19] It should be noted that JTB seems to agree with this proposition. In its responsive brief, JTB states, "In order for JTB to have a duty to warn Furuoka, JTB must have some knowledge of a foreseeable risk." (*citing* PROSSER ON TORTS § 31 (4th ed. 1971
)).

[20] Furuoka claimed that JTB regularly arranges or has arranged for poolside parties to be held at the hotel for the tours which it organizes; that the party was hosted by JTB; JTB knew, had substantial reason to know, and/or should have known that the hotel would conduct the party next to the pool; JTB knew, had (footnote continued . . .)

should have been held, the trial court correctly determined that JTB owed Furuoka the duty of ordinary care; JTB had a duty to act reasonably towards Furuoka as determined by JTB's relationship with Furuoka. Assuming, as we must at this stage in the proceedings, that JTB was Furuoka's agent, JTB had a duty to warn Furuoka of all known and reasonably discernable dangers germane to the scope of the agency.

¶37 The trial court inexplicably departed from the standard of ordinary care and applied a stricter, more demanding standard. By applying the standard "JTB has no duty to warn of every conceivable danger," the trial court misapplied the substantive law. Summary judgment was therefore improper.

IV. The court improperly decided the factual issues of proximate cause and contributory negligence as a matter of law.

¶38 The trial court determined that JTB's conduct was not the proximate cause of Furuoka's injuries. The trial court also observed that even if the lifeguard's absence was the proximate cause of Furuoka's injury, Furuoka could not recover from JTB because the absence was a readily observable condition.[21] Because material facts remain disputed,[22] the court should not have decided these issues.

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substantial reason to know, and/or should have known that the hotel did not or would not supply a lifeguard at the pool during the time which the party was to be conducted; JTB at no time apprised Furuoka that no lifeguard would be on duty at the swimming pools or that the hotel did not maintain adequate safeguards for Furuoka's safety at, in or around the pool area; and JTB's failure to meet the aforementioned duties proximately caused Furuoka's injuries, causing pain and suffering.

[21] It is not clear from the record before us how this observation could be made.

[22] For example, in his affidavit, Louis Sassi asserts that a properly positioned lifeguard could have intervened to prevent Furuoka from diving into the pool; we assume JTB takes a contrary position. Further, there is also a factual dispute as to whether Furuoka comprehended the danger of diving into the pool when he observed earlier that evening that one end of the pool was deep enough to dive in. This raises factual issues concerning the reasonableness of Furuoka's own conduct, and whether it constituted a substantial factor that caused his injury.

CONCLUSION

¶39 For the reasons stated above, the order granting summary judgment was improvidently granted. This case is reversed and remanded to the trial court for proceedings consistent with this opinion.

SO ORDERED THIS 28TH DAY OF MARCH 2002.

/s/_____
ALEXANDRO C. CASTRO, ASSOCIATE JUSTICE

/s/_____
JOHN A. MANGLONA, ASSOCIATE JUSTICE

/s/_____
MARTY W.K. TAYLOR, JUSTICE PRO TEMPORE