SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN LUIS OBISPO

PASO ROBLES BRANCH

GEOFFREY WALLACE, Petitioner, v. WILLIAM FORTINGTON, Respondent.	**CASE NO. 14CVP-0291** **RULING AND ORDER DENYING RESPONDENT'S REQUEST FOR DISCOVERY**

The issue before the Court is whether Respondent William Fortington ("Fortington") should be allowed to take the deposition of Petitioner Geoffrey Wallace ("Wallace") in this petition seeking a protective order for elder abuse under Welfare and Institutions Code sections 15610.07 and 15657.03 ("Elder Abuse Statute").

The Elder Abuse Statute provides, in pertinent part, that elder adults who have suffered abuse may seek protective orders enjoining individuals from abusing, intimidating, or threatening them. (Welfare and Institutions Code §§15657.03 and 15610.07(a) and (b).)

Temporary protective orders may be sought on an ex parte basis under CCP section 527, and judges, with few exceptions, are required to grant or deny these requests on the day they are filed. (*Id*. §15610.07 (e).) Protective orders must be personally served on the

respondent in the same manner as a summons in civil actions. (*Id*., §15610.07(k); California Rules of Court, Rule 3.1152 (c).)

Absent "good cause," temporary protective orders can last no more than 21 days, at which time a hearing must be held. (*Id*., §15610.07(d) and (f).) Individuals subject to temporary protective orders may obtain one 15-day continuance in order to prepare for the hearing, during which time temporary protective orders remain in effect. (CCP §527.) Additional continuances are available based on the "good cause" standard. (California Rules of Court, Rule 3.1152 (e).)

Upon proof by a preponderance of evidence after hearing, a petitioner may receive up to a five-year protective order, which may be renewed for an additional 5 years, or permanently, even without a showing of additional abuse. (Welfare and Institutions Code §15610.07 (i).) A restrained party must relinquish his or her firearms and is subject to criminal prosecution for willful disobedience of a protective order. (*Id*. §§15610.07(t) and (u).) The prevailing party may be awarded costs and attorney's fees. (*Id*. §15610.07(s).)

On November 18, 2014, Wallace, a 72-year-old retired sociology professor from UCSB, filed a six page declaration claiming that Fortington, a neighbor who lives on an adjoining 40-acre tract of land, has been harassing him and his wife in connection with a trespassing dispute that has been escalating out of control since 2011. That same day, pursuant to his ex parte application, Wallace obtained a Temporary Restraining Order forbidding Fortington from having any contact with Wallace and enjoining Fortington from going near Wallace's property until an evidentiary hearing scheduled for December 12, 2014. By agreement, the evidentiary hearing has been re-scheduled for February 23, 2015.[1]

Fortington contends that he is entitled to take a deposition because a petition is a "special proceeding of a civil nature" under CCP §2016.020 and, therefore, an "action" subject to the Civil Discovery Act of 1986, CCP §2017.010. (*See, e.g., Hung v. Wang* (1992) 8 Cal.App.4th 908, 924 (conspiracy claim against attorney is "special proceeding of a civil

[1] By stipulation, the parties are using the expedited Pretrial Discovery Conference procedures set forth in the Standing Case Management Order for civil cases in Department P1.

nature," and therefore an "action" within the meaning of the Civil Discovery Act); *Leake v. Superior Court* (2001) 87 Cal.App.4th 675, 680, *disapproved of on other grounds in People v. Yartz* (2005) 37 Cal.4th 529 (Sexually Violent Predator Act is a civil proceeding subject to the Civil Discovery Act).)

Relying on case law and guidebook authority, Wallace responds that discovery is not authorized under the Elder Abuse Statute, and that allowing a deposition to go forward would undermine the expedited hearing process of that statute. (See, e.g., *Thomas v. Quintero* (2005) 126 Cal.App.4th 635, 650 and fn.11; *Schraer v. Berkeley Prop. Owners' Assn.* (1989), 207 Cal.App.3d 719, 732-33 and fn. 6; California Practice Guide, Civil Pro. Before Trial (The Rutter Group) §9:699.3. ("No discovery: There is no provision for discovery in §527.6 proceedings. Indeed, because the hearing date is so prompt … there is no time to conduct discovery") .)

Although no case directly addresses whether discovery is available as a matter of right under the Elder Abuse Statute, the *Schraer* and *Thomas* decisions involve related procedural issues under CCP §527.6, the statute for obtaining protective orders for unlawful harassment. Since CCP section 527.6 parallels the Elder Abuse Statute, these authorities deserve careful examination. [2]

In *Schraer v. Berkeley Prop. Owners' Assn.*, 207 Cal.App.3d at 732-33, the court considered whether oral testimony was required during a restraining order hearing under CCP section 527.6. The court used "fundamental rules of statutory construction" in order to "effectuate the purpose of the law" while giving "a reasonable and common sense interpretation consistent with [its] purpose," and taking "public policy" into account, [while giving] great weight to consistent administrative construction." Doing so, the court concluded that oral testimony was required under the facts presented:

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[2] While nuances exist, there are many similarities among the statutes authorizing protective orders to prevent civil harassment, workplace violence, private postsecondary school violence, and elder or dependent adult abuse. (See, e.g., CCP §§527.6, 527.8, and 527.85, and Welfare and Institutions Code §15657.03; California Rule of Court, Rule 3.1152.)

> "Code of Civil Procedure section 527.6 must be interpreted as setting forth a procedure for what is in effect a highly expedited lawsuit on the issue of harassment. Although an initial temporary restraining order may be obtained ex parte on affidavit, the statute requires a more formal procedure for obtaining what approximates a permanent injunction.
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> This more formal procedure is required by due process. The injunction issued under the statute at issue is quite different from the kind of injunction issued under Code of Civil Procedure section 527, subdivision (a). Although the latter *preliminary* injunction may be issued on the basis of affidavit alone, the enjoined party still has the safeguard of a full trial on the merits to follow, which must, in accordance with the express dictate of the statute, be set "at the earliest possible date," taking precedence of all other cases except those of the same character or those to which special precedence is given by law.
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> In contrast, the procedure for issuance of an injunction prohibiting harassment is self-contained. There is no full trial on the merits to follow the issuance of the injunction after the hearing provided by Code of Civil Procedure section 527.6, subdivision (d). That hearing therefore provides the only forum the defendant in a harassment proceeding will have to present his or her case. To limit a defendant's right to present evidence and cross-examine as respondents would have us do would run the real risk of denying such a defendant's due process rights, and would open the entire harassment procedure to the possibility of successful constitutional challenge on such grounds.

In *Thomas v. Quintero,* 126 Cal.App.4th at 635, 650, the court observed that there was no procedural conflict between CCP §527.6 (the civil harassment statute) and CCP §425.16 (the anti-SLAPP statute) since discovery was typically unavailable under *both* statutes:

> Similarly, we have no concern that a request for discovery under the anti-SLAPP law might interfere with a hearing on a civil harassment petition. The anti-SLAPP statute itself imposes a general stay on discovery in the "action," subject to a motion upon a showing of good cause. (§425.16, subd. (g).) Thus, the norm would have both the hearings on the petition and the special motion to strike proceed without discovery.

Like harassment petitions, those brought for elder abuse must be considered "highly expedited lawsuits," and it is easy to see how the routine use of discovery would undermine them. Foremost, the elder abuse hearing deadlines are simply incompatible with the discovery timelines built into the Code of Civil Procedure.

Except upon a showing of "good cause," a petitioner cannot take a deposition during the first 20 days after service of the summons. (CCP §2025.210 (b).) A court order based on a variety of factors, including "necessity" "diligence" and lack of "prejudice," is also required for either party to take a deposition within 30 days before trial. (CCP §2024.050(b) (1) (2) and (3).)

Relatedly, there is insufficient time for the parties to propound discovery, or for judges to rule on the disputes that often arise. (See, e.g., CCP §2025.270 (10-day minimum for noticing deposition); CCP §2030.260 (30-day minimum for noticing interrogatories, admissions, and production of documents; CCP §1005 (16-day notice period for seeking protective orders, filing motions to compel, and other motions).)[3]

On the other hand, to say that discovery is *never* available is difficult to reconcile with the conclusion that a petition for a protective order under the Elder Abuse Statute is considered a "special proceeding of a civil nature" and therefore an "action" subject to the provisions of the Civil Discovery Act. (*Thomas*, 126 Cal.App.4th at 647; *Schraer*, 207 Cal.App.3d at 732.) And what sets the Elder Abuse Statute apart from other civil proceedings is the *absence* of any law limiting or entirely precluding discovery. (Compare CCP §§90-98 (restricting discovery in limited civil cases); CCP §§116.310(b), 116.770(b) (prohibiting discovery in small claims cases).) Certainly it would have been easy enough for the legislature to have entirely proscribed discovery if that had been its intention.[4]

Discovery can serve important purposes in civil litigation. Reasonably construing the purposes and procedures of the Elder Abuse Statute, this Court eschews any rigid rule, instead embracing the observation in *Schraer* (207 Cal.App.3d at 733, fn. 6) that procedures

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[3] Although the parties focus on Wallace's deposition, the notice to him is accompanied by a document request requiring Wallace to produce potentially-voluminous records, which could easily involve the Court in motion practice regarding relevance, privilege, privacy and burdensomeness.

[4] While the court in *Thomas* correctly observes that "there is no provision under section 527.6 allowing for discovery", and that ordinarily "there is insufficient time in which to conduct discovery" (126 Cal.App.4th at 650, fn.11), it holds only that discovery is not "the norm" and stops short of totally prohibiting discovery under CCP section 527.6. (*Id*. at 650.)

in harassment cases must be flexible. Accordingly, the Court concludes that discovery under the Elder Abuse Statute must be supported by a showing of "good cause."

The "good cause" standard, which is exemplified in the provisions for taking depositions at the very beginning or end of civil cases (see CCP §§2025.210(b) and 2024.050(a)), confirms that the use of discovery should be reserved for exceptional situations where live testimony, declarations, and/or other avenues of presenting evidence are demonstrably inadequate, and where the timing of the actual hearing might accommodate limited discovery. The necessity of "good cause" also harmonizes *Thomas* and *Schraer*, and it is in keeping with the *sui generis* nature of expedited lawsuits under the Elder Abuse Statute. [5]

Wallace's declaration outlines specific dates and times over the past several years when Fortington has allegedly harassed him, threatened him, and on one occasion, physically assaulted him. The alleged assault on October 9, 2013, was reported to the Atascadero Police Department, and criminal charges are now pending against Fortington as a result. (14C-04625.) Wallace's counsel stated at oral argument that he intends to present Wallace and perhaps one other witness to support his claims.

Fortington loosely claims in his moving papers that Wallace's deposition is "absolutely essential to presenting the factual issues and preparing for the hearing, including making decisions on necessary witnesses," and that a deposition would "undoubtedly save a tremendous amount of court time in presenting the hearing of this matter." When pressed by this Court, however, he proffered not a single name, only categories of witnesses (law enforcement officers, neighbors, and character witnesses) who might be called to impeach Wallace's statements and attack his character for truthfulness. Such bromides do not provide "good cause." Any reduction in the number of witnesses is entirely theoretical.

There is no right to take discovery as a matter of course under the Elder Abuse Statute. There is more than enough information available to Fortington, without a deposition

[5] As but one example, the Court can foresee situations in which the deposition of a critical yet unavailable out-of-state witness might be warranted.

of Wallace, to reasonably prepare his defense in time for the February 23, 2015 hearing. Fortington's assertions are factually unsupported and fall far short of the "good cause" mark. Accordingly, his request for discovery is DENIED.

With respect to time management of the upcoming hearing, the Court inquired of the parties at oral argument regarding the expected witnesses and nature of their testimony. Wallace intends to rely upon his declaration, and to produce one or two corroborative eyewitnesses. As stated, Fortington identified no specific witnesses, only general categories.

The Court has plenary authority to efficiently manage the cases on its docket. Each side will be allocated 60 minutes to present its case, including time for argument, direct examination, and cross-examination. The clerk shall keep time.

It is so ORDERED.

Dated: January 9, 2015

CHARLES S. CRANDALL
Judge of the Superior Court

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