EFiled: Mar 19 2012 11:36AM EDT Filing ID 43160507 Case Number 676,2011 D

## 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 REPLY BRIEF

# ON APPEAL FROM THE SUPERIOR COURT IN AND OF KENT COUNTY

Ronald G. Poliquin (#4447)
Law Firm of Ronald G. Poliquin, P.A.
375 W. North Street
Dover, Delaware 19904
(800)811-5182
ron@ronpoliquin.com

Attorney for Appellant

DATE: March 19, 2012

# TABLE OF CONTENTS

	Page	No.
SUMMARY OF THE ARGUMENT		
ARGUMENT		
I. The Commission's Promise to Reinstate Harmon is N to its "core regulatory function"		3
II. Question Presented: The Jury Decided that the Com Actions Supported its Manifestation that the Admi of Racing John Wayne was Authorized to Promise Ha Position Back	nistra rmon A	ator His 7 7
CONCLUSION		10

# TABLE OF CITATIONS

<u>rage</u>
Bringhurst v. Harkings, 122 A.783 (Del. 1923)
City Investing Co. Liquidating Trust v. Cont'l Cas. Co., 624 A.2d 1191, 1194 (Del.1993)
Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51 (1984)
<pre>Keating v. Appoquinimink School District., 1993 WL 460527 (Del.Ch. Nov. 3, 1993)</pre>
Mercedes-Benz of N. Am., Inc. v. Norman Gershman's Things to Wear, Inc., 596 A.2d 1358, 1362 (Del.1991)
<pre>Pisano v. Del. Solid Waste Auth., 2006 WL 3457686, at *9, Silverman, J. (Del. Super.Nov. 30, 2006)</pre>
Turner v. Vineyard, 80 A.2d 177, 179 (Del.1951) 3,4,7
Statutes and Other Sources
Del. Const. art. IV, § 11(1)(a)
http://dda.delaware.gov/harness/index.shtml4

## SUMMARY OF THE ARGUMENT

- 1. The Commission's promise to rehire Don Harmon has nothing to do with the Delaware Harness Racing Commission' core regulatory function.
- 2. The Jury decided that the Commission authorized John Wayne to promise Don Harmon reinstatement if he was acquitted of his criminal charges.

# STATEMENT OF FACTS

Harmon adopts the statement of facts set forth in Appellant's Opening Brief.

#### **ARGUMENT**

I. Question Presented: The Commission's Promise to Reinstate Harmon is Not Related to its "core regulatory function".

#### A. Standard of Review

The power to set aside a jury verdict or grant a new trial by a trial judge in this State should be treated with great caution and with extremely careful regard for the role of the jury. As the Supreme Court in 1923 noted, a motion, "will not be granted because the testimony is conflicting, even if the the preponderance be in favor of the party applying for a new trial." Bringhurst v. Harkings, 122 A.783 (Del. 1923)

The Delaware Constitution provides that "on appeal from a verdict of a jury, the findings of the jury, if supported by the evidence, shall be conclusive." Del. Const. art. IV, § 11(1)(a). This Court shall not disturb a jury's factual findings so long as there is "any competent evidence upon which the verdict could reasonably be based." See Mercedes-Benz of N. Am., Inc. v. Norman Gershman's Things to Wear, Inc., 596 A.2d 1358, 1362 (Del.1991) (quoting Turner v. Vineyard, 80 A.2d 177, 179 (Del.1951)). A court should not set a aside jury verdict unless "a reasonable jury could not have reached the result."

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).

## B. Merits of the Argument

The Administrator of Racing John Wayne's promise to Harmon that he would be reinstated if found not guilty of the criminal charges in no way violated the statutory scheme that the Delaware General Assembly set out for defendant.

The Delaware Harness Racing Commission regulates and

oversees the sport of Harness racing in the state.

<a href="http://dda.delaware.gov/harness/index.shtml">http://dda.delaware.gov/harness/index.shtml</a> Its primary

objectives and principles are to protect, preserve, and promote agriculture and horse racing through effective and efficient efforts to prevent and eliminate corrupt practices; ensure fairness in decisions affecting licensees and patrons; ensure due process in administrative proceedings; be attentive to the public and licensees and provide information concerning the industry and commission operations. The commission is also responsible for ensuring that the state and the betting public receive their fair percentages of the wagering dollar by overseeing periodic accounting audits.

http://dda.delaware.gov/harness/index.shtml

The case cited by the State, Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51 (1984) is inapplicable to these facts. Defendant implies 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 since the traditional elements of estoppel were not demonstrated.

Here, the Commission's promise to Harmon has nothing to do with protecting, preserving, and promoting agriculture and horse racing through effective and efficient efforts to prevent and eliminate corrupt practices. Secondly, the promise does not compromise the Commission's purpose to protect, preserve, and promote agriculture and horse racing through effective and efficient efforts to prevent and eliminate corrupt practices.

Next, the promise does not impact the Commission's ability to ensure fairness in decisions affecting licensees and patrons.

Finally, it has nothing to do with the Commission being responsible for ensuring that the state and the betting public receive their fair percentages of the wagering dollar by overseeing periodic accounting audits.

The Keating v. Appoquinimink School District., 1993 WL 460527 (Del.Ch. Nov. 3, 1993) case is not distinguishable from this case. In both cases, the issue is whether a board can be

bound by a chief administrative officer's promise without a authorized vote. Keating addressed whether a school board who has ultimate authority by vote could be bound by a principal's promise of employment. In Keating, the teacher knew that the school board had ultimate authority in hiring decisions and the Court still enforced the promise by the principal. Similar to Keating, John Wayne was the Commission's chief executive officer who carried out personnel decisions and the Commission should be bound by his promise based on the circumstances surrounding it. In fact, the Commission never previously rejected a slate judges proposed by Wayne so it was perfectly reasonable for Harmon to rely on Wayne's representations. In addition, Wayne explicitly stated he was authorized by the DHRC during executive session to make the promise to Harmon.

Lastly, the State's Answering Brief attempts to reargue facts already decided upon by the Jury. The jury decided that the Commission made a promise to Harmon that if he were found not guilty of his criminal charges then he would be reinstated as Presiding Judge. Secondly, the jury decided that Harmon reasonably relied on that promise to his detriment. Finally, as a result of relying on that promise, Harmon suffered damages. Any attempt to reargue those facts should be ignored by this Court.

II. Question Presented: The Jury Decided that the Commission's Actions Supported its Manifestation that the Administrator of Racing John Wayne was Authorized to Promise Harmon His Position Back.

#### 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).

#### B. Merits of the Argument

Delaware follows the Restatement of Agency. Pisano v. Del. Solid Waste Auth., 2006 WL 3457686, at \*9, Silverman, J. (Del. Super.Nov. 30, 2006). The Restatement (Third) of Agency states, "An agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent so to act."

The State should not now be able to protect itself now by asserting the same rules and regulations it failed to follow in the past. Defendants do not dispute the fact that the Commission and Wayne acted previously without a majority vote on other

matters. First, the Commission's initial investigation into

Harmon's conduct took place without a vote and absent a signed

complaint. 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.

Here, the Commission's actions supported its manifestation that it authorized Wayne to promise Harmon he could return to his position as Presiding Judge of the DHRC if found not guilty of the criminal charges. Supporting that manifestation are the facts contained in the opening brief: i.e. the Commission didn't vote on every action they took. In addition, the Commission's manifestations support the jury's finding that Wayne was authorized to make the promise. After his arrest, the DHRC could have immediately terminated him. Instead the DHRC took several actions maintaining their relationship with Harmon and bolstering the DHRC's promise of reinstatement. First, the DHRC only voted to suspend Harmon without pay pending the disposition of his criminal charges. Secondly, 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 or interim basis. Lastly, the DHRC continually conferred with Harmon's legal counsel concerning the status of his criminal charges.

There is a substantial evidence that the DHRC promised
Harmon his position back if acquitted of the charges. Wayne, as
Administrator of Racing, made continual promises to Harmon that
he would be reinstated as Presiding Judge if acquitted. Wayne
did not tell Harmon that his reinstatement would still be the
subject of an administrative recommendation that the DHRC was
considering. Rather, Wayne continually told Harmon (based on
what the DHRC told him) he would be reinstated upon his
acquittal. It was consistent with the DHRC's practice of having
Wayne carry out personnel decisions that his reinstatement was 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.

# CONCLUSION

Neither the trial court nor the Defendant give the jury's verdict in favor of Harmon the appropriate amount of deference. Here, the jury properly decided based on the evidence that the Commission authorized Wayne to promise Harmon his position back if he was acquitted. The Commission should not be allowed to shield itself from liability based on rules that were not followed in the termination of Harmon.

Respectfully Submitted,

/s/ Ronald G. Poliquin

Ronald G. Poliquin (#4447)
Law Firm of Ronald G. Poliquin, P.A.
375 W. North Street
Dover, Delaware 19904
(800)811-5182
ron@ronpoliquin.com

Attorney for Appellant

DATE: March 19, 2012