

IN THE MISSOURI SUPREME COURT

STATE EX REL.)
WILLIAM A. ZOBEL)
)
Relator,)
)
vs.) **Case No. SC86813**
)
HON. DON BURRELL,)
Judge of the Circuit Court of Greene)
County, Missouri, et al)
)
Respondents.)

SUBSTITUTE BRIEF OF RESPONDENT

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STATEMENT OF FACTS

Under Rule 83.08, when a case is transferred, “[t]he record on appeal in the court of appeals is the record before [the Supreme] court.” Missouri Supreme Court Rule 83.08. Neither the transcript of the disposition hearing nor the exhibits presented during that hearing were made part of the record in the court of appeals. Instead, the record in the court of appeals was limited to exhibits submitted by the parties with their respective suggestions. Because Relator’s Statement of Facts references the “trial transcript” and “trial exhibits” which were not part of the record at the court of appeals, Respondent submits this statement of facts which references exhibits which were part of the record before the court of appeals.

On January 8, 2005, Respondent Burrell (“Respondent”) signed a search warrant pursuant to section 578.018 (“Search Warrant 05SW001”). Respondent’s Exhibit AA, p. 1, ¶¶ 1-2 (Amended Findings and Order dated March 15, 2005).¹ The Sheriff of Greene

¹The record on appeal in this case consists solely of the exhibits submitted by the parties with their suggestions which were filed below. For the Court’s convenience, Respondent’s Exhibits AA, BB, and CC are included in the attached appendix.

County impounded one hundred and twenty horses from Relator's property pursuant to Search Warrant 05SW001. *Id.* at p. 1, ¶ 10. On the same day that Respondent signed the search warrant, he also set a disposition hearing for January 20, 2005. *Id.* at p. 2, ¶ 11.

Respondent conducted the disposition hearing pursuant to section 578.018 over the following days: January 20, 2005, February 1, 2005, February 28, 2005, and March 1, 2005. *Id.* at pp. 3-4, ¶¶ 26-32. Relator had notice of, conducted discovery in advance of, attended, participated in, presented evidence at, and was represented by counsel during the disposition hearing. *Id.* See also, Respondent's Ex. BB (Docket Sheet, Case No. 05SW001, entries dated 1-25-05, 2-18-05 and 2-23-05). Relator's discovery prior to the disposition hearing included the ability to inspect each horse in the care of the Humane Society of Missouri and the Carthage Humane Society. Respondent's Ex. BB (entries dated 1-25-05 and 2-23-05). Respondent did not require Relator to immediately post the bond or security required by section 578.018 but took the matter of the amount of the bond up with the disposition hearing. Respondent's Ex. AA at p. 4, ¶ 34, and Respondent's Ex. BB.

At the conclusion of the disposition hearing, Respondent found that Relator had neglected the horses and that the Sheriff properly impounded the horses. *Id.* at p. 4, ¶ 33 and at p. 5, ¶ 46. Respondent's Amended Findings and Order dated March 15, 2005, set the bond or security amount at \$105,000.00. *Id.* at p. 6, ¶ 3. Respondent allowed Relator ten days to post the required bond to prevent disposition of the horses. *Id.* Relator never posted or attempted to post any bond or security to prevent disposition of the horses. See, Respondent's Ex. BB.

On April 12, 2005, Respondent executed a Disposition Order which provided in paragraph six:

Pursuant to section 578.018, RSMo., the Humane Society of Missouri and the Carthage Humane Society are hereby granted permission to humanely dispose of the horses which were placed in their care by the Greene County Sheriff after their impoundment under Search Warrant 05SW001 and are also granted permission to humanely dispose of any offspring of those horses.

Respondent's Ex. CC.

On or about March 11, 2005, some sixty-two days after the horses were impounded, the Humane Society of Missouri filed a petition to perfect its lien on the horses under section 460.160, RSMo. Relator's Ex. D. As of March 11, 2005, the Humane Society of Missouri had incurred costs in excess of \$116,000.00 in the care and keeping of the horses placed in its care under Search Warrant 05SW001. *Id.* at p. 16. On or about April 8, 2005, the Carthage Humane Society filed a petition to perfect its lien on the horses in its care. Relator's Ex. E. As of April 8, 2005, the Carthage Humane Society had incurred costs in excess of \$40,000.00 in the care and keeping of the horses placed in its care under Search Warrant 05SW001. *Id.* E, at p. 8. Both the Humane Society of Missouri and Carthage Humane Societies continue to incur costs for the care and keeping of the impounded horses.

POINTS RELIED ON

I.

RELATOR IS NOT ENTITLED TO A WRIT OF MANDAMUS ORDERING RESPONDENT TO VACATE THE PORTION OF HIS APRIL 8, 2005, CIRCUIT COURT ORDER THAT ALLOWED THE DISPOSITION OF RELATOR'S HORSES BECAUSE RESPONDENT'S ORDER DOES NOT CONSTITUTE SPOILIATION OF EVIDENCE AND SUCH ORDER IS AUTHORIZED BY SECTION 578.018.

Norwood v. Drumm, 691 S.W.2d 238, 241 (Mo. banc 1985)

State v. Gibbons, 80 S.W.3d 461, 465 (Mo. banc 2002)

Care and Treatment of Schottel v. State, 159 S.W.3d 836, 841-42 (Mo banc 2005)

Baldrige v. Director of Revenue, 82 S.W.3d 212, 222-23 (Mo. App. W.D. 2002)

Section 578.018, RSMo. (2000)

II.

**RELATOR IS NOT ENTITLED TO A WRIT OF MANDAMUS ORDERING
RESPONDENT TO VACATE THE PORTION OF THE APRIL 8, 2005, CIRCUIT
COURT ORDER THAT ALLOWED THE DISPOSITION OF RELATOR'S HORSES
BECAUSE SECTION 578.018 IS CONSTITUTIONAL.**

Care and Treatment of Norton, 123 S.W.3d 170, 173 (Mo. banc 2003)

State v. Stokely, 842 S.W.2d 77, 80 (Mo. banc 1992)

State v. Brown, 660 S.W.2d 694, 697 (Mo. banc 1983)

Matthews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)

Section 578.018, RSMo. (2000)

ARGUMENT

RELATOR'S PETITION SHOULD BE DISMISSED

On May 26, 2005, this Court ordered this matter transferred from the court of appeals. As a part of that order this Court stated "Relator's substitute brief, if any, is due on or before June 4, 2005." As the Court is aware from the Application for Transfer, the court of appeals in its order below "dispens[ed] with issuance of a preliminary order, answer, further briefing and oral argument and issue[d] a peremptory writ in mandamus." (Emphasis added). The only briefs submitted to the court of appeals, therefore, were the parties respective suggestions in support or opposition. Had Relator not chosen to submit a substitute brief, therefore, this Court would have proceeded upon Relator's suggestions below as his brief.

Relator's Emergency Petition for Writ of Mandamus, Or In The Alternative, For a Writ of Prohibition should be dismissed because Relator's substitute brief alters the basis of the claims that were raised in the court of appeals brief. Rule 83.08 provides that;

[T]he substitute brief . . . shall not alter the basis of any claim that was raised in the court of appeals brief[.]

Missouri Supreme Court Rule 83.08 (emphasis added).

Relator's Petition and Suggestions in support which were filed in the court of appeals argued only two bases for relief: (1) that Respondent lacked jurisdiction to grant disposition of the horses because section 578.018 only conferred jurisdiction upon Respondent to determine whether the impounded horses should be returned to Relator or

whether the animals' impoundment should continue "until such time as criminal actions under related statutes are adjudicated" (See, Relator's suggestions in support, pp. 2-3) and (2) that Respondent had no jurisdiction to grant disposition of the horses because the circuit courts in which the humane societies had filed their lien actions were the only courts which had jurisdiction to dispose of the horses (See Relator's suggestions in support, pp. 4-6). See also, Relator's Petition pp. 4-5.

Relator does not raise either of those bases for relief in his substitute brief. As such, Relator has abandoned the bases for relief sought in his petition and suggestions filed in the court of appeals. *State v. Davidson*, 982 S.W.2d 238, 243 (Mo. banc 1998). Relator's brief in the court of appeals did not raise any other bases for his claim that Respondent lacked jurisdiction to grant disposition of the horses.

Having abandoned his two bases for relief which he presented to the court of appeals, Relator, now, for the first time, in his substitute brief, alters the bases for his claim and asks this Court to find that Respondent exceeded his jurisdiction upon theories that (1) the doctrine of spoliation of evidence bars Respondent's order or (2) that section 578.018 is unconstitutional. Having abandoned his original bases for relief and altered those bases in his substitute brief, Relator's petition should be dismissed. Missouri Supreme Court Rule 83.08(b); *Linzenni v. Hoffman*, 937 S.W.2d 723, 726-27 (Mo. banc 1997) ("On transfer to this Court, an appellant may not 'alter the basis of any claim that was raised in the brief filed in the court of appeals.'"); *Blackstock v. Kohn*, 994 S.W.2d 947, 953 (Mo. banc 1999) (Supreme Court "may not review claim" not raised before the court

of appeals); *Lane v. Lensmeyer*, No. SC86116, slip op. (Mo. banc 2005) (appellants barred from presenting new arguments upon transfer). *See also, State ex. rel Noranda Aluminum v. Mann*, 789 S.W.2d 497, 498 (Mo. banc 1990) (Petition in prohibition properly quashed where brief failed to comply with rule).

In the event that the Court chooses to reach the merits of the new bases for relief claimed by Relator, Respondent addresses them below.

STANDARD OF REVIEW

The standard of review for a writ of mandamus and/or prohibition is limited to “whether the trial court acted without jurisdiction or acted in excess of its jurisdiction.” *Norwood v. Drumm*, 691 S.W.2d 238, 241 (Mo. banc 1985). Relator’s Petition should be denied because Respondent in “granting . . . disposition of the impounded [horses]” acted within the jurisdiction explicitly given to him by section 578.018.1(1), RSMo.

I.

RELATOR IS NOT ENTITLED TO A WRIT OF MANDAMUS ORDERING RESPONDENT TO VACATE THE PORTION OF HIS APRIL 8, 2005, CIRCUIT COURT ORDER THAT ALLOWED THE DISPOSITION OF RELATOR’S HORSES BECAUSE RESPONDENT’S ORDER DOES NOT CONSTITUTE SPOILIATION OF EVIDENCE AND SUCH ORDER IS AUTHORIZED BY SECTION 578.018.

The soundness of Rule 83.08’s prohibition against altering bases for relief in substitute briefs is illustrated by Relator’s argument in his First Point Relied Upon. Much of his argument of this new basis for relief is composed of inflammatory extra-record

statements of fact which were not before Respondent or the court of appeals and are not true. Relator argues extra-record that Respondent's order is "a radical departure from previous practices under section 578.018" and attempts to delineate what "generally accepted practices" are under the statute. Relator, however, cites no authority and no part of the record for these assertions. Further, Relator attempts to argue extra-record matters concerning the identification of horses which are the subject of the pending criminal charges and complains extra-record about mistakes made recording identifying characteristics of the horses during their impoundment. In addition to being extra-record, these assertions do not go to the legality of Respondent's order but simply attack the sufficiency of the evidence below – an issue not before this Court.

"Generally, an appellate court cannot consider extra-record evidence." *Stanley v. City of Independence*, 995 S.W.2d 485, 488 n. 2 (Mo. banc 1999) citing *Pretti v. Herre*, 403 S.W.2d 568, 569 (Mo. 1966). This court should not consider and should strike Relator's extra-record assertions which appear throughout his brief. Relator does not support these assertions except to reference extra-record testimony of Relator at the disposition hearing. Further, Respondent cannot reply to such extra-record assertions except by making his own extra-record assertions. Instead of reopening evidence in the case and considering Relator's assertions in the first instance, this Court should disregard them.

Relator's first point relied on represents a misunderstanding the doctrine of spoliation. Relator, having abandoned his bases for relief below, now incorrectly asserts

that the spoliation doctrine divests Respondent of his statutory authority to grant disposition of the horses. This argument misapplies the spoliation doctrine and ignores section 578.018's explicit authorization of Respondent to grant disposition of the impounded horses.

Section 578.018

In his first point relied on, Relator completely ignores the disposition provisions of section 578.018. In advance of addressing spoliation doctrine it is necessary to explain 578.018.

To correctly construe the statute, the Court must apply the fundamental rules of statutory construction. This Court has consistently held that:

[T]he primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to the intent if possible, and to consider the words in their plain and ordinary meaning. The construction of statutes is not to be hyper-technical, but instead is to be “reasonable and logical and [to] give meaning to the statutes.”

State v. Gibbons, 80 S.W.3d 461, 465 (Mo. banc 2002) (emphasis added) (citations omitted). Further this Court has held that:

To ascertain legislative intent, the courts should examine the words used in the statute, *the context* in which the words are used and the problem the legislature sought to remedy by the statute's enactment.

Care and Treatment of Schottel v. State, 159 S.W.3d 836, 841-42 (Mo banc 2005)

(emphasis in original) (citation omitted).

Missouri Courts have also recognized that:

Where the language of a statute is clear, our courts may not determine that the General Assembly, by its enactment of the statute, encompassed a more restricted meaning for that statute.

State v. Rellihan, 662 S.W.2d 535, 545 (Mo. App. W.D. 1983) (citation omitted).

Finally, this Court has consistently held that ““[c]onstruction of statutes should avoid unreasonable or absurd results.”” *Gibbons* at 466 (emphasis added) (citation omitted).

Section 578.018, provides in relevant part:

1. Any duly authorized . . . law enforcement official may seek a warrant from the appropriate court to enable him to enter private property in order to inspect, care for, or impound neglected or abused animals. All requests for such warrants shall be accompanied by an affidavit stating the probable cause to believe a violation of sections 578.005 to 578.023 has occurred. A person acting under the authority of a warrant shall:(1) Be given a disposition hearing before the court through which the warrant was issued, within thirty days of the filing of the request for the purpose of granting immediate disposition of the animals impounded[.]

(2) Place the impounded animals in the care or custody of . . . an animal shelter [.]

(3) Humanely kill any animal impounded if it is determined by a licensed

veterinarian that the animal is diseased or disabled beyond recover for any useful purpose.

...

2. The owner or custodian or any person claiming an interest in any animal that has been impounded because of neglect or abuse may prevent disposition of the animal by posting bond or security in an amount sufficient to provide for the animal's care and keeping for at least thirty days, inclusive of the date on which the animal was taken into custody. Notwithstanding the fact that bond may be posted pursuant to this subsection, the authority having custody of the animal may humanely dispose of the animal at the end of the time for which expenses are covered by the bond or security,

Section 578.018, RSMo. (2000) (emphasis added).

With regard to disposition, therefore, once an animal has been properly impounded under a section 578.018 warrant, the statute: (1) requires the issuing court to hold a disposition hearing within thirty days of the filing of the request for such warrant, (2) allows a person acting under a warrant, following the disposition hearing, to be granted the ability to immediately dispose of the impounded animals; (3) allows the owner of the animals to prevent that immediate disposition by posting a bond or security to cover the costs of the animals' care; (4) conversely, provides that if the owner fails to post the required bond, the owner cannot prevent the animals' immediate disposition; and (5) if the costs of care for the impounded animals exceed the amount of the bond, allows the animal

shelter to humanely dispose of the animals, notwithstanding the fact that the owner posted a bond.

Other than providing that the disposition shall be “humane,” the statute does not restrict the types of dispositions which may occur after the circuit court grants immediate disposition. An animal shelter granted immediate disposition, therefore, may humanely dispose of the impounded animals by adoption, sale, euthanasia, or otherwise.

A key to the analysis of the legislature’s intent in this case is the legislature’s use of the words “impound” and “disposition.” The word “impound” commonly means, “to seize and hold in the custody of the law <~ stray cattle>.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1986).

Whereas the word “disposition” commonly means, [T]he act or power of . . . disposing of . . . : a placing elsewhere, a giving over to the care or possession of another, or a relinquishing . . . : the power of so placing, giving, ridding oneself of, relinquishing, or doing with as one wishes: discretionary control . . . : the transfer of property from one to another (as by gift, barter, sale, or by will).

Id. (emphasis added).

When the legislature conferred upon the circuit court the duty to hold a disposition hearing for the purpose of “granting immediate disposition of the impounded animal,” the legislature authorized the circuit court to, in turn, authorize the authority having custody of the animals to place, give, rid itself of, and relinquish the impounded animals. The statute

reflects the legislature's recognition that, once an animal is impounded and placed in the care of an animal shelter, costs of care and keeping accrue to the animal shelter without any guarantee of reimbursement. The legislature's remedy to this problem was two-fold: first, it gave the circuit court the power, following a disposition hearing, to grant the animal shelter "immediate disposition" of the impounded animal; and, second, it gave the animal owner the power to prevent that disposition by posting bond or security sufficient to cover the animal shelter's costs of care and keeping of the impounded animal. The legislature's solution, then, either gives the animal shelter discretion to dispose of the impounded animals and their accompanying expense, or affords the animal shelter protection against those continuing expenses through the bond or security posted by the animal owner.

Although Relator's substitute brief abandons his claims in his petition and original suggestions that section 578.018 does not authorize Respondent to, in turn, authorize disposition of the impounded horses by the authority having custody of them, those claims are addressed here to further illustrate the authority conferred upon Respondent by the statute.

To restrict disposition to indefinite custody by continued impoundment in an animal shelter, thereby prohibiting adoption or other humane disposition, as urged by Relator in his petition and original suggestions below, cannot be what the legislature intended by the phrase "immediate disposition of the animals impounded." The legislature's use of the two words, "impounded" and "disposition" in this phrase clearly indicates that the legislature intended that "disposition" means more than mere continued impoundment.

The incorrectness of Relator’s restrictive interpretation of section 578.018 and evidence of the interpretation’s being contrary to legislative intent is best illustrated by comparing the contradictory and curious results concerning disposition of impounded animals: first, when an owner posts a bond and, second, when the owner fails to post the required bond. As set out above, section 578.018.2 provides that if the owner posts a bond to prevent disposition of the impounded animals and, if the accruing costs of care for the impounded animals at some point in time exceed that bond, then “**[n]otwithstanding the fact that bond may be posted . . . the authority having custody of the animal may humanely dispose of the animal . . .**” *Id.* (Emphasis added). On the other hand, if the owner flaunts the bond requirement and refuses to post a bond, as in the case at bar, Relator contends that the circuit court may not allow the authority having custody of the animal to humanely dispose of it. In other words, Relator’s misinterpretation rewards the owner, like himself, who refuses to comply with the statute’s bond requirement – a curious result.

Relator in his petition and original suggestions also incorrectly asserts that section 578.021 restricts the disposition available under section 578.018 to continued impoundment until such time as criminal actions under related statutes are adjudicated. Section 578.021, RSMo, provides in relevant part that:

If a person is adjudicated guilty of the crime of animal neglect or animal abuse and the court having jurisdiction is satisfied that an animal owned or controlled by such person would in the future be subject to such neglect or abuse, such animal shall not be returned to or allowed to remain with such

person, but its disposition shall be determined by the court.

Id. Relator’s argument, however, puts the cart before the horse and ignores the “immediate disposition” language in section 578.018. It is not reasonable, and the legislature could not have intended, to restrict disposition under section 578.018 until a time after criminal actions are concluded. As set forth above, section 578.018 specifically allows for disposition of impounded animals in two circumstances: first, when the circuit court grants “immediate disposition” following the disposition hearing and, second, when the animal owner has prevented that disposition by posting the required bond or security but the costs of care and keeping of the impounded animal have exceeded the value of the bond or security. Under Relator’s logic section 578.021 does not allow either of those dispositions explicitly provided for in section 578.018 and renders those sections meaningless. Read in *para materia*, each section has meaning.

Relator’s construction also violates the fundamental rule of statutory construction that:

[w]hen statutes seem to conflict, courts must attempt to harmonize each statutory enactment, considering the legislative scheme and the plain meaning of the language used so that both sections have meaning. *Farmers' Electric Co-op., Inc. v. Missouri Dep't of Corrections*, 977 S.W.2d 266, 270 (Mo. banc 1998). In the course of construing statutes to be in harmony, we presume that the legislature intends a logical and reasonable result. *State ex rel. Scott v. Goeke*, 864 S.W.2d 411 (Mo. App. E.D.1993).

Division of Labor Standards v. Chester Bros. Const. Co., 42 S.W.3d 637 (Mo. App. E.D. 2001) (underlined emphasis added, *italic* emphasis in original).

Instead, reading sections 578.018 and 578.021 together and harmonizing them compels a logical, reasonable result and defeats Relator's assertion. Section 578.021 provides a consequence to the animal owner whose animals either were never impounded or, if impounded, have not been previously disposed of under section 578.018. In other words, section 578.021 applies when the criminal conviction occurs in the absence of impoundment (i.e., the animals remained in the owners care during pendency of the criminal case), when the criminal conviction occurs prior to the disposition of impounded animals under section 578.018.1(1), or when the animal owner prevents the disposition of impounded animals under section 578.018.2 by posting a sufficient bond or security and then was convicted.

Although not adopted by Relator as a basis for relief either before the court of appeals or before this court, Respondent here addresses the court of appeals interpretation of section 578.018 in its opinion below, which held that Respondent was without jurisdiction to grant disposition of the impounded horses. Respondent does so in accordance with Rule 84.04 which allows Respondent's brief to "include additional arguments in support of the judgment that are not raised by the points relied upon in the appellant's brief." Missouri Supreme Court Rule 84.04(f). The court of appeals based its misinterpretation on the 1993 amendment to section 578.018 stating:

The amendments to section 578.018 in 1993 significantly restricted the

permissible dispositions available to the court because the authority to dispose of an animal by adoption was removed from the statute, and disposition by humane killing was limited to those circumstances in which the animal is “diseased or disabled beyond recovery for any useful purpose.”

Respondent respectfully submits that neither the text of the statute nor the 1993 amendment to the statute supports either Relator or the court of appeals’ construction of the statute. The 1993 amendment to section 578.018, in part, eliminated the following language from 578.018.2:

[a]ny person incurring reasonable costs for the care and maintenance of such animal shall have a lien against such animal until the reasonable costs have been paid, and may put up for adoption or humanely kill such animal if such costs are not paid within 10 business days after demand. Any moneys received for an animal adopted pursuant to this subsection in excess of costs shall be paid to the owner of such animal.

Section 578.018.2 (1986) (amended 1993).

The court of appeals relied upon the elimination of that language and a comparison between sections 578.016 and 578.018 to support its holding that section 578.018 does not authorize adoption as a method of disposition. This analysis compares apples to oranges. Section 578.016 provides a mechanism for expedited disposition, *without hearing*, by adoption or euthanasia of impounded animals which are found abandoned off the owner’s property. In contrast, section 578.018 governs impounded animals which are removed from

the owner's property under authority of a search warrant. Because of the nature of the impoundment under section 578.018, the owner is due more process than an owner under section 578.016.

Prior to the 1993 amendment, section 578.018 was constitutionally suspect because the expedited disposition language in subsection two denied the owner due process. In 1993, the legislature remedied that defect by: first, providing for a disposition hearing through the addition of the language in section 578.018.1(1) and, second, by eliminating the expedited disposition process in section 578.018.2. The flawed expedited disposition process was replaced with a mechanism, the bond, which allowed the owner to prevent the disposition of the impounded animals prior to the disposition hearing provided for under the new section 578.018.1(1). The second purpose of the bond is to protect the entity having custody of the animal against the costs of care that accrue during the pendency of the disposition hearing. There is no language in the current section 578.018.2 or anywhere else in the statute which purports to restrict the types of dispositions which may occur if the circuit court grants immediate disposition of the impounded animals following the disposition hearing.

In support of the court of appeals' holding that dispositions following the disposition hearing are "significantly restricted," the court also relied, in part, on section 578.018.1(3) which provides that "a person acting under the authority of a warrant shall" (emphasis added):

(3) Humanely kill any animal impounded if it is determined by a licensed veterinarian that the animal is diseased or disabled beyond recover for any

useful purpose.

The court of appeals reads this language as a restriction upon Respondent's discretion following the disposition hearing. By its own terms, however, the text of section 578.018.1(3) is not a restriction upon dispositions which may occur if a circuit court grants immediate disposition following the disposition hearing under section 578.018.1(1). Instead, the subsection empowers "a person acting under the warrant" to humanely kill animals under certain circumstances without the necessity of a disposition hearing. In other words, animals found in such poor condition during the execution of the search warrant can be immediately euthanized and put out of their misery under section 578.018.1(3). That subsection, therefore, does not affect the ability of Respondent to grant disposition of the impounded animals under section 578.018.1(1).

In sum, Respondent acted correctly in granting the humane societies' disposition of the impounded horses. Section 578.018.1(1) expressly authorizes Respondent's action.

The Spoliation Doctrine Does Not Apply

The spoliation doctrine is a common law rule of evidence which has no effect upon statutes authorizing the disposition of seized property prior to trial. Missouri courts have defined the spoliation doctrine as follows:

"'Spoliation' is the destruction or significant alteration of evidence." A party who intentionally spoliates evidence is subject to an adverse evidentiary inference. "[T]he destruction of written evidence without satisfactory explanation gives rise to an inference unfavorable to the spoliator." "Similarly,

where one party has obtained possession of physical evidence which [the party] fails to produce or account for at the trial, an inference is warranted against that party." "[W]here one conceals or suppresses evidence such action warrants an unfavorable inference."

The standard for application of the spoliation doctrine requires that "there is evidence of an intentional destruction of the evidence indicating fraud and a desire to suppress the truth." . . . When spoliation is urged as a rule of evidence which gives rise to an adverse inference, it is necessary that there be evidence showing intentional destruction of the item, and also such destruction must occur under circumstances which give rise to an inference of fraud and a desire to suppress the truth.

Baldridge v. Director of Revenue, 82 S.W.3d 212, 222-23 (Mo. App. W.D. 2002) (citations omitted).

In short, this common law evidentiary doctrine operates to create an adverse inference which may be argued at trial by one party when the other party has destroyed or altered evidence under fraudulent circumstances. It is unreasonable to apply this doctrine to property disposed of by statute. Carried to the conclusion urged by Relator, even the State could not significantly alter the horses and would be required to keep them in the emaciated state in which they were taken into care. It is unreasonable and illogical to argue that this evidentiary doctrine extends to situations in which the legislature has expressly authorized the disposition of seized property, as the legislature has done in section 578.018.

The State must prove the identity of the impounded horses and the state must prove that those horses were abused or neglected by Relator at the time of the offense. *See, State v. Larson*, 941 S.W.2d 847, 850-51 (Mo. App. W.D. 1997). That burden can be met in a number of ways: testimony of the seizing officer(s); testimony of eyewitnesses at the scene; pictures of the impounded animals; veterinary testimony; registration documents; veterinary records and etc. With regard to a charge of animal abuse or neglect, the relevant issue is the condition of the animal during the time period of the alleged abuse or neglect. The condition of the animal some months later is irrelevant and the animal itself, therefore, is not a necessary piece of evidence at trial. It is illogical and unreasonable to hold that the spoliation doctrine requires the retention of property which need not be introduced as an exhibit at trial.

In any event, Relator's argument does not apply that doctrine to the facts before this Court. That is because the doctrine does not apply to the issues before this Court. The issue before this Court is whether section 578.018 authorizes Respondent to, in turn, authorize disposition of the horses by the authority having custody of them. Whether the adverse inference raised by the spoliation doctrine would apply in the criminal case involving the impounded horses, while unlikely, is another matter to first be determined by the trial court hearing that matter. Finally, the legislature, by enacting section 578.018, expressly authorized the "immediate disposition of the impounded [horses]" granted by Respondent.

II.

RELATOR IS NOT ENTITLED TO A WRIT OF MANDAMUS ORDERING

RESPONDENT TO VACATE THE PORTION OF THE APRIL 8, 2005, CIRCUIT COURT ORDER THAT ALLOWED THE DISPOSITION OF RELATOR'S HORSES BECAUSE SECTION 578.018 IS CONSTITUTIONAL.

This Court Should Strike Relator's Constitutional Claims

Relator has already had his constitutional claims resolved. On or about March 16, 2005, Relator filed a petition for a writ of prohibition in this Court challenging Respondent's jurisdiction on the basis that section 578.018 was unconstitutional. That petition was assigned case number SC86677. On March 21, 2005, this Court dismissed that petition without prejudice under Rule 84.22. (Resp. Appendix p. A23). On or about March 24, 2005, Relator filed the identical petition along with a motion to transfer in the court of appeals in case number SD26891. On March 31, 2005, the court of appeals resolved Relator's constitutional claims against him, denied his petition without opinion, and denied his motion for transfer to this Court. (Resp. Appendix p. A24).

Respondent's instant petition and accompanying suggestions, which were filed in court of appeals on April 13, 2005, do not raise any constitutional bases for relief. In fact, Relator was barred from again raising the constitutional issues by Rule 84.24(m) which provides that "if a peremptory writ is denied without opinion issuing, a motion for reconsideration of the court's action, however denominated, shall not be filed." Missouri Supreme Court Rule 84.24(m).

It is only through Relator's violation of Rule 83.08, whereby he alters his bases for relief in his substitute brief on transfer to this Court that he seeks a second bite at the apple

on his constitutional claims. Relator should not be allowed to alter his bases for relief and raise claims upon transfer that he was barred from raising in the court of appeals. .

Respondent requests, therefore, that the Court apply Rules 84.24(m) and 83.08 and strike Relator's second point relied on.

Relator's second point relied upon challenges section 578.018 under constitutional void for vagueness and equal protection principles. In essence, Relator argues that section 578.018 violates the equal protection clauses of the United States Constitution and Article I, Section 2, of the Missouri Constitution and that section 578.018 violates the due process clause of the United States Constitution.

Section 578.018 Is Constitutional

Again, Section 578.018 provides in relevant part:

1. Any duly authorized public health official or law enforcement official may seek a warrant from the appropriate court to enable him to enter private property in order to inspect, care for, or impound neglected or abused animals. All requests for such warrants shall be accompanied by an affidavit stating the probable cause to believe a violation of sections 578.005 to 578.023 has occurred. A person acting under the authority of a warrant shall:(1) Be given a disposition hearing before the court through which the warrant was issued, within thirty days of the filing of the request for the purpose of granting immediate disposition of the animals impounded;
- . . .2. The owner or custodian or any person claiming an interest in any animal

that has been impounded because of neglect or abuse may prevent disposition of the animal by posting bond or security in an amount sufficient to provide for the animal's care and keeping for at least thirty days, inclusive of the date on which the animal was taken into custody. Notwithstanding the fact that bond may be posted pursuant to this subsection, the authority having custody of the animal may humanely dispose of the animal at the end of the time for which expenses are covered by the bond or security, unless there is a court order prohibiting such disposition. Such order shall provide for a bond or other security in the amount necessary to protect the authority having custody of the animal from any cost of the care, keeping or disposal of the animal. The authority taking custody of an animal shall give notice of the provisions of this section by posting a copy of this section at the place where the animal was taken into custody or by delivering it to a person residing on the property.

(emphasis added).

Section 578.018 Provides Equal Protection

Relator's main constitutional argument, that section 578.018 violates the equal protection clauses of the United States Constitution and Article I, Section 2 of the Missouri Constitution, fails to state an equal protection violation. Relator appears to invoke the strict scrutiny standard (Relator's brief p. 20). Relator, however, neither alleges that the statute, on its face, discriminates against individuals based upon classification nor alleges that the statute discriminates against a class in its application. Because section 578.018 applies to

all persons equally without regard to classification, the statute satisfies the Equal Protection Clause.

This Court set out the test for Equal Protection Clause violations as follows:

[i]n deciding whether a statute violates the Equal Protection Clause, this Court engages in a two part analysis. The first step is to determine whether the classification operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution.

If so, the classification is subject to strict scrutiny and this Court must determine whether it is necessary to accomplish a compelling state interest.

Care and Treatment of Norton, 123 S.W.3d 170, 173 (Mo. banc 2003) (emphasis added).

When a statute is not discriminatory against a class on its face it may still be unconstitutional if applied in a discriminatory fashion. *State v. Stokely*, 842 S.W.2d 77, 80 (Mo. banc 1992). As in *Stokely*, Relator's cursory equal protection argument fails to take the question past the frivolous state. *See Id.* Relator neither argues that the statute discriminates on its face against different classes nor argues that the statute has been applied in a discriminatory fashion. Having failed to make or support these threshold arguments, Relator's Equal Protection Clause argument fails as frivolous.

Relator's "Vagueness" Claims Are Without Merit

Although incorrectly couched in equal protection terms, Relator's second claim in his second point relied on is that section 578.018 violates the Due Process Clause and is unconstitutionally vague.

Vagueness, as a due process violation, offends two important values. One is that notice and fair warning require that “laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.” Additionally, the vagueness doctrine assures that guidance through explicit standards, will be afforded to those who must apply the statute, avoiding possible arbitrary and discriminatory application..

State v. Brown, 660 S.W.2d 694, 697 (Mo. banc 1983) (citations omitted). This Court has further held that:

[a] statute is presumed constitutional and will not be held otherwise unless it clearly and undoubtedly violates some constitutional provision. Impossible standards of specificity are not required.

It is not the issue that the legislative branch of government which enacted the statute could have chosen more precise or clearer language which determines the issue of vagueness.

Id. (citations omitted).

Relator first complains that section 578.018 is void for vagueness because it fails to “supply standards for taking animals from the possession of their owner.” Relator’s brief at 19-23. Relator admits, however, that the terms “animal neglect” and “animal abuse” are specifically defined by sections 578.009 and 578.012. *Id.* at 20. Animal neglect is defined as the failure by an owner or custodian of an animal “to provide adequate care or adequate control, which results in substantial harm to the animal.” Sections 578.009, RSMo. As

applied in the instant case, animal abuse occurs when a person “having ownership or custody of an animal knowingly fails to provide adequate care or control.” Section 578.012, RSMo. These definitions are clearly set out in language understandable by a person of ordinary intelligence.

In this case, the legislature went a step further and defined the terms “adequate care” and “adequate control,” which are used in the definitions of animal abuse and animal neglect. “Adequate care” means “normal and prudent attention to the needs of an animal, including wholesome food, clean water, shelter and health care as necessary to maintain good health in a specific species of animal.” Section 578.005, RSMo (2000). “Adequate control” means “to reasonably restrain or govern an animal so that the animal does not injure itself, any person, any other animal, or property.” *Id.* These definitions also use common terms and are understandable by a person of ordinary intelligence.

“Where the words used are of common usage and understandable to persons of ordinary intelligence, they satisfy the constitutional requirement of definiteness and certainty.” *State v. Stone*, 926 S.W.2d 895, 899 (Mo. App. W.D. 1996) (citing *Prokopf v. Whaley*, 592 S.W.2d 819, 824 (Mo. banc 1980)). Although Relator urges the court to ignore the statutory definitions of “animal abuse” and “animal neglect” provided in sections 578.009 and 578.012, this Court recognizes that:

‘it is a fundamental rule of statutory construction that sections and acts in *pari materia* and all parts thereof, should be construed together, and compared with each other. No one act, or portion of all the acts, should be singled out for

consideration apart from all the legislation on the subject.’ 50 Am.Jur. 343, Statutes, Sec. 348.

Fleming v. Moore Brothers Realty Co., 251 S.W.2d 8, 15 (Mo. 1952).

In *Brown*, this court recognized that there “are many diverse circumstances which may give rise to a finding of child abuse or neglect [that] must be considered when the standards embodied in a statute are viewed in the light of the due process clause.” *Brown*, at 697. Likewise, there are many diverse circumstances which may give rise to a finding of animal abuse or neglect that must be considered when the standards of section 578.018 are viewed in light of the due process clause. Like the definition of child abuse considered by this Court in *Brown*, the definitions of animal abuse and animal neglect are set out in terms of general and common usage about which there is not great dispute as to meaning. Relator’s argument that section 578.018 is vague in that it fails to provide supply standards for the impoundment animals thereby failing to “give the person of ordinary intelligence a reasonable opportunity to know what is prohibited” is without merit.

Relator makes a second void for vagueness argument that the statute is unconstitutional because “it lacks sufficient guidance so as to avoid arbitrary and discriminatory application.” Relator’s Brief at 25-28. Again, this case is similar to this Court’s analysis of the child abuse statute in *Brown*. *See, Brown*, at 698. As in *Brown*, “while not all persons would agree in every instance whether certain specified conduct was sufficiently beyond normal to constitute [inadequate care or control], the statute clearly defines the yardstick to be applied.” *Id.* As this Court further recognized, “[t]he mere fact

that applying the statute may require some discretion on the part of the trier of fact does not render the discretion exercised analogous to defining a crime.” *Id.*

Section 578.018 defines the circumstances of animal abuse and neglect which justify impoundment, instructs the court to hold a hearing for the purpose of granting immediate disposition of an impounded animal, and states under what circumstances the animal owner can prevent disposition of an impounded animal. Given the diverse circumstances in which the trial court may be called upon to consider the questions of animal abuse and neglect and resulting impoundments, the legislature necessarily granted Respondent discretion to resolve those issues. Because the legislature also gave Respondent the yardstick by which to measure those issues and the procedure for doing so, section 578.018 is constitutional.

Section 578.018 Provides Due Process

Although not properly preserved in his points relied on in violation of Rule 84.04(e), Relator also challenges the statute in the body of his argument on procedural due process grounds under the United States Constitution. Relator’s Brief, at pp. 26-27.

Procedural due process requires a two-step analysis. First, the Court must consider whether the Relator was deprived of a constitutionally protected interest in life, liberty or property. If he was, the Court must then determine what process he was due with respect to that deprivation. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428, 102 S.Ct. 1148, 1153-54, 71 L.Ed.2d 265 (1982). It is undisputed by Respondent that Relator’s interest in his horses is a protected property interest under the Missouri and United States

Constitutions. Rather, the dispute is about what process Relator was due.

“The presumption is that an individual is entitled to notice and an opportunity for a hearing prior to the state’s permanent deprivation of his property interest. *Logan*, 455 U.S. at 434, 102 S.Ct. at 1156 (‘the State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement.’)” *Porter v. DiBlasio*, 93 F.3d 301, 305 (7th Cir. 1996). “However, a predeprivation hearing is not required in all circumstances. For example, where the State must of necessity act quickly, *see Logan*, 455 U.S. at 436, 102 S.Ct. at 1158[.]” *Id*; *see also, Moore v. City of Park Hills*, 924 S.W.2d 301, 303 (Mo. App. E.D. 1996)(“extraordinary situations do exist that justify postponing notice and opportunity for a hearing”) (*citing Fuentes v. Shevin*, 407 U.S. 67, 89, 92 S.Ct. 1983, 1998, 32 L.Ed.2d 556 (1972)).

The United States Supreme Court has set out two tests for determining whether due process is satisfied by a post-deprivation hearing such as that directed in section 578.018. These tests are set out in *Fuentes* and in *Matthews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). Because of the State’s interest in preventing cruelty to animals and because of the immediate need to protect animals from continued abuse and neglect, section 578.018's post-deprivation hearing satisfies due process under both tests.

The United States Supreme Court in *Fuentes*

enumerated a three part test to determine when such extraordinary situations exist: First, the seizure must have been directly necessary to secure an important governmental or general public interest; second, there must have

been a special need for very prompt action and third, the state must have kept strict control over its monopoly of legitimate force – the person initiating the seizure must have been a government official responsible for determining that it was necessary and justified in the particular instance. *Fuentes v. Shevin*, 407 U.S. at 91, 92 S.Ct. at 1999.

Moore, at 303.

As to the first prong of the *Fuentes* test, in this case, and all cases involving impoundment under section 578.018, the governmental and general public interest is the prevention of cruelty to animals. Respondent found that to be a legitimate public purpose. Resp. Ex. AA at para 43. The Missouri Court of Appeals has also recognized “that cruelty to animals is a statutory offense and that it is a valid state policy to render aid and protection to vulnerable and helpless animals.” *State v. Berry*, 92 S.W.3d 823, 829 (Mo. App. S.D. 2003) (quoting with approval, *State v. Roberts*, 957 S.W.2d 449, 452 (Mo. App. 1997), citing *State v. Bauer*, 379 N.W. 2d 895, 899 (Wis. App. 1985)). In *Berry*, this Court recognized that the doctrine of “exigent circumstances” applies to situations threatening the life of animals.

The second prong of the *Fuentes* test is met in that there is a special need for very prompt action when an animal is found to be abused or neglected. The failure to take prompt action leads to continued abuse and neglect, jeopardizing the health and life of the animal at issue. In this case, a doctor of veterinary medicine advised Detective Hall that many of the horses were in critical condition and would be in immediate danger if they were

not removed from the property. Relator's Ex. A at para. 9. Following the disposition hearing and Relator's opportunity to be heard, Respondent found that Relator had "neglected [the horses] to a point that an immediate 'rescue' of them was necessary and justified." Relator's Ex. A at para. 48.

Fuentes' final requirement is also met because impoundments of abused and neglected animals must, under section 578.018, be initiated by a "duly authorized public health official or law enforcement official." In this case, Detective Hall was the law enforcement official responsible for determining that impoundment of the horses was necessary and justified in the particular instance. Further, Missouri's statutory scheme under section 578.018 required Detective Hall and all other law enforcement officials seeking to impound abused and neglected animals to obtain a search warrant reviewed by an independent and objective magistrate prior to seizing the animals.

The three-part "extraordinary circumstance" test of *Fuentes* is satisfied here. The Missouri statutory scheme providing for judicial review of a search warrant application for the impoundment of abused or neglected animals followed by a post-seizure disposition hearing does not, therefore, offend due process under *Fuentes*.

The Missouri statutory scheme also satisfies due process under the balancing test of *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). In *Eldridge*, the United States Supreme Court set out the due process balancing test as follows:

Our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the

private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Eldridge, 424 U.S. at 335, 96 S.Ct at 903.

First, the private interest here is the possession of horses used by the owner in a brood mare operation for the production of income. This is a legitimate interest. The interest of an owner in a domestic animal, even when raised for profit, is a qualified right. While at common law "animals were possessed of no inherent right to protection from cruelty or abuse at the hand of man,. . . in a more civilized society, it is now generally recognized that legislation which has for its main purpose the protection of animals from harassment and ill-treatment is a valid exercise of the police power." *C.E. America, Inc. v. Antinori*, 210 So.2d 443, 444 (Fl. 1968) (*citing* AmJur.2d "Animals," § 27). *See also* Sections 578.009 and 578.012 (criminalizing neglect and abuse of animals).

Second, the risk of an erroneous deprivation of such interest is minimized by the statutory requirement that an independent and objective magistrate sign a search warrant finding probable cause to believe the animals were abused or neglected prior to the impoundment of the animals. Further, in light of the State's legitimate interest in rendering aid and preventing cruelty to, and the death of, the animals, additional or substitute

procedural safeguards requiring a hearing prior to the animal's impoundment would subject the animals to continued abuse and neglect, preventing the State from achieving its legitimate public purpose—the immediate protection of abused and neglected animals. As set out above, Missouri courts have recognized this to be a legitimate public purpose and have gone so far as to extend the doctrine of exigent circumstances to protect that interest. *See, Berry*, at 829. Because of the exigent circumstances presented in this case, and in most cases involving abuse or neglect, there would be little or no public value in additional procedural safeguards. The search warrant requirement of section 578.018 strikes a careful balance between the qualified interest of the animal owner and the public interest in providing immediate protection to abused and neglected animals. Missouri's statutory scheme under section 578.018, therefore, passes constitutional muster both under *Fuentes'* three part "extraordinary circumstance" analysis and also under the *Eldridge* balancing test.

Other states with similar statutory schemes have upheld the constitutionality of post-deprivation hearings in cases of animal abuse. *See, e.g., Marcotte v. Kansas Animal Health Department*, 83 P.3d 810 (Ks. App. 2004) (unpublished disposition finding post-deprivation hearing following seizure of abused dogs pursuant to administrative search warrant satisfied due process); *Hegarty v. Addison County Humane Society*, 848 A.2d 1139, 1144-45 (Vt. 2004) (holding that post-deprivation hearing following warrantless seizure of abused horse under exigent circumstances satisfied due process).

Section 578.018 Provides Notice And Opportunity to Be Heard

Section 578.018.2 satisfies the due process notice requirement on its face. Relator's argument that an animal owner would not know the purpose or scope of a disposition hearing under section 578.018 is refuted by the fact that the statute's notice requirement requires that a copy of the statute be provided to the owner. Section 578.018.2, RSMo. The court below found that the due process notice requirement and the notice requirement of 578.018 were satisfied in this case by certified letter which included a copy of the statute. Respondent's Exhibit A, p. 3, ¶ 23.

It is evident that the notice requirements were satisfied in that Relator and his attorney appeared at the first disposition hearing setting on January 20, 2005, and then appeared and presented evidence at the subsequent hearings on February 1, and 28, 2005 and March 1, 2005.

Generally, a party who has actual notice is not prejudiced by and may not complain of the failure to receive statutory notice. *Gateway Frontier Prop., Inc., v. Selner, Glaser, Komen, Berger and Galganski, P.C.*, 974 S.W.2d 566, 571 (Mo. App. E.D. 1998). Statutes that impose technical requirements for notice should not be strictly enforced where the party seeking enforcement had actual notice and cannot show prejudice as a result of the alleged failure to follow the technical requirements. *Id.* *Graves v. City of Joplin*, 48 S.W.3d 121, 124 (Mo. App. S.D. 2001). In *Graves*, this Court found that a landowner had sufficient notice of pending proceedings on demolition of his building to satisfy due process requirements, when initial notice was sent to the bank, where

notice of possible demolition, including statement of challengers' rights, was published four times in the local newspaper, and the landowner attended the hearing and was informed when the matter would be taken up at the next meeting. *Id.* In the instant case, Relator cannot deny that he had notice and that he had notice of the purpose of the disposition hearing.

Section 578.018.1 specifically provides for a "disposition hearing" prior to the disposition of the animal seized. While the statute states that the disposition hearing shall be given to "[a] person acting under the authority of a warrant," it does not specifically identify or limit any other parties to the hearing. When read in conjunction with the notice provisions of 578.018.2, the statute implies that the owner or custodian of the animals would have an opportunity to be heard at the disposition hearing.

It is important to note that the disposition hearing is a civil proceeding governed by the rules of civil procedure. This Court has noted,

we have defined civil suits to be those proceedings whereby the rights of private persons are protected or enforced, as contradistinguished from 'criminal cases' which refer to public wrongs and their punishment. *State ex rel. Kochtitzky v. Riley*, 203 Mo. 175, 101 S.W. 567, 568–569, *Hayes v. Hayes*, 363 Mo. 583, 252 S.W.2d 323, 326–327. *See also: In re Estate of Boeving*, Mo. App., 388 S.W.2d 40, 50. Essentially, therefore, civil suits are all those that are not criminal. *State ex. rel Sharp v. Knight*, 224 Mo. App. 761, 26 S.W.2d 1011, 1014.

State ex. rel. R. L. W. v. Billings, 451 S.W.2d 125, 127 (Mo. 1970) (*italic emphasis added for citation consistency*). The disposition hearing required by section 578.018 is a proceeding in which the rights of private persons are protected or enforced and is not concerned with public wrongs and punishments. The fact that the hearing may involve evidence of an alleged violation of criminal law does not make it a criminal case. *Id.* This case, therefore, was properly governed by the rules of civil procedure because “the Rules of Civil Procedure, . . . unless otherwise thereafter provided by statute are made to specifically govern ‘the practice and the procedure in all suits and all proceedings of a civil nature, legal, equitable and special in the Circuit Courts.’” *Id.*

Missouri Supreme Court Rule 52.12, Intervention, provides:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of this state confers an unconditional right to intervene or (2) when the applicant claims an interest relating to the property or transaction that is the subject of the action and the applicant is so situated that the disposition of the action, may as a practical matter impair or impede the applicant’s ability to protect that interest, unless the applicant’s interest is adequately represented by other parties.

(**Bold** emphasis in original; underlined emphasis added).

While section 578.018 does not provide an owner or custodian of the seized animal an unconditional right to intervene in the disposition hearing, the notice provided by section 578.018, combined with Rule 52.12, guarantees that the owner or custodian has an

opportunity to be heard. In this case, Relator was, in accordance with Missouri law, given an opportunity to be heard in that he: (1) was allowed to intervene; (2) was allowed to continue the hearing twice, once to prepare and once to accommodate his counsel's schedule; (3) was allowed to conduct discovery under the rules of civil procedure by deposition under Rule 57.03, and by entry upon land for inspection of the horses under Rule 58.01; (4) was allowed to cross examine the State's witnesses; and (5) was allowed to put on his own evidence. Respondent's Ex. BB. Relator was afforded an opportunity to be heard which satisfies due process under the Constitution.

**SECTION 578.018 AND THE LIEN STATUTES
ARE SEPARATE AND DISTINCT REMEDIES**

Relator's petition and suggestions below are premised, in part, on the theory that the lien statutes operate to divest Respondent of jurisdiction to dispose of the horses impounded pursuant to Respondent's warrant. Although, as argued above, Relator has abandoned this argument by not including it in his substitute brief, that argument is addressed here out of an abundance of caution.

Two statutory mechanisms serve to protect a humane society or other animal shelter from the costs incurred in the care and keeping of impounded animals, but one is much more limiting than the other. The first is the bond required by section 578.018.2. This bond is to be set at an amount sufficient to cover the costs of the care and keeping of the animals and is not limited by the value of the impounded animal. *Id.* The second is a statutory lien created by sections 430.150 and 430.165, RSMo., which is necessarily limited by the value of the impounded animal.

A statutory lien exists by operation of law and does not require any legal action on the part of the lien holder to create the lien. Sections 430.150 and 430.165, RSMo. If the "person claiming the lien" wishes to enforce that lien, section 430.160, RSMo., provides the mechanism by which the lien holders, the humane societies in this case, may seek to do so.

Under the lien statutes, of course, the amount a lien holder can recover is limited by the value of the animals themselves, and there is no guarantee that such value will cover the

expenses incurred. If an animal is in care for an extended time, therefore, the protection of the lien may become marginal as the costs of care and keeping begin to exceed the value of the animal.

A lien enforcement case is a civil action tried as “an ordinary case before an associate or a circuit judge.” Section 430.160, RSMo. Each party to a lien enforcement action, therefore, has a right to a jury trial. *The Humane Society of Missouri v. Boshers*, 948 S.W.2d 715, 717 (Mo. App. E.D. 1997). Like other civil actions, the litigation of a lien enforcement action to conclusion by jury trial can be a lengthy and expensive endeavor.

The lien statutes do not constitute sufficient remedies for animal shelters. Because of limited physical plant and financial resources, animal shelters are not in the business of providing lengthy indefinite care for impounded abused or neglected animals. Instead, animal shelters serve society by providing a temporary home for abused and neglected animals with an eye towards timely placement by adoption to a good home. Timely adoption of impounded animals is critical to the ability of the animal shelter to ensure it has space to accommodate the next set of animals in need of temporary care. The legislature recognized the insufficiency of the lien statutes as a remedy for animal shelters and the importance of timely disposition of impounded animals to animal shelters when it enacted section 578.018, first, with a right to a disposition hearing within 30 days of impoundment for “the purpose of granting immediate disposition of the animal impounded” and, second, if disposition not be immediately granted, with the protection of a bond to cover the costs

of care and keeping of the animal which is not limited by the value of the impounded animal.

Contrary to Relator's assertions, the lien statutes do not confer on him any right to challenge the disposition of the impounded horses under section 578.018. Respondent had his opportunity to challenge disposition under section 578.018 at the disposition hearing and had the ability to prevent the disposition under section 578.018 by posting the required bond. Having refused or failed to post the required bond and having been ruled against by the Court below at the disposition hearing, Relator has exhausted his remedies under section 578.018 and cannot prevent disposition of the horses under that statute. The lien statutes do not provide Relator with another bite at the apple but, instead, merely represent an alternative remedy for the humane societies, in absence of the protection of a section 578.018 bond, to protect them against at least a portion of the cost of the care and keeping of the animals.

Further, the lien enforcement action may, as any other civil action, "be dismissed by the plaintiff [humane societies] without order of the court anytime . . . prior to the swearing of the jury panel for voir dire examination." Missouri Supreme Court Rule 67.02(a). The humane societies, therefore, if satisfied with Respondent's disposition order below under section 578.018 are free to choose their remedy, to forego the limited protection of their liens, to dismiss their lien enforcement actions under Missouri Supreme Court Rule 67.02, and to dispose of the horses under Respondent's order.

Finally, Relator is simply incorrect when he asserts that Respondent has no jurisdiction over the disposition of the horses and that such jurisdiction lies with the circuit

courts in which the lien enforcement actions have been filed. Because the horses were seized and impounded under Respondent's warrant, Respondent maintains authority to control disposition of those horses:

'[t]he officer seizing and holding property under a warrant does so on behalf of the court, and possession by the officer is, in contemplation of law, possession by the court. Therefore, a court has the authority to control the disposition of property seized pursuant to its warrant, and an officer holding property must respond to the orders of the court for which he acted, and holds property subject to the court's direction and disposition.

Boshers v. The Humane Society of Missouri, 929 S.W.2d 250, 255 (Mo. App. S.D. 1996).

Respondent, therefore, has jurisdiction over the horses seized under Respondent's warrant and section 578.018 gives Respondent the authority to grant immediate disposition of those horses to the humane societies.

RELATOR FORFEITED HIS RIGHT TO CHALLENGE DISPOSITION

In addition to the fact that the merits of the instant case do not support Relator's Petition, there is an additional ground upon which this Court may deny Relator's Petition – Relator forfeited his right to challenge disposition of the animals when he refused to post the bond required by section 578.018. That section provides in relevant part:

2. The owner or custodian or any person claiming an interest in any animal that has been impounded because of neglect or abuse may prevent disposition

of the animal by posting bond or security in an amount sufficient to provide for the animal's care and keeping for at least thirty days, inclusive of the date on which the animal was taken into custody. Notwithstanding the fact that bond may be posted pursuant to this subsection, the authority having custody of the animal may humanely dispose of the animal at the end of the time for which expenses are covered by the bond or security, unless there is a court order prohibiting such disposition. Such order shall provide for a bond or other security in the amount necessary to protect the authority having custody of the animal from any cost of the care, keeping or disposal of the animal.

Id. (emphasis added). Although Relator was allowed to intervene and participate in the disposition hearing below, it is undisputed that Relator never posted the initial 30 day bond or security required by section 578.018.2, and then never posted bond or security ordered by Respondent to prevent the disposition of the horses. Relator having failed to post the bond has no right under section 578.018 to prevent the disposition of the horses. He, therefore, lacks statutory standing to challenge Respondent's Orders. This Court, therefore, should deny the instant Petition.

CONCLUSION

In view of the foregoing, Respondent respectfully requests that this Court deny Relator's Petition For Writ Of Mandamus, Or In The Alternative, Writ of Prohibition.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing brief complies with the limitations contained in Rule 84.04 and that the brief contains 11,349 words and 1075 lines of monospaced type.

The undersigned further certifies that the disks simultaneously filed with the brief have been scanned and are free from viruses.

J. Daniel Patterson

CERTIFICATE OF SERVICE

I, J. Daniel Patterson, hereby certify that on, June 8, 2005, a true and accurate copy of the Respondent's Brief and a floppy disk were either hand delivered or mailed by first class United States Mail to: The Honorable Don Burrell, Pat J. Merriman, Attorney for Relator, Merriman and Meier, Attorneys at Law, LLC, 218 N. Massey, Nixa, MO 65714; Price C. Kellar, Attorney for Relator, 482 US Hwy 60 East, Republic, MO; Christopher Cox, Attorney for the Humane Society of Missouri, 7751 Carondelet Ave., Suite 401, Clayton, MO 63105; and James R. Spradling, Attorney for the Carthage Humane Society, 320 Grant St., P.O. Box 731, Carthage, MO 64836. I further certify that on the 7th day of June, 2005, a copy of the brief and disk was sent to Dale Ingram, Attorney for Relator, 204 W. Linwood Blvd, Kansas City, MO 64111 by overnight Federal Express.

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IN THE MISSOURI SUPREME COURT

STATE EX REL.)
WILLIAM A. ZOBEL)
)
Relator,)
)
vs.) **Case No. SC86813**
)
HON. DON BURRELL,)
Judge of the Circuit Court of Greene)
County, Missouri, et al)
)
Respondents.)

RESPONDENT'S APPENDIX

APPENDIX

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