COPY

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

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

Plaintiffs-Appellants,

vs.

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

Defendants-Appellees.

COURT OF APPEALS OF NEW MEXICO
FILED
SEP 14 2015

No. 34,429

Appeal from the First Judicial Court, Santa Fe County, New Mexico

The Honorable T. Glenn Ellington, Judge

BRIEF IN CHIEF

GRAESER & MCQUEEN, LLC
Joshua Schwartz
Christopher L. Graeser
Post Office Box 220
Santa Fe, New Mexico 87504
Telephone: (505) 982-9074
Attorneys for Plaintiffs-Appellants

ORAL ARGUMENT IS NOT REQUESTED

Table of Contents

Statement of Compliance

The typeface in this brief is Times New Roman and, according to the word-count feature in Microsoft Word 2008 for Mac, the body contains 10,007 words. Accordingly, it complies with the type-volume limitation in Rule 12-213(F)(3) NMRA.

Table of Authorities

NEW MEXICO CASES

CASES FROM OTHER JURISDICTIONS

STATUTES

OTHER AUTHORITIES

SUMMARY OF PROCEEDINGS

Nature of the Case

This case presents the question whether racetrack owners or operators (racetrack proprietors) that are granted exclusive permission by New Mexico to hold horse races can effectively suspend indefinitely the State-issued license of a horse trainer, owner, or jockey (licensees) arbitrarily and without the involvement of State authority or due process.

Arnoldo Carrillo was a successful New Mexico horse trainer and owner, racing horses under licenses issued by the State of New Mexico. **[RP 362 ¶¶ 1,2; RP 171 ¶ 2]** Mr. Carrillo owns Santa Fe Racing By Carrillo's, LLC [sic] (together, Mr. Carrillo). **[RP 362 ¶ 1]** One by one, over a period of approximately nine months, the proprietors of four of the five New Mexico racetracks banned Mr. Carrillo. **[RP 455 ¶ 33; RP 301 ¶ 1; RP 321 ¶ 7; RP 390 ¶ 5]**

No complaints were filed against Mr. Carrillo with the respective Board of Stewards or with the New Mexico Racing Commission (Racing Commission) by the racetracks, and he was not provided any hearings or due process related to any of the four bans. Neither the Racing Commission nor the Board of Stewards suspended or revoked Mr. Carrillo's licenses. **[RP 362 ¶ 3]** 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. He lost his livelihood in horse racing as a result.

Mr. Carrillo filed suit seeking, among other things, due process, restoration of his access to the four horseracing tracks in New Mexico from which he is banned pending appropriate due process, and damages for the improper exclusions. **[RP 1-22]** Defendants filed motions for summary judgment early in the case–long before the deadline to complete discovery. **[RP 299, 319, 388, 440 (MSJs filed between 6/17/2014 and 8/4/2014); RP 381 ¶¶ 5,12 (discovery deadline of 2/26/2015); RP 378 (scheduling order filed 7/16/2014)]** Defendants argued that they could exclude Mr. Carrillo for any and all reasons other than illegal discrimination based on race, creed, color, national origin, etc. **[RP 308; RP 322; RP 391-92; RP 467-68]** The district court agreed and found that, as a matter of law, racetrack proprietors may exclude any person for any reason so long as the reason is not unlawful. **[RP 567]** Under the Order of the district court, a person with an occupational license to race horses issued by the State of New Mexico, at the track to ply his trade, can be ejected or excluded arbitrarily. The district court relied on the common law right to exclude, which the court found was codified by statute, and affirmed by regulation. **[*id.*]** The 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.

The district court misconstrued the controlling statute. Because genuine issues of material fact exist in relation to Mr. Carrillo's claims under the correct legal standard, this Court should reverse the district court's finding of summary judgment for Defendants. Because 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, contrary to the conclusion of the district court. In any case, the district court also misconstrued under the common law the right of racetrack proprietors to eject or exclude holders of occupational licenses to race horses. If this Court agrees with the district court that the Legislature did nothing more than codify the common law, the outcome is the same–this Court should reverse and remand for trial.

Summary Facts, Proceedings, and Disposition

Arnoldo Carrillo is an owner and trainer of racehorses licensed by the Racing Commission. **[RP 171 ¶ 2]** Mr. Carrillo was a successful horse racer in New Mexico. He earned purses totaling $383,939 in 2012, **[RP 362 ¶ 2; RP 364]** and was the seventh most successful quarter horse owner in the

United States that year, ranked by number of wins. **[RP 362 ¶ 1; RP 364]** According to the American Quarter Horse Association rankings, Mr. Carrillo had more wins in 2012 than any other owner in New Mexico, and was second in money earned. **[RP 365]**

In New Mexico, horse racing is conducted at only five tracks. **[RP 460 ¶ 4]** At any given time, there is only one horseracing meet. **[RP 460-61 ¶ 4]** In other words, during any meet, the host track has a state-granted monopoly on horse racing in New Mexico. **[*id.* (stating that meets are staggered so that only one race track holds a meet at any given time)]**; NMSA 1978, Section 60-1A-8(A) (2007) (stating that it is a violation of law to hold a professional horse race without both a license and authorization issued by the Racing Commission. Thus, a racetrack proprietor's unilateral decision to exclude a licensee from a meet forces the licensee out of the entire industry during that time frame.

Racetrack proprietors began denying Mr. Carrillo access to the racetracks without due process in late 2012. On October 29, 2012, Mr. Carrillo was notified verbally by Zia Park, LLC, that he could no longer race horses at the Zia Park racetrack and was banned from the property. **[RP 455 ¶¶ 33-34; RP 005 ¶¶ 49-50 (asserting Zia Park never provided written notice of the exclusion)]** On April 13, 2013, My Way Holdings, LLC (My

Way), owner of the Sunland Park Racetrack & Casino (Sunland Park), notified Mr. Carrillo by letter that he could no longer race horses at or enter the Sunland Park racetrack. **[RP 301 ¶ 1]** On April 19, 2013, SunRay Gaming of New Mexico, LLC, owner of SunRay Park and Casino (SunRay Park), notified Mr. Carrillo that he was barred from racing horses at the track and the premises, sending letters to Mr. Carrillo and to the New Mexico Racing Commission. **[RP 321 ¶ 7]** On July 2, 2013, Ruidoso Downs Racing, Inc., owner of Ruidoso Downs Race Track, similarly banned Mr. Carrillo and his horses. **[RP 390 ¶ 5]**

Defendants made no attempt to initiate license revocation, suspension, or other disciplinary proceedings against Mr. Carrillo, but instead chose to exclude him without explanation or with stated reasons that would have been insufficient under New Mexico law to suspend or revoke his license had he been afforded due process. Defendant Zia Park decided to exclude Mr. Carrillo after a horse he owned and trained, De Genuine Queen, suffered a fractured knee and was euthanized on October 29, 2012. **[RP 453 ¶ 27]** Defendant Zia Park did not offer a written explanation for the exclusion. **[RP 5-6 ¶¶ 49-50; RP 455 ¶¶ 33-34 (noting the exclusion but not noting or citing any written notice)].** Only in response to Mr. Carrillo's lawsuit did Defendant Zia Park provide its asserted reasons for his exclusion. **[RP**

462 ¶¶ 12-15] In addition to De Genuine Queen's injury, Zia Park noted that two other horses owned and trained by Mr. Carrillo were found to have sore legs and were removed from the facilities by equine transport. **[RP 451 ¶ 13, 451-2 ¶ 18]** Defendant My Way, which owns the Sunland Park racetrack, excluded Mr. Carrillo the day after the April 12, 2013, death of Jumpn Alegre, a horse owned and trained by Mr. Carrillo. **[RP 24]** Sunland Park's letter sent to Mr. Carrillo by Defendant My Way indicated that their decision to exclude Mr. Carrillo was based on death of Jumpn Alegre, which was then under investigation, and Mr. Carrillo's record at New Mexico tracks. **[RP 23]** This letter stated that management would "await the result of the Jumpn Alegre investigation and make any further determination it deems appropriate." ***[Id.]*** SunRay Park excluded Mr. Carrillo four days later, on April 17, 2013. **[RP 27]** SunRay Park's letter also indicated that the exclusion was based on Jumpn Alegre's death and Mr. Carrillo's record, and stated that any further determination would follow the results of the investigation into Jumpn Alegre's death. **[RP 27]** Ruidoso Downs sent Mr. Carrillo a letter of exclusion dated July 2, 2013, stating he was excluded "based on the number of incidents and your record at New Mexico tracks[,]" **[RP 390 ¶ 6]** but without any detail about the incidents or record.

The investigation into the death of Jumpn Alegre did not reveal the presence of any prohibited substances. **[RP 369]** Jumpn Alegre was found to have died from a pulmonary hemorrhage. **[RP 370]** Of the four Defendants, only Zia Park provided any details about Mr. Carrillo's additional record at New Mexico tracks on which Defendants stated they relied, and only in its motion for summary judgment. **[RP 451-2 ¶¶ 14-15, 20-22 (Zia Park MSJ); RP 301-302 ¶¶ 1-3 (My Way MSJ); RP 320 ¶ 5; RP 334 (SunRay MSJ); RP 390 ¶¶ 6-8 (Ruidoso Downs MSJ)]** In its Motion for Summary Judgment, Zia Park provided information about two horses, Osceolacorona for Me and Sweetened Vanilla, that exhibited soreness after racing on September 9, 2012. **[RP 451 ¶¶ 14-16; RP 452 ¶¶ 19-22]** Zia Park alleged that Osceolarona for Me, Sweetened Vanilla, and De Genuine Queen had been treated with phenylbutazone and flunixin megulmine prior to racing that day, and that Sweetened Vanilla and De Genuine Queen had been additionally treated with furosemide. **[RP 451 ¶¶ 14-15; RP 452 ¶¶ 20-22; RP 454 ¶¶ 28-30]** Phenylbutazone, flunixin megulmine, and furosemide are not banned substances under New Mexico horse racing regulations. 15.2.6.9(C)(3) NMAC. Phenylbutazone and flunixin megulmine are non-steroidal anti-inflammatory drugs (NSAIDs), and are on a list in the administrative code of "primarily therapeutic medications routinely given to

race horses." 15.2.6.9(C)(3) NMAC; 15.2.6.9(A)(4) NMAC; 15.2.6.9(A)(4)(f)(i) NMAC. These substances can be legally administered to horses. 15.2.6.9(C)(3) NMAC. Minor penalties are established for blood concentrations above a certain amount. *Id.* Under New Mexico regulations, the penalties for elevated levels of one of these substances ranges from a warning to, for a third offense in a year and any subsequent offense by a trainer, a maximum fine of $2,500 and a 30 day suspension. 15.2.6.9(C)(3) NMAC. Furosemide can be administered legally under certain conditions. 15.2.6.9(E). Otherwise, furosemide is in the same penalty class as the NSAIDs, but the maximum penalties are lower: the penalty for a third offense and each subsequent offense for a trainer administering flurosemide unjustifiably is subject to a maximum fine of $1,000. *Id.* In any case, Defendants have not identified evidence that Osceolacorona for Me, Sweetened Vanilla or De Genuine Queen had an elevated level of any of the substances, or that furosemide was prohibited in the case of Sweetened Vanilla or De Genuine Queen. **[RP 451 ¶ 14-454 ¶ 31]**

Neither the Racing Commission nor any Board Stewards took any action against Mr. Carrillo for any incident noted by Defendants, **[RP 362 ¶ 3]** nor was any complaint filed by Defendants. Mr. Carrillo was not granted any hearings on these four private exclusions that severely undermined his

ability to practice his profession racing horses in New Mexico. Neither the Racing Commission nor any Board of Stewards suspended or revoked Mr. Carrillo's licenses. **[RP 362 ¶ 3]**

On August 5, 2013, Mr. Carrillo filed suit against four sets of defendants, among others not part of this appeal: (1) My Way and employee Rick Baugh (together, Defendant Sunland); (2) SunRay Park and employee Lonnie S. Barber, Jr. (together, Defendant SunRay); (3) Ruidoso Downs Racing Inc. and employee Shaun Hubbard (together, Defendant Ruidoso Downs; and (4) Zia Park LLC and employee Rick Baugh (together, Defendant Zia Park). **[RP 1]** Mr. Carrillo sought a writ of mandamus, injunctive relief, and declaratory relief, and alleged interference with prospective contractual relations (two counts), prima facie tort, negligence, and violations of the Inspection of Public Records Act, NMSA 1978, Sections 14-2-1 to -12 (1947, as amended through 2013). [*id.*] Prior to trial, Defendants filed motions for summary judgment: Defendant My Way (operator of Sunland Park), on June 17, 2014; **[RP 299]** Defendant SunRay on July 2, 2014; **[RP 319]** Defendant Ruidoso Downs on July 21, 2014; **[RP 388]** and Defendant Zia Park on August 5, 2014. **[RP 488]** In their Motions for Summary Judgment, Defendants argued that, as a matter of law, they, as private racetrack providers, could exclude or eject a licensee such as Mr.

Carrillo for any reason other than illegal discrimination made unlawful by civil rights statutes such as the New Mexico Human Rights Act. **[RP 308 ("Plaintiffs have not alleged that their exclusions were otherwise unlawful, such as constituting a violation of the Civil Rights Act of 1964 or the New Mexico Human Rights Act"); RP 322 ("The only restriction on this right [to exclude] is the inability to discriminate against members of a protected class"); RP 391-92, RP 467-68 (arguing that the right to exclude patrons and licensees is restricted only by civil rights statutes establishing unlawful reasons for discrimination such as race, creed, color, or national origin)]** Mr. Carrillo responded to each of the motions. **[RP 348 (My Way Holdings, LLC (Sunland Park)); RP 374 (SunRay); RP 440 (Ruidoso Downs); RP 520 (Zia Park)]** Mr. Carrillo argued that the legal standard for exclusion of licensees offered by Defendants was incorrect. ***See, e.g.*, [RP 352-58]** Mr. Carrillo was prepared to present evidence that: his licenses to race horses in New Mexico were not suspended at any time in his career by any administrative body, **[RP 362 ¶ 3]**; he was not the subject of significant action by the Racing Commission nor any Board of Stewards; **[*id.*]** explanations for his exclusions were inadequate; hearings were not provided to him despite request, **[RP 32]**; and

the Board of Stewards and the Racing Commission did not discipline him for any incident noted by Defendants.

On December 17, 2014, a hearing was held on Defendants' motions for summary judgment. **[RP Case Docket at 10]** On January 6, 2015, the district court granted summary judgment in favor of Defendants. **[RP 567]** The district court based its order on a finding 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)." **[RP 567]** Mr. Carrillo timely appealed. **[RP 570]**

Standard of Review

An order granting summary judgment is reviewed de novo. *Associated Home and RV Sales, Inc. v. Bank of Belen*, 2013-NMCA-018, ¶ 22, 294 P.3d 1276. "Summary judgment is appropriate where there are no issues of material fact and the movant is entitled to judgment as a matter of law." *Tafoya v. Rael*, 2008-NMSC-057, ¶ 11, 145 N.M. 4, 193 P.3d 551. The party opposing summary judgment is entitled to all reasonable inferences in its favor, and all pleadings, affidavits, depositions, answers to interrogatories, and admissions are viewed in favor of a trial on the merits. *Associated Home and RV Sales,* 2013-NMCA-018, ¶ 22. Only if a prima facie case for

summary judgment is made must a party opposing a motion for summary judgment must make an affirmative showing by affidavit or other admissible evidence that there is a genuine issue of material fact. *Id.* ¶ 29. "[S]ummary judgment is a drastic remedial tool which demands the exercise of caution in its application, and [the appellate court] reviews the record in the light most favorable to support a trial on the merits." *Woodhull v. Meinel*, 2009-NMCA-015, ¶ 7, 145 N.M. 533, 202 P.3d 126 (internal quotation marks omitted).

Preservation

The issues raised on appeal were raised in Mr. Carrillo's responses to Defendants' Motions to for Summary Judgment, **[RP 348-33; RP 374-77; RP 440-447; RP 520-24]** and at the hearing on the Motions for Summary Judgment. **[Tr. 2:13-Tr.3:21]**

ARGUMENT

Summary of Argument

The New Mexico Legislature has explicitly defined the right at issue in this case. Section 60-1A-28.1, enacted in 2014, defines the right of racetrack proprietors to exclude or eject from their premises a person with an occupational license to race horses issued by the State of New Mexico. The contour of this right is the dispositive issue in this case. Under our

established principles of statutory construction, the district court incorrectly interpreted Section 60-1A-28.1. The correct construction of this statute as it applies to this case is that private racetrack proprietors "may eject or exclude from the association ground any person whose occupational license has been suspended or revoked by the [Racing C]ommission for administering a performance-altering substance[,]" Section 60-1A-28.1, and may exclude or eject those without occupational licenses to race horses, such as patrons, for any reason not made unlawful by anti-discrimination statutes, such as the New Mexico Human Rights Act, NMSA 1978, §§ 28-1-1 to -15 (1969, as amended through 2007), or the federal Civil Right Rights Act of 1964, 42 U.S.C. § 1981 *et. seq.* To the extent that the administrative code might be interpreted as inconsistent with the statute that defines the right to exclude or eject, the administrative code must give way to the statute. Because our Legislature has enacted a statute that specifically addresses the relevant legal issue, the common law right to exclude or eject is not dispositive to this appeal. Even if this Court affirms the district court's conclusion that Section 60-1A-28.1 codified the common law, the district court's construction of the common law is incorrect. Contrary to the district court's conclusion, licensees are not treated the same as patrons. Although patrons can be ejected or excluded for any reason, even arbitrarily, as long as the reason is

not grounded in illegal discrimination (i.e., based on race or national origin, etc.), the rule is narrower for licensees.

Defendant's prima facie case for summary judgment was predicated on an incorrect legal standard for exclusion of licensee Mr. Carrillo. Under the correct legal standard, Defendants' prima facie cases fail. Furthermore, the summary judgment motions were filed and heard well before the end of discovery, so the factual development in this case was prematurely interrupted. This Court should remand for proceedings under the correct legal standard.

I. THE DISTRICT COURT MISINTERPRETED SECTION 60-1A-28.1, WHICH CONTROLS.

The New Mexico Legislature defined the contours of the right of racetrack proprietors to eject or exclude from racetrack grounds:

> A. A racetrack licensee[1] 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.

[1] The term "proprietor" is used throughout this brief to distinguish a racetrack owner or operator, referred to in Section 60-1A-28.1(A) as "racetrack licensee[,]" from those with licenses to train and race horses, who are referred to in the statute as a person with an "occupational license."

Section 60-1A-28.1; *see also id.* (entitled "Racetrack licensees; power to eject or exclude"). 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. **[RP 567]**

A. Statutory construction.

The question presented by this issue is one of statutory construction, which this Court reviews de novo. *See State v. Nick R.*, 2009-NMSC-050, ¶ 11, 147 N.M. 182, 218 P.3d 868 ("Statutory construction is a matter of law we review de novo"). "When construing statutes, [an appellate Court's] guiding principle is to determine and give effect to legislative intent." *Baker v. Hedstrom*, 2013-NMSC-043, ¶ 11, 309 P.3d 1047 (internal quotation marks and citation omitted). *See also State ex. rel Helman v. Gallegos*, 1994-NMSC-023, ¶ 25, 117 N.M. 346, 871 P.2d 1352 ("we believe it to be the high duty and responsibility of the judicial branch of government to facilitate and promote the legislature's accomplishment of its purpose.").

"The first guide to statutory interpretation is the actual wording of the statute." *State v. Strauch*, 2015-NMSC-009, ¶ 13, 345 P.3d 317. However, "where the meaning of the facial language of a statute is in doubt, the plain language approach may not lead to a correct interpretation of true legislative intent." *Id.* Despite the "beguiling simplicity" of parsing the plain meaning

of a statute, our courts "must take care to avoid adoption of a construction that would render the statute's application absurd or unreasonable or lead to injustice or contradiction." *Id.* (internal quotation marks omitted); *accord* NMSA 1978, § 12-2A-18(A)(3) (1997) (stating statutes should be construed to "avoid an unconstitutional, absurd or unachievable result.").

Therefore, in order to establish the legislative intent of a statute that is at all unclear, our courts "must examine the plain language of the statute as well as the context in which it was promulgated, including the history of the statute and the object and purpose the Legislature sought to accomplish." *Strauch*, 2015-NMSC-009, ¶ 14 (internal quotation marks omitted). With "unclear statutory provisions . . . the statutory history provides [our courts] with guidance as to the legislative intent, allowing [our courts] to promote the legislature's accomplishment of its purpose." *Id.* ¶ 17 (internal quotation marks omitted).

In discerning the meaning of a particular statute or section of a statute, our courts read "legislation in its entirety and construe each part in connection with every other part to produce a harmonious whole[.]" *State v. Javier M.*, 2001-NMSC-030, ¶ 27, 131 N.M. 1, 33 P.3d 1 (internal quotation marks and citation omitted). Moreover, "a statute must be construed so that no part of the statute is surplusage or superfluous." *Id.* ¶ 32 (alteration

omitted); *see also State v. Johnson*, 1998-NMCA-019, ¶ 22, 124 N.M. 647, 954 P.2d 79 ("We have always rejected an interpretation of a statute that would make parts of it mere surplusage or meaningless.").

B. Plain language of Section 60-1A-28.1.

In this case, 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. **[RP 574]** Although the phrase "any lawful reason" is not legally defined in New Mexico in the context of horse racing, a definition can be approached by examining reasons known to be unlawful. The New Mexico Human Rights Act (NMHRA) establishes that it is unlawful for a place of public accommodation to discriminate on the basis of race, color, national origin, ancestry, and sexual orientation, among other bases. Section § 28-1-7; *see also Elane Photography v. Willock*, 2013-NMSC-040, ¶ 5, 309 P.3d 53 (stating that the NMHRA makes it unlawful for any person in any public accommodation to refuse to offer services or facilities, accommodations or goods on the basis of membership in certain protected classes). Indeed, each Defendant argued that they could exclude licensees such as Mr. Carrillo for any and all reasons except those grounded in illegal discrimination (such as race, creed, color, or national origin), *see, e.g.*, **[RP 308 ("Plaintiffs have**

not alleged that their exclusions were otherwise unlawful, such as constituting a violation of the Civil Rights Act of 1964 or the New Mexico Human Rights Act")] and the district court agreed. **[RP 567]** But if the intent of the Legislature was to enact a comprehensive rule allowing racetrack licensees to exclude or eject any person for any reason short of unlawful discrimination, including persons with racing-related occupational licenses, Subsection A of Section 60-1A-28.1 would be unnecessary and without meaning. Put another way, the district court's interpretation of Section 60-1A-28.1–that a racetrack proprietor can exclude any person for any reason that is not illegal–reduces Subsection A to surplusage. *See* § 60-1A-28.1(A) (granting a limited right of exclusion specifically for persons with occupational licenses). If Subsection B means that racetrack proprietors can exclude each and every person in the world for any and all reasons other than illegal discrimination, then the smaller group of people referred to in Subsection A has already been accounted for in Subsection B's universal sweep. Because the district court's interpretation renders Subsection A of the statute surplusage, that interpretation is incorrect. *See Javier M.*, 2001-NMSC-030, ¶ 32 (stating that "a statute must be construed so that no part of the statute is rendered surplusage or superfluous"); *Johnson*, 1998-NMCA-019, ¶ 22, 124 N.M. 647, 954 P.2d 79 ("We have always rejected an

interpretation of a statute that would make parts of it mere surplusage or meaningless.").

Also, the district court's construction of Section 60-1A-28.1 fails to harmonize that Section with the rest of the New Mexico Horse Racing Act (HRA), NMSA 1978, §§ 60-1A-1 to -30 (2007, as amended through 2015), as required. *See Javier M.*, 2001-NMSC-030, ¶ 27 (stating that courts must read statutes in their entirety, and "construe each part in connection with every other part to produce a harmonious whole"); *N.M. Bldg. & Const. Trades Council v. Dean*, 2015-NMSC-023, ¶ 11, 353 P.3d 1212 ("[I]n construing particular statutory provisions to determine legislative intent, an entire act is to be read together so that each provision may be considered in its relation to every other part, and the legislative intent and purpose gleaned from a consideration of the whole act."); *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("A court must . . . interpret [a] statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole") (internal quotation marks and citation omitted). As outlined below, horse racing is subject to an extensive regulatory scheme that provides for control over matters of licensure, supervision of licensees, penalties for the administration of prohibited substances and other violations, regulatory presence at racetracks

during meets, and thorough due process for a licensee facing action against his or her license.

The HRA governs horse racing in New Mexico and provides for a robust administrative system to regulate all aspects of the industry, including tracks, proprietors, and trainers. It establishes the Racing Commission, and "grants the Racing Commission administrative authority over the regulation of horse racing in New Mexico." *Perez v. Dep't of Workforce Solutions,* 2015-NMSC-008, ¶ *4, 345 P.3d 330.* The Racing Commission is composed of five members with knowledge of horse racing, appointed by the Governor and approved by the New Mexico Senate. Section 60-1A-3. The HRA grants to the Racing Commission broad powers and duties to "implement the [HRA] and ensure that horse racing in New Mexico is conducted with fairness and that the participants and patrons are protected against illegal practices." Section 60-1A-5(A); *see also* § 60-1A-4 (outlining twenty-nine distinct powers and duties of the Racing Commission); *Simon v. Taylor*, 981 F. Supp. 2d 1020, 1048 (D.N.M.2013) (stating that the Racing Commission is granted "broad powers and duties" under the HRA). The Racing Commission's power over horse racing is apparently plenary.

Among the powers and duties granted to the Racing Commission is authority over horse racing occupational licenses. Section 60-1A-4(A)(1); §

60-1A-7; § 60-1A-11. The HRA grants the Racing Commission the power to "suspend, revoke, or deny renewal of a license of a person who violates the provisions of the [HRA] or rules adopted pursuant to that act." Section 60-1A-5(C). Violations of the HRA are punishable as fourth degree felonies, § 60-1A-25, including violations for the mistreatment of horses. Section 60-1A-28 (A)-(C). The Racing Commission is empowered to investigate the operations of licensees, § 60-1A-5(A)(4), and has quasi-judicial powers in that arena. For example, the Racing Commission may compel discovery, § 60-1A-5(A)(3), summon witnesses, § 60-1A-5(A)(6), and administer oaths. Section 60-1A-5(A)(7). Procedures for these quasi-judicial powers are established in detail. See 15.2.1.9(C)(3) NMAC (providing for subpoenas and depositions); 15.2.1.9(C)(4) NMAC (pleadings); 15.2.1.9(C)(9) NMAC (discovery).

All proceedings of the Racing Commission on licensure matters must comport with basic due process requirements. The Racing Commission is *required* to provide a hearing and reasonable notice to any licensee facing any type of limitation or denial of his or her license. Section 60-1A-5(C) ("The commission shall provide a licensee facing suspension, revocation or denial of renewal of a license reasonable notice and an opportunity to be heard."). Notice and opportunity to be heard are the "essence of due

process." *State ex rel. Children, Youth & Families Dep't. v. Maria C.*, 2004-NMCA-083, ¶ 26, 136 N.M. 53, 94 P.3d 796. Thus, pursuant to the HRA, the Racing Commission cannot limit or deny a license without due process of law.

The actions of licensees at horse racing meets are heavily supervised. The HRA provides for three racing Stewards, licensed or certified by a horse racing organization with national recognition, to supervise each horseracing meet. Section 60-1A-12. The Stewards are responsible to the Racing Commission. 15.2.3.8(B)(1) NMAC. The Stewards have extensive authority and duties to enforce the HRA and the rules and regulations promulgated by the Racing Commission. *See* 15.2.3.8(B)(1-9) NMAC (granting numerous specific powers and duties to the Stewards, including, among others, the authority to supervise both participants and patrons of horse racing, 15.2.3.8(B)(1)(b) NMAC, and to resolve conflicts or disputes related to racing. 15.2.3.8(B)(1)(c) NMAC). Among the responsibilities of the Stewards is the duty to "take notice of alleged misconduct or rule violations and initiate investigations into the matters." 15.2.3.8(B)(3)(a) NMAC. Stewards must promptly investigate and render a decision on all protests, objections, and complaints they receive, and file a copy of such with the Racing Commission daily. 15.2.3.8(B)(4) NMAC.

The Stewards have the authority to impose penalties against licensees for violations, including placing a licensee on probation, suspension of a license, revocation of a license, and "exclu[sion] from [racing] grounds under the jurisdiction of the [Racing] [C]omission." 15.2.3.8(B)(3)(f) NMAC. Like the Racing Commission, the Stewards are subject to extensive due process requirements in the context of actions against a licensee. A section of the administrative code, titled "Due Process and Disciplinary Action[,]" details the "rules of procedure for stewards' hearings and commission proceedings." 15.2.1.9 NMAC. Pursuant to this section, a complaint by someone other than a Steward must be in writing, 15.2.1.9(B)(2)(c) NMAC, and the burden of proof lies on the person bringing the complaint to prove a violation. 15.2.1.9(B)(6) NMAC. A licensee faced with an adverse ruling by the Stewards may appeal to the Racing Commission. 15.2.1.9(B)(9)(a) NMAC. A licensee subject to a disciplinary proceeding of the Stewards is granted numerous protections, including the right to: proper notice of all charges; retain counsel; examine all evidence; present a defense; call witnesses; and cross-examine witnesses. 15.2.1.9(B)(1) NMAC. When Stewards exclude licensees, the Stewards must hold a hearing. 15.2.1.9(C)21(a)-(b) NMAC. When Stewards summarily

suspend a license, they must hold a hearing within three days. 15.2.1.9(B)(3).

Professional horse races are prohibited except as provided pursuant to the HRA. Section 60-1A-8(A). A person cannot hold a professional horse race unless licensed by the Racing Commission, and even then only on dates approved by the Racing Commission. *Id.* The Racing Commission has plenary power over the licensing of racetrack proprietors. *See* § 60-1A-28.1(N) (stating that any determination of the Racing Commission pursuant to the licensing of a racetrack proprietor is final and not subject to appeal).

The Racing Commission regulates the substances horses can be given, and has established a detailed schedule of penalties for violations. *See* 15.2.6.9(A) NMAC (establishing five classes of substances); *see* 15.2.6.9(B) NMAC (discussing substance penalties and establishing penalty categories); *See* 15.2.6.9(C) NMAC (establishing a penalty regime based on the category of substance). The penalty categories for substance administration penalties of run from Category A to Category D, with Category A being the most serious. The penalties section is highly detailed. *See, e.g.*, 15.2.6.9(C)(3) NMAC (stating in detail the penalties for administration of a Category C substance).

Section 60-1A-28.1 cannot be considered in a vacuum, but, instead, must be considered in relation to the above statutory scheme that regulates horse racing licensees, establishes due process requirements related to license suspensions and violations, and provides a detailed schedule of penalties for substance violations. *See In re Grace H.*, 2014-NMSC-034, ¶ 34, 335 P.3d 746 ("[A] statutory subsection may not be considered in a vacuum, but must be considered in reference to the statute as a whole and in reference to statutes dealing with the same general subject matter"). The district court's construction of Section 60-1A-28.1 fails to harmonize with the rest of the HRA because racetrack proprietors would (as in this case) have the power to circumvent the Stewards, the Racing Commission, and the entire statutory scheme to prevent a licensee from racing horses.

Mr. Carrillo received none of the process outlined above. Defendants effectively suspended Mr. Carrillo's license without ever presenting evidence or even presenting a concrete theory of how Mr. Carrillo might be responsible for the injuries to De Genuine Queen or Jumpn Allegre. The substances administered to Sweetened Vanilla and Osceolacorona for Me were not prohibited. Even if the blood concentrations were high–and Defendants did not assert that the amounts exceeded the legal concentrations–the penalties for Category C substances in an illegal

concentration established under the regulations created by the Racing Commission are relatively minor. *Cf.* 15.2.6.9(C)(3) (stating the penalties for administration of Category C substances). The racetrack proprietors' exclusions of Mr. Carrillo in this case are entirely divorced from the regulatory scheme envisioned by the Legislature, promulgated by the Racing Commission, and enforced by the Stewards.

As the facts of this case demonstrate, under the rule articulated by the district court, the power and duties of the Racing Commission are superseded by private racetrack proprietors. Moreover, the district court's construction of Section 60-1A-28.1 undermines the extensive due process protections granted to licensees. That the district court's construction of Section 60-1A-28.1 fails to harmonize with the surrounding statutory and regulatory structure, and even undermines that structure, is another indication that the district court's construction is not correct.

The better interpretation of the plain language of Section 60-1A-28.1 is that the intent of the Legislature is to grant racetrack proprietors a broad, general power to eject or exclude non-holders of occupational licenses related to horse racing, 60-1A-28.1(B), but establish more narrow rule for those who have occupational licenses issued by the State of New Mexico to participate in professional horse racing. *See* § 60-1A-28.1(A) (stating

specific circumstances in which persons with an "occupational license" may be excluded or ejected by racetrack proprietors). This reading gives meaning and effect to both sections of Section 60-1A-28.1, and avoids rendering Section 60-1A-28.1(A) surplusage and superfluous. Also, this interpretation harmonizes with the rest of the HRA, which grants extensive powers and duties to the Racing Commission to regulate participation and exclusion from horse racing in New Mexico, and establishes extensive procedures and due process for licensees facing potential penalties and suspensions resulting from infractions.

C. Legislative history of Section 60-1A-28.1.

To the degree that the meaning of the plain language of Section 60-1A-28.1 is ambiguous or doubtful when viewed through the prism of our principles and canons of statutory construction, any lingering doubt or ambiguity is erased by the legislative history. *Cf. Strauch*, 2015-NMSC-009, ¶¶ 14, 17 (stating that the history of a statute provides guidance in ascertaining legislative intent when statutory provisions are unclear or admit of ambiguity). Senate Bill 116, entitled "Permit Racetrack Ejections for Some Actions[,]" was enacted in 2014 and codified as the statute at issue, Section 60-1A-28.1. *Compare* S.B. 116, 51st Leg., 2nd Sess. (N.M. 2014), *available at*

http://www.nmlegis.gov/lcs/legislation.aspx?Chamber=S&LegType=B&LegNo=116&year=14 (follow "Final Version" hyperlink) *with* Section 60-1A-28.1. Although our Legislature generally speaks through its concerted action as demonstrated by its vote, contemporaneous documents prepared for and presented to the Legislature during the course of enactment of a statute may be considered by this Court as evidence of legislative intent. *Helman*, 1994-NMSC-023, ¶ 35; *see also Int'l Chiropractors Ass'n v. N.M. Bd. of Chiropractic Exam'rs*, 2014-NMCA-046, ¶ 32, 323 P.3d 914 ("contemporaneous documents presented to the Legislature . . . may be considered to bear upon legislative intent"); *see also* NMSA 1978 § 12-2A-20 (1997) (stating that "the legislative or administrative history of the statute" may be used to determine the meaning of the text of a statute that remains unclear). In this case, the Fiscal Impact Report for S.B. 116, prepared for and presented to the Legislature during the course of the enactment of the statute, clearly articulates the intended meaning of Section 60-1A-28.1:

> Synopsis of Original Bill
>
> Senate Bill 116 creates a new section in the Horse Racing Act that will provide civil immunity for lawful exclusion of licensees who eject or exclude from their premises any person whose occupational license has been suspended or revoked by the stewards or the commission for administering a performance-altering substance to a

racehorse. The racetrack licensees may prevent that person from reentering the licensed premises unless the suspension or revocation is reversed by the stewards or overturned by the commission or a court of competent jurisdiction . . . .

SIGNIFICANT ISSUES

Currently the S[tate]R[acing]C[ommission] has the statutory authority to administer sanctions against occupational licensees who administer performance altering drugs to a racehorse. But, by petitioning district courts for a restraining order or injunction on the imposed sanctions, these licensees who were administered sanctions from SRC for administering performance altering drugs to a racehorse continue to race horses pending disposition of the District Court's order. . . .

AOC writes:

SB 116 would delegate additional authority to the Commission's licensee, the racetrack owner/operator, to decide whether to eject any person from the racetrack licensee's premises if their occupational license has already been suspended or revoked for administering a performance-altering substance. The ejection could be permanent if the track stewards (who are appointed by the Commission), the Commission itself, or the Courts refuse to reverse or overturn the decision on the person's occupational license. Due process concerns could be resolved primarily by administrative authorities, the Commission or its appointed stewards, before seeking judicial relief. ***While the bill would give racetrack licensees immunity from suits arising from the ejection/exclusion, they would not have unchecked and unreviewable power to control and/or eject other racing participants from their premises.***

S.B. 116, Fiscal Impact Report, 51st Leg., 2nd Sess. (N.M. 2014), *available at*

http://www.nmlegis.gov/lcs/legislation.aspx?Chamber=S&LegType=B&LegNo=116&year=14 (follow "Fiscal Impact Report" hyperlink)(hereinafter S.B. 116 FIR)(emphasis added); *see also Helman*, 1994-NMSC-023, ¶¶ 33, 36 (holding that a Fiscal Impact Report was properly considered as evidence of legislative intent). The Fiscal Impact Report for S.B.116 confirms that the legislative intent was contrary to the construction of the statute by the district court. The following points with regard to the correct construction of Section 60-1A-28.1 bear emphasis:

(1) The purpose of the legislation was to grant racetrack proprietors authority that they did not previously possess. *See* S.B. 116 FIR (stating that SB 116 would delegate "additional authority to . . . the racetrack owner/operator"); *Chavez v. Am. Life & Cas. Ins. Co. of Fargo N.D.*, 1994-NMSC-037, ¶ 9, 117 N.M. 393, 872 P.2d 366 ("The Legislature is presumed to know the law, including the laws of statutory construction, when it passes legislation");

2) The additional authority the Legislature intended to grant to racetrack proprietors was only to eject or exclude occupational licensees whose license was already suspended or revoked. *See id.* (stating that S.B.

116 would allow racetrack proprietors to "decide whether to eject any person from the racetrack licensee's premises if [that person's] occupational license has already been suspended or revoked");

3) The lawful authority of racetrack proprietors to exclude or eject those with occupational licenses to race horses is entirely contingent on the suspension of that occupational license by administrative or judicial authority. *See id.* ("The racetrack licensees may prevent [the ejected or excluded] person from reentering the licensed premises *unless* the suspension or revocation is reversed by the stewards or overturned by the commission or a court of competent jurisdiction") (emphasis added); *id.* ("The ejection could be permanent if the track stewards . . . , the Commission itself, or the Courts refuse to reverse or overturn the decision on the person's occupational license.");

4) The intention of the Legislature was not to grant racetrack proprietors nearly unfettered power to eject or exclude those with occupational licenses to race horses. *See id.* (racetrack proprietors "would not have unchecked and unreviewable power to control and/or eject other racing participants from their premises.");

5) The Legislature was concerned with due process, and believed that the procedural protections granted to licensees pursuant to the HRA and

related rules and regulations would apply and protect licensees. *See id.* ("Due process concerns could be resolved primarily by administrative authorities, the Commission or its appointed stewards.").

Each of these points is inconsistent with the construction of the district court, under which a licensee, such as Mr. Carrillo, whose license had not been suspended or revoked by the Racing Commission, could be excluded or ejected without any hearings or due process, and without recourse to any meaningful review.

In conclusion, the Legislature did not intend to establish a comprehensive rule that racetrack owners can exclude or eject for any or no reason except illegal discrimination for all persons including licensees under Section 60-1A-28.1(B), and, with Section 60-1A-28.1(A), do nothing more than provide a narrow example of one reason among many that a licensee can be excluded under Section 60-1A-28.1(B). This construction, which is the effect of the district court's ruling, is not supported by the plain language of the statute as construed under our canons and principles of statutory construction, or the legislative history. Instead, the legislative intent of Section 60-1A-28.1 as it pertains to Mr. Carrillo was to provide racetrack proprietors a new right to exclude or eject those with an occupational license to race horses if that license has suspended or revoked by the Racing

Commission for the administration of a performance altering drug, for as long as that license is not in good standing.

II PUBLIC POLICY RUNS CONTRARY TO THE DISTRICT COURT'S CONSTRUCTION OF SECTION 60-1A-28.1.

To allow private racetrack proprietors the sweeping power to exclude licensees for all reasons except those that violate civil rights statutes is contrary to public policy. First, the broad rule articulated by the district court would undermine the regulatory structure envisioned by the Legislature. Professional horse racing is a form of gambling, and is heavily regulated by the State. The Legislature has granted the Racing Commission the authority to regulate horse racing in New Mexico, *Perez*, 2015-NMSC-008, ¶ 4, and the Racing Commission has the "duty to ensure that horse racing in New Mexico is conducted with fairness." Section 60-1A-5(A). The Racing Commission and the Stewards regulate licensure matters, including suspensions, revocations, and discipline for infractions such as administering prohibited substances to horses. Section 60-1A-5(C); 15.2.3.8(B)(1)(b) NMAC; 15.2.3.8(B)(3)(f) NMAC.

Under the district court's interpretation of Section 60-1A-28.1, private racetrack proprietors have greater powers over licensees than the Legislature granted the Racing Commission or than is possessed by the Stewards. Although hearings are always required when action is taken to suspend or

revoke a license, § 60-1A-5(C), and the Stewards are required to provide a hearing within three days of a summary suspension, 15.2.1.9(B)(3)(b) NMAC, racetrack proprietors would be able to indefinitely exclude licensees for even arbitrary reasons without any due process.

Furthermore, and importantly, allowing arbitrary exclusions could easily mask illegal discriminatory exclusions. If a racetrack proprietor is allowed to exclude or eject a licensee for the color of his boots, it will be nearly impossible to prove that the exclusion was, for example, actually because the licensee is of Mexican origin.

Under the rule of the district court, racetrack proprietors could, in effect, overrule decisions of the Racing Commission and the Stewards. For example, if the Stewards or the Racing Commission suspended a licensee's license and later rescinded the suspension after adjudicating the licensee to be blameless, the racetrack proprietor would still have the power to exclude the licensee.

The power of arbitrary exclusion of licensees also creates the opportunity for anticompetitive misuse. Racetrack proprietors might have closer relationships to some licensees than others, and sometimes race horses on their own. The exclusion of a successful horse racer, like Mr. Carrillo,

creates financial opportunity for other trainers and owners and, therefore, creates incentive for misuse or even corruption.

Finally, granting racetrack proprietors the power to eject or exclude licensees for any reason could inhibit licensees from reporting unsafe conditions or other improprieties at the racetracks out of concern for retaliation. To the extent that the New Mexico horse racing industry suffers from a bad reputation, impropriety, and unsafe conditions, **[RP 461 ¶ 5]** the solution is not to allow racetrack proprietors to override the regulatory process.

For the above reasons, the broad power of exclusion found by the district court is contrary to public policy and, for this reason also, should be rejected.

III. BECAUSE SECTION 60-1A-28.1 CONTROLS, THE COMMON LAW RIGHT TO EXCLUDE IS NOT RELEVANT. IN ANY CASE, DEFENDANTS' COMMON LAW RIGHT TO EXCLUDE LICENSEE MR. CARRILLO WOULD NOT SUPPORT SUMMARY JUDGMENT.

This issue raises an issue of law, which this Court reviews de novo. *City of Aztec v. Gurule*, 2010-NMSC-006, ¶ 5, 147 N.M. 693, 228 P.3d 477.

Even if this Court agrees with the district court and holds that, in enacting Section 60-1A-28.1, the Legislature merely "codified the common law right to exclude," **[RP 574]** summary judgment was nevertheless

inappropriate. There is a clear distinction, recognized by judicial authority, between the right of racetrack proprietors to eject or exclude patrons (i.e. spectators and bettors) and the right to eject or exclude licensees pursuing their trade at the only location available for them to do so, especially when the locations to perform that are limited. *See, e.g.*, *Cox v. National Jockey Club,* 323 N.E.2d 104, 108-109 (Ill. App. Ct. 1974) (recognizing the distinction under the common law between excluding patrons and licensees under conditions of limited opportunity). The right of a racetrack proprietor to exclude patrons or ticket holders is considerably broader than the right to exclude a trainer, owner, or jockey. A fundamental reason for the distinction is that, unlike patrons, "a horse's jockey, owner, or trainer has a right to engage in his chosen profession and is entitled to due process of law if he is to be lawfully denied an opportunity to do so." *State Racing Comm'n v. McManus*, 1970–NMSC–134, ¶ 19, 82 N.M. 108, 476 P.2d 767; *Stinebaugh v. N.M. Racing Comm'n*, No. 32,840, mem.op. ¶ 8 (N.M. Ct. App. July 9, 2015) (non-precedential); *see also Barry v. Barchi*, 443 U.S. 55, 64, 99 (1979) (holding that a horse trainer "had a property interest in his license sufficient to invoke the protection of the Due Process Clause [of the United States Constitution]").

A. Patrons can be excluded under the common law for any reason absent statutory language limiting that right.

As places of amusement held open to the public, privately owned racetracks traditionally have a common law right to exclude or eject patrons for any or even no reason as long as that reason has not been made illegal under a statute. That is, racetracks proprietors and other proprietors of places of public amusement can admit, exclude, or reject patrons without reason or justification under the common law as long the exclusion or ejection is not based on discrimination inconsistent with state or federal civil rights laws. *See Brooks v. Chi. Downs Ass'n.*, 791 F.2d 512, 513 (7th Cir. 1986) (holding that Illinois follows the common law rule that "the operator of a racetrack has the absolute right to exclude a patron from the track premises for any reason, or no reason, except race, color, creed, national origin, or sex"); *Garfine v. Monmouth Park Jockey Club*, 148 A.2d 1, 8 (N.J. 1959) (stating that the ejection and exclusion of a patron by a racetrack under the common law was not improper because not based on race, creed, color, national origin or ancestry, as prohibited by statute); *Marrone v. Washington Jockey Club of the D.C.*, 33 U.S. 401, 402 (1913) (holding that an entrance ticket to a racetrack was subject to revocation, and did not create a right to enter, under "the commonly accepted rule").

The reasoning behind the broad right of exclusion of patrons is explained by the Sixth Circuit in *Brooks*. 791 F.2d 512. If a racetrack

proprietor were limited to exclusions based on just cause, the proprietor would be liable if mistaken about the reason for the exclusion. *Id.* at 517. To take the example from *Brooks*: a racetrack proprietor who excluded someone because he seemed like a mobster does not want to have to "*prove* or *explain* that his reason for exclusion is a *just* reason." *Id.* Though the right to exclude patrons for entirely arbitrary reasons might be "arguably unfair[,]" racetrack owners are, for business reasons, likely to exercise this power reasonably. *See id.* at 517 (stating that economic incentives limit exclusions of paying customers without good reason); *id.* at 518 (stating that excluding patrons for reasons as arbitrary as, for example, having the name Adam Smith arguably offends precepts of fairness and equality). Furthermore, a patron does not have a right to that entertainment. *See Marrone,* 227 U.S. 633, 636 (1913) (holding that an entrance ticket to a racetrack did not create a right to enter, under "the commonly accepted rule").

B. The right to exclude licensees under the common law is limited.

The conditions and reasoning informing the broad right of exclusion of patrons do not apply to licensee exclusions. Accordingly, the right to exclude licensees is narrower. The conditions that inform the right to exclude licensees are as follows. Unlike patrons, persons with occupational licenses to race horses have a significant interest in, and a right to, admission

to racetrack grounds to in order to practice their professions. *McManus*, 1970–NMSC–134, ¶ 19; *see Barchi*, 443 U.S. at 64 (1979) (holding that a horse trainer "had a property interest in his license sufficient to invoke the protection of the Due Process Clause [of the Constitution of the United States]"). In addition, the direct economic incentives that serve to limit patron exclusions do not apply because licensees, unlike patrons, do not directly support racetrack proprietors through ticket, concession, and betting income. Furthermore, in the context of New Mexico horse racing, the behavior of licensees, unlike that of patrons, is heavily regulated by the Legislature through the HRA, the Racing Commission, and the Stewards, who are present at every meet. *See* § 60-1A-12 (providing for Stewards at every horse race). For example, license suspensions and revocations, including summary suspensions, are provided for by the regulatory structure. *See* 15.2.1.9(B)(3) NMAC (providing for the Stewards to summarily suspend the license of a licensee under certain circumstances). Also, at any given time in New Mexico, there is only one horseracing meet; **[RP 461 ¶ 4]** therefore, each racetrack has something akin to monopoly power during the time it hosts. During any given race meet, then, licensees are entirely dependent on the proprietor of that meet for the opportunity to earn a living. Finally, there are only five racetracks in New Mexico, **[RP 460 ¶ 4]** so each

track has significant power over a licensee's ability to earn a living at his or her chosen occupation. Against this backdrop, we turn to examine the common law right to exclude licensees.

New Mexico does not yet have an appellate decision that addresses the power of a racetrack proprietor to exclude or eject a State-issued licensee under the common law. And there are only a few out-of-state cases addressing the exclusion of licensees by private racetrack proprietors under the common law (as opposed to state statute). These cases generally hold that racetrack proprietors do not have the near absolute power to eject or exclude licensees granted by the district court in this case. In *Jacobson v. New York Racing Ass'n, Inc.*, the plaintiff, a licensed owner and trainer, had his license suspended by the New York Racing Commission. 305 N.E.2d 765, 766 (N.Y. 1973). The defendant, a racetrack proprietor granted "virtual monopoly" by the State, attempted to exclude plaintiff even after plaintiff's license was restored. *Id.*; *see id.* at 768 (stating that defendant was "granted a virtual monopoly" over throroughbred racing in New York). Plaintiff filed an action for damages. *Id.* at 766. The court held that, "in contrast to a racetrack proprietor's common-law right to exclude undesirable patrons," the racetrack proprietor did not have "absolute immunity from having to justify the exclusion of an owner and trainer whom the State has seen fit to

license." *Id.* at 767. The court reasoned that "exclusion . . . is tantamount to barring the plaintiff from virtually the only places in the State where he may ply his trade and, in practical effect, may infringe on the State's power to license horsemen." *Id.* at 768.

In *Cox*, the Illinois Court of Appeals held that "a private corporation licensed by the State of Illinois to conduct a horse racing meet on private property cannot arbitrarily deny a licensed jockey permission to participate in its racing meet." 323 N.E.2d at 107 (Ill. 1974). In Illinois, only one race meet was held at any time within 150 miles. *Id.* at 108. Under that circumstance, the racetrack proprietor had "a quasi-monopoly during the period of the subject racing meet and, therefore, defendants could not arbitrarily and without reason or justification deny plaintiff the opportunity of participating in its meet." *Id.* at 107-108.

Marzocca v. Ferone, a case in which there was no assertion of monopoly or quasi-monopoly power on the part of the racetrack proprietor, held that exclusions of persons "who wish to perform their vocational activities" in violation of public policy are not permitted. 461 A.2d 1133, 1137 (N.J.1983). Importantly, *Marzocca* did not involve the exclusion of a licensee, but only one horse. *Id.* at 1135. Another case not involving an assertion of any sort of monopolistic power, *Bresnik v. Beulah Park Ltd.*,

held that a jockey could be excluded by the proprietor of a racetrack absent legislation to the contrary. 1993-Ohio-19, 617 N.E.2d 1096, 1097 (Ohio 1993). However, that holding was subject to a well reasoned dissent that would have affirmed the decision below. *Id.* at 1098-1100 (Sweeney, J., dissenting). The dissent noted that horse racing was highly regulated in Ohio, and that the track stewards are granted power over those with occupational licenses. *Id.* at 1099-1100. "Given the extensive regulatory scheme[,]" stated the dissenting Judges, "a licensee . . . deserves the type of due process that statutes and rules allow when a steward . . . excludes a licensee from a [racetrack proprietor's] premises." *Id.* at 1099. These cases– *Jacobson, Cox, Marzocca,* and *Bresnik*–indicate that when racetrack proprietors have a significant amount of economic power over the ability of a licensee to ply his trade, the right of exclusion is accordingly limited and cannot be exercised without cause.

The right of a private hospital to exclude a medical licensee is similarly limited where a licensee's ability to practice her vocation is affected by the hospital's economic power. Where private hospitals have significant or quasi-monopoly power over the ability of medical licensees to practice their vocations, licensees are entitled to due process, cannot be excluded without reason, and are entitled to judicial review. This is the rule

in New Mexico. In *Kelly v. Saint Vincent Hosp.*, this Court concluded that because many areas are served by only one hospital, an exclusion would "essentially deny a doctor the opportunity to practice." 1984-NMCA-130, ¶ 5, 102 N.M. 201, 692 P.2d 1350. Because of this, and the fact that medical services are necessary, the Court held that judicial review of the decisions of a private hospital board was necessary under certain circumstances. *Id.* ¶¶ 5-8. Other courts have also held that when a hospital has significant power over a licensee's ability to earn a living, the common law right of private hospitals to deny staff privileges is accordingly limited, and licensees are accorded judicial review as to whether the private hospital denied privileges for reasons that were arbitrary, capricious, or unreasonable. *See, e.g.*, *Silver v. Castle Memorial Hospital*, 497 P.2d 564, 568 (Haw. 1976) (holding that the staffing decision of a private hospital was subject to judicial review as to whether the excluded licensee was afforded procedural due process and whether the hospital board's decision was unreasonable, capricious, or arbitrary, or discriminatory); *Ascherman v. Saint Francis Mem'l Hosp.*, 45 Cal.App.3d 507, 509, 511-512 (1975) (holding that when a licensee's ability to earn a living "would impair the [licensee's] right to fully practice his profession[,]" a privately owned hospital was subject to judicial review as to whether the licensee was excluded under policies that were "substantially

rational and procedurally fair"). By analogy, the right of a racetrack proprietor in New Mexico–each of which acts with the power of the entire industry during their meet and of which there are only five–is not entitled to exclude any licensee for any reason not deemed unlawful by statute, and excluded licensees are entitled to due process.

In sum, conditions in the New Mexico racing industry are such that the common law right of racetrack proprietors to exclude licensees should be construed narrowly. Racetrack proprietors are licensed by the Racing Commission to hold races. Section 60-1A-8(A). There are only five racetracks in the state, and at any given time, only one racetrack proprietor holds a race. **[RP 460-61 ¶ 4]** During any given meet, the host proprietor acts with the power of the entire industry from the perspective of a licensee attempting to practice his or her vocation–this constitutes monopolistic power over licensees. Because of the significant financial control exercised by the State-empowered racetrack proprietors over licensees, racetrack proprietors should not have the right to exclude licensees on a whim.

Contrary to the Order of the district court and the arguments of Defendants, racetrack proprietors, which exercise significant economic power, cannot under the common law exclude licensees for any reason, even those that are arbitrary, except such reasons made unlawful by civil rights

statutes. That rule is improperly broad. Mr. Carrillo respectfully submits that given the extensive powers over licensees granted to the Stewards and the Racing Commission, and given the economic power granted by New Mexico to the five racetrack proprietors in the state, racetrack proprietors do not need or have such arbitrary power to deprive licensees of their means of livelihood.

IV. 15.2.2.8(V) NMAC IS NOT RELEVANT TO THE OUTCOME OF THIS APPEAL.

The Order of the district court stated that racetrack proprietors have a common law right to exclude any person for any lawful reason that is "affirmed by regulation at 15.2.2.8(V) NMAC[.]" In relevant part, 15.2.2.8(V) NMAC states that "[a]n 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."

If this Court determines that Section 60-1A-28.1 determines the right of racetrack proprietors to exclude licensees, the meaning of 15.2.2.8(V) NMAC must be in accordance with Section 60-1A-28.1. *See Int'l Chiropractors Ass'n*, 2014-NMCA-046, ¶ 8 ("An administrative agency has no power to create a rule or regulation that is not in harmony with its statutory authority."). Should this Court determine that the Section 60-1A-

28.1 codified the common law, then the meaning of 15.2.2.8(V) NMAC must be in accordance with this Court's definition of the common law of exclusion of licensees in New Mexico. Either way, the meaning of 15.2.2.8(V) NMAC is derivative. 15.2.2.8(V) NMAC is not relevant to the outcome of this appeal.

CONCLUSION

Defendants' prima facie cases for summary judgment were predicated on an incorrect legal standard, and fail under the correct legal standard. Furthermore, the summary judgment motions were filed and heard well before the end of discovery, so the factual development in this case was prematurely interrupted. Mr. Carrillo respectfully requests that this Court reverse the district court's grants of summary judgment and remand to the district court for proceedings under the correct legal standard for exclusion of a licensee by a racetrack proprietor.

STATEMENT ON ORAL ARGUMENT

Because the disposition of this appeal rests on the construction of Section 60-1A-28.1, which is extensively briefed herein, Mr. Carrillo does not believe oral argument is necessary.

Respectfully submitted,

GRAESER & MCQUEEN, LLC

By: _____
Joshua Schwartz
Christopher L. Graeser
Post Office Box 220
Santa Fe, New Mexico
Attorneys for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I certify that a copy of this Brief in Chief was served upon:

Megan Day Hill
Ellen M. Kelly
Civerolo, Gralow, Hill & Curtis, P.A.
PO Drawer 887
Albuquerque, NM 87103-0887
Attorney for Sunray Gaming of New Mexico, LLC and Lonnie S. Barber, Jr.

Billy R. Blackburn
1011 Lomas Blvd. NW
Albuquerque, NM 87102
Attorney for Defendant Zia Park, LLC and Rick Baugh

John K. Ziegler
Christina M. Hazlett
Conklin, Woodcock & Ziegler, P.C.
320 Gold S.W., Suite 800
Albuquerque, NM 87102
Attorney for Defendant Ruidoso Downs Racing, Inc. and Shaun Hubbard

Deron Bradley Knoner
Keleher & McLeod, P.A.
PO Box AA
Albuquerque, NM 87103
Attorney for My Way Holdings, LLC DBA Sunland Park Racetrack & Casino and Rick Baugh

Hector Balderas,

Attorney General
Susan Sullivan,
Assistant Attorney General
Post Office Drawer 1508
Santa Fe, New Mexico 87504
Attorney for Sunland Park Board of Stewards, Zia Park Board of Stewards, SunRay Park Board of Stewards, Ruidoso Downs Board of Stewards, Vince Mares, New Mexico Racing Commission

by first-class mail this 14th day of September, 2015.

Joshua Schwartz