NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2007 CA 1301

COLLEEN DELACRUZ

VERSUS

JAMES EDWARD LAYRISSON,
SHERIFF OF TANGIPAHOA PARISH

Judgment Rendered: May 2, 2008

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Appealed from The Twenty-first Judicial District Court
in and for the Parish of Tangipahoa
State of Louisiana
Suit Number 2003-001101
The Honorable Zorraine M. Waguespack, Judge

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BEFORE: GAIDRY, McDONALD, AND McCLENDON, JJ.

McClendon, J. concurs and assigns reasons.

GAIDRY, J.

This is an appeal by the plaintiff, Colleen Delacruz (plaintiff), of a judgment dismissing her suit against her former employer, James Edward Layrisson, Sheriff of Tangipahoa Parish (Layrisson), for damages in tort arising out of an automobile accident she was in while on duty as a road deputy. After a thorough review of the record and applicable law, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff became employed by Layrisson as a road deputy in August 2000. On January 11, 2001, while on duty responding to a "suspicious person" call, she was involved in an automobile accident in which she sustained serious bodily injuries.[1] She filed this lawsuit for damages in tort[2] against Layrisson on March 28, 2003, seeking awards for past and future physical pain and suffering, loss of earnings, and medical expenses, as well as for permanent disability.[3] Plaintiff alleged in her petition that Layrisson assured her at the time of the accident that he would pay her medical expenses until she recuperated from her injuries, and that she would continue to receive her monthly salary during her recovery. She further alleged that contrary to these representations, Layrisson failed to pay all of her medical expenses; that he also failed to give her a $200.00 per month raise in salary that was given to all other road deputies in February 2001; that her salary was reduced in November 2002, from $1,518.00 to $1,013.00 per month; and that after refusing to apply for disability retirement, notwithstanding her alleged ability to return to work, she was laid off from her job with the defendant.

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[1] The record reveals that a lawsuit was previously filed by the injured occupants of the other vehicle involved in the accident against Delacruz, Layrisson, and Clarendon Insurance Company (Layrisson's automobile insurer). That suit was dismissed after the parties reached a settlement. The record in that suit was introduced into this record by the defendant, and reveals that the accident was caused when plaintiff inexplicably lost control of her vehicle, which spun into the oncoming lane, struck a vehicle, and continued to spin several more times after impact, ejecting the plaintiff and causing her injuries as well.

[2] In her original petition, plaintiff set forth numerous causes of action; however, by the time of the hearing on the exception and motion at issue in this appeal, she had abandoned all but the action in tort.

[3] In her petition, plaintiff correctly alleged that the sheriff is exempt by law from the mandate to provide workers' compensation insurance (see La. R.S. 23:1034B) and also alleged that Layrisson did not voluntarily provide a workers' compensation insurance policy to cover her injuries; thus, she filed a petition for damages in tort.

Layrisson responded to the lawsuit on May 29, 2003 by filing an answer ***generally denying most of the plaintiff's allegations***, together with an exception of prescription, alleging that on the face of the petition, it had been filed more than one year since the date of the accident. In support of the exception, at the hearing the defendant introduced the deposition testimony of the plaintiff, as well as the suit record in another lawsuit arising from the same accident, filed by the injured occupants of the vehicle that was struck by the plaintiff's vehicle. That suit was settled and dismissed. Plaintiff filed a brief in opposition to the exception in open court on the day of the hearing. Plaintiff introduced no evidence at the hearing. By judgment signed on October 21, 2003, the trial court denied the defendant's exception of prescription.

In July 2006, Layrisson filed another exception of prescription, reurging the argument that the plaintiff's petition, on its face, was prescribed, having been filed more than one year from the date of the accident. On the same day, July 24, 2006, Layrisson also filed a motion for summary judgment, supporting it with his own affidavit and a memorandum. In response, plaintiff filed one memorandum opposing both the exception and motion. As to the exception, plaintiff presented only the argument that the first exception, which was no different from the present one, had been properly denied; therefore, this exception also should be denied. No further evidence was submitted by the plaintiff to support this argument. In opposition to the motion for summary judgment, the plaintiff filed an affidavit, curriculum vitae, and two reports issued by Dr. W. Lloyd Grafton, plaintiff's expert witness in law enforcement, rendering his opinion on the adequacy of the training the plaintiff received as a road deputy.

ACTION OF THE TRIAL COURT

The exception and summary judgment hearings were initially set for different dates; however, a continuance was granted for the hearing on the

exception of prescription, and it was reset for the same day as the hearing on the motion for summary judgment. On September 18, 2006, the trial court heard both the exception of prescription and the motion for summary judgment. By judgment signed October 10, 2006, the trial court found in favor of the defendant and dismissed plaintiff's case with prejudice. Plaintiff filed a motion for new trial, which also was denied. This appeal by the plaintiff follows.

THE APPEAL

On appeal, plaintiff asserts that the trial court improperly reconsidered its original decision on the issue of prescription, that the trial court should have denied the exception of prescription, and that the trial court should not have granted the motion for summary judgment. Layrisson maintains the trial court was correct on both rulings, arguing that plaintiff failed in her burden of proving the case was not prescribed, and also that the motion for summary judgment was properly granted based on plaintiff's failure to prove a genuine issue of material fact existed regarding Layrisson's alleged negligence.[4]

ANALYSIS

The peremptory exception raising the objection of prescription may be pled at any stage of the proceeding in the trial court, and even on appeal. La. C.C.P. art. 928; **Johnson v. Escude**, 07-801, pp. 3-4 (La. App. 3rd Cir. 12/05/07), 971 So.2d 529, 532-33. Additionally, the pretrial denial of this peremptory exception is an interlocutory order; it does not determine the merits of the case and is therefore not a final judgment. La. C.C.P. art. 1841. Accordingly, an earlier ruling by the trial court denying an exception of prescription is not *res judicata*, and can be re-urged

[4] The record is somewhat unclear on exactly which issue the trial court ruled in granting the judgment in Layrisson's favor and dismissing plaintiff's suit. However, it is clear that both issues were taken up and heard on the date set for hearing, and that all parties presented arguments as to both issues. We recognize the trial court's oral reasons after dismissing the plaintiff's case (seemingly on the summary judgment basis) and then denying the motion for new trial (expressly on the issue of prescription) appear to be somewhat confused and incongruent. However, it is well settled in our law that an appeal is from the judgment itself, and not the reasons therefor. In this case, the judgment itself clearly dismisses the plaintiff's claims against the defendant, and finds the law to be in favor of the defendant. Because we find the trial court did not err in dismissing the plaintiff's claims as prescribed, it is of no moment that some reference was made to the merits of the summary judgment in the trial court's oral reasons.

at any time in the proceedings. **Johnson**, 07-801 at p. 4, 971 So.2d at 532. Moreover, a trial court's earlier ruling denying an exception of prescription does not preclude a subsequent order granting the same exception. See **Bellard v. Seale Guest House**, 04-376, pp. 5-6 (La. App. 3rd Cir. 10/06/04), 884 So.2d 1252, 1256. Accordingly, we find no merit in plaintiff's assignment that the trial court erred in reconsidering the exception when it had previously denied same.

We also find no merit in plaintiff's assertion that the trial court erred in granting the subsequent motion on the merits. Plaintiff argues that the doctrine of *contra non valentem* applies, specifically based on her allegations that she was "lulled" by Layrisson's paying her bills and salary for twenty-two months following the accident, and thus was prevented from availing herself of her cause of action against him. According to plaintiff, prescription was interrupted by Layrisson's alleged acknowledgement of his responsibility until he ceased paying her bills and salary, after which she promptly filed a petition for damages.

As plaintiff's petition was prescribed on its face,[5] she bore the burden of proving that prescription had been either interrupted or suspended, rendering the suit timely albeit filed later than the statutory one-year period. La. C.C. art. 3492; **Dunn v. City of Baton Rouge**, 07-1169, p. 1 (La. App. 1st Cir. 2/08/08), ___ So.2d ___, *citing* **Cichirillo v. Avondale Industries, Inc.**, 04-2894, 04-2918, p. 5 (La. 11/29/05), 917 So.2d 424, 428, and **In Re Medical Review Panel for Claim of Moses**, 00-2643, p. 6 (La. 5/25/01), 788 So.2d 1173, 1177.

Evidence may be introduced to support or controvert any of the objections pleaded when the grounds thereof do not appear from the petition. La. C.C.P. art. 931. Appellate review of the record following a hearing on exceptions is governed by manifest error when evidence has been introduced at the hearing. **Carter v.**

[5] The accident occurred on January 11, 2001, and the petition was filed more than two years later, on March 28, 2003.

Haygood, 04-0646, p. 9 (La. 1/19/05), 892 So.2d 1261, 1267. In the absence of evidence, the exception of prescription must be decided on the facts alleged in the petition, which are accepted as true. **Cichirillo**, 04-2894 at p. 5, 917 So.2d at 428.

Plaintiff herein presented no evidence at the hearing on the exception of prescription. Based on the allegations of the petition taken as true, plaintiff's suit for damages arising out of an accident occurring more than two years prior to filing is facially prescribed. The petition, however, attempts to establish a suspension of prescription based on factual allegations of the jurisprudential doctrine of *contra non valentem*. In particular, plaintiff relies on the third category of the doctrine, where the debtor himself has done some act effectually to prevent the creditor from availing himself of the cause of action, to claim an interruption of prescription. This third category encompasses situations where an innocent plaintiff has been lulled into a course of inaction in the enforcement of his right by some concealment or fraudulent conduct on the part of the defendant. **Kirby v. Field**, 04-1898, p. 2 (La. App. 1st Cir. 9/23/05), 923 So.2d 131, 135, writ denied, 05-2467 (a. 3/24/06), 925 So.2d 1230.

The plaintiff's petition makes no allegation of fraud or concealment. She alleged that the defendant promised to pay her medical bills and to continue paying her salary during her recovery, and admits in her petition that he fulfilled this promise for some time. She also admitted in her testimony (during the hearing on the motion for summary judgment) that she was aware that she had one year to file suit to recover in tort; however, since the defendant was paying her bills and her salary as promised, she did not feel the need to file suit.

At a trial of a peremptory exception of prescription, evidence may be admitted to support or controvert the defense. La. C.C.P. art. 931. As noted earlier, the plaintiff failed to present any evidence in order to bear her burden of proving the claimed interruption of prescription. In this case, all that plaintiff

claims she relied on was that the sheriff was paying her bills and salary, and she decided not to file suit as long as he was keeping his word on those promises. As a matter of law, these promises to pay made on behalf of the sheriff were gratuitous, and in no way assured the plaintiff that the sheriff was accepting tort liability for the accident, nor that he was willing to provide her with claims to personal injury damages in the absence of her filing suit. Accordingly, the trial court was correct in dismissing plaintiff's claims with prejudice on the basis that from the face of the petition, her action is prescribed and she failed to introduce any evidence or otherwise bear her burden of proving that the doctrine of *contra non valentem* applied to suspend prescription under the circumstances of this case.

Based on the foregoing ruling, we pretermit any discussion about the trial court's rulings on the motion for summary judgment; those issues are now moot. We also deny as moot the motion by the plaintiff to substitute Layrisson's successor in office as the proper party defendant. Costs of this appeal are assessed to the plaintiff, Colleen Delacruz.

AFFIRMED.

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VERSUS

JAMES EDWARD LAYRISSON,
SHERIFF OF TANGIPAHOA PARISH

****

McCLENDON, J., concurs.

I cannot say that the trial court erred in holding that *contra non valentem* did not apply in the case *sub judice*. Thus, I concur with the result reached by the majority.