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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Tehama)

SYDNEY H., a Minor, etc.,

Plaintiff and Respondent,

v.

WYATT D., a Minor, etc.,

Defendant and Appellant.

C064329

(Super. Ct. No.
CI62701)

Defendant Wyatt D. appeals from an order of the trial court enjoining him from coming within 25 yards of his elementary school classmate, plaintiff Sydney H., or from attending the school where they both had been enrolled since kindergarten. The court found defendant had harassed and bullied plaintiff over a substantial period of time, culminating in an incident in which defendant threatened plaintiff with a pair of scissors. Defendant contends there is insufficient evidence to support the order and the trial court abused its discretion in prohibiting

him from returning to school. We reject both contentions and affirm the order.

FACTS AND PROCEEDINGS

Except for part of one year, plaintiff and defendant had been classmates at Richfield Elementary School since kindergarten.

On September 17, 2009, when the parties were in the fifth grade, defendant "dumped" plaintiff out of a swing during lunch recess. Plaintiff reported the incident to a teacher. Approximately 10 minutes later, defendant approached plaintiff while she was standing in line to return to class. He held in his hand a pair of scissors he had retrieved from the trash and said, "Hey, Sidney [*sic*], show me your face." He then stuck the scissors within three inches of plaintiff's face. Plaintiff was unable to back away because she was standing in front of a wall and there were two other students next to her. Plaintiff reported the scissors incident to a teacher as well, and defendant was immediately suspended. He was later expelled from Richfield for the remainder of the school year and forced to attend another school.

This was not the first incident of misbehavior by defendant directed at plaintiff. In the fourth grade, plaintiff was in physical education class and defendant was sweeping the bleachers nearby as punishment for some misdeed. Defendant was "really mad," took off one of his shoes and threw it at plaintiff. On occasion, defendant took food off of plaintiff's

tray at lunch and ate it, told her she was "stupid," and said what she was wearing was "weird."

Defendant's misconduct in school was not directed at plaintiff alone. When plaintiff and defendant were in the third grade, plaintiff wanted to leave Richfield because defendant had been "bugging" the entire class so much that they could not get anything done. Richfield had a procedure whereby pink slips were issued to students for rules violations. Over the years, defendant had received 30 to 35 such pink slips. Defendant had also been sent to the principal's office on several occasions for rules violations.

Although defendant was expelled from Richfield for the remainder of the school year as a result of the scissors incident, the expulsion provided that he could return to school on January 4, 2010, if he satisfied four requirements, including maintaining his grades at the alternative school, maintaining appropriate behavior, and completing a program of counseling.

On October 14, 2009, plaintiff, by and through her guardian, filed a petition for order to stop harassment, requesting both an order to prohibit harassment and an order that defendant stay at least 100 yards away from plaintiff, her home and her school. The next day, the trial court issued a temporary restraining order (TRO) against defendant.

On December 17, 2009, the principal of Richfield notified defendant's parents that defendant had satisfied the requirements for his reinstatement and that defendant would be permitted to return to Richfield on January 4, 2010.

On January 5, 2010, while defendant was still subject to the TRO prohibiting him from returning to Richfield, the trial court conducted a hearing on plaintiff's request for an injunction. After the hearing, the court issued an order prohibiting defendant from coming within 25 yards of plaintiff and from returning to Richfield. On January 29, the court issued an injunction to that effect, which is set to expire on January 4, 2013.

Defendant appeals the injunction order. (Code Civ. Proc., § 904.1, subd. (a)(6).) He filed an opening brief raising two issues: (1) the evidence is insufficient to support the order, and (2) the trial court abused its discretion in prohibiting him from returning to Richfield. Plaintiff has not filed a respondent's brief.

DISCUSSION

I

Legal Framework

Although not expressly articulated by the trial court, the basis for the injunction is Code of Civil Procedure section 527.6 (section 527.6), which was adopted in 1978 to provide an expedited procedure for enjoining acts of harassment. (*Smith v. Silvey* (1983) 149 Cal.App.3d 400, 405; see Stats. 1978, ch. 1307, § 2, p. 4294.) It provides that "[a] person who has suffered harassment as defined in subdivision (b) may seek a temporary restraining order and an injunction prohibiting

harassment as provided in this section." (§ 527.6, subd.

(a)(1).)

Subdivision (b) defines "harassment" as "unlawful violence, a credible threat of violence, or a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the petitioner." (§ 527.6, subd. (b)(3).)

"Unlawful violence" is defined as "any assault or battery, or stalking . . . , but shall not include lawful acts of self-defense or defense of others." (§ 527.6, subd. (b)(7).) A "credible threat of violence" is "a knowing and willful statement or course of conduct that would place a reasonable person in fear for his or her safety, or the safety of his or her immediate family, and that serves no legitimate purpose." (§ 527.6, subd. (b)(2).) A "course of conduct" is defined as "a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose, including following or stalking an individual, making harassing telephone calls to an individual, or sending harassing correspondence to an individual by any means" (§ 527.6, subd. (b)(1).)

A party seeking an injunction under section 527.6 may obtain a temporary restraining order, with or without notice to the defendant. (§ 527.6, subd. (d).) The court shall

thereafter conduct a hearing on the plaintiff's request for an injunction. "If the judge finds by clear and convincing evidence that unlawful harassment exists, an injunction shall issue prohibiting the harassment." (§ 527.6, subd. (i).)

In reviewing an injunction issued under section 527.6, we determine whether the trial court has made the necessary factual findings and whether those findings are supported by substantial evidence. (*Bookout v. Nielsen* (2007) 155 Cal.App.4th 1131, 1137.) "We resolve all factual conflicts and questions of credibility in favor of the prevailing party and indulge in all legitimate and reasonable inferences to uphold the finding of the trial court if it is supported by substantial evidence which is reasonable, credible and of solid value." (*Schild v. Rubin* (1991) 232 Cal.App.3d 755, 762 (*Schild*).)

II

Course of Conduct

The expedited procedure of section 527.6 may be utilized by anyone who has suffered harassment, where harassment is defined as either (1) unlawful violence, (2) a credible threat of violence, or (3) a course of conduct that seriously alarms, annoys, or harasses a specific person. The trial court expressly found: "The evidence clearly established that Defendant harassed and bullied Plaintiff over a substantial period of time. The incident with the scissors appeared to be the last straw. Additionally, the Court was convinced that the victim is presently afraid of Defendant based on their

relationship since kindergarten, and that Defendant's conduct is likely to recur in the future."

The trial court did not specify which of the three categories of harassment applied in this instance. However, by indicating that defendant harassed and bullied plaintiff "over a substantial period of time," it appears the court was relying on the third category--a course of conduct. Although the first category, unlawful conduct, may be satisfied by a single act of assault, battery or stalking, the court made no finding that any of defendant's acts amounted to such conduct. There is no evidence of a battery or stalking, and the court did not find defendant made "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another," as required for an assault. (Pen. Code, § 240; see 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 346, pp. 436-437.) And while the scissors incident might arguably be viewed as a credible threat of violence, as part of "a knowing and willful . . . course of conduct that would place a reasonable person in fear for his or her safety" (§ 527.6, subd. (b)(2)), this too requires a finding that defendant engaged in a qualifying course of conduct.

In *Brekke v. Wills* (2005) 125 Cal.App.4th 1400 (*Brekke*), we addressed the requirements for an actionable course of conduct under section 527.6. In that case, the plaintiff's 16-year-old daughter, Danielle, began dating the defendant and soon thereafter Danielle's school performance suffered and her relationship with her parents deteriorated. The plaintiff told

her daughter the relationship with the defendant must end. The defendant thereafter called the plaintiff and she attempted to explain why she was concerned about his relationship with her daughter. However, the defendant “‘argued every point’” and would not listen to what she had to say. He also laughed and cussed at her. The plaintiff became frustrated and ended the conversation. When the plaintiff began fearing Danielle was using drugs, she searched Danielle’s room and found letters to Danielle from the defendant that she considered disturbing. Some contained instructions on how Danielle might retaliate against the plaintiff. (*Id.* at p. 1405.)

Knowing the plaintiff had been searching Danielle’s room, the defendant gave Danielle three letters to plant in the room with the expectation that the plaintiff would read them. In one letter, the defendant described a plan to provoke the plaintiff or her husband into physically attacking the defendant and then suing them for money. The letter also directed the plaintiff to turn to page eight, which was a separate letter to the plaintiff containing highly abusive language and expressing the defendant’s belief in the futility of trying to keep him and Danielle apart. (*Brekke, supra*, 125 Cal.App.4th at pp. 1405-1407.) In the third letter, the defendant set forth a “fantastical scheme of torture-murder” involving rabid dogs whereby he and Danielle could kill her parents. (*Id.* at p. 1407.)

After reading the three letters, the plaintiff sought a temporary restraining order and injunction against the defendant

pursuant to section 527.6. (*Brekke*, supra, 125 Cal.App.4th at p. 1407.) The trial court issued the requested injunction. (*Id.* at p. 1408.)

On appeal, the defendant argued, among other things, that there was insufficient evidence of a course of conduct sufficient to satisfy the requirement of section 527.6. We rejected that argument, finding sufficient evidence of a course of conduct from the three threatening letters, the earlier letters written to Danielle instructing her on how to retaliate against her parents, and the taunting telephone conversation between the plaintiff and the defendant. (*Brekke*, supra, 125 Cal.App.4th at p. 1413.) We explained: "It is readily apparent from the tone and content of his letters and telephone call that defendant had no intention of ceasing his behavior toward plaintiff. Thus, we have no trouble concluding that all of his actions constituted a course of conduct, i.e., 'a series of acts over a period of time, however short, evidencing a continuity of purpose'" (*Id.* at pp. 1413-1414.)

Defendant contends the present matter contains no such evidence of a continuity of purpose in his behavior toward plaintiff. We disagree. Calling plaintiff names and criticizing her clothes are not the types of things that would give rise to actionable harassment. Nor would defendant's disruptions in the third grade support a section 527.6 injunction, inasmuch as there is no evidence this was directed at plaintiff alone. However, the evidence presented at the hearing supports a finding that, on multiple occasions,

defendant stole food off of plaintiff's tray and ate it in front of her. He also threw a shoe at her in anger in the fourth grade. The following school year, defendant both "dumped" plaintiff out of her swing and, 10 minutes later, stuck a pair of scissors in her face after demanding, "show me your face."

Defendant argues there is no evidence the scissors incident was intended as retaliation for plaintiff having reported that he dumped her out of the swing. Defendant points out that he testified he had forgotten all about the swing incident by the time of the scissors incident. But the trial court was not required to accept defendant's self-serving testimony. The court could reasonably infer the scissors incident, which occurred only 10 minutes later, was in retaliation for plaintiff having gotten him in trouble for the swing incident.

As explained above, an actionable course of conduct requires "a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose" (§ 527.6, subd. (b)(1).) In our view, the various acts of defendant directed toward plaintiff can be considered part of a continuity of purpose to assert his physical domination over her and to intrude on her peace and tranquility. The trial court found defendant's misconduct toward plaintiff, which appeared to have been escalating, was likely to recur. Defendant does not challenge this finding. We conclude there is sufficient evidence to satisfy the course of conduct requirement of section 527.6.

III

Substantial Emotional Distress

In order for a course of conduct to support an injunction under section 527.6, it "must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the petitioner." (§ 527.6, subd. (b)(3).) Defendant contends there is insufficient evidence either that plaintiff suffered substantial emotional distress as a result of his actions or that a reasonable person would have suffered substantial emotional distress under the circumstances.

For a course of conduct to amount to harassment under section 527.6, there must be evidence the defendant's conduct "'seriously' alarmed, annoyed or harassed [plaintiff] to the extent that the conduct 'actually cause[d] substantial emotional distress'" and would have done so to a reasonable person as well. (*Schild, supra*, 232 Cal.App.3d at p. 762.) "Section 527.6 does not define the phrase 'substantial emotional distress.' However, in the analogous context of the tort of intentional infliction of emotional distress, the similar phrase 'severe emotional distress' means highly unpleasant mental suffering or anguish 'from socially unacceptable conduct' [citation], which entails such intense, enduring and nontrivial emotional distress that 'no reasonable [person] in a civilized society should be expected to endure it.' [Citations.]" (*Schild, supra*, 232 Cal.App.3d at pp. 762-763.)

Schild involved a dispute between neighboring property owners. The defendant cross-complained against the plaintiffs for allowing basketball to be played in the plaintiffs' backyard several times a week for up to 30 minutes each, which playing allegedly "interrupted Saturday and Sunday afternoon naps and, in general, interfered with [the defendant's] ability to rest and relax in [his] own home." (*Schild, supra*, 232 Cal.App.3d at p. 758.) The trial court entered an order enjoining the basketball playing except during certain limited hours. (*Id.* at p. 761.)

The Court of Appeal reversed, finding no substantial evidence that basketball playing during reasonable times of the day for periods of no more than 30 minutes amounted to unlawful harassment under section 527.6. (*Schild, supra*, 232 Cal.App.3d at p. 761.) The court found the evidence was sufficient to establish "that the noise from the [plaintiffs'] basketball playing penetrated the air, offended 'the senses' of the [defendant], invaded [his] 'peace and quiet,' and generally interfered with [his] 'comfortable enjoyment of life and property.'" (*Id.* at p. 763.) However, according to the court, there was "no medical, psychological or other evidence in the record that the sounds of basketball playing, however offensive and annoying, caused the [defendant] 'substantial emotional distress,' within the meaning of . . . section 527.6." (*Ibid.*) But even assuming the defendant suffered substantial emotional distress, the court concluded "the basketball playing in the time, place and manner as described which occurred prior to the

restraining order and injunction would not 'cause a reasonable person to suffer substantial emotional distress.'" (*Ibid.*, italics omitted.) According to the court, "[a] reasonable person must realize that complete emotional tranquility is seldom attainable, and some degree of transitory emotional distress is the natural consequence of living among other people in an urban or suburban environment. [Citation.] A reasonable person must expect to suffer and submit to some inconveniences and annoyances from the reasonable use of property by neighbors, particularly in the sometimes close living of a suburban residential neighborhood." (*Ibid.*) The court concluded, "the [plaintiffs'] basketball playing was not so outrageous, extreme, intense or enduring as to come within the scope of injunctive relief for willful harassment pursuant to section 527.6." (*Ibid.*)

Defendant contends his conduct here was "on par" with that of the defendant in *Schild*. He argues plaintiff failed to present any medical evidence that the actions directed at plaintiff caused her to suffer substantial emotional distress under section 527.6. Further, even if it had, defendant argues, the conduct would not have caused a reasonable person to suffer substantial emotional distress.

Defendant's conduct of throwing a shoe at plaintiff in anger, pushing her off a swing, and retaliating against her by putting a pair of scissors in her face in a threatening manner can hardly be viewed as "on par with" playing a noisy game of basketball that interrupts another's naptime. Defendant's

conduct is more akin to that of the defendant in *Schild* who, on two occasions, sprayed water from a hose onto the plaintiffs' basketball court while it was being used by the plaintiffs. The trial court enjoined that conduct as well, and the defendant did not even appeal that injunction. (*Schild, supra*, 232 Cal.App.3d at pp. 759-760.)

We are aware of no legal requirement that a section 527.6 petitioner provide medical proof of substantial emotional distress. Although the *Schild* court mentioned this as a basis for finding insufficient evidence of substantial emotional distress, it did not base its finding on this deficiency. Defendant cites no other authority for this proposition.

As noted above, the trial court concluded the evidence established defendant's conduct toward plaintiff "is likely to recur in the future," and defendant does not challenge this finding. It is not difficult to see how a 10-year-old who has had food repeatedly stolen from her lunch tray, had a shoe thrown at her in anger, been shoved off a swing, and then threatened with a pair of scissors in retaliation for reporting the swing incident, would suffer substantial emotional distress at the thought of defendant being permitted to come near her. We conclude substantial evidence supports the trial court's implied finding both that plaintiff suffered substantial emotional distress and that a reasonable 10-year-old would have suffered substantial emotional distress under the circumstances.

IV

Exclusion from School

Defendant contends the trial court abused its discretion in barring him from attending Richfield School. However, the injunction was issued in January 2010, when plaintiff and defendant were in the fifth grade. It is now more than two years later and, assuming normal progression, both parties are now in the seventh grade and are no longer attending Richfield School. Hence, defendant's abuse of discretion claim is now moot.

When an event occurs which renders it impossible for the appellate court to grant the appellant any effectual relief whatever, even if it should decide the case in favor of the appellant, the appeal is "moot." (*Consol. etc. Corp. v. United A. etc. Workers* (1946) 27 Cal.2d 859, 863.) "[T]he duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. . . ." (*Ibid.*)

Defendant argues the issue is not moot, because the order continues to require him to stay at least 25 yards away from plaintiff, which effectively means he cannot attend the same middle school as her. However, even assuming the parties sought to attend the same middle school, defendant's argument confuses

the two prongs of the trial court's order. The court prohibited defendant from (1) coming within 25 yards of plaintiff, and (2) attending Richfield School. Defendant contends the second prong was an abuse of discretion. He does not challenge the first prong. Thus, even if we were to grant him the relief requested, the 25-yard restriction would remain. If, as defendant argues, the first prong effectively prohibits him from attending the same middle school as plaintiff, then granting him the requested relief of striking the second prong would avail him nothing. Defendant's claim is therefore moot.

DISPOSITION

The order is affirmed.

HULL, J.

We concur:

RAYE, P. J.

ROBIE, J.