

NOT FOR PUBLICATION

NO. 24978

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

KOM THONGSONLONE, Plaintiff-Appellant, v.
STATE OF HAWAI'I, Defendant-Appellee, and
JOHN and/or JANE DOES 1-10, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(Civ. No. 01-1-2906)

SUMMARY DISPOSITION ORDER

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

Plaintiff-Appellant Kom Thongsonlone (Thongsonlone) appeals from the Judgment in favor of Defendant-Appellee State of Hawai'i (the State) entered by the Circuit Court of the First Circuit (the circuit court)¹ on February 7, 2002. The Judgment followed the circuit court's entry on December 17, 2001 of an "Order Granting [the State's] Motion to Dismiss [Thongsolone's] Complaint for Damages" on grounds that Thongsolone's claim was barred by the statute of limitations. We affirm.

Hawaii Revised Statutes (HRS) § 662-4 (1993) specifically provides as follows:

Statute of limitations. A tort claim against the State shall be forever barred unless action is begun within two years after the claim accrues, except in the case of a medical tort claim when the limitation of action provisions set forth in section 657-7.3 shall apply.

The record reveals that Thongsolone's Complaint, which was filed on October 3, 2001, sought damages for injuries that

¹ Judge Eden Elizabeth Hifo entered the Judgment and the order that are being challenged on appeal.

Thongsonlone suffered on August 10, 1999, when he slipped on a loose drain cover while washing dishes in the kitchen at the Halawa Correctional Facility, where he was an inmate. The Complaint was thus clearly filed after the applicable two-year statute of limitations.

Thongsolone nevertheless urges us to reverse the circuit court's order dismissing his action, on grounds that the doctrine of equitable tolling, adopted by this court in Wright v. State Farm Mut. Auto. Ins. Co., 86 Hawai'i 357, 949 P.2d 197 (App. 1997), was applicable to preclude the dismissal. We decline to do so.

Wright involved the application of the statute of limitations set forth in HRS § 294-36 (1985)² for a lawsuit brought on a contract providing for no-fault insurance benefits. Wright never addressed whether the equitable tolling doctrine could be invoked to toll the statute of limitations for negligence actions against the State, and the Hawai'i Supreme Court has declined in the past to apply statutory tolling provisions to HRS § 662-4. See, e.g., Whittington v. State, 72 Haw. 77, 806 P.2d 957 (1991) (holding that HRS § 657-13, which provides for tolling, by reason of a plaintiff's minority, of the statute of limitations for tort actions described in part I of chapter 657, does not apply to actions against the State brought pursuant to HRS chapter 662).

² Hawaii Revised Statutes (HRS) § 294-36 (1985) was repealed in 1987 and recodified as HRS § 431:10C-315 (1993).

NOT FOR PUBLICATION

Moreover, even if the equitable tolling doctrine were applicable to negligence actions against the State, the undisputed facts in this case do not support the tolling of the statute of limitations as to Thongsonlone. The record indicates that although Thongsonlone was injured on August 10, 1999, he waited until May 18, 2001, less than three months prior to the expiration of the statute of limitations, to retain an attorney. Thongsonlone contends that because he did not know the exact date of his injury, it was appropriate that the statute of limitations be tolled while his attorney awaited the State of Hawai'i, Department of Public Safety's response to a June 12, 2001 request for Thongsonlone's medical records. Equitable relief from the time limitations imposed by HRS § 662-4, however, is not available where a plaintiff fails to seek the timely advice of an attorney regarding the law applicable to the circumstances surrounding his or her injury. Hays v. City & County of Honolulu, 81 Hawai'i 391, 398, 917 P.2d 718, 725 (1996). Equitable relief from the statute of limitations is also not available where a plaintiff fails to exercise due diligence in pursuing a claim. Id. In this case, the nature of Thongsonlone's accident was such that Thongsonlone knew or should have known that a negligence claim existed as soon as the accident occurred. It is unclear to us why it was necessary for Thongsonlone's attorney to determine the exact date of Thongsonlone's injury before filing a complaint. A timely

NOT FOR PUBLICATION

complaint based on Thongsonlone's best information and beliefs about the incident could have been filed and thereafter amended upon discovery of more accurate facts.

Based on our review of the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised on appeal, as well as the case and statutory law relevant to these issues, we conclude that the circuit court did not err in dismissing Thongsonlone's complaint. Accordingly,

IT IS HEREBY ORDERED that the Judgment entered by the circuit court on February 7, 2002 and the "Order Granting [the State's] Motion to Dismiss [Thongsonlone's] Complaint for Damages" entered on December 17, 2001 are hereby affirmed.

DATED: Honolulu, Hawai'i, August 22, 2003.

On the briefs:

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for plaintiff-appellant.

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