

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

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Kanawha County Civil Action No. 09-C-688
The Honorable Paul Zakaib, Jr.

RESPONSE TO NON-PARTY PNGI CHARLES TOWN
GAMING, LLC'S PETITION FOR APPEAL

Counsel for Respondents:

Benjamin L. Bailey (WVSB #200)
Christopher S. Morris (WVSB #8004)
Bailey & Glasser, LLP
209 Capitol St.
Charleston, WV 25301
Telephone: 304-345-6555
Facsimile: 304-342-1110

Counsel for Petitioner:

Stuart A. McMillan (WVSB #6352)
Brian M. Peterson (WVSB #7770)
Bowles Rice McDavid Graff & Love, LLP
600 Quarrier St.
PO Box 1386
Charleston, WV 25325
Telephone: 304-347-1110

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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, respectfully urge this Court to reject the Petition for Appeal of PNGI Charles Town Gaming, LLC (“the Race Track” or “Petitioner”). The Race Track’s appeal is untimely, tendered without a sufficient record, premised upon waived issues, and premised upon an unconstitutional statute which the Race Track lacks standing to challenge. For each of these independently sufficient reasons, the Court should reject this Petition for Appeal.

The case underlying this appeal is a nearly two-year saga in which the Jockeys have, time and again, been forced to litigate for a meaningful and constitutional right of appeal and to litigate for the right to continue to race while their legitimate and worthy grounds for appeal have been considered by the various tribunals below. The Petitioner’s attempts to make itself the sole arbiter of just which jockeys are allowed to ride at the Charles Town race track began in April 2009.

On April 16, 2009, the Jockeys were granted an injunction against the West Virginia Racing Commission (“the Racing Commission”), which enjoined the Racing Commission from enforcing an order of the Stewards at Charles Town suspending the Jockeys’ racing permits. The Circuit Court, Egnor, J., after finding that the initial proceedings resulting in the suspension order unconstitutionally denied the Jockeys the right of due process, issued what the court termed a temporary restraining order (“TRO”) and ordered that this TRO against the Racing Commission would expire “upon the conclusion of the de novo hearing before the West Virginia Racing Commission” Temporary Restraining Order, *Reynolds v. The West Virginia Racing Comm’n*, No. 09-C-688 (dated Apr. 16, 2009).

The same day the TRO against the Racing Commission was issued, however, the Race Track advised the Jockeys that it did not deem itself bound by the injunction and instead took the position that the Jockeys would be barred from racing at Charles Town regardless of Judge Egnor's order. Therefore, on the afternoon of April 16, 2009, the Jockeys requested and received a second TRO, this time against the Race Track. In that Order, the Circuit Court, Egnor, J., enjoined the Petitioner from barring the Jockeys from its track. This injunction would "expire[] upon the conclusion of the de novo hearing before the West Virginia Racing Commission . . . unless extended for good cause shown" Order, *Reynolds v. The West Virginia Racing Comm'n*, No. 09-C-688 (dated Apr. 16, 2009).

The Racing Commission held its *de novo* hearing on August 5-7 and September 21-22, 2009, and entered a final order against the Jockeys on May 21, 2010. That final order was appealed to the Kanawha County Circuit Court, and the appeal is now ripe and in the breast of that court.

Thirteen months passed from the entry of the injunctive order restraining the Petitioner. During this period, the Race Track was content to be restrained, as it explains in its Petition for Appeal. Petition, p. 5 ("CTR&S decided not to challenge the Court's TRO in the present case CTR&S chose not take any independent action until the Racing Commission held its hearings before an administrative law judge ").

On May 24, 2010, the Race Track filed a Motion to Confirm Expiration of Temporary Restraining Order with the Circuit Court of Kanawha County. The Jockeys filed a response to the Motion to Confirm Expiration and asked the court, in accord with the terms of Judge Egnor's original injunctive order, "to extend the injunctive relief previously granted through the pendency of [their] appeal of the underlying administrative action." Pet'rs./Pls.' Response to

PNGI's Motion to Confirm Expiration of the Temporary Restraining Order and Motion to Continue Injunctive Relief, at 1 (filed June 2, 2010) attached as Exhibit A; *see also id.* at 2 ("request[ing] that the Court continue the existing injunction"). On June 3, 2010, the Circuit Court, Zakaib, J., denied the Race Track's Motion to Confirm Expiration, incorporated by reference the findings and rulings of its April 16, 2009 Order, and extended the application of the existing injunction against the Race Track. The Race Track then filed the instant petition for appeal on September 20, 2010, nearly four months after Judge Zakaib's ruling and thirteen months after Judge Egnor's ruling.

For each and all of the independently sufficient reasons set forth in detail below, the Court should exercise its discretion to reject the Race Track's appeal.

II. ARGUMENT

A. **The Court should decline the Petition because it is more than a year late.**

As the Race Track points out, preliminary injunctions are immediately reviewable. Petition, p. 8-9 citing *State ex rel. McGraw v. Telecheck Serv., Inc.*, 213 W.Va. 438, 445, 582 S.E.2d 885, 892 (2003). The Race Track fails to point out, however, that "[n]o petition shall be presented for an appeal from . . . any judgment, decree or order, which shall have been entered more than four months before such petition is filed in the office of the clerk of the circuit court." W. Va. R. App. P 3(a).

A review of the procedural history of this matter shows that the injunction challenged by the Race Track issued on April 16, 2009, not June 3, 2010, as alleged by the Race Track. The Race Track states, and the Jockeys agree, that Race Track was first enjoined by Judge Egnor on April 16, 2009. See Petition, pp. 3-4. That order expressly provided that the injunction would "expire[] upon the conclusion of the de novo hearing before the West Virginia Racing

Commission . . . unless extended for good cause shown” Order, *Reynolds v. The West Virginia Racing Comm’n*, No. 09-C-688 (dated Apr. 16, 2009), attached to Petition (emphasis added). On May 24, 2010, the Race Track filed a “Motion to Confirm Expiration of Temporary Restraining Order.” The Jockeys opposed that Motion in their filing styled “Petitioners’/Plaintiffs’ Response to PNGI’s Motion to Confirm Expiration of Temporary Restraining Order and Motion to Continue Injunctive Relief.” Pet’rs./Pls.’ Response to PNGI’s Motion to Confirm Expiration of the Temporary Restraining Order and Motion to Continue Injunctive Relief, *Reynolds v. The West Virginia Racing Comm’n*, No. 09-C-688 (filed June 2, 2010) attached as Ex. A (emphasis added). That document did not request the issuance of a new injunction; rather it requested the extension of Judge Egnor’s original injunction against the track: “Petitioners . . . also move the Court to extend the injunctive relief previously granted through the pendency of Petitioners’ appeal of the underlying administrative injunction in this matter.” Ex. A, p. 1. In that document, the Jockeys argued and requested as follows:

. . . the present situation before the Court is nearly identical to that facing the Court on April 16, 2009: the Jockeys have filed an appeal from Commission decisions raising weighty and substantial constitutional issues in regard to their rights to ride in thoroughbred horse races, the Court has issued at least temporary injunctive relief against the Commission and is considering further injunctive relief upon proper hearing, and the Track has again indicated to this Court that it fully intends to bar the Jockeys from its premises and effectively bar them from racing regardless of whether this Court finds that they deserve appellate relief or not. Again the Track has determined that it, and not the Racing Commission or this Court, shall be the sole arbiter of who shall be allowed to race horses in Charles Town.

For all the reasons that made the issuance of the Court's initial issuance of injunctive relief against the Track proper, the Jockeys respectfully request that the Court continue the existing injunction against the Track until this case can be finally resolved and deny the Track's pending motion.

Id. at p. 2. Additionally, the language of Judge Zakaib’s Order confirms that it did not constitute a new injunction. In the June 3, 2010, Order, the Circuit Court “incorporate[d] by reference the

findings and rulings of its April 16, 2009, Order which previously granted injunctive relief to the [Jockeys] and against the Track.” Order, *Reynolds v. The West Virginia Racing Comm’n*, No. 09-C-688 (dated June 3, 2010). It is clear, therefore, that the injunction that the Race Track claims was issued contrary to statute and rule is the original injunction issued by Judge Egnor, not the mere extension of the time of effectiveness of that injunction granted by Judge Zakaib. As the very limited record before the Court shows,¹ Judge Egnor’s injunction remained in effect continuously from April 16, 2009. Consequently, the time for appeal of that injunction under Rule 3(a) expired four months after its issuance on April 16, 2009, on or about the middle of August 2009. Here the Race Track did not file its petition for appeal until September 20, 2010, over a year after the proscribed appeal period had expired. This Court will not entertain an untimely appeal, *see C&O Motors, Inc. v. W. Va. Paving, Inc.*, 223 W. Va. 469, 473, 677 S.E.2d 905 (2009), and the Race Track’s petition for appeal was filed over a year after the challenged injunction was issued. Accordingly, the Race Track’s petition for appeal is time-barred and should be denied.²

¹ As explained in section II.B below, the record before the Court is plainly inadequate for the prosecution and effective resolution of the appeal requested by the Petitioner.

² Even if this appeal were not barred by the West Virginia Rules of Appellate Procedure, this Court should deny the petition for appeal under the equitable doctrine of laches due to the Petitioner’s lack of diligence in pursuing its challenge to the injunction and the resulting prejudice to the Jockeys. The equitable doctrine of laches “is a delay in the assertion of a known right which works to the disadvantage of another, or such delay as will warrant the presumption that the party has waived his right.” *State ex rel. W. Va. Dep’t of Health & Human Res. v. Carl Lee H.*, 196 W. Va. 369, 374 (1996) (internal quotation marks omitted). “It has been held that the defense of laches is sustainable only on proof of two elements: (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.” *State ex rel. Smith v. Abbot*, 187 W. Va. 261, 264 (1992) (internal quotation marks omitted). Both of those elements are present in this case.

The Petitioner has displayed a lack of diligence in failing to challenge the TRO for over a year. Moreover, the Petitioner has admitted that it acquiesced in the April 16, 2009 TRO, stating that “[the Petitioner] decided not to challenge the Court’s TRO in the present case until the [action before Judge King regarding whether a track may exclude private parties] was decided.” Petition, p.5. That voluntary decision to acquiesce for over a year triggers the doctrine of laches because it “raise[s] a presumption of intent . . . to abandon or relinquish the right.” *Stuart v. Lake Washington Realty Corp.*, 141 W. Va. 627, 645 (1956) (internal quotation marks omitted); *see also Moore v. Starcher*, 167 W. Va. 848, 852 (1981) (holding that acquiescence to an order can operate to bar relief).

The Jockeys have suffered prejudice as a result of the Petitioner’s lack of diligence in challenging the TRO. For over a year, the injunction against the Petitioner has been in effect and the Jockeys were permitted to pursue their livelihood during the pendency of the administrative proceedings. Now that the Racing Commission has made

B. The Court should decline the Petition because the Race Track has failed to provide an adequate record to allow effective and meaningful review.

The West Virginia Rules of Appellate Procedure place upon the appellant or petitioner seeking review the burden of providing the Court with such materials and facts as are necessary “to enable the Supreme Court to decide the matters arising in the petition.” W. Va. R. App. P. 4(c). Generally, the necessary materials and facts include a transcript of the relevant proceedings below, but a transcript need not necessarily be submitted: “In lieu of filing all or part of the transcript of testimony the petitioner may file under Rule 4A, in which event he may rely on the facts stated in his petition.” W. Va. R. App. P. 4(c)(i). Rule 4A provides an “inexpensive and expeditious method of appeal,” but places a concomitant burden upon petitioner’s counsel:

In lieu of filing all or part of the transcript of testimony, the petitioner shall set out in the petition a statement of all facts pertinent to the issues he raises. The petition shall include a certificate by the petitioner’s attorney that the facts alleged are faithfully represented and that they are accurately presented to the best of his ability. The use of the abbreviated procedure, set forth in this Rule 4A, places the highest possible fiduciary duty upon a lawyer with regard to the court

W. Va. R. App. P. 4A(c).

The Race Track here seeks to appeal the entry of an injunction order against it, but has not provided this Court with a transcript of either the April 16, 2009, hearing at which the injunction was granted or the June 3, 2010, hearing at which this injunction was extended for good cause shown. Nor has the Race Track provided this Court with a certified recitation of the facts presented and arguments advanced at either hearing. The uncertified recitation of facts offered by the Race Track runs six pages, but provides little to no factual averment regarding either the injunction hearing or the hearing of the Race Track’s Motion to Confirm Expiration of

a final decision, and the Jockeys continue their appeal, the Petitioner is attempting to strip away that livelihood from the Jockeys. The injunction and the right to practice their trade has become a certainty upon which the Jockeys have relied during the long life of the heretofore-unchallenged injunction. Subjecting the Jockeys to an appeal of that injunction at this late date subjects them to unfair and economically-damaging uncertainty. It also strips them of the opportunity for a meaningful appeal, as discussed in greater detail below.

Judge Egnor's Order. In regard to Judge Egnor's hearing, the Race Track provides no averment of the argument or evidence adduced; in regard to Judge Zakaib's hearing the Race Track avers only that "[a]t 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." Petition, p. 7 (describing primarily the Jockeys' argument for a stay of the Commission's imposition of penalty, not the Race Track's request to confirm expiration of Judge Egnor's Order). The Petition, while noting that the Race Track was present by counsel at Judge Zakaib's hearing, fails to discuss whether any or all of the issues raised in this appeal were presented to the Circuit Court for consideration. Because "this Court will not . . . upon review consider assignments of error on points not passed upon in the court below," *Rader v. Campbell*, 134 W.Va. 485, 489, 61 S.E.2d 228, 230 (1949), the conduct of the hearings below, the opportunities presented to the Race Track at those hearings, and the arguments and proffers of counsel at those hearings are of paramount necessity to determine the issues raised in this appeal. In the absence of a hearing transcript or a detailed and certified recitation of the facts encompassing that hearing, this Court does not possess the necessary record to rule on the questions raised by the Race Track. Because the record before the Court is plainly inadequate to allow meaningful and effective review, the Court should reject the Petition for appeal.

C. The Court should decline the Petition because the Race Track has waived the argument that the Circuit Court failed to follow Rule 65(d) in issuing the injunction.

The Race Track may not raise an argument on appeal that it did not make before the Circuit Court; to allow otherwise would deprive the Circuit Court of the opportunity to correct any errors or omissions complained of on appeal. In the instant matter, the Race Track has failed to show that it asked either Judge Egnor or Judge Zakaib to set bond, has failed to show that it

made any argument to either Judge as to the amount of bond the Court should set based on the alleged harm the Race Track would suffer from an injunction, and has failed to show that it asked either Judge to hold an evidentiary hearing, even though the Race Track was given notice of, attended, and argued through counsel at both hearings.³

Where, on appeal, “the record fails to establish that the specific challenges now raised were presented to or addressed by the court below,” all alleged errors are waived on appeal. *Coleman v. Sopher*, 201 W.Va. 588, 601, 499 S.E.2d 592, 605 (1997); *see also* Syl. pt. 3, *Hudgins v. Crowder & Freeman, Inc.*, 156 W.Va. 111, 191 S.E.2d 443 (1972) (“Courts of record can speak only by their records, and what does not so appear does not exist in law.”). The justification for this rule is that parties are not permitted to ambush the Circuit Court by remaining silent below in not objecting to or asserting alleged errors and then arguing on appeal that the Circuit Court has erred. *See Mayhew v. Mayhew*, 205 W. Va. 490, 506, 519 S.E.2d 188, 204 (1999) (“Our law is clear in holding that, as a general rule, we will not pass upon an issue raised for the first time on appeal.”). Such tactics deny the Circuit Court the opportunity to remedy any errors in the first instance. As this Court has explained,

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. Our cases consistently have demonstrated that, in general, the law ministers to the vigilant, not to those who sleep on their rights. Recently, we stated in *State ex rel. Cooper v. Caperton*, 196 W.Va. 208, 216, 470 S.E.2d 162, 170 (1996): “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.” When a

³ To the best of counsel’s recollection, knowledge, and belief, the Petitioner in fact failed to raise any of these issues at the hearing before Judge Zakaib. At this point, Counsel is in the same position as the Court: there is no reliable record presented by the Petitioner to show which issues were raised in the hearing below and which were not. Certainly, the paper record pointed to by the Petitioner does not show that these issues were raised before Judge Zakaib, and Petitioner has not argued otherwise or represented in its Petition that it asked the Circuit Court to set a bond or to hold an evidentiary hearing. Because the Petitioner did not provide either a transcript or a detailed, certified recitation of the facts pursuant to Rules 4(c) and 4A(c) of Appellate Procedure, this Court is being asked to review the petition for appeal without knowing what occurred at the injunction hearing and without the ability to ascertain independently the factual basis for the Circuit Court’s decision to issue the injunction.

litigant deems himself or herself aggrieved by what he or she considers to be an important occurrence in the course of a trial or an erroneous ruling by a trial court, he or she ordinarily must object then and there or forfeit any right to complain at a later time. The pedigree for this rule is of ancient vintage, and it is premised on the notion that calling an error to the trial court's attention affords an opportunity to correct the problem before irreparable harm occurs. There is also an equally salutary justification for the raise or waive rule: It prevents a party from making a tactical decision to refrain from objecting and, subsequently, should the case turn sour, assigning error (or even worse, planting an error and nurturing the seed as a guarantee against a bad result). In the end, the contemporaneous objection requirement serves an important purpose in promoting the balanced and orderly functioning of our adversarial system of justice.

State v. LaRock, 196 W. Va. 294, 316, 470 S.E.2d 613, 635 (1996) (citations omitted) (some internal quotation marks omitted).

The record presented to the Court by the Race Track shows only that the Race Track had ample opportunity before, during, and after Judge Egnor's and Judge Zakaib's hearings, at both of which it was represented by counsel, to challenge the Jockeys' arguments and to ask the Circuit Court to require the presentation of evidence or the security of a bond, or, alternatively, to postpone ruling on the requested injunction until some further evidentiary hearing could be held. The record before the Court is devoid of any indication that the Race Track ever availed itself of these opportunities. Consequently, because the Race Track has failed to present a record showing that Race Track raised its Rule 65 arguments below, the Court should reject Petitioner's appeal.

D. The Court should deny the Petition because its primary claim is based upon an unconstitutional statute.⁴

Race Track argues that W. Va. Code § 19-23-17 provides that a court may *never* stay the execution of a permit suspension pending appeal—and on its face, the statute would appear to say as much. The statute provides in relevant part that *permit* holders are *never* entitled to a stay,

⁴ Oddly enough, the Petitioner's reliance on this statute represents in the abstract the only viable reason for this Court to take up this case: to review this statute and declare it unconstitutional. However, as explained below in Section II.E, the Petitioner lacks the standing to bring such a claim.

stating 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 (emphasis added). But the statute also provides that *license* holders shall *always* receive a stay as a matter of course: “execution of a decision of suspension or revocation of a license *shall be stayed.*” *Id.* (emphasis added). The Jockeys and other workers at race tracks—the human beings—are permit holders; the tracks themselves—the large corporate interests—are licensees. This statute does not support the Petition for Appeal because it is unconstitutional; Section 19-23-17 violates due process by depriving the Jockeys and others like them of a meaningful opportunity to appeal the suspension of their licenses and also violates their right to equal protection by treating those with licenses (that is, businesses like the Race Track) more favorably than those with permits (that is, people like the Jockeys), with no rational justification for doing so.⁵

First, Section 19-23-17 is unconstitutional because that provision, if applied, would deprive the Jockeys of procedural due process. By automatically denying permit holders such as the Jockeys with the opportunity to seek a stay of a decision to suspend or revoke their permits during the pendency of an appeal, Section 19-23-17 deprives them of a meaningful appeal. This Court has recognized that “it is a fundamental requirement of due process to be given the opportunity to be heard *at a meaningful time and in a meaningful manner.*” *Hutchinson v. City of Huntington*, 198 W. Va. 139, 154, 479 S.E.2d 649, 664 (W. Va. 1996) (emphasis added). However, as noted below, jockeys are paid only when they race. A thirty-day suspension would, in every case, be completed by the time any rider was able to perfect and complete an administrative appeal of a suspension order issued by the Commission. By preventing permit holders from ever obtaining a stay, Section 19-23-17 would, if applied to the Jockeys, remove

⁵ Moreover, apart from the statute’s unconstitutionality, it conflicts with the State Administrative Procedure Act, which provides that an appellant may apply to the Circuit Court for a stay pending appeal. See W. Va. Code § 29A-5-4.

their ability to be heard in a meaningful time and in a meaningful manner, denying their right to procedural due process.

Section 19-23-17 also violates equal protection by treating two similarly-situated groups differently: license holders and permit holders. Statutes may not treat similarly-situated groups not part of a protected or quasi-protected class differently from one another without there being a rational basis for doing so. That is, the different treatment of those groups must be rationally related to a legitimate governmental purpose. *See Murphy v. E. Am. Energy Corp.*, 224 W. Va. 95, 101 n.6, 680 S.E.2d 110, 116 n.6 (2009). There is no legitimate governmental purpose behind granting an automatic stay to one group (license holders like the Race Track) while at the same time denying that stay to another (permit holders like the Jockeys). Why are large corporate license holders more entitled to meaningful appellate review than permit holders? Such inequitable and irrational treatment violates equal protection as well as fundamental principles of fairness.

Because W. Va. Code § 19-23-17 is unconstitutional, the Race Track's desired appeal to seek its enforcement is inappropriate. Accordingly, this Court should deny the Petition for Appeal.

E. The Court should deny the Petition because the Race Track lacks standing to bring its primary claim in this appeal.

Race Track's first assignment of alleged error is that the court below "committed a clear error of law by entering a stay of the Racing Commission's order even though W. Va. Code § 19-23-17 expressly prohibits such a stay." Petition, p. 8. It is a legal commonplace that a party, to seek redress of its purported grievances in a court of law, must have standing to bring a claim. In regard to appellate claims, the West Virginia Constitution, Article VIII, Section 3, "requires that a litigant have 'standing' to challenge the action sought to be adjudicated on appeal." *Guido*

v. Guido, 202 W.Va. 198, 202, 503 S.E.2d 511, 515 (1998). As this Court has explained, appellate standing

is comprised of three elements: First, the party must have suffered an “injury-in-fact”—an invasion of a legally protected interest. Second, there must be a causal connection between the injury and the conduct forming the basis of action. Third, it must be likely that the injury will be redressed through a favorable decision of the court.

Id. (citation omitted). The Race Track lacks standing to bring a claim based on an alleged violation of W. Va. Code § 19-23-17 because the portion of that statute relied upon protects no interest of the Race Track and because there is no causal connection between the Race Track’s alleged injury and the ruling of the Court below in regard to this statute.

Instructive regarding standing here is the case of *State v. Brandon B.*, 218 W.Va. 324, 624 S.E.2d 761 (2005). In *Brandon B.*, the West Virginia Department of Health and Human Resources (“WVDHHR”), a non-party, appealed a circuit ruling regarding the disposition and adjudication of two minors. *Id.* at 328, 765. The minors contended that the WVDHHR lacked standing to bring the appeal, arguing that the minors were in agreement with the results in the Circuit Court and that the WVDHHR, as a nonparty, had no appellate recourse. *Id.* This Court disagreed, noting that the statutory scheme under which the minors were adjudicated included the WVDHHR by requiring it to develop permanency plans for the juveniles, expend its funds to provide services to the juveniles, assume custody of the juveniles, and to participate in multi-disciplinary treatment teams established for the juveniles. *Id.* at 329, 766. Given that the application of the statutes at issue by the Court below created injury in fact to WVDHHR, this Court properly found that WVDHHR had standing to bring its appeal.

In the instant matter, the entity most closely analogous to WVDHHR in *Brandon B.* is the West Virginia Racing Commission. The Jockeys have no doubt that the Commission, having had its suspension of the Jockeys stayed by Judge Egnor and extended by Judge Zakaib, would

have standing to appeal that decision. The Race Track, however, is like the WVDHHR in *Brandon B.* only in that it is a nonparty. The decision of the circuit court below to stay the imposition of the Commission's suspension creates no injury in fact to the Race Track—in fact, that decision to stay the Commission's suspension injures, if any entity, only the Commission, and the Commission has chosen not to appeal the Circuit Court's ruling. Of course, the situation would be different had the Race Track been sanctioned by the Commission and had the court below chosen not to apply Section 19-23-17's automatic stay provision as to licenseholders. Then, and only then, would the Race Track be able to demonstrate proper standing to appeal the court's application of the statute. This is not the case, and because the Race Track has shown no injury-in-fact from the Circuit Court's rulings regarding the statute, the Race Track lacks standing to bring the primary claim it raises on appeal.

Further, the Race Track has not shown and cannot show that the Circuit Court's determination not to apply Section 19-23-17 to the Jockeys is a proximate cause of any injury to the Race Track. All of the injury alleged by the Race Track flows not from the Circuit Court's rulings regarding Section 19-23-17, but instead from the Race Track's claimed common-law right to exclude the Jockeys from its premises and alleged deficiencies in the process by which the injunction at issue was granted.

Accordingly, the Race Track lacks standing to bring its primary claim raised in this appeal. This Court should therefore deny the Petition.

III. CONCLUSION

The foregoing shows that granting review of the Race Track's appeal would be improvident. The Race Track is attempting to appeal an injunction that was granted against it in April 2009, and it has filed its Petition a year too late. Moreover, the Race Track has utterly failed to meet its burden of providing this Court with an adequate record upon which to judge the

validity of the Race Track's claims. On this front, it is more than a little presumptuous of the Race Track to ignore the Rules of Appellate Procedure relating to the provision of the record and then ask this Court to rule in a vacuum on the propriety of its claims. Of course, by failing to show in the limited record provided that it raised the issues complained of below, the Race Track has waived each and every claim for which it seeks review. When bundled with the unconstitutionality of the statute upon which the Race Track bases its primary claim and the Race Track's lack of standing even to challenge that statute, all these issues strongly urge denial of the Petition for Appeal.

Beyond these meaningful and important legal reasons, the Race Track's appeal should also be denied because it is, simply, the good and fair thing to do. The Jockeys have appealed and are appealing the disciplinary action levied upon them in violation of the constitutional rights and have made substantial progress in clearing their names. The Race Track would prefer to ignore this process and, rather than letting it run its course, appoint itself judge, jury, and executioner as to the Jockeys' racing careers.

As a matter of law and of fundamental fairness, the Court should deny the Petition for Appeal. It is this denial that the Jockeys request.

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



Benjamin L. Bailey (WVSB 200)
Christopher S. Morris (WVSB 8004)
Bailey & Glasser LLP
209 Capitol Street
Charleston, WV 25301
(304) 345-6555
(304) 342-1110 (facsimile)

EXHIBITS

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