

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 CA 1580

**LOUISIANA HORSEMEN'S BENEVOLENT AND
PROTECTIVE ASSOCIATION 1993, INC.**

VERSUS

**FAIR GROUNDS CORPORATION, FIRST STATEWIDE
RACING COMPANY, INC., D/B/A EVANGELINE DOWNS,
LOUISIANA DOWNS, INC., DELTA DOWNS RACING
ASSOCIATION, INC., AND LOUISIANA DEPARTMENT
OF PUBLIC SAFETY AND CORRECTIONS**



Judgment Rendered: **MAY - 2 2012**

**Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Case No. C411508**

The Honorable Todd Hernandez, Judge Presiding

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BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

GAIDRY, J.

This appeal arises from cross-motions for summary judgment filed on a third party demand after the matter was settled between the original parties. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

On November 8, 1994, the Louisiana Horsemen's Benevolent and Protective Association 1993, Inc. ("LHBPA") sued the Fair Grounds Corporation ("Fair Grounds"); First Statewide Racing Company, Inc., d/b/a Evangeline Downs; Louisiana Downs, Inc.; and Delta Downs Racing Association, Inc., claiming that the defendants were improperly withholding video poker revenues in violation of the Video Poker Devices Control Law. The LHBPA also sued the Louisiana Department of Public Safety and Corrections ("State"), alleging that the State, through the division of the Gaming Enforcement Section of the Office of State Police, is charged with the implementation of the Video Draw Poker Devices Control Law. The Fair Grounds filed a third-party demand against the State, seeking recovery of any funds for which it may ultimately be held liable, alleging that it detrimentally relied on the State's rules and regulations, causing it to incorrectly disburse the video poker funds. Louisiana Downs also filed a similar third-party demand against the State. The State denied any liability. LHBPA's claims against the defendants were subsequently settled, leaving only those claims in the third-party demands at issue.

Cross-motions for summary judgment were filed. On March 14, 2011, the trial court granted summary judgment in favor of the State and against the Fair Grounds and Louisiana Downs, dismissing their third party demands against the State, and denied the Fair Grounds' motion for summary judgment. The court agreed with the State that the Fair Grounds

could not carry their burden of proof to recover damages from the State under the Public Records Act; the Fair Grounds did not follow the proper procedure for recovery of damages under the Public Records Act; the Fair Grounds could not establish liability under the Unfair Trade Practices Act because the State's actions did not fall under the definition provided in La. R.S. 51:1402(8); the Fair Grounds produced no evidence of a conspiracy so as to create solidary liability under La. C.C. art. 2324; there was no detrimental reliance under the facts; and La. R.S. 2798.1 shields the State from liability because the actions complained of fall under the exercise or performance within the scope of its lawful powers and duties. The court designated the judgment as final and appealable, pursuant to La. C.C.P. art. 1991 and 1915(B)(1), finding that there was no just reason for delay in reaching a determination of the finality of the judgments.

Fair Grounds has appealed, alleging that the court erred in relying on this court's decision in *Wooley v. Luckinger*, in concluding that the elements of detrimental reliance were not proven, and in finding that the State was immune from liability because the State was not performing a policymaking or discretionary act.

DISCUSSION

A motion for summary judgment is a procedural device used to avoid a full scale trial when there is no genuine issue of material fact for all or part of the relief prayed for by a litigant. *All Crane Rental of Georgia, Inc. v. Vincent*, 10-0116, p. 4 (La.App. 1 Cir. 9/10/10), 47 So.3d 1024, 1027, writ denied, 10-2227 (La. 11/19/10), 49 So.3d 387. Appellate courts review summary judgments *de novo*, using the same criteria that govern the trial court's consideration of whether summary judgment is appropriate. *Costello v. Hardy*, 03-1146, p. 8 (La. 1/21/04), 864 So.2d 129, 137. A motion for

summary judgment should only be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact and that the movant is entitled to summary judgment as a matter of law. *See* La. C.C.P. art. 966(B).

The burden of proof on a motion for summary judgment remains with the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact. La. C.C.P. art. 966(C)(2). Once the motion for summary judgment has been properly supported by the moving party, the failure of the non-moving party to produce evidence of a material factual dispute mandates the granting of the motion. *Pugh v. St. Tammany Parish School Board*, 07–1856, p. 2 (La.App. 1 Cir. 8/21/08), 994 So.2d 95, 97 (on rehearing), *writ denied*, 08–2316 (La. 11/21/08); 996 So.2d 1113; *see also* La. C.C.P. art. 967(B).¹

In granting summary judgment in favor of the State, the court agreed with the State that a detrimental reliance claim cannot be equated with

¹ Louisiana Code of Civil Procedure article 967(B) provides:

When a motion for summary judgment is made and supported as provided above, an adverse party may not rest on the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided above, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be rendered against him.

equitable estoppel and that in this court's decision in *Wooley v. Lucksinger*, 06-1167 (La.App. 1 Cir. 5/4/07), 961 So.2d 1228, is on point.

In *Wooley*, the defendant, a former owner of a health maintenance organization ("HMO") who was being sued for corporate mismanagement and accounting negligence, filed a third party demand against the Louisiana State Department of Insurance, asserting, among other things, detrimental reliance in that it relied on material information provided to it by the Department of Insurance to its detriment. 961 So.2d at 1230. Specifically, the former owner of the HMO alleged that the Department of Insurance, through its conduct of approving all aspects of financial transactions of the HMO, represented that the transactions were legally permissible (including that the HMO was indeed statutorily solvent), and the former owner of the HMO was entitled to rely on the approval given by the Department of Insurance. *Id.*, 961 So.2d at 1237. Thus, when the former owner was found liable for damages arising from the sale of the HMO because the HMO was in fact not statutorily solvent, the Department of Insurance should be held liable to the former owner under the theory of detrimental reliance. *Id.* The trial court in *Wooley* dismissed the former HMO owner's third party demand against the State. On appeal from that judgment, this court noted that the elements of a cause of action for detrimental reliance, provided by La. C.C. art. 1967, are: (1) the defendant (promisor) made a promise to the plaintiff (promisee); (2) the defendant knew or should have known that the promise would induce the plaintiff to rely on it to his detriment; (3) the plaintiff relied on the promise to his detriment; (4) the plaintiff was reasonable in relying on the promise; and (5) the plaintiff suffered damages as a result of the reliance. *Id.*, 961 So.2d at 1238. This court noted that a promise is a declaration which binds the person who makes it to do a specific thing,

which then gives the other person to whom the declaration was made a right to expect or claim performance of that thing; the mere expression of an intention is *not* a promise. *Id.*, citing H. Johnson, 18 La. Civ. Law Treatise 2d, *Civil Jury Instructions*, §19.08, p. 401 (2001). This court found that as a matter of law, the actions and declarations of the Department of Insurance in following, applying, and executing its statutory powers and regulatory functions were not promises for Article 1967 detrimental reliance purposes. *Id.*, 961 So.2d at 1239. Because there was no promise by the Department of Insurance in favor of the former owner of the HMO, the claim for detrimental reliance was legally nonexistent. *Id.*

On appeal, Fair Grounds alleges that *Wooley* is distinguishable from the instant case, and therefore the trial court erred in relying on *Wooley* in granting summary judgment in favor of the State. Fair Grounds argues that the present case is distinguishable because the State's actions herein were directed specifically towards Fair Grounds and the State had knowledge that the Fair Grounds would rely on its actions, thus creating a quasi-contractual relationship. Fair Grounds alleges that a promise was made by the State in this case, when it drafted and adopted mandatory regulations and forms, to interpret the law in a specific manner, and that promise was directed specifically towards a specific and finite group of racetracks. Thus, it alleges that the elements of detrimental reliance were satisfied in this case.

We disagree that *Wooley* is distinguishable. The State promulgated regulations and adopted forms to implement the Video Draw Poker Devices Control Law as it was entrusted to do by the Legislature; as this court held in *Wooley*, the actions of the State in following, applying, and executing its statutory powers and regulatory functions were not "promises," *i.e.*, the State's actions were not declarations which bound the State to do a specific

thing, and did not give the Fair Grounds a right to expect or claim performance of that thing. Further, without the existence of a “promise,” there can be no detrimental reliance claim as a matter of law, regardless of the existence of other elements of a detrimental reliance claim. Thus, the court did not err in granting summary judgment on the claims for detrimental reliance.

In its next assignment of error, Fair Grounds argues that the trial court erred in finding that La. R.S. 9:2798.1 shields the State from liability based on its conclusion that the State was not performing a policymaking or discretionary act.

Louisiana Revised Statutes 9:2798.1 provides that liability shall not be imposed on public entities based upon the exercise or performance or failure to exercise or perform their policymaking or discretionary acts when such acts are within the course and scope of their lawful powers and duties. This immunity from liability does not apply to acts or omissions; (1) which are not reasonably related to the legitimate governmental objective for which the policymaking or discretionary power exists; or (2) which constitute criminal, fraudulent, malicious, intentional, willful, outrageous, reckless, or flagrant misconduct. La. R.S. 9:2798.1(B) and (C).

The Video Draw Poker Devices Control Law directs the State to promulgate rules and regulations to facilitate implementation of the law and the regulation and control of gaming operations. La. R.S. 27:307 and 308. The promulgation of rules and regulations by a department, division, or board of the State is “policymaking.” See *Wooley v. Lucksinger*, 06-1140 (La.App. 1 Cir. 12/30/08), 14 So.3d 311, 368 (reversed in part on other grounds), 09-0571 (La. 4/1/11), 61 So.3d 507. Because the State’s act of promulgating rules and regulations was reasonably related to the legitimate

governmental objective for which its policymaking power exists, and because it does not constitute criminal, fraudulent, malicious, intentional, willful, outrageous, reckless, or flagrant misconduct, the provisions of La. R.S. 2798.1 provide immunity to the State for its actions. This assignment of error by the Fair Grounds lacks merit.

CONCLUSION

For the reasons set forth above, the judgment appealed from is affirmed. Costs of this appeal are assessed to defendant-third party plaintiff, Fair Grounds.

AFFIRMED.