

**No. H026491**  
**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**  
**SIXTH APPELLATE DISTRICT**

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CITY OF SAN JOSE,  
Plaintiff and Respondent

v.

JOHN WEBSTER,  
Defendant and Appellant.

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On Appeal from the Santa Clara County Superior Court  
Case No. 1-01-CV-815401  
The Honorable Thomas Cain

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**RESPONDENT'S BRIEF**

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RICHARD DOYLE, City Attorney (088625)  
NORA FRIMANN, Chief Trial Attorney (93249)  
SANDRA LEE, Deputy City Attorney (203703)  
Office of the City Attorney  
151 West Mission Street  
San Jose, California 95110  
Telephone: (408) 277-4454

Attorneys for Plaintiff/Respondent CITY OF SAN JOSE

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## I. STATEMENT OF CASE

Appellant John Webster brings this appeal to challenge an Injunction issued pursuant to California Code of Civil Procedure section 527.8 by the Honorable Thomas Cain, of the Santa Clara County Superior Court. The City of San Jose (“City”) sought the Injunction on behalf of Police Lieutenant Brenda Herbert because of a threat and course of conduct by Mr. Webster that would put a reasonable person in fear for his or her safety.

## II. STANDARD OF REVIEW

The primary issue presented is whether the trial court’s findings and the Order granting the permanent injunction are supported by substantial evidence. If the trial court’s determination is supported by substantial evidence, it will be upheld on appeal. *Santoro v. Carbone* (1972) 22 Cal.App.3d 721, 728. In conducting a substantial evidence review, the appellate court must resolve all factual conflicts and questions of credibility in favor of the prevailing party, and draw all reasonable inferences in support of the trial court’s findings. *Schild v. Rubin* (1991) 232 Cal.App.3d 755, 762. “[W]hen two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court.” *Bowers v. Bernards* (1984) 150

Cal.App.3d 870, 873–74. The reviewing court must uphold the injunction if, on the entire record, there is any reasonable, credible evidence, contradicted or uncontradicted, which supports the findings and the final order. *Lenk v. Total–Western, Inc.* (2001) 89 Cal.App.4th 959, 968; *Schild v. Rubin, supra*, 232 Cal.App.3d at 762.

The second issue presented is whether the trial court’s grant of a protective order prohibiting the deposition of Brenda Herbert was an abuse of discretion. The standard of review for a discovery order is abuse of discretion because management of discovery lies within the sound discretion of the trial court. *People v. Superior Court (Cheek)* (2001) 94 Cal.App.4th 980, 987; *Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, 380. The trial court’s exercise of discretion cannot be disturbed where there is a basis for the ruling and it is supported by the evidence. *Johnson v. Superior Court* (2000) 80 Cal.App.4th 1050, 1061.

### **III. PROCEDURAL BACKGROUND**

On March 12, 2003, the City of San Jose filed an ex parte petition, supported by various declarations, with the Santa Clara County Superior Court for a temporary restraining order against Mr. Webster to protect the City’s employee, Police Lieutenant Brenda Herbert. [Clerk’s Transcript (“CT”):1–59] The restraining order was

issued by Judge Thomas Cain on that date, along with an Order to Show Cause as to why the injunctive relief which was simultaneously requested should not be granted. A hearing was noticed for March 21, 2003. [CT:60–63] Service of the application, including the declarations, and the Order to Show Cause and Temporary Restraining Order was effected on Mr. Webster on March 12, 2003. [CT:64–65]

Subsequently, the hearing date was continued by stipulation to May 23, 2003, with the temporary restraining orders remaining in effect. [CT:66–70] The hearing was again continued by stipulation, with the restraining orders remaining in effect, to July 25, 2003, to allow for briefing and hearing on a motion for protective order. [CT:72–77]

On May 23, 2003, the City of San Jose filed a motion for a protective order relative to the deposition of Brenda Herbert, noticed by counsel for Mr. Webster, seeking to prevent the deposition, or in the alternative, to place certain limits on the deposition. [CT:79–100] Mr. Webster's opposition to the motion was filed on June 3, 2003 [CT:102–118, 127–128], and the City's reply was filed on June 5, 2003 [CT:119–126]. The hearing was held on June 13, 2003, and the motion was granted. [Reporter's Transcript ("RT"):20] A written order was signed on June 30, 2003 and filed on July 9,

2003. [CT:130–131] Notice of the Entry of Order was filed on July 15, 2003. [CT:132–135]

On July 25, 2003, the hearing on the Petition of the City of San Jose for an Injunction Prohibiting Violence or Threats of Violence Against Employee (CLETS) took place. The Petition was granted, and an Order After Hearing on Petition of Employer for Injunction Prohibiting Violence or Threats of Violence Against Employee was issued on that date by Judge Cain. [CT:136–138] A Notice of Appeal was filed by Mr. Webster on September 18, 2003. [CT:140–141]

#### **IV. FACTUAL BACKGROUND**

For years, Mr. Webster persistently harassed San Jose Police Lieutenant Brenda Herbert, arguably defaming her in mailings, on his website, and on a “mobile billboard” that he drove around the City of San Jose. The City sought injunctive relief to protect its employee from the Appellant following an escalation of the harassment of Lt. Herbert sufficient enough to cause concern about her safety and that of other employees at her workplace. The facts of the threats and harassment do not appear to be disputed in any significant way by Mr. Webster.<sup>1</sup> Instead, he argues that the threats

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<sup>1</sup> Indeed, Mr. Webster confirms his activities in his February 22, 2003 letter. [CT:10–12]

and course of conduct were justified and served a legitimate purpose, thereby precluding the injunctive relief sought by the City. As discussed in further detail below, the activities of Mr. Webster that are the subject of the Injunction do not serve a legitimate purpose, and the Injunctive relief allows him to pursue protected activities despite his motives or the accuracy of his “beliefs.”

During 1990, in the course of her duties as a police officer, Brenda Herbert was involved in a sting operation related to the investigation of possible child exploitation. Her involvement was limited to speaking on the telephone with Mr. Webster. During the calls, which were recorded, Mr. Webster made statements about a plan involving sexual relations with his children. Mr. Webster was subsequently prosecuted and entered a plea of no contest to a felony charge of child pandering. [CT:24–27]

In September 1994, Glenn McCourtie (a colleague of Lt. Herbert) had occasion to learn of the obsession of Mr. Webster that would resurface time and again for many years. While working security, in police uniform, at a San José shopping mall, Lt. McCourtie was approached by Mr. Webster. Mr. Webster spoke to Lt. McCourtie at length about Lt. Herbert and the 1990 criminal case. At the time, Lt. McCourtie was concerned enough about Mr. Webster’s intensity and fixation with Lt. Herbert that he advised her

of the incident. In his declaration supporting the Petition, Lt. McCourtie stated that he believed Mr. Webster was acting “strange” and “paranoid.” [CT:16–17–]

The following year, Mr. Webster began to take more overt action directed at Lt. Herbert. In September 1995, Mr. Webster went to the Police Department and left a “reward” poster accusing Lt. Herbert of altering evidence. [CT:19–20, 37] Similar flyers were distributed to the public at a local bar and dance club and through the mail. [CT:19] In January 1996, Mr. Webster again went to Lt. Herbert’s place of employment and left additional documents related to his accusations against her. [CT:19]

At about the same time, Mr. Webster developed a website devoted in part to condemning Lt. Herbert, which includes (1) a copy of a declaration that Lt. Herbert signed regarding Appellant’s 1990 criminal conviction, (2) the undercover tape recordings of the conversations between Appellant and Lt. Herbert leading up to Appellant’s arrest, (3) Appellant’s views about sexual fantasies and the propriety of arranging sexual experiences for his own children, and most recently (4) a request to readers of the website for the addresses of Lt. Herbert and any of her family members. [CT:19–35]

After some time passed, Mr. Webster resumed more direct communications, sending items directly to Lt. Herbert at her workplace. In July 1999, Mr. Webster mailed a postcard to Lt. Herbert challenging her to a “duel to the truth.” [CT:29] In the fall of 2000, Lt. Herbert received a flyer from Appellant, who was then running for Assembly as a Libertarian candidate. [CT:41–42] The campaign mailer referred to Lt. Herbert with a sketch purportedly of her, and accused her of editing the tapes used in his criminal case more than a decade earlier. In June 2001, Lt. Herbert received a copy of the Libertarian newsletter “Frontiersman” at her workplace with a note that she was mentioned in Appellant’s article in that issue. [CT:44–45]

In January 2002, Mr. Webster subpoenaed Lt. Herbert to testify at his trial before the United States Tax Court. The Internal Revenue Service had brought an action against Mr. Webster for failure to pay taxes. Mr. Webster claimed that he did not have to pay taxes, and that in fact, the government owed him money as a result of the allegedly wrongful prosecution in 1990. He sought to compel Lt. Herbert to testify and admit her alleged wrongdoing back in 1990. [CT:49] The City of San Jose filed a motion to quash the subpoena on behalf of Lt. Herbert which was granted. [CT:49–52]

Several months later, beginning around August 2002, Appellant repeatedly circled Lt. Herbert's workplace in a large truck with an over-sized billboard-like sign that stated, "San Jose BAD COPS Starring Lt. Brenda Herbert ALTER EVIDENCE." Mr. Webster was observed sitting in his parked truck across from the police department looking through binoculars at employees as they left the office. [CT:47, 53-54]

Mr. Webster then took the next steps, sending a lengthy letter to Lt. Herbert and appearing at her home. On February 24, 2003, Appellant hand-delivered to Lt. Herbert's workplace a disturbing and rambling letter in which he blamed Lt. Herbert, who he had thought might have been his "soul mate," for causing his estrangement from his children. In the letter, he insisted that she confess the past wrongs against him, and suggested that afterward, they might write a book together. He also, for the first time, confessed that he had "gone to all the trouble with all the flyers, handouts, billboard truck, and the web-site" in the hope that Lt. Herbert would sue him for defamation. Then, he could get her on the witness stand to vindicate himself and would sue her, the police department and the City. [CT:10-12] Mr. Webster also enclosed with the letter a flyer with her husband's name and their home address printed on it. In the flyer, Appellant stated, "Lt. Herbert sells her soul." Mr. Webster

referred to Lt. Herbert as “the face of EVIL,” and warned, “Bad cops turn good citizens into Terrorists.” He also stated, “This is what was happening to cause the Oklahoma bombing where hundreds of innocent people were killed as ‘collateral damage’ in an effort to send a message....” [CT:13–15] That same month, Mr. Webster and a companion appeared at the Herberts’ home on two different occasions. [CT:7–8]

The City of San Jose subsequently sought and obtained a temporary restraining order and injunction preventing Mr. Webster from contacting Lt. Herbert and from coming within 300 yards of Lt. Herbert’s workplace and home.

## **V. ARGUMENT**

### **A. SUBSTANTIAL EVIDENCE SUPPORTED THE ISSUANCE OF THE INJUNCTION.**

The standard for reviewing the subject injunctive relief is the “substantial evidence” test. *Santoro v. Carbone* (1972) 22 Cal.App.3d 721, 728. In this case, the City submitted various declarations establishing a threatening course of conduct by Mr. Webster. In fact, Mr. Webster does not dispute that he intentionally set about to harass Lt. Herbert. The City also submitted evidence of threatening statements by Mr. Webster. When questioned by Judge Cain at the hearing, Mr. Webster’s response confirmed that it was

reasonable to conclude that Lt. Herbert, and possibly other City employees at her place of employment, were potentially at risk of harm. [CT:54–56]

The workplace violence safety statute authorizes an employer to seek a restraining order on behalf of an employee when the employee has “suffered unlawful violence or a credible threat of violence from any individual, that can reasonably be construed to be carried out or to have been carried out at the workplace.” (Code Civ. Proc., § 527.8(a)) The City based its application on a credible threat of violence, not actual unlawful violence, by the Appellant. Under the statute, a “credible threat of violence” is based on an objective, not a subjective, standard: “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....” (Code Civ. Proc., § 527.8(b)(2)) The course of conduct that underlies a credible threat may include: following or stalking an employee to or from the place of work, entering the workplace, following an employee during hours of employment, or sending correspondence to an employee by any means. (Code Civ. Proc., § 527.8(b)(3)) In addition to his use of threatening statements, the City alleged that Appellant engaged in these kinds of activities, including loitering around Lt. Herbert’s workplace and

home, entering her workplace, and sending correspondence directly to her and to others about her.

- 1. *The record establishes clear and convincing evidence of a course of conduct that would place a reasonable person in fear for his or her own safety.***

The factual support for the City's Petition is set out in detail in Section IV above. On review, the appellate court is to resolve factual conflicts and questions of credibility in favor of the prevailing party, and draw all reasonable inferences in support of the trial court's findings. *Schild v. Rubin* (1991) 232 Cal. App. 3d 755, 762. The record provides substantial evidence supporting the trial judge's issuance of the Injunction based on clear and convincing evidence that the appellant made a credible threat of violence. (Code Civ. Proc., § 527.8(f))

The City submitted several declarations setting forth evidence of conduct by Mr. Webster that began almost a decade before the injunctive relief was sought. The time frame during which the activity took place is part of the evidence that would place a reasonable person in fear for his or her safety; the activity did not cease with time, but instead increased.

The evidence of the "course of conduct" required under Code of Civil Procedure section 527.8(b)(2) was set forth in the declarations supporting the petition and included:

1. Discussions in September 1994 with a uniformed police officer about Lt. Herbert which caused the officer to be concerned enough about Lt. Herbert's safety to advise her of the nature of the contact with Appellant [CT:17];
2. A "reward" poster dropped off at the police department in September 1995 by Appellant which accuses Lt. Herbert of altering evidence [CT:19–20, 37];
3. A petition left at Lt. Herbert's office in January 1996 for San Jose police officers to sign along with a copy of his letter to the Grand Jury foreperson requesting an investigation into his claims of police misconduct [CT:19];
4. A website that the Appellant has maintained since 1996 which includes documents from his trial and post-trial motions, the tape recordings leading to his arrest, a photograph of a police department employee he thought was Lt. Herbert, and various writings of the Appellant dealing with his beliefs and his assertion that he was wrongfully prosecuted [CT:19–20, 21–35];

5. A postcard mailed from Appellant to Lt. Herbert at her workplace challenging her to a “duel to the truth” [CT:19–20, 29];
6. A flyer was sent to Lt. Herbert by Appellant in the fall of 2000 accusing her of editing tapes and containing a sketch of her face [CT:19–20, 41–42];
7. A copy of a newsletter sent by Appellant to Lt. Herbert in June 2001 with a notation that she was mentioned in an article he had written that was published in the newsletter [CT:19–20, 44–45];
8. A photograph of Appellant parked outside the police department, and a declaration of an officer summarizing her observations of his vehicle (mobile billboard) being parked at the department [CT:19, 47, 53–54];
9. A flyer provided to a San Jose police officer<sup>2</sup> from an acquaintance with the last name of “Herbert” in February 2003 which was sent by Appellant to

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<sup>2</sup> Paragraph 3 at page 1, line 23, of this declaration contains a typographical error indicating that the flyer was received by the declarant in 2002 rather than the correct year, 2003. This error

“Herbert Family Members” containing his allegations of police misconduct, alterations of the tapes, and the statement “Bad Cops turn good citizens into Terrorists” which referred to the Oklahoma City bombing of a government building and the killing of innocent people as “collateral damage” [CT:2–6];

10. Two visits to Lt. Herbert’s home [CT: 7–8]; and
11. A flyer similar to that sent to the family member referenced in point 9 above addressed to Lt. Herbert’s husband, as well as a lengthy letter from Mr. Webster addressed to Lt. Herbert, were delivered to the police department in February 2003 [CT:7–15].

In addition, Appellant attempted to subpoena the lieutenant to Tax Court, but the subpoena was quashed. [CT:48–52]

This ongoing campaign of Appellant was justified by him as an effort to get Lt. Herbert to testify under oath that she, in fact, altered tapes in connection with the 1990 criminal prosecution against him. This rationale ignores the fact that Brenda Herbert testified under

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was clarified on the record at the hearing before Judge Cain who noted that the postmark on the document was 2003. (RT:30:11-18)

oath at Appellant's preliminary hearing on June 18, 1990 and at that time she could have been cross-examined about the tapes [CT:26–27], and that she stated under oath in a declaration dated January 3, 1992, that she did not alter the recordings of her telephone conversations with the Appellant that were used in the prosecution of him. [CT: 26]

In addition to this course of conduct, Mr. Webster made a knowing or willful statement that would place a reasonable person in fear for his or her own safety. In the flyer sent to Lt. Herbert's husband [CT:14], Appellant states "Bad Cops turn good citizens into Terrorists". He writes that when police officers like Lt. Herbert alter evidence, they "unavoidably destroy the lives of a few good citizens" and that "[t]he once 'good citizen' is left with no way to get a peaceful redress of grievances." He continues that "[t]his is what was happening to cause the Oklahoma bombing where hundreds of innocent people were killed as 'collateral damage' in an effort to send a message...."

Code of Civil Procedure section 527.8(a) provides that an employer can seek a temporary restraining order and an injunction on behalf of an employee who has suffered unlawful violence or a credible threat of violence from any individual. A "credible threat of violence" is defined at Code of Civil Procedure section 527.8(b)(2)

as being one of two things: "...a knowing or willful statement **or** a 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." (Emphasis added.) The record provides substantial, clear and convincing evidence of both.

At the hearing, the Court asked many questions and verbally considered the arguments of counsel. In addition to the written evidentiary record and arguments of counsel, Judge Cain spoke with Mr. Webster at the hearing and specifically asked him about the reference to Oklahoma City as follows:

"The Court: What I don't understand is why was there a necessity to make the reference to Oklahoma City. I mean, if — everything you say may be true. And you — let's say that was the objective you were trying to achieve; but if you had dropped out that phrase, it still would have presented the same issue, calling for the same type of action.

...

The Court: Why did you put in that phrase?...

The Court: Because if your intent was to encourage her friends and neighbors to confront her with these bad cop issues, I mean, that's all said up to that point, and certainly after that point. But why the reference to Oklahoma City? I mean, there was no issue like that associated with Oklahoma City. Oklahoma City was just a pure act of violence, and not violence directed at any individual or any particular department. It was directed at a building that housed all kinds of governmental activity, including daycare. It was done without consideration of any aspect that you are trying to focus in as to one individual.

Mr. Webster: I'm saying – well, that was brought about by a frustration against a government gone bad. And that – in trying to essentially let her neighbors know that there's – really isn't something you can ignore.

The Court: So the same type of frustration Mr. McVeigh felt toward his government?

Mr. Webster: That's the type I'm talking about.

The Court: Okay. Well, you just hung yourself Mr. Webster.

...

The Court: I'm going to determine by clear and convincing evidence that we do have two acts course-of-conduct-wise that demonstrate a credible threat of violence.”

(Reporter's Transcript, page 54, line 23 through page 56, line 9.)

On review, the court should not substitute its inferences deduced from the facts for that of the trial court. *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873–74. In addition, the reviewing court must uphold the injunction if, on the entire record, there is evidence which supports the findings and the final order. *Lenk v. Total–Western, Inc.* (2001) 89 Cal.App.4th 959, 968. In this case, the inferences drawn by the trial judge, as well as all of the evidence before him, support the issuance of the injunctive relief, and that decision should not be overturned on appeal.

**2. *No legitimate purpose was served by the conduct of the appellant for which injunctive relief was sought.***

Mr. Webster claims that his activities are protected by the First Amendment and serve the “legitimate purpose” of exposing police misconduct. A potential defense to the subject injunction is that the conduct to be restrained serves a legitimate purpose. (Code Civ. Proc., § 527.8(b)(2).) However, the City did not seek to enjoin Mr. Webster from petitioning the government or anyone else about his grievances arising out of the 1990 prosecution, as annoying and harassing as that activity may have been to Lt. Herbert and those close to her. The City only sought to enjoin Mr. Webster from further harassing and threatening conduct toward Lt. Herbert directly. Even assuming that Mr. Webster has a valid grievance against Lt. Herbert arising out of the 1990 criminal investigation, that would not render legitimate a pattern of harassing, threatening behavior.

For years, Mr. Webster carefully navigated his course of harassment to arguably qualify his actions as protected speech and take advantage of that safe harbor. Even if the statements about Lt. Herbert that he published in the press and on the Internet, to city residents and to her co-workers, were defamatory, her recourse would have been to bring a defamation action, which, Mr. Webster revealed, was his intent and desire. [CT:10–12] However, whatever

protections may have shielded some of his prior actions from restraint, Mr. Webster's activities ultimately became threatening.

As important as the First Amendment guarantees are, "the right to free speech is not absolute." *Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 134. See also *In Re M.S.* (1995) 10 Cal.4th 698, 710; *USS–Posco Industries v. Edwards* (2003) 111 Cal.App.4th 436, 445. The California Supreme Court has recognized, "The state may penalize threats, even those consisting of pure speech, provided the relevant statute singles out for punishment threats falling outside the scope of First Amendment protection." *Id.* (citations omitted). "While the right to free speech guarantees a powerful right to express oneself, it does not include the right to repeatedly invade another person's constitutional rights of privacy and the pursuit of happiness through the use of acts and threats that evidence a pattern of harassment designed to inflict substantial emotional distress." *People v. Borrelli* (2000) 77 Cal.App.4th 703, 860 (upholding stalking statute Pen. Code, § 646.9 against First Amendment challenge as "[t]he aim and effect of th[e] statute are not to suppress speech, but to protect individuals in the exercise and enjoyment of their constitutional rights from invasive, oppressive conduct that infringes on those rights").

Appellant justifies his activities with respect to Lt. Herbert by claiming that he is merely acting on his First Amendment rights concerning what he believes was a wrongful prosecution of him in 1990. He “believes” that Lt. Herbert tampered with tape recordings of conversations that occurred between him and her in an undercover operation in which she was involved as a San Jose police officer, and he “believes” that he can provoke her into admitting wrongdoing. This motive of Mr. Webster is the basis for his assertion that his activities serve a “legitimate purpose” and therefore, pursuant to Code of Civil Procedure section 527.8(b)(2), his actions cannot be enjoined. This argument fails for one simple reason: The restraint sought by the City does not preclude Mr. Webster from petitioning his government or exercising his First Amendment rights; it merely prohibits him from engaging in certain conduct that was a credible threat of violence and which did not advance his asserted legitimate purpose. Mr. Webster can continue to petition governmental officials, he can drive his truck and billboard throughout all of San Jose with the exception of a 300 ft. radius of the police department and Lt. Herbert’s house, he can continue to post information on his website about the wrongs that he believes were committed against him, he can write letters and

articles, and make speeches. He cannot, however, continue his threatening and harassing behavior towards Lt. Herbert.

**B. THE COURT DID NOT ABUSE ITS DISCRETION IN GRANTING THE PROTECTIVE ORDER FOR THE DEPOSITION OF BRENDA HERBERT.**

The City of San Jose brought a motion for protective order in connection with the deposition of Brenda Herbert. Following a hearing, the motion was granted on the ground that the taking of the deposition would cause the deponent unwarranted annoyance, embarrassment or oppression, and that the deposition testimony sought was not calculated to lead to the discovery of admissible evidence. [CT:130] On appeal, the standard of review for a discovery order is abuse of discretion (*People v. Superior Court (Cheek)* (2001) 94 Cal.App.4th 980, 987), and the trial court's exercise of discretion cannot be disturbed where there is a basis for the ruling and it is support by the evidence. (*Johnson v. Superior Court* (2000) 80 Cal. App.4th 1050, 1061.)

The clearly stated purpose for taking the deposition was to question Lt. Herbert, under oath, about her participation in the criminal investigation and 1990 prosecution of John Webster. [CT:112–115] The motion was sought because the subject matter of the testimony was irrelevant, the deposition was calculated to harass, annoy and intimidate Brenda Herbert, and because Code of

Civil Procedure section 527.8 did not require a subjective finding of fear so discovery on that issue would be irrelevant. The City sought to preclude the deposition, or in the alternative, to put appropriate restrictions on the conduct of the deposition.

Code of Civil Procedure section 2017(a) provides that discovery is limited to matters relevant to the pending action. Code of Civil Procedure section 2025(i) confers on trial courts broad power to enter a protective order to prevent deposition discovery from causing “unwarranted annoyance, embarrassment, or oppression, or undue burden and expense” to any party, deponent, or other natural person. (Code Civ. Proc., § 2025(i).) The moving party must show that these factors outweigh the likelihood that the information sought will lead to the discovery of admissible evidence. *Emerson Electric Co. v. Superior Court* (1997) 16 Cal.4th 1101, 1110 (citing Code Civ. Proc. § 2017(c)).

The protective order may include any order that justice requires, including an order that the deposition not be taken at all, that the deposition be taken on certain specified terms and conditions, that certain matters not be inquired into, that the scope of certain matters not be inquired into, and that all or certain of the documents designated in the notice of deposition not be produced. (Code Civ. Proc., §§ 2025(i)(1), (5)–(6), (9)–(11).) Courts may

prohibit a deposition when the testimony sought from a deponent is irrelevant to the issues in the case. *Home Savings Bank v. Gilliam* (9th Cir. 1991) 952 F.2d 1152, 1157–58 (preventing deposition when proposed testimony irrelevant to issue of liability).

In applying for the temporary restraining order and injunction, the City did not submit a declaration from Lt. Herbert, but instead relied on declarations of others with personal knowledge of Mr. Webster's actions. Those actions, documented by Lt. Herbert's co-workers and husband, would place a reasonable person in fear for her safety and the safety of those near her at home and at work. (Code Civ. Proc., § 527.8(b)(2).) Lt. Herbert's testimony was not necessary to the City's application because the workplace violence statute no longer includes a subjective component on the part of the victim. The legislature removed subjective fear as an element when the statute was amended in 1998.<sup>3</sup> Consequently, Lt. Herbert's

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<sup>3</sup> Previously "a credible threat of violence" was defined as a threat intended to cause, and actually causing, a person to believe that he or she was under a threat of death or serious bodily injury. *City of Palo Alto v. Service Employees International Union Local 715* (1999) 77 Cal.App.4th 327, 336, n.5. Now, "a credible threat of violence" is defined as 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 serves no immediate legitimate purpose." *Id.* (quoting Code Civ. Proc., § 527.8(b)(2)).

deposition testimony was neither necessary nor appropriate in this case.

The provisions of Code of Civil Procedure section 527.8 are different from provisions found in Code of Civil Procedure section 527.6 (allowing individuals to obtain restraining orders) which require a showing of substantial emotional distress to the plaintiff.

Accordingly, the City of San Jose's efforts to enjoin continued threats by Mr. Webster in this matter was not dependent upon the subjective experience of Lt. Herbert. The City's remedies under Code of Civil Procedure section 527.8 stem from the City's concern about potential workplace violence and the protection of its employees.

Appellant's effort to depose Lt. Herbert about her subjective feelings, or a sense of being threatened, was nothing more than an effort to confront and question her, on matters irrelevant to this action.

The trial court recognized that this action, brought by the City of San Jose, should not be used by Mr. Webster to question Lt. Herbert about events that occurred long ago in conjunction with her police duties. Her involvement in that prosecution is irrelevant to the protection sought by the City of San Jose because of Mr. Webster's inappropriate and threatening statements and conduct.

As evidenced by Mr. Webster's own words, the deposition was to be no more than another vehicle of harassment. It has apparently

been his desire for years to put Lt. Herbert “on the stand” to confront her with his accusations that she altered evidence against him.<sup>4</sup> Mr. Webster has persistently sought to provoke Lt. Herbert so that she might sue him for defamation to allow him to re-litigate issues that were rendered moot by his plea. [CT:10–12] He sought to get her on the stand in his case with the IRS for failure to pay taxes. Having failed in those efforts, he attempted to use the City’s petition for an injunction to depose her. The purpose of the protective order provisions is precisely “to give a court the power to issue protective orders to prevent discovery abuses.” *Lowy Development Corporation v. Superior Court (Fontenla)* (1987) 190 Cal.App.3d 317, 321. The trial court reasonably exercised its discretion in precluding this discovery.

**C. APPELLANT WAIVED THE ARGUMENT THAT THE TRIAL JUDGE SHOULD HAVE RECUSED HIMSELF.**

Despite the fact that Appellant never moved to have the trial judge disqualified, Appellant appears to argue that Judge Thomas Cain erred by not recusing himself.

Code of Civil Procedure section 170.3(c)(1) sets forth the procedure for disqualifying a judge, which “must be asserted at the ‘earliest practicable opportunity’ after learning of the grounds

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<sup>4</sup> Again, this motive of Appellant disregards Lt. Herbert’s

therefore, otherwise it is deemed waived. [Citations.]” *Lagies v. Copley* (1980) 110 Cal.App.3d 958, 966, disapproved on other grounds in *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 738, fn. 23. Appellant’s counsel could have urged disqualification at the time that he became aware that the trial judge had signed the search warrants and order to seal the search warrant documents in Appellant’s criminal case more than ten years earlier, but he did not. Therefore, Appellant has waived any claim regarding disqualification. *Lagies v. Copley, supra*, 110 Cal.App.3d at 966.

Moreover, there is nothing in the record that indicates any bias by the trial court. There is no evidence that Judge Cain had any recollection of Appellant or his criminal case, let alone that the limited involvement in the criminal case affected his decision granting the injunction in this case. In fact, Judge Cain stated that although he reviewed the present case at great length, nothing triggered any recollection of Appellant; nor did counsel’s alerting him to this limited involvement in the criminal case jog his memory. [RT:21–23] Appellant’s counsel did not object to Judge Cain proceeding with the trial and indicated that he had brought the matter to the judge’s attention to give him an opportunity to recuse himself if he had any memory of it and if necessary. [RT:21–22]

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testimony on this issue, under oath, on two occasions in the past.

Under the circumstances of this case, Judge Cain was not required to recuse himself. By failing to make a timely objection or motion for disqualification, Appellant waived these arguments on appeal.

## **VI. CONCLUSION.**

Substantial evidence exists to support the injunctive relief granted in this matter, and the trial judge's orders should be upheld. In addition, the trial judge did not abuse his discretion in granting the protective order precluding the deposition. The City of San Jose had more than adequate grounds to seek to protect its employee and workplace in the face of threatening statements and conduct. This is particularly true when the statements were intended to evoke senseless, tragic violence against government employees.

Respectfully submitted this 16th day of July 2004.

RICHARD DOYLE, City Attorney

By \_\_\_\_\_  
NORA FRIMANN  
Chief Trial Attorney

Attorneys for Plaintiff/Respondent  
CITY OF SAN JOSÉ

**CERTIFICATE OF COMPLIANCE**

Pursuant to California Rule of Court 14(c)(1), I certify that the Respondent's Brief, filed herewith, is proportionately spaced, has a typeface of 13 points, and contains approximately 6,000 words.

Dated: July 16, 2004.

RICHARD DOYLE, City Attorney

By \_\_\_\_\_

NORA FRIMANN  
Chief Trial Attorney

Attorneys for  
Plaintiff/Respondent  
CITY OF SAN JOSE

## PROOF OF SERVICE

I, the undersigned say: I am a citizen of the United States, over 18 years of age, a resident of the County of Santa Clara, and not a party to the within action. My business address is 151 West Mission Street, San Jose, California 95110.

On July 16, 2004, I caused to be served the within:

## RESPONDENT'S BRIEF

by causing to be personally delivered the **original and 4 copies** thereof to:

Courts of Appeal  
Sixth Appellate District  
333 West Santa Clara Street, Suite 1060  
San José, CA 95113

and

by placing the **five true copies** thereof enclosed in a sealed envelope, with postage thereon fully prepared, for collection and mailing at my place of business following ordinary business practices. Said correspondence will be deposited with the United States Postal Service at San Jose, California, in the ordinary course of business; and there is United States mail at the place so addressed.

Supreme Court  
State of California  
350 McAllister Street, Room 1295  
San Francisco, CA 94102

and

by placing the **true copies** thereof enclosed in a sealed envelope, with postage thereon fully prepared, for collection and mailing at my place of business following ordinary business practices. Said correspondence will be deposited with the United States Postal Service at San Jose, California, in the ordinary course of business; and there is United States mail at the place so addressed.

Clerk of the Court  
Superior Court of California  
County of Santa Clara  
191 N. First Street  
San José, CA 95113

**One Copy**

John Webster  
1556 Halford, #132  
Santa Clara, CA 95051  
Tel: (408) 972-2963

Defendant/Appellant  
**Two Copies**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on July 16, 2004, at San Jose, California.

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BRANDE HALL GEX