

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION - THIRD DEPARTMENT

In the Matter of a Proceeding under Article 70 of
the CPLR for a Writ of Habeas Corpus,

THE PEOPLE OF THE STATE OF NEW YORK
ex rel. THE NONHUMAN RIGHTS PROJECT,
INC., on behalf of TOMMY,

Appellant,
v.

PATRICK C. LAVERY, individually and as an
officer of Circle L Trailer Sales, Inc., DIANE
LAVERY, and CIRCLE L TRAILER SALES,
INC.,

Respondents.

STATE OF NEW YORK)
)
COUNTY OF _____) ss:

Index No. 518336

**AFFIDAVIT IN SUPPORT
OF APPELLANT'S
MOTION FOR LEAVE TO
APPEAL TO THE COURT
OF APPEALS**

ELIZABETH STEIN, ESQ. being duly sworn, deposes and says:

1. I am an attorney duly admitted to practice in the courts of the State of New York and am the attorney of record for the above-named Appellant with respect to both the proceedings in the Supreme Court, Fulton County and the appeal taken from those proceedings.
2. I am fully familiar with the facts and with the questions of law involved in the appeal.
3. This affidavit is submitted in support of a motion by Appellant Nonhuman Rights Project, Inc. ("NhRP"), for leave to appeal to the Court of Appeals pursuant to New York Civil Practice Law and Rules ("CPLR") 5602(a).

4. Attached to the Motion for Leave to Appeal to the Court of Appeals as **Exhibit 1** is a true and correct copy of the opinion and order of this Court decided and entered on December 4, 2014, unanimously affirming the judgment of the Supreme Court, Fulton County, without costs, *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 2014 NY Slip Op 08531, 2014 N.Y. App. Div. LEXIS 8451, *3-4 (3rd Dept. Dec. 4, 2014) (“*Opinion*”).

5. The appeal was taken from a judgment of the Supreme Court, Fulton County, dated December 18, 2013, which denied the NhRP’s application for an order to show cause and petition for a common law writ of habeas corpus filed pursuant to CPLR Article 70 on behalf of Tommy, a chimpanzee detained in the State of New York.

6. This case raises novel and complex legal issues of state, national, and international importance that require review by the Court of Appeals.

7. The major question raised in the NhRP’s original proceeding in the Supreme Court, Fulton County and on appeal to this Court was whether a chimpanzee may be deemed a “person” for purposes of seeking a common law writ of habeas corpus to protect his common law right to bodily liberty. This question has not been decided by the Court of Appeals.

8. This Court concluded “that a chimpanzee is not a ‘person’ entitled to the rights and protections afforded by the writ of habeas corpus” and further stated that “animals have never been considered persons for the purpose of habeas corpus relief, nor have they been explicitly considered as persons or entities for the purpose of state or federal law.” *Opinion* at *3-4.

9. The Court predicated its decision on the theory that “legal personhood has consistently been defined in terms of both rights and duties” and that a chimpanzee’s “incapability to bear any legal responsibilities and societal duties . . . renders it inappropriate to confer upon chimpanzees the legal rights – such as the fundamental right to liberty protected by the writ of habeas corpus – that have been afforded to human beings.” *Opinion* at *5, *7.

10. As discussed in the NhRP’s memorandum of law accompanying this affidavit, I respectfully submit that this Court erred as a matter of law in denying personhood to a chimpanzee for the purpose of seeking common law writ of habeas corpus for the following

reasons: (1) The determination of whether an individual is a “person” for the purpose of vindicating that individual’s common law right to bodily liberty protected by a common law writ of habeas corpus depends neither upon that individual’s species nor that individual’s ability to bear duties and responsibilities, but is an issue of public policy to be decided by a court. Therefore, the Court’s failure to decide Tommy’s personhood as a matter of public policy is incorrect as a matter of law. (2) An individual’s common law right to bodily liberty is an immunity-right that does not correlate to a duty and responsibility. Therefore, the existence or nonexistence of Tommy’s ability to bear duties and responsibilities is irrelevant to a determination of whether he possesses the common law immunity-right to bodily liberty protected by the common law writ of habeas corpus. (3) New York has expressly granted personhood to certain nonhuman animals by allowing “domestic or pet” animals to be trust beneficiaries pursuant to Estates, Powers and Trusts Law 7-8.1. Therefore, the Court’s statement that nonhuman animals are not recognized as “persons” in New York is incorrect. (4) The reason “animals have never been considered persons for the purpose of habeas corpus relief” is because, prior to this case, no Anglo-American court has been asked to make such a determination.

11. The Court of Appeals should determine whether, and to what extent, this Court erred as a matter of law.

12. I further submit that the Court made a factual error in determining that a chimpanzee is not able to bear duties and responsibilities, as no facts in the uncontroverted record support such an assumption.

13. The Court of Appeals should determine whether this Court made a factual error as described above.

14. Because this case raises novel and complex issues of law that are of state, national, and international importance, and because the NhRP raises numerous complex legal arguments establishing that this Court made substantial legal errors in rendering its Opinion, the NhRP’s motion for leave to appeal to the Court of Appeals should be granted.

15. No previous application has been made for the relief herein sought.

WHEREFORE, I respectfully pray that the Court grant the NhRP's motion for leave to appeal to the Court of Appeals and the relief prayed for in the annexed proposed order.

Dated:

Respectfully submitted,

Elizabeth Stein, Esq.
Attorney for Appellant
5 Dunhill Road
New Hyde Park, New York 11040
(516) 747-4726

Sworn to before me this:

_____day of December, 2014

Notary Public

STATE OF NEW YORK)
) ss:
COUNTY OF _____)

On the ____ day of XXX, in the year 2014 before me, the undersigned, a notary public in and for said state, personally appeared Elizabeth Stein, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her capacity, and that by his/her signature on the instrument, the individual, or the person upon behalf of which the individual(s) acted, executed the instrument, and that such individual made such appearance before me the undersigned in the County of _____ and the State of New York.

Notary Public

My Commission Expires: _____