STATE OF MICHIGAN

COURT OF APPEALS

JOEL F. LABEAU,

Plaintiff-Appellant,

v

JEANNE K. HICKS, M.D., ADVANCED RADIOLOGY CONSULTANTS, P.C., MARK W. SCHARR, M.D., FLINT EMERGENCY PHYSICIANS, P.C., M. FLORES, M.D., MCLAREN REGIONAL MEDICAL CENTER, d/b/a MCLAREN OCCUPATIONAL AND URGENT CARE CENTER, G. L. LARSON, D.O., R. D. HELFERTY, M.D., G. H. ZIELINSKI, M.D., and BARINA ZADO, M.D.,

Defendants-Appellees.

UNPUBLISHED
August 8, 2000

No. 207264
Genesee Circuit Court
LC Nos. 95-039920-NH
97-054549-NH

Before: Gribbs, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

In this medical malpractice action, plaintiff appeals as of right the trial court's two separate grants of summary disposition that dismissed without prejudice all the claims in lower court nos. 95-039920-NH and 97-054549-NH.[1] We affirm.

Plaintiff argues on appeal that the trial court should have granted his motion for relief from judgment in the earlier case because he was not aware that the hearing on the motion for summary disposition was going ahead as scheduled and did not receive proper notice of entry of the judgment granting summary disposition in defendants' favor. Moreover, plaintiff contends that the failure to apprise him of the December 12, 1996 entry of the judgment of summary disposition resulted in his

[1] The trial court dismissed defendant Barina Zado, who was a defendant in lower court no. 95-039920-NH, with prejudice pursuant to the parties' stipulation.

inability to re-file his negligence claims against defendants Hicks, Advanced Radiology, Schaar, and Flint Emergency because the statute of limitations expired two days after the trial court entered the judgment of summary disposition. Yet, plaintiff did not receive notice that the trial court had entered judgment until December 17, 1996, approximately five days after the judgment was entered.[2]

We review the trial court's refusal to grant plaintiff's motion for relief from judgment for an abuse of discretion. *Redding v Redding*, 214 Mich App 639, 643; 543 NW2d 75 (1995). An abuse of discretion will be found only when the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Dacon v Transue*, 441 Mich 315, 329; 490 NW2d 369 (1992).

MCR 2.612(C) provides, as pertinent:

> (1) On motion and on just terms, the court may relieve a party . . . from a final judgment, order, or proceeding on the following grounds:
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> (a) Mistake, inadvertence, surprise, or excusable neglect.
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> * * *
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> (c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.
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> (d) The judgment is void.
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> * * *
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> (f) Any other reason justifying relief from the operation of the judgment.
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> (2) The motion must be made within a reasonable time, and, for the grounds stated in subrules (C)(1)(a), (b), and (c), within one year after the judgment, order, or proceeding was entered or taken. A motion under this subrule does not affect the finality of a judgment or suspend its operation.

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[2] A plaintiff must commence a malpractice action within two years of when the claim accrued. MCL 600.5805(1), (4); MSA 27A.5805(1), (4), *Solowy v Oakwood Hospital Corp*, 454 Mich 214, 219; 561 NW2d 843 (1997). It is plaintiff's theory that he filed lower court no. 95-039920-NH two days prior to the expiration of the statute of limitations applicable to his malpractice claims against defendants and that he tolled the statute of limitations by filing this lawsuit. Thus, plaintiff believes he had two days from December 12, 1996, when the trial court entered the judgment for summary disposition, in which to re-file his claims against defendants Hicks, Advanced Radiology, Schaar, and Flint Emergency.

Motions for relief from judgment must be brought within a reasonable time, *Detroit Free Press, Inc v Dep't of State Police*, 233 Mich App 554, 556; 593 NW2d 200 (1999), and, if the motion for relief is brought under subrules (C)(1)(a), (b), or (c), within one year after the judgment, MCR 2.612(C)(2). In his brief, plaintiff seems to imply that his motion for relief from judgment was timely *per se* because he filed it within one year of the entry of the allegedly erroneous judgment. However, the language of MCR 2.612(C)(2) states only that the reasonable time to file a motion for relief from judgment pursuant to subrules (1)(a), (b), or (c) must not exceed one year, not that one year is timely. See 3 Dean & Longhofer, Michigan Court Rules Practice, p 474. Here, in denying plaintiff's motion and citing plaintiff's inattention to the case, the trial court implicitly determined that the seven month delay in filing the motion for relief from judgment and the approximately two additional months before the motion was heard constituted an unreasonable amount of time. Under these circumstances, we find no abuse of discretion.

Nor is plaintiff's argument that he was entitled to relief from judgment because the trial court failed to comply with MCR 2.602(B) when entering the judgment of summary disposition compelling. There is little argument that defendants and the trial court did not comply exactly with MCR 2.602(B), as they admit such.[3] However, plaintiff's argument that he was prejudiced by the failure to comply with MCR 2.602(B)(1) is unconvincing. A court speaks through its written orders. *People v Vincent*, 455 Mich 110, 123; 565 NW2d 629 (1997). MCR 2.602(B) sets forth various procedures to ensure that a court's written orders comport with its actual decisions. See 3 Dean & Longhofer, Michigan Court Rules Practice, pp 299-302. Significantly, plaintiff does not argue that the judgment of summary disposition, as written, varies from the trial court's decision as reflected in the record of the December 9, 1996, motion hearing. Indeed, the judgment grants the exact relief contemplated at that hearing. Moreover, the fact that the trial court did not comply exactly with MCR 2.602(B)(1) when entering the judgment does not, contrary to plaintiff's argument, automatically make the judgment void:

> A judgment is "void" only if it is beyond the power of the court to render. In general, that will be the case only if the court lacked jurisdiction over the person or over the subject matter of the action.
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> Care should also be taken not to confuse "void" judgments with those that are merely "voidable." Certain procedural irregularities, not amounting to lack of jurisdiction over the person or subject matter, are sometimes characterized as making a judgment "voidable." This means that such judgments may be set aside upon a timely application in the same proceedings as a matter of judicial discretion. [3 Dean & Longhofer, Michigan Court Rules Practice, p 479 (footnotes omitted).]

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[3] Defendants submitted the judgment to the trial court after it granted its motion for summary disposition at the December 9, 1996, hearing. The trial court signed the judgment some three days after the hearing, an act that does not comport with a literal reading of MCR 2.602(B)(1), which allows the trial court to sign a judgment or order "at the time it grants the relief provided by the judgment or order."

Plaintiff has not attempted to show that the trial court's failure to comply with MCR 2.602(B) resulted in the judgment being void, rather than merely voidable. Instead, plaintiff argues that the failure to follow MCR 2.602(B) deprived him of notice that the trial court had decided to grant defendants' motion. However, plaintiff had notice that the hearing was scheduled for December 9, 1996. As he admitted, he mistakenly *assumed* that the Hicks defendants had agreed to further adjournment of the hearing on their summary disposition motion. Plaintiff cannot complain that the trial court's consideration of defendants' motion for summary disposition unfairly surprised him. Additionally, consonant with MCR 2.602(D)(1), it appears that plaintiff did receive proper service of the judgment of summary disposition within seven days of its entry. Plaintiff's own mistake of not appearing at the hearing is the initial reason why he did not *immediately* discover the trial court's decision and take steps to re-file his claims against defendants within the two days allegedly left under the statute of limitations. Plaintiff cannot argue his own error as a basis for appeal.[4] See *Bloemsma v Auto Club Ins Ass'n (After Remand)*, 190 Mich App 686, 691; 476 NW2d 487 (1991).

To the extent that plaintiff blames the trial court and defendants Hicks, Advanced Radiology, Schaar, and Flint Emergency for the expiration of the two-year statute of limitations, his argument is simply misplaced. Plaintiff incorrectly assumes that his September 22, 1995, filing of lower court no. 95-039920-NH tolled the two-year statute of limitations applicable to his medical malpractice claims. "Generally, a civil action is commenced and the period of limitation is tolled when a complaint is filed." *Scarsella v Pollak*, 461 Mich 547, 549; 607 NW2d 711 (2000); see MCR 2.101(B); MCL 600.5856; MSA 27A.5856. However, plaintiff's failure to file an affidavit of merit along with his complaint, pursuant to MCL 600.2912d(1); MSA 27A.2912(4)(1), not only was insufficient to commence his lawsuit against defendants, it did not toll the limitations period. *Scarsella*, *supra* at 549-550. Moreover, his eventual filing of an affidavit of merit more than one year after commencing lower court no. 95-039920-NH does not relate back to the filing of the original complaint. *Id.* at 550. Therefore, the limitations period based on plaintiff's emergency room treatment expired on or about September 24, 1995, long before the trial court's December 12, 1996, judgment of summary disposition in favor of defendants Hicks, Advanced Radiology, Schaar, and Flint Emergency. Thus, we affirm the trial court's refusal to grant plaintiff's motion for relief from judgment.

Further, as stated in his statement of questions involved, plaintiff questions whether "dismissal of a medical malpractice suit [is] an inappropriate sanction for plaintiff's failure to comply with the affidavit, medical release and notice provisions of MCL 600.2912b; MSA 27A.2912(2) where suit was started to avoid potential statute of limitations issues, but was not served before the notice period expired." This Court has already determined that dismissal is an appropriate sanction. In *Neal v Oakwood Hospital Corp*, 226 Mich App 701, 715; 575 NW2d 68 (1997), this Court held that "dismissal without prejudice was the appropriate remedy for plaintiff's noncompliance with § 2912b(1) [the notice provision]." Further, the *Neal* Court explained that "allowing plaintiff to disregard § 2912b(1) and prematurely commence his action simply in order to avoid the 1995 legislation and obtain the alleged

[4] We can, however, imagine a scenario where failing to follow the court rule could, indeed, prejudice a party. And certainly courts have a duty and responsibility, as do litigants, to follow the court rules.

benefit of supposedly more favorable law to the formal litigation of his case would directly undercut the statutory purpose of encouraging settlement before formal litigation is commenced." *Id.* at 716.[5]

To the extent that plaintiff further argues that the 182-day notice provision of §2912b is unconstitutional because it violates Const 1963, art IV, §27, by making other pieces of legislation, particularly statutes that place caps on the damages available to plaintiffs in medical malpractice actions regardless of their fault, MCL 600.1483; MSA 27A.1483 and MCL 600.6304; MSA 27A.6304, effective before ninety days after the end of the session in which the statutes were passed, we decline to address his argument. Plaintiff failed to raise this issue before the trial court, and thus it is not properly preserved for appellate review. *Ohio Farmers Ins Co v Shamie*, 235 Mich App 417, 426-427; 597 NW2d 553 (1999), vacated in part on other grounds 462 Mich 852 (2000). However, this Court may consider constitutional issues for the first time on appeal if no questions of fact exist and the interests of justice and judicial economy so dictate. *Great Lakes Div of Nat'l Steel Corp v Ecorse*, 227 Mich App 379, 426; 576 NW2d 667 (1998). We refuse to address this issue because plaintiff's claim is not ripe for our consideration. Plaintiff has failed to demonstrate that he actually was adversely affected by the premature application of the damages caps to his malpractice claims in violation of 1963 Const, art IV, §27. See *Straus v Governor*, 459 Mich 526, 545 n 14; 592 NW2d 53 (1999) ("Where a constitutional question is presented anticipatorily, the Court is required by the limits on its authority to decline to rule"); see also *Lewis v Krogol*, 229 Mich App 483, 490-491; 582 NW2d 524 (1998). We will not deal with constitutional questions hypothetically or in the abstract. *Lewis, supra* at 490.

Plaintiff also makes arguments at length in three separate issues concerning the constitutionality of the notice and 182-day waiting requirements of MCL 600.2912b; MSA 27A.2912(2).[6] Plaintiff claims that §2912b violates the equal protection clause, violates the separation of powers doctrine, and denies medical malpractice plaintiffs due process of law. For reasons previously stated by this Court, we find plaintiff's arguments without merit.

In *Neal, supra*, a panel of this Court fully addressed these issues. The *Neal* Court found that the notice and waiting provision does not violate the state and federal guarantees that no person will be denied equal protection of the law, US Const, Am XIV, §1; Const 1963, art 1, §2; *St Louis v Michigan Underground Storage Tank Financial Assurance Policy Bd*, 215 Mich App 69, 72-73; 544 NW2d 705 (1996). *Neal, supra* at 716-720. Nor does the provision violate due process by

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[5] To the extent that plaintiff suggests that his 1997 cause of action, which was filed after the expiration of the 182-day notice period expired, was improperly dismissed, his argument is without merit. Plaintiff failed to file an affidavit of merit with the complaint, and depending on the circumstances, dismissal without prejudice is an appropriate sanction for failure to file an affidavit of merit. *Dorris v Detroit Osteopathic Hospital Corp*, 460 Mich 26, 47-48; 594 NW2d 455 (1999). Moreover, plaintiff's suit would have been barred by the statute of limitations. See discussion in text, *supra*.

[6] Contrary to defendants' interpretation, our reading of plaintiff's appellate brief clearly indicates that plaintiff's final three issues do not, as defendants have argued, concern the constitutionality of the affidavit of merit requirement set forth in MCL 600.2912d; MSA 27A.2912(4).

vitiating vested property rights in causes of action, or by being unreasonable, arbitrary or capricious. *Neal*, *supra* at 716-721. Finally, this Court in *Neal* held that the notice and waiting provision does not constitute an unconstitutional delegation of legislative authority to a private party,[7] nor does it contravene the Supreme Court's superior rule-making power in matters of practice and procedure[8] because it does not change the manner in which or how a civil action is commenced in medical malpractice cases, see MCR 2.101(B), but merely imposes a temporal requirement with which a plaintiff must comply before commencing a civil action. *Neal*, *supra* at 721-723.[9] Therefore, in light of *Neal*, we reject plaintiff's arguments on appeal concerning the constitutionality of the notice and waiting provision of § 2912b.

Affirmed.

/s/ Roman S. Gribbs
/s/ Joel P. Hoekstra
/s/ Jane E. Markey

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[7] The Legislature may not delegate its law-making powers to private individuals or entities. *Osius v St Clair Shores*, 344 Mich 693, 698; 75 NW2d 25 (1956); *Neal*, *supra* at 721.

[8] See Const 1963, art 6, § 5; *McDougall v Schanz*, 461 Mich 15, 26; 597 NW2d 148 (1999).

[9] Plaintiff hypothesizes that other provisions of MCL 600.2912b; MSA 27A.2912(2) could conflict with MCR 2.118, which governs the amendment of pleadings. However, the trial court did not deny plaintiff the opportunity to amend his pleadings to add other parties or otherwise amend his complaint. Indeed, plaintiff never sought to amend his complaint. We do not address the issue of the statute's potential unconstitutional conflict with MCR 2.118 in light of the general presumption that constitutional issues that are not necessary to resolve a case will not be reached. *Great Lakes Div*, *supra* at 432.