

SUPREME COURT OF LOUISIANA

No. 95-C-0112

LORRAINE WHITNELL, WIFE OF/AND JAMES WHITNELL

Versus

DR. ARTHUR SILVERMAN

Consolidated with

No. 95-CA-0259

LORRAINE WHITNELL, WIFE OF/AND JAMES WHITNELL

Versus

DR. ARTHUR SILVERMAN, ET AL.

**ON DIRECT APPEAL FROM THE COURT OF APPEAL, FOURTH
CIRCUIT, STATE OF LOUISIANA**

KIMBALL, J., concurring.

This Court previously held *in this case* that plaintiffs' "claim against Dr. Menville [for negligence] is prescribed on the face of the petition and that there are no grounds for finding that prescription on the claim set forth in the petition has been interrupted..." *see Whitnell v. Menville*, 540 So.2d 304, 309 (La. 1989), and, regarding plaintiffs' claim in an amended petition for failure to disclose, "[t]he trial court correctly concluded that the doctor did not prevent timely filing of plaintiff's action intentionally, fraudulently, or by ill practice." *See Whitnell v. Menville*, 598 So.2d 345 (La. 1992). Upon remand to the trial court for a *Sibley* evidentiary hearing to determine whether La. R.S. 9:5628 is constitutional, the trial court made a factual finding that Mrs. Whitnell's condition was discoverable within the three year period contained in La. R.S. 9:5628.

Because there is no error in the trial court's factual determination that Mrs. Whitnell's condition was discoverable within the three year period provided by the statute and this court, applying the proper standard, *see Hillman, Et Al. v. Akins, Et Al.*, 93-0631 (La. 1/14/94), 631 So.2d 1, has already determined there is no evidence to support application of the doctrine of *contra non valentem*, Mrs. Whitnell's claim is prescribed under the statute. Furthermore, as Mrs. Whitnell's condition was in fact discoverable within the three year period contained in the statute, there is no need to reach or decide any constitutional issue in this case.