No. 101503 – *PNGI Charles Town Gaming, LLC d/b/a Charles Town Races and Slots v. Lawrence Reynolds, Anthony Mawing, Alexis Rios-Conde, Jesus Sanchez, Dale Whitaker, Luis Perez, and Tony Maragh*

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OF WEST VIRGINIA

Benjamin, Justice, with whom Justice Ketchum joins, dissenting:

In its decision, the majority reasons that the Racing Commission's power to issue licenses to jockeys deprives PNGI Charles Town Gaming, LLC, d/b/a Charles Town Races & Slots (hereinafter "CTR&S") of its right to run its business in the manner it believes is necessary to protect its business interests and exercise its property rights. Specifically, the majority's holding establishes that the Racing Commission may, by its granting of licenses to jockeys, determine not only the minimum protections for horse racing and gaming customers at CTR&S, but also effectively the maximum protections. In doing so, the majority relies on an incomplete and selective reading of applicable statutory and administrative authority. Further, the majority applies this selective authority in a manner which not only exceeds the constitutional authority of the Racing Commission, but also deprives CTR&S of its business and property rights.

At the outset, I agree with the majority that the Racing Commission may properly, pursuant to the police powers of the state, issue licenses to jockeys to race at tracks within West Virginia and that through this licensing process the Racing Commission may afford to race track customers certain minimum protections for horse racing and gaming. I

also do not dispute that the jockeys have a property right in the permits they receive from the Racing Commission *vis-a-vis* the state. However, the police powers of the state are not absolute, being limited strictly by the language of the constitution and by the jurisprudence of this Court. Further, the provision by the State to certain private persons of certain property or due process rights with respect to the State by means of a state license does not destroy or in any way minimize the full legal and natural rights already enjoyed by another private person, in this case a business and property owner. A constitutional "end run" is impermissible in our system of governance. The State cannot through its statutory licensing process attempt to create statutory rights for one individual which necessarily destroy the natural rights already enjoyed by another individual.

There is absolutely no law, constitutional or otherwise, which gives to jockeys in West Virginia the *right* to race at any track of their choosing regardless of the rights of the property owner. None. The licenses of the Racing Commission provide jockeys with the *privilege* of racing and are a means of ensuring minimum protections to the public for horse racing and gaming. They do not provide jockeys with the *right* to race wherever and whenever they desire. By finding otherwise, the majority has erroneously elevated a state agency-issued *privilege* to a *right* superior in nature and effect to the established property and business rights of CTR&S.

While the Racing Commission certainly can establish minimum racing safeguards at racetracks through its licensing pursuant to the police powers of the state, there is absolutely no legal basis for the majority to limit the property owner, here CTR&S, from imposing more stringent racing safeguards for the protection and assurance of its customers. In prohibiting CTR&S from exercising its prerogative to engage in stricter diligence of fairness in horse racing and gaming at its race track, the majority has improperly denied to CTR&S the full measure of its business and property rights and interfered with CTR&S's ability to determine how best to serve and protect its customers *beyond the minimum requirements established by state authority*.

1. West Virginia Statutory Law Limits the Authority of the Racing Commission

The majority quotes the introduction to § 19-23-6 which reads, "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 or dog race meetings and, in this regard, it has plenary power and authority . . . ." Eighteen sections then proceed after this language listing the ways by which the Racing Commission may regulate racing, such as promulgating reasonable rules, investigating violations of those rules and the statute. However, § 19-23-6 concludes by stating that "[t]he Racing Commission shall not interfere in the internal business or internal affairs of any licensee." Seeking to serve and

protect its customers to an extent beyond the minimum level of protection afforded by the Racing Commission is a matter solidly within the "internal business or internal affairs" of CTR&S. The majority's selective statutory consideration under the facts of this case highlight the legal error of the majority's overly expansive holding.

2. West Virginia Administrative Law Fails to Support the Majority Holding

The majority also argues that the West Virginia Code of State Rules and Regulations supports its position. It refers to W. Va. C.S.R. § 178-1-6.1 which reads:

> Any person ejected by the stewards or the association from the grounds of any 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 occupation permit holders who are ejected have the right of appeal to the Racing Commission.[1]

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[1]It seems appropriate to note at this juncture that § 178-1-6.1 may be a false favorite; there are two additional sections to § 178-1-6, not just the section on ejection, regarding exclusion and suspension. It is curious that the majority did not mention these other two sections in its opinion. They read:

> 6.2. The stewards or the association have the power to suspend or exclude from the stands and grounds persons acting improperly or whose behavior is objectionable. The stewards shall enforce the suspension or exclusion.
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> 6.3. When a person is excluded from a racetrack or is suspended, he or she is not qualified, whether acting as agent

(continued...)

The majority also states in a footnote that the meaning of appeal in § 178-1-6.1, while defined in § 178-1-2.7 as "a request for the Racing Commission or its designee to hold a hearing and review any decisions or rulings of the *stewards*" (emphasis added), "has been expanded to include an appeal of ejection by the stewards or by an association as well." It supports this conclusion by referring to § 178-1-2 which allows the meaning of a defined word to take on more than its definition in the W. Va. C.S.R. where "the context clearly requires a different meaning." In concluding that the context of § 178-1-6.1 requires "appeal" to take on a meaning above and beyond that delineated in § 178-1-2.7, the majority

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[1](...continued)

> or otherwise, to subscribe for, to enter or run any horse in any race either in his or her own name or in that of any other person until the stewards rescind their penalty.

Perhaps the majority decided to rely on § 178-1-6.1 because CTR&S's communication with the jockeys used the word "ejection." However, what CTR&S calls its action is irrelevant; what matters most is whether its actions amounted to an ejection, exclusion, or suspension. Nowhere in the applicable sections of the W. Va. C.S.R. or the W. Va. Code are the terms "ejection," "exclusion," or "suspension" defined, and the majority takes no steps in explaining why "ejection" applies in this case.

It is unquestionable that under §§ 178-1-6.2 and 6.3, there is no right to appeal to the Racing Commission. Under these sections, a person who is excluded or suspended may only regain access to the association's property with the permission of the association. If § 178-1-6.1 does in fact apply as the majority asserts, because it is the only section that is construed by the majority to provide support for its conclusion, I find it unnecessary to explore §§ 178-1-6.2 and 6.3 in any more depth.

errs. "[A]ppeal," as used in § 178-1-6.1, plainly means only an appeal from a decision of the stewards.

In its opinion, the majority also places emphasis on the last sentence of § 178-1-6.1, but it completely glosses over the language in the preceding sentence. The first sentence of that section requires that for a person ejected by the stewards or the association to regain admittance, that person must obtain permission for reentry from the Racing Commission *and* the association. To read the two sentences of § 178-1-6.1 in the way that the majority does makes the section discordant, especially in light of the limits of the State's police power. Here, the clear language of the drafters of this portion of the West Virginia C.S.R. should be given effect and should be read as written: appeals may only be taken by persons ejected by the stewards, and when a person is ejected by an association, permission must be received from the association before that person may regain admission. The majority erred in not giving plain effect to the clear language of the rule.

3. As applied, the Majority Decision Authorizes the Racing Commission to Exceed its Authority.

The Racing Commission derives its authority to regulate from the police powers of the state:

> 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 that 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.

State ex rel. Morris v. West Virginia Racing Commission, 133 W. Va. 179, 192–93, 55 S.E.2d 263, 270 (1949). This authority is therefore limited to that actually conveyed by the police power of the constitution and to the actual and natural rights of those affected by actions of the Racing Commission. This Court has also established that the premise of the police powers of the state is to protect and promote the general welfare of the public:

> The police power is the power of the state, inherent in every sovereignty, to enact laws, within constitutional limits, to promote the welfare of its citizens. The police power is difficult to define precisely, because it is extensive, elastic and constantly evolving to meet new and increasing demands for its exercise for the benefit of society and to promote the general welfare. It embraces the power of the state to preserve and to promote the general welfare and it is concerned with whatever affects the peace, security, safety, morals, health and general welfare of the community.

Syl. pt. 5, *Appalachian Power Co. v. Gainer*, 149 W. Va. 740, 143 S.E.2d 351 (1965). The Court has described the general welfare, in the context of the police power as:

> embrac[ing a] whole system of internal regulation by which the state may subject persons and property to all kinds of reasonable restraints and burdens in order to secure the general comfort, health and prosperity of the state, to preserve public order, prevent offenses, and to establish for this intercourse of citizens with citizens those rules of good conduct and good neighborhood which are calculated to prevent a conflict of rights and to insure to each the uninterrupted enjoyment of his own rights so far as is reasonably consistent with a like enjoyment of rights by others.

Farley v. Graney, 146 W. Va. 22, 35, 119 S.E.2d 833, 841 (1960) (quoting 4 M.J., Constitutional Law, Section 66, pages 158–59).

The majority holds that the Racing Commission has the authority to require CTR&S to allow jockeys onto its private property so that the jockeys may participate in horse races. From where the majority gleans this authority is unclear. As this Court has recognized, the state's police power is "broad and sweeping"; however, the police power is confined by the requirement that it be used to create laws that preserve and promote the general welfare. The police power is not unlimited.

Creating laws and rules that regulate horse racing and the "great evil [which] attends its practice," protects the public from, *inter alia*, the dangers inherent in gambling and protects gamblers from potential fraud. See *West Virginia Racing Commission, supra*. I fail to see how the general welfare of the people of West Virginia is promoted by forcing

CTR&S to admit onto its premises jockeys whose presence it deems harmful to its business. In no way does this action secure the general comfort, health and prosperity of the state, preserve public order, prevent offenses, or prevent a conflict of right. Instead, the action tramples on the property rights of a private business concerned that its customers be worried that "cheating" might be possible at the track. In reaching its decision, the majority has allowed the Racing Commission to exceed its constitutional authority, in direct disregard for the business and property rights of CTR&S.

The majority reasons that because CTR&S can only do business because of a license it has received from the Racing Commission, it must submit to the Racing Commission's requirement that jockeys be admitted to race on CTR&S's property. It was also argued to this Court that because the Legislature has the power to abolish all gambling within the State, it must also have the power to require readmittance of the jockeys. It is of no matter that the Legislature has the power to declare wagering illegal, nor does it matter that CTR&S must be licensed by the Racing Commission. The underlying basis for the power of the Racing Commission to act, the police powers of the state, does not give the Racing Commission the constitutional authority, through either the licenses or permits it issues, to reach so far into the manner by which CTR&S conducts its business or to contravene the business and property rights of CTR&S, a private business.

I respectfully dissent to the majority opinion. I am authorized by Justice Ketchum to state that he joins in this dissent.