

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 RAISE ADDITIONAL ISSUES IN APPELLANT'S
BRIEF PURSUANT TO CR 76.03(8), TO CONSOLIDATE THE APPEAL FROM
THE TRIAL COURT'S POST-JUDGMENT PROCEEDINGS WITH THE
PRESENT APPEAL, AND FOR LEAVE TO FILE THE CONSOLIDATED BRIEF
TENDERED HEREWITH**

MAY IT PLEASE THE COURT:

Appellant, American Saddlebred Horse Association, Inc. ("ASHA"), respectfully moves this Court for an Order permitting ASHA to address additional issues raised during the trial court's post-judgment proceedings in its appellant brief pursuant to CR 76.03(8); to consolidate the appeal from the trial court's post-judgment proceedings filed this date with the appeal from the trial court's original judgment; and for leave to file one consolidated brief addressing all issues. A copy of the notice of appeal from the trial court's August 9, 2011, post-judgment order ("August 9 Order") and the consolidated brief is tendered herewith.¹ ASHA has good cause in bringing this Motion because the

¹ See Notice of Appeal from August 9 Order attached hereto as Exhibit ("Ex") 1 and August 9 Order attached hereto as Exhibit 2. See Consolidated Brief attached hereto as Ex. 3.

trial court issued post-judgment rulings which raise additional issues that pertain directly to the present appeal and the trial court's interpretation and application of KRS §273.233 and because raising the additional issues in one consolidated brief would conserve the time and resources of this Court, counsel, and all parties involved in these appeals.

PROCEDURAL BACKGROUND RELEVANT TO ASHA'S MOTION

ASHA's original appeal, filed on or about February 2, 2011, was taken from the Fayette Circuit Court's final judgment of January 6, 2011, which incorporates in full the Opinion, Order and Judgment of December 2, 2010 ("December 2nd Order"). The December 2nd Order declared 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 to and to 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.

Under the December 2nd Order, ASHA was specifically directed to do as follows:

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.**²

Upon appeal from the December 2nd Order, ASHA moved the Kentucky Court of Appeals for a stay in trial court's enforcement proceedings pending the final disposition

² See December 2nd Order, p. 7, TR 0533-0541, attached hereto as Ex. 4 (emphasis added).

of ASHA's appeal. The Court of Appeals denied the motion. ASHA opted not to pursue interlocutory relief from the Kentucky Supreme Court pursuant to CR 65.09.

On June 15, 2011, ASHA invited the Appellee members to inspect documents responsive to the written requests of the Appellee members in compliance with the December 2nd Order. At the close of the full-day document inspection, ASHA's counsel, a Board representative, and the ASHA Executive Director met with Mr. Edward R. Bennett and counsel for the Appellee members, Stephen Houston, to answer questions about documents produced and to address any further requests for documents prompted by their inspection. The parties subsequently exchanged correspondence committing the Appellee members' requests and ASHA's responses to those requests in writing.

As evidenced by letters to and from counsel for both parties dated June 24 and 25, 2011, and July 1, 2011,³ ASHA carefully considered each and every request made before, during and after the June 15 inspection. ASHA agreed to produce any documents not previously requested, but responsive to the previously enumerated requests served upon ASHA in the pending litigation, at a continued inspection. As for requests falling outside the scope and relevant time period of the December 2nd Order, ASHA advised that it had a duty, both to its membership and under KRS §273.233, to request a statement of proper purpose for the inspection of the additional records. ASHA complied with the December 2nd Order and did not deny the Appellee members their right to inspect and copy documents responsive to the "enumerated written request(s) previously submitted."

ASHA agreed in its July 1, 2011 letter to counsel for the Appellee members to make all documents previously produced and any documents existing and responsive to

³ See letters to and from counsel of record, dated June 24 and 25, 2011, and July 1, 2011, attached hereto as Exs. 5, 6 and 7 respectively.

the Appellee members' supplemental requests available for a continued inspection at its corporate offices on July 19, 2011. ASHA also invited the Appellee members to state a proper purpose for each and every additional document request not falling under the scope of this Court's December 2nd Order for the Association's consideration.

Instead of responding to ASHA's good faith attempts to comply with the trial court's order and KRS §273.233, the Appellee members filed a motion for the trial court to order ASHA to appear and show cause why it should not be held in contempt of the trial court's judgment from which this appeal is taken.⁴

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 under well-settled law that "[t]he filing of a notice of appeal divests 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).

In its August 9 Order, the trial court found "proper purpose" for the additional requests as a matter of law when there was a material dispute regarding same, and without considering any evidence, affidavit or testimony, other than hearing a patently false statement made by opposing counsel that the former Executive Director of ASHA, Alan Balch, "fled the state to avoid a deposition."⁵ In addition, the trial court used the

⁴ 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 Exs. 8 and 9 respectively.

⁵ See Affidavit of Executive Director, Alan Balch, attached hereto as Ex. 10.

August 9 Order to expand the scope of its original December 2nd Order to apply prospectively to, in effect, include every shred of paper and electronic file in the possession of ASHA.

At present, there is no limit in scope or time for the ongoing document inspections, which are effectively paralyzing this non-profit organization and preventing its staff from meeting the charitable and educational obligations owed to its approximately 7,000 other members.⁶ ASHA believes that the trial court's expansive interpretation and application of KRS §273.233 creates an absurd result and imposes a substantial burden on the limited resources of non-profit membership associations throughout the Commonwealth of Kentucky. Indeed, 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.

**GROUND FOR ASHA'S MOTION TO ADDRESS ADDITIONAL ISSUES
RAISED DURING THE TRIAL COURT'S POST-JUDGMENT PROCEEDINGS
PURSUANT TO CR 76.03(8), TO CONSOLIDATE APPEALS, AND FOR LEAVE
TO FILE A CONSOLIDATED BRIEF ADDRESSING ALL ISSUES**

A party is limited on appeal to issues in the prehearing statement except that when good cause is shown the appellate court may permit additional issues to be submitted upon timely motion. CR 76.03(8); *Tetric v. Frashure*, 119 S.W.3d 89, 91-92 (Ky. App. 2003). Since entry of the December 2nd summary judgment, the trial court has issued post-judgment rulings which raise additional issues that pertain directly to the appeal of the trial court's interpretation of KRS §273.233 and its application of the statute to the

⁶ See Ex. 2.

facts of this case. ASHA has timely filed a separate notice of appeal from these post-judgment rulings on this date.

The Kentucky Court of Appeals has discretion to consolidate two or more appeals involving the same action and arising from the same court. See, e.g., Atkisson v. Atkisson, 298 S.W.3d 858, 862 (Ky. App. 2009); see also, 19 Snyder, Sumner, and Blickensderfer, Kentucky Practice: Appellate Practice, § 12.02, at p. 84 (2006). In such cases, a party may file a consolidated brief without necessity of a separate motion if the brief is filed on or before the earlier of the due dates for the briefs. Id.

ASHA's request for relief is timely, as it has tendered herewith the consolidated brief and a copy of the separate notice of appeal from the trial court's post-judgment proceedings. ASHA's motion is proper because raising issues pertinent to both appeals in one consolidated brief will serve the interests of judicial economy and fairness to the parties, and will avoid wasting this Court's resources with separate appeals, separate briefs, separate oral arguments, and separate written opinions.

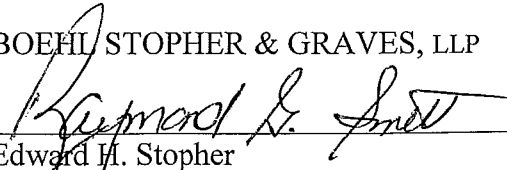
RELIEF REQUESTED

Based on the foregoing, ASHA respectfully requests this Court for an Order (1) to permit ASHA to address additional issues raised during the trial court's post-judgment proceedings in its appellant brief filed this date pursuant to CR 76.03(8); (2) to consolidate the appeal from the trial court's post-judgment proceedings filed this date with the present appeal from the trial court's December 2nd Order; and (3) for leave to file one consolidated brief addressing all issues. ASHA further requests that the consolidated brief tendered herewith be deemed filed on this date and that the appeal taken from the

trial court's post-judgment proceedings be consolidated for all purposes with the present appeal.

Respectfully submitted by:

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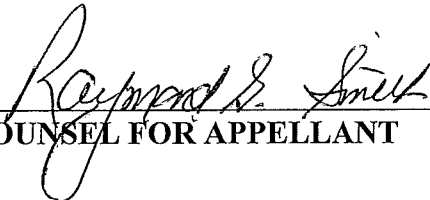
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CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing was served via first class mail and electronically on this 30th day of August, 2011 to the persons and addresses listed below.

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