NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 0299

WANDA FRANK

VERSUS

THE PARISH OF POINTE COUPEE
THROUGH ITS SHERIFF BEAUREGARD TORRES

Judgment Rendered: September 10, 2010

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APPEALED FROM THE EIGHTEENTH JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF POINTE COUPEE
STATE OF LOUISIANA
DOCKET NUMBER 42,006, DIVISION "A"

THE HONORABLE JAMES J. BEST, JUDGE

* * * * * * *

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Sheriff Beauregard Torres

BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

McClendon, J. concurs and assigns reasons.

McDONALD, J.

This is an appeal of a judgment from the Eighteenth Judicial District Court granting a peremptory exception raising the objection of prescription filed by the defendant. For the following reasons, the judgment is affirmed.

The plaintiff in this matter, Wanda Frank, was employed by the Sheriff of Pointe Coupee Parish as a deputy sheriff, assigned as a dietary employee. On December 3, 2007, Ms. Frank slipped and fell on some hot beans that had spilled onto the floor in the kitchen. Because of the injury sustained in the fall, Ms. Frank was not able to return to work. In March 2008, a letter was sent to Ms. Frank by the Chief Civil Deputy, Stacy Devillier, advising that a Certification of Health Care Provider dated February 14, 2008, stated that she was unable to return to work until May. The letter further advised that Ms. Frank did not have leave available to cover her through May, and requested that she schedule an appointment with a Dr. Picard so that the Sheriff's office could reevaluate her leave status. The letter also stated, "although PCSO was under no obligation to do so, you have been paid 100% of your salary from December 3, 2007 through March 2, 2008."

On April 11, 2008 a letter regarding leave status was sent to Ms. Frank by Chief Deputy Devillier. It advised that effective April 14, 2008, Ms. Frank's leave status was to be changed to unpaid. It stated, "Despite exhausting all available leave with PCSO, you have been paid and will continue to be paid 100% of your salary from December 3, 2007 through April 13, 2008, notwithstanding no requirement of PCSO to do so."

On December 4, 2008,[1] Ms. Frank filed a petition for damages alleging that defendant's employees negligently created a condition that created an unreasonable

[1] The petition was fax filed on this date, and the original was filed into the record on December 8, 2008.

risk of harm and as a direct result of the hazardous condition, plaintiff slipped and fell causing injury to her body.[2] Plaintiff prayed for judgment against the Parish of Pointe Coupee through its Sheriff, Beauregard Torres. In August 2009, an exception raising the objection of prescription was filed by the defendant.

A first amending petition was filed by plaintiff in September 2008, alleging that prescription of plaintiff's claim was interrupted by express acknowledgments by defendant's representatives, relying particularly on the unconditional payment of plaintiff's salary and medical expenses from December 3, 2007 through April 2008.

The trial court issued a ruling on the peremptory exception raising the objection of prescription, correctly noting that the plaintiff had the burden of proof and that she had failed to convince the court that she was "lulled" into not filing suit timely. Judgment was signed on November 3, 2009, granting the exception and dismissing plaintiff's suit with prejudice, at her cost. This appeal timely followed.

Plaintiff argues that the court committed legal error in dismissing her claim because the Sheriff's payment of unearned wages was an acknowledgement of liability that interrupted prescription. Plaintiff is correct that review by this court is *de novo.* While the issue of acknowledgment is a mixed question of law and fact, which is generally subject to the manifest error standard of review, where, as here, there is no dispute as to the dispositive facts, the issue can be decided as a matter of law and the review is *de novo. Demma v. Automobile Club Inter-Insurance Exchange,* 08-2810 (La. 6/26/09), 15 So.3d 95, 100 n.4. However, we do not agree that the payment in this case interrupted prescription as a matter of law.

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[2] Sheriff's deputies, with the exception of criminal deputy sheriffs for the Parish of Orleans, are exempted from the statutory Workers' Compensation scheme. LSA-R.S. 23:1034.

Prescription that has commenced to accrue, but that has not yet run, may be interrupted "when one acknowledges the right of the person against whom he had commenced to prescribe." LSA-C.C. art. 3464; *Demma,* 15 So.3d at 98. Substantively, an acknowledgment is a simple admission of liability resulting in the interruption of prescription that has commenced to run, but not accrued. *Id.* The form the acknowledgment may assume has been extensively discussed in doctrinal writings as well as in numerous decisions of this court. *Id.* The supreme court in *Demma* recognized that acknowledgment sufficient to interrupt prescription may be made verbally, in writing, by partial payment, by payment of interest or by pledge, or in other ways; and that it may be implied or it may be inferred from the facts and circumstances. *Id.*, 15 So.3d at 99. The court then considered tacit acknowledgment, noting that in *Mallett v. McNeal,* 05-2289, 05-2322 (La. 10/17/06), 939 So.2d 1254, 1259 the court held that one form of acknowledgment that will interrupt the running of prescription is the tacit acknowledgment resulting when the debtor makes an unconditional payment of a portion of the debt. *Demma,* 15 So.3d at 99, 106.

In *Lima v. Schmidt,* 595 So.2d 624, 634 (La. 1992), the supreme court defined a tacit acknowledgment as occurring when a debtor performs acts of reparation or indemnity, makes an unconditional offer or payment, or lulls the creditor into believing he will not contest liability, which definition was reiterated in *Mallett. In Mallett* court went on to note that the jurisprudence has also established that "mere settlement offers or conditional payments, humanitarian or charitable gestures, and recognition of disputed claims will not constitute acknowledgments." *Mallett,* 939 So.2d at 1259.

In this matter, the letters by the Sheriff's representative to Ms. Frank clearly convey the Sheriff's belief that he had no legal obligation to Ms. Frank. Ms. Frank states in her affidavit that she was told that the reason the Sheriff continued to pay

her salary, although she was unable to work, was because it was their fault that the injury occurred. As set forth in her brief and affidavit, she contends she was "lulled" into inaction by the belief that the Sheriff accepted responsibility for her injuries. As noted by the trial court, Ms. Frank knew seven months before the prescriptive date that she was no longer being paid by the Sheriff's Office. She had ample time to file suit if she believed she was entitled to compensation from the Sheriff.

The letter of April 11, 2008, unequivocally informed Ms. Frank of the Sheriff's position. Moreover, this letter was signed by Ms. Frank, acknowledging that she received and understood it. The trial court did not accept Ms. Frank's contention that she was lulled into inaction by the Sheriff. Neither do we. We find that the payment of unearned wages to Ms. Frank was a humanitarian or charitable gesture, not an acknowledgment of liability sufficient to interrupt prescription. Further, we do not find it necessary to reexamine the facts to determine if actions by the Sheriff could be considered a "tacit acknowledgment" in the face of the Sheriff's expressly stated position denying liability.

Accordingly, the judgment appealed is affirmed. This memorandum opinion is issued in compliance with Uniform Rules, Courts of Appeal, Rule 2-16.1.B. Costs are assessed to plaintiff, Wanda Frank.

AFFIRMED.

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McCLENDON, J., concurs and assigns reasons.

I respectfully concur with the result reached by the majority.

In her affidavit, Ms. Frank admitted that the sheriff's representative told her that the sheriff was under no obligation to pay her salary and medical expenses. Additionally, in the April 11, 2008 letter, which was signed by Ms. Frank as "understood and agreed," the sheriff's representative informed Ms. Frank that her salary would be paid through April 13, 2008, although there was no requirement of the sheriff to do so. Thus, the sheriff was clear that payments to Ms. Frank were being made gratuitously. Accordingly, under the specific facts of this case, I do not believe that the plaintiff met her burden of establishing that she was lulled into a course of inaction based upon the conduct of the defendant. See **Delacruz v. Layrisso**n, 07-1301 (La.App. 1 Cir 5/2/08) (unpublished opinion), writ denied, 08-1620 (La. 10/24/08), 992 So.2d 1042.