

COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
THIRD DIVISION
CASE NO. 09-CI-5292

NOV 23 2011

AMERICAN SADDLEBRED
HORSE ASSOCIATION, INC.

PLAINTIFF

V. **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

EDWARD R. BENNETT, et al.


DEFENDANTS

The Motion of the Defendants (hereinafter "Members") to hold the Plaintiff, American Saddlebred Horse Association, Inc. (hereinafter "ASHA"), in Contempt of Court and to Sanction ASHA for its conduct came on for hearing before the Court on October 14, 2011. The Court heard sworn testimony from Joan Jones and Will Wood from ASHA. The Court has now received and reviewed Proposed Findings of Fact and Conclusions of Law and a Brief from each party and has taken the issue under Advisement. It is now ripe for consideration and adjudication by the Court.

FINDINGS OF FACT

ASHA had adopted a "Document Retention and Destruction Policy" on July 6, 2009 which was filed as an Exhibit at the hearing. The Policy provided, in part, at Paragraph VI titled "Document Destruction" as follows:

Document Destruction will be suspended immediately upon any indication of an official investigation or when a lawsuit is filed or appears imminent. Destruction will be reinstated upon conclusion of the investigation.

A True Copy
ATTEST: WILMA F. LYNCH, CLERK
FAYETTE CIRCUIT COURT
By:  Deputy

This lawsuit was filed on October 6, 2009. While ASHA employees Jones and Wood were generally familiar with the lawsuit and the substance of the issues presented, no one had specifically told them to keep, preserve or maintain the business records, emails, documents or electronically retained information because of the pending litigation or otherwise. Each employee was aware of ASHA's "Document Destruction" Policy set out above. Each employee was generally aware that the main issue in this litigation was what records and documents of ASHA, if any, would have to be produced to the Members.

Sometime in February 2010, during the pendency of this litigation, ASHA's then Executive Director, Alan Balch, left the employment of ASHA. The circumstances of that departure is not before the Court but paperwork related to that parting have been produced to the Members by ASHA. During or sometime before Balch left ASHA, he had printed out to paper copy emails generated or received while employed at ASHA. Whether or not Balch printed out all emails is at issue. Balch may also have deleted emails prior to departure.

Toward the end of 2009, Balch's computer, along with others, had been "upgraded" and a "replacement" computer was provided to Balch for business use. Balch's "old" (former) computer was recycled for parts. The information and emails stored in the "old" computer were transferred to the "new upgraded" computer. When Balch left ASHA, certain emails were printed out to hard copies but some information or emails may have been kept and stored in the "new upgraded" computer. Any stored memory in Balch's computer was put on shared files. The new computer was then wiped clean and ready for another employee's use at ASHA.

Will Wood, the Technical Manager at ASHA since 2007, had the information and emails transferred from Balch's computer on a "backup" computer disc or other retention device on his desk after these transfers of information from Balch's computer. Sometime in 2010, since Wood

had not received any directive or instructions from anybody to the contrary, Wood “repurposed” the information, i.e., deleted the information.

The only backup available was a “Disaster Recovery” program which was a snapshot of the records retained on a day certain. The Court understands this backup information was also deleted by Wood. Wood also understood that a “document” per the Policy had to be printed out to paper or hard copy before ASHA’s Policy on Document Destruction applied.

In summary, ASHA employees deleted and/or destroyed, during the pendency of this litigation, computer hard drives and backup servers and/or backup databases which contained and constituted “records and documents” of ASHA per KRS 273.233 and ASHA’s own Document Retention and Destruction Policy. There is little dispute about this fact from the ASHA employees. This was primarily Balch’s emails and data but could include other information as well. ASHA also failed to preserve or give explicit and direct orders to its employees NOT to delete or destroy any “records or documents” in its possession, custody or control as to records, documents and information. This opened the door and gave employee Wood some alleged “flexibility” in his consideration of whether or not he had the discretion to delete or “repurpose” records and databases which contained records and documents of ASHA which were subject to the Court’s further orders.

CONCLUSIONS OF LAW

The Members request the Court hold ASHA in civil contempt, order ASHA to compensate the Members for all of their expenses and attorney fees and to order ASHA to produce all records, including those records listed in its privilege log. ASHA argues this is a case involving criminal contempt because, *inter alia*, the Members are seeking to punish ASHA.

Because of the significant disagreement as to the relief sought, it would be appropriate to address both positions as it applies to the facts of this case.

Contempt is the willful disobedience of – or open disrespect for – the rules or orders of a court. *Kentucky Retirement Systems v. Foster*, 388 S.W.3d 788, 801 (Ky. App. 2010). Contempt can be civil or criminal in nature. *Kentucky River Community Care, Inc. v. Stallard*, 294 S.W.3d 29, 31 (Ky. App. 2008). The type of contempt depends on the reason for the contempt citation. *Foster*, supra.

“Civil contempt ... is the failure to do something under order of court, generally for the benefit of a party litigant. The purpose of a court’s exercising its civil contempt powers is to force compliance with its orders or to compensate for losses or damages caused by non-compliance.” *Foster*, supra. In *Foster*, the issue was civil contempt when the trial court found a party litigant had forced the opponent to relitigate an issue that had been decided.

On the other hand, “criminal contempt is conduct that demonstrates disrespect toward the court, obstructs justice, or brings the court into disrepute. If the court’s purpose is to punish, the sanction is criminal contempt. *Stallard*, supra at 31. (Internal citations omitted).

Criminal contempt may be direct or indirect. Direct contempt involves an act committed in the presence of the court; indirect contempt is a violation that is committed outside the presence of the court and requires a hearing and presentation of evidence to establish a violation of the Court’s order. *Id.* ASHA argues the Members are seeking indirect criminal contempt even though the Members seek civil contempt.

Criminal contempt, unlike civil contempt, requires all elements, including willful disobedience, must be proven beyond a reasonable doubt, and the accused has a right to a jury trial if the fine is “serious.” *Stallard*, at 31. In *Brockman v. Commonwealth*, 185 S.W.3d 205

(Ky. App. 2005), a fine of \$825 satisfied the threshold element of “serious” to merit a jury trial. Civil contempt does not require proof beyond a reasonable doubt. *Commonwealth v. Burge*, 947 S.W.2d 805 (Ky. 1996). The burden of proof in civil contempt is generally by clear and convincing evidence. The minority of courts have found the burden to be by a preponderance of the evidence. 17 Am. Jur. 2d Contempt § 183 (2004). Kentucky has not adopted a standard on civil contempt.

On balance, this Court Concludes as a Matter of Law that the Members are seeking an Order of Civil Contempt against ASHA. The primary goal of this issue is to require ASHA to produce its records and documents that may still be held, including records listed on its privilege log, and for attorney fees incurred for litigating this dispute. This is civil contempt by definition.

ASHA had a legal duty to maintain all of its records and documents during this litigation. *Tinsley v. Jackson*, 771 S.W.2d 331 (Ky. 1989). This Conclusion is based on the fact that all such records and documents were the subject matter of this litigation. If ASHA was free to delete or destroy some of its records during the lawsuit, this Court’s ultimate ruling would be academic at best. ASHA also had a duty to comply with its own Document Retention and Destruction Policy which required ASHA to suspend any document destruction when a lawsuit is filed. This Court Concludes a “document” in said Policy includes electronically retained information, not just paper records as ASHA argues. ASHA had this duty and obligation, even if its employees were not advised of this duty by its Counsel.

Balch printed off some records but deleted some other electronic records. ASHA could not produce Balch’s emails because they were later deleted by ASHA. Balch’s “old” computer was sent to a recycling center which further prevented access to it by the Members. ASHA also failed to preserve records on backup servers and a database which were created just before this

lawsuit was filed. ASHA's current Executive Directive may have also deleted certain emails or other electronically stored information.

This Court Concludes as a Matter of Law that ASHA, based on the foregoing Findings of Fact and other Conclusions of Law set out herein, is in civil contempt of this Court.

As to remedies, the Court cannot order production of any records or documents that have been destroyed, deleted or made otherwise unavailable. Upon further reflection, and the Court being sufficiently advised;

IT IS ORDERED and ADJUDGED as follows:

1. ASHA is held in Civil Contempt of the Court for the actions of its employees in not maintaining all of its records and documents during their litigation as it was required to do by well-settled law and for its destruction or deleting said records or documents in absolute violation and disregard of its own Document Retention and Destruction Policy. This Finding and Conclusion is by clear and convincing evidence and is frankly beyond dispute;
2. ASHA shall pay to the Members such sum or sums of money that will fairly and reasonably compensate the Members for any and all expenses and costs, including reasonable attorney fees, that were incurred due to the preparation of or filing the pending Motion for Contempt or preparing for or attending the hearing on this issue or the preparation of or filing the Briefs requested by the Court at the conclusion of the hearing on October 14th;
3. The Members shall submit an affidavit from their Counsel in support of a specific finding by the Court as to a monetary amount within thirty (30) days of entry of this Order;

4. ASHA may request a hearing to contest the amount sought upon notice to the Court and Counsel within ten (10) days thereafter.

This the 23 day of NOV, 2011.


JUDGE, FAYETTE CIRCUIT COURT

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Findings of Fact,

Conclusions of Law and Order was served upon the following parties, via First Class Mail, this 23 day of November, 2011:

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