

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 07/23/12

DEPT. 50

HONORABLE JOHN L. SEGAL

JUDGE

I. FLORES

DEPUTY CLERK

HONORABLE

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

E. AVENA, C/A

Deputy Sheriff

NONE

Reporter

3:35 pm

BC375234

Plaintiff NO APPEARANCE

Counsel

AARON LEIDER ET AL

VS

Defendant NO APPEARANCE

Counsel

JOHN LEWIS ET AL

(8/16/11-PLTF NAME CHANGE)

NATURE OF PROCEEDINGS:

RULING ON SUBMITTED COURT TRIAL:

In this cause, heretofore submitted on June 25, 2012, the court announces is decision as follows:

For all of the reasons stated in the court's Statement of Decision filed this date under separate cover, the court rules as follows:

For these reasons, the court will enter judgment in favor of plaintiff and against defendants as follows:

On the first cause of action, the court will enter an injunction prohibiting defendants from using bull hooks and electric shock in the management, care, and discipline of the elephants at the Los Angeles Zoo. The court will also issue an injunction requiring defendants to exercise the elephants at the Los Angeles Zoo at least two hours a day, unless weather or emergency conditions make such exercise impracticable, and requiring defendants to rototill the soil and substrate of the elephant exhibit of the Los Angeles Zoo regularly, consistent with the standards and recommendations of Dr. James Oosterhuis and Mr. Jeffrey Andrews.

On the second cause of action, the court will enter a declaration that the elephants at the Los

<p align="center">MINUTES ENTERED 07/23/12 COUNTY CLERK</p>
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Angeles Zoo are entitled to a minimum of two hours a day of exercise, unless weather or emergency conditions make exercise impracticable, and that the soil and substrate of the elephant exhibit of the Los Angeles Zoo be turned or rototilled regularly, consistent with the recommendations of Dr. James Oosterhuis and Mr. Jeffrey Andrews.

Counsel for plaintiff are ordered to lodge and serve a proposed judgment pursuant to Section 632 of the Code of Civil Procedure and Rule 3.1390 of the California Rules of Court, within five days.

The clerk is to return the trial exhibits to counsel, who are ordered to keep them separate and in their present condition until the expiration of the time within which to file a notice of appeal, or, if any party timely files a notice of appeal, the issuance of the remittitur by the Court of Appeal, whichever occurs later.

Counsel are ordered to contact the clerk within 5 days to make arrangements for the pickup of all exhibit binders.

The clerk gives notice. A copy of the court's Statement of Decision is sent along with a copy of this minute order.

CLERK'S CERTIFICATE OF MAILING

<p align="center">MINUTES ENTERED 07/23/12 COUNTY CLERK</p>
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NATURE OF PROCEEDINGS:

I, the below-named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that on this date I served the minute order dated: 7/23/12, upon each party or counsel named below by placing the document for collection and mailing so as to cause it to be deposited in the United States mail at the courthouse in Los Angeles, California, one copy of the original filed/entered herein in a separate sealed envelope to each address as shown below with the postage thereon fully prepaid, in accordance with standard court practices.

Dated: July 24, 2012

John A. Clarke, Executive Officer/Clerk

By: _____



I. Flores, Deputy Clerk

✓ THE LAW OFFICES OF WASSERMAN, COMDEN, CASSELMAN & ESENSTEN, L.L.P.

DAVID B. CASSELMAN

JILL S. CASSELMAN

5567 Reseda Boulevard, Suite 330

Tarzana, CA 91357-7033

MINUTES ENTERED 07/23/12 COUNTY CLERK
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SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

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Counsel

(8/16/11-PLTF NAME CHANGE)

NATURE OF PROCEEDINGS:

JOHN A. CARVALHO
City Hall East
200 N. Main Street, Room 700
Los Angeles, CA 90012

FILED
LOS ANGELES SUPERIOR COURT

JUL 23 2012

JOHN A. CLARKE, CLERK
BY JAW
INGRID FLORES, DEPUTY

**SUPERIOR COURT FOR THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES**

AARON LEIDER,

Plaintiff,

v.

JOHN LEWIS, CITY OF LOS ANGELES, ET
AL.,

Defendants.

Case No. BC375234

STATEMENT OF DECISION

From June 18, 2012 to June 25, 2012, the court conducted the trial of this action in Department 50 of the Stanley Mosk Courthouse, Los Angeles Superior Court, John L. Segal presiding. David B. Casselman, Esq., and Jill S. Casselman, Esq., Wasserman, Comden, Casselman & Esenten, appeared for plaintiff. Deputy City Attorney John A. Carvalho, Esq., appeared for defendants. The parties were present throughout the course of the trial, introduced oral and documentary evidence, and submitted the case for decision. The court, having considered all of the evidence and the arguments of counsel, issues this statement of decision.

INTRODUCTION

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3 On August 2, 2007 plaintiffs Aaron Leider and the late Robert Culp filed this
4 action pursuant to Code of Civil Procedure section 536a, against defendant City of Los
5 Angeles, which owns the Los Angeles Zoo, and defendant John Lewis, the Director of
6 the Los Angeles Zoo. On May 13, 2008 the court, Hon. John Shepard Wiley, Jr.,
7 granted defendants' motion for summary judgment. On September 23, 2009 the Court
8 of Appeal reversed. See Culp v. City of Los Angeles, 2009 WL 3021762 (September
9 23, 2009).

10
11 On August 25, 2010 plaintiff Leider filed his first amended complaint. Plaintiff
12 alleges that the Elephants of Asia exhibit at the Los Angeles Zoo "has been open to the
13 public for many years, despite illegal, i.e., cruel and abusive treatment of City elephants
14 in violation of Penal Code sections 597, 597.1 and 596.5, which specifically prohibits
15 [sic] abuse of elephants." First Amended Complaint, ¶¶ 1, 2, 5. Plaintiff alleges:
16 "Pursuant to California Penal Code sections 597, 597.1 and 596.5," defendants'
17 "abusive acts violate the law and public policy of this state and lead to the suffering and
18 premature demise of" the elephants in the Los Angeles Zoo, and "also cause waste and
19 damage to the elephants, i.e. City property. As such, defendants["] actions may be
20 enjoined by plaintiffs as City taxpayers pursuant to California Code of Civil Procedure
21 section 526a." First Amended Complaint, ¶ 10.
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1 More specifically, plaintiff alleges that Bily, a male Asian elephant captured in
2 Malaysia and brought to the Los Angeles Zoo in 1989, "lives an unnatural, solitary life"
3 on an approximately one-quarter acre of hard substrate and concrete, with no shade
4 until the end of the day. Id., ¶ 29. Plaintiff alleges that Bily spends much of his time
5 engaged in standing, rocking or swaying while bobbing his head up and down, a
6 behavior known as "stereotypic behavior," that reflects emotional distress and causes
7 physical injury to his joints, legs, feet, and nails. See id., ¶ 30. Plaintiff alleges that the
8 health problems, such as arthritis and degenerative joint disease, caused by the fact
9 that the Elephants of Asia exhibit at the Los Angeles Zoo is too small and the substrate
10 is too hard for the elephants, constitute abuse of the elephants. Plaintiff makes similar
11 claims with respect to the two female elephants at the zoo, Tina and Jewel, who arrived
12 together on loan from the San Diego Zoo after they had been rescued from abusive
13 captivity in Texas.

14
15
16 Plaintiff alleges two causes of action, the first for injunctive relief and the second
17 for declaratory relief. Plaintiff seeks an order closing the elephant exhibit at the Los
18 Angeles Zoo, an order enjoining the use of certain instruments or devices that can be
19 and in the past have been used to abuse elephants, and a declaratory judgment that the
20 elephant exhibit is "inadequate, illegal (abusive), damaging and wasteful." Prayer, ¶¶ 2,
21 3, 4. At trial, plaintiff also requested in the alternative an order requiring the Los
22 Angeles Zoo to transfer Bily to an elephant sanctuary in Northern California or
23 Tennessee.
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DISCUSSION

A. *Code of Civil Procedure Section 526a*

This is a taxpayer action pursuant to Section 526a of the Code of Civil Procedure. Section 526a provides: "An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county, town, city or city and county of the state, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either by a citizen resident therein . . . who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein."¹ As the Court of Appeal explained in its opinion in this action, "Section 526a gives citizens standing to challenge governmental action and is liberally construed to achieve that purpose," which is "to permit a large body of persons to challenge wasteful government action that otherwise would go unchallenged because of the standing requirement." Culp, 2009 WL 3021762, at 3 (citing Daily Journal Corp. v. County of Los Angeles, 172 Cal. App. 4th 1550, 1557 (2009), and Humane Society of the United States v. State Board of Equalization, 152 Cal. App. 4th 349, 355 (2007)); see Rule 8.1115(b)(1), California Rules of Court (an unpublished opinion may be cited or relied on when "relevant under the doctrines of law of the case, res judicata, or collateral estoppel").

¹ It is undisputed that plaintiff is such a taxpayer.

1 Defendants argue that the term "illegal" modifies "expenditure," "waste," and
2 "injury," so that "'illegal' modifies each of the 3 items that follow it in the series," and that
3 "each part of Leider's § 536a claim collapses into a single claim on the facts of this case
4 . . . because the claims arise from identical facts and each must be tested against a
5 legal standard to be justiciable." Defendants' Trial Brief, 20:5-21:21. Plaintiff argues
6 that "Section 526a is a tripartite statute allowing equitable action to restrain or prevent
7 conduct which is (1) illegal (2) wasteful or (3) injurious to public property," and that the
8 "use of the disjunctive 'or' prior to the word 'injury' indicates that the legislature intended
9 to create three different categories which would independently justify requests for
10 equitable relief." Plaintiff's Trial Brief, 20, 12-16; see id., 31:20-24 ("if 'illegality' and
11 'waste' were eliminated from the statute, it would clearly authorize injunctive relief upon
12 taxpayer proof of an 'injury' . . . to property of a . . . city").
13

14
15 There is some validity to each side's interpretation of section 526a. Plaintiff is
16 correct that section 526a has three independent bases for taxpayer standing, and that
17 "illegal" modifies expenditure, but not waste or injury. This is so because under
18 California law the standard for determining whether a taxpayer has standing under the
19 "waste" prong of section 526a does not require illegality. Rather it requires that the
20 governmental action be "a useless expenditure and waste of public funds," or "wasteful,
21 improvident and completely unnecessary spending." Sundance v. Municipal Court, 42
22 Cal. 3d 1101, 1138-39 (1986); Harnett v. County of Sacramento, 195 Cal. 676, 683
23 (1925); Humane Soc'y, 152 Cal. App. 4th at 355; see Waste Management of Alameda
24 County, Inc. v. County of Alameda, 79 Cal. App. 4th 1223, 1240 (2000) ("essence of a
25

1 taxpayer action remains an illegal or wasteful expenditure of public funds or damage to
2 public property,” and “the plaintiff must cite specific facts and reasons for a belief that
3 some illegal expenditure or injury to the public fisc is occurring or will occur”). The same
4 must be true for “injury,” which statutorily is even farther away from “illegal.”

5
6 Nevertheless, all three prongs require some legal standard against which the
7 governmental action can be measured. California courts can entertain “only those
8 taxpayer suits that seek to measure governmental performance against a legal
9 standard” and can only “restrict conduct that can be tested against legal standards.”
10 Harman v. City and County of San Francisco, 7 Cal. 3d 150, 160-61 (1972). For an
11 illegal expenditure claim, a statute in the Penal Code will suffice and provide such a
12 legal standard, and the Court of Appeal in this case held that Penal Code section 596.5
13 provides such a “legal standard by which the alleged governmental conduct may be
14 tested.” Culp, 2009 WL 3021762, at 9. For a waste claim, waste can be measured
15 against known legal standards, such as Article XVI, section 6 of the California
16 Constitution, which prohibits gifts of public funds, or the eminent domain statutory
17 scheme governing fair market value of real property. Or, in a taxpayer action to compel
18 payment of prevailing wages to prison inmates to help defray the cost of the inmates’
19 room and board, the waste claim can be measured against Proposition 139, which
20 governs the employment of inmates and deductions by the Director of Corrections. See
21 Vasquez v. State of California, 105 Cal. App. 4th 849 (2003). And for an injury claim . . .
22
23 well, the parties concede that there are no published cases on the injury prong of
24 section 596.5, so whether there is a legal standard may be an open question. Plaintiff
25

1 argues that "in the context of this case, the injury prong fits like a glove," Plaintiff's Trial
2 Brief, 32:18, but plaintiff does not identify any legal standard for the injury prong.

3 Defendants assert that the "same tests must logically apply" to the waste and injury
4 prongs, but do not cite any authority for their assertion. Defendants' Trial Brief, 20:9.

5
6 *B. Illegal Expenditure*

7
8 *1. Penal Code Section 596.5*

9
10 Section 596.5 of the Penal Code provides:

11
12 It shall be a misdemeanor for any owner or manager of an elephant to
13 engage in abusive behavior towards the elephant, which behavior shall include
14 the discipline of the elephant by any of the following methods: (a) Deprivation of
15 food, water, or rest. [¶] (b) Use of electricity. [¶] (c) Physical punishment resulting
16 in damage, scarring, or breakage of skin. [¶] (d) Insertion of any instrument into
17 any bodily orifice. [¶] (e) Use of martingales. [¶] (f) Use of block and tackle.

18
19 Plaintiff argues that this statute prohibits two categories of conduct: (1) behavior
20 towards elephants that is abusive, and (2) discipline of elephants that falls under one of
21 the six (non-exclusive) categories listed in subdivisions (a)-(f) of the statute. See
22 Plaintiff's Trial Brief, 24:21-26:11. (Plaintiff claims that defendants engage in both kinds
23 of prohibited conduct.) The Court of Appeal's opinion in this case supports plaintiff's
24 interpretation of the statute. The court stated that "Penal Code section 596.5 proscribes
25 two types of actions -- abusive behavior toward an elephant in general, and

1 inappropriate discipline of the nonexhaustive types listed” in subdivisions (a)-(f). Culp,
2 2009 WL 3021762, at 6. The Court of Appeal held that “it is clear that Penal Code
3 section 596.5 does not render keeping an elephant in captivity illegal per se. But the
4 statute does make it illegal for an elephant manager or owner to engage in ‘abusive
5 behavior towards the elephant.’ Although the statute sets forth a list of abusive
6 disciplinary behaviors, the language and structure of the statutory scheme suggests the
7 list is not exclusive. We conclude that ‘abusive behavior’ may include the physical
8 characteristics of the enclosure in which elephants are kept. Whether keeping an
9 elephant in any particular enclosure rises to the level of abusive behavior is of necessity
10 a factually intensive inquiry that depends on the particularities of each case.” Id. at 7.

11
12 Defendants argue that the Court of Appeal’s interpretation of Penal Code section
13 596.5 is simply wrong. Defendants argue that the justices who decided the prior appeal
14 in this action were “unaware of the applicable regulations,” based their interpretation of
15 section 596.5 “on an unbriefed issue,” ignored “the legislative history of § 596.5,” and
16 improperly denied defendants’ petition for rehearing. Defendant’s Trial Brief, 8:15-21,
17 9:1-9. Defendants contend that the legislative history of section 596.5 “reveals that the
18 Legislature intended to criminalize *only* the 6 enumerated methods of discipline.” Id.,
19 10:21-22 (emphasis in original).

1 The Court of Appeal's interpretation of section 596.5, wrong though defendants
2 protest it may be,² is law of the case and binding on this court. See Hanna v. City of
3 Los Angeles, 212 Cal. App. 3d 363, 376 (1989) ("The decision of an appellate court,
4 stating a rule of law necessary to the decision of the case, conclusively establishes that
5 rule and makes it determinative of the rights of the same parties in any subsequent
6 retrial or appeal in the same case."), overruled on other grounds, Pasadena Police
7 Officers Association v. City of Pasadena, 51 Cal. 3d 564 (1990); see Morohoshi v.
8 Pacific Home, 34 Cal. 4th 482, 491 (2004). The law of the case doctrine even
9 "extend[s] to questions that were implicitly determined because they were essential to
10 the prior decision." Yu v. Signet Bank/Virginia, 103 Cal. App. 4th 298, 309 (2002).
11 Therefore, the court will determine whether defendants engage in abusive behavior
12 towards their elephants, and also whether defendants engage in any methods of
13 inappropriate elephant discipline, including the six enumerated methods listed in
14 subdivisions (a)-(f). The court now turns to this "factually intensive inquiry."
15

16
17 2. *Abusive behavior toward elephants*
18

19 All is not well at the Elephants of Asia exhibit at the Los Angeles Zoo. Contrary
20 to what the zoo's representatives may have told the Los Angeles City Council in order to
21 get construction of the \$42 million exhibit approved and funded, the elephants are not
22 healthy, happy, and thriving.
23

24 _____
25 ² The court notes that even if the legislature amended the statute before enacting it to
eliminate the words "but not be limited to," the legislature left in the final version of the
statute the words "shall include."

1 The Court of Appeal held that there was a triable issue of material fact in this
2 case on whether keeping elephants “in spaces that are insufficiently large and
3 composed of certain materials . . . rises to the level of abusive behavior” under Penal
4 Code section 596.5. 2009 WL 3021762, at 7-8. The evidence is inconclusive on the
5 issue of how much space an elephant needs (or three elephants need), and whether the
6 space for the elephants at the Los Angeles Zoo is “insufficiently large.” There is no real
7 dispute that the elephant exhibit at the Los Angeles Zoo is not as sufficiently large as an
8 elephant sanctuary or the wild, nor as insufficiently large as a small room or a trailer.
9 But further refinement from these extremes is difficult. Plaintiff’s first witness, Dr. Phillip
10 Ensley, a board certified veterinarian who worked at the San Diego Zoo and San Diego
11 Wild Animal Park (now called the San Diego Safari Park) for 29 years, admitted that
12 how much space a captive elephant needs is “a difficult standard to set.” At one point
13 Dr. Ensley gave an opinion that for indoor space, each elephant needs approximately
14 400 square feet, and for outdoor space one elephant needs 1,600 square feet and each
15 additional elephant needs 900 square feet. Later in his testimony, however, Dr. Ensley
16 stated that he is not really sure how much space an elephant in captivity needs, and he
17 admitted that in fact he has no opinion on this seemingly crucial disputed issue. See
18 Culp, 2009 WL 3021762, at 8. Dr. Ensley did relate his common sense (not really
19 expert) opinion that more space for an elephant is better than less space, but then
20 testified that there is no scientific evidence to support his opinion that larger spaces are
21 better for captive elephants than smaller spaces.
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1 The evidence, however, does support plaintiff's claim, which the court finds
2 plaintiff has proven by a preponderance of the evidence, that the ground of the
3 Elephants of Asia exhibit on which the elephants regularly walk is hard, not varied and
4 soft, and that the substrate of the exhibit creates a risk of injury to the elephants' joints,
5 feet, and nails. Dr. Ensley testified that based on his review of the medical and death
6 records of the Los Angeles Zoo, nine of the sixteen elephants who have died at the zoo
7 had arthritis or degenerative joint disease. Dr. Ensley believes that this condition is
8 caused by the limited space that the Los Angeles Zoo exhibit has for the elephants,
9 which causes the elephants to walk in and over the same areas and compact the
10 ground. Dr. Ensley testified that when he walked on this surface during his inspection of
11 the exhibit for this case, it was as hard as concrete. Dr. Ensley opined that the limited
12 exhibit space, and the way the walls, fencing, and electrical wiring guide the movement
13 of the elephants over the same or similar paths, increases the severity of the
14 compactness of the ground on which the elephants walk, further contributing to their
15 arthritis and joint problems. Consistent with his opinion, the photographic evidence
16 shows that the ground for much of the exhibit is awfully hard. See, e.g., Exhs. 38-015,
17 38-016, 38-088, 38-103, 38-119, 267-008. Indeed, on some portions of the ground of
18 the exhibit, the elephants, who weigh up to six tons, do not even leave footprints (and
19 presumably leave no footprints on the concrete bottom of the water pools).³

24 ³ Head Elephant Keeper Victoria Guarnett testified that the substrate is soft enough for
25 the elephants to dig in the sand and then throw the sand on themselves. This
testimony, however, which is probably true in part, is not dispositive of the issue of
whether the surface or substrate of the elephant exhibit is too hard.

1 Dr. Ensley's opinion about arthritis and joint disease was impeached on cross-
2 examination. Dr. Ensley testified that he does not know whether or to what extent
3 elephants in wild or captive environments other than the Los Angeles Zoo have arthritis,
4 nor has he ever studied arthritis in elephants. He admitted that absent this knowledge
5 he could not give much of an opinion about whether the surface of the Los Angeles Zoo
6 elephant exhibit causes arthritis in the elephants, because he does not know whether
7 elephants have or develop arthritis anyway. Nor could he say whether zoo elephants
8 develop arthritis earlier, faster, or more severely than elephants not subject to the zoo
9 conditions. He also could not give much of an opinion on whether the surface of the
10 exhibit is better, worse, or equivalent to what Asian elephants usually walk on, nor does
11 he know whether Asian elephants usually or often walk on compacted surfaces like the
12 surface at the Los Angeles Zoo. Dr. Ensley's opinion that the substrate of the elephant
13 exhibit at the Los Angeles Zoo is hard, however, was not impeached.

14
15 There is other evidence in the record supporting plaintiff's claim that the
16 hardness of the substrate is harming the elephants. Jeffrey Andrews, a witness called
17 by defendants, is the Vice President of Zoological Operations for Busch Gardens
18 Tampa/Sea World Parks and Entertainment. His experience includes work as the
19 Elephant Program Manager and an Elephant Research Coordinator at the San Diego
20 Zoo, and as an animal trainer at Sea World San Diego. Mr. Andrews is knowledgeable
21 about zoo elephant activity level and management, and in the medical care, transport,
22 and politics of elephants (this refers to political activity of humans relating to zoo
23 elephant management, not political-social activity of elephants in the wild). He is
24 knowledgeable about the history of captive elephant management, and how it evolved
25 from free contact to protected contact management. He has trained zoos on protected

1 contact management systems. He was also involved in rescuing Tina and Jewel from a
2 private company in Texas, and treating and transporting them to the San Diego Zoo.

3
4 Although Mr. Andrews testified on direct that he is satisfied that the Los Angeles
5 Zoo elephant exhibit's yards and barn are appropriate for the needs of Tina and Jewel,
6 he admitted on cross-examination that the soil in a small exhibit compacts faster than
7 soil in a larger exhibit, which is essentially what plaintiff claims. Mr. Andrews testified
8 that if the substrate compacts and hardens after a long period of elephants walking on
9 it, it is proper care and attention for the zoo to change, turn, or rototill the substrate,
10 again consistent with plaintiff's claims. He agreed that replacement or rototilling of the
11 ground in an exhibit is easy and a "simple matter," but that Los Angeles Zoo officials
12 seem to deny that compaction of sand or soil in an exhibit is an existing phenomenon,
13 let alone that rototilling is a "simple" solution to the problem. And Dr. James Oosterhuis,
14 the principal (but unlike Dr. Ensley, not a board certified) veterinarian at the San Diego
15 Zoo Safari Park who also helped rescue Tina and Jewel, testified that the substrate of
16 the Los Angeles Zoo elephant exhibit is harder than the substrate of the San Diego Zoo
17 elephant exhibit. Dr. Oosterhuis testified that the substrate for the elephants at the San
18 Diego Zoo is dirt and grass, and, unlike the substrate at the Los Angeles Zoo, is
19 rototilled regularly.
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23 The testimony of Dr. Curtis Eng, the Los Angeles Zoo's Chief Veterinarian and
24 another witness called by defendants, also supported plaintiff's claims. Dr. Eng testified
25 that the substrate on which the elephants walk can make a big difference in the health

1 of their feet. He had actually recommended that for the new elephant exhibit the Los
2 Angeles Zoo install a varied, relatively soft substrate that would allow for cushioning.
3 The zoo, however, ignored his recommendation and built the current exhibit with
4 nothing like the kind of soft substrate he had recommended. Shockingly, he also
5 testified that the keepers have told him that they regularly rototill the soil in the exhibit,
6 when in fact the opposite is true: It is undisputed that the elephant keepers in the Los
7 Angeles Zoo do not rototill the surface of the exhibit, and never have. Not once. It is
8 this kind of testimony, again offered by defendants, that makes one wonder whether the
9 keepers and medical staff are working in the same zoo.

10
11 The evidence also shows that several factors contribute to the hardness of the
12 substrate in the Los Angeles Zoo elephant exhibit. The substrate becomes compacted
13 from elephants repetitively walking on it and (despite Dr. Eng's misinformation) the lack
14 of any turning or tilling of the soil.⁴ The undisputed evidence, high school physics,⁵ and
15 common sense, show that a six ton animal repeatedly walking over the same surface
16 area will compact the ground.

17
18 The problem is compounded by the fact that the available surface area for the
19 elephants is much smaller than the total exhibit space because significant portions of
20 the exhibit are closed to the elephants, either for certain period of time, by gates used to
21 keep Bily separate from Tina and Jewell, or permanently, by electrically charged or "hot"
22 wires that keep the elephants away from areas of trees, brush, and grass within the

23
24 ⁴ Of course, the concrete surface of the elephant pools is immune to any rototilling
or other treatment. It is always as hard as . . . well, concrete.

25 ⁵ Pressure on a surface area is the force in pounds acting normal (i.e., perpendicular) to
the surface area, divided by the area in square inches or feet, or $P=F/A$.

1 exhibit. As Dr. Ensley explained in uncontroverted testimony, the trees and other
2 elements of the exhibit have electrical wires that will shock the elephants if they come
3 close. Elephants enjoy rubbing against and playing with trees, and like to knock them
4 over and eat them. The trees and planters in the exhibit, however, are surrounded by
5 electrical wires that prevent the elephants from getting to them or walking near them.
6 The photographic evidence confirms this testimony. Dr. Enlsey testified that in fact
7 there are no areas of grass that are not "hot wired" with electrical wires. Ms. Guarnett
8 confirmed that the hot wiring in the elephant exhibit is all over the exhibit and is used to
9 protect certain areas of the exhibit from the elephants, and to keep or "guide" the
10 elephants away from things like trees, plants, and grasses. The ramps that lead in and
11 out of the pool are also lined with electric wires. Mr. Andrews testified that from his
12 knowledge and experience elephants can sense or feel an electrical or "hot" wire before
13 they get close to it.

14
15 Which makes life for the elephants in the Los Angeles Zoo even worse. It is
16 undisputed that elephants by nature are attracted to and have evolved to need and use
17 trees, bushes, and grass. Mr. Andrews (again, one of defendants' witnesses) testified
18 that that it would be healthy for the elephants if they could knock down trees and rub
19 against them, and that it would be a "nice component to a good enrichment program" if
20 the zoo could get some trees, and let the elephants knock them down.⁶ It is one thing
21 to place electric fencing between elephants and something they are not interested in. It

22 _____
23 ⁶ Dr. Cathleen Cox, the Los Angeles Zoo's Research Director, actually proposed to Mr.
24 Lewis that the zoo put real trees into the ground of the elephant exhibit so that the
25 elephants could work on them and push them over, which is most equivalent to what
elephants do in the wild. Mr. Lewis rejected this proposal, even though cost was not an
issue because Dr. Cox believed that she could get the trees she needed for free from
the nursery or on the zoo property.

1 is another thing to place such electric hot-wiring between the elephants and something
2 they like, need, and use as part of their natural behavior. Thus, rather than providing
3 the elephants with trees to rub against and knock down as part of “an enriched
4 environment that stimulates and elicits species-specific behavior” (Exh. 72 at 4), the Los
5 Angeles Zoo’s elephant management system tempts the elephants with trees that
6 elephants naturally use to rub against and knock down, but frustrates the elephants by
7 keeping those trees in visual and sensory range but beyond access behind electrically-
8 charged wires.⁷

9
10 The small size of the Los Angeles Zoo has other adverse health effects, in
11 addition to increasing the hardness of the substrate. As Dr. Ensley also testified without
12 contradiction, the relatively small amount of space in the elephant exhibit contributes to
13 contamination, because there is more elephant urine and fecal matter in a small space.⁸
14 This leads to an increased risk and incidence of infection, as the elephants are forced to
15 live longer periods of time with their waste and are unable to leave the areas in which
16 they urinate and defecate. In the wild, they move on; in captivity, they stand or walk in
17 it. Dr. Eng confirmed that urine in an exhibit can create a risk of such an infection for a
18 captive elephant because foot problems and abscesses are common for captive
19 elephants, and infections from urine get into an elephant’s foot pad through cracks. Dr.
20 Eng testified that he does not know if anything is being done to eliminate or reduce the
21 amount of urine in the exhibit.

22
23 _____
24 ⁷ Penal Code section 596.5 makes it a misdemeanor to “discipline an elephant by “use
25 of electricity.” Plaintiff does not contend that the Zoo’s use of electric wire is “abusive
behavior” or a “discipline” of the elephants.

⁸ The evidence at trial was that elephants urinate 15 gallons a day.

1 The evidence also shows that the quality of the elephants' lives in the Los
2 Angeles Zoo elephant exhibit is not good, and that this is having serious repercussions
3 for their physical and emotional well-being. For example, all three elephants, and Bily in
4 particular, engage in or exhibit a behavior that everyone on both sides (with one or two
5 significant exceptions) agrees is abnormal and unhealthy, which the parties refer to as
6 "stereotypic behavior" or a "stereotype."⁹ Dr. Ensley described this behavior as
7 meaningless activity, such as head-bobbing, rocking and swaying, and shifting back and
8 forth in one place. Most of the expert witnesses agreed that on hard surfaces this
9 unnatural stereotypic behavior causes mechanical stress on the elephants' joints and
10 feet.

11
12 The most credible testimony was the testimony of Dr. Joyce Poole, who has
13 advanced degrees in elephant behavior from the University of Cambridge and Princeton
14 University, and who has become one of the world's leading experts on elephant
15 behavior. Dr. Poole, who has studied elephants since 1975, essentially pioneered the
16 study of the social organization of African elephants. Her expertise is elephant
17 communication and behavior, and one of her specialties is the study of musth, a period
18 of heightened sexual activity and aggressive behavior in male elephants. She has
19 studied and become an internationally recognized expert in musth, and in elephant
20 signaling and communication by infrasonic, vocal imitation, and re-vocalization. She
21 has studied primarily wild elephants, but has also studied elephants in orphanages.
22 She has spent over 100,000 hours in the wild observing and analyzing elephants and
23

24 ⁹ To those who do not work or spend much time with elephants, this term is somewhat
25 of a misnomer because it refers to behavior that is not "stereotypical" of normal elephant
behavior.

1 their behavior. Although most of her experience has been with African elephants rather
2 than Asian elephants, she did initiate an Asian elephant conservation project and
3 behavior study in Sri Lanka in 2008. She has received numerous honors and awards
4 for her elephant research, including a certificate of recognition by the California
5 Assembly for her work in educating people about elephants in captivity. She has
6 authored or co-authored numerous articles and chapters of books on elephant behavior.
7 See Exh. 109. Dr. Poole was far and away the most qualified witness at trial.
8 Defendants did not present the testimony of anyone with anything near her credentials,
9 knowledge, or experience.

10
11 Dr. Poole observed Bily, Tina, and Jewel at the Los Angeles Zoo on two
12 occasions. Her observations were admittedly not for very long (for several hours in
13 2008, and five to six hours in 2012), but someone of Dr. Poole's qualifications and
14 expertise does not need a long time in order to form accurate and credible opinions and
15 conclusions. She observed Bily's stereotypic behavior, and the abnormally stiff gait with
16 which all three elephants at the Los Angeles Zoo walk.

17
18 Dr. Poole testified that the stereotypic behavior exhibited by the elephants in the
19 Los Angeles Zoo is nothing like she has ever seen in wild elephants. In her almost 40
20 years of observing and studying elephants, she has never seen an elephant bob its
21 head or rock back and forth in place as or as much as Bily, Tina, and Jewel do. She
22 believes that Bily's stereotypic behavior of head-bobbing and rocking is strong evidence
23 that Bily is stressed, frustrated, bored, unanimated, and unhappy, and that the zoo is
24 not meeting his needs. She testified unequivocally that the stereotypic behavior
25 exhibited by the three elephants in the Los Angeles Zoo is not an expression of

1 excitement upon seeing a zoo keeper or at the prospect of being fed, as some zoo
2 employees claim. She testified that this behavior is never seen in wild elephants as an
3 expression of excitement or happiness.

4
5 The court credits Dr. Poole's testimony. Defendants did not present any
6 substantial evidence to contradict or impeach her testimony in any way. In fact,
7 testimony presented by defendants confirmed Dr. Poole's opinions and conclusions. For
8 example, Dr. Oosterhuis testified that even in his 37 years of experience at the San
9 Diego Zoo Safari Park and the San Diego Zoo, he has not seen the kind or amount of
10 stereotypic behavior that he has seen with elephants in the Los Angeles Zoo.

11
12 In response to the testimony of Dr. Poole, defendants submitted the testimony of
13 Victoria Guarnett, who has been an elephant keeper at the Los Angeles Zoo for 16
14 years, and has served as the Senior Elephant Keeper at the Los Angeles Zoo since July
15 3, 2011. Her training, education, and experience with elephants, however, pale in
16 comparison with Dr. Poole's. Ms. Guarnett, although sincerely dedicated to the three
17 elephants in her care, has no experience with elephants anywhere but in the Los
18 Angeles Zoo. She has no experience with elephants in the wild or with elephants in any
19 zoo or other facility other than the Los Angeles Zoo.

20
21 Moreover, Ms. Guarnett had somewhat shocking gaps in her knowledge of
22 elephants, and, for someone with the title Senior Elephant Keeper, had some surprising
23 misconceptions. For example, Ms. Guarnett believes that the head-bobbing behavior of
24 Bily and Jewel is a sign of happiness and comfort, like a dog wagging his tail. There is
25 no evidence in the record to support such a conclusion. As Ms. Guarnett admitted, the

1 opinions of (other, since she is not a) wild elephant experts are at best inconclusive, and
2 at worst are that such stereotypic behavior is anything but a sign of happiness and
3 comfort. In fact, Dr. Cathleen Cox, the Research Director at the Los Angeles Zoo, told
4 Ms. Guarnett that elephant head-bobbing is a sign of nervousness, boredom, and
5 unhappiness. And Mr. Andrews, an experienced elephant manager whose research
6 interests include "assessment of enrichment programs and strategies to maximize
7 species appropriate behavior in captive African and Asian elephants" (Exh. 254-003),
8 contradicted Ms. Guarnett on this very point. Mr. Andrews acknowledged that the head-
9 bobbing, swaying, and rocking of Bily, Tina, and Jewel are stereotypic behaviors,
10 caused by confinement in small spaces (although he was referring to the Texas captivity
11 of Tina and Jewel, not the Los Angeles Zoo), and that he has only seen it in a small
12 percentage of the elephants with which he has worked. That Ms. Guarnett continues to
13 believe that such behavior is an expression of happiness and contentment appears to
14 be part of her anthropomorphic fantasy that the elephants are happy to see her and live
15 their lives in captivity.

16
17 Dr. Eng's testimony that the three elephants' stereotypic behavior is a positive
18 trait that he sees no reason not to encourage (!) is even more incredible. Even though
19 Dr. Eng concedes that he is not knowledgeable about elephant behavior, he believes
20 that the elephants' head-bobbing and swaying is anticipatory behavior, which he
21 equates to a dog wagging its tail when his or her master arrives home.¹⁰ He testified

22
23
24 ¹⁰ Mr. Lewis appears to share this belief, although he concedes that stereotypic
25 behavior in elephants indicates stress or disorder. He stated that he believes such
behavior is unnatural but not pathological, like when his dog jumps up and down when
he returns home from work.

1 that the Los Angeles Zoo is not doing anything to address this behavior, even though he
2 knows it can increase the risk of foot cracks and infection.

3
4 Dr. Eng got his (misguided) conception that the stereotypic behavior exhibited by
5 Bily, Tina, and Jewell is a positive behavioral characteristic from Dr. Cox. Dr. Cox,
6 however, admittedly does not know very much about elephants, and like Dr. Eng and
7 Ms. Guarnett, has some strange ideas about elephant behavior. Most of Dr. Cox's
8 animal behavioral work has been in primates, ungulates, and condors, not elephants.
9 Unlike Dr. Poole, Dr. Cox has not published or submitted for publication any peer-
10 reviewed articles about elephants, nor has she studied or examined any elephants in
11 the wild or at any other zoo. She has also never consulted with any expert on wild
12 elephant behavior. She equates the treatment of elephants with the treatment of
13 children (although presumably not enough to object to keeping elephants in captivity),
14 and believes that comparing what is appropriate or inappropriate treatment for
15 elephants and children is a "fair comparison."

16
17 Dr. Cox began observing the elephants at the Los Angeles Zoo in 2002. She
18 believes (incorrectly) that Bily's repetitive behavior is not unusual, and that 40% of
19 elephants in captivity exhibit this kind of behavior. She testified that Bily does most of
20 his head-bobbing prior to being fed, and that the amount of time Bily spends head-
21 bobbing is in inverse proportion to the amount of time he spends feeding, foraging, and
22 engaging in other activities. She observed that in 2003 that Bily spent 50-55% (!!) of his
23 time standing in place and bobbing his head up and down. After 2004, Bily spent
24 slightly less time head-bobbing, and more time feeding and exploring. But in 2007 the
25 time he spent head-bobbing increased, so Dr. Cox had the keepers increase the

1 number of feedings per day from three to four. Since Bily moved into the new exhibit in
2 November 2010, his head-bobbing increased, then decreased, and now has increased
3 to 45% (!!!) of his time. Thus, Bily is essentially head-bobbing and swaying and rocking
4 in place nearly half of his observable life.¹¹ Dr. Cox added that Tina and Jewel engage
5 in this repetitive behavior 12% and 13% of the time, respectively. No wonder, as Mr.
6 Lewis admitted, zoo employees hear zoo patrons ask what is so wrong with the zoo's
7 elephants.

8
9 Dr. Cox has what she calls a "hypothesis," which she tested by having the
10 keepers increase Bily's enrichment activities, such as having him get his food in more
11 challenging ways, putting hay in a box for him to get out, placing food inside "boomer
12 balls" which present challenges for the elephants to access the food, all of which
13 increased his feeding time. Her "hypothesis" is that Bily's head-bobbing is related to his
14 expectation of the delivery of food at certain times. She even wrote a memo to Mr.
15 Lewis regarding her thoughts about reducing the amount of time Bily spends head-
16 bobbing.

17
18 Putting aside that Dr. Cox's hypothesis is contrary to the testimony of those
19 experts with knowledge on the subject, it makes no sense. She acknowledges that the
20

21
22 ¹¹ Dr. Cox's estimates of the percentages of time the zoo elephants spend head-
23 bobbing and rocking or swaying in place are based on limited data, and are probably
24 understated. Her staff and volunteers only observe and record the elephants' behavior,
25 as part of what they call making an "activity budget," from 10:00 a.m. to 4:00 p.m., and
their observations do not include observations of the elephants at night in the barn. Dr.
Cox admitted that she has never studied the elephants after dark, even though there
are recordings of the elephants in the barn that she could view. Q: "All you'd have to
do is ask the zoo for the video, correct?" A: "I could do that in the future."

1 elephants are intelligent enough to learn and know when they are going to be fed. This
2 means that changing the feeding times will not accomplish anything, even under her
3 hypothesis, because as she recognizes that the elephants are intelligent enough to
4 learn and then anticipate the new feeding times.

5
6 In any event, even Dr. Cox conceded on cross-examination that stereotypic
7 behavior indicates that something has occurred or is occurring that negatively affects
8 the elephants' emotional well-being, and that the stereotypic behavior indicates poor
9 mental health. She knows that head-bobbing and rocking behavior is not typical of wild
10 elephants "whatsoever." She agrees that head-bobbing could be related to stress, and
11 acknowledges that the Los Angeles Zoo has never taken any efforts to test or monitor
12 the elephants' stress levels. Dr. Cox seems to appreciate that the elephants'
13 stereotypic behavior is a sign that something is terribly wrong with the elephants, but
14 seems (and on the witness stand at trial appeared) at a complete loss, probably
15 because of her lack of qualifications, for what to do about it. Her testimony at trial was
16 internally inconsistent, often confused, and at times bewildering.

17
18 Dr. Poole testified that Bily also suffers because his heightened and extended
19 musth period of sexual arousal has no outlet, and because he does not have enough
20 space to deal with his frustration. It is undisputed that Bily's musth period is abnormally
21 long. The presence of other (dominant) male elephants could shorten Bily's musth
22 period (Exh. 152), but there are no other male elephants in the Los Angeles Zoo. Zoo
23 employees downplayed the effect on Bily of this extended musth period, but musth is
24 one of Dr. Poole's areas of extensive research and expertise. The zoo keepers'
25 knowledge again pales in comparison. The court again credits Dr. Poole's testimony.

1
2 Perhaps most significantly, the testimony of Dr. Oosterhuis, again a witness
3 called by defendants, was not much different than an outline of plaintiff's claims in this
4 case, and perhaps as much as the testimony of any witness called by plaintiff supports
5 plaintiff's claims. Dr. Oosterhuis testified that the stereotypic behavior exhibited by all
6 three of the elephants at the Los Angeles Zoo of head-bobbing, rocking, and swaying
7 places too much pressure on the elephants' feet and causes cracks in the nails. He
8 testified to and confirmed the following facts, many of which are contained in a chapter
9 on elephant care that he co-authored, entitled "Foot Care for Captive Elephants," and all
10 of which were unrebutted:

- 11
- 12 1. No matter how good a foot care program is, eventually elephants in
13 captivity will develop foot problems as a result of being kept in captivity.
14 The consequences of captivity catch up with an older elephant, and lack of
15 exercise is the most important factor contributing to the need for increased
16 foot care. (This is the basis of most of plaintiff's claims in this action.)
17
 - 18 2. Captive elephants require a minimum of one to two hours of walking
19 exercise each day in order for the elephants to get enough exercise of
20 their joints, tendons, and ligaments, to keep their feet healthy. (It is
21 undisputed that that Los Angeles Zoo is not exercising its elephants even
22 these amounts of time, which Dr. Oosterhuis testified are minimum
23 amounts.)
24
25

1 3. Unlike wild elephants, which walk up to 18 hours a day over different
2 substrates, sedentary captive elephants wear their foot pads down very
3 little. (This is contrary to Ms. Guarnett's belief that the foot pads of wild
4 elephants do not wear down as much as the foot pads of captive
5 elephants. It also supports plaintiff's claim that the lack of exercise of Bily,
6 Tina, and Jewel is harming their feet.)
7

8 4. Wild elephants, even though their pads have deep grooves and cracks
9 that give a false impression of disrepair, are able to maintain their feet by
10 walking great distances each day for feeding, bathing, digging, and
11 dusting. This exercise regimen, which captive elephants do not have
12 because of their sedentary lifestyle, wears down the pads and nails of wild
13 elephants sufficiently to maintain healthy feet, and strengthens the
14 tendons, ligaments, and muscles of their feet and legs. (Again, this is
15 exactly what plaintiff is claiming in this case.)
16

17
18 5. Abscesses are common in captive elephants. They are caused by the
19 multitude of problems associated with keeping elephants in captivity. The
20 elephant is not genetically programmed to withstand the constant
21 gravitational pressure of living on hard surfaces and carrying the kind of
22 excessive weight that is typical of most captive elephants. (This evidence
23 supports plaintiff's claims that the Los Angeles Zoo's management and
24
25

1 treatment of the three elephants are causing the abscesses in their feet
2 and nails, and that the hard substrate is contributing to the problem.)

3
4 6. Abnormal pressure on the nails, such as seen on the lateral nails of
5 elephants who engage in stereotypical rocking behavior, causes disruption
6 in the blood supply to the sensitive tissue behind the nail. Asian elephants
7 have larger nails, because they evolved on softer surfaces. (Thus, even
8 though plaintiff's witness Dr. Ensley did not know whether Asian elephants
9 walk on softer surfaces, defendants' witness Dr. Oosterhuis knew and
10 confirmed this fact.)

11
12 7. Prevention of abscesses requires: (a) exercise to strengthen foot
13 structures and maintain good blood flow to the feet; (b) reduction in weight
14 to reduce pressure on the feet; (c) soft, yielding surfaces for the elephants
15 to live on; (d) elimination of behavioral motions that cause abnormal stress
16 on the feet; (e) good hygiene practices to minimize surface contamination,
17 and (f) regular, complete, and correct pedicures. (Other than the
18 pedicures (f), it does not appear from the evidence that the Los Angeles
19 Zoo is complying with any of Dr. Oosterhuis' recommendations.)

20
21
22 8. Nail cracks are usually caused by repetitive movement that puts abnormal
23 pressure on the nail. The captive elephant's environment can exacerbate
24 this pressure. An example is the stereotypical behavior of an elephant
25

1 rocking, where the elephant stands in one place on a hard surface and
2 rocks back and forth, thereby putting abnormal pressure on the lateral
3 toes of the front feet, eventually causing nail cracks. Repetitive or
4 stereotypical behavior can increase wear on the toes, and cause cracks
5 and abscesses. (This appears to be what is occurring with Bily, exactly as
6 plaintiff claims. It is almost as if defendants called Dr. Oosterhuis to prove
7 plaintiff's claims in this case.)

8 The testimony of defendants' witnesses, including zoo employees and other
9 treating veterinarians called by defendants, also raises serious concerns about the level
10 of care that the elephants are receiving at the Los Angeles Zoo. Ms. Guarnett's beliefs,
11 including her uninformed and misguided opinion that the elephants' abnormal
12 stereotypic behavior is a sign of happy, content elephants, and the fact that Ms.
13 Guarnett is the Senior Elephant Keeper in charge of caring for and managing Bily, Tina,
14 and Jewel, and essentially controlling their lives in captivity, is particularly disturbing.
15 For example, she testified that she believes that even if elephants travel for long periods
16 of time, as they do in the wild, they would still need foot care and trimming, and that the
17 foot pads of wild elephants do not wear down as much as the foot pads of captive
18 elephants. The evidence in the record, and common sense, is to the contrary.

19
20
21 Ms. Guarnett also testified that she believes that it is healthy for Bily to always be
22 in a yard without another elephant, because male elephants in the wild are solitary. The
23 undisputed evidence and testimony of those with knowledge (Dr. Poole) is to the
24 contrary, and Ms. Guarnett admittedly has no knowledge of elephant behavior in the
25 wild.

1
2 As another example, the keepers at the Los Angeles Zoo have Bily lie down and
3 have him stand up on his back two legs in front of spectators at viewpoints at the
4 exhibit. Ms. Guarnett, however, does not consider these activities "tricks." She testified
5 that making Bily stand up on his back two legs is not a trick or performance for the
6 audience (although she does refer to the area where public visitors can hear her as a
7 "stage"), but an exercise to develop his muscles in the event (for which there is no plan
8 to have occur) that he has the opportunity to mate with a female elephant. Frankly, this
9 is absurd, and the court discredits this testimony. Moreover, Ms. Guarnett claims that
10 she does not know how Bily was trained to lie down, as the keepers have him do for
11 visitors to the Elephants of Asia exhibit. The court discredits this testimony as well. It is
12 inconceivable that the Senior Elephant Keeper of the Los Angeles Zoo has no
13 knowledge of the kinds of things that elephant trainers had to do to Bily and other
14 elephants to train them to lie down on command, such using a block and tackle to pull
15 the elephant's legs and poking the elephant's admittedly sensitive skin with a pole and
16 nail, as shown in Exhibit 47. For someone who claims to love the elephants, it is
17 shocking that she would command or at least assist them in performing an activity that
18 the elephants were taught to do in this way. The court also discredits Ms. Guarnett's
19 similarly remarkable testimony that the keepers never command Bily to stand on his
20 back two legs or lie down, they merely "ask" him to do so.

21
22 Finally, the evidence at trial shows that the three elephants at the Los Angeles
23 Zoo are emotionally and socially deprived. It is undisputed that Bily lives and has lived
24 for many years in isolation, separated at all times from other elephants, limited to
25 hearing and smelling Tina and Jewel from afar, occasionally able to rub trunks with

1 them through (presumably non-electrified) fencing. The most knowledgeable witness
2 on the subject, Dr. Poole, testified that the difference between the behavior of the three
3 elephants at the Los Angeles Zoo and the behavior of elephants in the wild is like "night
4 and day." Her observations of the three elephants, which although limited in hours were
5 done through the most experienced of eyes, revealed very little social interaction among
6 the three elephants. In her opinion, Bily, Tina, and Jewel are not getting much social
7 benefit from each other's presence in the Los Angeles Zoo's elephant exhibit.

8
9 It is true that the Los Angeles Zoo's elephant management manual (Exhs. 72 and
10 264) states that the zoo's elephant management philosophy is to give the elephants
11 choices and an enriched environment. And as one of plaintiff's witnesses, Dr. Mel
12 Richardson, admitted on cross-examination, the elephants have some choices
13 regarding where they go and what they do, although their choices are extremely limited
14 by the nature of their captivity. They can choose where to walk, when to go into a pool
15 of water, and what kind of keeper-provided activities to engage in, but only in the pen or
16 pens that the keepers allow them to enter, only if they walk on cement in the pool, and
17 in Bily's case only by himself. As Ms. Guarnett admitted on cross-examination, the
18 elephant's "choices" are limited by the fact that the keepers control the gates that dictate
19 the areas the elephants can enter, and the elephants have no control other than what
20 they do in the yard that the keepers decide to put them in. The "enrichment activities,"
21 such as fake dead trees and "boomer balls" into which the keepers hide food for the
22 elephants to find, break up the monotony of captivity to some extent by providing
23 temporary challenges, but these artificial attempts to stimulate admittedly intelligent
24
25

1 mammals are no substitute for or anywhere near the equivalent of elephant life outside
2 of a zoo. And Ms. Guarnett testified that she has never spoken with anyone about what
3 to do to make the exhibit "approximate the wild."
4

5 Significantly, the evidence is undisputed that there are tests that the zoo could
6 conduct to investigate whether the elephants are emotionally healthy. Dr. Eng testified
7 that he could test elephant blood or fecal samples for cortisol or adrenaline, and, after
8 establishing a baseline, the zoo could use cortisol levels to test the emotional states of
9 the elephants. Dr. Eng confirmed, however, that no veterinarian at the Los Angeles Zoo
10 has ever done any work to evaluate the emotional state or stress levels of the
11 elephants. In his words: "It's just never been done." Nor has the zoo ever conducted
12 any cortisol and adrenaline testing to establish a baseline for comparisons. Dr. Eng
13 conceded that the elephants could be under long term stress, and the zoo might not
14 even know it.
15

16
17 Thus, the Elephants of Asia exhibit at the Los Angeles Zoo is not a happy place
18 for elephants, nor is it for members of the public who go to the zoo and recognize that
19 the elephants are neither thriving, happy, nor content. Captivity is a terrible existence
20 for any intelligent, self-aware species, which the undisputed evidence shows elephants
21 are. To believe otherwise, as some high-ranking zoo employees appear to believe, is
22 delusional. And the quality of life that Bily, Tina, and Jewel endure in their captivity is
23 particularly poor.
24
25

1 But are defendants engaging in behavior that is abusive to the elephants?

2 Probably not.

3
4 Section 596.5 does not define "abusive behavior." Nor is there a definition of
5 "abusive behavior" anywhere in Part 1 (entitled "of crimes and punishments") of Title 14
6 (entitled "malicious mischief") of the Penal Code, which encompasses sections 594-
7 625c. Indeed, the only time the word "abusive" appears in all of Title 14, and indeed in
8 the entire Penal Code, is in section 596.5. The lack of a definition of what is "abusive"
9 and therefore prohibited under section 596.5 makes it difficult to determine what
10 standard to use in deciding whether the Los Angeles Zoo's treatment of its elephants
11 "rises to the level of abusive behavior."

12
13
14 The term "abuse" appears more frequently in the Penal Code than the term
15 "abusive," and most of the time it refers to spousal or child abuse. The only time the
16 term "abuse" appears within Title 14, which contains section 596.5, is in section 597,
17 which provides, among other things, that every person who "subjects any animal to
18 needless suffering, or inflicts unnecessary cruelty upon the animal, or in any manner
19 abuses any animal," is guilty of a misdemeanor or a felony. Penal Code § 597(b).
20 Section 599b provides, for purposes of Title 14, that "the words 'torment,' 'torture,' and
21 'cruelty' include every act, omission, or neglect whereby unnecessary or unjustifiable
22 physical pain or suffering is caused or permitted." Pen. Code § 599b (emphasis added).
23
24
25

1 Plaintiff points to Penal Code section 11199, entitled "Reports of animal abuse,
2 cruelty, or neglect by county employees; time and method of report; definitions; contents
3 of report." Section 11199, which connects "cruelty" to "abuse," provides that any
4 "employee of a county child or adult protective services agency, while acting in his or
5 her professional capacity or within the scope of his or her employment, who has
6 knowledge of or observes an animal whom he or she knows or reasonably suspects has
7 been the victim of cruelty, abuse, or neglect, may report the known or reasonably
8 suspected animal cruelty, abuse, or neglect to the entity or entities that investigate
9 [such] reports." Penal Code § 11199(a). Section 11199(a) also provides that "'cruelty,'
10 'abuse,' and 'neglect' include every act, omission, or neglect whereby unnecessary or
11 unjustifiable physical pain or suffering is caused or permitted." *Id.*, § 11199(d)(2)
12 (emphasis added). Thus, when it comes to animals, "abuse" under the Penal Code is
13 equivalent to "torment," "torture," "cruelty," and "neglect," and the issue is whether the
14 conduct, whether called "abuse," "torment," "torture," "cruelty," or "neglect," causes or
15 permits "unnecessary or unjustifiable physical pain or suffering" by the animal. *Id.*,
16 §§ 596.5, 597(b), 599b, 11199(d)(2); see People v. Sanchez, 94 Cal. App. 4th 622, 632-
17 33 (2001) (section 597(b) "may be violated by subjecting an animal to needless
18 suffering," or "by inflicting unnecessary cruelty," both of which "focus on the effect on the
19 animal, namely unnecessary cruelty or needless suffering").

20
21
22 In People v. Speegle, 53 Cal. App. 4th 1405 (1997), the court rejected the
23 defendant's argument that the words "needless suffering" in section 597(b) were
24 unconstitutionally void for vagueness. *Id.* at 1411-12. The court held that an "objective
25

1 standard of reasonableness” applied to determine what conduct causes “needless
2 suffering.” Id. The court stated because there “are an infinite number of ways in which
3 the callously indifferent can subject animals in their care to conditions which make the
4 humane cringe,” it is “impossible for the Legislature to catalogue every act which
5 violates the statute,” and that the “terms ‘necessary,’ ‘needless,’ and ‘proper’ all give fair
6 notice of an objective standard of reasonableness in the provision of sustenance, drink,
7 and shelter, and in the avoidance of infliction of suffering.” Id. The court also noted that
8 “the infliction of ‘needless’ suffering” does “not appear to be anything other than a
9 synonym for ‘unjustified.’” Id. at 1416.

10
11 Sanchez is an example of conduct that caused “needless suffering.” The
12 defendant was charged with, among other things, failure to provide medical treatment
13 for a severely wounded puppy. Sanchez, 94 Cal. App. 4th at 634. The defendant kept
14 the injured puppy outside with a pregnant chow dog which attacked the puppy, failed to
15 provide or seek treatment for the puppy's wounds other than putting peroxide on them,
16 and failed to do anything about maggots on the puppy, leaving the puppy to suffer for
17 five days. Id. at 636. The defendant argued that “he never saw the chow attack the
18 puppy, he applied hydrogen peroxide to the puppy's wound the day after the puppy
19 received the wound, he has bad eyesight and did not see the maggots, and he did not
20 call a third party because he had no money.” Id. The court found that the defendant’s
21 failure “to provide adequate medical treatment” while “keeping the puppy outside,”
22 subjecting the puppy “to greater risk of infection, and failing to contact third parties to
23
24
25

1 treat or euthanize the puppy free of charge, all contributed to the puppy's needless
2 severe suffering." Id.

3
4 Similarly, in People v. Youngblood, 91 Cal. App. 4th 66 (2001), the defendant
5 housed ninety-two cats in a small trailer, most of which were "covered in urine and
6 feces," were malnourished and emaciated, were "sick with upper respiratory, herpes
7 virus," had "ear mites [and] fleas," had neurological problems, were "missing portions of
8 their limbs or had deformed limbs," and "were either blind or partially blind in one or both
9 eyes," some even "missing eyes." Id., at 69. The court found that this "inadequate care
10 over a long period" caused needless suffering and supported a conviction under section
11 597(b). See id. at 69-72. In People v. Thomason, 84 Cal. App. 4th 1064 (2000), the
12 defendant bred mice and rats so that he could videotape them as he crushed and
13 mutilated them to death under the heel of a woman's shoe. Id. at 1065-67. The court
14 held that "no reasonable person [could] argue" that this conduct had not caused
15 "unnecessary or unjustifiable physical pain or suffering" to the mice and rats, as
16 defined by Penal Code section 599b. Id. at 1067, 1069-70.

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18
19 In People v. Brunette, 194 Cal. App. 4th 268 (2011), the defendant was convicted
20 of two felony counts of animal cruelty under Penal Code section 597(b), four
21 misdemeanor counts of providing unfit animal living conditions under Penal Code
22 section 597t, and three misdemeanor counts of animal neglect under Penal Code
23 section 597.1. Id. at 271-72. Employees of the County Animal Services Authority found
24 the defendant "standing in the midst of a canine charnel house. Some dogs lay dead or
25

1 dying. Most of the rest, in the dozens, were skin and bones from starvation, suffering
2 from infection, flea-ridden to a life-threatening degree, worm infested, panting in cages
3 exposed to the remote area's high temperature that day, putrefying with open sores,
4 malnourished, injured, and/or battle-scarred from fights over food. One employee
5 witnessed dog-on-dog predation first hand. As he stood talking with defendant through
6 a fence, 10 or 15 dogs began to attack another dog, 'just ripping it apart.' . . . The
7 property exuded orders of excrement and septic putrefaction. The authorities found one
8 dog that they estimated had been confined in a pickup truck cab for a month or more.
9 The truck's windows were closed and the air temperature was in the 90's that day." Id.
10 at 273. Two of the puppies "had lost much of their hair and were emaciated, with rib
11 cages and backbones showing. Defendant appeared indifferent to their plight. [A
12 witness] told defendant that the dogs were dying and defendant replied that he had
13 abandoned them to their fate." Id.
14

15
16 The facts in this case are nothing like the facts in Sanchez, Youngblood,
17 Thomason, and Brunette. Unlike the case in Sanchez, the zoo is providing adequate
18 medical care for the elephants, it's just not that good. Unlike the case in Youngblood,
19 the elephants are not stricken with multiple diseases, going blind, and losing limbs.
20 Unlike the case in Thomason, the zoo is not intentionally torturing the elephants for the
21 psychotic amusement of zoo employees. And unlike the case in Brunette . . . well,
22 admittedly there's really nothing like Brunette. The court finds that plaintiff has not
23 proven by a preponderance of the evidence that the Los Angeles Zoo's elephant exhibit
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25

1 is subjecting the elephants to needless suffering or inflicting unnecessary cruelty on the
2 elephants.

3
4 This case raises the question of whether the recreational or perhaps educational
5 needs of one intelligent mammal species outweigh the physical and emotional, if not
6 survival, needs of another. Existing California law does not answer that question. The
7 question is whether defendants engage in behavior that is abusive to the elephants by
8 keeping them in their current captive environment. The court concludes that plaintiff
9 has not met his burden of proof by a preponderance of the evidence on this issue.
10 Plaintiff has proven that defendants are not treating the elephants very well, but not that
11 defendants are engaging in behavior that is abusive to the elephants.
12

13
14 3. *Inappropriate Discipline*

15
16 A bull hook, for which the more contemporary and perhaps euphemistic name is
17 an ankus, is a stick or cane-like device with a metal barb or point on the end of what on
18 a walking cane would be the handle. See Exhibit 169. A block and tackle is an
19 arrangement of chains and pulleys that is usually used to lift heavy objects, like large
20 pumps (Bell v. Bank of Perris, 52 Cal. App. 2d 66, 71 (1942)), steel poles (Leslie v. City
21 of Monterey, 139 Cal. App. 713, 717 (1934)), and machine frames (Carlson v. Sun-Maid
22 Raisin Growers' Ass'n, 121 Cal. App. 719, 722 (1932)). In this situation, the block and
23 tackle is used to train elephants to do certain things, like lying down, by using chains to
24 pull their legs apart. The evidence shows that when Bily was much younger, trainers
25

1 formerly with the Los Angeles Zoo trained him to lie down using a block and tackle.

2 Exh. 42. Trainers also used a bull hook, a stick with a nail, or other similar tool. When
3 elephants that were trained or "broken" with a bull hook are subsequently shown a bull
4 hook or an object that looks like a bull hook, they (quite understandably) become afraid,
5 and comply with requests by the trainer or keeper. Mr. Lewis confirmed that if an
6 elephant has been hurt by a bull hook in the past, the elephant will react negatively if a
7 keeper merely shows or displays a bull hook.

8
9 No one seriously disputes that the use of bull hooks, electric shock, and block
10 and tackle to train or manage an elephant is abusive and inappropriate discipline under
11 Penal Code section 596.5. And defendants concede that keepers and trainers at the
12 Los Angeles Zoo in the past used these kinds of tools, and abused elephants with them.
13 Defendants do not seriously dispute that the use of these instruments in the past
14 constituted abusive behavior towards elephants. Defendants claim, however, that they
15 do not now condone or permit the use of a bull hook or similar instrument on elephants,
16 and that bull hooks and electric shock are no longer necessary now that the zoo uses a
17 system of protected contact elephant management. The issue, then, is whether
18 defendants' representations of discontinuance, or voluntary cessation, of the use of
19 these instruments defeats plaintiff's request for an injunction or declaratory relief.
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4. Voluntary Cessation

Defendants argue that issuing an injunction against the use of abusive elephant training tools and techniques “would be grossly inappropriate” because the Los Angeles Zoo no longer uses bull hooks, electric shock, and other prohibited methods of discipline. Defendants’ Trial Brief, 22:13. Defendants claim that there is no evidence of any elephant abuse in the Los Angeles Zoo in the last 20 years, and that for the past 18 months the zoo has used only positive reinforcement under a protected contact management system that does not require discipline. Id., 5:9-10, 22:10-11. Defendants also point out that its revised 2011 elephant management manual mandates that the Los Angeles Zoo use protected contact and positive reinforcement techniques to manage the elephants. Id. 5: 12-14. Defendants also rely on, and promise to comply with, a term of the written loan agreement between the Los Angeles Zoo and the San Diego Zoo governing Jewel and Tina, which requires the use of protected contact only, and which expressly prohibits the use of a bull hook. Id. 5:15-16.

Plaintiff argues that an injunction is necessary because although defendants now claim that they no longer use bull hooks, they refuse to state unequivocally or even consistently that they do not use and never will never return to using such tools and devices on elephants. Plaintiff’s Trial Brief, 19:7-8. Plaintiff points out that the 2011 elephant manual contains no mention of a bull hook or similar device, and does not ban the use of these traditional tools of elephant abuse. Similarly, the standards of the Association of Zoos & Aquariums (AZA), which the Los Angeles Zoo states it follows, do not prohibit or ban the use of bull hooks on elephants. Plaintiff also points to the fact that although defendants record many hours of the elephants through cameras placed in the exhibit, defendants have not retained (and often not even reviewed) these

1 recordings to see how the elephant keepers and others are treating the elephants. Id.,
2 18:14-16. Plaintiff emphasizes that defendants did not stop (or commit to stop) using
3 bull hooks until after plaintiff filed this action, and that nothing prevents the Los Angeles
4 Zoo from reinstating the practice of using bull hooks as soon as this litigation ends. Id.,
5 18:27-19:5.

6
7 A court's power to grant injunctive relief survives the defendant's voluntary
8 cessation of the wrongful conduct. United States v. W. T. Grant Co., 345 U.S. 629, 633
9 (1953); see Pittenger v. Home Savings & Loan Ass'n of Los Angeles, 166 Cal. App. 2d
10 32, 36 (1958) ("the voluntary discontinuance of allegedly wrongful conduct does not
11 destroy the justiciability of a controversy based upon such conduct"). The party seeking
12 the injunction, however, must satisfy the court that, in light of all the circumstances,
13 there remains some cognizable risk that the wrongful conduct will reoccur. W. T. Grant,
14 345 U.S. at 633. In determining whether to issue an injunction against voluntarily
15 discontinued acts, the court considers "the bona fides of the expressed intent to comply,
16 the effectiveness of the discontinuance and, in some cases, the character of the past
17 violations." Id.; see Bishop v. City of San Jose, 1 Cal. 3d 56, 65 (1969) (a court will not
18 grant an injunction to prevent that which as been discontinued, in good faith, in the
19 absence of any evidence that the acts are likely to be repeated in the future); Mallon v.
20 City of Long Beach, 164 Cal. App. 2d 178, 190 (1958).

21
22
23 The court may find that the request for an injunction is moot if the defendant can
24 demonstrate that "there is no reasonable expectation that the wrong will be repeated."
25 W. T. Grant, 345 U.S. at 633. However, "this burden is a heavy one" and the standard

1 is "stringent." Id.; see Friends of the Earth, Inc. v. Laidlaw Environmental Services, 528
2 U.S. 167, 189 (2000); Aguilar v. Avis Rent A Car Sys., Inc., 21 Cal. 4th 121, 133 (1999)
3 (a court may issue an injunction unless the defendant proves that it is unlikely to repeat
4 the practice).

5
6 a. The bona fides of the expressed intent to comply

7
8 The court may consider the defendant's disclaimer of any intention to continue
9 the wrongful practices that the plaintiff seeks to enjoin, but the defendant "cannot
10 automatically negate a threat that otherwise appears merely by disclaiming the present
11 intention to carry it out." Epstein v. Superior Court, 193 Cal. App. 4th 1405, 1410
12 (2011). Moreover, the mere fact that the defendant ceases the wrongful conduct during
13 the pendency of a lawsuit does not preclude the court from issuing injunctive relief to
14 prevent a post-judgment continuation of the wrongful conduct. Aguilar, 21 Cal. 4th at
15 133. "[M]any courts have rejected arguments against injunctive relief where defendants
16 changed their practices only in response to being sued." Id. A defendant that "takes
17 curative actions only after it has been sued fails to provide sufficient assurances that it
18 will not repeat the violation to justify denying an injunction." Id.

19
20 This factor weighs in favor of issuing an injunction against the use of bull hooks
21 and electric shock by the Los Angeles Zoo, particularly given the timing and manner of
22 defendants' stated cessation. Defendants discontinued the use of bull hooks during the
23 pendency of this lawsuit, making it questionable whether their intention to discontinue
24 using such tools of abuse is in good faith. Plaintiffs filed this action in 2007, at
25 approximately the same time that defendants claim that they last used free contact. In

1 2011, after the Court of Appeal's decision in this case and shortly before defendants
2 filed their second summary judgment motion, the Zoo revised its elephant management
3 manual. Although the new manual calls for protected contact management, it does not
4 ban the use of bull hooks and electric shock on the elephants.

5
6 Moreover, Mr. Lewis' statements during the pendency of this action do not inspire
7 confidence in his commitment to the ban on bull hooks. At first Mr. Lewis would not
8 answer questions regarding whether he planned to keep open the option of using bull
9 hooks in the future at the Los Angeles Zoo elephant exhibit, and stated that he wanted
10 to reserve for the keepers the option of using a bull hook in certain circumstances. Mr.
11 Lewis acknowledged that he believed that it was appropriate for keepers to use a bull
12 hook, including the barbed metal end of the bull hook, on elephants that were
13 "misbehaving." He also conceded during the trial that an individual elephant keeper
14 could make a personal subjective decision about whether to use a bull hook in any
15 given situation. But Mr. Lewis later changed his position. On the last day of trial, Mr.
16 Lewis testified that he is prepared to commit that the Los Angeles Zoo will not use bull
17 hooks or electric shock on any elephants, at least while he is director of the zoo. The
18 timing of these changes in defendants' position cast doubt on whether defendants'
19 discontinuance of the use of bull hooks is sincere, or simply expedient and in response
20 the filing of this action. The zoo's failure to include a prohibition on the use of bull hooks
21 in the 2011 edition of its elephant management manual also supports the issuance of an
22 injunction.

1
2 b. The effectiveness of the discontinuance

3
4 An issue does not become moot merely because the wrongful conduct has been
5 discontinued, especially where there is no assurance that the issue will not arise again
6 in the future. See Marin County Bd. of Realtors, Inc. v. Palsson, 16 Cal. 3d 920, 929
7 (1976). A case does not become moot simply because a defendant voluntarily ceases
8 the wrongful conduct but is free to resume it at any time. Kidd v. State of California, 62
9 Cal. App. 4th 386, 398 (1998). “[V]oluntary discontinuance of alleged illegal practices
10 does not remove the pending charges of illegality from the sphere of judicial power or
11 relieve the court of the duty of determining the validity of such charges where by the
12 mere volition of a party the challenged practices may be resumed.” Marin 16 Cal. 3d at
13 929. A “unilateral decision” to change “is also unilaterally rescindable.” Cook v. Craig,
14 55 Cal. App. 3d 773, 780 (1976). A court may issue an injunction where the defendant
15 “retains the means of continuing his transgressions, even though he testifies that he no
16 longer intends to do so.” Department of Agriculture v. Tide Oil Co., 269 Cal. App. 2d
17 145, 150 (1969); see Wood v. Pepper, 55 Cal. App. 2d 116, 124 (1942) (“a court is not
18 required to accept [the defendant’s] statement that he no longer intends” to continue the
19 wrongful conduct where the defendant still possesses the means of doing so).

20
21 This factor also weighs in favor of issuing an injunction. The Los Angeles Zoo
22 can reinstate the use of bull hooks and electric shock as soon as this litigation ends.
23 Neither the zoo’s 2011 edition of its elephant management manual nor the AZA
24 standards prohibit the use of bull hooks or electric shock. According to (one version of)
25 Mr. Lewis’ testimony, a keeper has the discretion to use a bull hook if the keeper

1 believes that it would not be abusive or constitute negative reinforcement. And if a
2 keeper did use a bull hook in an abusive manner, it is questionable whether the zoo
3 would discover the abuse in order to take any remedial action. This is because the
4 evidence shows that zoo employees are not watching the recordings of the elephants
5 (at least the Head Elephant Keeper, the Head Researcher, the Zoo's Chief Veterinarian,
6 and the Director are not watching), and so there is no assurance that Mr. Lewis' (most
7 recent) commitment to banning the use of bull hooks will be enforced.

8
9 Moreover, although Mr. Lewis (ultimately) testified that he is prepared to commit
10 that the Zoo will not use bull hooks or electric shock on any elephants under his
11 direction, there is nothing to prevent a new director from reinstating the use of these
12 abusive tools. This may be precisely why the San Diego Zoo felt that it had to make it
13 an express condition of the loan agreement for Tina and Jewel that the Los Angeles
14 Zoo commit in writing not to use bull hooks on any of the elephants. When counsel for
15 plaintiff asked Mr. Andrews, who brought Tina and Jewel from the San Diego Zoo to the
16 Los Angeles Zoo, about this, Mr. Andrews responded: "You're a lawyer, you know why
17 legal documents are important." Exactly.

18
19 In addition, although defendants claim that the Los Angeles Zoo will not reinstate
20 free contact elephant management because defendants designed the elephant exhibit
21 at considerable expense for protected contact elephant management, the fact remains
22 that defendants are free to return to free contact elephant management (and its
23 concomitant use of bull hooks and similar devices) at any time. The evidence reveals
24 instances in which keepers were not using an elephant restraining device as required by
25

1 the manual, and were caring for the elephants in a way that for all intents and purposes
2 was pretty close to free contact.

3
4 c. The character of the past violations

5 "An inference arises from illegal past conduct that future violations may occur."
6 S.E.C. v. Koracorp Indus., Inc., 575 F.2d 692, 698 (9th Cir. 1978); see United States v.
7 Laerdal Mfg. Corp., 73 F.3d 852, 857 (9th Cir. 1995) ("past illegal conduct gives rise to
8 an inference that future violations may occur"). The Los Angeles Zoo has a history of
9 elephant abuse and of missing zoo records, and an absence of documentation of the
10 abuses that the Los Angeles Zoo concedes occurred in the (admittedly distant) past. As
11 the Los Angeles City Administrative Officer's 2005 report delicately put it, the "history of
12 elephants at the Los Angeles Zoo has not been without incident." Exhs. 47-001, 47-
13 008, 204-001, 204-008. Management of elephants at the Los Angeles Zoo in the past
14 "was typical of zoo elephant management of the time" and included "chaining the
15 elephants in place over night." Exh. 47-059. There have been accusations of elephant
16 injuries resulting from the use of bull hooks and electrical prods, which zoo employees
17 have denied. See Exh. 47-060. The Los Angeles Zoo's history of not keeping complete
18 and accurate records also calls into question the defendants' ability to keep their word.

19
20 Therefore, weighing and considering the factors and the facts and circumstances
21 shown by the evidence, the court finds that defendants have not met their burden of
22 proving that their statements of voluntary commitment not to use abusive elephant
23 management tools like the bull hook and electric shock defeat plaintiff's entitlement to
24 an injunction. The court will enjoin the Los Angeles Zoo from using such devices, as
25 requested by plaintiff.

1 5. *Penal Code section 597*

2
3 Section 597(b) of the Penal Code provides:

4
5 [E]very person who overdrives, overloads, drives when overloaded, overworks,
6 tortures, torments, deprives of necessary sustenance, drink, or shelter, cruelly
7 beats, mutilates, or cruelly kills any animal, or causes or procures any animal to
8 be so overdriven, overloaded, driven when overloaded, overworked, tortured,
9 tormented, deprived of necessary sustenance, drink, shelter, or to be cruelly
10 beaten, mutilated, or cruelly killed; and whoever, having the charge or custody of
11 any animal, either as owner or otherwise, subjects any animal to needless
12 suffering, or inflicts unnecessary cruelty upon the animal, or in any manner
13 abuses any animal, or fails to provide the animal with proper food, drink, or
14 shelter or protection from the weather, or who drives, rides, or otherwise uses the
15 animal when unfit for labor, is, for each offense, guilty of a crime

16
17 Plaintiff focuses on the language in section 597(b) that follows “and whoever”
18 and that applies to someone who “subjects any animal to needless suffering, or inflicts
19 unnecessary cruelty upon the animal, or in any manner abuses any animal.” Plaintiff’s
20 Trial Brief, 28: 11-29:5. As noted above, however, the court finds that although the Los
21 Angeles Zoo is not treating its elephants well, the zoo is not abusing them. Nor does
22 the evidence show by a preponderance that the zoo is subjecting its elephants to
23 needless suffering or inflicting unnecessary cruelty. The evidence at trial shows that life
24 at the Los Angeles Zoo for Bily, Tina, and Jewell is empty, purposeless, boring, and
25 occasionally painful. Their lives are supervised, managed, and controlled by zoo

1 employees who appear to be in the dark about normal and abnormal behavior of
2 elephants, in denial about the physical and emotional difficulties of the elephants they
3 manage and whose lives they control, and under the misconception that the elephants
4 prefer to live their lives in an exhibit with human companions rather than with other
5 elephants. The elephants are hardly, as defendants contend, “thriving.” Defendants’
6 Trial Brief, 27:24. But the zoo’s conduct is not abusive, does not amount to causing
7 suffering, and is not cruel beyond the “ordinary” circumstance of captivity (which plaintiff
8 does not challenge). Moreover, as defendants correctly point out, plaintiff has not
9 presented any legal authority or evidence that section 597(b) applies to elephants (or
10 any other animals, for that matter) held captive in a zoo exhibit. Cf. 18 Pa. C.S.A.
11 §5511(a) (“Cruelty to Animals”) (“Killing, maiming, or poisoning domestic animals or zoo
12 animals”).

13
14 Penal Code section 597 does not provide a legal standard by which defendants’
15 conduct can be tested for purposes of the “illegal expenditure” provision of Code of Civil
16 Procedure section 526a.

17
18 6. *Penal Code section 597.1*

19
20 Section 597.1(a) of the Penal Code provides:

21
22 Every owner, driver, or keeper of any animal who permits the animal to be
23 in any building, enclosure, lane, street, square, or lot of any city, county, city and
24 county, or judicial district without proper care and attention is guilty of a
25 misdemeanor. Any peace officer, humane society officer, or animal control

1 officer shall take possession of the stray or abandoned animal and shall provide
2 care and treatment for the animal until the animal is deemed to be in suitable
3 condition to be returned to the owner. When the officer has reasonable grounds
4 to believe that very prompt action is required to protect the health or safety of the
5 animal or the health or safety of others, the officer shall immediately seize the
6 animal and comply with subdivision (f). In all other cases, the officer shall comply
7 with the provisions of subdivision (g). The cost of caring for and treating any
8 animal properly seized under this subdivision or pursuant to a search warrant
9 shall constitute a lien on the animal and the animal shall not be returned to its
10 owner until the charges are paid, if the seizure is upheld pursuant to this section.
11

12 Plaintiff focuses on the first sentence of section 597.1 that makes it illegal for an
13 owner of any animal to keep the animal in an "enclosure" in the city "without proper care
14 and attention." Plaintiff's Trial Brief, 29:12-30:5. Defendants focus on the second
15 sentence of section 597.1, which authorizes a "peace officer, humane society officer, or
16 animal control officer" to "take possession of the stray or abandoned animal."
17 Defendants' Trial Brief, 26:7-27:1.
18

19 The court agrees with plaintiff that the evidence at trial shows that the elephants
20 at the Los Angeles Zoo are not receiving "proper care and attention." An elephant in a
21 zoo, however, is not a "stray or abandoned animal." The statute's use of the word "the"
22 before the words "stray or abandoned animal" in the second sentence of section 597.1
23 suggests that the first of sentence section 597.1 applies to stray or abandoned animals,
24 not to captive animals in a zoo. And it is difficult to conceive of an animal control officer,
25

1 with or without a search warrant,¹² scaling the walls of the zoo and climbing over the
2 (electrified) fences enclosing the elephant exhibit to “take possession” of Bily, Tina, and
3 Jewel, and then sending the city an invoice for “the cost of caring for and treating” the
4 three elephants. See Penal Code §§ 597.1(a), 597.1(f). And again, plaintiff has not
5 presented any legal authority that section 597.1 applies to elephants (or any other
6 animals, for that matter) held captive in a zoo exhibit.

7
8 Penal Code section 597.1 does not provide a legal standard by which
9 defendants’ conduct can be tested for purposes of the “illegal expenditure” provision of
10 Code of Civil Procedure section 526a.

11
12 7. *Penal Code section 597t*

13
14 Section 597t of the Penal Code provides:

15
16 Every person who keeps an animal confined in an enclosed area shall
17 provide it with an adequate exercise area. If the animal is restricted by a leash,
18 rope, or chain, the leash, rope, or chain shall be affixed in such a manner that it
19 will prevent the animal from becoming entangled or injured and permit the
20 animal's access to adequate shelter, food, and water. Violation of this section
21 constitutes a misdemeanor. [¶] This section shall not apply to an animal which is
22 in transit, in a vehicle, or in the immediate control of a person.

23
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¹² See People v. Chung, 185 Cal. App. 4th 247 (2010).

1 Plaintiff argues, in closing argument and his trial brief, that “[p]erhaps no Penal
2 Code section is more directly on point than § 597t.” Plaintiff’s Trial Brief, 30:19.
3 Defendants have not briefed section 597t, and for some reason did not address the
4 statute in their closing argument.
5

6 Although the evidence is disputed about whether the elephants at the Los
7 Angeles Zoo have “adequate exercise area,” it is undisputed that the elephants do not
8 get enough exercise time in their “enclosed area.” According to witnesses called by
9 defendants, such as Dr. Oosterhuis, elephants in captivity require one to two hours of
10 daily exercise, and the evidence is undisputed (according to Senior Elephant Keeper
11 Ms. Guarnett) that the elephants in the Los Angeles Zoo get no more than 40 minutes of
12 daily exercise, if that. Thus, although the evidence does not directly show that the
13 elephants need more “exercise area,” it is undisputed that they need more exercise
14 time, which, because of the increased impact on the ground that more exercise would
15 cause, requires more exercise area. Or rototilling, which would remedy the increased
16 impact and resulting increased compactness and hardness of the ground of the exhibit
17 on which the elephants need to increase the time they spend exercising. Mr. Andrews
18 testified that such rototilling is (1) part of proper zoo elephant care, (2) easy, and (3) a
19 simple matter.
20

21 Therefore, the court finds, based on the testimony of Dr. Oosterhuis and Mr.
22 Andrews, both of whom were called by defendants, that plaintiff has met his burden of
23 proving a violation of Penal Code section 597t. The issue is the remedy. Issuing the
24 requested injunction of closing the elephant exhibit at the Los Angeles Zoo or ordering
25 the transfer of Bily, Tina, and Jewel (or at least Bily) from the Los Angeles Zoo to an

1 elephant sanctuary seems a bit much for the zoo's failure to meet the minimum daily
2 captive elephant exercise requirements by 20 minutes, or by an hour and 20 minutes.
3 A more appropriate injunction is to order the Los Angeles Zoo to exercise its elephants
4 one to two hours a day, which according to the zoo's witnesses is the minimum, and
5 which according to Ms. Guarnett the elephants are not getting, and to ameliorate the
6 increased compacting of the substrate by ordering the Los Angeles Zoo to rototill the
7 exhibit substrate, which is recommended elephant care anyway and easy to do. See
8 Magill Brothers v. Building Services Employees' Int'l Union, 20 Cal. 2d 506, 512 (1942)
9 (scope of an injunction is limited to "to the wrongful act sought to be prevented");
10 Planned Parenthood Golden Gate v. Garibaldi, 107 Cal. App. 4th 345, 357 (2003) ("an
11 injunction is a judicial remedy tailored to specific circumstances rather than a legislative
12 choice regarding the promotion of particular societal interests"); Enos v. Harmon, 157
13 Cal. App. 2d 746, 750 (1958) ("Injunction process ought never to go beyond the
14 necessities of the case and only to the extent required to preserve the rights of all
15 parties.").¹³ Therefore, the court will issue such an injunction as part of its judgment.
16 See City of Claremont v. Kruse, 177 Cal. App. 4th 1153, 1180 (2009) ("A trial court's
17 decision to grant a permanent injunction rests within its sound discretion").

18
19 8. 9 C.F.R. § 3.128

20
21 Plaintiff also relies on 9 C.F.R. § 3.128. This regulation, promulgated by the
22 United States Department of Agriculture pursuant to 7 U.S.C. § 2131, the Animal
23

24
25 ¹³ Because the evidence is undisputed that rototilling is simple and easy, and routinely
done at the San Diego Zoo, the burden on defendants in the balancing of the equities is
slight.

1 Welfare Act, provides: "Enclosures shall be constructed and maintained so as to
2 provide sufficient space to allow each animal to make normal postural and social
3 adjustments with adequate freedom of movement. Inadequate space may be indicated
4 by evidence of malnutrition, poor condition, debility, stress, or abnormal behavior
5 patterns."
6

7 The Animal Welfare Act is based on the Laboratory Animal Welfare Act of 1966,
8 which Congress in 1970 amended and renamed to guarantee the "humane care and
9 treatment" of various animals employed in "carnivals, circuses, and zoos." 7 U.S.C.
10 §§ 2131, 2132(h); see E. Beverage, Abuse Under the Big Top: Seeking Legal
11 Protection for Circus Elephants after ASPCA v. Ringling Brothers, 13 Vanderbilt J. Ent.
12 & Tech. Law 155, 158 (Fall 2010). "Regulations promulgated under the Act by the
13 United States Department of Agriculture (USDA) require that covered animals be
14 handled in a manner that does not cause 'cause trauma . . . behavioral stress, physical
15 harm, or unnecessary discomfort,' and that physical abuse not be used to 'train, work,
16 or otherwise handle animals.' Additionally, exhibited animals must have sufficient space
17 'to make normal postural and social adjustments with adequate freedom of movement.'"
18 Beverage, Legal Protection for Circus Elephants, *supra*, 158 (quoting 9 C.F.R. § 3.128).
19

20 Plaintiff has not proven by a preponderance of the evidence that the Los Angeles
21 Zoo's Elephants of Asia exhibit does not provide sufficient space for the elephants to
22 make normal postural and social adjustments with adequate freedom of movement.
23 The elephants at the Los Angeles Zoo do not have enough space to provide them with
24 "an enriched environment that stimulates and elicits species-specific behavior," as the
25 Zoo's 2011 elephant management program manual (Exh. 72) represents. But the

1 elephants do have enough space and freedom to make normal adjustments of their
2 posture and social movements. It is not as though the Los Angeles Zoo keeps its
3 elephants confined in small cages or dark rooms. Indeed, most of the administrative
4 decisions by the Department of Agriculture under 9 C.F.R. § 3128 involve actions
5 against private companies (not public zoos) for transporting or keeping tigers, lions, and
6 other animals in small crates that allow no or virtually no movement. See, e.g., In re
7 Lorenza Pearson dba L & L Exotic Animal Farm, 68 Agric. Dec. 685, 2009 WL 8382858
8 (July 13, 2009) (multiple lions, tigers, and jaguars confined in small trailers and pen
9 enclosures); In re Tiger Rescue, 67 Agric. Dec. 448, 2008 WL 81210037 (May 9, 2008)
10 (seven goats, two pigs, and a llama in the bed of a pick-up truck; deer housed in a
11 kennel); In re James Garretson dba Jungle Paradise Zoo, 2007 WL 3170309 (March 22,
12 2007) (“two juvenile lions in a travel crate that measured 4 feet by 7 feet which did not
13 allow the lions adequate space for freedom of movement”).

14
15 9 C.F.R. § 3.128 does not provide a legal standard by which defendants conduct
16 can be tested for purposes of the “illegal expenditure” provision of Code of Civil
17 Procedure section 526a.

18
19 *C. Waste*

20
21 Plaintiff argues, almost as an afterthought, that “to the extent that this Zoo injures
22 elephants or engages in illegal conduct, Defendants are wasting taxpayer funds. Any
23 other conclusion would be hard to justify.” Plaintiff’s Trial Brief, 33:7-8.
24
25

1 That is not the test. As noted above, the test for "waste" is whether the
2 governmental action is "a useless expenditure and waste of public funds," or "wasteful,
3 improvident and completely unnecessary spending." The City of Los Angeles spent \$42
4 million, and built a new elephant exhibit for the public to visit. That is not a useless or
5 completely unnecessary spending of public funds, at least not from the perspective of
6 human taxpayers. The fact that the elephants do not enjoy it as much as the visiting
7 public may ultimately amount, under certain circumstances not present here, to an
8 illegal expenditure, but it is not waste. Plaintiff does not really argue otherwise.
9

10 Plaintiff is not entitled to relief under the "waste" provision of Code of Civil
11 Procedure section 526a.
12

13
14 *D. Injury*
15

16 It is undisputed that elephants are property (although in the case of Tina and
17 Jewel, they are property of the San Diego Zoo). For the reasons stated above, the
18 court finds that plaintiff has met his burden of proof that the Elephants of Asia exhibit of
19 the Los Angeles Zoo is injuring the three elephants who live there. The problem is that,
20 unlike the Penal Code section 596.5 standard for the illegality provision of Code of Civil
21 Procedure section 536a, there is no "legal standard by which the alleged governmental
22 conduct may be tested" for the injury provision of section 536a. Culp, 2009 WL
23 3021762, at 9; see Rathbun v. City of Salinas, 30 Cal. App. 3d 199, 202 (1973) ("The
24
25

1 courts will entertain only those taxpayer suits that seek to measure governmental
2 performance against a legal standard.”).

3
4 Governments do all kinds of things that injure property. They may sometimes
5 have to pay compensation, but they are not subject to an injunction every time they
6 injure something. As the Court of Appeal in this case stated, “when there is no illegal
7 conduct to enjoin, and no waste, as in Sundance, the matter may be one of
8 governmental discretion and the court properly declines to get involved.” Culp, 2009
9 WL 3021762, at 9. As the court in Harman stated:

10
11 This well-established rule ensures that California courts, by entertaining only
12 those taxpayers’ suits that seek to measure governmental performance against a
13 legal standard, do not trespass into the domain of legislative or executive
14 discretion. This rule similarly serves to prevent the courts from hearing
15 complaints which seek relief that the courts cannot effectively render; the courts
16 cannot formulate decrees that involve the exercise of indefinable discretion; their
17 decrees can only restrict conduct that can be tested against legal standards. 7
18 Cal. 3d at 160-61.

19
20
21 The parties concede that there are no reported cases under the “injury” provision
22 of section 596.5, and plaintiff has not provided any applicable legal standard against
23 which the court could measure or “test” defendants’ injurious (but not abusive) conduct
24 toward the elephants in the Los Angeles Zoo. Plaintiff asserts that “in the context of this
25

1 case, the injury prong [of section 526a] fits like a glove." Plaintiff's Trial Brief, 32:18
2 (emphasis omitted). The problem is that there is no glove.

3 Plaintiff is not entitled to relief under the "injury" provision of Code of Civil
4 Procedure section 526a.

6 DISPOSITION

7 For these reasons, the court will enter judgment in favor of plaintiff and against
8 defendants as follows:

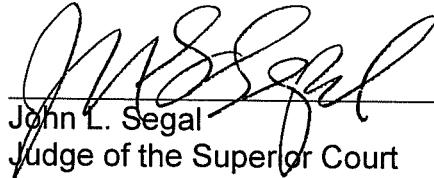
9
10 On the first cause of action, the court will enter an injunction prohibiting
11 defendants from using bull hooks and electric shock in the management, care, and
12 discipline of the elephants at the Los Angeles Zoo. The court will also issue an
13 injunction requiring defendants to exercise the elephants at the Los Angeles Zoo at
14 least two hours a day, unless weather or emergency conditions make such exercise
15 impracticable, and requiring defendants to rototill the soil and substrate of the elephant
16 exhibit of the Los Angeles Zoo regularly, consistent with the standards and
17 recommendations of Dr. James Oosterhuis and Mr. Jeffrey Andrews.

18
19
20 On the second cause of action, the court will enter a declaration that the
21 elephants at the Los Angeles Zoo are entitled to a minimum of two hours a day of
22 exercise, unless weather or emergency conditions make exercise impracticable, and
23 that the soil and substrate of the elephant exhibit of the Los Angeles Zoo be turned or
24
25

1 rototilled regularly, consistent with the recommendations of Dr. James Oosterhuis and
2 Mr. Jeffrey Andrews.

3
4 Counsel for plaintiff are ordered to lodge and serve a proposed judgment
5 pursuant to Section 632 of the Code of Civil Procedure and Rule 3.1390 of the
6 California Rules of Court, within five days. The clerk is to return the trial exhibits to
7 counsel, who are ordered to keep them separate and in their present condition until the
8 expiration of the time within which to file a notice of appeal, or, if any party timely files a
9 notice of appeal, the issuance of the remittitur by the Court of Appeal, whichever occurs
10 later. The clerk is to give notice.

11
12
13 Dated: July 23, 2012

14 
15 John L. Segal
16 Judge of the Superior Court
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