

STATE OF MICHIGAN
COURT OF APPEALS

SUSAN MARIE BURGARD and ROBERT
BURGARD,

UNPUBLISHED
March 17, 1998

Plaintiffs-Appellants,

v

No. 199655
Oakland Circuit Court
LC No. 96-518728-NH

DR. YASH PAL LAKRA and MERCY HEALTH
SERVICES, a/k/a ST. JOSEPH MERCY
HOSPITAL,

Defendants-Appellees.

Before: Holbrook, Jr., P.J., and White and Fitzgerald*, JJ.

MEMORANDUM.

Plaintiffs appeal as of right from a circuit court order dismissing without prejudice their complaint for failure to comply with § 2912b(1) of the Revised Judicature Act, MCL 600.2912b(1); MSA 27A.2912(2)(1). We affirm.

Plaintiffs raise a number of constitutional and nonconstitutional challenges, most of which were directly addressed by this Court in *Neal v Oakland Hospital Corp*, ___ Mich App ___, ___ NW2d ___, issued 12/12/97 (Docket No. 196964).¹ As in *Neal*, we choose to first address plaintiffs' nonconstitutional challenge. *Golden v Baghdoian*, 222 Mich App 220, 222, n 2; 564 NW2d 505 (1997). Plaintiffs' argue that the trial court should have stayed their suit, not dismissed it with prejudice. In circumstances directly analogous to the case at hand, this Court in *Neal* specifically addressed the points raised by plaintiffs, ultimately holding "that dismissal without prejudice is the appropriate remedy for plaintiff's noncompliance with § 2912b(1)." *Id.* at 4.

We now address plaintiffs' constitutional challenges to § 2912b(1). First, plaintiffs argue that by investing potential defendants with too much power over the filing of a complaint, § 2912b(1) unconstitutionally delegates legislative or judicial authority to private parties. In *Neal*, this Court specifically rejected such an argument with respect to legislative authority, reasoning that "[a]lthough the

* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

time at which the complaint may be filed will depend upon the potential defendant's actions or inactions, this does not constitute a delegation of legislative power." *Id.* at 6.² We believe this reasoning is equally applicable to the question of judicial authority. Such temporal mechanisms do not invest potential defendants with the "judicial authority to make final and binding decisions." *Knoke v Michlin Chemical Corp*, 188 Mich App 456, 459; 470 NW2d 420 (1991). Plaintiffs' argument that § 2912b(1) directly conflicts with MCR 2.101(B) was also rejected by the *Neal* Court. *Neal, supra* at 7. Finally, plaintiffs argue that § 2912b(1) violates the constitutional guarantees of equal protection and due process. In *Neal, supra*, we concluded that when addressing an equal protection challenge to § 2912b(1), the appropriate standard of review is the "rational basis test." *Id.* at 5. "Under the rational basis test, legislation is presumed to be constitutional and the party challenging the statute has the burden of proving that the legislation is arbitrary and thus irrational." *Id.* As for plaintiffs' due process challenge, "the pertinent issue is whether the statute bears a reasonable relation to a permissible legislative objective." *Id.* We conclude that plaintiffs have failed to establish either that § 2912b(1) is not rationally related to legislation's goal of "reducing the cost of medical malpractice litigation," *id.*, or that the section is not reasonably related to achieving this legitimate legislative objective.

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ Helene N. White

/s/ John W. Fitzgerald

¹ We note that plaintiffs' brief on appeal was filed before *Neal* was issued. Accordingly, plaintiffs would not have known about our resolution of that case before raising their arguments on appeal.

² Given our conclusion that § 2912b(1) does not constitute an unconstitutional delegation of legislative power, we choose not to address plaintiff's argument that § 2912b(1) does not include the appropriate standards to guide the proper exercise of such power. *Neal, supra* at 6, n 16.