

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

AMERICAN SADDLEBRED
HORSE ASSOCIATION, INC.

APPELLANT

APPEAL FROM FAYETTE CIRCUIT COURT
CIVIL ACTION NO. 09-CI-05292
JUDGE JAMES D. ISHMAEL, JR.

v.

EDWARD BENNETT, ET AL.

APPELLEES

APPELLANT'S BRIEF

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CERTIFICATE OF SERVICE

It is hereby certified that a copy was mailed to the following this 30th day of August, 2011: Lewis G. Paisley, Culver V. Halliday, Stephen A. Houston, Stoll Keenon Ogden PLLC, 2000 PNC Plaza, 500 W. Jefferson St., Louisville, KY 40202; and Hon. James D. Ishmael, Jr., Fayette Circuit Court, Robert F. Stephens Courthouse, 120 N. Limestone, Lexington, KY 40507. It is further certified that the record on appeal was not withdrawn by the party filing this Brief.



Edward H. Stopher

I. INTRODUCTION

Appellant, American Saddlebred Horse Association, Inc. (“ASHA”), appeals from the summary judgment entered by the trial court declaring that the inspection rights of members of a non-profit membership association under KRS §273.233 are plenary and that members are entitled to access and copy each and every document in the possession of the nonprofit association, despite the fact that KRS §273.233 expressly enumerates only certain categories of documents be kept and maintained for inspection by a nonprofit corporation and despite having a record replete with evidence that the Appellee members have an improper motive for their requests.

II. STATEMENT CONCERNING ORAL ARGUMENT

Appellant, the American Saddlebred Horse Association (“ASHA”), requests that this Court grant oral argument.

This appeal presents an issue of first impression in the Commonwealth of Kentucky. The trial court’s expansive interpretation of KRS §273.233 imposes a substantial burden on non-profit organizations who choose to incorporate in the Commonwealth of Kentucky and/or locate their corporate offices in our state. Indeed, the enforcement of the trial court’s judgment in this case has already forced ASHA to shutter its corporate office in Lexington, Kentucky and halt its day-to-day operations for several days in July 2011 to allow its staff to compile and produce each and every document and electronic file in the possession of ASHA. The unfettered and unrelenting demands for inspection of records have substantially hindered ASHA’s efforts to provide the educational and charitable services it owes to its entire membership and to further carry out its stated mission. Only through oral argument will the parties be able to address concerns that this Court will have regarding the kinds of disclosure at issue and the significant strain the trial court’s interpretation of this statute will have on the limited resources of non-profit membership associations throughout the Commonwealth of Kentucky.

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IV. STATEMENT OF THE CASE

This appeal arises out of a declaratory judgment action involving a dispute between ASHA and a small group of its members. ASHA is a Kentucky nonprofit association consisting of over 7,000 individual members from around the United States. The Appellees consist of a small group of its large and diverse membership who made, and continue to make, demands to inspect and copy each and every tangible and electronic document in the possession of the non-profit corporation.

A. ASHA Membership

For over a century, ASHA has been advancing the interests of the American Saddlebred, and today it serves a membership of over 7,000 individuals involved or interested in the American Saddlebred industry.¹ Members of ASHA include owners, breeders, trainers, and general enthusiasts of the American Saddlebred horse breed, and membership is open to the public with payment of an annual membership fee, based upon tiers of membership. The benefits of a standard membership include a subscription to American Saddlebred magazine, a copy of the American Saddlebred Reference Directory, unlimited access to member areas of the ASHA website, one copy of an extended pedigree or horse's show record, and eligibility to attend and vote at ASHA's annual meeting.²

B. Facts and Circumstances Giving Rise to This Litigation

This case stems from differing interpretations of one statute, KRS §273.233, which provides in its entirety as follows:

Each corporation shall keep correct and complete **books and records of account** and shall keep **minutes of the**

¹ See ASHA's website: <<http://www.asha.net/ASHA-Overview>>

² See ASHA's membership application: <http://www.asha.net/files/membership_application.pdf>

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 or attorney, for any proper purpose at any reasonable time.³

The interpretation of this statute presents an issue of first impression for our appellate courts. ASHA contends the statute expressly defines and sets forth the scope of the inspection rights of members of Kentucky non-profit corporations. The documents to be inspected and copied are the enumerated categories of documents required to be maintained by any Kentucky nonprofit corporation under KRS §273.233: (a) correct and complete books and records of account; (b) minutes of the proceedings of its members, board of directors and committees having any of the authority of the board of directors; and (c) a record of the names and addresses of its members entitled to vote.

The Appellee members, however, believe their inspection rights are plenary; they are entitled to inspect and copy each and every shred of paper and electronic file in the possession of the non-profit corporation immediately upon request, regardless of how relevant the information may be to confirming the charitable obligations of the association have been met, how private it may be for an ASHA employee (including all aspects of an individual's payroll data, e.g., requests for leave of absences, amounts invested in retirement accounts or taken in loan against their retirement, etc.), or how burdensome or vague the request. According to the Appellee members and the Fayette

³ Emphasis added to the specific terms in dispute. This was the language of the statute in 2009 when the dispute arose. KRS §273.233 was amended by the 2010 General Assembly to explicitly provide that the books and records inspected by a member may be copied by said member. The amendment in 2010 also expressly provides that the member's right of inspection shall not be abolished or limited by the corporation's articles of incorporation or bylaws.

Circuit Court, a global demand for immediate inspection of any and all documents, or all “books and records”, at any time is proper under KRS §273.233.

Despite having these divergent views on the statute’s interpretation, ASHA attempted to satisfy the demands of the Appellee members before litigation commenced. In March, 2009, certain members of ASHA requested from ASHA’s Board of Directors, and were provided, copies of ASHA’s tax returns, annual financial reports, and an audit conducted by a reputable independent auditing firm. After review of those records, five of the Appellee members signed a letter to the ASHA Board dated April 20, 2009, enclosing a list of twenty-nine requests for information from ASHA,⁴ composed of: (1) a single request for a copy of the employment agreement and deferred compensation package of Alan F. Balch, ASHA’s former Executive Director; (2) two requests of who voted for and against the agreement; and (3) twenty-six other requests to identify individuals and entities who were recipients of 2006 and 2007 expenditures and the purpose of each such expenditure.

On April 29, 2009, ASHA’s president responded to the April 20 letter, offering to make information available at ASHA’s board meeting scheduled for July 6, 2009.⁵ Appellee Simon Fredricks (a prior ASHA Board member who no longer breeds, owns or exhibits American Saddlebred horses) replied by letter dated May 4, 2009, rejecting the offer to attend the scheduled meeting and demanding that the requested documentation be “promptly” made available for inspection by the members.⁶ That demand was reiterated

⁴ See Complaint for Declaratory Judgment (“Complaint”), T.R. 0001-0012, and corresponding Ex. “A”, T.R. 0013-0019. Nine additional members were also listed in an attachment to Ex. A as joining in the request. While the correspondence was also addressed to the American Saddlebred Registry, Inc., the Registry is a separate and distinct entity and has no members. Only the documents of the Association are involved in this matter.

⁵ Complaint, Ex. B, T.R. 0020.

⁶ Complaint, Ex. C, T.R. 0021.

approximately one week later in a second letter from counsel for Appellees, dated May 12, 2009.⁷

By letter dated May 15, 2009, counsel for ASHA responded and advised generally that ASHA was under no legal obligation to respond to the additional document requests and that ASHA would not disclose individual employees' confidential employment information due to privacy concerns. In an effort to accommodate the requesting members, however, ASHA made available portions of ASHA's general ledgers itemizing the account entries for 2006 and 2007 requested expenditures, as well as Mr. Balch's employment agreement and deferred compensation agreement for review in ASHA's Lexington office on June 15, 2009. ASHA's controller was also made available on this date to answer any immediate questions about the documents.⁸ ASHA's counsel further advised the requesting members that Balch's employment and deferred compensation agreements were unanimously approved by the Board and that the minutes reflecting that approval were already available for member review on ASHA's website.⁹

The Appellees replied in a letter dated May 20, 2009, suggesting that ASHA agreed to produce "some, but not all" of the requested documents and stating that KRS §273.233 required the production of all requested documents but nonetheless accepted the invitation to review and copy the documents provided at ASHA's office on the proposed June 15, 2009 date.¹⁰ The Appellees followed this meeting with a letter dated June 26, 2009, again stating without particularity that ASHA had not produced all

⁷ Complaint, Ex. D, T.R. 0022-0024.

⁸ Complaint, Ex. E, TR 0025-0026.

⁹ See ASHA's website: <<http://www.asha.net/html/files/MINSAssnBofD25Oct06.pdf>>

¹⁰ Complaint, Ex. F, T.R. 0027.

previously requested documents, citing KRS §273.233 again, and adding twenty-two new specific requests for information.¹¹

ASHA's counsel responded by letter dated July 13, 2009, disputing some of the Appellees' characterizations as to the events of the June 15, 2009 meeting and reiterating the Association's position as to the scope of KRS §273.233, but stating that ASHA's Board had agreed to produce the requested information for inspection on July 29, 2009.¹² ASHA reiterated that personal and confidential information would not be disclosed¹³ and advised the Appellees that the ASHA Board had approved new internal operating procedures for the regular inspection of records by members.¹⁴ These procedures were adopted in large part to address the disruptive and burdensome nature of the Appellees' widening campaign of requests by establishing a fixed schedule for administering member requests.

The Appellees responded on July 22, 2009, asserting their position that KRS §273.233 applied to all of the nonprofit entity's documents, agreeing to meet on July 29, 2009, and making yet another request for correspondence involving one of ASHA's Directors.¹⁵

On July 29, 2009, representatives of the Appellee members appeared at ASHA's offices. ASHA provided approximately eight bankers boxes of documents for their review.¹⁶ They inspected the documents and afterward requested, and were provided,

¹¹ Complaint, Ex. G, T.R. 0028-0034.

¹² Complaint, Ex. I, T.R. 0037-0038.

¹³ While ASHA disclosed salary expenditures as part of its financial records, it withheld any individually-identifying information for personnel other than Mr. Balch, who had consented to the disclosure of his individual information.

¹⁴ A July 13, 2009 press release concerning these administrative changes is attached to the Complaint as Ex. H, T.R. 0035-0036.

¹⁵ Complaint, Ex. J, T.R. 0039-0040.

¹⁶ See Affidavit of Alan Balch, T.R. 0458-0460.

photocopies of approximately 200 pages. As the Appellees were still not satisfied, however, Mr. Balch, ASHA's Executive Director, posted on an online forum an invitation for the members "to sit down with the board as a whole and ****talk**** about their concerns, determine what they are with precision, and inspect or review whatever they want" on August 12, 2009.¹⁷ Appellee Simon Fredricks on the same forum replied, indicating his group's acceptance of these terms and asking for a date.¹⁸ October 5 was set for the prospective meeting.¹⁹

By letter dated August 25, 2009, counsel for the Appellee members demanded that documents be produced prior to the October 5 meeting and set forth a list of yet another set of fourteen requests for documents and information (many of which had already been provided).²⁰ ASHA's counsel responded on September 4 pointing out that the offer accepted by the Appellees was not conditioned upon any further advance production of documents, but that documents were available for review according to ASHA's newly adopted guidelines for regular member inspection.²¹

On October 5, 2009, Appellees Edward R. Bennett, Kris Knight, and Lynn W. Via appeared in Lexington, Kentucky for the scheduled meeting, with Simon Fredricks attending by telephone. The ASHA Board again produced the eight boxes of documents which had previously been produced and informed the Appellees that all documents had been produced except for (1) personnel and salary information of ASHA employees and (2) email communications between ASHA directors and officers discussing personnel

¹⁷ Complaint, Ex. L, T.R. 0044-0045.

¹⁸ Complaint, Ex. K, T.R. 0041-0043.

¹⁹ Complaint, Ex. M, T.R. 0046.

²⁰ Complaint, Ex. N, T.R. 0047-0049.

²¹ Complaint, Ex. O, T.R. 0050-0051. Upon information and belief, counsel for the Appellee members did appear at ASHA's offices for the regularly scheduled inspection date but did not review any documents.

issues, prospective and current Board members, and other personal, confidential information that was exchanged with a reasonable expectation of privacy. Asked what other information they believed ASHA was failing to disclose, the Appellees refused to respond or engage in any discussion as to their purported concerns. The meeting concluded without the Appellees having discussed any issues or reviewed any documents.

Because of Appellees repeated demands for documents and their threats of litigation based upon their interpretation that KRS §273.233 was unlimited in scope,²² ASHA filed its complaint for declaratory relief against its own members, requesting that the trial court to construe the scope of KRS §273.233. The Appellees counterclaimed for declaratory relief under the same statute.²³

C. Discovery Proceedings in the Trial Court

The trial court stayed written discovery and permitted limited deposition discovery prior to the submission of briefs, a hearing, and a ruling on ASHA's request for declaratory relief under KRS §273.233. The Appellee members took the depositions of former ASHA employees Beth Blanton and Jennifer Wasserzug, ASHA controller Joan Jones; and member of ASHA's Board of Directors and former member of its Finance Committee Carl Holden. While they were purportedly taken to develop the record for summary judgment on the declaratory judgment action, the depositions ultimately had little to do with the trial court's interpretation of KRS §273.233. The only portions of the

²² See Complaint, Ex. G, T.R. 0028-0034, and Ex. P, T.R. 0052.

²³ In their counterclaim, the Appellees also asserted claims for breach of contract (Count II) and promissory estoppel (Count III) seeking the same relief requested under their counterclaim for declaratory judgment (Count I). Appellees explicitly limited their dispositive motion to the declaratory judgment counterclaim, and never raised their counterclaims for breach of contract and promissory estoppel in their motion. These separate claims were dismissed without prejudice under the trial court's Final Judgment and Order entered January 6, 2011, see T.R. 0070-0117.

depositions remotely relevant to the construction of KRS §273.233 are those in which Carl Holden and Joan Jones verified that ASHA produced all financial documents for 2006 and 2007 believed to be required under the statute,²⁴ and that ASHA withheld only those records containing confidential information (such as individual social security numbers and credit card account numbers); private personnel and individually identifying payroll records; internal emails among ASHA Board directors, officers, and employees; and other confidential information.

D. The Trial Court's Summary Judgment

The parties filed cross motions for summary judgment requesting that the trial court declare the rights and responsibilities of the parties under KRS §273.233. ASHA argued that under general rules of statutory construction the first and second sentences of the 2009 language of KRS §273.233 should be read together. The first sentence enumerates what documents a nonprofit corporation must maintain for inspection by its membership, i.e., accounting and financial records, minutes of Board meetings, and the membership list. The second sentence provides the membership with the right to inspect these documents.

The trial court disagreed and held that the two sentences set forth separate and distinct rights, responsibilities, and duties. Reading the second sentence separately, the trial court concluded that the Appellees are entitled to inspect and copy any and all "books and records" in the Appellant's possession. By way of post-judgment rulings, the trial court has expanded its judgment to include literally any and all tangible documents

²⁴ See T.R. 0356-0358; 0363-0365, Deposition of Joan Jones, March 17, 2010, pp. 38, 40-41, and T.R. 0370-0372; 0377-0380, Deposition of Carl Holden, March 11, 2010, pp. 41-44, respectively.

and electronic files, no matter how relevant or burdensome, as a “book and record” for purposes of the statute.

E. Post-Judgment Proceedings in the Trial Court

Under its summary judgment, the trial court specifically directed ASHA to make available for inspection all books and records “pursuant to [the Appellee members’] enumerated written request (sic) previously submitted.” Upon appeal from this Order, ASHA moved the trial court and the appellate court for a stay in the enforcement proceedings pending the final disposition of ASHA’s appeal. The motions were denied, and the parties proceeded with the document inspection as ordered.

After a full-day document inspection on June 15, 2011, the Appellee members submitted follow-up requests for supporting documentation for financial records already provided as well as never-before-made demands to inspect and copy all financial records from 2009 and 2010 and numerous other documents falling 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 §273.233.²⁵ In letters dated June 25, 2011 and July 1, 2011, 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. As for the new inspection demands, ASHA expressed a willingness to accommodate the Appellee members upon their stating a proper purpose for their new requests.²⁶

In addition, ASHA voluntarily provided the Appellee members with a copy of the Audit Report and related Financial Statements of ASHA for the years ending Dec. 31,

²⁵ See June 24, 2011 letter from Attorney Stephen Houston to Attorney Jeff Adamson attached hereto as Exhibit (“Ex.”) 1.

²⁶ See Letters of June 24 and 25, 2011 and July 1, 2011, which outline the supplemental and additional requests for documents by the Appellees and ASHA’s response, attached hereto as Exs. 1, 2, and 3, respectively.

2010 and 2009 as soon as it became available and prior to its dissemination to the full membership in hopes of addressing the “oversight questions” put forth by the Appellee Members as their stated purpose for the subject document inspection and declaratory judgment action. In the 2010 audit report, the independent audit firm of Dean, Dorton, Allen, Ford, PLLC states that “[o]ur responsibility is to express an opinion on these financial statements based on our audit.” The report further states:

We conducted our audit in accordance with auditing standards generally accepted in the United States of America. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement....We believe that our audit provides a reasonable basis for our opinion.

The report concludes with a clean opinion, stating “[i]n our opinion, the financial statements referred to above present fairly, in all material respects, the financial position of American Saddlebred Horse Association, Inc. as of December 31, 2010 and the results of its operation and its cash flows for the year then ended in conformity with accounting principles generally accepted in the United States of America.”²⁷

The Appellee members again rejected ASHA’s efforts to meet their demands and filed a motion for the trial court to order ASHA to appear and show cause why it should not be held in contempt of court.²⁸ The trial court proceeded with a hearing on Appellee members’ contempt motion on July 22, 2011. ASHA argued that a proper purpose had not been demonstrated for the Appellee members’ new document requests and objected to the trial court having jurisdiction to enter new or amended orders in a matter on appeal.

²⁷ The Dean, Dorton, Allen, Ford audit firm is the successor by merger to the firm of Cotton, Allen, the firm the Appellee members retained to review ASHA’s financial records prior to this suit.

²⁸ See Defendants’ Motion For the Court To Order Plaintiff to Appear And Show Cause Why It Should Not Be Held In Contempt Of Court and ASHA’s Response, attached hereto as Ex. 4.

In its Order of August 9, 2011, the trial court found “proper purpose” for the additional requests as a matter of law, without taking any evidence, affidavit or testimony, and presumably based upon the patently false statement made by opposing counsel that the former Executive Director, Alan Balch, “fled the state to avoid a deposition.”²⁹ In addition, the trial court expanded the scope of its summary judgment to effectively include any and all documents and electronic files in the possession of ASHA. Presently there is no limit in scope or time for the ongoing document inspections.³⁰

ASHA held the most recent document inspection on August 15, 2011, in compliance with the Court’s August 9 Order. ASHA shuttered its corporate office in Lexington, Kentucky July 26, 2011 through July 29, 2011, less than one-month before the most important showcase for the American Saddlebred breed, the 2011 World Championship Horse Show at the Kentucky State Fair, in order to allow ASHA’s small staff of seven employees to devote 100 percent of its efforts to retrieve and produce all of the documents requested by the Appellee members in their June 24 letter. The Appellee members included among their requests entirely new demands for all “financial records” from 2008 to present and a global request for all communications of ASHA board members, officers and employees.³¹ Over 20,000 documents were ultimately retrieved, categorized, and produced for inspection at the follow-up meeting with representatives of the Appellee members held at ASHA’s corporate offices on August 15, 2011.

At its last post-judgment hearing on August 26, 2011, the trial court ordered the production of records relating to the termination of Alan Balch’s employment with

²⁹ See Affidavit of Executive Director, Alan Balch, attached hereto as Ex. 5.

³⁰ See Order entered August 9, 2011, attached hereto as Ex. 6.

³¹ See Press Release, dated July 25, 2011, attached hereto as Ex. 7.

ASHA over ASHA's objection.³² ASHA requested these records be excluded from the ongoing records inspection because Alan Balch's settlement agreement contains a contractual obligation to maintain the confidentiality of the contents of the agreement and because the Appellee members had already been provided the amounts paid to Mr. Balch in settlement.

The Appellee members have routinely published matters pertaining to this litigation to the general public via various social networking and forum websites, such as Facebook, www.trot.org, and www.saddlebredcentral.com. As a result, providing a copy of the Balch settlement agreement to the Appellee members would be tantamount to breaching the terms of confidentiality and would expose ASHA and its membership to damages for breach of contract. The Fayette Circuit Court overruled ASHA's objection, deeming it just another "record" of ASHA and ordered it be produced pursuant to its interpretation of KRS §273.233.

V. ARGUMENT

A. KRS §273.233 Provides the Sole Authority For A Non-Profit Member's Right of Inspection

The right of a member to inspect the "books and records" of a nonprofit association is a statutory adaptation of common law rules governing the relationship between for-profit corporations and their shareholders. At common law, a shareholder of a for-profit corporation was granted the right to inspect the corporation's documents because of his property interest – a shareholder was deemed to be the actual owner of all the assets of the corporation, with his ownership percentage being represented in his

³² See Ex. 6, at (4).

holding of stock.³³ Therefore, inspection simply was an extension of ownership, and it served the purpose of providing the shareholder, who may have no role in the day-to-day management of corporate affairs, with information necessary to allow him to monitor and safeguard his personal financial interest.³⁴ The common law right of inspection for shareholders of for-profit corporations was incorporated into the statutory law of the various states, which provides fairly specific parameters of inspection.³⁵

As state laws began to allow for the formation of nonstock, nonprofit corporations, the statutory framework incorporated requirements that the nonprofit entity maintain on hand certain books and records and that members of the nonprofit be entitled to inspect such records. In Kentucky, that right is set forth in the statute at issue, KRS §273.233. The statute provides no definition for the term “books and records of a corporation,” but common sense dictates that there must be some reasonable limitation as to the meaning and scope of this phrase, otherwise, a non-profit corporation could face a substantial burden complying with repeated demands to inspect every document in its possession, without limitation in time or scope, at great expense to the rest of the members of the corporation.

³³ William Coale Development Co. v. Kennedy, 121 Ohio St. 582, 170 N.E. 434, 435 (Ohio 1930) (“The real owners of all the net assets of any corporation are the stockholders.... If the corporation abandons the purposes of its creation and dissolves the corporation, the net assets on hand must be distributed to the stockholders according to their holdings of stock, for the plain and very simple reason that the stockholders are the owners of all the net assets of the corporation, and for the further reason that outstanding stock is always a liability of the corporation, so that the stockholders are its creditors as well. Can anything be plainer than the fact that the owner of property has a clear right to inspect his own property?”). Notably, the same rationale does not hold in the context of a nonprofit association, which, upon dissolution, must transfer its assets to another entity having a like nonprofit purpose. KRS §273.303(3) & 26 CFR 1.501(c)(3)-1(b)(4). Thus, the shareholder-member analogy does not hold in this context.

³⁴ State ex rel. Kennedy v. Continental Boiler Works, Inc., 807 S.W.2d 164, 166 (Mo.Ct.App. 1991) (“The right of a stockholder to inspect the books and records of the corporation ... is based upon his interest in the assets and business of the company.... He has a right to know how the affairs of the company are conducted, and whether the capital of which he has contributed a share is being prudently and profitably employed. Such a right is necessary for the stockholder's protection.”).

³⁵ See, e.g., KRS §271B.16-010 *et seq.*

Even a shareholder of a for-profit corporation is not entitled to all of the documents in the company's possession.³⁶ A member's interest in a nonprofit association is even less direct than a stockholder's property interest. A stockholder owns stock and seeks to derive financial gain from his capital investment in the for-profit corporation. In the nonprofit corporation, however, a member owns no stock, and instead participates as a member in the association toward a charitable purpose through the payment of the annual membership fee.³⁷ The trial court erred in failing to recognize this distinction between the inspection rights of a shareholder and a member of a non-profit association.

B. Principles of Statutory Construction Limit the Right of Inspection Under KRS §273.233 to the Specific Classes of Documents Listed

The for-profit corporation statute requires the corporation to maintain certain specific corporate records listed in KRS §271B.010, and the shareholder is, pursuant to KRS §271B.020, permitted to inspect only those records specifically set forth in the statute, including excerpts of minutes and records of action, accounting records, and the record of shareholders.³⁸ The statute governing records for a nonprofit corporation follows a similar structure. In its first sentence, KRS §273.233 requires that the nonprofit corporation maintain (a) "correct and complete books and records of account"; (b) "minutes of proceedings"; and (c) "a record of the names and addresses of its members entitled to vote." The second sentence then follows with the statement that "[a]ll books and records may be inspected by any member."

³⁶ See KRS §271B.16-020. Prior to enactment of the statutory limitations, older case law indicates that a for-profit stockholder's rights may have been somewhat broader at common law, but even there it was recognized that "the right of inspection [of a stockholder] rests upon the fact of ownership." Otis-Hidden Co. v. Scheirich, 187 Ky. 423, 219 S.W. 191, 194 (Ky. 1920).

³⁷ See generally Affidavit of Conley Salyer, an expert in non-profit governance, as to member inspection rights under KRS §273.233, at T.R. 0387-0388.

³⁸ KRS §271B.16-020(1) & (2).

Where there is any question as to the intended scope of a statute, courts must give effect to its plain meaning as derived from the language chosen by the General Assembly.³⁹ With respect to the plain meaning of “books and records” employed in KRS §273.233, it is appropriate for the Court to refer to established guidelines in construing the language of statutes. Here, the intended scope of KRS §273.233 can be gleaned from the fact that the statute consists of two sentences, the first containing specific references to classes of documents while the second refers only to a general term. The General Assembly enacted the two sentences together and, according to the plain meaning of the language used, intended that these sentences be construed together.⁴⁰ Indeed, it is a longstanding rule of statutory construction that general terms associated with specific terms shall be construed as being limited to the specific meaning:

[W]here, in a statute, general words follow or precede a designation of particular subjects or classes of persons, the meaning of the general words ordinarily will be presumed to be restricted by the particular designation, and to include only things or persons of the same kind, class, or nature as those specifically enumerated, unless there is a clear manifestation of a contrary purpose.⁴¹

Ignoring these well-established standards, the trial court erroneously concluded that the limiting language of the first sentence did not apply to the second sentence. The trial court disregarded the “general rule of statutory construction that an enumeration of particular items excludes other items which are not specifically mentioned and construed the second sentence independent of the first, and that “all books and records” means all documents of whatever nature in the custody or control of the nonprofit association.

³⁹ Bowling v. Kentucky Dept. of Corrections, 301 S.W.3d 478, 490-491 (Ky. 2009).

⁴⁰ Id. at 491 (“We presume, in a case such as this one of related statutes, that the General Assembly intended for the statutes to be construed together and for both to have meaning”).

⁴¹ Steinfeld v. Jefferson County Fiscal Court, 312 Ky. 614, 229 S.W.2d 319, 320 (Ky. 1950) (citation omitted); See also, Bd. of Educ. Of Rockcastle County v. Kirby, 926 S.W.2d 455, 457 (Ky. 1996).

Common sense also dictates that the General Assembly would have never intended for KRS §273.233 to impose the kind of burden placed upon ASHA in this case. No just and proper purpose exists – short of a showing of misconduct, such as fraud, mismanagement, embezzlement, or conflicts of interest – to force a non-profit organization to shutter its day-to-day operations in order to comply with unfettered and unrelenting demands for inspection of every tangible document and every electronic file in its possession. ASHA is a relatively small organization, imagine enforcement of the trial court’s expansive interpretation and application of KRS §273.233 upon some of much larger Kentucky non-profit membership associations, such as the Girl Scouts of Kentuckiana (serves 29,000 members in 64 counties in western Kentucky and southern Indiana⁴²), the University of Kentucky Alumni Association (serves over 37,000 members⁴³), the University of Louisville Alumni Association (serves over 130,000 members⁴⁴), and the Kentucky YMCA (serves over 207,000 registered members and 285,000 program members across the Commonwealth of Kentucky⁴⁵). If the Kentucky Court of Appeals was to affirm the trial court orders in the present case, all of these membership associations would be required to immediately comply with any members’ demand for inspection of each and every document in the possession of their organization – regardless of how relevant the information may be to confirming that the charitable obligations of the association have been met, how private the information requested, or how burdensome or vague the request. Such an absurd result could not have been intended by the General Assembly when it enacted KRS §273.233.

⁴² <http://www.kyanags.org/about/default.aspx>

⁴³ <http://www.ukalumni.net>

⁴⁴ <http://www.uoflalumni.org>

⁴⁵ <http://www.ymcasofky.org/html/statistics.html>

The correct interpretation must read the first and second sentence of the statute together. Otherwise what would be the purpose of enumerating the kinds of documents a non-profit must maintain for inspection? The term “books and records” in the second sentence refers to (and is limited to) those same specific classes of documents, (a) “books and records of account”; (b) minutes; and (c) the list of voting members enumerated in the preceding sentence. When the legislators in the General Assembly enacted KRS §273.233 with a reference in the second sentence to “books and records,” they meant what they said and said what they meant. “Books and records” are comprised of “books and records of account” (i.e., all accounting and financial records), minutes, and the membership list, not every shred of paper and electronic document in possession of a non-profit corporation as the trial court has ordered.

For these reasons, the trial court’s judgment should be set aside and summary judgment entered in favor of ASHA.

C. KRS §273.233’s Limited Scope Also Reflects the Scope of A Nonprofit Member’s Interests

A member in a nonprofit association has an interest in ensuring that the association is pursuing the charitable mission for which it was established,⁴⁶ and the member is empowered to appeal to other members entitled to vote if there is some matter of concern subject to member influence.⁴⁷ Therefore, financial and transactional information (“books and records of account”) is subject to disclosure, as are records of action by members, the board, or committees having board authority (“minutes of the

⁴⁶ Bill Reno, Inc. v. Rocky Mountain Ford Dealers’ Adv. Ass’n, 378 P.2d 206, 207 (Col. 1963) (“A member of a nonprofit corporation is entitled to be informed concerning the business activities conducted by the corporation”).

⁴⁷ KQED, Inc. v. Hall, 185 Cal.Rptr. 630, 633 (Cal.App. 1982) (“The inspection statutes are concerned with providing a method by which members of nonprofit corporations may communicate with other members on matters relating to their interests as members. As noted above, the basic method provided for accomplishment of this goal is a right of access to membership lists”).

proceedings”), and the member is entitled to a list of names and addresses of all members eligible to vote for the purpose of facilitating contact and fostering discussion or organization among members entitled to vote as to proposed member action. Those three categories are sufficient to protect the member’s interest in ensuring that the nonprofit is furthering its mission and to allow the member to communicate with the broader voting membership.

Unlike a for-profit corporation and its shareholders, a nonprofit association is not working to earn a profit for its members but rather is serving a charitable mission. Members subscribe to a nonprofit corporation through contribution of membership fees because they agree with the nonprofit’s charitable mission. Such subscription and support, however, does not make the member an owner or manager, and the member should not be entitled, by mere dint of his payment (in this case \$70.00) of an annual membership fee, to assert some individualized interest that warrants enhanced protection.

D. Authority of Other Jurisdictions Reflects a Policy of Limiting the Scope of A Nonprofit Member’s Right of Inspection

While the subject of a member’s right to inspect nonprofit records has not been addressed in Kentucky case law, it has been the subject of opinions from other jurisdictions. Most of this extra-jurisdictional case authority is somewhat limited in providing assistance to this Court’s construction of the scope of KRS §273.233. This is due in part to the variety of language or requirements contained in the statutes of other states⁴⁸ and the dearth of cases involving similar statutes that raise the same questions of the scope of requests.⁴⁹

⁴⁸ Many states have adopted more recent versions of the Revised Model Nonprofit Corporation Act, which more explicitly state that the right of inspection is limited to listed classes of documents. For a history of the Model Act, see Lizabeth A. Moody, "Revising the Model Nonprofit Corporation Act: Plus ça change,

Most disputes over inspection relate to another requirement of inspection, which is also found in KRS §273.233, i.e., that the member's request be for a "proper purpose." While ASHA did not brief that issue directly prior to the trial court's entry of summary judgment, it did raise the issue in the trial court's post-judgment proceedings.⁵⁰ The extra-jurisdictional authority dealing with questions of "purpose" further indicate that inspection should be limited to those records germane to the stated purpose.⁵¹ And the bulk of cases involve requests by members to review only records relating to financial transactions, leading to the presumption that "books and records" is generally accepted to mean only financial records.⁵²

Beyond the issue of "proper purpose," however, the inherent scope of the right of inspection is one which finds limits in the case law of other jurisdictions, particularly where there is a delineation in the statute requiring that particular records be maintained by the nonprofit corporation:

The records which a voting member is entitled to examine are limited to records of members' and directors' meetings, lists of members, records of assets, liabilities and financial transactions, and records of trust funds.⁵³

plus c'est la même chose", 41 Ga. L. Rev. 1335, 1346 (2007) (noting critically that the older Model Nonprofit Corporation Acts "almost slavishly followed" the Model Business Corporation Act).

⁴⁹ For example, Lang v. Western Providers Physician Org., 688 N.W.2d 403 (S.D. 2004), involved a statute similar to KRS §273.233, but the court noted specifically that the issue of the scope of the phrase "all books and records" had not been preserved on appeal and was not being addressed.

⁵⁰ The Appellees' initial letter stated only that "[W]e want to be sure that the ASHA is utilizing its assets in a prudent manner, and in furtherance of the purposes of the ASHA". See Complaint, Ex. A, T.R. 0013-0019. Subsequent oral requests as to their purpose elicited only the simple response "Oversight".

⁵¹ Wells v. League of American Theatres and Producers, Inc., 706 N.Y.S.2d 599, 604 (N.Y. Sup. Ct. 2000) ("It is in the Court's discretion to exercise its authority to limit or expand the scope of members' inspection of corporate records to the material necessary to protect their interest in the corporation") (holding that minutes of meetings and a member list were subject to disclosure).

⁵² Shaw v. Hurst, 582 A.2d 87 (Pa. Cmwlth. 1990) (granting the member was entitled to inspect "certain corporate records," where the request was made for "checkbooks, ledgers and other books and records").

⁵³ Bourgeois v. Landrum, 396 So.2d 1275, 1277 (La. 1981); See also, Billiot v. New Orleans and Baton Rouge Steamship Pilots Ass'n, 840 So.2d 1291, 1294 (La. App. 2003) ("The plaintiffs seek narrative billing records that include personal matters and information regarding the investigation into two of the plaintiffs.

Here, KRS §273.233 similarly delineates specific classes of “books and records” to be maintained by the association. The right of members to inspect “all books and records” should therefore be limited to those books and records actually specified in the statute.⁵⁴

In one of the few cases to delve into the issues raised in this declaratory judgment action, i.e., the precise scope of a nonprofit member’s right of inspection and the right of the nonprofit to withhold documents, the Pennsylvania Supreme Court noted that the right of inspection afforded a member was not unlimited:

[A] member’s access is more limited than that of a director who is performing his or her fiduciary duties. The plain meaning of the phrase [“records of proceedings”], therefore, could permit a member’s access to duly authorized minutes of official action of the board of directors of a nonprofit corporation but could, for example, exclude access to a variety of documents, such as correspondence and draft documents.⁵⁵

The court went on to find that “[t]he scope of records to which a member has access is further limited by considerations of privacy, privilege and confidentiality.”⁵⁶ In a concurring opinion, one justice wrote

Limiting the scope of records of proceedings subject to inspection is consistent with the historical development of the shareholder’s right of inspection....

Absent throughout the development of the shareholder’s right of inspection is any precedent that would support Appellees’ expansive interpretation of such right. In the context of both business and nonprofit corporations, the courts have recognized that a shareholder or member is

This information is not contemplated by and is beyond the scope of R.S. 12:223”) (reversed and remanded on other grounds).

⁵⁴ Nor should the Appellees suggest that “books and records of account” be interpreted broadly. Phoenix Gen. Hosp. v. Sup. Ct. of Maricopa Cty., 402 P.2d 233, 235 (Ariz.App. 1965) (finding that a statutory limitation to “books of account” was “more restrictive” than the plaintiffs’ request to see all “books and records”).

⁵⁵ Lewis v. Pennsylvania Bar Ass’n, 701 A.2d 551, 554 (Penn. 1997).

⁵⁶ Id. (finding that documents provided to the nonprofit with an expectation of privacy should remain private).

entitled to inspect documents such as membership lists, financial records, audit reports and minutes of meetings.⁵⁷

The Court of Appeals of Ohio found proper the requests of members which were limited to a “copy of a current membership list, minutes of meetings of both the board of trustees and the membership, and all financial statements and reports.”⁵⁸ The Ohio statute, Ohio Rev. Code §1702.15, is very similar to KRS §273.233:

1702.15 Corporation to keep books and records of account and minutes of proceedings.

Each corporation shall keep correct and complete books and records of account, together with minutes of the proceedings of its incorporators, members, directors, and committees of the directors or members. Subject to limitations prescribed in the articles or the regulations upon the right of members of a corporation to examine the books and records, all books and records of a corporation, including the membership records prescribed by section 1702.13 of the Revised Code, may be examined by any member or director or the agent or attorney of either, for any reasonable and proper purpose and at any reasonable time.

In construing this statute, the Court observed that the documents to which the member was entitled were those specifically listed in the statute:

Members of a nonprofit corporation are entitled to seek information concerning the business activities conducted by the corporation. As discussed above, all books and records of account are to be kept by the corporation and may be examined by any member for reasonable and proper purpose.⁵⁹

Here, of course, the Appellee members have not similarly limited their requests to financial reports and accounting records, minutes, and membership lists. Rather, they

⁵⁷ *Id.* at 556 (J. Zappala, concurring) (citation omitted).

⁵⁸ *Carlson v. Rabkin*, 789 N.E.2d 1122, 1130 (Ohio App. 2003).

⁵⁹ *Id.*

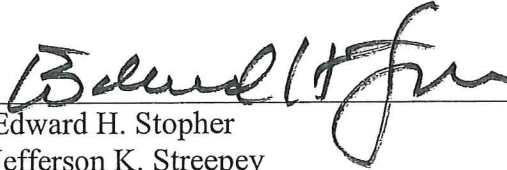
contend that they are entitled to unfettered access to all documents in ASHA's possession, including private, personnel information, and correspondence.⁶⁰

VI. CONCLUSION

For the foregoing reasons, Appellant, American Saddlebred Horse Association, Inc., respectfully requests the Court set aside the summary judgment entered by the trial court, and direct that summary judgment be entered in favor of ASHA.

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⁶⁰ See Affidavit of Conley Salyer, T.R. 0387-0388.

AMERICAN SADDLEBRED
HORSE ASSOCIATION, INC.

APPELLANT

APPEAL FROM FAYETTE CIRCUIT COURT
CIVIL ACTION NO. 09-CI-05292
JUDGE JAMES D. ISHMAEL, JR.

v.

EDWARD BENNETT, ET AL.

APPELLEES

APPENDIX TO
APPELLANT'S BRIEF

| <u>NO.</u> | <u>DESCRIPTION</u> | <u>PAGE(S)</u> |
|-------------------|---|-----------------------|
| 1 | Opinion, Order and Judgment of December 2, 2010 | TR0533-0541 |
| 2 | Final Judgment and Order of January 6, 2011 | TR0565-0566 |
| 3 | June 24, 2011 letter from Attorney Stephen Houston to Attorney Jeff Adamson | Exhibit 1 |
| 4 | June 25, 2011 letter from Attorney Jeff Adamson to Attorney Stephen Houston | Exhibit 2 |
| 5 | July 1, 2011 letter from Attorney Jeff Adamson to Attorney Stephen Houston | Exhibit 3 |
| 6 | Defendants' Motion for The Court to Order Plaintiff to Appear and Show Cause Why It Should Not Be Held in Contempt of Court and ASHA's Response | Exhibit 4 |
| 7 | Affidavit of Alan F. Balch dated August 24, 2011 | Exhibit 5 |
| 8 | Order of August 9, 2011 | Exhibit 6 |
| 9 | Press Release dated July 25, 2011 | Exhibit 7 |