CAUSE NO. 10-78909-2

CITY OF ARLINGTON	§	**COUNTY COURT AT LAW**
V.	§	**NUMBER TWO**
JASON SHAW, VANESSA SHAW, and U.S. GLOBAL EXOTICS, INC.[1]	§	**TARRANT COUNTY, TEXAS**

CITY OF ARLINGTON'S BRIEF REGARDING COMPLETENESS OF RECORD & REQUEST TO AFFIRM ORDER OF ARLINGTON MUNICIPAL COURT

TO THE HONORABLE JUDGE OF COUNTY COURT AT LAW NUMBER TWO:

COMES NOW, the City of Arlington (the "City"), to present its complete record and to request that this Court affirm the decision of the Arlington Municipal Court that the animals at issue were cruelly treated.

I. RESPONSES TO COURT'S CONCERNS ABOUT THE RECORD.

At a hearing held on January 28, 2010, this Court requested that each party submit briefs to the court on the matter of the record from the initial hearing. With regard to the reporter's record (audio recordings):

(1) this Court's record (both clerk's and reporter's) is **complete** (Exhibits 1, 2, and 3), with certifying affidavits attached (Exhibits 4 and 5); and

(2) the reporter's record is now correctly presented with all tapes in proper order,

Thus, there is no "significant portion" of the reporter's record missing. Accordingly, there is no basis for reversal regarding the record. *See* Tex. R. App. P. 34.6(f).

[1] In the Arlington Municipal Court, this case was originally styled "In re Approximately 27,000 Animals Seized on December 15, 2009," because this case is an *in rem* property action, not an original lawsuit.

With a complete clerk's and reporter's record available to this Court for review, the City requests that this Court affirm the decision of the Arlington Municipal Court (municipal court) because:

(1) Appellants did not follow the applicable Texas Rules of Appellate Procedure; therefore, they have no grounds on which to object to any alleged error in the reporter's record provided by Arlington Municipal Court Judge Michael Smith;

(2) Appellants have provided no reason—factual, legal, or otherwise—as to why this Court should reverse the municipal court's decision; in particular, Appellants have failed to establish that the evidence presented at the hearing amounted to less than substantial evidence, and Appellants have failed to prove that they have met any other legal standard of review that would merit reversal.

II. BACKGROUND.

On December 18, 21-22, and 28-31, the Arlington Municipal Court, Judge Michael Smith presiding, held a hearing under Texas Health & Safety Code chapter 821 to determine whether approximately 27,000 animals had been cruelly treated by their owners, Jasen Shaw, Vanessa Shaw, and U.S. Global Exotics, Inc. (Appellants). On January 5, 2010, Judge Smith determined that all of the animals had been treated cruelly. On January 15, 2010, Appellants filed their notice of appeal. On January 20, 2010, Judge Smith delivered the court's record (clerk's record[2]) to this Court. On January 27, 2010, Judge Smith delivered a set of digital video discs (DVDs) containing the audio recordings of the hearing in municipal court, though never requested or paid for by Appellants. On January 28, 2010, this Court heard argument regarding a motion to dismiss for lack of jurisdiction filed by People for the Ethical Treatment of Animals, a motion that this Court denied. On January 29, 2010, the City of Arlington (the City) provided this Court with

[2] *See* Tex. R. App. Proc. 34.5(a).

new copies of the audio recordings from the municipal court hearing (reporter's record[3]) and accompanying affidavits attesting to their accuracy, authenticity, and completeness.

III. ARGUMENTS & AUTHORITIES

The City will briefly address its reasons why this Court should affirm the municipal court's decision that the animals at issue in this seizure were cruelly treated.

A. Appellants Did Not Follow the Texas Rules of Appellate Procedure.

Appellants did not follow the applicable Texas Rules of Appellate Procedure; therefore, they have no grounds on which to object to any alleged error in the reporter's record provided by Judge Smith. The Texas Rules of Appellate Procedure (TRAP rules) govern procedure in appellate courts and before appellate judges.[4] Since the instant matter is on appeal in an appellate court before an appellate judge, the TRAP rules apply.

The TRAP rules also govern the procedure for obtaining and filing the reporter's record. A reporter's record includes copies of the "tapes or other audio-storage devices on which proceedings were recorded."[5] The TRAP rules have very specific requirements for an appellant to obtain a reporter's record for appeal: "*At or before* the time for perfecting the appeal, the appellant must request *in writing* that the official reporter prepare the reporter's record" [*emphasis* added].[6] Here, Appellants did not request for a reporter's record "at or before the time for perfecting the appeal," which in this case was January 15, 2010.[7] In fact, Appellants have never made a *written* request for the reporter's record.

---

[3] *See* Tex. R. App. P. 34.6(a)(2).
[4] Tex. R. App. P. 1.1.
[5] Tex. R. App. P. 34.6(a)(2).
[6] Tex. R. App. P. 34.6(b)(1).
[7] January 15, 2010 was ten days after Judge Smith's order, and was the final day in which Appellants could file their notice of appeal to perfect their appeal. See Tex. Health & Safety Code § 821.025(a).

Judge Smith, in the initial hearing at the municipal court, ordered that the Appellants "pay costs of court, including the costs of the transcript for appeal."[8] In Judge Smith's order, the term "transcript" for appeal refers to the reporter's record under TRAP rule 34.6—this makes sense because there is no reason that a party should pay for the costs of the clerk's record under TRAP rule 34.5. Appellants have paid neither the costs of court nor the costs of the transcript (reporter's record) for appeal. Texas Health & Safety Code § 821.025(a) requires the municipal court to provide a transcript to the appellate court. As this Court pointed out in the January 28 hearing, the term "transcript" in section 821.025(a) refers to the clerk's record under TRAP rule 34.5—this makes sense because section 821.025(a) deals with appeals from muncipal courts of record as well as justice of the peace courts and regular municipal courts, both of which are not "of record." Courts that are not "of record" would have no reporter's record under under TRAP rule 34.6, so the word "transcript" in section 821.025(a) clearly refers to the clerk's record under TRAP rule 34.5. Judge Smith provided this Court with the "transcript" (clerk's record) on January 20, per section 821.025(a). As a courtesy to this Court, Judge Smith also provided copies of the audio recordings on January 27, even though Appellants failed to comply with his order and with the TRAP rules, and despite the fact that he was under no legal obligation to do so.

Since Appellants have not complied with the applicable TRAP rules and with Judge Smith's order to pay the costs of court and of the transcript, they have no grounds on which to object to any alleged error in the reporter's record provided by Judge Smith.

B. If Parts of the Record Are Lost or Destroyed, Appellants Have Not Satisfied Texas Rule of Appellate Procedure 34.6(f).

For the sake of argument, even if there are parts of the record that are lost or destroyed, Appellants have not satisfied the test found in Texas Rule of Appellate Procedure 34.6(f), and

[8] Order of Judge Smith, p. 5.

therefore are not entitled to a new trial[9] or reversal. To be clear, the City does not concede that any parts of the record are indeed lost or destroyed. In fact, the City argues that the new copies of the audio recordings with supporting affidavits constitute the complete reporter's record.

Under Rule 34.6(f), if part of the reporter's record is lost or destroyed, an appellant is entitled to a new trial only if four elements are met:

> (1) if the appellant has timely requested a reporter's record;
>
> (2) if, without the appellant's fault, ... a significant portion of the [electronic] recording has been lost or destroyed or is inaudible;
>
> (3) if the lost, destroyed, or inaudible portion of the reporter's record ... is necessary to the appeal's resolution; and
>
> (4) if the lost, destroyed or inaudible portion of the reporter's record cannot be replaced by agreement of the parties ....[10]

The TRAP rules were revised to include this test in 1997. The former rules, in particular Rule 50(e), were more stringent, e.g. the Appellant likely did not have to show harm in order to merit reversal on appeal.[11]

Appellants have not satisfied the test for reversal found in the post-1997 Rule 34.6(f).

Element #1. As stated in Part II(A), *supra*, Appellants have not timely requested a reporter's record.[12]

Element #2. Appellants have not proved to this Court that "a significant portion of the recording has been lost or destroyed or is inaudible."[13] In fact, the only concerns that this Court

---

[9] There has been no trial in this case, only a hearing. Tex. Health and Safety Code §§ 821.022(b), 821.023. Chapter 821 does not even mention a trial, again, only a hearing. Chapter 821 does not even mention the right to a re-hearing, only an appeal. Tex. Health and Safety Code § 821.025.

[10] *See* Tex. R. App. P. 34.6(f).

[11] See *Owens-Illinois v. Chatham*, 899 S.W.2d 722, 733 (Tex. App.—Houston [14th Dist.] 1995) & *Weaver v. Westchester Fire Ins. Co.*, 739 S.W.2d 23, 24 (Tex. 1987).

[12] Tex. R. App. P. 34.6(f)(1).

had with any of the audio recordings, i.e. Tapes 2B, 3, and 24, have now been resolved with the new copies of the audio recordings and supporting affidavits.

Element #3. Aside from the fact that Appellants have not established that any of the record is missing, they have also not established that "the lost, destroyed, or inaudible portion of the reporter's record ... is necessary to the appeal's resolution."[14] Appellants have failed to show any harm related to any specific evidence in the hearing. Rather, the testimony as a whole, is overwhelming that the animals were treated cruelly. This evidence came from people familiar with the Shaws and U.S. Global Exotics's operations, from 3 veterinarians and one other animal expert who inspected and cared for the animals at the seizure and afterward, and from Mike Bass, Arlington Assistant Director of Community Services who was involved in the seizure.

Element #4. Again, aside from the fact that Appellants have not established that any of the record is missing, they have also not attempted to obtain an agreement with the City as to the contents of "the lost, destroyed or inaudible portion of the reporter's record."[15]

Since Appellants have not met even one of the required elements for a new trial in the event of a missing record, let alone all four required elements, they are not entitled to either a new trial or a reversal.

C. Appellants Have Satisfied None of the Standards of Review Meriting Reversal.

Appellants have provided no reason—factual, legal, or otherwise—as to why this Court should reverse the municipal court's decision; in particular, Appellants have failed to establish that the evidence presented at the hearing amounted to less than substantial evidence, and Appellants have failed to prove that they have met any other legal standard of review that would merit reversal.

---

[13] Tex. R. App. P. 34.6(f)(2).
[14] Tex. R. App. P. 34.6(f)(3).
[15] Tex. R. App. P. 34.6(f)(4).

1. Substantial Evidence.

When an order, such as this, is appealed, the appellate court must examine the judge's order to determine if it is reasonably supported by substantial evidence, considering the record as a whole.[16] Whether substantial evidence supports a decision such as this is a question of law.[17] The Substantial Evidence Standard gives great deference to the lower court in that the appellate court may only review whether the order was reasonable, not whether it was correct.[18] The appellate court may not substitute its judgment for that of the lower court in determining if there was substantial evidence, and can consider only the record on which the decision is based.[19] The standard can be further described as substantial evidence being more than a scintilla and being enough relevant evidence that a reasonable mind could come to the same conclusion as the lower court.[20] Under this standard, the lower court's findings, inferences, conclusions, and decision are presumed to be supported by substantial evidence—it is the Appellant's burden to prove otherwise.[21]

Appellants have provided nothing in their pleadings or in any other filing with this Court that the municipal court's order was improper under the Substantial Evidence Standard. In fact, the City submits that the evidence at the initial hearing was overwhelmingly in support of the finding that all of the animals were cruelly treated. Appellants have not proven otherwise and overcome this high standard of review.

---

[16] *Cooper v. City of Dallas*, 229 S.W.3d 860, 863-864 (Tex. App.—Dallas 2007, pet. denied).
[17] *Texas Dept. of Pub. Safety v. Alford*, 209 S.W.3d 101, 103 (Tex. 2006).
[18] *El Paso v. Pub. Util. Comm'n of Tex.*, 883 S.W.2d 179, 185 (Tex. 1994).
[19] *Tex. State Bd. of Dental Exam'r v. Sizemore*, 759 S.W.2d 114, 116 (Tex. 1988).
[20] *City of Dallas v. Hamilton*, 132 S.W.3d 632, 637 (Tex. App.—Beaumont 2004, pet. denied).
[21] *Wu v. City of San Antonio*, 216 S.W.3d 1, 5 (Tex. App.—San Antonio 2006, no pet.).

2. Other Standards.

Appellants have failed to prove to this Court that they have met any legal standard of review that would merit reversal in this case.

IV. CONCLUSION & PRAYER

For these reasons, the City requests that this court affirm the municipal court's decision because:

(1) The record is complete. There is no showing that any portion of the record is missing. In the event that any portion is missing, it is de minimis and does not meet the "significant portion" requirement of Texas Rule of Appellate Procedure 34.6(f), and therefore are not entitled to a new "trial" or reversal; and

(2) Appellants did not follow the applicable Texas Rules of Appellate Procedure; therefore, they have no grounds on which to object to any alleged error in the reporter's record provided by Judge Smith;

(3) Appellants have provided no reason—factual, legal, or otherwise—as to why this Court should reverse the municipal court's decision; in particular, Appellants have failed to establish that the evidence presented at the hearing amounted to less than substantial evidence, and Appellants have failed to prove that they have met any other legal standard of review that would merit reversal.

Respectfully submitted,

____

JAY DOEGEY, City Attorney
State Bar No. 05942600
LINDA R. FRANK, Asst. City Attorney
State Bar No. 07370700
ROBERT FUGATE, Asst. City Attorney
State Bar No. 0793099
DAVID S. JOHNSON, Asst. City Attorney
State Bar No. 24060026
Attorneys for CITY

CAUSE NO. 10-78909-2

CITY OF ARLINGTON	**§**	**COUNTY COURT AT LAW**
V.	**§**	**NUMBER TWO**
JASON SHAW, VANESSA SHAW, and	**§**	**TARRANT COUNTY, TEXAS**
U.S. GLOBAL EXOTICS, INC.		

The Court, after examining the pleadings and briefs timely filed and any evidence admitted for consideration, and considering arguments of counsel, determined that this case should be AFFIRMED.

IT IS ORDERED that the order of the Arlington Municipal Court is AFFIRMED.

Signed and entered on this _______ day of ________________________, 2010.

____

JUDGE PRESIDING

CAUSE NO. 10-78909-2

CITY OF ARLINGTON	§	**COUNTY COURT AT LAW**
V.	§	**NUMBER TWO**
JASON SHAW, VANESSA SHAW, and	§	**TARRANT COUNTY, TEXAS**
U.S. GLOBAL EXOTICS, INC.		

CITY OF ARLINGTON'S RESPONSE TO NOTICE OF APPEAL & MOTION TO DISMISS FOR LACK OF JURISDICTION

TO THE HONORABLE JUDGE OF COUNTY COURT AT LAW NUMBER TWO:

COMES NOW, the City of Arlington (the "City"), and requests that this court dismiss this appeal for lack of jurisdiction.

I. Introduction

Under Texas Health and Safety Code § 821.025(a), this Court has 10 calendar days (January 30, 2010), after receiving the transcript (January 20, 2010), in which to dispose of the appeal. At issue in this case are 27,000 animals that need to be placed in their permanent homes. Due to the urgent nature of this case and the limited period in which to resolve this case, the City of Arlington (the "City") feels that it is necessary to file this brief in response to the notice of appeal filed at the Arlington Municipal Court ("municipal court") by Jasen Shaw, Vanessa Shaw, and U.S. Global Exotics, Inc. (Appellants).

This case was originally styled, in the municipal court's order, as "In re: Approximately 27,000 Animals Seized on December 15, 2009" because it is an *in rem* property forfeiture case similar to other cases of civil seizure and forfeiture of animals. This case was initiated when the

City seized approximately 27,000 animals from Appellants under Texas Health and Safety Code chapter 821, on the grounds of cruel treatment.

The City of Arlington did not file a civil lawsuit against Appellants and did not appeal the municipal court's decision to this Court. In fact, the City argues that this appeal is improper.

II. Arguments and Authorities

A. No Appellate Court in Tarrant County Has Jurisdiction to Hear this Appeal

The City requests that this Court dismiss this appeal for lack of jurisdiction.

Although Defendant has a "right" to appeal, under Texas Health and Safety Code § 821.025, there is no court to which Appellants can appeal the municipal court's finding that the animals at issue were cruelly treated.[1] The case of *In re Loban* held that there is no court in Tarrant County that can receive an appeal of a civil judgment originating in a municipal court of record, like the Arlington Municipal Court.[2] The *Loban* case dealt with an appeal from the Grapevine Municipal Court of Record of a "dangerous dog" hearing under Health and Safety Code chapter 822.[3] The instant case deals with an appeal from the Arlington Municipal Court of Record of an "animal cruelty" hearing under Health and Safety Code chapter 821. Although these are different types of animal hearings, the same law applies as they are both appeals of civil judgments from municipal courts of record in Tarrant County. The dangerous dog appeal provision states that the owner of an alleged dangerous dog "may appeal the decision of the ... municipal court in the same manner as appeal from other cases from the ... municipal court."[4]

---

[1] *In re Loban*, 243 S.W.3d 827, 830-31 (Tex. App.—Fort Worth 2008).
[2] *Id.* & Tex. Gov't Code § 30.00851.
[3] *Id.* at 828-29.
[4] Tex. Health and Safety Code § 822.0421.

The animal cruelty appeal provision states that "[a]n owner divested of ownership of an animal ... may appeal the order to a county court[5] or a county court at law ...."[6]

Only two courts can possibly have jurisdiction over an appeal from a judgment of a municipal court of record: (1) a county criminal court, first and (2) a county court at law, second, but only if the county has no county criminal court.[7] Tarrant County criminal courts only have jurisdiction over criminal cases and have no jurisdiction over civil matters.[8] An animal cruelty hearing under Chapter 821 is a civil matter, not a criminal matter,[9] so the Tarrant County criminal courts do not have jurisdiction over this appeal. Tarrant County courts at law *do* have jurisdiction over civil matters,[10] however, a person can only appeal a judgment in a civil matter from a municipal court of record to a county court at law if the county in which the appeal lies has no county court at law.[11] Since Tarrant County *does* have county criminal courts, the Tarrant County courts at law cannot receive an appeal of a civil judgment from a municipal court of record and do not have jurisdiction over such an appeal.[12]

Since no appellate court in Tarrant County has jurisdiction to hear an appeal of this case, the City requests that this Court dismiss the appeal for lack of jurisdiction.

---

[5] Although Section 821.025 refers to a "county court," nowhere in Chapter 30 of the Government Code (Municipal Courts of Record) is there any mention of this term. Presumably, the term "county court" in section 821.025 refers to a "county criminal court," one of the two courts that may hear an appeal from a municipal court of record. *See* Tex. Gov't Code § 30.00014(a).
[6] Tex. Health and Safety Code § 821.025(a).
[7] *Id.*
[8] Tex. Gov't Code § 25.2223(a).
[9] See *Loban*, 243 S.W.3d 827.
[10] Tex. Gov't Code § 25.2222(a).
[11] Tex. Gov't Code § 30.00014(a) & *Loban*, 243 S.W.3d 830-31.
[12] *Id.*

III. CONCLUSION & PRAYER

For these reasons, the City requests that this court dismiss this appeal for lack of jurisdiction.

Respectfully submitted,

____
JAY DOEGEY, City Attorney
State Bar No. 05942600
LINDA R. FRANK, Asst. City Attorney
State Bar No. 07370700
ROBERT FUGATE, Asst. City Attorney
State Bar No. 0793099
DAVID S. JOHNSON, Asst. City Attorney
State Bar No. 24060026
Attorneys for CITY

101 S. Mesquite St., Suite 300
Post Office Box 90231 MS 63-0300
Arlington, Texas 76004-3231
(817) 459-6878
(817) 459-6897 FAX

CERTIFICATE OF SERVICE

I certify that on January 25, 2010, a copy of this motion was sent by certified mail, return receipt requested, to Attorney for the Appellants:

Lance Evans
115 W. Second St., Ste. 202
Fort Worth, TX 76102

A courtesy copy was also sent by e-mail to Attorney for the Appellants: <lanceevans@egdmlaw.com>.

JAY DOEGEY, City Attorney
State Bar No. 05942600
LINDA R. FRANK, Asst. City Attorney
State Bar No. 07370700
ROBERT FUGATE, Asst. City Attorney
State Bar No. 0793099
DAVID S. JOHNSON, Asst. City Attorney
State Bar No. 24060026
Attorneys for CITY

101 S. Mesquite St., Suite 300
Post Office Box 90231 MS 63-0300
Arlington, Texas 76004-3231
(817) 459-6878
(817) 459-6897 FAX

DENIED
m.a.s.
1-15-10

CAUSE NO. 4909-D

IN RE	§	IN THE MUNICIPAL COURT
	§	
APPROXIMATELY 27,000 ANIMALS	§	CITY OF ARLINGTON
	§	
SEIZED DECEMBER 15, 2009	§	TARRANT COUNTY, TEXAS

MOTION FOR NEW TRIAL

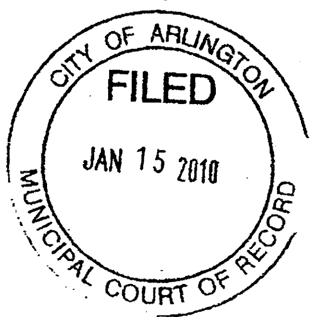
COMES NOW LANCE EVANS, Attorney for JASEN SHAW, VANESSA SHAW, and U.S. GLOBAL EXOTICS, INC., Respondents in the above entitled and numbered cause, and moves the Court to grant a new trial for the following reasons:

I.

The trial court violated Respondents' rights to due process and due course of law under the United States and Texas Constitutions as well as their right to Jury Trial under the 7th Amendment to the United States Constitution and Article I, section 15 of the Texas Constitution by denying Respondents' request for a jury trial in this matter.

II.

The evidence was factually insufficient to support the trial court's findings and judgment.



III.

The trial courts findings and judgment are against the overwhelming weight of the evidence.

IV.

The evidence was legally insufficient to support the trial court's findings and judgment.

V.

The trial court violated Respondents' rights to due process and due course of law under the United States and Texas Constitutions by denying Respondents' Sworn Motion for Continuance.

VI.

The trial court erred by denying Respondents' Motion for Plea in Abatement pursuant to Rule 21, Texas Rules of Civil Procedure, because the Notice of Hearing did not name the actual owner of the seized animals at issue.

VII.

The statute under which Judgment was rendered is unconstitutional because it denies Respondents procedural and substantive due process of law. Further, it constitutes an improper taking of property in violation the United States and Texas Constitutions.

VIII.

The trial erred by admitting into evidence exhibits which were not properly authenticated and by improperly admitting hearsay.

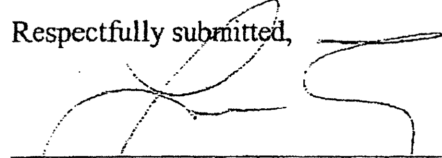
IX.

The trial court did not correctly apply the law to the facts.

X.

The trial court erred by failing to make specific findings with regard to each specific animal seized that the particular animal was cruelly treated and, therefore, subject to seizure and/or forfeiture.

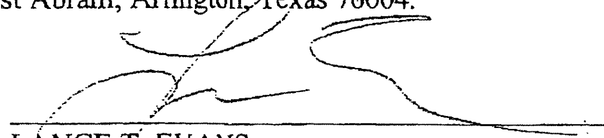
Respectfully submitted,



LANCE T. EVANS, SBN 06723680
115 W. 2nd Street, Suite 202
Fort Worth, Texas 76102
817-332-3822
817-332-2763 Fax
ATTORNEY FOR RESPONDENTS

CERTIFICATE OF SERVICE

On this the 15 day of January, 2010, a true copy of the foregoing Notice of Appeal has been delivered to the City Attorney, 200 West Abram, Arlington, Texas 76004.



LANCE T. EVANS

NO. 4909-D

IN RE:	§	IN MUNICIPAL COURT OF
APPROXIMATELY 27,000 ANIMALS	§	CITY OF ARLINGTON
SEIZED DECEMBER 15, 2009	§	TARRANT COUNTY, TEXAS

NOTICE OF APPEAL

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW LANCE EVANS, Attorney for JASEN SHAW, VANESSA SHAW, and U.S. GLOBAL EXOTICS, INC., Respondents in the above entitled and numbered cause, and file this Notice of Appeal and in support thereof would show the court as follows:

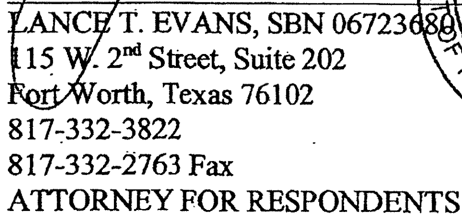
I.

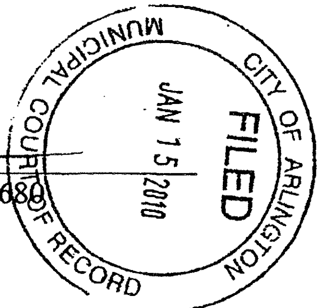
That on the 5th day of January, 2010, Associate Judge Michael Smith of the Arlington Municipal Court ruled that all animals seized on December 15, 2009 were cruelly treated and Jasen Shaw, Vanessa Shaw and U.S. Global Exotics, Inc. were divested of ownership of the animals seized on December 15, 2009 and deprived of all right, title and interest in the animals.

II.

Pursuant to Texas Health & Safety Code, Section 821.025, the Respondents hereby give Written Notice of Appeal from said judgment to County Court at Law of Tarrant County, Texas.

Respectfully submitted,

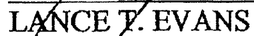




LANCE T. EVANS, SBN 06723680
115 W. 2nd Street, Suite 202
Fort Worth, Texas 76102
817-332-3822
817-332-2763 Fax
ATTORNEY FOR RESPONDENTS

CERTIFICATE OF SERVICE

On this the 15th day of January, 2010, a true copy of the foregoing Notice of Appeal has been delivered to the City Attorney, 200 West Abram, Arlington, Texas 76004.



LANCE T. EVANS

CAUSE NO. 4909-D

IN RE:	§	IN THE MUNICIPAL COURT
	§	
APPROXIMATELY 27,000 ANIMALS	§	CITY OF ARLINGTON
	§	
SEIZED DECEMBER 15, 2009	§	TARRANT COUNTY, TEXAS

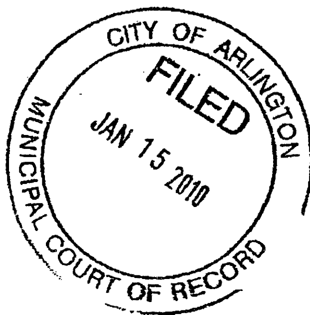
APPEAL BOND

WHEREAS, on the 5th day of January, 2010, in the above entitled and numbered cause, in said Court, Associate Judge Michael Smith ruled that all animals seized on December 15, 2009 were cruelly treated and Respondents JASEN SHAW, VANESSA SHAW and U.S. GLOBAL EXOTICS, INC. were divested of ownership of the animals seized on December 15, 2009 and deprived of all right, title and interest in the animals, and from which said judgment said Respondents appeal to the County Court at Law of Tarrant County, Texas pursuant to Texas Health and Safety Code, Section 821.025.

THEREFORE, we, the undersigned, as principals, and as sureties, do hereby bind ourselves, our heirs, executors and administrators, jointly and severally, to the State of Texas, in the sum of TEN THOUSAND AND 00/100 DOLLARS ($10,000.00).

CONDITIONED, that the above Respondents shall well and truly make a personal appearance before the County Court at Law of Tarrant County at its next regular term, to be held in Fort Worth, Texas, on the _____ day of ________________, 20__, and there remain from day to day and term to term and answer in said cause on trial in said Court.

WITNESS OUR HANDS this 15th day of JAN., 2010.



WAIVED BY SURETY
JASEN SHAW

WAIVED BY SURETY
VANESSA SHAW

WAIVED BY SURETY
U. S. GLOBAL EXOTICS, INC. by Jasen Shaw, President

LANCE T. EVANS / SB# 06723680
115 W. Second St., Ste. 202
Fort Worth, Texas 76102
(817) 332-3822

APPROVED and filed this 15 day of JAN., 2010

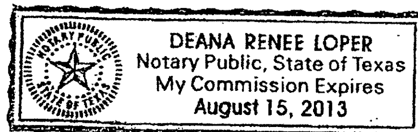
JUDGE PRESIDING

THE STATE OF TEXAS §
TARRANT COUNTY §

I, LANCE T. EVANS, do swear that I am worth in my own right at least the sum of $10,000.00 after deducting from my property all that which is exempt by the constitution and laws of the State from forced sale, and after the payment of all our debts, and after satisfying all encumbrances upon my property which is known to me, and that I reside in Tarrant County, and have property in this State liable to execution worth $10,000.00.

LANCE T. EVANS, Surety

SWORN TO AND SUBSCRIBED BEFORE ME, the undersigned authority, on this 15TH day of JANUARY, 2010.



Notary Public, State of Texas
My Commission Expires: 8/15/2013

NO. 4909-D

In re:	§	IN THE MUNICIPAL COURT
	§	
APPROXIMATELY 27,000 ANIMALS	§	CITY OF ARLINGTON
	§	
SEIZED ON DECEMBER 15, 2009	§	TARRANT COUNTY, TEXAS

ORDER

Commencing on the 18th day of December and ending on the 31st day of December, 2009, a hearing was held in the above-styled and numbered cause before Associate Judge Michael Smith of the Arlington Municipal Court, sitting in his capacity as Magistrate. The purpose of the hearing was to determine whether animals seized by the City of Arlington (hereinafter called "the City") on December 15, 2009 from Jasen Shaw, Vanessa Shaw, and U.S. Global Exotics, Inc. (hereinafter called "Respondents") at 1007 Oakmead Drive, Arlington, Tarrant County, Texas were "cruelly treated" as defined by Texas Health and Safety Code §821.021. The City was represented by Assistant City Attorneys Linda Frank, Asem Eltiar, and David Johnson. Respondents were represented by attorneys Lance Evans and Jim Jay.

Background

On December 15, 2009, Chief Judge Stewart Milner of the Arlington Municipal Court issued a warrant, as authorized by Texas Health and Safety Code §821.022, for the seizure of animals being housed at 1007 Oakmead Drive in Arlington, Tarrant County, Texas. The warrant was issued in response to an affidavit that had been filed by Mike Bass, an officer with the City who has responsibility for animal control. The testimony revealed that the total number of animals seized was approximately 27,000 and represented approximately 500 species. These animals were the inventory of a business operating under the name "U.S. Global Exotics," which buys and sells "exotic" animals.

At the time of this seizure, the City believed that Jasen and Vanessa Shaw were the owners of this business and the owners of the animals. A copy of the seizure warrant, which named Jasen and Vanessa Shaw as the animals' owners, together with written notice of the time and place of this hearing, was handed to Jasen Shaw when the animals were seized on December 15, 2009. At the hearing, it was shown that the business and animals are actually owned by a corporation called U.S. Global Exotics, Inc., and that Jasen Shaw is the president of that corporation.

The attorneys for Respondents argue that the owner of the animals, U.S. Global Exotics, Inc., was not properly made a party to this proceeding, since the seizure warrant did not mention this corporation by name. This Court does not agree with this contention, for the following reasons. There appears to be no statutory requirement that the application for the warrant, or the warrant itself, must contain the name of the owner. Texas Health and Safety Code §821.022 spells out the procedure to be followed when an authorized officer "has reason to believe that an animal has been or is being cruelly treated." Subsection (a) of that statute provides that the officer may apply to a magistrate for a warrant to seize the animal. Subsection (b) provides that upon a showing of probable cause to believe that the animal has been or is being cruelly treated, the magistrate "shall issue the warrant and set a time within 10 calendar days of the date of issuance for a hearing in the appropriate justice court or municipal court to determine whether the animal has been cruelly treated." Neither of these two subsections of the statute mentions the word "owner." This wording would seem to allow a concerned officer to take quick action for the welfare of an animal and "get the ball rolling" even in cases where the officer has been unable, or has not yet had time, to determine the exact ownership of the animal. Only in subsection (c) of §821.022 does the owner of the animal come into the picture, when the officer, upon executing the warrant, is required to "give written notice to the owner of the animal of the time and place of the hearing."

Since the owner of the animals in this case is a corporation, the statutes dealing with service of process on corporations must be followed in order to comply with the notice requirement just mentioned. Texas Business Corporation Act §2.11 provides "The president and all vice presidents of the corporation and the registered agent of the corporation shall be agents of such corporation upon whom any process, notice, or demand required or permitted by law to

be served upon the corporation may be served." Further, Texas Business Organizations Code §5.255 similarly provides that the president and each vice president of a corporation is an agent upon whom process, notice, or demand against the corporation may be served. In the present case, while the corporation U.S. Global Exotics, Inc. was not named anywhere in the warrant, the corporation's animals were seized, and the corporation's president, who was physically present, was personally handed a notice advising the time and place that a hearing on the treatment and eventual disposition of the animals was to be held. This Court finds that this service on the corporation's president satisfied the notice requirement of Texas Health and Safety Code § 821.022(c).

Discussion of the Evidence

Both sides presented witnesses during the hearing, and their combined presentations totaled seven days of testimony. The Court heard testimony from several expert witnesses as well as other fact witnesses and received into evidence photographs, videos, and documents. The Court heard argument from counsel for both sides. This evidence demonstrated the confinement, health, and condition of the animals at 1007 Oakmead Drive.

The evidence revealed that U.S. Global Exotics, Inc. is in the business of importing and selling "exotic" animals. One of the expert witnesses defined an "exotic" animal as an animal that is not a dog or cat or domesticated agricultural animal. This definition is broader than one might expect, and includes animals as familiar and common as hamsters, as well as very rare mammals, reptiles, arachnids, and amphibians. The witnesses who testified on this point were in general agreement that about 75-80% of the animals at the facility were "wild-caught," meaning that they were trapped or otherwise captured in the wild and then sold. The balance of the animals came from farming operations that breed them for commercial purposes. The animals seized originally came from several continents. U.S. Global Exotics buys and transports these animals to its facility at 1007 Oakmead Drive, and then sells them to other dealers, pet stores, zoos, and private purchasers. Some of these sales are international, and others are domestic.

Several witnesses testified about the conditions they observed at the facility at 1007 Oakmead Drive. Dozens of photographs and a number of video and audio recordings were

received in evidence. Taken together, the evidence shows several ongoing problems which can be briefly summed up with the following observations.

(1) The facility was seriously understaffed. At the time of the seizure, there were only three employees whose sole job duty was the care of the animals. Although Jasen and Vanessa Shaw and one or two other non-caretaker employees would sometimes assist, there was still far too little time and manpower available to care for such a large number of animals. Some of the witnesses who were employed at the facility testified that some of the rooms in which animals were housed did not even have a caretaker assigned to them. In those rooms, the animals' needs had to wait until one of the caretakers assigned to other rooms found time to come and check them. Among the experts who testified, opinions as to the number of employees that would be needed to care for this many animals ranged from 20 to 40.

(2) All of the animals were subjected to poor air quality, with most of the witnesses describing a constant stench of death, and with one witness also describing a strong ammonia odor resulting from urine.

(3) Many of the animals were housed in overcrowded conditions, including many types of animals that are solitary by nature and should not be forced into close proximity even with others from their own species. The testimony revealed that this overcrowding causes stress in animals, increases the incidence of fighting, injuries, and cannibalism, and facilitates the transmission of disease.

(4) Many of the animals were unreasonably deprived of basic needs, such as food, water, clean bedding, and heat. In perhaps the worst example, one shipment of 414 iguanas was packaged in small groups in bags, and the bags were then packed in boxes for shipment to Egypt. A problem developed with the purchaser, and the order was eventually canceled. The iguanas were left in the shipping boxes for approximately two weeks, without food or water. When the boxes were opened, approximately 200 of the iguanas had died. While the testimony did not reveal any other situation as dramatic as this, inadequate supplies of food and water, as well as dead animals remaining in areas where live animals were confined, were ongoing, everyday problems that extended across all parts of the facility. In part, these problems resulted from the understaffing mentioned above.

For all of the above reasons, as well as others that were detailed in the testimony, at least four of the expert witnesses testified that all of the animals in the facility were cruelly treated.

Many animals died in the facility, but these deaths do not constitute conclusive evidence of cruel treatment. The testimony showed that at the time of the seizure, approximately 600 dead animals were found in Respondent's facility at 1007 Oakmead Drive. This statistic has received much publicity and might persuade the casual observer that Respondents are automatically to blame, but this Court finds that the evidence does not support such a view, any more than it supports the view that the City is automatically responsible for the deaths of the almost 4,000 animals that have died since the City took custody of them. As the City and Respondents have clearly and ably pointed out, when one acquires an animal, it may already have problems.

Firstly, evidence received at the hearing indicates that the death rate in the animal trade is generally high. One witness cited a study that indicated that as many as 70% of reptiles die before reaching their ultimate purchaser. The evidence further indicates that deaths in the animal trade can result from any of a number of factors. A high percentage of these animals are already carrying diseases and/or parasites which they had in the wild. Some of these diseases and parasites can be fatal. Many of the animals experience stress, which can result from being captured, from being transported, from temperature changes, or from other factors. This stress can be harmful to the animals' health and can result in death. Additionally, some animals simply stop eating. The evidence showed that cessation from eating can result from stress, from temperature changes, from simply being moved to another cage, and from any number of other factors, including some that cannot be determined. The evidence indicated that sometimes an animal that has stopped eating will eventually start eating again. In other cases, animals never resume eating and simply die. Finally, the treatment the animal received at the hand of the previous owner yesterday may have a very strong bearing on the condition it exhibits today. Because of all these factors, the evidence would not support a finding that all animal deaths in a facility such as U.S. Global's are the result of the treatment the animals are receiving there. It should also be noted that animals in the wild die from predators, disease, and any number of other factors. Whether a given animal would have a longer life expectancy in the wild than it would in the exotic animal trade must be left to conjecture.

The evidence also showed that U.S. Global's facility is intended to be only a temporary stopping point for the animals. As in any business that buys and sells any type of merchandise, quick turnover is desirable. This is especially true when the commodity involved is literally "perishable." At first glance, the Court finds some merit in the proposition that a facility that is being used as a temporary holding facility where animals are only briefly housed before being shipped to new owners might reasonably be held to a slightly lower standard than would a facility where the animals will be kept for an indefinite period. However, it was very common for an animal's stay at this facility to become longer than expected. Even if a lower standard of care were permissible for animals that are transient, no steps were taken by Respondents to insure that more intensive and generous care was given to those whose stay was being extended. Evidence was received which indicated that this facility was operated in accordance with industry standards of the exotic animal trade. While this may be true, this Court is not free to substitute those standards for the standards set by Texas statutes.

Findings

Having considered the evidence and argument of counsel, this Court finds:

The jurisdictional requirements set forth in Chapter 821, Texas Health and Safety Code, have been met, and this Court has jurisdiction to hear this matter.

The Respondents cruelly treated all of the animals made subject of this hearing by cruelly confining the animals.

In particular, all of the animals were cruelly treated in one or more of the following manners: cruelly confined and injured due to such confinement; unreasonably denied necessary food and water; subjected for an extended period of time to food and/or water contaminated with foreign substances including but not limited to feces and urine; held in enclosures inappropriate for the animals in size and design; overcrowded in enclosures; held in shipping containers for

extended periods of time without proper care, including but not limited to denial of necessary food, water, and veterinary care; subjected to conditions that promoted fighting and cannibalism; and denied necessary veterinary care.

Respondents failed to employ sufficient personnel to adequately care for the animals.

The City did not present any evidence detailing the costs incurred in housing and caring for the animals during their impoundment, so Respondents are not required to pay any such costs.

IT IS THEREFORE ORDERED that:

Pursuant to Texas Health and Safety Code § 821.023(d), U.S. Global Exotics, Inc., and, to the extent that they may have an ownership interest, Jasen Shaw and Vanessa Shaw, are hereby divested of ownership of the animals in question and deprived of all right, title and interest in the animals.

Pursuant to Texas Health and Safety Code § 821.023(d), the City is given the animals and is ordered to sell the animals at a public sale by auction, have the animals humanely euthanized, or give the animals to a non-profit animal shelter, pound, or society for the protection of animals.

Respondent U.S. Global Exotics, Inc. is ordered to pay costs of court, including the costs of the transcript for appeal.

Let execution issue as necessary for enforcement of this order.

Signed on this ______ day of ________________, 20____

____

Michael Smith
Judge Presiding

CAUSE NO. 10-78909-2

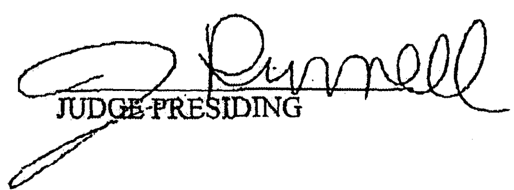
CITY OF ARLINGTON	X	COUNTY COURT AT LAW
	X	
	X	
V.	X	NUMBER TWO
	X	
	X	
JASON SHAW, VANESA SHAW, and	X	TARRANT COUNTY, TEXAS
	X	
U.S. GLOBAL EXOTICS, INC.	X	

COURTS ORDER

The Court, after examining and considering the transcript, evidence, audio tape recordings of the Arlington Municipal Court hearing and briefs filed by counsels has determined that the Judgment of the Arlington Municipal Court should be **AFFIRMED** in its entirety.

IT IS ORDERED that the order signed by Arlington Municipal Court Judge Michael Smith on January 5, 2010 is **AFFIRMED** in its entirety.

Signed and entered on this 30 day of January, 2010.



JUDGE PRESIDING

CAUSE NO. 10-78909-2

CITY OF ARLINGTON	§	**IN COUNTY COURT**
	§	
VS.	§	**AT LAW NO. TWO OF**
	§	
JASEN SHAW, VANESSA SHAW	§	
AND U.S. GLOBAL EXOTICS, INC.	§	**TARRANT COUNTY, TEXAS**

2010 JAN 29 PM 1:29

BRIEF IN SUPPORT OF
APPEAL FROM FORFEITURE ORDER

COMES NOW, JASEN SHAW, VANESSA SHAW AND U.S. GLOBAL EXOTICS, INC., hereinafter called Appellants, by and through their attorney of record, LANCE T. EVANS, and files this Brief in support of their appeal from a forfeiture order entered by the Municipal Court of the City of Arlington, Tarrant County, Texas.

HISTORY OF THE CASE

This was an operation by People for the Ethical Treatment of Animals (PETA) to further their ideological agenda. They did the "investigation," provided all the evidence, and contracted with all the witnesses for the City except city employee Mike Bass, and UTA employee Carl Franklin. None of the impartiality attributed to law enforcement or other governmental investigative agencies was present here. The fact finder did not appear to factor in or even recognize the significance that all the evidence put forth by the City of Arlington was bought and paid for by PETA. It is a stated goal of PETA as well as Dr. Warwick and Carl Franklin to end this industry. PETA sponsored legislation in congress last year to outlaw the sale of most of these types of animals. That legislation did not pass, and PETA is now trying operations like this one to directly put dealers out of business, as well as intimidate others in this industry. This

is important in the context of the hearing in the Municipal court because it shows the bias and motive for the testimony put forth by the City of Arlington and PETA.

PETA specifically hired Howard Goldman to serve as an "undercover investigator" by securing a job at U.S. Global Exotics under false pretenses. Mr. Goldman began working there in mid-May of 2009 and continued in an undercover capacity until the seizure on December 15th, 2009. Howard testified that he was paid approximately $135.00 for every day that he turned in a report to PETA, and that he turned in a report every day that he worked at U.S. Global Exotics.

Most of the witnesses for the City were contracted and offered payment by PETA for their services, some in the summer of 2009. PETA staff met with Mike Bass, City of Arlington, in September 2009 to consult with him on this operation. Mr. Bass testified that he was shown evidence that had been compiled by PETA, but he determined that at that time there was not probable cause to suspect that the Shaws nor U.S. Global Exotics were responsible for cruel treatment of animals.

POINT OF ERROR NUMBER ONE

APPELLEE CITY OF ARLINGTON'S FAILURE TO PROVIDE A COMPLETE WRITTEN TRANSCRIPT AS REQUIRED BY LAW DENIED APPELLANTS THE ABILITY TO PROPERLY PROSECUTE THEIR APPEAL AND DENIED THEM DUE PROCESS UNDER THE 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 19 OF THE TEXAS CONSTITUTION.

SUMMARY OF THE ARGUMENT

The City has produced tapes containing the testimony from the forfeiture hearing. The tapes, which clearly are at least part of the trial court's "transcript," were not produced within five days after the notice of appeal and appeal bond were filed in this case. Furthermore, the

tapes do not contain the complete proceedings from the hearing – Tape 2 Side B is unplayable, Tape 3 is missing and Tape 24 is missing, blank and/or broken. Appellants request that this court find that the City (1) failed to provide a complete transcript as required by statute, (2) failed to do so within the time period required by law and (3) spoliated evidence that it had a duty to maintain.

ARGUMENT & AUTHORITIES

A. The trial court had an obligation to record and transcribe the trial court proceedings.

The trial court below is, by admission, a municipal court of record governed by TEX. GOV'T CODE Ch. 30. As such, the City must provide a court reporter to preserve a record in cases tried in that court. TEX. GOV'T CODE § 30.00010 (a). Instead of providing a court reporter, a municipality may record trial proceedings. § 30.00010 (d). It is presumed, in light of the production of tape recordings of the trial proceedings below, that the City has opted to record proceedings under subsection (d) rather than provide a court reporter under subsection (a). By making such an election, the City is obligated to ensure the transcription of the proceedings by an official court reporter in the event of an appeal. § 30.00010(d). The clerk of the City of Arlington municipal court(s) of record, by statute, must appoint the official court reporter. § 30.00856. Based on the foregoing provisions, the trial court below had a statutory obligation to record and transcribe the forfeiture proceedings.

B. The trial court, not the Appellants, had the obligation to provide this court with a transcript of the trial court proceedings.

In line with the above statutory provisions, TEX. HEALTH & SAFETY CODE § 821.025 (a) obligates the trial court (not the respondent) to deliver a copy of the trial court's transcript to the appellate court. In discerning the legislature's intended appellate procedure for Ch. 821 cases, we must read § 821.025 and the general appellate rules and/or statutes for the trial court (in this case TEX. GOV'T CODE Ch. 30) together. *Granger v. Folk*, 931 S.W.2d 390, 391 (Tex. App. – Beaumont 1996). Reading the statutes together, TEX. GOV'T CODE § 30.00010 (d) obligated the trial court to "transcribe" the trial proceedings, and TEX. HEALTH & SAFETY CODE § 821.025 (a) required the trial court to deliver the trial court's "transcript" to the appellate court. Appellants do not dispute their obligation under TEX. GOV'T CODE § 30.00014 (g) to pay the fee for the transcription of the proceedings. But the obligation to provide the transcription of the trial proceedings to the appellate court fell solely upon the trial court, not the Appellants.

C. The trial court failed to timely provide a complete transcript of the proceedings below.

Section 821.025 required the trial court, "not later than the fifth calendar day after the date the notice of appeal and appeal bond is filed," to deliver a copy of the trial court transcript to the appellate court. It is undisputed that the notice of appeal and appeal bond were filed in this case on January 15, 2010. Section 821.025 therefore required the trial court to deliver its transcript by January 20, 2010. It is undisputed that this Court did not receive the tapes of the trial court proceedings (let alone the statutorily required

transcription of the trial court proceedings) until late in the afternoon on January 27, 2010. The trial court therefore failed to perform its obligations under both §§ 30.00010 and 821.025. Appellants should not be prejudiced by the trial court's failures, and it is appropriate for this Court to dismiss this appeal and reverse the trial court's decision below.

D. Spoliation is a question of law and subject to sanctions

The doctrine of spoliation refers to the improper destruction of evidence relevant to a case. *Cresthaven Nursing Residence v. Freeman*, 134 S.W.3d 214, 225 (Tex. App. B Amarillo 2003, no pet.). The determination of whether a party has destroyed evidence is a question of law for the court to decide. *Miller v. Stout*, 706 S.W.2d 785, 787-88 (Tex. App. B San Antonio 1986, no writ). The legal inquiry by the court involves considering:

1) whether there was a duty to preserve the evidence;
2) whether the alleged spoliator either negligently or intentionally spoliated evidence; and,
3) whether the spoliation of evidence prejudiced the non-spoliator's ability to present its case or defense.

Trevino v. Ortega, 969 S.W.2d 950, 958-60 (Tex. 1998 (Baker, J., concurring).

Upon a complaint of spoliation, the threshold inquiry therefore is whether the alleged spoliator was under any duty or obligation to preserve the evidence. Appellants have cited to ample authority above supporting the proposition that the trial court had a duty to record and transcribe the trial court proceedings, and deliver that transcription to this court.

Courts have broad discretion to take measures to correct the ill effects resulting from spoliation, including a jury instruction on the spoliation presumption and death penalty sanctions. *Cresthaven*, 134 S.W.3d at 225; *see also, Trevino*, 969 S.W. 2d at 953. A spoliation instruction may be warranted in a case involving the loss or destruction of evidence even when

there is no allegation of intentional conduct. *Gilmore v. SCI Texas Funeral Services, Inc.*, 234 S.W.3d 251 (Tex. App. Waco 2007, pet. denied); *see also, Tex. Elec. Co-op. v. Dillard*, 171 S.W.3d 201, 208-09 (Tex. App. B Tyler 2005, no pet.)

The bottom line is that the City was under a duty to preserve the transcription of the trial court testimony. Despite being under this duty, the City failed to preserve the transcription. The reasonable inference from all of this is that the transcription was unfavorable to the City, or the City would have taken appropriate steps to secure and preserve this important evidence.

E. Appellants are entitled to a spoliation presumption or other sanctions for the City's improper conduct.

When a party spoliates evidence, the court may submit a spoliation presumption instruction. *Trevino*, 969 S.W.2d at 960. A spoliation instruction should inform the factfinder that the spoliating party has either intentionally or negligently destroyed evidence and, therefore, the jury should presume that the destroyed evidence was unfavorable to the spoliating party. *Id.* Some Texas courts have held it is error to refuse to submit a spoliation instruction when the non-spoliating party had properly raised the issue. *Watson v. Brazos Elec. Power Coop., Inc.*, 918 S.W.2d 639 S.W.2d 639, 643 (Tex. App. B Waco, 1996, no writ). Moreover, the court has broad discretion to fashion an appropriate remedy to restore the parties to a rough approximation of their positions if all the evidence were available. *Johnson*, 106 S.W.3d at 721.

In the present case, Appellants have shown that they are entitled to an instruction on the City's spoliation of the audio tapes of the trial court proceedings. The City was under a duty to preserve the evidence and either intentionally or negligently allowed its destruction materially prejudicing Appellants in the presentation of their case. Moreover, as sanction for such conduct, the Court should dismiss this appeal and reverse the trial court's decision below. Such sanctions are reasonable and necessary to place Appellants back into the position they would have been if

all of the evidence were available. Having destroyed evidence pertaining to its prosecution, the City should be prevented from otherwise presenting it. *Plorin*, 755 S.W.2d at 492.

POINT OF ERROR NUMBER TWO

THE CITY OF ARLINGTON ERRED IN DENYING APPELLANTS A JURY TRIAL.

SUMMARY OF THE ARGUMENT

Appellants were denied the right to jury trial afforded to them by the 7th Amendment of the United States Constitution and Article I, Section 15 of the Texas Constitution.

ARGUMENT AND AUTHORITIES

This seizure was set for hearing at 2 pm on December 18th, 2009. Appellants' request for jury trial was made in writing and filed with the court prior to the start of the hearing. At a pretrial hearing held on the morning of December 18th, Appellants' Request for Jury Trial was denied. The Arlington Municipal Court erred when it denied Appellants' Request for Jury Trial. The seizure of the animals by the City of Arlington was a seizure of privately owned property, triggering the protection of the 7th Amendment of the United States Constitution[1] and Article I, Section 15 of the Texas Constitution[2]. *Granger v. Folk*, 931 S.W.2d 390 (Tex.App.-Beaumont 1996) contains a good analysis of why the right to a jury trial applies in seizures under Texas Health and Safety Code Section 821.023. The court in *Granger* cites both of the above

---

[1] In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. VII.

[2] The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency. . . .

TEX.CONST . art. I, § 15

provisions in holding that an owner whose animals were seized does in fact have a right to jury trial. This case did involve an appeal from a justice court to a county court, but the Court of Appeals made it clear that it was the effect of the seizure on appellant's property rights that triggered his right to a jury trial, and not merely that the justice court was not a court of record. Id. at 392. Further, in *Monterey v. Del Monte Dunes*, 119 S.Ct. 1624 (1999) the United States Supreme Court held that the issue of whether a landowner has been deprived of all economically viable use of his property is a predominately factual question. The Court affirmed a trial court's decision to allow a jury trial for Del Monte Dunes, which was denied the right to develop its parcel of land it owned because of a strict application process by the city in which it was located.

POINT OF ERROR NUMBER 3

THE EVIDENCE IS INSUFFICIENT TO SUPPORT A FINDING THAT THE SEIZED ANIMALS WERE CRUELLY TREATED BY APPELLANTS.

SUMMARY OF THE ARGUMENT

The Municipal Court's decision to forfeit all the animals seized was not supported by the evidence.

ARGUMENT AND AUTHORITIES

This court has the authority to review the sufficiency of the evidence that was presented to the Municipal Court, and if that evidence is insufficient to justify forfeiture of any of the animals, to return those animals to one or more of the Appellants.

a.) The judgment of the Municipal Court was erroneous in that it made a blanket finding of cruelty to animals on every animal seized. There were many individual animals and species about which there was no specific credible evidence submitted. Even viewing the City's evidence in its most favorable light, the mere assertion that on one particular morning the facility

did not smell good, or that not all of its cages had been cleaned, or that it may have arguably been understaffed, does not allow the Municipal Court to just infer cruel treatment. Section 821 by its plain language contemplates actual proof that each animal seized was cruelly treated. Contained in the record is an inventory of every animal seized on Dec. 15th, 2009. I encourage this court to compare this list of animals with the evidence and testimony provided in the hearing. The city thinks that a general claim of cruelty is enough to cover every animal without the inconvenient requirement of specific proof as to each. This is a denial of due process and amounts to an unconstitutional taking of property under the 14th amendment of the U.S. Constitution and Article I Section 19 of the State Constitution. Because of the time constraints imposed by statute, I have attached as Appellant's Exhibit 1 a copy of the inventory of seized animals. I have tried to highlight the animals that I do not recall being even mentioned in the hearing.

b.) The Due Process Clauses of the 14th amendment of the U.S. Constitution and Article I Section 19 of the State Constitution require the Municipal Court to make specific findings as to each animal seized. The Arlington Municipal Court instead made general findings that make it impossible to determine a.) if an individual animal was cruelly treated, and b.) how that individual animal was cruelly treated. This makes it impossible to respond on appeal to the Municipal Court's ruling, and again denies appellants their constitutional rights to appeal. Further, by making such general findings, it is impossible to determine which appellant may have cruelly treated an animal. Section 821 does not allow the forfeiture of an animal from an owner where that owner was not found to engage in cruel treatment. *Hoog v. State*, 87 S.W. 3d 740 (Tex. App. – San Antonio [4th Dist.] 2002) at 746. For example, it could be found that Vanessa Shaw cruelly treated an animal, but that Jasen Shaw did not. Under Section 821,

Vanessa could be divested of ownership, but not Jasen. In addition, theoretically the cruel acts of an employee could be imputed to a corporation, resulting in a corporation being divested of the animal in question. In this case, there is evidence that Howard Goldman, while working at U.S. Global, left a container of frogs to die over several days time rather than rectify the conditions that they were in. While the acts of this employee may theoretically be enough to divest U.S. Global of ownership, it would not be fair, nor what Sec. 821 contemplates, to divest Jasen Shaw of his ownership interest if he had no knowledge of Mr. Goldman's cruel acts. Section 821 has no provision for imputing the cruel acts of one individual to another individual.

c.) It is important to note that in addition to PETA securing all of the City's "experts" except for Carl Franklin, they had to go all over the U.S. and to Great Britain to find them. These were witnesses that were already sympathetic to PETA's cause and some had worked with PETA in the past. We have one of the finest veterinary schools in the U.S. at Texas A&M, yet strangely there was no attempt to secure help from that institution. Even Dr. Tristan, who is a graduate of Texas A&M, was apparently solicited by PETA through someone in Arizona. Dr. Tristan's testimony is especially suspect; he testified that he personally examined some 22,000 reptiles and amphibians, and found that every one of them required "medical care" When pressed on cross examination, he admitted that he had no records of examination or diagnoses on any of the animals, that no examinations to determine cause of death for animals that he claimed died from cruel treatment, and that the "medical treatment" that he referred to consisted of providing food and water.

d.) Dr. Susan Brown claimsed that cannibalism was caused in prairie dogs by malnutrition. There was no evidence of underweight or underfed prairie dogs. The pictures show prairie dogs that appear normal weight. She then later claims that the food being given to

the prairie dogs was improper because it caused them to be overweight. Her standard of care advocated replicating the animals' natural habitat; she did not seem to understand that this was a temporary holding facility for animals that were being transported. Claims that hedgehogs needed hiding places to be properly housed, yet in one of the pictures they did in fact have them. There was no evidence that Jasen or Vanessa Shaw ordered that those be taken out; how can cruelty be imputed to them if an employee or Howard Goldman later took these shelters out before the raid? She claims that the method of housing the small mammals was per se cruel, but the USDA, which regulates facilities like US Global that trade in mammals, performed an inspection in June of 2009, and passed US Global with those same methods of housing. Her testimony characterizing the problem of small mammals cannibalizing each other was rare and only attributable to cruel treatment was rebutted by both Paul Boiko and Andrew Endsley, who testified that they had seen this problem when they worked at other pet stores and mammals were steored together, as is common and accepted in the pet industry. Lisa Goodwin from the Dallas World Aquarium said that in her experience working in the animal industry this is a common problem and does not indicate cruel treatment.

e.) Dr. Clifford Warwick made wild claims about the sanitary conditions at US Global without one scientific test or other bit of scientific evidence to substantiate said claims. His claim of expertise is in the area of "reptile behavior", and he advocates banning the trade of reptiles.

f.) Lisa Goodwin, Paul Boiko, and Mike Doss all testified that Jasen Shaw went out of his way to put together a first rate facility at extra cost to himself.. Mr. Shaw had a company from Germany come over and custom build housing for the amphibians and small reptiles. He

has aluminum and mesh cages constructed for the large reptiles. He had an elaborate filtered tank system custom-built to house turtles and amphibians.

g.) There was testimony that many of these animals made a habit of voiding in their water source, especially the amphibians and reptiles. Evidence showed that employees typically arrived around 9 am, and the seizure commenced at around 9:30 am, insuring that none of the employees had time to change out any water supplies and creating a false impression. The PETA witnesses claim that the smell at the warehouse was evidence of cruel treatment, and Judge Smith commented on that in his ruling. This evidence is misleading because any building that houses 27,000 animals is going to have a strong oder no matter what the circumstances. It is important that two professionals who were independent witnesses (Mike Doss and Lisa Goodwin) and who were used to working in facilities with large numbers of animals did not note what they considered an abnormal smell coming from US Global when they were there. If there was a smell that was stronger than normal, it could have admittedly been attributable to the disaster with the iguana shipment that was to go to Egypt.

h.) The timing of the raid coincided with normal shopping day. Testimony of Andrew Endsley showed that he was headed out to make the weekly food run on the morning of December 15th, but was prevented from doing so by the raid. Detailed evidence of weekly food purchases was admitted with no rebuttal evidence by City that it would be insufficient to feed the number of animals on hand. Paul Boiko testified that he never observed any problems with increasing the food supply when necessary.

i.) The City tried to imply that storage of small frogs in soda bottles was cruel treatment. However, Mike Doss testified that he has seen frogs shipped in this manner in the industry. Paul

Boiko testified that the mortality rate for these frogs went down when US Global stopped trying to house them in a traditional enclosure. The video of an employee shaking frogs out of a soda bottle certainly shows questionable treatment of the frogs, but there is no evidence that Jasen or Vanessa Shaw condoned or even knew of such treatment, or that any other US Global employee engaged in that practice.

j.) Paul Boiko testified that the iguanas that were the focus of the City's cruelty allegation were purchased specifically to be resold and shipped to Egypt. They had been taken out of their standard packing and put in cages, but they became extremely agitated and began to injure themselves. There was also testimony that some of the iguanas were not in good health and were starting to die. Mr. Boiko testified that the supplier of the iguanas recommended that they be repackaged for shipment and stored someplace cool to slow down their metabolism, and this advice was taken. The problem was exacerbated when the customer in Egypt cancelled his order. Mr. Boiko testified that Jasen had instructed the employees to check on the iguanas, but that he did not know that they were in such a bad state on the day of the raid.

k.) Both Paul Boiko and Andrew testified that they felt there was sufficient staff to properly care for the animals. They both rebutted the City's assertion that there were only 3 caretakers for the facility. At the time of the seizure, Paul Boiko, Mark Ware, Chris Casote, Howard Goldman, and Vanessa Shaw were all caring for the animals, with occasional help from Lori Anderson and Andrew Endsley. Mike Doss testified that when he was there he saw no signs of problems associated with understaffing.

l.) The only person to testify that he felt like there was insufficient veterinary care was the PETA informant, Howard Goldman. Paul Boiko and Andrew both testified that Dr.

Giggleman was on-site often and made himself available for consultation as needed. They went into detail about the level of services offered by Dr. Giggleman and that they felt it was sufficient to properly care for the animals. Paul testified that it was incumbent upon the individual caregivers to let Dr. Giggleman know if they had a problem or needed assistance.

m.) Howard Goldman committed animal cruelty himself in the name of his investigation and on behalf of PETA, his employer. He purposefully failed to come to the aid of animals that he claimed were in distress, instead photographing them, and failed to take initiative to care for the animals that were in his care. Howard was caught in a specific lie regarding feeder mice; he said that the snakes were not fed in May when he thought there were no records showing that. Records were later produced showing that was not true. The City argued Howard's acts can be imputed to the corporation. This is dangerous- it allows a group like PETA to have a clandestine employee neglect the animals in his care and then have cruelty imputed to the corporation. Howard was actually a PETA employee, not a US Global employee; therefore his acts cannot be imputed to the corporation.

- Howard neglected the snakes in his care.
- Howard cruelly treated the animals he documented by not providing care for them and by not seeking the assistance of other employees to provide care or rectify problems.
- As part of his duties, Howard was given the responsibility of purchasing feeder mice for the snakes. Howard testified that the number for the supplier of feeder mice was on the wall in the snake room where he worked. Howard was impeached by a witness from Big Cheese when he said he wasn't allowed to buy more feeder mice. Chris Richter testified that he offered Howard extra mice and Howard refused. He also refused offers to buy frozen feeder

mice to supplement the supply for the snakes. This was in direct contradiction to Howard's testimony that he had asked the Shaws for alternative food supplies and was refused.

- Scorpions – Howard was not truthful regarding care given by Paul; he said it was no-existent, but Paul testified that he went to great lengths to care for the scorpions. Paul also testified that when he put the scorpions that he thought were dead in the dumpster, he taped up the box. It is significant that Howard may have untaped the box to stage the photo for maximum effect; it shows his willingness to distort the truth.

- At first claimed he did not have his daily reports, then produced hundreds of pages.

- At first claimed that he only stamped each food card for the snakes when he put in a mouse, not when the snake actually ate. On cross he had to admit that he was told in the first week to stamp the card when the snake ate after being confronted with his reports

- Claims to be bystander w/ problems regarding the two Coatimundis, yet Paul's testimony showed that Howard was involved in choosing the cage that he later claimed was inappropriate. Paul actually suggested another cage but was ignored.

- Paul rebutted Howard's testimony by testifying that he never heard Howard complain about a lack of food, and never heard Howard complain about a lack of vet care.

- Even though his status as a veterinary technician was one of the reasons that he was hired, Paul Boiko testified that he never witnessed Howard applying his skills as a vet tech in the course of his work at U.S. Global Exotics.

n.) Carl Franklin actually contradicted other PETA witnesses in that he said that a large number of the snakes did not appear to be suffering any ill effects.

o.) Mike Doss works at the Fort Worth Zoo and is an expert in the care of reptiles. He had been to U.S. Global Exotics many times in a professional capacity and was there within one month of the raid. He was allowed to walk around the facility and testified that it was generally clean and well run. Among other things, he testified that:

- It was common for reptiles to void in their water dishes and it would not be uncommon to have to clean them out every morning.
- It was an accepted practice to not feed reptiles prior to shipping because it could be detrimental to their health.
- It was not harmful for turtles to enter a hibernation-like state; in nature they may be in such a state for months during cold weather. This remained true whether the turtles were young or old.
- He pointed out some snakes that were improperly labeled in a way that could cause regulatory problems. In the course of the discussion, it was discovered that Howard Goldman had mislabeled the snakes.
- He rebutted Dr. W's irresponsible assertions that the U.S. Global Exotics facility was contaminated to the point that it needed to be gutted and rebuilt.
- He stated that U.S. Global Exotics was one of the better facilities of its type that he had seen in terms of design, equipment, and cleanliness.

p.) Jasen Shaw's name came up so rarely in the hearing that the evidence presented by the City purporting to show cruelty to animals cannot be tied to him. Jasen had every incentive to give proper care to the animals, because every time one of them died or was injured, it cost

him money. Every time an order was shipped to a customer that was substandard, it injured his reputation in the industry.

CONCLUSION

The law itself was not intended for a seizure of this magnitude, and applying the strict time deadlines in Sec. 821 is in itself a denial of Due Process under Article 14 of the United States Constitution, as well as Article I, Sec. 19, of the Texas Constitution. For this reason, Appellants pray that their appeal is granted, the order of the Arlington Municipal Court is reversed, and that all remaining seized animals be immediately returned.

Respectfully submitted,

____

LANCE T. EVANS, SBN 06723680
115 W. Second Street, Suite 202
Fort Worth, Texas 76102
(817) 332-3822
(817) 332-2763 Fax
ATTORNEY FOR APPELLANTS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief was served on the City Attorney for the City of Arlington this _____ day of January, 2010.

____

LANCE T. EVANS

CAUSE NO. ________

	§	IN THE MUNICIPAL COURT
IN RE:	§	
	§	OF ____________________________
___________ [*name/description of animal*]	§	
	§	____________ COUNTY, TEXAS

WHEREAS, in the above-entitled and numbered cause, tried before Honorable Judge __________________, of the __________________ [*city name*] Municipal Court of _________________________________ [*name of city*] County, Texas, judgment was rendered in favor of the City of __________________, and against __________________ [*owner's name*], former owner of __________________ [*name/description of animal(s)*], hereinafter, "the animal[*s*]", divesting ownership of __________________ [name/description of animal] from __________________ [*owner's name*] and for court costs under Texas Health & Safety Code § 821.023 in the sum of $_______, from which judgment __________________ [*owner's name*] desires to appeal to the County Court [*at Law*] of ______________________________ County, Texas; and

WHEREAS, appellant desires to suspend execution of said judgment pending determination of such appeal:

NOW, THEREFORE, WE, __________________ [*name of appellant*], as principal, and __________________ [*either* ___________ (*name of surety company*), a corporate surety company duly qualified and authorized to do business in Texas, *or* ___________ (*name*) and ___________ (*name*), two good and sufficient sureties], as surety, acknowledge ourselves bound to pay to the City of __________________ [*name*], obligee, the sum of $_______ [*amount of bond set by judge*], the estimated expenses incurred in housing and caring for the animal[*s*] while impounded during the appeal process, conditioned, however, that the above-named principal shall prosecute the appeal with effect and shall pay off and satisfy:

(1) the judgment of court costs under Texas Health & Safety Code § 821.023 that may be rendered against ___________ (him *or* her) on appeal, as well as

(2) the sum provided by this bond to cover said estimated expenses of housing and caring for the animal[*s*] during the appeal process, that may be rendered against ___________ (him *or* her) on appeal.

WITNESS our hands this date: ____________________.

__________________ [*signature of principal*]
__________________ [*typed name*]
__________________ [*signature of surety*]
__________________ [*typed name*]
____________________________________ [*address*]
__________________ [*signature of surety*]
__________________ [*typed name*]
____________________________________ [*address*]

APPROVED AND FILED on date: ____________________.

____
JUDGE, MUNICIPAL COURT OF ______________________
____________________________________ COUNTY, TEXAS