

NO. 101503

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

PNGI CHARLES TOWN GAMING, LLC d/b/a CHARLES TOWN RACES AND SLOTS,

Petitioner

v.

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

Petitioners Below, Respondents

and

WEST VIRGINIA RACING COMMISSION

Respondent Below, Respondents

**SUPPLEMENTAL REPLY BRIEF OF APPELLANT
PNGI CHARLES TOWN GAMING, LLC**

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

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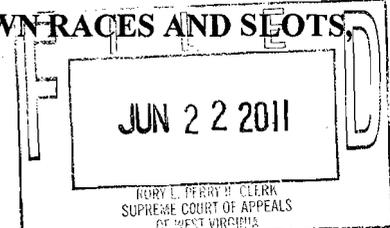


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I. OVERVIEW

The supplemental briefs of the Racing Commission, the Jockeys and the Amici Curiae supporting them, offer scant support for the Circuit Court's procedurally and substantively flawed TRO against non-party Appellant PNGI Charles Town Gaming, LLC (CTR&S). No Appellees deny that the Circuit Court: (1) ignored W.Va. Code § 19-23-17 in granting a stay; (2) concluded without factual basis that CTR&S was "in active concert or participation with"¹ the Racing Commission in exercising its right to exclude the Jockeys; (3) failed to take evidence, require a bond, analyze the relevant legal factors, or follow the procedural requirements of W.Va. R. Civ. P., Rule 65; and (4) infringed upon CTR&S's fundamental property rights by enjoining it from excluding the Jockeys pending their appeals.

Instead of defending the lower court's injunction orders or addressing the assignments of error, the Jockeys merely repeat their baseless procedural objections, and reargue the constitutionality of W.Va. Code § 19-23-17. The Racing Commission similarly dodges the assignments of error, opting instead to seize this appeal as a second chance to gain from the courts a power the Legislature has refused to give it -- the power to override racing association ejections of permit holders. This Court considered and unanimously denied a petition raising all of the Racing Commission's arguments in *PNGI Charles Town Gaming, LLC v. West Virginia Racing Commission, et al.*, Civil Action No. 09-MISC-106 (King, J.) (cert. denied, W.Va. Supr. Ct. Docket Nos. 100098 and 100099) (2010).

Moreover, in this case, CTR&S exercised its property rights in an attempt to protect its business. Like any other property owner, CTR&S has the right to exclude from its

¹ The Court can reverse based solely on the lack of evidence supporting the "active concert or participation" element of Rule 65. CTR&S's right to eject is independent of the Racing Commission's power to suspend occupational permits, and the two did not act "in concert." Without concerted activity, the circuit court had no basis to extend its TRO to CTR&S.

premises anyone it deems harmful to its business interests, so long as the exclusion does not violate some positive law. This right has never been abrogated by the West Virginia Legislature and this Court should reject the Racing Commission's attempt to emasculate the common law right with a "review and approval" power.

II. REPLY TO SUPPLEMENTAL RESPONSE OF THE RACING COMMISSION

The Racing Commission makes no effort to defend the lower court's TRO. Instead, it focuses on two issues: (1) curtailment of a racing association's common law right to exclude permit holders; and (2) the constitutionality of W.Va. Code § 19-23-17. CTR&S agrees with the Racing Commission only on the second point.

A. Racing associations possess a common law right to exclude.

CTR&S is a private company that owns the racetrack at Charles Town, and as a property owner, it maintains the right to exclude undesirable persons. A property owner's right to exclusive possession is firmly rooted in the common law of this state, *see, e.g., Pocahontas Light & Water Co.*, 52 W.Va. at 440 (1903) ("The foundation of property consists in its being an exclusive right; other persons cannot impair its enjoyment, or impose burdens on it by intermeddling with it without the owner's leave or color of legal authority."); *Stuart v. Lake Washington Realty Corp.*, 141 W.Va. 627, 651-652, 92 S.E.2d 891, 904-905 (1956) ("As an incident of her ownership of the tract ... the plaintiff had the absolute and exclusive right to the full enjoyment of her property and to hold it free from disturbance by any other person ... This right is a natural right which will be regarded and protected as property and as parcel of the land."), and in the common law of the United States, *Lingle v. Chevron U.S.A., Inc.* 544 U.S. 528, 540, 125 S.Ct. 2074, 2082 (2005) ("[an] owner's right to exclude others from entering and

using her property [is] perhaps the most fundamental of all property interests."); *accord Dolan v. City of Tigard*, 512 U.S. 374, 384, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831-832, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979).

Racetrack owners possess a common law right to exclude unwanted persons, be they patrons or permit holders. *Marrone v. Washington Jockey Club*, 227 U.S. 633 (1913); *Garfine v. Monmouth Park Jockey Club*, 148 A.2d 1 (N.J. 1959); *Greenfield v. Maryland Jockey Club of Baltimore*, 57 A.2d 335 (Md. 1948); *Madden v. Queens Cty. Jockey Club*, 72 N.E.2d 697 (N.Y. 1947), *cert. denied*, 332 U.S. 761 (1947); *James v. Churchill Downs, Inc.*, 620 S.W.2d 323 (Ky. Ct. App. 1981).

This common law right is not affected by licensure as a racing association under state law. Indeed, the West Virginia Rules of Racing, W. Va. C.S.R. § 178-1-1, *et seq.*, expressly acknowledge and preserve the common law right. Rule 10.19 provides that “[t]he stewards **or the association** have the power to suspend **or exclude from the stands and grounds persons acting improperly or whose behavior is otherwise objectionable.**” 178 W.Va. Code State R. § 1-10.9 (effective date Apr. 6, 2007) (emphasis added). In addition, Rule 4.7 provides that “[a]ny person ejected by the stewards **or the association** from the grounds of an association shall be denied admission to the grounds until permission for his or her reentry has been obtained **from the association and** the Racing Commission....” *Id.* at § 178-1-4.7 (emphasis added). The concurrent rights of the Racing Commission and the racing associations to exclude undesirable persons has worked in harmony for decades to preserve the integrity of the sport.

B. The West Virginia Legislature has not abrogated a racing association's common law right to exclude.

If the West Virginia Legislature sought to alter the common law, presumably it could do so, but it has not. The Racing Commission's reliance on "plenary power" and a non-specific rule of racing to establish this abrogation has been rejected by Circuit Judge King, *see PNGI Charles Town Gaming, LLC v. West Virginia Racing Commission, et al.*, Civil Action No. 09-MISC-106 (King, J.) and implicitly by this Court in refusing to disturb his ruling. *See PNGI Charles Town Gaming, LLC v. West Virginia Racing Commission, et al.*, W.Va. Supreme Court Appeal No. 10098, *cert denied* April 5, 2010.

This Court has long held that "[t]he common law, if not repugnant of the Constitution of this State, continues as the law of this State unless it is altered or changed by the Legislature." Syl. Pt. 3, *Seagraves v. Legg*, 127 S.E.2d 605 (W. Va. 1962). "It has been repeatedly held in this state that under the provisions of Article VIII, Section 21, of the Constitution of the State of West Virginia, and [West Virginia Code Section] 2-1-1, the common law prevails unless changed by statute." *Id.* at 6. If the Legislature intends to alter or supersede the common law, "it must do so clearly and without equivocation." *State ex rel. Van Nguyen v. Berger*, 483 S.E.2d 71, 75 (W. Va. 1997) (emphasis added). Because the Racing Commission can point to no specific law or legislatively approved regulation giving it the power to review and overrule racing association ejections of permit holders, the common law right controls.

C. The Racing Commission's "plenary power" to govern racing does not give it the power to overrule racing association exclusions.

While the Racing Commission undoubtedly has “plenary power” to govern racing under W.Va. Code § 19-23-6, that grant of power does not specifically grant it the power to review and overrule racing association ejections. In fact, that statute provides that “[t]he racing commission shall not interfere in the internal business or internal affairs of any licensee.” W.Va. Code § 19-23-6. Private decisions of racing association managers to exclude persons it deems harmful to its business interests is undoubtedly an “internal business” matter.

Depriving racing associations of the power to eject persons from their business premises directly interferes with their internal affairs because it inhibits the ability of racing associations to control the most important internal, core issue to their organizations -- their reputations and public images. The ability of a racing association to control the public perception of the integrity of its product, *i.e.*, legitimate gambling and entertainment, is paramount to its success. This is so because the primary source of revenue for a racetrack is the portion it retains from the amount wagered by its customers on the races. If the races are unfair, the public stops wagering. Therefore, it is essential that CTR&S take steps to maintain an excellent reputation for the quality of racing conducted at its track and the honesty of the individuals associated with its business, including jockeys.

The common law right to eject is invaluable to the management of a racing association’s reputation for integrity and it is essential that the association be able to exercise its business discretion in determining the best way to promote the integrity of the sport at its property. By mandating that the Racing Commission is not to interfere with a racing association’s exercise of business judgment, W.Va. Code § 19-23-6 provides that, under West Virginia law, racing associations retain the autonomy to eject persons, including occupational permit-holders, from their business premises. To hold otherwise would allow the Racing

Commission to intrude upon the internal business or internal affairs of a racing association in contravention of Section 19-23-6.

D. The Racing Commission's power to hear appeals of ejections does not extend to racing association ejections.

The only other authority cited by the Racing Commission as abrogating the common law is Rule 4.7 of the Rules of Racing, which governs ejections. Judge King considered and rejected the Racing Commission's interpretation of this rule, finding that the rule applied only to stewards' ejections, not racing association ejections. (9/24/2009 Order of Judge King at ¶ 26) A review of Rule 4.7 by this Court will yield the same result.

First, as noted above, Rule 4.7 expressly reserves the independent right of racing associations to eject occupational permit-holders. The rule provides that “[a]ny person *ejected by the stewards or the association* from the grounds of an association *shall be denied admission to the grounds until permission for his or her reentry has been obtained from the association and the Racing Commission.*” W. Va. C.S.R. § 178-1-4.7 (2007) (emphasis added). Not only do both the stewards and the racings associations have the power to exclude, but *both* must consent to the return of any ejected person. This is a critical recognition of the independent rights of both entities responsible for preserving the integrity of racing.

The Racing Commission seizes on the last sentence of Rule 4.7 as a grant of ultimate authority to review and overrule racing association ejections of permit holders. The last sentence reads “[a]ll occupational permit holders who are ejected have the right of appeal to the Racing Commission.” *Id.* This provision cannot be construed to abrogate the racing association's common law right of exclusion for two reasons. First, such an interpretation would nullify the first sentence of Rule 4.7 requiring the permission of *both* entities to reinstate an

ejected party. If the Racing Commission truly has the “final say” on reinstatement as it suggests, then the dual consent required by the first sentence of Rule 4.7 would be nullified.

Second, the last clause of Rule 4.7 granting ejected permit-holders an “appeal” to the Racing Commission must be read in light of the narrow definition of the term “appeal” contained in the Rules of Racing. An “appeal” is defined in Rule 2.7 as “a request for the Racing Commission or its designee to investigate, consider and review *any decisions or rulings of the stewards* of a meeting.” *W. Va. C.S.R. § 178-1-2.7* (2007) (emphasis added). An ejection decision made by a private racing association is not a decision or ruling of the stewards. Therefore, the “appeal” granted to permit holders by Rule 4.7 can apply only to ejections by the stewards. *See, In re Greg H.*, 542 S.E.2d 919, 923 (W. Va. 2000) (holding that “[w]here the Legislature does, however, define what a particular term ‘means,’ such definition is ordinarily binding upon the courts and excludes any meaning that is not stated”). The Racing Commission cannot ignore its own definition to suit its interpretation of the rule.

The Racing Commission urges the Court to interpret Rule 4.7 to abrogate the common law right of exclusion simply because the Racing Commission itself interprets the rule in that manner. (Supp. Br. of Racing Comm’n at 11-13) However, the Rules of Racing are legislatively approved rules that must be interpreted in accordance with the law, not in accordance with the understanding of the commissioners. *See Smith v. Nest Virginia Human Rights Commission*, 216 W. Va. 2, 9, 602 S.E.2d 445, 452 (2004) (“A regulation that is proposed by an agency approved by the Legislature is a ‘legislative rule’ as defined by the State Administrative Procedures Act, W. Va. Code 29A-1-2(d) (1982), and such a legislative rule has the force and effect of law.”)

Moreover, this Court is required to interpret Rule 4.7 to be consistent with the common law, not in derogation of it, whenever possible. “[W]here there is any doubt about the meaning or intent of a statute in derogation of the common law, the statute is to be interpreted in the manner that makes the least rather than the most change in the common law.” *Phillips v. Larry's Drive-In Pharmacy, Inc.*, 220 W.Va. 484, 492, 647 S.E.2d 920, 928 (2007). Undoubtedly, the Racing Commission’s interpretation makes the *most* change in the common law while the interpretation of CTR&S makes the least change. Accordingly, this Court must reject the Racing Commission’s argument that the Legislature granted it authority to review and overrule racing association exclusions.

Finally, the Racing Commission’s interpretation of Rule 4.7 would have far-reaching negative consequences. While state law requires the Racing Commission not to interfere with the internal business affairs of racing associations, granting the Racing Commission the unfettered right to reverse any racing association exclusion of a permit-holder would inevitably result in significant interference with the racing associations’ right to choose its employees. The Racing Commission can decide who *may* work at a racing association, but cannot dictate who *must* work there.

As noted in CTR&S’s supplemental brief, all participants in thoroughbred horseracing must hold occupational permits. Under Rule 43.1 of the Rules of Racing, virtually every individual working for or performing services at a West Virginia racetrack has an occupational permit issued by the Racing Commission.² These permit-holders include owners,³

² Rule 43.1 provides that “[a]ny person who is involved in or employed by those involved in racing or operating a licensed racetrack or those operating concessions for or under authority from any association, shall have a valid occupational permit issued by the Racing Commission, unless otherwise specifically exempt from this requirement.” *W. Va. C.S.R. § 178-1-43.1* (2007).

³ *See, W. Va. C.S.R. § 178-1-49* (2007).

trainers,⁴ jockeys,⁵ employees of the racing association,⁶ concessionaires,⁷ tip sheet vendors,⁸ blacksmiths,⁹ jockey agents,¹⁰ and photographers.¹¹ If a racing association fires and excludes from its grounds a racing official for intentional misconduct, for instance, that racing official would have a direct appeal of his ejection to the Racing Commission under Rule 4.7. Then, the Racing Commission would have the power to review that decision and reinstate the racing official so he can carry out his permitted occupation of racing official. (After all, the Racing Commission contends that its “plenary power” gives it, not the racing association, the ultimate power to decide who participates in racing in the State of West Virginia) (*See* Supp. Br. of W.Va. Racing Comm’n at 4). While the Racing Commission vows they would never use their power to interfere with a racing association’s employment decisions in this manner, their interpretation of the Rules of Racing would allow exactly that.

For these reasons, the Racing Commission’s arguments regarding the right to exclude permit holders must be rejected.

III. REPLY TO SUPPLEMENTAL RESPONSE OF THE JOCKEYS

The Jockeys’ Supplemental Response similarly offers little support for affirming the circuit court’s TRO. They merely reiterate their procedural defenses of waiver, untimeliness

⁴ *Id.*

⁵ *See, W. Va. C.S.R. § 178-1-45* (2007).

⁶ *See, W. Va. C.S.R. § 178-1-43.1* (2007).

⁷ *Id.*

⁸ *See, W. Va. C.S.R. § 178-1-44* (2007).

⁹ *See, W. Va. C.S.R. § 178-1-48* (2007).

¹⁰ *See, W. Va. C.S.R. § 178-1-46* (2007).

¹¹ *See, W. Va. C.S.R. § 178-1-32* (2007).

of appeal, and the unconstitutionality of the statute the circuit court ignored. None of these arguments have substantial legal support.

A. CTR&S did not waive its objections to the TRO.

The Jockeys repeat that CTR&S waived all of its assignments of error by “failing to demonstrate that it made specific objections [to Judge Zakaib’s order] at the time of ruling.” However, the errors raised in this appeal *were* raised prior to the entry of the June 3, 2010 order, and thus preserved. In its Motion to Confirm Expiration of Temporary Restraining Order filed on May 24, 2010, CTR&S objected to Judge Egnor’s earlier finding that CTR&S was “in active concert or participation” with the Racing Commission as unsupported by evidence, (5/24/10 CTR&S’s Mot. to Confirm Expiration of TRO at ¶ 10), that the TRO interfered with CTR&S’s common law right to exclude undesirable persons from its property, (*id.* at ¶ 13, 23), that the TRO harmed CTR&S’s business and hindered its ability to preserve the integrity of racing at its property, (*id.* at ¶¶ 19-22), that the trial court had improperly issued the TRO without holding a hearing, without receiving evidence, and without applying any of the factors required by cases such as *Camden-Clark Memorial Hosp. Corp. v. Turner*, 212 W.Va. 752, 575 S.E.2d 362 (2002) that govern issuance of TROs. The lower court considered and rejected all of these objections by entering its second TRO. (*See* 6/7/10 Order) The lower court also considered, and rejected, the Racing Commission’s argument that W.Va. Code § 19-23-17 prohibited the stay, (*See* 6/1/2010 Racing Comm’n Resp. in Opp. to Emerg. Mot. to Stay Enforcement of Penalty) thus preserving that issue for appeal.

By raising these issues in the written motions submitted to the lower court prior to its ruling, CTR&S was not required to raise them again after the ruling and prior to appeal. *James M.B. v. Carolyn M.*, 193 W.Va. 289, 293, 456 S.E.2d 16, 20 (1995) (“It must be emphasized that motions to reconsider or to amend or alter the judgment upon a Rule 59(e)

motion are not necessary to preserve the right of appeal. As we stated in *Parkway Fuel [Service, Inc. v. Pauley]*, (1975), 159 W.Va. [216] at 219, 220 S.E.2d [439] at 441 [(19750)], “[t]hese remedies exist concurrently with and independently of the remedy of appeal...”). In any event, even if it was required to object following the ruling, CTR&S satisfied that requirement by noting on the face of the order appealed from its objections. (See 6/3/2010 Order at p. 3). Thus, all five assignments of error were properly preserved, and CTR&S has waived nothing.

B. CTR&S’s Petition was Timely Filed.

The Jockeys’ argument that CTR&S’s appeal is untimely is baseless. Although they argue that CTR&S’s appeal of the June 3, 2010, order is actually an appeal of the earlier April 16, 2009, TRO, the record shows that the June 3, 2010, order stands on its own as a separate, appealable order. By its own express terms, the April 16, 2009, TRO terminated after the *de novo* hearing before the Racing Commission. Even if CTR&S’s decision not to challenge the April 16, 2009, order is viewed as a waiver (which it is not), that waiver would not prevent appeal of the subsequent injunction. *Camden-Clark Mem’l Hosp. Corp. v. Turner*, 212 W. Va. 752, 759, 575 S.E.2d 362, 369 (2002) (“[c]learly, agreeing to extend the term of the temporary restraining order does not waive the subject party’s right to contest the temporary restraining order, or any subsequent injunction.”)

Furthermore, any order denying a request to dissolve an injunction is appealable under West Virginia law. *Gwinn v. Rogers*, 92 W. Va. 533, 115 S.E. 428 (1922) (“An order in a chancery cause refusing to dissolve an injunction is an appealable decree....”). The June 3, 2010 TRO appealed from was also a denial of CTR&S’s motion to declare the April 16, 2009 TRO expired. Simply stated, the Jockeys offer nothing to contradict the broad scope of review by this Court of preliminary injunction orders. Syllabus 2, *State ex rel. McGraw v. Telecheck Services*,

Inc., 213 W. Va. 438, 445, 582 S.E.2d 885, 892 (2003) (“our longstanding jurisprudence is to the effect that this Court possesses discretionary appellate jurisdiction to review interlocutory lower court orders in cases in equity relating to preliminary or temporary injunctive relief.”)

C. West Virginia Code § 19-23-17 is Constitutional.

Finally, the Jockeys contend that West Virginia Code § 19-23-17, which prohibits the Circuit Court from staying the suspension of permits pending appeal, violates due process and equal protection. They offer no case authorities in their Supplemental Brief supporting their argument, and CTR&S is aware of none.

To the contrary, the court in *Hubel v. West Virginia Racing Commission*, 376 F. Supp. 1 (S.D.W.Va. 1974), *aff'd by published opinion*, 513 F.2d 240 (4th Cir. 1975) held that due process was *not* violated by requiring permit holders to serve up to 30-days of their suspensions while their appeals were pending. Noting the Legislature’s plenary power to regulate horse racing, District Judge K.K. Hall held that this rule did not deny trainers due process of law, but instead represented and constituted a legitimate exercise of the state's police powers. *Hubel*, 376 F. Supp. 1, 4 (S.D.W.Va. 1974). The Jockeys contend that CTR&S’s reliance on *Hubel* is misplaced because there is no analogous rule guaranteeing a hearing by the circuit court within 30 days as there is with appeals to the racing commission. However, the Jockeys in this case were only suspended for 30 days. Regardless of the level of appeal, the reasoning of *Hubel* is applicable insofar as it held that due process is not violated by requiring a permit holder to serve a 30-day suspension while awaiting his appeal hearing.

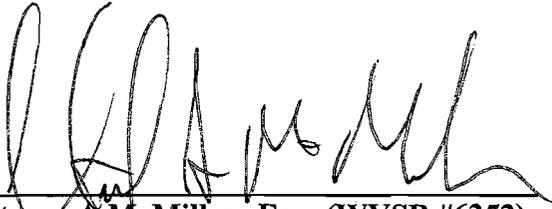
The Jockeys’ equal protection argument similarly lacks support from any case authorities. The Jockeys argue that the line drawn by the Legislature distinguishing licensees from permittees is a “distinction without a difference.” (Supp. Br. of Jockeys at 6) However,

they can offer nothing more than trivial similarities between occupational permits and racing association licenses. It defies logic to suggest that individual jockeys riding individual horses are similarly situated to the owners of the multi-million dollar business enterprises that produce the very racing products that enable the jockeys to race in the first place. Treating differently situated people differently creates no Equal Protection problem.

IV. CONCLUSION AND RELIEF REQUESTED

Despite being captured on video cheating and being found guilty of corruption, the Jockeys have successfully gamed the courts to continue racing with impunity for over two years. The common law right of racing associations to exclude corrupt players has been eviscerated here by the circuit court's unlawful injunctions. The judicial system has thus far utterly failed to uphold the law, the rules of civil procedure, the rights of non-parties, the integrity of racing, and the public good. The importance of fairness, transparency, and honesty in racing is of critical importance not only to the parties, but to the people of this State, who derive millions of dollars in tax revenues annually from racetracks. This appeal presents this Court with an opportunity to uphold the law, to correct egregious errors in the use of injunctions, and to restore the balance of rights struck by the Legislature to preserve the integrity of racing.

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



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Respectfully Submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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D/B/A CHARLES TOWN RACES AND SLOTS,
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ALEXIS RIOS-CONDE, JESUS SANCHEZ,
DALE WHITTAKER, LUIS PEREZ. and
TONY A. MARAGH,
Petitioners Below, Respondents,**

and

No.: 101503

**THE WEST VIRGINIA RACING
COMMISSION,
Respondent Below, Respondent,**

CERTIFICATE OF SERVICE

I, Stuart A. McMillan, do hereby certify that a true and exact copy of the foregoing **Supplemental Reply Brief of Appellant PNGI Charles Town Gaming, LLC** was hand delivered to the West Virginia Supreme Court Clerk and served to counsel by depositing the same postage prepaid in the United States Mail, this 22nd day of June, 2011, addressed as follows:

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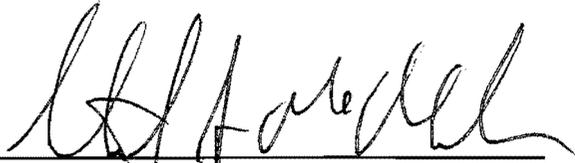
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