

NO. 24512

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

STEVEN S. O'CONNOR, Plaintiff-Appellant, v.  
NORBERT WONG, M.D.; MICHAEL MEAGHER, M.D.;  
RADIOLOGY ASSOCIATES, INC., a Hawai'i corporation;  
and EMERGENCY GROUP, INC., a Hawai'i corporation,  
Defendants-Appellees, and THE QUEEN'S MEDICAL  
CENTER, a non-profit Hawai'i corporation; SUTTER  
HEALTH PACIFIC, a California Corporation for Non-  
Profit; JOHN DOES 1-10; JANE DOES 1-10; DOE  
PARTNERSHIPS 1-10; DOE CORPORATIONS 1-10; ROE NON-  
PROFIT CORPORATIONS 1-10; and ROE GOVERNMENTAL  
ENTITIES 1-10, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT  
(CIV. NO. 96-5171)

MEMORANDUM OPINION

(By: Burns, C.J., Watanabe and Foley, JJ.)

Plaintiff-Appellant Steven S. O'Connor (O'Connor)  
appeals from the August 2, 2001 Judgment entered by Judge Russell  
Blair in favor of Defendants-Appellees Norbert Wong, M.D. (Dr.  
Wong), The Emergency Group, Inc. (EGI), Michael Meagher, M.D.  
(Dr. Meagher), and Radiology Associates, Inc. (RAI) (collectively  
Defendants). The August 2, 2001 Judgment was based on summary  
judgment orders entered on January 26, 2001, and April 19, 2001.  
We affirm.

RELEVANT STATUTES

The Hawaii Revised Statutes (HRS) (1993) provide, in relevant part, as follows:

**§657-7.3 Medical torts; limitation of actions; time.** No action for injury . . . against a . . . physician or surgeon, . . . or a licensed hospital as the employer of any such person, based upon such person's alleged professional negligence, . . . shall be brought more than two years after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, . . . .

. . . .

**§671-12 Review by panel required; notice; presentation of claims; request for a more definite statement of the claim.**

(a) . . . [A]ny person . . . 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. Claims shall be submitted to the medical claim conciliation panel in writing. The claimant shall set forth facts upon which the claim is based and shall include the names of all parties against whom the claim is or may be made who are then known to the claimant.

. . . .

**§671-16 Subsequent litigation; excluded evidence.** The claimant may institute litigation based upon the claim in an appropriate court only after a party to a medical claim conciliation panel hearing rejects the decision of the panel, or after the eighteen-month period under section 671-18 has expired.

. . . .

**§671-18 Statute of limitations tolled.** The filing of the claim with the medical claim conciliation panel shall toll any applicable statute of limitations, and any such statute of limitations shall remain tolled until sixty days after the date the decision of the panel is mailed or delivered to the parties; provided that in no case shall the applicable statute of limitations be tolled for more than eighteen months. If a decision by the medical claim conciliation panel is not reached within eighteen months, the statute of limitations shall resume running and the party filing the claim may commence a suit based on the claim in any appropriate court of this State. The panel shall notify in writing all parties of this provision.

## POINT ON APPEAL

In essence, O'Connor's appeal challenges the following conclusion of law entered by Judge R. Mark Browning:

14. As such, the Court concludes [O'Connor's] claims against Defendants are time barred because he failed to submit his claims to the State of Hawaii Medical Claims Conciliation Panel within the time period imposed by HRS Section 657-7.3. [O'Connor's] claims against Defendants were not instituted until October 21, 1996, more than two (2) years from the date of their accrual, e.g., the date on which [O'Connor] knew or should have known of his claims against Defendants which, in this case, occurred on August 22, 1994, but certainly no later than August 30, 1994.

## STANDARD OF REVIEW

The circuit court's grant or denial of summary judgment is reviewed *de novo* under the same right/wrong standard applied by the circuit court. Roxas v. Marcos, 89 Hawai'i 91, 116, 969 P.2d 1209, 1234 (1998) (citation omitted); Amfac, Inc. v. Waikiki Beachcomber Investment Co., 74 Haw. 85, 104, 839 P.2d 10, 22 (1992) (citation omitted). "Summary judgment is appropriate 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 judgment as a matter of law." Roxas, 89 Hawai'i at 116, 969 P.2d at 1234 (citation omitted); see also Hawai'i Rules of Civil Procedure (HRCP) Rule 56(c). "A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties." Hulsman v.

Hemmeter Dev. Corp., 65 Haw. 58, 61, 647 P.2d 713, 716 (1982)  
(citations omitted). In a motion for summary judgment, "'we must  
view all of the evidence and the inferences drawn therefrom in  
the light most favorable to the party opposing the motion.'" Morinoue v. Roy, 86 Hawai'i 76, 80, 947 P.2d 944, 948 (1997)  
(quoting Maguire v. Hilton Hotels Corp., 79 Hawai'i 110, 112, 899  
P.2d 393, 395 (1995)) (brackets omitted).

FACTS (EVIDENCE VIEWED MOST FAVORABLY TO O'CONNOR)

The following are the facts stated by O'Connor in his  
deposition and/or his handwritten exhibits.<sup>1</sup>

On July 11, 1994, O'Connor slipped on some stairs. The  
next day, O'Connor was seen in the emergency room of Queen's  
Medical Center (QMC) where he complained of pain in his right arm  
below the elbow. Dr. Wong examined O'Connor and sent him for  
x-rays. Dr. Meagher examined the x-rays and reported a normal  
forearm with normal alignment. Dr. Wong diagnosed a mild sprain,  
prescribed medication, and advised O'Connor that he would most  
likely have symptoms for thirty days. He also advised O'Connor  
to seek follow-up care the following morning with his primary  
care physician. Dr. Wong had no further contact with O'Connor.

---

<sup>1</sup> A summary judgment having been entered against Plaintiff-Appellant  
Steven S. O'Connor, the findings of fact entered in this case are the facts  
viewed most favorably to him.

O'Connor had experienced a sprain-type injury prior to the injury in question and it had subsided within a week. Dr. Wong had advised him that his symptoms should resolve within thirty days. Instead, his pain was getting worse. He had a big lump at the point of the injury. He was scared to return to QMC because he "felt" Dr. Wong made a mistake. He initially saw Dr. John Martell (Dr. Martell) at the "free medical clinic" on August 22, 1994. On August 30, 1994, O'Connor told Dr. Martell that he "felt" he had been mis-diagnosed by Dr. Wong and was thinking he had a break in his arm. The pain "was bad." He was not able to move his elbow. Dr. Martell advised O'Connor to return to QMC to have another x-ray of his right arm. O'Connor told Dr. Martell that he would not return to QMC because he "was paranoid of [Dr.] Wong." Dr. Martell referred O'Connor to another facility for an x-ray. Treatment was refused because O'Connor could not pay and did not have insurance. Dr. Martell continued to treat O'Connor for arm complaints, as well as general health problems. O'Connor's arm symptoms did not cease, and Dr. Martell again advised O'Connor to return to QMC for another x-ray.

Finally, on November 15, 1994, O'Connor was seen at the Queen Emma Clinic for an x-ray. After looking at the x-ray films taken the first time in July 1994, the doctor advised O'Connor

that O'Connor had a broken arm. A new set of x-rays confirmed the fact of the break. According to O'Connor, he some time later was advised "by other doctors" "that the bone has since surely re-connected, but incorrectly" and "most likely I'll need to have the bone rebroken."

On April 12, 1995, "as per advise [sic] from [his] Attorney as well as a few doctors [he had] seen, and others[,] " O'Connor filed a handwritten claim with the Medical Claims Conciliation Panel of the Department of Commerce & Consumer Affairs, State of Hawai'i (MCCP). In this claim, O'Connor named QMC as a target respondent. He did not identify any other target respondents, other than referring generally to "doctors" at QMC. He stated his "full intent to bring the most severe neglect & malpractice charges against the doctor in [q]uestion upon my original visit to Q.E. as well as charges against the medical institution who hired & employs him."

On April 13, 1995, the MCCP sent a letter to O'Connor advising him the claim was incomplete and that he needed to specifically identify each respondent by name and failure to do so may not toll the statute of limitations. The MCCP also provided O'Connor with a brochure outlining the steps necessary to make a claim. Additionally, they advised him to obtain a copy of his medical records to assist in identifying potential respondents.

On May 2, 1995, O'Connor responded to the letter from the MCCP by restating his claim but failing again to identify with specificity the names of the respondents. He further requested that the MCCP obtain his records and search the records for the identity of the physicians O'Connor wished to target for medical malpractice.

On May 5, 1995, the MCCP sent another letter to O'Connor telling him they were a neutral board, they did not participate in discovery requests, and the burden of obtaining medical records was his. Additionally, they told him the claim was accepted on behalf of QMC and O'Connor would need to notify the MCCP of the identity of the other respondents as soon as he identified them.

On October 21, 1996, O'Connor's attorney, William H. Elkner, filed with the MCCP O'Connor's amended claim identifying Defendants (Dr. Wong, EGI, Dr. Meagher, and RAI).

On December 17, 1996, in the instant case, O'Connor filed a complaint for damages alleging two counts: (1) medical malpractice against Dr. Wong and Dr. Meagher, and (2) respondeat superior against QMC, Sutter Health Pacific (SHP), RAI, and EGI.

By stipulated order filed on July 7, 1997, O'Connor's complaint against SHP was dismissed. By stipulated order filed on December 27, 1999, O'Connor's complaint against QMC was dismissed.

On December 1, 2000, Dr. Wong and EGI filed a joint motion for summary judgment and, on December 26, 2000, Dr. Meagher and RAI filed a substantive joinder. On January 26, 2001, the circuit court entered an order granting the motion for summary judgment in favor of Defendants. On April 19, 2001, the circuit court entered its findings of fact, conclusions of law and order granting the motion. The Judgment, entered on August 2, 2001, awarded costs against O'Connor in favor of EGI and Dr. Wong.

#### DISCUSSION

1.

O'Connor contends that on April 12, 1995, he complied with the requirements of HRS § 671-12 by filing a claim with the MCCP. Regarding QMC, we agree. Regarding Defendants, we disagree because as to them, O'Connor did not comply with the HRS § 671-12 filing requirements until October 21, 1996. Therefore, as to Defendants, no HRS § 671-18 tolling of the HRS § 657-7.3 statute of limitations occurred until October 21, 1996, and, by then, it was too late.

2.

HRCP Rule 15 governs "Amended and supplemental pleadings." O'Connor cites HRCP Rule 15(c) entitled, "*Relation back of amendments*," in support of his argument that he filed his

claim with the MCCP on April 12, 1995, and that his amended claim identifying Dr. Wong and Dr. Meagher, filed October 21, 1996, relates back, thus tolling the statute.

O'Connor misunderstands the requirements of HRS § 671-16. We agree that O'Connor's April 12, 1995 claim to the MCCP was timely regarding QMC. We agree with the circuit court's conclusion that O'Connor's claim to the MCCP failed to name and, therefore, did not apply to, Defendants.

In its April 13, 1995, and May 5, 1995 letters, the MCCP: (1) correctly advised O'Connor that (a) the claim was accepted on behalf of Queen's Medical Center and O'Connor would need to notify the MCCP of the identity of the other respondents as soon as he identified them and (b) the claim was incomplete and that he needed to specifically identify each respondent by name and failure to do so may not toll the statute of limitations; and (2) instructed O'Connor to obtain a copy of his medical records to assist in identifying potential respondents. O'Connor did not take any steps to protect himself until seventeen months later when, on October 21, 1996, he filed an amended claim.

3.

O'Connor argues that the HRS § 657-7.3 statute of limitations period did not begin to run until November 15, 1994,

because he neither discovered, nor through the use of reasonable diligence should have discovered, the injury until November 15, 1994, when he was advised by a physician at Queen Emma Clinic that the x-rays taken on July 12, 1994, showed a fracture of his right arm. O'Connor states that he is a lay person without medical knowledge and training, he relied upon the advice of his physicians that he had a sprain, and he did not know he had been misdiagnosed until November 15, 1994. This allegation and argument is contradicted by the facts noted above.

#### CONCLUSION

On the day when O'Connor knew or should have known of his claims against Defendants, the two-year limitation period specified in HRS § 657-7.3 began to run. O'Connor knew or should have known of his claims against Defendants prior to October 21, 1994. Therefore, when, on October 21, 1996, O'Connor filed with the MCCP his claims against Defendants, the two-year statutory limitation period had expired.

Accordingly, we affirm the August 2, 2001 Judgment in favor of Defendants and against O'Connor.

DATED: Honolulu, Hawai'i, January 28, 2003.

On the briefs:

David C. Schutter and  
Christopher A. Dias  
(Schutter, Dias, Smith &  
Wong, of counsel)  
for Plaintiff-Appellant. Chief Judge

John S. Nishimoto and  
Stephen G. Dyer  
(Ayabe, Chong, Nishimoto,  
Sia & Nakamura)  
for Defendant-Appellee Associate Judge  
Norbert Wong, M.D. Associate Judge

William S. Hunt and  
Peter Knapman  
(Alston Hunt Floyd & Ing)  
for Defendants-Appellees  
Michael Meagher, M.D., and  
Radiology Associates, Inc.

Howard F. McPheeters,  
Jan M. Tamura, and  
David Y. Suzuki  
(Burke, Sakai, McPheeters,  
Bordner, Iwanaga & Estes,  
of counsel)  
for Defendant-Appellee  
The Emergency Group, Inc.