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Opinion following rehearing

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

ROBERT KRELL, Plaintiff and Respondent, v. FLEMING GRAY, Defendant and Appellant.	B169593 (Los Angeles County Super. Ct. No. BS083364)

APPEAL from an order of the Superior Court of Los Angeles County, John P. Shook, Judge. Reversed with directions.

Law Office of Bruce Adelstein and Bruce Adelstein for Defendant and Appellant.

Los Angeles Unified School District, Office of General Counsel, Katrina M. Campbell for Plaintiff and Respondent.

Defendant, Fleming Gray, appeals from a June 18, 2003, order granting an injunction prohibiting civil harassment in favor of plaintiff, Robert Krell. We conclude no injunctive relief could be granted on the grounds that defendant threatened plaintiff and the remainder of the order violates defendant's state and federal constitutional rights to protest the manner in which a public school is operated. We previously issued an opinion reversing the injunctive order under review and remanded for a partial retrial. We then granted defendant's rehearing petition. We now outright reverse the order under review.

First, we must determine the effect of a March 12, 2003, order by Commissioner Scott Gordon denying a Code of Civil Procedure[1] section 527.8 petition by plaintiff's employer, the Los Angeles Unified School District (the district), to enjoin defendant from coming within 100 yards of specified places. The district's petition was filed on January 30, 2003, and assigned case No. BS081010. No temporary orders were issued and the district's petition proceeded to trial on March 12, 2003. The district presented evidence defendant, who was a former long-term substitute teacher, made written threats directed at plaintiff and had engaged in picketing in front of Pacoima Middle School. Commissioner Gordon denied the district's workplace violence petition. Commissioner Gordon found that there was insufficient evidence to link defendant to the threats. Commissioner Gordon found as to the district's assertion defendant made the threats, "I don't think there is any evidence to support this." No appeal was taken by the district from Commissioner Gordon's March 12, 2003, order. Nor was a notice of entry of judgment served.

On May 22, 2003, plaintiff filed a section 526 petition for an injunction prohibiting harassment which was assigned case No. BS083364. Trial was held before Judge John P. Shook on June 18, 2003. Part of the evidence in support of the petition

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1 All future statutory references are to the Code of Civil Procedure.

was that defendant had made written threats directed at plaintiff. On June 18, 2003, defendant interposed no collateral estoppel objection premised on Commissioner Gordon's March 12, 2003, findings. Ordinarily, the failure to assert a collateral estoppel or res judicata objection forfeits the issue. (Code Civ. Proc., § 1908.5; *Rideaux v. Torgrimson* (1939) 12 Cal.2d 633, 638; *Domestic & Foreign Petroleum Co. v. Long* (1935) 4 Cal.2d 547, 562.) However, on June 18, 2003, the date of trial in the present case, Commissioner Gordon's March 12, 2003, order was not yet final. This was because the time period during which the district could have appealed from Commissioner Gordon's March 12, 2003, order had not yet expired. (*Franklin & Franklin v. 7-Eleven Owners for Fair Franchising* (2000) 85 Cal.App.4th 1168, 1174-1175; *National Fire Ins. Co. v. Stites Prof. Law Corp.* (1991) 235 Cal.App.3d 1718, 1726.) Because no notice of entry of judgment was served, the time to appeal expired 180 days after March 12, 2003, well after the June 18, 2003, injunctive order under review. (Cal. Rules of Court, rule 2(a)(3); *Vernon v. Great Western Bank* (1996) 51 Cal.App.4th 1007, 1011.) Hence, during the June 18, 2003, trial, defendant could not rely on collateral estoppel principles. But Commissioner Gordon's March 12, 2003, order is now final. Because it is final, Commissioner Gordon's March 12, 2003, order is now entitled to collateral estoppel effect. (*Saavedra v. Orange County Consolidated Transportation etc. Agency* (1992) 11 Cal.App.4th 824, 829; *Brake v. Beech Aircraft Corp.* (1986) 184 Cal.App.3d 930, 941.)

Collateral estoppel prevents litigation of issues argued and decided in the initial action. (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896; *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341.) Because plaintiff was not a named party in the first action, he may be bound by its outcome only if he was in privity to the district who filed the workplace harassment petition. (*Horwich v. Superior Court* (1999) 21 Cal.4th 272, 285; *Armstrong v. Armstrong* (1976) 15 Cal.3d 942, 951.) The district and its employee, plaintiff, are in privity for collateral estoppel purposes. (*People v. Sims* (1982) 32 Cal.3d 468, 486-487; *Clemmer v. Hartford Insurance Co*. (1978) 22 Cal.3d 865, 875.) Plaintiff

had notice of the district's action, he signed the petition and a supporting declaration which identified written and oral threats. The district's petition asserted that plaintiff was the subject of harassment by defendant. Further, plaintiff testified at the March 12, 2003, trial before Commissioner Gordon. For collateral estoppel purposes, plaintiff, who had notice of and participated in the first action and whose interest of being free from harassment and threats of violence was at issue, was in privity with the district. (*Clemmer v. Hartford Insurance Co*., *supra*, 22 Cal.3d at pp. 875-876; *Lynch v. Glass* (1975) 44 Cal.App.3d 943, 948-949.)

Thus, Judge Shook's June 18, 2003, order cannot be justified based on the threats purportedly made by defendant. All of the threats posited in the district's workplace violence action were made prior to March 12, 2003, the date of Commissioner Gordon's orders. All of the threats linked to defendant in the present civil harassment action brought by plaintiff were made before March 12, 2003, the date Commissioner Gordon denied the district's workplace violence action. Commissioner Gordon's purely factual findings are binding. Hence, Judge Shook's June 18, 2003, injunctive order cannot be legally premised on the threat evidence.

In this regard, there is no issue of pure law which can be the subject of relitigation. The rule allowing relitigation of issues of law in rare circumstances is inapplicable here. (*Arcadia Unified School Dist. v. State Dept. of Education* (1992) 2 Cal.4th 251, 259; *Modesto City Schools v. Education Audits Appeal Panel* (2004) 123 Cal.App.4th 1365, 1379; Rest.2d Judgments, § 28.) This rule is rarely invoked and here the issue is entirely factual—an insufficient justification has been provided to disregard well established collateral estoppel rules.

Second, we agree with defendant that the remaining justification for the June 18, 2003, injunctive order is violative of the First Amendment. There is evidence defendant picketed in front of the school with signs that accused plaintiff, a vice principal who supervises educational operations, of being a racist. The injunction at issue bars picketing within 100 yards of the school where plaintiff was employed at the time of the

trial and mentioning him in a sign. As to the content-neutral aspect of the injunction, the following test is applied: "[W]hen evaluating a content-neutral injunction, we think that our standard time, place, and manner analysis is not sufficiently rigorous. We must ask instead whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." (*Madsen v. Women's Health Center, Inc.* (1994) 512 U.S. 753, 765; see *DVD Copy Control Ass'n, Inc. v. Bunner* (1994) 31 Cal.4th 864, 880.) As to that part of the injunction which prohibits defendant from mentioning plaintiff on a picket sign, we apply the following test: "For the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. *Carey v. Brown* [(1980)] 447 U.S. 455, 461 []." (*Perry Educ. Ass'n v. Perry Local Educators' Ass'n* (1983) 460 U.S. 37, 45; see *DVD Copy Control Ass'n, Inc. v. Bunner*, *supra*, 31 Cal.4th at p. 877.) The injunction at issue fails under both tests. Setting aside the threat evidence which is no longer before us, defendant, who no longer works for the district, has peaceably picketed accusing his former employers of racism and incompetence. There is no evidence defendant has blocked an entrance to the school or picketed plaintiff's residence. No doubt, there is evidence plaintiff has experienced stress because of the picketing and threats which, as noted earlier, are not before us. But the conclusory evidence at issue concerning the picketing is insufficient to permit a court to restrict defendant's constitutional right to protest what he views as an unfairly managed school district. Hence, the trial court could not issue a civil harassment injunction. (§ 527.6, subd. (b)(3); see *Thomas v. Quintero* (2005) 126 Cal.App.4th 635, 662-663.)

Plaintiff argues though that defendant's conduct affects students and the classroom environment and cites evidence to that effect. But as defendant correctly notes, the present petition was brought by plaintiff—not by the district or on behalf of the children. Further, the petition was not filed by any guardian ad litem on behalf of a student. If a petition or some other form of request for injunctive relief were sought by the district or on behalf of the students because of disruption of the learning environment, the result

might be quite different. The First Amendment rights at issue apply very differently when picketing materially interferes with an elementary school classroom environment. (*Grayned v. City of Rockford* (1972) 408 U.S. 104, 117-118; see *Hazelwood School Dist. v. Kuhlmeier* (1988) 484 U.S. 260, 266-267.) However, the petition in this case was filed to forestall harassment of *plaintiff* by defendant. The section 526 petition does not raise the broader issue of interference with the classroom environment.

The June 18, 2003, injunctive order is reversed. The trial court is to enter a new order denying the petition filed May 22, 2003. Defendant, Fleming Gray, is to recover his costs and attorney fees from plaintiff, Robert Krell.

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TURNER, P.J.

We concur:

MOSK, J.

KRIEGLER, J.*

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* Judge of the Superior Court of Los Angeles County, assigned by the Chief Justice pursuant to article VI, section 6, of the California Constitution.