

IN THE
Court of Appeal of the State of California
IN AND FOR THE
Fifth Appellate District

JONATHAN MORGAN,
Plaintiff and Appellant,

v.

SAN JOAQUIN COMMUNITY HOSPITAL,
Defendant and Respondent.

F045075

(Super. Ct. No. 248385-SPC)

ORDER MODIFYING OPINION
AND DENYING PETITION
FOR REHEARING

THE COURT:

It is ordered that the opinion filed herein on December 10, 2004, be modified in the following particulars:

The three full paragraphs on page 6 of the slip opinion are modified to state as follows:

“Second, the SAC alleged that defendant withheld medical records showing the results of an HIV test until July 28, 1999, and that this constituted intentional concealment of the injury within the meaning of section 340.5, tolling the beginning of the limitations period until that date. The allegation does not support the contention that defendant concealed the injury from plaintiff. Plaintiff’s claim was that defendant harmed him by giving him anti-HIV drugs whose side effects made him ill, not that it caused him to become HIV-positive.

“Third, the SAC alleged that on July 9, 2002, plaintiff served a notice of intent to sue on defendant pursuant to section 364. Section 364 requires a medical malpractice plaintiff to file a notice of intention to sue 90 days before filing suit. (§ 364, subd. (a).) If the plaintiff serves the

notice during the final 90 days of the limitations period, the statute of limitations is tolled for 90 days beginning when the notice is served. The result is that the limitations period is extended 90 days beyond the date on which it would otherwise have expired. (§ 364, subd. (d); *Woods v. Young* (1991) 53 Cal.3d 315, 325.) Here, however, plaintiff's allegation was that he served the notice of intent to sue *after* the end of the original limitations period. Even if the true date of injury was June 30, 1999, and the limitations period expired on June 30, 2002, the notice of intention to sue came afterward, on July 9, and therefore could not toll the limitations period.

“Fourth, plaintiff alleged in the SAC that equitable tolling was appropriate because the prison interfered with the filing of his notice of intent to sue, which he had deposited in the prison mail drop on May 31, 2002. If we were to take May 31, 2002, as the date of service of the notice of intent to sue and June 30, 2002, as the end of the limitations period, then the notice of intent would have been timely served and the limitations period would have been extended another 90 days, to September 28, 2002. But the complaint, filed on October 11, 2002, would still have been too late.”

This modification does not effect a change in the judgment.

Plaintiff's request for judicial notice is granted. His petition for rehearing is denied.

Wiseman, J.

WE CONCUR.

Vartabedian, Acting P.J.

Harris, J.