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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

PEOPLE FOR THE ETHICAL
TREATMENT OF ANIMALS, INC.,

Plaintiff and Appellant,

v.

MONTEREY ZOOLOGICAL SOCIETY,
INC., AND CHARLIE SAMMUT,

Defendants and Respondents.

H048546, H048878
(Monterey County
Super. Ct. No. 20CV002113)

This appeal by plaintiff People for the Ethical Treatment of Animals, Inc. (PETA) calls for us to examine the extent to which a private zoo’s management of its elephants furthers the zoo’s “constitutional right of free speech in connection with a public issue or an issue of public interest.” (Code Civ. Proc., § 425.16, subd. (e)(4).)¹ Because we conclude defendants Monterey Zoological Society, Inc. (Monterey Zoo or Zoo) and its founder/president, Charlie Sammut, have not met their burden on the first step of their anti-SLAPP motion, we reverse the trial court’s order granting the motion and awarding prevailing party fees.

¹ Unspecified statutory references are to the Code of Civil Procedure.

I. BACKGROUND

A. *The Complaint*

PETA filed a complaint for injunctive relief against Sammut and the Monterey Zoo under California's Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.), "to prevent their ongoing unlawful business practices in the management and care of elephants."

PETA is a nonprofit corporation that announces as its mission that it "opposes speciesism . . . , a human-supremacist worldview, and focuses its attention on the four areas in which the largest numbers of animals suffer the most intensely for the longest periods of time: in laboratories, in the food industry, in the clothing trade, and in the entertainment industry." PETA's motto is that "[a]nimals are not ours to experiment on, eat, wear, use for entertainment, or abuse in any other way."

Sammut was originally the founder and owner of Wild Things Animal Rental, Inc., which rented out exotic animals for use in television and film. In 2011, he converted Wild Things Animal Rental, Inc. into the Monterey Zoo, a nonprofit corporation, of which Sammut is the president. Sammut is also the president and chief executive officer of another corporate entity, the Vision Quest Ranch, a bed and breakfast operating from the same property as the Monterey Zoo. Until February 2019, Sammut was also the director of the now-defunct Elephants of Africa Rescue Society, a nonprofit corporation also operating from the same property as the Zoo and the bed and breakfast.

PETA alleges that in June 2018, two employees of Monterey Zoo were walking two African elephants, Paula and Kristy, to a "breakfast with the elephants" event at which guests renting bungalows could "interact with and feed the elephants." When one employee took "aggressive action" in response to Paula's refusal to continue, the elephant "thrashed and threw the employee in the air, breaking the employee's back and ankle." The second employee attempted to stop the mauling by beating the elephant with a cane. The California Division of Occupational Safety and Health (CAL/OSHA) cited

Monterey Zoo for failing to report the attack and for failing to establish and implement an effective injury and illness prevention program.

PETA claims that (1) defendants' use of "free contact"—a management and training practice in which keepers share the same unrestricted space with the elephants—constituted an unlawful business practice in violation of California's Occupational Safety and Health Act (Lab. Code, § 6400 et seq.); and (2) defendants' use of wooden canes to control the elephants constituted an unlawful business practice violative of California's ban on the use on elephants of bullhooks or other devices designed to inflict pain (Fish & Game Code, § 2128).²

PETA alleges that defendants' use of free contact is "a dangerous and abusive circus-style training method where keepers share the same unrestricted space with the elephants and use domination, force, negative reinforcement, and physical punishment to exact their obedience—and use wooden canes to control them." In contrast, PETA alleges that the "vast majority of facilities that manage and care for elephants do so using protected contact," where elephants and their keepers do not share the same space but have contact through a barrier: "The elephant is not spatially confined and is free to leave the work area at will. The elephant learns through positive reinforcement, and physical punishment is strictly prohibited." PETA contends that free contact presents a safety risk in violation of Labor Code section 6400, et seq., which requires employers to furnish safe and healthful places of employment.

PETA alleges that use of a bullhook "control[s] elephants through negative reinforcement (teaching elephants to move away from the bullhook to avoid the physical

² Fish and Game Code section 2128 prohibits "[a]ny person who houses, possesses, manages, or is in direct contact with an elephant" from using, "brandishing, exhibiting or displaying" a "bullhook, ankus, baseball bat, axe handle, pitchfork, or other device designed to inflict pain for the purpose of training or controlling the behavior of an elephant."

or psychological pain they learn to associate with the device), and positive punishment (discouraging unwanted behaviors by inflicting pain).”

According to PETA, “the wooden canes Defendants use to control elephants . . . have L-shaped handles that resemble a hook, are used for negative reinforcement and positive punishment, and are treated the same as bullhooks under California’s ban on such devices.”

PETA alleges that, of seven facilities in California that house elephants, the Monterey Zoo is the only one that continues to put employees in free contact with elephants or allow employees to use a device akin to a bullhook to control the elephants.

B. *The Anti-SLAPP Litigation*

On August 26, 2020, Sammut and Monterey Zoo filed a special motion to strike PETA’s complaint, contending that PETA’s claim arises out of defendants’ protected speech on matters of public interest. Defendants further argued that PETA had no reasonable probability of prevailing on the merits because it lacked standing to bring an unfair competition claim, and defendants’ elephant management complied with applicable workplace safety and animal welfare laws and regulations.

In support of defendants’ contention that PETA’s claims target protected activity, Sammut averred that Monterey Zoo offers educational programs for students and people of all ages. Beyond general admission to the zoo, defendants also sell opportunities to participate in “up close and personal” elephant programs. These include “the Pachyderm Package” (a 90-minute, \$275/couple, “private behind the scenes experience . . . (not with the general public)” of “additional hands-on full contact experience with our African elephants” in which guests “[g]et up close and personal”); “Elephant Encounter” (60-90 minutes, priced on request, “an interactive and fun event Get up close and personal”); and “Butch’s Bedtime”³ (30-40 minutes, \$40/child, or \$35/child for B&B

³ After the demise of Paula and Kristy, the Zoo procured two African elephants—“Butch” and “Buffy”—from a Florida carnival operation. PETA states in its opening

guests—“Help us herd them into their barns, give them bedtime snacks [and] medications, if necessary”). “[K]ey feature[s]” of such encounters, according to Sammut, are “demonstrations with our animals that allow our guests to view and experience the animal in a very meaningful way.” Defendants rely on revenues from the elephant encounters to fund “not only the elephants’ care, but also care for the other animals at the Zoo. For the period from August 15, 2019[,] through December 31, 2019, that funding totaled approximately \$372,317, which is a vital percentage of that which is needed” to operate the zoo.

As evidence of the speech for which defendants assert protection, Sammut included with his declaration a two-page representative script bearing the directive, “(To be used at B&B and daily elephant meet & greets, Butch’s Bedtime Tour, Pachyderm Package and VIP tours) [¶] The following facts and demonstrations are to be included in the above tours/meet & greets as much as possible/time will allow.” The script closes with a similar directive: “Again, try to include as much of the above information as possible in all interactions while providing fun and factual answers to any/all questions about the elephants as individuals. Refer all questions you are unsure of . . . to others or offer to return an answer at a later time.”

The script includes facts about elephants generally, such as descriptions of their ears, teeth, feet, and eating habits. The script directs the presenter to cue the elephant to demonstrate various points—to display its ears (“Coincidentally, the African elephants have a very large ear that resembles the shape of the African continent”); to open its mouth (“They grow six sets of molar teeth in one lifetime . . .”); to display its feet (“In captivity, we are charged with providing foot care to accomplish the same healthy feet”

brief that, since entry of judgment, one of the elephants has died and the other is no longer at the Zoo. Given the trial court’s award of costs and attorney fees, however, the appeal is not moot. (See *Save Our Residential Environment v. City of West Hollywood* (1992) 9 Cal.App.4th 1745, 1750-1751.)

as an elephant “forced to walk” in the wild); to assume various positions (“The elephants are trained as babies to assume certain positions that enable their caretakers to provide them with the care and grooming they need”); to stand on its front feet for measurement of foot diameter and height (“A fun Fact: If you measure the circumference of the elephant’s front foot while standing on it, you can double that number and come within inches of the elephant[’]s height to the shoulder”).

The script also includes the following prompts for the presenter, but without cues for elephant participation: “Encourage ALL to research and support elephant programs in captivity and in the wild” and “[advise that] [o]ur elephants, as well as all animals in zoos, are truly the survival insurance of all species today.”

According to Sammut, use of the cane to “cue” the elephant means to touch the end of the cane to a specific location on an elephant’s body, with a verbal command to either move in a certain direction or perform another act, such as raising a foot for foot care or presenting other parts of their bodies for a health inspection and/or grooming needs. Sammut denied using the cane or any other instrument for discipline. Sammut asserted that, “Without the cane, the Zoo could not conduct the elephant presentations in their current form.” As for free contact generally, Sammut asserted that “the elephants enjoy the human interaction” and that curtailing the elephants’ direct interactions with their handlers “would likely have a negative effect on the elephants’ mental and physical welfare. It will also have a profound, negative effect on the education and conservation work [the Zoo] accomplish[es] with [its] encounters.”

As to Paula’s 2018 mauling of her handler, Sammut denied any ongoing workplace safety violation, noting “[t]he wooden walking cane that was used to touch the elephant did not result in any marks on the elephant’s skin, nor did it cause any injuries [to the elephant].” In the aftermath, the Zoo “spent hundreds of thousands of dollars to redesign and remodel the elephant habitat to remove the risk of such an accident recurring.” Specifically, “[t]he redesign eliminated the need for the elephants to be

handled outside of their habitat, as they are now contained behind the new and extensive protective barriers of the habitat.” But the Zoo continues to “provide elephant care in a system of [free] contact management” within the habitat.

Sammut states that prior to the effective date of the bullhook ban, the Zoo sought guidance from the United States Department of Agriculture (USDA) and the California Department of Fish and Wildlife (CDFW) as to a suitable bullhook alternative. According to Sammut, “[t]he USDA . . . and CDFW . . . approved the use of the wooden walking cane with the elephants” in response to the Zoo’s request for guidance. The CDFW, following its investigation into the 2018 elephant attack, “approved the Zoo’s continued use of the wooden walking cane with the elephants, and advised the Zoo that the cane did not meet the description of the devices listed in [Fish and Game Code] § 2128.”

Defendants’ experts—a veterinarian who works for the Zoo and another veterinarian who worked with elephants in over 60 elephant holding facilities over 37 years—state that some of the elephants at the Monterey Zoo have come from “less than desirable circumstances” and that all the elephants “were familiar with being managed with bullhooks, and likely uncomfortable with being handled in any other fashion.” They assert that the wooden cane used by the Zoo does not share the same features and qualities as a bullhook, but is more similar to a “target pole,” which is used in most zoological facilities across the country. Defendants’ experts also stated that the use of free contact as a management system is an “essential safety and welfare tool” without which veterinarians would not be able to provide medical care to elephants promptly and safely.

PETA’s experts—the elephant manager of the Oakland Zoo and the former director of elephant programs for The Elephant Sanctuary in Tennessee—state that free contact is dangerous, because it establishes a relationship of human dominance that the elephant’s size and potential for resistance or retaliation makes unstable; in their view,

the autonomy that protected contact affords elephants leaves them less fearful and less likely to behave unpredictably, promoting a safer work environment for trainers. The experts assert that the use of free contact and bullhooks can increase aggression by the elephants. According to one of PETA's experts, the L-shaped design of the wooden canes used by Monterey Zoo resembles a bullhook and triggers the elephants' "superb memories" as to their experience of actual bullhooks used for negative reinforcement and positive punishment on sensitive parts of their bodies. PETA claims the canes as used by the Zoo are thus "designed to inflict pain" within the meaning of the statutory ban.

PETA's experts addressed protected contact as an alternative to free contact. The Oakland Zoo, for example, transitioned its management of elephants from free contact to protected contact 30 years earlier, "prompted by the death of an elephant manager due to an elephant attack in [a free-contact] setting." According to one expert, "it appears that Monterey Zoo has the infrastructure and facilities to begin transitioning its management to [protected contact] immediately, and is equipped with adequate infrastructure and facilities to use [protected contact] for many aspects of elephant husbandry and care."

The trial court issued a written order granting the special motion to strike. Although it did not address free contact as a protected activity, it concluded that the use of a wooden walking cane to cue the elephants by touching the elephant with the cane concurrently with voicing a command was an integral part of the Monterey Zoo's lectures and presentations.

For the second step of the anti-SLAPP analysis, the trial court found that PETA did not show minimal merit to its claim. The court stated that PETA had not shown standing, that the use of the cane was not banned by Fish & Game Code section 2128, that no evidence was presented showing that free contact under all conditions does not provide a safe place of employment, and that PETA had failed to produce evidence of the failure of defendants to have an illness and injury prevention program.

Defendants thereafter moved for an award of mandatory attorney fees and costs pursuant to section 425.16, subdivision (c). The court granted the motion, awarding attorney fees of \$74,115, costs for the anti-SLAPP motion of \$893.75, attorney fees for the fees and costs motion of \$20,690, and costs for that motion of \$957.93.

PETA timely appealed both orders.

II. DISCUSSION

Section 425.16, “commonly known as the anti-SLAPP statute, allows defendants to request early judicial screening of legal claims targeting free speech or petitioning activities.” (*Wilson v. Cable News Network, Inc.* (2019) 7 Cal.5th 871, 880-881 (*Wilson*)). The California Supreme Court has articulated a two-step procedure for litigation of an anti-SLAPP motion. “First, ‘the moving defendant bears the burden of establishing that the challenged allegations or claims “aris[e] from” protected activity in which the defendant has engaged.’ [Citation.] Second, for each claim that does arise from protected activity, the plaintiff must show the claim has ‘at least “minimal merit.”’ [Citation.] If the plaintiff cannot make this showing, the court will strike the claim.” (*Bonni v. St. Joseph Health System* (2021) 11 Cal.5th 995, 1009.)

Our review is de novo. (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1067 (*Park*)). “We exercise independent judgment in determining whether, based on our own review of the record, the challenged claims arise from protected activity.” (*Ibid.*) In reviewing the record, “[w]e do not . . . weigh the evidence, but accept plaintiff’s submissions as true and consider only whether any contrary evidence from the defendant establishes its entitlement to prevail as a matter of law.” (*Ibid.*)

A. *Conduct in Furtherance of Protected Speech*

Defendants contend PETA’s cause of action arises from activity protected under section 425.16, subdivisions (e)(3)—“any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public

interest”—and (e)(4)—“any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.” (§ 425.16, subd. (e).) We assume without deciding that aspects of defendants’ “Elephant Tour Script,” when delivered, contribute to the public debate on an issue of public interest—what Sammut describes as “the importance of viewing ambassador elephants in zoological care as a means to learn about, appreciate, and conserve the species in the wild and to influence important research and legislation that affects all elephants.”

Defendants argue broadly that PETA’s UCL claim necessarily “arises from” the Zoo’s protected speech, because PETA by its prayer for relief seeks not only to enjoin free contact and cane usage but to shut down Monterey Zoo’s elephant presentations, remove the elephants to a sanctuary, and bar defendants from owning or exhibiting elephants in the future. It is true that PETA’s prayer for relief exceeds what its own experts characterize as a soluble elephant management challenge. But while PETA’s preferred remedy may confirm its broader agenda, “[t]he anti-SLAPP statute’s definitional focus is not the form of the plaintiff’s cause of action but, rather, the defendant’s *activity* that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning.” (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 92.) Turning to defendants’ activity, then, the only activities alleged to give rise to liability are the use of free contact and wooden canes. Because no aspect of these activities entails the “written or oral statement” contemplated by subdivision (e)(3) of section 425.16, we focus on subdivision (e)(4), which encompasses “conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech.” (§ 425.16, subd. (e)(4).)

Here, we understand the chain of defendants’ reasoning to be that free contact enables Monterey Zoo to exhibit elephants in direct interaction between handlers and elephants; the handlers’ direct control over the elephants in turn enables visitors to enjoy

and interact with the elephants as well; because the handlers also deliver scripted educational content during the presentations, the elephant management techniques that facilitate the elephant-human interaction are in furtherance of constitutionally protected speech; and the speech is also entitled to anti-SLAPP protection because it is in connection with a public issue or an issue of public interest.

But the fact that a defendant may engage in constitutionally protected speech does not entitle it to anti-SLAPP protection for all of its conduct. (*Spencer v. Mowat* (2020) 46 Cal.App.5th 1024, 1040.) To focus the inquiry, we look to whether Monterey Zoo’s use of free contact and canes “bears a sufficiently substantial relationship” to the Zoo’s “ability to speak on matters of public concern to qualify as conduct in furtherance of constitutional speech rights.” (*Wilson, supra*, 7 Cal.5th at p. 894.)

In *Wilson*, the California Supreme Court observed: “A news organization’s hiring or firing of employees—like virtually everything a news organization does—facilitates the organization’s speech to some degree. But it does not follow that everything the news organization does qualifies as protected activity under the anti-SLAPP statute. The First Amendment does not immunize news organizations from laws of general applicability ‘simply because their enforcement . . . has incidental effects on [the press’s] ability to gather and report the news.’ [Citation.] We likewise do not read the anti-SLAPP statute to call for preliminary screening of every claim that might be brought against a news organization, merely because the claim might have incidental effects on the organization’s operation.” (*Wilson, supra*, 7 Cal.5th at pp. 893-894.)

We are not concerned here with a news organization, but as in *Wilson*, not all conduct undertaken by Monterey Zoo is entitled to anti-SLAPP protection merely because the Zoo may on occasion engage in constitutionally protected speech. Defendants highlight their delivery of educational speech in the context of “elephant encounters” but acknowledge that its use of free contact is not unique to those encounters. As Sammut states in his declaration, free contact is used for “management”

and “training.” And as defendants’ veterinary experts explain, the Zoo’s use of free contact facilitates prompt treatment of the elephants by ensuring the elephants are under their keepers’ control and not a safety risk to the veterinarians. In free contact, the elephant handler uses the wooden cane to “ ‘cue’ ” or guide the elephants—to move in a certain direction, assume a particular position, or present a body part for medical inspection or grooming. These uses of free contact and canes reflect the defendants’ preferred approach to elephant husbandry generally, independent of defendants’ ability to communicate basic facts about elephants or encourage an interest in conservation.

That defendants’ use of free contact also facilitates their hosting of elephant encounters does not transform the protected speech potentially delivered in these encounters, time permitting, into the basis for PETA’s complaint. (*Park, supra*, 2 Cal.5th at p. 1060 [“a claim may be struck only if the speech or petitioning activity *itself* is the wrong complained of”].) The fact that forbearance from the challenged activity might have an incidental effect on how the Zoo chooses to showcase its elephants when and if its staff read from their scripts does not demonstrate a “sufficiently substantial relationship to the organization’s ability to speak on matters of public concern to qualify as conduct in furtherance of constitutional speech rights.” (*Wilson, supra*, 7 Cal.5th at p. 894; see *id.* at pp. 893, 896.) As PETA points out, all other zoos in California provide educational presentations to the public without resort to free contact or use of canes.

Defendants supply no reason that they could not continue to offer the same educational content to all zoo visitors without hands-on/canes-on direction by keepers in free contact with the elephants. Accordingly, defendants’ reliance on *Pacific Coast Horseshoeing School, Inc. v. Kirchmeyer* (9th Cir. 2020) 961 F.3d 1062 is unavailing, because PETA’s challenge to the conduct does not restrict the public’s right to receive information or defendants’ right to disseminate information, or erect barriers, content-neutral or otherwise, to defendants’ communication of educational content. (Cf. *id.* at p. 1069 [holding that legislation implicates First Amendment rights by precluding a

prospective student without a high-school diploma or GED from enrolling in a private postsecondary vocational school unless he first passed an examination unrelated to the proposed instructional program].)

Content aside, defendants focus on the “up close and personal” elephant encounters that some visitors choose to purchase—whether through the Zoo or through Sammut’s bed and breakfast—and assert that visitors’ experience of the elephants in these encounters is critical to defendants’ message, given “the very special bond” these visitors are privileged to witness. But on this record, Sammut’s claim of a bond between elephant and keeper lacks any concrete evidentiary foundation. Paula’s 2018 mauling of one handler as another tried unsuccessfully to intervene does not support Sammut’s claim. Defendants have not disputed PETA’s characterization of the mauling or its circumstances; Sammut in his declaration notes only the absence of an “ongoing” CAL-OSHA violation at the zoo and the lack of injury to the elephant (as distinct from the handler). The evidence from PETA’s elephant experts suggests that what Sammut would have us presume to be a bond is reducible to the trained elephants’ compliance (most of the time) with their handlers’ direction.

Absent more than a conclusory declaration of a special bond, it is difficult to discern on this record a relationship of any substance between defendants’ use of free contact and their ability to deliver its protected speech to any or all of its guests. To be sure, defendants’ general and long-standing reliance on free contact facilitates the specific types of “elephant encounters” sold by the Zoo. What free contact appears on this record to further is not the Zoo’s educational speech but defendants’ ability to monetize access to the elephants by directing the elephants within arm’s reach of private audiences. The viability of defendants’ elephant-centered business model if PETA were to succeed in its claims is of course a significant matter. But the issue before us is not whether defendants may continue or resume free contact management of any elephants they may acquire in the future, only whether their speech insulates them from answering

contact in favor of protected contact, making use of canes or bullhooks unnecessary. Nor have defendants rebutted PETA's evidence that protected contact is not an impediment to the delivery of educational speech about elephants. Gina Kinzley, elephant manager for the Oakland Zoo, attested that "[e]ducational presentations to the public about elephants, including demonstrations, can be conducted effectively in [protected contact], from behind a barrier" and that she has routinely done so by cueing the elephants with a "target pole" toward which the elephant is trained to move.

While we do not interpret *Lieberman* as requiring that conduct "in furtherance" be *essential* to the accomplishment of a protected activity, our focus is necessarily whether the challenged activity has a "sufficiently substantial relationship" to constitutional speech, and not whether it is essential to what at bottom is defendants' preferred approach to managing its elephants and staff. Accordingly, the Zoo's evidence falls short of a *prima facie* case for conduct in furtherance of speech, because it does not establish a substantial relationship between the challenged use of free contact or the wooden cane and the Zoo's ability to communicate its educational content.

Because defendants have not met their *prima facie* burden on the first step of the anti-SLAPP inquiry, we need not reach PETA's claim of minimal merit.

B. *Attorney Fees and Costs*

The trial court awarded a total of \$96,656.68 in attorney fees and costs to defendants as the prevailing party under section 425.16, subdivision (c)(1). In light of our conclusion on the anti-SLAPP motion, the order for fees and costs is reversed. (See *Lafferty v. Wells Fargo Bank* (2013) 213 Cal.App.4th 545, 551.)

III. DISPOSITION

The trial court's orders granting defendants' anti-SLAPP motion and attorney fees and costs are reversed. Costs on appeal are awarded to PETA.

LIE, J.

WE CONCUR:

GREENWOOD, P.J.

GROVER, J.

People for the Ethical Treatment of Animals, Inc. v. Monterey Zoological Society, Inc., et al.

H048546

People for the Ethical Treatment of Animals, Inc. v. Monterey Zoological Society, Inc., et al.

H048878