

APPELLATE COURT
STATE OF CONNECTICUT

A.C. 41464

NONHUMAN RIGHTS PROJECT, INC., on behalf of
BEULAH, MINNIE, and KAREN

v.

R.W. COMMERFORD & SONS, INC. a/k/a COMMERFORD ZOO,
and WILLIAM R. COMMERFORD, as President of
R.W. COMMERFORD & SONS, INC.

BRIEF OF AMICUS CURIAE MARK A. DUBOIS

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STATEMENT OF INTEREST OF AMICUS CURIAE¹

I submit this brief in support of the Nonhuman Rights Project's ("NhRP") efforts to secure habeas corpus relief for Beulah, Karen, and Minnie. I have been an attorney licensed in Connecticut for forty years. From 2003 through 2011 I was Connecticut's Chief Disciplinary Counsel, essentially the chief ethics prosecutor of the Connecticut Judicial Branch. In that office, I prosecuted over 1,000 lawyer ethics cases and supervised many more. I am co-author, with James Sullivan, of *Connecticut Legal Ethics and Malpractice*, the only book devoted exclusively to Connecticut legal ethics. It is now in its third edition. I have taught law and lawyers' ethics at UConn Law, Quinnipiac University School of Law, and Yale Law School where my office had a clinic focused on lawyer discipline. For the last 15 years, my practice has been devoted primarily to the law of lawyering, i.e., legal ethics, the regulation of the profession, the unauthorized practice of law, legal malpractice and related subjects and issues. I have been recognized as an expert in the field of legal ethics and professional responsibility and testified in state court in Connecticut and in federal court in Nevada and Texas on the subject of legal ethics and professional responsibility. I am freely and voluntarily offering this brief as *amicus curiae* on the issue of frivolity in the above-captioned case. I am not being compensated for this work.

ARGUMENT

I. Argument Summary

In the above-captioned case, the Nonhuman Rights Project ("Petitioner") submitted a Verified Petition for a Common Law Writ of Habeas Corpus ("Petition") on behalf of Beulah,

¹ The amicus party was assisted by an attorney for the Plaintiff in organizing and formatting his own work into this brief. No other party has contributed to the cost of preparation or submission of the this brief.

Minnie, and Karen, seeking the extension or modification of the Connecticut common law of habeas corpus. On December 26, 2017, the Trial Court refused to issue the writ under P.B. § 23-24 (a)(1) on the ground the NhRP lacked standing and, in the alternative, under P.B. § 23-24 (a)(2), as the Petition was “wholly frivolous on its face as a matter of law.” (“Decision” at 1). While I do not address standing in this brief, I support standing for the Nonhuman Rights Project in this case.

In my professional opinion, this action is not frivolous, in whole or in part. Rather, as explained below, applying the relevant legal and ethical standards, the case is supported by facts and an objectively reasonable argument for the expansion of the existing law.

II. The Court Should Apply an Objective Standard on the Issue of Frivolity

For the purposes of this *amicus curiae* brief, I use the term “frivolous” as it is used in Rule 3.1 of the Rules of Professional Conduct and Rule 11 of the Federal Rules of Civil Procedure. While the term is used frequently in our statutes and rules, its only definition is found in case law. However, as set forth below, the standard for determining whether a case is frivolous varies depending on the cause of action and the stage of litigation, *infra*.

In *Texaco, Inc. v. Golart*, 206 Conn. 454, 463–64 (1988) our Supreme Court, for the purpose of determining whether an appeal was frivolous, looked to the commentary to Rule 3.1 defining an action as frivolous “if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.” See also *In re State 's Exhibit 11*, No. CV032318, 2003 WL 23028281, at *4 (Conn. Super. Ct. Dec. 9, 2003) (“[t]he commentators of the Rules define ‘frivolous’ (in Rule 3.1), in relevant part, as a

situation where 'the lawyer is unable to make a good faith argument on the merits of the action taken'').

The applicable standard to apply on the issue of frivolity in a court pleading is an objective one. *Frivolous Conduct Under Model Rule of Professional Conduct 3.1*, 21 J. Legal Prof. 231 (1996) ("the objective application of the 'not frivolous' standard has been adopted by Rule 3.1 and is the dominant approach today"); 95 A.L.R. Fed. 107, *Comment note—general principles regarding imposition of sanctions under Rule 11, Federal Rules of Civil Procedure*, § 6[a] *Standard for judging conduct of person signing motion or pleading and cases and authorities cited therein (the conduct of a person who signs a motion, pleading, or other paper is to be judged by an objective standard of reasonableness under the circumstances.)*

In *Ahuja Holdings, LLC v. Zoning Bd. of Appeals of City of Stamford*, No. FSTCV12601381 IS, 2013 WL 1943824, at *3 (Conn. Super. Ct. Apr. 18, 2013), the Superior Court for the Judicial District of Stamford-Norwalk, quoting from Funk & Wagnalls, *New College Standard Dictionary* (1968), adopted the definition of frivolity when evaluating allegations in a legal pleading as "the quality or condition of being 'frivolous'" which is defined as "void of significance or reason; petty, trivial, or unimportant."

In *Henry E.S., Sr. v. Hamilton*, No. F02CP07003237A, 2008 WL 1001969, at *5 (Conn. Super. Ct. Feb. 28, 2008), the Superior Court for the Judicial District of Stamford-Norwalk defined a frivolous claim, in the context of a habeas claim, as one "that has no legal basis or merit," citing *Black's Law Dictionary* (8th ed. 2004).

III. There is an Objective Factual Basis for Petitioner's Argument that Connecticut Law Allows for the Relief it is Seeking

As pled in the Petition, many legal scholars—and recently American courts—now believe that the law recognizes that nonhuman animals are within the scope of persons covered by laws such as habeas corpus. *People v. Graves*, 163 A.D.3d 16, 21 (4th Dept. 2018) (it is “*common knowledge* that personhood can and sometimes does attach to nonhuman entities like . . . *animals*.”) (emphasis added, citations omitted).

The subjects of the Petition are sentient and autonomous beings with complex social systems who, in many ways, live their lives in a way that includes elements of what are understood and believed to be civil and social relationships, i.e., they are civilized beings. As such, they are "persons" within the ambit of habeas corpus jurisprudence.

In my professional opinion, the signatory lawyers to the Petition are acting upon an objectively reasonable belief that adequate factual grounds exist for the petition and the relief sought. The Petition is neither void of significance or reason nor petty, trivial, or unimportant. It has a sound basis in fact.

IV. There is a Good-Faith Basis for Petitioner's Argument for Expanding Habeas Corpus Law to Nonhuman Animals.

Our Supreme Court, in *Lozada v. Warden, State Prison*, 223 Conn. 834, 841 (1992) noted that “[t]he writ of habeas corpus does not focus solely upon a direct attack on the underlying judgment or upon release from confinement.” Rather, it is a remedy for any sort of wrongful detention without color of law.

The Petitioner has a good-faith basis for arguing for an extension of existing law to support the petition. Not only do many legal scholars believe that the law warrants granting to nonhuman animals some of the protections allowed to persons under various relevant

legal schemes, but some courts have acknowledged such rights may exist. See, e.g., *In re Cecilia*, Third Court of Guarantees, Mendoza, Argentina, File No. P-72.254/15 at 22-23, 24 (Nov. 2016) (a petition for a writ of habeas corpus was granted on behalf of a chimpanzee, Cecilia, and the court declared Cecilia a “non-human legal person” with “nonhuman rights,” and ordered her immediate release from a zoo and subsequent transfer to a sanctuary).

V. The Issues Raised in the Petition are Debatable Among Jurists of Reason, Could be Resolved in Petitioner’s Favor, and Deserve Encouragement to Proceed

Our Supreme Court, in *Simms v. Warden*, 230 Conn. 608, 616 (1994), held that, to determine whether a habeas appeal is frivolous, a court must examine if the appeal satisfies one of the three criteria established by the U.S. Supreme Court in *Lozada v. Deeds*, 598 U.S. 430, 431–32 (1991). A habeas appeal that satisfies one of the *Lozada* criteria is not frivolous. *Simms*, 230 Conn. at 616. A petitioner satisfies that burden by demonstrating: “that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further.” (internal citations omitted). *Id.*

In this case, Petitioner cites a multitude of jurists in support of the Petition, the claims could certainly be resolved in favor of Petitioner, and the claims should proceed to resolution.

CONCLUSION

This Court should recognize that when criteria for personhood are reasonably and consistently applied, Beulah, Karen, and Minnie satisfy the criteria and are entitled to *habeas* relief.

Dated: New London, Connecticut
November 5, 2018

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CERTIFICATE OF SERVICE

This is to certify that the foregoing Brief complies with all provisions of Practice Book § 67-2, and that on this the 5th day of November 2018, the foregoing Brief was both mailed and electronically transmitted to the following:

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This is further to certify pursuant to § 67-2(i) that the foregoing Brief is a true copy of the Brief submitted electronically to the Court on this day, and that the Brief does not contain any information prohibited from disclosure by rule, statute, court order, or case law. A copy of the electronic confirmation receipt is attached hereto.

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Mark A. Dubois
Commissioner of Superior Court