DISSENTING OPINION BY ACOBA, J.,
WITH WHOM CIRCUIT JUDGE CHAN JOINS

I would grant certiorari in this case.

I.

Petitioner/Plaintiff-Appellant Steven S. O'Connor (Petitioner) suffered an injury to his lower right arm on July 11, 1994, when he slipped on a staircase. He sought treatment the following day, July 12, 1994, at the Queen's Medical Center (Queen's), where Respondent/Defendant-Appellee Norbert B. Wong, M.D. (Dr. Wong) treated him in the emergency room, then ordered an x-ray. "The x-ray was misinterpreted as normal by the radiologist," Respondent/Defendant-Appellee Michael Meagher, M.D. (Dr. Meagher), who "described the forearm as intact and normally aligned." Queen's discharged Petitioner "with medication as well as follow-up instructions."

Petitioner continued to suffer pain in his arm, but did not wish to return to Dr. Wong because he "no longer trusted him." Petitioner went instead to Kalihi Palama Center on August 22, 1994, and again on August 30, 1994. The doctors at Kalihi Palama recommended another x-ray, which Petitioner was unable to afford. Still feeling Dr. Wong had been wrong and therefore unwilling to return to Queen's, Petitioner went to the Queen Emma Clinic on November 15, 1994, where an orthopedic surgical resident diagnosed the fracture and noted that it had healed incorrectly and required surgery to re-break and set the

bone.

Petitioner contacted the Medical Claims Conciliation Panel (MCCP) through a letter dated April 5, 1995, indicating his desire to file a complaint. The MCCP informed Petitioner, in a letter dated April 13, 1995, that a claim required him to specifically name the health care providers who were to be the adverse parties, and included a brochure entitled "How to File Claim."

Petitioner was told that the MCCP would be "unable to identify the health care provider(s) you wish to name, [and Petitioner's] letter may not be considered a claim before the MCCP and any applicable statute of limitations may not be tolled." Petitioner responded in a letter dated April 17, 1995, naming Queens's and "doctors on record." On May 5, 1995, the MCCP informed Petitioner by letter that they considered the complaint to be against "Queen's Hospital" and "John Does 1-2." On October 21, 1995, Petitioner filed an amended MCCP complaint naming Dr. Wong, Dr. Meagher, and their respective employers, The Emergency Group, Inc. (TEG), and Radiology Associates, Inc. (RAI).

Petitioner filed a complaint in the court on December 17, 1996, naming Dr. Wong, Dr. Meagher, TEG, RAI and Queen's (collectively referred to as "Respondents") as defendants. Queen's was subsequently dismissed by stipulation of the parties. At this time, the MCCP had not issued a decision.

The record shows no indication that a MCCP hearing was initiated, even after the filing of the amended complaint.

On December 1, 2000, Dr. Wong and TEG filed a "Joint Motion for Summary Judgment" in the court, "contending that [Petitioner's] claims were time-barred by the applicable statute of limitations." In support of this motion, the parties noted deposition testimony that in August of 1994 Petitioner "felt that Dr. Wong made a mistake."

On December 26, 2000, Dr. Meagher and RAI filed a joinder to the Motion for Summary Judgment, basing their defense on the defense set forth by Dr. Wong, and adding the contention that Petitioner's claims against them were further "precluded because [they] were never served with [Petitioner's] MCCP amended complaint naming them as Respondents."

On January 3, 2001, Petitioner filed a memorandum in opposition to Defendant's December 1, 2000 motion for summary judgment. Petitioner argued that the motion should be denied because he "did not know, nor should have known, of the facts constituting the Defendants' negligence until, at the earliest, November 15, 1994, when he was informed for the first time that his arm was fractured." This was within the two-year statute of limitations for filing with the MCCP.

The court granted the Motion for Summary Judgment and the joinder at a hearing on January 11, 2001. Subsequently, on

January 26, 2001, the court filed its order granting Respondents' motion for summary judgment and joinder.

On April 19, 2001, the court filed its findings of facts and conclusions of law and order granting Respondents' motion for summary judgment and joiner.

In its conclusion of law 10, the court observed that Petitioner testified that "[b]y August 22, 1994 . . . [Petitioner] sought treatment at Kalihi Palama Center because he was experiencing increasing pain, no longer trusted Dr. Wong, knew that something was wrong, . . . and knew that he had a 'break' in his arm." It found that, based on when Petitioner "knew or should have known" of his injury, "[Petitioner] was required to identify and submit his claims against [Respondents] by August 22, 1996, but certainly no later than August 30, 1996. Although [Petitioner] had pursued a claim against Queen's, he did not identify and file his claim against [Respondents] with the MCCP until October 21, 1996." The court therefore concluded that Petitioner's claims had not been instituted until "more than two (2) years from the date of their accrual" under Hawai'i Revised Statutes (HRS) § 657-7.3 (1993).[1]

On August 2, 2001, the court entered its judgment and on August 27, 2001, Petitioner filed his notice of appeal.

[1] HRS § 657-7.3 provides that "[n]o action for injury against [a medical practitioner] . . . shall be brought more than two years after the plaintiff discovers, or through the use of reasonable diligence should have discovered the injury[.]"

On January 28, 2003, the Intermediate Court of Appeals (the ICA)[2] filed its memorandum opinion affirming the judgment of the court. The ICA held that Petitioner "knew or should have known of his claims against [Respondents] prior to October 21, 1994. Therefore, when, on October 21, 1996, [Petitioner] filed with the MCCP his claims against [Respondents], the two-year statutory limitation period had expired." ICA Memorandum Opinion (Memo. Op.) at 10. The ICA explained that Petitioner's allegations that he did not "discover[] the injury until November 15, 1994, when he was advised by a physician at [the] Queen Emma Clinic that the x-rays taken on July 12, 1994 showed a fracture of his right arm[,]" were "contradicted by the facts noted above." Memo. Op. at 10.

II.

In his petition, Petitioner contends that the ICA committed a grave error when it failed to consider the testimony of Petitioner that "he neither believed nor was ever informed by any physician that he had a fractured elbow until November 15, 1994, within two years of his timely filing a [MCCP] proceeding," thereby failing to view the facts in the light most favorable to Petitioner.

III.

Pursuant to HRS § 602-59 (1993 & Supp. 2003), a party may appeal the decision of the ICA by an application to this

[2] Chief Judge Chief Judge James S. Burns, Associate Judges Corinne Watanabe and Daniel R. Foley.

court for a writ of certiorari. See HRS § 602-59(a) (1993). In determining whether to accept or reject the application for writ of certiorari, this court reviews the ICA decision for:

> (1) grave errors of law or of fact, or (2) obvious inconsistencies in the decision of the intermediate appellate court with that of the supreme court, federal decisions, or its own decision, and the magnitude of such errors or inconsistencies dictating the need for further appeal.

HRS § 602-59(b) (1993). This court has the discretion to grant or deny a petition for certiorari. See HRS § 602-59(a).

IV.

A.

Hawai‘i applies the "discovery rule" in determining when the applicable statute of limitations begins to run. The "discovery rule" states that "[t]he statute [of limitations] does not begin to run until the plaintiff knew or should have known of the defendant's negligence." Yoshizaki v. Hilo Hosp., 50 Haw. 150, 154, 433 P.2d 220, 223 (1967). When applying the "discovery rule," the "trier of fact must determine the date by which the [a]ppellants knew or should have known" of their malpractice claim. Blair v. Ing, 95 Hawai‘i 247, 267, 21 P.3d 452, 472 (2001) (citing Dunlea v. Dappen, 83 Hawai‘i 28, 36, 924 P.2d 196, 204 (1996)). Additionally, this court has clearly held that "the moment at which a statute of limitations ruling is triggered is ordinarily a question of fact."[3] Norris v. Six Flags Theme

[3] This court has affirmed orders granting motions for summary judgment in cases where the statute of limitations has run, however, such cases are distinguishable. The decisions do not turn on facts surrounding (continued...)

Parks, Inc., 102 Hawai‘i 203, 206, 74 P.3d 26, 29 (2002).

B.

Knowledge of the existence of negligence refers to "those *facts* which are necessary for an actionable claim before the statute begins to run." Russell v. Attco, Inc., 82 Hawai‘i 461, 463, 923 P.2d 403, 405 (1996) (quoting Hays v. City & County of Honolulu, 81 Hawai‘i 391, 398, 917 P.2d 718, 725 (1996)) (emphasis in original); see also Buck v. Miles, 89 Hawai‘i 244, 971 P.2d 717 (1999). Even where the court does not believe the plaintiff's version of the facts as to when the plaintiff discovered the negligence, the question should not be resolved by summary judgment. In Jacoby v. Kaiser Found. Hosp., 1 Haw. App. 519, 527, 622 P.2d 613, 618 (1981), the ICA held that "although there is evidence on the record to contradict [the plaintiff's] claim of non-discovery of the requisite information, we are unable at this point to say that [the plaintiff] cannot prevail under any circumstances."

In determining that Petitioner knew or should have known of the injury before August 30, 1994, the court relied on

[3](...continued)
whether the plaintiff knew or should have known of their injury but, instead, turn on questions of law involving the scope of the discovery rule. See Russell v. Attco, Inc., 82 Hawai‘i 461, 463, 923 P.2d 403, 405 (1996) (clarifying that plaintiffs cannot benefit from the discovery rule when they initially named "doe defendants" in their complaint and their complaint was found to be time barred); Buck v. Miles, 89 Hawai‘i 244, 250, 971 P.2d 717, 723 (1999) (concluding that it was "undisputed" that the plaintiff had the requisite awareness of the facts necessary for an actionable claim, and that an expert opinion was not required under the discovery rule); Hays v. City & County of Honolulu, 81 Hawai‘i 391, 399, 917 P.2d 718, 726 (1996) (holding that "plaintiff's lack of knowledge regarding the legal duty [of the city] . . . will not justify application of the discovery rule").

the Petitioner's testimony that the pain he experienced after the visit to Queen's was "unlike any pain he had experienced with prior sprains and had worsened since he was seen by Dr. Wong[.]" The court in its findings of fact 4 stated that "by this time [Petitioner] thought he had a 'break' in his arm," therefore, in its conclusion of law 10 the court concluded that he knew in August that Dr. Wong had "made a mistake." This is not a sufficient basis to grant summary judgment.

In Jacoby, the plaintiff had consulted other physicians and even stated to a reporter that "she specifically claimed that the Kaiser facilities had not cared for her," all before she claimed to know of her injury. 1 Haw. App. at 526, 622 P.2d at 618. Nevertheless, the ICA ruled that since, under oath, plaintiff claimed she did not know of her injury until later, the issue was not appropriate for summary judgment. Id. at 526-27, 622 P.2d at 618. Petitioner also claimed, under oath, that he knew of the injury on November 15, 1994. Therefore this issue, as in Jacoby, is inappropriate for summary judgment.

V.

Furthermore, in determining a motion for summary judgment, the court must view all facts in the light most favorable to the non-moving party. Morinoue v. Roy, 86 Hawai'i 76, 947 P.2d 948 (1997). As in Jacoby, evidence contradicting Petitioner's claim of non-discovery is not sufficient for the court to have conclusively determined when Petitioner should have known of his injury. Viewed in the light most favorable to the

Petitioner, he discovered the full nature of his injury and the mistake made at Queen's on November 15, 1994 when he visited the Queen Emma Clinic and was told that his July 1994 x-ray showed a fracture, and an additional set of x-rays showed the bone had healed incorrectly. Moreover, Petitioner's deposition is unclear as to when he discovered there was a misdiagnosis. Petitioner stated the following in his deposition:

> Q [Plaintiff's counsel]: Were you concerned that maybe they mis - - maybe misdiagnosed you? Did that concern ever come up?
> A: Let's see. At that time, I'm not sure if then.
> Q: You think - - were you thinking that maybe you did have a fracture? I'm talking 30 days out.
> A: Right. The term "fracture" never entered my mind. I was thinking more like a break.
> Q: A break?
> A: Yeah.
> Q: A broken bone?
> A: I don't know if I thought it then, but we're coming to the ballpark of when I did think it, yeah.

Petitioner stated in his declaration that "[o]n November 15, 1994[,] I was informed for the first time that my arm was fractured . . . [.] It was only then, and not earlier, that I learned my arm was fractured."

Measured from this point, Petitioner filed his amended complaint with the MCCP on October 21, 1996, within the two-year statute of limitations period, pursuant to HRS § 657-7.3. Therefore, Petitioner's claim was not barred by the two-year statute of limitations as the statute of limitations under HRS § 657-7.3 was tolled until the MCCP decided the claim or eighteen months had passed.

VI.

Under HRS § 671-12 (1993), a claimant "shall submit a

statement of the claim to the [MCCP] before a suit based on the claim may be commenced in any court of this State."[4] HRS § 671-18[5] (1993) states that the filing of a claim with the MCCP tolls the statute of limitations until a decision of the MCCP. HRS § 671-16 (1993) requires that a plaintiff wait to institute litigation until after the MCCP's decision or until eighteen months have passed without a decision.[6]

Although the premature filing of a suit in court, before a decision is handed down from the MCCP, would usually divest the circuit court of jurisdiction to hear the case, this court has allowed a claim filed in the circuit court to proceed before a MCCP decision had been rendered, where the plaintiff substantially complied with the statute. See Garcia v. Kaiser Found. Health Plan, 90 Haw. 425, 978 P.2d 863 (1999), Tabosa v. Queen's Med. Ctr., 69 Haw. 305, 741 P.2d 1280 (1987).

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[4] HRS § 671-12 provides that "any person or the person's representative claiming that a medical tort has been committed shall submit a statement of the claim to the medical claim conciliation panel before a suit based on the claim may be commenced in any court of this State."

[5] HRS § 671-18 states in relevant part that

> [t]he filing of the claim with the [MCCP] shall toll any applicable statute of limitations, and any such statute of limitations shall remain tolled until sixty days after the date of decision of the panel. . . . If a decision by the [MCCP] is not reached within eighteen months, the statute of limitations shall resume running and the party . . . may commence a suit based on the claim[.]

[6] HRS § 671-16 states that the "claimant may institute litigation based on the claim in an appropriate state court only after a party to a [MCCP] hearing rejects the decision of the panel, or after the eighteen-month period under section 671-18 has expired." (Emphasis added.) Although inapplicable to this case, HRS § 671-16 was amended in 2003, reducing the period a party had to wait to file a complaint in circuit court from eighteen months to twelve months if the MCCP failed to render a decision.

In Tabosa, this court determined that the plaintiff's case was not barred by failing to obtain a decision from the MCCP before filing in state court. The plaintiff in that case filed against Queen's and "Doe" doctors in state court two days before filing against named doctors with the MCCP. After the MCCP decision found actionable negligence and the decision was rejected by Queen's, Tabosa moved to name the doctors in her state court complaint. Tabosa, 69 Haw. at 310, 741 P.2d at 1284. This court relied on several factors to vacate dismissal of Tabosa's claim: 1) Tabosa's actions were consistent with the legislature's purpose in creating the MCCP system, 2) the defendants were not unduly prejudiced by the early filing, and 3) access to the courts as against compliance with the letter of the statute. Id. at 314-15, 741 P.2d at 1286-87.

As to the first factor, this court has stated that "[t]he perception of a 'crisis in the area of medical malpractice' caused the enactment of the statutory provisions now codified in HRS chapter 671." Id. at 311-12, 741 P.2d at 1285 (citing 1976 Haw. Sess. L. Act 219, § 1). The legislative objectives in passing the statute included a desire to "make the system less costly" and to "'encourage early settlement of claims and to weed out unmeritorious claims.'" Id. at 312, 741 P.2d at 1285 (quoting Hse. Stand. Comm. Rep. No. 417, in 1976 House Journal, at 1460). The claim in Tabosa was determined to be consistent with the legislative purpose because "the claim against Queen's was deemed meritorious by the advisory body, and

the health care providers had an opportunity to avoid litigation, all before they were named as defendants in the suit." Id. at 314, 741 P.2d at 1286.

Here, Petitioner attempted to comply with the statute but, unlike the plaintiff in Tabosa, filed in the court against named defendants before receiving a decision from the MCCP about whether the conduct of the doctors was actionable. In Garcia, the plaintiffs named the defendants in state court six months prior to the decision by the MCCP, "frustrat[ing] the intent of HRS ch. 671 to screen unmeritorious claims against health care providers and encourage the early settlement of claims." 90 Hawai‘i at 440, 978 P.2d at 878. This court decided that "[g]iven [that] the MCCP decision was filed after the commencement of this suit in the circuit court, . . . [the p]laintiffs have failed to comply with HRS § 671-12." Id. at 439, 978 P.2d at 877. While this case is similar to the circumstance in Garcia that resulted in disallowance of the claim, Petitioner's claim does not frustrate legislative intent. First, there was no decision by the MCCP that the "evidence did not establish that . . . [the doctors] were actionably negligent in their care and treatment[.]" Id. Additionally, Petitioner's claim is meritorious, insofar as it does not appear the inaccurate reading of the original x-ray is disputed.

The second Tabosa factor was whether there was undue

prejudice to the defendants as a result of the early filing. Tabosa, 69 Haw. at 315, 741 P.2d at 1287 (stating that defendants "do not appear to have been unduly prejudiced by a hasty and ill-advised anonymous . . . pleading"). Here, Respondents are not unduly burdened except to the extent that the MCCP did not issue a ruling. The existence of a ruling allows potential defendants the opportunity to either settle the case or defend a lawsuit. Respondents were named in Petitioner's amended complaint, but the MCCP did not inform at least one of them of the pending claim and apparently did not schedule a hearing within the time required in the statute. Any undue burden resulting from the MCCP's failure to render a decision could be rectified, if necessary, before a court rules on the merits of the claim, and should not bar Petitioner's claim.

The third factor, the common law tradition of allowing an injured plaintiff "right to redress in a court of law[,]" weighs in favor of allowing Petitioner's claim to proceed. Id. 69 Haw. at 315, 741 P.2d at 1287. Petitioner is clearly an injured party with very few resources, who did not have the assistance of an attorney for the majority of the process. Petitioner should not be penalized for the confusing state of his MCCP claim. His difficulties in following the dictates of HRS chapter 671 were not fabrications intended to intentionally thwart the process. Accordingly, the Tabosa factors weigh in

favor of allowing Petitioner's case to proceed.

VII.

Thus, I would reverse the January 28, 2003 memorandum opinion of the ICA and remand the case to the court with instructions to vacate the January 26, 2001 order granting summary judgment and the April 19, 2001 findings of fact, conclusions of law and order granting summary judgment herein.