EFiled: Aug 21 2014 11:57AM EDT
Filing ID 55920558
Case Number 292,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ROBERT C. VILLARE, M.D. and DELAWARE VALLEY PHYSICIANS & SURGEONS, PA,	:	No. 292,2014
Plaintiffs-Below, Appellants,	:	
v.	:	Appeal from the Superior Court of the State of Delaware in and for New Castle County,
BEEBE MEDICAL CENTER, INC.,	:	C.A. No. 08C-10-189-JRJ
Defendant-Below, Appellee.	:	

[CORRECTED] ANSWERING BRIEF OF APPELLEE BEEBE MEDICAL CENTER, INC.

Dated: August 21, 2014

Sean J. Bellew (#4072)
Erika R. Caesar (#5143)
Ballard Spahr LLP
919 N. Market Street, 11th Floor
Wilmington, DE 19801
Telephone: (302) 252-4465
Facsimile: (302) 225-4466

Attorneys for Appellee Beebe Medical Center, Inc.

TABLE OF CONTENTS

Page

NATURE OF PROCEEDINGS 1

SUMMARY OF ARGUMENT 2

STATEMENT OF FACTS 4

A. Beebe's Reapplication Process 4

B. Villare's 2005 Reapplication is Denied 5

C. Villare Files Suit Based on Beebe's Denial of His Reapplication 6

D. Villare Fails to Quantify His Damages Over the Course of the Litigation 7

E. The Superior Court Limits the Scope of Recoverable Damages in Light of a Previous Case Filed By Villare 8

F. The Superior Court Grants Summary Judgment to Beebe 9

ARGUMENT 11

I. THE SUPERIOR COURT PROPERLY DISMISSED VILLARE'S BREACH OF CONTRACT CLAIM AS A MATTER OF LAW BECAUSE VILLARE FAILED TO PROFFER A COGNIZABLE BASIS FOR DAMAGES 11

A. Question Presented 11

B. Scope of Review 11

C. Merits of Argument 11

1. Villare's Alleged Damages are Improperly Based on Gross Revenue, Rather Than Lost Profits 12

2. Villare Failed to Proffer a Damages Expert 13

3. Villare's Alleged Damages are Speculative 14

4. Villare's Alleged Damages are Indistinguishable from His Earlier Trauma Case 16

5. Villare Does Not Dispute That He Cannot Proffer a Lost Profits Damages Model and Expert Testimony 17

II. THE SUPERIOR COURT CORRECTLY HELD THAT BEEBE'S APPOINTMENT POLICY IS NOT AN ENFORCEABLE CONTRACT 20

A. Question Presented 20

B. Scope of Review 20

C. Merits of Argument 21

1. The Appointment Policy's Plain and Unambiguous Language Explicitly Disclaims a Right to Reappointment 21

2. Applying Delaware's Traditional Contract Law Principles, the Appointment Policy at Issue is Not an Enforceable Contract 22

3. Public Policy Considerations Weigh in Favor of Holding That the Appointment Policy is Not an Enforceable Contract 25

CONCLUSION 27

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

American Original Corp. v. Legend, Inc.,
689 F. Supp. 372 (D. Del. 1988) ... 12

Brader v. Allegheny Gen. Hosp.,
64 F.3d 869 (3rd Cir. 1995) ... 18, 19

Gardner v. The Calvert,
253 F.2d 395 (3d Cir. 1958) ... 12

Monroe v. AMI Hosp., Inc.,
877 F. Supp. 1022 (S.D. Tex. 1994) ... 24

United States v. Behan,
110 U.S. 338 (1884) ... 12

STATE CASES

Airborne Health, Inc. v. Squid Soap, LP,
984 A.2d 126 (Del. Ch. 2009) ... 20

Cornell Glasgow, LLC v. LaGrange Props., LLC
2012 WL 6840625 (Del. Super. Ct. Dec. 7, 2012) ... 22

Crowell Corp. v. Himont USA, Inc.,
1994 WL 762663 (Del. Super. Ct. Dec. 8, 1994) ... 18

Durig v. Woodbridge Bd. of Educ.,
1992 WL 301983 (Del. Super. Ct. Oct. 9, 1992) ... 20

Dworkin v. St. Francis Hosp., Inc.,
517 A.2d 302 (Del. Super. Ct. 1986) ... 21

E.I. DuPont de Nemours & Co. v. Pressman,
679 A.2d 436, 445 (Del. 1996) ... 18

Empire Fin. Servs. v. The Bank of New York (Delaware),
2007 WL 1991179 (Del. Super. Ct. June 19, 2007) ... 13, 14

Frontier Oil Corp. v. Holly Corp.,
2005 WL 1039027 (Del. Ch. Apr. 29, 2005)....................11, 12

Granger v. Christus Health Cent. La.,
2013 WL 3287128 (La. June 28, 2013)....................18, 19

GyneConcepts, Inc. v. Kim,
2010 WL 3279382 (Del. Ch. Aug. 17, 2010)....................13

Johnson v. Rooney,
2011 WL 2178693 (Del. Super. Ct. May 25, 2011)....................22

Lank v. Moyed,
909 A.2d 106 (Del. 2006)....................11, 20

Lipson v. Anesthesia Services, P.A.,
790 A.2d 1251 (Del. Super. Ct. 2001)....................24

Manczur v. Southside Hosp.,
183 N.Y.S.2d 960 (N.Y. Sup. Ct. 1959)....................25

Mason v. Cent. Suffolk Hosp.,
819 N.E.2d 1029 (N.Y. Ct. App. 2004)....................23, 24

Miller v. St. Alphonsus Regional Medical Center, Inc.,
87 P.3d 934 (Idaho 2004)....................24

Munoz v. Flower Hosp.,
507 N.E.2d 360 (Ohio Ct. App. 1985)....................25

Patel v. Patel,
2009 WL 427977 (Del. Super. Ct. Feb. 20, 2009)....................21, 22

Pierce v. Int'l Ins. Co. of Ill.,
671 A.2d 1361 (Del. 1996)....................18

PJ King Enters., LLC v. Ruello,
2008 WL 4120040 (Del. Super. Ct. July 1, 2008)....................13, 14

Salisbury v. Credit Serv., Inc.,
199 A. 674 (Del. Super. Ct. 1937)....................21

State Farm Mut. Auto. Ins. Co. v. Patterson,
7 A.3d 454 (Del. 2010) 11, 21

Sullivan v. Baptist Mem'l Hosp. – Golden Triangle, Inc.,
722 So. 2d 675 (Miss. 1998)..24

Tanner v. Exxon Corp.,
1981 WL 191389 (Del. Super. Ct. July 23, 1981).......................................14, 15

Villare v. Beebe Medical Center, Inc.,
2013 WL 2296312 (Del. Super. Ct. May 21, 2013) 9, 16

Weary v. Baylor Univ. Hosp.,
360 S.W.2d 895 (Tex. Civ. App. 1962)...25

Weichert Co. of Pa. v. Young,
2007 WL 4372823 (Del. Ch. Dec. 7, 2007) 11, 21

Zipper v. Health Midwest,
978 S.W.2d 398 (Mo. Ct. App. 1998) 24

STATE: STATUTES, RULES, REGULATIONS, CONSTITUTIONAL PROVISIONS

Superior Court Civil Rules 702 and 705...14

OTHER AUTHORITIES

John Hulston, *et al.*, *Do Hospital Medical Staff Bylaws Create a Contract?* 25

NATURE OF PROCEEDINGS

On October 20, 2008, Appellant, Robert C. Villare, M.D. ("Villare"), filed suit against Appellee Beebe Medical Center, Inc. ("Beebe") and others, seeking damages for Beebe's denial of Villare's reapplication for medical staff privileges in October 2005. Among other things, Villare alleged breach of contract and breach of the duty of good faith and fair dealing, intentional interference with contractual relations, and civil conspiracy. On August 16, 2012, the Court signed a stipulation dismissing all of Villare's claims, except breach of contract and breach of the duty of good faith and fair dealing against Beebe. On July 25, 2013, Beebe, the only remaining defendant, filed a Motion for Summary Judgment as to Breach of Contract and Proffered Damages.

By Memorandum Opinion dated March 19, 2014, the Honorable Jan R. Jurden of the Superior Court in New Castle County, Delaware properly granted Beebe's motion for summary judgment. Villare subsequently filed a Motion for Reargument, which was denied on May 21, 2014.

On June 2, 2014, Villare filed a Notice of Appeal in this Court, and submitted his Opening Brief on July 17, 2014 ("Op. Br."). This is Appellee Beebe Medical Center, Inc.'s Answering Brief.

SUMMARY OF ARGUMENT

I. Appointment to Beebe Medical Center Medical Staff establishes an enforceable contract under the terms of the Beebe Policy on Appointment. Both the hospital and the staff physician secure rights and undertake obligations under the terms of the Policy. When considering a physician application for staff reappointment the hospital is bound by the covenant of good faith and fair dealing and must accord the applicant due process. The grant of summary judgment to the Defendant on the record in this case was erroneous as a matter of law.

Denied. The Superior Court properly held that Beebe's Appointment Policy is not an enforceable contract that gives rise to a private cause of action, as it expressly disclaims any right to staff reappointment, does not contain the bargained-for consideration necessary to create a contract under Delaware law, and manifests a procedure instead of contractual undertakings. Acting in accordance with its policy, Beebe denied Villare's reapplication for medical staff privileges in October 2005 due to Villare's failure to submit sufficient evidence of clinical competence and lack of clarity regarding the privileges requested. Absent an enforceable contract, Villare's implied covenant of good faith and fair dealing claim fails as a matter of law. Further, any due process claim should be dismissed outright as untimely, as it was not raised until nearly five years after this action was initiated. Even if the Court permits Villare's due process claim, it should be dismissed because Villare failed to plead or identify a violation of constitutionally protected rights.

II. The denial of reappointment to a staff physician without due process in violation of the contract and the covenant of good faith and fair dealing harms the applicant, and exposes the hospital to damages for the harm caused.

Denied. The Superior Court properly held that Villare failed to establish a damages claim against Beebe. Villare's claim of economic, reputational, and emotional harm contains numerous flaws fatal to his cause of action. As to economic damages, it is undisputed that Villare failed to proffer a damages expert and improperly based his damages model on gross revenue "guesstimates," instead of the requisite non-speculative evidence of lost profits. Villare's claim for reputational and emotional damages is similarly unsustainable, as these tort-based damages are not available under contract law. Villare's inability to prove damages is fatal to his case, as damages are a necessary element of breach of contract claims.

STATEMENT OF FACTS

A. Beebe's Reapplication Process

Medical staff appointments at Beebe are governed by the Medical Staff Policy on Appointment of Beebe Medical Center Lewes, Delaware (the "Appointment Policy"). (B1-72.)[1] Pursuant to this policy, appointments last for two years after which time the physician must seek reappointment. (B32.) The process for a physician seeking biennial renewal of privileges begins with the physician first seeking reappointment through an application process. (*Id.*) The process consists of four stages through which the physician's application is reviewed by the Department Chief, Credentials Committee, Medical Executive Committee and Board of Directors. (B32-37.) Each stage involves an evaluation before proceeding to the next level until the ultimate determination is made by the Board of Directors whether to reappoint the physician and extend his or her privileges. (*Id.*)

Appointment to Beebe's medical staff is a privilege, not a right. The Appointment Policy expressly states:

> Appointment to the Medical Staff is a privilege and not a right. No individual shall be entitled to appointment to the Medical Staff or to exercise particular clinical privileges in the Hospital merely by virtue of the fact that such individual: . . . 3. has had in the past, or currently has, Medical Staff appointment or privileges at this or any Hospital or health care facility . . . .

[1] Citations to Beebe's Appendix are identified by numbers with the prefix "B."

(B9.) In addition, the policy contemplates instances where the credentialing committees might need additional information from an applicant. In those situations, the applicant bears the burden of supplying the requested information or risks his or her privileges being deemed relinquished.

> If at any time an Appointee fails to provide required information pursuant to a formal request by [the credentialing committees], the Appointee's clinical privileges shall be deemed to be voluntarily relinquished until the required information is provided to the satisfaction of the requesting party.

(B52.) The applicant always bears the burden of demonstrating that he or she meets the standards for continued appointment to Beebe's medical staff. (B34, 69.) Villare admitted in his Complaint that his application for reappointment "was subject to the Medical Staff Policy on Appointment of Beebe." (B80.) Villare referred to the "Medical Staff Policy on Appointment of Beebe Medical Center" in his Complaint as the "Appointment Policy" or the "bylaws." (B80, 90.)

B. <u>Villare's 2005 Reapplication is Denied</u>

Beebe extended privileges to Villare to practice medicine from his initial appointment to the medical staff in 1999 until his failure to obtain reappointment in 2005. (B79-80.) Villare's privileges were due to expire on July 30, 2005. (B73.) Beebe provided Villare with ample time to complete a reappointment application and upon eventual receipt of the application, Beebe initiated the review process. Pursuant to their procedures, Beebe assessed Villare's competency and ability to

provide medical services. On October 24, 2005, the Credentials Committee and Executive Committee voted and decided not to renew Villare's privileges for reasons including, "1) insufficient evidence of continued clinical competence and 2) the evaluative bodies' inability to determine the precise privileges you were requesting." (B76.) Beebe notified Villare of the decision and Villare subsequently requested a hearing on the Board's decision. (B117-19.) However, Villare later withdrew this request and, accordingly, no hearing was conducted. (*Id.*)

The record is clear and should be undisputed that: (i) Beebe asked Villare for additional evidence to support his reapplication and (ii) Villare changed his request for specific privileges midstream during the reapplication review process. (B73-75.)

C. <u>Villare Files Suit Based on Beebe's Denial of His Reapplication</u>

On October 20, 2008, Villare filed suit against Beebe and others, alleging, among other things, breach of contract and breach of the duty of good faith and fair dealing, intentional interference with contractual relations, and civil conspiracy. (B77-115.) All of Villare's claims were subsequently dismissed, except breach of contract and breach of the duty of good faith and fair dealing against Beebe. (B138-39.) The gravamen of Villare's breach of contract claim centers on Beebe's denial of his reapplication for medical staff privileges in October 2005.

D. Villare Fails to Quantify His Damages Over the Course of the Litigation

Initially, Villare identified Andrew Verzilli and proffered his report as expert evidence of his alleged damages. When confronted with a *Daubert* motion, Villare voluntarily withdrew the expert report and Verzilli as a trial witness. (B127-35.) Thereafter, the Court required Villare to serve supplemental answers to interrogatories regarding his alleged damages. (B136-37.) Villare's second attempt at a written damages disclosure was misguided and inadmissible. Villare's second written disclosure (styled as amended answers to damages interrogatories) is not verified or attested to by an expert witness or even by Villare himself (as a fact witness). (B140-42.) Further, the disclosure fails to quantify with any particularity a final damages claim, sets forth gross revenue figures rather than lost profits, and contains clear mathematical errors. (*Id.*).

In his damages deposition, Villare admitted that he cannot quantify his damages with any certainty and that he does not even know what amount is more probable than not. (B148.) In fact, Villare admitted that he would have to "guesstimate" how his alleged damages are allocated amongst gross revenues, emotional distress and other "nondescript or nebulous" areas of claimed damages. (B152, 162) (suggesting coyly that he would not allocate his damages because of the "uncertainty in how a jury is going to look at that").

E. The Superior Court Limits the Scope of Recoverable Damages in Light of a Previous Case Filed By Villare

On October 4, 2005, Villare filed another complaint related to his work at Beebe, claiming that Beebe breached a trauma services agreement with him when Beebe terminated the agreement following his failure to adequately and timely respond to trauma alerts at the hospital (the "Trauma Case"). Through the Trauma Case, Villare sought damages from the loss of his on-call payments, revenue from residual procedures from working in the emergency room and, as asserted during his deposition, revenues from not being reappointed to Beebe's medical staff. Beebe subsequently filed a motion for summary judgment in that action, claiming that Villare was limited to the contractual limitation on damages. Villare countered with specific allegations and alleged support for damages purportedly falling outside the agreement's terms. In spite of these arguments, the Superior Court granted Beebe's motion. Specifically, in a March 11, 2008 Memorandum Opinion, the Court held as follows:

> *Failure to be reappointed*
> Plaintiff has not provided the Court with information on a measure of damages for this claim. As such, summary judgment is granted in favor of defendant on this issue.

Based on this decision, Beebe moved for summary judgment in the present action, asserting that Villare's claims were barred by the doctrines of collateral estoppel and *res judicata*. In a May 21, 2013 decision, the Court granted the

motion with respect to any alleged facts and damages related to Beebe's termination of Villare's trauma contract:

> [C]ollateral estoppel will apply to any mention of the Trauma Contract, Trauma Case or Trauma Complaint. The Trauma Case was adjudicated to a final disposition and the parties involved in both cases are identical. The damages pertaining to the Trauma Case were dismissed through summary judgment and that decision was not appealed nor was a motion for reargument filed. Villare had a full and fair opportunity to litigate the damage aspect of the Trauma Case but chose not to present evidence (other than a brief mention in his deposition). Villare is therefore collaterally estopped from alleging in this case that the termination of his Trauma Contract led to his failure to be reappointed. . . .
>
> The alleged damages stemming from the loss of production after the termination of the Trauma Contract were adjudicated in the Trauma Case, and will be conclusive in subsequent causes of action, such as the case *sub judice*. Therefore, if, for example, Villare attempts at trial to relate the termination of the Trauma Contract to the Credentialing Claim he would be collaterally estopped from doing so.

Villare v. Beebe Medical Center, Inc., 2013 WL 2296312, at *5 and n.57 (Del. Super. Ct.). As part of its decision, the Court recognized that Villare claimed damages "[i]n the Trauma Case [] related to the 'loss of pay' and 'drop in procedure volume'. . ." *Id.* at *4.

F. <u>The Superior Court Grants Summary Judgment to Beebe</u>

On July 25, 2013, Beebe filed a Motion for Summary Judgment as to Breach of Contract and Proffered Damages. Oral argument on Beebe's motion was held

on December 16, 2013. By Memorandum Opinion dated March 19, 2014, the Honorable Jan R. Jurden of the Superior Court in New Castle County, Delaware properly granted Beebe's motion for summary judgment. (*See* Order attached as Exhibit A to Appellant's Opening Brief.) In doing so, the Court held that Beebe's "Bylaws [] do not create an enforceable contract" necessary to sustain Villare's breach of contract claim because their purpose is to set forth a procedure, not a right to staff appointment.[2] Order ¶ 13. Further fatal to Villare's breach of contract claim was his inability to prove damages, as he does not have a damages expert and failed to provide any non-speculative evidence of lost profits. *Id.* ¶ 14. In addition, the Court rejected Villare's due process claim as untimely and unsupported by the factual record. *Id.* ¶ 11. On March 27, 2014, Villare filed a Motion for Reargument, which was ultimately denied.

[2] The Superior Court only referred to Beebe's Appointment Policy as bylaws because the parties used the terms interchangeably. Order at 2 n.7.

ARGUMENT

I. THE SUPERIOR COURT PROPERLY DISMISSED VILLARE'S BREACH OF CONTRACT CLAIM AS A MATTER OF LAW BECAUSE VILLARE FAILED TO PROFFER A COGNIZABLE BASIS FOR DAMAGES

A. Question Presented

Did the Superior Court correctly hold that Villare did not provide a sufficient basis for breach of contract damages when Villare offered "guesstimates" as to his damages, and failed to show lost profits and proffer a damages expert?

B. Scope of Review

The Supreme Court exercises *de novo* review over decisions to grant or deny motions for summary judgment. *Lank v. Moyed*, 909 A.2d 106, 108 (Del. 2006); *State Farm Mut. Auto. Ins. Co. v. Patterson*, 7 A.3d 454, 456 (Del. 2010).

C. Merits of Argument

To establish a claim for breach of contract under Delaware law, a plaintiff must prove: (1) the existence of a valid and enforceable contract; (2) breach; and (3) damaged suffered as a result of the breach. *Weichert Co. of Pa. v. Young*, 2007 WL 4372823, at *2 (Del. Ch. Dec. 7, 2007). The proper measure of damages for a breach of contract "is an amount sufficient to restore the injured party to the position it would have been in had the breach not occurred." *Frontier Oil Corp. v. Holly Corp.*, 2005 WL 1039027, at *39 (Del. Ch. Apr. 29, 2005). A plaintiff must

prove damages by a preponderance of the evidence and, while absolute precision is not required, mere speculation is not sufficient. *Id.* As discussed herein, Villare failed to proffer a cognizable basis for damages by using the wrong damages model, relying on speculative evidence, and failing to identify a damages expert as required under Delaware law. Villare also seeks tort-based damages that are not recoverable in breach of contract actions.

1. Villare's Alleged Damages are Improperly Based on Gross Revenue, Rather Than Lost Profits

The proper damages model for Villare's breach of contract claim is lost profits. *American Original Corp. v. Legend, Inc.*, 689 F. Supp. 372, 381 (D. Del. 1988) (citing *United States v. Behan*, 110 U.S. 338, 344 (1884); *Gardner v. The Calvert*, 253 F.2d 395, 397 (3d Cir. 1958)). Villare's damages disclosure, however, sets forth a model based on gross revenue rather than lost profits. (B140-42) (claiming "gross revenues" and "gross receipts" as a foundation for his damages and suggesting that his calculation would be "offset (mitigated) by Dr. Villare's actual gross revenues for the same period"). Indeed, Villare testified at his deposition that he was looking to recover his gross revenue or his "total receipts." (B205-208.)

Gross revenue, however, is an unreliable basis for determining contract damages, as it does not factor in any of the expenses deducted in a lost profit calculation, such as overhead and other costs attendant to operating a business.

Empire Fin. Servs. v. The Bank of New York (Delaware), 2007 WL 1991179, at *4 (Del. Super. Ct. June 19, 2007) ("It is axiomatic that a claim for lost profits requires evidence of lost revenues, minus the costs associated with generating those revenues"); *GyneConcepts, Inc. v. Kim*, 2010 WL 3279382, at *2 (Del. Ch. Aug. 17, 2010) (recognizing that lost profits cannot be solely based on self-serving evidence of projected gross revenues). Contract damages are not intended to bestow unwarranted windfalls on the complaining party. Rather, if an enforceable contract was breached, the bargained-for exchange is the expectancy of profits. Because Villare failed to identify or proffer a lost profits model or calculation, he cannot sustain a breach of contract claim.

2. Villare Failed to Proffer a Damages Expert

Lost profit damages must be presented through expert testimony. *PJ King Enters., LLC v. Ruello*, 2008 WL 4120040, at *3 (Del. Super. Ct. July 1, 2008) ("Delaware law consistently holds that economic and financial damages require expert testimony") (citation omitted). Here, Villare did not identify a damages expert in the proposed pretrial order submitted to the trial court. (B282-304.) Further, Villare's damages disclosure is an unsworn supplemental interrogatory response, not signed or attested to by an expert witness. (B140-42.)

Notably, this deficiency cannot be cured by Villare's lay testimony as to what he perceives to be his damages. As this Court explained in *Empire*, "[i]t is

axiomatic that a claim for lost profits requires evidence of lost revenues, minus the costs associated with generating those revenues." *Empire*, 2007 WL 1991179, at *4. When a plaintiff attempts to prove lost profits using a fact witness rather than an expert witness, the approach "does not comport with the requirements of *Daubert*, Superior Court Civil Rules 702 and 705, or the legal requirements for lost profits." *Id.* at *5; *see also PJ King*, 2008 WL 4120040, at *3 (precluding a lay witness from testifying as to "diminution in value or economic and financial damages").[3] Given that Villare failed to identify an expert witness for trial and Villare himself is a lay witness not qualified to testify as an expert witness on economic damages, he cannot offer the evidence needed to prove the very damages that would be recoverable in this case.

3. Villare's Alleged Damages are Speculative

Aside from the complete absence of a lost profits calculation and expert, Villare's damages claim must fail because it is speculative. "[A] plaintiff, in order to recover damages from a defendant for breach of contract, must demonstrate with reasonable certainty that the defendant's breach caused the loss." *Tanner v. Exxon Corp.*, 1981 WL 191389, at *1 (Del. Super. Ct. July 23, 1981). Therefore, to recover profits lost by an alleged breach of contract, Villare must lay a basis for a

[3] Villare's claimed economic damages are so illusory that his initial expert, Verzilli, a forensic economist, could not calculate them with the requisite level of specificity. Verzilli's assessment was premised mainly on a national survey of full-time, general surgeons' revenues unrelated to Villare or Beebe.

reasonable estimate of losses. *Id.* at *2. Speculative damages are not recoverable. *Id.* ("Speculative profits are those the evidence of which is so meager or uncertain as to afford no reasonable basis for inference"). By Villare's own admission, the best he can muster are "guesstimates" and that his gross revenue in 2006 would simply be "higher' than 2005. (B162, 222-23) (admitting that he "guess[es] there are some unknowns" when asked for any more detail other than a belief that his revenues would be higher). Consistent with his damages disclosure, Villare does not provide any quantifiable damages nor propose a potential calculation model that could guide a jury to fashion an appropriate award.

The Superior Court, recognizing the foregoing palpable evidentiary deficiencies, held that Villare could not present sufficient evidence for a damages award:

> After six years of litigation, Villare does not have an expert to prove damages, and admits that he only has "guesstimates." Further, Villare has submitted a damages disclosure not related to lost profits. All Villare has are his tax returns to show "gross receipts" and personal income. Villare claims that his personal accountant will testify, but the accountant was not timely disclosed as an expert and, at this point, the Court is not going to permit it. In the end, Villare is unable to present a "sufficient basis" upon which a jury could find a "fair and reasonable estimate" of his lost profit damages.

Order at 9.

4. Villare's Alleged Damages are Indistinguishable from His Earlier Trauma Case

Villare's damages claim also improperly overlaps with damages claimed in the Trauma Case. In this Court's May 21, 2013 decision on Beebe's motion for summary judgment on the issue of *res judicata*, the Court granted the motion to the extent Villare may have intended to rely on any facts surrounding or alleged damages resulting from Beebe's termination of Villare's trauma contract. *Villare v. Beebe Medical Center, Inc.*, 2013 WL 2296312, at *5 (Del. Super.). Specifically, the Court held that "Villare is collaterally estopped from alleging in this case that the termination of his Trauma Contract led to his failure to be reappointed." *Id.* In addition, the Court held that the "alleged damages stemming from the loss of production after the termination of the Trauma Contract were adjudicated in the Trauma Case, and will be conclusive in subsequent causes of action, such as the case *sub judice*." *Id.* at n.57. Earlier in its decision, the Court recognized that Villare claimed damages "[i]n the Trauma Case [] related to the 'loss of pay' and 'drop in procedure volume'. . ." In the case *sub judice*, Villare claims losses associated with: (i) "fees for Trauma coverage at Beebe" and (ii) loss of private referral work stemming from his loss of access to trauma work in 2003. (B141, 174-76.) These claimed damages are not recoverable.[4]

[4] Villare's damages disclosure also contains other errors that make it inherently unreliable: e.g., (i) clear calculation errors, (ii) purported calculations that are almost twice the amount Verzilli

5. Villare Does Not Dispute That He Cannot Proffer a Lost Profits Damages Model and Expert Testimony

Tellingly, in his opening brief, Villare does not dispute, and thereby implicitly admits, the Superior Court's determination that he failed to present any evidence of lost profits, and that he does not have a damages expert.[5] Instead, the thrust of Villare's argument is that the law "should provide a remedy" because he was personally and economically affected by Beebe's decision not to reappoint him. Op. Br. at 24. This argument is unavailing.

First, while Villare can certainly claim that he was economically affected by Beebe's decision, Delaware law requires breach of contract plaintiffs to actually *prove* their damages in accordance with the law. As discussed in detail above, Villare fell woefully short of this burden by failing to proffer a lost profits model, let alone expert testimony as to lost profits.

---

attributed to the same alleged loss and (iii) lost gross revenue from work that Villare intended to undertake at Cape Surgical – a dismissed defendant.

[5] Villare argues that his personal accountant (David Hellburg) could testify but neglects to acknowledge that he failed to identify Mr. Hellburg at the discovery stage as a potential witness and to identify Mr. Hellburg in the proposed pre-trial order as a fact or expert witness who was going to be called to testify at trial. Instead, when inquiry was made about Mr. Hellburg at Villare's deposition, Villare's counsel represented that if called at trial, Mr. Hellburg (or his colleague) would only testify about Villare's tax returns as a factual witness and that no expert testimony would be presented. (B246-47.) As a result, Villare cannot provide testimony or even rely on Mr. Hellburg's "educated guesstimate" at trial about what Villare's revenue would have been in 2006 (or beyond) but for Beebe's alleged breach of contract. Without baseline projected revenue figures, Villare cannot hope to prove lost profits. Insofar as Villare implies that his accountant is qualified to testify because the defense expert is an accountant, he fails to acknowledge that Beebe has provided the requisite information as to their expert's qualifications and background as required under the Superior Court Civil Rules of Procedure and timely identified their accountant as an expert, none of which was done with respect to the witness that Villare proffers.

Second, contract law does not allow recovery for the "intangible personal harm" that Villare claims to have suffered, including any emotional distress and loss of reputation or esteem. Op. Br. at 24; *Crowell Corp. v. Himont USA, Inc.*, 1994 WL 762663, at *3 (Del. Super. Ct. Dec. 8, 1994) (Delaware law does not allow recovery of consequential damages in the form of good will, lost future profits, lost customers, or reputational harm in breach of contract actions).

In *E.I. DuPont de Nemours & Co. v. Pressman*, the Delaware Supreme Court addressed the damages properly awarded for violation of the duty of good faith and fair dealing in an employment contract. The court noted that "historically, damages for breach of contract have been limited to the non-breaching parties' expectation interest." 679 A.2d 436, 445 (Del. 1996). Thus, the court went on to find that a breach of the duty of good faith and fair dealing gives rise to neither punitive damages nor damages for emotional distress. *Id.*; *see also Pierce v. Int'l Ins. Co. of Ill.*, 671 A.2d 1361, 1367 (Del. 1996) (damages for emotional distress are not available for the violation of the duty of good faith in contract, but must be sought in tort law). Likewise, Villare is limited to simple expectation damages and nothing more.

The two cases Villare cites in support of his damages argument are inapposite. *See* Op. Br. at 24-25 (citing *Granger v. Christus Health Cent. La.*, 2013 WL 3287128 (La. June 28, 2013); *Brader v. Allegheny Gen. Hosp.*, 64 F.3d

869 (3rd Cir. 1995)). While they support tort-based damages for breach of contract actions, they are not Delaware cases nor do they apply Delaware law. *Granger v. Christus Health Cent. La.*, 2013 WL 3287128, at *49 (permitting an award of general damages for a breach of contract claim); *Brader*, 64 F.3d at 878-79 (permitting a plaintiff's claim for breach of contract to survive a motion to dismiss where it sought alleged as damages "loss of income, loss of personal and professional reputation, emotional distress, expenses for a new job search and the costs of appeals"). Villare has not articulated any compelling reason that warrants departure from Delaware's well-established principle that tort-based damages are not available for contract claims.

II. THE SUPERIOR COURT CORRECTLY HELD THAT BEEBE'S APPOINTMENT POLICY IS NOT AN ENFORCEABLE CONTRACT[6]

A. Question Presented

Did the Superior Court properly conclude that Beebe's Appointment Policy does not constitute an enforceable contract when the policy expressly disclaims any right to staff reappointment, does not contain the bargained-for consideration necessary to create a contract under Delaware law, and evinces a procedure instead of contractual undertakings?

B. Scope of Review

The Supreme Court exercises *de novo* review over decisions to grant or deny motions for summary judgment. *Lank v. Moyed*, 909 A.2d 106, 108 (Del. 2006);

[6] Because Villare's breach of contract claim fails, so must his implied covenant of good faith and fair dealing claim, which, contrary to Villare's assertion, is separate and distinct from a due process claim. Implied covenant claims are dependent upon the existence of contract, whereas due process claims are predicated on the Fourteenth Amendment of the United States Constitution and require deprivation of constitutionally protected rights, or retaliation to the exercise of such rights. *Airborne Health, Inc. v. Squid Soap, LP*, 984 A.2d 126, 145 (Del. Ch. 2009) ("The implied covenant of good faith and fair dealing inheres in every contract governed by Delaware law"); *Durig v. Woodbridge Bd. of Educ.*, 1992 WL 301983, at *3, *5 (Del. Super. Ct. Oct. 9, 1992) *aff'd*, 622 A.2d 1095 (Del. 1993) ("[D]eprivation of an interest is entitled to procedural due process only when such interest is circumscribed by the Fourteenth Amendment's protection of liberty and property," and substantive due process claims require a showing of "retaliation to plaintiff's exercise of constitutionally protected rights"). If the Appointment Policy constitutes a contract, Villare could claim that Beebe breached its terms, but would ultimately be unsuccessful, as Villare breached the contract first by failing to exhaust the administrative remedies outlined in the policy. If the Appointment Policy does not constitute a contract, as Beebe contends, Villare's implied covenant claim must fail as a matter of law. Villare is then left with the Fourteenth Amendment due process claim, which also must fail because he has failed to plead or identify a violation of any constitutionally protected interest. *See, e.g., Durig*, 1992 WL 301983, at *3-5 (assistant principal who filed suit based on a school board's non-renewal of his contract and failure to provide him with a hearing, could not sustain procedural and substantive due process claims on summary judgment).

State Farm Mut. Auto. Ins. Co. v. Patterson, 7 A.3d 454, 456 (Del. 2010).

C. **Merits of Argument**

1. The Appointment Policy's Plain and Unambiguous Language Explicitly Disclaims a Right to Reappointment

At its core, Villare's breach of contract claim is predicated on Beebe's denial of his reapplication for medical staff privileges in October 2005. To establish a claim for breach of contract under Delaware law, a plaintiff must prove: (1) the existence of a valid and enforceable contract; (2) breach; and (3) damages suffered as a result of the breach. *Weichert Co. of Pa. v. Young*, 2007 WL 4372823, at *2 (Del. Ch.). "Under Delaware law, an enforceable contract consists of an offer, an acceptance, and consideration." *Patel v. Patel*, 2009 WL 427977, at *3 (Del. Super. Ct. Feb. 20, 2009) (citing *Salisbury v. Credit Serv., Inc.*, 199 A. 674, 681 (Del. Super. Ct. 1937)). As a preliminary matter, Beebe's Appointment Policy expressly provides that there is no right to appointment or reappointment to the medical staff. This plain and unambiguous language should control and operate to defeat Villare's contention that he possesses an enforceable contractual right or interest. In short, having made no promise, Beebe could not have breached an obligation when it denied Villare's reapplication. The Court should not attempt to create new case law or a new cause of action under the guise of interpreting the policy. *Dworkin v. St. Francis Hosp., Inc.*, 517 A.2d 302, 306 (Del. Super. Ct. 1986) ("While deference must be given to the discretionary decisions made by

medical professionals, hospital bylaws should not be so liberally construed as to permit actions inconsistent with their express language"); *cf. Cornell Glasgow, LLC v. LaGrange Props., LLC*, 2012 WL 6840625, at *12 (Del. Super. Ct. Dec. 7, 2012) (recognizing that the court will not rewrite the parties' agreement under the guise of interpreting it).

2. Applying Delaware's Traditional Contract Law Principles, the Appointment Policy at Issue is Not an Enforceable Contract

As the Superior Court acknowledged, "[a]n enforceable contract under Delaware law requires 'an offer, an acceptance, and consideration.'" Order at 7 (citing *Patel v. Patel*, 2009 WL 427977, at *3 (Del. Super. Ct. Feb. 20, 2009)). The consideration, in particular, must be bargained for. *Johnson v. Rooney*, 2011 WL 2178693, at *2 (Del. Super. Ct. May 25, 2011) ("The formation of a contract 'requires a bargain in which there is manifestation of mutual assent to the exchange and consideration'"). Here, the factual record is void of evidence indicating that Villare bargained with Beebe as to the terms of the Appointment Policy. Further, as the Superior Court acknowledged, the Appointment Policy sets forth a procedural process and does not evince any intent by Beebe to be bound as with a contract:

> [T]he Court finds that the Bylaws here do not create an enforceable contract because the Bylaws expressly state that "[a]ppointment to the Medical Staff is a privilege and not a right" and otherwise set forth the process to acquire Medical Staff privileges. In other words, the

> Bylaws provisions at issue are not written to provide a basis for breach of contract, but to set forth a procedural process. There is no express intent to be bound by the provisions at issue or any indicia of a promise.

Order at 7-8 (footnotes omitted). This analysis applies with equal force to Villare's claim that the Appointment Policy confers a contractual obligation on Beebe to exercise due process. The intent of the policy is to create a procedure, not a contract. If Beebe does not operate according to the procedures set forth in the policy, Villare's recourse is an administrative hearing, not a civil suit.

As further support for its holding, the Superior Court referred to *Mason v. Cent. Suffolk Hosp.*, 819 N.E.2d 1029 (N.Y. Ct. App. 2004). Order ¶ 13. Villare argues, unconvincingly, that reliance on *Mason* is improper because the case is factually different and New York has additional credentialing review procedures. Motion ¶¶ 1-2.

To the contrary, *Mason*'s facts and law easily align with this case. In *Mason*, a doctor filed a breach of contract action against a hospital after the hospital suspended certain of the doctor's privileges. *Mason*, 819 N.E.2d at 1030. To that end, the doctor claimed that the hospital's bylaws constituted a contract that the hospital breached when it failed to follow the procedures detailed in the bylaws and suspended him without legitimate cause. *Id.* The doctor's claim was later dismissed and the New York Court of Appeals affirmed, holding that "no action for damages may be based on a violation of medical staff bylaws, unless

clear language in the bylaws creates a right to that relief." *Id.* As noted by the Superior Court, *Mason* is particularly persuasive because Delaware case law likens New York's contract principles to those espoused in Delaware. Order at 7.

The *Mason* court's conclusion is similar to the Delaware Superior Court's holding in *Lipson v. Anesthesia Services, P.A.*, 790 A.2d 1251, 1284 n.68 (Del. Super. 2001). In *Lipson*, the Court noted that "in certain circumstances" a hospital's bylaws can give rise to contractual rights and obligations, but specifically rejected an argument that a physician had a "right" to participate in on-call coverage because there was no such "right" referenced in the hospital's bylaws. *Id.* at 1284 n.68. (citation omitted). Akin to *Mason* and *Lipson*, the clear language of Beebe's Appointment Policy does not provide Villare with a right to appointment; thus, no contract exists.

Several other jurisdictions have likewise held that hospital bylaws do not confer any contractual rights to physicians applying for medical staff privileges. *See*, *e.g.*, *Monroe v. AMI Hosp., Inc.*, 877 F. Supp. 1022, 1029 n.5 (S.D. Tex. 1994) (interpreting Texas law that bylaws do not constitute contract); *Miller v. St. Alphonsus Regional Medical Center, Inc.*, 87 P.3d 934, 942 (Idaho 2004) (holding that a hospital's bylaws do not confer any contractual rights); *Sullivan v. Baptist Mem'l Hosp. – Golden Triangle, Inc.*, 722 So. 2d 675, 680-81 (Miss. 1998) (granting privileges does not create contract); *Zipper v. Health Midwest*, 978

S.W.2d 398, 415-17 (Mo. Ct. App. 1998) (holding, in case of first impression, bylaws do not create contract); *Manczur v. Southside Hosp.*, 183 N.Y.S.2d 960, 961-62 (N.Y. Sup. Ct. 1959) (finding bylaws created procedural rules for governing staff members not binding contract); *Munoz v. Flower Hosp.*, 507 N.E.2d 360, 365 (Ohio Ct. App. 1985) (finding no mutuality of obligation, thus, bylaws do not create contract); *Weary v. Baylor Univ. Hosp.*, 360 S.W.2d 895, 896-97 (Tex. Civ. App. 1962) (finding bylaws do not create contract); John Hulston, *et al.*, *Do Hospital Medical Staff Bylaws Create a Contract?*, 51 J. Mo. B. 352, 355 (Nov./Dec. 1995) (arguing bylaws should not be considered a contract giving rise to cause of action for damages, but should be enforceable in action for injunctive relief).[7]

3. Public Policy Considerations Weigh in Favor of Holding That the Appointment Policy is Not an Enforceable Contract

To hold that Beebe's appointment policy is an enforceable contract would effectively open the floodgates to claims from disgruntled physicians unsatisfied with decisions made by the hospital or medical facility in which they work. It would further burden the courts with task of evaluating and reviewing physician credentials and privileges for adequacy, a specialized area that should remain within the purview of the medical profession. In this instance, Villare had the

[7] Though Villare cites cases from other jurisdictions holding that bylaws are contracts, such a conclusion would contravene Delaware's traditional contract principles.

opportunity to have Beebe's denial of his reapplication reviewed at a hearing, but he declined to take advantage of that process. The Court should not now be required to take up the very process that Villare did not avail himself of in the first instance.

CONCLUSION

In light of the foregoing, it is respectfully suggested this Court should affirm the Superior Court's March 19, 2014 Order granting summary judgment in favor of Beebe Medical Center, Inc., as all portions of the Order were correct on the law and facts.

Dated: August 21, 2014

/s/ Erika R. Caesar
Sean J. Bellew (#4072)
Erika R. Caesar (#5143)
Ballard Spahr LLP
919 N. Market Street, 11th Floor
Wilmington, DE 19801
Telephone: (302) 252-4465
Facsimile: (302) 225-4466

Attorneys for Appellee Beebe Medical Center, Inc.