

**COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
CASE NO. 2011-CA-002320**

**AMERICAN SADDLEBRED
HORSE ASSOCIATION, INC.**

APPELLANT

v.

**Appeal from the Fayette Circuit Court
Action No. 09-CI-05292**

EDWARD BENNETT, ET AL.

APPELLEES

APPELLEES' MOTION TO DISMISS

Pursuant to CR 76.34(6), Appellees Edward R. Bennett, Carl T. Fischer, Jr., Kris Knight, Tom Ferrebee, Simon Fredricks, M.D., and Lynn W. Via (collectively the "Members") hereby move the Court to dismiss this appeal filed by Appellant American Saddlebred Horse Association ("ASHA") on December 22, 2011. The November 23, 2011 order of the Fayette Circuit Court from which ASHA appeals is not a final and appealable order. Therefore, this Court lacks jurisdiction to hear this appeal.

I. INTRODUCTION

On September 23, 2011, the Members filed a motion to hold ASHA in contempt of court and sanction it for its flagrant misconduct during this litigation. The Fayette Circuit Court held an evidentiary hearing on the Members' motion on October 14, 2011 and requested post-hearing briefing from the parties. On November 23, 2011, the Fayette Circuit Court entered an order (the "November 23 Order") finding, "beyond dispute," that ASHA was in contempt of court and ordering that 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 [Members' motion to hold ASHA in contempt]." The

November 23 Order specifically permitted the Members thirty days to submit an affidavit with regard to the amount of expenses and costs incurred and permitted ASHA ten days thereafter to request a hearing to contest that amount.

The Members submitted their affidavit of expenses and costs on December 19, 2011. On December 27, 2011, ASHA filed a motion for a hearing to contest the requested amount. Yet, despite the clear instructions in the November 23 Order that further steps were required to fully adjudicate the Members' contempt motion and ASHA's own intent to contest the expenses and costs sought by the Members, ASHA filed this notice of appeal on December 22, 2011, before the Circuit Court could consider the amount of expenses and costs to be awarded to the Members.

II. ARGUMENT

THIS APPEAL MUST BE DISMISSED BECAUSE THE NOVEMBER 23 ORDER IS NOT A FINAL AND APPEALABLE ORDER

Appellate courts in Kentucky have jurisdiction to hear appeals exclusively from "final" orders of the lower courts. *Hook v. Hook*, 563 S.W.2d 716, 716-17 (Ky. 1978). CR 54.01 defines a final order. "A final or appealable judgment is a final order adjudicating all the rights of all the parties in an action or proceeding, or a judgment made final under Rule 54.02." CR 54.01. The November 23 Order is neither an order that adjudicated all the rights of all the parties nor an order made final under CR 54.02.

"[T]he final and appealable character of an order should be tested on the basis of whether the order grants or denies the ultimate relief sought in the action or requires further steps to be taken in order that the parties' rights may be finally determined." *Brumley v. Lewis*, 340 S.W.2d 599, 600 (Ky. 1960) (quotation omitted). The November 23 Order did not grant or deny the ultimate relief requested, *i.e.*, a sanction against ASHA for its contemptuous actions. Rather, the

November 23 Order merely set the stage for such an award, finding that ASHA acted in contempt of court but leaving the issue of the amount of sanctions for further proceedings.

In order for there to be an appealable final order in contempt-of-court proceedings, there must be both a finding of contempt and an imposition of a sanction or penalty, such as a fine or a jail sentence; a mere adjudication of contempt of court is not a final order until a sanction or penalty is also imposed.

4 Am. Jur. 2d *Appellate Review* § 198 (2007). Because the November 23 Order left open the amount of costs and expenses to be paid to the Members, it is not a final and appealable order. *See Hill v. Kentucky Lottery Corp.*, 327 S.W.3d 412, 418 (Ky. 2010) (“If an order entered in a cause does not put an end to the action, but leaves something further to be done before the rights of the parties are determined, it is interlocutory and not final.”) (quotations omitted); *Hale v. Deaton*, 528 S.W.2d 719 (Ky. 1975) (dismissing appeal where Circuit Court’s order specifically left open value of property in dispute, required the defendants to produce an accounting and permitted a hearing to dispute that accounting).

Likewise, the November 23 Order was not made final under CR 54.02. “CR 54.02 . . . permits an interlocutory judgment or order to be made appealable under specified circumstances.” *Hook*, 563 S.W.2d at 717. To be appealable under CR 54.02, the lower court must “determin[e] that there is no just reason for delay” and must “recite such determination and . . . recite that the judgment is final.” CR 54.02(1). The rule is clear regarding the requirement of these recitals:

In the absence of such recital, any order or other form of decision, however designated, which adjudicates less than all the claims or the rights and liabilities of less than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is interlocutory and subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Id. Here, the Circuit Court made neither the necessary determination that there is no just reason for delay nor the required recitals. Therefore, the November 23 Order is not appealable under CR 54.02. *See Peters v. Bd. Of Educ. Of Hardin County*, 378 S.W.2d 638, 639 (Ky. 1964) (“In the absence of the recitations required by the rule, in the order or judgment, an adjudication of one or more claims, but less than all the claims in an action, will not be entertained on appeal by the Court of Appeals.”)

III. CONCLUSION

Because the November 23 Order is not a final and appealable order, the Court lacks jurisdiction and this appeal must be dismissed.

Respectfully submitted,



Lewis G. Paisley
Culver V. Halliday
Stephen A. Houston
STOLL KEENON OGDEN PLLC
2000 PNC Plaza
500 West Jefferson Street
Louisville, Kentucky 40202

Counsel for Appellees

CERTIFICATE OF SERVICE

A copy of the foregoing document was served by hand delivery to the following on the 4th day of January, 2012:

Edward H. Stopher
Jefferson K. Streepey
Raymond G. Smith
Jeff W. Adamson
Boehl Stopher & Graves, LLP
400 West Market Street, Suite 2300
Louisville, KY 40202-3354

And by First Class United States Mail, postage prepaid, to:

Hon. James D. Ishmael, Jr.
Fayette Circuit Court
Robert F. Stephens Courthouse
120 N. Limestone
Lexington, Kentucky 40507



Counsel for Appellees