UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Case No. 19-2000

Joyce Rowley, Plaintiff, Appellant

v.

City of New Bedford, MA, Defendant, Appellee

On Appeal from the United States District Court
District of Massachusetts

APPELLANT'S REPLY TO APPELLEE'S RESPONSE BRIEF

By:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES, STATUTES, REGULATIONS

I. Summary of Reply

Appellant-Plaintiff Joyce Rowley offers this Reply to Appellee's Response Brief as it raised new issues not covered in the appeal, and to address misstatements of fact and law. Rowley offers this Reply as a substitute to replace that filed in December 2019 as a more reasoned reply.

After further scrutiny of Appellee's brief, Rowley found several material factual errors; claims of experts and expertise that were not substantiated by the record, and flawed legal arguments.

II. Appellee's Statements of Fact in Error

Appellee misstates several facts relevant to the disposition of this matter. The first two preliminary injunctions were not resolved in the City's favor as is stated in their brief--they were declared moot by the district court in September 2018 (Appellee Br. p.2). Moreover, the third preliminary injunction was not

denied, it was consolidated without notice with the trial on the merits over Rowley's objections in February 2019 (Id, 2, 26-27).

The Appellee Brief also states that Rowley intends facts regarding harm and harassment to be considered under Issue #1 of her appeal (Appellee Brief, p. 7). This is not correct. Only the district court's findings of fact regarding "harm" to Ruth and Emily are to be reviewed under that issue as further described below. The court's conclusions of law regarding harassment are in Issue #2 of the appeal.

Appellee frequently states that the October 29, 1986 "Arrival Report" was authored by the U.S. Department of Agriculture (USDA) (Id, p. 3, 4). The report is an unsigned document that was updated further on November 2 and November 10, 1986--making it extremely unlikely to have been authored by USDA staff. It is not printed on USDA or any other agency letterhead, nor is there anything to indicate that the USDA authored it.

In a discussion of the 2014 Audit, and elsewhere in the brief, Appellee claims that there "was no other evidence of any other AWA violation during the many decades that [Ruth and Emily] have lived at the zoo." (Id, 8). This is patently false. The City was cited in 1985 for bringing Emily back to the zoo prior to her barn being completed, and fined $100,000 for conditions that nearly closed the zoo in 1995 (Tr. Ex. 19, Investigative Enforcement Services (IES) Report, Tr. trans. 3/7/19, 68:1-69:16).

Appellee attempted to have those portions of the IES report excluded as they claimed variously that the document was hearsay, and the second violation was not targeted at Ruth and Emily. Rowley argued that the entire document was a public government document obtained in 2014 under the Freedom of Information Act, and that the 1985 AWA violation was for failure to shelter Emily, and so relevant to consideration under the ESA. The 1995 AWA violations and $100,000 fine was also

relevant to Ruth and Emily as they both resided at the zoo at the time. The district court accepted the document as a public record obtained lawfully under the Freedom of Information Act but erroneously only included two pages of it.

Appellee claims that Rowley relied on "examination of the City's witnesses and expert witness" (Appellee Br. p. 13).That is patently false. Rowley subpoenaed five witnesses for examination--the former zookeeper who injured Ruth's ear in 2017, a new keeper who began the year Ruth "escaped" in a blizzard and so had knowledge of training on the bullhook as well as the switch in 2017 to protected contact, Interim veterinarian Dr. Michael Ryer--because the City's veterinarian left during litigation, and due to Dr. Ryer's experience as a zookeeper during the 1980s, and Shara Crook, currently the Assistant Zoo Director. A fifth witness, Zoo Director Keith Lovett, was subpoenaed but unavailable to testify.

Appellee claims that witness Dr. Michael Ryer, interim veterinarian at the zoo, had variously 30 to 35 years experience with Ruth and Emily (Appellee Br. 5,6). His testimony showed that he had at most 9 years with these elephants: from 1986-1988 as a zookeeper; an indeterminate period in the 1990s, and specifically from 2000-2005; July 2015-June 2016; September 2018-March 2019 as the zoo veterinarian (Tr. trans. 3/5/19, 30:11 -31:7). He testified that he was not an elephant veterinarian, nor an elephant expert (Id, 110:21, 113:10). As such, his statements regarding the elephant's health, care and management are not expert opinion (Appellee's Brief, p. 6).

Appellee's representations of Shara Crook's qualifications and involvement with the elephants were likewise incorrect. Ms. Crook testified that she was not an elephant expert (Tr. trans. 3/7/19, 15:12). Nor is she a veterinarian (Id, 6:20). Further, she was only appointed elephant care manager in 2013 (Id, 30:2).

Prior to that she held several positions at the zoo from seasonal worker to administrative positions (Id, 8:23-24). She has not "led the improvement and the evolution of the [elephant] habitat" for "over three decades" but instead perhaps for seven years at the time of trial (Appellee Br., p. 7).

Appellee misstates the evidence of aggression between Ruth and Emily, not only as Rowley has stated it, but as the zookeepers themselves described it (Id, 7, 10-12). In the 2015 Independent Panel Report that Appellee refers to, Appendix C, identifies how the City's zookeepers described the attacks *at the time of the incidents* (e.g. "Emily bit Ruth") (Trial exhibit 8). Appellee fails to state that the panel ignored the *19 injuries* Ruth sustained between 2005 and 2014, again as reported by the City's zookeepers at the time of the incidents.

Appellee misstates the City's awareness of the aggression between the elephants. In both the 2010 and the 2018

Buttonwood Park Zoo Elephant Management Policy and Keeper /Manuals presented as evidence at trial, both documents have a section on protocol for addressing "Re-direction of Aggression between Conspecifics" which Rowley raised at trial (Tr. trans. 3/6/19, 62:132, Tr. Ex. 16, p. 11-12; Tr. Ex. 29, p. 10, "*Make sure Emily sees you once an hour so that she knows you are watching her,*" indicating that Emily is the aggressor to be watched. This changed slightly in the later edition). The zoo staff, including Ms. Crook and the keepers are well aware of the long-term and continuing issue of aggression between the elephants.

III. Expertise, the AZA and Expert Testimony

Taking a cue from the PETA/ALDF Amicus Curiae Intervenor Brief, Appellee states that Rowley did not provide any expert witnesses, nor expert testimony, and so failed to carry her burden of proof. However, even Amici acknowledged that this is not a fatal error (Am.Br., p.4, "The absence of expert testimony is

by no means fatal per se to a citizen suit under the ESA.").[EN1]

The district court did not provide the broad-brush lack of expertise or expert witnesses to Rowley's entire case that Appellee and the intervenors PETA/ALDF have read into the decision. Specifically, the district court's findings only refer to Rowley's purported lack of expertise--not lack of expert witnesses--relative to the zombie-like stereotypy exhibited by both elephants.[EN2]

Rowley's appeal relies on uncontroverted facts, including eight videos, photographic documentation, USDA APHIS records, and zoo records of the harm to the elephants. The City did not counter those videos with any opposing expert testimony, nor provide videographic proof of "affiliative" behavior between the two elephants. Nor did they dispute the photographic evidence or exhibits of zoo records of the harm done to Ruth and Emily.

As to Appellee's remarks on transport, none of the witnesses

who testified on this issue had transported elephants (Tr. trans. 3/7/19, Crook, at p. 54:24) or done so recently (Tr. trans. 3/6/19, 46:24-47:24, Dr. Ryer once helped move Emily nearly 30 years ago) (Appellee's Br. 18). Dr. Mikota's Curriculum Vitae (CV) does not indicate that she offers that professional service, or has in the past.

Rowley consulted with experts in transport and presented at least one of the opinions that informed her testimony--that of Dr. Erica Ward, DVM, who had participated in the transport of 36 elephants in Thailand, many of them older than Ruth and Emily, all of them successful (Tr. trans. 3/7/19, 95:24-96:9). Dr. Ward's referenced literature on the low stress levels of transported elephants and the quick dissipation of their cortisol levels, a stress indicator, was excluded as the district court deemed it "not a learned treatise." It is, however, the only evidence offered in the case on transport.

And of all the witnesses that the district court heard at trial and in filings, only Rowley is not paid by the zoo nor reliant on the zoo industry for her income.

AZA reports

The Appellee attempts to blur the line between USDA inspection reports showing "no non-compliant issues" and the Association of Zoos and Aquariums (AZA) reports, at one point going so far as to call AZA staff "inspectors" (Appellee Br. p. 12).

During the trial, the Appellee did not present *any* expert testimony by U.S.D.A. Animal Plant Health Inspection Services (USDA APHIS) Animal Care division employees on whether the Buttonwood Park Zoo elephant exhibit met or exceeded general animal husbandry practices and care as described in the US Fish and Wildlife Services (USFWS) regulations at 50 CFR 17.3.

Rowley provided the 2014 AWA violation citation and portions of the USDA IES report and settlement to pay a $777

fine (Tr. Ex. 1). The IES report indicated several other AWA violations involving the elephants in 1985 and again in 1995.

Appellee implies that the AZA and its zoo "experts" are a substitute for the USDA APHIS Animal Care division, but that is not substantiated by the record. Nor does the record show that guidelines or other documents promoted by the AZA "meet or exceed" the AWA standards, are "generally accepted animal husbandry practices," nor even what is the AZA guidelines' basis for elephants care.

The AZA is not referenced in the Endangered Species Act (ESA) 16 USC 1531 et seq; nor is it referenced in the USFWS regulations 50 CFR 17 et seq. The Animal Welfare Act (AWA) does not reference the AZA nor confer to it any regulatory or other authority (7 USC 2131 et seq).

Finally, Rowley points to the hefty "accreditation" fees that the City pays to belong to the AZA--upwards of $10,000.

Appellee's Veterinarian Experts

Dr. Ryer was not qualified to make the statement regarding the City's elephant facilities as "state-of-the-art" or on the quality of the elephant care program (Id., p.6) or whether the behavior between Ruth and Emily is "normal elephant behavior" (Id., p. 7) as he was neither an elephant expert, a zoo exhibit designer, nor an animal behaviorist.

The 2014 Audit team had a veterinarian without specialized knowledge of elephants (Id, p. 8). Appellee's Statement of Facts regarding that document's conclusions on Ruth's frostbite-damaged tail, vulva, and ears "healing" or either elephant's health should be seen in light of that lack of qualification. Nor was this unnamed veterinarian called at trial to testify.

. The 2015 Independent Panel[EN3] consisted of Dr. Vint Virga, a small animal veterinarian who practiced in Rhode Island and had no experience with elephants nor was he an animal

behaviorist. He did not testify at trial.

The second panelist, Otto Fad, was an elephant manager at a Florida zoo in 2015 and not a veterinarian. He did not testify at trial. He is now on the Board of Directors at the Elephant Refuge in North America, one of the two elephant sanctuaries willing to take in Ruth and Emily.

The third panelist, Dr. Susan Mikota, DVM testified at trial.

Appellee states that Rowley did not provide any expert testimony to oppose Dr. Mikota (Id, p. 13). However, the district court's decision did not mention her [EN4] (Dkt 91).

While Dr. Mikota's CV is impressive, her work has not been in animal behavior but in research on mycobacterium tuberculosis in elephants and other mammals, and a host of research projects over the past 20 years here and abroad. She was a zoo veterinarian but at a zoo without elephants, worked briefly for The Elephant Sanctuary as a veterinarian, and briefly with the

USDA APHIS in licensing 30 years ago. (Tr. Ex. 13)

As Rowley stated in her Appeal, Dr. Mikota admitted she was not an animal behaviorist (Tr. trans. 3/6/19, 131:17, 134:2).

As such, Dr. Mikota is not qualified to state what constitutes "normal elephant behavior" by Ruth and Emily (Appellee Br., p. 7), or aggression by Emily against Ruth, and or Ruth's behavior in response both at trial and as referenced in Trial Exhibit 8, the 2015 independent panel report (Id, p. 13).[EN5] Nor is she qualified to assess whether Emily ripping off Ruth's tail bandages which led to Ruth's pain and infection was just "object play."

Dr. Mikota testified that "Ruth didn't run away" when attacked by Emily, (Tr. trans. 3/6/19, 95:23, "Emily approached Ruth, gave her a little shove, Ruth didn't run away." The comma is in the wrong place in the transcript. Ruth was "shoved" (rammed) in the video displayed). Dr. Mikota testified that the aggression by Emily against Ruth was merely "displacement,"

and then tried to convince the court that two African bull elephants in musth sparring was typical of female Asian elephant aggression (Id, 96:20-23).

Dr. Mikota refused to answer questions on The Elephant Sanctuary's elephant management, claiming it was not in her purview as the sanctuary's full-time veterinarian (Id, 106:3). Therefore, her testimony on the City's elephant management is not within her purview as a consulting veterinarian.

Appellee claims that Dr. Mikota was qualified to state that Ruth and Emily are "...receiving excellent care,...are in an elephant program that exceeds [unstated] standards" (Appellee Br. p. 14). The brief continues with a broad list of what the veterinary care program entails (preventive health care, diet, foot care) that exceeds "professional standards" and AZA standards but without reference to a specific statement by Dr. Mikota (Id.). None of Dr. Mikota's testimony referenced AWA

regulations or generally accepted animal husbandry practices.

On cross-examination regarding the lack of sanitation from the barn's dirt floor leading to both elephants' foot abscesses, Dr. Mikota acknowledged the elephants' foot infections and the barn floor's causation but claimed, "Everything is a tradeoff." Her view of quality health care or elephant management allows injury to the elephants as part of a "trade-off." (Tr. trans, 3/6/19, 114:5-25).

Further, Dr. Mikota's testimony should be seen in light of her financial bias. Under oath, she testified that she had received approximately $15,000 in consulting fees for approximately 15 days of work over the period 2015 to 2019 and including $7,000 in donations from the City and $2,500 from the Buttonwood Park Zoo Zookeepers Association (Id, 137:1-3). Further questioning indicated that she derives professional fees from her foundation, Elephant Care International (ECI) to which the

donations are made (Id, 138:1-3).

But Dr. Mikota failed to disclose that ECI and its subsidiaries Elephant Care Asia and the Vietnam Initiative *continue* to receive donations from the zoo, at the time of trial and beyond, according to the ECI/Vietnam Initiative and Buttonwood Park Zoo webpages (Appellant Reply Exhibits 1-2).

During the trial, Dr. Mikota was allowed to leave the stand hurriedly as Rowley was questioning her financial information, and over Rowley's objections. Clearly, her testimony was biased by her income from this zoo and perhaps others.

IV. Reply to Appellee's Brief on Issue #1, Clearly Erroneous Findings of Fact

Appellee's Argument misstates the Appeal Issue #1, that the district court's failure to find Asian elephants Ruth and Emily were harmed was clearly erroneous. Rowley specifically did not use the term "harass" in Issue #1. Issue #2 seeks *de novo*

appellate review of whether the Appellee should be allowed an exception under 50 CFR 17.3. If not, Ruth and Emily were "harassed" as a matter of law.

The ESA is clear that "harm" is an act, intentional or negligent, that actually kills or injures a member of the endangered species. That the district court failed to identify the elephants' injuries as "takes" is the clear error.

Ruth and Emily were harmed during their 33 years at the City zoo--and there was a preponderance of evidence to show the physical harm both elephants suffered and are suffering as a result of their captivity. These injuries are "takes" under the ESA.

Appellee discusses the standard of review, stating that the district court's decision was simply one of two permissible views, and so not clearly erroneous (Appellee Br., 16). Rowley disagrees.

Although the role of the appellate court is not to decide factual issues *de novo,* the district court's account of the

evidence must be plausible in light of the entire record (*Anderson v. Bessemer City*, 470 US 564 at 574 (1985)).

Appellee, of course, plays down the harm that Ruth suffered, stating that as long as the district court acknowledged the physical injuries, that it was one of two "permissible views."

But the ESA doesn't state that some injuries are okay, or that an injury must be of a certain severity to count as a take. So it is not a matter of two permissible views, but that the district court took a view that was clearly wrong. Injuries cannot be "weighed" to determine whether they count as a take.

Nor is expert testimony needed to see that Ruth is indeed limping, her tail is short, her left ear is very tiny and her right ear also seems kinda short. Rowley's point all along is that you don't need to be a veterinarian or an expert to see Ruth's injuries. These injuries happened recently, not prior to her arrival. Further, the City employees, veterinarians, and

witnesses acknowledged each and every injury.

In fact, Appellee acknowledges that the injuries exist in its brief. In the footnotes, Appellee addresses Ruth's ear loss, frostbite, tail loss, and harm from Emily's aggression (Id, p. 17). Siding with *Amici* again, Appellee reiterates that Rowley hasn't met her burden of proof due to her lack of expertise or expert witness evidence. As stated above, it simply wasn't necessary.

However, that the district court saw the photographic and videographic evidence and the zoo's own records and somehow determined that these weren't injuries is not plausible.

For example, when Ruth was attacked by Emily five days after her tail was amputated, the City's own veterinarian did not find it to be "object play," but saw it as harming Ruth. In the zoo's records, Dr. Arnett Chinn determined that for Emily to continue to injure Ruth would also cause Ruth further injury by infection. Each of those components, the November 9, 2014

attack on video, the November 12, 2014 record that the attack caused two sutures to loosen, and the December 4, 2014 attack described in the zoo's records where Emily swallowed the bandage after ripping it off of Ruth's amputated tail, and subsequent attacks were "injuries" under the law as identified by the City's veterinarian at the time of the incidents.

The court and Appellee, presumably, weighed these against Dr. Mikota's testimony that it was just "object play." That was clearly an error. These were injuries, or harm, as defined in the ESA.

As a second example, Emily has suffered foot abscesses (infections) as a result of the City installing a dirt floor in the barn. Dr. Mikota acknowledged the infections. Rowley did not need to provide a counter expert--the injury was acknowledged, as well as that the City's action--replacing the concrete floor with a dirt floor--caused the harm.

Third, it is not plausible to state that either elephant is given appropriate veterinary care when one elephant is limping and both have degenerative joint disease, yet no radiographs (x-rays) have been taken for diagnosis or treatment in the past three years. According to AWA standards as described by the district court, the "...exhibitor shall establish and maintain a program of adequate veterinary care that include...the use of appropriate methods to prevent, control, diagnose, and treat disease and injuries..." (ECF 91, p. 22, 9 CFR 2.40(b). Yet the district court and the Appellee continue to praise the zoo's veterinary care.

So it's not a question of the district court's decision being one of two permissible views, but holding a view that is implausible on each of Rowley's counts in her complaint.

V. Reply to Appellee's Brief on Issue #2: Legal argument on harassment

Appellee interprets the reference to the elephants as being

"on exhibit" in the court's discussion of the AWA as meaning that the Appellee is entitled to an exception under the USFWS regulations 50 CFR 17.3. In doing so, they sidestep Rowley's point: Ruth and Emily do not meet the definition of "captive wildlife" and so Appellee is not entitled to a harassment exception. They offer no opposition to the point on appeal.

The assumption by everyone--the district court, Appellee, their "experts" and *Amici*--is that the conditions at the City zoo harass Ruth and Emily, and therefore require an exception.

In support of this position, Rowley points to endangered species of non-mammals such as birds, amphibians, reptiles, and fish that may be possessed but are not protected by the AWA. If they are kept for breeding purposes to enhance the propagation of the species, the general animal husbandry practice portion of the exception doesn't apply, but breeding and veterinary provisions do. This false analogy shows the intent and context of

the exception.

But if the endangered species of non-mammals are possessed for other purposes such as personal enjoyment, the exception does not apply, and intentional or negligent acts or omissions which harass them are considered "takes."

Ruth and Emily were not in captivity for breeding to propogate or conserve the species. Therefore, the City's acts or omissions that harass them counts without exception as a "take," a violation of the ESA.

Even if there is merit to the argument that Appellee is entitled to an exception, if all references to the AZA are deleted from Appellee's brief, it is apparent that there is no proof that the City has met the "generally accepted animal husbandry practices" as required under the USFWS regulations (See discussion on AZA expertise, above). The AWA as administered by the USDA APHIS, not the AZA, is what governs.

More importantly, the district court premised its entire harassment determination solely on the basis of the exception. Inherent in that determination is that Ruth and Emily are harassed by the City.

Absent an exception, Ruth and Emily were harassed as defined by 50 CFR 17.3 as seen by their foot and skin infections, among other injuries, from the filthy barn floor on which they spend most of their lives.

VI. Consolidation

Appellee simply misstates the issue. Rowley's preliminary injunction was not denied on February 12, 2019. It was consolidated with the trial, and done so improperly without any discovery or even an Answer having been served.

VII. Conclusion

Rowley is not seeking a second bite of the apple, as Appellee claims. This case and this appeal is about the federal courts

upholding the Endangered Species Act and finding that the City of New Bedford has harmed and harassed Asian elephants Ruth and Emily and continues to do so. It seeks the immediate removal of Ruth, whose harm may be more apparent. But it also seeks the removal of Emily, who is also harmed by her living conditions. Leaving the two elephants at Buttonwood Park Zoo would be a violation of the ESA, as the City has shown that it cannot and will not meet their needs.

Respectfully submitted,
/s/Joyce Rowley, Plaintiff-Appellant, *pro se*

EN1. Amici's brief then states that these cases are fact- and science-based and so require experts. Rowley believes that the use of experts to determine common sense issues in endangered species act suits against zoos by PETA and ALDF delays the rescue of animals in dire conditions. The recent Cricket Hollow Zoo case, which eventually closed the zoo, resulted in three lemurs dying during two years of litigation. Likewise, the two-year PETA suit against the TriState Zoological Park resulted in five of the nine subject endangered species animals dying in two years of litigation. An approach more like that of confiscation of

domestic animals from clearly filthy conditions is needed where visible injuries are present.

EN2 Rowley consulted with Dr. Gay Bradshaw relative to the elephants' stereotypy and received a brief report, Trial Exhibit 25.

EN3: The panel was formed to address the AWA complaint by In Defense of Animals, an international animal welfare advocacy group, regarding conspecific aggression yet nowhere in the report was the AWA section on separation of incompatible animals reviewed. Appellee's Brief incorrectly states that the complaint was initiated by Rowley or her organization.

EN4: A reference to the "City's veterinarians" in the decision was interpreted to mean the four veterinarians that the City employed between 2015-2019.

EN5: Appellee's brief notes that the AZA Independent Panel reviewed "30 videos" attributed to Rowley. At trial, Rowley denied supplying videos to the panel (3/6/19, 92:22). Instead, Crook testified that panel members visited social media sites and looked at videos. It is unclear what they watched or whether this was of interest to the district court.

CERTIFICATE OF COMPLIANCE

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/s/Joyce Rowley
Appellant, pro se
February 6, 2020

CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2020, I electronically filed this Appellant's Reply Brief with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:Attorney John A. Markey (jmarkey@msmw-law.com) and intervenors counsel Jeffrey Richter (jeff.richter@klgates). Attorney Kreg Espinola was served by email at (kespinola@bevlegal.com)

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