[Cite as *Paar v. Jackson Twp. Bd. of Trustees*, 2004-Ohio-5567.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

PHILIP W. PAAR

Plaintiff-Appellee

-vs-

JACKSON TOWNSHIP BOARD OF TRUSTEES

Defendant-Appellant

JUDGES:
: Hon: W. Scott Gwin, P.J.
: Hon: Sheila G. Farmer, J.
: Hon: John F. Boggins, J.
:
:
: Case No. 2003-CA-00334
:
:
: O P I N I O N

CHARACTER OF PROCEEDING:	Civil appeal from the Stark County Court of Common Pleas, Case No. 2002CV00432
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	October 18, 2004

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
LEE E. PLAKAS ELIZABETH RAIES Unizan Building Canton, OH 44702	GREGORY BECK JAMES F. MATHEWS 400 S. Main Street North Canton, OH 44720

Gwin, P.J.

{¶1} Defendant Jackson Township Board of Trustees appeals a judgment of the Court of Common Pleas of Stark County, Ohio, entered on a jury verdict in favor of plaintiff Philip W. Paar on his complaint for breach of contract and promissory estoppel. Appellant assigns six errors to the trial court:

{¶2} "I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FAILING TO GRANT A DIRECTED VERDICT ON ALL COUNTS OF THE APPELLEE'S COMPLAINT, PARTICULARLY PROMISSORY ESTOPPEL AND BREACH OF CONTRACT.

{¶3} "II. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON THE CLAIMS OF PROMISSORY ESTOPPEL AND BREACH OF CONTRACT.

{¶4} "III. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON IMMUNITY AND OTHER CONTRACT DEFENSES, AND BY PROHIBITING APPELLANTS FROM UTILIZING EVIDENCE CONCERNING THE *DAWSON* SETTLEMENT.

{¶5} "IV. THE TRIAL COURT FAILED TO GRANT A MISTRIAL AFTER THREE JURORS COMPLAINED ABOUT INFORMATION PROVIDED BY DEBORAH DAWSON DURING A RECESS, AND AFTER COUNSEL FOR BOTH PARTIES MOVED FOR A MISTRIAL.

{¶6} "V. THE TRIAL COURT ERRED IN FAILING TO REMIT OR ENTER JUDGMENT ON THE VERDICT FOR PROMISSORY ESTOPPEL AFTER ADVISING COUNSEL BEFORE THE JURY WAS INSTRUCTED THAT THE COURT COULD

MAKE AN ADJUSTMENT IF THE VERDICTS WERE RETURNED FOR BOTH BREACH OF CONTRACT AND PROMISSORY ESTOPPEL.

{¶7} "VI. THE TRIAL COURT ERRED IN FAILING TO GRANT A NEW TRIAL OR JUDGMENT NOTWITHSTANDING THE VERDICT ON THE VERDICTS OF CONTRACT BREACH AND PROMISSORY ESTOPPEL."

{¶8} At trial, the jury heard evidence appellee was a police officer for appellant Jackson Township for most of the past 24 years. Appellee was a patrol officer in 1977, and advanced through the ranks to the level of Chief in 1983. In 1997, the Board of Trustees demoted him to the position of Lieutenant, but 4 months later, a new Board of Trustees re-appointed appellee as Police Chief. Appellee was Chief of Police until he tendered his resignation on November 19, 2001. The circumstances surrounding appellee's retirement and the subsequent events were the subject of this lawsuit.

{¶9} Beginning in the spring of 2001, appellee approached the Board of Trustees about the possibility of implementing Community Oriented Government in Jackson Township. Community Oriented Government is a system which coordinates various township services in order to better serve the residents. The trustees gave appellee permission to investigate the idea, and to attend a conference on the subject. After attending the conference, appellee gave a full presentation on the concept of Community Oriented Government to the Board of Trustees. Two of the trustees supported the concept and were in favor of creating a position to implement the concept in Jackson Township.

{¶10} Appellee was considering resigning from his position as Chief of Police to begin receiving retirement benefits. One of the township trustees suggested to appellee

he would support appellee to fill the newly created position of Public Services Coordinator to implement the Community Oriented Government. The trustee asked appellee to draft a job description and an employment contract for the Public Services Coordinator position. The Law Director for the township reviewed and approved the job description and employment contract. One of the provisions of the employment agreement provided the parties contemplated the position would have bargaining unit status, but this required approval from the State Employee Relations Board.

{¶11} At a public hearing on November 19, 2001, the Board of Trustees approved the creation of the Public Services Coordinator position, and appellee presented the Board with his written resignation. The Board accepted the resignation, and offered appellee the position of Public Services Coordinator. Appellee accepted the position, which was to begin on December 3, 2001.

{¶12} The resolution creating the position and appointing appellee invoked the statutory authority of R.C. Section 511.10. The resolution also accepted the negotiated agreement, containing the provision the position would become a union position if and when SERB gave its approval.

{¶13} On November 30, 2001, a Jackson Township resident, Deborah Dawson, filed a lawsuit in Stark County Common Pleas Court alleging violations of Ohio's Sunshine Law in the creation of the Public Services Coordinator position. On December 4, 2001, the trustees met with their attorney and the attorney for Ms. Dawson in Executive Session, and entered into a settlement of the pending lawsuit. The terms of the settlement included removal of appellee from the Public Services Coordinator position, and prevented appellee from returning to his former position as Chief of Police.

However, the parties agreed appellee would be appointed to a Lieutenant's position with the township police department. The settlement agreement rescinded all resolutions regarding the creation of the Public Services Coordinator position, and specified the position would not be created or filled before May 1, 2002. After the parties entered into the settlement, the Police Sergeant's Union filed a grievance against the township based on the union agreement which provided any Lieutenant in the township had to be drawn from the Sergeant's pool. As a result, the Board did not give appellee the promised Lieutenant position.

{¶14} After appellee left the township payroll, he was offered a temporary part-time position to perform various administrative functions in the township. The Board indicated it would create the position for appellee so that his income would be the equivalent to what he would have received had he remained Chief of Police. The long-term goal of the Board was to create the Public Services Coordinator position, and offer the position to the best candidate. The Board indicated appellee would be strongly considered. Appellee testified he did not believe the Board would fulfill these promises, perhaps because someone would file another action against him as it happened in the Dawson suit. Appellee declined to accept the part-time job and instead filed his lawsuit in February, 2002.

I

{¶15} In its first assignment of error, appellant Board of Trustees argues the trial court should have granted a directed verdict in its favor on all counts of the appellee's complaint. Pursuant to Civ. R. 50, a trial court must construe the evidence most strongly in favor of the party against whom the motion is directed, and if it finds that

upon any determinative issue reasonable minds could come to but one conclusion on the evidence submitted, and this conclusion is adverse to the non-moving party, then the court shall sustain the motion and direct a verdict for the non-moving party as to this issue. The reasonable minds test calls upon the court only to determine whether there exists any evidence of substantial probative value in support of the claims of the party against whom the motion is directed, *Wagner v. Roche Laboratories* (1996), 77 Ohio St. 3d 116, 671 N.E. 2d 252. The motion for directed verdict raises a question of law because it examines the materiality of the evidence as opposed to the conclusions which may be drawn from the evidence, *Ruta v. Breckenridge-Remy Company* (1982), 69 Ohio St. 2d 66, 23 OO 3d 115, 430 N.E. 2d 935. Because a motion for directed verdict presents a question of law, our standard of reviewing a trial court's judgment on a directed verdict is de novo, *Titanium Industries v. S.E.A, Inc.* (1997), 118 Ohio App. 3d 39.

{¶16} First, as to appellee's cause of action for promissory estoppel, in order to prove his claim, appellee must show: (1) a promise; (2) that the promisor should reasonably expect to induce action or inaction on the part of another; (3) which does induce the action or inaction; and (4) injustice will result if the promise is not enforced, see *Ed Schory & Sons, Inc. v. Francis* (1996), 75 Ohio St. 3d 433.

{¶17} First, appellant Board argues appellee could not have reasonably relied upon anything that was said or done outside the confines of a public meeting of the Board of Township Trustees, because the Board of Trustees can only function as a Board when it operates in open and public meetings.

{¶18} Appellee responds he presented evidence the Board made statements to him both during Executive Session and in the open meeting following the Executive Session, which encouraged him to resign in order to accept the newly created position of Public Services Coordinator. Appellee did present evidence certain trustees made statements to him outside of meetings, but appellee argues there were statements and actions taken during the public meeting which in and of themselves permit reasonable reliance. We agree.

{¶19} Next, appellant argues appellee must prove appellant deliberately misled him into resigning, or were fraudulent in offering him the position of Public Service Coordinator. As appellee points out, there are two lines of cases in Ohio, one suggesting the promisor's conduct must be misleading, but another line of cases suggesting knowingly false representation or fraud is not an element of estoppel, see, e.g., *First Federal Saving & Loan Association of Toledo v. Perry's Landing, Inc.* (1983), 11 Ohio App. 3d 135, 463 N.E. 2d 636. In the *Perry's Landing* case, the Court of Appeals for Wood County conducted an extensive discussion of the doctrine of estoppel. The court cited Restatement of the Law 2d, Contracts 1981 and case law, for the proposition that proof of fraud is not always necessary for estoppel, and one may be held responsible for words or acts which he knows or should know will be acted upon by another. Estoppel is not actionable fraud, and must not be treated as actionable fraud. There is no need to prove intent to deceive, nor misrepresentation of fact to form the basis of an estoppel, *Perry's Landing* at 647, citations deleted. When a party induces another to take an action, estoppel prevents the party from later taking an inconsistent position which damages the other because of the induced action.

{¶20} We find appellee was not required to prove appellant acted fraudulently, or intended to mislead him into resigning his position as Chief of Police. Appellee presented evidence tending to show appellant Board of Trustees offered him the position of Public Services Coordinator, so he resigned his position as Chief of Police. Thereafter, appellant Board not only withdrew its offer to place appellee in the position of Public Services Coordinator, but also agreed in the Dawson settlement not to restore appellee to his former position as Chief of Police. We find this is sufficient to meet the elements of promissory estoppel.

{¶21} With regards to the breach of contract claim, appellant Board argues it created the position of Public Services Coordinator under R.C. 511.10, which provides for at-will employment of employees within a township. For this reason, the Board urges any appointment it made to the position of Public Services Coordinator was at the pleasure of the Board, and the position could be eliminated at any time.

{¶22} Appellant responds while R.C. 511.10 is the general enabling statute which provides for the hiring of certain classifications of township trustees, the statute does not limit the authority of the trustees to enter into written employment agreements with its employees instead of maintaining an at-will employment status. Appellee cites us to *Beasley v. City of East Cleveland* (1984), 20 Ohio App. 3d 370, 486 N.E. 2d 859, as authority for the proposition a city manager working under an employment contract can bring a breach of contract claim against the city.

{¶23} We find appellee presented evidence tending to show the employment relationship between the Board and appellee Paar involved a written employment agreement, and was not an at-will relationship.

{¶24} Next, the Board argues R.C. 2744.07 provides political sub-divisions shall defend their employees who are sued in connection with their duties. If the political sub-division enters into a consent judgment or settlement, then no action or appeal of any kind may be brought by any person, including the employee or a taxpayer concerning the amount or circumstances of the consent judgment or settlement.

{¶25} We find R.C. 2774.07 does not provide immunity under these circumstances. The settlement the Board entered into was not in defense of any employee sued in connection with his duties. Appellee was not involved in the negotiations, and was not a party to the Dawson litigation.

{¶26} We find none of appellant's arguments against appellee's causes of action are well taken, and accordingly we conclude the trial court correctly overruled the motion for directed verdicts.

{¶27} The first assignment of error is overruled.

II and III

{¶28} Both of these assignments of error address jury instructions.

{¶29} First, appellant argues the trial court erred in instructing the jury on promissory estoppel and breach of contract. In addition to the issues raised in I, supra, appellant argues the Doctrine of Estoppel is never applicable against a political sub-division while engaged in a governmental function. Appellant Board argues because R.C. 2744.07 permits it to enter into settlements, it was performing a governmental function when it entered into the Dawson settlement which effectively eliminated appellee's new position, and his old one. As stated in I, supra, we find the statute does not provide immunity to appellant as to an action by appellee.

{¶30} In its third assignment of error, appellant urges the trial court erred in failing to instruct the jury on immunity and other contract defenses, and also by preventing appellant from utilizing any evidence concerning the Dawson settlement.

{¶31} As stated supra, we find immunity was not an available defense here.

{¶32} Appellant attempted to cross-examine appellee regarding the Dawson lawsuit. The trial court instructed the jury the Dawson lawsuit did not involve appellee and did not affect the contractual relationship, if any, he may have had with the township. At the conclusion of the case, the trial court gave jury instructions informing the jury the Dawson lawsuit had no legal bearing on whether the Board of Trustees had the legal right to rescind the position of Public Services Coordinator. Instead, the court instructed the jury the Board of Trustees had the authority to rescind or terminate the position or employee at any time at the discretion of the Board of Trustees so long as this did not violate any legal agreement or contract.

{¶33} The trial court found appellant had entered into the Dawson settlement voluntarily, and we agree. The record does not demonstrate appellant trustees could not have negotiated some other settlement or pursued other alternatives.

{¶34} A trial court properly instructs the jury where the instruction given correctly states the law which applies to the issues raised by the evidence in the case, see e.g., *Pallini v. Dankowski* (1969), 17 Ohio St. 2d 51. A trial court has broad discretion in instructing the jury, *Bostic v. Conner* (1988), 37 Ohio St. 3d 144.

{¶35} We find the trial court did not err in instructing the jury as it did. Accordingly, the second and third assignments of error are overruled.

IV

{¶36} In its fourth assignment of error, appellant argues the court erred in not granting a mistrial after 3 jurors informed the court Deborah Dawson made open and prejudicial comments in their presence during a recess.

{¶37} The trial court conducted a voir dire of the jury after learning from the bailiff the jurors had reported Ms. Dawson's actions. Juror 19 stated while she was waiting to get some food at the counter, a woman behind the juror said in a loud voice, something about money being offered, and a salary and that she could not believe some things. The woman identified herself as Deborah Dawson. The court asked Juror 19 if she understood anything Deborah Dawson said has absolutely nothing to do with case. The juror agreed she understood this and could put the matter out of her mind. The juror indicated she was still comfortable sitting on the jury, and did not feel intimidated or pressured.

{¶38} Juror 37 informed the court two women between Juror 19 and Juror 37 were talking loudly while waiting for their food. One of the ladies stated she was a teacher for 31 years, and after she retired, she never expected to be able to get her job back. When Juror 37 heard the name Deborah Dawson, she turned around and left. The juror informed the court she felt able to continue to sit on the jury and be fair, and she had not repeated any of this to any of the other jurors.

{¶39} Finally, Juror 49 told the court he had been in the snack bar when he heard someone say something about $100,000 and a job being created for someone. The juror indicated he had a hearing problem, and stepped a few paces away so he would

not be able to hear anything else. This juror also informed the court he was able to put it totally out of his mind, and do justice to both sides.

{¶40} The trial court found there was no taint and every one of the jurors had indicated they could be fair. The trial court gave all counsel the opportunity to question the jurors.

{¶41} Appellant argues the negative impact of the various comments in front of the jury could not be overstated. Appellant states there is little doubt Dawson's intent was to influence the jury, but admits the actual impact of her statements is unclear. Appellant also asserts the jury had learned from these comments there was an offer made by appellant to appellee to resolve the claim.

{¶42} We have reviewed the record, and we agree with the trial court the jurors appeared to be uninfluenced by Deborah Dawson's statements. From the jurors' reports, it is not at all clear the jurors understood there had been any settlement offer made.

{¶43} In determining whether a trial court properly exercised its discretion, reviewing courts must determine whether there was a manifest necessity or high degree of necessity for ordering a mistrial, or whether the ends of public justice will otherwise be defeated, *State v. Widner* (1981), 68 Ohio St. 2d 188, 429 N.E. 2d 1065. The Supreme Court has been reluctant to formulate standards outlining the circumstances under which a mistrial may arise, but has instructed us to defer to the trial court's discretion in light of all surrounding circumstances, Id.

{¶44} We find the record supports the trial court's determination a mistrial was not necessary. Accordingly, the fourth assignment of error is overruled.

V

{¶45} In its fifth assignment of error, appellant argues the trial court should not have entered judgment both on promissory estoppel and breach of contact. Appellant argues the two claims are alternatives, *Kashif v. Central State University* (1999), 133 Ohio App. 3d 678. In fact, appellant states, the two claims are mutually exclusive, and it is plain error for the trial court to enter judgment on verdicts based on both. In *Castle Nursing Homes, Inc. v. Sullivan* (November 21, 1996), Holmes Appellate No. 95-CA-541, this court reviewed a judgment entered on a jury verdict for both breach of contract and promissory estoppel. In that case, the trial court had instructed the jury Sullivan's recovery would be the same on either claim, and the jury returned identical verdicts on each claim.

{¶46} The appellant in *Sullivan* argued to us the claims were separate and distinct, not alternative, because the breach of contract claim was based on the written employment agreement while the promissory estoppel claim was based on an alleged oral representation Sullivan could remain with Castle Nursing Home until retirement. We found the jury verdicts were inconsistent because the written provisions of the contract provided for a limited term of employment, although it was renewable upon agreement of the parties.

{¶47} Here, the appellant failed to object to the jury verdict, and did not raise any concern when the trial court asked if there were any other matters to be considered after the reading of the verdict. Appellant did not object to the jury instructions, or ask for an instruction that the claims were in the alternative. Here, the jury was instructed not to award damages for the same item twice, and appellant did not request any jury

interrogatories to test the verdict. Appellant did not request the jury verdicts be clarified or re-submitted to the jury.

{¶48} Appellee argues the breach of contract claim was presented from the time the breach of the contract occurred until the date of the trial, and the jury awarded him $105,000, which was in accord with the evidence. The contract had no specific ending date. Appellee also testified he expected to remain working with the township until his retirement in approximately 12 years. The court instructed the jury it could consider the amount of future expectancy damages. The verdicts awarded different amounts.

{¶49} We find the damages on the breach of contract and promissory estoppel are not identical, and we find where appellant has failed to object, offer any jury instruction, or any jury interrogatory, the trial court did not err in entering judgment on both verdicts.

{¶50} The fifth assignment of error is overruled.

VI

{¶51} In its final assignment of error, appellant argues the trial court should have granted a new trial, or judgment notwithstanding the verdict.

{¶52} Pursuant to Civ. R. 50, a motion for judgment notwithstanding the verdict is similar to a motion for directed verdict in that the trial court must determine whether, as a matter of law, reasonable minds could come but to one conclusion upon the evidence submitted. Appellant re-submits its arguments in I, supra, for a directed verdict, in support of its argument it was entitled to a judgment notwithstanding the verdict.

{¶53} For the reasons we stated in I, supra, we reject these arguments.

{¶54} Appellant also argues the trial court should have ordered a new trial pursuant to Civ. R. 59. The grounds appellant gave for the granting of a new trial was that the evidence did not sustain the verdict, and the incident with Deborah Dawson constituted an irregularity of the proceedings which prevented appellant from having a fair trial.

{¶55} In determining a motion for new trial, the trial court may weigh the evidence and determine the credibility of the witnesses to insure justice has been done, see *Rohde v. Farmer* (1970), 23 Ohio St. 2d 82.

{¶56} We have reviewed the record, and we find there was sufficient, competent and credible evidence going to each element of the claims to support the jury's verdict. Accordingly, the court did not err in overruling the motion for new trial.

{¶57} The sixth assignment of error is overruled.

{¶58} "I. THE TRIAL COURT ERRED IN DENYING CROSS APPELLANT'S MOTION FOR PREJUDGMENT INTEREST."

{¶59} Turning now to the cross-appellant's assignment of error, appellee/cross-appellant argues the trial court erred when it did not grant appellee's motion for pre-judgment interest made pursuant to R.C. 1343.03. The statute provides when money becomes due and payable upon any bond, bill, note, or other instrument of writing, book account, settlement, verbal contracts, or judgments and decrees, the creditor is entitled to interest at a rate of 10% per annum.

{¶60} The Supreme Court has held pre-judgment interest is not available to a plaintiff in a breach of employment contract claim, because damages cannot be ascertained until a determination is made, and cannot be ascertained by a mere

computation or reference to market values. Also appellant points out, if appellee had been placed in the position of Public Services Coordinator, he would have received wages over time, and not all at once when he assumed the position.

{¶61} In addition, the damages for promissory estoppel are expectancy damages, for wages expected to be paid out in the future. Clearly, pre-judgment interest would not apply to wages not due and payable prior to trial.

{¶62} We find the trial court did not err in overruling appellee/cross-appellant's motion for pre-judgment interest.

{¶63} The cross-assignment of error is overruled.

{¶64} For the foregoing reasons, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed.

By Gwin, P.J.,

Farmer, J., and

Boggins, J., concur

_____

_____

_____

JUDGES

WSG:clw 0922

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

PHILIP W. PAAR	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
JACKSON TOWNSHIP BOARD OF TRUSTEES	:	
Defendant-Appellant	:	CASE NO. 2003-CA-00334

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed. Costs to appellant.

_____

_____

_____

JUDGES