

COURT OF APPEALS OF KENTUCKY
Case No. 2011-CA-000232

AMERICAN SADDLEBRED
HORSE ASSOCIATION, INC.

APPELLANT

v.

EDWARD BENNETT, ET AL.

APPELLEES

Appeal from Fayette Circuit Court
No. 09-CI-05292

**MOTION FOR LEAVE TO FILE AN AMENDED PREHEARING STATEMENT
AND TO EXTEND THE TIME TO FILE AN APPELLANT BRIEF**

MAY IT PLEASE THE COURT:

Appellant, American Saddlebred Horse Association, Inc. (“ASHA”), respectfully moves this Court for an Order permitting ASHA to file an amended Prehearing Statement and extending the time to file the appellant’s brief pursuant to CR 76.12(2) from August 15, 2011 until 30 days after Appellees file any supplemental pre-hearing statement that they may wish to file. ASHA has good cause in bringing this Motion because the trial court has now issued a new ruling that raises additional issues pertinent to the appeal:

FACTUAL BACKGROUND RELEVANT TO ASHA’S MOTION

This appeal arises from a dispute between a non-profit membership association, ASHA, and a small group of its members, Appellee members, regarding what documents must be produced for inspection and copying to members of a non-profit membership association under KRS §273.233. KRS §273.233 provides as follows:

Each corporation shall keep correct and complete books and records of account and shall keep minutes of the proceedings of its members, board of directors and committees having any of the authority of the board of directors; and shall keep at its registered office or principle office in this state a record of the names and addresses of its members entitled to vote. All books and records of a corporation may be inspected by any member, or his agent of attorney, for any proper purpose at any reasonable time.¹

Prior to filing suit in the Fayette Circuit Court, the Appellee members made numerous requests for documents which ASHA believed fell outside the scope of what a non-profit corporation is required to maintain and produce for inspection to its members under KRS §273.233. The small group of Appellee members made clear their intent to sue ASHA and its general membership under the authority of KRS §273.233, so ASHA filed the subject complaint for declaratory relief to request an interpretation of KRS §273.233 from the Fayette Circuit Court and a declaration of the rights and responsibilities of the parties under the statute. This presented an issue of first impression for the courts of the Commonwealth of Kentucky.

The Appellee members counterclaimed for declaratory relief under the same statute. The parties took limited discovery and then filed summary judgment motions setting out their respective interpretations of KRS §273.233. The Fayette Circuit Court heard oral argument and ultimately ruled in favor of the Appellee members. Under the trial court's final judgment of January 6, 2011, which incorporates in full the Opinion, Order and Judgment of December 2, 2010 ("December 2nd Order"), ASHA was specifically directed to do as follows:

¹ This was the language of the statute in 2009 when this dispute arose. The statute was amended by the 2010 General Assembly to provide that the books and records inspected by a member may be copied by said member. The amendment in 2010 also provides that a member's right of inspection shall not be abolished or limited by the corporation's articles of incorporation or bylaws.

Accordingly, it is the Opinion, Order and Judgment of this Court that the Defendants' Members set out above are entitled to inspect and copy any and all books and records of the ASHA and make copies thereof at a reasonable expense pursuant to their enumerated written request (sic) previously submitted. (Emphasis added).

Upon appeal from this Order, ASHA moved this Court for a stay in enforcement proceedings pending the final disposition of ASHA's appeal. The motion was denied and the parties proceeded with the document inspection as ordered.

After a full-day document inspection, the Appellee members submitted follow-up requests for supporting documentation for financial records already provided as well as a set of completely new demands to inspect documents which ASHA believed fell outside the "enumerated written request (sic) previously submitted" and for which the Appellee members had not yet stated a proper purpose as required under KRS §273.233. ASHA agreed to produce additional documents responsive to the requests falling under the scope of the Fayette Circuit Court's order on July 19, 2011, and requested that the Appellee members state a proper purpose for their new requests to inspect documents. The Appellee members then filed a motion for the Court to order ASHA to appear and show cause why it should not be held in contempt of court.²

GROUND FOR ASHA'S MOTION TO AMEND ITS PREHEARING STATEMENT AND FOR AN EXTENSION OF TIME TO FILE A BRIEF

In response to the Appellee members' contempt motion, ASHA argued that it had complied, or was attempting in good faith to comply, with the trial court's order. ASHA further argued that the Appellee members' contempt motion was an improper attempt to request the trial court to expand, clarify or amend an Order that is the subject of an appeal pending in this Court. It is well-settled law that "[t]he filing of a notice of appeal divests

² See Defendants' Motion for the Court's to Order

the trial court of jurisdiction to rule on matters involved in the appeal while the appeal is pending.” Young v. Richardson, 267 S.W.3d 690 (Ky. App. 2008). See also, Johnson v. Commonwealth, 17 S.W.3d 109, 113 (Ky. 2000).

The trial court proceeded with a hearing on Appellee members’ contempt motion on July 22, 2011. The court heard arguments from counsel regarding whether a proper purpose had been demonstrated for the Appellee members’ new requests for books and records and whether the trial court had jurisdiction to enter new or amended orders in a matter on appeal. The trial court ruled that the Appellee members had stated a proper purpose and then expanded its order for inspection of documents to apply prospectively to any and all books and records of the association.³ ASHA has closed its corporate offices from July 26 through July 29 in order to compile the documents responsive to the Court’s order, including over an estimated 50,000 pages of e-mail correspondence of ASHA board members, officers, and employees. While the trial court has not yet entered an order concerning its ruling at the hearing on July 22, 2011, such an order is expected to be entered within the next few days.

RELIEF REQUESTED

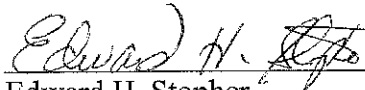
Appellant’s brief is currently due on August 15, 2011. Based on the foregoing, ASHA requests leave to file an amended Prehearing Statement and that its time for filing an appellant brief be extended thirty (30) days pursuant to CR 76.12(2). The trial court’s proceedings of this past week have raised new legal issues and errors of court, i.e., proper purpose and jurisdiction, that ASHA could not and did not identify as issues to be presented on appeal in its Prehearing Statement previously filed with the Court.

³ See proposed order tendered to Appellee’s counsel, attached hereto as Exhibit A.

Accordingly, ASHA requests the Court enter an Order directing that: (1) ASHA file its Amended Prehearing Statement no later than ten (10) days after the Fayette Circuit Court enters its Order regarding the July 22, 2011 hearing; (2) the Appellee members file any supplemental pre-hearing statement within ten (10) days after ASHA files its Amended Prehearing Statement; and (3) ASHA file its Appellant brief on or before thirty (30) days after the ten (10) days for Appellees to file any supplemental pre-hearing statement has expired. The Appellee members' brief shall be filed sixty (60) days after the appellant brief is filed.

Respectfully submitted by:

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COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing was served via first class mail and electronically on this 28th day of July, 2011 to the persons and addresses listed below.

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COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
22ND JUDICIAL CIRCUIT
DIVISION 3

AMERICAN SADDLEBRED
HORSE ASSOCIATION, INC.,

Plaintiff

v.

EDWARD R. BENNETT,
CARL T. FISCHER, JR.,
KRIS KNIGHT, TOM FERREBEE,
SIMON FREDERICKS, M.D.,
and LYNN W. VIA,

Defendants

Case No. 09-CI-05292

ORDER

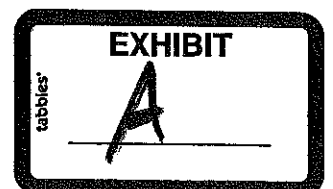
This matter came before the Court on Defendants' Motion For the Court To Order Plaintiff to Appear And Show Cause Why It Should Not Be Held In Contempt Of Court. The Court having reviewed the written arguments of both parties and entertained oral arguments,

IT IS HEREBY ORDERED that:

(1) The Defendants' have stated a proper purpose to inspect records of the American Saddlebred Horse Association ("ASHA"), and they are entitled to inspect such records pursuant to this Court's orders dated December 2, 2010 and January 6, 2011.

(2) On or before August 5, 2011, ASHA shall produce for inspection and copying all ASHA records responsive to the requests contained in the letter from counsel for the Defendants to counsel for ASHA dated June 24, 2011 (attached as exhibit G to Defendants' motion).

(3) The Defendants shall file a separate motion, with a memorandum in support, if they wish to inspect American Saddlebred Registry records.



(4) ASHA shall file a separate motion, with a memorandum in support, if it wishes to withhold any records relating to the termination of Alan Balch's employment with ASHA.

JUDGE, FAYETTE CIRCUIT COURT

Tendered by:

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CLERK'S CERTIFICATE OF SERVICE

A copy of the foregoing Order was entered on _____, 2011, and served via first class United States Mail, postage prepaid, to the following on the ____ day of _____, 2011.

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