IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

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

Plaintiffs/Appellants,

v.

COA No. 34,429
1st Judicial District Court
Case No. D-101-CV-2013-02048

MY WAY HOLDINGS, LLC
a foreign limited liability company d/b/a
SUNLAND PARK RACETRACK & 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.,
and SHAUN HUBBARD,

Defendants/Appellees.

DEFENDANTS/APPELLEES ZIA PARK, LLC AND RICK BAUGH'S ANSWER BRIEF

(Oral Argument Requested)

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INTRODUCTION[1]

This appeal comes before the Court because Appellees acted to protect the lives of racehorses and their riders, preserve the wellbeing of a historic New Mexico industry, and safeguard their business interests. In 2012, Appellant Arnoldo Carrillo was the trainer of several racehorses with a troubling history of injury. The first horses initially escaped with ambulatory transportation off the track, but the situation soon escalated when another of Appellant's horses suffered a life-ending injury during a race.

Once horses trained by Appellant began dying, Appellees Zia Park and Rick Baugh refused to wait for more corpses, horse or human. They acted to protect the athletes, the industry, and their business and excluded Appellant from racing at their facility. Their decision looked clairvoyant mere months later when another of Appellant's horses died at Sunland Park Racetrack, leading other tracks in New Mexico to exclude Appellant.

Appellant sued Appellees and claimed he was "arbitrarily" excluded when the real reason was his record of injuries to horses. The District Court granted summary judgment in favor of Appellees and Carrillo filed

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[1] This Introduction is intended to provide preliminary background as to the issues raised in this matter and is supported by the Summary of Proceedings and Argument to follow. Citations to the record as to all facts are included within said Summary of Proceedings.

this appeal. Once again, Appellant mischaracterizes his exclusion as "arbitrary" rather than due to the high rate of injury and death to horses trained by him.

Appellees acted within their rights in excluding Appellant. They have every right as private property owners to exclude persons for any lawful reason. Regardless, contrary to Appellant's argument, they did not exclude him "arbitrarily." Rather, Appellees acted with a clearly justifiable reason – the need to protect lives, the industry and their business. This Court should uphold the District Court's grant of summary judgment.

SUMMARY OF PROCEEDINGS

I. FACTUAL BACKGROUND

Horse racing is an historic phenomenon in New Mexico, a cornerstone of local culture, and a vital industry here. (RP 449; RP 461). Currently, five racetracks are authorized by the New Mexico Racing Commission to conduct live horseracing, including Appellee Zia Park, LLC. (RP 449; 460). Each track conducts its meet on pre-approved dates and there is continuous year-round racing in New Mexico as a result. (RP 449; RP 461).

A. Racing Injuries Threaten the Industry and its Players

Horseracing came under attack in recent years with sensationalized

media reports of traumatic injuries to horses and their riders. (RP 450; RP 461). The reports focused on alleged rampant doping of horses by their trainers. (RP 450; RP 461). New Mexico and local trainers were particularly singled out for scrutiny by the New York Times when the paper disparaged the local industry and trainers' attempts to mask their horse's injuries from regulators through "stacking" –medicating horses with two specific pain medications (Phenylbutazone and Flunoxin). (RP 450); Walt Bogdanich, *Mangled Horses, Maimed Jockeys*, N.Y. Times, March 24, 2012, at A1. As reported in the New York Times, this practice unfortunately leads to catastrophic injury and breakdowns during races. Id.

Industry leaders are especially concerned by injuries to horses for several reasons. (RP 461). First, as evidenced by the instant case, a breakdown during a race can mean a horse is euthanized on the track, before the viewing public. More importantly, any injury to a horse during a race creates a life-threatening situation for the jockey. (RP 450). In 2012, Zia Park and New Mexico were still reeling from two such high profile incidents. (RP 461). In 2010, a horse fell during a race at Zia Park. The jockey was thrown to the turf, trampled and killed. (RP 461). In 2011, a well-known jockey became paralyzed after the horse he was riding suffered an injury during a race. (RP 461).

B. Appellant's Horses Suffer Injury at an Alarming Rate, Endangering the Participants and the Health of the Industry

When Appellant came to race his horses at Zia Park in 2012, the track was particularly vigilant in avoiding any further such incidents. Track management, including Racing Manager Appellee Rick Baugh, paid close to injury reports and became leery of trainers who's horses were injured at high rates, particularly if they were practicing "masking" in a manner that may hide injuries from officials. (RP 460-462). Appellant Arnoldo Carrillo was noticed for precisely these reasons. (RP 462).

On September 9, 2012, there were only two horses injured at Zia Park. (RP 450-453). Both horses suffered apparent limb injuries. (RP 451-52). Both required ambulatory transportation. (RP 451-52). Both were treated by "stacking" multiple pain killers – Phenylbutazone and Flunoxin – a practice known to mask injury. (RP 451-52; RP 461-62). Finally, both horses were trained by Appellant. (RP 451-53). It is *extremely* rare for a single trainer to have *two* horses injured on a single day, particularly when no other horses are injured. (RP 462). Zia Park thus became justifiably concerned.[2] (RP 462). Track management

[2] The fact that Appellant was sanctioned by the New Mexico Racing Commission during the same meet for overmedicating another horse with excessively high levels of pain-killing (and injury-masking) drugs shows the concern was justified. (RP 362).

expressed their concern directly to Appellant.

Unfortunately, on October 29, 2012, Appellees' concerns proved prophetic. On that date, another horse trained by Appellant and treated with masking pain killers suffered catastrophic injury, broke down, and was euthanized on the track. (RP 453-54).

C. Appellant's Troubling Record Leads to His Exclusion Under Terms to Which He Agreed

Every trainer entering horses into races at Zia Park agreed to the policies of the 2012 Horsemen's Guide, which notified trainers their racing privileges were subject to revocation. (RP 454-55). Pursuant thereto, after Appellant's horse was euthanized, Zia Park revoked his racing privileges and exercised its right to exclude Appellant. (RP 455). The decision to exclude Appellant was based upon a justifiable concern that his training methods were resulting in unfit horses running in races and was motivated by a desire to protect the best interests of racing, the safety of the participants, and Zia Park's legitimate business interests. (RP 462).

Unfortunately, Appellee's action again turned prophetic when another of Appellant's horses required ambulatory transport following a race at Sunland Park in Sunland Park, New Mexico, on April 12, 2013, and immediately thereafter collapsed and died. (RP 456).

II. PROCEDURAL BACKGROUND

A. Appellant's Complaint

On August 5, 2013, Appellant filed his Petition for Writ of Mandamus and Complaint for Preliminary and Permanent Injunctive Relief, Declaratory Judgment, Interference With Prospective Contractual Relations (Two Counts), Prima Facie Tort, Negligence and Violation of the New Mexico Inspection of Public Records Act in the First Judicial District Court (hereinafter "Petition and Complaint"). (RP 1-36). Each count against Zia Park and Rick Baugh was premised on the presumption that Appellant's trainer's license granted him an absolute right of access to Appellee's property and overrode Appellee's property rights.

Count Two of the Petition and Complaint sought injunctive relief forcing Zia Park and Rick Baugh to provide him access to race his horses and argued there was no authority for his exclusion despite his dangerous precedent of injured horses. (RP 15-16). Count Three sought declaratory judgment "confirming Plaintiffs' right to enter the tracks and race their horses." (RP 16). Counts Four and Five raised claims of interference with prospective contractual relations and alleged Zia Park and Baugh excluded Appellant unlawfully and with the motive to harm and/or injure him. (RP 16-18). Count Six raised a claim of prima facie tort and alleged Appellees

lacked sufficient justification for Appellant's exclusion. (RP 18-19). Finally, Count Seven raised a negligence claim and alleged Appellee's had an affirmative duty to permit Appellant unfettered access. (RP 19).

B. Summary Judgment

After the parties conducted discovery, Appellees filed a Motion For Summary Judgment as to Claims Against Defendants Zia Park LLC and Rick Baugh and memorandum in support thereof. (RP 448-482). The Motion for Summary Judgment set forth the uncontested factual basis outlined above and argued that, based upon the numerous injuries to horses in Appellant's care and the threat posed to the industry and other participants therefrom, Appellees' actions were lawful and in accordance with their rights. (RP 448-458). Appellant filed a Response, but did not raise any issue of material fact therein. (RP 520-24).

On December 17, 2014, all the parties in this lawsuit appeared for hearing as to Appellees' Motion for Summary Judgment and similar motions for summary judgment filed by the three other racetrack operators included in the lawsuit by Appellant. (12/17/14 Tr.). At said hearing, Appellant conceded the factual basis for summary judgment as to all four motions for summary judgment, including that of Appellees. (12/17/14 Tr. 3:16-19). The District Court thus granted summary judgment in favor of

Appellees. This appeal followed. (RP 566-67).

ARGUMENT

Appellant did not contest the factual basis supporting Appellees' motion for summary judgment in his pleadings or at the hearing before the District Court. Thus, Appellant conceded horses trained by him were being injured, and even killed, at an alarmingly high rate. The situation raised legitimate and justifiable concern that Appellant's continued participation in races would endanger his horses, the lives of jockeys, the well-being of the industry, and Zia Park's business interests.

Under the circumstances, Appellees were clearly justified, legally and morally, to exclude Appellant from their facility. The District Court properly determined Appellant's claims fail as a matter of law.

I. Standard of Review and Record for Review

A. Lack of Contested Material Facts Limits Record on Review

Appellees Zia Park and Rick Baugh filed for summary judgment and set forth material facts in support thereof. (RP 448-458). It thus became Appellant's burden to demonstrate to the District Court the existence of *specific admissible* evidence to create a material disputed factual issue. Spears v. Canon de Carnue Land Grant, 1969-NMSC-163, ¶¶11-12, 80 N.M. 766, 461 P.2d 415 ("party opposing a motion for summary judgment

cannot defeat the motion and require a trial by the bare contention that an issue of fact exists, but must show that evidence is available which would justify a trial"); Archunde v. International Surplus Lines Ins. Co., 1995-NMCA-110, ¶22, 120 N.M. 724, 905 P.2d 1128 (party opposing summary judgment must "come forward with affidavits or other properly admissible evidence showing that a material disputed factual issue exists."); Cain v. Champion Window Co. of Albuquerque, LLC, 2007-NMCA-085, ¶7, 142 N.M. 209, 164 P.3d 90; Parker v. E.I.DuPont de Nemours & Co., Inc., 1995-NMCA-086, ¶10, 121 N.M. 120, 909 P.2d 1. Kerman v. Swafford, 1984-NMCA-030, ¶14, 101 N.M. 241, 680 P.2d 622. Appellant was duty-bound to come forward with *any* evidence in his knowledge to resist Appellees' motion before the District Court. Hamilton v. Hughes, 1958-NMSC-029, ¶7, 80 N.M. 766, 461 P.2d 415 ("There is a duty imposed upon one opposing motion for summary judgment to resist it by whatever type of evidentiary material that is at hand."). He was not entitled to "rely on the allegations contained in the complaint or on mere arguments." Quintana v. University of California, 1991-NMCA-016, ¶16, 111 N.M. 679, 808 P.2d 964; Cain, 2007-NMCA-085, ¶7 ("The non-movant cannot rely on the allegations in its complaint or on the argument of counsel to defeat summary judgment"); Archuleta v. Goldman, 1987-NMCA-049, ¶6, 107

N.M. 547, 761 P.2d 425 (cannot defeat summary judgment with allegations in an unverified complaint or argument); Parker, 1995-NMCA-086, ¶15 ("party opposing summary judgment may not simply argue that evidentiary facts requiring trial on the merits exist, nor may it rely on allegations of the complaint").

Four separate summary judgment motions were filed by the respective racetrack operators sued by Appellant, and Appellant had four opportunities to produce evidence to avoid summary judgment. Appellant did not take advantage of this opportunity. In his responses to the motions for summary judgment, he did not provide any evidence to contest any material fact. Instead, he relied entirely on argument and one extremely limited affidavit indicating Appellant's earnings in 2012 and an admission of his previously being sanctioned for over-medicating a racehorse with painkillers. (RP 362-63).

Nor did Appellant provide any evidence to show the existence of a material issue of fact during the hearing on the four summary judgment motions. (12/17/14 Tr.). The factual record on review is thus limited to those uncontested material facts presented by Appellees in their Motion for Summary Judgment (RP 348-358). Durham v. Guest, 2009-NMSC-007, ¶10, 145 N.M. 694, 204 P.3d 19 (review on appeal is limited to the record

"certified by the clerk of the trial court").

B. Standard of Review

Appellant suggests an incorrect standard of review when he argues this Court must examine this matter in the light most favorable to Appellant. (Brief in Chief, pp. 11-12). Appellant conceded all factual issues before the District Court and thus is not entitled to any presumptions in his favor. City of Albuquerque v. BPLW Architects & Engineers, Inc., 2009-NMCA-081, ¶7, 146 N.M. 717, 213 P.3d 1146 ("[I]f no material issues of fact are in dispute and an appeal presents only a question of law, [the courts] apply de novo review and are not required to view the appeal in the light most favorable to the part opposing summary judgment."); Rutherford v. Chaves County, 2003-NMSC-010, ¶8, 133 N.M. 756, 69 P.3d 1199 (if issue on review is purely legal, appellate court will not review in light most favorable to party opposing summary judgment); Holguin v. Fulco Oil Services, LLC, 2010-NMCA-091, ¶7, 149 N.M. 98, 245 P.3d 42 (where a pure question of law is at issue, review is de novo without favoring the party opposing summary judgment).

II. The Traditional Common Law Supports Summary Judgment

In 1876, New Mexico formally adopted the common law, and "it is as much the rule of decision in this state as in those in which it was the law

from the beginning of their political existence." Beals v. Ares, 1919-NMSC-067, 25 N.M. 459, 185 P. 780, 781. Under the common law, Appellees, as owners of property, retain a bundle of rights, including the right to exclude others from the property. Santa Fe County Bd. of County Comm'rs v. Town of Edgewood, 2004-NMCA-111, ¶5, 136 N.M. 301, 97 P.3d 633. The right to exclude is "the most fundamental of all property interests." State v. Office of the Public Defender ex rel. Muqqddin, 2012-NMSC-029, ¶41, 285 P.3d 622; see also Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982)(Marshall, T., J.)("[t]he power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights").

A century ago, the United States Supreme Court explicitly certified that horse racetrack operators have the right of exclude persons from their property. Marrone v. Washington Jockey Club, 227 U.S. 633, 636 (1913). Although Marrone addressed the exclusion of a patron, the majority of cases decided in the following century upheld the absolute right of racetrack owners to exclude licensed participants in racing as well, including owners, trainers, jockeys and agents for any reason. See Martin v. Monmouth Park Jockey Club, 145 F.Supp. 439, 440 (D.N.J.1956) *affirmed* 242 F.2d 344 (3rd Cir.1957)(exclusion of licensed jockey upheld);

Tisher v. California Horse Racing Bd., 231 Cal.App.3d 349 (Cal.1991)(exclusion of licensed harness drivers upheld); Ferraro v. Finger Lakes Racing Assn., 182 A.2d 1072 (N.Y.App.Div.4d 1992)(exclusion of licensed trainer upheld); Marzocca v. Ferone, 461 A.2d 1133, 1137 (N.J.1983)(permanent exclusion of race horse upheld); Bresnik v. Beulah Park Ltd. Partnership, Inc., 617 N.E.2d 1096, 1097 (Ohio 1993)(exclusion of licensed jockey agent upheld); Crissman v. Dover Downs Entertainment, Inc., 289 F.3d 231 (3rd Cir.2002)(exclusion of licensed owners and trainers upheld); Arone v. Sullivan County Harness Racing Ass'n, Inc., 90 A.D.2d 137 (N.Y.App.Div.1982) (exclusion of licensed trainers, drivers and owners upheld); Calder Race Course, Inc. v. Gaitan, 393 So.2d 15 (Fl.Ct.App.1980)(exclusion of trainer upheld).

Thus, Appellees retain a right to exclude Appellant from their premises for any lawful reason (i.e. other than gender, race, sexual orientation, etc.). There was no allegation in the instant matter that Appellant was excluded for an unlawful reason and Appellant failed to make any showing of a contested material fact as to the issue. Accordingly, the District Court properly granted summary judgment. Affirmance is appropriate.

III. Appellant's Modified Common Law Standard Supports Summary Judgment

Appellant's focus is on a modified common law standard. According to Appellant, he cannot be excluded for "any" reason or "arbitrarily" because he is a licensee of the New Mexico Racing Commission. Regardless of whether or not New Mexico adopts this modified common law standard, Appellant's argument is misplaced for one simple reason – he was excluded because horses were being injured and killed at an alarming rate under his care, creating concern for the safety of other participants and the wellbeing of the industry. (RP 455). His exclusion was for a very good reason.

A. Appellant was not excluded "on a whim" as he claims, he was excluded because of injured and dead horses

Appellant repeats the mantra that he was excluded "arbitrarily" – as if, if he says it enough, it will suddenly find support in the record. However, he conceded to the facts setting forth the truth behind his exclusion. Appellee's exclusion was to protect Appellant's horses and the other participants from his troubling history of injured and dead horses. It is not "arbitrary" and "on a whim" to protect the industry and save lives in the face of the mounting number of incidents with Appellant's horses.

Appellant's horses proved more likely to suffer injury during races.

Because Appellees felt a responsibility for other participants and the industry itself, they simply could not accept the risk of another catastrophic incident involving Appellant. (RP 450; RP 461). Appellant's exclusion was necessary to protect lives because the next injury may kill both the horse and the jockey. Furthermore, it was necessary to protect the industry and Zia Park's continuing business viability. The local industry was under national scrutiny due to equine injuries, and another front-page expose could have been devastating. (RP 450; RP 461). Appellant's track record raised *serious* concerns Zia Park was obligated to address and provided justification for his exclusion.

B. Appellant is a Trainer, Not a Doctor, and His Exclusion Was Proper Regardless of the Standard Used

Appellant argues this Court should limit the common law authority of racetracks to exclude licensees because, he alleges, they hold a quasi-monopoly. He brazenly likens himself to a medical doctor, unconvincingly trying to equate training horses to providing necessary medical care to rural communities. According to Appellant, racetracks are like rural hospitals, and since hospitals in New Mexico do not have the full right of exclusion when it comes to doctors, racetracks do not have the full right of exclusion when it comes to trainers. (Brief in Chief, p. 42-44). Appellant, however, is not a doctor. Medicine is unique and the case upon which he relies, Kelly

v. St. Vincent Hospital, 1984-NMCA-130, 102 N.M. 201, 692 P.2d 1350, has no applicability to his situation as a troubled racehorse trainer.

1. *Inapplicability of Kelly*

Appellant's argument ignores the basis for the Kelly rule. This is fatal to his argument because the logic behind limiting the common law right of hospitals does not carry to horseracing.

Kelly limited a hospital's right of exclusion because medicine is unlike any other business. Id., 1984-NMCA-130, ¶6. Medical services are an unavoidable necessity, and thus the medical field involves "inelastic demand relationships" in which "consumers will continue to purchase [medical services] no matter how highly priced the services are." Id.

In medicine, unlike in horseracing, a unique quasi-monopoly develops in the rural locations served by single hospitals because "a consumer cannot demonstrate his or her dissatisfaction with the service by patronizing another supplier (the effect of monopolization) or by refraining from buying the service (the effect of inelasticity)." Id. Thus, hospitals are immune to the usual pressures that lead to self-regulation. Id. In medicine, "consumers" have no choice but to seek care, and often must do so at unexpected times and close to home. The unique aspects of medicine relied on by Kelly clearly have no applicability to horseracing, a for-profit

sporting entertainment business. Appellant's argument carries little weight because he is not a doctor and Appellees are not a rural hospital.

California recognized the difference between medicine and horseracing when it rejected an argument similar to Appellant's in Tisher v. California Horse Racing Bd., 231 Cal.App.3d 349 (Cal.1991). In that case, licensed harness drivers (similar to a jockey) claimed their exclusion from Los Alamitos Racetrack was improper because the justification provided by the track owner was insufficient. Tisher, 231 Cal.App.3d at 352. Los Alamitos was the sole harness racing facility in California for a period of 107 days (the next closest facility during that period was thousands of miles away in the Midwest). Id.

Similar to Appellant's argument in this case, the Tisher plaintiffs compared themselves to doctors who could not get hospital privileges. The Tisher Court soundly rejected the comparison for obvious reasons - "this case involves a sport, not a necessity of life." Id., 231 Cal.App.3d at 359. It noted that, unlike the altruistic motives related to the practice of medicine, "[p]eople become involved in professional sports to make money, not serve the public." Id. The situation of the medical provider without hospital privileges is inapplicable to the horsemen without a place to ride because, in the sports context, a license to compete does not "confer upon their

holders an absolute right to compete in any [horse] racing meeting in the state." Id., 231 Cal.App.3d at 360; see also Cox v. National Jockey Club, 323 N.E.2d 104, 107 (Ill.App.1st 1974)("A license to a jockey by the Illinois Racing Board does not constitute a ticket of admission to any race track in which the jockey desires to ply his trade"). The common sense reasoning of Tisher is applicable to Appellant, not the fact-specific reasoning of Kelly.

Appellant, like the plaintiffs in Tisher, may compete at other times and in other places. (Unlike the Tisher plaintiffs, he need not travel thousands of miles to find other racing). In addition to the Downs at Albuquerque and the New Mexico State Fair, from which Appellant has not been excluded, (RP 458), horse race meets occur in the surrounding states of Arizona, Texas, Oklahoma, and across the country. Appellant is free to ply his trade elsewhere (RP 458) and there is no doubt the people of Hobbs, New Mexico, where Zia Park is located, do not "need" his services to survive.

For these reasons, Appellees retained their full common law right of exclusion. There is no issue of material fact suggesting Appellees excluded Appellant for anything but a lawful reason. The District Court properly granted summary judgment.

2. *Appellant's exclusion was justifiable regardless*

Regardless, Appellant's argument fails because, even under his

proposed modified common law rule, Appellees acted within their rights. Appellant cites only two cases that limit the common law right of exclusion as to horse racetracks based on a "quasi-monopoly" analysis: Jacobson v. New York Racing Assoc., Inc., 305 N.E.2d 765 (N.Y.1973) and Cox v. National Jockey Club, 323 N.E.2d 104 (Ill.App.1st 1974). However, Appellant fails to recognize that, under *either* of those cases, summary judgment was still proper.

Although both cases ruled that racetracks could not "arbitrarily and without reason or justification deny" a licensee the opportunity to participate in their race meet, Cox, 323 N.E.2d at 108; see also Jacobson, 305 N.E.2d at 768, both also ruled that a racetrack was within its right to exclude a licensee if there was a legitimate justification for the exclusion. Jacobson, 305 N.E.2d at 768 (noting a plaintiff bears a "heavy burden to prove [exclusion] was not a reasonable discretionary business judgment"); Cox, 323 N.E.2d at 108-109 (exclusion is proper with a "legitimate and reasonable justification"). While Appellant repeatedly claims he was excluded "on a whim" and "arbitrarily", the act of repeating this claim does not make it so, and the record proves the opposite.

Appellees excluded Appellant because horses under his care were exhibiting injury at an alarming rate. The repeated injuries were creating

life-threatening situations, endangering the best interests of racing generally, and threatening Zia Park's legitimate business interests. (RP 455; RP 462). Thus, even assuming New Mexico has limited the common law right of exclusion as to racetracks as proposed by Appellant, his exclusion was permissible and summary judgment was appropriately entered by the District Court. See Cox, 323 N.E.2d at 109 (even if racetrack could not arbitrarily and without reason deny a licensee participation, "[i]f 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"); Jacobson, 305 N.E.2d at 768 (excluded licensee has "heavy burden to prove [exclusion] was not a reasonable discretionary business judgment, but was actuated by motives other than those related to the best interests of racing").

IV. New Mexico's Horse Racing Regulatory Scheme Supports the Common Law Right of Exclusion

Appellant argues the Horse Racing Act and the regulatory scheme it supports indicate an intention to limit Appellee's right of exclusion as to Appellant. Basic canons of statutory construction indicate Appellant is mistaken. In fact, the Horse Racing Act, and the regulations adopted pursuant thereto, explicitly confirm the common law right of exclusion as to Appellees.

A. The Common Law Remains Unless Expressly Abrogated

In 1876, New Mexico formally adopted the common law, and "it is as much the rule of decision in this state as in those in which it was the law from the beginning of their political existence." Beals, 1919-NMSC-067, ¶31. "Statutes are but a small part of our jurisprudence. The principles of the common law pervade and permeate everything which is subject to legal regulation. Such law defines rights and wrongs of every description and the remedies for public and private redress. By its principles statutes are read and construed. They supplement or change it, and it adjusts itself to the modification and operates in conjunction and harmony with them. If words from its vocabulary are employed in them, it expounds them. If the statutes are in derogation of it, it yields and bides its time. If they are cumulative, it still continues. Rules of interpretation and construction are derived from the common law, and, since that law constitutes the foundation and primarily the body and soul of our jurisprudence, every statutory enactment is construed by its light and with reference to its cognate principles." Id., 1919-NMSC-067, ¶35. Thus, the common law fills "every crevice, nook, and corner" of the law unless it has been supplanted by statute. Id., 1919-NMSC-067, ¶36.

Any examination of the intent of the Horse Racing Act as to

Appellee's common law right of exclusion must be examined through this lense. Appellant's argument fails to do so, mistakenly ignoring the "strict rule that the common law must be expressly abrogated by a statute." Sims v. Sims, 1996-NMSC-078, ¶23, 122 N.M. 618, 930 P.2d 153.

B. The Regulatory Scheme Prior to 2014 Upheld the Common Law Right of Exclusion as to Appellees

Appellant argues the regulatory scheme put in place by the Horse Racing Act indicates Appellees lack the common law right of exclusion. Similar arguments have been rejected because, as set forth above, statutory construction requires courts to examine a regulatory scheme in the context of the common law, which is not preempted by statutes related to the same general subject matter. See e.g. Gutierrez v. Sundancer Indian Jewelry, Inc., 1993-NMCA-156, 117 N.M. 41, 868 P.2d 1266 (New Mexico OHSA statutory law did not preempt common law as to relationship between employers and employees). To the contrary, New Mexico adopts "a strict rule that the common law must be expressly abrogated by a statute." Sims, 1996-NMSC-078, ¶23. Appellant has not presented this Court with any provision of law within the regulatory scheme as it existed in 2012 when he was excluded by Appellees or 2013 when he filed his claims that would indicate Appellees' common law right of exclusion was abrogated.

1. *A license does not confer an unfettered right to access*

Appellant's first argument, that the Racing Commission's authority to grant, suspend and revoke licenses for trainers limited the common law right of exclusion, (Brief in Chief, pp. 20-22), fails because "neither board rules nor public policy dictates that those licenses be considered to confer upon their holders an absolute right to compete in any [horse] racing meeting in the state." Tisher, 231 Cal.App.3d at 360; see also Cox, 323 N.E.2d at 107 ("A license to jockey by the Illinois Racing Board does not constitute a ticket of admission to any race track in which the jockey desires to ply his trade."). Appellant's trainer's license merely provides him with the authority to legally train racehorses, it does not provide him an unfettered right of access to any particular track.

2. *Regulatory supervision over the race meet does not abrogate Appellees' right of exclusion*

Similarly, Appellant's second argument, that the right of exclusion is limited because "[t]he actions of licensees at horse racing meets are heavily supervised", (Brief in Chief, p. 22), also fails to acknowledge the difference between a license to train and a right to access. This is clear when one examines the regulations relating to the Stewards' authorities upon which Appellant relies. While those rules may provide "pervasive powers...to the supervising stewards," those powers "relate to the actual

running of the racing meet and *not to who is to be allowed to participate*." See Cox, 323 N.E.2d at 107. The regulatory scheme thus does not indicated that the legislature and/or the Racing Commission "intended that a licensee conducting a horse racing meet should not be allowed to exclude a particular [trainer] from participating in its meet." See Id.

3. The regulatory scheme expressly reserved the common law right of exclusion for any lawful reason

Perhaps the best evidence that the regulatory scheme did not abrogate the common law right of exclusion for Appellees is the simple fact that the Racing Commission adopted a rule that expressly reserved the common law right of exclusion. In 2001, the Racing Commission adopted 15.2.2.8(V) NMAC, which expressly incorporates the common law right of exclusion for racetrack operators into the regulatory scheme of the Horse Racing Act and declares:

> ***An association may eject or exclude a person for any lawful reason.***

(Emphasis added).

Contrary to Appellant's argument, Appellees acted within their rights as defined by the regulatory scheme when they excluded him due to the high rate of injuries to horses under his care. The District Court properly granted summary judgment in their favor.

C. The 2014 Addition of NMSA 1978, §60-1A-28.1 Did Not Abrogate Appellee's Common Law Right of Exclusion as to Appellant in 2012

Appellant argues summary judgment was inappropriate because he interprets NMSA 1978, §60-1A-28.1 to limit Appellees' rights and control his claims against Zia Park and Rick Baugh even though it did not take effect until two years after the claims arose and nearly a full year after he filed this lawsuit. A proper interpretation of §60-1A-28.1, based upon valid rules of construction, shows Appellee's common law right of exclusion remains intact. The District Court's grant of summary judgment was proper.

1. *The plain language supports exclusion*

"In New Mexico, legislative intent must be determined primarily by the *legislation itself*." United States Brewers Assoc., Inc. v. Director of the New Mexico Dept. of Alcoholic Beverage Control, 1983-NMSC-059, ¶10, 100 N.M. 216, 668 P.2d 1093 (emphasis in original). The plain language of §60-1A-28.1 is not ambiguous when it explicitly states that ***nothing*** contained therein "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***." NMSA 1978, §60-1A-28.1(B)(emphasis added). This language clearly indicates two key factors.

First, subsection (B) explains that Appellee's must have had a preexisting power to eject or exclude a person from the association grounds for any lawful reason. In other words, the common law right of exclusion as explained above. After all, if there was no right of exclusion the legislature's inclusion of subsection (B) was not only superfluous, it was nonsensical. The fact that this language was specifically included means there *must* be a right of exclusion for any lawful reason in the first place.

Second, subsection (B) clearly states that "***nothing***" in §60-1A-28.1 is to be construed to limit that right. In other words, subsection (A) is *not* a limitation on the common law right of exclusion as Appellant argues. To the contrary, the only reasonable interpretation is that subsection (A) defines one "lawful reason" for which persons licensed by the Racing Commission may properly be excluded. If it were meant to be exclusive, subsection (B) would not exist.

Appellant's tortured argument to the contrary fails because it ignores the plain language of the statute. Moreover, Appellant improperly contorts the plain language to *avoid* the common law rule in violation of the "strict" rule of Sims. Appellant has made no showing of any explicit indication the legislature intended to supplant the common law when it passed §60-1A-28.1, and thus it must be presumed the common law right of exclusion was

maintained. Sims, 1996-NMSC-078, ¶22; Beals, 1919-NMSC-067, ¶35. Appellee's interpretation, the same interpretation adopted by the District Court, does so.

2. *Under Appellant's interpretation the statute is improperly retroactive*

As shown above, under the common law and the regulatory scheme in 2012, Appellees clearly had a right to exclude Appellant for "any lawful reason." Thus, *if* §60-1A-28.1 is interpreted to limit the right of exclusion in certain instances, it would impair the rights of Appellees and impose a new duty upon them to provide unfettered accessed to licensed persons. Statutes are not to be construed in such a retroactive manner. See N.M.Const. Art. 4, §34 ("No act of the legislature shall affect the right or remedy of either party...in any pending case."); Gadsden Fed. of Teachers v. Bd. of Ed. of Gadsden Ind. School Dist., 1996-NMCA-069, ¶¶13-14, 122 N.M. 98, 920 P.2d 1052; Wilson v. New Mexico Lumber & Timber Co., 1938-NMSC-040, ¶¶4-5, 42 N.M. 438, 81 P.2d 61. Appellant's interpretation is not supported by the canons of construction.

3. *Appellant's reliance on legislative history is improper*

As shown above, the plain language of §60-1A-28.1 is not ambiguous in context of the common law. Unable to accept the plain language of §60-1A-28.1, Appellant looks to the legislative history, in particular the Fiscal

Impact Report prepared for the *original* bill which eventually was modified into the language of §60-1A-28.1. Appellant's reliance on the legislative history, in particular portions of one document, not contained in the record, which he claims is solely indicative of legislative intent, is improper for several reasons. First, it violates the directives of the New Mexico Supreme Court. Second, Appellant never placed the Fiscal Impact Report into evidence and thus it is not part of the record for this Court's consideration.

a. Use of legislative history should be *extremely rare*

In Regents of the University of New Mexico v. New Mexico Federation of Teachers, 1998-NMSC-020, 125 N.M. 401, 962 P.2d 1236, the New Mexico Supreme Court instructed other courts to avoid legislative history as a means to determine legislative intent, and instead focus on canons of construction:

> It is the policy of New Mexico courts to determine legislative intent primarily from the legislation itself.... We do not attempt to divine what legislators read and heard and thought at the time they enacted a particular item of legislation. If the intentions of the Legislature cannot be determined from the actual language of a statute, then ***we resort to rules of statutory construction, not legislative history***.

Id., 1998-NMSC-020, ¶30.

Particularly apropos to Appellant's argument, the Supreme Court

continued to warn litigators about reliance on Helman and that decision's limited acceptance of documentation in support of legislative history:

> It is true that, at least on one rare occasion, we looked to 'contemporaneous documents submitted to and considered by the legislature at the time of enactment of the legislation.' Helman, 1994-NMSC-022, 117 N.M. at 350 n. 4, 355-56, 871 P.2d at 1356 n. 4, 1361-62. However, even this tangible evidence ***can be of questionable probity in intuiting the Legislature's thought processes. The connection between a particular document and the final wording of a statute may be very tenuous.***

Regents, 1998-NMSC-020, ¶31 (emphasis added). Appellant's reliance on the "Fiscal Impact Report" to discern legislative intent is thus misplaced, particularly since it was prepared in regards to the original bill and not the final version adopted as §60-1A-28.1.

b. *The Fiscal Impact Report is not in the record*

Regardless of whether or not it is appropriate to examine legislative history in this case, Appellant failed to make any record concerning the documentation he now relies upon. Unlike in Helman, Appellant did not seek to admit the Fiscal Impact Report into evidence although he had *ample* opportunity to present evidence in opposition to summary judgment. Moreover, Appellant never raised the Fiscal Impact Report as a justification for his interpretation of the statute, and thus denied Appellees the ability to counter with other contemporaneous information concerning the intended

contours of §60-1A-28.1.Under such circumstances, the Fiscal Impact Report is not considered. See e.g. State v. Turley, 1980-NMCA-167, ¶16, 96 N.M. 592, 633 P.2d 700.

c. *The Fiscal Impact Report supports the common law right of exclusion*

Regardless, the *full* language of the Fiscal Impact Report shows that it supports the common law right of exclusion. When quoting the Fiscal Impact Report, Appellant omits a key statement indicative of the law's intent – to protect racetrack operators from suit when they exercise their right of exclusion:

> [The] S[tate] R[acing] C[omission] reports that the states racetracks are diligent in helping the SRC impose sanctions *but without civil immunity they must defend tort claims filed against them.*

S.B. 116, Fiscal Impact Report, 51st Leg., 2nd Sess. (N.M.2014). The law was meant to protect Appellees, not Appellant as he claims.

D. Conclusion

There is only one interpretation of §60-1A-28.1 which fits within existing canons of construction. It was clearly intended as a codification of the common law right of exclusion so as to protect horse racetrack operators from suits brought by excluded trainers. The plain language of the statute supports Appellee's continued right of exclusion. The regulatory

scheme as a whole supports Appellee's continued right of exclusion. Even the legislative history relied upon by Appellant supports Appellee's continued right of exclusion. The District Court properly determined New Mexico had not abrogated Appellee's common law right to exclude Appellant for any lawful reason. Summary judgment was appropriately granted.

V. The Right of Exclusion is Fatal to All of Appellants' Claims

As shown above, Appellees retain their common law right of exclusion as to Appellant. This is fatal to each of Appellant's claims because he cannot prove a necessary element thereof. Summary judgment was appropriately granted.

A. Summary Judgment as to Injunctive and Declaratory Relief

Appellant's claims as to injunctive relief (Count Two) and declaratory relief (Count Three) were based upon the faulty premise that Appellees did not have legal authority and/or a lawful reason to exclude Appellant and/or did not have a lawful reason to do so. As shown above, Appellees retain their common law authority to exclude Appellant for any lawful reason. Moreover, the uncontested material facts show the exclusion was for a lawful reason.

While the New Mexico horse racing industry was under heavy

scrutiny, particularly as it relates to trainer doping and horse injuries and deaths at the track, and reeling from two tragic incidents resulting in paralysis and death to two beloved jockeys, Appellant's horses repeatedly were injured during races. (RP 450-53). When the injuries escalated and one of Appellant's horses broke down and was euthanized on the track, it raised legitimate concern that Appellant was racing unfit horses and endangering the safety of other participants and the overall health of the horse racing industry in New Mexico. (RP 455). Those concerns led Defendants to exercise their right to exclude Plaintiffs. (RP 455).

Appellees brought forth evidence before the District Court showing the exclusion was grounded in legitimate justifiable reasons. (RP 448-458; RP 460-62). Appellant's repeated claim that he was excluded "on a whim" and "arbitrarily" are unsupported by the record and he provided no factual basis to the District Court to support any claim his exclusion was based on an unlawful reason. (12/17/14 Tr.). Summary judgment was appropriate as to Appellant's request for injunctive relief because his exclusion was justified. Martin, 145 F.Supp. at 440-41 (despite intense regulation, racetrack operator maintains "right as private corporation to admit or exclude any persons it pleases from its private property, absent some definite legal compulsion to the contrary"); Garifine v. Monmouth Park

Jockey Club, 148 A.2d 1, 6 (N.J.1959) (racetrack operators have no obligation to permit admission under the common law); Marzocca v. Ferone, 461 A.2d 1133, 1136 (N.J.1983) (racetrack operator's common law right of exclusion applies to "both patrons and those who have a business relationship with the racetracks"); Ferraro, 182 A.2d 1072 (upholding exclusion by racetrack based upon business interests and the interests of horse racing).

B. Appellees Are Entitled to Summary Judgment As To Appellant's Claim of Interference With Prospective Contractual Relations

Appellant brings two claims of Interference With Prospective Contractual Relations. Count Four includes claims against Defendants Zia Park and Rick Baugh for interference with prospective contractual relations and alleges several potential purchasers of Appellant's race horses refused to complete the purchase(s) because the horses were excluded from entry into live races at Zia Park. (RP 16-17). Count Five alleges the existence of contracts permitting Appellants to enter their horses in live racing at the various race tracks. (RP 17-18).

"Establishing tortious interference with contract is not easy. Tort liability attaches only where the interference is without justification or privilege." Guest v. Berardinelli, 2008-NMCA-144, ¶32, 145 N.M. 186, 195 P.3d 353. Appellant had the burden to bring forth evidence to show

Appellees caused him to lose the benefits of a contract "either with an improper motive or by use of improper means." Id., 2008-NMCA-144, ¶32; see also M&M Rental Tools, Inc. v. Milchem, Inc., 1980-NMCA-072, ¶24, 94 N.M. 449, 612 P.2d 241. Appellant's claim fails because there was no evidence of either an improper motive or improper means.

1. *There was no improper motive*

To prove an improper motive, Appellant was required to provide evidence that Appellees exclusion of him was "solely to harm [Appellant]." M&M Rental Tools, Inc., 1980-NMCA-072, ¶27. Appellees provided ample evidence that Appellant's exclusion was motivated solely by a desire to protect lives, the wellbeing of the industry and Appellee's business interests. Appellant provided no evidence at all as to Appellees' motive, and thus conceded their motives were not improper. See Id., 1980-NMCA-072, ¶27.

2. *Improper means were not utilized*

To prove improper means, Appellant was required to show Appellees' exclusion of him was "wrongful by some measure *beyond the fact of the interference itself*." M&M Rental Tools, Inc., 1980-NMCA-072, ¶37 (emphasis added). In determining whether or not wrongful means were used, courts examine statutory law, regulatory law, common law, and "an

established standard of a trade or profession." Id. Under each of these standards, Appellant has failed to show improper means were used.

As set forth above, the statutory, regulatory and common law all support Appellees' right to exclude Appellant, particularly for the reasons he was excluded. Moreover, based on reported case law, it is clear that racetrack operators in many jurisdictions exercise the right of exclusion in similar circumstances. See e.g. Bresnik, 617 N.E.2d at 1097 (exclusion of licensees); Calder Race Course, Inc., 393 So.2d 15 (exclusion of trainer); Marzocca, 461 A.2d 1133 (exclusion of horses). Appellant failed to bring forth any evidence to suggest Appellees' conduct was wrongful under any of these standards.

3. *Appellant's tortious interference claim fails*

Appellant failed to present any material issue of fact concerning an improper motive or the use of improper means by Appellees in excluding Appellant. Accordingly, summary judgment is appropriate because an essential element of his claim is absent.

C. Appellant's Prima Facie Tort Claim Fails

Appellant raised a claim of prima facie tort. (RP 18-19). "Prima facie tort is not intended to be a 'catch-all' alternative for every action that cannot stand on its own legs." Guest, 2008-NMCA-144, ¶37; see also Lexington

Ins. Co. v. Rummel, 1997-NMSC-043, ¶11, 123 N.M. 774, 945 P.2d 992 (prima facie tort is not intended to provide a remedy for every intentionally caused harm, only those without justification); Schmitz v. Smentowski, 1990-NMSC-002, ¶63, 109 N.M. 386, 785 P.2d 726 (prima facie tort "should not be used to evade stringent requirements of other established doctrines of law"). To avoid summary judgment, Appellant was required to present evidence to show a genuine issue of material fact existed as to whether Appellees committed (1) a lawful intentional act (2) with the intent to cause injury, (3) which actually resulted in injury, and was done (4) without "sufficient justification for the injurious act." Lexington Ins. Co., 1997-NMSC-043, ¶10.

Appellees concede the first element was met because they acted lawfully in excluding Appellant. (Ironically, Appellant's argument that the exclusion was unlawful is fatal to his prima facie tort claim). However, as to the remaining elements, there is no genuine issue of material fact. The record indicates summary judgment was appropriately granted.

As to the second element, Appellant "bear a heavy burden to establish intent to injure," Lexington Ins. Co., 1997-NMSC-043, ¶12, which is distinct from the intent to commit the act resulting in injury. Id., 1997-NMSC-043, ¶14. Appellees submitted uncontested facts indicating their

intent was to protect the best interests of horse racing in New Mexico, the safety of its participants and patrons, and their own business interests. (RP 448-458; RP 460-62). Appellant, on the other hand, presented no evidence that Appellees acted with the intent to injure him. An essential element is lacking and summary judgment is appropriate.

Furthermore, as set forth herein, the uncontested material facts provide ample justification for Appellant's exclusion. The inordinately high rate of injury to horses in Appellant's care created a danger to other participants and amplified critiques of the horse race industry in New Mexico. (RP 450; RP 461). Appellant's continued participation at Zia Park threatened the life and limb of riders, the wellbeing of the industry and Appellees' business operations. (RP 455). Thus, as a matter of law, Appellees are not liable. See e.g. Id., 1997-NMSC-043, ¶13 (prima facie tort liability is not established when conduct was to protect a valid business interest).

D. Summary Judgment is Appropriate on Appellant's Negligence Claim

Appellant raised a claim of negligence, which cannot proceed without the existence of a legal duty on the part of Appellees' to provide him unfettered access. See Herrera v. Quality Pontiac, 2003-NMSC-018, ¶6, 134 N.M. 43, 73 P.3d 181; (RP 19, ¶167). Whether or not such a duty

exists is a question of law, determined through examining policy set forth in legal precedent, statutory law, and other legal principles. Id., 2003-NMSC-018, ¶7. These factors each show the alleged "duty to permit entry to the racetracks and entry in races" is not one the law will give recognition and effect, and thus Appellees are entitled to summary judgment.

First, there is a long line of established precedent favoring Appellees' right of exclusion as to Appellant, particularly in light of Appellant's record of injuries and horse fatalities in a short period of time. See e.g. Martin, 145 F.Supp. at 441 ("In a sport where the greatest importance should attach to dissipating any cloud of association with the undesirable, and in which the appearance as well as the fact of complete integrity is of paramount consideration, to exclude plaintiff from riding because of his record was an understandably warranted exercise of discretion"). Moreover, this right was incorporated into both the regulatory law, and now the statutory law. Thus, it is settled there is no such duty on the part of Appellees. See Herrera, 2003-NMSC-018, ¶14 ("Courts should make policy in order to determine duty *only when the body politic has not spoken*...").

In the absence of any legal duty to provide Appellant with access, Appellees are entitled to summary judgment as to the negligence claim.

VI. Request for Oral Argument

Appellees hereby requests oral argument pursuant to Rule 12-214(B)(1) NMRA and submits said argument would be helpful to a resolution of the issues in this matter. In particular, Appellees note that there is no reported New Mexico case law explicitly confirming the continued viability of a racetrack operator's right of exclusion as to licensees of the New Mexico Racing Commission.

VII. Request for Opportunity to Respond to Amicus Brief

The League of United Latin American Citizens submitted a request with this Court seeking consideration of an amicus curiae brief provided thereby. This Court held any ruling as to consideration of said brief in abeyance. Appellees thus did not respond to the arguments presented therein in order to preserve judicial resources. In the event this Court determines it will consider amicus brief, Appellees request a reasonable opportunity to respond thereto.

CONCLUSION

Appellant was excluded from Zia Park Racetrack because horses he trained were suffering injury and death at an alarmingly high rate. If Appellees had not acted and Appellant kept running horses with a pension for injury, it was only a matter of time before an excruciatingly tragic incident would occur. Appellees acted justly to protect the lives of the participants in racing, the wellbeing of racing generally, and their own legitimate business interests. Appellant made no effort to show otherwise.

Under any legitimate interpretation of the law, summary judgment was appropriate. This Court should affirm the District Court's grant of summary judgment.

Respectfully submitted,

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I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to the following this 2nd day of November, 2015:

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