

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

FRED and SHARON JOHNSON,

Appellants,

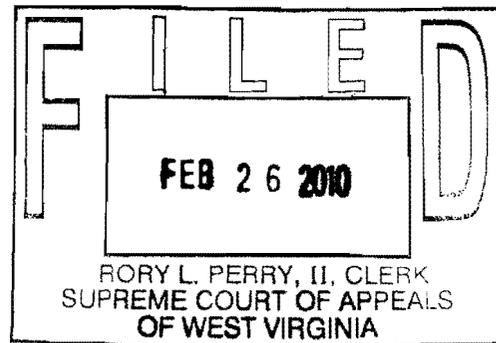
v.

Appeal No. 35285

BOARD OF STEWARDS OF
CHARLES TOWN RACES,

Appellee.

REPLY BRIEF OF APPELLANTS



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REPLY BRIEF OF APPELLANTS

COME NOW, Appellants, Fred and Sharon Johnson, by counsel, and file the following Reply Brief, and state in support thereof as follows:

I. SUMMARY OF THE REPLY ARGUMENT

The Brief of the Appellee (hereinafter referred to as the "Opposition") filed by the Stewards at the Charles Town Race Track (the "Stewards") largely ignores the Findings of Fact and Conclusions of Law entered by the Racing Commission on July 7, 2008. First, the Opposition ignores the fact that the Racing Commission made only four (4) Findings of Fact. The first Finding of Fact is that the Johnsons' horse, Eastern Delite, finished first on October 20, 2007 and blood and urine samples were collected thereafter. The second and third Findings of Fact state that the samples were collected, preserved and tested by the Racing Commission's laboratory and an independent laboratory, and each set of samples tested positive for caffeine. The fourth Finding of Fact is that there was no evidence that either the trainer or the owner of the horse administered a banned substance to the horse.

Throughout the Opposition, the Stewards suggest that the whole world knows that caffeine is a drug and that the Racing Commission, in fact, concluded as both a matter of fact and as a matter of law, that caffeine is a drug. The Stewards state, without authority, that "*caffeine is*

*a drug and/or a stimulant that does not naturally occur in the system of a horse.” See Stewards’ Opposition at page 11. Further, the Stewards assert that the decision in *Simmons v. Div. of Pari-Mutuel Wagering, Dept. of Business Regulation*, 412 So.2d 357 (1982) *aff’d Simmons v. Div. of Pari-Mutuel Wagering, Dept. of Business Regulation*, 407 So.2d 769 (1981) can be distinguished from the facts at hand because the *Simmons* Court upheld the prohibition against “drugs.” The Stewards’ argument in this regard ignores the Conclusion of Law made by the Racing Commission regarding the presence of caffeine in Eastern Delite:*

2. *That caffeine is a stimulant and a banned substance in that it is not a naturally occurring substance in horses. Pursuant to Rules of Racing Section 178-1-66.5 West Virginia is a “zero tolerance” jurisdiction with respect to caffeine;*

The Racing Commission’s three (3) page Findings of Fact and Conclusions of Law are attached to this Reply as Exhibit A. Simply stated, while the Stewards argue throughout their Opposition that caffeine is clearly a drug and is therefore prohibited, the Racing Commission did not find caffeine to be a drug either in their (a) Findings of Fact; or (b) Conclusions of Law. Rather, the Racing Commission found caffeine to be “*a stimulant*” and “*a banned substance that is not a naturally occurring substance in horses.*” Thus, the focus in this appeal must still be the consideration of a regulation that bans substances that are foreign to the natural horse. The precise language of Section 178-1-66.5, which the Johnsons assert to be constitutionally infirm, is as follows:

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.

Notwithstanding the Findings of Fact by the Racing Commission, the Circuit Court, sitting on appeal, did not find that caffeine was a “*banned substance*” that is not a naturally occurring substance in horses, but rather, found that the Racing Commission could legitimately

adopt a zero tolerance policy (March 11, 2009 Circuit Court Order Finding of Fact No. 2) and that “*caffeine was a drug . . .*” (Circuit Court Finding of Fact No. 4). A copy of the Circuit Court’s Order Affirming West Virginia Racing Commission’s Order of July 7, 2008 is attached hereto as Exhibit B. Curiously, the Circuit Court made a finding that caffeine was a drug when the Racing Commission did not. Nevertheless, in Conclusion of Law No. 6, the Circuit Court stated the following:

That the findings made by the WVRC should not be disturbed on appeal because they are not contrary to the evidence or based on a mistake of law. The WVRC findings are not clearly wrong to warrant judicial interference.

The Circuit Court’s finding that caffeine is a drug was not based on law or fact from the Racing Commission hearing and is, quite simply, overreaching.

Accordingly, the focus in this appeal should be more narrow, given the actual decision made by the Racing Commission that caffeine is a “*banned substance foreign to the natural horse.*” Clearly, the only “*substance*” banned by Section 178-1-66.5 are those foreign to the natural horse. Therefore, the language that the Florida Supreme Court found to be constitutionally infirm in *Simmons* is nearly identical to the West Virginia regulation.

The Johnsons respectfully argue that the Stewards’ repeated assertions that caffeine is a drug cannot be supported as a matter of law. Further, it is respectfully asserted that determining what is and what is not a drug requires guidance from articulated rules within a regulatory scheme. The West Virginia Rules of Racing impermissibly lack that guidance, and, in a modern world, *State ex rel. Morris v. West Virginia Racing Commission*, 133 W.Va. 179, 55 S.E.2d 263 (1949), should be reversed. While it may have been impractical to have promulgated more specific guidance relating to banned substances and definitions thereof in 1949, sixty-one years

later the regulations in our sister states clearly demonstrate that such guidance is not only practical, but easily achieved.

II. ARGUMENT

A. The Racing Commission Did Not Find Caffeine to Be a Drug

The Stewards assert that the entire world knows that caffeine is a drug, without support of any cited regulations or case law, while the Racing Commission did not conclude that caffeine is a drug. Specifically, as noted above, the Racing Commission concluded that “*caffeine is a stimulant and a banned substance that is not a naturally occurring substance in horses.*”

The significance of this Finding is two-fold. First, it makes much of the dialogue about the status of caffeine as an alleged “*drug*” a misdirection in this appeal, because the Racing Commission did not make a Finding of Fact or a Conclusion of Law that caffeine is a drug. Secondly, because the Racing Commission did not find caffeine to be a drug, but rather a “*stimulant and a banned substance that is not a naturally occurring substance in horses,*” the Florida Supreme Court’s holding in *Simmons v. Div. of Pari-Mutuel Wagering, Dept. of Business Regulation*, 412 So.2d 357 (1982) *aff’d Simmons v. Div. of Pari-Mutuel Wagering, Dept. of Business Regulation*, 407 So.2d 769 (1981) is entirely applicable to the facts at hand. While it may be true that the Florida Court upheld the prohibition against drugs, and the Johnsons respectfully assert that drugs are specifically identified in the Florida regulatory scheme as being “*drugs prohibited by law,*” the instant case should not be about whether or not caffeine is a drug.

The Racing Commission’s three (3) page Findings of Fact and Conclusions of Law are also quite interesting when compared to the March 11, 2009 Order of the Jefferson County Circuit Court affirming the Racing Commission’s Order. Specifically, while the Racing Commission found caffeine to be a stimulant and substance foreign to the natural horse, the

Circuit Court made no such finding in its Order. Rather, the Circuit Court found that caffeine is a drug.

Accordingly, as this Honorable Court considers the Opposition filed by the Stewards in this case, it should be noted that the West Virginia Racing Commission has not found caffeine to be a drug either as a Finding of Fact or a Conclusion of Law. Further, the record before the Court does not support the Circuit Court's conclusion on appeal that caffeine is a drug, as the Circuit Court also affirmed the Findings of Fact and Conclusions of Law by the Racing Commission and declined to disturb them on appeal "*because they are not contrary to the evidence or based on a mistake of law.*" See Circuit Court Conclusion of Law No. 6.

**B. As a Matter of Law and as a Matter of Fact,
Caffeine is Not A Drug**

In the Opposition, the Stewards baldly assert that "*whole world knows that caffeine is a drug!*" See Opposition at page 37. This assertion is not supported by reported regulations or case law. The Stewards have provided no authority for guidance to this Court.

Notwithstanding the Stewards' protestations and exclamation marks, the status of caffeine is well-settled by a government agency, which has broad powers over everything that people and even horses eat or ingest — specifically, the Food and Drug Administration ("FDA").

**1. The Food and Drug Administration
Considers Caffeine to be a Food Substance**

The Federal Courts have frequently been called upon to determine whether the FDA has properly classified what is and what is not a drug. The Second Circuit Court of Appeals confirmed the appropriate analysis in determining whether vitamin A and D capsules were to be classified as drugs in *National Nutritional Foods Association v. Mathews*, 557 F.2d 325 (1977):

The drug definition is to be given a liberal interpretation in light of the remedial purposes of the legislation, see, United States v. An Article of Drug . . . Bacto-

Unidisk, 394 U.S. 784, 792, 798, 89 S.Ct. 1410, 22 L.Ed.2d 726 (1968), but when an FDA determination that an article is a “drug” is so directly in conflict with the statutory definition, it must be invalidated as arbitrary and capricious and not in accordance with law. See, *National Nutritional Foods Ass’n v. FDA*, *supra*, 504 F.2d at 789, n. 35.

Id. at 336 (Emphasis added).

The statutory definition of what is a “drug” has been articulated by Congress in 21 U.S.C.

321(g)(1):

The term “drug” means (A) articles recognized in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them; and (B) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; and (C) articles (other than food) intended to affect the structure or any function of the body of man or other animals; and (D) articles intended for use as a component of any article specified in clause (A), (B), or (C). A food or dietary supplement for which a claim, subject to sections 343(r)(1)(B) and 343(r)(3) of this title or sections 343(r)(1)(B) and 343(r)(5)(D) of this title, is made in accordance with the requirements of section 343(r) of this title is not a drug solely because the label or the labeling contains such a claim. A food, dietary ingredient, or dietary supplement for which a truthful and not misleading statement is made in accordance with section 343(r)(6) of this title is not a drug under clause (C) solely because the label or the labeling contains such a statement. (Emphasis added.)

Authority for the body of regulations administered by the FDA began with the Federal Food, Drug and Cosmetic Act of 1938. Through this Act, the FDA exercises authority to regulate over “1 trillion worth of products, which account for 25 cents of every dollar spent by American consumers.” See the *Food and Drug Administration: An Overview*, available at <http://www.cfsan.fda.gov/fdaoverview.html>.

Notwithstanding the Stewards’ naked assertion that the “whole world knows” that caffeine is a drug, the FDA has adopted a regulation at 21 C.F.R. 182.1180 that caffeine is “food for human consumption which is generally accepted as safe” (“GRAS”). Simply stated, while the Stewards assert, without identifying any reported case or regulation by any regulatory body

that caffeine is a drug, the FDA has adopted a regulation classifying caffeine as a food substance based on the mandate from the United States Congress as set forth in Section 321.

Caffeine is a substance which has garnered the attention of the FDA in many circumstances. In fact, most of the reported cases and literature regarding caffeine and the FDA relate to the FDA's conclusion that caffeine is a "*generally regarded as safe*" ("GRAS") product. Caffeine has been a GRAS product permitted to be used in food substances without further regulation since 1961. *See* 26 Fed.Reg. 938 and 21 C.F.R. 121.

FDA regulations require the disclosure of the presence of caffeine in a food product without the requirement of disclosure of the quantity of caffeine in the product. *See* 21 C.F.R. 182. However, where caffeine is a natural part of the product itself, such as with coffee, tea and chocolate, and is not an additive, no disclosure that caffeine is in the product is required by any FDA regulation. Stated differently, when caffeine naturally occurs in a product such as coffee, rather than soda where caffeine is an added ingredient, disclosure of the existence of caffeine is not required. *See* 21 U.S.C. 348.

**2. Caffeine is a Substance Occasionally
Added to Products to Create "Caffeinated Drugs"**

While the Stewards assert that the whole world knows that caffeine is a drug, much of the regulatory record regarding caffeine relates to its inclusion as an ingredient in drugs. Examples of "*caffeinated drugs*" are present in our everyday life. Many headache remedies, such as Excedrin, contain caffeine. FDA regulations require caffeine to be identified in a "*caffeinated drug*" both qualitatively and quantitatively – meaning that both the presence and the amount of caffeine in each dose must be disclosed. In fact, 21 C.F.R. 340.50(c)(1-3) requires the following disclosure on products containing caffeine:

The labeling of the product contains the following warnings under the heading 'warnings': (1) The recommended dose of this product contains about as much caffeine as a cup of coffee. Limit the use of caffeine-containing medications, foods, or beverages while taking this product because too much caffeine may cause nervousness, irritability, sleeplessness, and, occasionally, rapid heart beat. (2) For occasional use only. Not intended for use as a substitute for sleep. If fatigue or drowsiness persists or continues to recur, consult a physician [or doctor]. (3) Do not give to children under 12 years of age.¹

Obviously, the FDA and the Federal Courts, when appropriate, determine whether or not substances are drugs or food based upon well-articulated criteria for this purpose. Without question, such analysis is complicated and scientific in nature. While the Second Circuit in *National Nutritional* concluded that the FDA acted arbitrary and capriciously when it determined that vitamins A and D were “drugs,” that Court also concluded that the same were not “drugs” as defined by the statutory definition. This example illustrates the dilemma at hand. In West Virginia, in regard to the Rules of Racing, what is and what is not a drug or banned substance must be determined without the benefit of a statutory or regulatory definition.

**C. The Development of Science Over Sixty Years
Mandates that the Result in *State ex rel Morris v. West Virginia
Racing Commission* be Overruled**

In their Opposition, the Stewards argue that the so-called zero tolerance rule as established in 178 C.S.R. 1, Section 66.5 is constitutionally sound and has a rational basis because of the mandate of *State ex rel. Morris v. West Virginia Racing Commission*, 133 W.Va. 179, 55 S.E.2d 263 (1949). On page 24 of their Opposition, the Stewards correctly note that *Morris* stands for the proposition that, in certain circumstances, specific guidelines are not required. The *Morris* Court confirmed first that the legislature had the authority to delegate rule-

¹ The Johnsons respectfully contend that if the amount of caffeine in the product were equivalent to a teaspoon of coffee, the amount at issue in this case, the above-mandated disclosure and warning would not be required.

making for horseracing to the Racing Commission. The Johnsons do not contest that authority in this appeal.

However, in *Morris*, this Honorable Court concluded that the:

[R]ule requiring an express standard to guide discretion is recognized as properly applied to statutes or ordinances regulating ordinary lawful activity, but to be subject to the exception that where it is impractical to lay down a definite comprehensive rule, such is where the regulation turns upon the question of personal fitness or where the act relates to the administration of a police regulation and is necessary to protect the general welfare, morals, and safety of the public, it is not essential that a specific prescribed standards be expressed.

Id. at 193 (Emphasis added).

In upholding the zero tolerance policy of the predecessor regulation (which required that any substance or drug affect the speed of a horse in a race), this Honorable Court concluded that given the “*nature of things, no usable standard can be set for the promulgation of the regulations under which racing may be conducted, and especially to guard against fraud and deceit.*” *Id.*

In *Morris*, this Honorable Court looked to similar regulations adopted by Maryland, Florida and New York for guidance and support for the conclusion that the then-applicable prohibition against “*narcotics, stimulants and drugs used for the purpose of stimulating a horse or affecting the speed*” of a horse in a race was appropriate. Admittedly, the issue of greatest concern to the *Morris* Court was the trainer responsibility rule, which was acknowledged to be harsh. Nevertheless, the *Morris* Court confirmed that no specific standard would be required on what substance was prohibited and what was not, and that Rule 248 constituted a proper exercise of the police power. *Id.* at 203.

Since the *Morris* case was decided in 1949, there are obvious changes that would permit the promulgation of a more definitive regulations governing racing in West Virginia. Changes in

science, medicine and equine pharmacology are part of the record presented to the Racing Commission. While the concern of the *Morris* Court about the difficulty in identifying a specific standard to “*guide discretion*” sixty-one years ago, today this is not the case.

The Johnsons respectfully assert that in 2007 it was clearly practical for regulations to have been adopted that would guide the discretion of horsemen and regulatory agencies alike. Much as this Honorable Court looked to the sister states to decide *Morris*, this Court can take judicial notice of the regulations adopted in Kentucky, Maryland, New York and California for the following specific purposes:

- Each of the sister states has a specific definition of what is and what is not a drug;
- Each of the sister states has a specific identification of drugs that are prohibited; and
- Each of the sister states has a regulatory scheme inconsistent with the zero tolerance policy.

Certainly, it is not for this Court to rewrite West Virginia’s racing regulations, as that is the exclusive jurisdiction of the legislature as delegated to the West Virginia Racing Commission. However, statutes and regulations must specifically set forth impermissible conduct with sufficient clarity that persons of ordinary intelligence (and Racing Commissioners and Circuit Courts) know what is prohibited. *See State ex rel. Appleby v. Recht*, 213 W.Va. 503, 583 S.E.2d 800 (2002). As a matter of basic procedural due process, a law is void on its face if it is so vague that persons must guess at its meaning and differ as to its application. *See State ex rel. White v. Todt*, 197 W.Va. 334, 475 S.E.2d 426 (1996). This allows a person to know what is prohibited so that he or she may act accordingly and “*if arbitrary and discriminatory*

enforcement is to be prevented, laws must provide explicit standards for those who apply them.” *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); see also *State ex rel. Hechler v. Christian Action Network*, 201 W.Va. 71, 491 S.E.2d 618 (1997). The “rule reflects the common law and has, by the Supreme Court of the United States, been molded into ‘a rule of constitutional law, holding that such definiteness is necessary to satisfy the due process requirements of the Fourteenth Amendment.’” *Gooden v. Board of Appeals of West Virginia Dept. of Public Safety*, 160 W.Va. 318, 234 S.E.2d 893 (1977)(quoting *State v. Flinn*, 208 S.E.2d 538 (W.Va. 1974)). A statute or rule can be so vague that its application is necessarily arbitrary and capricious.

This doctrine was first applied to criminal statutes, but it has been extended to statutes and ordinances involving matters in which criminal penalties are not at issue. See *Hartsock-Flesher Candy Co. v. Wheeling Wholesale Grocery Co.*, 174 W.Va. 538, 328 S.E.2d 144 (1984). For example, the failure to define the term “*impecunious candidate*” in a filing fee exemption for political candidates rendered the rule unenforceable due to vagueness. See *Garcelon v. Rutledge*, 173 W.Va. 572, 318 S.E.2d 622 (1984). In *Garcelon*, this Court reasoned that the “*total absence of any criteria for determining when potential candidates qualify for the waiver of filing fees leaves persons of common intelligence who aspire to public service to necessarily guess as to whether they are legally entitled to ballot access without the payment of a filing fee.*” *Id.* at 575, 318 S.E.2d at 626 (internal citations omitted). Likewise, the racing regulation at issue is wholly without “*any criteria*” for determining whether a substance is banned or is or is not a drug.

**D. The Florida Supreme Court’s Rationale is
Applicable to West Virginia’s Zero Tolerance Rule**

The Stewards argue that the analysis of the Florida Supreme Court in *Simmons v. Div. of Pari-Mutuel Wagering, Dept. of Business Regulation*, 412 So.2d 357 (1982) *aff’d Simmons v.*

Div. of Pari-Mutuel Wagering, Dept. of Business Regulation, 407 So.2d 769 (1981) is not applicable to the instant dispute because the underlying statutes were not identical and that the Florida Supreme Court upheld specifically the prohibition against drugs identified in the Florida regulation. The Stewards also assert that the Johnsons' identification of the Florida standard, which required "*drugs*" to be those that are "*prohibited by law*," to be inapplicable because that particular standard related to punishment for violation of the racing regulations, rather than the prohibition from racing itself.

The Johnsons respectfully assert that, in any jurisdiction, the racing rules must be read together and harmonized, as is the case with the application by a court of any regulatory scheme. The "*drug prohibited by law*" language identified by the Johnsons in their Brief comes from Florida Code Section 550.24, which is unquestionably part of Florida's Rules of Racing. Accordingly, the Florida Rule does have guidance as to what is and what is not a drug. Conversely, the West Virginia Rule is left to speculation, guessing and uncertainty.

E. The Racing Commission and the Stewards Improperly Delegated Authority and Discretion to the Private Laboratory

The Stewards and the Racing Commission improperly delegated authority and discretion to their private laboratory, Delare Associates. The record below demonstrates that Delare Associates determines testing parameters for drugs, including what drug substances the testing laboratory will seek to discover. Simply stated, this means that Delare Associates decides both what substances are prohibited and what substances are permitted. As the Court will recall, it is an undisputed matter of fact that some drugs, such as antibiotics and worming agents, are simply not the subject matter of any testing. It is clear from the record below that the Racing Commission did not properly make any decision or determination by adopting a regulation or by directing Delare about the testing parameters; rather, in this regard, Delare stepped into the shoes

of the Racing Commission in exercising the Racing Commission's discretionary rule-making power, without any publication of its standards and criteria as required by the Administrative Procedures Act.

The Stewards have not identified any authority supporting the proposition that delegation of the discretion to determine the substances to be tested for is appropriate. Rather, the Stewards refer only to the statutory authority of the Racing Commission to "*provide by contract for the maintenance and operation of the testing laboratory.*" See Opposition at pgs. 44-45, quoting West Virginia Code Section 19-23-6(11). In this regard, the Stewards have misinterpreted the Johnsons' improper delegation argument. The Johnsons do not deny that the Stewards had the right to contract with a laboratory, but assert that such laboratory should not be exercising sole discretion as to what tests should be run and the substances to be detected. See *Sierra Club v. Sigler*, 695 F.2d 957 (5th Cir. 1983); *Fund for Animals v. Kempthorne*, 538 F.3d 124 (2nd Cir. 2008); and *U.S. Telecom Ass'n v. F.C.C.*, 359 F.3d 554 (D.C. Cir. 2004), *cert. denied*, 543 U.S. 925 (2004). The Johnsons have identified substantial authority from around the country standing for the proposition that rule-making may not be delegated by the Racing Commission to any other party. The Johnsons respectfully assert that this issue alone merits reversal.

F. Super Creatine Contained Only 4.8 to 5.7 Parts Per Billion of Caffeine

Throughout their Opposition, the Stewards assert that the caffeine found in Eastern Delite's system "*came from inside its own camp,*" because Mrs. Johnson testified at the hearing before the Racing Commission that she provided Eastern Delite with a dietary supplement known as Super Creatine on the day before and the day of the race in question.

The evidence at the hearing is uncontested that the manufacturer of Super Creatine does not identify caffeine as an ingredient in their product as each tube contained only 4.8 to 5.7 parts

per billion of caffeine, and the manufacturer does not consider substances present in their product of less than 190 to 360 parts per billion to be the “*existence*” of caffeine in a Super Creatine product. *See* Johnson Exhibits 5, 6 and 7 to the Racing Commission. For Eastern Delite to have 350 to 500 parts per billion of caffeine in its system from Super Creatine, the horse necessarily would have had to ingest approximately 60 to 90 tubes of the dietary supplement. No evidence from the record supports such a suggestion.

Certainly, it appears that Super Creatine is a product contaminated with caffeine as shown by the testing results provided to the Racing Commission as Johnson Exhibits 5, 6 and 7. The use of Super Creatine does not explain the presence of caffeine in the horse’s body at the level detected. The mere presence of caffeine at the level detected — a teaspoon — should not result in the disqualification of Eastern Delite, particularly in the absence of a clear standard adopted by the Racing Commission with a rational relation to the performance of a horse in the race.

G. Caffeine Equal to a Teaspoon of Coffee Remains Uncontested

In their Opposition, the Stewards are critical, to some extent, of Dr. Thomas Tobin and, in particular, what they characterize as “*evasive*” testimony when he appeared before the Racing Commission. *See* Opposition at pgs. 39-40. Notwithstanding that criticism, no challenge was made or assertion presented to Dr. Tobin’s testimony and calculations regarding the impact of the amount of caffeine in Eastern Delite’s system at the time of the post-trial testing.

Specifically, it is absolutely uncontested in this proceeding that the amount of caffeine in Eastern Delite’s system had no impact. This evidence was important at the Racing Commission and has importance in this proceeding for the reasons articulated by the Illinois Supreme Court in *Kline v. Illinois Racing Board*, 127 Ill.App. 702, 469 N.E.2d 667 (1984). One reason that the

Illinois Supreme Court declined to invalidate the Illinois “*zero tolerance rule*” or “*foreign to the natural horse rule*” was because the litigants in *Kline* did not provide any evidence regarding the actual impact of the disqualifying substance of the horse in the race in question.

The Johnsons understand the Stewards’ position in this case that the absence of any impact on racing performance is of no consequence in a zero tolerance state. The Johnsons’ argument is that such a rule, considered in conjunction with the lack of meaningful guidance in the West Virginia Rules of Racing, is arbitrary and capricious. To the extent that *Morris* stands for the proposition that substances which impact the speed of a horse in a race are prohibited, the Johnsons agree in theory. However, the essence of the argument in this case remains undisputed as a matter of equine pharmacology and science. The presence of caffeine in the body of Eastern Delite did not provide any advantage in the running of the 2007 West Virginia Breeders’ Classic. Accordingly, caffeine in this instance was a benign banned substance of the type that caused invalidation of the Florida racing rule at issue in *Simmons*. The caffeine in Eastern Delite functioned neither as a drug nor as a stimulant.

III. CONCLUSION

The equities in this case are straightforward. It is undisputed from the record below that your Appellants, Fred and Sharon Johnson, are good citizens and exemplary horsemen with no prior record of any transgressions before the West Virginia Racing Commission. Obviously, this is one of the reasons that the Racing Commission vacated Mr. Johnson’s suspension as the trainer of Eastern Delite. This is also one of the reasons that the Racing Commission found that the Johnsons did not provide their horse with prohibited substances, even following Mrs. Johnson’s explanation regarding the unknowing administration of a dietary supplement that contained less than 6 parts per billion of caffeine.

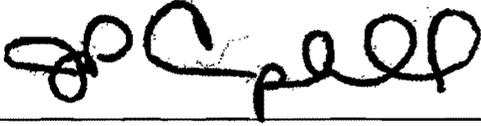
Arbitrary and capricious rules include rules that, on their face, are unfair. Disqualifying a winning horse that had no unfair advantage by virtue of the presence of the equivalent of a teaspoon of coffee, and penalizing good, honest, hardworking horse owners and horse trainers is fundamentally unfair. If a horse has a substance in its body that makes it run faster or even slower in a race, disqualification is appropriate for all of the reasons identified in *Morris*. However, if a substance has absolutely no impact on the performance of a horse; is equivalent to the ingestion of a teaspoon of coffee; and likely ended up in the body of the horse by happenstance or insidious acts of third parties in the receiving barn, disqualification is simply fundamentally unfair.

Mr. and Mrs. Johnson respectfully assert that the zero tolerance rule is one without appropriate meaning or definition and should be invalidated. Mr. and Mrs. Johnson further respectfully assert that this Court need not rewrite the rules as the Racing Commission can readily adopt new ones that are constitutionally firm, as have been adopted in Kentucky, Maryland, New York and California.

IV. RELIEF SOUGHT AND REQUEST FOR ORAL ARGUMENT

Fred and Sharon Johnson respectfully request that the Circuit Court's March 11, 2009 Order affirming the Racing Commission be reversed; that this Honorable Court provide the racing industry and the Racing Commission with guidance regarding arbitrary and capricious regulations; and that Eastern Delite be restored its victory and purse in relation to the Classic.

Fred and Sharon Johnson respectfully request to be heard orally by this Honorable Court on March 3, 2010.



FRED and SHARON JOHNSON
By Counsel

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Campbell Flannery, P.C.
19 East Market Street
Leesburg, Virginia 20176
(703) 771-8344/Telephone
(703) 777-1485/Facsimile

CERTIFICATE OF SERVICE

I hereby certify that service of a true copy of the foregoing has been made as follows:

Type of Service: Federal Express
Date of Service: February 26, 2010
Persons served and address: Ronald R. Brown, Esquire
Benjamin F. Yancey, III, Esquire
Office of the Attorney General
Building 1, Room W-435
Charleston, West Virginia 25305
Item Served: Reply Brief of Appellants


James P. Campbell

S:\Civil\Clients\Johnson, Freddie\Local Counsel - Karen Murphy\Appeal\Reply Brief.doc

BEFORE THE WEST VIRGINIA RACING COMMISSION

**Re: Appeal of Fred Johnson/Sharon Johnson
West Virginia Racing Commission Appeal of
Stewards' Ruling No. 302 of November 29, 2007**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On the 17th day of June, 2008 came the Appellants in person and by their counsel, Karen Murphy, *pro hac vice*, and James Campbell, and came the Appellees by their counsel, Thomas W. Smith, Managing Deputy Attorney General, before the West Virginia Racing Commission, upon notice of hearing duly filed and served upon the Appellants, and upon the appeal of Stewards' Ruling No. 302, dated November 29, 2007, wherein the Stewards ruled that the horse "Eastern Delight" be disqualified from the 7th race on October 20, 2007 and the purse for such race be redistributed and that the trainer, Fred Johnson, be suspended for a period of fifteen (15) days upon the positive testing of said horse for the substance caffeine.

This matter comes on for hearing upon the timely appeal of Fred Johnson and Sharon Johnson to said Stewards' Ruling pursuant to the duly adopted regulations of the West Virginia Racing Commission before the West Virginia Racing Commission, Fred C. Peddicord, Chairman, Bryan Mitchell, Member, and George Sideropolis, Member.

FINDINGS OF FACT

Whereupon the commission heard the testimony of Danny Wright, Chief Steward, Charles Town Races and Slots, Joseph Strug, of Dalare Associates, Dr. Dennis K. Dibbern, Dr. Thomas Tobin, Fred Johnson, Karen Johnson and the jockey, Oscar Flores, considered the stipulations of the parties and the exhibits made a part of the record herein, and upon consideration thereof does hereby **FIND** as follows:



1. That the horse "Eastern Delight" finished first in the 7th race on October 20, 2007, and thereafter blood and urine samples were taken as required by the applicable regulations of the West Virginia Racing Commission;

2. That the test samples of blood and urine were properly collected, preserved and submitted to Dalare Associates and a split sample was further submitted to the testing laboratory at Louisiana State University at the request of the Appellants;

3. That the samples collected from "Eastern Delight" tested positive for caffeine at Dalare Associates and at Louisiana State University;

4. That there is no evidence that the trainer or owner of "Eastern Delight" administered a banned substance to said horse;

CONCLUSIONS OF LAW

1. The Commission does further conclude that the Appellants failed to establish that the horse "Eastern Delight" did not test positive for the substance caffeine;

2. That caffeine is a stimulant and is a banned substance in that it is not a naturally occurring substance in horses. Pursuant to Rules of Racing § 178-1-66.5 West Virginia is a "zero tolerance" jurisdiction with respect to caffeine;

3. That pursuant to the regulations enacted by the West Virginia Racing Commission, and specifically Rules of Racing § 178-1-66.5, any substance found in the blood or urine of a horse, which substance is not a naturally occurring substance, with the exception of phenylbutazone or furosemide (Lasix), and thereby is a violation of the regulations of the West Virginia Racing Commission;

4. That there is no minimum threshold level for banned substances below which a positive result is not considered as positive;

5. While not binding upon the Commission it is noted that the concentration of caffeine in "Eastern Delight" found by both Dalare Associates and by Louisiana State University exceeded the threshold level recommended by RCI;

6. That further pursuant to said regulations, and specifically pursuant to Rules of Racing § 178-1-31.2 the trainer of any horse is the absolute insurer of and responsible for the condition of the horse regardless of the acts of third parties;

7. That given the positive test for caffeine, the regulations of the Racing Commission require that the horse "Eastern Delight" be disqualified and the purse for the 7th race on October 20, 2007 be redistributed as set forth in Stewards' Ruling No. 302 dated November 29, 2007;

8. That Stewards' Ruling No. 302, dated November 29, 2007 be, and the same hereby is, **AFFIRMED** with respect to the disqualification of the horse "Eastern Delight" and the redistribution of the purse for said race; and

9. There being no evidence that trainer Fred Johnson or anyone on his behalf administered a banned substance (caffeine) to the horse "Eastern Delight" the Commission does hereby further **ORDER** that the suspension of trainer Fred Johnson be, and the same hereby is, **SET ASIDE** and **VACATED**.

ENTERED this 9th day of July, 2008.


Linda Rupledge, Executive Secretary
West Virginia Racing Commission

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

FRED AND SHARON JOHNSON,

Appellants,

v.

BOARD OF STEWARDS
OF CHARLES TOWN RACES,

Appellee.

RECEIVED

MAR 11 2009

CIVIL ACTION NO. 08-00008
JEFFERSON COUNTY
CIRCUIT COURT
HONORABLE DAVID H. SANDERS

ORDER AFFIRMING WEST VIRGINIA
RACING COMMISSION'S ORDER OF JULY 7, 2008

By Ruling, dated November 29, 2007, the Board of Stewards of Charles Town Races ("BOS") ordered the redistribution of the purse and disqualification of the horse "Eastern Delite," who finished first in the seventh race on October 20, 2007, at the Charles Town Racetrack, in Charles Town, West Virginia for having tested positive for the drug caffeine. Thereafter, by Order, dated July 7, 2008, the West Virginia Racing Commission ("WVRC") affirmed the BOS's November 29, 2007 Ruling disqualifying Eastern Delite and ordering the redistribution of the purse. This matter is now before the Court pursuant to Fred and Sharon Johnson's ("Appellants") appeal from the WVRC's Order of July 7, 2008.

On December 19, 2008, a hearing was held before the Court during which the parties were permitted to present oral argument in support of their positions. After a thorough review of the entire record, as well as the pleadings and arguments of the parties, the Court finds the following:



1. The Court finds that the WVRC was given the authority delegated by the West Virginia Legislature to promulgate rules to establish how racing will be conducted against the backdrop of pari-mutual betting.

2. The Court finds that it is within the legitimate police powers that the WVRC adopt a zero tolerance rule to ban any drug substance, metabolite or analog not naturally occurring in a horse.

3. The Court finds that the zero tolerance rule is rationally based to take uncertainty out of the process and eliminate litigation in every case resulting in a positive test because determining whether such positive tests had an actual impact upon a horse in a race would be impractical and would lead to the rule being unenforceable.

4. The Court finds that there is ample evidence before the WVRC that caffeine was a drug, including the testimony of Danny Wright and Dr. Thomas Tobin. Further, caffeine is banned in other states and the levels of caffeine in the blood of Eastern Delite is well above the thresholds that are established in states where thresholds are utilized.

5. The Court finds that the absolute insurer rule is rationally based.

6. The Court finds that the WVRC was neither clearly wrong nor arbitrary and capricious when applying the zero tolerance rule to the facts at hand.

ACCORDINGLY, for the reasons stated on the record of this Court, it is

ORDERED and **ADJUDGED** as follows:

1. That 178 C.S.R. 1, Section 66.5, which states, "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", has a rational basis related to the objectives of the State and Legislature in seeking that horse racing be fair and untainted and is therefore constitutional;

2. That the record in this case is replete with evidence showing that caffeine is a drug and a prohibited substance under the above rule;

3. That the Court is not persuaded with the argument that the above cited rule is arbitrary, capricious, and unenforceable as a matter of law, because it lacks sufficient standards and is therefore unconstitutional. The Court finds that this rule, which provides that "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", has sufficient standards to be enforceable and is not arbitrary and capricious as a matter of law; therefore, this rule is constitutional in accordance with the prior decisions of the West Virginia Supreme Court of Appeals.

4. That the argument that a horse should not be disqualified for injecting caffeine that has no impact on the speed of the horse or equine performance is unpersuasive. Such an approach, if adopted, would necessarily result in almost endless conflicts between chemical and medical experts at the hearing conducted by the BOS and the WVRC before the winner of a race could be declared. Endless debate as to whether the speed of a particular horse was "affected" by a given concentration of a certain drug during a race would not enhance the interest of the horse racing industry in West Virginia nor its patrons. The essence of horse racing is the immediate finality of declaring the winner;

5. That the Decision of the WVRC was not in violation of constitutional or statutory provisions; was not in excess of the statutory authority or jurisdiction of the WVRC; was not made upon unlawful procedures; was not affected by other error of law; was not clearly wrong in view of

the reliable, probative and substantial evidence on the whole record; and was not arbitrary or capricious or characterized by abuse of discretion or clearly unwanted exercise of discretion.

6. That the findings made by the WVRC should not be disturbed on appeal because they are not contrary to the evidence or based on a mistake of law. The WVRC findings are not clearly wrong to warrant judicial interference.

7. That the Order of the WVRC, dated July 7, 2008, be and it is hereby affirmed.

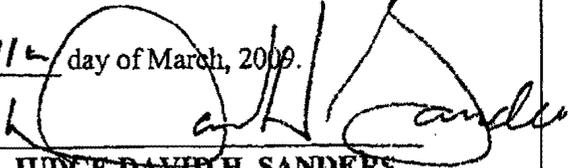
8. That the parties are hereby granted an objection and exception to the ruling of the Court.

9. That by Order Granting Stay and Injunction Pending Appeal, dated July 14, 2008, the Court stayed enforcement of the WVRC's July 7, 2008 Order and issued a preliminary injunction enjoining the redistribution of the purse for the Breeders Classic, held on October 20, 2007. That Appellants have requested, with no objection from the WVRC, the Court to extend the stay of the enforcement of the WVRC's July 7, 2008 Order as well as the preliminary injunction enjoining the redistribution of the first place purse for the Breeder's Classic held on October 20, 2007, in order for Appellants to perfect an appeal with the West Virginia Supreme Court of Appeals. Accordingly, the Court hereby further **ORDERS** that the stay of the enforcement of the WVRC's July 7, 2008 Order as well as the preliminary injunction enjoining the redistribution of the first place purse for the Breeder's Classic held on October 20, 2007, be and they are hereby extended forty-five (45) days from the entry of this Order or fifteen (15) days after the filing of the transcript of the oral arguments in this case, whichever is later.

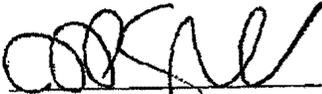
All which accordingly **ADJUDGED, ORDERED** and **AGREED**.

The Clerk is directed to mail a certified copy of this Order to all counsel of record.

THIS FINAL ORDER ENTERED this 11th day of March, 2009.


JUDGE DAVID H. SANDERS

Prepared by and with
Objections Noted on the Record:


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A TRUE COPY
ATTEST:

LAURA E. RATTENNI
CLERK, CIRCUIT COURT
JEFFERSON COUNTY, W.VA.

BY M. Scott
DEPUTY CLERK

Copy to:

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Benjamin F. Yancey, III (WVSB # 7629)
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cc's

J. Campbell

R. Brown - B. Kara

3-12-09