

IN THE IOWA DISTRICT COURT FOR WORTH COUNTY

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WORTH COUNTY, IOWA,  
Plaintiff,

vs.

BARBARA J. KAVARS,  
Respondent.

CASE NO. CVCV012607

**PLAINTIFF'S REPLY BRIEF &  
REQUEST TO STRIKE FACTS AND  
EXHIBITS NOT IN EVIDENCE**

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COMES NOW, Kelsey A. Beenken, Assistant Worth County Attorney, and for Plaintiff's Reply Brief & Request to Strike Facts and Exhibits Not in Evidence, hereby incorporates in full Plaintiff's Amended Brief, filed November 12, 2018, and further states the following:

**I. INTRODUCTION**

Plaintiff begins by respectfully being mindful that a brief should be brief, when possible, not repetitive and verbose. In that vein, Plaintiff focuses its response on three points:

1. Respondent's Brief misstated evidence presented at numerous junctures and cited information not in evidence in a "throw everything up to see what sticks" approach using inflammatory language that attempted to paint service of the Search Warrant as a pseudo-military operation, ASPCA care of the Rescued Animals as lacking, and attitudes of law enforcement and the ASPCA as heartless and uninformed.
2. It is important to remember that *only* if this Court does not find neglect on the basis of failure to provide sufficient food *or* sufficient water *or* adequate shelter does this Court need to even consider or determine the statutory meaning of "sustenance." For reasons discussed in Plaintiff's Amended Brief and additional thoughts discussed below in response to Respondent's Brief, it is reasonable for this Court to find that sustenance requires some sort of care linked to the sustaining of an animal's life and health.
3. The determination of whether an animal is "threatened" is one of fact, and the Court is the fact-finder in this matter. Therefore, it is improper to fault a witness for failing to express a conclusion of law, and it was proper for witnesses to only express their

opinions that the Rescued Animals were neglected and the basis for those opinions. The specificity of information provided regarding each particular Rescued Animal in this case allows the Court to make a finding that neglect has indeed been proven by a preponderance of the evidence. The evidence presented in this case was much greater than the information regarding neglect provided by lay witnesses and law enforcement in the various cited cases. Because the animals are indeed “threatened animals,” custody *shall* be ordered to the Local Authority.

## II. REQUEST TO STRIKE FACTS AND EXHIBITS NOT IN EVIDENCE

Respondent has attempted to admit additional evidence in this matter through Respondent’s Brief. Most notably, Exhibit 3 attached to Respondent’s brief is not any sort of legal authority nor was it admitted into evidence in this matter. Further, the following statements are included in Respondent’s Brief that are not legal authority/arguments nor evidence admitted at the time of trial (this is not an exhaustive list but merely the most important improper statements):

1. “These animals were not of unusual condition for animals of their age.” Respondent’s Brief, pg. 2, ¶1. There was no testimony or evidence to this effect.
2. Various names and ages of the 13 Rescued Animals. Although a couple of names and ages were testified to, not all of them were. This appears to be an attempt to humanize Respondent and dehumanize Plaintiff and the ASPCA. Respondent’s Brief, pgs. 6-8.
3. “The burrs and other plant debris in this type of thick, long hair coat is not unusual for a dog of this breed who are allowed to run outside.” Respondent’s Brief, pg. 8, last paragraph. There was no testimony or evidence to this effect.
4. “There were no life-threatening conditions in the house, and it was not unfit for human habitation or the Sheriff’s office would have had an obligation to remove Mrs. Kavars from the home at that point as well.” Respondent’s Brief, pg. 22, ¶2. There was no testimony or evidence to this effect.
5. “If Barb does not have those four cats returned to her, they will likely be euthanized due to their age and care requirements.” Respondent’s Brief, pg. 24, final paragraph. There was not one shred of evidence admitted that supports this statement.

Exhibit 3 attached to Respondent’s Brief, the above statements, and any other statements contained in Respondent’s Brief that misstate or attempt to add additional evidence should be

totally stricken and the Court should disregard any alleged “evidence” that was not properly submitted and accepted by the Court at the time of the hearing.

### III. ADDRESSING RESPONDENT’S MISSTATEMENT OF FACTS

Throughout Respondent’s Brief, there are numerous misstatements of facts and the record. Although the following is not an exhaustive list of the misstatements, it does include the most important inaccuracies that are necessary to address briefly:

1. In regard to Dr. Pearlman’s testimony, Respondent alleges that “[m]any of her concerns were related to fecal tests she noted should be conducted....Test results were negative for dogs in Exhibits 13, 14, and 16. No tests resulted in positive findings and all known results were negative.” Respondent’s Brief, pg. 9, ¶5. Dr. Pearlman’s testimony was that the fecal tests could *rule out* other causes of the dogs being much too thin. The negative test results on some of the animals corroborate the fact that the likely cause of the dogs being substantially underweight is from inadequate food because the fecal test has ruled out other causes.
2. In regard again to Dr. Pearlman, Respondent alleges she “had seen none of the animals after the seizure process for further analysis or review.” Respondent’s Brief, pg. 10, ¶2. That statement is blatantly false as Dr. Pearlman testified quite clearly that she had in fact seen all of the thirteen Rescued Animals within a couple days prior to the hearing in this matter. She further testified that all of the animals had visibly improved after being out of Respondent’s environment for only a matter of weeks, which corroborates Plaintiff’s contention that the animals were neglected while in Respondent’s care.
3. “When asked to connect any specific condition of the animals’ verified observable health status, the veterinarian was unable to connect them to any of the care provisions related to shelter.” Respondent’s Brief, pg. 11, ¶4. Dr. Pearlman testified very clearly that the sanitary conditions of the shelter were very likely linked to many of the animals’ ailments, to include respiratory issues, discharge from eyes, poor coats, parasites, and more.
4. “No evidence in the instant case indicates tests showing parasitic or bacterial infections which are highly contagious and require treatment.” Respondent’s Brief, pg. 17, ¶8. That is only true if one were to totally disregard Dr. Pearlman’s clear and credible

testimony that she literally observed parasites hanging from or coming out of some of the animals' rectums while on scene at Respondent's property.

5. "[D]ogs were on a schedule of 3 years for updated shots and vaccinations or as visibly needing assistance." Respondent's Brief, pg. 20. This is in direct contradiction to Respondent's own testimony. Although she testified that she felt the dogs only *needed* routine care once every three years, she went on to testify that she did not consistently provide that care once every three years and actually could not or would not give direct answers to the Plaintiff's proffered questions regarding this issue.
6. "The injury to Yeager is not a violation of the ordinary standard of care required under the statute of neglect. It was an unforeseen and unforeseeable event. Nothing like this had happened before." Respondent's Brief, pg. 23, ¶8. This is simply not true according to the evidence. Numerous dogs were observed with wounds consistent with dog fighting. Dogs were observed fighting at various times by Deputy Grunhvd, and he observed wounds consisting with bite wounds on his very first visit to Respondent's residence. Respondent was fully aware of these issues.

#### **IV. ADDRESSING RESPONDENT'S LEGAL ARGUMENTS**

It is important to remember that *only* if this Court does not find neglect on the basis of failure to provide sufficient food *or* sufficient water *or* adequate shelter does this Court need to even consider or determine the statutory meaning of "sustenance." Plaintiff maintains that there is overwhelming evidence of lack of sufficient food, sufficient water, or adequate shelter for the Court to determine the Rescued Animals are threatened on those bases alone, and Plaintiff refers the Court to Plaintiff's Amended Brief regarding that issue. However, much has been made about the interpretation of "sustenance" and it is necessary for Plaintiff to address Respondent's legal arguments regarding the same.

##### **A. Use of Livestock Chapter for Definition of "Sustenance"**

Respondent attempts to rely upon Iowa Code Chapter 717 to define "sustenance." However, a review of both Chapter 717 (titled "Injury to Livestock") and Chapter 717B (titled "Injury to Animals Other Than Livestock") actually lend favor to Plaintiff's argument. In both chapters, definitions are laid out and clearly state that the definitions are as used in each respective chapter. The livestock chapter defines "sustenance" as "food, water, or a nutritional formulation

customarily used in the production of livestock.” IOWA CODE §717.1(8). Common sense dictates that this definition specifically applies to livestock and livestock only. The legislature enacted an entirely separate chapter to address injury to animals other than livestock, and Chapter 717B does not define “sustenance.”

It becomes even clearer that the Chapter 717 definition should not be used for Chapter 717B when you look at their respective neglect provisions. “Livestock neglect” is defined as:

1. A person who impounds or confines livestock, in any place, and does any of the following commits the offense of livestock neglect:
  - a. Fails to provide livestock with care consistent with customary animal husbandry practices.
  - b. **Deprives livestock of necessary sustenance.**
  - c. Injures or destroys livestock by any means which causes pain or suffering in a manner inconsistent with customary animal husbandry practices.

IOWA CODE §717.2(1) (emphasis added). Notably, the neglect definition makes no mention of food or water, presumably because it was already covered by the “sustenance” definition provided specifically for this chapter. However, Chapter 717B defines neglect quite differently:

1. A person who impounds or confines, in any place, an animal is guilty of animal neglect if the person does any of the following:
  - a. Fails to supply the animal during confinement with **a sufficient quantity of food or water.**
  - b. Fails to provide a confined dog or cat with adequate shelter.
  - c. Tortures, **deprives of necessary sustenance**, mutilates, beats, or kills an animal by any means which causes unjustified pain, distress, or suffering.

IOWA CODE §717B.3(1) (emphasis added). In this chapter, the legislature included both a provision for food and water and also a totally separate provision for necessary sustenance. This can only mean that the legislature intended “necessary sustenance” to include above and beyond food and water, and it obviously shows that Chapter 717 and 717B are intended to be substantially different. The Court is referred back to Plaintiff’s Amended Brief and the statutory construction argument included therein, where the Courts have consistently held that all parts of a statute are to be given effect and statutes are not to be interpreted to render a part thereof meaningless. This, coupled with the relevant case law, certainly makes it quite reasonable for the Court to find that “sustenance” in Chapter 717B is linked to providing care that sustains the animal’s health or life, which would include medical treatment.

Respondent further relies on an excerpt from the Iowa Practice Series: Criminal Law, Volume 4, authored by Robert R. Rigg, who states that “[i]t *appears* that the elements of subsection (c) are redundant of subsection (a). Necessary sustenance is a provision of adequate food and water.” *See* Respondent’s Exhibit 1 (emphasis added). Quite notably, however, absolutely no authority is cited to substantiate that statement, and it is obvious that it is merely an opinion of the author. The opinion of Robert R. Rigg is not legal authority, and without any authority to substantiate his opinion, should not be given any weight in this context.

Finally, Respondent relies upon a case decided over 100 years ago, *Pieper v. Krutzfeldt*, 136 NW 904 (Iowa 1912), to define “sustenance” as food, shelter, and drink. However, Respondent completely misstated the conclusions of that case. The *Pieper* Court concluded that, based upon the Iowa Code of 1907, a person who does not undertake responsibility for another person’s livestock cannot be held accountable for neglect of the other person’s livestock. The *Pieper* case involved only livestock, and it has already been established that the legislature has clearly intended for livestock and animals other than livestock to be treated differently. Finally, nowhere in the *Pieper* case does it actually define “sustenance.” The case is irrelevant. Respondent has provided no actual authority to support the claim that “sustenance” *in the context of Iowa Code Chapter 717B* means only food and water.

#### **B. Use of Breeder Regulations**

In addition to veering into statutes governing livestock, Respondent relies on regulations that apply to breeders and argues that the animals were not neglected because Respondent is governed by those regulations. Yet, replete throughout the document, the dogs and cats at issue are characterized as companion animals and pets. Discussion of these breeder regulations is irrelevant, as the statute at issue in this case – Iowa Code Chapter 717B – does not “excuse” commercial breeders from the neglect provisions that are applicable to all animals. Not to mention, Respondent mischaracterizes the definition of “adequate water,” which actually reads as: “reasonable access to a supply of clean, fresh, potable water provided in a sanitary manner *or provided at suitable intervals for the species and not to exceed twenty-four hours at any interval.*” IOWA CODE §162.2(2) (emphasis added). The obvious interpretation of that definition is that the absolute maximum interval water must be provided at is *at least* every 24 hours. However, according to the plain language of the definition, it actually must be provided at *suitable intervals*, which may be more frequently than every 24 hours.

Respondent is further required to provide *sufficient* water for the animals as required in Iowa Code §717B.3, and that may also require a suitable interval of more than once every 24 hours. Even if Respondent did in fact put some water in a bucket every 24 hours that was shared by multiple dogs and, in the winter time, froze into ice thereby making it inaccessible, that is not *sufficient* water. Although clever, Respondent cannot use the breeder regulations to escape her responsibilities under Iowa Code Chapter 717B.

**C. Totality of the Circumstances**

Respondent inaccurately pleads that Iowa Code §717B.4(2) “states each animal is to be determined individually whether threatened or not.” Respondent’s Brief, pg. 3. This is a total misrepresentation of the statute as there is no such statement within any part of Chapter 717B. Respondent appears to rely upon the fact that it references “an animal.” However, this has specifically been addressed by the Court. In an unpublished opinion, which is cited in Respondent’s Exhibit 2, the Iowa Court of Appeals stated as follows:

Although Iowa Code section 717B.3 makes reference to “an animal,” nothing in that provision or in the remainder of the chapter requires a district court to hear evidence and make separate findings with respect to each animal. In this case, the deputy sheriff seized 154 animals. The district court adopted the veterinarian’s opinion that, although there were variations in the degree of harm, all the animals were at risk. That general finding was sufficient to establish neglect of all the animals.

*County of Benton, Iowa v. Galkowki*, Benton County Case No. CVCV009554 (Iowa District Court, Feb. 8, 2018) (citing *Grundy County v. Moeller*, 1999 WL 823640 (Iowa Ct. App. Oct. 15, 1999)). This finding simply makes sense, particularly in a case that deals with so many animals. As Dr. Pearlman testified, the more dominant animals are likely to get access to the scarce amount of food and water provided, which would result in those animals presenting healthier than others. That does not mean, however, that neglect did not occur.

**D. Weighing Conflicting Evidence When Fact-Finding Regarding Neglect**

This Court is now well-versed regarding the particular conditions of the Rescued Animals. Plaintiff chooses not to review these but does respectfully direct the Court to Respondent’s testimony, also cited in her Brief, regarding her efforts to provide food and water specifically to the dogs on her premises. According to her testimony she provides five cups of food to each dog in the winter. That is 770 cups of food per day, every day, for the dogs who lived on that property on November 12, 2018. That Respondent’s testimony regarding said provision of food was truthful

and accurate flies in the face of the evidence before this Court. Respondent similarly testified that she provided water to all the dogs in her care at least once per day. This testimony was directly contradicted by Deputy Grunhovd, who credibly testified that Respondent told him she does not provide water every day in the winter because the Samoyeds prefer to eat snow and ice. Further, that testimony is contradicted by consistent observations of a lack of accessible water on the property.

Finally, Respondent offered a recitation of “Reasonable Care Efforts” in an attempt to show lack of neglect, in her order of priority. Respondent’s Brief, pg. 20. Respondent cites necessary physical care, including food, water and shelter as her first priority. The physical evidence suggests efforts have sadly suffered on all these fronts. She next stresses that she prioritizes “daily individual interaction.” As above, the evidence flies in the face of Respondent’s assertion that she interacts individually on a daily basis with 154 dogs, some of whom she has acknowledged as fearful, in the several feces-filled kennels on the property. Further contradicting this claim by Respondent is her testimony that she was unaware that she had at least three emaciated dogs, which shows that either her testimony was untruthful in that regard, or that she obviously was not interacting with all of the dogs.

Respondent then offers that she next prioritizes puppy veterinary care, visiting the veterinarian two times for each puppy before each reaches the age of two months. No documentary evidence or independent witness were presented to corroborate this claim, and the number of puppies with a Purina Body Condition score of three or below, as well as other health issues, calls this testimony into question.

The fourth priority is grooming. The evidence – via testimony and photographic – suggests otherwise. Next comes teeth, although Respondent asserts that, “Checking teeth is not a general health issue,” in direct contradiction to the veterinary physician and expert who testified that dental care is important and poor dental hygiene can lead to serious health issues. Interestingly, Respondent wrote: “No bad breath issues or dental concerns were noted by Barb when she interacted with the dogs daily by feeding, watering, petting and giving them individual attention and affection.” Respondent’s Brief, pg. 20. This is contradicted by the evidence and veterinary testimony that numerous dogs, and cats, suffered from minor to severe dental disease. Finally, Respondent suggests that toenail “inspection” happens by itself for dogs that run on concrete and states: “Barb never observed any indicator of nail problems affecting the gait or causing pain . . .”



Respondent's Brief, pg. 20. Again, Dr. Pearlman testified that each of the animals on the property suffered from overgrown nails.

**E. Return of Animals to Respondent if Found to be Threatened Animals**

Respondent requests that, even if the Court finds the animals to be "threatened animals," they should still be returned to her. Respondent attempts to rely on one case, which is a district court ruling out of Benton County, Iowa. *See* Respondent's Brief, Exhibit 2. Quite obviously, the district court opinion relied upon by Respondent is not controlling authority. In fact, the ruling relied upon by Respondent is in direct contradiction to the statute. Iowa Code §717B.4(3) reads in relevant part:

If the court determines that an animal is a threatened animal, the court **shall** order the **local authority** to dispose of the threatened animal in any manner deemed appropriate for the welfare of the animal.

(emphasis added). The language of the statute is mandatory, not permissive. If the Court finds the animals to be "threatened animals," then the Court has no discretion to return the animals to the Respondent.

In the event the Court were to rule in line with the Benton County district court, the facts of this case still do not warrant the return of any animals to Respondent. Although Respondent may have exerted some effort in cleaning bits and pieces of her home and three of her 32 kennels, she admitted she only cleaned in preparation for the hearing. There is no indication that suggests Respondent is willing or capable of maintaining a clean, sanitary shelter for these animals. Most importantly, though, is Respondent has no clear plan to prohibit future breeding of the animals if returned, which is, at least in part, what led to the current predicament. Although she alleged she was not going to continue breeding, she would not commit to much of anything on cross examination on that matter. It is clear that Respondent is not capable of properly caring for the Rescued Animals.

**V. CONCLUSION**

It is important to remember that the standard of proof in this matter is a preponderance of the evidence, and Plaintiff has certainly met that burden. Although Plaintiff is only required to prove one of the various methods of neglect, the evidence presented in this case actually proves that Respondent failed to provide sufficient food, sufficient water, *and* adequate shelter. Therefore, the Court need not even interpret "necessary sustenance." However, the authority and guidance

regarding “sustenance” are in Plaintiff’s favor. Although the unpublished Iowa Court of Appeals opinions are not controlling, they are important in this case due to the lack of case law and authority on these issues. The Court should use said unpublished opinions to aid in this Court’s interpretation of the law.

Even after all the evidence offered by the Plaintiff, the Respondent ultimately admitted that “difficult conditions” existed, adding that “Mrs. Kavars put the welfare of the outside animals first, her indoor animals second and her own maintenance and care last.” Respondent’s Brief, pgs. 1-2. While this was perhaps an attempt to sound selfless, it may ultimately define the problem. The owner of these animals cannot properly care for them or any other until she first properly cares for herself. In those surroundings, these nine dogs and four cats endured a life of neglect, and they were properly rescued by law enforcement. After a consideration of all of the evidence, the Court should render the Rescued Animals as Threatened Animals and order disposition to Plaintiff.

Dated this 14<sup>th</sup> day of December, 2018.

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