SUPREME COURT OF LOUISIANA

No. 95-C-0112

LORRAINE WHITNELL, WIFE OF/AND JAMES WHITNELL

Versus

DR. ARTHUR SILVERMAN ET AL

Consolidated with

No. 95-CA-0259

LORRAINE WHITNELL, WIFE OF/AND JAMES WHITNELL

Versus

DR. ARTHUR SILVERMAN, DR. JOHN G. MENVILLE ET AL

LEMMON, J., Dissenting

Latency periods of various medical conditions have little to do with this case. Plaintiff was allegedly damaged by Dr. Menville, not because of some condition he caused that did not manifest itself immediately, but because he either failed to diagnose a condition that had manifested itself or, having discovered a cancerous or pre-cancerous condition, failed to inform plaintiff of the condition at a time when treatment was critical.

This case turns on whether La. Rev. Stat. 9:5628 precludes the application of either the third or the fourth category of the doctrine of contra non valentem agere nulla currit praescripto[1] to suspend or to prevent commencement of Section 5628's three-year

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[1]The third and fourth categories of contra non valentem listed in Corsey v. State Dept. of Corrections, 375 So. 2d 1319, 1321-22 (La. 1979), are:

> (3) Where the debtor himself has done some act effectually to prevent the creditor from availing himself of his cause of action;

period of limitation. The initial inquiry is into the interrelationship between Section 5628 and the doctrine of contra non valentem.

La. Rev. Stat. 9:5628 and Contra Non Valentem

La. Rev. Stat. 9:5628 is multi-faceted, providing three separate periods of limitation. First, Section 5628 provides the general rule of prescription in medical malpractice cases. Such an action generally prescribes one year from the date of the alleged act, omission or neglect. Second, Section 5628 provides an exception to the general rule by incorporating the discovery rule of the fourth category of contra non valentem into those cases in which the cause of action is not immediately knowable. Such actions prescribe one year from the date of discovery of the alleged act, omission or neglect.[2] Finally, in cases otherwise falling within the discovery rule, Section 5628 provides that the claim "must be filed at the latest within three years from the date of the alleged act, omission or neglect."[3] Since the third period of limitation in Section 5628 precludes application of the discovery rule if suit is not filed within three years, Section 5628, if constitutional, prevents application of the fourth category of contra non valentem after three years.[4] See Chaney v. State Through Dept. of Health and Human

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> (4) Where the cause of action is not known or reasonably knowable by the plaintiff, even though his ignorance is not induced by the defendant.

[2]This second period of limitation is a prescriptive period which may be interrupted or suspended.

[3]This latter period, although characterized by this court (see, e.g., Crier v. Whitecloud, 486 So. 2d 713 (La. 1986)) and others as a prescriptive period, is really one of peremption. La. Civ. Code art. 3458. Unless timely exercised, a right is extinguished upon the expiration of a period of peremption which cannot be renounced, interrupted or suspended. La. Civ. Code art. 3461.

[4]Curtailment of the discovery rule in medical malpractice actions was one of the principal purposes of the adoption of Section 5628, which is a statute of repose.

Resources, 432 So. 2d 256 (La. 1983).

Fourth Category of Contra Non Valentem

This court, when presented this case for the first time in Whitnell v. Menville, 540 So. 2d 304 (La. 1989), held that plaintiff's claim against Dr. Menville for negligent misdiagnosis of plaintiff's condition was prescribed or perempted on the face of the petition, since such conduct falls under the discovery rule of the fourth category of contra non valentem and Section 5628 restricts the applicability of that discovery rule to three years. However, recognizing that prescription or peremption might have been suspended if Dr. Menville correctly diagnosed plaintiff's condition and with knowledge of the condition failed to disclose it, this court remanded the case to the trial court with instructions to allow plaintiff to amend her petition under La. Code Civ. Proc. art. 934 to allege facts that could remove the grounds for the exception of prescription. In so doing, we explained that "[i]f Dr. Menville withheld information from the patient regarding her physical condition, his act of doing so, while in itself a tort, might also serve to trigger the third category of contra non valentem (prevention by the debtor)." Id. at 310. We further noted that this court had never decided whether Section 5628 precludes applicability of the third category of contra non valentem.

This court's application of Section 5628 in Whitnell I to hold plaintiff's claim of negligent misdiagnosis prescribed or perempted accords with the decision on rehearing in Crier v. Whitecloud, 486 So. 2d 713 (La. 1986), in which I concurred. Because this court apparently is not presently inclined to reconsider the constitutional issue decided in Crier, I agree that Section 5628 (if constitutional) precludes the application of the fourth category of contra non valentem.[5]

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[5]A case with a lengthy latency period might call for our reexamination of the Crier decision on the constitutionality of Section 5628.

Section 5628 distinguishes not only between victims of medical

Third Category of Contra Non Valentem

The third category of contra non valentem applies when the debtor himself has done some act that effectually prevents the creditor from availing himself of his cause of action. Corsey v. State Dept. of Corrections, 375 So. 2d 1319 (La. 1979).

In Rajnowski v. St. Patrick's Hosp., 564 So. 2d 671 (La. 1990), the plurality decision held that the third category of contra non valentem did not apply because the test results that the doctor failed to disclose did not constitute material information. The concurring justice in the four-to-three decision expressed his opinion that even if the test results constituted material information and the non-disclosure prevented the patient's timely filing of the action, the doctrine of contra non valentem cannot be invoked because the doctor did not intentionally conceal that information. The concurring justice expressed his belief that the third category of contra non valentem does not apply when the doctor's act or omission that prevented the patient's discovery

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malpractice and victims of other torts, but also between medical malpractice victims with injuries that manifest themselves within three years and victims with injuries that remain latent beyond three years. While such classifications are usually analyzed for equal protection purposes under a rational basis standard (the asserted rational basis being the perceived medical malpractice insurance crisis in the 1970s), there are also due process implications to the analysis.

There have been suggestions that only a small percentage of medical malpractice claimants are affected by a three-year statute of repose. See Scott A. DeVries, Medical Malpractice Acts' Statutes of Limitations as They Apply to Minors: Are They Proper?, 28 Ind. L.Rev. 413, 415 (1995)(discussing a survey that suggests a three-year occurrence-based rule would time-bar only ten percent of malpractice claims). The converse, however, is equally true -- only a small percentage of claims against health care providers are eliminated by such a statute. Depriving a few perhaps horribly injured innocent victims of their claims in order to relieve a few health care providers of late filing problems such as lost evidence, faded memories and unavailable witnesses appears to be fundamentally unfair, which is the hallmark of a due process violation. The medical malpractice victim, who has the ultimate burden of proof at trial, labors under the same difficulties caused by the late manifestation of an injury, which is not attributable to the victim. The latency of the injury may not alone provide constitutional justification for preferring the medical profession over the victims of medical professionals who are thereby deprived of compensation for their injuries.

of the cause of action was merely negligence or innocent misrepresentation.

The three-justice plurality decision in Rajnowski turned on the lack of materiality of the non-disclosed information and not on the lack of intentional concealment of that information. This court has never held that the third category of contra non valentem does not apply when a doctor, who has actual knowledge of material information about a patient's condition, fails to disclose the information for some reason short of intentional concealment.[6]

The doctrine of contra non valentem is based on the principle that prescription does not run against a party who is unable to act. The doctrine prevents the commencement or the running of liberative prescription under certain circumstances. While the fourth category of contra non valentem focuses on the reasonableness of the creditor's inaction, Jordan v. Employee Transfer Corp., 509 So. 2d 420 (La. 1987), the third category focuses on the conduct of the debtor that effectually prevents the creditor from asserting a cause of action timely. There is a vast difference between the situation in which a doctor negligently fails to learn material information about the patient's condition and the situation in which the doctor knows material information and breaches his or her duty to disclose the information to the patient. In the former situation, the doctor commits a single breach of duty to diagnose correctly the patient's condition which is known neither by the doctor nor the patient, and the forth category of contra non valentem would apply but for Section 5628. In the latter situation, the doctor, who is in a fiduciary relationship with the plaintiff, has a continuing duty to disclose the known material information, not only on the day that the doctor learns the information, but also on every day thereafter until the patient learns the information

[6]The decision in Hillman v. Akins, 93-0631 (La. 1/14/94), 631 So. 2d 1, held that the third category of contra non valentem did not apply because the record did not contain "any evidence proving that any of the defendants knew the device had not been approved by the FDA."

from another source. Breach of this continuing duty is analogous to a continuing tort, and a new cause of action (with a new prescriptive or peremptive period) arises each day that the doctor fails to disclose, either intentionally or negligently, the material information known by the doctor but not by the patient, and thereby effectually prevents the patient from availing himself or herself of the cause of action.

In the present case, if it were undisputed that Dr. Menville knew from the biopsy report that plaintiff had a cancerous or pre-cancerous condition, then I would apply the third category of contra non valentem to prevent commencement of Section 5628's peremptive period. However, Dr. Menville testified that he interpreted the pathology report as not revealing the presence of cancer cells, and the pathologist testified that Dr. Menville's interpretation was "fair and reasonable."

In determining the conflict over whether Dr. Menville knew from the biopsy report that plaintiff had a cancerous or pre-cancerous condition, the trial court (on the first remand by this court) applied the standard postulated by the Rajnowski concurrence that would require intentional concealment for the third category of contra non valentem to apply. I disagree that intentional concealment should be required; I would apply the third category when a doctor, with knowledge of material information about a patient's condition, prevents the patient from availing himself or herself of the cause of action by failing to reveal to the patient the vital information that the patient relies solely on the doctor to disclose.

Accordingly, I would remand the case to the trial court for a factual determination under the proper standard[7] of whether Dr. Menville knew plaintiff had

[7]The denial of certiorari by this court at 598 So. 2d 345 (La. 1992), indicating that the "trial court correctly concluded that the doctor did not prevent timely filing of plaintiff's action intentionally, fraudulently or by ill practice," may be the law of the case in this court, but is not res judicata on the applicability of the third category of contra non valentem. Writ denials do not make law, particularly in cases involving remands after partial judgments, despite the contrary decision in Rivet v.

a cancerous or pre-cancerous condition that he failed to disclose, either intentionally or negligently. If so, then I would hold that the third category of contra non valentem applies to prevent the commencement of Section 5628's peremptive period. If not, then neither the doctor nor the patient knew the material information, and the third category of contra non valentem does not apply.

Department of Transp. and Dev., 96-0145 (La. 9/5/96), 680 So. 2d 1154.