

United States Court of Appeal

For the First Circuit

No. 18-1961

JOYCE ROWLEY,

Plaintiff-Appellant, pro se

v.

CITY OF NEW BEDFORD, Commonwealth of Massachusetts

Defendant-Appellee

RESPONSE TO ORDER

Plaintiff-Appellant Joyce Rowley appealed the district court's order refusing her motions for preliminary injunction under 28 U.S.C. 1292(a)(1), interlocutory appeals. The district court ruled one motion was moot and consolidated the other with the trial on the merits (D. Ct. No. 34, 37, case no. 1:17-cv-11809-WGY, D. Mass). Rowley seeks emergency relief and reversal of the district court's refusal to grant a preliminary injunction.

On November 2, 2018, the First Circuit Court of Appeals required Rowley to demonstrate the Court's jurisdiction over the matter.

I. District Court Rule 65(a) consolidation.

Rule 65(a) states that "before or after beginning the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing."

Although consolidation is discretionary, a case is not ripe for an advanced trial date when discovery is not complete (Pughsley v 3750 Lake Shore Drive Co-op Building, 463 F .2d 1055, 1057, 7th Cir. (1972)).

From Pughsley:

"A litigant applying for a preliminary injunction should seldom be required either to forego discovery in order to seek emergency relief, or to forego a prompt application for an injunction in order to prepare adequately for trial. Different standards of proof and of preparation may apply to the emergency hearing as opposed to the full trial."

And:

"At times, particularly if the parties consent, if discovery has been concluded or if it is manifest that there is no occasion for discovery, consolidation may serve the interests of justice."

Rowley brought this appeal because the case is not ripe for a full trial. No discovery has been held; in fact, the defendant City hasn't answered the complaint. Yet the need for relief is dire.

II. 28 U.S.C. 1292(a)(1), Interlocutory appeal.

The district court order is not a case management order, unlike In re Rectical Foam, Corp. (859 F .2d 1000, 1002-1003, 1st Cir. (1988)), where one of several litigants appealed a discovery order for cost-sharing video reproduction. Discovery was well underway in that case.

Here, the initial preliminary injunction and the second renewed injunction are not for the purpose of discovery. They were intended to remove one of two Asian elephants from conditions that are dangerous to her.

Under 28 U.S.C.1292(a)(1), an appeal of an order "...granting, continuing, modifying, refusing, or dissolving" an explicit preliminary injunction may be made where "serious, perhaps irreparable

consequences" will occur. In Gulfstream Aerospace Corp. v.

Mayacamas Corp. (485 U.S. 271, 108 S.C. 1133,, 1142-1143, (1988)), the

Supreme Court stated:

"Section 1292(a)(1) will, of course, continue to provide appellate jurisdiction over orders that grant or deny injunctions and *orders that have the practical effect of granting or denying injunctions* and have 'serious, perhaps irreparable, consequences'," citing Carson v. American Brands, Inc., 450 U. S. 79, 84 (1981), quoting Baltimore Contractors, Inc. v. Bodinger, *supra*, at 181, (emphasis added).

By failing to grant a preliminary injunction nearly a year after the initial motion and months after the second, the order will cause serious and likely irreparable consequences, not just to the underlying Endangered Species Act case, but to the Asian elephant Ruth, who is the subject of the preliminary injunction.

III. Serious, irreparable consequences

The harm that Asian elephants Ruth and Emily have suffered at defendant City's zoo is tangible. Chronic foot abscesses, and staphylococcus and streptococcus skin and foot infections, are some

of the ongoing health problems for both elephants that are caused by the environment at the defendant City zoo.

But Ruth has also been subject to two near-death experiences in the past four years. In 2014, defendant City was cited and fined for failing to protect Ruth from the elements during a blizzard, a direct violation of the federal Animal Welfare Act.¹

Ruth lost part of one ear and had to have 10" of her tail amputated resulting from this traumatic event, when City zoo staff failed to secure the door during the blizzard of January 2-3, 2014. Temperatures were subzero that night. She was found outside the next morning by staff, covered in snow and ice while the blizzard continued to rage. It took five hours to resuscitate her.

Although she survived, Ruth then got staphylococcus and streptococcus infections on the raw tissue of her legs, tail, vulva, and ears where the skin was sloughing off from frostbite. Elephants "dust"

1. Exhibit 1, U.S.D.A. Animal Care Violation citation.

themselves frequently, and she dusted with the only material available--the feces- and urine- contaminated dirt floor of the stall she was confined in.

More recently, Ruth began losing her other ear. Ruth's right ear continues to fall off due to vasculitis, a painful inflammation of the blood vessels.² The vasculitis, which presented in late September 2017, is also a result of defendant City zoo staff error and/or her environment. The onset was proximal to an injection into her ear vein of ketaprofen, a nonsteroidal anti-inflammatory drug used as pain relief for Ruth's chronic foot and joint pain.

This ear, too, became infected with staphylococcus and streptococcus, again due to her environment. It has not yet completely healed over a year later.

An elephant's ears are thermoregulators, and the intricate and complex vascular system cools the blood of these giant creatures

2. Exhibit 2, Progressive photos of Ruth's right ear.

through flapping, or wetting when water is available.

This past summer's weeks of 100° Fahrenheit temperatures left Ruth sweltering without reprieve unless one of the zookeepers hosed her down. Now, going into cold weather, Ruth will suffer again, unable to stay warm.

Merely being in a heated barn will not be sufficient to mitigate the serious consequences of her confinement for what is usually days and weeks at a time in the winter.³ Ruth, one of the world's largest land mammals at 9' in height and 10' in length, is confined to a 17' x 40' stall, surrounded by steel bars. Another effect of confinement is osteoarthritis and chronic foot problems seen in her slow painful gait.

Ruth has been limping on her right front leg since about May 2014. Undiagnosed or treated for a year, Ruth received sporadic pain medication for it. Due to the second near-death experience in July

3. To see the scale of the barn from the elephant's perspective, this video taken of Ruth rising from the floor shows how confining it is. Such forced immobility causes painful osteoarthritis, seen in Ruth's gait taken November 3, 2018.

2016, a gastrointestinal blockage, Ruth has been on psyllium for two years. A possible mineral depletion from the long-term use of psyllium or an injury to her left rear leg has also affected her gait.

Elephants do not have diaphragms. Falling and being unable to right themselves can lead to death as the elephant's own weight crushes its internal organs.

Confined to a small, fetid barn, Ruth exhibits stereotypic behavior, swaying and rocking in place.⁴ The zoo has begun closing the barn door to prevent public video recording; but it's unlikely to have prevented the stereotypy caused by 16 to 20 hours daily confinement in an area that allows her only a few steps in any direction, unable to avoid her own considerable waste.

These conditions have caused Ruth harm and will continue to do so resulting in serious and likely irreparable consequences unless she is removed from defendant City zoo.

4. This video of Ruth swaying as she waits to be fed was taken in 2016, prior to the steel bars installation. Her space is even smaller now.

IV. Emergency relief sought

Removal to the warm climate sanctuary in Tennessee, The Elephant Sanctuary, would prevent further harm and likely reverse some of Ruth's physical and psychological health issues as described in the preliminary injunctions (1:17-cv-11809-WGY, Dkt. #16-17, and 27-28).

There, elephants are not confined daily, have appropriate space, and facilities to accommodate them. These include adequate veterinary staffing, 24-hour daily caretaker staff, equipment to lift a fallen elephant in the barn and in the 2,000-acre habitat, and a new medical facility designed specifically for managing sick elephants.

The sanctuary was selected for its mild climate, but also its remoteness. The sounds and smells of forest, streams, and meadows contribute to elephants' psychological well-being.

The defendant City zoo's 32-year-old barn and 20,000 s.f. exhibit is woefully lacking in comparison. The surrounding urban smells and

sounds such as sirens and vehicle traffic, and loud parties with live music held at the zoo, are stressful to a species with the capacity of smell and sound far beyond human range. In the wild, an Asian elephant can smell water a mile away, and hears with an infrasonic range of several miles. For Ruth, the urban environment adds another stress to her already stressful life.

V. Conclusion

This Court has jurisdiction to provide the emergency relief sought on appeal under 28 U.S.C. 1292(a)(1). Asian elephant Ruth is being dangerously harmed due to her environment at defendant City's zoo. The district court's order has the practical effect of refusing to grant the preliminary injunction, which will have serious and perhaps irreparable consequences.

Respectfully submitted,

/s/Joyce Rowley,
Plaintiff-Appellee, pro se
P.O. Box 50251
New Bedford, MA 02745

CERTIFICATE OF SERVICE

This is to certify that this document has been served on the defendant's attorneys as follows: electronically to John Markey, and via U.S. mail to Kreg Espinola on this date.

/s/Joyce Rowley
Plaintiff-Appellee, pro se
P.O. Box 50251
New Bedford, MA 02745

Dated: November 7, 2018



Exhibit 1. U.S.D.A.
Citation

Buttonwood Park Zoo
425 Hawthorn Street
New Bedford, MA 02740

CITATION AND NOTIFICATION OF PENALTY

We believe that you violated the Animal Welfare Act (7 U.S.C. § 2131 et seq.) (AWA), as described below.

Date of Violation: January 2, 2014

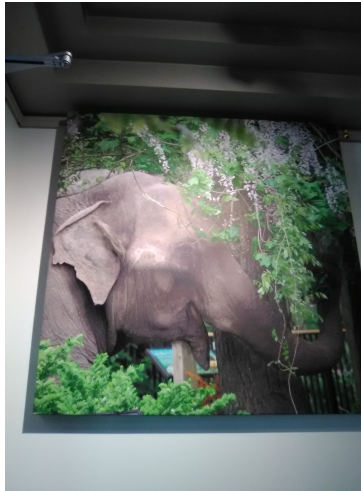
9 C.F.R. § 2.131(b)(1) Handling of all animals shall be done as expeditiously and carefully as possible in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort.

You failed to handle at least one (1) of the animals in your care as expeditiously and carefully as possible to prevent excessive cooling, behavioral stress, physical harm, or unnecessary discomfort. You failed to secure an access door in a heated elephant barn leading to an outdoor exhibit space, which allowed a female, Asian elephant ("Ruth") to venture outside during a snow storm with below freezing temperatures. The elephant suffered injuries to its ear(s), vulva, tail, and extremities.

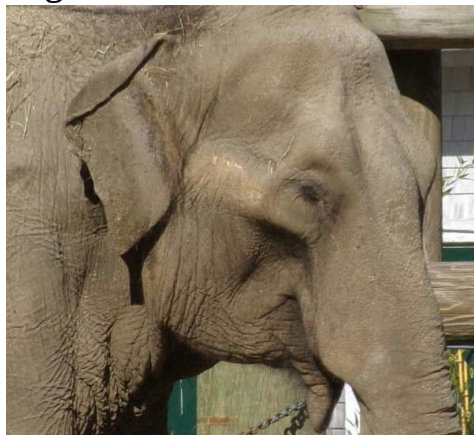
The penalty for the alleged violation(s) described above is \$777.

Exhibit 2. Progressive photos of Ruth's right ear

Asian elephant Ruth's right ear, undated zoo photo, pre-frostbite.



Asian elephant Ruth's right ear, October 4, 2018, sloughing began.



Asian elephant Ruth's right ear, November 3, 2018, sloughing still occurring.

