

AMERICAN SADDLEBRED HORSE
ASSOCIATION, INC.

PLAINTIFF

ASHA'S RESPONSE TO DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT AND REPLY IN
v. **SUPPORT OF ASHA'S MOTION FOR SUMMARY JUDGMENT**

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

DEFENDANTS

* * * * *

Comes Plaintiff, American Saddlebred Horse Association, Inc. ("ASHA"), by counsel, and submits the following Response to Defendants' Motion for Summary Judgment and Reply in Support of its own Motion for Summary Judgment:

INTRODUCTION

ASHA was compelled to file this action for declaratory judgment construing the requirements of KRS 273.233 because of the Defendants/Counter-Plaintiffs' continued threats of litigation.¹ Presented with Defendants' unyielding but amorphous assertions that ASHA had not fulfilled its responsibilities to a small splinter group of its membership, ASHA had no choice but to halt the continuing harassment by this group and appeal to this Court to resolve the dispute. Throughout this matter, the Defendants have been nonspecific about their purported concerns and the documents to which they believe they are entitled. It is ASHA's contention that the declaratory judgment it seeks in this matter requires a full, frank, and clear consideration of the legal issues at play. However, the Defendants in their motion for summary judgment on Count I

¹ See Complaint, Exhibits G and P.

of their counterclaims² have failed to either respond to ASHA's own motion or offer any reasoned analysis that furthers the Court's consideration of these issues, and instead have perpetuated a muddled perspective of the legal and policy issues involved. ASHA respectfully requests that the Court review the respective briefs of the parties and conclude that the Defendant's expansive interpretation of KRS 273.233 lacks support and cannot stand.

ARGUMENT

A. Defendants Fail to Provide Any Support for Their Expansive Reading of KRS 273.233

Emblematic of the Defendants' approach is their mischaracterization of the record. Specifically, the Defendants state that Carl Holden had a disagreement with Alan Balch "about his right to inspect ASHA records",³ thereby backhandedly suggesting that information was withheld from a director of the association. However, that simply is not true, and the deposition testimony does not support any such characterization.⁴ Rather, Mr. Holden's testimony made clear that there was no disagreement about any right to inspect records, and that indeed Mr. Holden's requests for information were answered. Apparently Mr. Balch and Mr. Holden had a difference over the chain of communication involved (i.e. whether directors should communicate directly with staff or should instead direct communications to the office of the executive secretary). However, in no manner could Mr. Holden's testimony be read to mean that at any time Mr. Holden or anyone associated with ASHA questioned his right to information, and it is a rank distortion of the record to suggest otherwise.

² The Defendants have explicitly limited their dispositive motion to the declaratory judgment counterclaim, and have not raised their counterclaims for breach of contract and promissory estoppel in their motion. Defendants' Motion for Summary Judgment, p. 1.

³ Defendants' Memorandum in Support of Cross-Motion for Summary Judgment, p. 4.

⁴ Defendants' Memorandum in Support of Cross-Motion for Summary Judgment, Ex. 9 and ASHA's Motion for Summary Judgment, Ex. 3, p 12: "Q: Did you feel like you had access to all of the information you needed to fulfill your fiduciary obligations? A: Yes."

Equally, the Defendants perpetuate their characterization of the comment made on August 12, 2009 by Mr. Balch over the internet forum on <<http://www.trot.org>>, as a formal offer to allow the Defendants to “inspect or review whatever they want.”⁵ As the record clearly shows, however, the purpose of Mr. Balch’s post was to foster a meaningful discussion about the Defendants’ concerns, and the relevant portion of the posting provided in full:

The small group of concerned members should avail themselves of the opportunity offered to them 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.

(Emphasis in original).⁶ Mr. Balch posted this comment precisely because the Defendants had not made clear what their concerns were, and therefore Balch made the comment in hopes of obtaining a clearer understanding of the small group’s concerns. However, the Defendants refused to enter into any such discussion at the October 5, 2009 meeting. Regardless, Defendants distort the record and play coy with the facts in implying that Mr. Balch’s posting constituted a bare offer to “inspect or review whatever they want.”

Indeed, it is telling of the Defendants’ avoidance of a frank discussion of the issues that the Defendants offer no response or alternative to the standards of statutory construction raised in ASHA’s own Motion for Summary Judgment. In fact, the absence of any discussion of standards for statutory construction should be conclusive against the Defendants – after all, the instant claim is for declaratory judgment of interpretation of a statute, and as the Kentucky Supreme Court has noted, in construing statutes, the goal of the Court “is to give effect to the

⁵ Defendants’ Memorandum in Support of Cross-Motion for Summary Judgment, p. 4.

⁶ Defendants’ Memorandum in Support of Cross-Motion for Summary Judgment, Ex. 10; Complaint, Ex. L.

intent of the General Assembly, and we derive that intent, if at all possible, from the plain meaning of the language the General Assembly chose.”⁷

In interpreting statutory language, it is necessary to glean legislative intent, and the traditional standards of statutory construction, as previously argued by ASHA, here dictate that the scope of “books and records” in the second sentence of KRS 273.233 clearly is limited to those specified in the preceding sentence of the same statute. Instead of responding on the grounds of any arguable contrary legislative intent, the Defendants wholly ignore the well-established precepts of statutory construction, and would have this Court do the same in contravention of all principles of jurisprudence.

Instead, the Defendants embark upon a lengthy recitation of case law and secondary authority in support of their assertion that the Court should find that, regardless of any statutory language, the Defendants are entitled to enforcement of an expansive common law right of inspection of the nonprofit association’s records, without limitation. Defendants suggest that there is no meaningful difference between for-profit shareholders and members of a nonstock, nonprofit association, and that rights of inspection granted under common law apply equally to both, even in the face of statutory codification of inspection rights.⁸

However, even while asserting that the distinction between for-profit shareholders and nonprofit members should have no effect, the Defendants simply confirm ASHA’s point that the common law right of inspection was derived from a shareholder’s property interest and the need to protect that interest. Quote after quote cited by the Defendants makes this very point:

⁷ Bowling v. Kentucky Dept. of Corrections, 301 S.W.3d 478, 490-491 (Ky. 2009).

⁸ Indeed, while Defendants suggest that statutory rights of inspection in the context of for-profit shareholders merely “supplement” the common law right, even in that context it has been specifically held that “When a general codification has occurred, a statute fully occupying the field covered by the common law, as certainly was here the case, replace and extinguishes the common law.” Caspary v. Louisiana Land and Exploration Co., 707 F.2d 785, 791 (4th Cir. 1983).

The right of a stockholder to examine the records and books of account of a corporation... will enable him to better protect his interest and perform his duties. State v. Malleable Iron Range Co., 187 N.W. 646 (Wis. 1922).

We therefore conclude that all of the correspondence in question... is subject to inspection by plaintiff, who has an interest to protect... Otis-Hidden Co. v. Scherich, 187 Ky. 423, 219 S.W. 191, 194 (1920) (also observing on p. 193 that “[t]he right of inspection [of a stockholder] rests upon the fact of ownership”).

While the books and papers of the corporation are necessarily in the hands of the corporate officers and agents, they are the common property of the shareholders who have a right to know what the corporation is doing.... Business prudence demands that the investor keep a watchful eye on the management and condition of the business. 5A William Meade Fletcher, Fletcher Cyclopedia of the Law of Private Corporations §2213.

As a matter of self-protection, a stock holder was entitled to know how his agents were conducting the affairs of the corporation of which he or she was a part owner. Saito v. McKesson HBOC, Inc., 806 A.2d 113, 116 (Del. 2002) (quoting Shaw v. Agri-Mark, Inc., 663 A.2d 464, 467 (Del. 1995)).

(Emphasis added). It is the stockholder’s individual property interest that gave rise to the common law right, which existed to serve the shareholder’s self-interest. No such property interest extends to members of a nonstock, nonprofit corporation, and the underlying rationale for the common law right cannot be logically extended to organizations such as ASHA here.⁹ Rather, the sole basis for the member’s right of inspection in the case of a nonprofit association is found in the statute, and the Defendants attempts to fall back upon some broad assertions of common law will not stand.

⁹ Even those cases involving nonprofit corporations that suggest a member has an interest in the corporations’ business affairs involve some personal interest. See, for example, Bill Reno, Inc. v. Rocky Mountain Ford Dealers’ Advertising Association, 378 P.2d 206, 208 (Colo. 1963) (where plaintiff alleged he was entitled to a share of the assets on dissolution); Burton v. Cravey, 759 S.W.2d 160 (Tex. 1988) (condominium homeowner’s association). Notably, and as already argued, ASHA does not contend that a member has no interest in ensuring the association is pursuing its charitable mission, but such an interest is simply not at all analogous to a for-profit shareholder’s self-interest in protecting an investment. And in the context of an LLC, where Defendants note the statute by default permits an LLC member without a percentage interest, the statute nevertheless also by default confers management rights upon such members, yielding a personal interest (and duties) distinguishable from a non profit association member who does not have any management rights. KRS 275.195(3); 275.165(1).

As noted before, a subscribing member of a nonstock, nonprofit association has an interest in ensuring that the association pursues its charitable mission, and the statute should be construed to facilitate that interest. However, it is ASHA's contention that all of the information already disclosed to the Defendants more than serves that purpose and satisfies the scope of the statute.¹⁰ Defendants repeatedly assert that financial information, specifically payroll information, has been withheld from them, implying that there is information regarding association expenses being withheld from their review. However, that is a mischaracterization of the information which was withheld. ASHA has already clarified that the payroll information withheld is those payroll files that individually identify people, or could be tied to identified individuals, who are in the employ of ASHA, people who have a legitimate and proper expectation in the privacy of their personal salary information. Payroll expenditure information as a classification of expense clearly is featured in ASHA's regular financial reports, which were provided to the Defendants. It is simply not right to imply that Defendants have not been provided information required and necessary to address any concerns about the propriety of association expenditures.

Furthermore, in support of their Motion, the Defendants cite two cases for the proposition that, under similar statutes, two courts had held that the scope of "books and records" should be construed broadly. However, both of those cases explicitly stated that the issue of the scope of the right was not an issue on appeal, and therefore comments by those courts neither represent a studied review of the law nor offer any guidance to the Court here. In quoting Lang v. W. Providers Physician Org., 688 N.W.2d 403 (S.D. 2004), the Defendants conceded that the scope

¹⁰ Of course ASHA believes that financial information is available under the statute as a "record of account" – that's not a judicial admission, that's common sense – but that does not imply that documents may not be subject to countervailing privacy considerations, or that the association is required to throw open every document that contains any sort of number, particularly if, as here, the same information is otherwise available in a nonexempt form.

of “books and records” had not been preserved on appeal, but nevertheless they cite it for the very suggestion that the scope is broad.¹¹ In quoting Patel v. Ill. State Med. Soc’y, 698 N.E.2d 588, 593 (Ill.App.Ct. 1998), the Defendants suggest that the Court there entered a holding on the central issue of the scope of the phrase “all books and records”. However, the Defendants neglect to provide the full excerpt from the Illinois court’s opinion, which actually appeared in a footnote to the opinion. That footnote concludes with the statement that “However, we need not decide the scope of the plaintiffs’ right at this juncture; it suffices to observe that they would at least be entitled to inspect those records for which they had shown a proper purpose.”¹² Therefore, neither of these cases provide any guidance on the issue of the intended scope of “books and records”.¹³

Finally, the Defendants provide absolutely no justification for the logical consequences of their assertion that KRS 273.233 should be read broadly to include all documents of any kind. Simply put, if the statute were so construed, then a nonprofit member’s right of inspection would be far more comprehensive than and even exceed those provided by statute to a for-profit shareholder investor. Such an assertion is ridiculous, particularly in the case of an association, such as that here, where member status can be achieved through payment of a nominal

¹¹ Defendants’ Memorandum in Support of Motion for Summary Judgment, p. 8, fn. 25. The court held in Lang, p. 410, that “WPPO claims that the language ‘all books and record’ as contained in SDCL 47-24-2, does not encompass all documents but has a more limited meaning.... WPPO has not preserved this issue for appeal”.

¹² 698 N.E.2d at 593, fn. 4. The Illinois statute actually currently provides “Any voting member shall have the right to examine, in person or by agent, at any reasonable time or times, the corporation’s books and records of account and minutes, and to make extracts therefrom, but only for a proper purpose”. 805 ILCS 105/107.75.

¹³ Those cases referenced the scope of requests solely in the context of the specific “proper purpose” given by the inspecting members for their review. As previously noted here, Defendants have given very little explication of their purported “concerns”, despite repeated requests by ASHA as to exactly what information they might be after. ASHA is forced to conclude that either their purpose is not proper, or they feel that no factual purpose is required beyond the general claim of “oversight”.

subscription fee.¹⁴ However, the Defendants offer no policy or logic that would support such an absurd conclusion.

B. Recent Amendment to KRS 273.233 Has No Bearing on This Action

KRS 273.233 was amended in the recent legislative session to explicitly state that books and records “may be inspected and copied by any member”. 2010 Senate Bill 150, Section 17 (emphasis represented insertion). The bill was signed by the Governor April 13 (as ASHA was preparing to file its own Motion for Summary Judgment) and is not effective until July 15, 2010. However, Defendants suggest that the amendment to the statute indicates that the General Assembly all along intended that KRS 273.233 included a right to inspect. Not only does the language of the current (soon to be former) statute not support such intent, but the amendment of the statute actually establishes precisely the opposite. It is a rule of longstanding in Kentucky that, where the General Assembly has amended a statute to introduce a requirement, it is presumed that the amendment changed the law. In Whitley County Bd. of Ed. v. Meadors, 444 S.W.2d 890 (Ky. 1969), for example, the teacher licensing standards were revised to add a new requirement that a certificate be obtained before serving a required probationary period. It was argued there, as Defendants argue here, that the amendment indicated that the General Assembly intended the requirement to be part of the law all along. However, the Court found precisely the opposite: “So, for whatever purpose it might have had in mind, the legislature now has required the teacher to hold a certificate to obtain probationary service credit. But there is no presumption from the amendment that such is what the statute meant originally. On the contrary, the presumption is that the legislature, by the amendment, intended to change the law.” Id. at 891.

¹⁴ Mary Grace Blasko, Kurt S. Crossley and David Lloyd, Standing to Sue in the Charitable Sector, 28 U.S.F.L.R. 37 (Fall, 1993), cited by Defendants, concedes at p. 58 that “Admittedly, some charitable corporations call anyone who makes contributions above a certain amount a ‘member,’ [fn 180] and courts generally have not granted standing to such ‘members.’” (noting further in footnote 180 that “The only connection of many of the ‘members’ of museums, zoological societies, etc., with the organization is an annual contribution”).

Therefore, if anything, the applicable presumption is that in amending KRS 273.233, the General Assembly seeks to provide for a member's right to copy records where there actually was no right before, and ASHA was well-within its rights to deny whatever copies it did.¹⁵

This declaratory judgment requests a ruling under the current form of KRS 273.233, which was effective and controlled the Defendants' requests made in 2009. The amendments set forth in 2010 Senate Bill 150 are not even effective until July 15, 2010, and have no bearing on this case, except as provided above as indicating the legislative intent that there was no right to copies before amendment.

Furthermore, the law even as amended cannot be read to require ASHA to incur the expense of generating copies itself. The Defendants have asserted that KRS 273.233 gives them a right to obtain from ASHA photocopies of records they are entitled to inspect. ASHA has provided to the Defendants photocopies of some documents requested by the Defendants; however it is ASHA's position that KRS 273.233, both as currently enacted and as amended, simply does not give the Defendants the right to compel ASHA to make photocopies and produce them. The reason for this is simple: ASHA is a nonprofit association that does not enjoy the benefits of a large endowment for operational financing and like almost all nonprofits walks a thin financial line from year to year.

In the context of a for-profit corporation, KRS 271B.16-020 provides specifically that "[a] shareholder of a corporation shall be entitled to inspect and copy" specified records, and KRS 271B.16-030(2) provides that "[t]he right to copy records under KRS 271B.16-020 shall include, if reasonable, the right to receive copies made by photographic, xerographic, or other means", for which the corporation may assess a reasonable charge.

¹⁵ It is important, however, to not lose sight of the fact that ASHA did actually make available to members all documents produced in response to the Defendants' initial request on ASHA's website.

There is no parallel provision in the nonprofit statutes. KRS 273.233 merely provides that books and records “may be inspected” by members, without any mention of copies. And even after amendment effective July 15, 2010, there is no provision regarding payment for copies.

It is ASHA’s position that the difference between the treatment of Chapter 271B, which provides specifically that a stockholder of a for-profit corporation may “receive” photocopies for which the corporation may assess a charge, and the treatment of Chapter 273, which merely provides the member the right to inspect (and effective July 15, to copy), reflects an understanding of the General Assembly as to the difference in burden of inspection on nonprofit associations versus for-profit corporations. Specifically, ASHA contends that while KRS 273.233 will, after July 15, 2010, permit members to make copies of inspected records, whether by longhand or by scanning or photocopying, the burden for doing so is placed entirely on the members, who must provide their own means for copying. Members cannot force a nonprofit association to make copies for them. Otherwise, a nonprofit association would be required to devote significant personnel time and obtain or utilize the equipment necessary to generate copies (particularly in the case of repeated requests as voluminous as those made by the Defendants here). Even were a nominal charge allowed to be assessed, such a requirement would be an onerous burden imposed on nonprofit entities, and the legislative enactment reflects in the nonprofit context a shifting of the burden of providing the means of making copies to the inspecting member.

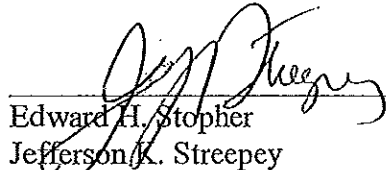
CONCLUSION

WHEREFORE, for the foregoing reasons, ASHA requests that this Court deny Defendants’ Motion for Summary Judgment and reiterates its request that the Court enter summary judgment in favor of ASHA declaring that the scope of the right of inspection of

nonprofit "books and records" set forth in KRS 273.233 is limited to those classes of records identified in the statute, specifically "books and records of account", "minutes of the proceedings of its members, board of directors and committees having any of the authority of the board of directors", and "a record of the names and addresses of its members entitled to vote." ASHA further requests a finding by the Court that the documents already produced by ASHA satisfies the requirements of KRS 273.233, and that the Defendants are not entitled to any further documentary production. And finally, ASHA requests that the Court find that ASHA is only required to permit inspection of books and records under KRS 273.233.

Respectfully submitted,

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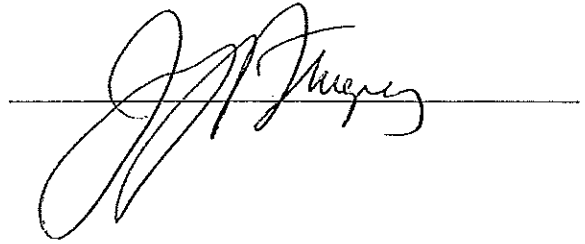
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CERTIFICATE OF SERVICE

It is hereby certified this 1st day June, 2010, that a copy of the foregoing was served via first class mail to the following:

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A handwritten signature in cursive script, appearing to read "J. M. [unclear]", is written over a solid horizontal line. The signature is positioned to the right of the address block.