**IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**



ARNOLDO CARRILLO and SANTA FE HORSE RACING BY CARRILLO'S, LLC, a domestic limited liability company

Plaintiffs/Appellants,

v.

Ct. App. No. 34,429

MY WAY HOLDINGS, LLC, a foreign limited liability company d/b/a SUNLAND PARK RACETRACK AND CASINO, et al.,



Defendant/Appellees.

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**DEFENDANTS/APPELLEES RUIDOSO DOWNS RACING, INC. AND SHAUN HUBBARD'S ANSWER BRIEF**

On appeal from First Judicial District Court, Santa Fe County
The Honorable T. Glenn Ellington presiding
No. D-101-CV-2013-02048

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***ORAL ARGUMENT REQUESTED***

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## OTHER AUTHORITIES

## I. NATURE OF THE CASE AND COURSE OF PROCEEDINGS

This appeal arises from the grant of summary judgment in favor of Defendants/Appellees My Way Holdings, LLC and Rick Baugh, SunRay Gaming of New Mexico, LLC and Lonnie S. Barber, Jr., Ruidoso Downs Racing, Inc. and Shaun Hubbard and Zia Park, LLC and Rick Baugh (collectively, the "Associations[1]") on Plaintiffs/Appellants Arnoldo Carrillo and Santa Fe Horse Racing by Carrillo's (collectively "Carrillo") Petition for Writ of Mandamus and Complaint for Preliminary and Permanent Injunctive Relief, Declaratory Judgment, Interference with Prospective Contractual Relations (Two Counts), Prima Facie Tort, Negligence and Violation of the New Mexico Inspection of Public Records Act. [RP 1-36, 566-69] Carrillo alleges that Ruidoso Downs Racing, Inc. and Shaun Hubbard (collectively, "Ruidoso Downs") excluded Carrillo from its racetrack grounds without a lawful reason. [RP 15] Carrillo's theory and claims are premised on the argument that Ruidoso Downs cannot exclude Carrillo *sua sponte* but can only do so through a formal complaint filed with the Board of Stewards. [RP 15]

Ruidoso Downs moved for summary judgment on all claims. It established that it has a clear common law right to exclude patrons and licensees, such as

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[1] An Association is "an individual or business entity holding a license from the commission to conduct racing with pari-mutuel wagering." 15.2.1.7(A)(8) NMAC. For purposes of this brief, the term "Association" is synonymous, and used interchangeably, with "racetrack."

Carrillo, from its private property and that this common law right has been affirmed in New Mexico by both statute and regulation. [RP 299-310; 319-344; 388-407; 448-482] Appellant responded to the Motion but did not dispute any facts. [RP 440-44] The New Mexico Racing Commission, Vince Mares, the Director of the New Mexico Racing Commission, and the Board of Stewards for Sunland Park, Zia Park, Sunray Park, and Ruidoso Downs, through the Attorney General's Office, filed a Notice of Concurrence supporting the Associations' position that racetracks, as private property owners, have the common law right to exclude both patrons and licensees. [RP 563-65]

After reviewing the parties' submissions and conducting a hearing, the district court determined that, as a matter of law, under the common law and as codified by statute at NMSA 1978, §60-1A-28.1, a racetrack owner has a right to exclude any person for any lawful reason. [Tr.-3:25; Tr.-4:1-4] Appellant did not make any argument at the hearing. Rather, he conceded the Motion. *Id.* The order granting summary judgment was entered on January 6, 2015, and a timely notice of appeal was filed. [RP 566-69, 570-76]

## II. SUMMARY OF RELEVANT FACTS AND PROCEEDINGS

### A. The Structure and Framework of New Mexico Horse Racing

In New Mexico, horse racing is governed by the Horse Racing Act, NMSA 1978, § 60-1A-1, *et. seq.* (the "Act"). [RP 4, 192] The Act created the New

Mexico Horse Racing Commission (the "Commission"), which has adopted rules governing horse racing. NMSA 1978, § 60-1A-3; NMSA 1978 § 60-1A-5(A) ("The commission shall adopt rules to implement the Horse Racing Act and to ensure that horse racing in New Mexico is conducted with fairness and that the participants and patrons are protected against illegal practices."). *See also* 15.2.1 NMAC, *et. seq.* "It is the intent of the [C]ommission that the rules of the [C]ommission be interpreted in the best interests of the public and the jurisdiction." 15.2.1.8(A)(1) NMAC.

The Commission is vested with authority to implement, administer, and enforce the Act, including oversight of licensing. *See* 15.2.1.8(A)(1) NMAC. *See also* 15.2.1.6 NMAC; NMSA 1978, § 60-1A-4. As part of its licensing oversight, "[t]he [C]ommission may suspend, revoke or deny renewal of a license of a person who violates the provisions of the…Act or rules adopted pursuant to that [A]ct.

The Act also creates a Board of Stewards (the "Board"), which has the authority to supervise all racing officials, track management, licensed personnel, other persons responsible for the conduct of racing, and patrons and to resolve conflicts or disputes related to racing and discipline violations. 15.2.3.8(B)(1)(b), (c) NMAC. The Board is licensed and employed by the Commission to supervise each race meet. NMSA 1978 § 60-1A-12.

There are five Associations that are licensed to conduct horse racing and gaming by the Commission and New Mexico Gaming Control Board. [RP 460] Ruidoso Downs, a private entity that owns and operates Ruidoso Downs Race Track in Ruidoso Downs, Lincoln County, New Mexico, [RP 3, 190], is one Association that holds a license from the Commission to conduct racing with pari-mutuel wagering. [RP 406]

**B. New Mexico Law Regarding Exclusion from Racetracks**

New Mexico statutes and rules provide for the exclusion of individuals from racetracks. In 2001, the Commission enacted Section 15.2.2.8(V) of the New Mexico Administrative Code, which gives Associations the right to eject or exclude individuals from association grounds. 15.2.2.8(V) NMAC provides, in part:

> V. EJECTION AND EXCLUSION
>
> (1) An association shall immediately eject from the association grounds a person who is subject to such an exclusion order of the commission or stewards and notify the commission of the ejection.
>
> (2) An association may eject or exclude a person for any lawful reason. An association shall immediately notify the stewards and the commission in writing of any person ejected or excluded by the association and the reasons for the ejection or exclusion.

In addition to the rules providing for exclusion, the Act provides for the Commission to exclude individuals from racetracks:

The [C]ommission may:

> exclude or compel the exclusion of a person from all horse racetracks who the commission deems detrimental to the best interests of horse racing or who willfully violates the...Act, a rule or order of the commission or a law of the United States or New Mexico.

NMSA 1978, § 60-1A-4(A)(2). Further, the New Mexico Legislature, in 2014, unanimously passed, and Governor Martinez signed into law, Senate Bill 116 ("S.B. 116"), stating:

> A. A racetrack licensee may eject or exclude from the association grounds any person whose occupational license has been suspended or revoked by the commission for administering a performance-altering substance as provided in Subsection A of Section 60-1A-28 NMSA 1978.
>
> B. Nothing in this section shall be construed to limit a racetrack licensee's power to eject or exclude a person from the association grounds for any other lawful reason.
>
> C. For the purposes of this section, "association grounds" means all real property used during a race meeting by a person holding a license from the commission to conduct racing with pari-mutuel wagering, including the racetrack, grandstand, casino, concession stands, offices, barns, stable area, employee housing facilities and parking lots.

S.B. 116 was subsequently codified as NMSA 1978, § 60-1A-28.1. Section 60-1A-28.1(B), which reads exactly as S.B. 116(B), grants Associations with a statutory right to exclude, as previously recognized by 15.2.2.8(V) NMAC.

### C. Carrillo's Exclusion from Ruidoso Downs

Mr. Carrillo is a racehorse owner and trainer, and he owns Santa Fe Horse Racing by Carrillo's, LLC. [RP 2, 449-50] On July 2, 2013, Shaun Hubbard, General Manager of Ruidoso Downs, sent a letter to Mr. Carrillo that stated, "Based on the number of incidents and your record at New Mexico tracks, Ruidoso Downs has decided in the best interest of horse racing, to deny you entry to the Ruidoso Downs property and entry into any race during live racing." [RP 12, 205, 390, 406] The letter also stated that Carrillo's future eligibility would be determined upon review of Carrillo's past incidents. *Id.*

The "incidents" and "record" referenced in Mr. Hubbard's letter referred to instances involving Carrillo's horses at other New Mexico race tracks, including injuries sustained by Carrillo's horses at Zia Park. [RP 390, 406] Specifically, two of Carrillo's horses—Osceolacorona for Me and Sweetened Vanilla—were removed from Zia Park's test barn via equine ambulance and treated for knee and leg injuries after winning races at Zia Park on September 9, 2012. [RP 450-52] It is uncommon for an individual trainer to have two horses require ambulatory service on the same day. [RP 453, 462] Both horses had been treated with phenylbutazone, an anti-inflammatory capable of masking injury, and flunixin meglumine, an anti-inflammatory that can mask injury and serious illness. [RP 451-52] Sweetened Vanilla had also been treated with furosemide, which is used

to prevent bleeding during racing and to treat pulmonary edema and heart failure in horses. [RP 452-53]

The next month, another horse owned and trained by Carrillo, De Genuine Queen, suffered a fractured knee and had to be euthanized after crossing the finish line after the second race at Zia Park on October 29, 2012. [RP 5, 453] De Genuine Queen had also been treated with phenylbutazone, flunixin meglumine, and furosemide. [RP 454]

One of the incidents referred to in Ruidoso Downs' letter was also the death of Jumpn Alegre, a horse owned and/or under Carrillo's care, which died on April 12, 2013, shortly after winning a quarter horse race at Sunland Park Racetrack & Casino. [RP 301, 390, 406] Ruidoso Downs' letter excluding Carrillo did not foreclose Carrillo's future racing eligibility at Ruidoso Downs. [RP 491]

**D. Carrillo Received and Conducted Discovery to Its Satisfaction**

After filing the lawsuit, Carrillo served Ruidoso Downs with one set of requests for production on November 22, 2013. [RP 256-57] Ruidoso Downs served responses on January 6, 2014. [RP 285-86] At no point did Carrillo serve Ruidoso Downs with any interrogatories or additional requests for production. Carrillo did not request supplementation of any of Ruidoso Downs' responses. Carrillo also did not file a motion to compel the production of any documents

requested in the only set of requests for production that were served on Ruidoso Downs.

### E. Ruidoso Downs Made a Prima Facie Case for Summary Judgment

Ruidoso Downs moved for summary judgment on all of Carrillo's claims, establishing that it has a clear right, as a private property owner, to exclude individuals from its property under common law and New Mexico law. [RP 388-407] Ruidoso Downs articulated that the right to exclude is founded on a long-standing principle of property law that has been recognized within the context of places of amusement, including racetracks. [RP 392-93] Ruidoso Downs further established that the right to exclude applies equally to both patrons and licensees, so long as the exclusion is premised on a lawful reason and not on race, creed, color, age, sex or national origin. [RP 393, 489]

Summary judgment was similarly justified by New Mexico statutes and rules that affirm the common law right to exclude. Ruidoso Downs demonstrated that these authorities have extended the Commission and Stewards' right to exclude to Associations. [RP 394-95, 490-91]

Based on the right to exclude persons for any lawful reason, Ruidoso Downs's summary judgment motion showed that Carrillo was excluded out of concern for Carrillo's horses, including the manner in which they were treated and

cared for, and to preserve the best interests and integrity of horse racing at Ruidoso Downs. [RP 390, 406]

Carrillo's Response failed to establish the existence of any material issue of fact or refute the facts set forth by Ruidoso Downs, effectively conceding the fact that Ruidoso Downs excluded Carrillo for a valid, lawful reason. [RP 443 (arguing instead that nothing in Mr. Hubbard's Affidavit alleges that "Mr. Carrillo was responsible for the injuries" or "attempt[s] to distinguish Mr. Carrillo's record from that of hundreds of other successful trainers or owners.")]

Carrillo's Response did not allege that the matter was not ripe for summary judgment. The Response contained no Rule 1-056(F) affidavit contending that discovery was in its early stages or that summary judgment briefing was premature. [RP 440-44] Carrillo's Response also failed to address arguments made by Ruidoso Downs with respect to Carrillo's additional claims of negligence, tortious interference with contractual relations, and prima facie tort. *Id.* By failing to address these claims in front of the district court, Carrillo has abandoned these claims on appeal[2]. *See* Rule 12-216(A) NMRA (issue must be preserved by invoking ruling of district court). *See also Matter of Estate of Kimble*, 1994-

[2] Carrillo's claims for negligence, interference with contractual relations, and prima facie tort are further waived for purposes of this appeal because Carrillo failed to address them in his opening brief. *See State v. Montoya Guzman*, 2004-NMCA-097, ¶ 23, 136 N.M. 253, 96 P.3d 1173 (stating that issues not argued in the brief in chief are deemed abandoned).

NMCA-028, ¶ 25, 117 N.M. 258, 871 P.2d 22 (where record fails to indicate that argument was presented to court below, unless it is jurisdictional in nature, it will not be considered on appeal.) Carrillo also failed to discuss the plain language and statutory interpretation of Section 60-1A-28.1 in his Response. [RP 440-44]

**F. The Summary Judgment Hearing**

At the hearing on Ruidoso Downs' summary judgment motion, Carrillo made no substantive oral argument in opposition to the motion. [Tr.-1-Tr.-7] Rather, Carrillo conceded that the Court was likely to grant the motion filed by Ruidoso Downs, and the other Associations, on the grounds that Associations retain the common law right to exclude licensees. [Tr.-3:4-5, 16-19]

Notwithstanding its concession, Carrillo noted that the legal question of whether Associations have a right to exclude licensees was, at the time, before the Court of Appeals in the matter of *Stinebaugh v. My Way Holdings*, D-202-CV-2014-01399, Court of Appeals No. 2014 34,100. [Tr.-2:15-16, 21-23] Carrillo indicated an intent to "take up" the legal question of an Association's right to exclude and "join it" with *Stinebaugh*[3]. [Tr.-2:16-21] At no point during the hearing did Carrillo articulate that summary judgment should be denied for any

[3] Appellant Stinebaugh has since abandoned his appeal, filing a stipulated motion to dismiss his appeal on July 30, 2015, which was granted pursuant to a Court order on August 6, 2015. The appeal was formally closed on October 14, 2015.

reason, including on the basis that discovery was in its early stages or that summary judgment was premature. [Tr.-1-Tr.-7]

### G. The District Court Grants Summary Judgment for Ruidoso Downs

Based on case law, Carrillo's concession that the Court was likely to grant summary judgment, and Carrillo's stated intent to join *Stinebaugh* on appeal, the district court concluded that, as a matter of law, under the common law and codified by statute at NMSA 1978, Section 60-1A-28.1, a racetrack owner has a common law right to exclude any person for any lawful reason. [Tr.-3:25; Tr.-4:1-4] The district court then granted summary judgment in favor of Ruidoso Downs and the other Associations. [Tr.-3:24-25; Tr.-4:1-7]

## III. ARGUMENT

### A. Summary Judgment Was Properly Granted Because Carrillo Offered No Competent Evidence That Ruidoso Downs Does Not Have The Right To Exclude Licensees For Any Lawful Reason As Recognized By Common Law

#### 1. Standards governing review.

Because this appeal arises from a grant of summary judgment, this Court's standard of review is de novo. *City of Rio Rancho v. Amrep Southwest, Inc.*, 2011-NMSC-037, ¶ 14, 150 N.M. 428, 260 P.3d 414. A primary purpose of the summary judgment rule is to isolate and dispose of factually unsupported claims. *Goradia v. Hahn Co.*, 1991-NMSC-040, ¶ 18, 111 N.M. 779, 782, 810 P.2d 798, 801 (1991). Summary judgment is intended to expedite litigation by determining

whether a plaintiff possesses competent evidence to support his claims so as to raise genuine issues of material fact and, if he has not, then to dispose of the matters at that stage of the proceeding. *Goffe v. Pharmaseal Labs., Inc.*, 1976-NMCA-123, ¶ 8, 90 N.M. 764, 568 P.2d 600, *rev'd in part on other grounds*, 1977-NMSC-071, 90 N.M. 753, 568 P.2d 589.

Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 1-056(C) NMRA; *Ciup v. Chevron U.S.A., Inc.,* 1996-NMSC-062, ¶¶ 5-6, 122 N.M. 537, 928 P.2d 263. The moving party may establish a prima facie case for summary judgment if, through discovery, it appears that the non-moving party cannot factually establish an essential element of its claims. *Paragon Found., Inc. v. State of N.M. Livestock Bd.*, 2006-NMCA-004, ¶ 11, 138 N.M. 761, 126 P.3d 527. A prima facie showing is "such evidence as is sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted." *Goodman v. Brock*, 1972-NMSC-043, ¶ 8, 83 N.M. 789, 498 P.2d 676. Once the defendant has made a prima facie showing to support summary judgment, the burden shifts to the plaintiff "to demonstrate the existence of specific evidentiary facts which would require a trial on the merits." *Roth v. Thompson*, 1992-NMSC-011, ¶ 17, 113 N.M. 331, 825 P.2d 1241.

In opposing summary judgment, a plaintiff may not simply argue that evidentiary facts might exist, nor rest on the allegations of the complaint. *Dow v. Chilili Coop. Ass'n*, 1986-NMSC-084, ¶ 13, 105 N.M. 52, 728 P.2d 462. Rather, a plaintiff must adduce evidence sufficient to justify a trial on the issues. *Clough v. Adventist Health Sys., Inc.*, 108 N.M. 801, 803, 780 P.2d 627, 629 (1989). Although inferences should be drawn in the nonmoving party's favor, "[t]he inferences, which the party opposing the motion for summary judgment is entitled to have drawn from all the matters properly before and considered by the trial court, must be *reasonable* inferences." *Goffe*, 1976-NMCA-123, ¶ 5 (emphasis in original) (cited authority omitted).

"An inference is not a supposition or a conjecture, but is a logical deduction from facts proved and guess work is not a substitute therefor." *Stambaugh v. Hayes*, 1940-NMSC-048, ¶ 32, 44 N.M. 443, 103 P.2d 640 (internal citation omitted). Unreasonable inferences drawn from disputed facts cannot serve as a basis for denying summary judgment. *Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶ 10, 148 N.M. 713, 242 P.3d 280. "Only when the inferences are reasonable is summary judgment inappropriate. *Id.*

Moreover, the allegedly disputed facts must be material for a party to survive summary judgment. *Id.* ¶ 11. In determining which disputed facts are material, the court must look to the substantive law governing the dispute and

focus its inquiry on whether, under that substantive law, the disputed fact is necessary to give rise to a claim. *Id.* (cited authorities omitted). "A fact is material for the purpose of determining whether a motion for summary judgment is meritorious if it will affect the outcome of the case." *Parker v. E.I. Du Pont de Nemours & Co.*, 1995-NMCA-086, ¶ 9, 121 N.M. 120, 909 P.2d 1. If the material facts are not in dispute, but only the legal effect of the facts is presented for determination, then summary judgment may properly be granted. *Cuevis v. State Farm Mut. Auto. Ins. Co.,* 2001-NMCA-038, ¶ 6, 130 N.M. 539, 28 P.3d 527.

**2. Ruidoso Downs has the common law right to exclude all persons, including licensees.**

A racetrack's common law right to exclude individuals for any lawful reason was first recognized in *Marrone v. Washington Jockey Club*, 227 U.S. 633, 33 S.Ct. 401 (1913). Since that decision, courts across several jurisdictions have recognized that, under the common law, private property owners like Ruidoso Downs have the right to exclude not only patrons but also licensees from their property.

Under the common law, Ruidoso Downs, as a private property owner, retains a bundle of rights, one of the most essential being the right to exclude others from its property. *Santa Fe County Bd. of County Comm'rs v. Town of Edgewood*, 2004-NMCA-111, ¶ 5, 136 N.M. 301, 97 P.3d 633. The right to

exclude is "the most fundamental of all property interests." *State v. Office of the Public Defender ex rel. Muqqddin*, 2012-NMSC-029, ¶ 41, 285 P.3d 622.

Despite Carrillo's reliance on the dissent in *Bresnik v. Beulah Park Ltd.*, 617 N.E.2d 1096 (Ohio 1993), the majority holding is aligned with a substantial amount of authority that acknowledges a private property owner's common law right to exclude both patrons and licensees. In *Bresnik*, the court held that a racetrack owner had a common law property right to exclude a licensed jockey agent that was neither abrogated nor abolished by a statute permitting the state racing commission to exclude jockey agents from racetracks or by rules authorizing track stewards to do so. *Bresnik*, 617 N.E.2d 1096, 1097. This regulatory framework in *Bresnik* is similar to that in place in New Mexico. In addition to the common law right to exclude, the Commission is permitted to exclude licensees under New Mexico law. *See* NMSA 1978 § 60-1A-4 ("The [C]omission may exclude or compel the exclusion of a person from all horse racetracks who the commission deems detrimental to the best interests of horse racing..."). *See also* 15.2.1.9(C)(21)(a) NMAC ("The steward, agency director, or commission may order an individual ejected or excluded from all or part of any premises under the regulatory jurisdiction of the commission if the stewards, agency director, or commission determine that the individual's presence on association grounds is inconsistent with maintaining the honesty and integrity of

racing.") The Board may also exclude licensees under New Mexico statutes and rules. *Id.*; 15.2.3.8(B)(3)(f) NMAC ("The stewards may impose any of the following penalties on a licensee for a violation of the act or these rules: exclude from grounds under the jurisdiction of the commission."

Most recently, the New Mexico Legislature recognized the Association's right to exclude through NMSA 1978, § 60-1A-28.1. However, this right to exclude has been recognized in 15.2.2.8(V) NMAC since 2001. The district court's ruling mirrors that of the *Bresnik* court, which found that any statutes and rules expressly allowing exclusion supplemented—and not abrogated—the common law. *Bresnik*, 617 N.E.2d 1096, 1097.

In addition to *Bresnik*, other jurisdictions also recognize a property owner's right to exclude licensees, undermining Carrillo's contention that there is a "limited" right to exclude licensees. *Martin v. Monmouth Park Jockey Club*, 145 F. Supp. 439 (D.N.J. 1956), *aff'd,* 242 F.2d 344 (3d Cir. 1957), articulates a private entity's right to exclude licensees. In *Martin*, the court upheld the exclusion of a jockey, who had been licensed by the racing commission and found that the New Jersey Racing Commission rules did not give the jockey the right to ride at a private corporation's track over its objection. *Martin*, 145 F. Supp. at 440. The court found that, although a racetrack is "intensely regulated,"..."[n]othing is more elementary than its right as a private corporation to admit or exclude any persons it

pleases from its private property, absent some definite legal compulsion to the contrary." *Id.* (emphasis added). The court further noted that "nowhere in the statutes or rules governing race tracks is there any indication that simply because he has a license from the...Commission a [licensee] thereby possesses a right to ride at any track in the state despite the wishes of its owners." *Id.* Similarly, neither the Act nor the rules contemplate bestowing Carrillo and other licensees with unfettered access and rights to Association grounds and participation in races by virtue of an occupational license. Nothing in the Act indicates that the Legislature intended to remove an Association's common law right to prohibit a horse owner from using its track.

In *Catrone v. State Racing Comm'n*, 459 N.E.2d 474 (Mass.App. 1984), the court upheld the exclusion of a licensed trainer, finding:

> the statutes and the regulations, viewed in the aggregate, convince us that a licensed racetrack, except as otherwise clearly provided by statute or valid regulation, remains a private proprietary corporation, at liberty to deal (or reasonably to refrain from dealing) with licensed owners, trainers, and jockeys at least in accordance with a sound business judgment. We perceive no legislative purpose to modify the powers which a racetrack would have possessed apart from present statutory regulation so as to deprive it of discretionary business judgment in determining which licensed horse owners and horse trainers will be allowed to use its facilities. Indeed, the commission by § 4.14(10) (1978), allowing the refusal of race entries without explanation...as one of its regulations, in substance has stated formally what is essentially the rule in force in several jurisdictions. In such jurisdictions a proprietary racetrack, even though intensively regulated, need not permit participation in racing by any person, simply because that person has a license from the regulatory commission, and those jurisdictions certainly permit exclusion from such participation on reasonable business

> grounds. See *Martin v. Monmouth Park Jockey Club,* 145 F.Supp. 439, 440-441 (D.N.J.1956), aff'd per curiam, 242 F.2d 344 (3d Cir.1957); *Evans v. Arkansas Racing Commn.,* 270 Ark. 788, 797-803, 606 S.W.2d 578 (1980), cert. denied, 451 U.S. 910, 101 S.Ct. 1980, 68 L.Ed.2d 299 (1981).

*Catrone*, 459 N.E.2d at 476-77. While New Mexico statutes and rules do not predicate exclusion on "sound business judgment," they do allow exclusion for any "lawful reason" without explanation. Ruidoso Downs possessed a lawful reason in excluding Carrillo. [RP 5, 301, 390, 406, 450-54, 462]. The Legislature, in allowing exclusion for any lawful reason, does not intend to keep Associations from pursuing their common law rights. Though there may be "significant interference with...use of...licenses...neither rules nor public policy dictates that those licenses be considered to confer upon their holders an absolute right to compete in any harness racing meeting in the state." *Tisher v. California Horse Racing Bd.*, 282 Cal. Rptr. 330, 337 (Cal. App. 2 Dist. 1991).

Carrillo relies on four cases in an attempt to illustrate a "limited" right to exclude licensees—*Jacobsen v. N.Y. Racing Ass'n*, 305 N.E.2d 765 (N.Y. 1973), *Cox v. Nat'l Jockey Club*, 323 N.E.2d 104 (Ill. App.1974), *Marzocca v. Ferone*, 461 A.2d 1133 (N.J. 1983), and *Bresnik v. Beulah Park Ltd.*, 617 N.E.2d 1096 (Ohio 1993). *Bresnik*, as discussed, supports a common law right to exclude licensees, and the three remaining cases are readily distinguishable from and inapposite to Carrillo's exclusion.

In *Jacobsen*, the defendant racetrack excluded a licensed owner and trainer. However, the court recognized that a racetrack possesses the right to exclude a licensee if there is a legitimate basis for the exclusion. *Jacobsen*, 305 N.E.2d 765, 768 (stating that a plaintiff bears a "heavy burden to prove [exclusion] was not a reasonable discretionary business judgment, but was actuated by motives other than those related to the best interests of racing") Further, the defendant, unlike Ruidoso Downs, had been given a franchise by the state to conduct horse racing. *Jacobsen*, 305 N.E.2d 765, 766. While the court did not reach the question of state action, this distinction is significant. Ruidoso Downs is not a state-granted franchise. Instead, not only does Ruidoso Downs have a common law right to exclude, but it is also an Association that has been granted the authority to exclude licensees pursuant to its racetrack license and New Mexico statutes and rules. *See* 15.2.1.7(A)(8) NMAC ("Association" is an individual or business entity holding a license from the commission to conduct racing with pari-mutuel wagering.); *see also Brooks v. Chicago Downs Ass'n, Inc.*, 791 F.2d 512, 516 (7th Cir. 1986) (racetrack is not a state granted franchise). Moreover, the defendant in *Jacobsen* owned three of the four racetracks in the state. In denying the owner access to stall space at each track, the defendant single-handedly excluded the owner from the sport. However, in the instant lawsuit, Ruidoso Downs is only one of several racetracks who excluded Carrillo, based on lawful reasons. [RP 5, 301, 390, 406,

450-54, 462] The *Jacobsen* court also precluded exclusion of licensees on the basis that it may "infringe on the State's power to license horsemen." *Jacobsen*, 305 N.E.2d 765, 768. However, this concern lacks merit in New Mexico, as there is a substantial licensing scheme in which Associations play no part. Whether Ruidoso Downs excludes any person has no bearing on licensure, as the Commission is solely responsible for license oversight. *See* NMSA 1978, § 60-1A-5(C).

*Cox* is also distinguishable because the court held that under Illinois law a private property owner cannot *arbitrarily* deny entry to a licensee. *Cox*, 323 N.E.2d 104, 107. The court held, "We do not mean to intimate that a licensee conducting a horse racing meet...can never bar a jockey from participation. If a *legitimate* and *reasonable* justification for exclusion is articulated the licensee conducting the horse racing meet would certainly be within the boundaries of acceptable behavior." *Id.* at 109 (emphasis added). Unlike the jockey in *Cox*, Carrillo was not arbitrarily excluded. Rather, Ruidoso Downs informed Carrillo that he was excluded from its grounds on the basis of his record, including several incidents involving his horses. [RP 390, 406]. These incidents, detailed herein, took place at various New Mexico racetracks and include two horses requiring ambulatory service on the same day and the death of two horses. [RP 5, 301, 390, 406, 450-54, 462] Given the numerous incidents, Ruidoso Downs excluded

Carrillo out of concern for his horses and in the best interest of the sport. [RP 395, 406] These reasons are not arbitrary. Regardless, nothing in the traditional common law or the Act precludes exclusion for an "arbitrary" reason. *Cox* also recognized that a licensee's record is not an arbitrary basis for exclusion, citing *Martin v. Monmouth Park Jockey Club*, 145 F. Supp. 439 (D.N.J. 1956) *aff'd, Martin v. Monmouth Park Jockey Club*, 242 F.2d 344 (3d Cir. 1957) with approval for the following holding:

> In a sport where the greatest importance should attach to dissipating any cloud of association with the undesirable, and in which the appearance as well as the fact of complete integrity is of paramount consideration, to exclude plaintiff from riding because of his record was an understandably warranted exercise of discretion.

*Cox*, 323 N.E.2d at 109, *citing Martin*, 145 F. Supp. at 441.

*Marzocca* is similarly deficient in supporting Carrillo's position. Carrillo cites only a portion of the court's holding in *Marzocca* to portray that excluding persons who seek to perform vocational activities in violation of public policy is not permitted. Carrillo's Brief in Chief ("BIC"), p. 41. Rather, the court stated, in full, "In the absence of a legitimate regulation governing the subject matter, such an inference [that property owners have no interest in excluding licensees] could create an unwarranted interference with the business relationships of a private racetrack and those people who wish to perform their vocational activities on racetrack property." *Marzocca*, 461 A.2d 1133, 1137. New Mexico has such

regulations—NMSA 1978, § 60-1A-28.1 and 15.2.2.8(V) NMAC—that expressly allow Associations to exclude licensees. In reality, the court found that "the racetrack's common law right to exclude exists in the context of this case, *i.e.*, where the relationship is between the track management and persons who wish to perform their vocational activities on track premises." *Marzocca*, 461 A.2d. at 1137

Carrillo attempts to draw parallels between the licensing scheme of horse racing in New Mexico and licensing in the context of hospital privilege. However, there is no comparison to horse racing. The *Kelly* case involved limited exclusion due to the "inelastic demand relationships" of medicine, which require consumers to "purchase [medical services] no matter how highly priced the services are." *Kelly v. St. Vincent Hospital*, 1984-NMCA-130, ¶ 6, 102 N.M. 201, 692 P.2d 1350. Moreover, this very same argument was rejected in the *Tisher* case, which held, "this case involves a sport, not a necessity of life." *Tisher*, 282 Cal. Rptr. at 337. The common law clearly recognizes a right to exclude licensees under the facts set forth in this matter.

## B. Summary Judgment In Ruidoso Downs' Favor Comports With Well-Established Authorities Addressing A Private Property Owner's Authority To Exclude Licensees For Any Lawful Reason

### 1. The Court should not consider Carrillo's arguments regarding NMSA 1978, § 60-1A-28.1 on appeal because they were not before the district court.

As a preliminary matter, the Court should not entertain Carrillo's arguments regarding the meaning and interpretation of Section 60-1A-28.1 because Carrillo did not invoke the ruling of the district court on this argument. "To preserve an issue for review on appeal, it must appear that appellant fairly invoked a ruling of the trial court on the same grounds argued in the appellate court." *Woolwine v. Furr's, Inc.,* 1987-NMCA-133, ¶ 20, 106 N.M. 492, 496, 745 P.2d 717, 721. *See* Rule 12-216(A) NMRA 1996 (issue must be preserved by invoking ruling of district court). Absent a citation to the record or any obvious preservation, the Court of Appeals will not consider the issue. *Nellis v. Farmers Ins. Co. of Arizona*, 2012-NMCA-020, ¶ 23, 272 P.3d 143. The rules of preservation are no different for review of summary judgment than for review of other final orders. *Spectron Dev. Lab. v. Am. Hollow Boring Co.,* 1997–NMCA–025, ¶¶ 31–32, 123 N.M. 170, 936 P.2d 852. The Court of Appeals reviews the case litigated below, not the case that is fleshed out for the first time on appeal. *Id.*, ¶ 32.

On appeal, Carrillo attempts to argue that the district court misconstrued the intent of Section 60-1A-28.1. However, Carrillo presented no arguments regarding

the interpretation of Section 60-1A-28.1 based on either plain language or rules of statutory construction in his Response to Ruidoso Downs' summary judgment motion or at oral argument. [RP 440-44; Tr.-1-Tr.-7] Because Carrillo did not invoke the district court's ruling on the interpretation of Section 60-1A-28.1, any arguments regarding the plain language and statutory construction of this provision are not properly before this Court. *See Spectron Dev. Lab.,* 1997–NMCA–025, ¶ 32 ("[I]t is a serious mistake to treat district court hearings on motions to dismiss and motions for summary judgment as mere rehearsals for later appellate review.) (internal citations omitted).

**2. Notwithstanding the fact that Carrillo waived any arguments regarding statutory interpretation, the plain language of Section 60-1A-28.1 affirms the right to exclude licensees for any lawful reason.**

NMSA 1978, § 60-1A-28.1 provides, in part:

> A. A racetrack licensee may eject or exclude from the association grounds any person whose occupational license has been suspended or revoked by the commission for administering a performance-altering substance as provided in Subsection A of Section 60-1A-28 NMSA 1978.
>
> B. Nothing in this section shall be construed to limit a racetrack licensee's power to eject or exclude a person from the association grounds for any other lawful reason.

Through amending the Act to include NMSA 1978, § 60-1A-28.1(B), the New Mexico Legislature recognized the Association's common law and fundamental right to exclude both patrons and licensees. This authority to exclude patrons and

licensees given to Associations is supported by the plain language of Section 60-1A-28.1(B).

In construing statutes, the Court must determine and give effect to the Legislature's intent. To discern the Legislature's intent, the Court looks first to the plain language of the statute, giving the words their ordinary meaning, unless the Legislature indicates a different one was intended. *Badilla v. Wal-Mart Stores E. Inc.*, 2015 WL 5269726 (Sept. 10, 2015). *See State v. Tufts*, 2015-NMCA-075, ¶ 15, 355 P.3d 32, *cert. granted* (June 19, 2015) (courts are required to attribute the usual and ordinary meaning to words used in a statute).

While the term "lawful reason" is undefined in the Act and related administrative code provisions, "lawful" is not a term of art. Rather, it is easily defined by its ordinary meeting of "not contrary to law; permitted by law. See Legal." Black's Law Dictionary, Abridged 8th Ed. (2005). Ruidoso Downs excluded Carrillo based on Carrillo's incidents and record at New Mexico tracks, including injuries sustained by two horses on the same day that both required equine ambulatory service and the death of two horses shortly after winning races [RP 301, 390, 406, 450-54, 462]. Ruidoso Downs' exclusion of Carrillo was motivated out of concern for Carrillo's horses, including the manner in which they were treated and cared for, and to preserve the best interests and integrity of horse

racing at Ruidoso Downs. [RP 390, 406] These are "lawful reasons" because they are not contrary to law.

The plain meaning of "person" also contemplates the inclusion of licensees. Section 60-1A-28.1(A) refers to the exclusion of a "person whose occupational license has been suspended or revoked." Holders of occupational licensees are licensees. *See* 15.2.1.7(L) ("'Licensee' is any person or entity holding a license from the Commission to engage in racing or a regulated activity.") However, even if the Legislature had not specifically referred to persons with occupational licenses, licensees are nonetheless encompassed within the definition of person. *See* NMSA 1978, § 60-1A-2(P) ("licensee means a *person* licensed by the commission and includes a holder of an occupational, secondary or racetrack license") (emphasis added). *See also* NMSA 1978, Section 60-1A-5(C) ("The commission may suspend, revoke or deny renewal of a *license of a person* who violates the provisions of the…Act…") (emphasis added).

Based on the plain meaning rule, Section 60-1A-28.1(B) provides that Associations have the power to exclude persons, including race horse owners, from an Association grounds for any reason that is not contrary to law.

### 3. Notwithstanding the fact that Carrillo waived any arguments regarding statutory interpretation, the statutory construction[4] of Section 60-1A-28.1 affirms the right to exclude licensees for any lawful reason.

Where statutory language is plain, the court's task of statutory interpretation ends. *Morris v. Brandenburg*, 2015-NMCA-100, ¶ 19, 356 P.3d 564, *cert. granted* (Aug. 31, 2015). However, if the intentions of the Legislature cannot be determined from the actual language of a statute, then courts resort to rules of statutory construction. *Romero v. Progressive Nw. Ins. Co.*, 2010-NMCA-024, ¶ 21, 148 N.M. 97, 230 P.3d 844 *aff'd sub nom. Jordan v. Allstate Ins. Co.*, 2010-NMSC-051, 149 N.M. 162, 245 P.3d 1214. In considering principles of statutory construction, courts must attempt to construe a statute according to its obvious spirit or reason. *Benavides v. E. New Mexico Med. Ctr.*, 2014-NMSC-037, ¶ 24, 338 P.3d 1265. "One guide to finding legislative intent is to strive to read related statutes in harmony so as to give effect to all provisions." *Dewitt v. Rent-A-Ctr., Inc.*, 2009-NMSC-032, ¶ 30, 146 N.M. 453, 212 P.3d 341 (internal citations omitted). Courts should presume that the Legislature does not intend to enact useless statutes. *Pina v. Gruy Petroleum Mgmt. Co.*, 2006-NMCA-063, ¶ 22, 139 N.M. 619, 136 P.3d 1029. Because the plain language of Section 60-1A-28.1 is

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[4] Carrillo's statutory construction arguments are asserted in a subsection entitled "Plain language of Section 60-1A-28.1." BIC, p. 17. However, because Carrillo's argument goes beyond a discussion of the plain meaning of the statute, they are addressed here in the context of statutory construction.

clear, no further statutory interpretation is required. *See Morris*, 2015-NMCA-100, ¶ 19. However, to the extent that the Court deems an analysis of statutory construction necessary, Carrillo's interpretation of Section 60-1A-28.1 nonetheless fails.

Carrillo contends that the district court's interpretation of Section 60-1A-28.1 reduces Subsection A to surplusage. BIC, p. 18. However, nothing in Section 60-1A-28.1(B) renders Subsection A surplusage. Rather, the provisions of Subsection B illustrate that the Legislature specifically intended to grant Associations the authority to exclude licensees for additional reasons beyond a suspended or revoked license, as expressly stated in Subsection A. This coincides with the Legislature's intent to grant Associations greater authority through the enactment of Section 60-1A-28.1 and harmonizes the Act with 15.2.2.8(V) NMAC, which has allowed Associations the right to exclude licensees for reasons beyond deficient licenses since 2001. The Legislature does not enact useless statutes. *Pina*, 2006-NMCA-063, ¶ 22. Rather, Section 60-1A-28.1 codifies rights that the Commission expressly granted to the Associations.

Under Carrillo's reading of Section 60-1A-28.1, the only reason to exclude a licensee from association grounds is a revoked or suspended license. This limited interpretation fails from both a practical and policy perspective. First, as a practical matter, Associations must be able to exclude licensees for reasons beyond

a suspended or revoked license in order to comply with its duty of maintaining the safety of association grounds. 15.2.28(E)(4) NMAC ("An association shall maintain all facilities on association grounds to ensure the safety and cleanliness of the facilities at all times.") Second, excluding licensees on the sole basis of license status undermines the spirit of the common law and the Commission's intent to allow Associations to exclude as enumerated in 15.2.2.8(V). Finally, limiting an Association's right to exclude only those licensees whose licenses have been suspended or revoked runs contrary to the common law and intent to preserve the integrity of horse racing if there are questionable issues other than whether a license is suspended or revoked. In enacting Section 60-1A-28.1(B), the Legislature sought to clarify and extend an Association's right to exclude—not limit it.

Further, while Carrillo belabors that the district court misinterpreted Section 60-1A-28.1 based on principles of statutory construction, Carrillo wholly neglects to discuss the manner in which the common law shapes the rules of statutory construction. At a minimum, "[t]he common law can aid in interpretation of statutes." *Perry v. Williams*, 2003-NMCA-084, ¶ 25, 133 N.M. 844, 70 P.3d 1283. However, our Supreme Court has recognized that deference is, and should be, given to the common law:

> When this Court interprets statutes, we do so against a background of common law principles. In 1876, New Mexico's territorial Legislature

> determined that "the common law as recognized in the United States of America shall be the rule of practice and decision." 1875–1876 N.M. Laws, ch. 2, § 2; *see* NMSA 1978, § 38–1–3 (1876). "[T]he common law, upon its adoption, came in and filled every crevice, nook and corner in our jurisprudence where it had not been stayed or supplanted by statutory enactment...." *Sims v. Sims,* 1996–NMSC–078, ¶ 23, 122 N.M. 618, 930 P.2d 153 (internal quotation marks and citation omitted). We presume that the Legislature enacts statutes that are consistent with the common law and that the common law applies unless it is *clearly abrogated. Id.* ¶ 24. "A statute will be interpreted as supplanting the common law only if there is an explicit indication that the legislature so intended." *Id.* ¶ 22.

*San Juan Agr. Water Users Ass'n v. KNME-TV*, 2011-NMSC-011, ¶ 20, 150 N.M. 64, 257 P.3d 884 (emphasis added). *See also S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 763 (10th Cir. 2005), *as amended on denial of reh'g* (Jan. 6, 2006) ("When Congress legislates against a backdrop of common law, without any indication of intention to depart from or change common law rules, the statutory terms must be read as embodying their common law meaning.")

The common law, which specifically recognizes that private property owners have a right to exclude licensees, has not been abrogated in New Mexico, and Carrillo has offered no evidence to establish otherwise. Rather, the First and Second Judicial District Courts, in this matter and in *Stinebaugh*, have specifically recognized that New Mexico has not abrogated the common law rights of private property owners, citing Section 60-1A-28.1 and 15.2.2.8(V) NMAC with approval. [RP 486, 496, 573-74] Section 60-1A-28.1, when analyzed in consideration of the

relevance of, and reverence for, the common law, establishes that Associations have the right to exclude licensees for any lawful reason.

Carrillo paints a dire picture in which the district court's interpretation of Section 60-1A-28.1 will lead to Associations haphazardly excluding all licensees on a "whim." This, however, is pure speculation and not the case. First, Carrillo's speculative argument has not been factually developed. The Court cannot read an argument into the Act that has not been previously discussed. *Romenesko v. Barber*, 1968-NMSC-066, ¶ 11, 79 N.M. 83, 439 P.2d 919 (court will not speculate on questions requiring the assumption of facts.) Second, the regulatory scheme of the Act and rules is designed to prevent such conduct. The Associations, by virtue of racetrack licenses, are subject to the oversight of the Commission. NMSA 1978, § 60-1A-4(A)(1) ("The [C]omission may grant, deny, suspend or revoke…racetrack licenses); NMSA 1978 § 60-1A-5(B) ("Every license issued by the [C]ommission shall require the licensee to comply with the rules adopted by the [C]ommission.") Regardless, the Court cannot limit an Association's common law and statutory right to exclude but must instead defer to the Legislature's intent. Finally, the undisputed facts establish that Carrillo himself was not excluded on a whim, but for the lawful reasons of concern for his horses and the state of horse racing as a whole. [RP 5, 301, 390, 406, 450-54, 462]. Carrillo's allegation that Associations will impulsively exclude is baseless.

**4. The legislative history of NMSA 1978, § 60-1A-28.1, while unnecessarily examined by Carrillo, affirms the right to exclude licensees.**

There is no need to consider the legislative history of Section 60-1A-28.1, as the right to exclude licensees for any lawful reason is apparent through the plain language and statutory construction of the provision. However, to the extent that the Court finds that the legislative history of the statute should be addressed, it offers no evidence contrary to the district court's ruling.

It is the policy of courts to determine legislative intent primarily from the legislation itself. If the intentions of the Legislature cannot be determined from the actual language of a statute, then courts resort to rules of statutory construction, not legislative history. *Romero v. Progressive Nw. Ins. Co.*, 2010-NMCA-024, ¶ 21, 148 N.M. 97, 230 P.3d 844. *See also Regents of Univ. of New Mexico v. New Mexico Fed'n of Teachers*, 1998-NMSC-020, ¶ 30, 125 N.M. 401, 962 P.2d 1236 ("If the intentions of the legislature cannot be determined from the actual language of a statute, then Supreme Court resorts to rules of statutory construction, not legislative history.") Only after resorting to rules of statutory construction does legislative history become relevant. *U.S. v. Norberto*, 373 F.Supp.2d 150, 157 (E.D.N.Y. 2005) ("consideration of a statute's legislative history is a matter of last resort and is only considered when the plain language and canons of statutory interpretation fail to resolve statutory ambiguity") (internal citations omitted).

Although contemporaneous documents presented to the Legislature or statements of legislators made while legislation is pending may be considered to bear upon legislative intent, our courts do not generally consider statements of legislators or others after legislation has passed. *Int'l Chiropractors Ass'n v. New Mexico Bd. of Chiropractic Examiners*, 2014-NMCA-046, ¶ 32, 323 P.3d 914, 923.

Carrillo relies solely on the Fiscal Impact Report for Senate Bill 116, the precursor to Section 60-1A-28.1, in an attempt to argue that the Legislature intended Associations to exclude only occupational licensees whose license had previously been suspended or revoked. BIC, p. 30; S.B. 116 Fiscal Impact Report, 51st Leg., 2nd Session. (N.M. 2014), http://www.nmlegis.gov/lcs/legislation.aspx?Chamber=S&LegType=B&LegNo=116&year=14 (Fiscal Impact Report). However, this interpretation is misguided and contrary to the very text of the law.

First, the Fiscal Impact Report is not properly before this Court, as it is not part of the record and was not brought before the district court. *See* Section II(E) and (F).

Second, the Fiscal Impact Report is immaterial, as it is the sort of evidence that should not be considered now that Section 60-1A-28.1 is codified as law. *See Int'l Chiropractors Ass'n*, 2014-NMCA-046, ¶ 32. *See Regents of University of*

*New Mexico*, 1998-NMSC-020, ¶ 29 ("It is the policy of New Mexico courts to determine legislative intent primarily from the legislation itself.")

Third, the very text of S.B. 116 and Section 60-1A-28.1 undermines Carrillo's contention that a licensee can only be excluded by Associations if his or her occupational license has been suspended or revoked. Subsection B provides, "Nothing in this section shall be construed to limit a racetrack licensee's power to eject or exclude a person from the association grounds for any other lawful reason." Had the Legislature premised exclusion on the narrow basis advocated by Carrillo, there would have been no need for Subsection B of S.B. 116 and Section 60-1A-28.1. *See State v. Johnson*, 1998-NMCA-019, ¶ 22, 124 N.M. 647, 954 P.2d 79 (this Court has "always rejected an interpretation of a statute that would make parts of it mere surplusage or meaningless.") Carrillo cannot argue that the district court's interpretation of Section 60-1A-28.1(B) renders Subsection A useless or superfluous while interpreting S.B. 116 in the same incorrect manner by erroneously relying solely on the Fiscal Impact Report in his favor.

Finally, if Carrillo is to assert that documents presented to the Legislature should be looked to in the interpretation of Section 60-1A-28.1, consideration should also be given to other contemporaneous documents, including prior versions of S.B. 116 and related committee reports. *In re Gabriel M.*, 2002-NMCA-047, ¶ 15, 132 N.M.

124, 45 P.3d 64 (the Court compares the earlier versions of a statute with the current version to help determine legislative intent.) *See* S.B. 116, http://www.nmlegis.gov/lcs/legislation.aspx?Chamber=S&LegType=B&LegNo=116&year=14. The version of S.B. 116 introduced to the Legislature contained the following provision, which was initially introduced as Subsection B:

> A racetrack licensee that ejects or excludes a person from the racetrack licensee's licensed premises pursuant to Subsection A of this section may prevent that person from reentering the licensed premises unless the suspension or revocation is reversed by the stewards or overturned by the commission or a court of competent jurisdiction.

This subsection, however, was stricken in its entirety by the Senate Judiciary Committee. S.B. 116, Senate Judiciary Committee Report, http://www.nmlegis.gov/lcs/legislation.aspx?Chamber=S&LegType=B&LegNo=116&year=14 (SJC Committee Report). Importantly, neither the Senate Judiciary Committee nor the House Judiciary Committee requested that the language that was ultimately passed as Subsection B and later became Section 60-1A-28.1(B)—which allows Associations to exclude for lawful reasons beyond license status—be stricken. *Id.*; S.B. 116, House Judiciary Committee Report, http://www.nmlegis.gov/lcs/legislation.aspx?Chamber=S&LegType=B&LegNo=116&year=14 (HJC Committee Report). Had the Legislature intended that Associations have the power to exclude only licensees whose licenses had been suspended or revoked, S.B. 116 would not have been codified with a provision

explicitly stating that Associations have the right to exclude "for any other lawful reason."

### 5. 15.2.2.8(V)(2) NMAC affirms Ruidoso Downs' right to exclude licensees for any lawful reason.

While Carrillo argues on appeal 15.2.2.8(V) NMAC is not relevant to the outcome of the appeal, the interpretation of Section 60-1A-28.1 goes hand-in-hand with 15.2.2.8(V) NMAC to fully establish that Ruidoso Downs has the right to exclude licensees for any lawful reason.

In interpreting sections of the administrative code, we employ the same rules as used in statutory construction. *Romero v. Laidlaw Transit Services, Inc.*, 2015 WL 4608096, at *5 (N.M. Ct. App. July 31, 2015). *See also AMREP Sw. Inc. v. Sandoval Cnty. Assessor,* 2012–NMCA–082, ¶ 14, 284 P.3d 1118 (reading pertinent statutory and administrative code provisions "together so as to give effect to their meaning"); *Howell v. Marto Elec.,* 2006–NMCA–154, ¶ 16, 140 N.M. 737, 148 P.3d 823 ("[I]t is the function of [the] courts to interpret [statutes and regulations] in a manner consistent with the legislative intent.").

Pursuant to 15.2.2.8(V)(2) NMAC, "An [A]ssociation may eject or exclude a person for any lawful reason." Licensees are encompassed within the regulatory definition of "person," as set forth in the rules created by the Commission. *See* 15.2.1.7(L) NMAC ("'Licensee' is any *person* or entity holding a license from the Commission to engage in racing or a regulated activity") (emphasis added). *See*

*also* 15.2.1.7(P)(7) NMAC ("'Person' is one or more individuals, a partnership, association, organization, corporation, joint venture, legal representative, trustee, receiver, syndicate, or any other legal entity.") While the Commission could have specifically exempted licensees from an Association's right to exclude, it chose not to do so in crafting 15.2.2.8(V)(2). Though "lawful reason" is not defined in the administrative code, its plain meaning as applied to Section 60-1A-28.1 is equally appropriate to 15.2.2.8(V)(2) NMAC. *See* Section II(B)(2). Under the plain language, an Association may eject or exclude a licensee for any reason not contrary to law.

In claiming that 15.2.2.8(V)(2) NMAC is irrelevant and derivative, Carrillo effectively asks the Court to consider the statutory framework of the Act without regard for the rules that the Act gives the Commission the power to create. This position is misguided and views the entire horse racing framework in a vacuum. 15.2.2.8(V) NMAC is particularly significant, given the fact that has been in effect since 2001 and predates Section 60-1A-28.1. 15.2.2.8(V) NMAC also establishes that the Commission, under its authority to promulgate rules to accomplish its purpose and intent, intended that Associations have the right to exclude patrons and licensees from racetracks. *See* NMSA 1978 §§ 60-1A-5(A), 60-1A-5(B). The Commission's intent to allow Associations to exclude patrons and licensees is further reflected by the fact that the Commission and its Director, Vince Mares,

filed a Notice of Concurrence supporting the Associations' position that racetracks, as private property owners, have the common law right to exclude both patrons and licensees through the Attorney General's Office. [RP 563-65]

The Legislature granted the Commission rule-making power, and, through these rules, the Commission explicitly recognized the common law and bestowed Ruidoso Downs and other Associations the authority to exclude licensees. Carrillo cannot claim that the legislative intent must be read as a whole without giving due weight to the Legislature's desire to allow the Commission to make its own rules. NMSA 1978, § 60-1A-5(A) ("The commission shall adopt rules to implement the Horse Racing Act and to ensure that horse racing in New Mexico is conducted with fairness and that the participants and patrons are protected against illegal practices.") When read together, 15.2.2.8(V)(2) NMAC and Section 60-1A-28.1 uphold the legislative intent of extending to Associations the right to exclude patrons and licensees for any lawful reason.

### C. Carrillo's Arguments On Appeal Fail Because Carrillo Attempts To Create Duties and Due Process Obligations That Are Not Required Under New Mexico Law

Carrillo contends that he was excluded based on reasons insufficient under due process and that he received no hearings following his exclusion; however, his occupational license does not entail any specific rights to due process from a racetrack.

A license granted by the Commission does not create any due process rights for a licensee. Rather, a "license granted...is a privilege...; it is not a vested right within the meaning of the due process clause of the state and federal constitutions." *State Racing Commission v. McManus*, 1970-NMSC-134, ¶ 19, 82 N.M. 108, 476 P.2d 767. Ruidoso Downs and the other Associations are places of amusement, not state actors. While "[t]he State...has an important interest in assuring the integrity of racing carried on under its auspices," *Barry v. Barchi*, 443 U.S. 55, 56, 99 S.Ct. 2642, 2644-45 (1979), a racetrack is not a public utility; it is a place of amusement—which has never been regarded as a function or purpose of government. *Madden v. Queens County Jockey Club*, 72 N.E.2d 697 (N.Y. 1947).

In *Evans v. Arkansas Racing Comm'n*, 606 S.W.2d 578, 583 (Ark. 1980), the court found that a license creates no guarantees or rights and that a racetrack's exclusion does not constitute state action.

> We are of the view that Oaklawn's actions in failing to recommend Evans for a license and failing to provide him with stall space before any hearing was held were not state action. Arkansas does not run Oaklawn. While it has laws which permit the extensive regulation of Oaklawn, the state does not dictate to Oaklawn how it will run its track. Oaklawn has a franchise and a license to run its race track. The Commission has the sole authority to license owners, trainers and jockeys, but nowhere in the law or in the regulations of the Commission is any licensee guaranteed a right to use that license. Whether an owner is granted the right to race or enter a certain number of races is not the subject of a regulation. Whether an owner is to be given a certain number of stalls at the race track is not the subject of a rule or regulation. Arkansas has decided by the absence of law or regulation to leave the running of the track to the judgment of the [racetrack].

Similarly, the State of New Mexico does not run Ruidoso Downs. Carrillo confuses Ruidoso Downs' actions with state action that requires due process protections. However, Carrillo's license affords no such guarantees, including guarantees to racetrack grounds access or participation in races. Consequently, Ruidoso Downs' exclusion of Carrillo is not state action requiring due process protections. *See Catrone v. State Racing Com'n*, 459 N.E.2d 474, 479 ("We perceive no basis for holding that the racetrack's exclusion...amounts to 'State action.' It is clear from the record that the racetrack excluded [the licensed horse trainer] by itself on its own responsibility.")

Moreover, Carrillo is not entitled to formal state involvement, as neither the Act nor the related rules created by the Commission require Ruidoso Downs to file a complaint following exclusion, conduct a hearing following exclusion, or provide an explanation justifying an exclusion. While Carrillo alleges that Ruidoso Downs failed to file a complaint under 15.2.1.9(B) NMAC following its exclusion, [RP 110, BIC, p. 8], no complaint is required. [RP 13] 15.2.1.9(B) NMAC provides, in part:

> Complaints.
>
> > (a) On their own motion or on receipt of a complaint from an official or other person regarding the actions of a licensee, the stewards may conduct an inquiry and disciplinary hearing regarding the licensee's actions. The stewards shall not conduct a disciplinary hearing regarding a licensee's action that results in detection of a Class 1 or 2 drug as found in 15.2.6 NMAC. Hearings on these matters shall proceed directly to the commission

> and shall be conducted in accordance with 15.2.1.9 NMAC.
>
> (b) A complaint made by someone other than the stewards must be in writing and filed with the stewards not later than 72 hours after the action that is the subject of the complaint.

15.2.1.9(B)(2)(a)-(b) NMAC. Nowhere in the rules adopted by the Commission is an *Association* required to file a complaint regarding a licensee's exclusion. This is consistent with the Legislature's intent to allow Associations to exclude, as it would be unreasonable to require an Association to file a complaint regarding its own lawful exclusion and well-reasoned business decisions. The burden to file a complaint rests solely with a party who wishes to file an objection with the Board of Stewards. 15.2.1.9(B)(2)(a) NMAC.

Relatedly, while hearings are required in certain circumstances, they are not required for a licensee's exclusion by an Association. Rather, the Board or Commission must conduct a hearing for an exclusion if a steward, agency director, or the Commission "order[s] an individual ejected or excluded from all or part of any premises under the regulatory jurisdiction of the [C]omission." 15.2.1.9(C)(21)(a)-(b) NMAC. Hearings are also required for license suspensions or administrative penalties. *See* 15.2.1.9(B)(3)(b) ("A licensee whose license has been summarily suspended is entitled to a hearing [by the Board] on the summary suspension not later than the third day after the license was summarily suspended.") *See also* 15.2.1.9(C)(20)(a), (d) NMAC (hearing is required if the

Commission imposes an administrative penalty for a violation of the Act or a rule or order adopted under the Act that constitutes a ground for disciplinary action).

Finally, Ruidoso Downs is under no legal obligation to tell Carrillo the basis of the exclusion. BIC, p. 6. [RP 108] Carrillo's attempt to create a duty requiring Associations to explain exclusions is a red herring—the issue at the center of the lawsuit is whether Ruidoso Downs has the right to exclude. Under the common law and New Mexico law, Associations have this right. Nowhere in the rules or Act does the Legislature or Commission require an Association to explain the basis of an exclusion to a licensee. Notwithstanding this lack of duty, Ruidoso Downs informed Carrillo that Carrillo's incidents and record were the basis of the exclusion. [RP 205] While arbitrary exclusions have been disfavored in certain jurisdictions, the basis of Carrillo's exclusion—his record of incidents involving his horses—was not arbitrary. [RP 5, 301, 390, 395, 406, 450-54, 462] courts have also expressly held that a licensee's record is an appropriate basis for exclusion. *See Martin v. Monmouth Park Jockey Club*, 145 F. Supp. 439 (D.N.J. 1956). *See also Cox v. Nat'l Jockey Club*, 323 N.E.2d 104 (Ill. App.1974).

### D. Carrillo's Arguments On Appeal Demonstrate Carrillo's Inability To Prove That Ruidoso Downs Lacked A Lawful Reason To Exclude Carrillo

The record on appeal and relevant authorities soundly support summary judgment in Ruidoso Downs' favor on Carrillo's petition and complaint. Carrillo's

points on appeal provide no grounds for reversing the district court's summary judgment decision.

**1. Carrillo improperly raises new issues on appeal.**

Carrillo attempts to interject new arguments and fact issues on appeal, despite the fact that these arguments could have been—but were not—raised in Response to Ruidoso Downs' motion and at oral argument[5].

Carrillo devotes the bulk of his opening brief to the interpretation of NMSA 1978, Section 60-1A-28.1. However, as set forth in Sections II(E) and (F) and III(B)(1), neither Carrillo's response to the summary judgment motion nor his statements at oral argument included an analysis of Section 60-1A-28.1. [RP 440-44; Tr.-1-Tr.-7] Issues not properly brought before the district court cannot be reviewed for the first time on appeal. *Chapel v. Nevitt*, 2009-NMCA-017, ¶ 53, 145 N.M. 674, 203 P.3d 889 ("It is a basic principle that issues not raised in the district court cannot be raised for the first time on appeal.")

In addition, while Carrillo previously alleged that he has never faced any "significant disciplinary actions" [RP 349, 362], he has not previously discussed before the district court the presence of phenylbutazone, flunixin, and furosemide

[5] Carrillo contends on appeal that he "was prepared to present evidence" regarding his licensure, disciplinary history, and allegations of a lack of due process; however, at the summary judgment hearing, Carrillo declined the opportunity to assert any arguments and offered no evidence. BIC, p. 10. Rather, Carrillo conceded that the motions would be granted.

as a basis for his exclusion. [RP 1-22, 440-44; Tr.-1-Tr.-7] Moreover, Carrillo's focus on a lack of "significant" discipline is a red herring that detracts from the central issue of Ruidoso Downs' right to exclude both patrons and licensees for *any* lawful reason. Any arguments regarding the levels and presence of substances as the basis of Carrillo's exclusion from Ruidoso Downs have been abandoned.

Finally, Carrillo argues that summary judgment was premature, as the motions for summary judgment were filed and heard prior to the conclusion of discovery and before substantial factual development could take place. However, Carrillo cannot now rely on his own missed opportunities as the basis of reversing the district court's ruling. As established in Section II(D), Carrillo, at no point, filed a Rule 1-056(F) NMRA affidavit in response to Ruidoso Downs' Motion. [RP 440-44] Nor did Carrillo raise the issue of premature factual development in his response or at the summary judgment hearing. *Id.*, [Tr.-1-Tr.-7] Carrillo had ample opportunity to raise the issue of any alleged premature factual development prior to this appeal but can no longer do so at this stage of the proceedings.

**2. Ruidoso Downs excluded Carrillo for a lawful reason.**

By relying on arguments not properly before this Court and by attempting to impose duties not legally required, Carrillo demonstrates that he has no basis on which to overcome the district court's ruling. Rather, Carrillo's complaint and

subsequent briefing suffers from the same infirmity as that of the plaintiff in *Garifine v. Monmouth Park Jockey Club*, 148 A.2d 1 (N.J. 1959):

> The plaintiff's complaint states that the defendant advised him that he is not wanted at the race track and that his general record and reputation warrant his exclusion. It does not question the defendant's good faith or sound purpose nor does it present any countervailing circumstances or any urgent considerations of justice or policy which might move a court to depart from the many judicial decisions which have sustained the common law right of race track operators to exclude suspected undesirables.

*Garifine*, 148 A.2d at 6. Similarly, Carrillo does not, and cannot, question Ruidoso Downs' purpose or judgment in Carrillo's exclusion, as it was premised on several lawful reasons—Carrillo's record of incidents involving Carrillo's horses, concern for Carrillo's horses, and the integrity of horseracing in New Mexico. Carrillo did not controvert any facts supporting these legal reasons for exclusion in his summary judgment Response and has failed to do so in his appeal by relying on arguments not properly brought before the district court. [RP 440-44]

## IV. CONCLUSION

For all the foregoing reasons, Ruidoso Downs requests that the district court's grant of summary judgment in its favor be affirmed.

## V. STATEMENT REQUESTING ORAL ARGUMENT

Ruidoso Downs requests oral argument because the issues on appeal involve matters of public importance having the potential to affect the integrity and operation of horse racing throughout the state.

Respectfully submitted,

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## STATEMENT OF COMPLIANCE

This brief complies with the limitations of Rule 12-213(F)(3) NMRA because this brief contains 10,933 words, excluding the parts of the brief exempted by Rule 12-213(F)(1) NMRA, according to the Word Count obtained using Microsoft Word 2010.

This brief complies with the typeface requirements of Rule 12-305(C)(1) NMRA because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 font size Times New Roman.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of Defendant/Appellee's Answer Brief were served by U.S. First Class Mail on the following counsel of record this 5th day of November, 2015:

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