

STATE OF NEW YORK : SUPREME COURT  
COUNTY OF ORLEANS

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

THE NONHUMAN RIGHTS PROJECT, INC.,  
on behalf of HAPPY,

Petitioner,

INDEX # 18-45164

- vs -

MOTION

JAMES J. BREHENY, in his official capacity  
as Executive Vice President and General  
Director of Zoos and Aquariums of the  
Wildlife Conservation Society and Director  
of the Bronx Zoo, and WILDLIFE  
CONSERVATION SOCIETY,

Respondents.

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50 Delaware Avenue  
Buffalo, New York  
Pt. 31 Chambers  
February 5, 2019

B e f o r e:

HONORABLE TRACEY A. BANNISTER  
Supreme Court Justice

A p p e a r a n c e s:

STEVEN M. WISE, ESQ.,  
ELIZABETH STEIN, ESQ.,  
Appearing for the Petitioner via telephone.

KENNETH A. MANNING, ESQ.,  
JOANNA J. CHEN, ESQ.,  
Appearing for the Respondents via telephone.

KEVIN SCHNEIDER AND SPENCER LO, Present, via  
telephone.

1 THE COURT: Let's begin. Everybody put your  
2 appearance on the record starting with petitioners.

3 MS. STEIN: Elizabeth Stein for the Nonhuman Rights  
4 Project.

5 MR. WISE: Steven Wise for the Nonhuman Rights  
6 Project.

7 THE COURT: Okay. Respondents.

8 MR. MANNING: Ken Manning from Phillips, Lytle for  
9 respondent.

10 THE COURT: Okay.

11 MS. CHEN: Joanna Chen with Phillips, Lytle for  
12 respondent.

13 THE COURT: Okay. And then also on the line who  
14 won't be speaking but have been invited to observe or listen  
15 is Kevin Schneider, executive director of the NhRP, correct?

16 MR. SCHNEIDER: That is correct. Thank you, Your  
17 Honor.

18 THE COURT: And Spencer Lo, also on staff with the  
19 NhRP.

20 MR. LO: Yes.

21 THE COURT: All right. Then I'm going to allow the  
22 petitioners to start your argument.

23 MR. WISE: Thank you, Your Honor. I'd like to just  
24 begin immediately arguing the merits of the motion to  
25 reargue. So CPLR 2221(d)(2) allows the petitioner to bring

1 a motion for leave to reargue which is what we're doing  
2 based upon matters of law or fact that were allegedly either  
3 overlooked or misapprehended by the Court in determining the  
4 respondent's motion to transfer venue to the Bronx County.  
5 In this argument, the petitioner intends to point out to  
6 this Court how it overlooked or misapprehended at least six  
7 matters of law and three matters of fact in its order to  
8 transfer the case to the Bronx County, and to argue that  
9 these matters individually and collectively required this  
10 Court to reverse its order and to proceed under Article 70.

11 The six matters of law that Nonhuman Rights Project  
12 argued that this Court overlooked or misapprehended include,  
13 number one, the misapplication of CPLR 503(a), requirement  
14 of having a nexus or residence. We'll explain why it does  
15 not apply, and it's because habeas corpus is a special  
16 proceeding. Number two, is the misapplication of CPLR  
17 510(1) which requires proof that venue in Orleans County was  
18 improper. I will argue that venue in Orleans County was  
19 actually proper, so 510(1) does not apply. The third matter  
20 of law would be the misapplication of CPLR 510(3),  
21 Subsection 3, which was neither raised, nor argued by the  
22 respondent, and will also demonstrate this doesn't have any  
23 legal basis to its application and case at bar. The fourth  
24 will be the failure of the Court to apply CPLR 506(a) when  
25 it does apply because habeas corpus is, indeed, a special

1 proceeding. Fifth will be the misapplication of CPLR  
2 7004(c) to the motion to transfer because CPLR 7004(c) does  
3 not apply to motions to transfer. And also, even if it did  
4 apply, this Court misapplied CPLR 7004(c) by referring to  
5 the first sentence which only applies to detainees and state  
6 institutions, when the second sentence applies because the  
7 elephant is not a detainee in a state institution as the  
8 respondent is not a state institution. So the issue is --  
9 actually there are two main issues. First of all, how does  
10 one acquire venue in a habeas corpus case. The second issue  
11 is then how do you transfer venue in a habeas corpus case.  
12 In that issue all three -- or both parties, the petitioner  
13 and respondent, as well as this Court, have some say in the  
14 matter.

15 So, first of all, is that the respondent has  
16 repeatedly, and we argue erroneously, argued that CPLR  
17 503(a) determines venue in this case. However, it does not  
18 apply because CPLR 503(a) prescribes the place -- or says  
19 that the place of trial shall be in the county in which one  
20 of the parties resides when it was commenced, or in which a  
21 substantial part of the events or omissions giving rise to  
22 the claim occurred, which I believe has been abbreviated to  
23 mean a nexus. However, it has a major exception which is  
24 except as prescribed by law.

25 Now, the Nonhuman Rights Project said in order to

1 understand what is prescribed by law, this Court needs to go  
2 to CPLR 506. And the reason it needs to go to CPLR 506 is  
3 that a habeas corpus proceeding is a special proceeding.  
4 And that, of course, is set out in CPLR 7001, the second  
5 sentence of which says that a proceeding under this article  
6 which is Article 70 is, indeed, a special proceeding.

7 Now, CPLR 506 is directed to when where special  
8 proceedings are to be commenced. And it says that unless  
9 otherwise prescribed in Subdivision B, which applies to  
10 Article 78 doesn't apply to us, or in the law authorizing  
11 the proceedings, which would be Article 70, a special  
12 proceeding may be commenced in any county where the  
13 proceeding is triable. We argue that the proceeding is  
14 triable in the same counties in which the law authorizing  
15 the special proceedings says it may be commenced and that,  
16 indeed, is Article 70. So you then go to Article 70, and  
17 you look specifically at CPLR 7002(b)(3), and that says that  
18 except as provided in a paragraph that doesn't have any  
19 relevant case at bar, a petition for the writ should be made  
20 to, and Subsection 3, 7002(b)(3) says to any Justice of the  
21 Supreme Court. Now, the NhRP then decided for its own  
22 reasons to commence a petition for the writ in Orleans  
23 County, and it was done pursuant to CPLR 7002(b)(3) which  
24 it's allowed to do because of the fact that that's where  
25 CPLR 506(a) sends us. So the commencement by the Nonhuman

1 Rights Project in Orleans County was correct, and so that is  
2 where we properly acquired venue. Now, at this point, the  
3 petitioner's work in acquiring venue is over. Now it  
4 switches to the Courts. So at this point, CPLR 7003(a) sets  
5 up three actions that a Justice of the Supreme Court may  
6 take once the petitioner files in front of any Supreme Court  
7 Judge and acquires venue in that county. So it sets out  
8 three actions. One of the actions is, of course, that the  
9 Court may deny the writ. This Court did not deny the writ.  
10 Now that leaves two actions. One, it may issue the writ  
11 then in one of two ways, and those depend upon whether or  
12 not the petitioner seeks production of the detainee or not  
13 in Court. So if the petitioner wants the prisoner or the  
14 detainee brought into Court, then they seek a writ of habeas  
15 corpus. If they do not want the production of the detainee  
16 in Court, then the petitioner seeks an Order to Show Cause  
17 because that's exactly what it says. It says -- 7003(a)  
18 says the Court to whom the petition is made shall issue the  
19 writ without delay, dot, dot, dot, or where the petitioner  
20 does not demand production of the person detained, that  
21 orders the respondent to show cause why the person detained  
22 should not be released. And I can point to the commentary  
23 to CPLR 7001 which just says the common law writ of  
24 certiorari to inquire into detention has been merged with  
25 habeas corpus. So, therefore, once it did that, the only

1 significant difference between a writ of habeas corpus and a  
2 writ of certiorari to inquire into detention is that the  
3 former requires production of prisoner for hearing on the  
4 writ, and the latter dispenses with that. So we, the  
5 Nonhuman Rights Project, did not want Happy the elephant  
6 brought into Court which is why we urged the Court to issue  
7 an Order to Show Cause.

8 Now, next is that once this Court has been issued  
9 the Order to Show Cause, then we move to CPLR 7004(c). Now,  
10 that concerns the issue of where the issued writ or the  
11 Order to Show Cause is to be returnable; so that, in other  
12 words, where the venue is going to be. So there's two  
13 possibilities. The first possibility is that CPLR 7004(c),  
14 the first sentence says that a writ to secure the discharge  
15 of a person from a state institution shall be made  
16 returnable before a Justice of the Supreme Court residing  
17 within the county in which the person is detained. So when  
18 the detainee is being detained in a state institution, then  
19 the writ is to be made returnable in the county in which the  
20 detainee is detained. Now, that is the first sentence of  
21 CPLR 7004(c). In the case at bar, correctly the respondent  
22 has repeatedly agreed that it is not a state institution.  
23 That it is a nonprofit corporation. The first sentence of  
24 7004(c) then does not apply to the case at bar because of  
25 the fact that the respondent is not a state institution.

1 And the second sentence of 7004(c) says that in all other  
2 cases, and obviously we're part of the in all other cases,  
3 it says the writ shall be made returnable in the county  
4 where it was issued, which would be Orleans County in this  
5 case, except that where the petition was made in the Supreme  
6 Court or to a Supreme Court Justice outside the county in  
7 which the person is detained, such Court or Justice may make  
8 the writ returnable before any Judge authorized to issue it  
9 in the county of detention. So at this point, this Court  
10 could have made the writ returnable -- it says it shall make  
11 the writ returnable in Orleans County, but it may make the  
12 writ returnable in the county of detention which would have  
13 been Bronx County. This Court then chose to make the writ,  
14 and properly so, under CPLR 7004(c) to make the writ  
15 returnable, the Order to Show Cause returnable, in the  
16 county of issuance which is Orleans County. Now, this  
17 marked the end of the process of acquiring venue. The  
18 petitioner has chosen the county pursuant to CPLR 7000 --

19 THE COURT: Hold on one second. I'm just going to  
20 say this. All the things that you've read, I haven't heard  
21 you read the word venue once. Okay. I understand it talks  
22 about a writ being made to a Supreme Court -- any Supreme  
23 Court Justice or any Justice of the Supreme Court and made  
24 returnable, but not once does it say what you just  
25 concluded, okay, that that confers venue on this case in



1 that Court. Okay. I haven't heard you say venue. And I'm  
2 reading along with you, so it's not like I'm just listening  
3 to your words. I'm also reading the CPLR as we talk.

4 MR. WISE: Thank you. I greatly appreciate that.  
5 It is the same thing. That's where the case is heard.

6 THE COURT: All right. So your position is that  
7 means venue?

8 MR. WISE: It does mean venue, yes.

9 THE COURT: Okay. Continue.

10 MR. WISE: Thank you, Your Honor. Now, the  
11 respondent, however, now may weigh in because the respondent  
12 may now seek to transfer venue from the Court -- I'm sorry,  
13 from the county in which the petitioner chose, but more  
14 importantly in which the Court said it made the writ  
15 returnable. Now, the only way in which venue can be  
16 transferred is then through CPLR 510 or -- and 511. And if  
17 it's not transferred, or the petitioner does not seek to  
18 transfer, otherwise venue remains in the county in which the  
19 Order to Show Cause was made returnable which in this case  
20 would be Orleans County.

21 Now, on November 21st of 2018, the respondent filed  
22 its demand for change of venue. And it said that they  
23 demanded, quote, pursuant to CPLR Rule 511, that the venue  
24 of the above-captioned proceeding be changed from the County  
25 of Orleans, which obviously the respondent is agreeing with

1 us that the venue right now at that point is in the County  
2 of Orleans where it has been improperly placed to the County  
3 of Bronx where venue would be proper, and it gives three  
4 grounds. One of them is as provided by CPLR 503, by CPLR  
5 510(1), and by CPLR 7004(c). Now, we've already seen that  
6 CPLR 503 does not apply because it does not apply to special  
7 proceedings. We have not yet talked about Section 510 --  
8 CPLR 510(1), but CPLR 510(1), as I'll speak about in a  
9 minute, only applies -- are you with me?

10 THE COURT: I am.

11 MR. WISE: Good. I touched something on my phone,  
12 and all of a sudden I got something new on the screen. I  
13 wanted to make sure I didn't cut everybody off. 510(1), as  
14 we shall see, applies only when the county designated for  
15 the venue is not a proper county. So they must then under  
16 510(1) show that Orleans is not a proper county, but they  
17 can't do that because under 7002(b)(3) and under 7004(c),  
18 both the petitioner and this Court have designated Orleans  
19 Supreme Court as the proper venue. Then they also at that  
20 point brought in 7004(c). 7004(c) is puzzling because  
21 7004(c) as we talked about has the first sentence and the  
22 second sentence, and that occurs when the Judge is issuing  
23 under the writ of habeas corpus or the Order to Show Cause  
24 and has to make an initial determination as to where it will  
25 be returnable. It does not permit anyone to go back to it.

1 And in a situation that does not involve originally making  
2 the decision as to where the Order to Show Cause should be  
3 made returnable in the county of detention or in all other  
4 cases in the county of issuance, or sometimes in the county  
5 of detention. However, if the Judge decides it's in the  
6 county of issuance, then that is venue. Now, that's the  
7 three grounds that in their demand for change of venue they  
8 gave. None of them are appropriate. However, then they  
9 filed a motion to transfer, and the motion itself was filed  
10 on December 3rd. And the motion itself, the notice of  
11 motion simply said that they wish to be heard for an order,  
12 and on page two it says pursuant to CPLR 511 and 7004(c),  
13 transferring this proceeding to the New York State Supreme  
14 Court in Bronx County. So at this point, they appear to  
15 have dropped 503(a), CPLR 503(a), and dropped CPLR 510(3).  
16 It's just not clear. They said the same thing that what is  
17 clear is again they claim that you can go back to 7004(c)  
18 and start over again as if you were initially making the  
19 argument -- as if you were initially deciding where the writ  
20 or the Order to Show Cause is to be returned. That's the  
21 purpose of 7004(c), and that's the full purpose which is  
22 where is it to be returned, in the county of detention or in  
23 the county of issuance. Once the Court decides the county  
24 of issuance, that's where venue is; and you can't go back to  
25 7004(c) unless for some reason there's a new writ that's

1 going to be issued or there's a new Order to Show Cause that  
2 has been sought.

3 THE COURT: Okay. I've got your argument.

4 MR. WISE: Okay. As well as the accompanied  
5 memorandum that they also said that they cited 503(a), but  
6 as we've discussed, 503(a) is not applicable because of the  
7 fact that this is a special proceeding. They also pointed  
8 out that the Nonhuman Rights Project did not identify any  
9 nexus. That is 503(a) language, and that is simply another  
10 way of saying 503(a). So 503(a), however, does not apply.

11 They then said that what the Nonhuman Rights  
12 Project had done which is filing suit in Orleans County  
13 somehow involved forum shopping. And the Nonhuman Rights  
14 Project had not objected to this until finally it did  
15 recently saying that forum shopping in New York implies that  
16 the forum shopper is engaging in a fraud of the Court. The  
17 Nonhuman Rights Project is not engaging in a fraud of the  
18 Court; therefore, there cannot be any forum shopping.  
19 Coming to the Court and saying this is what we're doing,  
20 this is why we're doing it, we're entitled to do it under  
21 Article 70, 7,0003 B 3, it's impossible that it can be forum  
22 shopping. You can't forum shop in a place in which you are  
23 allowed to be and which you announced to everybody exactly  
24 what it is you're doing.

25 The third thing is they simply say 7004(c), but

1 they make the same error by going back to 7004(c), and  
2 imagining that that section can be employed in a situation  
3 other than deciding where the writ will be returned or where  
4 the Order to Show Cause will be returned.

5 Now, in the December 14th, 2018, hearing though,  
6 this Court appeared to follow what the respondent did, and  
7 specifically went back to CPLR 7004(c), and saying that the  
8 writ, and I quote what the Court said, needs to be made  
9 returnable before some county that has some nexus to this  
10 elephant and her conditions of captivity, and then the Court  
11 cited to CPLR 7004(c), the first sentence. So,  
12 respectfully, the Nonhuman Rights Project argues that the  
13 nexus language is 503(a) language, CPLR 503(a) language, and  
14 that is irrelevant because this is a special proceeding.  
15 And that you do not go back to CPLR 7004(c) because the only  
16 time 7004(c) is used is under the circumstance of when the  
17 Court is deciding and what Court does it make the Order to  
18 Show Cause or the writ of habeas corpus returnable. The  
19 only way that someone can move to transfer a case from one  
20 county to another county is by employing CPLR 511 and CPLR  
21 510. And then the third error, respectfully, that the  
22 Nonhuman Rights Project sees is when the Court had that  
23 discussion, it then erroneously referred to CPLR 7004(c)  
24 first sentence saying it should be made returnable before a  
25 Justice of the Supreme Court or County Court Judge being and

1 residing in the county where the person is detained, but  
2 that only applies in cases where the detainee is in a state  
3 institution. So for all three of those reasons, 503(a)  
4 simply is not applicable, 7004(c) is not applicable; and  
5 even if it was, the first sentence is not applicable because  
6 the Bronx Zoo is not a state institution.

7 Now, finally we move up to the issue of 510 and  
8 specifically 510(1). In its notice of motion, in its  
9 memorandum, and in its motion itself, the respondent did not  
10 ever state that it was making its motion pursuant to 510.  
11 And so it has waived its ability to do that, or it should  
12 have waived it. If this Court says that -- and in the  
13 original notice of the intent to transfer which was not  
14 duplicated ever again anywhere else. In fact, if you look  
15 at the transcript of the December 14th hearing, the number  
16 510 does not appear to come out of the mouth of any of the  
17 counsel for the respondent. But if you want to say that by  
18 stating its original notice to change venue it mentioned  
19 510(1), well, the only thing it mentioned was 510(1). Now,  
20 510(1), again, allows a change of venue when the county  
21 designated for the purpose is not the proper county. This  
22 requires the Bronx Zoo to demonstrate that Orleans was not a  
23 proper county.

24 THE COURT: Okay. All right. I've given you a lot  
25 of time. I'm interested in hearing the other side, unless

1 there's something that you haven't said that you need to say  
2 in a short time.

3 MR. WISE: I will say something just in a short  
4 time which is that this Court then moved to 510(3) which  
5 provides for a change of venue when it can be deemed the  
6 material witnesses and the ends of justice will be promoted  
7 by that change. This Court was not allowed to do that  
8 because the respondent did not ask -- did not invoke 510(3)  
9 in any way. Specifically under 510 the Court is not allowed  
10 to make any kind of a sua sponte decision. There is a case  
11 we cited, Mejia vs. J. Crew Operating Corporation,  
12 140 AD3d 505 in the First Department where they specifically  
13 said that the Supreme Court erred in treating the motion to  
14 change venue under 510(1) as having been made under 510(3).  
15 And also just as important, that the commentary to CPLR 510  
16 notes that there's a rigorous set of evidentiary  
17 requirements for a motion to change venue under 510(3),  
18 including you have to list the names, addresses, and  
19 occupation of the witnesses. You have to disclose the facts  
20 to which the witnesses will testify. You have to  
21 demonstrate the witnesses are actually willing to testify.  
22 You have to show that the witnesses would, in fact, be  
23 inconvenienced in the absence of a change of venue. Because  
24 perhaps the respondent did not intend to make a motion under  
25 510(3), they never tried to meet that rigorous evidentiary

1 requirement. And even if they had, the commentary also  
2 notes that the focus on moving venue is on the convenience  
3 of witnesses or nonparties witnesses. You can't be an  
4 employee. You can't be a party. You can't be a person  
5 under control of the party. All of the applicants of the  
6 Bronx Zoo, all the names of the Bronx Zoo presented were  
7 employees of the Bronx Zoo. All the commentary also notes  
8 that the Court gives no weight to expert witnesses.  
9 Everyone agrees and this Court said that one of the main  
10 reasons the Court felt that a change of venue was  
11 appropriate was because of the expert witnesses. But the  
12 commentary and the cases make clear that you don't take into  
13 account the convenience of expert witnesses when you're  
14 trying to make that sort of a change.

15 I will not talk about the three alleged  
16 misapprehension of the facts. We talked about it in the  
17 memos. But, in short, there are no statutes that support a  
18 change of venue. There's no CPLR's. There are no cases.  
19 There is nothing whatsoever that supports a change of venue  
20 from Orleans County to Bronx County. Orleans County is and  
21 always has been the proper venue. Bronx County is not a  
22 proper venue. It would have been a proper venue had this  
23 Court under 7004(c) initially had the Order to Show Cause  
24 returned to the Bronx. But once it didn't, the only way  
25 that it could be moved to the Bronx was if the respondent



1 made a proper motion under CPLR 510 and was able to prove  
2 that it did under one of those three subsections. It did  
3 not, and; therefore, this Court erred in the six ways in  
4 which I have stated. And this Court should then on  
5 reargument, the merits of the reargument, it should reverse  
6 its motion and allow the case to proceed pursuant to Article  
7 70. Thank you so much for listening.

8 THE COURT: No problem. Mr. Manning or Joanna,  
9 which of you are going to make the argument?

10 MR. MANNING: I'm just coming out of an appointment  
11 at Strong Memorial with some experts, Your Honor. Joanna  
12 will take it for us.

13 THE COURT: Okay. Miss Chen.

14 MR. MANNING: Thank you.

15 MS. CHEN: Thank you, Your Honor. We'll keep it  
16 brief because we believe that the Court decided correctly.  
17 The Court identified CPLR 7004(c) as the basis for where the  
18 writ should be made returnable. 7004(c) says that the writ  
19 may be made returnable in the county of detention, and the  
20 Court identified the Bronx County as the county of  
21 detention. In response to petitioner's arguments, nothing  
22 in 7004(c) forecloses the Court from making a decision to  
23 make the writ returnable in the county of detention. Even  
24 if assuming for the moment that you do agree with petitioner  
25 that you made the writ returnable in Orleans County, nothing

1 in CPLR 7004(c) says you can't make a further change with  
2 regard to the venue.

3 With regard to Article 5, the Court has an  
4 alternative basis on which to transfer venue to the Bronx  
5 County. As we have reiterated in our papers, *Greene v. The*  
6 *Supreme Court Westchester County and Appelton* demonstrate  
7 that Article 5 and all of its provisions apply to habeas  
8 proceedings. They do not simply apply to CPLR 506. And if  
9 you look at CPLR 503(a), it requires a nexus to the place  
10 where the proceeding is going to be tried. Here it's  
11 undisputable that the Bronx County is where the Bronx Zoo  
12 is. It's undisputable it's where Happy is. And as a result  
13 of the considerations under 503(a), venue in Orleans County  
14 is improper under 510(1), and that's the basis that we moved  
15 on, and 511. And the Court touched upon the considerations  
16 during its decision.

17 Finally, the petitioner didn't raise the motion for  
18 permission to appeal to the Fourth Department in its  
19 argument, but we do note that there are no less than three  
20 Court of Appeals decisions holding that there are no appeals  
21 allowed from intermediate order in habeas proceedings. And  
22 we would suggest that those decisions are controlling and  
23 that the Court deny the motion for reargument, deny the  
24 motion for permission to appeal to the Fourth Department,  
25 and deny both of the accompanying motions to stay.

1 THE COURT: Okay. Anything further? Say your name  
2 whoever wants to talk.

3 MR. WISE: Miss Chen, are you finished? I didn't  
4 mean to interrupt you.

5 MS. CHEN: No, please go ahead.

6 MR. WISE: Well, I won't talk about the merits of  
7 the motion to reargue anymore. And it's kind of an awkward  
8 procedural position to be arguing a motion for a stay during  
9 appeal because the Court hasn't issued an order, and we  
10 don't know what the order is going to be.

11 THE COURT: I have issued an order on the original  
12 motion.

13 MR. WISE: Yes, indeed. Thank you very much.  
14 So that would be -- yes, you are correct. I mistakenly  
15 forgot that. Okay. So then we do have a motion for leave  
16 to appeal, the motion for leave to appeal, and we have a  
17 motion for stay during that so this case does not start  
18 going off on two tracks. That's one of the reasons.  
19 There's not a motion for stay while we seek leave for appeal  
20 in this Court. And then we would be seeking a motion for  
21 leave to stay up in the Fourth Department. At that point,  
22 the Fourth Department would retain jurisdiction over the  
23 proceedings in the Bronx Court, and you can have the Bronx  
24 Court moving in one direction, you have the Fourth  
25 Department moving in another direction, unless the -- unless

1 either this Court or the Fourth Department issues the stay.

2 Now, in trying to determine whether a stay should  
3 be issued, the Court has to weigh the prejudice of the  
4 moving party in denying a motion to stay versus the  
5 nonmoving party in granting a motion to stay. And the  
6 factors to consider should be does the appeal have merit,  
7 and I would argue that it's clear.

8 THE COURT: Right, and you've made that argument on  
9 the merits.

10 MR. WISE: No, I'm not making that argument. It's  
11 clear. I'm not making that argument again. I promise.  
12 However, we do think it's a powerful argument. Then you'd  
13 have to look at the prejudice to either side. The prejudice  
14 to our side, to Happy, is that Happy's liberty is at stake.  
15 The First Department where the Bronx is -- this isn't a  
16 venue argument. This is an argument about whether or not  
17 the First Department which does not -- which rejects the  
18 idea that a nonhuman animal can never be a person is going  
19 to make that decision. Or the Fourth Department, which at  
20 least in the Graves case, did not reject that. And also  
21 it's clear that what we argued is that the Fourth Department  
22 is in conflict with what Judge Fahey said. It's in conflict  
23 with the Court of Appeals case in Burns. It's in conflict  
24 with public policy as set forth in the New York Pet Trust  
25 case that makes nonhuman animals persons. The Fourth

1 Department is in harmony both with Judge Fahey's decision,  
2 with the Burns case, with the public policy; and also it has  
3 the case that is essentially on all fours with this, the  
4 Rivera case. In that case you not only have the petitioner  
5 seek a leave to appeal, but you ended up having the  
6 respondent do it. And the Rivera case said under CPLR 7001  
7 and all the cases that are cited by the respondents, all  
8 immediately cite CPLR 7001 which are appeals to the rights  
9 or they cite cases that cite to CPLR 7001. What they say is  
10 that there is no appeal of rights. And we agree, the  
11 Nonhuman Rights Project agrees, that we do not have an  
12 appeal as a right from the Court's decision transferring the  
13 case to the Bronx. However, we do have a right to seek --  
14 to ask the Supreme Court and to ask the Fourth Department if  
15 it will give us permission, and we think we should be able  
16 to have permission because this is not only something that  
17 will involve Happy and involve every single day that Happy  
18 is now in the Bronx Zoo, we argue it is not the proper place  
19 for her to be, but it's also an important case with respect  
20 to the broader look at habeas corpus. We think that the  
21 respondent's arguments have never been made before. There  
22 are no cases that the respondent can cite that it's ever  
23 upheld an argument that they are making, that somehow you  
24 are not allowed to even ask for leave to appeal. You are  
25 allowed to ask under the statute.

1           THE COURT: I got you. And I do have to move this  
2 along. So is there anything else, Joanna, let me ask you --  
3 or let me ask both of you this question. We were in Court  
4 in Orleans County. And after I issued my ruling, I  
5 remember, Mr. Wise, you said to me, Your Honor, can I  
6 attempt to change your mind. Okay. And there was an  
7 objection by Mr. Manning that he said something to the  
8 effect that, well, there's your motion to reargue, et  
9 cetera. I mean, is there any merits to the argument that  
10 petitioner has already had a motion to reargue, and this is  
11 just another motion to reargue?

12           MR. WISE: No, there's no merit to that at all. It  
13 couldn't have been a motion to reargue an order. The order  
14 was actually entered, for one thing, almost a month later.  
15 I couldn't have moved to reargue an order that was going to  
16 be entered that had not yet be entered and would not be  
17 entered until a month later. What I was doing was trying to  
18 end the oral argument which we had in a way in which I  
19 thought it should go which is that the Court should deny it.  
20 But there are requirements for how you file a motion to  
21 reargue. It's not a motion to reargue.

22           THE COURT: In other words, I should never let  
23 somebody do that in the future?

24           MR. WISE: No. Of course. It's part of the  
25 argument. In fact, the reason I said that is in over the

1 last 40 years of practicing law, if it looks like I'm not  
2 winning, I always say is there anything I can say, can I try  
3 this or try that, can I change your mind. On occasion I  
4 apparently am persuasive and it happens, but most of the  
5 time the Court does what the Court did now and said, no, you  
6 can't make me change my mind, so I'm going to rule for the  
7 other side. Under no circumstance is it a motion to  
8 reargue.

9 THE COURT: Okay. Miss Chen?

10 MS. CHEN: Your Honor, I think the transcript  
11 speaks for itself in that the petitioner has already been  
12 given an opportunity to reargue its substantive arguments to  
13 the Court. There was no formal motion made with regard to  
14 reargument.

15 THE COURT: So I will tell you if, in fact, I  
16 accept your argument, that would probably be the last time I  
17 would allow anybody to argue after they've had the benefit  
18 of the Court's decision being expressed on the record.  
19 Okay. The Court is supposed to have the last word. If I  
20 make a decision and if somebody asks to change my mind, I  
21 think I maybe have learned something in that, I will clarify  
22 whether they intend to waive their right to reargue based  
23 upon the fact that they're already rearguing. Okay. But  
24 that being said, the Court has listened, but the Court does  
25 feel regardless of the arguments of counsel that Orleans

1 County is not a proper county based on 503(a), 510(1), and  
2 510(3). I believe that it is probably the most inconvenient  
3 place to have this case argued. And I can evidence that by  
4 the fact that we're on the telephone now, and that despite  
5 Court being in session on Friday, that because you didn't  
6 want or could not or, you know, found it difficult to come  
7 to Orleans to make an argument in person, you know, you've  
8 witnessed how difficult it is to have a case in such a  
9 remote county. Okay. And also one where there is simply no  
10 nexus whatsoever to Happy. So I have not changed my ruling  
11 whatsoever. And I'm not making any -- I'm not granting a  
12 motion for you to seek appeal. If you think you could seek  
13 it in some other way without my permission, go for it; but  
14 I'm not granting the permission. This case does not belong  
15 in Orleans County. Even if it thought it belonged in  
16 Orleans County a little bit, if I had any misgivings, I  
17 would give some serious thought to it. But there is simply  
18 no reason for this case to be in Orleans County, okay, no  
19 legal reason, no moral reason. And so I'm ending the  
20 comments, and I'm closing the record with what I just had to  
21 say. And, Kelly, how can they reach you to order the  
22 transcript if they wish?

23 THE COURT REPORTER: It's 716-845-2146.

24 MR. WISE: Your Honor, what we intend to do is as  
25 soon as we get the transcript, to approach a Justice of the



1 Fourth Department. May we have a stay until we can do that?

2 THE COURT: Well, sure. You got a real short  
3 window. If they'll talk to you, I have no objection to  
4 that. So 30 days.

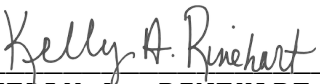
5 MR. WISE: Thank you, Your Honor. We're very  
6 grateful for that. We appreciate it.

7 THE COURT: Not a problem. Thank you very much.

8 \* \* \*

9 C E R T I F I C A T I O N

10  
11 I certify that the foregoing 25 pages are a correct  
12 transcription of the proceedings recorded by me in this matter.

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16 KELLY A. RINEHART,  
17 Official Court Reporter.

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