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Case Number 266,2021

IN THE SUPREME COURT OF THE STATE OF DELAWARE

NICHOLAS KROLL,	:	
	:	C.A. No.: 266, 2021
Appellant/Plaintiff Below,	:	
	:	The Court of Chancery of the
	:	State of Delaware
v.	:	CA No.: 2019-0969-KSJM
	:	
CITY OF WILMINGTON, CITY OF WILMINGTON POLICE DEPARTMENT and MICHAEL PURZYCKI, Mayor of the City of Wilmington,	:	
Appellee/Defendants Below.	:	

APPELLANT'S REPLY BRIEF

Nicholas Kroll v. City of Wilmington
The Court of Chancery of the State of Delaware
CA No.: 2019-0969-KSJM
Chancellor Kathaleen St. J. McCormick

SILVERMAN McDONALD & FRIEDMAN

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Dated: November 22, 2021

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REPLY ARGUMENT

I. The lower Court committed reversible error because, arguendo, even if the CBA error is found to be harmless, Appellant still has a colorable claim for equitable relief in the Court of Chancery, which was erroneously denied.

It is uncontroverted among the parties that the lower Court committed error when it granted Appellees' Motion to Dismiss, holding that the Appellant had an adequate remedy of law under the terms of the Collective Bargaining Agreement ("CBA").[1] Appellees, however, seek to convince the Court that the lower Court's error was harmless, arguing that Appellant did not have subject matter jurisdiction under any set of circumstances.[2] Appellees argument is flawed as it is based on inconsistent case law, relies on speculations as to the Appellant's intentions, and attempts to distract the Court's focus from a jurisdictional question, to an argument on the merits of the case.

The only issue before the Court is whether the Court of Chancery committed error when it dismissed Appellant's case based on a misreading of the terms of the CBA. The answer to that question is an unequivocal yes. All parties agree that Appellant is not provided a legal remedy under the grievance provision of the

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[1] References to Appellant's Opening Appendix will be cited as follows: (A__). The appendix is Bates stamped in the lower right corner.

[2] *See generally* Appellees' Answering Brief.

CBA.[3] All parties agree that the Court commit error when it dismissed Appellant's case based on that provision of the CBA.[4] The relevant question now is whether the lower Court's error is found to be reversible under this Court's *de novo* review.[5] The answer to that question is also a firm yes. The error is reversible because, even setting aside the misreading of the CBA, Appellant sufficiently pled a claim for equitable relief. Appellant has no legal remedy, under the CBA or otherwise, that will allow him full and fair relief from the Appellees' unlawful actions. As such, the lower Court's decision should be reversed.

When reviewing the Court of Chancery's dismissal based on lack of subject matter jurisdiction, this Court applies the same standard as the lower Court. The Court of Chancery can exercise subject matter jurisdiction only when a case falls under one of three categories[6]: 1) " one or more of the plaintiff's claims for relief is equitable in character." 2) "a plaintiff requests equitable relief and there is no

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[3] Id. at pg. 21.

[4] Id. at pg. 22.

[5] Merrill v. Crothall-American, Inc., 606 A.2d 96, 99 (Del. 1992); citing Fiduciary Trust Co. v. Fiduciary Trust Co., 445 A.2d 927 (Del. 1982).

[6] Id. (quoting Delawareans for Educ. Opportunity v. Carney, 2018 WL 4849935, at *5 (Del. Ch. Oct.5, 2018)); see also Candlewood Timber Grp., LLC v. Pan Am. Energy, LLC, 859 A.2d 989, 997 (Del. 2004) (identifying the three ways the "Court of Chancery can acquire subject matter jurisdiction").

adequate remedy at law," and 3) "jurisdiction exists by statute."[7]

"In deciding whether or not equitable jurisdiction exists, the Court must look beyond the remedies nominally being sought, and focus upon the allegations of the complaint in light of what the plaintiff really seeks to gain by bringing his or her claim."[8] "The appropriate analysis requires a "realistic assessment of the nature of the wrong alleged and the remedy available in order to determine whether a legal remedy is available and fully adequate."[9]

However,

> [t]he mere fact that a litigant may have a remedy at law does not divest Chancery of its jurisdiction. The basic jurisdictional fact upon which equity operates is the absence of an adequate remedy in the law courts. The question is whether the remedy available at law will afford the plaintiff full, fair and complete relief.[10]

There was no adequate legal remedy in Superior Court

In the instant case, Appellees seek to convince this Court that Appellant had an adequate legal remedy in Superior Court, but abandoned that avenue. That is simply incorrect. While Superior Court was an available option at the time of

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[7] Id. (quoting Delawareans for Educ. Opportunity, 2018 WL 4849935, at *5.))

[8] Candlewood Timber Grp., LLC, 859 A.2d at 997.

[9] Id.

[10] Hughes ToolCo. v. Fawcett Publ'ns, Inc., 315 A.2d 577, 579 (Del.1974). (emphasis added).

filing, it did not provide full, fair and complete relief to the Appellant after Appellees' were found to be in breach of the CBA.[11] The Superior Court could not assign a monetary value to Appellant's damages without significant speculation related to the scope of impact the termination and decertification would have on Appellant's career as law enforcement officer, as well as the anticipated length and trajectory of his ongoing employment with WPD, had the breach not occurred. Further, there were elements such as overtime, paid benefits, special pay jobs and pay increases stemming from promotions that could not be reasonably calculated. Simply put, there is no fair method, for either party, to assign monetary value (ie. a legal remedy) to Appellant's damages arising from Appellees' breach of the CBA. Typically, Delaware law does not entertain speculative damage recovery.[12] It must be noted, however, that this Court recently reversed a dismissal based on speculative damages in a legal malpractice claim.[13] That case is not applicable to the instant case in that it related to legal fees

[11] A-98, A-131.

[12] Mooney v. Pioneer Natural Resources Company, N17C-01-225 RRC, Memorandum Opinion, Cooch, J. (Del. Supr. Ct. Oct. 24, 2017); Abbott Labs. v. Owens, 2014 WL 8407613, at *11 (Del. Super. Ct. Sept. 15, 2014) (citing Nucar Consulting, Inc. v. Doyle, at *12 (Del. Ch. Apr. 5, 2005), aff'd, 913 A.2d 569 (Del. 2006)

[13] Country Life Homes, LLC., et al. V. Gellert Scali Busenkell & Brown, LLC, 259 A.3d. 55 (Del. 2021)

stemming from alleged legal malpractice of an out-of-state law firm. The lower Court dismissed, holding that the Appellants/Defendants Below claims would require a fact finder to speculate as to whether it would have prevailed, whereby amounting to speculative damages.[14] Appellees/Plaintiffs-Below argued that the Appellants/Defendants Below were not able to state a claim for relief because it could not demonstrate that "but-for" legal malpractice, it would have prevailed. This Court reversed holding that the Appellants/Defendants-Below did not have to demonstrate that it would have prevailed in order to establish damages.[15] It held that Appellants/Defendants Below could have been damaged in ways other than a loss in the contested negotiations, such as excess attorneys fees resulting from negligent legal advice.[16] The Country Life case is not analogous to the facts of the instant case, as it speaks to the nuances of how the damage occurred. Additionally, there was a finite monetary amount that was in contention. In the instant case, there is no identifiable damage amount. In order to provide full and complete relief to the Appellant, the Superior Court would have to speculate as to the extent of Appellant's damages (ie. the trajectory of his career path), as well as

[14] Id. at pg. 7.

[15] Id. at pg 10.

[16] Id.

the monetary value of those damages (ie. Pay raises, special pay jobs, benefits). There is no way to do so without significant speculation on all issues. As such, equitable relief in the form of an injunction enjoining Appellees to reinstate Appellant to his position as a police officer is the only avenue by which Appellant will be fairly and fully compensated.

Chancery Court Breach of Contract Action

Appellant properly filed a Breach of Contract action in the Court of Chancery whereby seeking equitable relief from the Appellees' wrongful breach of the CBA. The Appellees attempt to leverage a typographical error to convince the Court that Appellant's intention in the lower Court was to appeal the administrative decision. While regrettable, the misuse of party titles in Appellant's Complaint does not offer a glimpse into the mind of Appellant, and reveal a hidden agenda. The crux of Appellant's Court of Chancery claim focuses on the Appellees' unilateral modification of the term "residence" as it applied to Appellant's residency requirement for City employees. Appellant has an actionable claim against the Appellees for which he can conceivably recover, based on a breach of contract. It is an uncontroverted fact that Appellees breached the CBA when it wrongfully modified the definition of the term "residence". It is an uncontroverted fact that Appellant was a member of the party that aggrieved the

matter, and received a favorable decision in both the Arbitration and Appeal. It is an uncontroverted fact that Appellees were precluded from utilizing the 2018 modified "residence" definition in any disciplinary matter. Based on the evidence in the record, it is clear that the precluded 2018 residence definition was, in fact, used against the Appellant in his disciplinary hearing, resulting in his termination. Even in light of those facts, Appellees would have the Court believe that Appellant has no colorable equitable claim stemming from this breach. Appellees argue that Appellant failed to properly state a claim for relief because the Appellees are already bound by the Arbitration Award, and any additional court action would simply require the Appellees to follow the law.[17] Appellees rely on the Court's holding in Gladney v. City of Wilmington,[18] to argue that there is a presumption that Appellees would follow the law.[19] The Appellees further quote the Court in Christiana Town Ctr. Ltd. Liab. Co. v. New Castle Cty[20] :

> It would be anathema to our form of government to believe, as a baseline principle, that after a court renders a declaratory judgment another

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[17] A-153.

[18] Gladney v. City of Wilmington, No. 5717-VCP, 2011 Del. Ch. LEXIS 182 (Del. Ch. Nov. 30, 2011).

[19] Appellees' Answering Brief at pgs. 26-27.

[20] Christiana Town Ctr. Ltd. Liab. Co. v. New Castle Cty., No. 20215, 2003 Del. Ch. LEXIS 60 (Del. Ch. June 6, 2003).

> governmental agency would not follow that decision. It may actually be the case that a particular agency does not follow such a judgment, but a party should only seek injunctive relief if that agency actually refuses to comply with the judicial declaration.[21]

That is a bold assertion from Appellees considering that it has acted unlawfuolly from the beginning. Appellees circumvented its long-standing contractual duties of the CBA and unilaterally modified the definition of "residence" whereby breaching the contract, knowingly misapplied it during Appellant's disciplinary hearing, and was then precluded by an Arbitrator and the Court of Chancery from using the modified definition in *any* disciplinary measures. Yet, despite the Arbitration Award,[22] the Court's Order,[23] the lower Court's subtle push toward a resolution[24], and the presumption that Appellees will follow the law, Appellees have engaged in costly, protracted litigation to avoid doing just that. Appellees refuse to "follow the law" and undo the wrong it inflicted on Appellant when it applied the banned definition of the word "residence" in his hearing. Under the holding in Christiana Town Ctr.,[25] Appellant

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[21] Id.

[22] A-131.

[23] A-98.

[24] A-23.

[25] Christiana Town Ctr. Ltd. Liab. Co., No. 20215, 2003 Del. Ch. LEXIS 60 (Del. Ch. June 6, 2003).

is entitled to the sought-after equitable relief in light of Appellees' clear refusal to comply with the judicial declaration. Appellees' argument that the lower Court's error is harmless because, under a *de novo* review, there is still not cause of action is illogical and should not be entertained by this Court.

Appellant was denied due process by the misapplication of the modified residence definition

Despite the fact that this Appeal is based on a jurisdictional question, Appellees attempt to reargue the underlying administrative findings of fact related to dishonesty. Should the Court choose to consider Appellees' argument, it still lacks weight as Appellant was judged against the wrong standard which impacted the lens in which all the evidence was viewed. More importantly, Appellant was denied due process in the misapplication of the modified residence definition.

Appellant was disciplined and lost his job based on the improper application of the modified term "residence", resulting in a complete failure of due process.[26] While the FOP and Appellees were litigating over a seemly abstract breach, Appellant was the real-life collateral damage resulting from the breach. Appellant's due process rights were violated when he was denied a meaningful,

[26]U.S. Const. Amend. XIV,§ 1

and fair hearing.[27] The focal point of Appellant's disciplinary hearing was his residency status. However, the definition of the term "residence" used to measure Appellant's innocence or guilt was found by an arbitrator to be improper, and Appellees were ordered to cease from using the modified definition in any way, including discipline. Yet, it applied during Appellant's administrative hearing, denied him of a meaningful hearing, and resulted in his termination. Arguendo, even giving weight to Appellees' argument that the dishonesty charge called for termination, Appellant was denied due process of law with the application of the modified "residence" definition. The denial of due process triggers Appellant's rights under the Law Enforcement Officer's Bill of Rights, rendering any evidence related to residency inadmissible at his disciplinary hearing.[28] Furthermore, no disciplinary action can arise from that evidence.[29] Without the residency charge, no charge for dishonesty stemming from the residency investigation can stand, whereby making Appellees' argument moot.

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[27] Adjile, Inc. v. City of Wilmington, 2005 WL 1139577, at *7 (Del. May 12, 2005).

[28] 11 Del. C. § 9206.

[29] Id.

CONCLUSION

The undeniable fact in this matter is that the lower Court erred as a matter of law and fact when it dismissed Appellant's claim, finding that he had an alternate avenue of relief through the grievance procedure of the CBA. Arguendo, even if this Court found that the error was harmless, Appellant still has a viable cause of action for equitable relief, which was denied.

There is no question that there exists a contract between the FOP, and by extension Appellant, and the Appellees and a breach occurred when "residence" was unilaterally modified. Appellant is squarely and undeniably impacted by the unlawful breach of the terms of the CBA by Appellees, and suffered significant damages.

Equitable relief is the only appropriate relief because Appellant's damages are not compensable by monetary damages in Superior Court. Furthermore, the monetary value of the breach is impossible to calculate. Presumably, neither party can determine how long Appellant would have been employed by WPD, nor how much overtime he would have logged, or the trajectory of his career. He could have potentially worked as a WPD officer for decades, or on the other end of the spectrum, only several years. There is no way to assign money damages without significant speculation, which would result in prejudice on both side. The only

way to fully and fairly compensate Appellant is through equitable relief.

Based on the foregoing, to allow the lower Court's decision to stand serves no purpose other than to shield Appellees from their wrongdoing. That would be grossly unfair to Appellant and sets a precedent that the City of Wilmington can breach their agreements, ignore judicial declarations, and suffer no consequence of those actions.

For the foregoing reasons, the lower Court committed reversible error when it dismissed Appellant's case based on lack of subject matter jurisdiction. The decision should be reversed and remanded.

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