

STATE OF MICHIGAN
COURT OF APPEALS

CHARLENE GRIFFITH and DONALD GRIFFITH,

UNPUBLISHED
May 1, 1998

Plaintiffs-Appellants/
Cross-Appellees,

v

No. 197970
Washtenaw Circuit Court
LC No. 96-003352 NH

JAMES O'DAY, D.O. and OAKWOOD UNITED
HOSPITALS, INC., d/b/a BEYER HOSPITAL,

Defendants-Appellees,

and

M.D. APPLEFORD, M.D.,

Defendant-Appellee/
Cross-Appellant.

Before: Bandstra, P.J., and MacKenzie and N.O. Holowka*, JJ.

MEMORANDUM.

Plaintiffs appeal by right summary disposition, without prejudice, in this medical malpractice action based on commencement of suit prior to expiration of the statutory notice period prescribed by MCL 600.2912b(1); MSA 27A.2912(2)(1). We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E). The motion to expedite, previously held in abeyance, is granted.

Dismissal without prejudice, whatever the motives underlying plaintiff's failure to comply with the statutory pre-suit notice requirement, is the appropriate action by the circuit court. *Neal v Oakwood Hospital Corp*, 226 Mich App 701, 715; ___ NW2d ___ (1997); *Morrison v Dickinson*, 217 Mich App 308, 319; 551 NW2d 449 (1996). Additionally, plaintiff's equal protection, US Const, Am XIV, § 1, Const 1963, art 1, § 2, due process, US Const, Am XIV, § 1, Const 1963, art

* Circuit judge, sitting on the Court of Appeals by assignment.

1, § 17, and separation of powers, Const 1963, art 3, § 2, challenges to the constitutionality of the statute are without merit for the reasons adduced in *Neal, supra* at 716-723. If, as plaintiffs contend, substantive legislative changes affecting medical malpractice actions cannot properly be applied retroactively to this case, in which rights allegedly vested prior to the effective date of such legislation, such issues are properly raised if and when application of such substantive statutes arises in the context of a medical malpractice complaint filed in conformity with the requirements of MCL 600.2912b; MSA 27A.2912(2).

This conclusion renders moot, for present purposes, cross-appellant's claim that dismissal as to him was proper because the summons expired before service of process occurred.

We affirm.

/s/ Richard A. Bandstra
/s/ Barbara B. MacKenzie
/s/ Nick O. Holowka