



IN THE SUPREME COURT OF THE STATE OF DELAWARE

DONALD L. HARMON,	)	
	)	
Plaintiff Below-	)	
Appellant,	)	No. 676, 2011
	)	
v.	)	
	)	
STATE OF DELAWARE, DELAWARE	)	
HARNESS RACING COMMISSION	)	
	)	
Defendant Below-	)	
Appellee.	)	

APPELLANT'S OPENING BRIEF

ON APPEAL FROM THE SUPERIOR COURT IN AND OF KENT COUNTY

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DATE: February 3, 2012

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NATURE AND STAGE OF PROCEEDINGS

Don Harmon ("Harmon") filed his initial complaint on January 3, 2007. Harmon's original complaint included claims against the State Of Delaware Harness Racing Commission, Delaware Harness Racing Commission, William A. Oberle, Jr., Robert Collison, and John Wayne. Appellant's original claims included violations of the Delaware Whistleblower's Act, breach of good faith and fair dealing, abuse of process, and promissory estoppel. Subsequently, the individual defendants were dismissed from the case.

On November 28, 2007, the trial court denied the State's Motion for Summary Judgment regarding the breach of good faith and fair dealing and promissory estoppel claims.

On January 8, 2010 the trial court reversed its earlier decision and granted the State's Motion for Summary regarding the breach of good faith and fair dealing claim but denying the motion with regard to the promissory estoppel claim. The trial court then denied Appellant's motion for reargument on September 27, 2010.

On January 11, 2011, a five day trial began on the promissory estoppel claim. At the end of the appellant's case in chief, the trial court denied the State's Motion for Judgment as a Matter of Law. The jury entered a verdict for the appellant of \$102,273.

On November 17, 2011, the trial court granted the State's motion for judgment as a matter of law or in the alternative a motion for a new trial.

This is appellant's opening brief in support of reversing the trial court's decisions regarding the promissory estoppel and breach of good faith and fair dealing claim.

SUMMARY OF THE ARGUMENT

1. The evidence at trial supported a finding that John Wayne was authorized by the Delaware Harness Racing Commission to promise Don Harmon reinstatement if he was acquitted of his criminal charges.
2. The fact that a state agency has to vote on matters does not preclude a promissory estoppel claim.
3. The evidence supported the jury's decision that John Wayne had apparent authority to promise Don Harmon reinstatement if he was acquitted of his criminal charges.
4. Delaware courts have consistently enforced the doctrine of promissory estoppel in the employment context against government agencies.
5. The trial court's reliance on *Pisano v. Delaware Waste Authority* and *Kulesza v. Alcoholic Beverage Control Commission*, is inappropriate.
6. Substantial evidence was presented at trial to support the jury's finding that the Commission promised Harmon his position back if acquitted of the criminal charges.
7. Substantial evidence was presented at trial to support the jury's finding that Don Harmon relied on the Commission's promise to reinstate him to his detriment.
8. The DHRC's misrepresentations that Harmon would be reinstated as Presiding Judge if acquitted of his criminal charges violated the implied covenant of good faith and fair dealing.
9. The Commission acted arbitrarily, unreasonably, or capriciously in suspending and then terminating Harmon for enforcing the racing rules and regulations he was obligated to enforce.

STATEMENT OF FACTS

In December 26, 1998 Don Harmon began his tenure as Presiding Judge with the Delaware Harness Racing Commission ("DHRC" or "Commission") (A-102, A-103) Previously, Harmon served as a judge with the State of Ohio. (A-93) Delaware Judge Dale Milby recruited Harmon from Ohio. (A-93) Upon arriving, Harmon re-wrote the Delaware Harness racing rules and regulations. (A-89) Harmon always carried a copy of the rules with him. (A-77) As Presiding Judge, Harmon supervised the Associate Judges and ensured rules were followed. (A-89) As Presiding Judge, Harmon was obligated to correct the mistakes of associate judges when necessary. (A-129)

The DHRC is a Department of the State of Delaware. The DHRC is composed of four voting members and a chairman appointed by the Governor. The primary purpose of the Commission is to regulate and oversee the sport of harness racing. 3 Del. Code. § 10005. Beth Steele has been the Chairman of the Delaware Harness Racing Commission since 2001. (A-133)

The DHRC appoints an Administrator of Racing as its executive officer who is in charge of carrying out its rules and orders. (DHRC Rule 3.16) Other than the DHRC members themselves, the Administrator of Racing is its highest ranking employee (3 Del. Code. § 10007 (e)) John F. Wayne was the Commission's former Administrator of Racing and chief executive

officer. He is currently the Administrator of Racing for the Delaware Thoroughbred Racing Commission. (A-64)

Wayne ran the day to day operations of the DHRC. (A-124) His duties included maintaining records, administering payroll, collection of funds, drug testing, and managing investigations. (A-64) The DHRC authorized Wayne to make representations on the Commission's behalf to DHRC employees. (A-64) (A-81) Wayne was Harmon's supervisor and was authorized to handle personnel matters addressing Harmon's employment. (A-68) (A-64(a)) (A-67) Accordingly, Wayne signed off on personnel documents dealing with Harmon as an authorized representative of the DHRC. (A-67)

Prior to each racing meet, Wayne submitted a slate of judges for the Commission's approval. (A-128) The Commission's approval was largely pro forma since the Commission never rejected a slate for any reason. (A-128)

The April 3, 2003 Qualifying Race

In the spring of 2003, rumors began to circulate concerning allegations about a qualifying race and Don Harmon. (A-73) Wayne was notified by Chairman Steele to look into these rumors. (A-73)

The rumors involved an April 3, 2003 qualifying race which included a horse named CC's Dadissiya. (A-73) Wayne instructed the official DHRC investigator, Francis Swift, to investigate the rumors. (A-73) The investigation into the race occurred five

months after it happened. (A-87) A qualifying race ensures that a horse meet certain standards prior to the public being able to wager on it. (A-88)

The normal procedure for a qualifying race is that two associate judges would watch the races from the judges' stand for the first three (3) or four (4) races, then the Presiding Judge would replace one of the associate judges. (A-84)

For the April 3, 2003 qualifying race, Harmon, as Presiding Judge, replaced Associate Judge Dale Milby after the fourth race. (A-84) When Harmon arrived to replace Milby and join Associate Judge Alan Cook, a driver by the name of Cole called the Judges' stand requesting an interference break. (A-85) Based on Judge Cook's explanation and the rules, Harmon changed the break to an interference break which Judge Cook signed off on. (A-86) Harmon accepted Cook's recollection of what happened on the track (A-85) Cook told Harmon that the driver of one horse ran over Cole's horse which was in front of him causing his horse to make a break. (A-85) Harmon changed the score sheet from a break to interference because the disruption was caused by something out of the driver's control. (A-85) Cook did not disagree with Harmon's interpretation of the rule. (A-86) Interference calls are a common occurrence. (A-90)

DHRC rule 3.1.6 requires all complaints against racing officials be signed and in writing. (A-121, A-122) The DHRC

never received a signed written complaint against Harmon. (A-72(a)) Every witness verified that Harmon noted that interference took place during the race which necessitated Harmon to correct the score sheet. (A-74) In addition, Associate Judge Cook signed off on Harmon's correction. (A-75)

Harmon was interviewed by Swift and provided documents to assist with the investigation. (A-88) Swift's investigation found no wrong doing on the part of Harmon. (A-130)

After Swift's investigation, Chairman Steele unilaterally instructed Wayne that Robert Collison would replace Swift as the investigator for the case. (A-76) It was the only time that an independent investigator was ever assigned to a DHRC case. (A-76) Steele assigned Collison without notification or approval by the Commission. (A-126) She sent a memorandum to Wayne stating she assigned Collison to the case pursuant to DHRC Rule 3.17. (A-127) Rule 3.17 allows the Commission to appoint additional racing officials by Commission vote. (A-125) However, there was never a vote for Robert Collison to be appointed as investigator. (A-78) Collison's investigation resulted in Harmon being criminally charged by the State Police.

Harmon's Criminal Charges and the Commission's Promise of Reinstatement

Harmon was confronted with criminal charges against him in January 2004. (A-90) He was charged with one misdemeanor and one felony charge for changing an official state record. (A-84) Prior to these charges, Harmon never had any formal complaints against him as a judge. (A-91) Harmon never wavered on his innocence throughout his criminal proceedings. (A-70).

After Harmon was criminally charged, the DHRC voted to suspend him without pay, but keep him on as a state employee. (A-70) The Commission wanted to wait for the resolution of the criminal charges prior to deciding whether or not to reinstate Harmon. (A-83) During this time, Allan Cook replaced Harmon but was only given the title of "acting" presiding judge. (A-120)

During his criminal proceedings, Harmon kept in regular contact with the Commission through Wayne. (A-94) Wayne would speak with Harmon after notifying and receiving permission from the Commission to do so. (A-70) Wayne communicated regularly with the Commission regarding Harmon's employment status. (A-80)

After Harmon received his criminal charges, the Commission informed Wayne that Harmon would be reinstated if he was found not guilty of the criminal charges. (A-69) (A-79) Some of these conversations occurred during executive sessions of Commission meetings when discussing personnel matters including the

following: (A-69)

Wayne specifically asked the Commissioners:

"If Harmon is acquitted of all charges, does he get his job back?"

"After asking the question, the Commissioners looked at each other...and said "yes." (A-70)

The Commission authorized Wayne to tell Don Harmon that if he was found not guilty of the criminal charges, he would be reinstated. (A-71) (A-83) (A-72)

After being authorized by the Commission to do so, Wayne informed Harmon that he would be reinstated as Presiding Judge if he was found not guilty. (A-95) As a representative of the Commission, Wayne consistently told Harmon he would get his job back if he was found not guilty. (A-98(a))

After being found not guilty, Harmon immediately contacted Wayne about getting his position back. (A-77(a)) Harmon was not reinstated even though Wayne reminded the Commission about their promise to reinstate Harmon. (A-77(a)) Instead, the Commission approved a new slate of judges days after Harmon's not guilty verdict. (A-101) During that time, Wayne was out of town and unable to attend the Commission meeting where Harmon was released by the Commission from his suspension and not reinstated. (A-72)

At the time of his suspension, Harmon was making up to

\$100,000 a year with certain benefits. (A-99) If the Commission had not promised Harmon his job back, Harmon would have pursued other positions in the racing industry or perhaps pursued a different career altogether. (A-95) During his suspension, Harmon was offered several opportunities to work for individuals as a horse trainer, but he had to turn them down. (A-97) Harmon was barred from training horses for private individuals since the Commission still employed him as a racing official and the rules prohibit racing officials from training horses privately. (A-98) Detrimentally, Harmon could also not pursue other employment opportunities due to the anticipated time commitment necessary upon his reinstatement. (A-97) Harmon also passed on several business opportunities because of his expectation of returning to work as a judge. (A-98) In addition, Harmon could not accept job offers from other racing jurisdictions because it would be a conflict to accept another racing position while still a Delaware racing official. (A-100) Pending his reinstatement, Harmon was forced to borrow money from his children and relatives for living expenses in anticipation of getting his job back. (A-100)

Dr. Minnehan's Testimony at Trial

The trial court specifically limited Dr. Minnehan's testimony to a time period of limited duration to fit a promissory estoppel claim. Dr. Minnehan was only allowed to

testify regarding damages for a period of time of one year after the Commission's promise to Harmon. (January 1, 2004 until November 18, 2005) (A-131 - A-133) Minnehan's numbers were both conservative and limited in nature. (A-104 - A-120)

After deliberations, the jury found in favor of Harmon on the issue of promissory estoppel and awarded Harmon \$102,273.00 which accounts for little more than his yearly salary. (A-29)

ARGUMENT

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY GRANTING THE STATE'S MOTION FOR JUDGMENT AS A MATTER OF LAW AND MOTION FOR A NEW TRIAL. THE ISSUE IS PRESERVED IN THE COURT'S OPINION DATED NOVEMBER 17, 2011 AND ATTACHED AND ALSO DURING TRIAL AT A-39 to A-48.

A. Standard of Review

A motion for judgment as a matter of law and/or new trial is subject to a de novo review. *City Investing Co. Liquidating Trust v. Cont'l Cas. Co.*, 624 A.2d 1191, 1194 (Del.1993) (subjecting rulings of law to de novo review). See also *Turner v. State*, 957 A.2d 565, 572 (Del.2008) (noting that a trial court's formulation and application of legal principles is subject to de novo review).

This Court should view the record from a perspective most favorable to the jury's verdict. *Burgos v. Hickok*, 695 A.2d 1141 (Del. 1997) A verdict should not be set aside unless it shocks the conscience of the Court and its sense of justice, and the injustice of allowing the verdict to stand is clear. *Storey v. Castner*, 314 A.2d 187 (Del. 1973) A trial judge should not set aside a jury verdict unless the evidence preponderates so heavily against the jury verdict that a reasonable jury could not have reached the result. *Storey v. Camper*, Del.Supr., 401 A.2d 458, 465 (1979).

B. JOHN WAYNE WAS AUTHORIZED BY THE COMMISSION TO PROMISE DON HARMON THAT HE WOULD BE REINSTATED IF FOUND NOT GUILTY OF HIS CRIMINAL CHARGES.

Delaware courts have consistently enforced the doctrine of promissory estoppel in the employment context against government agencies. State agencies are bound by the acts and promises of its administrators. See *Reeder v. Sanford School, Inc.*, 397 A.2d 139 (Del. Super., 1979); *Keating v. Board of Educ. of the Appoquinimink Sch. Dist.*, Del. Ch., C.A. No. 12589, 1993 WL 460527, at *4, Jacobs, V.C. (November 3, 1993), aff'd, Del.Supr., 650 A.2d 1305 (1994); *Crisco v. Board of Educ. of the Indian River Sch. Dist.*, Del. Ch., C.A. No. 9282, 1988 WL 90821, at *3, Berger, V.C. (August 29, 1988)

The *Keating v. Board of Educ. of the Appoquinimink Sch. Dist.* case is most analogous to the current case. In *Keating v. Board of Educ. Of the Appoquinimink Sch. Dist.*, Del. Ch., C.A. No. 12589, 1993 WL 460527, at *4 (Nov. 3, 1993) aff'd Del.Supr., 650 A.2d 1305 (1994), a non-tenured teacher alleged the breach of an oral representation that her contract would be renewed for another 1-year term.

In *Keating*, a principal's representation to a non-tenured teacher that she would be rehired, bound the school district, despite the fact that the teacher had knowledge that the School Board had final say and would need to vote to approve all hiring

decisions. Finding that she detrimentally relied on that representation (most notably by purchasing a new automobile), the court awarded her 5 years of back pay and ordered her reinstatement.

Here, the trial court granted the State's Motion for Judgment as a Matter of Law based on the fact that the Commission needed to vote to take action on all matters. However, the DHRC authorized Wayne to make representations on the Commission's behalf to DHRC employees. (A-64) (A-81)

There 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. In fact, Wayne testified that the Commission authorized him to tell Don Harmon that if he was found not guilty of the criminal charges, he would be reinstated. (A-71) (A-83) (A-72) Some of these conversations occurred during official executive sessions of Commission meetings during the discussion of personnel matters. (A-69) Wayne testified that he specifically asked the Commission if he was authorized to tell Harmon about the promise and they said yes.

The Commission's defense that the promise made by Wayne was not authorized because no vote took place was rejected by the jury and should be rejected by this Court. First, the Commission's initial investigation into Harmon's conduct took

place without a vote and absent a signed complaint. Complaints against racing officials including judges are to be in writing and signed. DHRC Rule 3.1.6. DHRC officials are entitled to formal hearing regarding rule violations. Steele unilaterally instructed Wayne and then Collision to look into the matter without a vote or a subsequent hearing. All of the acts by Steele required a vote but none were taken as required. The State should not now be able to protect itself now by asserting the same rules and regulations it fails to follow.

C. DON HARMON REASONABLY RELIED ON WAYNE'S REPRESENTATIONS.

It was reasonable for Harmon to rely on Wayne's representations. Wayne was Harmon's supervisor and was authorized to handle personnel matters addressing Harmon's employment. Analogous to *Keating*, even if Harmon knew that the Commission had the ultimate authority to make hiring decisions, that fact, without more, would not preclude his reasonable reliance upon Wayne's promises.

The Administrator of Racing is the highest ranking employee as defined by its chain of command. Wayne oversaw the day-to-day work of the DHRC. Wayne regularly made representations on behalf of the DHRC. Wayne had the authority to carry out personnel matters. It was reasonable for employees to rely on representations made by Wayne. The DHRC routinely approved his slate of judges and never exercised its authority to reject a

judge.

Finally, the DHRC authorized communications between Wayne and Harmon throughout his criminal proceeding. The DHRC was aware that Wayne was communicating with Harmon prior to his trial. Regardless, the actions of the Commission supported the fact that they authorized Wayne to make the promise and the fact that the Commission is supposed to act by vote should not preclude a claim for promissory estoppel.

D. HARMON RELIED ON THE COMMISSION'S PROMISE TO HIS DETRIMENT.

Harmon detrimentally relied on the Commission's promise to reinstate him if he was acquitted of the criminal charges. Harmon suffered extensive financial hardship as a result of the DHRC failure to reinstate him as Presiding Judge. As a result of the DHRC's promise to reinstate him upon his acquittal, Harmon turned down his son's offer to form a working partnership in a construction business named Harmon Contracting LLC. Harmon rejected the business opportunity because of his expectation to return to his position as Presiding Judge of the DHRC. Harmon suffered economic damages in the form of lost wages and a lost business opportunity.

Harmon withheld from inquiring into and applying for employment with another horse race business as it would result in a conflict of interest since he was still a racing official. Several trainers inquired into his services but he rejected

their offers as it would preclude him from being reinstated as Presiding Judge. Harmon suffered economic damages in the form of lost wages. Harmon delayed seeking employment to train horses due to DHRC's rule prohibiting a person who trains horses from working as a judge.

The Commission's promise to reinstate him was consistent with other actions they took at that time. Rather than terminate Harmon, they placed him on suspension specifically until the resolution of the criminal charges. In addition, Harmon's replacement, received the title "acting" presiding judge indicating to Harmon that he would be reinstated once he was acquitted of his criminal charges.

Relying on DHRC's promise to reinstate him upon his acquittal, Harmon was denied the opportunity to apply for other judge or administrative positions in other jurisdictions due to not being able to make the time commitment. Harmon expected to be reinstated by the DHRC once acquitted. As a result, Harmon withheld from pursuing employment opportunities. Harmon suffered economic damages in the form of lost wages and lost employment opportunities. But for the DHRC's promise, Harmon would have sought employment.

Harmon's reliance on the DHRC's promise caused him to spend and borrow money with the expectation of repaying it after his acquittal. Harmon's expectations of reinstatement led him to

borrow money from family and friends which he expected to pay back upon his return to employment with the DHRC. Compared to *Keating*, the jury award on behalf of Harmon is rather conservative. In *Keating*, after finding that she detrimentally relied on that representation (most notably by purchasing a new automobile), the court awarded her 5 years of back pay and ordered her reinstatement. Here, Harmon was only awarded \$102,273.00 which accounts for a little more than his yearly salary. (A-29)

E. THE TRIAL COURT'S RELIANCE ON *MCCOY V. STATE*, 277 A.2D 675 (DEL. 1971) AND *KULESZA V. ALCOHOLIC BEVERAGE CONTROL COMMISSION*, 1991 WL 302534 (DEL.SUPER.) IS INAPPROPRIATE.

The trial court's decision relies on *McCoy v. State*, 277 A.2d 675 (Del. 1971) and *Kulesza v. Alcoholic Beverage Control Commission*, 1991 WL 302534 (Del.Super.) Both decisions are inapplicable to the application of promissory estoppel in the employment law context.

In *McCoy*, a criminal defendant argued his petition for habeas corpus should be granted because of a mistake on his parole paperwork regarding the date when parole supervision was supposed to terminate. The Court did not address his estoppel argument since it was first raised on appeal. The Court stated "...estoppel is not appropriate under these circumstances" and "particularly inappropriate in criminal cases". *Id.*

In *Kulesza v. Alcoholic Beverage Control Commission*, the

court denied an appeal of a liquor license suspension. The appellant argued that the Commission should be estopped from finding him guilty of the violation because the appellant relied to his detriment on the Commission' policy memorandum. The Supreme Court state in *Kulesza and Conway v. Wolf Liquor*. 200 A.2d 831 (Del. 1964) that "in matter of this nature, a State or its agencies cannot be estopped by the unauthorized acts of its officers." Id.

In *Pisano v. Delaware Solid Waste Authority*, 2006 WL 3457686 (Del. Super.), the Superior Court rejected plaintiff Pisano's promissory estoppel claim because there was no evidence that Stanley Wong of Professional Systems Associates, Inc. was a agent for the DSWA. In *Pisano*, the Court rejected a argument that Wong had apparent authority since DSWA was a state agency and there was no evidence of a "substantial injustice" if apparent authority was not applied. Pisano was not able to demonstrate that Wong showed signs of authority to Pisano and the signs of authority were linked to DSWA's intentional or unwitting conduct. In addition, the court decided any reliance on Wong's authority would have to be reasonable, which is a jury decision.

The *McCoy* case is not applicable to the case at bar due to the fact that it involves a mistake by the government concerning a date of termination on probation paperwork. First, Delaware

Courts have applied promissory estoppel in the employment context against state agencies. Secondly, there is evidence in Harmon's case that the Commission actually authorized Wayne to promise Harmon reinstatement if he was acquitted of his criminal charges.

Kulesza v. Alcoholic Beverage Control Commission is not an employment case and only addresses the unauthorized acts of its officers. Once again, evidence supports that Wayne was authorized to make the promises to Harmon.

Pisano v. Delaware Solid Waste Authority, 2006 WL 3457686 (Del. Super.) addresses a private citizen binding a state agency due to his promises. Wayne was the chief executive officer of the DHRC who was authorized to make representations on the Commission's behalf. In addition, the *Pisano* decision states apparent authority may apply if an element of "substantial injustice" to the plaintiff not to enforce the promise is determined by the jury. Here, the trial court never addresses why the element of "substantial injustice" does not apply to Harmon's case. Nonetheless, the jury found that it would be "unjust" to Harmon if the Commission was not bound to its promise to reinstate him. (A-34)

Lastly, the trial court cites *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51 (1984). But *Heckler* is inapplicable to these facts. Defendants imply that

the Court is prohibiting the Defendant from enforcing the law by allowing the jury's verdict to stand. In *Heckler*, the Supreme Court decided the Government was not estopped from recovering funds from a private party regarding the over payment of Medicare disbursement since the traditional elements of estoppel were not demonstrated to begin with. The Court's decision was mainly addressing estoppel and its limitation regarding the collection of federal funds.

F. THE JURY'S FINDING THAT HARMON PROVED THE ELEMENTS OF PROMISSORY DOES NOT SHOCK THE CONSCIENCE OF THE COURT.

Plaintiff prevails on a promissory estoppel claim when he shows (1) that a promise was made, (2) that it was the reasonable expectation of the promisor to induce action or forbearance on the part of the promisee, (3) that the promisee relied on the promise and took action to his detriment, and (4) that such promise is binding because injustice can be avoided only by enforcement of the promise. *Lord v. Souder*, 748 A.2d 293 (Del.2000)

The Commission should not be protected by rules and regulations they fail to follow. The DHRC make decisions without a majority vote. On September 8, 2003, without a vote by the DHRC, Steele unilaterally replaced Swift and appointed Robert Collison to investigate an anonymous complaint against Harmon. In addition, the DHRC was investigating an unsigned complaint.

Complaints against racing officials including judges are required to be signed and in writing. (DHRC Rule 3.1.6)

Wayne promised Harmon on numerous occasions that he would be reinstated if he were found not guilty. DHRC authorized communications between Wayne and Harmon throughout his criminal proceeding. In addition, the DHRC was aware Wayne was communicating with Harmon prior to his trial.

Wayne did not tell Harmon that his rehiring would still be the subject of an administrative recommendation that the DHRC was considering. Rather, Wayne continually told Harmon that he would be reinstated upon his acquittal, thereby suggesting (consistent with the DHRC's practice of having Wayne carry out their personnel decisions) that his reinstatement would be a foregone conclusion. In these circumstances, Wayne's representations and the DHRC's own conduct regarding Harmon's pending criminal charges constituted a clear and definite promise.

Since Harmon served at the DHRC's pleasure, they could have immediately terminated him. Instead the DHRC took several actions bolstering Wayne's promise. First, the DHRC voted to suspend Harmon with pay pending the disposition of his criminal charges. DHRC's decision to wait until the disposition of his criminal charges could reasonably signify that their decision to reinstate would be based on the outcome of the criminal trial.

The DHRC voted to add the term "Acting Presiding Judge" to Harmon's replacement signifying that the individual is only holding the position on a temporary and interim basis.

As outlined previously, Harmon relied on Wayne's promises to his detriment. Only after learning that the DHRC decided not to reinstate him, did Harmon attempt to find other employment. *Reeder v. Stanford School, Inc.*, Del.Super., 397 A.2d 139, 141-42 (1979) (plaintiff-teacher's decision not to seek alternate employment found to constitute detrimental reliance).

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY BARRING HARMON FROM RECEIVING LOST WAGES...THE ISSUED WAS PRESERVED AT TRIAL (A-39 - A-48, A-131 - A-133)

A. Standard of Review

This Court's review of the trial court's decision to not allow lost wages for a promissory estoppel claim is de novo.

B. Promissory estoppel claims allow back pay and monetary damages.

In *Keating*, the court awarded plaintiff 5 years of back pay and ordered her reinstatement. Here, the trial court barred any argument regarding back pay.

Here, the trial court should have allowed the plaintiff to argue for back pay. A key portion of plaintiff's promissory estoppel claim is that plaintiff would have been employed if the State fulfilled its promise. Therefore, the only appropriate remedy to fulfill that promise is for some type of lost wage and back pay determination. Unlike *Keating*, Harmon was not going to be reinstated and the remedy of monetary back pay is particularly important.

III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY GRANTING THE STATE'S MOTION FOR SUMMARY JUDGMENT REGARDING HARMON'S BREACH OF GOOD FAITH AND FAIR DEALING CLAIM. THE ISSUE IS PRESERVED IN THE COURT'S OPINION DATED SEPTEMBER 27, 2010 ATTACHED AND AS SUBMITTED IN PLAINTIFF'S OPENING BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AT A-49 to A-63.

A. SCOPE OF REVIEW

This Court will conduct a de novo review of a decision for summary judgment. *Furman v. Delaware Dep't of Transp.* (Del., 2011)

B. THE STATE'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED BASED ON THE FACTS IN DISPUTE.

The State's motion for summary judgment for breach of the implied covenant of good faith and fair dealing should have been denied.

The implied covenant of good faith and fair dealing attaches to all contracts. An employee hired at-will is employed via a contract and therefore the parties are bound to act in good faith and fair dealing. *Harmon v. State of Delaware, et al.*, C.A. 07C-01-003 (Del. Super. Nov. 28, 2007) (Witham, J.) (Order) citing *Wharton v. Worldwide Dedicated Services*, 2007 WL 404770, *6 (Del. Super.Ct.) and *E.I. DuPont de Nemours & Co. v. Pressmen*, 679 A.2d 436, 441 (Del.1995).

There is evidence supporting that Harmon properly charted the break/interference break harness racing rule and performed his duties in accordance with his employment contract-as he was obligated to enforce the rule and racing laws of the State of

Delaware. A reasonable jury could find that the Commission acted arbitrarily, unreasonably, or capriciously in terminating him. Further, the Commission told Harmon that he was suspended pending the outcome of the criminal trial and that he would be reinstated if acquitted. A reasonable jury could find that the Commission acted arbitrarily, unreasonably, or capriciously in their decision not to reinstate him upon his acquittal.

Additionally, the State's breach fits sufficiently under the two of the four narrow exceptions to the general rule of at-will employment contracts.

Termination of an at-will employee will not be left alone if (1) the termination violated public policy; (2) the employer made a misrepresentation; (3) the employer abused its authority to deprive the employee of compensation; or (4) the employer created grounds for termination by falsifying records. *Wharton v. Worldwide Dedicated Services*, 2007 WL 404770,*6 (Del.Super.Ct.) See *E.I. DuPont de Nemours & Co. v. Pressman*, 679 A.2d 436 (Del. 1995).

First, the evidence supports that the Commission made misrepresentations to Harmon by promising that he would be reinstated as Chief Presiding Judge if he was acquitted. Secondly, evidence supports that the Commission abused its authority by terminating Harmon for enforcing the rules and racing laws for which he was obligated to enforce.

When the evidence is viewed in the light most favorable to the plaintiff, material facts were in dispute and therefore summary judgment for the breach of implied covenant of good faith and fair dealing was inappropriate.

CONCLUSION

For the foregoing reasons, Don Harmon requests the following relief:

1. The Court reverse the trial court's decision granting the State's Motion for Judgment as a Matter of Law and/or in the alternative Motion for a New Trial.

2. The Court restore the jury verdict on Harmon's behalf for promissory estoppel in the amount of \$102,273.00 plus interest at the legal rate.

3. The Court reverse the trial court's decision of summary judgment in favor of the plaintiff on the breach of good faith and fair dealing claim and remand for a new trial.

Respectfully Submitted,

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DATE: February 3, 2012