



IN THE SUPREME COURT OF THE STATE OF DELAWARE

DONALD L. HARMON,	:	
	:	
Plaintiff-Below,	:	No. 676, 2011
Appellant,	:	
	:	
v.	:	
	:	
STATE OF DELAWARE,	:	
DELAWARE HARNESS RACING	:	On Appeal From the
COMMISSION,	:	Superior Court of the
	:	State of Delaware, in
Defendant-Below,	:	and for Kent County
Appellee.	:	C.A. No. 07C-01-003

APPELLEE'S ANSWERING BRIEF ON APPEAL

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NATURE OF THE PROCEEDINGS

On January 3, 2007, plaintiff, who served at the pleasure of the Delaware Harness Racing Commission ("defendant") as a Presiding Judge, filed a complaint in Superior Court, C.A. No. 07C-01-003 WLW, against defendant and individual co-defendants including John Wayne ("Wayne"), after defendant denied plaintiff's request in 2004 to be reinstated. (A-1, Docket Entry #1).¹ Plaintiff's complaint alleged various claims, including breach of the implied covenant of good faith and fair dealing.

On July 16, 2007, defendant, along with individual co-defendants, moved for summary judgment. Wayne, who was represented by appointed conflicts counsel, also sought summary judgment on July 2, 2007, in part on the basis that Wayne had no authority to bind defendant and Wayne's statements to plaintiff could not create a reasonable expectation of continued employment. (A-3,4).

Plaintiff voluntarily dismissed Wayne on the day of the hearing for the summary judgment motions. (A-5). Plaintiff also dismissed all claims except for breach of implied covenant of good faith and fair dealing and the Whistleblowers Protection Act, and sought leave to add a claim of abuse of process. (A-5).

On November 28, 2007, the Superior Court granted summary judgment for the individual defendants and dismissed the Delaware

¹ In accordance with Supreme Court Rule 14, defendant will rely upon by reference the Appendix of plaintiff's Opening Brief, referred to as "A-". Reference to the Appendix of defendant's Answering Brief is designated as "B-", with specific reference to the trial transcript designated as "Tr.", followed by numbers for the volume, page designated as "P" and line designated as "L".

Whistleblower's Protection claim. *Harmon v. State of Delaware, et al.*, C.A. No. 07C-01-003 (Del.Super. Nov.28, 2007) (Order) (A-6).

On January 30, 2009, plaintiff amended his complaint to add claims for breach of the implied covenant of good faith and fair dealing and promissory estoppel. (A-9).

Following cross-motions for summary judgment, the Superior Court on January 8, 2010, granted summary judgment to defendants on all claims except promissory estoppel. *Harmon v. State of Delaware, et al.*, C.A. No. 07C-01-003 (Del.Super. Jan.8, 2010) (A-19). Plaintiff's request for reargument was denied. *Harmon v. State of Delaware, et al.*, C.A. No. 07C-01-003 (Del.Super. Sept.27, 2010).

On October 13, 2010, defendant filed a Motion in Limine to limit the testimony of plaintiff's expert, Francis H. Minnehan, Ph.D., regarding any claims of future income, and to limit the testimony of Wayne from saying that he was authorized to make the purported promise on the defendant's behalf. (A-23).

On December 21, 2010, the Superior Court decided that Wayne was not at liberty to define the scope of his own authority, and that Dr. Minnehan's opinion was relevant to determine damages (detrimental reliance), which was an essential element of promissory estoppel. *Harmon v. State of Delaware, et al.*, C.A. No. 07C-01-003 (Del.Super. Dec.21,, 2010). (A-25).

On January 10, 2011, a five-day jury trial began, at which defendant moved to strike the testimony of Dr. Minnehan, as he had not provided a report on reliance damages (Tr.II, P75, L16 to P77, L13) (B-

42). The Superior Court determined that Dr. Minnehan was expected to testify in accordance with its December 21st Order as to reliance damages and allowed plaintiff's expert additional time to obtain additional facts needed to make an estimation as to reliance damages. (Tr.II, P79, L1-8) (B-45), (Tr.II, P99, L13-20) (B-50) (Tr.II, P109, L9-20) (B-52) (Tr.II, P115-117) (B-56-58).

Following the conclusion of plaintiff's case, defendant moved for judgment as a matter of law under Super.Ct.Civ. R. 50, which the Superior Court granted in part, as plaintiff would not be entitled to receive backpay during the period of his suspension (Tr.III, P77) (B-71). Following presentation of defendant's case, the trial concluded with a jury verdict award of \$102,273. Defendant followed up on its Rule 50 Motion and the Superior Court ordered the parties to enter a briefing schedule (Tr.IV, P142, L16-23 - P143 L1-3) (B-116-117).

On January 25, 2011, defendant renewed its motion for judgment as a matter of law or for a new trial. (A-26).

On November 17, 2011, the Superior Court granted defendant's motion, determining that defendant was entitled to judgment as a matter of law or a new trial, on the claim of promissory estoppel. *Harmon v. State of Delaware, et al.*, C.A. No. 07C-01-003 (Del.Super. Nov. 17, 2011). (A-26-27).

On December 12, 2011, plaintiff filed his appeal with this Honorable Court, and filed his Opening Brief on February 3, 2012.

This is defendant's Answering Brief.

SUMMARY OF ARGUMENT

1. Denied. The Superior Court correctly concluded that promissory estoppel and apparent authority are not permitted against defendant, an arm of the State of Delaware.

2. Denied. Defendant's authority and core function is to regulate and oversee harness racing within Delaware in the public interest, and appoint racing officials in the public interest that serve at defendant's pleasure. 3 Del.C. §§ 10005, 10007. A majority of defendant's members constitutes a quorum for the transaction of any business, performance of any duty and exercise of any power of defendant. 3 Del.C. § 10006.

3. Denied. No evidence was elicited that defendant had made a promise to reinstate plaintiff nor that Wayne had been authorized by defendant to make such a promise, and further, Wayne's testimony did not establish an actual promise was made to plaintiff.

4. Denied. No Delaware case authorizes promissory estoppel against a government entity in its core regulatory function and Delaware cases go against governmental estoppel where there is a public interest or core function of the governmental entity.

5. Denied. The Superior Court correctly based its decision on various case law and legal authority, including *Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51 (1984) and *Kulesza v. Alcoholic Beverage Control Comm.*, 1991 WL 302534 (Del. Super. Dec. 30, 1991).

6. Denied. No evidence was elicited that defendant had made a

promise to reinstate plaintiff nor that Wayne had been authorized by defendant to make such a promise, and further, Wayne's testimony did not establish an actual promise was made to plaintiff.

7. Denied. Neither plaintiff nor plaintiff's economic expert provided any evidence as to reliance damages, which are the damages for a promissory estoppel claim.

8. Denied. The record is devoid of any evidence that defendant made a promise regarding reinstatement to plaintiff nor that Wayne had been authorized by defendant to make such a promise and further, Wayne's testimony did not establish an actual promise made to plaintiff.

9. Denied. Defendant did not act arbitrarily, unreasonably or capriciously in suspending and terminating plaintiff.

STATEMENT OF FACTS

The Delaware Harness Racing Commission

The Delaware Harness Racing Commission ("defendant") is an arm of the State of Delaware, comprised of five people, and is charged with protecting the integrity of harness racing and the betting public in Delaware. 3 Del.C. § 10005 (Tr.III, P118, L3-5; P119, L2-20; P120, L9-17) (B-74-76). Beth Steele has been a member of defendant Commission since 1993 and Chair since 2001. (Tr.III, P117, L12-20) (B-73). Defendant works as a team on matters that come before it. (Tr.III, P118, L6-8) (B-74). A quorum of three Commissioners is needed to meet and conduct business. (Tr.III, P122, L18-23) (B-77). Defendant takes an action on its business by majority vote and is required to maintain minutes of its meetings and business, which are approved by vote. (Tr.III, P123, L14-17, P131-132) (B-78, 86-87). Defendant's statutory duties include appointing racing officials, including the Presiding Judge. (Tr.III, P123, L18-23, P124, L1-6) (B-78-79). Racing officials are appointed by defendant from race meet to meet, and serve at defendant's pleasure. (Tr.III, P124-125) (B-79-80). Personnel matters, including pay rates, appointments, or firings, come before and are voted on defendant. (Tr.III, P125-126) (B-80-81). Racing officials are paid per diem, meaning they are not paid if they do not work. (Tr.III, P126, L19-23) (B-81).

Plaintiff's Appointment

Defendant appointed plaintiff as a seasonal racing judge in 1998. (Tr.I, P140, L21; P141, L1) (B-33-34). Plaintiff was an at-will

appointee and paid per diem. (Tr.III, P127, L4-7)(B-82). Plaintiff understood he served at defendant's pleasure and his services could be terminated at any time. (Tr.I, P141, L3-23 - P142, L16)(B-34-35); 3 Del.C. § 10007(d).

Wayne's Position as Administrator of Racing

Wayne was Administrator of Racing of defendant, from 1999 to 2005. (Tr.I, P23, L23 - P24, L5)(B-1-2). Wayne acknowledged he had no authority individually or as Administrator to hire or terminate any employee of the defendant, including plaintiff. (Tr.I, P62, L3)(B-16). Wayne's job responsibilities were those as directed by defendant and set out in 3 Del.C. § 10007(e) (Tr.I, P61-62)(B-15-16)(Tr.III P130, L6-12)(B-85). Wayne was to carry out what defendant directed him to do. (Tr.III, P190, L9-13)(B-109). When defendant authorized Wayne to do something, it would be noted in the minutes. (Tr. III, P190, L 23 - P191, L1)(B-109-110). If defendant requested a letter of some import, it would be dictated to Wayne by defendant's counsel. (Tr.III, P190-191)(B-109-110). Wayne was not a member of defendant and had no authority to vote on defendant's matters. (Tr.III, P128, L11-21)(B-83). As Administrator of Racing, Wayne would take care of general, daily-occurring housekeeping matters. (Tr.III P129, L2-4) (B-84). Wayne's job was to see that defendant's records were maintained; administrate payroll; collect funds for equine drug testing and human drug testing; manage investigators and assign cases; track information; file an annual report to the Governor; give defendant a monthly summary of activities of the administration of licensing and

investigations; media contacts; and make defendant aware of items that would come to defendant's office. (Tr.I, P25-26, L14-7) (B-3-4).

Wayne was not plaintiff's supervisor. (Tr.I, P.26, L11-15) (B-4). Wayne occasionally dealt with plaintiff on personnel matters, but there were not many personnel documents for Wayne to sign as to plaintiff, who had been appointed previously by defendant (Tr.I, P26, L18-20 - P27, L1-6) (B-4-5). Wayne would meet daily with plaintiff and had a close working relationship. (Tr.I, P74, L8-16) (B-21).

Wayne was only authorized as directed by defendant to make representations to employees. (Tr.I, P29, L1-5; Tr.III, P130, L6-12) (B-7,85). As directed by defendant, Wayne would deal with matters concerning pay rates of racing officials, including the position of Presiding Judge. (Tr.I, P32, L3-7) (B-8). Defendant, not Wayne, divided the responsibilities of the position of State Steward when that position became vacant. (Tr.I, P28, L13-18) (B-6).

The Qualifying Race When Plaintiff Was Not In The Judges Stand

Plaintiff was not in the judges' stand at the time of a 4th qualifying race on April 3, 2003 at Dover Downs, but changed the rulings of two Associate Judges who were in the judges' stand, allegedly as a favor for one of the horse's owners so the horse would qualify for that race and participate in a stake race the following week. (Tr.I P142-149) (B-119-126).

Defendant's Actions as to Plaintiff's Employment Status

Plaintiff testified that he was suspended on the day of his arrest, per order of defendant. (Tr.I, P107) (B-28). He subsequently

appeared before defendant, which ruled to continue the suspension (Tr.I, P107, L19-23 - P108, L1) (B-28-29).

Defendant met on January 12, 2004 and, through vote, suspended plaintiff as Presiding Judge without pay and directed Wayne to give plaintiff something in writing. (Tr.III, P144-146) (B-90-92). This was reflected in defendant's meeting minutes. (Tr.III, P145, L3-20) (B-91). A letter dated January 14, 2004 confirmed defendant's actions of its January 12th meeting. (Tr. III, P146, L3-21) (B-92).

Defendant's meeting minutes also showed defendant met on January 22, 2004, at which plaintiff and his attorney, Joe Hurley, Esq., appeared and requested several things, including a rescission of the suspension. Defendant, through vote, decided to continue the suspension without pay and directed Wayne to write a letter to Hurley with defendant's decision. (Tr.I, P91-92, P93 L2-21) (B-24-26) (Tr.III, P148-150) (B-93) (Tr.I, P46, L12-16) (B-11). Defendant, not Wayne, assigned a replacement Presiding Judge during plaintiff's absence. (Tr.I. P45, L14-17) (B-10). A letter dated January 23, 2004 confirmed defendant's action. (Tr.I, P87-88) (B-22-23) (Tr.III, P150, L6-18) (B-95).

Defendant met at a regularly scheduled meeting on October 19, 2004, and approved, through vote, the racing officials for the upcoming Dover race meeting that started at the end of October. (Tr.III, P152, L8 - P153, L12) (B-96-97). After appointing the racing officials, Defendant received a request from plaintiff to be reinstated. (Tr.III, P153, L22 - P154, L 16) (B-97-98). On October 27,

2004, defendant met and decided, through vote, to schedule a meeting to consider plaintiff's application to return as Presiding Judge and directed its counsel to prepare a letter confirming its action. (Tr.III, P155, L6-17) (B-99).

On November 16, 2004, defendant met to listen to plaintiff and his attorney, for his request to be reinstated. (Tr.III, P156, L7-21) (B-100). After the presentation from plaintiff and his attorney, defendant decided, through vote, to not rehire plaintiff. (Tr.III, P157, L2-23 - P158, L1-22) (B-101-102). A letter dated November 18, 2004 confirmed defendant's decision. (Tr.III, P158, L1-22) (B-102).

No Promise by Defendant

Defendant's minutes from 2004 reveal no mention that defendant promised to reinstate plaintiff if acquitted, no mention that defendant voted to make a promise to reinstate plaintiff, and no mention of defendant directing Wayne to make a promise of reinstatement to plaintiff. (Tr.III, P133-134) (B-88-89).

Chair Steele testified Wayne approached her about what she thought would happen to plaintiff's position. Chair Steele informed that the status of plaintiff's appointment had to be decided by defendant as a whole and Wayne could not speak with plaintiff. (Tr.III, P161, L15-21) (B-103). Defendant did not know Wayne was speaking with plaintiff. A decision about plaintiff's job had to be by a vote of the entire defendant Commission. (Tr.III P176, L10-17) (B-108).

Most items discussed between Chair Steele and Wayne had to go to

defendant for its approval. (Tr.III, P163, L18-20)(B-104). Wayne was involved in personnel matters only at defendant's direction. (Tr.III, P170, L8-10)(B-106).

Wayne's Own Assurance to Plaintiff

Wayne testified at trial that he previously testified in deposition that Chair Steele had said that if plaintiff was found innocent, plaintiff would probably get his job back or defendant will consider him for the job. (Tr.I, P65, L10-22 - P66, L1-20)(B-17-18):

Q. So that [Chair Steele's] response was, well - is - **"If he's found innocent, he'll probably get his job back or we'll consider him for the job"**?

A. This is what I was deposed then, that's what I recall at that time.

Q. And **that's what was said**?

A. **Yes, sir.**

Q. Now, was Mr. Harmon given an opportunity to ask for reconsideration of his job?

A. Yes, he was.

(Tr.I, P66, L1-20)(B-18)(emphasis added).

Wayne acknowledged that he testified previously in deposition that he was "absolutely certain" about Chair Steele's above response. (Tr.I, P95, L3-14)(B-27).

There is no testimony or evidence that defendant's five-members or, at a minimum, a requisite three-member quorum of the defendant agreed that plaintiff would be reinstated following acquittal or directed Wayne to make such a representation to plaintiff.

Wayne agreed that his deposition testimony was not exactly what he testified to on direct examination at trial. (Tr.I, P65, L10-22)(B-17). Wayne testified that "the discussion regarding possible reinstatement was by two Commissioners, Chair Steele and Robert

Everett." (Tr.I, P67, L15-23)(B-19). Wayne did not document the alleged promise. (Tr.I, P69, L9-22)(B-20).

On direct examination during trial, Wayne was unsure of when he asked the question of whether plaintiff would get his job back, but thought it could have been at or after a meeting of defendant or during executive session. (Tr.I, P35, L11-17) (B-9). Even so, defendant's minutes from 2004 reveal no mention of a promise. (Tr.III, P133-134)(B-88-89).

Plaintiff's Understanding of Wayne's Assurance

Plaintiff understood his suspension on the day of his arrest was per order of defendant. (Tr.I, P107, L17-20)(B-28). Plaintiff subsequently appeared before defendant, which ruled to continue the suspension. (Tr.I, P107, L19-23) (B-28). Plaintiff inquired about his job status when he spoke with Wayne and was told by Wayne that he would get his job back if found not guilty. (Tr.I, P115, 2-9)(B-30). At plaintiff's request, defendant held a meeting to consider plaintiff's request to be reinstated. (Tr.I, P132 L7-18)(B-31). Plaintiff understood that a slate of racing officials to work upcoming race meets had been approved previously by defendant. (Tr.I, P134, L4-7)(B-32). Plaintiff testified that his contract with defendant was from November to November (Tr.I, P134, L8-9)(B-32). Plaintiff indicated on his application for unemployment insurance benefits dated February 27, 2004, that he would not be recalled to work. (Tr.I, P171, L22-23, P173, L15-22)(B-38-39).

No Evidence of Reliance Damages

Plaintiff did not purchase any material items, such as a luxury car, in reliance on the purported promise to be reinstated. (Tr.I, P163, L19-22) (B-36). Plaintiff did not do anything in reliance on the alleged promise of being reinstated and waited to get his job back. (Tr.I P164, L16-22) (B-37). Plaintiff contends his change in position was that he did not alter his lifestyle enough for someone who was not going back to work. (Tr.I P164, L3-5) (B-37).

Plaintiff could not talk to trainers who approached him because the criminal trial was occurring. (Tr.II, P8, L6-9) (B-40). He entertained working in construction with his son, but could not make a time commitment because of the criminal trial. (Tr.II, P8, L19-22) (B-40). Racing industry people were not interested in speaking with him until his suspension and criminal trial resolved. (Tr.II, P9, L11-15) (B-41).

On *voir dire*, plaintiff's expert, Dr. Minnehan, testified that he did not look at the value, expenses, or losses that plaintiff incurred as a result of relying on a promise to be reinstated. (Tr.II, P93, L5-9) (B-47). Also, Dr. Minnehan did not do an analysis of expenses or losses resulting from relying on a promise, and would need to consult with plaintiff as to specific dates and his identification of a loss. (Tr.II, P94, L14-16, P95, L11-15) (B-48-49).

The Superior Court had determined that the measure of damages for promissory estoppel is measured by the reliance cost reasonably incurred by a plaintiff or, stated differently, reimbursement of

expenditures and losses incurred by the promise with a value of the promise performance. (Tr.II, P111 L14-19; P112 L6-12)(B-53-54). The Superior Court allowed plaintiff's expert additional time to have additional facts needed to form an opinion as to reliance damages. (Tr.II, P99, L13-20)(B-50).

After having additional time, Dr. Minnehan testified he had no information or that plaintiff had incurred any losses or expenses related to plaintiff's delay in seeking new employment after November 2004, and no information that plaintiff had job search expenses. (Tr.III, P23, L1-15)(B-61).

Plaintiff sent letters and made numerous phone calls in his job search attempts after November 18, 2004 but did not keep track of these expenses. (Tr.III, P50, L12-17)(B-62). Plaintiff thought the cost of applying for jobs, before or after November 2004, would have been equal (Tr.III, P51, L5-10)(B-63).

Dr. Minnehan calculated plaintiff's lost wages from 2004 had he been working as a racing official. (Tr.III, P22)(B-60). Dr. Minnehan's opinion offered at trial was based solely on plaintiff's wages from 2003 and carried them forward to 2005. (Tr.III, P22, L12-14)(B-60).

While the jury found in favor of plaintiff on the issue of promissory estoppel, it awarded plaintiff approximately his one-year's salary, based upon testimony regarding plaintiff's wages, not reliance damages.

ARGUMENT

I. THE SUPERIOR COURT DID NOT COMMIT REVERSIBLE ERROR BY GRANTING DEFENDANT'S MOTION FOR JUDGMENT AS A MATTER OF LAW OR MOTION FOR A NEW TRIAL.

I.(a) Questions Presented

Whether the Superior Court correctly granted defendant judgment as a matter of law or a new trial, by not applying promissory estoppel against defendant where defendant's core regulatory function is to protect the public's interest in harness racing, and by not finding apparent authority as plaintiff, an insider, bore the risk of error in dealing with a governmental entity? This question was preserved below. (B-64-71, B-107-108).

I.(b) Scope of Review

The standard and scope of review of the Superior Court's grant of a motion for judgment as a matter of law under Superior Ct.Civ.R. 50 is *de novo*. *Gilbert v. El Paso Co.*, 575 A.2d 1131, 1141 (Del. 1990).

The standard and scope of review of the Superior Court's grant of a motion for a new trial under Superior Ct.Civ.R. 59(a) is abuse of discretion. *Storey v. Camper*, 401 A.2d 458, 465 (Del. 1979). An appellant has "[t]he heavy burden of showing that the after-verdict decision was 'clearly unreasonable' ... or that it 'exceeded the bounds of reason in view of the circumstances.'" *Wilmington Med.Ctr. v. Redden*, 312 A.2d 625, 626 (Del. 1973). When such a motion is granted on weight of evidence grounds, a trial judge's "discretionary power is still given the deference required by his presence at trial and his duty to see that there is no miscarriage of justice." *Id.* (citation

omitted).

I.(c) Merits of Argument

The Superior Court correctly granted defendant's motion, as plaintiff's claim of promissory estoppel is inapplicable where defendant's core functions are to protect the public interest and regulate harness racing in Delaware. 3 Del.C. § 10005.

B. John Wayne was not authorized by Defendant to make any promises.

Estoppel against a government entity, unlike a private or commercial dispute, is adverse to the very essence of representative democracy. In the present case, estoppel is not appropriate as it violates the statutory scheme that the Delaware General Assembly set out for defendant. "When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined. It is for this reason that *it is well settled that the Government may not be estopped on the same terms as any other litigant.*" *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 60 (1984) (emphasis added). No Delaware case authorizes estoppel against a government entity in its core regulatory functions. Indeed, Delaware cases go against government estoppel where there is a public interest or the core function of the entity. *McCoy v. State of Delaware*, 277 A.2d 675 (Del. 1971) (erroneous information in parole papers will not estop parole board from ordering petitioner's recommitment); *Downer v. State of Delaware*, 702 A.2d 925, 1997 WL 673717 (Del. 1997) (parole board not estopped); *Kulesza v.*

Alcoholic Beverage Control Comm., 1991 WL 302534 (Del. Super. Dec. 30, 1991) (alcohol regulatory commission not estopped from enforcing violation where policy memorandum suggested such conduct would not be violation); *Conway v. Wolf Liquor Company*, 200 A.2d 831, 834 (Del. 1964) ("in matters of this nature, a State or its agencies cannot be estopped by unauthorized acts of its officers"); *Pisano v. Delaware Solid Waste Auth.*, 2006 WL 3457686 (Del. Super. Nov. 30, 2006) (courts will not consider apparent authority claims against government entities). While some Delaware cases can be found that apply estoppel against a government, none do so in a core function of the entity.

Defendant has the authority and responsibility to protect the public interest in all respects concerning the conduct of harness racing and the employment of individuals, such as plaintiff who had been appointed a racing judge, in Delaware. 3 Del.C. § 10005 (Tr.III, P53-54) (B-64-65). Defendant also has an unquestioned responsibility regarding employment of racing officials in the public interest under 3 Del.C. § 10007, who serve at defendant's pleasure. Significantly, defendant acted together as a body or voted with respect to plaintiff's appointment status. (Tr.III P175-176, L15-23) (B-107-108).

Defendant is not subject to plaintiff's claim of promissory estoppel, given its core regulatory function and as Delaware statutory law assigns its employment decisions solely to it. Therefore, the Superior Court's decision was correct and should be affirmed.

Plaintiff's reliance upon the three cases cited in his Opening Brief is notably misplaced. (Op.Brf. P16-18). First, contrary to the

facts of the present case, the case of *Reeder v. Sanford School, Inc.*, 397 A.2d 139 (Del. Super. 1979) involved a private employer, not a governmental entity, and is inapplicable. The State government agency here -- defendant, which regulates harness racing in Delaware and protects the public interest in that regulated industry - may not be estopped on the same terms as other litigants. *Heckler, supra*. Second, defendant is not a school board, contrary to plaintiff's cases of *Keating v. Appoquinimink School Dist.*, 1993 WL 460527 (Del.Ch. Nov. 3, 1993) and *Crisco v. Indian River Sch. Dist.*, 1988 WL 90821 (Del.Ch. Aug. 29, 1988). In *Keating*, the Court of Chancery noted that it had previously applied the promissory estoppel doctrine against school boards. *Keating, supra*, at 4 and at 4, n.4. Unlike defendant, school district boards do not provide a core regulatory function that protects the public's interest in a regulated area. Third, a written policy in an employment manual was not the issue in the present case, as it was in *Crisco, supra*. In that case, a policy regarding a reduction in force, set forth in the school district's employee manual, was determined to be a binding promise and thus, the school district was estopped from terminating Crisco where it violated its own written policy about dismissing teachers because of a reduction in force. *Id.* at 5. Such are not the facts in the present case.

Plaintiff points to no case where estoppel was authorized against a government entity in its core regulatory function. Instead, plaintiff relies heavily on *Keating v. Appoquinimink Sch. Dist.* which is plainly distinguishable: (1) unlike plaintiff, Ms. Keating did not

serve in a position responsible for enforcing the law in a regulated industry, to protect the public's interest; (2) unlike plaintiff, Ms. Keating had an eyewitness present during the key conversation of when a promise had been made and this eyewitness corroborated Ms. Keating's recollection of that promise; (3) unlike plaintiff, Ms. Keating was expressly told that she could purchase a car because her teaching employment contract was being renewed; and (4) unlike plaintiff, Ms. Keating was not informed of the role the school district board played in hiring decisions, including her initial hiring. *Keating, supra*, at 2-3.

Undisputed evidence in the record shows that defendant itself did not make a promise to plaintiff, and defendant as a body never authorized or directed Wayne to make a promise to plaintiff, in accordance with 3 Del.C. Ch. 100. Indeed, plaintiff was aware of defendant's appointment responsibilities as he had previously attended defendant's meetings and requested to appear before it regarding his employment status.

Plaintiff argues that "[t]here is substantial evidence that the Commission authorized Wayne to tell Harmon that he would be reinstated if acquitted of the criminal charges, regardless if it was done by vote or not." (Op.Brf. P17). This argument ignores defendant's minutes from 2004 that omit any mention that defendant promised to reinstate plaintiff, any mention of defendant directing Wayne to make such a promise to plaintiff, any mention in letters between defendant and plaintiff's attorney that defendant promised to reinstate

plaintiff, and any mention that defendant voted to promise to reinstate plaintiff (TR.III, P133-134) (B-88-89).

Moreover, the testimony of plaintiff's sole witness, Wayne, did not establish an actual promise was made to plaintiff. Rather, at trial, Wayne testified -- as he previously testified in deposition -- that defendant's Chair had said that if plaintiff were found innocent, plaintiff would "[p]robably get his job back or we'll consider him for the job." (Tr.I, P65, L10-22; P66, L1-20) (B-17-18) (emphasis added). Unquestionably, such a statement is not a definite promise of reinstatement that would support a claim of promissory estoppel.

(C) **Plaintiff could not reasonably rely on Wayne's representations.**

Plaintiff and his sole witness, Wayne, were both appointed by defendant and attended meetings before defendant. As such, plaintiff and Wayne are insiders who should be presumed to know the law of the entity that appointed them.

Plaintiff also argues that even if he knew defendant had the ultimate authority to make hiring decisions, this fact did not preclude plaintiff's reasonable reliance on Wayne's promise, as "Wayne was Harmon's supervisor and was authorized to handle personnel matters addressing Harmon's employment." (Op.Brf. P18-19). This argument fails as it is not supported by the evidence in the record.

Wayne was not plaintiff's supervisor. (Tr.I, P26, L11-15) (B-4). Further, Wayne had no authority individually or as Administrator to hire or terminate any employee of defendant, including plaintiff.

(Tr.I, P62, L3)(B-16). Wayne's job responsibilities were those as directed by defendant and set out in 3 Del.C. § 10007(e) (Tr.I, P61-62)(B-15-16); (Tr.III, P130, L6-12)(B-85); (Tr.III, P190, L9-13)(B-109). Wayne occasionally dealt with plaintiff on personnel matters, but there were not many personnel documents for Wayne to sign as to plaintiff, who had been appointed previously by defendant (Tr.I, P26, L18-20 - P27, L1-6)(B-4-5).

The doctrine of apparent authority generally does not apply to government entities. *Pisano v. Delaware Solid Waste Auth.*, 2006 WL 3457686 (Del. Super. Nov. 30, 2006) "Usually, however, third parties dealing with governmental entities 'take the risk of error regarding the agent's authority to a greater degree than do third parties dealing through agents with nongovernmental principals.'" *Id.* at 7 (citing *Restatement (3d) of Agency* § 2.03 cmt. g (2006)). "This is consistent with the general rule that those who deal with Government are expected to know the law and may not rely on the conduct of Government agents contrary to the law." *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 63 (1984). It is long-held Delaware law that Wayne cannot establish his own authority as an agent for defendant. *Pisano, supra*, at 8 (citing *Arthur Jordan Piano Co. v. Lewis*, 154 A. 467 (Del.Super 1930)). The only evidence presented as to Wayne's "authority" regarding his representations of a promise to plaintiff is Wayne's own vague statements.

As set forth above in *Heckler* and the *Restatement (3d) of Agency*, the requirements for there to be authority to act on behalf of a

principal are those requirements for third parties, *not insiders*, as in the present case. Plaintiff and his sole witness and friend, Wayne, were both appointed by defendant and thus, are insiders who should be presumed to know the law of the entity that appointed them.

(D) There was no evidence presented at trial of any reliance damages by Plaintiff.

Plaintiff argues he relied on Wayne's promise to his detriment, however the evidence in the record does not support this. (Op.Brf. P19-21). There was no evidence of reliance damages, as plaintiff as well as his expert, provided no testimonial evidence at trial.

The Superior Court correctly determined that plaintiff could recover only reliance damages, but plaintiff provided no evidence of such at trial. *Harmon v. State of Delaware, et al.*, C.A. No. 07C-01-003, at 17 (Del.Super. Nov. 17, 2011) (Order); (Tr.II, P91-114) (B-127-150); see also *Ramone v. Lang*, 2006 WL 4762877 (Del.Ch. Apr. 3, 2006) (explanation of reliance damages). Plaintiff's expert provided testimony as to lost wages but not as to reliance damages. Plaintiff testified that he wrote letters and made telephone calls but did not keep track of expenses. *Harmon, supra*, at 17.

Plaintiff understood his suspension on the day of his arrest was per order of the defendant. (Tr.I, P107, L17-20) (B-28). Plaintiff subsequently appeared before the defendant, which ruled to continue the suspension. (Tr.I, P107, L19-23) (B-28). At plaintiff's request, defendant held a meeting to consider plaintiff's request to be reinstated. (Tr.I, P132 L7-18) (B-31). Plaintiff understood that a slate of racing officials to work upcoming race meets had been

approved previously by the defendant. (Tr.I, P134, L4-7) (B-32).

(E) The Superior Court properly applied the case law.

As argued *infra*, at pages 16-20, the Superior Court correctly relied on the cases of *Heckler*, *McCoy*, *Kulesza* and *Pisano* for the position that promissory estoppel is not applied against a government entity in its core regulatory function. While plaintiff argues reliance on these cases was error (Op.Brf.P22-24), plaintiff offers no case or argument where estoppel was authorized against a government entity in its core regulatory function.

(F) The Superior Court properly granted judgment as a matter of law on the issue of promissory estoppel.

Plaintiff also argues that the jury's finding of promissory estoppel did not shock the conscience of the Superior Court. (Op. Brf. P24-26). In this context, plaintiff argues that the Chair's assignment of an inspector without a vote by the defendant prevents defendant from relying on the law that defendant's business acts are made by vote. These arguments miss the mark.

A plaintiff must prove, by clear and convincing evidence, the elements of promissory estoppel. This includes proof that defendant made a promise and reliance damages. *Lord v. Souder*, 748 A.2d 393, 399 (Del. 2000). Plaintiff elicited no evidence at trial that defendant made a promise to reinstate plaintiff nor that defendant authorized or directed Wayne to make such a promise. There is no testimony or evidence that defendant's five-members or, at a minimum, a requisite three-member quorum agreed that plaintiff would be reinstated following acquittal or directed Wayne to make such a representation to

plaintiff. (TR.III, P133-134) (B-88-89).

Assuming, for purposes of argument, that plaintiff's argument here were accepted in that the individual Chair, without a vote by defendant, could "bind" defendant as to a promise - which defendant adamantly refutes -- the testimony of plaintiff's sole witness, Wayne, did not even establish an actual promise by the Chair:

Q. So that [Chair Steele's] response was, well - is - **"If he's found innocent, he'll probably get his job back or we'll consider him for the job"**?

A. This is what I was deposed then, that's what I recall at that time.

Q. **And that's what was said?**

A. **Yes, sir.**

Q. Now, was Mr. Harmon given an opportunity to ask for reconsideration of his job?

A. Yes, he was.

(Tr.I, P65, L10-22, P66, L1-20) (B-17-18) (emphasis added).

In addition, the Superior Court correctly determined that given the insufficiency of evidence on reliance damages, the jury's award of \$102,273 based on a finding of promissory estoppel was against the great weight of the evidence and satisfied the standard for granting a new trial. *Harmon v. State of Delaware, et al.*, C.A. No. 07C-01-003, at 17 (Del.Super. Nov. 17, 2011). Despite the Superior Court's January 8, 2010 and December 21, 2010 Orders from which the claim of promissory estoppel proceeded, plaintiff provided no report of reliance damages, to support his claim of promissory estoppel, from his expert before trial. (Tr.I P77) (B-44). At trial, plaintiff provided no evidence of reliance damages, despite specific instructions and additional time to do so. (Tr.II P108-113) (B-51-

58). Plaintiff's expert provided testimony as to lost wages, but not as to reliance damages. (Tr.III P22-23, P50-51) (B-60-63). Further, plaintiff testified that he wrote letters and made telephone calls but did not keep track of job search expenses. (Tr.III, P50-51) (B-62-63).

Absent evidence of reliance damages, the Superior Court correctly granted defendant's motion for a new trial.

II. THE SUPERIOR COURT CORRECTLY DETERMINED THAT LOST WAGES ARE NOT PART OF RELIANCE DAMAGES FOR A CLAIM OF PROMISSORY ESTOPPEL.

II.(a) Questions Presented

Whether the Superior Court correctly determined that lost wages are not included in reliance damages for a claim of promissory estoppel, where an at-will employee serves at defendant's pleasure and is paid per diem? This question was preserved below. (B-50-55, B58-63, B105-114).

II.(b) Scope of Review

The standard and scope of review of the Superior Court's grant of a motion for judgment as a matter of law under Superior Ct.Civ.R. 50 is *de novo*. *Gilbert v. El Paso Co.*, 575 A.2d 1131 (Del. 1990).

The standard and scope of review of the Superior Court's grant of a motion for a new trial under Superior Ct.Civ.R. 59(a) is abuse of discretion. *Storey v. Camper*, 401 A.2d 458, 465 (Del. 1979).

II.(c) Merits of Argument

The Superior Court correctly determined that only reliance damages were recoverable for a claim of promissory estoppel. (Tr.II, P105-114) (B-141-150); see also *Ramone v. Lang*, 2006 WL 4762877 (Del.Ch. Apr. 3, 2006).

In its Order dated December 21, 2010, the Superior Court correctly determined that detrimental reliance damages are an essential element of promissory estoppel, and courts award reliance damages for promissory estoppel. *Harmon v. State of Delaware, et al.*, C.A. No. 07C-01-003 (Del.Super. Dec. 21, 2010) (Order).

At trial and in accordance with its December 21, 2010 Order, the

Superior Court reiterated that the only damages available to plaintiff were reliance damages. (TR.II, P99) (B-50). It correctly ruled that plaintiff was permitted to offer evidence of "reimbursement of the expenditures and losses incurred" by plaintiff's reliance on a promise of reinstatement. (Tr.II, P108-113)(B-51-55). Damages did not mean backpay, as plaintiff had no claim for the position. (Tr.III P77)(B-71). Because no report on reliance damages had been provided by plaintiff's expert, Dr. Minnehan, the Superior Court allowed plaintiff an opportunity to instruct his expert on its rulings and have Dr. Minnehan testify accordingly (Tr. II, P118-119)(B-58-59).

However, during his testimony the following day, Dr. Minnehan did not offer any testimonial evidence as to reliance damages, as the Superior Court instructed. (Tr.III, P22-23)(B-60-61). Further, plaintiff was recalled as a witness by his counsel and during cross-examination, plaintiff testified he had no record of expenses regarding his job search after he knew he was not going to be reinstated by defendant (Tr. III, P50, L12-17)(B-62) and there would have been no difference in costs as to his job search before November 2004 and thereafter. (Tr.III, P51, L1-10)(B-63).

With respect to damages, the Superior Court correctly instructed the jury that they could only award reliance damages for a claim of promissory estoppel:

If you find that the defendant is liable on the claim as I've explained it, then you may award Donald Harmon damages that are necessary to compensate him for his reasonable reliance on the promise of the defendant. **That means that Donald Harmon has no legal claim for continuation of his salary and benefits after his**

suspension of January 8, 2004. Instead, Donald Harmon may recover, if he has proved promissory estoppel, as I have instructed you on, the value of any losses or expenses related to the delay in his seeking new employment after November 2004, caused by his reliance on the Commission's promise to reinstate him. He may not recover anything else.

I remind you that you may award reliance damages only for losses and expenses that the plaintiff proves are proximately caused by the defendant's alleged promise to reinstate him following his being found not guilty on the criminal charges.

(Tr. IV, P72, L12 - P74, L11) (B-113-115) (emphasis added).²

In other words and as properly instructed, reliance damages are the expenses and losses from plaintiff's delayed job search, due to his detrimental reliance.

Plaintiff relies on *Keating, supra*, to argue that plaintiff should have been allowed to argue for backpay. (Op.Br. P27).

Plaintiff was allowed ample opportunity to argue damages. Indeed, following voir dire of plaintiff's expert, plaintiff submitted cases, including *Keating, supra*, at trial to support his position. Well-within its discretion, the Superior Court determined that *Keating, supra*, was not on point with respect to damages as to promissory estoppel and declined to follow it. (Tr.II, P111) (B-53). Explaining its reasoning, the Superior Court correctly determined and explained how reliance damages are measured. (Tr.II P108-109, P111-114) (B-51-56).

² Defendant objected to the jury instruction as to apparent authority, which told the jury that Wayne was defendant's agent, despite the overwhelming evidence that Wayne was not authorized or directed to act in the way he did (Tr. IV, P8-24) (B-151-167).

III. THE SUPERIOR COURT CORRECTLY APPLIED THE LAW AND GRANTED SUMMARY JUDGMENT TO DEFENDANT ON THE CLAIM OF BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING.

III.(a) Questions Presented

Whether the Superior Court correctly applied the law when granting defendant summary judgment on the claim of breach of the implied covenant of good faith and fair dealing? This question was preserved below (A-3, A-17-18, A-21) and in *Harmon v. State of Delaware, et al.*, C.A. No. 07C-01-003 (Del.Super. Jan. 8, 2010), *reargument den'd*, *Harmon v. State of Delaware, et al.*, C.A. No. 07C-01-003 (Del.Super. Sept.27, 2010).

III.(b) Scope of Review

The standard and scope of review of the Superior Court's grant of a motion for judgment as a matter of law under Superior Ct.Civ.R. 50 is *de novo*. *Gilbert v. El Paso Company*, 575 A.2d 1131, 1141-42 (Del. May 16, 1990). To the extent issues on appeal are matters of law, it is decided whether the trial court erred in formulating or applying legal principles. *Id.* at 1142.

III.(c) Merits of Argument

"Delaware recognizes a limited implied covenant of good faith and fair dealing as an exception to the weighty presumption of the doctrine of at-will employment." *Ayres v. Jacobs & Crumplar, P.A.*, 1996 WL 769331, at 11 (Del. Super., Dec. 31, 1996). The covenant is limited to certain narrow categories: (1) the termination violates public policy; (2) the employer made a misrepresentation; (3) the employer abused its authority to deprive employee of compensation; or

(4) the employer created grounds for termination by falsifying records. *Id.* In his Opening Brief, plaintiff raises two narrow exemptions -- misrepresentation and abuse of authority to deprive an employee of compensation - in arguing that granting summary judgment in defendant's favor on this claim was inappropriate. (Op.Brff. P29).

The Superior Court correctly determined that plaintiff failed to satisfy the requirements for a claim of breach of implied covenant of good faith and fair dealing. *Harmon v. State of Delaware, et al.*, C.A. No. 07C-01-003, at 13 (Del.Super. Jan. 8, 2010). Specifically, the Superior Court stated that the record before it, on cross-motions for summary judgment, contained no evidence that Wayne's statements were made in bad faith, as required by *Dial v. Astropower, Inc.*, 1999 WL 1441993, at 3 (Del.) and *Gilliland v. St. Joseph's at Providence Creek*, 2006 WL 258259, at 7 (Del. Super.). *Harmon, supra*, at 12 -13. The Superior Court correctly analyzed the record, finding that plaintiff failed to allege in his complaint or motion for summary judgment that Wayne's statements were made in bad faith, regardless of whether Wayne had the requisite authority from defendant to make a promise. *Harmon, supra*, at 13.

Plaintiff did not seek or oppose summary judgment on the exemption of abuse of authority. In its Opinion and Order dated January 8, 2010, the Superior Court stated that Plaintiff did not offer argument to support the application of exemptions one, three, and four, as enumerated above, for a claim of breach of the implied covenant of good faith and fair dealing. *Id.* at 11. "Although Harmon fails to

address the other three narrow situations, for the sake of completeness, the Court notes that it has reviewed the record and concludes that none are applicable to the case at bar." *Id.* at 13, n.24. Therefore, Plaintiff is precluded from doing so now.

CONCLUSION

For the foregoing reasons, Appellee, the State of Delaware, Delaware Harness Racing Commission, respectfully requests that this Court affirm the decision of the Superior Court trial judge below, as there was no reversible error in granting defendant's motion for judgment as a matter of law or motion for a new trial in this case.

Respectfully Submitted,

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DATED: March 5, 2012

CERTIFICATE OF SERVICE

I, Laura L. Gerard, Deputy Attorney General, hereby certify that on March 5, 2012, I caused Appellee's Answering Brief to be electronically filed and served by Lexis/Nexis to:

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