IN THE COURT OF APPEALS FOR THE STATE OF NEW MEXICO

ARNOLDO CARRILLO and SANTA FE RACING BY CARRILLO'S, LLC,
A domestic limited liability company,
Plaintiffs-Appellants,

vs.

Court of Appeals No. 34,429
Santa Fe County
D-101-CV-2013-02048

MY WAY HOLDINGS, LLC, a foreign limited liability company d/b/a SUNLAND PARK RACETRACK AND CASINO; SUNRAY GAMING OF NEW MEXICO, LLC, a domestic limited liability company; ZIA PARK, LLC, a foreign LIMITED LIABILITY COMPANY; RUIDOSO DOWNS RACING, INC., a domestic corporation; RICK BAUGH; LONNIE S. BARBER, JR.; SHAUN HUBBARD,
Defendants-Appellees.

ANSWER BRIEF OF APPELLEES SUNRAY GAMING OF NEW MEXICO, LLC, A DOMESTIC LIMITED LIABILITY COMPANY and LONNIE S. BARBER, JR.

On Appeal from the First Judicial District Court
County of Santa Fe, State of New Mexico
The Honorable Louis P. McDonald

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ORAL ARGUMENT IS REQUESTED

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CERTIFICATE OF COMPLIANCE

Ellen M. Kelly, hereby certifies that the number of words in the body of this Answer Brief, exclusive of Cover Page, caption, Table of Contents, Table of Authorities, Signature Blocks, and certificate of service is, 7,210 words according to Microsoft Word version 2010, using Times New Roman typeface, as prescribed by SCRA 12-213(F).

I also certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

By: Ellen M Kelly

Megan Day Hill
Ellen M. Kelly
Attorney for Defendants-Appellees

SUMMARY OF PROCEEDINGS

This case stems from the exclusion of Arnoldo Carrillo (Carrillo), a trainer licensed by the New Mexico Racing Commission (Commission), from four New Mexico racetracks in 2013. The Defendants include SunRay Gaming of New Mexico, LLC, and Lonnie Barber Jr., the director of racing operations for SunRay Gaming. RP I/003, ¶ 22. Defendants SunRay Gaming and Barber are collectively referred to as "SunRay" in this brief. It is undisputed that as of 2013, SunRay Gaming had a license to operate SunRay Park, as alleged by Plaintiffs at RP I/002, ¶ 14.

On August 5, 2013, Plaintiffs filed their *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 Inspective of Public Records Act* (the *Petition*). The *Petition* sought both damages and equitable relief from the named tracks and their named employees. RP I/001-36. The summary judgment disposing of all claims against the tracks and the named employees was issued January 6, 2015. RP III/566-569.

Five of the counts in the *Petition* make claims against all four tracks: Count Two for preliminary and permanent injunctive relief (RP I/015-16); Count Three

for declaratory judgment (RP I/016); Count Five for interference with prospective contractual relations (RP I/017-18); Count Six for prima facie tort (RP I/018-19) and Count Seven for negligence (RP I/019). Count Four included additional claims against Defendants Zia Park, LLC and Rick Baugh (RP I/016-17). The *Petition* is silent as to whether Carrillo had a one- or three-year trainer's license, as allowed by 16.47.1.8A(1) NMAC, when the license he held as of April 2013 was due to expire, and whether Carrillo tried to renew his license, if it expired after he was excluded from the tracks. There are no allegations in the *Petition* that the exclusion by SunRay (or any other tracks) was due to discrimination against Carrillo based on his ethnicity or national origin.

The underlying case also involves claims against the New Mexico Racing Commission and the Commission's boards of stewards at the four tracks. The claims against the Commission and its stewards are in Counts One and Eight. Count One seeks a writ of mandamus for the Commission and stewards to require the tracks to admit Carrillo (RP I/014-15). Count Eight includes claims against the boards of stewards for violation of the Inspection of Public Records Act (RP I/019-20).

SunRay filed its *Motion for Summary Judgment* on July 2, 2014 (RP II/319-344). SunRay's *Motion* argued that SunRay had a common-law right to exclude

Carrillo (RP II/321-323), and that SunRay complied with all the Commission's requirements for the exclusion (RP II/323-324), found at 15.2.2.8(V)(2) NMAC[1]:

> V. EJECTION AND EXCLUSION:
>
> (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.

SunRay's *Motion* included uncontested material facts (RP II/320-321) and the required evidentiary support for them. Plaintiffs' *Response* did not address, much less contest, any of SunRay's uncontested material facts. Those uncontested material facts established that SunRay complied with 15.2.2.8(V)(2) in its exclusion of Carrillo. Defendant Barber drafted the exclusion notice after he learned of Carrillo's exclusion from Sunland Park because of SunRay's concern about the safety of jockeys and horses running at SunRay, and the reputation of the racing industry in New Mexico. RP II/320-21, uncontested fact Nos. 3-5 and 9. The uncontested facts also established that the exclusion letter, the completed "exclusion/trespassing form" and SunRay's 2012-2013 medication policy were faxed to the State Racing Commission on April 17, 2013; that the letter was sent return receipt requested to Plaintiff Carrillo on April 19, 2013; a copy was sent to Plaintiffs' counsel the same day, and that the Commission stewards at SunRay also

[1] Race tracks are referred to as associations in the New Mexico statutes and rule governing horse racing. 15.2.1.7(A)(8) NMAC.

received notice of the exclusion. RP II/320-21, uncontested fact Nos. 3 and 5-8. SunRay's *Motion* also included other legal and fact-based arguments for summary judgment in SunRay's favor on the claims against it in Counts Two, Three, Five, Six and Seven of the *Petition*. RP II/323-327. Plaintiffs' *Response* to SunRay's *Motion* is found at RP II/374-377. The *Response* did not challenge any of SunRay's uncontested material facts and it did not offer any additional or alternative uncontested facts.

SunRay's was the second summary judgment filed by any of the Defendants: the first was filed by Defendants My Way Holdings/Sunland Park and Rick Baugh (MWH/Sunland) on June 17, 2014 (RP II/299-310). Plaintiff's *Response* to SunRay's *Motion* said that "Sunray makes substantially the same arguments" made by MWH/Sunland in its motion, incorporated Plaintiffs' *Response* to the Sunland *Motion* (found at RP II/348-370) and went on to discuss the additional cases included in SunRay's *Motion* that had not been included in MWH/Sunland's *Motion* (RP II/374). Plaintiffs *Response* to SunRay's *Motion* did not make any argument responding to SunRay's legal and factual arguments about Counts Two, Three, Five, Six and Seven of the *Petition*.

SunRay filed its *Reply* in support of its *Motion* on July 29, 2014. RP III/423-431. Defendants Ruidoso Downs and Shaun Hubbard filed their *Motion*

for Summary Judgment on July 21, 2014 (RP III/388-407), and Zia Park and Rick Baugh filed their *Motion* on August 5, 2014 (RP III/448-482).

The January 6, 2015 summary judgment only addressed the claims of the Defendant track and their employees, and as a result only those claims are involved in this appeal. Although the Commission did not file a motion for summary judgment of its own, on December 16, 2014, it filed a *Notice* that it concurred that the tracks "have the common law right to exclude both patrons and licensees." RP III/563-564.

All parties appeared for a hearing on the motions on December 17, 2014. Record of Proceeding, TR 1-2. Plaintiffs' counsel opted not to argue the motions. Instead, counsel noted that the issue of whether the tracks retain a common law right to exclude licensees was before the Court of Appeals in the case of *Stinebaugh v. My Way Holdings* COA No. 2014-34100, (TR 2), and conceded that the trial court was "likely to grant the four motions" (TR 3), assuming the appeal in this case could be "joined" with the *Stinebaugh* appeal (TR 3). As a result, the Court ruled:

> Given your statements, the Court finds, as a matter of law, that both under common law and codified in the statute in the 2000 – in Section 60-1A-28, which was the resulted [*sic*] bill 116 last year, that there is nothing in the section that prohibits the common law interpretation that a property owner has the right to exclude.

TR 3-4. The corresponding summary judgment, at RP III/566-569, found that under New Mexico law track owners have a common-law right to exclude any person for any lawful reason, a right affirmed by regulation at 15.2.2.8(V)(2) and codified by statute at NMSA 1978, § 60-1A-28.1. That statute, which was passed in 2014, reads:

> **60-1A-28.1. Racetrack licensees; power to eject or exclude.**
>
> 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.

Plaintiffs filed their appeal in this case on February 2, 2015 (RP III/570-576). Stinebaugh apparently abandoned his appeal in COA No. 2014-34100.

ARGUMENT

Plaintiffs complain at length that SunRay could not exclude Arnoldo Carrillo from SunRay's premises without a prior hearing convened by the Commission or its stewards. However, Plaintiffs do not cite to any rule or statute that required

SunRay to wait until Commission officials conducted a hearing before excluding Mr. Carrillo from its premises, because there are none.

SunRay did everything required by the rules of the State Racing Commission to exclude Carrillo from SunRay's premises. It sent the required notices to Plaintiffs, to the Commission, and to the SunRay stewards of the Commission. Its reasons for excluding Mr. Carrillo were reasonable as well as lawful. Plaintiffs have no claims to assert against the SunRay Defendants as a result.

I. SUMMARY JUDGMENT STANDARDS

This Court reviews orders granting summary judgment de novo. *Firstenberg v. Monribot*, 2015-NMCA-062, ¶ 13, 350 P.3d 1205. Summary judgment is granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Rule 1-056(C) NMRA; *Gordia v. Hahn*, 1991-NMSC-040, ¶ 17, 111 N.M. 779.

A motion for summary judgment is properly granted against a party who cannot produce sufficient evidence to establish the existence of an element essential to that party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Gordia*, 1991-NMSC-040, ¶ 19. Once the moving party makes a prima facie case for summary judgment, the party resisting the motion bears the affirmative duty of producing evidence to show that a genuine issue of fact requiring a trial exists.

Goodman v. Brock, 1972-NMSC-043, ¶ 8, 83 N.M. 789, and *Schmidt v. St. Joseph's Hosp.*, 1987-NMCA-046, ¶ 5, 105 N.M. 681. Where the defendant negates an essential element of the plaintiff's case, and the plaintiff fails to show that admissible evidence creates an issue of fact regarding that element, summary judgment is appropriate. If the non-moving party does not meet this burden, summary judgment must be granted for the moving party. *Goodman* and *Firstenberg, supra.*

In addition, an appellate court "will affirm the district court if it is right for any reason and if affirmance is not unfair to the appellant." *Maralex Resources, Inc. v. Gilbreath*, 2012-NMSC-012, ¶ 13, 134 N.M. 308 (citation omitted).

II. THE SUNRAY DEFENDANTS HAD THE RIGHT TO EXCLUDE CARRILLO

A. The SunRay Defendants had a right to exclude Carrillo under the common law and the rules of the Commission.

A property owner has the broadest possible right to exclude persons from its premises at common law. *See, Nollan v. California Coastal Comm.*, 483 U.S. 825, 831, 107 S.Ct. 3141, 3145 (1987) ("We have repeatedly held that, as to property reserved by its owner for private use, 'the right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property'"). There are no New Mexico cases applying this principle to race tracks, but the Commission recognizes the common law right of tracks to exclude both

licensees such as Carrillo, and track patrons. RP III/563-64. Since the Commission is the agency responsible for the supervision of horse racing in New Mexico, this Court should defer to its position. *State Bd. of Psychologist Exam'rs v. Land,* 2003–NMCA–034, ¶ 5, 133 N.M. 362 ("[C]ourts will ordinarily defer to an agency when there are legal questions that implicate special agency expertise or the determination of fundamental policies within the scope of the agency's statutory function [.]" (internal quotation marks and citation omitted)).

Other states also recognize that the common law right protects race tracks which exclude trainers who have been licensed by state authorities. *See*, e.g., *Marzocca v. Ferone*, 93 N.J. 509, 516, 461 A.2d 1133, 1137 (N.J. 1983) ([W]e hold 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 the track premises'"), *Calder Race Course, Inc., v. Gaitan*, 393 So.2d 15 (Fla.Ct.App. 1980) ("Until the Florida Legislature acts or private racing establishments disparage constitutionally guaranteed rights, they continue to have the right to choose those persons with whom they wish to do business"), and *Bresnik v. Beulah Park Ltd.,* 1993-Ohio-19, 617 N.E.2d 1096, 1097-98 ("Beulah Park has a common-law right to exclude persons from its business premises absent specific legislative language to the contrary. The Revised Code contains no such language. . . Contrary to appellee's

assertion, [Ohio's horse racing statute] and its accompanying regulations do not abolish the common-law right of proprietors to exclude individuals from their property. Not every statute is to be read as an abrogation of the common law.")

Plaintiffs unsuccessfully seek to distinguish *Marzocca* from the issues involved here because that case involved the exclusion of a particular race horse rather than the horse's trainer. *Brief in Chief* at 41. However, it was not the horse but the trainer who filed suit, claiming "that the exclusion violated the rules of the [New Jersey Racing] Commission, constituted an unconstitutional restriction on interstate commerce, and violated his due process rights." 93 N.J. at 512-13, 461 A.2d at 1135.

As these cases demonstrate, the trial court correctly ruled that SunRay had a common law right to exclude Carrillo, and this Court should affirm the summary judgment. Plaintiffs claim "[t]he right to exclude licensees under the common law is limited," *Brief in Chief* at 38, but under the rule they propose SunRay would still be entitled to summary judgment.

Jacobson v. New York Racing Ass'n Inc., 350 N.Y.S.2d 639, 305 N.E.2d 765 (N.Y. 1973), cited in the *Brief in Chief* at 40-41, involved a Rule 1-012(B)(6) motion rather than a motion for summary judgment. Jacobson was a trainer denied stall space after his license suspension had ended, and who claimed the lack of stalls virtually barred him from thoroughbred racing in the state, 33 N.Y.S.2d at

640, 305 N.E. 2d at 766. The *Jacobson* court declined to apply the common law right of exclusion for those who had a license to work in the racing industry, such as jockeys, owners, harness drivers, grooms or trainers, or other racetrack employees, even though the right had been recognized in several other states, as detailed by the court at 33 N.Y.S.2d at 642, 305 N.E. 2d at 767-68.

However, the *Jacobson* decision did not mean the track had to give the plaintiff stall space. Plaintiffs fail to mention that in ruling Jacobson could pursue his claim for damages, the Court warned, "[I]t will be plaintiff's heavy burden to prove that the denial of stall space was not a reasonable discretionary business judgment, but was actuated by motives other than those relating to the best interests of racing generally." 33 N.Y.S.2d at 643, 305 N.E. 2d at 768.

Cox v. National Jockey Club, 23 Ill.App.3d 160, 323 N.E.2d 104 (Ct.App. 1974), cited in the *Brief in Chief* at 41, also involved a motion to dismiss rather than a motion for summary judgment. The case involved a jockey who claimed that because he had a license, the operators of race tracks "had a duty and obligation under the laws of Illinois not to interfere directly or indirectly with him in his business and occupation as a jockey and not to interfere directly or indirectly with him in his business employment and contractual relationships with third persons." 24 Ill.App.3d at 162, 305 N.E.2d at 106. Like the *Jacobson* court, *Cox* rejected the plaintiff's claim that the track had to accommodate him simply

because he had a license. Instead, the court ruled that much of the complaint failed to state a claim upon which relief could be granted, 24 Ill.App.3d at 164, 305 N.E.2d at 107. *Cox* agreed that "defendants could not arbitrarily and without reason or justification deny plaintiff the opportunity of participating in its [*sic*] meet," but added:

> We do not mean to intimate that a licensee conducting a horse racing meet in Illinois 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.

24 Ill.App.3d at 166, 305 N.E.2d at 108-9.

Even under the rules announced in *Jacobson* and *Cox,* SunRay was entitled to summary judgment, because the undisputed material facts establish that SunRay excluded Carrillo based on the investigation of the death of Jumpn' Alegre, SunRay's concern about the safety of jockeys and horses racing at SunRay, and its concern about the reputation of horse racing in New Mexico. RP II/321, uncontested fact No. 9. This establishes that the exclusion was "actuated by motives . . . relating to the best interests of racing generally" as discussed in *Jacobson*, and that SunRay had a "legitimate and reasonable justification for exclusion," as discussed in *Cox.*

Not even the reasoning of dissent in *Bresnik*, *supra*, cited in the *Brief in Chief* at 41-42, can tip the balance in Plaintiffs' favor. The dissent saw the

majority's opinion as making the race track "judge, jury and executioner to anyone who enters its grounds, regardless of whether such person is licensed to be there by the State Racing Commission." 617 N.E.2d at 1100. This view does not represent the law in New Mexico, since neither the common law nor 15.2.2.8(V) NMAC prohibits an aggrieved party from seeking relief from the courts. The dissent's concerns and the parade of horribles envisioned by Plaintiffs if the summary judgment is upheld (*Brief in Chief* at 34-35) are also not plausible – tracks in the real world need trainers to run horses in races, to bring in the paying customers who place the bets that provide revenue for the tracks. See, e.g., the July 2013 article entitled "Roar of the crowd fades" at http://www.timesunion.com/local/article/Roar-of-the-crowd-fades-4664053.php.

Plaintiffs' reliance on the cases involving Court review of denials of hospital privileges to doctors is equally off the mark. The needs of patients rather the rights of doctors justify judicial review, "under very limited circumstances, [of] decisions made by a private hospital board," *Kelly v. St. Vincent Hosp.*, 1984-NMCA-130, ¶ 8, 102 N.M. 201, because that "medical services often are viewed as a necessity." *Id.* ¶ 6. Horse racing can hardly be described as falling into the same category, even by most of the people involved in the industry.

B. SunRay is entitled to summary judgment because it complied with all the Commission's requirements for excluding Carrillo.

SunRay also had the right to exclude Carrillo under 15.2.2.8(V)(2) NMAC, as SunRay argued in its *Motion*, RP II/323. As of 2013, 15.2.2.8(V)(2) was the only provision of New Mexico law which specifically addressed the right of a track/association to exclude anyone. The rule has been in effective at least since 1997: it first appeared as 8.4.6.2 NMAC (12/15/97) and was included in the recompilation of 2001 in 15.2.2 NMAC (3/15/2001).

Rule 15.2.2.8(V) reads:

> 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.

The uncontested material facts in SunRay's *Motion for Summary Judgment* establish that SunRay complied with all the procedural requirements of 15.2.2.8(V)(2) when it excluded Carrillo, since SunRay notified Carrillo, his lawyer, the Commission and the Commission's stewards at SunRay about the exclusion. The uncontested facts established that the exclusion letter, the completed "exclusion/trespassing form" and Sunray's 2012-2013 medication

policy were faxed to the State Racing Commission on April 17, 2013; that the letter was sent return receipt requested to Plaintiff Carrillo on April 19, 2013; a copy was sent to Plaintiffs' counsel the same day, and that the Commission stewards at SunRay also received notice of the exclusion. RP II/330, uncontested fact Nos. 3 and 5-8.

SunRay's *Motion* also established that SunRay had a lawful reason for the exclusion. Defendant Barber drafted the exclusion notice after he learned of Carrillo's exclusion from Sunland Park, and because of SunRay's concern about the safety of jockeys and horses running at SunRay, and the reputation of the racing industry in New Mexico, RP II/330-31, uncontested fact Nos. 3-5 and 9. None of the uncontested material facts were challenged in Plaintiffs' *Response* to SunRay's *Motion*. Therefore, Plaintiffs have admitted them and cannot attack them now. Rule 1-056(D)(2) NMRA ("All material facts set forth in the statement of the moving party shall be deemed admitted unless specifically controverted").

SunRay's reasons for the exclusion cannot be unlawful. Concern about the safety of jockey and horses and the reputation of racing in New Mexico is not prohibited, and the concerns are consistent with the purpose or regulating horse racing in the state. *See* NMSA 1978 § 60-1A-5A ("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 on the racing grounds."). This was particularly true in 2013, when SunRay and other tracks were aware that the reputation of horse racing in New Mexico was under attack nationally, as SunRay argued in its *Motion*. RP II/325.

Plaintiffs' *Response* to the MWH/Sunland *Motion* contained two legal arguments disputing the applicability of 15.2.2.8(V)(2) to the Carrillo exclusion. First, they claimed that 15.2.2.8(V)(2) "does not allow ejection of exclusion of a licensee," RP II/357-58, although Plaintiffs failed to offer any citation for the proposition that licensees are not covered by the rule. Plaintiffs also failed to explain why a licensee such as Carrillo would not fall within the ordinary meaning of "person", when since only natural persons can be licensed as a trainer in New Mexico. *See* 15.2.3.2 NMAC, which defines of the scope of rules governing flat racing officials at horse tracks as covering "All persons engaged in racing, or employed on a licensee's racetrack premises" and 15.2.3.8A NMAC, which lists only natural persons as possible flat racing officials. *See* also the very broad Commission definition of "person" at 15.2.1.7(P)(7) NMAC, *State ex rel. Northwestern Colonization & Imp. Co. of Chihuahua v. Huller*, 1918-NMSC-001, ¶ 6, 23 N.M. 306 ("American authorities are in one accord in holding that the word "person" is a generic term of comprehensive nature, embracing natural and artificial persons, such as corporations), and the definition of "person" in Black's

Law Dictionary 1028 (5th ed. 1979) ("In general usage, a human being (i.e. natural person).

Second, Plaintiffs' MWH/Sunland *Response* argued that even in the case of a lawful exclusion, there is a complaint process as contained in 15.2.2.8(U)(2) NMAC, which required that the tracks notify the Commission of any complaint. But Plaintiffs ignore that the process in 15.2.2.8(U)(1) NMAC applies to complaints by members of the public, not licensees, as stated in 15.2.2.8(U)(1) NMAC:

> **U. COMPLAINTS:**
>
> **(1)** An association shall designate a location and provide personnel who shall be readily available to the public to provide information or receive complaints.
>
> **(2)** An association shall promptly notify the commission of a complaint regarding an alleged violation of the Act or a rule of the commission; an alleged violation of ordinances or statutes; accidents or injuries; unsafe or unsanitary conditions for patrons, licensees or horses.

By failing to challenge any of the uncontested material facts in SunRay's *Motion*, Plaintiffs have admitted that SunRay complied with Plaintiffs' reading of 15.2.2.8(U)(2), since it notified both the Commission and its stewards of the exclusion of Carrillo. RP II/320-21, uncontested fact Nos. 6 and 8.

For their *Brief in Chief*, Plaintiffs have switched arguments, and claim that 15.2.2.8(V)(2) NMAC is not relevant because "it must be in accordance with

Section 60-1A-28.1." SunRay submits the two provisions are consistent and that § 60-1A-28.1 supports SunRay's position in this case, as SunRay argues in detail at Point IV below. However, even if the rule and statute were not consistent, 15.2.2.8(V) was the only provision in effect in 2013, and its meaning is clear: SunRay was entitled to exclude Carrillo for any lawful reason, as long as SunRay complied with the notice requirements of 15.2.2.8(V)(2), which it did. Therefore, SunRay is entitled to summary judgment.

III. SUNRAY IS ENTITLED TO SUMMARY JUDGMENT BASED ON THE FACTS ESTABLISHED BY ITS MOTION FOR SUMMARY JUDGMENT

SunRay's *Motion for Summary Judgment* not only argued that it was entitled to exclude Carrillo as a matter of law. It also established that SunRay's factual showing meant Plaintiffs could not prevail on their claims against SunRay, so summary judgment is appropriate based on those facts. SunRay submits this Court can affirm the judgment pursuant to Rule 12-201(C) NMRA because of SunRay's factual showing, and because affirmance is not unfair to the appellant. *Maralex*, *supra*.

Count V of the *Petition* claims Plaintiffs are entitled to damages from SunRay for interference with prospective contractual relations because:

> 157. The Associations' and Management's sole motive was to exclude Plaintiffs from the racetracks, and thus harm them.
>
> 158. The Associations and Management had no basis on which to

lawfully exclude the horses or the Plaintiffs.

SunRay is entitled to summary judgment on the Count V claims since uncontested material fact No. 9 establishes that it legitimately excluded Carrillo to protect the safety of jockeys and horses and the reputation of the racing industry in New Mexico, and not to harm Carrillo. This was argued by SunRay as part of its *Motion for Summary Judgment*, RP II/326.

Count VI of the *Petition* claims damages based on prima facie tort because:

> 163. The Associations' and Management's intent in excluding Plaintiffs from the racetracks was to injure them.
>
> 164. The Associations' and Management's actions had insufficient economic or social justification.

Again, SunRay is entitled to summary judgment on the Count VI claims since uncontested material fact No. 9 establishes that it reasonably decided to exclude Carrillo not with the intent of injuring him, but because of its safety and public relations concerns. Given these uncontested facts, Plaintiffs cannot meet the "heavy burden" they bear to prove that in excluding Carrillo, SunRay had an actual intent to injure him. *Lexington Ins. Co.*, 1997-NMSC-043, ¶ 12, 123 N.M. 774, *Kitchell v. Public Service Co. of New Mexico*, 1998-NMSC-051, ¶ 16, 126 N.M. 525. Even when a defendant may have had a motive to harm the plaintiff, if there is a legitimate business reason for a defendant's actions, the defendant will not be liable. *Zarr v. Washington True Solutions, LLC,* 2009–NMCA–050, ¶ 25, 146

N.M. 274. Under this rule, SunRay is entitled to summary judgment since it had legitimate reasons to exclude Carrillo. This was argued by SunRay as part of its *Motion for Summary Judgment*, RP II/326.

Count VII of the *Petition* claims damages from Defendants based on what Plaintiffs term a negligence claim:

> 167. The Associations and Management owed Plaintiffs a legally recognized duty to permit entry to the racetrack and entry in races in the absence of formal exclusion for demonstrated cause (lawful reasons).
> 168. The Associations and Management failed in their duty by denying entry to Plaintiffs without cause.
>
> 169. Plaintiffs were injured by the loss of the ability to race horses and the chance of winning money.
>
> 170. The Associations' and Managements' exclusion of Plaintiffs were proximately related to Plaintiffs' injuries.
>
> 171. The Associations and Management are liable to Plaintiffs for their damages related to the exclusions.

RP I/019.

As SunRay argued in its *Motion*, RP II/327, Plaintiffs cannot prevail on the negligence claim because Count VII is based on a false premise regarding SunRay's duties. In fact, and as SunRay has argued throughout its *Motion* and this brief, SunRay does not owe Plaintiffs "a legally recognized duty to permit entry to the racetrack and entry in races in the absence of formal exclusion for demonstrated cause." Furthermore, the undisputed material facts establish that

Carrillo was not excluded without cause or a lawful reason. Accordingly, Plaintiffs also cannot recover on their negligence claim, and SunRay is entitled to summary judgment.

Plaintiffs' other claims against SunRay appear in Counts II and III of the *Petition*, in which Plaintiffs seek injunctive and declaratory relief. The Count II claim for injunctive relief is based on the allegations that:

> 131. As regulated entities, the Associations and Management may not exclude the Plaintiffs *sua sponte*, but rather must do so only through complaint filed with the Board of Stewards.
>
> 132. In the absence of a lawful reason to exclude Plaintiffs and formal action to do so, the Associations and Management must be enjoined from enforcing their exclusion of Plaintiffs, and any race horses owned by them, onto the racetracks.
>
> 133. In the absence of a lawful reason to exclude Plaintiffs and formal action to do so, the Associations and Management must allow them and any race horses owned by them future entries onto the racetracks.
>
> 134. No such lawful reason for such exclusion exists or has been determined or adjudicated.
>
> 135. No such lawful reason has been articulated by the Associations or Management.
>
> 136. The Associations and Management have no authority to exclude Plaintiffs, as such authority is vested in the Boards of Stewards or the Commission, which has abrogated its [*sic*] authority to do so.
>
> 137. As a result of the Associations' and Management past and continuing conduct, Plaintiffs have suffered and continue to suffer immediate and irreparable harm for which they have no adequate remedy at law, and, therefore, injunctive relief is required.

RP I/15-16.

The *Petition* does not specifically request a preliminary injunction, but Plaintiffs could not obtain one in any event, since they cannot there is a substantial likelihood they will prevail on the merits. *National Trust for Historic Preservation v. City of Albuquerque*, 1994-NMCA-057, ¶ 21, 117 N.M. 590. As SunRay established first in its Motion and now in this brief, Plaintiffs do not have a factual basis to prevail on any of their claims against SunRay, and therefore Plaintiffs cannot obtain a preliminary or permanent injunction against SunRay. This was argued by SunRay in its *Motion* at RP II/324-25.

For its claim for declaratory relief in Count III of the *Petition*, Plaintiffs alleged:

> 139. An actual controversy exists between the parties within the meaning of the New Mexico Declaratory Judgment Act, NMSA 1978 §44-6-1 through -15.
>
> 140. In the absence of a lawful reason to exclude Plaintiffs and following the legally required procedures, the Associations and Management must allow them and any racehorses owned by them future entries onto their racetracks.
>
> 141. No such lawful reason exists, and no such procedure was followed.
>
> 142. No such lawful reason has been articulated by the Associations or Management.
>
> 143. A declaratory judgment confirming Plaintiffs' right to enter the tracks and race their horses should be issued.

RP I/016.

As SunRay argued below at RP II/324-25, Plaintiffs' claim that only the Boards of Stewards or the Commission may exclude someone from a track has no basis in New Mexico statute, rule or case law. It also directly contradicts the language of 15.2.2.8(V)(2) NMAC, quoted above. SunRay had and has good reason to be worried about safety and the public image of racing in New Mexico, particularly when unexplained deaths of horses occur on New Mexico tracks. As part of its summary judgment, SunRay pointed the trial court to several articles to demonstrate the challenges that the reputation of horse racing had in New Mexico. RP II/325, footnote 1. Those challenges to the industry remain. *See*, e.g., the March 2014 article entitled "Martinez vetoes horse-racing reform bill," relating to horse-racing reform legislation considered during the 2015 legislative session at http://www.santafenewmexican.com/news/legislature/martinez-vetoes-horse-racing-reform-bill/article_7321a28b-0b4a-5a1f-b4b7-900b5b812b69.html, and the December 2014 article entitled "Official: Horse-drugging cases are bottlenecked in court," about Commission's view that the public perceives no one is taking action against trainers who are drugging horses, found at: http://www.santafenewmexican.com/news/local_news/official-horse-drugging-cases-are-bottlenecked-in-court/article_eaf129b4-3947-5bd4-9ebb-2f8d6f183405.html.

In short, Plaintiffs have no legal or factual basis on which to obtain a declaratory judgment against SunRay. Legally, SunRay had no duty to follow any procedures other than those in 15.2.2.8(V)(2) NMAC before it excluded Carrillo, and follow the procedures it did. Factually, the uncontested evidence is that SunRay had a legal reason to exclude Carrillo. Uncontested Material Fact No. 9, RP II/321. Therefore, Plaintiffs have no basis for declaratory relief against SunRay and this Court should affirm the summary judgment.

IV. THE TRIAL COURT CORRECTLY FOUND THAT NMSA 60-1A-28.1 CONFIRMS SUNRAY'S RIGHT TO EXCLUDE CARRILLO

A. Plaintiffs have waived any argument based on NMSA 1978 § 60-1A-28.1 (2014).

Plaintiffs' *Brief in Chief* contains their first claim that N.M.S.A. § 60-1A-28.1 is the statute that controls the outcome of the issues in this case. *Brief in Chief* at 3 and 12-35. Therefore, this Court should disregard Points I and II of Plaintiffs' *Brief* because they are based on arguments about N.M. Stat. Ann. § 60-1A-28.1 which were not raised below. *Brown v. Trujillo*, 2004-NMCA-040, ¶ 39, 135 N.M. 365, 373 ("We do not review arguments that are raised for the first time on appeal.").

Plaintiffs filed their *Petition* in August 2013 (RP I/001). Section 60-1A-28.1 was passed in 2014. Plaintiffs never moved to amend their Petition to claim § 60-1A-28.1 controlled any aspect of this case. SunRay did not refer to § 60-1A-28.1

in its *Motion* or *Reply* in support of the *Motion* (RP II/319-344 and RP III/423-431). Plaintiffs never claimed that § 60-1A-28.1 was controlling in any of their *Responses* to the summary judgment motions. RP II/348-370 (*Response* to MWH/Sunland and Baugh), RP II/374-77 (*Response* to SunRay); RP III/440-44 (*Response* to Ruidoso Downs and Hubbard), and RP III/520-24 (*Response* to Zia Park and Baugh).

The bill that became § 60-1A-28.1, specifically § 60-1A-28.1(B), was cited in MWH/Sunland's *Motion* as affirming a racetrack owner's common-law right to exclude a person from its private property. RP III/304. This reference by MWH/Sunland invited Plaintiffs to present the § 60-1A-28.1 arguments to the trial court they now make to this Court, but Plaintiffs ducked it. The only reference Plaintiffs made to § 60-1A-28.1 in its *Response* to MWH/Sunland's *Motion* was dismissive: "Sunland also cites a recently adopted statute . . . which really adds nothing to the legal analysis." RP III/357, note 4. Plaintiffs never referred to § 60-1A-28.1 at all in their *Response* to the Ruidoso Downs or Zia Park motions for summary judgment, *See*, RP III/440-444 (Ruidoso *Response*) and RP III/520-524 (Zia Park *Response*), although in both motions, § 60-1A-28.1(B) was cited as codifying or affirming the common law right of exclusion as applied to racetracks in New Mexico. RP III/394 (Ruidoso Downs) and RP III/469-70 (Zia Park).

Since Plaintiffs did not claim before the trial court that § 60-1A-28.1 was controlling in their *Responses* to the summary judgments motions of Sunland or SunRay, they are not entitled to make any argument based on § 60-1A-28.1 against SunRay now. The Court should disregard Points I and II of the *Brief in Chief* as a result. *Brown, supra.*

B. The plain meaning of Section 60-1A-28.1 affirms SunRay's right to exclude Carrillo.

Section 60-1A-28.1 reads in full:

> **60-1A-28.1. Racetrack licensees; power to eject or exclude.**
>
> 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.

(Emphasis added.)

The plain meaning of sub-section B – indeed the only possible meaning – is that the right of a track to eject or exclude a person for any lawful reason overrides all portions of § 60-1A-28.1. *Cf. State v. Ross*, 1986-NMCA-015, ¶ 17, 715 P.2d

471, in which this Court interpreted the language in the Securities Act of "nothing in this section shall be construed as limiting the power of the state to punish any person for any conduct which constitutes a crime by state or at common law" to be "a clear expression of legislative intent that a defendant may also be convicted and sentenced for both general fraud and securities fraud", and *Safeway, Inc., v. Rooter 2000 Plumbing and Drain SSS*, 2013-NMCA-02, ¶ 23, 297 P.3d 347, in which this Court held that the language "[n]othing in this section shall be construed to affect or impair any right of indemnity or contribution arising out of any contract of agreement or any right of indemnity otherwise provided by law" in NMSA 1978 § 41-3A-1(F), meant Safeway had a right of indemnity even though it had been found partially at fault by a jury.

Since the meaning of § 60-1A-28.1(B) is so clear, the Court is required "to give effect to the statute's language and refrain from further interpretation when the language is clear and unambiguous." *Martinez v. Cornejo*, 2009-NMCA-011, ¶ 11, 146 N.M. 223. When § 60-1A-28.1(B) is given its plain meaning, it is clear that it states the same rule as Rule 15.2.2.8(V)(2) NMRA, and that SunRay was entitled to exclude Carrillo because it had a lawful reason to do so. Construing § 60-1A-28.1(B) to apply as it was written does no damage to the meaning of § 60-1A-28.1(A): it simply means that in addition to having legislative authority to exclude licensees whose licenses have been suspended or revoked by the

Commission for administering a performance-altering substance, tracks also are permitted to exclude licensees (and any other persons) for any lawful reasons. Consequently, the trial court was correct in finding that NMSA 1978 § 60-1A-28.1 codified SunRay's right to exclude Carrillo, and this Court should affirm the summary judgment.

C. Section 60-1A-28.1 was not in effect at the time of Arnoldo Carrillo's exclusion from the SunRay track in 2013, and cannot be applied retrospectively against SunRay.

Plaintiffs' reliance on § 60-1A-28.1 would be pointless even if their reading of it were correct, because that statute was not in effect when the events in this case arose. SunRay excluded Carrillo in April 2013. Uncontested Material Fact Nos. 3-8 in SunRay's *Motion for Summary Judgment*, RP II/320-31, which Plaintiffs did not contest. Section § 60-1A-28.1 was passed in the 2014 legislative session and took effect March 3, 2014. Therefore, it cannot "control" the disposition of any issues in this case unless its effect is retrospective, and establishing the retroactivity of § 60-1A-28.1 is a burden Plaintiffs cannot meet.

New Mexico law presumes a statute operates prospectively unless a "clear intention" on the part of the legislature exists to give the statute retroactive effect. *Swink v. Fingado*, 1993-NMSC-013, ¶ 28, 115 NM 275. Our courts "look primarily to the legislation itself to ascertain legislative intent." *Int'l Chiropractors*

Ass'n v. N.M. Bd. of Chiropractic Examiners, 2014-NMCA-046, ¶ 32, 323 P.3d 914 (relied upon by Plaintiffs at pages 28 and 45 of their *Brief in Chief*).

> As a general rule, the Legislature "speaks solely through its concerted action as shown by its vote." *U.S. Brewers Ass'n, Inc. v. Dir. of the N.M. Dep't of Alcohol Beverage Control,* 1983–NMSC–059, ¶ 9, 100 N.M. 216, 668 P.2d 1093 (emphasis, internal quotation marks, and citation 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.

Id.

It is also clear that when all sections of § 60-1A-28.1 are read together, the purpose of the law is to make it easier for race tracks to improve the poor perception of horse racing in New Mexico, by affirming the authority of the tracks to exclude or eject all categories of persons from all portions of their premises. There is nothing in the language of § 60-1A-28.1 indicating that the legislature intended to have it operate retrospectively, and Plaintiffs have offered nothing that overcomes the presumption that the statute should operate retrospectively.

The only route Plaintiffs have chosen to argue about the legislature's purpose in passing § 60-1A-28.1 is to cite a Fiscal Impact Report (FIR) prepared by the staff of the Legislative Finance Committee. *Brief in Chief* at 27-32. The purpose of the report would have been to estimate "the effect the bill will have on the state's finances if passed. FIRs address direct and indirect costs as well as

revenue changes resulting from the proposed legislation." Glossary of Legislative Terms, found at http://www.nmlegis.gov/lcs/glossary.aspx.

SunRay does not disagree that in the right case, an FIR might be an appropriate document to consider in considering legislative intent. It was appropriate in the case of *State ex rel Helman v. Gallegos*, 1994-NMSC-023, 117 N.M. 346, in which the issue was the legislature intent in passing different provisions affecting the rights of state employees participating in the retirement benefits established by the Public Employees Retirement Act. *Id.* ¶ 4.

But this is not such a case. There is no reason to think a report prepared by the staff of the Legislative Finance Committee would offer anything authoritative about the legislature's non-fiscal intent in passing a bill relating to the exclusion of persons from New Mexico race tracks. This is especially true in view of the limited role the courts assign to anything beyond the legislation itself, to determine legislative intent. *See Id.* ¶ 36. (emphasis added), in which the Court of Appeals explicitly limited the consideration of FIRs: "We hold only that the trial court properly admitted contemporaneous documents, actually submitted to the legislature, for the purpose of determining whether any of the revisions to the Act was expected to have a significant fiscal impact." *See* also *Int'l Chiropractors Ass'n*, *supra,* and *Baker v. Hedstrom*, 2012-NMCA-073, ¶ 28, 284 P.3d 400 (emphasis added):

> We are unpersuaded by Plaintiffs' legislative history and intent arguments and the authority they cite in support of those arguments. Further, the Word affidavit has no bearing here as, generally, not even statements of legislators are considered competent evidence in determining legislative intent. *Cf. Gallegos,* 117 N.M. at 355–56, 871 P.2d at 1361–62 ("Statements of legislators, *after* the passage of the legislation, however, are generally not considered competent evidence to determine the intent of the legislative body enacting a measure." (internal quotation marks and citation omitted)). Word only provided policy assistance to the Legislature and therefore was at least one step removed from the legislative process.

This Court should be just as unpersuaded by the offered "legislative history" as the *Int'l Chiropractic* court was, and by any claim that § 60-1A-28.1 can be read to support Plaintiffs' claims.

CONCLUSION

For all the foregoing reasons, Defendant SunRay asks that this Court affirm the summary judgment entered in its favor.

STATEMENT OF COUNSEL AS TO ORAL ARGUMENT

Defendant SunRay requests oral argument since it could help clarify or refine the parties' arguments about the effect of NMSA 1978 § 60-1A-28.1 on the issues of this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that on this 29th day of October, 2015, a copy of the foregoing was mailed to all counsel of record as follows:

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