COPY

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED
NOV 0 2 2015

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

Plaintiffs-Appellants,

vs. No. 34,429

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

Defendants-Appellees.

Appeal from the First Judicial Court, Santa Fe County, New Mexico
The Honorable T. Glenn Ellington, Judge

ANSWER BRIEF OF MY WAY HOLDINGS, LLC d/b/a SUNLAND PARK RACETRACK AND CASINO AND RICK BAUGH

KELEHER & McLEOD, P.A.
Deron B. Knoner
Nathan S. Stimson
Post Office Box AA
Albuquerque, New Mexico 87102
Telephone: (505) 346–4646
Attorneys for Defendants-Appellees My Way Holdings, LLC, a foreign limited liability company d/b/a Sunland Park Racetrack & Casino, and Rick Baugh as to allegations involving his employment with My Way Holdings, LLC

ORAL ARGUMENT IS REQUESTED

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

I. INTRODUCTION 1

II. FACTS RELEVANT TO ISSUES ON APPEAL 1

III. QUESTION PRESENTED 4

IV. ARGUMENT 4

A. The District Court Properly Granted Summary Judgment For Appellees Based On Their Common-Law Right To Exclude Any Person For Any Lawful Reason 4

1. The Common-Law Right 5

2. 15.2.2.8(V) NMAC 7

3. Section 60-1A-28.1 NMSA 1978 8

4. The Cases From Other Jurisdictions Cited By Appellants Are Not Applicable To New Mexico 9

B. Section 60-1A-28.1 Does Not Alter The Common-Law Right Of Exclusion, But Confirms Such Right 12

1. Appellants Failed To Preserve Their Arguments Regarding Section 60-1A-28.1 12

2. Even If Appellants' Argument Had Been Preserved, Section 60-1A-28.1 Does Not Operate To Modify Appellees' Common-Law Right To Exclude 15

a. Even if Appellants' Argument Had Been Preserved, Section 60-1A-28.1 Was Not In Effect At The Time Of Mr. Carrillo's Exclusions And Would Not Control 16

b. Even If Appellants' Argument Had Been Preserved, The District Court Did Not Rely On Section 60-1A-28.1 17

c. Even If Appellants' Argument Had Been Preserved, The District Court Did Not Misinterpret Section 60-1A-28.1 18

i. There Is No Surplusage 18

ii. Section 60-1A-28.1 Is Consistent With The Balance Of The Horse Racing Act 20

iii. There Is No Need Or Basis To Invoke Legislative Intent Or History To Interpret The Plain Provisions Of Section 60-1A-28.1 22

3. 15.2.2.8(V) NMAC Is Relevant To The District Court's Decision Because It Preceded Section 60-1A-28.1 And Was In Effect When Mr. Carrillo Was Excluded 24

C. Because Appellees Are Not State Actors, Due Process Requirements Are Not Implicated 25

D. Appellants' Causes Of Action Against Appellees All Hinge On Whether Appellants Have A Right Of Access To Appellees' Racetracks 28

E. In The Event The Court Grants LULAC's Motion For Leave To File An Amicus Curiae Brief, The MWH Defendants Should Be Permitted To File A Response................29

V. CONCLUSION..30

VI. STATEMENT CONCERNING ORAL ARGUMENT............................30

TABLE OF AUTHORITIES

Page

New Mexico Cases:

AFSCME v. Bd. of Cnty. Comm'rs,
2015-NMCA-070, 352 P.3d 682 26

Cuevas v. State Farm Mut. Auto. Ins. Co.,
2001-NMCA-038, 130 N.M. 539, 28 P.3d 527 4

Kelly v. St. Vincent Hosp.,
1984-NMCA-130, 102 N.M. 201, 692 P.2d 1350 .... 6, 7

Los Chavez Cmty. Ass'n v. Valencia Cnty.,
2012-NMCA-044, 277 P.3d 475 26

N.M. Bd. of Veterinary Med. v. Riegger,
2007-NMSC-044, 142 N.M. 248, 164 P.3d 947 .... 19, 23

Potter v. Pierce,
2015-NMSC-002, 342 P.3d 54 4

Romero v. Progressive Nw. Ins. Co.,
2010-NMCA-024, 148 N.M. 97, 230 P.3d 844 23

State v. Goss,
1991-NMCA-003, 111 N.M. 530, 807 P.2d 228 13

Woolwine v. Furr's, Inc.,
1987-NMCA-133, 106 N.M. 492, 745 P.2d 717 13

Zamora v. St. Vincent Hosp.,
2014-NMSC-035, 335 P.3d 1243 4

Other Jurisdictions:

Bloate v. United States,
559 U.S. 196 (2010) 20

Bresnik v. Beulah Park Ltd. P'ship,
617 N.E.2d 1096 (Ohio 1993) 6, 11, 12

Cox v. Nat'l Jockey Club,
323 N.E.2d 104 (Ill. App. Ct. 1974) 10

D. Ginsberg & Sons, Inc. v. Popkin,
285 U.S. 204 (1932) 20

Epstein v. Cal. Horse Racing Bd.,
35 Cal. Rptr. 642 (Cal. Ct. App. 1963) 6

Jacobson v. N.Y. Racing Ass'n, Inc.,
305 N.E.2d 765 (N.Y. 1973) 9, 10

Marrone v. Wash. Jockey Club,
227 U.S. 633 (1913) 5, 6, 9

Martin v. Monmouth Park Jockey Club,
145 F. Supp. 439 (D.N.J. 1956) 5

Marzocca v. Ferone,
461 A.2d 1133 (N.J. 1983) 10, 11

Pierce v. Ortho Pharm. Corp.,
417 A.2d 505 (N.J. 1980) 11

Statutes and Rules:

New Mexico Horse Racing Act,
NMSA 1978, §§ 60-1A-1 to -30
(2007, as amended through 2015) 18

NMSA 1978, § 60-1A-4(A)(1) (2007) 22

NMSA 1978, § 60-1A-4(A)(2) (2007) 22

NMSA 1978, § 60-1A-4(A)(4) (2007) 22

NMSA 1978, § 60-1A-8(C) (2007) 10

NMSA 1978, § 60-1A-28(A) (2013) 19

NMSA 1978, § 60-1A-28.1 (2014) 5, 8, 9, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 30

NMSA 1978, § 60-1A-28.1(A) (2014) 18, 19, 20

NMSA 1978, § 60-1A-28.1(B) (2014) 12, 18, 19, 20

Rule 1-056(C) NMRA 4

Other Authorities:

15.2.1.7(A)(8) NMAC 8

15.2.1.7(P)(7) NMAC 24

15.2.1.8(I)(9) NMAC 22

15.2.2.8(V) NMAC 5, 7, 8, 9, 13, 24, 25

I. INTRODUCTION

This case presents the issue of the scope of a private landowner's right in New Mexico to exclude individuals from its property for any lawful (i.e., non-discriminatory) reason.

II. FACTS RELEVANT TO ISSUES ON APPEAL

Defendant-Appellee My Way Holdings, LLC ("MWH") is the owner and operator of Sunland Park Racetrack & Casino. [2 RP 301-02 ¶ 1.] On April 12, 2013, a racehorse owned by or under the care of Plaintiff-Appellant Arnoldo Carrillo died shortly after winning a race at Sunland Park Racetrack and Casino. [*Id.*] Prior to this incident, in September of 2012, two of Mr. Carrillo's horses were removed from the track at Zia Park via equine ambulance, and one of his horses died on the tract at Zia Park the following month, leading to his exclusion from that racetrack on October 29, 2012. [3 RP 450-55 ¶¶ 12-34.]

On April 13, 2013, MWH notified Mr. Carrillo that he would be denied entry to MWH's private property, pending an investigation regarding the circumstances of the horse's death, because of his record at New Mexico racetracks. [2 RP 301-02 ¶ 1.] Two other New Mexico

racetracks subsequently excluded Mr. Carrillo from their respective properties as well. *See* [2 RP 320-21 ¶¶ 5-7]; [3 RP 390 ¶¶ 5-6].

Appellants claimed that the exclusions of Mr. Carrillo lacked any lawful reason, and they filed suit against Appellees, the racetrack owners and members of their respective management, as well as the New Mexico Racing Commission ("Commission") and the Boards of Stewards of the various racetracks. As against the Appellees, Appellants sought preliminary and permanent injunctive relief and a declaratory judgment, and asserted causes of action for interference with prospective contractual relations, prima facie tort, and negligence. *See generally* [1 RP 1-22]. Appellants sought an order from the district court enjoining Appellees from enforcing their exclusions of Appellants from Appellees' private property, and a declaratory judgment that Appellants had a right to enter Appellees' respective racetracks and race their horses there. [*Id.*]

MWH and Rick Baugh, MWH's general manager during the time relevant to MWH's exclusion of Mr. Carrillo (together, the "MWH Defendants"), sought summary judgment on the grounds that MWH had the right under the common law to exclude any person from its premises for any lawful reason, a right affirmed in New Mexico by both regulation

and subsequently enacted statute. *See generally* [2 RP 299-310]. Similar motions for summary judgment were filed by the other Appellees. Appellants opposed the MWH Defendants' summary judgment motion on the grounds that MWH did not have the right to deny licensed individuals such as Mr. Carrillo from its premises without cause, arguing that regulations provided a process to determine cause to deny entry and that MWH lacked justification for excluding Mr. Carrillo. *See generally* [2 RP 348-73]. Appellants opposed the other summary judgment motions on similar grounds.

The district court granted summary judgment for the MWH Defendants and the other Appellees, concluding that, as a matter of law, MWH had the right to exclude from its premises any person for any lawful reason. [3 RP 567.] The district court's decision relied on a private landowner's right to exclude under the common law, which the court found was affirmed by both regulation and statute. [*Id.*] Appellants timely appealed the district court's decision. [3 RP 570-72.]

III. QUESTION PRESENTED

In New Mexico, does the owner of a horse racetrack have a lawful right to deny entry to its private property to a person seeking to race horses?

IV. ARGUMENT

STANDARD OF REVIEW: New Mexico appellate courts review a grant of summary judgment de novo. *Zamora v. St. Vincent Hosp.*, 2014-NMSC-035, ¶ 9, 335 P.3d 1243. "Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." *Potter v. Pierce*, 2015-NMSC-002, ¶ 8, 342 P.3d 54. *See also* Rule 1-056(C) NMRA. If the facts are not disputed, but only the legal effect of the facts is at issue, then summary judgment is proper. *Cuevas v. State Farm Mut. Auto. Ins. Co.*, 2001-NMCA-038, ¶ 6, 130 N.M. 539, 28 P.3d 527.

A. The District Court Properly Granted Summary Judgment For Appellees Based On Their Common-Law Right To Exclude Any Person For Any Lawful Reason.

In granting the MWH Defendants' Motion for Summary Judgment, the district court correctly ruled that "[u]nder New Mexico law, a racetrack owner has a common-law right to exclude any person for any lawful

reason, which right has been affirmed by regulation at 15.2.2.8(V) NMAC and codified by statute at NMSA 1978, Section 60-1A-28.1 (2014)." [3 RP 567.]

1. *The Common-Law Right.*

The common law has long recognized a racetrack owner's right to exclude any person for any lawful reason. In 1913, the United States Supreme Court, in an opinion authored by Justice Oliver Wendell Holmes, articulated the principle that because racetracks are not a utility created for the benefit of the public at large, but are in fact private entities under no restriction as to who they choose to admit, exclusions from them are not actionable offenses. *Marrone v. Wash. Jockey Club*, 227 U.S. 633, 636-37 (1913). As Justice Holmes described it, a racetrack owner has an unrestricted right under the common law to determine who can be admitted to its grounds. *Id.*

Courts across the country subsequently recognized the common-law right articulated by *Marrone*. *See, e.g., Martin v. Monmouth Park Jockey Club*, 145 F. Supp. 439, 440 (D.N.J. 1956) (holding 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"); *Bresnik v. Beulah Park Ltd. P'ship*, 617 N.E.2d 1096, 1097 (Ohio 1993) ("At common law, proprietors of private enterprises such as places of amusement and entertainment can admit or exclude whomsoever they please, and their common-law right continues until changed by legislative enactment." (internal quotation marks and citation omitted)); *Epstein v. Cal. Horse Racing Bd.*, 35 Cal. Rptr. 642, 648 (Cal. Ct. App. 1963) (recognizing that "in the absence of statute there exists no constitutional or common-law right of access to race tracks or other places of public amusement comparable to the right to accommodation at inns" (internal quotation marks and citation omitted)).

Appellants argued below and continue to argue before this Court that the right to exclude licensees under the common law is more limited than the Supreme Court's holding in *Marrone*. [BIC 38-45.] The only New Mexico case to which Appellants cite in support of their argument is *Kelly v. St. Vincent Hospital*, 1984-NMCA-130, 102 N.M. 201, 692 P.2d 1350. In that case, this Court held that a private hospital cannot exclude a medical licensee without adequate justification for doing so. [BIC 42-43.] However, the holding in *Kelly* was based on specific public policy considerations

unique to the medical field. 1984-NMCA-130, ¶¶ 4, 6. Consequently, the *Kelly* court held that its review of a private hospital's policy "is very narrow, restricted, and limited," because of the court's "strong reluctance in interfering in the private sector and a further reluctance in expanding the scope of judicial review." *Id.* ¶ 22.

Appellants do cite to rulings from other states where the common-law right has been narrowed by legislation specific to those states or other concerns specific to those jurisdictions. [BIC 40.] While those cases are distinguishable, as shown in Section (A)(4) below, the public policy in New Mexico, as reflected in both regulation and statute, has not been to narrow, but to affirm the common-law right of racetrack owners to exclude.

2. *15.2.2.8(V) NMAC.*

The regulation promulgated by the Commission, and which was in effect at the time of Appellees' exclusion of Mr. Carrillo, is 15.2.2.8(V) NMAC, which provides as follows:

> 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[1] 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.

15.2.2.8(V) NMAC (emphasis added).

3. *Section 60-1A-28.1 NMSA 1978.*

The statute cited by the MWH Defendants is Section 60-1A-28.1, which was enacted by the New Mexico Legislature during the pendency of this litigation, and which provides, in relevant part, as follows:

> 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.

Section 60-1A-28.1.

While other states have enacted legislation specifically limiting a racetrack's common-law right of exclusion by imposing requirements that the racetrack show good cause for an exclusion, or afford notice and a

[1] "Association" is defined as "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.

hearing prior to or within a short time after exclusion, New Mexico has not enacted any such legislation. Instead, as both 15.2.2.8(V) NMAC and Section 60-1A-28.1 demonstrate, New Mexico has made a policy decision to affirm, rather than restrict, the common-law right of a New Mexico racetrack, like other private property owners, to exclude any person from its private property for any lawful reason.

4. *The Cases From Other Jurisdictions Cited By Appellants Are Not Applicable To New Mexico.*

Because New Mexico has chosen to affirm rather than restrict racetrack owners' common-law right of exclusion, the cases cited by Appellants from other jurisdictions where courts have recognized a narrowing of the *Marrone* common-law right to exclude are inapplicable and are not persuasive.

For example, in *Jacobson v. New York Racing Association, Inc.*, 305 N.E.2d 765, 768 (N.Y. 1973), the court indicated a willingness to apply a principle of New York law that "the arbitrary action of a private association is not immune from judicial scrutiny," because of the fact that the defendant nonprofit racing association had a "virtual monopoly" over thoroughbred racing in the State of New York. *Id.* In that case, the

defendant owned all but one of the major thoroughbred racetracks in New York and had a 25-year franchise granted by the state to conduct thoroughbred races with pari-mutuel betting. *Id.* at 766, 768. In the instant matter, none of the individual Appellees has such expansive control over horse racing in New Mexico, and a racetrack license issued by the Commission is only valid for one year. NMSA 1978, § 60-1A-8(C) (2007).

In *Cox v. National Jockey Club*, 323 N.E.2d 104, 108 (Ill. App. Ct. 1974), the Illinois Court of Appeals' decision similarly turned on the court's finding that an Illinois racetrack has a "quasi-monopoly" during its allotted racing dates. While horse racing is undisputedly a regulated industry in New Mexico, and while racing seasons in New Mexico generally do not overlap, whether MWH or any other Appellee has a "quasi-monopoly" is not dispositive. Instead, within the context of the regulation of the industry in New Mexico, both the Commission and the Legislature have specifically chosen to affirm the common-law right of each of the racetracks to exclude.

In *Marzocca v. Ferone*, 461 A.2d 1133, 1137 (N.J. 1983), the New Jersey court held that a racetrack owner's common-law right to exclude "persons who wish to perform their vocational activities on the track premises" was

limited, proscribing exclusions which violate public policy. This limitation, applicable to licensees, was based on New Jersey law specific to the area of employment at will. *Id.* (citing *Pierce v. Ortho Pharm. Corp.*, 417 A.2d 505 (N.J. 1980)). In New Mexico, the Legislature and the Commission have seen fit to require that exclusions of any person, including licensees, be for a lawful reason, but have otherwise chosen to leave the common-law right in place.

Finally, Appellants cite *Bresnik's* dissenting opinion, which focused on the "extensive regulatory scheme" governing horse racing in Ohio. 617 N.E.2d at 1099. Contrary to the dissenting opinion, however, the *Bresnik* majority affirmed that the presence of extensive governmental regulations typically associated with state-sanctioned monopolies does not invalidate a racetrack's common-law right to exclude. *Id.* at 1098. *Bresnik* held that "[n]ot every statute is to be read as an abrogation of the common law," and that "[s]tatutes are to be read and construed in the light of and with reference to the rules and principles of the common law in force at the time of their enactment." *Id.* According to the court, "in giving construction to a statute the legislature will not be presumed or held, to have intended a repeal of the settled rules of the common law *unless the language employed by*

it clearly expresses or imports such intention." *Id.* (internal quotation marks and citation omitted). Here, Section 60-1A-28.1(B) expresses no intent to depart from the common-law right to exclude. On the contrary, it affirms the common-law right to exclude for any lawful reason.

Unlike other jurisdictions, New Mexico has not acted to narrow a racetrack owner's common-law right to exclude anyone, even licensees, for any lawful reason. Instead it has enacted both a regulation and a statute which recognize that right. The district court properly recognized MWH's common-law right to exclude Appellants from its racetrack for any lawful reason, and properly granted summary judgment on that basis. [3 RP 567.]

B. Section 60-1A-28.1 Does Not Alter The Common-Law Right Of Exclusion, But Confirms Such Right.

1. *Appellants Failed To Preserve Their Arguments Regarding Section 60-1A-28.1.*

As noted above, in moving for summary judgment, the MWH Defendants cited Section 60-1A-28.1 as evidence that the common-law right or a racetrack owner to exclude an individual from its private property has been affirmed in New Mexico by statute. In response to that argument, Appellants specifically dismissed any significance of Section 60-1A-28.1 to this matter, stating, "Sunland also cites a recently-adopted statute

containing the same language [as 15.2.2.8(V)(2) NMAC], which really adds nothing to the legal analysis." [2 RP 357 n.4.]

Appellants have apparently changed their view of Section 60-1A-28.1, as they now devote the great majority of their Brief in Chief addressing the construction, language, and legislative history of Section 60-1A-28.1, and now claim that it controls the outcome of this matter. *See generally* [BIC 14-33]. They assert that "[t]he district court misconstrued the controlling statute" [BIC 3] (emphasis added), and that "[b]ecause the relevant legal standard is determined by statute, the outcome of this appeal does not rest on the common law right to exclude or eject" [*id.*]. Appellants' argument fails on both procedural and substantive grounds.

As a procedural matter, the argument now advanced by Appellants that Section 60-1A-28.1 controls resolution of this matter has not been preserved and should not be considered by the Court. *See Woolwine v. Furr's, Inc.*, 1987-NMCA-133, ¶ 20, 106 N.M. 492, 745 P.2d 717 ("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."); *see also State v. Goss*, 1991-NMCA-003, ¶ 12, 111 N.M. 530, 807 P.2d 228 ("Matters not specifically called to the trial court's

attention, unless jurisdictional, will not be considered for the first time on appeal.").

None of Appellants' responses to Appellees' respective motions for summary judgment discussed or even specifically referenced Section 60-1A-28.1 (except to dismiss its significance, as noted above). *See generally* [2 RP 348-73]; [2 RP 374-77]; [3 RP 440-44]; [3 RP 520-24]. Appellants certainly never took the position before the district court that Section 60-1A-28.1 controls the outcome of this matter, much less that it is ambiguous or that it modifies the common law so as to preclude exclusion.

Further, Appellees relied on their common-law right to exclude, and never argued that Section 60-1A-28.1 formed the basis for that right, and the question of whether Section 60-1A-28.1 applied and controlled review of Appellants' exclusion was never presented to the district court. *See generally* [2 RP 299-310] (MWH Defendants' motion for summary judgment); [3 RP 408-19] (reply in support of same); [2 RP 319-44] (Defendants-Appellees SunRay Gaming of New Mexico, LLC and Lonnie S. Barber, Jr.'s motion for summary judgment); [3 RP 423-31] (reply in support of same); [3 RP 388-407] (Defendants-Appellees Ruidoso Downs Racing, Inc. and Shaun Huabbard's motion for summary judgment); [3 RP

485-98] (reply in support of same); [3 RP 448-82] (Defendants-Appellees Zia Park, LLC and Rick Baugh's motion for summary judgment and memorandum in support of same); [3 RP 527-36] (reply in support of same).[2]

Because the issue of whether Section 60-1A-28.1 gave Appellees the right to exclude Appellants was never presented to the district court, and because the district court did not grant summary judgment on that basis, Appellants argument on appeal that Section 60-1A-28.1 controls the outcome of this matter was not preserved and the Court should decline to consider it.

2. *Even If Appellants' Argument Had Been Preserved, Section 60-1A-28.1 Does Not Operate To Modify Appellees' Common-Law Right To Exclude.*

Even if this Court were to find that Appellants preserved their argument that Section 60-1A-28.1 controls the outcome of this matter, analysis of the argument Appellants construct around Section 60-1A-28.1 demonstrates that it fails on substantive grounds as well. Indeed, what

---

[2] Appellees consistently argued in these briefs that in enacting Section 60-1A-28.1, the Legislature affirmed the common-law right of racetrack owners to exclude any person for any lawful reason, not that it created a new right.

Appellants present are a series of erroneous arguments constructed one upon another. First, Appellants argue that Section 60-1A-28.1, rather than the common law, controls the disposition of this matter. Then they argue that the district court relied upon Section 60-1A-28.1 in granting summary judgment. Finally, they argue that the district court, in relying on Section 60-1A-28.1, misinterpreted it. None of these arguments withstand scrutiny.

a. *Even If Appellants' Argument Had Been Preserved, Section 60-1A-28.1 Was Not In Effect At The Time Of Mr. Carrillo's Exclusions And Would Not Control.*

Appellees excluded Mr. Carrillo from their respective racetracks during the period October 2012 through July 2013. *See* [3 RP 455 ¶¶ 33-34] (Appellants excluded from Zia Park on October 29, 2012); [2 RP 301 ¶ 1] (Appellants excluded from Sunland Park and Casino on April 13, 2013); [2 RP 320-21 ¶¶ 5-7] (Appellants excluded from SunRay Park and Casino on April 19, 2013); [3 RP 390 ¶¶ 5-6] (Appellants excluded from Ruidoso Downs on July 2, 2013).

Section 60-1A-28.1 did not become effective until March 3, 2014—more than eight months after the last exclusion of Mr. Carrillo. *See* Section 60-1A-28.1 (noting that Section 60-1A-28.1 became effective immediately upon its approval on March 3, 2014); [2 RP 304 n.3] (noting same).

Consequently, Section 60-1A-28.1 could not have formed the basis for Mr. Carrillo's exclusions, nor could it have prohibited those exclusions. Instead, Section 60-1A-28.1 does what Appellees said—it affirms the preexisting common-law right to exclude. Because it was not in effect at the time of Mr. Carrillo's exclusions, it cannot and does not control the outcome of this matter, and Appellants' argument fails.

b. *Even If Appellants' Argument Had Been Preserved, The District Court Did Not Rely On Section 60-1A-28.1.*

Appellants incorrectly argue that "the district court construed Section 60-1A-28.1 to mean that a racetrack proprietor in New Mexico can 'exclude any person for any lawful reason,' including licensee Mr. Carrillo." [BIC 17]; *see also,* BIC 15 ("The district court interpreted this statute to mean that racetrack proprietors could eject or exclude any person, even a person with an occupational license such as Mr. Carrillo, for any lawful reason.").

The truth is, the district court did not construe Section 60-1A-28.1, other than to acknowledge that when it was enacted in 2014, it codified the existing common-law right of a racetrack owner in New Mexico to exclude any person for any lawful reason. [3 RP 567.] Even if the district court did "interpret" Section 60-1A-28.1 in the manner argued by Appellants, the fact

remains that the district court did not rely on Section 60-1A-28.1 in granting summary judgment for Appellees. Consequently, the question of whether Section 60-1A-28.1 applied retroactively to govern Appellees' actions in 2012 and 2013 is not before the Court on appeal.

c. *Even If Appellants' Argument Had Been Preserved, The District Court Did Not Misinterpret Section 60-1A-28.1.*

Appellants next argue that the district court's "interpretation" of Section 60-1A-28.1(B) ("Subsection B") was erroneous because it renders Section 60-1A-28.1(A) ("Subsection A") surplusage, and that the district court interpreted the statute in a way that is inconsistent with the balance of the New Mexico Horse Racing Act (the "Horse Racing Act"), NMSA 1978, §§ 60-1A-1 to -30 (2007, as amended through 2015). Leaving aside the fact that the district court did not "interpret" Section 60-1A-28.1 other than to say that it affirms Appellees' preexisting common-law right, Appellants' arguments still have no merit.

i. There Is No Surplusage.

In Subsection A, the Legislature provided a specific lawful reason for why a racetrack licensee may eject or exclude a person from its grounds—namely, because the person's occupational license has been suspended or

revoked by the Commission for administering a performance-altering substance, as provided in Section 60-1A-28(A). In Subsection B, the Legislature made it clear that "[n]othing 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," Section 60-1A-28.1(B) (emphasis added), i.e., any reason not specifically provided for in Subsection A.

By their plain language, Subsection A and Subsection B identify separate lawful reasons for a racetrack licensee to eject or exclude a person from its grounds. Simply put, Subsection B encompasses all lawful reasons not provided for in Subsection A, and in doing so it does not render Subsection A surplusage. Section 60-1A-28.1 therefore does not present the Court with an ambiguity or a conflict between different provisions. *See N.M. Bd. of Veterinary Med. v. Riegger*, 2007-NMSC-044, ¶ 11, 142 N.M. 248, 164 P.3d 947 ("We do not depart from the plain language of a statute unless we must resolve an ambiguity, correct a mistake or absurdity, or deal with a conflict between different statutory provisions.").

Additionally, even if Subsection B could be interpreted as encompassing Subsection A, such an interpretation still does not render

Subsection A surplusage. It is an accepted rule of statutory construction that "general language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment." *Bloate v. United States,* 559 U.S. 196, 207-08 (2010) (brackets omitted) (quoting *D. Ginsberg & Sons, Inc. v. Popkin,* 285 U.S. 204, 208 (1932)). Therefore, even if Subsection B is read broadly enough to encompass Subsection A, under the principle of statutory construction expressed in *Bloate,* the general language of Subsection B cannot be held to apply to the more specific matter addressed by Subsection A. In essence, interpreting Subsection B as encompassing <u>all</u> lawful reasons for a racetrack licensee's exclusion of a person from its grounds, including but not limited to the lawful reason specifically provided for in Subsection A, does not render Subsection A surplusage.

ii. Section 60-1A-28.1 Is Consistent With The Balance Of The Horse Racing Act.

Appellants make the further argument that the district court's ruling is inconsistent with the other provisions of the Horse Racing Act, an argument which is premised upon the assertion that the common-law right of exclusion is inconsistent with the heavily regulated nature of horse

racing in New Mexico. Appellants assert that "[t]he ruling of the district court effectively renders all New Mexico-issued occupational licenses related to horse racing subject to the whims of a few racetrack proprietors who are granted exclusive licenses by the State to run horse racing meets in New Mexico." [BIC 2-3.] Appellants, while citing the "extensive regulatory scheme" governing horse racing in New Mexico [BIC 19-20], overlook the reality that Appellees are ultimately subject to the Commission's oversight and authority, a fact which shows Appellants' concerns and argument on this point to be without merit.

Appellants acknowledge that the Horse Racing Act "provides for a robust administrative system to regulate all aspects of the industry, including tracks, proprietors, and trainers," and that the Commission's power over horse racing "is apparently plenary." [BIC 20.] In fact, Appellants have acknowledged that "[h]orseracing is among the most heavily regulated industries in the state," and that "[t]he tracks (called 'associations') are regulated in minute detail." [2 RP 351.]

Appellants' arguments fail to consider that the Commission is empowered by the Horse Racing Act to take remedial, even drastic, measures to prevent the abuse of power by New Mexico racetrack owners.

Indeed, under the Horse Racing Act, the Commission can deny, suspend, or revoke racetrack licenses. NMSA 1978, § 60-1A-4(A)(1) (2007). *See also* 15.2.1.8(I)(9) NMAC (listing various grounds for the Commission's denial, suspension, or revocation of racetrack licenses). The Commission can compel a racetrack licensee's exclusion of a person from the racetrack premises. Section 60-1A-4(A)(2). It can also investigate a racetrack's operations and place a designated representative on the racetrack's premises in order to ensure compliance with the Horse Racing Act and the Commission's regulations. Section 60-1A-4(A)(4).

If the Commission were to conclude that an association was abusing its right to exclude—with respect to Appellants, licensees generally, or the public—it could readily take action under the authority granted to it by the Horse Racing Act to rectify the abuse. Consequently, the Legislature's preservation and affirmation of the common-law right to exclude cannot and should not be read by this Court as somehow contradicting the balance of the Horse Racing Act.

iii. There Is No Need Or Basis To Invoke Legislative Intent Or History To Interpret The Plain Provisions Of Section 60-1A-28.1.

In a final effort to salvage their argument, Appellants argue for a "better interpretation of the plain language of Section 60-1A-28.1" based on "the intent of the Legislature." [BIC 26.] However, examining the Legislature's intent is unnecessary where the language of a statute is plain. *See Riegger*, 2007-NMSC-044, ¶ 11. Further, while Appellants encourage this Court to look to the legislative history of Section 60-1A-28.1 [BIC 27], "legislative history is not persuasive in determining legislative intent." *Romero v. Progressive Nw. Ins. Co.*, 2010-NMCA-024, ¶ 21, 148 N.M. 97, 230 P.3d 844. New Mexico courts "determine legislative intent primarily from the legislation itself," and "[i]f the intentions of the Legislature cannot be determined from the actual language of a statute, then we resort to rules of statutory construction, not legislative history." *Id.* (internal quotation marks and citation omitted).

The language of Section 60-1A-28.1 is plain. It is consistent with the balance of the Horse Racing Act. In summary, Section 60-1A-28.1 does precisely what the district court concluded it did. It affirms Appellees' preexisting right to exclude individuals from their private property, and Appellants' argument fails.

3. *15.2.2.8(V) NMAC Is Relevant To The District Court's Decision Because It Preceded Section 60-1A-28.1 And Was In Effect When Mr. Carrillo Was Excluded.*

As noted above, the district court also looked to 15.2.2.8(V) NMAC as confirmation of the common-law right to exclude in New Mexico. Appellants argue that because 15.2.2.8(V) NMAC is derivative to either the common law or Section 60-1A-28.1, it is not relevant to the outcome of this matter. [BIC 45-46.] Appellants are incorrect. While the district court did not grant summary judgment for Appellees on the basis of 15.2.2.8(V) NMAC, this regulation is relevant because it was in effect in 2012-2013 when Mr. Carrillo was excluded from the various racetracks.

The regulations promulgated by the Commission reflected by Title 15, Chapter 2, Part 2, including 15.2.2.8(V) NMAC, became effective March 15, 2001. Therefore, when Appellees excluded Mr. Carrillo from their racetracks, the Commission, consistent with the common law, permitted Appellees to "eject or exclude a person[3] for any lawful reason." Moreover, contrary to Appellants' argument that the regulation is derivative of the

[3] "Person" is defined as "one or more individuals, a partnership, association, organization, corporation, joint venture, legal representative, trustee, receiver, syndicate, or any other legal entity." 15.2.1.7(P)(7) NMAC.

statute and should be disregarded, 15.2.2.8(V) NMAC became effective nearly thirteen years before Section 60-1A-28.1 became law on March 3, 2014, so there is no question that 15.2.2.8(V) NMAC is not derivative of Section 60-1A-28.1.

The district court properly recognized that 15.2.2.8(V) NMAC affirmed the existing common-law right of racetrack owners to exclude any person for any lawful reason, and it properly relied upon the regulation for this limited purpose in granting summary judgment. [3 RP 567.]

C. Because Appellees Are Not State Actors, Due Process Requirements Are Not Implicated.

As a final matter, Appellants incorrectly argue that Appellees' actions resulted in Appellants being denied due process with regard to Mr. Carrillo's horse racing license. Appellants' Brief in Chief addresses this matter frequently. *See, e.g.*, [BIC 1] (alleging that Mr. Carrillo "was not provided any hearings or due process related to any of the four bans"); [BIC 4] ("Racetrack proprietors began denying Mr. Carrillo access to the racetracks without due process in late 2012."); [BIC 5] (stating that Appellees excluded Mr. Carrillo "without explanation or with stated

reasons that would have been sufficient under New Mexico law to suspend or revoke his license had he been afforded due process").

Appellants cite the "extensive regulatory scheme" governing horse racing in New Mexico as providing the basis for their alleged due process deprivation [BIC 19-20], and they engage in a lengthy discussion of the Horse Racing Act provisions and regulations applicable to the Commission and the Boards of Stewards. *See, e.g.*, [BIC 21] ("All proceedings of the Racing Commission on licensure matters must comport with basic due process requirements."); [BIC 22] (stating that the Commission "cannot limit or deny a license without due process of law"); [BIC 23] ("Like the Racing Commission, the Stewards are subject to extensive due process requirements in the context of actions against a licensee.").

Fatal to their position, however, Appellants have not alleged any state action by Appellees. *See AFSCME v. Bd. of Cnty. Comm'rs*, 2015-NMCA-070, ¶ 9, 352 P.3d 682 ("The Fourteenth Amendment of the United States Constitution protects citizens from state action that leads to deprivations of liberty and property without due process of law.") (emphasis added) (quoting *Los Chavez Cmty. Ass'n v. Valencia Cnty.*, 2012-NMCA-044, ¶ 20, 277 P.3d 475). Rather, Appellants specifically

acknowledge that Appellees' actions were private in nature. *See* [BIC 1-2] ("In short, Mr. Carrillo's occupational licenses to participate in professional horse racing were effectively suspended indefinitely by private parties without any due process or formal involvement by the State of New Mexico." (emphasis added)); [BIC 8] (stating that Mr. Carrillo "was not granted any hearings on these four private exclusions" (emphasis added)).

Appellants acknowledge that neither the Commission nor any of the Boards of Stewards took action against Mr. Carrillo for any incidents cited by Appellees in support of their exclusions, or suspended or revoked Mr. Carrillo's licenses. [BIC 8-9.] They also acknowledge that Appellees' exclusions of Mr. Carrillo "are entirely divorced from the regulatory scheme envisioned by the Legislature, promulgated by the Racing Commission, and enforced by the Stewards." [BIC 26.] This is true, because Appellees' actions were private in nature and did not amount to state action.

Appellants' arguments unnecessarily complicate this straightforward issue. Appellees did not engage in state action, and Appellants admit as much. Because Appellees are not state actors, due process requirements are not implicated. Appellants' due process argument lacks merit.

D. Appellants' Causes Of Action Against Appellees All Hinge On Whether Appellants Have A Right Of Access To Appellees' Racetracks.

Appellants' Complaint included six causes of action against Appellees,[4] all of which depended on whether Appellants had the right to access Appellees' racetracks. *See* [1 RP 15] (Count Two for preliminary and permanent injunctive relief based on Appellants' exclusion); [1 RP 16] (Count Three for declaratory judgment based on same); [*id.*] (Count Four for interference with prospective contractual relations based on same); [1 RP 17] (Count Five for interference with prospective contractual relations based on same); [1 RP 18] (Count Six for prima facie tort based on same); [1 RP 19] (Count Seven for negligence based on same). Appellants did not argue to the district court, and do not argue on appeal, that any of their causes of action against Appellees are valid if they do not have a right of access to Appellees' racetracks.

Appellees moved for summary judgment on the basis that all of these causes of action failed, because they had exercised their rights as private

[4] Appellants also asserted causes of action against the Boards of Stewards and the Commission. *See* [1 RP 13] (Count One against the Boards of Stewards and Commission for writ of mandamus); [1 RP 19] (Count Eight against the Boards of Stewards for violation of New Mexico Inspection of Public Records Act).

property owners to exclude Mr. Carrillo for any lawful reason. *See generally* [2 RP 299-310]; [2 RP 319-44]; [3 RP 388-407]; [3 RP 448-82]. The district court agreed, and granted summary judgment on this basis. [3 RP 567.] Consequently, should this Court affirm the decision of the district court, none of Appellants' causes of action against Appellees will be deemed to have survived.

E. <u>In The Event The Court Grants LULAC's Motion For Leave To File An Amicus Curiae Brief, The MWH Defendants Should Be Permitted To File A Response</u>.

With respect to the League of United Latin American Citizens (LULAC)'s motion for leave to file an amicus curiae brief, in the event that the Court grants LULAC's motion, the MWH Defendants will at that time request the opportunity to file a response. The MWH Defendants would note at this time that during the pendency of this appeal, Appellants, represented by LULAC's counsel, have filed a new lawsuit against the MWH Defendants and others alleging, *inter alia*, violation of Appellants' rights under 42 U.S.C. § 1983.

At this time, however, the MWH Defendants would simply reiterate their position from the Response to the Motion for Leave to File an Amicus Brief that LULAC's proposed amicus curiae brief presents issues which

were not before the district court and which are not helpful for the Court's consideration of this appeal. The MWH Defendants should be afforded the opportunity to respond to these novel issues if the Court grants LULAC leave to file its amicus curiae brief.

V. CONCLUSION

For the reasons stated above, the Court should affirm the district court's granting of summary judgment in favor of the MWH Defendants.

VI. STATEMENT CONCERNING ORAL ARGUMENT

The MWH Defendants request oral argument, as they believe oral argument may assist the Court in its analysis and resolution of the issues, particularly the applicability of Section 60-1A-28.1 to the issues of this case.

Respectfully submitted,

KELEHER & McLEOD, P.A.

By:

Deron B. Knoner
Nathan S. Stimson
Post Office Box AA
Albuquerque, New Mexico 87103
(505) 346-4646
Attorneys for Defendants-Appellees My Way Holdings, LLC, a foreign limited liability company d/b/a Sunland Park Racetrack & Casino, and Rick Baugh as to allegations involving his employment with My Way Holdings, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 2, 2015, the foregoing pleading was filed with the Court of Appeals and delivered to counsel of record via electronic mail:

Christopher L. Graeser
GRAESER & McQUEEN, LLC
P.O. Box 220
Santa Fe, NM 87504
(505) 982-9074
chris@tierralaw.com
Attorneys for Plaintiffs-Appellants Arnoldo Carrillo and Santa Fe Horse Racing By Carrillo's, LLC

Richard B. Word
Assistant Attorney General
P.O. Box 1508
Santa Fe, NM 87504
(505) 827-6024
rword@nmag.gov
Attorney for Defendants-Appellees Ruidoso Downs Board of Stewards, Sunland Park Board of Stewards, Sunray Park Board of Stewards, Zia Park Board of Stewards, New Mexico Racing Commission, and Vince Mares

Megan Day Hill
Ellen M. Kelly
CIVEROLO, GRALOW, HILL & CURTIS, P.A.
P.O. Box 887
Santa Fe, NM 87103
(505) 842-8255
hillm@civerolo.com
kellye@civerolo.com
Attorneys for Defendants-Appellees Sunray Gaming of New Mexico, LLC and Lonnie S. Barber, Jr.

Billy R. Blackburn
1011 Lomas Blvd. NW
Albuquerque, NM 87102
(505) 242-1600
billy@bblackburnlaw.com
Attorney for Defendants-Appellees Zia Park, LLC and Rick Baugh

John K. Ziegler
Christa M. Hazlett
CONKLIN, WOODCOCK & ZIEGLER, P.C.
320 Gold Ave. SW, Suite 800
Albuquerque, NM 87102
(505) 224-9160
jkz@conklinfirm.com
cmh@conklinfirm.com
Attorneys for Defendants-Appellees Ruidoso Downs Racing, Inc. and Shaun Hubbard

Christa M. Okon
THE OKON LAW FIRM
The El Patio Building
117 N. Guadalupe Suite B
Santa Fe, NM 87501
(505) 989-4500
cmokonlaw@aol.com
Attorneys for LULAC

Nathan S. Stimson

4839-2318-9289, v. 8