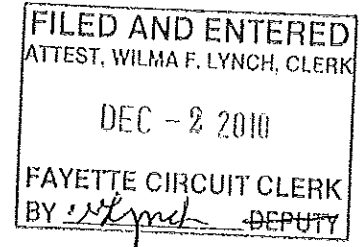


FAYETTE CIRCUIT COURT  
CIVIL BRANCH  
THIRD DIVISION  
CIVIL ACTION NO. 09-CI-5292



AMERICAN SADDLEBRED  
HORSE ASSOCIATION, INC.

PLAINTIFF

V OPINION, ORDER AND JUDGMENT

EDWARD R. BENNETT, ET AL

DEFENDANTS

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This matter is before the Court on Joint Motions for Summary Judgment by the Plaintiff, American Saddlebred Horse Association, Inc. (hereinafter "ASHA"), and the Defendants, Edward R. Bennet, Carl T. Fischer, Jr., Kris Knight, Tom Ferrebee, Simon Fredricks, MD and Lynn W. Via (hereinafter "Defendants" or the "Members") on ASHA's Complaint and the Members' Counter-Claim. Both parties are seeking Declaratory Relief by way of an adjudication as to the interpretation of KRS 273.233. The Court has had the benefit of excellent Memoranda of Law from both parties and has considered equally excellent Oral Arguments on the pending Motions. The Court has taken the matter under advisement and now renders its Opinion, Order and Judgment.

FACTUAL BACKGROUND AND CHRONOLOGY OF EVENTS

The ASHA is a non-profit corporation established to promote the American Saddlebred breed of horse and to promote the American Saddlebred industry. The Defendants are Members of the ASHA. By letter dated February 10, 2009, a CPA firm identified "significant deficiencies" in the accounting policies of the ASHA. By letter dated April 20, 2009, the Defendants-Members requested books and records containing certain information indicating reasons for

concern and articulated reasons supporting their request for information, documents, books and requests from the ASHA. There followed an exchange of correspondence between the parties and Counsel relative to that request of the Members to ASHA. On June 15, 2009, the ASHA allowed representatives of the Members to inspect portions of the books and records of the corporation but refused to permit inspection of other books, records and documents. The ASHA also refused to allow the representatives of the Members to copy any of the materials produced. This was followed by another exchange of correspondence between the Members and the ASHA.

On or about July 7, 2009 the ASHA amended its bylaws to identify, with specificity, the limited categories of documents that it deemed appropriate for inspection by its members. The Amended Bylaw, effective July 7, 2009, provided in part as follows:

“...[A] member of the Association in good standing may be permitted to inspect the articles of incorporation, bylaws, financial statements, minutes, the record of executive compensation, as disclosed on IRS Form 990, and list of the names and addresses of members of the Association during regular business hours, upon at least five (5) business days prior written notice of his or her request stating the purpose of the inspection.”

A limited production of documents transpired on July 29, 2009 which the Members felt were not responsive to their request. Copying of the documents produced were limited by the ASHA. Thereafter, there followed continued correspondence and communications between the ASHA and the Members and their respective representatives and Counsel. Following any agreement between the parties as to resolution of the dispute, the ASHA filed this Declaratory Judgment which drew the Counter-Claim of the Members also seeking Declaratory relief from the Court.

OPINION AND ANALYSIS OF ISSUE PRESENTED

Both Motions for Summary Judgment and Declaratory Relief center around the statutory interpretation of KRS 273.233 which is found in the chapter applicable to “Nonstock, Nonprofit Corporations and provides:

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 or attorney, for any proper purpose at any reasonable time.<sup>1</sup>

That amendment to KRS 273.233 was effective July 15, 2010.

The ASHA argues that the first and second sentences of the 2009 language of KRS 273.233 be read together. Reading them together, argues the ASHA, the reference to “books and records” in the second sentence refers back to the classes of documents enumerated in the first sentence. Thus, argues the ASHA, “books and records” actually means “books and records of account” (i.e., accounting and financial records, minutes, and the membership list) but does not include every document or piece of paper in ASHA’s possession.

On the other hand, the Members argue that the first sentence of the statute identifies records that non-profit corporations are required to maintain whereas the second sentence of the statute provides to the members of a non-profit corporation a right to inspect “all books and

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<sup>1</sup>This was the language of the statute in 2009 when this dispute arose. The statute has been 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 provided that the member’s right of inspection shall not be abolished or limited by the corporation’s articles of incorporation or bylaws.

records.” These are separate and distinct duties, responsibilities and rights mandated by the legislature as to both the non-profit corporation and its Members say the Members.

It is axiomatic and well-settled law that in the interpretation of a statute, the Court must give effect to its plain and ordinary meaning as derived from the language chosen by the General Assembly. The ASHA argues that general terms in a statute associated with specific terms should be construed as being limited to the specific terms and meaning. *Steinfeld v Jefferson County Fiscal Court*, 229 S.W.2d 319 (Ky. 1950). Also, argues the ASHA, a general rule of statutory construction is that enumeration of particular items excludes other items which are not specifically mentioned. *Board of Education of Rockcastle County v Kirby*, 926 S.W.2d 455 (Ky. 1996). On the other hand, the Members argue that statutes granting the right of inspection must be construed liberally. 88 ALR 3d 663 ¶ 2[a] and cases cited at footnote 28 of the Members’ Memorandum. Further, argues the Members, “books and records” should be given a broad construction so as to extend to all records, contracts, paper and correspondence to which the common law right of inspection of a stock holder might properly apply. 18 A. Am.Jur. 2d *Corporations* § 330 and cases cited at footnotes 29 and 30 of the Members’ Memorandum.

Taking all of these statutory construction principles to heart and looking at the “four corners” of the statutory language applicable in 2009 as set out above, this Court is of the Opinion and Judgment that the General Assembly “said what it meant and meant what it said.” Looking at the plain and ordinary everyday language of the referenced statute, it appears to this Court that there are separate and distinct rights, responsibilities and duties of first, the non-profit corporation, and secondly, its members.

If, the General Assembly meant that only the “books and records” set out in the first

sentence of the statute could be inspected by any member, the legislative branch could have certainly worded the second sentence of the statute accordingly. It would not take a Constitutional lawyer to draft language to that effect had the legislature intended to limit the inspection rights of the members of a non-profit corporation to just the enumerated items found in the first sentence of the statute. By way of example only and not meant as an intrusion into the legislative purgative or discretion, if the legislature had intended for the members of a non-profit corporation to only be able to inspect the enumerated items in the first sentence of the statute, it could have spelled out in the second sentence something like:

All **such** books and records of a corporation **specifically set out and enumerated in the first sentence of this statute** may be inspected by any member, or his agent or attorney, for any proper purpose at any reasonable time.

This is but one example imagined by this Court that would have expressly limited the right of inspection of a member of a non-profit corporation as is argued by the ASHA. Clearly, the legislature did not include any such language or any other language to that affect in the statute effective in 2009. Rather, and significantly to this Court, the legislative language set out that:

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. (emphasis added)

In the Court's mind, had the legislature intended to limit the rights of inspection of a member of a non-profit corporation to only the enumerated items set out in the first sentence of the statute as argued by the ASHA, it could have certainly done so as suggested by the Court in the language above or similar language. On the other hand, the fact that the legislature did not include that language and rather included the all-inclusive description of "**all books and**

records” is a clear indication to this Court that it was the intent of the legislature to do exactly what the language of the statute, in its plain and ordinary every day meaning, expressly set forth, i.e., that “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.” (emphasis added)

While there is no Kentucky case interpreting this statute, sister states support this Court’s interpretation of a similar statute interpreting the scope of the inspection rights granted to members of a non-profit corporation. South Dakota law is identical to the language of this Kentucky statute. In 2004, the Supreme Court of South Dakota held that “as a long as a member has stated a proper purpose, which is presumed, the member may inspect all books and records necessary to make an intelligent and searching investigation” *Lang v W.Providers Physician Org.*, 688 N.W. 2d 403, 407 - 08 (S.D. 2004) (citing *Patel v Illinois State Medical Society*, 698 N.E. 2d 588 (Ill. App. Ct. 1998).

The Illinois statute on the right of inspection differs only in that the right to inspection is afforded to only those members entitled to vote. The Appellate Court of Illinois held in *Patel v Illinois State Medical Society*, *supra* as follows:

The right to examine records may even extend to records for which a proper purpose has not been directly shown, so long as one has been shown for some records: “the shareholder is not required to establish a proper purpose for each record he requests. Once that purpose has been established, the shareholder’s right to inspect extends to all books and records necessary to make an intelligent and searching investigation and from which he can derive any information that will enable him to better protect his interest.”

Further, this Court does adopt the argument that inspection statutes are to be construed liberally. While this is not an “Open Records” case, the same general principle is applicable that

the right of a member of the general public or, in the case at bar, the right of a member of a non-profit corporation, should be inclusive as to the material sought and should be construed liberally in favor of inspection. See also *Bill Reno, Inc. v Rocky Mountain Ford Dealer's Advertising Association*, 378 P2d 206 (Colo. 1963); *Saio v McKesson HBOC, Inc.*, 806 A.2d 113 (Del. 2002). Simply put, members of either a for-profit corporation or a non-profit corporation are entitled to information relative to the business activities conducted by the corporation. This Court feels that the requested items enumerated by the Members in the case at bar fit squarely within that principle and parameters.

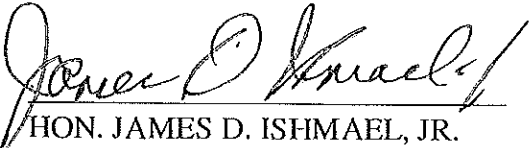
The 2010 Amendment to KRS 273.233 affects two issues in this case. There was some dispute about whether or not the "right to inspect" included only the opportunity to review certain documents or whether the "right to inspect" also included the right to copy the documents. The legislature has now set forth explicitly in the 2010 Amendment that not only may all books and records of a non-profit corporation be inspected by any member but that the said documents may also be copied by the member. Further, the July 2009 Amendment to the Bylaws attempting to limit the right of inspection to only certain documents or items has been negated by the last sentence of the 2010 Amendment to the statute. This Court holds and determines that the Bylaw Amendment of the ASHA is invalid and carries no force or effect as it is in direct violation of the statute, as amended.

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 previously submitted. This right of inspection and copying is not

limited to the enumerated items set out in the first sentence of KRS 273.233 but shall include each and every item, document or record of any description responsive to the written requests of the Members. The purported 2009 Bylaw Amendment of the ASHA is ruled to be invalid and unenforceable in this regard.

IT IS THEREFORE ORDERED AND ADJUDGED that the Plaintiff's Motion for Summary Judgment is OVERRULED and the Defendants-Members' Motion for Summary Judgment is GRANTED pursuant to this Opinion, Order and Judgment.

Dated this 30 day of November, 2010.

  
HON. JAMES D. ISHMAEL, JR.



This is to certify that a true and correct copy of the foregoing Opinion, Order and Judgment was served upon the following parties, via First Class Mail, this 2nd day of November, 2010:

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