

IN THE SUPREME COURT OF IOWA
SUPREME COURT NO. 17-0794

DIANNA HELMERS

Plaintiff-Appellant,

v.

CITY OF DES MOINES

Defendant-Appellee.

*APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY
HONORABLE LAWRENCE MCLELLAN, DISTRICT COURT JUDGE*

**RESISTANCE TO APPLICATION FOR FURTHER REVIEW OF
IOWA COURT OF APPEALS DECISION OF APRIL 4, 2018**

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PROOF OF SERVICE

On April 23, 2018, I served this Resistance on all other parties by filing it with the EDMS system, which will serve all of the parties.

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CERTIFICATE OF FILING

I, Jamie Hunter, certify that I did file this Resistance with the Clerk of the Iowa Supreme Court by the electronically filing it with EDMS on April 23, 2018.

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STATEMENT IN RESISTANCE TO FURTHER REVIEW

According to Rule 6.1103, this Court reserves further review to those cases in which the court of appeals has (1) entered a decision in conflict with a decision of this Court or the Court of Appeals on an important matter; (2) decided a substantial question of constitutional law or an important question of law that has not been, but should be, settled by this Court; (3) decided a case where there is an important question of changing legal principles; or (4) decided a case that presents an issue of broad public importance that this Court should ultimately determine. Iowa R. App. P. 6.1103(1)(b)(1)-(4).

None of these rules support further review. The City merely contends that review should be granted because it believes the majority of the five-justice panel erred in its decision.

The Court of Appeal's opinion does not conflict with any decision of this Court or the Court of Appeals and the City fails to identify any "important question of law," any "important question of changing legal principles," or any public interest that is at stake that would support further review. To the contrary, public interest supports an immediate resolution to this matter, which has drug on for more than two years while Pinky, the dog at issue, has been confined at taxpayer expense at the Animal Rescue League of Iowa without any visitors. In his concurring opinion, Judge Doyle pointed out that this matter should have been resolved two years ago, and that releasing Pinky would be a "win/win."

The City is simply unhappy with the decision of the Court of Appeals and inexplicably wants to maintain control over this dog. This is not an appropriate ground to seek further review, and the City's application should be denied.

FACTS

The City's facts are notable for what they do not include. First, it highlights that Pinky was previously declared a vicious/high risk dog, but fails to mention that this designation was improperly made when Pinky was under six months old and based solely on her visual appearance, not by her behavior. Pinky never had any prior signs of aggression or altercation with any human or animal prior to the incident with Rebel, an at-large cat, in March 2016. Rebel quickly made a full recovery, and Pinky's owner covered all of the veterinary bills through insurance. Despite repeated requests from Pinky's current owner, Dianna Helmers, to transfer Pinky to the licensed animal shelter that she operates in rural Grundy County, the City has kept Pinky locked up without so much as a visitor for over two years all because – in the words of Judge McDonald at the oral argument – “a dog was just being a dog.”

ARGUMENT

- I. THE CITY'S ARGUMENTS THAT THE COURT OF APPEALS ERRED IN RULING THAT MUNICIPAL ORDINANCE 18-196(6) IS UNCONSTITUTIONAL DOES NOT SUPPORT FURTHER REVIEW.**
 - A. Judge Doyle's concurring opinion supports finality, not further review.**

The City attempts to characterize Judge Doyle’s “determining vote” as being improperly based on settlement negotiations. (App. for Further Review at 22). This is simply incorrect. The very first sentence of his concurring opinion is “I concur with Judge Tabor’s opinion.” He did not write separately to offer a different analysis, let alone a different analysis based on inadmissible settlement negotiations. Rather, he wrote specially to express his dismay of the City’s unwavering position that resulted in two years of costly litigation and waste of judicial resources. Judge Doyle’s special concurrence highlights why this Court should not accept further review.

The purpose of the city’s dangerous dog ordinance is to protect those within the confines of the city from injury or harm by dangerous dogs. Helmers offered to remove Pinky from Des Moines and shelter her in Grundy County. Pinky’s removal from Des Moines would eliminate the risk that Pinky might cause harm to someone in Des Moines. Sounds like a win/win solution – Pinky’s life is spared and Des Moines is freed of what it perceives as a threat of harm to its citizens.

(Slip Op. at 19).

Denying further review will finally put a long-overdue resolution on this matter. Ten-year old Pinky can spend the remainder of her life in the countryside, far away from the city that has kept her locked up for the past two years and from the taxpayers the city purports to represent.

B. The City’s reliance on Judge McDonald’s dissenting opinion is misplaced.

The City heavily relies on Judge McDonald’s dissenting opinion, which none of the other four judges joined. In doing so, the City argues both that the seven

paragraphs of section 18-196 should be interpreted as being exclusive, and that vicious propensities can be defined by using common understanding of the words “vicious” and “propensities” as set forth in dictionaries. (App. for Further Review 18-19; Slip Op. at 32). The problem with this argument is that, if 18-196 was exclusive rather than illustrative, one isolated incident directly contradicts the workable definition of “vicious propensities.” If, as the majority surmised, vicious propensities could be defined as having “undesirable, aggressive tendencies,” then that definition is inconsistent with the result that an animal could be found dangerous solely for one isolated incident that falls under section 18-196(6).

Aggression can be commonly defined as “a forceful action or procedure (such as an unprovoked attack) especially when intended to dominate or master”, while tendencies can be defined as the plural “a proneness to a particular kind of thought or action.”¹ Using these common definitions, it becomes clear that the subsections of 18-196 simply could not be exclusive, as that outcome would be inconsistent with the definition of “vicious propensities.” Therefore, the majority is correct when finding that section 18-196 cannot be made constitutionally definite by judicial construction.

Moreover, when applying these definitions to Pinky’s case, it becomes clear that there was not substantial evidence to support the dangerous dog finding, as Judge

¹ <https://www.merriam-webster.com/dictionary/aggression?src=search-dict-hed>; <https://www.merriam-webster.com/dictionary/tendencies>

Danilson wrote specially to elaborate on. (Slip Op. at 15). Judge Danilson specifically noted,

[E]ven if the vagueness could be overcome through interpretation or construction of the ordinance, and thereby demystified, there is insufficient evidence to support the dangerous-dog declaration. No evidence was presented of any vicious propensities of Pinky other than her one act with Rebel, which I find wholly insufficient.

(Slip Op. at 17-18).

The City misreads the majority's opinion that the dangerous animal ordinance leaves too much discretion in the hands of city officials. (Slip Op. at 13). The majority found that the ordinance "does not delineate clear boundaries between what conduct by an animal is tolerated within the city limits of Des Moines and what marks an animal as having 'vicious propensities.'" (Slip Op. at 13). The City argues that the vagueness doctrine does not prohibit the exercise of unbridled discretion in the enforcement of the law, and compares it to enforcement of traffic laws. (App. for Further Review at 20). The obvious difference between the City's dangerous dog ordinance and traffic laws is that the traffic laws are clearly defined. While not every law enforcement officer will prosecute a non-functioning rear registration light, the law does give clear notice to motorists that a registration light is required. In contrast, Des Moines pet owners are left to guess what conduct might be considered vicious propensities under the poorly drafted ordinance with several undefined terms.

In sum, the majority was correct in determining that section 18-196(6) was unconstitutional as applied to Pinky. In determining whether to accept further

review, this Court should also consider Judge Danilson's concurring opinion that there was not substantial evidence to uphold the dangerous dog declaration.

CONCLUSION

For the reasons articulated herein, Dianna Helmers asks this Court deny the City's Application for Further Review. Alternatively, if the Court grants further review, the Court should review each argument raised by the Appellant in her initial appeal to the Court of Appeals.

REQUEST FOR ORAL ARGUMENT

Should this Court grant further review, the Appellant requests to be heard in oral argument.

COST CERTIFICATE

I hereby certify that the costs of printing the Appellant's proof brief was \$0 because the brief was filed electronically.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:

this brief contains 1,322 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because:

this brief has been prepared in a proportionally spaced typeface using Garamond font in 14 point, or

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