

A.C. 42795	:	APPELLATE COURT
	:	
In the matter of a Petition for a Common Law Writ of Habeas Corpus,	:	
	:	
NONHUMAN RIGHTS PROJECT, INC., on behalf of BEULAH, MINNIE, and KAREN,	:	STATE OF CONNECTICUT
Plaintiff,	:	
v.	:	
	:	
R.W. COMMERFORD & SONS, INC. a/k/a COMMERFORD ZOO, and WILLIAM R. COMMERFORD, as President of R.W. COMMERFORD & SONS, INC.,	:	October 15, 2019
Defendants.	:	

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

Pursuant to Connecticut Practice Book §§ 60-1, 60-2, and 60-3, Plaintiff, the Nonhuman Rights Project, Inc. (“NhRP”), moves this Court for leave to file a supplemental brief to address this Court’s decision in 192 Conn. App. 36 (“Decision”) (A.C. 41464).

I. Brief history of the case

On November 13, 2017, Plaintiff filed its first Verified Petition for a Common Law Writ of Habeas Corpus (“Petition I”) seeking a good faith extension or modification of the common law of habeas corpus on behalf of Beulah, Karen, and Minnie, three elephants alleged to be illegally detained by Defendants (collectively “Commerford”) (D.N. LLI-CV17-5009822-S). Plaintiff sought recognition of the elephants’ common law right to bodily liberty protected by habeas corpus and their immediate release from illegal detention. On December 26, 2017, the trial court declined to issue the writ on the ground that Plaintiff lacked standing under P.B. § 23-24(a)(1) as Plaintiff failed to allege it had a “significant

relationship” with the elephants, and on the alternate ground that Petition I was “wholly frivolous” under P.B. § 23-24(a)(2).

On June 11, 2018, Plaintiff filed a second habeas corpus petition (“Petition II”) on behalf of Beulah, Karen, and Minnie. (D.N. LLI-CV18-5010773-S). On February 13, 2019, the trial court dismissed Petition II pursuant to PB § 23-29(3). On August 9, 2019, Plaintiff filed its brief in this second appeal with this Court.

On August 20, 2019, the Appellate Court affirmed the Petition I trial court’s decision only on the ground that Plaintiff lacked standing and on an entirely different basis—one which Plaintiff had no warning and accordingly did not have an opportunity to adequately brief—that “the elephants, not being persons, lacked standing in the first instance.” Decision at 41. This Court concluded that the elephants were not “persons” because they are “incapable of bearing duties and social responsibilities required by [the] social compact,” thus determining the merits of the case. *Id.* at 46. On September 12, 2019, this Court denied Plaintiff’s motion for reconsideration en banc, and on October 2, 2019, the Connecticut Supreme Court denied Plaintiff’s petition for certification to appeal the Decision.

II. Specific facts upon which the moving party relies

Plaintiff filed its brief in the instant appeal before this Court issued the Decision in A.C. 41464. Therefore, Plaintiff did not know the basis for the Decision at the time Plaintiff filed its initial brief in the instant appeal.¹

¹ Minnie remains the sole surviving elephant in this case; the other two, Beulah and Karen, have died during the pendency of this matter.

III. Legal grounds upon which the moving party relies

As the Decision implicates Plaintiff's standing, this Court must address the Decision in the instant appeal even though the trial court did not dismiss Petition II on standing grounds. See *Blumberg Associates Worldwide, Inc. v. Brown and Brown of Connecticut*, 311 Conn. 123, 161 (2014) ("the reviewing court not only can but must address an issue implicating subject matter jurisdiction whenever it arises, regardless of how the issue comes to the court's attention.")² In addressing standing this Court will necessarily have to address the merits issue of whether elephants cannot be "persons" because they are "incapable of bearing duties and social responsibilities required by [the] social compact." Decision at 46.

Before addressing Plaintiff's standing, however, this Court should "exercise [its] discretion in determining whether to order parties to brief the issue[.]" *Matey v. Estate of Dember*, 85 Conn.App. 198, 204 n.3 (2004) (citation omitted). This Court frequently permits parties to submit supplemental briefs addressing issues related to subject matter

² See also *Grabowski v. Bristol*, 64 Conn.App. 448, 450 (2001) (question of subject matter jurisdiction requires court's independent review despite having not been raised by party on appeal); *Lucarelli v. Freedom of Information Commission*, 29 Conn.App. 547, 548 n. 2 (1992), *cert. denied*, 225 Conn. 901 (1993) (court addresses issues of standing and mootness sua sponte because "those concepts implicate this court's subject matter jurisdiction and therefore must be addressed.")

jurisdiction,³ and it should grant Plaintiff the opportunity to do so for two reasons.

First, permitting Plaintiff to submit supplemental briefing accords with fundamental fairness. See *State v. Connor*, 321 Conn. 350, 372 (2016) (“Thus, it is clear that, at a minimum, the parties must be provided sufficient notice that the court intends to consider an issue. It is implicit that an opportunity to be heard must be a *meaningful* opportunity, in order to satisfy concerns of fundamental fairness.”) (emphasis in original).

The issue of an elephant’s personhood goes to the merits of this case and ultimately determines whether Minnie will ever be free. Plaintiff’s Petition II brief did not address this issue since the trial court dismissed Petition II pursuant to PB § 23-29(3), not on standing grounds or on the merits. Similarly, Plaintiff’s Petition I brief only touched on the personhood issue in summary form since the trial court concluded that the NhRP lacked standing because Plaintiff “failed to allege a ‘significant relationship’ with the elephants,” not because the elephants were not “persons.” Decision at 41. At the time Plaintiff filed its brief in the instant appeal, the Decision in A.C. 41464 also had not yet been issued.

³ See, e.g., *Bd. of Educ. of Town of Stratford v. City of Bridgeport*, 191 Conn.App. 360, 380 (2019) (ordered supplemental briefs “on the issue of whether the trial court lacked subject matter jurisdiction over count six because the statutory theft claim was not ripe.”); *Reinke v. Sing*, 162 Conn.App. 674, 677 (2016), *rev’d by* 328 Conn. 376 (2018) (ordered supplemental briefs on “whether the trial court had subject matter jurisdiction to open the judgment in the absence of a finding of fraud.”); *Fairchild Heights Residents Ass’n, Inc. v. Fairchild Heights, Inc.*, 131 Conn. App. 567, 571 (2011), *rev’d by* 310 Conn. 797 (2014) (ordered supplemental briefs on whether “the plaintiff had standing to bring a CUTPA claim”); *JP Morgan Chase Bank, N.A. v. Zubretsky*, 130 Conn.App. 115, 118 (2011) (ordered supplemental briefs on “whether the trial court had subject matter jurisdiction to issue its September 24, 2009 judgment denying the defendant’s homestead exemption claim.”); *Burke Const., Inc. v. Smith*, 41 Conn.App. 737, 738 n.2 (1996) (ordered supplemental briefs on the issue of subject matter jurisdiction).

Accordingly, without the opportunity for supplemental briefing, Plaintiff would again be severely prejudiced by the lack of opportunity to address this Court’s determination that elephants are not “persons”—specifically because they are “incapable of bearing duties and social responsibilities required by [the] social compact.” Decision at 46. See *Geriatrics, Inc. v. McGee*, 332 Conn. 1, 9 n.11 (2019) (“we have admonished our courts to give the parties a fair opportunity to provide briefing and/or argument on any issue that the court raises on its own initiative.”).⁴

This is of special concern as, except for two patently erroneous New York decisions which are contrary both to the law in New York and centuries of Anglo-American jurisprudence, *Matter of Nonhuman Rights Project, Inc. v. Lavery*, 152 A.D.3d 73 (1st Dept. 2017) and *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148 (3d Dept. 2014)—the former of which merely followed the latter—the notion that personhood and fundamental legal rights depend on the ability to bear duties has never been adopted by any court in legal history. See Black’s Law Dictionary (11th ed. 2019) (“So far as legal theory is concerned, a person is any being whom the law regards as capable of rights or duties. Any being that is so capable is a person, whether a human being or not”) (quoting John Salmond, *Jurisprudence* 318 (Glanville L. Williams ed., 10th ed. 1947)).

⁴ See also *Prime Locations of CT, LLC v. Rocky Hill Development, LLC*, 167 Conn.App. 786, 808 n.17, *cert. denied*, 323 Conn. 935 (2016) (“the principles of due process and fundamental fairness require that the parties be provided sufficient notice that the court intends to consider an issue and a meaningful opportunity to be heard on that issue.”); *Johnson v. Commissioner of Correction*, 168 Conn.App. 294, 298 n. 8, *cert. denied*, 323 Conn. 937 (2016) (dismissal on alternative grounds proper where “the petitioner will suffer no prejudice because he has the opportunity to respond to proposed alternative grounds in the reply brief.”) (citing *State v. Martin M.*, 143 Conn. App. 140, 151-53 (2013)).

Moreover, those two New York cases were stoutly criticized in a Court of Appeals concurring opinion by Judge Eugene M. Fahey, who wrote:

Even if it is correct, however, that nonhuman animals cannot bear duties, the same is true of human infants or comatose human adults, yet no one would suppose that it is improper to seek a writ of habeas corpus on behalf of one's infant child. . . . [The] conclusion that a chimpanzee cannot be considered a “person” and is not entitled to habeas relief is in fact based on nothing more than the premise that a chimpanzee is not a member of the human species. . .

Matter of Nonhuman Rights Project, Inc. v. Lavery, 31 N.Y.3d 1054, 1057 (2018) (Fahey, J., concurring) (citations omitted).

Judge Fahey further elaborated that:

The better approach. . . is to ask not whether a chimpanzee fits the definition of a person or whether a chimpanzee has the same rights and duties as a human being, but instead whether he or she has the right to liberty protected by habeas corpus. That question, one of precise moral and legal status, is the one that matters here. Moreover, the answer to that question will depend on our assessment of the intrinsic nature of chimpanzees as a species.

Id.

Second, by permitting supplemental briefing, this Court is more likely to reach a correct, fair and just result in the instant appeal, as it would ensure that this Court is informed of all relevant authorities before relying on the Decision. In particular, Plaintiff will establish that the Decision is erroneous—and thus should not be relied upon—because it directly conflicts with controlling Connecticut Supreme Court precedent, including *Jackson v. Bulloch*, 12 Conn. 38 (1837), *Connecticut Assn of Boards of Educ Inc v. Shedd*, 197 Conn. 554 (1985), *Maloney v. Pac*, 183 Conn. 313 (1981), *State v. Pierson*, 208 Conn. 683 (1988), *State v. Iban C*, 275 Conn. 624 (2005), and *Electrical Contractors Inc v. Department of Educ*, 303 Conn. 402 (2012).

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CERTIFICATION

I hereby certify that: a copy of the foregoing has been delivered electronically on the date hereof to each other counsel of record and the non-appearing defendants; counsels' and defendants' names, addresses, e-mail addresses and telephone numbers are listed below; the foregoing has been redacted or does not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law; and the foregoing complies with all applicable rules of appellate procedure.

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