

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR KENT COUNTY

DONALD HARMON, :  
 : C.A. No. 07C-01-003 WLW  
Plaintiff, :  
 :  
v. :  
 :  
STATE OF DELAWARE, :  
DELAWARE HARNESS RACING :  
COMMISSION, WILLIAM A. :  
OBERLE, JR., individually and as :  
State Representative, and ROBERT :  
COLLISON, individually and as :  
Inspector for Delaware Thoroughbred :  
Racing Commission, :  
 :  
Defendants. :

Submitted: July 9, 2010  
Decided: September 27, 2010

**ORDER**

Upon Plaintiff's Motion for Reargument.  
*Denied.*

Ronald G. Poliquin, Esquire of Chasnov, Schaeffer & Poliquin, Dover, Delaware;  
attorneys for the Plaintiff.

Laura L. Gerard, Esquire, Department of Justice, Wilmington, Delaware; attorneys  
for the Defendants.

WITHAM, R.J.

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**FACTS**

Those most salient facts are set forth for emphasis. For a full recitation of the facts, the Court directs the parties to its January 8, 2010 Order.

Harmon began working for the Delaware Harness Racing Commission (DHRC) as a harness racing judge in 1999. On July 1, 2000, Harmon was promoted to Presiding Judge, which is a non-merit system position. He was an at-will employee, paid per diem, and served at the pleasure of DHRC.

In the Spring of 2003, DHRC received a complaint, alleging that Harmon had abused his authority as presiding judge to illegally affect the outcome of a qualifying race. DHRC began an internal investigation of the incident. Additionally, the Delaware Department of Justice brought criminal fraud charges against Harmon, alleging that he abused his authority to affect the outcome of the qualifying race. DHRC suspended Harmon from his position, pending the outcome of the criminal trial. The parties stipulate that John Wayne, an employee of DHRC who was charged with investigating the allegations against Harmon, assured Harmon that he would be reinstated if he were ultimately acquitted. Harmon was acquitted. Nonetheless, DHRC decided not to reinstate him as a presiding judge.

**PROCEDURAL HISTORY**

This lawsuit ensued, with Harmon bringing multiple claims against the State and its agents. By January of 2010, the lawsuit had been whittled down to three claims: (1) breach of the implied covenant of good faith and fair dealing by the State, (2) abuse of process against a state official, and (3) promissory estoppel against the

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State. The parties filed cross-motions for summary judgments on all claims.

In an order dated January 8, 2010, the Court granted the State's motion for summary judgment on the implied covenant and abuse of process claims, but denied the motion as to the promissory estoppel claim. Harmon then filed a motion for reargument, contending that the Court erred by granting summary judgment against his claim for breach of the implied covenant of good faith and fair dealing. The Court will now reconsider the issue.

### **STANDARD OF REVIEW**

A motion for reargument provides the Court with the opportunity to reconsider its findings of fact and conclusions of law in an order or decision.<sup>1</sup> The Court must consider whether it overlooked a precedent or legal principle that would have controlling effect, or whether it has misapprehended the law such as would affect the outcome of the decision.<sup>2</sup> Thus, the Court will modify its order if it finds, upon reconsideration, that the State was not entitled to summary judgment on the claim for breach of the implied warranty of good faith and fair dealing.

Summary judgment should be granted only if the record shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.<sup>3</sup> The facts must be viewed in the light most favorable to the non-

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<sup>1</sup> *Hessler, Inc. v. Farrell*, 260 A.2d 701, 702 (Del. 1969).

<sup>2</sup> *Johns v. Council of Delaware Ass'n of Prof'l Engineers*, C.A. No. 03A-07-001WLW, 2004 WL 2830937 (Del. Super. Ct. Apr. 12, 2004).

<sup>3</sup> Super. Ct. Civ. R. 56(c).

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moving party.<sup>4</sup> Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of the law to the circumstances.<sup>5</sup> However, when the facts permit a reasonable person to draw but one inference, the question becomes one for decision as a matter of law.<sup>6</sup>

**DISCUSSION**

The implied covenant of good faith and fair dealing is a judicial construction that forbids either party to a contract from exploiting “oppressive or underhanded tactics” to deny its counter-party the benefit of the bargain.<sup>7</sup> The implied covenant requires parties to exercise good faith in the performance of their contract, but it does not override express terms or create new obligations.<sup>8</sup> In order to establish a prima facie case for breach for the implied covenant, a plaintiff must demonstrate: (1) a specific implied contractual obligation, (2) a breach of that obligation by the defendant, (3) and resulting damage to the plaintiff.<sup>9</sup>

Harmon essentially contends that DHRC breached the implied covenant of

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<sup>4</sup> *Guy v. Judicial Nominating Comm’n*, 659 A.2d 777, 780 (Del. Super. Ct. 1995).

<sup>5</sup> *Ebersole v. Lowengrub*, 180 A.2d 467, 468-69 (Del. 1962).

<sup>6</sup> *Wootten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).

<sup>7</sup> *Chamison v. HealthTrust, Inc.--Hosp. Co.*, 735 A.2d 912, 920 (Del. Ch. 1999) *aff’d sub nom. Healthtrust, Inc.-Hosp. Co. v. Chamison*, 748 A.2d 407 (Del. 2000).

<sup>8</sup> *Id.*

<sup>9</sup> *Southern Track & Pump, Inc. v. Terex Corp.*, 2009 WL 1619634 (2009)

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good faith and fair dealing by breaking a promise. However, a broken promise, by itself, does not constitute bad faith. In order to prevail, Harmon would need to identify a specific contractual obligation that DHRC performed in bad faith.<sup>10</sup> However, the Court finds that DHRC had no contractual obligation to reinstate Harmon under Harmon's employment contract. Moreover, Wayne's promise did not create a duty to reinstate him.

First, DHRC had no duty to reinstate Harmon under the terms of his employment contract. Under Delaware law, employment contracts are presumed to be "at will," which means either party may terminate the employment relationship at any time.<sup>11</sup> After the spectacle of Harmon's criminal trial, DHRC decided not to continue Harmon's employment. Delaware's at-will employment law permits DHRC the discretion to make that decision.

The implied covenant of good faith and fair dealing limits an employer's right to terminate an at-will employee in only certain very narrowly defined categories, such as where the employer misrepresents an important fact that the employee relies on either to accept a new position or remain in a current one.<sup>12</sup> However, such misrepresentations must be intentional or reckless.<sup>13</sup>

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<sup>10</sup> *Southern Track & Pump, Inc.*, 2009 WL 1619634 (2009).

<sup>11</sup> *Rizzitiello v. McDonald's Corp.*, 868 A.2d 825, 830 (Del. 2005).

<sup>12</sup> *E.I. DuPont de Nemours & Co. v. Pressman*, 679 A.2d 436, 441 (Del. 1996).

<sup>13</sup> *Dial v. Astropower, Inc.*, 1999 WL 1441993, at \*3 (Del. Super).

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Under Superior Court Rule of Civil Procedure 56, the Court treats cross-motions for summary judgment as joint stipulations that there are no genuine issues of material fact and the matter is submitted for judgment on the record. This case has been pending for nearly four years, and Harmon has amended his complaint three times. Yet, Harmon has nonetheless failed to provide anything more than generalized accusations to advance his contention that DHRC (or Wayne) acted intentionally or recklessly by assuring him that he would be reinstated. Judging from the record, the Court finds that Harmon has not met his burden of demonstrating that Wayne's statement amounted to intentional or reckless misrepresentation.

Second, John Wayne's promise did not create a new contractual duty to reinstate Harmon upon acquittal. Under Delaware law, contracts and contract modifications must be supported by consideration. Consideration is a bargained-for exchange of legal value.<sup>14</sup> Harmon has not demonstrated that he in any way bargained for Wayne's promise. Judging from the record on this cross-motion for summary judgment, the Court finds that Wayne's assurance was no more than a statement of his expectation that Wayne would be reinstated if he were acquitted. Thus, even if Wayne had authority to bind DHRC, his statement to Harmon did not create a legally binding agreement.

**CONCLUSION**

Harmon cannot establish a prima facie case for breach of the implied covenant

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<sup>14</sup> *Barnard v. State*, 642 A.2d 808, 818 (Del. Super. Ct. 1992) aff'd, 637 A.2d 829 (Del. 1994).

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of good faith and fair dealing because he has not shown a specific contractual duty that the State performed in bad faith. Therefore, the Court properly granted summary judgment to the State. Harmon's motion for reconsideration under Superior Court Civil Rule 59 is ***denied***.

IT IS SO ORDERED.

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William L. Witham, Jr.  
Resident Judge

WLW/dmh

oc: Prothonotary

xc: Order Distribution