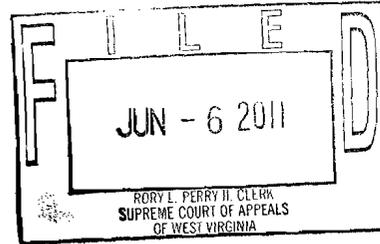


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**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**

**THE WEST VIRGINIA RACING COMMISSION,**

**Respondent below/Respondent.**

---

**FROM THE CIRCUIT COURT OF KANAWHA COUNTY  
THE HONORABLE PAUL ZAKAIB, JR.  
CIVIL ACTION 09-C-688**

---

**SUPPLEMENTAL RESPONSE BRIEF OF THE WEST VIRGINIA  
RACING COMMISSION**

**DARRELL V. McGRAW, JR.  
ATTORNEY GENERAL**

**KELLI D. TALBOTT  
DEPUTY ATTORNEY GENERAL  
ANTHONY D. EATES II  
ASSISTANT ATTORNEY GENERAL  
State Capitol, Room E-26  
Charleston, WV 25305  
Phone: (304) 558-2021**

---

**TABLE OF CONTENTS**

I. INTRODUCTION ..... 1

II. ARGUMENT ..... 5

    A. A LICENSED WEST VIRGINIA RACETRACK IS ANSWERABLE TO THE RACING COMMISSION WHEN IT SEEKS TO EJECT A RACING COMMISSION PERMIT HOLDER INASMUCH AS PERMIT HOLDER EJECTMENTS ARE SUBJECT TO THE PLENARY POWER OF THE RACING COMMISSION AND THE COMMISSION'S AUTHORITY UNDER 178 W. VA. C.S.R. 1, § 4.7. .... 5

    B. WEST VIRGINIA CODE § 19-23-17 WHICH PROVIDES THAT COMMISSION PERMIT SUSPENSION OR REVOCATION DECISIONS SHALL NOT BE STAYED PENDING A JUDICIAL DETERMINATION IS CONSTITUTIONAL OR CAN BE CONSTRUED BY THIS COURT TO SUSTAIN ITS CONSTITUTIONALITY. .... 22

III. CONCLUSION ..... 29

## TABLE OF AUTHORITIES

### CASES:

<i>Appalachian Power Company v. State Tax Department</i> , 195 W. Va. 573, 466 S.E.2d 424 (1995) .....	21
<i>Barry v. Barchi</i> , 443 U.S. 55 (1979) .....	5, 10, 21
<i>Bellucci v. Commonwealth of Pennsylvania, State Horse Racing Comm'n</i> , 445 A.2d 865 (Pa. Commw. Ct. 1982) .....	13
<i>Bowers v Wurzburg</i> , 205 W. Va. 450, 519 S.E.2d 148 (1999) .....	23
<i>Catrone v. State Racing Commission</i> , 459 N.E.2d 474 (Mass. App. Ct. 1984) .....	15
<i>Commission on Medical Discipline v. Stillman</i> , 435 A.2d 747 (Md. 1981) .....	24
<i>Cox v. National Jockey Club</i> , 323 N.E.2d 104 (Ill. App. Ct. 1974) .....	8
<i>Dailey Gazette Co., Inc. v. Caryl</i> , 181 W. Va. 42, 280 S.E.2d 209 (1989) .....	23
<i>Evans v. Arkansas Racing Commission</i> , 606 S.W.2d 578 (Ark. 1980) .....	14
<i>Flynn v. Board of Registration in Optometry</i> , 67 N.E.2d 846 (Mass. 1945) .....	25
<i>Foxboro Harness v. State Racing Commission</i> , 674 N.E.2d 1322 (Mass. App. Ct. 1997) .....	16
<i>Garifine v. Monmouth Park Jockey Club</i> , 148 A.2d 1 (N.J. 1959) .....	17
<i>Greenburg v. Hollywood Turf Club</i> , 7 Cal. App. 3d 968 (Cal. Ct. App. 1970) .....	9
<i>Gury v. Board of Public Accountancy</i> , 474 N.E.2d 1085 (Mass. 1985) .....	25
<i>Hubel v. West Virginia Racing Commission</i> , 376 F. Supp. 1 (S.D. W. Va.), <i>aff'd</i> , 513 F.2d 240 (4th Cir. 1974) .....	5, 25
<i>Jacobson v. New York Racing Association, Inc.</i> , 305 N.E.2d 765 (N. Y. 1973) .....	9

<i>Morningstar v. Black and Decker Manufacturing Co.</i> , 162 W. Va. 857, 253 S.E.2d 666 (1979) .....	19, 20
<i>Morrison v. California Horse Racing Board</i> , 252 Cal. Rptr. 293 (Cal. Ct. App. 1988) .....	15
<i>Norwood v. Horney</i> , 853 N.E.2d 1115 (Ohio 2006) .....	27
<i>Pernalski v. Illinois Racing Board</i> , 692 N.E.2d 773 (Ill. App. Ct. 1998) .....	14
<i>PNGI Charles Town Gaming, LLC v. West Virginia Racing Commission, et al.</i> , Nos. 100098 and 100099 .....	2, 17
<i>Pundy v. Department of Professional Regulation</i> , 570 N.E.2d 458 (Ill. App. Ct. 1991) .....	25
<i>Smith v. West Virginia Human Rights Commission</i> , 216 W. Va. 2, 602 S.E.2d 445 (2004) .....	17, 21
<i>Smothers v. Lewis</i> , 672 S.W.2d 62 (Ky. 1984) .....	27
<i>Solimeno v. State Racing Commission</i> , 509 N.E.2d 1167 (Mass. 1987) .....	14
<i>State ex rel. Kassabian v. Board of Medical Examiners</i> , 235 P.2d 327 (Nev. 1951) .....	24
<i>State ex rel. Morris v. West Virginia Racing Commission</i> , 133 W. Va. 179, 55 S.E.2d 263 (1949) .....	5, 12
<i>State ex rel. Van Nguyen v. Berger</i> , 199 W. Va. 71, 483 S.E.2d 71 (1996) .....	22
<i>State v. Hochhausler</i> , 668 N.E.2d 457 (Ohio 1996) .....	26
<i>Tillis v. Wright</i> , 217 W. Va. 722, 619 S.E.2d 235 (2005) .....	23
<i>UMWA by Trumka v. Kingdon</i> , 174 W. Va. 330, 325 S.E.2d 120 (1984) .....	23
<i>Wilkerson v. Waterford Park, Inc.</i> , Civil Action No. 3972, (Cir. Ct. Hancock Co. 1968), <i>aff'd without opinion</i> , Sup. Ct. App. W. Va., cert. denied, 396 U.S. 906 (1969) .....	17, 18
<i>Willis v. O'Brien</i> , 151 W. Va. 628, 153 S.E.2d 178 (1967) .....	27

*Wood v. Leadbitter*, 13 M.&W. 838, 153 Eng. Rep. 351 (Ex. 1845) ..... *passim*

**CONSTITUTIONAL PROVISIONS:**

W. Va. Const. art. VIII, § 13 ..... 19, 20

**STATUTES:**

W. Va. Code § 2-1-1 ..... 19, 20

W. Va. Code §§ 19-23-1 *et seq.* ..... 6

W. Va. Code § 19-23-1(a) ..... 5

W. Va. Code § 19-23-2(a) ..... 5, 9

W. Va. Code § 19-23-3(7) ..... 6

W. Va. Code § 19-23-3(17) ..... 10

W. Va. Code § 19-23-6 ..... 5

W. Va. Code § 19-23-6(18) ..... 6, 7

W. Va. Code § 19-23-17 ..... *passim*

W. Va. Code § 29A-5-4(c) ..... 22, 23

**OTHER:**

178 W. Va. C.S.R. 1, Thoroughbred Racing Rule (July 10, 2011) ..... 2

178 W. Va. C.S.R. 1, Thoroughbred Racing Rule (April 6, 2007) ..... 2

178 W. Va. C.S.R. 1, Thoroughbred Racing Rule (June 7, 1985) ..... 12

178 W. Va. C.S.R. 1, § 2 (2007) ..... 12

178 W. Va. C.S.R. 1, § 2.7 (2007) ..... 11

178 W. Va. C.S.R. 1, § 2.10 (2007) ..... 11

178 W. Va. C.S.R. 1, § 4.7 (2007) ..... *passim*

178 W. Va. C.S.R. 1, § 4.8 (1985) .....	12
178 W. Va. C.S.R. 1, § 8.37 (2007) .....	7
178 W. Va. C.S.R. 1, § 8.4 (2007) .....	7
178 W. Va. C.S.R. 1, § 8.8 (2007) .....	7
178 W. Va. C.S.R. 1, § 8.9 (2007) .....	7
178 W. Va. C.S.R. 1, § 10 (2007) .....	11
178 W. Va. C.S.R. 1, § 10.19 (2007) .....	16
178 W. Va. C.S.R. 1, § 6.1 (July 10, 2011) .....	16, 22
178 W. Va. C.S.R. 1, § 6.2 (July 10, 2011) .....	16
178 W. Va. C.S.R. 1, § 43.1 (2007) .....	11
1971 Rules of Racing, Adm. Reg. 19-23, Series 1, § 60 .....	13
Enr. Comm. Sub. S.B. 177, § 64-7-3(a) (W. Va. Mar. 12, 2011) .....	22
<a href="http://apps.sos.gov/adlaw/files/rulespdf/178-01.pdf">http://apps.sos.gov/adlaw/files/rulespdf/178-01.pdf</a> .....	22
Liebman, Bennett, <i>The Supreme Court and Exclusions by Racetracks</i> , 17 Vill. Sports & Ent. L.J. 421(2010) .....	19
W. Va. R. Pro. Adm. Appeals, Rule 6(d) .....	25

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**

**THE WEST VIRGINIA RACING COMMISSION,**

**Respondent below/Respondent.**

---

**FROM THE CIRCUIT COURT OF KANAWHA COUNTY  
THE HONORABLE PAUL ZAKAIB, JR.  
CIVIL ACTION 09-C-688**

---

**SUPPLEMENTAL RESPONSE BRIEF OF THE WEST VIRGINIA  
RACING COMMISSION**

**I.**

**INTRODUCTION**

The West Virginia Racing Commission, by counsel, Kelli D. Talbott, Deputy Attorney General, and Anthony D. Eates II, Assistant Attorney General, responds to the Supplemental Brief of Appellant PNGI Charles Town Gaming, LLC, pursuant to this Court's March 31, 2011 Order.<sup>1</sup>

---

<sup>1</sup> This response does not contain a recitation of the procedural history and the pertinent facts. The Racing Commission's October 20, 2010 response to the petition for appeal in this matter contains this information.

This appeal centers on the question of the scope of authority of a licensed racetrack to eject a person holding an occupational permit issued by the Commission without any check, balance, or review by the Commission. In essence, the fundamental question in this appeal is who ultimately controls thoroughbred racing in the State of West Virginia -- the Racing Commission or the racetracks that are licensed by the Commission to conduct racing and pari-mutuel wagering? Moreover, this appeal raises the question as to what it means to have a Racing Commission-issued occupational permit allowing the permit holder to be a jockey, a thoroughbred owner, a thoroughbred trainer, etc., on a licensed racetrack. Can the track, through a management ejection, effectively “revoke” a person’s State-issued racing occupational permit without any review by the Racing Commission?

The Petitioner argues that it has an unfettered common law right to eject a permit holder without a review by the Racing Commission. The Racing Commission contends that the Petitioner’s ability to eject a permit holder is subject to the plenary authority of the Racing Commission and review by the Racing Commission under 178 W. Va. C.S.R. 1, § 4.7., which gives ejected permit holders the right of appeal to the Racing Commission.<sup>2</sup>

The extent of a licensed West Virginia racetrack’s property right to eject Racing Commission permit holders was placed before this Court in appeals filed by the Racing Commission and three permit holders on January 29, 2010 in the matter of *PNGI Charles Town Gaming, LLC v. West Virginia Racing Commission, et al.*, Nos. 100098 and 100099. In those appeals, the Racing

---

<sup>2</sup> The Commission cites the pertinent section of its Thoroughbred Racing Rule (effective April 6, 2007) that is in effect as it files this brief. However, a new Thoroughbred Racing Rule will go into effect on July 10, 2011, before the conclusion of this case. In the new Rule, the provision giving permit holders the right to appeal an ejection by the track to the Racing Commission is contained verbatim in § 6.1. Therefore, the operative section of the Rule remains intact.

Commission and three permit holders sought reversal of an order entered by the Honorable Charles E. King, Kanawha County Circuit Court, in which Judge King held that the racetrack had an unfettered right to eject those who hold Racing Commission-issued permits to come onto the racetrack and engage in their racing-related occupations without any right to a hearing or any other review by the Racing Commission. On March 30, 2010, this Court refused to hear the appeals of Judge King's order.

In contrast, Judges L. D. Egnor, Jr. (sitting for Judge Paul Zakaib, Jr.) and Judge Zakaib, acting in this case below, refused to allow the Petitioner to eject the jockey Respondents pending disposition of the Racing Commission's administrative hearing proceedings and pending disposition of the jockeys' Circuit Court appeal of the Commission's permit suspension order. Both Judges Egnor and Zakaib clearly recognized that the jockeys' ability to get on the track's premises to ride thoroughbred racehorses and their ability to use their permits allowing them to ride thoroughbred racehorses, are inextricably intertwined. They are not, as the Petitioner would suggest, concepts which can be completely divorced from each other.

Although the Petitioner suggests that the law of track ejection is settled in West Virginia and that therefore, this appeal is a "no-brainer" for this Court, the fact remains that this Court has never squarely addressed the issue presented.<sup>3</sup> In fact, the circumstances under which this case

---

<sup>3</sup> This Court took this appeal and set it for argument under Rule 20, which is reserved for cases involving issues of first impression; issues of fundamental public importance; constitutional questions regarding the validity of a statute or a court ruling; and, inconsistencies or conflicts among the decisions of the lower courts. If the settled law is in its favor as the Petitioner suggests, this Court could have reversed Judges Egnor and Zakaib by issuing a memorandum decision under Rule 21 or granted this case under Rule 19, which is reserved, in part, for cases where the governing law is settled, but the lower court has erred.

arises highlight the problem with the Petitioner's assertion that its ejection is a completely separate undertaking from the State's permit issuance. In this case, the Racing Commission charged the jockeys for the wrongdoing at issue and decided that the appropriate discipline for the wrongdoing was a thirty day permit suspension and \$1,000.00 fine. That suspension and fine is now on appeal before Judge Zakaib. The Petitioner sought the Circuit Court's permission to eject the jockeys from its premises for an unspecified period, presumably exceeding thirty days. Judge Zakaib enjoined the Petitioner from doing so, thus setting up this appeal.

The Petitioner's position is that what the Racing Commission did in its permit proceeding and what the Circuit Court may do in reviewing that proceeding doesn't matter. Because in the end, through the exercise of its management ejection, it is going to decide whether or not the jockeys get to ride horses. In essence, the Petitioner advocates that it gets to decide who races, not the Racing Commission. The Petitioner wishes to effectively usurp the Commission's role over the regulation of its permit holders and the Circuit Court's role in reviewing the Commission's regulatory action, by ejecting the jockeys and precluding them from riding horses on its racetrack and making the Commission's and the Circuit Court's proceedings meaningless. Moreover, the track wants this Court to ignore the plain language of § 4.7. of the Commission's Thoroughbred Racing Rule which gives the Commission the right to review appeals of ejections.

## II.

### ARGUMENT

- A. **A LICENSED WEST VIRGINIA RACETRACK IS ANSWERABLE TO THE RACING COMMISSION WHEN IT SEEKS TO EJECT A RACING COMMISSION PERMIT HOLDER INASMUCH AS PERMIT HOLDER EJECTMENTS ARE SUBJECT TO THE PLENARY POWER OF THE RACING COMMISSION AND THE COMMISSION'S AUTHORITY UNDER 178 W. VA. C.S.R. 1, § 4.7.**

The licensed racetracks in this State owe their very existence to a grant of authority by the State inasmuch as the State has the power to allow and regulate racing or completely abolish racing within its borders. *Hubel v. West Virginia Racing Commission*, 376 F. Supp. 1 (S.D. W. Va), *aff'd* 513 F.2d 240 (4th Cir. 1974). Racing for a purse cannot be conducted in this State without a grant of licensure to a racetrack and the issuance of permits to those who are involved in the conducting or holding of racing on the racetrack. West Virginia Code §§ 19-23-1(a) and 19-23-2(a). The Racing Commission's statutory process requiring the issuance of permits to those who wish to ply their racing-related professions on the state's racetracks means something. The United States Supreme Court has held that a racing permit holder has a property interest in his or her permit. *Barry v. Barchi*, 443 U. S. 55 (1979). In addition, the Legislature has explicitly directed that the Racing Commission shall have unqualified and absolute power and authority over racing:

The racing commission has full jurisdiction over and shall supervise all horse race meetings, all dog race meetings and all persons involved in the holding or conducting of horse and dog race meetings, and, in this regard, it has plenary power and authority . . . .

West Virginia Code § 19-23-6.

In *State ex rel. Morris v. West Virginia Racing Commission*, 133 W. Va. 179, 192, 55 S.E.2d 263, 270 (1949), this Court described the broad power and authority of the Racing Commission:

There cannot, in our opinion, be any doubt as to the power of the Legislature to regulate horse racing, nor does there seem to be any contention on this point. Whatever may be said in favor of horse racing, and much can be said, it must be admitted that great evil attends its practice, such as calls for the intervention of the State, under its police power, to the end that such evil be minimized so far as it is possible to do so. This intervention and control is exercised under the police power of the State, and the use of that power rests with the Legislature. The police power is broad and sweeping, inherent in sovereignty and except as restricted by constitutional authority, or natural right, which, in effect, is unlimited.

The “persons” involved in conducting or holding horse race meetings over which the Legislature has given the Racing Commission plenary authority include not only the “persons” who are permit holders who ride, train, own, and groom horses, but also the “persons” who hold licenses to operate racetracks. *See* West Virginia Code § 19-23-3(7).

The essence of Petitioner’s argument before this Court is that the permits that the Commission issues don’t mean much. It can choose to refuse to allow a permit holder to come onto its track to engage in a racing occupation without a review by the Commission; it can choose to ignore the Commission’s adjudicatory proceedings related to the appropriate sanctions against permit holders; it can, in sum, do what it wants. Petitioner’s position raises the ultimate question of what does it mean to hold a permit issued by the Racing Commission?

According to the Petitioner, it is “interference” in its internal business or internal affairs for the Commission to review its ejection of permit holders. *See* West Virginia Code § 19-23-6(18) (“The racing commission shall not interfere in the internal business or internal affairs of any licensee.”) The Petitioner’s ejection of a permit holder is no more an “internal affair” than many other aspects of its operations that the Racing Commission regulates. And, to interpret § 19-23-6(18) as prohibiting the Racing Commission from reviewing permit holder ejections, is to render entire portions of West Virginia Code §§ 19-23-1 et seq. and 178 W. Va. C.S.R. 1 to be meaningless.

Under the Petitioner's interpretation of § 19-23-6(18), the Commission could not require it to give it audited financial statements as 178 W. Va. C.S.R. 1, § 8.4. requires; it could not direct that it have no less than eight races a day as 178 W. Va. C.S.R. 1, § 8.8. requires; it could not mandate that it have an ambulance available when racing is conducted as 178 W. Va. C.S.R. 1, § 8.9. requires; it could not direct it to number barns and stalls as required by 178 W. Va. C.S.R. 1, § 8.37., etc.

Who gets to race is at the core of the Commission's regulatory function. In reviewing ejection appeals from its permit holders, the Racing Commission is not deciding whether the track serves filet mignon or prime rib in the dining room or whether it hires a particular accounting firm to do its books. Matters like these may be the internal business affairs of the track. But, whether someone who holds a permit gets to come on to the track to ride horses is, fundamentally, the Racing Commission's business.

The world of racing in this State and others is unique when it comes to the process of permit issuance. The West Virginia Racing Commission doesn't issue occupational permits so that jockeys can ride thoroughbreds down Kanawha Boulevard. It issues occupational permits so that jockeys can ride thoroughbreds on licensed West Virginia racetracks, which are obviously discrete and identifiable locations.

Having a permit to engage in a racing-related occupation is not the same as having a law license or a medical license or a license to practice dentistry. A lawyer or a doctor or a dentist can open a professional practice on any street corner in the State, including Kanawha Boulevard. They are not dependent upon the good graces of another to engage in their trades. Those engaging in racing occupations, however, can only ride, own and/or train thoroughbreds in a race for a purse on a racetrack licensed by the State of West Virginia.

While the Petitioner quibbles in its supplemental brief as to whether the record below contains evidence of its “quasi-monopoly” status, the fact remains that there are only two thoroughbred racetracks in this State.<sup>4</sup> This Court can take judicial notice of that fact. It is uncontested. Whether or not there are other tracks in other states upon which jockeys can ride thoroughbreds is not relevant. The West Virginia Racing Commission does not issue occupational permits so that jockeys can ride horses in Maryland or Pennsylvania. It issues occupational permits so that jockeys can ride horses on West Virginia racetracks. Moreover, the West Virginia Racing Commission does not issue licenses for persons to operate racetracks in other states, it issues licenses for persons to operate racetracks in West Virginia.

When there are only two thoroughbred racetracks licensed in this State, it is axiomatic that a West Virginia permit holder’s ability to actually get on a West Virginia racetrack is of great importance and consequence to the exercise of his or her profession. If one or both of the racetracks refuse to allow the permit holder on the track, the permit holder’s ability to engage in his or her profession *in this State* is substantially impinged upon, if not outright squelched. Other state courts have recognized the quasi-monopolistic nature of racing and have rejected a track’s right to unilaterally eject racing permit holders. *See Cox v. National Jockey Club*, 323 N.E.2d 104, 108 (Ill. App. Ct. 1974) (“We . . . are of the opinion that with the benefit of receiving a quasi-monopoly comes corresponding obligations one of which is not to arbitrarily exclude a jockey who desires to participate in a racing meet. The arbitrary exclusion of the plaintiff meant that he was deprived of the opportunity to engage in his chosen occupation within a reasonable geographic area and for a

---

<sup>4</sup> Mountaineer Racetrack in Chester, West Virginia is, of course, the other thoroughbred racetrack in this State and it is approximately a five hour drive from Charles Town.

significant period of time.”); *Jacobson v. New York Racing Association, Inc.*, 305 N. E.2d 765, 768 (N. Y. 1973) (“NYRA has a virtual monopoly power over thoroughbred racing in the State of New York. Exclusion from its tracks is tantamount to barring the plaintiff from virtually the only places in the State where he may ply his trade and, in practical effect, may infringe on the State’s power to license horsemen. In contrast to a racetrack proprietor’s common-law right to exclude undesirable patrons, it would not seem necessary to the protection of the legitimate interests that the proprietor have an absolute immunity from having to justify the exclusion of an owner or trainer whom the State has deemed fit to license.”); *Greenburg v. Hollywood Turf Club*, 7 Cal. App.3d 968, 976 (Cal. Ct. App. 1970) (“It is a matter of judicial notice that by virtue of the licensing powers of the Board, racing associations have a quasi-monopoly and that the number of tracks in operation at any one time is severely limited. . . . This imposes upon Hollywood certain obligations to which other land owners are not subject.”)

The Racing Commission issues permits to persons engaging in racing occupations pursuant to West Virginia Code 19-23-2(a) so that they may have the ability and opportunity to engage in such racing occupations *on West Virginia racetracks*:

No person . . . shall participate in or have anything to do with horse or dog racing for a purse or a horse or dog race meeting **at any licensee’s horse or dog racetrack, place or enclosure, where the pari-mutuel system of wagering upon the results of such horse or dog racing is permitted or conducted**, as a horse owner, dog owner, jockey, apprentice jockey, exercise boy, kennel helper, trainer, groom, plater, stable foreman, valet, veterinarian, agent, clerk of the scales, starter, assistant starter, timer, judge or pari-mutuel employee, or in any other capacity specified in reasonable rules and regulations of the racing commission unless such person possesses a permit therefor from the West Virginia racing commission and complies with the provisions of this article and all reasonable rules and regulations of such racing commission.

(Emphasis added).

The entire legislative premise upon which the issuance of occupational permits by the Racing Commission is built is to have the State's permission to enter licensed racetrack grounds to engage in a racing occupation. To allow the racetracks to ultimately decide the validity or worth of those permits, is to let the gambling house control racing. It is to allow the gambling house to decide who the participants are in the gambling enterprise. If the house can decide who the participants are, it can influence the betting odds. This cannot be what our Legislature intended.

Given the entire scheme under which racing functions and given that the United States Supreme Court has recognized that those who are issued occupational permits by a state racing authority have a property interest in their permit sufficient to invoke due process protections, *Barry v. Barchi, supra*, the Racing Commission has promulgated § 4.7. in its Thoroughbred Racing Rule which states *in its entirety*<sup>5</sup> as follows:

Any 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. **However, all occupational permit holders who are ejected have the right of appeal to the Racing Commission.**

(Emphasis added).

This rule plainly carves out occupational permit holders from the overarching rule that any "person" (generally speaking, *i.e.*, a patron, a bettor, etc.) that is ejected from the track by either the

---

<sup>5</sup> The Racing Commission quotes every word of § 4.7. in this brief, while noting that in the Petitioner's supplemental brief, it omitted the last sentence of the section when quoting it. The last sentence is a critical portion of the Rule because it is the portion that provides for a review of track ejections by the Racing Commission.

stewards<sup>6</sup> or the association<sup>7</sup> has to get permission from both to come back on the track. However, the rule provides for a marked exception for a specific group of persons -- those who are occupational permit holders. Occupational permit holders aren't required to gain "permission" to re-enter track grounds from either the stewards or the racetrack. Instead, they unequivocally have a right of appeal of the ejection to the Racing Commission and the Racing Commission ultimately gets to decide whether or not they can re-enter.<sup>8</sup>

Section 4.7. does not confine appeals of ejections to only those ejections ordered by the stewards. The carve-out in the rule for occupational permit holder appeals immediately follows explicit language that refers to both steward ejections *and* track ejections. Although 178 W. Va. C.S.R. 1, § 2.7. defines "appeal" as a request for the Racing Commission to review decisions or rulings of the stewards, the Racing Commission contends that this language was never meant nor

---

<sup>6</sup> The "stewards" are the Racing Commission's agents at the racetrack who are responsible for the general supervision of occupational permit holders, licensees, and the conduct of racing. *See* West Virginia Code § 19-23-3(17) and 178 W. Va. C.S.R. 1, § 10.

<sup>7</sup> The "association" is an entity licensed to conduct horse racing for a purse involving pari-mutuel wagering. *See* 178 W. Va. C.S.R. 1, § 2.10.

<sup>8</sup> In its supplemental brief, the Petitioner sets up the farfetched scenario in which the Racing Commission could order it to re-hire and allow re-entry of a terminated track employee who holds an occupational permit if the Commission decided that the track's actions were unwarranted. While there is no doubt that the track's employees must have occupational permits issued by the Racing Commission, *see* 178 W. Va. C.S.R. 1, § 43.1, it defies reason and the law that the Racing Commission would use its power to review ejections of permit holders to force a racetrack to re-hire a terminated track employee. Who the track terminates from employment is its business. The termination of a track employee is only of concern to the Racing Commission insofar as the employee was terminated for conduct which violates the statutes and/or the racing rules enforced by the Racing Commission. In that event, the track must fulfill its obligation to report the violations to the Racing Commission so that action can be taken against the person's state-issued permit. The Racing Commission does not wish to use and has never used its review right under § 4.7. to do anything other than provide a check and balance on the track's ejection of permit holders who are not employees of the racetrack.

has it been interpreted by the Racing Commission to restrict appeals of ejections in § 4.7. to only those ejections ordered by the stewards.

Before the definition of the word “appeal” and other terms used in the Thoroughbred Racing Rule are spelled out, the following language appears: “As used in this rule and unless the context clearly requires a different meaning, the following terms shall have the meaning ascribed in this section . . . .” 178 W. Va. C.S.R. 1, § 2. The Racing Commission has never constricted appeals under § 4.7. to those arising from stewards’ ejections. The Racing Commission has given that word a broader meaning in keeping with the entire legislative scheme under which racing is operated in this State, as discussed *supra*; in recognition of the quasi-monopolistic nature of racing and the limited venues at which occupational permit holders may ply their trades; and, in recognition of the property right that occupational permit holders have in their permits. The prefatory language in § 2 of the Rule, allows the Racing Commission to ascribe a broader meaning to the word “appeal” in the context in which it is used in § 4.7., and the Racing Commission has done so for years.

That § 4.7. was never meant to limit appeals of ejections to those issued by the stewards is borne out by looking at past incarnations of the Racing Commission’s rules that are available.<sup>9</sup> In the Commission’s Thoroughbred Rule, 178 W. Va. C.S.R. 1, that was filed and in effect on June 7, 1985, the following language appears in § 4.8.: “Any person ejected from the grounds of an association shall be denied admission to said grounds until permission for his reentering has been obtained from the Association and the Racing Commission: Provided, however, That all licensed

---

<sup>9</sup> The West Virginia Secretary of State only has the Racing Commission’s rules dating back to the 1985 Rule cited in this brief. The Racing Commission was able to locate a copy of its 1971 Rule, also cited in this brief. The Racing Commission could not locate copies of any rules that pre-date 1971 although it is clear that the Racing Commission had rules prior to 1971, as this Court has cited rules of the Racing Commission dating back to the 1940s. See *Morris v. West Virginia Racing Commission, supra*.

personnel ejected shall have the right of appeal to the Racing Commission.” The 1985 rule contains no limiting definition of the word “appeal.” The word “appeal” is not defined at all. In the Commission’s 1971 “Rules of Racing,” Administrative Regulations 19-23, Series 1, § 60, the following language appears: “Any person ejected from the grounds of an Association shall be denied admission to said grounds until permission for his re-entering has been obtained from the Association and the Racing Commission provided however that all licensed personnel ejected shall have the right of appeal to the Racing Commission.” Again, the word “appeal” has no limiting definition in the 1971 Rule.

The fact that almost identical language regarding permit holder ejection appeal rights appears in the Commission’s racing rules dating back until at least 1971, demonstrates that the West Virginia Racing Commission has had a decades-old rule which gives ejected permit holders (whether ejected by the track or by the stewards) a right of appeal to the Racing Commission. There is no evidence that the Racing Commission or the Legislature meant otherwise.<sup>10</sup>

Other racing states have provisions similar to § 4.7. allowing a right of appeal of track ejections to the state racing regulator. The following cases provide a discussion of other states’ law and demonstrate that West Virginia’s rule is in the mainstream. In *Bellucci v. Commonwealth of Pennsylvania, State Horse Racing Commission*, 445 A.2d 865 (Pa. Commw. Ct. 1982), the Pennsylvania racing commission held an administrative hearing which culminated in the suspension

---

<sup>10</sup> This Court need only look at the record in the previous 2010 appeals, *PNGI Charles Town Gaming, LLC v. West Virginia Racing Commission, et al.*, Nos. 100098 and 100099, that pertained to this issue to see that permit holders have invoked this right of appeal and that the Commission has entertained such appeals. In 2005, two of the permit holders involved in this previous case invoked § 4.7. and the Commission entertained their track ejection appeals. The record in that case demonstrates that counsel for Charles Town Racetrack stood before the Commission during that proceeding and conceded that the Racing Commission had the power to review the track’s ejection.

of a horse trainer's license and it held a separate hearing on the horse trainer's appeal of the racetrack's ejection under that state's law. In *Evans v. Arkansas Racing Commission*, 606 S.W.2d 578 (Ark. 1980), after having been granted a license to own and train horses by the racing commission, Evans was issued an ejection notice by Oaklawn Race Track. The commission held a hearing on the ejection and upheld it. The Arkansas Supreme Court explicitly held that had the commission seen fit, it could have overturned the ejection:

The record reflects the Commission deferred to the private corporation's judgment in this matter and we cannot say the Commission's judgment in that regard was arbitrary. It would mean that the Commission would have to decide when Evans could race, how often, how many stalls he could have and so forth - a posture the Commission, no doubt, did not want to take. **But it could have done so. The Commission is charged with regulating that track in the public interest and that interest is paramount.**

*Id.* at 585 (emphasis added).

An Illinois court in *Pernalski v. Illinois Racing Board*, 692 N.E.2d 773 (Ill. App. Ct. 1998), looked at that state's statute (which resembles West Virginia's § 4.7.) which provided for track exclusions of occupational licensees, but provided a hearing before the racing board on the propriety of the exclusion. The *Pernalski* court sanctioned the racing board's authority to both take action against a horse trainer's license *and* to hold a hearing on the racetrack's ejection. Similar circumstances arose in the case of *Solimeno v. State Racing Commission*, 509 N.E.2d 1167 (Mass. 1987), where licensed greyhound kennel owners, trainers and assistant trainers were ejected under a state statute which provided for a right of appeal to the racing commission. The commission held a hearing on the racetrack's ejections and in upholding them, set dates upon which the license-holders would be able to return to the track.

In *Morrison v. California Horse Racing Board*, 252 Cal. Rptr. 293 (Cal. Ct. App. 1988), the racing board held a hearing on Hollywood Park racetrack's exclusion of a licensed horse owner from that racetrack and on the board's own exclusion of the owner from all California racetracks. The court held that the evidence of Morrison's misconduct provided "a rational basis to justify Hollywood Park's determination that Morrison's presence in the inclosure at Hollywood Park would be inimical to the interests of legitimate horse racing. Substantial evidence supports the decision to exclude him pursuant to rule 1990." *Id.* at 299. Obviously, this case illustrates that the racetrack had to answer to the racing board and, ultimately, the judicial system, to show that its exclusion of the licensee was justified.

In *Catrone v. State Racing Commission*, 459 N.E.2d 474 (Mass. App. Ct. 1984), a licensed horse trainer was refused stall space at Suffolk Downs racetrack and was denied the ability to enter horses in races. When the stewards at the track refused to honor Catrone's request that they order the racetrack to allow him to enter horses, Catrone appealed to the racing commission. The racetrack claimed that the commission had no jurisdiction to hear the matter, but the appeals court disagreed:

The comprehensive provisions of G.L. c. 128A and the regulations under it . . . show that the commission had jurisdiction to consider Catrone's appeal to it from the stewards' refusal to order the racetrack to allow his participation in racing. The commission has been given sufficiently broad powers (including those of granting and suspending licenses) . . . to permit it to review the conduct of its licensees in accordance with reasonable procedures set out in its regulations. Although the statutory grant of jurisdiction could have been made more explicit, we reject the racetrack's contention that the commission had no jurisdiction of this situation.

*Id.* at 477-78.

After holding a hearing on Catrone's ejection, the Massachusetts Racing Commission upheld the track's ejection. In another case from Massachusetts, the opposite result came out of

the commission's review of a track's ejection. In *Foxboro Harness v. State Racing Commission*, 674 N.E.2d 1322 (Mass. App. Ct. 1997), the racetrack excluded the horses of a licensed trainer and the trainer requested a hearing before the racing commission. After holding the hearing, the racing commission found that the track's decision "had not been based upon sound business judgment, but was arbitrary and capricious. The commission ordered [the track] to admit [the trainer] to its grounds and to accept entries of his horses in accordance with its usual methods of doing so." *Id.* at 1324.

There is no doubt that *under the Thoroughbred Racing Rule*, the Petitioner has the power to exclude both patrons and permit holders from its grounds. 178 W. Va. C.S.R. 1, §§ 4.7. and 10.19.<sup>11</sup> The Legislature has given the Petitioner that power in a legislative rule that has the force and effect of law. *See Smith v. West 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.") But, as examined above in this brief, that power is explicitly checked by the Legislature's approval of a rule that gives the right of review of permit holder ejections to the Racing Commission.

Despite the fact that the Petitioner has the power of ejection under the Commission's legislative rule, the Racing Commission does not concede that the common law gives the Petitioner the right to eject permit holders. Petitioner ultimately relies on the common law doctrine which some states have recognized as espoused in *Wood v. Leadbitter*, 13 M. & W. 838, 153 Eng. Rep. 351

---

<sup>11</sup> As noted previously, a new Thoroughbred Racing Rule will go into effect on July 10, 2011. The language that is in §§ 4.7. and 10.19. in the current rule is contained in §§ 6.1. and 6.2. of the new rule.

(Ex. 1845), pertaining to the ejection of a *patron*. The English court held that a *patron* who buys a ticket for admission to a racetrack could be kicked off because the mere purchase of an admission ticket did not give the patron a property right entitling him to remain on the grounds after he was asked to leave. The English Court dealt with the matter as a real estate issue.

At issue in *Wood*, was a four-day race event that was held on the property of one Lord Eglintoun and tickets for admission to the grand stand were sold in the town for a guinea. Wood bought a ticket and came into the grand stand. Leadbitter, “an officer of police” was ordered by Lord Eglintoun to ask Wood to leave.<sup>12</sup> Wood refused to leave and Leadbitter took him by the arm and forced him out. The Court held that the the admission ticket was in effect a “deed” that was revocable at any time despite the fact that money was paid for it. The Court held that Lord Eglintoun need not refund Wood his ticket money.

The common law principle found in *Wood v. Leadbitter* has been imposed in some states upon the scenario wherein a racetrack ejects a racing permit holder from its premises. This Court has never expressly adopted the principle of *Wood v. Leadbitter* with regard to patrons on West Virginia’s racetracks, let alone having expressly announced that the principle applies to racing permit holders in the modern regulatory context in which racing is operated today.<sup>13</sup>

---

<sup>12</sup> Lord Eglintoun was said to have wanted Wood to leave “in consequence of some alleged malpractice of his on a former occasion, connected with the turf.” *Id.* at 838.

<sup>13</sup> In *Wilkerson v. Waterford Park, Inc.*, Civil Action No. 3972 (Cir. Ct. Hancock Co. 1968), *aff’d without opinion*, Sup. Ct. App. W. Va., *cert denied*, 396 U.S. 906 (1969), this Court disposed of an appeal without issuing an opinion in a case in which jockeys were ejected by the Waterford Park racetrack in Hancock County. The Circuit Court of Hancock County in upholding the track’s right of ejection, relied upon New Jersey precedent, *Garifine v. Monmouth Park Jockey Club*, 148 A.2d 1 (N.J. 1959), which is predicated on the *Wood v. Leadbitter* doctrine. In issuing his ruling in *PNGI Charles Town Gaming, LLC v. West Virginia Racing Commission, et al.*, Civil Action No. 09-MISC-106, Judge King relied upon *Wilkerson* and *Garifine* for his finding that West Virginia law recognizes the common law right of racetracks  
(continued...)

The *Wood v. Leadbitter* doctrine should not be categorically imposed by this Court upon the ejection of racing permit holders, as such permit holders have a completely different interest in the practice of their occupation on the racetrack, compared with a mere patron who wants to bet or watch races. An admission ticket to a racetrack does not give the patron a property right. The issuance of a permit by the Racing Commission, however, gives the permit holder a property right. In addition, *Wood v. Leadbitter* arose long before the system of legalized pari-mutuel wagering and regulated horse racing and is inapposite to the racing universe in which we find ourselves today.<sup>14</sup>

This Court should also recognize that the holding in *Wood v. Leadbitter* was subsequently questioned, distinguished and ultimately rejected by the courts of England:

The *Wood* holding experienced a somewhat checkered history in England. Judges over a period of many years tended to question it and to distinguish its holding. By 1898, it could be said that:

The general tenor of remarks made on *Wood v. Leadbitter* in subsequent judgments is that the decision is not to be extended; and that the principle established by the case is to be so interpreted as to do justice where the person having a license has a substantial interest in property of his own to be preserved, or where there is something to be done by the other party for consideration received.

Finally, in 1915 . . . the holding in *Wood* was effectively discarded in *Hurst v. Picture Theatres* [[1915] 1 K.B. 1 (A.C.)]. *Hurst* bought a ticket to see a movie, but the theatre's management forcibly removed him because they alleged that he had not paid. The theater argued that, under *Wood*, it had the right to remove *Hurst*, who

---

<sup>13</sup>(...continued)

to eject patrons and permit holders. As is discussed in this brief, this Court should reject the *Wood v. Leadbitter* doctrine and find that it is not the common law in this State. Moreover, as also discussed in this brief, even if this Court would find that the doctrine of *Wood v. Leadbitter* was, at one time, the common law of this State, it has been altered by the Racing Commission's and the Legislature's adoption of § 4.7. in the Thoroughbred Racing Rule. The Circuit Court's decision in *Wilkerson* makes no mention of § 4.7., nor anything resembling § 4.7. Therefore, one can logically presume that either § 4.7. or its equivalent didn't exist in 1968, or the issue was not raised by the parties and was missed by the Circuit Court.

<sup>14</sup> This State legalized pari-mutuel wagering and horse racing in the 1930s, as did several other states.

simply had a revocable license. The trial court judge opined that Wood was no longer good law because “a visitor to a theatre who had paid for his seat had a right to retain his seat so long as the performance lasted, provided he [abided by management’s rules].” After the judge instructed the jury accordingly, Hurst recovered £ 150 in damages. The Court of Appeal upheld the verdict, finding that a contrary conclusion would be “not only contrary to good sense, but contrary also to good law” and would “involve[ ] startling results.” The court stated that “[i]t is no longer good law to do such an act as the defendants have done here.” The court suggested that with the merger of law and equity under the Judicature Act of 1873, Wood had to give way to equitable considerations in the current case. Thus, while Wood was not technically overruled, its holding has become an anachronism.

Eventually, whatever remained of Wood would be formally terminated in 1948 by *Winter Garden Theatre (London) Ltd. v. Millennium Productions Ltd* [[1948] A.D. 173 (H.L.). “[S]ince the fusion of law and equity, . . . [Wood] . . . should no longer be regarded as an authority.” *Id.* at 191] and in 1952 by *Errington v. Errington & Woods* [[1952] 1 K.B. 290 (Denning, L.J.)(C.A.). “Law and equity have been fused for nearly 80 years, and since 1948 it has been clear that, as a result of the fusion, a licensor will not be permitted to eject a licensee in breach of a contract to allow him to remain . . . nor in breach of a promise on which the licensee has acted, even though he gave no value for it.” *Id.* at 298-99].

Bennett Liebman, *The Supreme Court and Exclusions by Racetracks*, 17 *Vill. Sports & Ent. L.J.* 421, 436-437 (2010) (some footnotes omitted).

This Court has the power, in fact, to hold that any principle contained in *Wood v. Leadbitter* which may be construed to give the Petitioner the power to eject permit holders, is not the common law in this State. This Court held in *Morningstar v. Black and Decker Manufacturing Company*, 162 W. Va. 857, 253 S.E.2d 666 (1979), that neither constitutional<sup>15</sup> nor statutory<sup>16</sup> provisions

---

<sup>15</sup> Article VIII, § 13 of the West Virginia Constitution provides that “[e]xcept as otherwise provided in this article, such parts of the common law, and of the laws of this State as are in force on the effective date of this article and are not repugnant thereto, shall be and continue the law of this State until altered or repealed by the legislature.”

<sup>16</sup> West Virginia Code § 2-1-1 states that “[t]he common law of England, so far as it is not repugnant to the principles of the Constitution of this State, shall continue in force within the same, except in those respects wherein it was altered by the general assembly of Virginia before the twentieth day of June, eighteen hundred and sixty-three, or has been, or shall be, altered by the legislature of this State.”

preserving the common law were intended to operate as a bar to this Court's evolution of common law principles, including the Court's historic power to alter or amend the common law.

In *Morningstar*, this Court addressed a certified question from the United States District Court for the Southern District of West Virginia regarding the extent to which a manufacturer of a defective product is liable in tort in this State to a person injured by such a product. In the underlying suit, the Morningstars alleged injury as a result of a defective saw. In answering the question, this Court was faced with determining whether Article VIII, Section 13 of the West Virginia Constitution and West Virginia Code § 2-1-1 barred the Court from changing the common law. The Court held that these provisions "were not intended to operate as a bar to this Court's evolution of common law principles, including its historic power to alter or amend the common law." *Morningstar*, Syl. Pt. 2.

In reaching its decision, this Court examined holdings in other states relating to those states' adoption of the common law as it stood at the time of those states' creation. For example, this Court looked at New York's precedent wherein the New York Court of Appeals declined to treat a constitutional provision similar to Article VIII, Section 13 as a bar to that court's altering the common law:

The adoption by the people of this state of such parts of the common law as were in force on the 20th day of April, 1777, does not compel us to incorporate into our system of jurisprudence principles, which are inapplicable to our circumstances, and which are inconsistent with our notions of what a just consideration of those circumstances demands.

*Id.* at 672 (quoting *Trustees etc., of Town of Brookhaven v. Smith*, 80 N.E. 665, 666-67 (N.Y. 1907)).

The *Morningstar* Court went on to look at Indiana law on the same issue:

We cannot believe, then, that our Legislature intended to petrify the rules of the common law as declared by judicial decisions at any one time or period, and to

set them up in such inflexible form as to make them absolute rules of decision throughout all time. . . . Under the section of the statute relied on, where there are no governing enactments of the Legislature, the courts of this State are, in all matters coming before them, to endeavor to administer justice according to the promptings of reason and common sense, which are the cardinal principles of the common law, and they are not to accept blindly the decisions of the English courts of any particular time or period without inquiring as to the reasons upon which they rest. To do so would be to adopt a practice which would be in direct violation of the theory of that common law which the statute prescribes we are to follow . . . .

*Id.* at 675 (quoting *Ketelson v. Stilz*, 111 N.E. 423, 425 (Ind. 1916)).

Looking at the present case, and assuming that any common law right that the Petitioner can be said to have under *Wood v. Leadbitter* does not distinguish between a patron and permit holder, this Court is free to decide that it should make such a distinction. Unlike the time of *Wood v. Leadbitter*, it is well-settled American jurisprudence that an individual who engages in a racing occupation has a property right in his or her state-issued permit. *Barry v. Barchi, supra*. Certainly, in 2011, over 170 years after *Wood v. Leadbitter* was decided, this Court is not compelled to incorporate into our jurisprudence an ossified tenet that has no place in the modern-day racing context. The fact that the courts of England abandoned *Wood v. Leadbitter* long ago gives ample support to this Court to reject whatever principles may be found in its holding.

Setting aside the Court's power to determine the common law, if indeed *Wood v. Leadbitter* was the common law at one time in this State and it was read to allow racetracks unfettered authority to eject permit holders, then § 4.7. in the legislative Thoroughbred Racing Rule (and previous incarnations of it referenced above on page 12 and 13 of this brief) altered the common law with the express approval of the West Virginia Legislature. As noted above, once approved by the West Virginia Legislature, a rule promulgated by the West Virginia Racing Commission has the force and effect of law. *Smith, supra*. A legislatively approved rule "has the force of a statute itself."

*Appalachian Power Company v. State Tax Department of West Virginia*, 195 W. Va. 572, 585, 466 S.E.2d 424, 436 (1995).

The Commission's rule plainly makes racetrack ejections subject to the ultimate authority and review by the Racing Commission. Therefore, the enactment of § 4.7. and its predecessors, as well as the Legislature's recent March 2011 re-enactment of § 4.7. in the revised Thoroughbred Racing Rule<sup>17</sup>, makes it "clear and unequivocal" that the Legislature intended to alter whatever common law permit holder ejection authority can be said to have existed under *Wood v. Leadbitter*. See *State ex rel. Van Nguyen v. Berger*, 199 W. Va. 71, 75, 483 S.E.2d 71, 75 (1996) ("If the Legislature intends to alter or supersede the common law, it must do so clearly and without equivocation.")

**B. WEST VIRGINIA CODE § 19-23-17 WHICH PROVIDES THAT COMMISSION PERMIT SUSPENSION OR REVOCATION DECISIONS SHALL NOT BE STAYED PENDING A JUDICIAL DETERMINATION IS CONSTITUTIONAL OR CAN BE CONSTRUED BY THIS COURT TO SUSTAIN ITS CONSTITUTIONALITY.**

After the Commission issued its order of permit suspension against the Respondent jockeys on May 21, 2010, the jockeys filed a motion for a stay in the Circuit Court of Kanawha County. The Circuit Court granted that stay under West Virginia Code § 29A-5-4( c), which gives circuit court judges the discretion to issue stays pending disposition of administrative appeals. (6/3/10 Order.)

---

<sup>17</sup> Enr. Comm. Sub. for Senate Bill 177, § 64-7-3(a) (W. Va. Mar. 12, 2011) contains the Legislature's authorization for the new Thoroughbred Racing Rule that goes into effect on July 10, 2011. As previously noted, § 4.7. is re-enacted verbatim in § 6.1. of the new Rule. The entire new Rule is on file with the Secretary of State and can be accessed at <http://apps.sos.wv.gov/adlaw/files/rulespdf/178-01.pdf>

The Commission argued against the issuance of the stay on multiple grounds, including the express language of § 19-23-17:

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.

It is worth noting that at no time did Judge Zakaib find this statute unconstitutional when he granted the stay requested by the jockeys. Judge Zakaib merely, in the Racing Commission's estimation, applied the general statute (§ 29A-5-4(c)) to the detriment of the specific statute (§ 19-23-17), which is in contravention of the rules of statutory construction. See Syl. Pt. 1, *UMWA by Trumka v. Kingdon*, 174 W. Va. 330, 325 S.E.2d 120 (1984). *Accord Tillis v. Wright*, 217 W. Va. 722, 728, 619 S.E.2d 235, 241 (2005) (“[S]pecific statutory language generally takes precedence over more general statutory provisions.”); *Bowers v. Wurzburg*, 205 W. Va. 450, 462, 519 S.E.2d 148, 160 (1999) (“Typically, when two statutes govern a particular scenario, one being specific and one being general, the specific provision prevails.” (citations omitted)); *Daily Gazette Co., Inc. v. Caryl*, 181 W. Va. 42, 45, 380 S.E.2d 209, 212 (1989) (“The rules of statutory construction require that a specific statute will control over a general statute when an unreconcilable conflict arises between the terms of the statutes.” (citations omitted)). In that regard, the Racing Commission contends that Judge Zakaib erred.

The Respondent jockeys, however, argue that Judge Zakaib could not apply § 19-23-17 because a stay is necessary to preserve their constitutional due process rights. To the extent that this

Court deems it necessary to reach the issue of the constitutionality of § 19-23-17's prohibition of stays for suspended or revoked permit holders, the Racing Commission submits that the statute is constitutional under the State's police power.

Several other state courts have held similar statutes to be valid under the State's police power. In *Commission on Medical Discipline v. Stillman*, 435 A.2d 747 (Md. 1981), the court held that a statute which precluded Maryland courts from staying an order of the state commission on medical discipline revoking or suspending a medical license did not violate either the separation of powers or the due process constitutional doctrines. The court opined that because reasonable judicial review of commission decisions was provided for by statute, the prohibition on stays pending judicial review did not encroach upon the judiciary's inherent power to review administrative action. The court acknowledged that the right to practice medicine is a property right of which a doctor cannot be deprived without due process, but explained that no person has an absolute vested right to so practice, but only a conditional right which is subordinate to the police power to protect and preserve the public health. The court stated that the statutory provision likely resulted from the legislature's belief that the negative effect on physicians whose licenses are suspended or revoked was outweighed by the harm that might befall the public if any of the physicians sanctioned by the commission were permitted to continue practicing pending judicial review. The court went on to say that physicians who had been issued some lesser discipline (short of a suspension or revocation) were not precluded from obtaining a stay under the statute and thus it was only when the potential threat to the public was the greatest that the legislature had seen fit to preclude stays. Moreover, the court held that the "no stay" provision bore a substantial relationship to the public health, safety, and welfare of the people of the state and did not constitute

a denial of due process, bearing in mind the statutory safeguards governing commission proceedings. *Accord Flynn v. Board of Registration in Optometry*, 67 N.E.2d 846 (Mass. 1945); *State ex rel. Kassabian v. Board of Medical Examiners*, 235 P.2d 327 (Nev. 1951); *Pundy v. Department of Professional Regulation*, 570 N.E.2d 458 (Ill. App. Ct. 1991); *Gury v. Board of Public Accountancy*, 474 N.E.2d 1085 (Mass. 1985).

The principles set forth in these cases apply equally to the “no stay” statute for racing permit holders found in § 19-23-17. The State’s regulation of racing is without question an exercise of the State’s police power. As the court in *Hubel v. West Virginia Racing Commission*, 376 F. Supp. at 5<sup>18</sup>, noted: “The harm threatened to the public by the abuses attending horse racing is well documented.” It is therefore logical to conclude that our Legislature determined that after a fully due process-compliant hearing before the Racing Commission<sup>19</sup>, the harm to a suspended or revoked

---

<sup>18</sup>The Petitioner cites *Hubel* in support of the notion that § 19-23-17 is constitutional. While the reasoning in *Hubel* may be very generally supportive of the notion that § 19-23-17 is constitutional, the Racing Commission submits that *Hubel* is not directly on point in comparison to the cases that it has cited in this brief in support of § 19-23-17's constitutionality. *Hubel* dealt with the lack of a stay after the stewards imposed a summary forty-seven day suspension of a horse trainer’s permit when a horse in his care tested positive for a prohibited drug. The stewards’ summary suspension of the trainer was on appeal to the Racing Commission which was required to hold a hearing within thirty days of the filing of the trainer’s appeal. The court in *Hubel* found that because the trainer’s summary suspension was subject to a review hearing by the Commission in a very short period of time, it was permissible to deny a stay in that interim period. The court noted that if the period of time in which the Commission was to conduct the hearing was extended, the lack of a stay may become problematic. In this case, the Court is faced with a statute that provides for no stay after a full hearing has been held and no statutory provisions that require the circuit court to decide the jockeys’ appeal in any specified time period. Although Rule 6(d) of the West Virginia Rules of Procedure for Administrative Appeals provides for the entry of a final judgment in administrative appeals within six months of the filing of the appeal (the jockeys’ appeal was filed on June 1, 2010), and despite the fact that Judge Zakaib’s own order, (6/3/10 Order at 2), indicated that the Court would render a decision within thirty days of the jockeys’ reply brief being filed (which required his decision by September 13, 2010), there still is no decision in this matter.

<sup>19</sup>One need only make a cursory review of the record below to see that the jockeys were afforded full due process protections in the conduct of the Racing Commission’s administrative hearing. The Commission, with the agreement of the Respondent jockeys, appointed an independent attorney/hearing examiner to  
(continued...)

racing permit holder is far outweighed by the State's interest in keeping the adjudicated wrongdoer out of racing to protect the wagering public and to preserve the public's confidence in the integrity of racing. Moreover, our Legislature reserved the "no stay" rule for those permit holders who receive the most serious of sanctions in the form of suspensions or revocations. Obviously then, like the Maryland statute at issue in *Stillman*, those West Virginia permit holders who are found to be responsible for conduct warranting a less serious sanction may still seek a stay from a circuit court judge.

The Racing Commission agrees with the Petitioner's assessment of the alleged equal protection problems with § 19-23-17 insofar as it provides that suspensions or revocations of track licenses by the Commission are automatically stayed by operation of the statute. The Petitioner's analysis on pages 8 and 9 of its supplemental brief refutes any argument that the Respondent jockeys may have that the statute violates equal protection notions when it automatically grants a stay to track licensees, but denies a stay to permit holders. As the Petitioner explains in its supplemental brief, track licensees whose operations provide substantial revenues to the state are not similarly situated with individual permit holders whose suspension or revocation affects only one person. The Racing Commission believes it is purely within the province of the Legislature to determine that because the State has a substantial interest in the continuance of racing pending an appeal of the

---

<sup>19</sup>(...continued)

preside over the hearing, which was nonetheless attended by the members of the Racing Commission. The hearing was conducted over the course of five days in August and September 2009. The parties submitted proposed findings of fact and conclusions of law to the hearing examiner. After receiving the hearing examiner's recommended decision, the Commission gave the parties another opportunity to be heard before it to argue over whether or not the Commission should adopt or reject the hearing examiner's recommended decision. Thereafter, after hearing such arguments, the Commission adopted the hearing examiner's recommended decision, which did not sustain all of the charges brought against the jockeys.

suspension or revocation of a track's license, there shall be an automatic stay of a suspension or revocation order issued against a track by the Commission.

The Racing Commission could find no case law wherein this Court has reviewed a statute such as § 19-23-17 which contains a "no stay" provision. As stated above, the Commission contends that the statute is within the ambit of the State's police power. However, other state courts have held that such a statute violates the separation of powers doctrine (not the due process doctrine advocated by the Respondent jockeys) because a "no stay" provision interferes with the courts' inherent authority. *See State v. Hochhausler*, 668 N.E.2d 457 (Ohio 1996) (in which the court struck a statute that prohibited the granting of a stay pending appeal of an administrative driver license suspension because the court found that the statute interfered with court's judicial functions and violated the separation of powers doctrine). *Accord Norwood v. Horney*, 853 N.E.2d 1115 (Ohio 2006); *Smothers v. Lewis*, 672 S.W.2d 62 (Ky. 1984).

Assuming, *arguendo*, this Court finds constitutional fault with the "no stay" provision for suspended or revoked permit holders in § 19-23-17, this Court has an obligation to construe the statute to sustain its constitutionality. This Court has held that "[w]hen the constitutionality of a statute is questioned every reasonable construction of the statute must be resorted to by a court in order to sustain constitutionality, and any doubt must be resolved in favor of the constitutionality of the legislative enactment." Syl. Pt. 3, *Willis v. O'Brien*, 151 W. Va. 628, 153 S.E.2d 178 (1967).

A reasonable construction of § 19-23-17, which preserves the circuit court's ability to grant a stay if warranted, would be to read the statute as providing an automatic stay for track licensees and providing for no such automatic stay for permit holders. Thus, the statute could be read to

preserve the circuit court's discretion to grant a stay for permit holders, if warranted by the circumstances.

The Racing Commission notes that the Petitioner's position in this appeal is that it would not have been enjoined by the Circuit Court if the Racing Commission's suspension of the Respondent jockeys had not been stayed by the Circuit Court. Moreover, the Respondent jockeys question the Petitioner's standing to raise the Circuit Court's stay, which clearly by the terms of the Circuit Court's order, only applies to the Racing Commission. The injunction order issued against the Petitioner by the Circuit Court is separate and is based upon a finding of the lower court that the Respondent jockeys would suffer irreparable harm if the Petitioner is allowed to eject them during the pendency of the Circuit Court proceedings. (Order, 1, June 3, 2010).

Whether or not the Circuit Court would have seen fit to enjoin the Petitioner from ejecting the Respondent jockeys absent a stay of the Racing Commission's permit suspension, is open to question. In fact, the Petitioner's unequivocal representation to this Court that it would not have been enjoined absent the issue of the stay order against the Commission is speculative. At an early juncture in the Circuit Court's proceedings, the Respondent jockeys raised the issue of their right of appeal under § 4.7. (Trial Tr. 13, Apr. 16, 2009). It is conjecture at this point as to whether or not the Circuit Court would have refrained from enjoining the Petitioner from ejecting the jockeys absent a stay of their permit suspension. Therefore, the resolution of the stay issue is not necessarily dispositive of the ejection issue that this brief discusses above.

**III.**

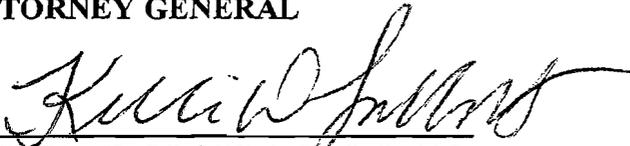
**CONCLUSION**

WHEREFORE, based upon the foregoing, the West Virginia Racing Commission respectfully requests that this Court hold that Petitioner's right of ejection of permit holders under the Commission's Thoroughbred Racing Rule is not unfettered and that it subject to the Commission's plenary regulatory authority and its power to review track ejections of permit holders under 178 W. Va. C.S.R. 1, § 4.7.

**Respectfully submitted,**

**WEST VIRGINIA RACING COMMISSION**  
**By counsel**

**DARRELL V. MCGRAW, JR.**  
**ATTORNEY GENERAL**



**KELLI D. TALBOTT (WVSB # 4995)**  
**DEPUTY ATTORNEY GENERAL**  
**ANTHONY D. EATES II (WVSB # 7708)**  
**ASSISTANT ATTORNEY GENERAL**  
State Capitol, Room E-26  
Charleston, West Virginia 25305  
(304) 558-2021

CERTIFICATE OF SERVICE

I, Kelli D. Talbott, Deputy Attorney General for the State of West Virginia, do hereby certify that a true and exact copy of the foregoing Supplemental Response Brief of the West Virginia Racing Commission was served by depositing the same postage prepaid in the United States Mail, this 6<sup>th</sup> day of June, 2011, addressed as follows:

Gregory Bailey  
Arnold & Bailey  
117 E. German Street  
Post Office Box 69  
Shepherdstown, WV 25443

Benjamin L. Bailey  
Christopher S. Morris  
Bailey & Glasser  
209 Capitol Street  
Charleston, West Virginia 25301

Stuart A. McMillan  
Bowles Rice McDavid Graff & Love  
Post Office Box 1386  
Charleston, West Virginia 25325-1386

Carte Goodwin  
Goodwin & Goodwin  
300 Summers Street, Suite 1500  
Charleston, WV 25301

Douglas McSwain  
Sturgill, Turner, Barker & Moloney  
333 W. Vine Street, Suite 1400  
Lexington, KY 40507

Mindy Coleman  
Jockeys' Guild, Inc.  
103 Wind Haven Drive, Suite 200  
Nicholasville, KY 40356

  
KELLI D. TALBOTT