

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2009 CA 1104

CARL J. HARRELL

VERSUS

**STATE OF LOUISIANA, DEPARTMENT OF PUBLIC SAFETY AND
CORRECTIONS, OFFICE OF MOTOR VEHICLES**



Judgment Rendered: DEC 23 2009

**Appealed from the
20th Judicial District Court
In and for the Parish of East Feliciana
State of Louisiana
Case No. 39383**

The Honorable William G. Carmichael, Judge Presiding

**Jennifer Del Murray
Baton Rouge, Louisiana**

**Counsel for Defendant/Appellant
Department of Public Safety and
Corrections, Office of Motor
Vehicles**

**Charles E. Griffin, II
St. Francisville, Louisiana**

**Counsel for Plaintiff/Appellee
Carl J. Harrell**

BEFORE: DOWNING, GAIDRY, AND McCLENDON, JJ.

Downing, J. concurs.

McCleendon, J. concurs with the result reached.

GAIDRY, J.

The State of Louisiana, through its Department of Public Safety and Corrections (the Department), appeals a judgment ordering it to reinstate the driving privileges of a commercial truck driver and a subsequent judgment denying its motion for new trial. For the following reasons, we hold that the plaintiff's petition fails to state a cause of action due to preemption and reverse both judgments.

FACTS AND PRIOR PROCEEDINGS

The plaintiff, Carl J. Harrell, is a "long-haul" commercial truck driver primarily employed in the hauling of hazardous material. He held a Louisiana Class "A" commercial driver's license, with an "H" (hazardous materials) endorsement.

On March 26, 2007, while hauling a wide load (but not hazardous material), plaintiff received a citation (LABI005464) for speeding. Notice of violation was issued on March 30, 2007. Plaintiff claims to have promptly paid the monetary penalty of \$100.00, but that claim is disputed by the Department, which claims to have no records of such payment. Based upon plaintiff's supposed failure to pay the penalty or to seek timely administrative review within 45 days, his driving privileges were suspended by the Department pursuant to La. R.S. 32:1525(B)(2).

On October 25, 2007, plaintiff received another citation (LAAT001267) for speeding, as well as for driving a commercial transport vehicle while his commercial driver's license was suspended. Notice of those violations was issued on October 31, 2007.

On October 26, 2007, the day after receiving the above-described second citation, plaintiff paid the penalty for the March 26, 2007 violation,

supposedly for the second time, according to his trial testimony and that of his wife.

Plaintiff did not request an administrative hearing of the October 26, 2007 violations within 45 days, and did not pay the assessed civil penalty of \$375.00 until January 3, 2008, some 64 days after the notice was issued.

On or about August 29, 2008, plaintiff received a renewed driver's license that did not reflect any restrictions or disqualifications.

On October 6, 2008, the Department issued an Official Notification of Withdrawal of Driving Privileges to plaintiff, advising him that his driving privileges were suspended for 365 days based upon a conviction of January 28, 2008 for "violation of suspension or revocation of operator's license" under La. R.S. 32:415, relating to the offense of operating a motor vehicle while a license is suspended or revoked. The "docket number" of the conviction was listed as LAAT001267, the same number as the citation for the violations of October 25, 2007. The notification further advised plaintiff that he was disqualified from operating a commercial motor vehicle for 365 days under La. R.S. 32:414.2(A)(4)(e).

On October 23, 2008, plaintiff filed a petition in the 20th Judicial District Court for the Parish of East Feliciana against the Department, seeking to stay the suspension of his driving privileges, overrule the suspension, and reinstate his driving privileges. The trial court set a hearing on plaintiff's claim for such mandatory injunctive relief for November 24, 2008.

The matter was heard as scheduled. A considerable portion of the testimony and documentary evidence related to plaintiff's supposed timely payment of the penalty for the March 26, 2007 violation. At the conclusion of the trial, the trial court ruled in favor of plaintiff and against the

Department. On January 6, 2009, the trial court signed its judgment, ordering the Department to “reinstate, in full, the driving privileges of [plaintiff] immediately, without any restrictions.”

On January 12, 2009, the Department filed a motion for new trial on the grounds that the judgment was clearly contrary to the law and the evidence. That motion was heard on March 9, 2009, and the trial court signed its judgment denying the motion on March 19, 2009.

The Department now appeals.

ASSIGNMENTS OF ERROR

The Department initially assigns as error the trial court’s judgment ordering it to reinstate plaintiff’s driving privileges. It further contends that the trial court erred in denying its motion for a new trial.

Elsewhere in its brief, the Department designates the judgment appealed as that denying its motion for new trial. A judgment denying a motion for new trial is an interlocutory judgment and normally unappealable. However, the Department has clearly challenged the original judgment on the merits in its first assignment of error, and has attached copies of both that judgment and the judgment denying its motion for new trial to its brief. It is also the established practice of the appellate courts, as directed by the supreme court, to treat the appeal of the denial of a motion for a new trial as an appeal of the judgment on the merits, when it is clear from the appellant’s brief that he intended to appeal the merits of the case. *Smith v. Hartford Accident & Indem. Co.*, 254 La. 341, 348-49, 223 So.2d 826, 828-29 (La. 1969); *Carpenter v. Hannan*, 01-0467, p. 4 (La. App. 1st Cir. 3/28/02), 818 So.2d 226, 228-29, *writ denied*, 02-1707 (La. 10/25/02), 827 So.2d 1153. Thus, the merits of the judgment of January 6, 2009 are properly before us.

DISCUSSION

Title 32, Chapter 12 of the Louisiana Revised Statutes, La. R.S. 32:1501, *et seq.*, is entitled “Hazardous Materials Transportation and Motor Carrier Safety.” The law expressly declares that it is the public policy of this state “[t]hat all carrier transportation, including . . . transportation of . . . freight, . . . should comply with minimum state standards of safe operation, . . . due to the size and momentum of the transport vehicles involved, the adverse impact on economic welfare posed to the citizens of this state when these transport vehicles are involved in accidents, the threat to public safety caused by these accidents, and the huge volume of shipments in which carriers are involved.” La. R.S. 32:1501(3).

Louisiana Revised Statutes 32:1525 addresses the enforcement of violations under that chapter and the Federal Motor Carrier Safety Regulations. Louisiana Revised Statutes 32:1525(A)(2)(a) provides, in pertinent part:

Each notice of violation shall clearly indicate if a monetary penalty is assessed for the violation or if the notice of violation is only a warning. In cases of the assessment of a monetary penalty, each notice of violation shall be sent to the responsible party by certificate of mailing. Such notice of violation shall also contain notice that *the responsible party shall have forty-five calendar days from the date of issuance of the notice of violation to either pay the monetary penalty for the violation or to request, in writing, an administrative hearing to review the notice of violation.*

(Emphasis added.)

The notices of violation issued to plaintiff on March 30, 2007 and October 31, 2007 complied with the foregoing provision. Plaintiff did not request an administrative hearing relating to any violation, but instead eventually paid the monetary penalties for all the violations, including that for operating a commercial motor vehicle while disqualified from doing so.

And plaintiff's payment of the penalties for the October 25, 2007 violations was indisputably late, being made well over the 45-day period set forth above.

Mr. Harrell paid the monetary penalty for violation of La. R.S. 32:415 instead of seeking an administrative hearing within the 45-day preemptive period. Such payment clearly constitutes an admission that he operated a commercial motor vehicle while his driving privileges were suspended, and, more importantly, it constitutes a conviction under 49 C.F.R. § 384.215 and La. R.S. 32:414.2(A)(1)(b)(i). Louisiana Revised Statutes 32:414.2(A)(4)(e) requires that "any person *shall* be disqualified from operating a commercial motor vehicle for a period of one year for . . . [a] first offense of operating a commercial motor vehicle when, as a result of prior violations committed while operating a commercial motor vehicle, the driver's commercial driver's license is suspended, revoked, canceled, or disqualified." (Emphasis added.)¹

Title 49, § 383.5 of the Code of Federal Regulations defines "conviction" as follows:

Conviction means an unvacated adjudication of guilt, or a determination that a person has violated or failed to comply with the law in a court of original jurisdiction or by an authorized administrative tribunal, an unvacated forfeiture of bail or collateral deposited to secure the person's appearance in court, a plea of guilty or nolo contendere accepted by the court, the payment of a fine or court cost, or violation of a condition of release without bail, regardless of whether or not the penalty is rebated, suspended, or probated.

See also La. R.S. 32:414.2(A)(9)(a), containing similar language.

¹ Title 49, § 384.215(a) of the Code of Federal Regulations provides that "[t]he State must disqualify from operating a CMV [commercial motor vehicle] each person who is convicted, as defined in Sec. 383.5 of this subchapter, in any State or jurisdiction, of a disqualifying offense . . ., for no less than one year."

We conclude that the 45-day period of La. R.S. 32:1525(A)(2)(a) is a preemptive period, as the claim is of a public law nature and there is a clear public interest promoted by the limited period of time within which to seek administrative review. *See Weems v. Dep't of Pub. Safety & Corr.*, 571 So.2d 733, 735 (La. App. 2nd Cir. 1990); *Green v. La. Dep't of Pub. Safety & Corr.*, 603 So.2d 800, 802 (La. App. 1st Cir. 1992); *Simmons v. La. Dep't of Pub. Safety & Corr.*, 04-102, pp. 4-6 (La. App. 3rd Cir. 5/12/04), 872 So.2d 650, 652-54. *See also* La. R.S. 32:1501(3).

Peremption may be noticed by a court, including an appellate court, on its own motion. La. C.C.P. art. 927(B); La. C.C. art. 3460. Accordingly, we find that plaintiff was precluded from contesting at trial the validity of the conviction for the March 26, 2007 violation that formed the basis of the initial suspension of his driving privileges, as well as the validity of the convictions for the October 25, 2007 violations. Such being the case, he has failed to state a cause of action to overrule the mandatory disqualification of his privileges to operate commercial motor vehicles. Plaintiff's untimely challenge to the original suspension of his driving privileges, based upon the Department's claim of untimely payment of the penalty for the March 26, 2007 citation, also constitutes an impermissible collateral attack.

We further reject plaintiff's contention that the Department was equitably estopped from suspending his driving privileges and disqualifying him from operating a commercial motor vehicle by reason of the routine issuance of a renewed driver's license on August 29, 2008. The Official Notification of Withdrawal of Driving Privileges was issued by the Department on October 6, 2008, only five weeks later, and less than a year after the violations of October 25, 2007. As such, the case of *Spataro v. State ex rel. Dep't of Pub. Safety & Corr.*, 577 So.2d 795 (La. App. 2nd Cir.

1991), cited by plaintiff, involving a three-year gap between the issuance of an unrestricted license (issued three years after the conviction) and a later attempt to impose restrictions, is distinguishable. Estoppel is not favored in our law. *Barnett v. Saizon*, 08-0336, p. 10 (La. App. 1st Cir. 9/23/08), 994 So.2d 668, 674. Additionally, and more importantly, since there is positive law governing the issue, resort to equity is inappropriate. *See* La. C.C. art. 4 and *Dupont v. Hebert*, 06-2334, p. 7 (La. App. 1st Cir. 2/20/08), 984 So.2d 800, 806-7, *writ denied*, 08-0640 (La. 5/9/08), 980 So.2d 695.

For the foregoing reasons, we conclude that both of the Department's assignments of error have merit. The trial court's judgment on the merits and its judgment denying the Department's motion for new trial are reversed. All costs of court are assessed to the plaintiff, Carl J. Harrell.

REVERSED.