

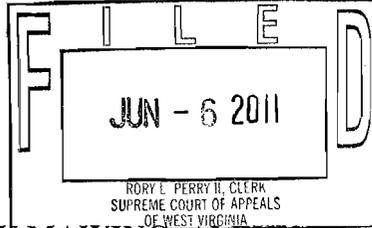
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 101503

**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,**

and

WEST VIRGINIA RACING COMMISSION,

Respondents.

**SUPPLEMENTAL BRIEF OF RESPONDENTS REYNOLDS,
MAWING, RIOS-CONDE, SANCHEZ, WHITTAKER,
PEREZ, AND MARAGH**

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I. Introduction

Respondents Lawrence Reynolds, Anthony Mawing, Alexis Rios-Conde, Jesus Sanchez, Dale Whittaker, Luis Perez, and Tony A. Maragh (collectively, “the Jockeys”), by counsel and pursuant to this Court’s Scheduling Order, hereby present their Supplemental Brief responding to Petitioner PNGI Charles Town Gaming, LLC d/b/a Charles Town Races and Slots’ Supplemental Brief. For the reasons discussed in greater detail below, the Circuit Court’s Order below should remain undisturbed.

II. Argument

Petitioner is not entitled to relief in this Court. Petitioner has waived its grounds for appeal, its appeal is untimely, and the statute upon which it relies is unconstitutional.

A. Petitioner has waived its grounds to appeal by failing to demonstrate that it made specific objections at the time of the ruling.

Petitioner did not preserve its objections below and may not raise them before this Court. Petitioner argues that, by handwriting the verbiage “objected to and approved as to form only” on the order form, it somehow raised a sufficient objection to the Temporary Restraining Order (“TRO”) such that it has not waived its objections regarding evidentiary hearings and bond. Pet’r’s Supplemental Br. at 5. This argument is incorrect. As this Court has stated,

To preserve an issue for appellate review, a party must articulate it with such sufficient distinctiveness to alert a circuit court to the nature of the claimed defect. The rule in West Virginia is that parties must speak clearly in the circuit court[,] on pain that, if they forget their lines, they will likely be bound forever to hold their peace . . . It must be emphasized that the contours for appeal are shaped at the circuit court level by setting forth with particularity and at the appropriate time the legal ground upon which the parties intend to rely.

Hanlon v. Logan Cnty. Bd. of Educ., 201 W. Va. 305, 315, 496 S.E.2d 447, 457 (1997) (quoting *State v. Browning*, 199 W. Va. 417, 425, 485 S.E.2d 1, 9 (1997)); *see also* Syl. pt. 1, *Maples v. W. Va. Dep’t. of Commerce, Div. of Parks and Recreation*, 197 W. Va. 318, 475 S.E.2d 410

(1996) (“A litigant may not silently acquiesce to an alleged error . . . and then raise that error as a reason for reversal on appeal.”); *State v. LaRock*, 196 W. Va. 294, 316, 470 S.E.2d 613, 635 (1996) (“One of the most familiar procedural rubrics in the administration of justice is the rule that the failure of a litigant to assert a right in the trial court likely will result in the imposition of a procedural bar to an appeal of that issue.” (internal quotation marks omitted) (quoting *State v. Miller*, 194 W. Va. 3, 17, 459 S.E.2d 114, 128 (1995))). Petitioner’s handwritten generic objection failed to articulate any claim that bond was required, that affirmative evidence by testimony was required, that a statute barred the grant of a stay, or any other meaningful objection. Further, Petitioner has not even averred, much less shown by transcript,¹ that it objected on any of the grounds it now asserts. By failing to provide the Court below with an objection of “sufficient distinctiveness to alert [the] circuit court to the nature of the claimed defect,” Petitioner has waived its objections to the injunction below and is “bound forever to hold [its] peace.” *Hanlon*, 201 W. Va. at 315, 496 S.E.2d at 457. For that reason, Petitioner is not entitled to relief.

B. Petitioner’s waiver cannot be cured by the plain error doctrine because the Court’s ruling below was fundamentally fair.

Petitioner is not entitled to plain error review. As this Court has held,

An unpreserved error is deemed plain and affects substantial rights only if the reviewing court finds the lower court skewed the fundamental fairness or basic integrity of the proceedings in some major respect. In clear terms, the plain error rule should be exercised only to avoid a miscarriage of justice. The discretionary authority of this Court invoked by lesser errors should be exercised sparingly and should be reserved for the correction of those few errors that seriously affect the fairness, integrity, or public reputation of the judicial proceedings.

¹ Petitioner has not provided this Court with a transcript of either hearing below. Respondents raised that failure in their prior brief, and Petitioner addressed this issue in its Supplemental Brief, claiming that the record on appeal is adequate. Pet’r’s Supplement Br. at 4. Petitioner is wrong—the record is not adequate for review and the waiver issue vividly illustrates that point. A transcript would show definitively whether Petitioner made or waived the necessary specific objection and whether evidence was offered, whether by proffer or by live witness testimony. In fact, Petitioner waived these objections, and it was Petitioner’s burden to provide these transcripts under the rules in effect at the time of the Petition for Appeal. It failed to do so.

Syl. pt. 7, *LaRock*, 196 W. Va. at 299, 470 S.E.2d at 618; *see also City of Philippi v. Weaver*, 208 W. Va. 346, 350, 540 S.E.2d 563, 567 (2000) (stating that “courts should be very cautious in recognizing plain error”). Under this well-recognized standard, the injunctions granted below do not constitute plain error.

As the limited record before this Court shows, both Judge Egnor and Judge Zakaib thoroughly reviewed the rights of the Jockeys and Petitioner’s stated intent to bar the Jockeys from racing regardless of the Court’s directives to the West Virginia Racing Commission (“the Commission”). Both Judges concluded, on the complete record before them, that Petitioner should be enjoined because the Jockeys otherwise would suffer irreparable harm. The Jockeys have shown that allowing Petitioner to exclude them as the result of the charges brought against them (and which they contest) would result in the Jockeys effectively being punished without meaningful review. Two Circuit Court Judges have agreed with the Jockeys. Petitioner has failed to show or even allege that it has been harmed in any practical way. Further, Petitioner fails to demonstrate that the Court’s rulings below in regard to enjoining Petitioner affected the fairness, integrity, or public reputation of the proceedings below. *See* Pet’r’s Supplemental Br. at 6. Under all the circumstances, the Courts’ rulings below were fundamentally fair, and thus the plain error doctrine is inapplicable. Because there is no compelling reason to invoke the plain error rule, *City of Philippi*, 208 W. Va. at 350, 540 S.E.2d at 567, Petitioner cannot use that doctrine to avoid the consequences of its waiver below. “[I]n general, the law ministers to the vigilant, not to those who sleep on their rights.” *Id.* (internal quotation marks omitted).

C. Petitioner’s appeal was not timely filed because the true ruling it seeks to overturn is the initial ruling of Judge Egnor, entered over a year prior to Petitioner’s appeal.

Petitioner’s appeal was untimely filed. Petitioner argues that Judge Egnor’s injunction expired of its own accord, and that Judge Zakaib entered an entirely new injunctive order.

Petitioner hopes to avoid the consequences of its long and conscious delay in seeking review of Judge Egnor's ruling. However, as the record before this Court shows, Petitioner found the question of whether Judge Egnor's order was still in place sufficiently unclear to seek a declaration from Judge Zakaib that the Order had expired. Further, Judge Zakaib's Order makes clear that he is *extending* the prior injunction issued by Judge Egnor, not granting a new one.

A petitioner to this court may not artfully identify a later appealable order as the order it seeks to overturn when it truly appeals an earlier order for which the time for appeal has run. *See City of Philippi*, 208 W. Va. at 349, 540 S.E.2d at 566. In that case, the Court looked behind the petitioner's claim that it was appealing a later-entered order, examining the substance of the petitioner's argument to reveal that the petitioner actually sought to reverse an earlier order for which the time to appeal had run. *See id.* The Court explained:

While the Appellant suggests that the July 14, 1999, modification order could technically qualify as the order appealed from, thereby extending the periods within which to file the notice of intent to appeal and the appeal, such contention is unconvincing. The Appellant is not disputing the elements of the modification of sentence contained in the July 14, 1999, order, but is rather appealing the alleged errors of the lower court encompassed within the June 11, 1999, order. It is the conviction the Appellant is seeking to reverse on appeal, not the authorization to serve days of work release in exchange for days of confinement. Utilization of the July 14, 1999, order to establish the appellate time constraints would be inappropriate.

Id. Similarly, in this case Petitioner has purported to appeal a later order in a vain attempt to avoid the consequences of waiting over a year to appeal the injunction. Every argument Petitioner raises is applicable to Judge Egnor's earlier Order, and Petitioner simply bootstraps those arguments onto Judge Zakaib's Order. But Judge Zakaib simply extended Judge Egnor's original Order on the same grounds and rationale as that applied by Judge Egnor.

Petitioner's argument on this point is disingenuous. Petitioner makes clear in its Petition for Appeal that it *consciously chose* not to challenge Judge Egnor's ruling while it attempted to

litigate a different case regarding its claimed common-law right to exclude permit holders from its premises, and while the Jockeys pursued the appeal to which they were undoubtedly entitled. Petitioner admits that “[it] decided not to challenge the Court’s TRO in the present case until the other case was decided. Moreover, [Petitioner] chose not [to] take any independent action until the Racing Commission held its hearings before an administrative law judge.” Pet. for Appeal at 5. By later attempting to make Judge Zakaib’s Order the ruling at issue in this matter rather than Judge Egnor’s, the Petitioner seeks to take advantage of the unfolding of events it perceives to be in its favor—the resolution of the other pending case and the ruling on the Jockeys’ appeal to the Commission. This gamesmanship is inappropriate, and under the holding of *City of Philippi v. Weaver*, this appeal should be deemed untimely.

D. West Virginia Code § 19-23-17 impermissibly treats similarly situated entities differently, violating the Jockeys’ right to equal protection of the law.

Petitioner argues that, in regard to West Virginia Code § 19-23-17, the Jockeys and Petitioner are not similarly situated, and so the law is entitled to treat them differently. Even a cursory review of the situation shows this assertion to be incorrect.

Under § 19-23-17, the Jockeys and Petitioner are similarly situated in every meaningful way. *See* W. Va. Code § 19-23-17. First, neither the Jockeys nor Petitioner may engage in their chosen business without the permission of the Commission. Second, both are subject to discipline by the Commission. Third, both are entitled to appeal a disciplinary decision made by the Commission. The only relevant difference between Petitioner and the Jockeys in regard to Section 19-23-17 is that the statute provides that, when Petitioner is disciplined by the Commission, it receives an automatic stay of its punishment, but when the Jockeys are disciplined by the Commission, they are *never* entitled to a stay, regardless of how badly their

rights may have been violated. A clearer example of treating similarly situated entities differently is difficult to imagine.

Petitioner argues that it operates under a license, while the Jockeys operate under permits, making the two entities different. Pet'r's Supplemental Br. at 9. This is a distinction without a difference. Whether called a license or a permit, both documents are granted by the Commission and allow the holder to engage in the business of thoroughbred horse racing.

Because West Virginia Code § 19-23-17 treats similarly situated entities differently without a compelling state interest for doing so,² this statute violates the guarantee of equal protection embodied in the United States and West Virginia Constitutions. *See* U.S. Const. amend. XIV; W. Va. Const. art. III § 10.

E. West Virginia Code § 19-23-17 denies the Jockeys their constitutional right to due process, and Petitioner's reliance on *Hubel* is misplaced.

Petitioner argues that *Hubel v. West Virginia Racing Commission*, 376 F. Supp. 1 (S.D. W. Va. 1974), supports the premise that barring any stay of discipline pending appeal of the Racing Commission is compatible with due process. This is a serious misreading of *Hubel*.

Hubel holds that, where a permit holder has been sanctioned by racing officials at the track and is guaranteed a hearing of an appeal of that sanction by the Commission within ten to thirty days, it is not a due process violation to bar a stay of discipline in this short interim. As the Court explained:

On its face, Rule 804 is indeed broad in its sweep. It is conceivable that in some circumstances the rule could be a mechanism for accomplishing suspensions of racing licenses without ever affording the opportunity for a hearing. As an example of the injustice that could result, the stewards of a race track could summarily suspend a trainer for a violation of Rules 793 or 795(b), and the Commission, by refusing to stay the suspension pursuant to Rule 804 pending appeal, and by further delaying or protracting a determination of the appeal, could

² Petitioner chooses to insist only that the Jockeys and Petitioner are situated differently, and offers no state interest (compelling or otherwise) for the statute's different treatment of the Jockeys and Petitioner.

effectively thwart the trainer's chances of refuting the charges. The potential harm that could be inflicted upon a trainer in this circumstance is obvious.

The broad sweep of Rule 804 is limited, however, by the next succeeding rule. Rule 805 of the West Virginia Racing Commission provides: [upon] receipt of the written demand for such hearing, in accordance with Rule 803, a time and place not less than ten (10) nor more than thirty (30) days thereafter will be set by the Commission. Any scheduled hearing may be continued by the Racing Commission upon its own motion or for good cause shown by the person demanding the hearing. *When these two rules are read together, it is clear that the requirements of due process are satisfied.*

Id. at 5 (citing W. Va. Code § 19-23-16(d)) (emphasis added) (internal quotation marks omitted).

Hubel thus supports the Jockeys' position in this matter, because when the Jockeys seek an appeal from the Commission's decision, they have no analogue to Rule 805 which guarantees them a speedy enough determination of their appeal that the appeal remains meaningful.³

Accordingly, Petitioner's reliance on *Hubel* is misplaced. Section 19-23-17 violates the Jockeys' constitutional right to due process of law. *See* W. Va. Const. art. III § 10.

III. Conclusion

Petitioner's untimely appeal is fatally flawed. Not only is the appeal untimely, but Petitioner failed to preserve its challenge by specifically objecting to the TRO before the Circuit Court. Moreover, to the extent Petitioner's claims are not waived, they are based on an unconstitutional statute. This Court should affirm the Order below.

³ An illuminating parallel may be drawn to the State Administrative Procedures Act, which maintains its constitutionality by addressing this problem in West Virginia Code § 29A-5-4(c). That Section allows a petitioner to apply to the Circuit Court for a stay of the agency's order, decision, or act. But for § 19-23-17, there would be no question of the propriety of Judge Zakaib's extension of Judge Egnor's injunction, for § 29A-5-4(c) would govern.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of June, 2011, the foregoing **SUPPLEMENTAL BRIEF OF RESPONDENTS REYNOLDS, MAWING, RIOS-CONDE, SANCHEZ, WHITTAKER, PEREZ, AND MARAGH** was served via the US Mail upon the following individuals and entities:

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