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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No: ~~09-039~~
35285

FRED AND SHARON JOHNSON,

Appellants,

v.

BOARD OF STEWARDS
OF CHARLES TOWN RACES,

Appellee.

AMICUS CURIAE BRIEF OF RAYMOND J. FUNKHOUSER

Pro Se

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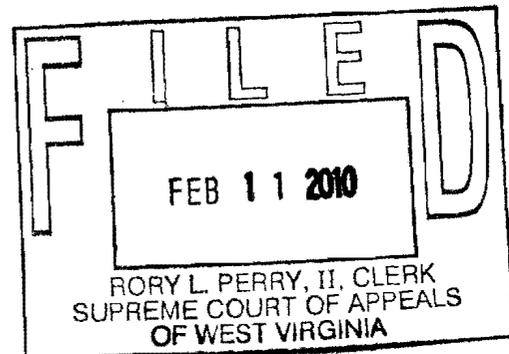


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COMES NOW Raymond Joseph Funkhouser, pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure, and hereby submits to this Court his brief *amicus curiae* in the above referenced matter.

I. INTRODUCTION AND INTEREST OF AMICUS

Raymond J. Funkhouser is a member of O'Sullivan Farms LLC. O'Sullivan Farms LLC is the owner of the racehorse Confucius Say¹, the second-place finisher in the 2007 West Virginia Breeders Classic race to the racehorse Eastern Delight, owned by Appellant Sharon Johnson and trained by Appellant Fred Johnson. If this Court affirms the disqualification of Eastern Delight by the Board of Stewards of Charles Town Races, the West Virginia Racing Commission, and the Circuit Court of Jefferson County, Confucius Say will be determined the

¹ Confucius Say is the winner of the West Virginia Breeders Classic 2001 and 2002 races, setting the stakes race record for that race in 2002; following an injury and three-year recovery period, Confucius Say returned in 2006 to win the Onion Juice West Virginia Breeders Classic race in stakes record time. Both records still stand.

See 2010 Charles Town Races & Slots 2010 media guide, at 15, 31, 33;
Available at: http://www.ctownraces.com/site/images/racing/2010_ctrs_media_guide.pdf

winner of the seventh race on October 20, 2007, at the Charles Town Racetrack in Charles Town, West Virginia. *See* W. Va. Code § 19-23-6(12). *See also* 178 C.S.R. 1, § 60.9 (“The owner or owners of any horse that is disqualified shall be denied, and shall promptly return any part of the purse, sweepstakes, or any trophy or prize. The stewards shall redistribute the purse and/or prizes.”). Thus, Raymond J. Funkhouser, Confucius Say and O’Sullivan Farms, LLC have a substantial interest in the outcome of this appeal. In addition to the difference between first and second place purse money for the West Virginia Breeders Classic, one-hundred and twenty-six thousand dollars (\$126,000), the disqualification of Eastern Delight and subsequent victory for Confucius Say would make Confucius say the all-time leading winner in West Virginia Breeders Classics history and only horse to win the West Virginia Breeders Classic three times.

This case turns on whether the rules of racing in West Virginia, W. Va. Code § 19-23-1 et seq. and 178 C.S.R. 1, §1 et seq., are to be enforced to all that participate in thoroughbred racing in West Virginia. Accordingly, the resolution of this case is of interest to all those who participate in thoroughbred racing in West Virginia, including Raymond J. Funkhouser and O’Sullivan Farms, LLC, which urges this Court to exercise caution in formulating a resolution to the instant case.

II. DISCUSSION OF LAW

Thoroughbred racing in West Virginia is a highly regulated industry in which the West Virginia Legislature has given the West Virginia Racing Commission plenary power and authority to regulate horse racing. *See generally* W. Va. Code § 19-23-1 et seq. and 178 C.S.R. 1, §1 et seq. This Court affirmed similar West Virginia Racing Commission rules regarding stimulants

to avoid, so far as possible, the use of medicine or drugs which might affect the normal ability of a horse to run in a race intended to be conducted under rules of honesty and fairness. In effecting such a result, in the peculiar circumstances under which horses are trained and prepared for racing, responsibility for the condition of a horse when he enters a race must, of necessity, be placed somewhere. To leave any doubt on that point would be to make ineffective all efforts at regulation, and all attempts to assure fairness in horse racing. It goes without saying that the State, having assumed, under its police powers, full and complete control of all horse racing conducted under the pari-mutuel system, became morally responsible to insure, so far as possible, that no fraud or deceit would be practiced in an enterprise over which it had assumed control. Therefore, the Legislature, in enacting the racing statute, realized the importance and necessity of the power of regulation of racing, and gave to the Racing Commission, set up thereunder, full and complete powers of regulation. The language is broad and general; but it is assumed that it was intended to apply to all problems affecting horse racing, without going into particular detail, or without attempting to set up any particular standards under which the commission might act.

State ex rel Morris v. West Virginia Racing Commission, 55 S.E.2d 263, 270-271 (1949).

“It is evident that the evil sought to be prevented was to avoid either stimulating or depressing a horse, because whatever the effect, the awarding of the purses, and the wagers on the results of the races, would be affected.” *Id.* This Court has consistently upheld the rules of racing to protect the integrity of the sport and all participants.

Rules Nos. 268 and 274, promulgated by the West Virginia Racing Commission, which respectively provide for the suspension of a horse whose saliva or urine discloses the presence of any narcotic, stimulant, or drug, and for the return and the redistribution of the purse won by a horse found to be stimulated, are not violative of any provision of the Constitution of the United States or of the Constitution of West Virginia, and are valid.

State ex rel. Spiker v. West Virginia Racing Commission, 63 S.E.2d 831, Syl. Pt. 2 (1951).

Sharon Johnson administered Super Creatine to Eastern Delight on October 19, 2007 and October 20, 2007, the day before and the day of the West Virginia Breeders Classic. Tr. 175. Mrs. Johnson described Super Creatine as a “paste” that she administers to horses which “gives them a little oomph.” Tr. 178. This was clearly a violation 178 C.S.R. 1, § 60.10 (“No person

shall improperly tamper or attempt to tamper with any horse in a way as to affect its speed in a race, nor shall any person counsel or in any way aid or abet any tampering.”) and § 66.5 (“No horse participating in a race shall carry in its body any drug substance, its metabolites, or analog, which are foreign to the natural horse except as provided, by this rule.”). There is little doubt that Mrs. Johnson affected the speed and outcome of the race by administering Super Creatine to Eastern Delight.

West Virginia’s zero tolerance rule is clear. Mr. Johnson understands this rule. Tr. 151-153. Eastern Delight tested positive for caffeine, a prohibited substance. Confucius Say and Double Tollgate, the second and third place finishers, were tested after the race and did not have any prohibited substances in their systems. The Johnsons contend that West Virginia’s zero tolerance rule is arbitrary and capricious. However, even when using the Racing Commissioners International threshold standard of 100 nanograms per milliliter, Eastern Delight’s blood sample was three to five times greater than this threshold. Tr. 99. Thus, Eastern Delight tested positive for a prohibited substance under any jurisdiction’s standard in the United States of America, including West Virginia.

Overturning the disqualification of Eastern Delight would destroy the integrity of thoroughbred racing in West Virginia, affecting all who participate fairly and unfairly, and would overturn the very notion of fairness in racing. Similarly, if Eastern Delight is not disqualified, those wagering on racing in West Virginia from around the country and globe may refuse to wager on racing in West Virginia since there would be no clear standard about drug testing and permissible drug usage in the sport. The rules of racing are clear. Eastern Delight’s trainer understands the rules, although he is not required to understand the rules for them to be enforced. Sharon Johnson administered Super Creatine to Eastern Delight the day before and the

day of the race to give Eastern delight extra oomph, to increase his speed unfairly by administering a prohibited substance. Eastern Delight should be disqualified for racing with prohibited substances.

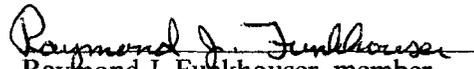
III. CONCLUSION

For the foregoing reasons, O'Sullivan Farms, LLC respectfully requests this court to affirm the Board of Stewards, the West Virginia Racing Commission, and the Circuit Court's disqualification of Eastern Delight based on legal grounds, fairness, and the far-reaching adverse affects that would ensue if the disqualification is overturned.

Respectfully Submitted,

Pro Se

By


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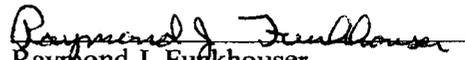
Appellee.

CERTIFICATE OF SERVICE

I, Raymond J. Funkhouser, member of O'Sullivan Farms, LLC, do hereby certify that a true and exact copy of the foregoing "*Amicus Curiae* Brief of Raymond J. Funkhouser" was served upon counsel for Appellant and Appellee by depositing the same, postage prepaid, in the United States mail, this 9th day of February, 2010, addressed as follows:

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