and are expected to keep dropping.

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McGovern v. BHC Fremont Hospital and MICRA's CCP 364 - lessons learned

By Benjamin T. Ikuta

Earlier this year, on Jan. 4, 2023, the First District, Division 1, of the California Court of Appeal published *McGovern v. BHC Fremont Hospital, Inc.* (Cal. Ct. App., Dec. 21, 2022, No. A161051) 2022 WL 18107709.

The holding was relatively simple. In medical malpractice actions, an intent-to-sue letter must be sufficiently detailed in order to qualify as a letter under Code of Civil Procedure section 364. However, *McGovern* shows that there are several important lessons for the plaintiff-side medical malpractice attorney.

Code of Civil Procedure section 364 is part of the Medical Injury Compensation Reform Act of 1975. Like the other MICRA statutes, section 364 was not only misguided, it was very poorly written and confusing. Pursuant to section 364(a), "No action based upon the health care provider's professional negligence may be commenced unless the defendant has been given at least 90 days' prior notice of the intention to commence the action." Under section (d) of the statute: "If the notice is served within 90 days of the expiration of the applicable statute of limitations, the time for the commencement of the action shall be extended 90 days from the service of the notice."

Section 364(b) notes that no particular form of notice is required, but that the letter "shall notify the defendant of the legal basis of the claim and the type of loss sustained, including with specificity the nature of the injuries suffered."

In short, section 364 requires a litigant pursuing a medical malpractice action to provide at least 90 days of notice to a healthcare defendant before initiating a lawsuit. If the letter is sent within the last 90 days of the one-year statute of limitations under Code of Civil Procedure section 340.5, a plaintiff has an extra 90 days to file the lawsuit. However, if the letter is sent prior to the last 90 days of the statute, there is no extension of 90 days. Lastly, when one letter is sent prior to the last 90 days of the statute, a second letter sent within the last 90 days will have no impact and thus provide no extension.

In *McGovern*, a prominent Northern California law firm represented the plaintiff, who was admitted to a psychiatric hospital under a section 5150 hold given that she was gravely disabled and also a danger to others. While there, she was assaulted by another patient and sustained a skull laceration, broken clavicle, and two broken ribs. Four months after the incident, her law firm sent a litigation hold letter that demanded that the hospital preserve all videotapes, photographs, incident reports, and witness statements in relation to the incident. The letter broadly described the incident and the plaintiff's injuries and also requested that the hospital's insurance carrier contact the attorney. There was no reference to section 364 and five of the six paragraphs referred to the preservation of evidence.

Shortly before the one-year expiration date, the plaintiff's law firm sent another letter with a specific reference to section 364. The letter contained far more detail regarding the plaintiff's injuries. The plaintiff filed suit about fourteen months after the incident.

The trial court granted the hospital's motion for summary judgment, finding that the negligence-based claims were untimely. In doing so, the trial court found that the earlier litigation hold letter qualified as a section 364 notice. As such, the second letter did not provide any extension on the statute of limitations.

The Court of Appeal held that this was error. The first letter only had a broad, generalized

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description of "serious... injuries to her head, and back, including a broken clavicle." There was no description of treatment, sequelae, or residual area. The letter did not monetize the plaintiff's losses in any way and said nothing about the plaintiff's economic or non-economic damages. Most importantly, when read as a whole, the letter was clearly meant as a litigation hold letter and not an intent-to-sue letter. Accordingly, only the second letter qualified as a section 364 letter and the case was thus timely.

There are some important lessons for the plaintiff-side medical malpractice attorney from *McGovern*. As the *McGovern* Court of Appeal correctly noted, "[g]iven the wording of the statute, it is likely impossible to fashion a bright line rule in these cases." To avoid any ambiguity, when sending out any letters prior to section 364 letter, such as a litigation hold letter or a demand for records under Evidence Code section 1158, clearly state somewhere on the letter: "This is **not** a section 364 letter."

Even more importantly, this case shows the dangers of relying on section 364 letters. The plaintiff's attorney should seriously consider not doing section 364 letters at all unless the attorney needs the extra time to evaluate the case. Failure to comply does not act as a bar against the plaintiff's case. (Code Civ. Proc., § 365.)

Instead, companion section 365 states that "failure to comply with such provisions by any attorney at law shall be grounds for professional discipline and the State Bar of California shall investigate and take appropriate action in any such cases brought to its attention."

Advising not to follow section 364 is controversial given the potential discipline by the state bar. However, in the 48-years since section 364 was enacted, not a single attorney has ever been disciplined or cited for failing to follow section 364. Even more importantly, relying on section 364 is simply not in the best interests of the client and can only serve to harm the plaintiff's case.

In *Kumari v. The Hospital Committee for the Livermore-Pleasanton Areas* (2017) 13 Cal.App.5th 306, 308, a patient fell and broke her right shoulder when she was left unattended after undergoing a c-section and with considerably low hemoglobin levels. A few months after the incident, the patient herself sent a letter accusing the hospital of malpractice and requesting compensation for her injuries. The letter did not reference section 364 and the patient was unaware of the existence of section 364.

The plaintiff thereafter hired an attorney, who was unaware of the prior letter. The attorney sent a section 364 letter and relied on the extra 90 days of the statute. The hospital moved for summary judgment, arguing that the plaintiff's own letter constituted a section 364 letter and, thus, her attorney's letter was ineffective. Both the trial court and the Court of Appeal agreed, finding that the patient's letter qualified as a section 364 letter and her case was time-barred.

In *Bennett v. Shahhal* (1999) 75 Cal.App.4th 384, 387, an attorney sent a section 364 letter two months after a botched brain surgery, intending to later file the lawsuit. Several months later, the attorney informed the patient that he could not pursue the lawsuit due to financial and medical problems.

After undergoing another brain surgery to fix residual issues from the malpractice, the patient hired a second lawyer, who agreed to take the patient's case. The lawyer, unaware that the prior lawyer had sent a letter, sent another letter within the last 90 days of the statute. The Court of Appeal affirmed the trial court's granting of the doctor's motion for summary judgment. The result was a brain-damaged plaintiff whose case was time-barred as a matter of law.

Given that no specific form of notice is required, if the plaintiff sent even an early email or message portal to the defendant healthcare provider alleging negligence and demanding compensation, there is a possibility that a subsequent 364 letter will not serve to extend the statute.

And even though the plaintiff's attorney in *McGovern* ultimately prevailed on reversing summary judgment, what exactly did the plaintiff and her attorneys gain? The plaintiff's case in *McGovern* was delayed for years while her case went through the lengthy and expensive appellate process.

Some medical malpractice attorneys from the plaintiff bar were unhappy with the publication of the *McGovern* case. Many attorneys always follow section 364 in fear of the potential state bar repercussions. They noted that even though the appellate court found in the plaintiff's favor, the defense may use *McGovern* to argue that any vagueness or ambiguity in a section 364 letter without a clear and thorough description of the plaintiff's injuries should not qualify at all to extend the statute. Frankly, these concerns that a timely section 364 letter may not be deemed to be valid also warrants not relying on a section 364 letter. Of course, any typographical error on the address of a letter or a letter sent to an incorrect address may also completely bar a plaintiff's claim.

As further support for simply not complying with section 364, it is critical to note that on its face, section 364 is nonsensical and internally inconsistent. Section 364 is so poorly worded that the California Supreme Court in *Woods v. Young* (1991) 53 Cal.3d 315, 321 simply refused to apply the language of the statute. While the statute states that the plaintiff has a 90-day extension from the date of the letter, the California Supreme Court held that the plaintiff has 90 days of *tolling* as long as the letter is sent within the last 90 days.

As recognized in *Woods*, a literal following of section 364 and its 90-day extension from the date of the letter would "lead to incongruous results." It would be impossible for a litigant to both provide at *least* 90 days of notice while also timely filing the lawsuit if it is within the last 90 days of the statute of limitations period. The lawsuit would have to be filed a day late. It is not surprising that the Honorable Stanley Mosk explained in his concurrence in *Woods* that section 364 is a "contradictory and ineffectual statutory scheme." Given that section 364 on its face punishes a diligent plaintiff while rewarding a dilatory one, Justice Mosk stated: "It is difficult to believe that the Legislature deliberately intended such an inexplicable result."

Avoid the headache and do not jeopardize the client's case. And, don't follow section 364.

Benjamin T. Ikuta *is an attorney at Ikuta Hemesath LLP, where he concentrates his practice almost entirely on medical malpractice on the plaintiff side. He successfully sought publication in McGovern v. BHC Fremont Hospital.*