IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

DONALD HARMON,	:	
	:	C.A. No. 07C-01-003 WLW
Plaintiff,	:	
	:	
v.	:	
	:	
STATE OF DELAWARE,	:	
DELAWARE HARNESS RACING	:	
COMMISSION,	:	
	:	
Defendant.	:	

Submitted: August 24, 2011
Decided: November 17, 2011

MEMORANDUM AND ORDER

Upon Defendant's Motion for Judgment as a Matter
of Law, or in the Alternative, for a New Trial.
Granted.

Ronald G. Poliquin, Esquire, Dover, Delaware; attorney for the Plaintiff.

Laura L. Gerard, Esquire and Marc P. Niedzielski, Esquire, Department of Justice, Wilmington, Delaware; attorneys for the Defendant.

WITHAM, R.J.

This is the Court's memorandum decision on the issue presented:

Whether Defendant's motion for judgment as a matter of law, or in the alternative, for a new trial, should be granted?

FACTS

Donald Harmon (hereinafter "Plaintiff") was hired by the Delaware Harness Racing Commission (hereinafter "Defendant") as an associate judge on August 30, 1998. Plaintiff was promoted to presiding judge, the highest racing official, on July 1, 2000. Plaintiff was an at-will employee, paid per diem, who served at the pleasure of the Defendant. In early January of 2004, the State of Delaware filed criminal charges against Plaintiff, among them a felony charge for changing an official record.[1] On January 14, 2004, Defendant suspended Plaintiff without pay pending disposition of the criminal charges. On October 22, 2004, Plaintiff was acquitted of criminal charges.[2] Shortly after his acquittal, Defendant did not reinstate Plaintiff.

Plaintiff filed this case for promissory estoppel against Defendant on January 3, 2007.[3] The five day trial commenced on January 11, 2011, resulting in a verdict for Plaintiff of $102,273. At the close of Plaintiff's case, Defendant moved for judgment as a matter of law under Superior Court Civil Rule 50, which was denied.

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[1]Tr. I at 107.

[2]Pl's Br. at 10.

[3]Plaintiff's complaint also included claims for breach of the implied covenant of good faith and fair dealing against Defendant and abuse of process against two other defendants. On January 8, 2010, the Court granted summary judgment on all claims but the promissory estoppel claim against Defendant.

Defendant timely filed its renewed motion for judgment as a matter of law as well as its motion in the alternative for a new trial under Superior Court Civil Rule 59.

Standard of Review

When considering judgment as a matter of law the trial judge does not weigh the evidence.[4] The Court views the evidence in the light most favorable to the non-moving party.[5] "If the facts and inferences so considered compel reasonable persons to reach just one conclusion–that the moving party is entitled to judgment–the motion will be granted."[6]

Superior Court Civil Rule 50(a)(1) states,

> If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the Court may determine the issue against the party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

Superior Court Civil Rule 50(b) states, in pertinent part,

> Whenever a motion for a judgment as a matter of law made at the close

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[4]*Luciani v. Adams*, 2003 WL 262500, at *3 (Del. Super. Feb. 10, 2003). *Luciani* frames the law in terms of judgment notwithstanding the verdict. Directed verdict and judgment notwithstanding the verdict have been merged into the term "judgment as a matter of law." *See* Super. Ct. Civ. R. 50. The underlying legal analysis remains the same.

[5]*Luciani*, 2003 WL 262500, at *3.

[6]*Id.*

> of all the evidence is denied or for any reason is not granted, the Court is deemed to have submitted such action to the jury subject to a later determination of the legal questions raised by the motion. Such a motion may be renewed by service and filing not later than 10 days after entry of judgment. A motion for a new trial under Rule 59 may be joined with a renewal of the motion for judgment as a matter of law, or a new trial may be requested in the alternative. If a verdict was returned, the court may, in disposing of the renewed motion, allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as a matter of law.

Superior Court Civil Rule 59(a) states, in pertinent part, "A new trial may be granted as to all or any of the parties and on all or part of the issues in an action in which there has been a trial for any of the reasons for which new trials have heretofore been granted in the Superior Court." A motion for a new trial serves a different purpose than judgment as a matter of law, and it has a separate standard.[7] In deciding such a motion, the Court must weigh the evidence to decide if the verdict was one which might have been reached on reasonable grounds.[8]

In analyzing a motion for a new trial, there is a presumption that the jury verdict is correct.[9] In order to be set aside, the jury's verdict must be "against the

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[7] *Id.* at *5.

[8] *McCloskey v. McKelvey*, 174 A.2d 691, 693 (Del. Super. 1961).

[9] *Smith v. Lawson*, 2006 WL 258310, at *3 (Del. Super. Jan. 23, 2006) (*citing Mills v. Telenczak*, 345 A.2d 424, 426 (Del. Super. 1975)).

great weight of the evidence or the verdict shocks the Court's conscience."[10] Stated in a different manner, the jury's verdict may be disregarded when the Court is of the belief that the jury ignored the applicable rules of law.[11] Fifty years ago, this Court stated,

> [T]he verdict must be manifestly and palpably against the weight of the evidence or for some reason, or a combination of reasons, justice would miscarry if it were allowed to stand. It is not a sufficient ground for a new trial that the verdict is merely against the preponderance of the testimony, or that the Court may have arrived at a different result.[12]

Under Superior Court Civil Rule 50(c), when dealing with simultaneous motions for judgment as a matter of law and for a new trial, if the Court grants the motion for judgment as a matter of law "the Court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for a new trial."[13]

To succeed in a claim based on promissory estoppel, Plaintiff must show, by clear and convincing evidence, as follows: "(1) a promise was made; (2) it was the reasonable expectation of the promisor . . . to induce action or forbearance on the part

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[10] *Id.* (*citing Storey v. Camper*, 401 A.2d 458, 465 (Del. 1979)).

[11] *Id.* (*citing Storey v. Castner*, 314 A.2d 187, 193 (Del. 1973)).

[12] *McCloskey*, 174 A.2d at 693.

[13] Super. Ct. Civ. R. 50(c).

of the promisee; (3) the promisee . . . reasonably relied on the promise and acted to his detriment; and (4) that such a promise is binding because injustice will be avoided only by enforcement of the promise."[14]

"A principal is bound by an agent's apparent authority which he knowingly permits the agent to assume [or] which he holds the agent out as possessing."[15] Apparent agency requires that "an agent can bind the principal on an apparent authority basis only if the third person involved reasonably concludes that the agent is acting for the principal."[16] With regard to this second requirement, the Delaware Supreme Court went on to say:

> In dealing with the agent the third person must act with 'ordinary prudence and reasonable diligence,' in ascertaining the scope of the agent's authority and he will not be permitted to claim protection if he ignores facts illustrating the agent's lack of authority. In this regard, the third person must make a preliminary investigation as to the agent's apparent authority and additional investigations if the facts so warrant.[17]

DISCUSSION

At the heart of Plaintiff's case are three legal arguments that the jury must have granted to have found in his favor. First, John Wayne (hereinafter "Wayne"), Administrator of Racing, must have been an agent of the Commission. Second, all

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[14]*Ramone v. Lang*, 2006 WL 905347, at *14 (Del. Ch. Apr. 3, 2006).

[15]*Crumlish v. Price*, 266 A.2d 182, 183-84 (Del. 1970).

[16]*Int'l Boiler Works Co. v. General Waterworks Corp.*, 372 A.2d 176, 177 (Del. 1977).

[17]*Id.*

elements of promissory estoppel must have been fulfilled. Third, Plaintiff must have suffered cognizable reliance damages in the amount of $102,273.[18]

In analyzing this motion for judgment as a matter of law, the Court views the evidence in the light most favorable to the non-moving party.[19] If the Court finds that, upon consideration of the facts and inferences, reasonable persons could reach only the conclusion that the movant is entitled to judgment, then the motion will be granted.[20]

Apparent Agency Inapplicable to This Case

To analyze the agency of Wayne, important background must be established regarding Wayne's position as Administrator of Racing. 3 *Del. C.* § 10007(e) states in part,

> The Commission may employ an Administrator of Racing who shall perform all duties prescribed by the Commission consistent with the purposes of this chapter. . . . The Administrator of Racing shall be the representative for the Commission at all race meetings. The Administrator shall attend all meetings of the Commission and shall keep a complete record of its proceedings . . . . The Administrator of Racing shall be the executive officer of the Commission and shall be responsible for keeping all Commission records and carrying out the rules and orders of the Commission.

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[18]This third argument is taken up later in the Court's supplementary analysis for the motion for a new trial in the alternative under Superior Court Civil Rule 50(c).

[19]*Luciani*, 2003 WL 262500, at *3.

[20]*Id.*

In an order dated December 21, 2010, this Court found as follows: "[P]laintiff can only enforce Wayne's promise against the Commission if Wayne had authority to make the promise on the Commission's behalf. The Commission contends, correctly, that Wayne is not at liberty to define the scope of his own authority."[21]

For the purposes of this motion, the Court will assume, as the jury did, that Wayne made the statement that Plaintiff would get his job back once he was cleared of criminal charges. Plaintiff argues as circumstantial evidence of a promise to restore his employment that he was suspended and not terminated during the course of his criminal case, that the person who replaced him was deemed "Acting Presiding Judge" signifying a temporary hold on the position, and that Defendant conferred with Plaintiff's legal counsel concerning the status of his criminal charges.

3 *Del. C.* § 10006 states, in part, "A majority of the Commissioners shall constitute a quorum for the transaction of any business, for the performance of any duty and for the exercise of any power of the Commission." The implication of this section is that Defendant needed to vote to legitimize any promise to reinstate. According to Chairwoman Steele, the minutes of the meetings during that time period reveal no such promise or vote to reinstate Plaintiff upon acquittal of his criminal charges, nor do they contain any direction to Wayne to act in making a promise of reinstatement.[22]

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[21]Order at 5.

[22]Tr. III at 134.

Delaware follows the Restatement of Agency.[23] The Restatement (Third) of Agency states, "An agent acts with *actual authority* when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act."[24] Since Defendant must act by a vote, and no such vote occurred, it could not have made a manifestation to its agent Wayne. Thus, no actual authority was granted to Wayne.

This leaves apparent authority. "A principal is bound by an agent's apparent authority which he knowingly permits the agent to assume [or] which he holds the agent out as possessing."[25] Apparent agency requires that "an agent can bind the principal on an apparent authority basis only if the third person involved reasonably concludes that the agent is acting for the principal."[26] Questions of apparent authority of an agent are questions of fact and are ordinarily for the jury to determine.[27] Nevertheless, Defendant urges that apparent agency should not apply to it as a matter of law. The Restatement (Third) of Agency notes that apparent authority generally

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[23]*Pisano v. Del. Solid Waste Auth.*, 2006 WL 3457686, at *9, Silverman, J. (Del. Super. Nov. 30, 2006).

[24]§ 2.01 (2006) (emphasis added).

[25]*Crumlish*, 266 A.2d at 183-84.

[26]*Int'l Boiler Works Co.*, 372 A.2d at 177.

[27]*Billops v. Magness Constr. Co.*, 391 A.2d 196, 199 (Del. 1978).

does not apply to governmental entities.[28] This Court noted in *Pisano v. Delaware Solid Waste Authority*, "At most, courts apply apparent authority against governmental entities reluctantly."[29] Typically, when dealing with governmental entities, third parties "take the risk of error regarding the agent's authority to a greater degree than do third parties dealing through agents with nongovernmental principals."[30] *Pisano* and the Restatement note that a possible exception to this principle is when "substantial injustice" would occur as a result.[31] As a matter of law, Plaintiff's case fails here. The Court does not see a scenario in which Plaintiff suffered what could be described as "substantial injustice," and Plaintiff bore the risk of error in dealing with a governmental entity.[32]

Promissory Estoppel Inapplicable

A case for promissory estoppel requires, by clear and convincing evidence, as follows: "(1) a promise was made; (2) it was the reasonable expectation of the promisor . . . to induce action or forbearance on the part of the promisee; (3) the promisee . . . reasonably relied on the promise and acted to his detriment; and (4) that such a promise is binding because injustice will be avoided only by enforcement of

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[28] § 2.03 cmt. g (2006).

[29] *Pisano*, 2006 WL 3457686, at *9.

[30] *Id.* (*quoting* Restatement (Third) of Agency § 2.03 cmt. g (2006)).

[31] 2006 WL 3457686, at *9; § 2.03 cmt. g.

[32] Plaintiff should have a higher awareness of this risk because of his position as Presiding Judge.

the promise."[33]

Delaware courts have precluded the use of estoppel in similar contexts. In *Kulesza v. Alcoholic Beverage Control Commission*, this Court found estoppel inapplicable where an alcoholic beverage proprietor attempted to use an unauthorized policy memorandum written by the Commission to estop the suspension of her license for sale of alcohol to an underage individual.[34] *Kulesza* recounted a previous similar case in which the Governor signed a bill into law on June 23, 1961, increasing the tax on wine, and the Executive Secretary of the Alcoholic Beverage Commission announced that the new tax rate would go into effect on July 1, 1961.[35] The Executive Department later stated that the new rate would go into effect on June 23, 1961.[36] The defendant in that case argued that the statement by the Executive Secretary should estop enforcement of the new tax rate before July 1, 1961.[37] The Delaware Supreme Court stated, "[I]n matters of this nature, a State or its agencies cannot be estopped by the unauthorized acts of its officers."[38] The Court of Chancery has disputed the applicability of this case outside the context of the effective date for

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[33] *Ramone*, 2006 WL 905347, at *14.

[34] 1991 WL 302534, at *2.

[35] *Conway v. Wolf Liquor Co.*, 200 A.2d 831, 833 (1964).

[36] *Id.*

[37] *Id.* at 834.

[38] *Id.*

new tax rates when erroneous information has been provided by an official.[39] Nevertheless, in a case in which a parolee attempted to use an estoppel argument, the Delaware Supreme Court remarked strongly against the use of estoppel in the governmental context: "Ordinarily a state is not estopped in the exercise of its governmental functions by the acts of its officers."[40]

The argument against estoppel in this context is further bolstered by a statement of the United State Supreme Court on applying estoppel to the government. The Supreme Court noted, "[T]he general rule [is] that those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to the law."[41] Although the Supreme Court does not completely preclude the use of estoppel against the government, it certainly restricts its use in all but the most serious cases.[42]

Plaintiff presents a line of cases in which promissory estoppel was applied to the context of school board employee terminations.[43] The Court, however, believes

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[39]*See Mirzakhalili v. Chagnon*, 2000 WL 1724326, at *12 n.48 (Del. Ch. Nov. 28, 2000) (utilizing equitable estoppel in the context of a Delaware Association of Professional Engineers election).

[40]*McCoy v. State*, 277 A.2d 675, 676 (Del. 1971).

[41]*Heckler v. Cmty. Health Servs. Of Crawford Cnty., Inc.*, 467 U.S. 51, 63 (1984).

[42]*See id.* at 60-61.

[43]*Keating v. Board of Educ. of the Appoquinimink School Dist.*, 1993 WL 460527 (Del. Ch. Nov. 3, 1993); *Crisco v. Board of Educ. of the Indian River School Dist.*, 1988 WL 90821 (Del. Ch. Aug. 29, 1988); *Reeder v. Sanford School, Inc.*, 397 A.2d 139 (Del. Super. 1979) (inapplicable

that *Kulesza* is more analogous to the case at bar. The Court's belief is affirmed by the strong statement of the Delaware Supreme Court in *McCoy*. In *Kulesza*, the policy memorandum issued by the Alcoholic Beverage Control Commission was unauthorized by law.[44] This Court did not allow that memorandum to estop enforcement of the law. The United States Supreme Court also views estoppel in the governmental context with skepticism.

In the case at bar, by law, Defendant takes authorized action solely by vote. Plaintiff was fully aware that Defendant conducted business by majority vote as he had been present at several proceedings in which he attempted to be reinstated. Further, under the statutory scheme for Defendant mentioned above, and by Plaintiff's own acknowledgment,[45] Plaintiff served at the pleasure of Defendant as an at-will employee. For all of the reasons mentioned above, as a matter of law, estoppel is not permitted in this context.

Motion in the Alterative for a New Trial

Pursuant to Superior Court Civil Rule 50(c), when dealing with simultaneous motions for judgment as a matter of law and for a new trial, if the Court grants the motion for judgment as a matter of law "the Court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is

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because case involves a private employer).

[44]1991 WL 302534, at *2.

[45]Tr. I at 141-42.

thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for a new trial."[46] As the Court has granted judgment as a matter of law in favor of Defendant, the Court must also discuss its ruling on the motion in the alternative for a new trial.

Superior Court Civil Rule 59(a) states, in pertinent part, "A new trial may be granted as to all or any of the parties and on all or part of the issues in an action in which there has been a trial for any of the reasons for which new trials have heretofore been granted in the Superior Court." A motion for a new trial serves a different purpose than judgment as a matter of law, and it has a separate standard.[47] In deciding such a motion, the Court must weigh the evidence to decide if the verdict was one which might have been reached on reasonable grounds.[48]

In analyzing a motion for a new trial, there is a presumption that the jury verdict is correct.[49] In order to be set aside, the jury's verdict must be "against the great weight of the evidence or the verdict shocks the Court's conscience."[50] Stated in a different manner, the jury's verdict may be disregarded when the Court is of the

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[46]Super. Ct. Civ. R. 50(c).

[47]*Luciani*, 2003 WL 262500, at *5.

[48]*McCloskey*, 174 A.2d at 693.

[49]*Smith*, 2006 WL 258310, at *3 (*citing Mills*, 345 A.2d at 426).

[50]*Id.* (*citing Camper*, 401 A.2d at 465).

belief that the jury ignored the applicable rules of law.[51]

The Court rules in the alternative that the motion for a new trial must be granted. On the facts, the Court feels that the jury's verdict was against the great weight of the evidence in each of the three areas necessary for Plaintiff's success in this case: apparent agency, promissory estoppel, and reliance damages.

Reviewing the legal elements of apparent agency, the Court believes that no reasonable jury could have found for Plaintiff on the second element: "[A]n agent can bind the principal on an apparent authority basis only if the third person involved reasonably concludes that the agent is acting for the principal."[52] With regard to this second requirement, the Delaware Supreme Court stated:

> In dealing with the agent the third person must act with 'ordinary prudence and reasonable diligence,' in ascertaining the scope of the agent's authority and he will not be permitted to claim protection if he ignores facts illustrating the agent's lack of authority. In this regard, the third person must make a preliminary investigation as to the agent's apparent authority and additional investigations if the facts so warrant.[53]

Plaintiff worked in some capacity for Defendant for over five years before he received his suspension for being charged criminally. After his suspension he had several further interactions with Defendant. Plaintiff knew exactly how Defendant operated, which is by a vote of the Commissioners. Thus, Plaintiff had to have

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[51] *Id.* (*citing Castner*, 314 A.2d at 193).

[52] *Int'l Boiler Works Co.*, 372 A.2d at 177.

[53] *Id.*

known that Wayne was operating outside the scope of his agency in telling Plaintiff he would get his job back upon being cleared of criminal charges. Plaintiff is not permitted to ignore facts indicating an alleged agent's lack of authority.[54] On this set of facts, Plaintiff's claim of apparent agency must fail.

Likewise in this case, Plaintiff's claim of promissory estoppel must fail. To reiterate, a case for promissory estoppel requires proof, by clear and convincing evidence, as follows: "(1) a promise was made; (2) it was the reasonable expectation of the promisor . . . to induce action or forbearance on the part of the promisee; (3) the promisee . . . reasonably relied on the promise and acted to his detriment; and (4) that such a promise is binding because injustice will be avoided only by enforcement of the promise."[55] The record is devoid of any evidence that Defendant made a promise regarding employment to Plaintiff. This fact is confirmed by the testimony of Chairwoman Steele.[56] Because there was no promise by Defendant, the remainder of the prima facie case for promissory estoppel must fail.

On the aspect of reliance damages, Plaintiff's case must fail. During trial, the Court determined that Plaintiff could recover only reliance damages.[57] Reliance damages may be awarded on an estoppel theory to avoid injustice so that Plaintiff is

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[54] *Id.*

[55] *Ramone*, 2006 WL 905347, at *14.

[56] Tr. III at 134.

[57] Tr. II at 112.

restored to the *status quo ante*.[58] Perhaps the most elegant, yet straightforward, definition of reliance damages is as follows: "Reliance damages are calculated by asking what it would take to restore the injured party to the economic position occupied before the party acted in reasonable reliance on the promise."[59] The jury awarded Plaintiff $102,273. Plaintiff's expert provided testimony as to lost wages but not as to reliance damages.[60] Plaintiff testified that he wrote letters and made telephone calls but did not keep track of expenses.[61] Given the insufficiency of the evidence on reliance damages, the jury's award is against the great weight of the evidence, and it shocks the conscience of this Court. Thus, this Court rules in the alternative that the issues of liability and damages must be tried again.[62]

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[58]*Gillenardo v. Connor Broadcasting Delaware Co.*, 2002 WL 991110, at *9 (Del. Super. Apr. 30, 2002).

[59]Entry for Reliance Damages, LEGAL INFORMATION INSTITUTE, http://www.law.cornell.edu/wex/reliance_damages (last visited Nov. 14, 2011).

[60]Tr. III at 22-23.

[61]Tr. III at 50-51.

[62]The Court finds it necessary to write a brief note regarding Defendant's assertion that the Court's instruction as to apparent authority was erroneous. First, it is unclear whether Defendant timely objected to the instruction since Defendant's counsel claims that they did and Plaintiff's counsel claims that they did not, and neither side points to the disputed portion of the record. Second, the Court believes that this order adequately explains the Court's views on apparent agency in this context, and therefore, it is unnecessary to reach this objection.

CONCLUSION

Both necessary aspects of Plaintiff's case, apparent agency and promissory estoppel, fail as a matter of law. Thus, pursuant to Defendant's motion under Superior Court Civil Rule 50(b), this Court finds that Defendant is entitled to judgment as a matter of law.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh
oc: Prothonotary
xc: Ronald G. Poliquin, Esquire
Laura L. Gerard, Esquire
Marc P. Niedzielski, Esquire