SUPREME COURT OF LOUISIANA

No. 95-C-0112

LORRAINE S. WHITNELL, wife of/and JAMES WHITNELL

Versus

DR. ARTHUR SILVERMAN, ET AL

Consolidated with

95-C-0259

LORRAINE WHITNELL, wife of/and JAMES WHITNELL

Versus

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

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FOURTH CIRCUIT, PARISH OF ORLEANS, STATE OF LOUISIANA

JOHNSON, Justice[*]

We granted the State of Louisiana's writ of certiorari and ordered that the State's appeal be consolidated with Dr. Menville's appeal, to determine whether La. R.S. 9:5628 is unconstitutional as applied to plaintiff's diagnosed disease which as a latency period of less than three years.[2] The trial court found that the statute was constitutional as applied to plaintiff, whose disease had manifested itself within the three-year statutory period. The court further concluded that applying the statute to an illustrative list of nineteen diseases which have latency periods longer than three years, renders the

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[*] Pursuant to Rule IV, Part 2, § 3, Chief Justice Pascal F. Calogero was not on panel. Judge Henry L. Yelverton, Court of Appeal, Third Circuit, participated as Justice Pro Tempore, in place of Justice James L. Dennis.

[2] 94-2937 (La. 1/6/95), 648 So.2d 910 and 95-0112 (La. 2/3/95), 649 So.2d 395, respectively.

statute unconstitutional. The court of appeal affirmed in part and reversed in part, finding that the statute was unconstitutional as applied to diseases with latency periods greater than and less than three years, and to hold otherwise would be discrimination based upon physical condition. For the reasons assigned, we conclude that La. R.S. 9:5628 is constitutional as applied to plaintiffs herein. Because the plaintiffs lack standing to argue the constitutionality of the statute as applied to third parties in hypothetical situations, we further conclude that the lower courts erred in determining that La. R.S. 9:5628 is unconstitutional as applied to the illustrative list of nineteen diseases with latency periods longer than three years.

FACTS AND PROCEDURAL HISTORY

On May 5, 1980, Mrs. Lorraine Whitnell began treating with Dr. John G. Menville, a urologist, for bladder and urinary tract problems. During the course of her treatment, Dr. Menville admitted Mrs. Whitnell to Touro Infirmary for a cytoscope of her bladder. At trial, Mrs. Whitnell testified that subsequent to the cytoscope, Dr. Menville informed her that the test results were normal, and that he saw nothing wrong with her bladder. Mrs. Whitnell maintains that she reasonably believed she suffered from infection, and acted accordingly and reasonably. She continued experiencing problems, so she ceased treatment with Dr. Menville in July, 1980. Thereafter, in January, 1981, she began seeing Dr. Arthur Silverman for the same condition and for treatment of the same symptoms. She continued seeing Dr. Silverman until 1984.

On October 11, 1984, Dr. Silverman's partner, Dr. Ronald Schwartz, examined Mrs. Whitnell and hospitalized her for tests and studies. The next day, Dr. Schwartz informed Mrs. Whitnell of the results of a pathology report, which revealed that she had a malignant tumor in her bladder which required radiation treatment and removal of her

bladder, appendix and reproductive organs. This surgery was performed on October 29, 1984. At the trial, Mrs. Whitnell testified that this was the first time a physician had informed her that she had a cancerous bladder.

On September 26, 1985, Mrs. Whitnell and her husband, James Whitnell, filed a medical malpractice suit, naming Drs. Silverman and Schwartz as defendants. That lawsuit, which was later dismissed without prejudice on an exception of prematurity, failed to name Dr. Menville as a defendant. While the case was being considered by the medical review panel, Mrs. Whitnell requested her complete medical record from Touro. From information contained in these records, Mrs. Whitnell learned of a 1980 pathology report from a biopsy of her bladder performed by Dr. Menville. The 1980 pathology report revealed that Mrs. Whitnell had "squamous metaplasia, with focal moderate to marked dysplasia" or cystistcystica. Plaintiffs assert that this was the first time they learned of the 1980 pathology report, which essentially revealed the presence of a precancerous lesion on Mrs. Whitnell's bladder. Plaintiffs further allege that the 1980 pathology report gave a microscopic description which was compatible with a diagnosis which could be interpreted as carcinoma in situ of the bladder or a precancerous lesion which had a high likelihood of developing into cancer of the bladder, but that Dr. Menville failed to disclose this information.

Subsequent to the issuance of a medical panel opinion, plaintiffs filed the instant lawsuit on September 22, 1986, naming Drs. Silverman, Schwartz and Menville as solidary defendants, for the alleged misdiagnosis of her bladder cancer. Dr. Menville filed an exception of prescription on the basis that plaintiffs' action was filed after the three-year statutory limitation as provided in La. R.S. 9:5628. The trial court sustained Dr. Menville's exception of prescription and dismissed plaintiffs' action against

defendant. The court of appeal affirmed.[3] This Court granted writs to determine whether prescription was interrupted by Dr. Menville's alleged knowledge of Mrs. Whitnell's danger of developing bladder cancer, and his failure to disclose that information to plaintiffs.[4] On review, we reversed the judgment of the court of appeal and remanded the case to the district court with instructions, allowing plaintiffs to amend their petition in accordance to La. C.C.P. art. 934.[5] We found that plaintiffs' claim against Dr. Menville had prescribed on the face of the petition. However, based upon plaintiffs' allegations that Dr. Menville failed to disclose vital information to Mrs. Whitnell, which raised the possibility that prescription may have been interrupted by the doctrine of *contra non valentem*, we concluded that plaintiffs' claim should be dismissed absent an opportunity to amend their petition to allege facts sufficient to overcome the grounds of the peremptory exception.

In accordance with this court's instructions, plaintiffs filed their First Supplemental and Amending Petition on March 28, 1989. After subsequently re-filing his exception of prescription, the trial court, once again, sustained Dr. Menville's exception and dismissed plaintiffs' claims against him on the grounds that Dr. Menville's alleged failure to disclose vital information to Mrs. Whitnell in regard to her condition was neither intentional nor fraudulent. The court of appeal affirmed, finding no error in the trial court's ruling.[6]

On writ of review, we granted in part and denied in part.[7] Although we agreed

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[3] 525 So.2d 361 (La. App. 4th Cir. 1988).

[4] 530 So.2d 553 (La. 1988).

[5] 540 So.2d 304 (La. 1989).

[6] 592 So.2d 429 (La. App. 4th Cir. 1991).

[7] 598 So.2d 429 (La. 1992).

that the trial court correctly concluded that the doctor did not prevent the timely filing of plaintiffs' action intentionally, fraudulently, or by ill practice, we remanded the case to the trial court for an evidentiary hearing and ruling on whether La. R.S. 9:5628 is unconstitutional. Pursuant to this court's order, the trial court conducted a *Sibley* hearing on the constitutionality of La. R.S. 9:5628, and concluded that the statute as applied to plaintiffs, was constitutional. The trial court further concluded that "in order for R.S. 9:5628 to be unconstitutional for a particular plaintiff, the plaintiff must have a disease that was not diagnosed by the alleged malpracticing doctor and that [sic] the plaintiff experienced no symptoms that would put the plaintiff on notice that the plaintiff had a disease; in addition, the disease would have to be one of a [sic] serious, life-threatening nature, such that the delay in treatment causes death or a very substantial impairment of the plaintiff's life." In its Reasons for Judgment, the trial court also noted that no medical malpractice insurance crisis existed in 1975 when R.S. 9:5628 was passed.

In accordance with Article V, §5(D) of the Louisiana Constitution, the State of Louisiana appealed the constitutional issue directly to this court. We granted writs and remanded the matter to the court of appeal to decide under its appellate jurisdiction.[8] On appeal, the Fourth Circuit affirmed in part and reversed in part.[9] The court of appeal agreed that the statute was unconstitutional as applied to causes of action and damages caused by diseases with a latency period of over three years; however, the court found that La. R.S. 9:5628 is also unconstitutional as applied to plaintiffs herein under Louisiana Constitution Article 1 §3. The court concurred with the trial court's reasons that no medical malpractice insurance crisis existed warranting the Louisiana

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[8] 629 So.2d 1146 (La. 1993).

[9] 93-2468, 94-0343 (La. App. 4th Cir. 11/4/94); 646 So.2d 995.

Medical Malpractice Act under La. R.S. 40:1299.41 et seq., and suggested that it would overrule *Crier v. Whitecloud*, 496 So.2d 305 (La. 1986) is it had the power to do so. The court of appeal conceded however, that it lacked the power to overturn a ruling by this court.

Defendant, Dr. Arthur Silverman, appeals from that judgment, arguing: 1) the lower court erred in finding that La. R.S. 9:5628 is unconstitutional as applied to Lorraine Whitnell; 2) the lower court erred in finding that La. R.S. 9:5628 is unconstitutional as applied to hypothetical plaintiffs; 3) the lower court erred in its factual finding that no medical malpractice insurance crisis existed in 1975; and 4) the lower court erred in finding that *Crier v. Whitecloud* should be overruled. The State of Louisiana, in maintaining that the statute is constitutional, also appealed to this court raising similar specifications of error as those raised by defendant, Dr. Silverman.

LAW AND DISCUSSION

Because the court of appeal's opinion unequivocally states that this court's opinion in *Crier, supra* deviates from our opinion in *Sibley v. Board of Supervisors of Louisiana State University*, 477 So.2d 1094 (La. 1985), we are obliged to discuss the clear distinctions between both cases for our readers and more pointedly, the appellate court's review.

In *Sibley*, this Court was challenged to interpret, among other issues, whether the statutory malpractice judgment limitation under La. R.S. 40:1299.39 violated equal protection of the laws based upon physical condition.[10] This matter, which was decided on rehearing, overruled our original judgment in *Sibley (I)*.[11] The majority concluded

[10] La. R.S. 40:1299.42(1) limits the total amount recoverable to $500,000.00, plus interest and costs for all malpractice claims for injuries to or death of a patient.

[11] 462 So.2d 149 (La. 1985).

that the federal three-tier system of constitutional scrutiny was an inappropriate model for the interpretation and application of our State's equal protection laws. We determined that Article I, Section 3 of the 1974 Louisiana Constitution necessitates that: (1) A statute shall be repudiated completely if it classifies individuals by race or religious belief; (2) A statute's enforcement shall be refused absent a showing that the classification has a reasonable basis when the statute classifies persons on the basis of birth, age, sex, culture, physical condition, or political ideas or affiliations; and (3) A statute shall be rejected when the law classifies on any other basis, and a member of the disadvantaged class shows that it does not suitably further any appropriate state interest. Based upon the facts and circumstances presented before us in this particular case, we found that the statutory limitation against a malpractice judgment in excess of $500,000.00 classifies individuals because of their physical condition. We explained as follows:

> The law on its face is designed to impose different burdens on different classes of persons according to the magnitude of damage to their physical condition. The statute creates two classes: one, a group of malpractice victims each of whom has suffered damage that would oblige a defendant under our basic law to repair it by paying in excess of 500,000 dollars; another, a class consisting of victims whose damages would not require an award over this amount to make individual reparation. Victims in the former class are prevented from recovering for all their damage, while those in the latter class are allowed full recovery. Damage to the physical condition of each malpractice victim is the primary element of his damage and a primary cause of his being assigned to one of the two classes. Thus, the statutory disadvantages or discriminates against one class of individuals by reason of or because of their physical condition.

Sibley (II) at 1108, 1109. We remanded this case to the court of appeal, which ultimately remanded it to the trial court for an evidentiary hearing to determine whether this legislative classification substantially furthered a legitimate state purpose. *See Sibley*, 490 So.2d 307 (La. App. 1st Cir. 1986). Prior to judicial determination of whether the $500,000.00 malpractice judgment limitation was enacted in furtherance

of a legitimate state purpose, what the Louisiana Legislature perceived to be a malpractice insurance crisis, the parties settled this case.

In *Crier,* this Court was asked to determine whether the three-year prescriptive period on medical malpractice claims pursuant to La. R.S. 9:5628 violated plaintiff's right to due process, open access to courts, and particularly, plaintiff's rights under the equal protection clauses of the Federal and State Constitutions. *Crier,* which was decided on rehearing, followed the analogy of *Hebert v. Doctors Memorial Hospital*, 486 So.2d 717 (La. 1986), insofar as this court's interpretation of La. R.S. 9:5628. We concluded that La. R.S. 9:5628 is a prescriptive statute with one qualification, that is, that the *contra non valentem* type exception to prescription embodied in the discovery rule is expressly made inapplicable after three years from the act, omission or neglect. *Crier v. Whitecloud*, at 307.

With regard to equal protection, since it is the underlining issue before this court, we determined in *Crier* that La. R.S. 9:5628 does not discriminate on the basis of severity. Instead, it affects every person who seeks medical treatment equally. It provides notice that malpractice claims will be barred if they are not filed within three years from the date of the alleged act, omission or neglect. We concluded that the three-year prescriptive period does not create a classification that disadvantages or discriminates against one class of individuals by reason of, or because of their physical condition as did La. R.S. 40:1299.39, the $500,000.00 medical judgment limitation. Thus, we determined that the statute should be upheld absent a showing by plaintiff that the statute failed to further an appropriate state interest. *Id* at 311.

Clearly, there is a distinction between this court's rationale in *Sibley* in comparison to our reasoning in *Crier*. The most obvious distinction, which the appellate court failed to appreciate, is that in *Sibley*, we examined whether La. R.S.

40:1299.39 of the Medical Malpractice Act, the statutory malpractice judgment limitation, violated plaintiff's equal protection under the laws, while in *Crier* we determined whether equal protection of the laws was violated by the three-year statutory limitations on medical malpractice claims under La. R.S. 9:5628. These two cases are distinct. Therefore, we disagree with the court of appeal's finding that *Crier* is a deviation from *Sibley*. We further disagree with the court of appeal's finding that *Crier* should be overruled.

A. Equal Protection

Regarding the case at hand, we first consider the question of whether the court of appeal erred in finding that La. R.S. 9:5628 is unconstitutional as applied to Mrs. Whitnell. The court of appeal found that the enforcement of La. R.S. 9:5628 denies Mrs. Whitnell her constitutional right to equal protection of the laws, thereby contravening Article I Section 3 of the Louisiana Constitution. This Louisiana constitutional provision states the following:

> **No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, *physical condition* [emphasis added], or political ideas or affiliations.**

The court of appeal determined that La. R.S. 9:5628 is violative of Louisiana Constitutional Article I, Section 3, in that it unreasonably discriminates against Mrs. Whitnell on the basis of physical condition, thereby creating a classification prohibited by the Louisiana Constitution. To support its position, the court of appeal noted the testimony of Dr. Stuart Hoffman, who provided an illustrative list of 19 diseases with latency periods in excess of three years. The list of the 19 diseases with latency periods in excess of three years consisted of the following:

1. Carcinoma of the cervix--in situ--pap smear
2. Mammographic evidence of breast carcinoma--non-palpable
3. Familial hypolipidemia
4. Asymptomatic coronary atheroschlerosis
5. Early stage multiple myeloma
6. Von Willbrand's disease
7. Leukoplakia
8. Colon polyps
9. Malignant melanoma behind ear
10. Aneurysm--thoracic aorta--cerebral artery
11. Early stage ovarian carcinoma
12. Chronic active hepatitis
13. First degree heart block
14. Second degree heart block
15. Petit mal seizures
16. Congenital absence of the spleen
17. Pernicious anemia
18. Gout
19. Blood Transfusion Acquired AIDS

Mrs. Whitnell suffered bladder and urinary tract problems. As evidenced by the above indicated illustrative list, Mrs. Whitnell's condition was not included among the diseases which purportedly have latency periods in excess of three years. Neither did Mrs. Whitnell posit or present any evidence to suggest that her medical condition had a latency period in excess of three years. On the contrary, the evidence clearly reveals that Mrs. Whitnell experienced symptoms of her medical problems well within the three-year statutory prescriptive period. The facts reveal that she visited Dr. Menville's office for bladder problems from May, 1980 until July, 1980. Because her bladder problems persisted, she began seeing Dr. Silverman for the same condition in January, 1981, and continued her visits with him until 1984. Despite her continued bladder problems within the first year after her last visit with Dr. Menville, Mrs. Whitnell failed to file suit naming Dr. Menville as a defendant until 1986. Therefore, we find that La. R.S. 9:5628 is constitutional as applied to Mrs. Whitnell and the facts and circumstances in this particular case.

Because the La. R.S. 9:5628 is constitutional as applied to Mrs. Whitnell, and

because Mrs. Whitnell's medical condition is not included among the diseases with latency periods in excess of three years, the court further finds that the lower courts erred in finding that the statute is unconstitutional as applied to individuals with diseases which have latency periods in excess of three years. The United States Supreme Court has consistently held that a party has standing to challenge the constitutionality of a statute only to the extent that the statute adversely affects his own rights. *County of Ulster v. Allen* 442 U.S. 140, 99 S. Ct. 2213, 60 L. Ed.2d 777 (1979); *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S. Ct. 2908, 37 L. Ed.2d 830; See also, Sedler, "Standing to Assert Constitutional Jus Tertii in the Supreme Court", 71 Yale L.J. 599 (1962). This Court has also consistently made identical findings. See, *State v. Turner*, 393 So.2d 436 (La. 1980) rehearing denied; *Baehr, et al v. City of Lake Charles*, 387 So.2d 1160 (La. 1980). As a general rule, if there exists no constitutional defect in the application of a statute to a litigant, such litigant has no standing to raise constitutional challenges to the application of the statute to third parties in hypothetical situations. *United States v. Raines*, 362 U.S. 17, 80 S. Ct. 519, 4 L. Ed. 2d 524 (1960);[12] *County of Ulster v. Allen; Broadrick v. Oklahoma; State v. Turner, Baehr v. City of Lake Charles*. Essentially, a litigant may only assert his or her own constitutional rights, and should be denied standing when he or she seeks to assert and vindicate the property rights of third parties. *McGowan v. State of Maryland*, 366 U.S. 420 81 S. Ct. 1101, 6 L. Ed.2d 393 (1961); *Sherman v. Cabildo Construction Company,* 490 So.2d 1386 (La. 1986). Even if we held La. R.S. 9:5628

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[12] In *United States v. Raines*, 362 U.S. 17, 80 S. Ct. 519, 4 L. Ed.2d 524 (1960), the United States Supreme Court confirmed the following rule:

> "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional."

unconstitutional, we could not grant any relief to Mrs. Whitnell. Accordingly, we hold that Mrs. Whitnell has no standing to challenge the constitutionality of La. R.S. 9:5628 in its application to individuals with diseases characterized by latency periods in excess of three years. We also hold that the lower court erred in holding that La. R.S. 9:5628 is unconstitutional as applied to hypothetical third parties with diseases with latency periods in excess of three years, because Louisiana courts are without power to render judgments over moot and abstract propositions. *See, Church Point Wholesale Beverage v. Tarver,* 614 So.2d 697 (La. 1993).[13] We further hold that the trial court erred in admitting into evidence Dr. Stuart Hoffman's testimony regarding the list of diseases with latency periods in excess of three years, for such evidence was irrelevant in this case.

Consistent with the court's finding that Mrs. Whitnell has no standing to assert constitutional attacks for third parties with diseases with latency periods in excess of three years, the court further finds that Mrs. Whitnell has no foundation or standing to raise the equal protection challenge to La. R.S. 9:5628 on the basis that it discriminates on the basis of physical condition. Equal protection of the laws provides that persons similarly situated receive like treatment. *Sherman v. Cabildo Construction Co.*, 490 So.2d 1386, 1389 (La. 1986). Accordingly, to raise a valid equal protection challenge, Mrs. Whitnell must show that application of La. R.S. 9:5628 treats her differently from other individuals similarly situated to her, i.e., individuals with diseases with latency periods less than three years. In this case, the evidence clearly shows that Mrs. Whitnell is being treated as all other individuals with diseases with latency periods less than three years. For reasons provided hereinabove demonstrating Mrs. Whitnell's lack

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[13] This ruling by the court does not address the constitutionality of La. R.S. 9:5628 as it applies to individuals with diseases that have latency periods in excess of three years. The court has basically declined to decide on this issue because it is not presently before it.

of standing to make challenges for hypothetical third parties, it would be improper and useless to compare Mrs. Whitnell's physical condition to individuals with diseases with latency periods in excess of three years. Thus, we conclude that Mrs. Whitnell has failed to show that La. R.S. 9:5628 fails to treat persons similarly situated to her situation differently, and that accordingly, she is not afforded the equal protection constitutional challenge to La. R.S. 9:5628.

Because the court finds that La. R.S. 9:5628 does not classify individuals on the basis of physical condition under the facts of this particular case, there is no need to further examine the facts of this case in light of the equal protection analysis espoused by this court in *Sibley*.[14] At a bare minimum, a showing of a "classification" must be made prior to addressing whether or not La. R.S. 9:5628 is primed by "an appropriate governmental interest suitably furthered." *See Sibley*. Additionally, it is incumbent upon one attacking the constitutionality of a statute to show that he or she is within a class of individuals disadvantaged by the statute. *See Sibley at 1107*. Mrs. Whitnell has failed to show that she fits within a class of individuals disadvantaged by a statutory classification. Mrs. Whitnell further failed to show that she met the criteria of any of the situations which trigger an equal protection analysis.[15] Thus, the Court

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[14] 477 So.2d 1094 (La. 1985).

[15] *See Sibley v. Board of Supervisors of Louisiana State University*, 477 So.2d 1094 (La. 1985), in which the Louisiana Supreme Court determined that the Louisiana equal protection clause is separate and distinct from its federal counterpart, and that the federal multi-level system is an inappropriate model to interpret the Louisiana Constitution. In *Sibley*, the Court adopted a more viable model, which invalidates enforcement of legislative classifications in three instances: 1) When the law classifies individuals by race or religious beliefs, it shall be repudiated completely; 2) When the statute classifies persons on the basis of birth, age, sex, culture, physical condition, or political ideas or affiliations, its enforcement shall be refused unless the state or other advocate of the classification shows that the classification has a reasonable basis; and, 3) When the law classifies individuals on any other basis, it shall be rejected whenever a *member of the disadvantaged class* [emphasis added] shows that it does not suitably further any appropriate state interest.

does not have to explore the issue of whether or not there was an actual medical malpractice insurance crisis which precipitated the enactment of La. R.S. 9:5628.[16] Such a discussion under the particular facts of this case would merely amount to an advisory opinion, which is not only disfavored by Louisiana courts,[17] but which also has no bearing whatsoever on the outcome of this case since it is unnecessary to show "an appropriate government interest suitably furthered" by the statute. Moreover, this finding conforms to the long-standing judicial principle that courts will not consider constitutional challenges unless necessary to the resolution of a dispute. *Benson & Gold Chevrolet v. La. Motor Vehicle Commission,* 403 So.2d 13, 23 (La. 1981).

B. Access to the Courts

Mrs. Whitnell also challenges the constitutionality of La. R.S. 9:5628 on the basis that its application deprives her of the constitutional right to access to the courts. Article I, Section 22 of the Louisiana Constitution of 1974 provides:

> All courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights.

As this court determined in *Crier v. Whitecloud*, the constitutional guarantee of access to the courts and a remedy for injuries does not warrant a remedy for every single injury. In *Crier v. Whitecloud*, this court examined the historical background of Article I, Section 22 of the Louisiana Constitution and concluded that in adopting this constitutional article, the Constitutional Convention did not intend to limit the

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[16] Mrs. Whitnell argued that the Legislature had no valid purpose for enacting La. R.S. 9:5628 because the Legislature's purported governmental interest, the alleviation of a medical malpractice insurance crisis, did not exist. She maintained (and the court of appeal agreed), that the increase in insurance rates was a normal actuarial aberration. See, *Whitnell v. Silverman, et al* 646 So.2d 989 (La. App. 4th Cir. 1994).

[17] See, *Church Point Wholesale Beverage v. Tarver,* 614 So.2d 697 (La. 1993).

Legislature's ability to restrict causes of action or to bar the Legislature from creating various areas of statutory immunity from suit.[18] The court further acknowledged that the establishment of statutes of limitations are within the scope of legislative authority, and that enactment of such does not eliminate the remedy for a civil wrong. The Legislature essentially makes a legislative determination that after a certain period of time, no cause of action can arise. Moreover, "[w]here access to the judicial process is not essential to the exercise of a fundamental constitutional right, the legislature is free to allocate access to the judicial machinery on any system or classification which is not arbitrary." *Crier* (citing *Bazley v. Tortorich*, 397 So.2d 475 (La. 1981)).

In the case at hand, this court has already determined that Mrs. Whitnell is not part of a class disadvantaged by the enforcement of La. R.S. 9:5628, and further, that the statute is constitutional as applied to her under the facts in this case. The court further finds that symptoms of Mrs. Whitnell's condition were manifested long before the expiration of the statutory three-year prescriptive period. The court finds her delay in filing suit against Dr. Menville unreasonable, when she was symptomatic well within six months after her last visit with him. Under these circumstances, Mrs. Whitnell is afforded no more consideration or protection than other tort or medical malpractice victims subject to the statutory prescriptive periods promulgated by the Legislature. Thus, the court finds that La. R.S. 9:5628 does not unconstitutionally deprive Mrs. Whitnell of access to the courts.

Finally, the courts notes that in this case, there exists no facts which should interrupt the running of prescription. This court has already determined that Dr. Menville did not intentionally, fraudulently, or by ill practice, prevent the timely filing of Mrs. Whitnell's action, so as to invoke application of the doctrine of *contra non*

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[18] *Crier v. Whitecloud*, 496 So.2d 305, 310 (La. 1986).

valentem. *See, Whitnell v. Silverman,* 598 So.2d 345 (La. 1992). Hence, the court finds no basis to rule La. R.S. 9:5628 unconstitutional in its application, in any respect, under the facts in this case. Until we are satisfied that the facts of a particular case warrant a finding that the statute is unconstitutional in its application, we must obey the legislation. *See, Louisiana Power & Light Co. v. Lasseigne*, 240 So.2d 707 (La. 1970).

DECREE

For the foregoing reasons, we reverse the judgment of the trial court, as affirmed by the court of appeal, insofar as it declared La. R.S. 9:5628 unconstitutional as to hypothetical third parties with diseases characterized by latency periods longer than three years. We reverse the court of appeal's ruling that La. R.S. 9:5628 is unconstitutional as applied to the plaintiffs herein, and reinstate the trial court's finding that the statute is constitutional in its application to plaintiff. We also reverse the court of appeal's ruling that there existed no medical malpractice insurance crisis which precipitated the enactment of La. R.S. 9:5628, for the reason that it was improper for the court of appeal to apply the "appropriate governmental interest suitably furthered" standard under the facts in this particular case.

REVERSED