

NO. _____

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

LAWRENCE REYNOLDS, ANTHONY MAWING, ALEXIS RIOS-CONDE, JESUS SANCHEZ, DALE WHITTAKER, LUIS PEREZ, and TONY A. MARAGH

Plaintiffs Below

v.

WEST VIRGINIA RACING COMMISSION

Defendant Below

CLAYTON S. GAINSON, CLERK
KANAWHA CO. CIRCUIT COURT

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**PETITION FOR APPEAL
BY PNGI CHARLES TOWN GAMING, LLC
An Enjoined Non-Party in the Above-Referenced Action**

**From the Circuit Court of Kanawha County, West Virginia
Civil Action No. 09-C-688
Judge Paul Zakaib, Jr.**

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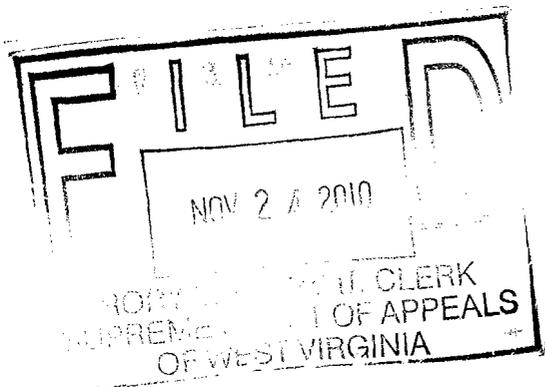


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I. KIND OF PROCEEDING AND NATURE OF RULING BELOW

This is an appeal of an injunction order entered against PNGI Charles Town Gaming, LLC d/b/a Charles Town Races & Slots (CTR&S), a non-party to this case. The plaintiffs below are seven jockeys (“Jockeys”)¹ who were found guilty by the Board of Stewards at Charles Town Races and Slots, and later by the West Virginia Racing Commission, of conniving with a racing official to commit a corrupt practice in the conduct of thoroughbred horse racing. Following a *de novo* hearing, the Racing Commission upheld the Board of Stewards’ thirty day suspensions of the Jockeys’ racing permits and \$1,000 fines for each jockey—the maximum fine permitted by law. The Jockeys appealed the Racing Commission’s ruling to the Circuit Court of Kanawha County and requested an order staying the suspension of their permits until the appeal is decided. Over the objection of the Racing Commission and in direct contravention of West Virginia Code § 19-23-17 prohibiting stays, Judge Paul Zakaib, Jr. not only granted the stay, but enjoined CTR&S from exercising its independent common law right to exclude the Jockeys from its premises. Because Judge Zakaib had no authority to stay the underlying action or enjoin CTR&S from excluding the Jockeys from its property, his injunction against CTR&S must be reversed immediately.

¹ Jockey Alexis Rios-Conde was arrested and charged with two counts of armed robbery on August 9, 2010. According to press accounts, Mr. Rios-Conde was identified as the assailant who robbed at gunpoint both a 7-Eleven and a gaming establishment called Sofia’s within a few hours of each other on August 9 in Ranson, West Virginia. (See “Man charged in two armed robberies in Ranson”, Hagerstown Herald-Mail, August 10, 2010 <http://www.herald-mail.com/?cmd=displaystory&story_id=250653&format=html>). He is currently incarcerated at the Eastern Regional Jail. CTR&S has ejected Mr. Rios-Conde from its property, and that ejection has not been challenged.

II. STATEMENT OF FACTS

The West Virginia Rules of Racing² require jockeys to be weighed before each thoroughbred horse race by a racing official called the “clerk of scales” in a process known as “weighing out.” W.Va. Code of State R. §178-1-17.2. If the jockey’s actual weight varies from the published program weight, the variance must be reported to the Board of Stewards³ and the wagering public immediately. W.Va. Code of State R. § 178-1-17.3. The wagering public relies on this information in placing bets, and both the wagering public and the licensed entity (CTR&S) are harmed by incorrect reporting of jockey weights.

The seven Jockeys and CTR&S’s former Clerk of Scales, Michael Garrison (who is not a party to this action),⁴ were caught on video participating in what has been characterized by the Racing Commission’s independent hearing examiner as a “farical, chaotic” series of weigh-outs which were a

circus and a mockery of the [weighout] process with jockeys stepping on and off the scales in mere seconds; jockeys stepping on the scales with only one foot; jockeys getting up on the scale in rapid succession without allowing the scale to register zero between weigh-outs, jockeys practically ‘dancing’ on the scales; and, jockeys failing to have the proper equipment and/or clothing at weighout.

(Hearing Examiner’s Findings of Fact, Conclusions of Law and Recommended Order at p. 23,

¶14) After reviewing the video, the Board of Stewards concluded that the jockeys engaged in

² The Legislative Rules governing thoroughbred racing in West Virginia can be found at W. Va. Code of State R. § 178-1-1, et seq. (effective April 6, 2007). These regulations are referred to as the “Rules of Racing.”

³ The “stewards” are “persons designated to represent the [West Virginia] Racing Commission whose duty it is to supervise any horse race meeting as may be provided by reasonable rules of the Racing Commission.” W.Va. Code of State R. § 178-1-2.101. They are agents of the W.Va. Racing Commission, and their power to exclude and fine racing officials, jockeys, and others is independent of any decision made by the Racing Association (CTR&S). The CTR&S Board of Stewards consists of three individuals. They are, essentially, the referees of the horse races.

⁴ Unlike the Jockeys, Michael Garrison was an employee of CTR&S. He was terminated from employment immediately upon CTR&S’s discovery of his role in the gross misconduct. In a separate order, the Racing Commission affirmed the decision of Stewards to suspend indefinitely Mr. Garrison’s racing permit and to fine him \$1,000.00, which is the most severe penalty he could receive.

dishonest, corrupt and fraudulent conduct detrimental to racing in violation of 178 W.Va. Code of State R. 1 §§ 60.1, 60.5 and 63.3 and imposed a \$1,000.00 fine and 30 day suspensions of the Jockeys' occupational permits. The Jockeys appealed the Stewards' decisions to the West Virginia Racing Commission.

The jockeys believed they were not afforded due process before the Board of Stewards, so on April 16, 2009, the Jockeys filed a civil complaint with the Circuit Court of Kanawha County alleging violation of their due process rights. They included a request for a temporary restraining order against the Racing Commission, alleging that the Racing Commission, through the Stewards, denied the Jockeys' constitutional rights to due process by suspending their licenses without proper notice of the charges and without a proper hearing. (*See* Compl. at ¶¶25-43) Their complaint requested a temporary restraining order that would "stay the suspension of the Jockeys' racing permits" pending the *de novo* hearing of their appeals to the Racing Commission.

On April 16, 2009 at 10:00 a.m., the Circuit Court entered a temporary restraining order (TRO) ordering that "the suspensions of the plaintiffs' racing permits [were] stayed" until "the conclusion of the *de novo* hearing before the West Virginia Racing Commission, which will occur within 30 days of the filing of the Request for Hearing, unless extended for good cause shown or by agreement of the parties." (TRO of 4/16/2010 at 10:30 a.m. at p. 2) Later that same day at 3:00 p.m., the Jockeys requested a second hearing to extend the TRO to prohibit CTR&S, a non-party to these proceedings, from denying the Jockeys entry to its property to race while their appeal was being pursued.

With little deliberation, Judge Egnor extended the TRO to CTR&S based on the mistaken belief that CTR&S was somehow "in active concert or participation with" the Racing

Commission. (*Id.* at 2) However, the jockey's right to maintain their racing permits is independent of the race tracks' rights to exclude them from their individual racetracks. Neither a factual nor legal predicate supported the "active concert or participation" finding by the trial judge. In his second order, which extended the TRO to CTR&S, Judge Egnor offered no valid legal or factual basis for his ruling. He simply wrote :

Rule 65(d) of the West Virginia Rules of Civil Procedure states that a TRO is binding not only upon the parties to the TRO action, but also "upon those persons in active concert or participation with" those parties.

The Court FINDS that PNGI Charles Town Gaming, LLC, d/b/a Charles Town Races & Slots, is in active concert or participation with the Defendant, for all those reasons stated at the hearing. Further, if the Track bars the Plaintiffs from racing at the Track, the irreparable harm that caused the Court to issue the TRO would go unabated. Such conduct would render the Court's TRO a nullity and frustrate the Court's authority to ensure compliance with its lawful orders.

Therefore, the Court ORDERS that PNGI Charles Town Gaming, LLC shall not restrict or impede the rights of the Plaintiffs listed above to enter the Track and engage in their legitimate racing activities. ... [U]ntil the TRO expires, the Track may not impair or impede the Plaintiffs' rights to engage in activities consistent with the Plaintiffs' racing permits.

(Order of 4/16/2010 at 3:00 p.m.) By its terms, the TRO was to "expire[] upon the conclusion of the *de novo* hearing before the West Virginia Racing Commission ... unless extended for good cause shown or by agreement of the parties." (*id.* at 2) There was no bond required of the Jockeys in this order.

The Racing Commission held its *de novo* hearing on the charges against the Jockeys in this case on August 5-7 and September 21-22, 2009. Contrary to the Court's earlier conclusion, CTR&S's common law right to exclude undesirable persons from its property is the independent right of any property owner and is in no way an act "in concert or participation

with” the Racing Commission. Regardless of whether these jockeys hold a valid racing permit, they are not guaranteed admission to any private racetrack in the State of West Virginia. However, at the time the TRO was entered in this case, this precise issue was being litigated in a separate action pending before the Circuit Court of Kanawha County styled *PNGI Charles Town Gaming, LLC v. West Virginia Racing Commission, et al.*, Civil Action No. 09-MISC-106 (King, J.), and CTR&S decided not to challenge the Court’s TRO in the present case until the other case was decided. Moreover, CTR&S chose not take any independent action until the Racing Commission held its hearings before an administrative law judge, even though its decision to exclude the jockeys did not rest on whether they were found innocent or guilty of the Racing Commission’s charges.

After the conclusion of the *de novo* hearing, but before a decision was reached, Judge King entered final judgment in *PNGI Charles Town Gaming, LLC v. West Virginia Racing Commission, et al.*, holding that CTR&S maintains a common law right to exclude undesirable persons from its property, including those holding racing permits issued by the Racing Commission. The court prohibited the Racing Commission from conducting hearings on the ejection decisions of racing associations, including CTR&S, concluding that the Racing Commission lacks the authority to reinstate unilaterally an ejected permit holder over the objection of a racing association. (Order Granting Writ of Prohibition entered 9/24/2009). The Racing Commission appealed the ruling to this Court, but the petition was refused 5-0 on April 5, 2010.

On April 23, 2010, a recommended decision and order was tendered by the Racing Commission’s independent hearing examiner Jack McClung. On Friday, May 21, 2010, the Racing Commission entered its final order finding the Jockeys guilty of “conniving” with the

Clerk of Scales “in the commission of a corrupt practice” by engaging in what the hearing examiner characterized as “sham” and “farcical” weigh-outs at CTR&S. The findings of fact reached by the Hearing Examiner were not overturned or disturbed by the Racing Commission. The Racing Stewards, the independent Hearing Examiner, and the Racing Commission have now all concluded that the Jockeys have engaged in corrupt practices that violate the Rules of Racing.

At its public hearing held May 21, 2010, the Racing Commission entertained an oral motion from counsel for the Jockeys to stay the decision pending possible appeal to the Circuit Court. The Commission orally granted the motion. This caused some confusion as to whether CTR&S (who was incorrectly found to be acting “in active concert or participation with” the Racing Commission by Judge Egnor) would be somehow bound by the Racing Commission’s voluntary stay. So, on May 24, 2010, CTR&S filed a Motion to Confirm Expiration of Temporary Restraining Order, asking the Circuit Court of Kanawha County to rule that the TRO that was no longer in effect as to CTR&S, and that CTR&S was free to now exercise its common law right to exclude these persons from its premises.

On May 25, 2010, the Racing Commission issued a written order retracting its oral grant of Jockeys’ motion to stay. It stated that “upon further consideration,” it had determined that “the provisions of W. Va. Code § 19-23-17 preclude the Commission the authority to grant a stay in this circumstance.”⁵ The Racing Commission did, however, delay the

⁵ West Virginia Code § 19-23-17 governs judicial review of orders of the Racing Commission. It provides that the Administrative Procedures Act applies to such appeals, **except that stays pending appeal are not discretionary.** In the case of an appeal of the suspension of a racing permit, no stay may be granted. In the case of an appeal of a racing license, a stay must be granted. Because the Jockeys in this case had their racing permits suspended, the circuit court and the Racing Commission were prohibited from granting a stay. *See* W.Va. Code § 19-23-17 (“execution of a decision of suspension or revocation of a permit **shall not be stayed or suspended pending a final judicial determination.**”) (emphasis added).

effective date of its order to June 1, 2010 to afford the Jockeys an opportunity to file their appeal.⁶

On June 1, 2010, the Jockeys filed a motion to stay with the Circuit Court, which the Racing Commission opposed. The Circuit Court granted a temporary stay, and a hearing was held on June 3, 2010. At this hearing, the Circuit Court heard oral argument from the parties' counsel as well as counsel for CTR&S on whether a stay should be issued and if so, whether CTR&S should be enjoined from preventing the Jockeys from racing at their property. The Court ruled that the stay should be issued and that an injunction should be issued against CTR&S. (*See* 6/3/2010 Order). Again, the Circuit Court offered little explanation for its ruling. Judge Zakaib simply ruled

After reviewing the motions and hearing the arguments of counsel for the parties and the movant, the Court hereby FINDS that the Track's proposed bar of the Petitioners would result in irreparable harm to the Petitioners and would deprive them of a meaningful opportunity for review of the sanctions imposed on the Petitioners by the Racing Commission. The Court further incorporates by reference the findings and rulings of its April 16, 2009, Order which previously granted injunctive relief to the Petitioners and against the Track on the same grounds as those presented here. Accordingly, the Court hereby DENIES the Track's Motion and ORDERS that the Track shall not restrict or impede the rights of the Petitioners to enter the Track and engage in their legitimate racing activities.

(June 3, 2010 Order). Again, there was no bond required of the Jockeys in this order. It is from this injunction CTR&S now appeals.

⁶ Of course, delaying the effective date of an order is tantamount to a stay, and therefore is prohibited by W.Va. Code § 19-23-17.

III. ASSIGNMENTS OF ERROR

In entering its injunction order, the Circuit Court of Kanawha County committed the following reversible errors:

1. It committed a clear error of law by entering a stay of the Racing Commission's order even though West Virginia Code § 19-23-17 expressly prohibits such a stay;
2. It improperly exercised jurisdiction over CTR&S, a non-party, by concluding, without factual or legal basis, that CTR&S was "in active concert or participation with" the Racing Commission under Rule 65(d) of the West Virginia Rules of Civil Procedure;
3. It abused its discretion in enjoining CTR&S under the four factor test set forth by this Court for issuance of injunctions in *Camden-Clark Memorial Hospital v. Turner*;
4. The Court otherwise failed to follow the procedural requirements of W.Va. R. Civ. P., Rule 65 by (a) failing to require security on the part of the Jockeys in the form of a bond; and (b) failing to hold an evidentiary hearing prior to the issuance of the injunction; and
5. The injunction infringes on CTR&S's fundamental property rights.

Accordingly, the Petitioner hereby respectfully requests that the Court vacate the injunction entered by the Circuit Court of Kanawha County.

IV. STANDARD OF REVIEW

Preliminary injunctions are immediately reviewable. In *State ex rel. McGraw v. Telecheck Serv., Inc.*, this Court held that "West Virginia Constitution, article VIII, section 3, which grants this Court appellate jurisdiction of civil cases in equity, includes a grant of jurisdiction to hear appeals from interlocutory orders by circuit courts relating to preliminary and

temporary injunctive relief.” 213 W. Va. 438, 445, 582 S.E.2d 885, 892 (2003). The Court applies the following standard of review to such appeals:

“In reviewing the exceptions to the findings of fact and conclusions of law supporting the granting of a temporary or preliminary injunction, we will apply a three-pronged deferential standard of review. We review the final order granting the temporary injunction and the ultimate disposition under an abuse of discretion standard, *West v. National Mines Corp.*, 168 W.Va. 578, 590, 285 S.E.2d 670, 678 (1981), we review the circuit court's underlying factual findings under a clearly erroneous standard, and we review questions of law de novo. Syllabus Point 4, *Burgess v. Porterfield*, 196 W.Va. 178, 469 S.E.2d 114 (1996).” Syllabus Point 1, *State v. Imperial Marketing*, 196 W.Va. 346, 472 S.E.2d 792 (1996).

Syl. Pt. 3, *Telechek Serv. Inc.*, 213 W.Va. 438.

V. POINTS AND AUTHORITIES

The Court must vacate the injunction entered against CTR&S by the Circuit Court because the Circuit Court abused its discretion and committed plain legal error in granting injunctive relief. Specifically, the Circuit Court ignored a clear statutory directive prohibiting stays of Racing Commission decisions that suspend or revoke racing permits. It then expanded that illegal stay by enjoining a non-party (CTR&S) from exercising its independent common law property rights. The Court ignored nearly all of the procedural safeguards required by Rule 65 and prior decisions of this Court. Accordingly, the injunction must be vacated.

1. **The Circuit Court lacked discretion to enter a stay of the Racing Commission's order under West Virginia Code § 19-23-17.**

The injunction entered against CTR&S is an expansion of an illegally granted stay. The Circuit Court had no discretion to enter a stay of the Racing Commission's order under

West Virginia Code § 19-23-17. This section, which governs judicial review of Racing Commission decisions, provides in pertinent part:

Any person adversely affected by a decision of the racing commission rendered after a hearing held in accordance with the provisions of section sixteen of this article shall be entitled to judicial review thereof. All of the pertinent provisions of section four, article five, chapter twenty-nine-a of this code shall apply to and govern such judicial review with like effect as if the provisions of said section four were set forth in this section, except that execution of a decision of suspension or revocation of a license shall be stayed or suspended pending a final judicial determination, **and except that execution of a decision of suspension or revocation of a permit shall not be stayed or suspended pending a final judicial determination.**

W. Va. Code § 19-23-17 (2007 Repl. Vol.) (emphasis added). Ordinarily, the Administrative Procedures Act gives a circuit court the discretion to enter a stay pending appeal from an administrative agency's decision to suspend or revoke a permit or license. However, section 19-23-17 *removes all discretion* to stay decisions of the Racing Commission to suspend racing licenses and permits.⁷ Under this section, suspensions of racing licenses are automatically stayed while suspensions of racing permits "shall not" be stayed. The Circuit Court's order staying the suspension of the Jockeys' racing permits in this case was therefore contrary to law.

- 2. The Circuit Court erred in concluding that CTR&S was "in active concert or participation with" the Racing Commission under W.Va. R. Civ. P., Rule 65(d) by excluding the jockeys from racing at CTR&S's property.**

The injunction entered against CTR&S is nothing more than an extension of the improvidently-granted stay. The Jockeys argued before the Circuit Court that any stay of their suspensions would be meaningless unless CTR&S was prohibited from excluding them from

⁷ Under West Virginia Code § 19-23-3 and 178 W.Va. Code of State R. §2, thoroughbred racetracks are issued a "license" to operate by the West Virginia Racing Commission. Persons who participate in racing, such as jockeys, are issued occupational "permits." This case involves only involves racing "permits," not licenses.

racing at its track. However, because CTR&S was a non-party who would not be affected by any stay order, the Jockeys had to seek an injunction under Rule 65 to force CTR&S to allow them on their property to race. Even Rule 65, however, is not binding on non-parties unless they are “in active concert or participation with” the Racing Commission. So, the Jockeys argued that CTR&S, by attempting to enforce its fundamental property right to exclude undesirable persons, was acting “in active concert or participation with” the Racing Commission. The Circuit Court adopted this argument without any facts to support such a finding.

Rule 65(d) of the West Virginia Rules of Civil Procedure states which persons may be bound by an injunction. Subsection (d) states, in pertinent part:

Every order granting an injunction ... is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

W.Va. R. Civ. P., Rule 65(d) (1998). Although the phrase “in active concert or participation” has never been interpreted by this Court, the language is nearly identical to that used in Rule 65(d)(2) of the Federal Rules of Civil Procedure, which provides that

The order binds only the following who receive actual notice of it by personal service or otherwise: (A) the parties; (B) the parties' officers, agents, servants, employees, and attorneys; and (C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).

Fed. R. Civ. P., Rule 65(d)(2). Accordingly, the Court can look to federal interpretations of this phrase for guidance.

The United States Supreme Court, in the course of examining the origins and impact of Rule 65(d), has stated:

This [rule] is derived from the common law doctrine that a decree of injunction not only binds the parties de-fendant but also those

identified with them in interest, in “privity” with them, represented by them or subject to their control. In essence it is that defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding.

Regal Knitwear Co. v. NLRB, 65 S.Ct. 478, 481, 324 U.S. 9, 14, 89 L.Ed. 661 (1945). In their treatise *Federal Practice and Procedure*, the late Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane note in order to enforce an injunction against a non-party, the moving party must demonstrate “privity” between the party and the non-party:

[T]he court must go further and determine whether the nonparty is in the requisite “privity” relationship with the enjoined party to justify enforcing the order against him. Although the rule itself does not speak of “privity,” the concept frequently is used by the federal courts as synonymous with the enumeration in Rule 65(d) of nonparties who may be bound. ... [T]he privity concept must be restricted to persons so identified in interest with those named in the decree that it would be reasonable to conclude that their rights and interests have been represented and adjudicated in the original injunction proceeding.

11A Fed. Prac. & Proc. Civ. § 2956 (2d ed.) The authors go on explain that “Privity is not established merely because persons are interested in the same question or desirous of proving the same set of facts or because the issue being litigated is one that might affect their interests by providing a judicial precedent that would be applied in a subsequent action.” *Id.* (footnote omitted).

Under West Virginia law, “[t]he term ‘privity’ is a somewhat fluid concept.” *Conley v. Spillers*, 171 W. Va. 584, 589, 301 S.E.2d 216, 220-221 (1983). In the Syllabus of *Cater v. Taylor*, 120 W.Va. 93, 196 S.E. 558 (1938), this Court said: “Privity, in a legal sense, ordinarily denotes ‘mutual or successive relationship to the same rights of property’.” And, in Syllabus Point 1 of *Gentry v. Farruggia*, 132 W.Va. 809, 53 S.E.2d 741 (1949), it said: “Where, the principle of *res judicata* is invoked in order for it to apply it must appear either that the

parties in the present case are identical with those in the former litigation or that their privity with them was such as to give them a common interest in the outcome thereof.” In *Jordache Enterprises, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 204 W. Va. 465, 478, 513 S.E.2d 692, 705 (1998), the court stated that “the term privity ... includes those who are successors to a property interest, those who control an action although not formal parties to it, those whose interests are represented by a party to the action, and possibly coparties to a prior action.”

Applying these principles to the present case, it is clear there is no “privity” relationship between the Racing Commission and Charles Town Races & Slots. The Racing Commission’s interest is in enforcing the West Virginia Rules of Thoroughbred Horse Racing and ensuring that violations of rules are punished. The interest of Charles Town Races and Slots is in preserving the integrity of racing at its property alone, and in exercising its common law right to exclude undesirable persons from its property to maintain such integrity. CTR&S’s exercise of its exclusion right in no way depends on a finding of guilt by the Racing Commission. CTR&S is not the alter ego of the Racing Commission or an extension of it. The Racing Commission and CTR&S share no common property interests, CTR&S has no right to control the proceedings against the jockeys, the Racing Commission does not represent CTR&S’s common law property interests, and CTR&S has never been a co-party with the Racing Commission in any prior proceeding involving these jockeys. The mere fact that both the Racing Commission and CTR&S wish to preserve the integrity of racing does not create “privity” under Rule 65.

CTR&S has never acted, and has no desire to act, “in active concert or participation” with the Racing Commission. It simply wants to exercise its common law

property rights. Accordingly, the Circuit Court's issuance of an injunction against CTR&S must be vacated.

3. The Circuit Court abused its discretion in enjoining CTR&S under the four factor test set forth by this Court for issuance of injunctions.

The granting or refusal of an injunction, whether mandatory or preventive, "calls for the exercise of sound judicial discretion in view of all the circumstances of the particular case; regard being had to the nature of the controversy, the object for which the injunction is being sought, and the comparative hardship or convenience to the respective parties involved in the award or denial of the writ." Syl. pt. 4, *State ex rel. Donley v. Baker*, 112 W. Va. 263, 164 S.E. 154 (1932); accord, *Jefferson Cty. Bd. of Educ. v. Jefferson County Educ. Ass'n*, 183 W. Va. 15, 393 S.E.2d 653 (1990); *State ex rel. East End Assoc. v. McCoy*, 198 W. Va. 458, 481 S.E.2d 764 (1996). In making this "balancing" inquiry, this Court has followed the lead of the Fourth Circuit Court of Appeals:

Under the balance of hardship test the [lower] court must consider, in "flexible interplay," the following four factors in determining whether to issue a preliminary injunction: (1) the likelihood of irreparable harm to the plaintiff without the injunction; (2) the likelihood of harm to the defendant with an injunction; (3) the plaintiff's likelihood of success on the merits; and (4) the public interest. *Jefferson County Bd. of Educ. v. Jefferson County Educ. Ass'n*, 183 W. Va. 15, 24, 393 S.E.2d 653, 662 (1990) (quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley*, 756 F.2d 1048, 1054 (4th Cir.1985) (citation omitted)) (additional citations omitted).

Camden-Clark Mem'l Hosp. Corp. v. Turner, 212 W. Va. 752, 756, 575 S.E.2d 362, 366 (2002).

None of the four factors set forth in the *Camden-Clark Memorial Hospital* case weigh in favor of enjoining CTR&S.

a. The Jockeys were not likely to be irreparably harmed without an injunction.

First, the Jockeys can show no likelihood of irreparable harm if an injunction was not entered against CTR&S. The Circuit Court, in its June 3, 2010 Order, made no findings of fact regarding “irreparable harm.” It merely stated in a conclusory fashion that “the Track’s proposed bar of the Petitioners would result in irreparable harm to the Petitioners and would deprive them of a meaningful opportunity for review of the sanctions imposed on the Petitioners by the Racing Commission.” (6/3/2010 Order at 1) This conclusion has no support in the record. Being excluded from Charles Town Races will in no way deprive these jockeys of a “meaningful opportunity for review” of their sanctions. Regardless of whether they win or lose their appeal, they will not be automatically entitled to race at CTR&S. Exclusion from CTR&S does not affect their racing permits in any way, and a reversal of their suspensions will not allow them to race at Charles Town if CTR&S chooses to exclude them. This injunction does not prevent irreparable harm to them, it simply delays the inevitable. They have not even challenged CTR&S’s right to exclude them. Even without an injunction against CTR&S, these jockeys are free to race at any other race track in West Virginia (or out of state if they hold the proper permits). Without an injunction, they can still carry on their professions elsewhere. Therefore, the first element is not satisfied.

b. The injunction harms CTR&S.

With an injunction in place, CTR&S is required to allow these seven cheating jockeys to race at its track, even though all of them have been found guilty of a corrupt practice in multiple forums. Allowing cheating jockeys to continue to race with impunity for months and months after their misconduct has been exposed impugns the integrity of racing at CTR&S and therefore harms its business in a way that cannot be measured. In addition, the injunction harms

CTR&S's property rights. Every private property owner has the fundamental right to exclude undesirable persons from its property. The lower court's injunction tramples on that fundamental right, which causes actual harm to CTR&S every second this injunction is in place. An enjoined party need only demonstrate "harm," not "irreparable harm." See *Camden-Clark Mem'l Hosp. Corp.*, 212 W. Va. at 756. Clearly, CTR&S is harmed by this injunction by being forced to do business with these dishonest jockeys. Therefore, the second factor, too, weighs against the injunction.

c. The Jockeys are extremely unlikely to succeed on the merits of their appeals.

Because the Jockeys have no claims against CTR&S, the lower court was required to consider the likelihood of success of the Jockeys' appeals of the Racing Commission's decisions. Their chances of success are slim. The Jockeys have been found guilty of violating the West Virginia Rules of Racing by the Charles Town Board of Stewards, by an independent hearing examiner, and by the Racing Commission itself following a *de novo* hearing. Their misdeeds are recorded on video. Their arguments on appeal are extremely weak. The Circuit Court made no finding that their latest appeal has any merit whatsoever, but it entered an illegal stay and an injunction against CTR&S anyway. The burden was on the Jockeys to show a likelihood of success on their appeal, and they offered nothing. Accordingly, the third factor weighs against them.

d. The public interest weighs against an injunction.

Finally, the public interest heavily supports CTR&S, not the jockeys. As the primary organ of public policy in the State of West Virginia, the Legislature has determined that

the public interest does not favor stays of racing permit suspensions or revocations pending appeal. *See* W.Va. Code § 19-23-17. Even aside from the absolute statutory ban on stays, common sense dictates that the public interest favors exclusion of cheating jockeys from racing once they have been afforded due process and convicted by two unbiased tribunals of corrupt practices. The fairness, transparency, and integrity of the sport is of vital interest not only to the participants and the betting public, but to the state, the counties, and the municipalities that rely heavily on revenues the sport generates. On the other hand, the public has no interest in allowing corrupt jockeys to continue racing while they pursue multiple levels of appeal. Therefore, the fourth factor weighs against the injunction entered by the Circuit Court.

Because none of the four factors outlined in *Camden-Clark Memorial Hospital* weighs in favor of enjoining CTR&S from excluding these Jockeys from its property, the injunction should never have been entered and must be vacated.

4. The Court otherwise failed to follow the technical requirements of W.Va. R. Civ. P., Rule 65.

The Circuit Court's injunction is also defective under Rule 65 because it does not address the bond, and no evidentiary hearing was held prior to its issuance.

a. The Circuit Court did not set a bond.

This Court has previously held that a bond is required for an injunction to take effect. *State ex rel. Lloyd's Inc. v. Facemire*, 687 S.E.2d 341, 344 (W.Va. 2009). "An order of injunction is of no legal effect under [W.Va. Code §53-5-9], unless the court requires a bond, or recites in the order that no bond is required for good cause, or unless the movant is a personal representative." Syllabus Point 4, *Meyers v. Washington Heights Land Co.*, 107 W.Va. 632, 149

S.E. 819 (1929); *State ex rel. Lloyd's Inc. v. Facemire*, 687 S.E.2d at 344 (W.Va. 2009). Rule 65(c) states that “No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court in its discretion deems proper....” W.Va. R. Civ. P., Rule 65(c).

In the present case, the circuit court's order is silent on the requirement that a bond be posted prior to the injunction taking effect. The circuit court is not permitted simply to ignore the bond requirement. In this case, the injunction exposes CTR&S to significant risk that these Jockeys will continue their corrupt practices, thereby impugning the fairness of racing at CTR&S. If a jockey wins a race by cheating, a racetrack is not only at risk of formal challenges from the other participants and possible redistribution of purses, but it is exposed to extreme negative publicity that impugns its reputation and casts doubt on the fairness of all of its races. Such a scandal would have a severe negative impact on CTR&S's business, yet the Circuit Court made no attempt to address the downside risk of its injunction through the bonding process. In view of the clear language of Rule 65(c), West Virginia Code § 53-5-9 and West Virginia common law, “the failure of the circuit court's order to require the posting of an injunction bond, or to specifically state why an injunction bond is not required, renders the injunction void.” *State ex rel. Lloyd's Inc. v. Facemire*, 687 S.E.2d at 345 (W.Va. 2009). For this defect alone, the injunction must be vacated.

b. The Circuit Court failed to hold any evidentiary hearing prior to the issuance of the injunction.

The injunction entered against CTR&S must also be vacated because it was not based upon any evidence adduced in a hearing. Although oral argument was heard on the Jockeys' motion, no witnesses were called and no affidavits or other evidence was submitted to determine whether the *Camden Clark Memorial Hospital* factors were present. In the past, this

Court has advised that preliminary injunctions cannot rest on mere “cursory affidavits.” See *Jefferson Cty. Bd. of Educ. v. Jefferson Co. Educ. Ass’n*, 183 W.Va. 15 (1990). “As support for a preliminary injunction the court can consider only facts presented by affidavit or testimony and cannot consider facts provable under the modern liberal interpretation of the complaint but which have not been proved.” *Societe Comptoir De L’Industrie Cotonniere, Etablissements Boussac v. Alexander’s Dep’t Stores, Inc.*, 190 F.Supp. 594, 601 (D.C.N.Y. 1961), aff’d 299 F.2d 33 (2d Cir. 1962); see also 11A Wright & Miller, *Federal Practice and Procedure (Civil)* § 2949 (2d ed.) (“Evidence that goes beyond the unverified allegations of the pleadings and motion papers must be presented to support or oppose a motion for a preliminary injunction.) Circuit courts are not only required to take evidence before issuing preliminary or permanent injunctions, they are required to set forth that evidence in their orders. Rule 52(a) of the West Virginia Rules of Civil Procedure states that “in granting or refusing preliminary injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action.” W.Va. R. Civ. P., Rule 52(a). In the present case, the Jockeys advanced no evidence through testimony or affidavits before the Circuit Court. They merely relied on the arguments of their legal counsel, their complaints and briefs. Entering an injunction on such submissions was clearly erroneous.

5. The injunction infringes on CTR&S’s fundamental property rights.

Circuit courts are required to balance the “comparative hardship ... to the respective parties involved in the award or denial” of an injunction. Syl. pt. 4, *State ex rel. Donley v. Baker*, 112 W. Va. 263, 164 S.E. 154 (1932). The Circuit Court in this case only considered the harm to the Jockeys if no injunction were entered without considering the effect

the injunction would have on CTR&S's fundamental property rights. The common-law right of a private property owner to exclude others is fundamental. "The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) (Marshall, J.); see *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1, 19 (1908) (Holmes, J. concurring) ("The notion of property ... consists in the right to exclude others from interference with the more or less free doing with it as one wills."); see also Shyamkrishna Balganesh, *Demystifying the Right to Exclude: Of Property, Inviolability, and Automatic Injunctions*, 31 Harv. J.L. & Pub. Pol'y 593, 661 (2008) ("The right to exclude, then, remains the defining ideal of property.") Unless a property owner excludes a person for a discriminatory reason or a reason prohibited by law, then the courts of this state should not compel the landowner to allow people on his property against his wishes. Instead, our courts should be aiding landowners in protecting their fundamental property rights.

In the context of racing specifically, the common law right of racetracks to exclude patrons has been recognized for over one hundred fifty years. See, *Wood v. Leadbitter* (Ex. 1845), 153 Eng. Rep. 351. American courts have followed *Wood* since the beginning of the last century. See, *Marrone v. Washington Jockey Club*, 227 U.S. 633 (1913). In *Marrone*, the United States Supreme Court, citing *Wood*, held that track management had the right to exclude a patron suspected of "doping" a horse he entered in a previous race. *Id.* at 636.

Since *Marrone*, courts have recognized the right of a racetrack to exclude unwanted patrons. *James v. Churchill Downs, Inc.*, 620 S.W.2d 323 (Ky. Ct. App. 1981); *Greenfield v. Maryland Jockey Club of Baltimore*, 57 A.2d 335 (Md. 1948); *Garfine v. Monmouth Park Jockey Club*, 148 A.2d 1 (N.J. 1959); *Madden v. Queens County Jockey Club*,

72 N.E.2d 697 (N.Y. 1947), *cert. denied*, 332 U.S. 761 (1947). Thus, proprietors of private places of amusement, such as racing associations, have the right to exclude unwanted patrons from their property, so long as the exclusion is not based upon race, creed, national origin or other protected classification.

The common law principle established in *Wood* and *Marrone* is not limited to the exclusion of patrons; rather, it applies equally to the exclusion of licensees or permit-holders by racetracks. *Hedges v. Yonkers Racing Corp.*, 918 F.2d 1079, 1083-84 (2nd Cir. 1990); *Martin v. Monmouth Park Jockey Club*, 145 F. Supp. 439, 441 (D. N.J. 1956); *Calder Race Course, Inc. v. Gaitan*, 393 So.2d 15, 16 (Fla. Dist. Ct. App. 1980) (holding that “[u]ntil the Florida Legislature acts or private racing establishments disparage constitutionally guaranteed rights, they continue to have the right to choose those persons with whom they wish to do business”); *Hughes v. Kentucky Horse Racing Auth.*, 179 S.W.3d 865, 868, fn. 8 (Ky. Ct. App. 2004) (holding that the Kentucky Revised Code, in 810 K.A.R. 1:025, Section 7, recognizes “the independent ‘common law right of associations to eject or exclude persons, licensed or unlicensed, from association grounds”); *Marzocca v. Ferone*, 461 A.2d 1133, 1137 (N.J. 1983) (holding that “the racetrack’s common law right to exclude exists in the context of this case, i.e., where ‘the relationship [is] between the track management and persons who wish to perform their vocational activities on the track premises”); *Arone v. Sullivan Cty. Harness Racing Ass’n, Inc.*, 457 N.Y.S.2d 958, 959 (N.Y. App. Div. 1982) (holding that “defendant had available to it the long-recognized prerogative of racetrack operators to exclude anyone from its track, without cause, provided the exclusion is not based on race, creed, color or national origin”); *Bresnik v. Beulah Park Limited Partnership, Inc.*, 617 N.E.2d 1096, 1098 (Ohio 1993) (recognizing common law right of proprietor of racetrack to exclude licensed jockey agent from its racetrack).

Moreover, this Court has recently upheld a racetrack's common law right of exclusion against interference by the West Virginia Racing Commission. The case of *PNGI Charles Town Gaming, LLC v. West Virginia Racing Comm'n, supra*, arose out of the Racing Commission's attempt to hold evidentiary hearings pursuant to the Administrative Procedures Act whereby CTRS would bear the burden of proving that it had "just cause" to eject three individuals from its premises. CTRS filed a petition for writ of prohibition against the Racing Commission with the Circuit Court of Kanawha County, and Judge King granted the petition. The lower court ruled that the Racing Commission had no authority to conduct hearings on the ejection decisions of racing associations, including CTRS, and that the Racing Commission lacked the authority to unilaterally reinstate an ejected permit holder over the objection of a racing association. The Racing Commission appealed to this Court, and this Court refused the petition 5-0 on March 30, 2010. See *PNGI Charles Town Gaming, LLC v. West Virginia Racing Commission, Chairman Fred C. Peddicord, Chairman of the West Virginia Racing Commission, and Richard C. Watson, Janene Watson and Patty A. Burns, Intervenors*, W.Va. Supr. Ct. Appeal No. 100098 (2010).

A review of the case law outside this jurisdiction reveals that nearly every other state recognizes a racing association's common law right to exclude, unless explicitly taken away by regulation or statute. In addition to West Virginia, the common law right to eject prevails and is not subject to any type of review by a state racing authority in the following jurisdictions: (1) Delaware,⁸ (2) Indiana,⁹ (3) Iowa,¹⁰ (4) New Mexico,¹¹ (5) Ohio,¹² (6) Florida,¹³ (7) Kentucky,¹⁴ (8) Maryland,¹⁵ (9) Nevada,¹⁶ (10) New Hampshire,¹⁷ (11) New Jersey¹⁸ and (12) New York.¹⁹

⁸ See, 3-500-501 Del. Code Regs. § 4.4.5 (providing that "[a]n association may eject or exclude a person for any lawful reason"); *Crissman v. Dover Downs Entertainment, Inc.*, 289 F.3d 231 (3rd Cir. 2002).

⁹ See, 71 *Ind. Admin. Code 4-4-6* (providing that “[a]n association may eject or exclude a person, licensed or unlicensed, from association grounds solely of its own volition and without any reason or excuse given therefore, provided, however, such ejection or exclusion shall not be founded on race, religion, or national origin.”).

¹⁰ See, *Iowa Admin. Code r. 491-5.4(5)(d)* (providing that “[a] licensee may eject or exclude any person, licensed or unlicensed, from the premises or a part thereof of the licensee’s facility, solely of the licensee’s own volition and without any reason or excuse given, provided ejection or exclusion is not founded on constitutionally protected grounds such as race, creed, color, disability, or national origin”).

¹¹ See, *N.M. Code R. § 15.2.2.8(V)(2)* (providing that “[a]n association may eject or exclude a person for any lawful reason”).

¹² See, *Bresnik v. Beulah Park Ltd. Partnership, Inc.*, 617 N.E.2d 1096 (Ohio 1993).

¹³ See, *Calder Race Course, Inc. v. Gaitan*, 393 So.2d 15 (Fla. Dist. Ct. App. 1981) (holding that “[u]ntil the Florida Legislature acts or private racing establishments disparage constitutional guaranteed rights, they continue to have the right to choose those persons with whom they wish to do business.”); *Winfield v. Noe*, 426 So.2d 1148 (Fla. Dist. Ct. App. 1983) (per curiam) (holding “[t]hat the state, in the public interest, undertook to regulate and control pari-mutuel wagering did not, standing alone, abrogate the common law right of those private enterprises to exclude persons with whom they choose not to do business, absent a showing that the exclusion of any person is for reasons which are constitutionally impermissible.”)

Florida Statutes Annotated Section 550.0251 arguably may have abrogated the common law right of ejection; however, CTRS is unaware of any case law addressing this issue directly; therefore, CTRS submits that, under the holdings of *Calder Race Course, Inc.* and *Winfield*, the common law right of ejection is not subject to review by the state racing authority in Florida.

¹⁴ See, *James v. Churchill Downs, Inc.*, 620 S.W.2d 323, 325 (Ky. Ct. App. 1981); *Hughes v. Kentucky Horse Racing Auth.*, 179 S.W.3d 865, 868 n.8 (Ky. Ct. App. 2004). The case law in the Commonwealth of Kentucky declares that racetracks are vested with the common law right to eject both patrons and permit-holders and that such right has not been abrogated. In *James v. Churchill Downs, Inc.*, 620 S.W.2d 323 (Ky. Ct. App. 1981), the Court of Appeals of Kentucky held that the Kentucky statutes, which vested the Kentucky State Racing Commission with a similar right to exclude undesirable patrons from racetracks, did not abrogate racetracks’ common law right of exclusion. *James v. Churchill Downs, Inc.*, 620 S.W.2d 323, 325 (Ky. Ct. App. 1981). In fact, the *James* Court held that rather than limiting the common law right, the Kentucky statutes actually expanded the right by vesting it in an additional entity, the Kentucky State Racing Commission. *Id.*

Approximately ten years after *James*, counsel for Co-Petitioners was able to successfully convince the Kentucky State Racing Commission that it possessed the authority to review ejection decisions made by private racetracks. See, *In re Billy Phelps*, February 28, 1991. However, the racetrack involved in that case failed to seek any relief from the Kentucky State Racing Commission’s decision. Nevertheless, CTRS is currently unaware of any other case where the Kentucky State Racing Commission exercised this unprecedented usurpation of authority. More importantly, no case law in Kentucky validates this renegade decision by the Kentucky State Racing Commission. In fact, the Court of Appeals of Kentucky has since held that Kentucky law “recognizes in 810 KAR 1:025, Section 7, the independent ‘common law rights of associations to eject or exclude persons, licensed or unlicensed, from association grounds’ without so much as mentioning any type of review by the State Racing Commission. *Hughes v. Kentucky Horse Racing Auth.*, 179 S.W.3d 865, 868 n.8 (Ky. Ct. App. 2004).

¹⁵ No Maryland statute or regulation expressly provides for review of ejection decisions by the Maryland Racing Commission. Likewise, there is no Maryland case law holding that the common law right of racetracks to eject either patrons or permit-holders has been abrogated or that the exercise of such common law right is subject to review by the Maryland Racing Commission.

¹⁶ See, *Nev. Rev. Stat. Ann. § 463.0129* (West 2009) (providing that “[t]his section does not . . . abrogate or abridge any common-law right of a gaming establishment to exclude any person from gaming activities or eject any person from the premises of the establishment for any reason . . .”).

¹⁷ See, *N.H. Rev. Stat. Ann. § 284:39* (West 2009) (providing that “[a]ny licensee under this chapter may refuse admission to or eject from the grounds or the enclosure of the racetrack where a licensed race or race meet is

By enjoining CTR&S from exercising its fundamental common law property right, the Circuit Court has harmed CTR&S and its decision must therefore be immediately reversed.

VI. CONCLUSION & RELIEF REQUESTED

The importance of fairness, transparency and honesty in horse racing is of critical importance to CTR&S and to the State of West Virginia. If CTR&S is viewed as condoning cheating or corrupt practices, it will lose the trust of the wagering public and its reputation will be damaged. If the wagering public cannot trust that the races are conducted in a fair and transparent fashion, they will place their bets elsewhere, and all racing constituents will be adversely impacted. CTR&S's standards are established in the exercise of its independent business judgment that is not dependent upon nor subject to the approval of the Racing Commission. In fact, the Racing Commission is prohibited from interfering with CTR&S's internal business operations, including its decisions regarding exclusions. W. Va. Code § 19-23-6 (West 2009) ("The racing commission shall not interfere in the internal business or internal affairs of any licensee.")

being held any person or persons whose presence or conduct, in the sole judgment of the licensee, is inconsistent with the orderly and proper conduct of the race meet or is detrimental to the sport of racing, whether or not such presence or offensive conduct is associated with gambling."); *Tamelleo v. New Hampshire Jockey Club, Inc.*, 163 A.2d 10, 13 (N.H. 1960) (holding that Section 284:39 "is substantially declaratory of the common law which permits owners of private enterprises to refuse admission or eject anyone whom they desire").

¹⁸ See, *Marzocca v. Ferone*, 461 A.2d 1133 (N.J. 1983) (holding that aggrieved ejected permit-holders should seek redress in the courts rather than before the New Jersey Racing Commission because ejections involve the common law rights of racetracks and not regulation by the Commission.)

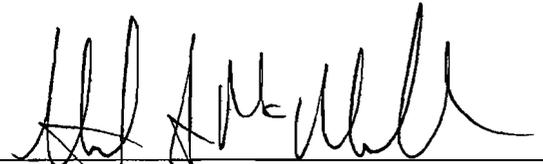
¹⁹ See, *Arone v. Sullivan Harness Racing Ass'n*, 457 N.Y.S.2d 958, 959 (N.Y. App. Div. 1982) (holding that "[b]y issuing regulations reiterating the proprietor's power to serve whom it pleases, the [New York] State Racing and Wagering Board has emphasized that the ability of private racetracks to bar unwanted persons continues intact despite extensive State control of harness racing). Specifically, the regulations in New York state that "[n]othing contained in this section [addressing the expulsion of undesirable persons from the racetrack] shall diminish the right of any track to exclude any person as a patron or otherwise without reason, provided such exclusion is not based upon race, creed, color or national origin." *N.Y. Comp. Codes R. & Regs. tit. 9, § 4119.8* (West 2009).

CTR&S regards the Jockeys' corrupt practices as detrimental to the best interests of racing, and the Jockeys' continued presence and engagement in racing activities at its race track impugns the integrity of racing. Forcing CTR&S to allow these Jockeys to race while the Jockeys exhaust their appeals for unspecified periods of time harms CTR&S's business and violates the standards CTR&S has established for the integrity of the sport.

ACCORDINGLY, PNGI Charles Town Gaming, LLC requests that this Court grant its appeal and vacate the injunction entered by the Circuit Court of Kanawha County.

Respectfully Submitted,

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