SUPREME COURT OF KENTUCKY
NO. 2018-SC-0630-TG

THE FAMILY TRUST FOUNDATION
OF KENTUCKY, INC., d/b/a THE
FAMILY FOUNDATION — APPELLANT

v.

ON APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
NO. 10-CI-1154

THE KENTUCKY HORSE RACING
COMMISSION, *et al* — APPELLEES

BRIEF OF *AMICUS CURIAE*
KENTUCKY CHAMBER OF COMMERCE

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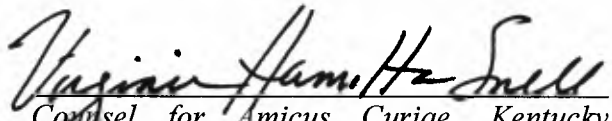
CERTIFICATE OF SERVICE

It is hereby certified that on this 15th day of October, 2020, copies of this Brief were served upon the following via U.S. Mail: Stanton L. Cave, the Law Office of Stan Cave, P.O. Box 910457, Lexington, Kentucky 40591; Jennifer Wolsing and T. Chad Thompson, Kentucky Horse Racing Commission, 4063 Iron Works Pkwy, Building B, Lexington, KY 40511; Brad S. Keeton, Stoll Kennon Odgen PLLC, 200 PNC Plaza, 500 West Jefferson Street, Louisville, Kentucky 40202; William M. Lear, Jr., Steven B. Loy, Stoll Keenon Odgen PLLC, 300 West Vine Street, Suite 2100, Lexington, Kentucky 40507; William A. Hoskins, Jay Ingle, and Christopher Hoskins, Jackson Kelly PLLC, 175 E. Main St., Suite 500, Lexington, KY 40507; Sheryl G. Snyder, Jason Patrick Renzelmann, Frost Brown Todd, LLC, 400 W. Market Street #3200, Louisville, Kentucky 40202; Richard W. Bertelson, III, Office of Legal Services for Revenue, P.O. Box 423, Frankfort, Kentucky 40602; Rebecca Combs Lyon, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; and Hon. Thomas D. Wingate, Circuit Judge, Franklin Circuit Court, 222 St. Clair Street, Frankfort, Kentucky 40601.



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STATEMENT OF POINTS AND AUTHORITIES

May It Please The Court:

On behalf of its business members, the Kentucky Chamber of Commerce is concerned that the Court's Opinion contravenes long-established rules of statutory construction and respect for precedent on which businesses rely in conducting their activities in the Commonwealth. The Chamber is the largest business association in the Commonwealth with over 3,800 member businesses, which range from family-owned shops to Fortune 500 companies and employ over half of Kentucky's workforce. The Chamber promotes a vision for Kentucky to encourage a strong economy for everyone's benefit and to foster business creation, expansion and retention. For this reason, the Chamber champions the right of businesses and their employees to believe conduct is lawful when they conform to the terms of governing statutes and regulations under known rules of interpretation and existing precedent.

The Singular Reference Includes the Plural. But in reversing and remanding the Circuit Court, this Court appears to emphasize the use of the singular "a" and "an" in governing statutes and regulations. For example, on page 7, the Court underscores the definition of "pari-mutuel wagering" as "'any system whereby wagers with respect to outcome of **a horserace**, are placed with, or in, a wagering pool.'" (quoting 15 U.S.C. § 3002(13) (emphasis in original). The Court then lists four Kentucky regulations in 810 KAR 1:011 as consistent with the singular "a" in the statute reasoning that the regulations refer to "**a** live or historical race" or "**an**" historical race." [Opinion at 8 (emphasis in original)]. These singular "a" and "an" articles lead the Court to conclude that pari-mutuel wagering can only concern "a discrete event" rather than multiple horse races. *Id.* at 9.

The Court's reliance on the singular article conflicts with KRS 446.020. Since 1942, KRS 446.020(1) has instructed that "[a] word importing the singular number only may be extended and be applied to several persons as well as to one person..." In *Davis v. Goodin*, 639 S.W. 2d 381 (Ky. App. 1982), Judge Wintersheimer explained that inclusion of the plural with the singular is the proper interpretation. "A correct statutory construction, pursuant to KRS 446.020(1), provides that the singular includes the plural. A word importing the singular number only may be extended and applied to several persons as well as to one person." *Id.*

For example, in *Kreiger v. Garvin*, 584 S.W. 3d 727 (Ky. 2019), this Court interpreted "a person" to mean the plural, namely more than one person. This conclusion lined up with KRS 446.020(1):

> Contained in the Chapter of the Kentucky Revised Statutes regarding statutory construction, it provides in pertinent part; "[a] word importing the singular number only may extend and be applied to several persons or things, as well as to one (1) person or thing..." That statute was enacted in 1942 and has ever been amended.

Id. at 730.

Thus, "[w]hen amending or enacting legislation, we presume the Legislature knows and understands the then–existing laws. *Castle v. Commonwealth*, 411 S.W. 3d 754, 758 (Ky. 2013). **Since the Legislature knew of KRS 446.020(1) at the time it enacted KRS 403.270 and used no language indicating it meant its singular language not to extend to more than one person**, we hold that the language utilized ["a person"] does not limit a minor's de facto guardian to one person." *Kreiger*, 584 S.W. 3d at 730 (emphasis added). *See also Miller v. Johnson Controls, Inc.* 296 S.W. 3d 392, 422 (Ky. 2009) (Abramson, Justice, dissenting) ("In general, however, statutory singulars are understood as referring as well to plurals"); *Greene v. Slusher*, 300 Ky. 715, 718, 190 S.W.2d 29, 31 (1945)

(Whether statute refers to singular or plural "makes no difference, for we are instructed by the Legislature that in the construction of the Revised Statutes, KRS 446.020" a singular number may be applied to several persons or things.).

Apply this principle of interpretation, the definition of pari-mutuel wagering should be read as including the plural "horseraces." If so, the Circuit Court correctly ruled that "pari-mutuel wagering does not require patrons to wager on the same horse races." No words in the definition of pari-mutuel wagering favor a different conclusion.

In 810 KAR 1:001(48), the Racing Commission sets forth a four-part definition of pari-mutuel wagering that no business could reasonably construe as precluding historical wagering on multiple races: "[A] system of or method of wagering approved by the Commission in which patrons are wagering among themselves and not against the association and amounts wagered are placed in one or more designated wagering pools and the net pool is returned to the winning patrons." 810 KAR 1:001(48). Nothing in the context of this provision suggests any reason to limit wagering only to "a" race or "an" historical race.

While this Court states the Commission's regulations "repeatedly refer to a singular historical horse race" [Opinion at 9], the regulations also should be read as repeatedly referring to the plural "historical horse races" consistent with KRS 446.010(1). The plural interpretation is equally consistent with the Legislature's grant of plenary authority to the Racing Commission in KRS 230.361: "The racing commission shall promulgate administrative regulations governing and regulating mutuel wagering on horse **races** under what **is** known as the pari-mutuel system of wagering." (emphasis added). This

underscored language is plural and in the present tense, and thereby looks forward to the concepts of pari-mutuel wagering today, not decades ago.

Precedent Should Control. In "the Federalist Paper No. 78" on the Judiciary Department, Alexander Hamilton instructs that a robust respect for precedent preserves the integrity of the judicial branch: "To avoid arbitrary discretion in the courts, it is indispensable that they should be bound by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them." Such stare decisis is a matter of great practical import for those regulated by judicial decisions. Businesses, like members of the Chamber, seek to conform their conduct to the plain words of statutes and regulations and to the precedent construing them. Being able to rely on predictability in the law enables a business to avoid a misstep and potential liability. Businesses must have confidence that governing precedent is stable, especially when businesses have relied upon it.

Appalachian Racing LLC, et al v. The Family Trust Foundation of Ky., Inc., 423 S.W.3d 726 (Ky. 2014), is the precedent at issue here. This Court stated that the Commission "has no authority to create from whole cloth and to approve a wagering pool in which each patron is wagering on a different event or separate events." [Opinion at 13]. But in *Appalachian Racing*, the Court upheld the Commission's regulations on historical racing. "Because the regulations promulgated by the Commission for the licensing of historical horse race wagering are consistent with the statutory mandate for 'pari-mutuel wagering' on 'legitimate horse racing," we conclude that the Commission did not exceed the scope of its authority and the regulations are therefore not invalid." *Appalachian Racing LLC, et al v. The Family Trust Foundation of KY, Inc.*, 423 S.W.3d at 738.

Appalachian Racing could not be clearer: "[A]s a matter of law, the regulations allowing for pari-mutuel wagering on historical horse racing are valid." *Id.* at 742. Businesses should be entitled to rely on regulations that a court upholds as valid. In validating the Commission's regulations, *Appalachian Racing* necessarily approves the use of the "initial seed pool" defined in 810 KAR 1:001(33) as consistent with pari-mutuel wagering because it is nonrefundable: It means "a **nonrefundable** pool of money funded by an association in amount sufficient to ensure that a patron will be paid the minimum amount required on a winning wager on an historical horse race." (emphasis added). This Court stated that the initial seed pool "impermissibly" involves the association but this conclusion appears contrary to the valid regulations upheld in *Appalachian Racing*. The initial seed pool cannot mean patrons are wagering "against" the association because the amount is unrefundable – the association has nothing at stake. And "seed pool," as defined in 810 KAR 1:001(68), expressly means "money funded by patrons wagering on as historical race." (emphasis added).

The specific regulations on wagering allow an association to conduct wagering on "historical races" on any days and hours approved by the Commission. And, those regulations upheld in *Appalachian Racing* are unmistakable in prohibiting any wagering against the association. See 810 KAR 1:011(4)(b) ("A payout to a winning patron shall be paid from money wagered by patrons and shall not constitute a wager against the association."); 1:011(4)(c) (An association "shall not conduct wagering in such a manner that patrons are wagering against the association."). Under the plain terms of the regulations on which businesses and patrons should be able to rely, patrons are wagering

among themselves and not against the association, and payouts are paid from pools that patron wagering creates.

This Court suggests that the Commission may somehow have exceeded its authority in the regulations on historical racing. [Opinion at 10]. But *Appalachian Racing* appears to turn on an opposite recognition in holding: "There is no doubt that [it] was the intention of the General Assembly to vest the Commission with 'forceful control of horse racing in the Commonwealth' and the wagering thereon KRS 230.215(2)." *Id.* at 737. See also *Jamgotchian v. Kentucky Horse Racing Comm'n*, 488 S.W. 3d 594, 611 (Ky. 2016) (The Commission has "plenary power" to prescribe the conditions under which wagering is conducted.).

This Court concludes that a change in the definition of pari-mutuel wagering is necessary and the change must be made by the Legislature. [Opinion at 13]. But the Legislature has spoken. It has bestowed plenary authority on the Commission to regulate historical racing under its definition of pari-mutuel wagering. And, the Legislature enacted KRS 446.020(1) decades ago as a fundamental framework for construing language. Under this statute, "a" race includes "races." Indeed the regulations on historical race wagering refer repeatedly to "historical horse races." See 810 KAR 1:120, Section 4(c), Section 5(1) and (2a) (2b), Section 6(1) and (2).

In sum, this Court acknowledges the "importance and significance" of the equine industry to the Commonwealth and the "numerable economic pressures that impact it." [Opinion at 13]. Given the industry's unique contribution to Kentucky's history, economy, workforce and culture, the Chamber respectfully urges the Court to save the equine industry from the singular "a" and permit the plural construction that KRS 446.020(1)

articulates. Like all other enterprises, businesses in the equine industry should be able to rely on the Commission's regulations and the precedent validating those regulations on historical racing.

Respectfully submitted,

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