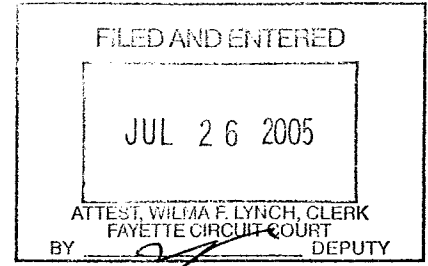


COMMONWEALTH OF KENTUCKY
FAYETTE DISTRICT COURT
FIRST DIVISION
CASE NOS: 05-M-00703
05-M-00815



COMMONWEALTH OF KENTUCKY,

PLAINTIFF,

v.

**AMICUS CURIAE,
LEXINGTON HUMANE SOCIETY AND LEXINGTON-FAYETTE ANIMAL CARE &
CONTROL, LLC, RESPONSE IN SUPPORT OF RESTITUTION ORDER**

KATHLEEN NYGAARD,

DEFENDANT.

Comes now *Amicus Curiae*, Lexington Humane Society and Lexington-Fayette Animal Care & Control, LLC, and hereby respectfully submit their brief in support of the request of the County on behalf of and for the Lexington-Fayette Urban County Government and its citizens and the Lexington Humane Society (“LHS”) and Lexington-Fayette Animal Care & Control, LLC (“ACC”), for an order of restitution against the Defendant in the above styled case. The restitution is to repay ACC for costs and expenses it has incurred related to the medical care and the day-to-day care and keeping of the numerous dogs and horses taken into custody which are the basis of the animal cruelty charges asserted against the Defendant and for which the jury has convicted her.

As an introductory clarification, it must be understood that ACC is authorized, empowered and designated by the LFUCG under a performance service contract to handle all animal care and control matters for the Urban County Government. It shall be the duty of the local police to aid the LHS (or the designee) in the arrest of any person who may be in the act of violating the cruelty to animals ordinance (LFUCG section 4-2, which references KRS 525.130).

The ACC/LHS representative, Carolyn Wheeler, was the complaining witness for the charges against the Defendant and a witness at trial for the prosecution. To the extent the complaining witness in a criminal matter is considered “a victim,” ACC and LHS should therefore be considered “victims” in this case. Obviously, the animals cannot speak for themselves and will never be eligible for a restitution order, only concerned persons or representatives of entities like ACC or LHS will ever be the complaining witness in such a situation involving a claim of cruelty to animals. In fact, a mere witness to such cruelty could be a complaining witness in such a case, but it is unclear whether such person could be considered the “victim.” In this case, ACC/LHS is clearly a financial victim in the case and the Court should so find.

As a result of the complaint initiated by Wheeler, ACC acted consistent with its delegation, designation and authorization from the LFUCG and took possession of the particular animals alleged to be harmed. In this particular case, the billing information submitted in the record establishes that ACC has incurred over \$16,085 in expenses related to the care and keeping of the dogs and horses which were the subject of the animal cruelty charge against the Defendant during the seven (7) months this case has been pending. Of that sum, at least \$7,995.00 was paid for the veterinary care and hospitalization of the three horses. Those sums were paid by ACC to the providers of those services. While some foster families may care for or house animals without charge to the ACC (or LHS) or may keep and care for the animals without any expectation of ultimate reimbursement or compensation, there can be no dispute that the amounts sought by ACC are amounts actually expended by it or otherwise authorized to be recovered. While amounts such as \$7.50 per day may be authorized as a recoverable per diem figure for the boarding of dogs, such amounts are certainly below market rates and in no way close to the actual costs for boarding for horses or for boarding these horses. In other words, the

request of ACC is merely to recover from the responsible party (Nygaard) costs and expenses which the responsible party has caused ACC (and therefore the citizens of this County) to expend; it is not seeking nor intending to recover actual market rates that might otherwise be charged by private parties in the business of keeping and boarding animals.

The County has previously set forth grounds to request and justify an order of restitution in favor of ACC/LHS, including KRS 258.215 and LFUCG Ordinance Section 4-2 through 4-9. In addition, it appears that restitution is generally available to the court to impose as a condition of probation or parole (See, KRS 439.563 (condition of parole) and KRS 533.030(3) (condition of probation)). The court has already ordered probation for a part of the Defendant's sentence, and restitution is completely appropriate and authorized absent of, or in addition to, such probation. As KRS 533.030(3) makes clear, when there are out-of-pocket losses, which we clearly have with ACC/LHS, or medical related expenses that have been paid by a governmental entity (which we have by the LFUCG through its designee, ACC/LHS), the court shall order the defendant to make restitution in addition to any other penalty provide for the commission of the offense. The restitution shall be ordered in the full amount of the damages. LFUCG Ordinance 4-9(c) empowers the LHS (on behalf of the local government) to seize and impound any animal which is the subject of a violation of the cruelty ordinance/statute.

We agree that restitution serves the goal of making the Defendant pay the expenses that resulted from her criminal conduct for which she stands convicted. "The trial court has the statutory authority to establish restitution and is in the best position to make the appropriate and well-informed decision in a fair and impartial manner. There is no undue or inherently difficult burden on the trial court to require such full restitution." Hearn v. Com., 80 S.W.3d 432, (Ky. 2002). It appears that this Court should merely identify the County and its citizens, and

specifically therefore ACC/LHS, as victims of the Defendant's crime. By doing so the basis for restitution appears automatic and mandatory on the court. See, Com. v. O'Bryan, 97 S.W.3d 454, (Ky.App. 2003). Obviously, the dogs and horses are the primary victims of Defendant's conduct, but the rest of the citizens of the county are paying the price for Defendant's conduct.

We will readily acknowledge that an order of restitution does not preclude the property owner or any *victim* who suffered personal physical, mental, or financial injury from proceeding in a civil action to recover damages from the Defendant. See, Kentucky Practice, Criminal Practice & Procedure, Volume 9, section 31:140. What is important to consider for this analysis is that "a civil verdict shall be reduced by the amount paid under the criminal restitution order." KRS 533.030(3)(d). Thus, there is no worry that the Defendant will be subject to double financial penalties in the face of this court ordering restitution in favor of ACC/LHS and the pending civil action filed by the landowners who claim rent and board is owed by Defendant. In fact, the clear distinction is that ACC/LHS has incurred expenses solely as a result of the Defendant's criminal act for which she has been convicted. The essence of the situation presented is that while Defendant dispels any claim or notion of ownership of (and therefore financial responsibility for) these animals, she should not benefit by lack of actual "ownership" of these animals to avoid imposition of an order of restitution to attempt to compensate those who are financial victims of the Defendants crime. In addition, ACC/LHS should not be required to expend more resources to attempt to recovery restitution from Defendant in a separate civil action.

LFUCG Ordinance 4-9 provides in part that any person in violation of the provisions of Section 4-2 of this Code shall be subject to an order of restitution for the actual costs incurred in seizing, impounding and confining the animal. In conjunction with K.R.S. 525.130, for which

the Defendant stands convicted on seven counts, the Court surely has the basis to order restitution.

It is also important to note that Amy Jo Labbe claims ownership of the three horses in issue for the ACC/LHS restitution claim. Yet, she has failed for nearly five months to take possession of those animals and relieve ACC/LHS of the burden of care and keeping. Regardless, it was the Defendant's criminal act for which she has been convicted which has resulted in the expenses incurred by ACC/LHS.

K.R.S. 258.215, (4) provides adequate support for an order of restitution. It states that "[t]he owner of an impounded animal is responsible for all fees associated with the impoundment of the animal. If the owner can be identified, the fees are due even if the owner does not reclaim the animal." "Owner" is defined within KRS 446.010 as any person having a property interest in such animal." Clearly, by Defendant boarding these horses under an agreement with the owners, the Defendant obtains a property interest in the vehicles. In fact, in the event the owner of record failed to pay the Defendant for the board and keeping of the horses, if properly handled, the Defendant would be entitled to claim an agister's lien against the horses and retain possession of them and ultimately force the sale of them to satisfy Defendant's board bills. What could be a better example of acquiring an property interest in these animals.

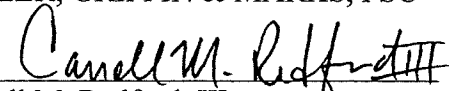
In short, this court should find that the County and citizens therein (including ACC/LHS) are the victims of Defendant's crime. The appropriate restitution order should be entered in favor of ACC/LHS to compensate it consistent with the billing documentation submitted and in the amount of \$16,085.50.

It goes without saying that the court's actions in this case involving a claim for restitution for the expenses related to the care and keeping of impounded animals by the County through its

designee, ACC/LHS, are important for not just this case but any future case involving the impounding of animals as a result of cruelty to animals charges. If the Court declines to enter any restitution order, then such enforcement actions may become impossible due to the financial burden it will impose upon ACC/LHS while cases remain pending or if there is a substantial likelihood that such expenses will not be recovered unless more money is spent in the civil courts to attempt to collect from the criminal or other responsible parties. There can be no better example to show the legislature's intent regarding restitution is to place the true cost of crime on the responsible party, not the law-abiding citizens of the County.

WHEREFORE, ACC/LHS requests the Court order the requested restitution in the amount of \$16,085.50 payable to ACC/LHS.

RESPECTFULLY SUBMITTED
MILLER, GRIFFIN & MARKS, PSC

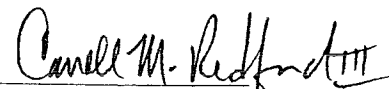
BY: 
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ATTORNEYS FOR ACC/LHS

CERTIFICATE OF SERVICE

I hereby certify that true and correct copy of the foregoing has been served via mail, postage prepaid, on this the 26th day of July 2005 upon:

Hon. Jerome Baker, Jr.
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