

S232622

IN THE SUPREME COURT OF CALIFORNIA

AARON LEIDER,

Plaintiff and Appellant,

vs.

JOHN LEWIS, et al.,

Defendants and Appellants.

SUPREME COURT
FILED

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After a Decision by the Court of Appeal, Second Appellate
District, Case No. B244414

**ANSWER TO PETITION FOR REVIEW
(RAISING ADDITIONAL ISSUES)**

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I. ADDITIONAL ISSUES PRESENTED.

As set forth below, the existing Petition raises no compelling reason to review or reverse the decision of the Second District Court of Appeal. However, should this Court be inclined to consider the issues presented by this case, it is respectfully submitted that the following issues should be included as part of that review:

1. Where the evidence found by the trial court, compels a legal determination, in this case, "animal cruelty" *as defined by more than one California Penal Code*, can a trial or appellate court simply refuse to make such a finding, without abusing its discretion as a matter of law?

2. Where the evidence, as expressly determined by the trial court, establishes that a public entity is causing "injury" to public property, in this case, the elephants in the Los Angeles Zoo, can the trial or appellate court simply refuse to apply the "injury" prong of Code of Civil Procedure § 526a, without abusing its discretion as a matter of law?

3. Where a public entity is factually and legally "abusing" and "injuring" animals, and no law enforcement agency has even attempted to stop such abuse (in this case, allowing the unnecessary suffering and death of sixteen Los Angeles Zoo elephants) can a trial or appellate court assigned to address the issues, simply refuse to do so without abusing its discretion as a

matter of law?¹

II. WHY REVIEW NEED NOT BE GRANTED.

The City Petition seeks review based upon a less than candid presentation of the evidence and findings below. Indeed, almost none of the relevant arguments and findings adverse to its position have been set forth. Instead, it jousts at windmills, hoping to create interest, not justice.

As but one example, the Petition relies heavily upon the decision in *Nathan H. Schur vs. City of Santa Monica* (1956) 47 Cal.2d 11 as it relates to application of Civil Code § 3369 in this case. The Petition implies that the current language of that statute was in force when it was enacted in 1872 and thus when *Schur* was decided in 1956. But, as it well knows, yet fails to disclose anywhere in the Petition, § 3369 was critically amended after *Schur*, and only then for the first time expressly authorized injunctions where they are "otherwise provided by law." Code of Civil Procedure § 526a is the basis for standing in this action. It does independently otherwise provide by law for standing to request the precise relief requested herein.

Similarly, the Petition pretends that it is concerned with criminal liability of City employees, in cases seeking an injunction under § 526a, allegedly in contravention of § 3369. But, having lost this case at trial and on

¹ All emphasis in quoted material is added, unless specified otherwise.

appeal, it is well aware that no one faced any such criminal liability. In fact, no one even requested such a criminal finding in this undeniably civil case. The criminal statutes merely provide the legal standards by which the trial courts can gauge whether an injunction is warranted in this context.

The Petition also relies heavily upon the conflict between the decision below and the decision in *Animal Legal Defense Fund v. Regents of the University of California* (2015) 239 Cal. App. 4th 1286 (*ALDF*). While the two decisions are in conflict, they hardly pose a difficult dilemma for the courts of this state. No other courts have ever addressed the same issue of standing, and § 526a is clear and unambiguous. There is truly no logic or law justifying the *ALDF* decision, which transparently seeks to write § 526a out of the Code, trampling on the plain language and intent of the legislature. Trial courts which are presented with the issue will quickly see the defects in the *ALDF* logic, eliminating any true conflict over time.

Perhaps most importantly, the Petition truly rides "rough shod" over the undisputed facts and express findings of the trial court. As if this case was starting anew, the Petition tries to rewrite the trial court record, which, more than most, is stunning in its factual clarity. It is the remarkably one-sided nature of those factual findings which animate the additional issues for review which follow.

Presented accurately, the trial court record does not support the positions taken in support of the instant Petition. For example:

City position: A few months after the City Council voted to expand the Zoo's elephant exhibit, Billy became the Zoo's only elephant when the Zoo sent the other remaining elephant elsewhere. (6 R T 997.) (Petition, p.9)

Response: Actually, no elephants were sent elsewhere after the funding for the expanded exhibit was approved. To the contrary, *the remaining two other elephants died shortly after the funding was approved.* The City Council asked about their health and was falsely told by Zoo Director, John Lewis, that they were "just fine." When the funding was approved with that understanding, no one told the Council that both elephants died shortly after that approval, or that they died of long term exhibit-caused conditions...and inadequate supervision. (Misrepresentations about Tara, 8 RT 1523:1-1527:27; and about Gita, 8 RT 1529:20-26; 8 RT 1531:8-1540:5)

In fact, Billy would not have been the "only" remaining elephant if **sixteen** elephants had not died prematurely and in pain in this facility. (Trial Exhibit 22) Many environmental factors in this facility, detailed at trial, explain why the testimony of renowned elephant expert Joyce Poole was uncontradicted when she revealed that the Asian elephants in this Zoo **"die fully ten years younger, on average, than Asian elephants in all other North American zoos.** (4 RT:464:25-467:4)

Even Zoo Director Lewis had to admit, that this fact means that the L.A. Zoo is doing something "very wrong." (8 RT:1516:26-1517:3) Thus, it was these astonishing comparative death statistics which demonstrate why

Billy, a relatively young bull elephant, remains the only living long term inhabitant owned by the Los Angeles Zoo.

City position: *Penal Code section 597t*: The rototilling and exercise injunctions were based on the trial court's finding that the city and Lewis violated section 597t, which requires confined animals to be provided with an adequate exercise area. It was undisputed that they had complied with and exceeded the requirements of the specific regulations that govern housing elephants, title 14 of the California Code of Regulations, section 671.3, subd. (a)(IO) and subd. (b)(2)(M)(1)-(2), including the amount of space for each elephant and the exhibit's substrate. (Petition, p.4)

Response: This claim is not just false – it completely ignores the facts and the controlling law, which the City itself conceded on appeal. (Respondents' Brief, p. 23) As Leider pointed out, there is no factual or legal basis for the City claim that a "regulation" somehow trumps or supersedes the Penal Codes, which were directly at issue in this case. As this Court has confirmed, it is well established that **"a regulation which impairs the scope of a statute must be declared void."** *Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 321. "It is well settled ... that laws passed by the Legislature under its general police power will prevail over regulations made by [a department] with regard to matters which are not exclusively [that department's] affairs." *County of Los Angeles v. State Dep't of Public Health* (1958) 158 Cal.App.2d 425, 437 [agencies], quoting *Tolman v. Underhill*

(1952) 39 Cal.2d 708 and *Glickman v. State Bar* (1973) 9 Cal.3d 179, 184)

Thus, the issue at trial was whether keeping elephants in tiny spaces violated the animal cruelty provisions of the Penal Code. It was and is of no moment that the insufficient space in question might meet some random "minimum space" regulation *promulgated by a committee*. **Laws enacted by the entire legislature take precedence over committee promulgated regulations**, under an unbroken line of Supreme Court decisions. That is why the Penal Code was the focus at trial, not a committee standard.

City position: After construction began on the new exhibit, in 2008 to 2009, the City Council reconsidered all questions related to keeping elephants at the Zoo: should Billy be sent elsewhere, should elephants remain at the Zoo, and should construction cease or continue? (5 RT 716-717, 719-720; 7 RT 1383.) (Petition, pp.9-10)

Response: The inference here is that the City thoughtfully considered and then decided to proceed in the best interests of the elephants. But, again, this is far from the truth. As noted above, the trial record confirms that the City Council acted based upon misinformation it received from the Zoo, through Director Lewis, including the following:

- Contrary to the representations made to the City Council about Zoo expertise in such matters or the size of the new exhibit, the claims that were made were nothing more than sales puffery to gain the

necessary funding for the new exhibit. The Zoo representations to the City Council (about massive increases in space for the elephants) were simply without basis, at best, and fraudulent at worst. (7 RT 1379:13-1380:7, 1415:25-1416:10 and 8 RT 1501:17-1502:26)

- Zoo researcher Cathleen Cox described an actual recommendation to provide enrichment whereby (free) trees would be placed in the exhibit to allow the elephants to forage as they do in the wild, allowing them to push the trees over and eat them. This proposal was rejected by Director Lewis incredibly, because he said he was concerned that the elephants might try to use the downed trees to manage an escape. But, without disclosing his own rejection, this very proposal was one of the enrichment ideas Lewis used to convince the City Council to approve the new exhibit. (7 RT 1289:7-1290:26; 7 RT 1291:20-1292:12)
- As noted above, despite their grave health, Mr. Lewis told the City council that Tara and Gita were "fine" and "doing well." But, for many years, he knew that Tara and Gita had very serious, and likely fatal degenerative conditions, caused by their captivity, including foot abscesses and bone infections. But, despite all of this, to gain funding for the new exhibit, Mr. Lewis and others also told the City Council that they were doing well. (See misrepresentations about

Tara, at 8 RT 1523:1-1527:27; see also misrepresentations about Gita, at 8 RT 1529:20-26; 8 RT 1531:8-1540:5)

City position: The new elephant exhibit's design is a large barn with heated floors and padded stalls encircled by four yards. (5 RT 751-752, 760, 764, 768.) (Petition, p.10)

Response: In reality, most of the \$42 million dollars was spent to improve the external *appearance* of the exhibit for the patrons. Nothing meaningful was done to change the environment to benefit the elephants. Indeed, Defendant Zoo Director, John Lewis himself reluctantly admitted this controlling fact, stating that: "... from Billy's standpoint, I don't think there's really that much difference." (7RT:1416:23-1417:8, 1419:18-24; 8 RT:1512:19-1513:24) The elephants still live in pens which are essentially the same size as in the prior exhibits. (3 RT 54:16-23 and 57:7-28; 7 RT 1415:25-1419:24) The new exhibit provides far less than two acres for the elephants themselves to stand and move about. This total area is divided into four separate pens, which leaves the elephants in spaces which are the same size or smaller than the pens in the old exhibits. (3 RT 50:19 – 51:5, 58:2-9, 174:6-11). By comparison, the exhibit offers large, expansive areas *outside* the space available to the elephants. The *visitors* actually have almost twice the space available to the elephants themselves. Clearly not an improvement for elephants.

City position: The yards' substrate is two feet of riverbed sand. (5 RT

747, 754-755, 762, 766.) (Petition, p.10)

Response: Maybe the day it was delivered. But, as determined by the trial court, the sand areas where the elephants stand or walk are continuously hard packed, providing surfaces essentially like concrete, due almost entirely to the limited size of their pens, (6 CT 1223:1-5; 3 RT 66:6 – 67:9; 4 RT 411:3 – 413:25; 6 CT 1223:1-5)

City position: The yards include enrichment devices such as boomer balls (5 RT 747, 754-756), a large sand pile (746, 748), a large hollow log into which items are placed for the elephants to forage (*ibid.*), (Petition, p.10)

Response: Again, these peripheral citations intentionally miss the point. The trial court found just the opposite: that the elephants are not enriched – they are bored and frustrated. (6 CT 1228:2-8; 1229:12-1230:24) The small pens prevent the elephants from exercising naturally, which is critical to their health for a variety of reasons inherent in their physical and social evolution. (4 RT 462:23-28) Nor does the City dispute this fact. (7 RT 1412:1-7) They also suffer from a lack of social interaction. It is undisputed that **Billy has lived alone for decades**. The difference between the behavior of the three elephants at the Los Angeles Zoo and the behavior of the elephants in the wild is like “night and day.” (6 CT 1241:2-6) Uncontradicted expert observations revealed that, given the fencing and other restrictions, there is very little social interaction among the three elephants.” (4 RT 436:17-437:24) They are anything but enriched. They live in solitary confinement.

City position: The yards include ... water features in every yard (5 RT 746-747, 752, 754, 761, 765). (Petition, p.10)

Response: This sounds good, without more. But, in reality, even this simple assertion misrepresents the reality at this facility. As the trial court found, the elephants are taunted by the close proximity of grass and trees, to which they are attracted, but they cannot touch. All such areas are laced with electric wires that prevent the elephants from eating or even walking near them. In fact there are no areas of grass that are not "hot wired." (6 CT 1227:3-7; Trial Ex. 175) **Even the ramps that lead in and out of the pools are lined with electric wires.** As the City's own expert admitted, elephants can sense or feel electrical or "hot" wire before they even get close to it (6 CT 1227:10-13). Given these facts, the trial court conclude that "This makes life for the elephants in the Los Angeles Zoo even worse." (6 CT 1227:10-13)

City position: Leider's expert Joyce Poole testified that the new exhibit is "much better" than the old one, though it did not go nearly far enough. (4 RT 473-474.) (p.10)

Response: Again, this snippet, offered in a vacuum, completely mischaracterizes her testimony. Dr. Poole was *highly critical* of the new exhibit, notwithstanding some improvements over the horrific conditions that existed before. In context, Dr. Poole could not have been more emphatic that this Zoo facility is woefully inadequate and harmful to the elephants. (6 CT:1235:18-20; 4 RT:462:23-28; 4 RT:433:7-434:13)

City position: Leider presented evidence that:

- the elephants' huge size compacted the soil and that compaction is related to smaller spaces. (3 RT 50, 74.)
- The exhibit's sand had become "compacted and densified" and as hard as concrete. (3 RT 66, 71, 73.)
- Hard substrates create the risk of injuring the elephants' joints, feet, and nails (6 CT 1223, 1226), with captive elephants inevitably developing foot problems due to lack of exercise (6 CT 1236-1239).
(Petition, p.10)

Response: As with every other attempt to re-characterize the record, this final attempt warrants close scrutiny. Focusing on the express findings of the Trial Court, *set forth in actual quotes*, not wishful summaries, the trial record reveals the following:

- "All is not well at the Elephants of Asia exhibit ... [c]ontrary to what the zoo's representatives may have told the Los Angeles City Council in order to get construction of the \$42 million exhibit approved and funded, **the elephants are not healthy, happy, and thriving.**" (6 CT 1221:19-22)
- "[T]he hardness of the substrate is harming the elephants." (6 CT 1224:16)
- "[T]he court finds...that the ground of the...exhibit on which the

elephants regularly walk is hard, not varied and soft, and that the substrate of the exhibit creates a risk of injury to the elephants' joints, feet, and nails." (6 CT 1223:1-5)

- "Dr. Ensley testified that based on his review of the medical and death records of the Los Angeles Zoo, nine of the sixteen elephants who have died at this zoo had arthritis or degenerative joint disease. ..cause by the limited space that the ...Zoo exhibit has for the elephants, which causes the elephants to walk in and over the same areas and compact the ground...as hard as concrete" (6 CT 1223:5-12)
- [T]he photographic evidence show that...on some portions of the ground of the exhibit, the elephants, who weigh up to six tons, do not even leave footprints..." (6 CT 1223:16-19)
- The Zoo's own expert, Mr. Jeffrey Andrews, provided "other evidence...that the hardness of the substrate is harming the elephants." (6 CT 1224:15-18)
- The Los Angeles Zoo's Chief Veterinarian (Dr. Curtis Eng) "also supported plaintiff's claims. Dr. Eng testified that the substrate on which the elephants walk can make a big difference in the health of their feet. He had actually recommended that for the new elephant exhibit the ...Zoo install a varied, relatively soft substrate that would allow for cushioning. The zoo, however, ignored his

recommendation and built the current exhibit with nothing like the kind of soft substrate he had recommended." (6 CT 1225:23-1226:4)

- "Shockingly, he also testified that the keepers have told him that they regularly rototill the soil in the exhibit, when in fact the opposite is true: It is undisputed that the elephant keepers...do not rototill the surface of the exhibit, and never have. Not once." (6 CT 1226:5-9)
- "The evidence also shows that several factors contribute to the hardness of the substrate in the ...Zoo elephant exhibit." (6 CT 1226:11-12)
- "The problem is compounded by the fact that the available surface area for the elephants is much smaller than the total exhibit space because significant portions of the exhibit are closed to the elephants....by gates...or permanently, by electrically charged or 'hot' wires that keep the elephants away from the areas of trees, brush, and grass within the exhibit....that will shock the elephants if they come close." (6 CT 1226:20-1227:3)
- "Which makes life for the elephants in the Los Angeles zoo even worse. It is undisputed that the elephants by nature are attracted to and have evolved to need and use trees, bushes and grass....It is one thing to place electric fencing between elephants and something

they are not interested in. It is another thing to place such electric hot-wiring between the elephants and something they like, need, and use as part of their natural behavior." (6 CT 1227:15-1228:2)

- "Thus, rather than providing... 'an enriched environment' ... Zoo's elephant management system tempts the elephants with trees that elephants naturally use to rub against and knock down, but frustrates the elephants by keeping those trees in visual and sensory range but beyond access behind electrically-charged wires." (6 CT 1228:2-8)
- "[T]he relatively small amount of space in the elephant exhibit contributes to ... an increased risk of infection, as the elephants are forced to live longer periods of time with their waste and are unable to leave the areas in which they urinate and defecate. In the wild, they move on; in captivity, they stand or walk in it." (6 CT 1228:12-16)
- "Dr. Eng confirmed that urine in an exhibit can create a risk... of... infection for a captive elephant because foot problems and abscesses are common for captive elephants, and infections from urine get into an elephant's foot pad through cracks." (6 CT 1228:17-19)
- "Dr. Eng does not know if anything is being done to eliminate or reduce the amount of urine in the exhibit." (6 CT 1228:19-21)

- "The evidence also shows that the quality of the elephants' lives in the Los Angeles Zoo elephant exhibit is not good, and that this is having serious repercussions for their physical and emotional well-being." (6 CT 1229:1-3)
- "For example, all three elephants, and Billy in particular, engage in...a behavior that everyone on both sides (with one or two significant exceptions)...agrees is abnormal and unhealthy, which the parties refer to as 'stereotypic behavior'..." (6 CT 1229:3-6)
- "Most of the expert witnesses agreed that on hard surfaces this unnatural behavior causes mechanical stress on the elephants joints and feet." (6 CT 1229:8-10)
- "Dr. Eng (the Zoo veterinarian) "testified that the ...Zoo is not doing anything to address this behavior, even though he knows in can increase the risk of foot cracks and infections." (6 CT 1232:21-1233:2)
- "The most credible testimony was the testimony of Dr. Joyce Poole, who...has become of the world's leading experts on elephant behavior....Dr. Poole testified that the stereotypic behavior exhibited by the elephants in the Los Angeles Zoo is nothing like she has ever seen in wild elephants...She believes that Billy's stereotypic behavior of head-bobbing and rocking is strong evidence that Billy is stressed, frustrated, bored, unanimated, and

unhappy, and that the zoo is not meeting his needs." (6 CT 1229:12-1230:24)

- "She testified unequivocally, that the stereotypic behavior exhibited by the three elephants in the Los Angeles Zoo is not an expression of excitement upon seeing a zoo keeper or at the prospect of being fed, as some zoo employees claim...The court credits Dr. Poole's testimony. Defendants did not present any substantial evidence to contradict or impeach her testimony in any way. In fact, testimony presented by defendants confirmed Dr. Poole's opinions and conclusions." (6 CT 1230:24-1231:7)
- "For example, Dr. Oosterhuis [the Zoo Veterinary expert] testified that even in his 37 years of experience at the San Diego Zoo Safari Park and the San Diego Zoo, he has not seen the kind or amount of stereotypic behavior that he has seen with elephants in the Los Angeles Zoo." (6 CT 1231:7-10)
- "In response to the testimony of Dr. Poole, defendants submitted the testimony of Victoria Guarnett...the Senior Elephant Keeper at the Los Angeles Zoo... [who] has no experience with elephants anywhere but in the Los Angeles Zoo." (6 CT 1231:12-19)
- "Mr. Guarnett had somewhat shocking gaps in her knowledge of elephants, and, for someone with the title Senior Elephant Keeper, had some surprising misconceptions. For example, Mr. Guarnett

believes that the head-bobbing of Billy and Jewel is a sign of happiness and comfort, like a dog wagging his tail. There is no evidence in the record to support such a conclusion." (6 CT 1231:21-25)

- "That Ms. Guarnett continues to believe that such behavior is an expression of happiness and contentment appears to be part of her anthropomorphic fantasy that the elephants are happy to see her and live their lives in captivity." (6 CT 1232:12-15)
- "Since Billy moved into the new exhibit...his head-bobbing increased...to 45%(!!!)...nearly half of his observable life."...No wonder, as Mr. Lewis admitted, zoo employees hear zoo patrons ask what is so wrong with the zoo's elephants." (6 CT 1234:1-7)
- "Dr. Poole testified that Billy also suffers because his heightened and extended musth period of sexual arousal has no outlet, and because he does not have enough space to deal with his frustration...Zoo employees downplayed the effect on Billy of this extended musth period, but musth is one of Dr. Pool's areas of extensive research and expertise. The court again credits Dr, Poole's testimony." (6 CT 1235:18-25)
- "Perhaps most significantly, the testimony of Dr. Oosterhuis, again a witness called by the [City]...perhaps as much as the testimony of any witness called by plaintiff supports plaintiff's claims. (6 CT

1236:1-5) Dr. Oosterhuis testified...to and confirmed the following facts..."

- "No matter how good a foot care program is, eventually elephants in captivity will develop foot problems..." (6 CT 1236:11-12)
- "Los Angeles Zoo is not exercising its elephants even...minimum amounts." (6 CT 1236:18-24)
- "Abscesses are common in captive elephants. They are caused by the multitude of problems associated with keeping elephants in captivity. The elephant is not genetically programmed to withstand the constant gravitational pressure of living on hard surfaces and carrying the kind of excessive weight that is typical of most captive elephants." (6 CT 1237:18-23)
- "Abnormal pressure on the nails...causes disruption in the blood supply to the sensitive tissue behind the nail...because they [Asian elephants] evolved on softer surfaces.'" (6 CT 1238:4-7)
- "Prevention of abscesses requires: [several things]...Other than...pedicures, it does not appear...that the ...Zoo is complying with any of Dr. Oosterhuis' recommendations." (6 CT 1238:12-20)

- "Nail cracks are usually caused by repetitive movement that puts abnormal pressure on the nail...An example is the stereotypical behavior of an elephant. The captive elephant's environment can exacerbate this pressure...This appears to be what is occurring with Billy, exactly as plaintiff claims."
(6 CT 1238:22-1239:7)
- "The testimony of defendant's witnesses, including zoo employees and other treating veterinarians called by defendants, also raises serious concerns about the level of care that the elephants are receiving at the Los Angeles Zoo." (6 CT 1239:8-11)
- "Mr. Guarnett also testified that she believes that it is healthy for Billy to always be in a yard without another elephant, because male elephants in the wild are solitary. The undisputed evidence and testimony of those with knowledge (Dr. Poole) is to the contrary, and Mr. Guarnett admittedly has no knowledge of elephant behavior in the wild." (6 CT 1239:20-25)
- "As another example, the keepers at the Los Angeles Zoo have Billy lie down and have him stand up on his back two legs in front of spectators...Ms. Guarnett however, does not consider these activities 'trick'... Frankly, this is absurd, and the court discredits this testimony." (6 CT 1240:2-9)
- "Moreover, Ms. Guarnett claims that she does not know how Billy

was trained to lie down, as the keepers have him do for the visitors to the Elephants of Asia exhibit. The court discredits this testimony as well. It is inconceivable that the Senior Elephant Keeper of the Los Angeles Zoo has no knowledge of the kinds of things that elephant trainers had to do to Billy and other elephants to train them to lie down on command, such as using a block and tackle to pull the elephant's legs and poking the elephant's admittedly sensitive skin with a pole and nail, as shown in Exhibit 47." (6 CT 1240:9-16)

- "For someone who claims to love the elephants, it is shocking that she would command or at least assist them in performing an activity that the elephants were taught to do in this way." (6 CT 1240:16-18)
- "[T]he evidence at trial shows that the three elephants at the Los Angeles Zoo are emotionally and socially deprived." (6 CT 1240:21-22)
- "[T]he evidence is undisputed that there are tests that the zoo could conduct to investigate whether the elephants are emotionally healthy...however no veterinarian at the ...Zoo has ever done any work to evaluate the emotional state or stress levels of the elephants." (6 CT 1242:5-11)
- "Dr. Poole was far and away the most qualified witness at trial..." (6 CT 1230:7) She established, without dispute, that the Asian

elephants at the Los Angeles Zoo are dying fully 10 years younger than Asian elephants at all other North American Zoos. (4 RT 464:25-467:4)

- "The most knowledgeable witness on the subject, Dr. Poole, testified that the difference between the behavior of the three elephants at the ... Zoo and the behavior of elephants in the wild is like 'night and day.'" (6 CT 1241:1-4)
- "[Zoo Direction] Mr. Lewis' statements during the pendency of this action do not inspire confidence in his commitment to the ban on bull hooks." (6 CT 1253:6-7)
- "The court agrees with plaintiff that the evidence at trial shows that the elephants at the ... Zoo are not receiving 'proper care and attention.'" (6 CT 1259:19-20)
- "[T]he court finds that plaintiff has met his burden of proof that the Elephants of Asia exhibit of the Los Angeles Zoo is injuring the three elephants who live there." (6 CT 1265:17-19)
- "Thus, the Elephants of Asia exhibit at the Los Angeles Zoo is not a happy place for elephants, nor is it for members of the public who go to the zoo and recognize that the elephants are neither thriving, happy, nor content." (6 CT 1242:17-19)
- "Captivity is a terrible existence for any intelligent, self-aware

species, which the undisputed evidence shows elephants are. To believe otherwise, as some high-ranking zoo employees appear to believe, is delusional. And the quality of life that Billy, Tina and Jewel endure in their captivity is particularly poor." (6 CT 1242:20-23)

Beyond these actual trial court findings, there are also numerous undisputed expert findings which, for whatever reason, were not included in the Statement of Decision. Perhaps most prominent among them is the finding of Dr. Poole that Asian elephants in this Zoo "die fully ten years younger, on average, than Asian elephants in all other North American zoos. (4 RT:464:25-467:4) There could hardly be a more damning indictment.

III. WHY THE ADDITIONAL ISSUES SHOULD BE CONSIDERED, IF REVIEW IS GRANTED.

Given these remarkably, one-sided trial court findings, it is patently clear that this facility has been and will continue to cause the premature suffering and death of elephants. This facility is violating multiple California Animal Cruelty Penal Code sections, whether it is analyzed as "abuse" or "unnecessary pain or suffering" or in some other way, it is unlawfully harming these majestic animals.

Under California law, the Penal Code sets forth several relevant standards. After review of the unpublished (original) opinion of the Second District, establishing the "law of the case," the trial court found:

"... it is clear that Penal Code section 596.5 does not render keeping an elephant in captivity illegal per se. **But the statute does make it illegal for an elephant manager or owner to engage in 'abusive behavior towards the elephant.'** Although the statute sets forth a list of abusive disciplinary behaviors, the language and structure of the statutory scheme suggest the list is not exclusive. **We conclude that 'abusive behavior' may include the physical characteristics of the enclosure in which elephants are kept.** Whether keeping an elephant in any particular enclosure rises to the level of abusive behavior is of necessity a factually intensive inquiry that depends on the particularities of each case." (3CT:525)

The significance of the §596.5 "abusive behavior" standard is its focus on the "conduct" of the owner of the elephant. But, contrary to that guidance, the trial court clearly did not apply that standard. (6CT:1243:8-12)

The Second District made it clear that what was required was "a factually intensive inquiry" into the "characteristics of the enclosure in which the elephants are kept." This intensive inquiry was provided. But, after making the necessary findings, the trial court ignored its own conclusions. It is a tautology that neither a trial court nor an appellate court is free to ignore critically relevant, established facts. But, they did.

§596.5 "abusive behavior" is one of the clearest, most objective

standards in this case, because it is not dependent on either: (i) the *intent* of the owner; or (ii) whether any injury actually occurred. By its terms, if the owner uses certain types of proscribed equipment, or breaks the skin of the elephant, it would violate the Code. There is no requirement that the elephant must objectively suffer harm as a result of the use of this equipment. The violation is manifest by the conduct of the owner, who simply uses the prohibited equipment.

The trial court began by acknowledging the holding of the original Second District opinion, identifying it as the law of the case, stating that:

"The Court of Appeal's interpretation of section 596.5, wrong though defendants protest it may be, is law of the case and binding on this court ... Therefore, the court will determine whether defendants engage in abusive behavior towards their elephants ..." (6 CT:1221)

Unfortunately, despite the foregoing acknowledgement, the trial court promptly departed from the required standard. After soundly criticizing the physical characteristics of the exhibit, among many factors set forth in the Statement of Decision, not one of those factors were applied to a legal analysis of §596.5. Instead, the trial court claimed it did not have a clear definition for what constituted "abusive behavior:"

"Section 596.5 does not define 'abusive behavior.' ... The lack of a definition of what is 'abusive behavior' and therefore

prohibited under section 596.5 makes it difficult to determine what standard to use in deciding whether the Los Angeles Zoo's treatment of its elephants 'rises to the level of abusive behavior.'" (6 CT:1243)

Effectively ignoring the statute and the law of this case, the trial court substituted the standard to be applied under §596.5, with a hybrid of the standard applicable to §597(b). It appears this was done because §597(b) uses a form of the word "abuse" in its text, stating:

"The only time the term "abuse" appears within Title 14, which contains section 596.5, is in section 597, which provides, among other things, that every person who '**subjects any animal to needless suffering**, or inflicts unnecessary cruelty upon the animal, or in any manner abuses any animal,' is guilty of a misdemeanor or a felony. Penal Code §597(b)." (6 CT:1243)

However, notwithstanding the error of the trial court in conflating the "abusive behavior" standard of §596.5, with the "needless suffering" standard under Penal Code §597(b), the result should have been the same.² The focus of the two statutes, while both applicable, are entirely different. Yet, the trial court failed to apply the facts to either correct standard. It chose not to do so

² Penal Code §596.5 states in relevant part as follows: "It shall be a misdemeanor for any owner or manager of an elephant **to engage in abusive behavior towards the elephant ...**"

even though the “unnecessary...pain or suffering” standard required *far less than the overwhelming level of proof, expressly confirmed by its own Statement of Decision*. As but one example of how low the bar is set, the Court in *People v. Farley* (1973) 33 Cal. App. 3d Supp. 1, 10, held that:

"[A] conviction of cruelty to animals in the sense of failing to provide them with proper food and water, while it does not require proof of criminal intent or criminal negligence, does require proof that the defendant was negligent in that **he intentionally did an act (or failed to act) from which harm to the animals was reasonably foreseeable**, i.e., foreseeable by a reasonably prudent man caring for horses."

In this case, the evidence shows decades of abuse, resulting in nearly continuous suffering, **resulting in multiple elephant deaths**. The Los Angeles Zoo has been repeating the same harmful acts, including keeping these massive, highly intelligent animals in tiny spaces, without any true stimulation of any kind, for decades.

Indeed, even felony prosecutions under this section merely require proof of gross negligence. As the court in *People vs. Speegle* (1997) 53 Cal. App. 4th 1405 concluded at 1413, the proper “intent” instruction to give the jury in Penal Code §597(b) felony cases is as follows:

“...That person committed a grossly negligent act or omission
... [which] caused danger to an animal’s life.”

In context, the trial court found that the Zoo has been violating that standard daily, quite literally for decades. But, it made no legal conclusions as a result of those findings. The Court of Appeal also merely affirmed, doing nothing to apply the controlling law to the facts.

It is noteworthy that *Speegle*, concluded at 1414 that in §597f cases, all that must be proven is that the defendant was negligent, i.e.:

“...conscious, acting voluntarily, and that a reasonable person in the defendant's position would have foreseen that harm to the animal would result from the care that the defendant was giving it.”³

Again, the fact finding of the trial court, as noted above, confirmed countless examples of voluntary action, known to cause harm. But, those findings were ignored, by both the trial court and the Second District. This was a manifest abuse of discretion. **By failing to apply the law, both courts effectively applied the wrong law.**

The apparent goal of the Penal Code cruelty sections is to proscribe

³ In *People v. Untiedt* (1974) 42 Cal.App.3d 550, 554 the court even analyzed and rejected the claim that the phrase “without proper care and attention” in §597f was unconstitutionally vague, “in light of the clear legislative purpose...” The same language was used again by the legislature in §597.1, evidencing the same “clear legislative purpose,” which clearly applies to all of the Penal Codes at issue.

animal cruelty in every form, to the extent possible. Hence, simple foreseeability of harm, even without actual harm to the elephants, gives rise to a violation. Given the long history of injury, suffering and death at this facility, it is beyond dispute that the City was well aware “that harm to the [elephants] would result from the care that [they were] giving it.” Indeed, the totality of the evidence confirms that the City knew they were causing such harm, but consciously chose to do nothing about it. They even went so far as to conceal it.

Although ignored, the trial court record documents a pattern of behavior and resultant harm, including life-threatening physical conditions. They start with the absence of adequate space, combined with inadequate care and attention, causing injuries of various kinds. As a result, every L.A. Zoo elephants must eventually deal with excruciating pain and unnecessary suffering. What they endure is every bit as horrific as any of the cited §597(b) cases.

Simple review of the keeper logs (in evidence) detail daily foot cracks, infections and other physical problems. That evidence can be traced forward to the elephant necropsy reports, which provide a ghastly summary of the horrific suffering that caused the deaths of these elephants. Their deaths are so unnecessary, but uniquely tied to the conditions of their captivity. (Trial Ex’s

1- 32)⁴

Again, the tragic deaths of Tara and Gita, also provide ample evidence of violative conduct comparable to that found in the §597(b) cases. Just to convince the City council to fund the construction of the new exhibit, known false statements were provided. At the time of the vote, the Zoo Director was asked, and assured the Council that all of their elephants were "just fine." (8RT:1523:1-1524:7; 8RT:1529:20-26; 8RT:1553:17-24) But, in truth, he knew, as did all of the Zoo personnel involved with these elephants (8RT:1539:24-1540:5) that both Tara and Gita were in dire straits, in excruciating pain, barely able to stand up. (8 RT:1524:8-20; 8 RT:1524:23-1525:8; 8 RT:1526:19-26; 8 RT:1527:10-27; 8 RT:1531:8-19; 8 RT:1531:27-1532:11; 8 RT:1532:16-24; 8 RT:1533:10-14; 8 RT:1534:3-7; 8 RT:1535:2-5; 8 RT:1535:21-23; 8 RT:1536:2-5; 8 RT:1536:12-25; 8 RT:1537:22-26; 8 RT:1539:16-18; 8 RT:1545:4-1547:13)⁵ Soon after the vote, they died of their

⁴ Apart from the death and injury reports in the Zoo records, additional evidence of abuse causing needless suffering, relates to the abhorrent training of Billy, involving use of a block and tackle, and bull hooks, which the Zoo relies upon daily to compel its elephants to perform tricks for the public. (Trial Exh. 42; 4 RT:319:12-322:22; 7 RT:1395:20-23; 6 CT:1240:5-20) The City has not and cannot deny this ongoing abuse.

⁵ This evidence was also set forth in the Leider Brief X-AOB:105-106. Yet again, the City could not deny these facts, conceding them by silence.

(footnote continued)

Zoo related injuries. This fact is undisputed, indeed, shameful.

The trial court findings and undisputed evidence confirm a level of egregiousness that equals or exceeds that of almost every case cited by the City or the trial court. Indeed, none other than this case involve duplicity and intent to permit harm, at the highest levels of City government, including the refusal of the City Attorney to prosecute any of the longstanding, well documented violations in this facility.

The legal conclusion that must be drawn is that this facility is itself abusive, given its incredibly harmful physical environment, among other things (for purposes of Penal Code § 596.5). At the same time, it also causes “unnecessary pain...and suffering” (for purposes of Penal Code § 597). These conclusions are implicit in almost every factual finding made by the trial court. But, one and all were ignored.

Neither the trial court nor the Court of Appeal chose to apply any of these stunning findings to the relevant Codes. Every Penal Code relied upon by Leider at trial was violated, as confirmed by the record and the undeniable factual findings. "Injuries" were confirmed, yet neither the Penal Code nor §526a was applied, as stated and required. On that basis, no real consideration was even given to closing this abusive exhibit to elephants. How can any court simply ignore the controlling facts, as they compel application of the

controlling law?

Is it not the duty of a trial court and a court of appeal to apply the undisputed findings of fact to the law? Is it not an abuse of discretion to fail to do exactly that? Had either court done so, the only conclusion they could have reached on this record, was that this exhibit violates the Penal Code in multiple ways and warrants an injunction under §526a.

The facts are essentially undisputed. For their protection, the subject exhibit should have been closed to elephants. A fair and impartial application of the facts established by the record required such a finding. It was an abuse of discretion to shirk this responsibility. No court is authorized to pick and choose what facts to ignore or what law to apply, when it is factually warranted.

To both educate all of the courts of this state, and to eliminate the manifest error in this record, this Court should apply the law to the undisputed facts and close this zoo to elephants.

CONCLUSION

If this Court chooses to grant review in this case, it is respectfully submitted that it should review the facts and issues outlined herein, which warrant closing this exhibit to elephants, as a matter of law. Failing to apply those facts to the controlling law was an abuse of discretion, by both the trial and appellate court. Both warrant review generically, to provide guidance to all of the courts of this state concerning their manifest obligations, and

specifically, to remedy an injustice in this matter, which has been prosecuted pro bono since 2007.

Respectfully submitted:

DATED: March 10, 2016

CASSELMAN LAW GROUP

By: 

DAVID B. CASSELMAN
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LEIDER

CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 8.504(d)(1), this Petition For Review contains 6,848 words as counted by the Microsoft Word, word processing program used to prepare it.

A handwritten signature in black ink, appearing to read "David B. Casselman", written over a horizontal line.

David B. Casselman

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of LOS ANGELES, STATE OF CALIFORNIA. My business address is 5567 Reseda Boulevard, Suite 330, Tarzana, California 91356. I am over the age of eighteen years and am not a party to the within action;

On March 10, 2016, I served the following document(s) entitled **ANSWER TO PETITION FOR REVIEW** on ALL INTERESTED PARTIES in this action by placing true copies thereof enclosed in sealed envelopes addressed as follows:

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BY MAIL: By placing a true copy thereof in a sealed envelope addressed as above, and placing it for and mailing following ordinary business practices. I am readily familiar with the firm's practice of collection and processing correspondence, pleadings and other matters for mailing with the United States Postal Service. The correspondence, pleadings and other matters are deposited with the United States Postal Service with postage thereon fully prepaid in Tarzana, California, on the same day in the ordinary course of business. I am

aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 10, 2016, at Tarzana, California.


Jamie D. Kessinger