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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

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| GEOFFREY R. KEYES,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>JAN C. BIRO,<br><br>Defendant and Appellant. | B271768<br><br>(Los Angeles County Super. Ct. No. BS160192) |

APPEAL from an order of the Superior Court of Los Angeles County, Carol Boas Goodson, Judge. Affirmed.

Jan Charles Biro, in pro. per., for Defendant and Appellant.

Cole Pedroza, Kenneth R. Pedroza, Cassidy C. Davenport; Patterson Lockwood Hillyer, and Kevin P. Hillyer for Plaintiff and Respondent.

Scott & Cyan Banister First Amendment Clinic UCLA School of Law and Eugene Volokh for Amici Curiae The American Civil Liberties Union of Southern California, Aaron Caplan, and Eugene Volokh.

Jan Charles Biro appealed from a civil harassment restraining order in favor of Geoffrey R. Keyes, M.D. We affirm the court's order.

## FACTUAL AND PROCEDURAL SUMMARY

On March 4, 2016, Keyes filed a request for a civil harassment restraining order (CHRO) pursuant to Code of Civil Procedure section 527.6.[1] In supporting declarations, Keyes stated the following: Biro has sent "multiple documents with libelous information" to the directors of medical associations of which Keyes has been the president. The documents included cartoons, which Keyes describes as "violent and sexual images depicting [Keyes] and [his] staff." The cartoons have caused concern among Keyes's family and professional colleagues, who have "warned [him] to be cautious for fear of violence." Biro's conduct has also caused him "grave concern[] about [Biro's] potential for violence." Keyes "believe[s] that [Biro] has impersonated [Keyes] as a physician on the Internet, promising young women surgery who will meet with him," and stated that "[t]here has been posting on" an Internet site by someone pretending to be Keyes, stating that "I am a serial killer and need to be stopped." Keyes further stated that Biro lost a small claims lawsuit and a superior court lawsuit against him, and "sued the Medical Board of California" (Medical Board), which found no wrongdoing by Keyes.

The trial court denied Keyes's request for a temporary restraining order and set the matter for a hearing. Biro filed a response to Keyes's petition on March 25, 2016, denying the allegations.

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[1] Unless otherwise indicated, statutory references are to the Code of Civil Procedure.

Biro and Keyes each appeared propria persona at the hearing held on March 28, 2016. Keyes presented 21 exhibits to the court without objection from Biro. These documents reveal the following facts.

In 2011, Keyes, a cosmetic surgeon, contracted with Biro to perform a series of cosmetic procedures on Biro's face, ears, and neck. Keyes performed the surgery, but Biro was dissatisfied with the results. Biro sued Keyes in small claims court, which found in Keyes's favor.

While his small claims case was pending, Biro filed a complaint regarding Keyes with the Medical Board, which ultimately rejected Biro's claims.

In 2012, Biro filed a lawsuit in the superior court against Keyes, alleging medical malpractice and other claims.[2] In May 2013, he filed a document in that action titled, "Notice of intention 'to go public,' " in which he stated that he "will directly turn to" (1) "the medical community of Los Angeles to obtain professional, unbiased medical opinion about his case and see whether his opinion . . . is well founded," and (2) "the general public of California via media to obtain opinion about his case and see whether the people of [California] are willing to accept the 'Keyes-story' and the judicial management of the numerous complaints against him."

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[2] The superior court sustained Keyes's demurrer to Biro's medical malpractice claim without leave to amend on the ground it was barred by the doctrine of res judicata based on the judgment in Biro's small claims action. In June 2015, Division Seven of this court reversed, holding that res judicata did not bar Biro's claim. (*Biro v. Keyes* (Jun. 10, 2015, B247927) [nonpub. opn.].) Our record does not reflect whether that action has been resolved.

In July 2013, Biro issued two purported press releases in which he described his "bitter experience" of litigating against Keyes, and referred to other medical malpractice cases against Keyes. In September 2013, Biro issued a third press release titled, " 'Public review' of cosmetic surgeon starts to replace failed board supervision." The press release states that the Medical Board has "ignored" complaints about Keyes, and that Biro has sent an "open letter" to four plastic surgery associations requesting a "peer review" of Keyes's medical practice.

On January 31, 2014, Biro sent an 80-page document to the Medical Board and to members of the boards of (1) American Association for Accreditation of Ambulatory Surgery Facilities (AAAASF), (2) California Society of Plastic Surgeons, (3) Los Angeles Society of Plastic Surgeons, and (4) the Aesthetic Society Education and Research Foundation (collectively, the professional societies). The document was titled in part, "Request for professional 'peer review' of the cosmetic surgery practices of Geoffrey R. Keyes MD." Biro included documents related to his malpractice claim against Keyes, provided information about other lawsuits against Keyes, and asked the professional societies to conduct a peer review of Keyes's medical practice and to determine whether Keyes breached the relevant standard of care.

On June 21, 2014, Biro sent to the four professional societies a document titled, "Continued Urgent Request for Professional 'peer review' of the Cosmetic Surgery Practices of [Keyes.] [¶] Alarming need to establish the relevant standard of care in California." (Capitalization and underlining omitted.) Biro referred to the documents he had previously sent to the professional societies and alleged that Keyes had "violate[d] the standard of medical care" in various ways.

On January 7, 2016, Biro wrote a letter to Keyes at Keyes's office address. Biro stated: "I want to acknowledge your kind attention to my subject that is related to the usefulness of cosmetic/esthetic surgery for late-middle aged men as a service to improve their life quality. . . . [¶] Now, after four years of research and observations, I got a picture, that is fundamentally different from my original expectation and the expectations of the general public in [California]. . . . [¶] . . . [¶] Now, by this, it is time for me to conclude the research and discovery phase of my work and proceed to some form of closure that will benefit the medical society and the potential cosmetic-surgery customers in [California]. . . . [¶] I already have some material for publication that will illustrate, with a lot of warm humor, my personal experiences with the famous cosmetic surgeon and the president of related societies, Dr[.] Harry Hung HollyCut. [¶] May I ask you here, with the greatest possible respect: [W]ould you like to endorse this lovely cartoon character, please?" (Boldface omitted.)

The letter included two cartoon drawings depicting "Dr[.] Harry Hung HollyCut" and "his nurse, Miss Holes." The cartoons are accompanied by the following description: "My name is Dr[.] Harry Hung HollyCut . . . . You need to be familiar with me—and my services—if you are looking for any kind of cosmetic surgery in the world's capital of body modifications: Los Angeles. [¶] I am experienced and providing any kind of cosmetic surgery to my clients. I promise you that I will do my very best for your satisfaction. You will feel younger, more attractive—for the gender of your choice—and your self-confidence with be higher than ever after a single touch of my magical fingers. [¶] . . . [¶] I provide unrestricted satisfaction warranty. It means that if you are not satisfied with our works, we will automatically engage our legal counselor—the unreplaceable Atty. Hillyerious—to book you an appointment [i]n the Court of your choice."

About one week later, Biro sent a letter to Keyes's nurse at Keyes's office address and included four additional cartoon drawings. The letter states: "This is time for me to thank you very much for your kind and highly professional contribution to my studies regarding the art of Cosmetic Surgery & Related Court Procedures in Los Angeles. I will never forget you[r] participation in my bleeding complication during my neck surgery and that you stopped the bleeding with your 'prays' [*sic*] . . . . Thank you very much. [¶] I have here a humble question to you that you don't need to answer to me, but to yourself instead. I got the impression, that you are a devoted Christian. Your necklace with the big cross may be, of course, only a 'marketing jippo' of your bosh [*sic*], but let me assume, that it is genuine. And here is my concern: how can you possibly combine a peaceful religion in your mind with serving a violent and ignorant surgeon, who is completely occupied with self-idolatry and causes so much sadness and distress with his actions?"

Biro's letter to the nurse continues: "I attach some cartoons that warmly and with a lot of humor depict Dr[.] Harry Hung HollyCut and his adorable assistant Miss Holes to erect a long lasting monument to the art of Hollywood-kind of cosmetic surgery. Let me know how do you like it, please."

The most recent document among Keyes's exhibits is dated January 27, 2016 (the 2016 report), and is addressed to: "Cosmetic Surgery Related Societies in [California], Media, Other Concerned Parties." It is a 15-page report, ostensibly authored by Biro and David Cohen, Ph.D, about a purported four-year study of "the conditions of cosmetic/esthetic surgery in Hollywood/Los Angeles/[California] under the professional guidance of Dr[.] Geoffrey Keyes of Hollywood." The letter is critical of Keyes and the Medical Board, and makes numerous disparaging comments regarding Keyes. The last page of the 2016 report

includes one cartoon depicting "Dr[.] HollyCut" standing next to two women with exposed breasts. His hand is held under the breast of one woman, and the caption reads: "Dr[.] HollyCut is always ready to give you a HELPING HAND."

The 2016 report was accompanied by a collection of 32 cartoon drawings featuring "Dr[.] HollyCut" and "Nurse Holes" of the "Cosmetic Surgery Center of Harry Hung HollyCut MD." The cartoons depict caricatures of a cosmetic surgeon and his nurse who perform surgeries with harmful and grotesque results. Some depict women's bare breasts and others rely on offensive racial stereotypes.

Keyes produced two documents whose author and source are not indicated. One appears to be an email dated July 28, 2014 from "Wufoo" to KCBS-TV, which begins: "My name is Geoffrey Keyes and I am a serial killer." The apparent Keyes-imposter states that he is a plastic surgeon who has "developed a few techniques in order to put people in constant pain and misery," and that he "enjoy[s] maiming and disfiguring people." The email concludes: "Everyone who comes in for plastic surgery becomes our slave. They always hope we can fix it. We don't want to fix it though. If we kill people you'll never know. Accidents happen all the time. We can do anything we want."

The second document indicates that it was "posted" on March 17, 2013 and states: "The Butcher of Beverly Hills: Geoffrey Keyes (Beverly Hills) [¶] There is this plastic surgeon in Beverly Hills who intentionally harms people. He cuts into their noses in such a way that their breathing is decreased. He does this to eliminate competition. It's a sort of legal murder for him. He injures people and then has them come back again and again. He destroys very valuable lives and kills potential. He is the Butcher of Beverly Hills. He may even be part of a secret underground association designed to eliminate people who they see are threats.

We should all be afraid. He is the Butcher of Beverly Hills. He is Geoffrey Keyes."

At the conclusion of the hearing on Keyes's request for a CHRO, the court issued an order on Judicial Council form CH-130 (rev. July 1, 2014), ordering Biro not to: (1) "[h]arass, intimidate, molest, attack, strike, stalk, threaten, assault (sexually or otherwise), hit, abuse, destroy personal property of, or disturb the peace of [Keyes]"; (2) "[c]ontact [Keyes], either directly or indirectly, in any way, including, but not limited to, in person, by telephone, in writing, by public or private mail, by interoffice mail, by e-mail, by text message, by fax, or by other electronic means" (boldface omitted); and (3) "[t]ake any action to obtain [Keyes's] address or location."

The court also issued a stay-away order, requiring Biro to stay at least 100 yards from Keyes's home, vehicle, and office "except in civil court filings only[,] as Medical Board notified [and] warned Biro he should stop." The order is to expire after three years.

Biro timely appealed. In his opening brief, Biro makes numerous points that are not supported by legal authority or pertinent arguments, which we decline to address.[3] (See *Trinkle v. California State Lottery* (2003) 105 Cal.App.4th 1401, 1413; *Dabney v. Dabney* (2002) 104 Cal.App.4th 379, 384.) His legally cognizable arguments are: (1) the trial court deprived him of due process by

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[3] Such points include the arguments that his conduct is supported by principles of medical ethics and "professional autonomy," and by his oath of allegiance to the United States upon becoming a naturalized citizen. Biro also devotes several pages of his opening brief to argue that Keyes is a "high conflict personalit[y]," without explaining how this is pertinent to the appeal.

limiting his ability to speak at the hearing on the CHRO; (2) the findings necessary to establish the CHRO are not supported by sufficient evidence; (3) his criticized activity is constitutionally protected; and (4) the CHRO constitutes an unlawful prior restraint on speech.

We granted the application of The American Civil Liberties Union of Southern California, Aaron H. Caplan, and Eugene Volokh to file an amici brief in support of Biro. Amici contend that Biro's communications to third parties are constitutionally protected and that the CHRO is an impermissible prior restraint on Biro's right to free speech.

## DISCUSSION

### I. Preliminary Matters

Keyes requests that we strike or disregard three attachments to Biro's opening brief. The first attachment is a copy of Biro's response to Keyes's request for the CHRO. We have granted Biro's request to augment the record with this document, and its attachment to the brief is permitted under rule 8.204(d) of the California Rules of Court. Keyes's request to that extent is denied. The two other documents are an annotated copy of the reporter's transcript of the CHRO hearing and a table appearing to show Biro's comments to particular statements in Keyes's request for the CHRO. These documents are not authorized attachments, and we therefore grant Keyes's request to disregard them.

Keyes requests that we take judicial notice of a criminal protective order (Pen. Code, § 136.2) issued against Biro on May 22, 2017, after the CHRO issued in the instant case. Because the document was not before the trial court in this case and is not relevant to the issues on appeal, we decline to take judicial notice of the document. (See *Vons Companies, Inc. v. Seabest Foods, Inc.*

(1996) 14 Cal.4th 434, 444, fn. 3; *Arce v. Kaiser Foundation Health Plan, Inc.* (2010) 181 Cal.App.4th 471, 482.)

## II. Due Process and the Conduct of the Hearing

Biro contends that the trial court's conduct during the hearing on the CHRO deprived him of his right to due process. In particular, he asserts that the court "actively prohibited" him from speaking, failed to collect information about the case, ignored Biro's written opposition to the CHRO, "made up [its] mind" before the hearing, was noticeably sympathetic to Keyes, and should have given a "little more attention" to the case because it involved two physicians.[4] He further asserts that the family law court, where the hearing was held, was not a proper forum for the CHRO proceedings. The arguments are made without citations to legal authority and few citations to the record.

The constitutional requirement of due process requires the government to provide reasonable notice and an opportunity to be heard before depriving one of life, liberty, or property. (U.S. Const., 14th Amend., § 1; Cal. Const., art. I, §§ 7, subd. (a), 15; *Kentucky Dept. of Corrections v. Thompson* (1989) 490 U.S. 454, 460.) What process is constitutionally due in a particular situation varies depending upon the nature of the government function involved and the private interests at stake. (*Morrissey v. Brewer* (1972) 408 U.S.

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[4] Biro complains that Keyes and the trial court referred to him as "Mr. Biro," not Dr. Biro. Biro, however, is not licensed as a physician and surgeon under California law and, therefore, is not entitled to use the prefix "Dr." or other terms indicating or implying that he is a physician, even if he is so licensed in another jurisdiction. (Bus. & Prof. Code, § 2054; *Lawton v. Board of Medical Examiners* (1956) 143 Cal.App.2d 256, 259-263.) Accordingly, we do not refer to him as a physician and the trial court cannot be faulted for referring to him as Mr. Biro.

471, 481.) The government's function in CHRO proceedings is " 'to protect the individual's right to pursue safety, happiness and privacy.' " (*Schraer v. Berkeley Property Owners' Assn.* (1989) 207 Cal.App.3d 719, 729-730 (*Schraer*); see also *R.D. v. P.M.* (2011) 202 Cal.App.4th 181, 192 (*R.D.*) [restraining order "serves an important governmental and public purpose—the prevention of violence and harassment, and the protection of [the petitioner's] right to safety and privacy"].) The private interests at stake—the loss of the defendant's liberty that would result from the CHRO—on the other hand, are limited; although the person subject to a CHRO will be constrained in some respects for a limited time, he or she is not confined to prison or deprived of any property. In light of the important government function and the defendant's private interests, CHRO proceedings are subject to relaxed evidentiary rules, may be "procedurally truncated" and "expedited" (*Kaiser Foundation Hospitals v. Wilson* (2011) 201 Cal.App.4th 550, 557), and do not necessarily require "a full-fledged evidentiary hearing with oral testimony from all sides" (*Schraer*, *supra*, 207 Cal.App.3d at p. 733, fn. 6).

Here, Biro received actual notice of the CHRO proceedings, he filed a written opposition, and he appeared at the hearing where he had an adequate opportunity to present his evidence and argument. The assertions that the trial court did not read his opposition and had decided the case prior to the hearing are based on conjecture. Based on our review of the record, including the transcript of the hearing, we are satisfied that the procedures and the trial court hearing fulfilled Biro's right to due process.

### III. Sufficiency of the Evidence of Harassment

Biro contends that the evidence was insufficient to support the CHRO and that his actions are constitutionally protected. Generally, we review the trial court's express and implied findings

supporting a CHRO to determine whether they are supported by substantial evidence. (*R.D.*, *supra*, 202 Cal.App.4th at p. 188.) Under this standard, " '[w]e resolve all conflicts in the evidence in favor of respondent, the prevailing party, and indulge all legitimate and reasonable inferences in favor of upholding the trial court's findings. . . .' [Citation.] Whether the facts are legally sufficient to constitute civil harassment within the meaning of section 527.6 is a question of law reviewed de novo." (*Parisi v. Mazzaferro* (2016) 5 Cal.App.5th 1219, 1226.) We determine independently whether particular activity is constitutionally protected. (*Bose Corp. v. Consumers Union of U.S., Inc.* (1984) 466 U.S. 485, 499; *Smith v. Novato Unified School Dist.* (2007) 150 Cal.App.4th 1439, 1454.)

**A.**

Section 527.6 permits a "person who has suffered harassment" to obtain "an order after hearing prohibiting harassment." (§ 527.6, subd. (a)(1).) Harassment is defined 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." (*Id.*, subd. (b)(3).) Keyes does not contend that Biro's actions amounted to unlawful violence or a credible threat of violence; if Biro harassed Keyes, it was by his "course of conduct."

Although the person seeking the restraining order must be the "specific person" at whom the harassing course of conduct is directed, this requirement is satisfied when the defendant sends correspondence to third parties with the intent that it be conveyed to the plaintiff. (*Brekke v. Wills* (2005) 125 Cal.App.4th 1400, 1413 (*Brekke*).) Thus, if Biro intended that his letters to professional societies and Keyes's nurse would ultimately be conveyed to Keyes, a court could reasonably find that these letters were part of a course of conduct "directed at" Keyes. Here, Biro does not dispute that he intended that Keyes read his correspondence. Indeed, he states in

his opening brief that "Keyes received a complimentary copy" of his letters to the professional societies. The court could also reasonably conclude that Biro intended that Keyes would see the letter he sent to Keyes's nurse by mail to Keyes's office.

**B.**

A "course of conduct" is defined in section 527.6 as "a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose, including . . . sending harassing correspondence to an individual by any means . . . ." (§ 527.6, subd. (b)(1).) "Constitutionally protected activity" is expressly excluded from the definition. (*Ibid*.) Biro argues that his allegedly harassing activity cannot support a restraining order because it consists of constitutionally protected activity. We reject the contention.

Biro contends that his activity is constitutionally protected because none of it falls within particular categories of speech historically excluded from First Amendment protection, such as "[f]ighting words," "[t]rue threats," obscenity, and speech that incites imminent lawless action. (See, e.g., *U.S. v. Alvarez* (2012) 567 U.S. 709, 717 (plur. opn. of Kennedy, J. [listing categories of speech historically excluded from First Amendment protection].) He does not cite any authority for this assertion, and courts have not construed "[c]onstitutionally protected activity" in section 527.6 in terms of these categories. (See, e.g, *Brekke*, *supra*, 125 Cal.App.4th at p. 1409 [harassment may include conduct which, "while 'not totally unprotected'—'is of less First Amendment concern' "]; *Parisi v. Mazzaferro*, *supra*, 5 Cal.App.5th at p. 1228 [same].)

Under Biro's view, no conduct outside the categories of speech that have been historically excluded from First Amendment protection could ever constitute harassment, even if the conduct could be constitutionally proscribed in a particular context.

We reject this view. As the United States Supreme Court has explained, determining that conduct falls outside the categorical exceptions to First Amendment protection "merely begins our inquiry. Even protected speech is not equally permissible in all places and at all times." (*Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.* (1985) 473 U.S. 788, 799; see generally *Ward v. Rock Against Racism* (1989) 491 U.S. 781, 791 [speech may be restricted by content-neutral, reasonable time, place, or manner regulations]; *U. S. v. O'Brien* (1968) 391 U.S. 367, 377 [incidental regulation of speech will be upheld if it furthers an important or substantial governmental interest unrelated to the suppression of free expression and is no greater than necessary to further that interest].)

Picketing on a matter of public concern, for example, is not within any of the categories of speech historically excluded from First Amendment protection, but may nevertheless be prohibited when it takes place outside of, and is targeted at, a particular residence. (*Frisby v. Schultz* (1988) 487 U.S. 474, 486-487.) Similarly, the right to approach someone on the way to a healthcare facility to hand the person a leaflet and to attempt to change the person's views is generally protected by the First Amendment, but may be constitutionally restricted in order to protect the "unwilling listener's interest in avoiding unwanted communication." (*Hill v. Colorado* (2000) 530 U.S. 703, 716 (*Hill*).) Thus, although, as amici point out, "[t]here is no categorical 'harassment exception' to the First Amendment's free speech clause" (*Saxe v. State College Area School Dist.* (3d Cir. 2001) 240 F.3d 200, 204), the First Amendment does not guarantee the right to harass another whenever the harassment is accomplished through speech that might otherwise be protected. (See *People v. Borrelli* (2000) 77 Cal.App.4th 703, 716 [although "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"]; *Brekke*, *supra*, 125 Cal.App.4th at pp. 1409-1410 [song lyrics included in harassing letter "were not constitutionally protected in this context"].)

Everyone, the United States Supreme Court has stated, has a "very basic right to be free from sights, sounds, and tangible matter we do not want"—in short, a "right 'to be let alone.' "[5] (*Rowan v. Post Office Dept.* (1970) 397 U.S. 728, 736 (*Rowan*).) In *Rowan*, the high court relied on this right to uphold a statutory procedure allowing the recipients of unwanted commercial mail to stop the senders from continuing to send them mail. Although this "right to avoid unwelcome speech has special force in the privacy of the home . . . and its immediate surroundings" (*Hill*, *supra*, 530 U.S. at p. 717, citation omitted), it is not abandoned when we venture out in public or go to work. (See *Amer. Foundries v. Tri-City Council* (1921) 257 U.S. 184, 204 [an employee going to and from work "has a right to be free, and his employer has a right to have him [or her] free" of "unjustifiable annoyance and obstruction" by others]; *Hill*, *supra*, 530 U.S. at p. 717 [right to avoid unwelcome speech protected when accessing medical facilities]; see also *Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 161-162 (conc. opn. of Werdegar, J.) [harassing speech may be restricted in the workplace because employees are "a captive audience"].)

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[5] Although the *Rowan* court described the "*right* . . . to be let alone" (*Rowan*, *supra*, 397 U.S. at p. 736 (italics added)), the high court subsequently explained that this "right" "is more accurately characterized as an 'interest' that States can choose to protect in certain situations." (*Hill*, *supra*, 530 U.S. at p. 717, fn. 29.) California, by enacting section 527.6 with the express purpose "to protect the individual's right to pursue safety, happiness and privacy as guaranteed by the California Constitution" (Stats. 1978, ch. 1307, § 1, p. 4294), has chosen to protect that interest.

Here, the letters and caricatures Biro sent to Keyes's workplace were unwelcome and constituted a " ' "verbal [and] visual assault" ' " on Keyes and his nurse. (See *Hill*, *supra*, 530 U.S. at p. 716.) In light of Keyes's protectable interests in avoiding unwanted communication and his "right to be let alone," Biro's actions were no more constitutionally protected than the proscribed actions of the picketers, leafleteers, and commercial vendors in the cases discussed above. Moreover, the communications to Keyes and his employee at Keyes's office contributed nothing to the core First Amendment value of an " 'open marketplace' in which differing ideas about political, economic, and social issues can compete freely for public acceptance without improper government interference." (*Knox v. Service Employees* (2012) 567 U.S. 298, 309; see also *Brekke*, *supra*, 125 Cal.App.4th at p. 1409 [harassing communications between purely private parties on matters of private interest did not implicate speech on matters of public concerns at the heart of the First Amendment's protection].) We therefore reject Biro's claim that his correspondence to Keyes's office, including the "complimentary cop[ies]" of his correspondence with the professional societies, is constitutionally protected activity within the meaning of section 527.6.[6]

[6] Because the correspondence sent directly to Keyes's office is sufficient to establish a harassing course of conduct, we do not address whether Biro's other activity is constitutionally protected.

**C.**

Biro challenges the finding that his conduct did not have a "legitimate purpose." (§ 527.6, subd. (b)(3).) He contends that his letters to the various organizations were sent: (1) to inform cosmetic surgeons about the existence of a serious and professional disagreement about the standard of care in California; (2) to ask for an opinion and advice about what should be done "in these situations"; (3) to provide an "honest and friendly opinion" about the status and direction of medical care; and (4) to convince Keyes to collaborate in a peer review procedure to solve the disagreement.

Although there is support for Biro's view of the evidence, the record also supports the trial court's finding that some of his communications were sent with the improper purposes of harassing Keyes. For example, the collection of Dr. HollyCut cartoons—depicting caricatures of Keyes and his nurse in sexually and racially offensive scenes engaging in cosmetic surgery with undesired or grotesque results—does not fit any of Biro's four categories of legitimate purposes. Nor does the January 2016 letter to Keyes that accompanies the cartoons and sarcastically inquires whether Keyes would endorse the drawing of Dr. HollyCut. Further, the "Butcher of Beverly Hills" Internet post and the purported admission by the Keyes imposter that he is a serial killer do not have a legitimate purpose. Thus, even if some of Biro's letters could be viewed as having legitimate purposes, the trial court could reasonably conclude that other communications did not.[7]

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[7] Amici contend that "the trial court failed to exclude from its consideration the many allegations of conduct not 'directed at' Keyes and any allegations describing constitutionally protected activity." Biro, however, did not object to any of the evidence, and neither he nor amici can raise evidentiary issues on appeal. (See *Dimmick v. Dimmick* (1962) 58 Cal.2d 417, 422 ["points not raised

**D.**

Biro next contends that even if his letters caused Keyes to suffer emotional distress, the evidence is insufficient to establish that they "would cause a *reasonable person* to suffer substantial emotional distress." (§ 527.6, subd. (b)(3), italics added; see, e.g., *Cooper v. Bettinger* (2015) 242 Cal.App.4th 77, 88.) We disagree. The evidence indicates that Biro initially pursued his complaints against Keyes through civil litigation and administrative procedures. He later went "public" with press releases, Internet posts, and requests for peer reviews (sending "complimentary cop[ies]" to Keyes). Most recently, he sent sarcastic letters and offensive drawings directly to Keyes and his nurse, as well as to members of professional societies. The drawings are caricatures of Keyes and his nurse that depict Keyes as a sinister and macabre doctor who performs cosmetic surgeries with grotesque results and uses the legal system to avoid liability. Viewing these disturbing and sometimes violent drawings in the context of the entire course of Biro's conduct, the trial court could have reasonably concluded, as it did, that a reasonable person in Keyes's position would suffer substantial emotional distress.

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in the trial court will not be considered on appeal"]; *California Assn. for Safety Education v. Brown* (1994) 30 Cal.App.4th 1264, 1274 [court will not consider argument asserted by amicus that was "not 'presented to or passed on by the lower courts' "].) In any case, the question is not whether there was any evidence of protected activity, but whether there was sufficient evidence of unprotected activity.

## IV. The CHRO Is Not An Unlawful Prior Restraint on Speech

Biro and amici contend that the CHRO is an unconstitutional prior restraint. We disagree.

In the First Amendment context, a prior restraint is an order " '*forbidding* certain communications when issued in advance of the time that such communications are to occur.' . . . Temporary restraining orders and permanent injunctions—i.e., court orders that actually forbid speech activities—are classic examples of prior restraints." (*Alexander v. United States* (1993) 509 U.S. 544, 550, citation omitted.) As our state Supreme Court has explained, the rule prohibiting prior restraints on speech applies to content-based injunctions only. (*DVD Copy Control Assn., Inc. v. Bunner* (2003) 31 Cal.4th 864, 886, citing *Thomas v. Chicago Park Dist.* (2002) 534 U.S. 316, 321-322.)

Biro advances no substantive argument in support of his prior restraint contention. Amici, however, contend that the CHRO impermissibly "foreclose[s] all avenues of communication about Keyes, except for litigation. It prohibits only speech to third parties about Keyes, as opposed to speech to those same parties on other topics. Because it bars speech on a specific topic," amici conclude, "the injunction is content-based." Keyes responds by stating that this argument ignores the plain language of the CHRO. We agree with Keyes.

Here, the relevant part of the CHRO, set forth in Judicial Council form CH-130, prohibits Biro from "[c]ontact[ing] [Keyes], either directly or indirectly, in any way, including, but not limited to, in person, by telephone, in writing, by public or private mail, by interoffice mail, by e-mail, by text message, by fax, or by other electronic means." (Boldface omitted.) The CHRO thus bars all contact with Keyes, regardless of content, and, as Keyes stated

in his respondent's brief, "does not prohibit Biro's speech to third parties," so long as he does not use such communication as a means of indirectly contacting Keyes. (See *Brekke*, *supra*, 125 Cal.App.4th at p. 1413.)

Because the order is content-neutral and, by limiting it to prohibiting contact with Keyes, is no broader or more restrictive than necessary to prevent further harassment of Keyes, it is not unconstitutional. (See *Madsen v. Women's Health Center, Inc.* (1994) 512 U.S. 753, 765; *R.D.*, *supra*, 202 Cal.App.4th at p. 193.)

Amici point to certain statements the trial court made at the hearing to suggest that the order is broader than its terms. The trial court stated, for example, that it would grant the request for the CHRO, and informed Biro that he "can contact any public agency, but [he] cannot contact [Keyes's] patients, his family, his office. You do it through the appropriate court if you feel you have standing." Keyes then asked, "What about the associations? Can he stop from doing this to my colleagues?" The trial court then told Biro, "[Y]ou are not to contact anyone who is not an official—I'm going to put that in the order. No one except an official—a public organization." Keyes again asked if the court would "stop him from contacting associations that I've been president of." The trial court responded: "I'm going to put except in civil court filings." With one exception, however, the trial court's statements were not incorporated into the CHRO itself. The one exception is in the "Stay-Away" portion of the order, which requires Biro to stay away from Keyes "except in civil court filings only as Medical Board notified [and] warned." This language, merely limits the nature of the stay-away order; it does not infringe upon Biro's right to communicate with third parties.

## V. Keyes's Attorney Fees

Keyes requests we award him his costs and attorney fees on appeal. He is statutorily entitled to them. (§ 527.6, subd. (s).) The amount of the costs and fees shall be determined by the trial court. (See *Security Pacific National Bank v. Adamo* (1983) 142 Cal.App.3d 492, 498.)[8]

## DISPOSITION

The order appealed from is affirmed. Keyes is awarded his costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J. JOHNSON, J.

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[8] Biro filed a motion in this court for sanctions pursuant to Code of Civil Procedure section 128.7. He asserts that Keyes and his attorney are misusing the courts and engaging in malicious legal actions against him to delay and prevent him from pursuing his efforts to obtain peer review of Keyes. For the reasons stated in *Bryan v. Bank of America* (2001) 86 Cal.App.4th 185, 197-198, the cited statute does not apply to appellate proceedings. Moreover, the motion has no substantial factual support. Accordingly, the motion is denied.