

NO. 23827

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

DENISE DUNSTER, Plaintiff-Appellant, v.  
NATALIE DUNSTER, Defendant-Appellee

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT  
(Civ. No. 1SS00-1040)

MEMORANDUM OPINION

(By: Burns, C.J., Watanabe, and Lim, JJ.)

Plaintiff-Appellant Denise Dunster (Denise) appeals from an "Order Granting Mutual Injunction Against Harassment," (Mutual Injunction Order) (underscoring in original), entered by Judge David L. Fong of the District Court of the First Circuit (the district court) on September 8, 2000. We affirm.

BACKGROUND

This case is an outgrowth of a divorce proceeding. The individuals relevant to this case are: (1) Denise, who is (a) the plaintiff in Civil No. 1SS00-1040, (b) the defendant in Civil No. 1SS00-1046, (c) the new wife of Jeffrey Dunster (Jeffrey or Jeff), and (d) the stepmother of Carlie Dunster<sup>1</sup> (Carlie), the daughter of Natalie Dunster (Natalie) and Jeffrey, who, at the time of the proceedings below was five years old;

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<sup>1</sup> Throughout the transcripts, the daughter of Jeffrey and Natalie is referred to as "Carly." It appears from the record, however, that the daughter's name is spelled "Carlie."

(2) Natalie, who is (a) the defendant in Civil No. 1SS00-1040, (b) the plaintiff in Civil No. 1SS00-1046, (c) the ex-wife of Jeffrey, and (d) the mother of Carlie; and (3) Seth Sutherland (Seth), Natalie's boyfriend and a co-defendant in Civil No. 1SS00-1040.

1. Civil No. 1SS00-1040

On August 24, 2000, at 10:24 a.m., Denise filed against Natalie and Seth a "Petition for Ex Parte Temporary Restraining Order [(TRO)] and for Injunction Against Harassment; Declaration of Petitioner; [TRO] Against Harassment; and Notice of Hearing" in Civil No. 1SS00-1040 (Denise's petition). Denise claimed in the petition that she had "been yelled at, harassed, and received late phone calls multiple time [sic] to [her] home and business" from Natalie. Denise also declared that on May 18, 2000, she faxed a letter to Natalie, "requesting [Natalie] not to call [Denise's] office or business line." Denise also notified Natalie on several other occasions not to call Denise's office, not to call to announce the arrival of faxes, and not to call Denise and Jeffrey's home after 8:00 p.m. because it disturbed Carlie and the six-month-old baby of Jeffrey and Denise. Denise also detailed "recent or past acts or threats of harassment" that had occurred from June 18, 2000 through August 19, 2000 in which Natalie had, among other things: called or faxed letters to Denise's office; sent faxes to Denise at home; called to let Denise know that a fax was coming; and repeatedly called Denise

at home or at the office, only to hang up when Denise answered the phone.

Denise also stated in the petition, in relevant part:

On March 6, 1999 Natalie stood by my front yard and yelled at me causing the neighbors to come outside to see what all the racket was about.

August 7, 1999 [-] Natalie and her boyfriend [Seth] trespassed by entering our property and Natalie boldly and self-righteously opened the front door and entered my home. ([Honolulu Police Department (HPD)] called.) <We had to pay for our damaged gate>

May 12, 2000 - [Seth] came to my home with a friend named David". While only David appeared at the gate initially, I approached the closed gate and asked what he needed. As David started speaking, Seth jumped from behind our rock wall (startling me) and started yelling at me at the top of his lungs. I initially didn't recognize him. He looked like someone on T.V. who was high on "ice". After a short while I realized who was yelling at me. I asked him to please leave and went back in the house. Seth continued ringing the gate bell. Note: I have a 6 month-old baby and it was quite disturbing. Finally, I went back outside to ask him to leave and informed him that he was disturbing the baby by yelling and continuously ringing the gate. His reply was "Good." "Must be hard having a baby." I subsequently called HPD who later came and asked Seth to leave.

Dear Honorable Judge,

I don't bother anyone. I'm a hard worker, have had up to 40 employees working for me, very active in the community. I just want to have peace and not have to worry about being harrassed [sic] or looking over my shoulder.

Judge Barbara Richardson (Judge Richardson) issued a TRO against Natalie and Seth on August 24, 2000 and set a hearing on Denise's motion for injunction against harassment for September 8, 2000 at 8:30 a.m.

2. Civil No. 1SS00-1046

On August 24, 2000, at 12:59 p.m., Natalie filed against Denise a "Petition for Ex Parte [TRO] and for Injunction Against Harassment; Declaration of Petitioner; [TRO] Against Harassment; and Notice of Hearing" in Civil No. 1SS00-1046 (Natalie's petition). In a statement attached to the petition, Natalie said, in part:

On August 19, 2000, [Denise] called me and told me that she would be faxing a letter to my office and copy the Human Resources Department and copy Steve Bollenbach (the President and C.E.O of Hilton Hotels Corporation). This is following a threat that she made to me on August 16, 2000 that she would get me fired. She called my cellular screaming with anger that she had just received my letter and warned me that she would contact Steve Bollenbach and get me fired. I was unsure of what letter she was referring to since I did not send her a letter[. However,] I suspected that she was referring to the letter I sent to Jeff (her husband & my ex-husband) regarding Denise's inappropriate behavior on the exchange of my daughter on August 13, 2000.

Background: Denise and Jeff Dunster have faxed numerous letters to my office after they have been asked not to. They recently faxed letters to the Human Resources Department, Executive Business Services Center and Executive Office at the Hilton Hawaiian Village where I work. The Hilton Hawaiian Village has also told them to refrain from sending faxes to my work. There is no reason that they should be sending faxes to my work. I have a fax machine at home that is available to receive faxes 24 hours a day. I have also extended a suggestion that if they are unable to fax my home for any reason, they could send the letter by mail.

Natalie then outlined eight pieces of correspondence which she had sent, advising Denise and Jeffrey not to fax Natalie at work, and closed by saying: "[Denise] and [Jeff] continue to harass me and I would like this [c]ourt to restrain [Denise] from further doing so." Natalie's petition was granted the same day by

Judge Richardson, and the hearing on Natalie's petition for an injunction against harassment was scheduled for September 8, 2000, at 8:30 a.m.

### 3. The September 8, 2000 Hearing

Both Denise's and Natalie's petitions were heard on September 8, 2000 in a consolidated hearing before Judge David Fong (Judge Fong). Judge Fong announced at the outset of the hearing that the order of the hearing would be as follows:

We go from [Denise's] petition, and any of her witness [sic]. Then we go to [Natalie's] petition, and any of her witnesses. Then we go back to [Denise] for a final rebuttal, and back to [Natalie] for her final rebuttal.

Judge Fong then read Denise's petition aloud and, thereafter, asked Denise what the faxes referred to in her petition were about. Denise replied that they were "[m]ostly faxes to my husband and his ex-wife, Natalie" concerning "[c]hild custody, child care, ranging from personal situations to---[.]" Denise then presented four witnesses.

Sue A. Lehrke, Ph.D. (Dr. Lehrke) testified that she was the custody evaluator for the divorce between Jeffrey and Natalie and had been "ordered to try to resolve disputes between Jeffrey and [Natalie] from May of 1998, until June of 1999."

According to Dr. Lehrke:

[F]or years now, this has been a high conflict divorce. [Denise] is the stepmother, and the communication really does not need to go to [Denise]. The communication is usually addressed to [Jeffrey] who has his own fax line. And instead, the communication is going to [Denise's] work line, which there's been numerous requests not to have it go there.

The communication between them has been an issue in Family Court, and probably will be again. And Natalie has already explained to you that she really does not have a need to communicate with [Denise], or to be in her presence, except at school events. At this point, the [c]ourt order does not state that they have to alternate attendance at school events, but that's a request that's going to have to be made in Family [C]ourt.

They--at this point, . . . a post-divorce order allows them both to be present at school events, and [Carlie's] activities. And so that would be a problem with respect to a restraining order.

But there is another case in Family Court which will be heard on Monday, at which time the request will be made for an order that they alternate at school events, which would then allow a restraining order to be used.

Dr. Lehrke also informed Judge Fong that "[t]here is a restraining order--another restraining order being heard in Family Court. That one is [Natalie] versus [Jeffrey], and that one is scheduled for Monday."

Jolene Joey Miyashiro (Miyashiro), the principal of the pre-school that Carlie attended, was called to the stand next. Miyashiro testified that it was "very uncomfortable for staff" when Natalie and Denise were both on campus. Miyashiro stated that she had "to actually restrict Natalie from the campus because of events that occurred up to that point." However, when pressed by the judge to describe the events that she had witnessed, Miyashiro admitted that she had never actually observed any incident between Natalie and Denise and was basically relying on statements related to her by Denise. Miyashiro described one incident which occurred after a school activity had ended. According to Miyashiro, when it was time to leave, Carlie was crying and yelling and did not want to leave

the school area with Denise and Jeffrey. Miyashiro admitted, however, that she did not witness any incident between Natalie and Denise that may have prompted Carlie's behavior.

The next witness was Denise's husband, Jeffrey. Jeffrey testified that Natalie was "a vexatious litigator who has litigated everything under the sun for the past four years. We've been in and out of court dozens of times." Referring to the allegations in Natalie's petition, Jeffrey stated that all the correspondence outlined by Natalie was "addressed from Natalie to Jeff, or Jeff to Natalie. Nowhere in there is Denise mentioned. I think she's got the wrong person on the ticket personally." At that point, Judge Fong read Natalie's petition aloud for the record. Jeffrey thereafter testified that Natalie sends multiple faxes in the same day and had faxed 183 letters "from her work to us. 183. Okay. There is harassment going on, but it's in the other direction." Jeffrey explained that he works from 3:30 a.m. until about 11:30 a.m. and had asked Natalie not to fax him until after 12:00 p.m. because Natalie "would call up and say your fax line is busy, clear it, I'm sending you a fax. And if we don't clear it, she'll keep calling us and tie up the lines." Jeffrey stated, "This is the fourth TRO that either Natalie or her friends or affiliates or whatever have filed on me or [Denise]. To date, everyone of them has been dismissed." Additionally, Natalie has called HPD "a number of times." When asked to describe the specific incidents between Denise and

Natalie, Jeffrey said that Natalie "harasses through the fax systems, through the phoning."

Denise's final witness was Detective Roland Turner, who testified, in relevant part, that

[a]pproximately a year ago, . . . I was a patrol officer sent to the home on Coelho Way. It was regarding a trespassing complaint made by [Denise] versus . . . I guess [Natalie] in this matter.

At that time, it was alleged that [Natalie] and her boyfriend had come onto the property, and it was regarding some purpose of the exchange of [Carlie], and then they had refused to leave the property when asked to do so.

[Denise] was alleging that--I believe that [Carlie] wasn't made ready to be handed over, or you know, per the custody ruling at the time it was supposed to be done, and so they were in a dispute over that matter.

As far as specific observations, by the time I got there, I believe both the other parties were already off the property. And I don't recall any specific, you know, inter-action between them that I could consider harassment or so forth.

Natalie then presented her case. She explained that the reason she called prior to faxing documents to Jeffrey was that Jeffrey had asked her "way back in December of 1999" to call to notify him that she was sending a fax. "And the reason is because that way, the party receiving the fax doesn't have an excuse, well, I didn't know it was sitting in the machine." She testified that the reason she was faxing late in the evening was "because . . . we were on asset division, and there were deadlines that the [c]ourt was setting. I faxed him prior to the deadline so that he would have a chance to look at the asset division prior to the actual date that we were to divide the assets. Natalie stated that Jeffrey "has four phone lines at his



house." The first one was for personal use, the second was a fax number, the third was an office number, and the fourth "to [Natalie's] knowledge, was a personal line, but now they're claiming it's an office number." Natalie testified that on August 16, Denise

called me yelling and screaming at me. I could barely make out what she was saying. It was on my cellular phone. I asked her to repeat herself. She said, you know darn well what I'm talking about. She screamed that she would be contacting Steve Bollenbach. At the time I said who, what are you talking about. She yelled and screamed. At that point, she said, I'm going to have you fired. And she hung [sic] on me.

Natalie continued, stating that all the faxes she sent to Jeffrey and Denise's home were "addressed to [Jeffrey] personally." However, the faxes sent back to Natalie "have notations on it [sic] with Denise's handwriting."

Natalie then proceeded to discuss how, when Denise brought Carlie for an exchange, Denise had a way of doing things "to kind of press buttons." She explained:

Like if I'm parked in a stall in a corner of a parking lot, she'll park right in the middle, right smack in front of me, blocking my car in, and blocking traffic from going by. I've asked her to park in stalls--you know, there's many parking stalls on the side of me. She doesn't.

There hasn't been any real fist fight, verbal fights of any kind. The incident with the slippers that [Miyashiro] is referring to, it was March 6. I was picking up [Carlie], and she was carrying her, holding the slippers in her hand. She passed off [Carlie], and as I was putting [Carlie] into the car, she went to grab her mail from her mail box, and started walking away. And I asked her, Denise, can I have [Carlie's] slippers. She refused to listen to me, ignored me.

And it was--if I can demonstrate, she was holding her mail like this, and the slippers were right on top, so I had just, you know, grabbed 'em, before she had left and walked

away. I've admitted to a lot of people that that probably was the wrong thing to do.

But at that point, she yelled at me right in front of [Carlie], and then in front of [Carlie], and in front of me, I don't know why she would do this, but she like came right up to [Carlie's] face, you know, still with me, and she said, "Mommy loves you", and I know it's just to, you know, further try [sic] get in my face that she's trying to point out that she's the mom too.

There hasn't been like I said any physical things that have happened. Let's see. Oh, and again, okay, his personal line at his home is hooked up to his--or it was, and I believe it still is--hooked up to his broadcast faxing, so often times the phone line is busy, and I couldn't get through.

So instead of not notifying that a fax was coming on that and wait, I would call the other two lines of his, and just leave messages that I was--that a fax came through. That's all. There was nothing else left on the message. They're very simple. It's Jeff, this is Natalie. I'm sending you a fax. And I'd hang up. They're not harassing calls.

Seth was the next witness to testify. He explained that he really did not have anything to do with Denise. He "may have seen her three times in [his] life." The only incident he was involved in with Denise occurred when he and a friend were trying to serve papers on Jeffrey. Because Seth was sure that if he were seen by Jeffrey, Jeffrey would not come to the door, Seth asked a friend to ring the doorbell. When the doorbell rang, Jeffrey's voice answered the intercom, and Seth's friend asked if Jeffrey was there. After Seth's friend was put on hold for a couple of minutes, Denise came out to the gate, and Seth "came from behind and gave--there's a wall there that I was standing [sic], and I said oh, you're saying Jeff's not here now. I just heard him, and we just seen him cross." Seth denied that he "was

yelling and making a big commotion and screaming at the top of [his] lungs with [Denise]." He concluded by saying that he had no reason to see Denise or talk to her, and that he stays "far away" from her.

The final witness called to the stand was Peter Moix (Moix), who had been present at the "Christmas graduation" in 1998 when "[Carlie] was crying and screaming." He apparently was called by Natalie "to counter as to what [Miyashiro]" had testified to. Moix testified that he had not observed any specific incidents between Denise and Natalie, although he had received phone calls reporting that incidents involving "people scream[ing] at people, and things" had occurred. The district court ruled that Moix's testimony was hearsay and that the 1998 incident was too old to be relevant to the hearing.

During her final rebuttal, Denise denied the statements in Natalie's letters that she said things to Natalie when they exchanged Carlie. According to Denise, "I stay far away from [Natalie]. I never speak to her. I stay by my car. And [Natalie has] also made remarks that--I don't even make eye contact with her, in that letter you have. And that I don't even acknowledge her. And that's because I stay far away, because all the hostility." Pressed by the district court to explain what she considered to be harassment in the faxes sent by Natalie, Denise said, "Just the accusations that, you know, her false

accusations that I snicker at her and stuff[.]" The following colloquy then occurred:

THE COURT: But they're not made to you. They're made to [Jeffrey].

[DENISE]: It's made in regard to me.

THE COURT: Yeah, but they're not direct harassment of you, right. They're statements she's making about your conduct, your alleged conduct---

[DENISE]: Correct.

THE COURT: ---to [Jeffrey].

[DENISE]: Correct. And what I wanted to show---

THE COURT: And you consider this harassment of you.

[DENISE]: Oh, no, not at all. I wanted to show---

THE COURT: Okay. That's what I was looking for.

[DENISE]: Okay.

THE COURT: Do you have any of those?

[DENISE]: I have evidence of late phone calls.

THE COURT: No, I don't need that.

[DENISE]: Okay.

A videotape was then displayed to the district court. Denise explained that the videotape, which was not included in the record on appeal, recorded that Seth was asked to leave because "he was disturbing our baby, and [Seth's] response was good." Denise stated that on the videotape, Seth "state[s] his purpose for being there. And that--but prior to that, he was yelling at the top of his lungs at the gate[.]" However, Denise acknowledged that the "yelling" was not recorded on the videotape. Jeffrey then interjected that the tape also included

an incident that "happened just this past week-end [sic]. . . .  
About how she stays in the parking lot. I did the exchange.  
[Carlie is] in the car. You can hear her talking. And then she  
got in the car and drove, and went to another part of the parking  
lot. And it's on here." The following exchange then occurred:

THE COURT: And what's wrong with that?

[JEFFREY]: You know it's just uncomfortable.  
[Carlie], my daughter, she's five years old, and she sees  
this.

THE COURT: She doesn't have a legal right to do that?

[JEFFREY]: Don't you feel uncomfortable when  
somebody--she follows us to church. Sits in the back row.

THE COURT: Well, you get up and you leave if you're  
not comfortable. I don't understand--I don't look at that  
as being harassment, okay. We have a certain amount that--  
we can stop threats, we can stop contact. We cannot stop  
dirty looks.

[JEFFREY]: I understand.

THE COURT: And I don't think we can stop somebody  
from being in a place where they legitimately have a right  
to be, unless there is specific harassment.

After the videotape was displayed to the court, Denise was asked  
for her final comments with regard to the relationship between  
her and Natalie. She stated:

[S]he has a tendency to be physical. And she has yelled at  
me, but I can't prove that. But I can say that [when] we  
even go to a business trip to the mainland, she's calling my  
cellular phone. She's sending an express mail to--you know  
what I mean.

And she just won't leave us alone, Your Honor, late  
phone calls like that, you know just--we stay far away from  
her. We cannot help if she shows up at our place unless  
it's court ordered, and even then she does not listen.

. . . .

. . . We just want--we just want no hostility and no harassments. Stay away from us as far as, you know--don't come to our home. She's already entered our home twice, uninvited. And just to leave me alone. Both of them actually. Just don't come to our place. No more house--uninvited house calls.

At that point, the district court asked Natalie if she wished to make a final response. Natalie stated:

Yes, I'd like to respond. We exchange [Carlie] at Long's parking lot at--Pali Long's parking lot. I'm not sure if you're familiar with it. It's a very large parking lot.

. . . .

. . . Often we exchange in the very corner diagonally from the Long's and Safeway. Jeff is referring to, you know, me hanging around. Often times I go from dropping [Carlie] off, and I go right to the store. As you said, there's nothing wrong with that, but I just wanted to let you know that is what I was doing.

Often times too I do stay there for a moment. I take notes of everything that happens. I note down the time I arrived. The time they arrived. I note anything that was discussed that is pertinent. Anything that happened.

The following colloquy then occurred with the district court:

THE COURT: What's the point that you're trying to make?

[NATALIE]: I'm just saying, he said I hang around there and stuff. And I think it's very unusual that they hang around---

. . . .

. . . and they video camera me.

. . . .

. . . Okay. Denise says a comment that I called on their cellular on during their vacation. Jeff told me in his letter to call either his cellular or her cellular. I was advised of both phone numbers. In fact our divorce decree actually states quote each parent shall have [sic] provide the other with full itinerary, and shall provide liberal telephone access with the other parent during travel.

So--in fact, I tried to have contact with [Carlie], and they wouldn't allow it. They didn't answer their phone calls. I left messages. I faxed. I sent an express letter. There was [sic] no contacts. But that's not in your jurisdiction.

I did want to mention I just remembered an incident with Denise where she was physical. I picked up [Carlie] from her. She asked me if I was going to drop off [Carlie] at five. And I said, have Jeff call me, please. And she asked again. She said, are you going to have [Carlie]--you know, drop off [Carlie] at five. I said, please have Jeff call me.

I put [Carlie] in the car in the back seat. As I was putting her in the back seat, she again asked me, and I said Denise, please have Jeff call me. I got in my car. I closed the door. She was so mad that I hadn't answered her that she slammed her hand against my car. Between the two windows, there's a strip, and she slammed her hand which startled both [Carlie] and myself.

I looked at her, and I said whoa, you know, and I just didn't--didn't want to go into anything with her. I drove away.

THE COURT: Let me ask you this. What was so difficult about your answering the question?

[NATALIE]: Because I don't want to deal with her. It was very early on in the relationship---

THE COURT: What was so difficult about just answering the question so that--you know, it was a simple question. Why couldn't you just give her an answer?

[NATALIE]: I understand. I understand. But all arrangements were made between Jeff and I.

THE COURT: No, no, no. It's a provocation here, okay. All you had to do was answer the question. Why make it difficult[?]

[NATALIE]: I wasn't trying to make it difficult.

THE COURT: Well, you sure did. I mean, I would consider that it's a simple question.

[NATALIE]: Well, I had no idea she would be so crazy and hit my car.

THE COURT: No, that's not the point. You're provoking confrontation here.

[NATALIE]: Well, as I drove away, she flung my car door open, as I'm driving away. You know, so---

THE COURT: You understand what I'm saying. All you had to do was answer the question.

[NATALIE]: Yes. I understand.

. . . .

. . . I was just trying to show that Denise is physical. Her temper is--you know, that was the first time I ever had to see that temper in her. And I hope not to ever see it again.

THE COURT: Would you agree that it might have been provoked? When a simple question was asked three times, and no answer was given?

[NATALIE]: I don't particularly care to make arrangements in front of [Carlie].

THE COURT: I'm not talking about that. I'm talking about an effort to try and avoid conflict here.

[NATALIE]: Yes. But this was early, early on. She was only his girlfriend. We had nothing to do with each other. And, you know, I really didn't want to talk with her.

THE COURT: Very well. Do you have anything else you want to add?

[NATALIE]: Regarding my TRO, there have been eighteen different faxes that I counted, totalling forty-one pages that were sent within a year to my office.

THE COURT: Who sent them?

[NATALIE]: They were sent by Jeff, but a lot of them have Denise's handwriting on them. And---

THE COURT: But who sent the faxes?

[NATALIE]: I believe the late faxes recently were from Denise.

THE COURT: How do you know that?

[NATALIE]: Because Jeff works very late hours, and he doesn't stay up. And this fax is just fifteen minutes after midnight, and it has Denise's handwriting on it. And these faxes often times are sent when I'm not even working there.



One was sent on a Friday at 7:10 p.m. Two of them were sent on--just after midnight to my Executive Office.

Denise also came to my office and met with the General Manager or--actually, I'm sorry, the Executive Office, and the Director of Human Resources. Hilton does not want to be involved in this. They're--they shouldn't be. They have nothing to do with Denise. In fact, what Jeff and I have going on, it's Denise gets involved, so her coming to my office was a harassment. She purposely tried to portray that I'm a problem for her with my work place, and they have nothing to do with it.

I just--you know, I just don't want any more faxes coming to my work place. I don't want any more phone calls from Denise, or any more harassment from her.

The district court, thereafter, orally announced its ruling. The district court dismissed the petition as to Seth but issued a Mutual Injunction Order against both Denise and Natalie, stating, partly, as follows:

Now, with regard to you two ladies. I'm going issue [sic] a mutual, both sides. I will say this, what you guys are arguing about is really petty, very, very, petty. But it's a continuous course of conduct by both sides, I believe.

This is a divorce that I assume is over now. You guys should let go, and stop the pettiness in--for the sake of [Carlie]. It doesn't do [Carlie] any good to see this kind of conflict between stepmother and mother. And like I said, you provoked. You don't have to do little things like that to each other.

But it will be a three year injunction. No contact whatsoever between the parties. And that will be subject to any Family Court order. So whatever the Family Court decides on Monday, if there is to be a hearing, so be it. But ours will be subject to theirs. They will have precedent over ours. And as between you two, three years, no contact whatsoever.

The district court took a recess to prepare the written order, then reconvened after providing the parties with certified copies of the Mutual Injunction Order, which required, in relevant part, as follows:

2. [Denise] and [Natalie] and any other person acting on behalf of [Denise] or [Natalie] are hereby restrained and enjoined from:
  - A. Contacting, threatening or physically harassing each other and/or any person(s) residing at each other's residences, subject to special conditions in paragraph 5 below.
  - B. Telephoning each other, subject to special conditions in paragraph 5 below. . [sic]
  - C. Entering and/or visiting the premises, including yard and garage, of the residence and/or place of employment of the other, subject to special conditions in paragraph 5 below.
3. This injunction shall be effective as of September 8, 2000, and shall be in full force and effect for a period of 3 years from said date unless terminated or modified by appropriate order of this [c]ourt.
4. While this injunction Order is in effect, both [Denise] and [Natalie] are **PROHIBITED** from **POSSESSING OR CONTROLLING** any **FIREARM OR AMMUNITION**. Any firearm or ammunition in the possession or control of either [Denise] or [Natalie] must be **IMMEDIATELY TURNED OVER** to the **[HPD]** for safekeeping until this injunction is no longer in effect.
5. Special conditions or modifications: 1) This Order shall be subject to any Orders issued by the Family Court. 2) This Order shall not prohibit [Natalie] from contacting the residence of [Jeffrey] with regard to any matters dealing with visitation or exercise of visitation rights by [Natalie].
6. IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT ANY **WILFUL VIOLATION** OF THIS **ORDER** SHALL BE **PUNISHABLE AS CRIMINAL CONTEMPT** UNDER SECTION 604-10.5 OF THE HAWAI'I [sic] REVISED STATUTES. IN ADDITION, **ANY VIOLATION** OF THE **FIREARM AND AMMUNITION ORDER** SHALL BE PUNISHABLE AS A **MISDEMEANOR OFFENSE** UNDER SECTION 134-7 OF THE HAWAI'I [sic] REVISED STATUTES.

(Bolded, underscored emphases in original.) The district court then addressed the parties, pointing out, among other things, as follows:

This is an unusual situation because [Jeffrey] has custody of [Carlie], and [Denise] has to have contact, and

I've made a special provision here that first of all, this order shall be subject to any orders issued by the Family Court, which means that if they choose to issue--if Family Court chooses to issue any kind of order with regard to this matter, it takes precedence over this order. Okay?

Secondly, this order shall not prohibit [Natalie] from contacting the residence of [Jeffrey] with regard to any matters dealing with visitation, or exercise of visitation rights, by [Natalie].

Also note on the very bottom in six, it is further ordered, adjudged, and decreed, that any wilful violation, okay, of this order shall be punishable.

Now, what that means is she can call. If you happen to pick up the phone, just acknowledge that it's you and that you can't talk--you know, you can't do it, and pass the phone on, okay. That way we don't have---

And I'm going to ask one last thing. You guys, before you try and do anything, and stick the other side, think to yourself, is this a good thing or bad thing for [Carlie] who really, really, really, is innocent of any problems that have gone on between the two of you, or the four of you. Let's put it that way.

Is this a good thing for [Carlie?] Ask yourself that. I understand you do have a question about dropping off on visitation.

The following interchange then occurred:

[NATALIE]: That's correct. Every Sunday, we exchange [Carlie] at the Pali Long's parking lot, and it is usually myself, so I'm not sure as to if you'd allow Denise or not to be there to do that exchange or not. Or what the distance---

THE COURT: Why is it necessary that Denise do that?

[DENISE]: We have--may I answer?

THE COURT: Yeah.

[DENISE]: We have businesses. We go on the road a lot, and--during week-ends [sic] and so forth.

THE COURT: But this is one or two meetings during the week, right. Every other---

[NATALIE]: Once every other Sunday.

THE COURT: Every other. I'm going to have this apply. I'm going to have this apply, and have [Jeffrey] do the exchange. Okay. Have Denise leave first, and then the other side wait. Natalie, wait five minutes, so that there's no further contact this morning.

#### ISSUES ON APPEAL

Denise raises three issues on appeal: (1) whether the evidence presented was sufficient to grant an injunction against harassment against Denise; (2) whether the district court erred in combining both harassment cases and allowing Natalie to give a second rebuttal after Denise gave her final rebuttal, thus causing a great disadvantage on Denise's part; and (3) whether there was evidence of intent on Denise's part to harass Natalie.

#### DISCUSSION

##### A. Sufficiency of the Evidence

It should be noted initially that the bulk of Denise's opening brief is devoted to discussing Natalie's inappropriate behavior, rather than the lack of substantial evidence justifying an injunction against Denise for harassment.

The criteria for issuance of an injunction against harassment are set forth in HRS § 604-10.5 (Supp. 2001), which provides as follows:

**Power to enjoin and temporarily restrain harassment.**

(a) For the purposes of this section:

"Course of conduct" means a pattern of conduct composed of a series of acts over any period of time evidencing a continuity of purpose.

"Harassment" means:

(1) Physical harm, bodily injury, assault, or the threat of imminent physical harm, bodily injury, or assault; or

(2) An intentional or knowing course of conduct directed at an individual that seriously alarms or disturbs consistently or continually bothers the individual, and that serves no legitimate purpose; provided that such course of conduct would cause a reasonable person to suffer emotional distress.

(b) The district courts shall have power to enjoin or prohibit or temporarily restrain harassment.

(c) Any person who has been subjected to harassment may petition the district court of the district in which the petitioner resides for a temporary restraining order and an injunction from further harassment.

(d) A petition for relief from harassment shall be in writing and shall allege that a past act or acts of harassment may have occurred, or that threats of harassment make it probable that acts of harassment may be imminent; and shall be accompanied by an affidavit made under oath or statement made under penalty of perjury stating the specific facts and circumstances from which relief is sought.

(e) Upon petition to a district court under this section, the court may temporarily restrain the person or persons named in the petition from harassing the petitioner upon a determination that there is probable cause to believe that a past act or acts of harassment have occurred or that a threat or threats of harassment may be imminent. The court may issue an ex parte temporary restraining order either in writing or orally; provided that oral orders shall be reduced to writing by the close of the next court day following oral issuance.

(f) A temporary restraining order that is granted under this section shall remain in effect at the discretion of the court for a period not to exceed ninety days from the date the order is granted. A hearing on the petition to enjoin harassment shall be held within fifteen days after the temporary restraining order is granted. In the event that service of the temporary restraining order has not been effected before the date of the hearing on the petition to enjoin, the court may set a new date for the hearing; provided that the new date shall not exceed ninety days from the date the temporary restraining order was granted.

The parties named in the petition may file or give oral responses explaining, excusing, justifying, or denying the alleged act or acts of harassment. The court shall

receive all evidence that is relevant at the hearing, and may make independent inquiry.

If the court finds by clear and convincing evidence that harassment as defined in paragraph (1) of that definition exists, it may enjoin for no more than three years further harassment of the petitioner, or that harassment as defined in paragraph (2) of that definition exists, it shall enjoin for no more than three years further harassment of the petitioner; provided that this paragraph shall not prohibit the court from issuing other injunctions against the named parties even if the time to which the injunction applies exceeds a total of three years.

Any order issued under this section shall be served upon the respondent. For the purposes of this section, "served" shall mean actual personal service, service by certified mail, or proof that the respondent was present at the hearing in which the court orally issued the injunction.

Where service of a restraining order or injunction has been made or where the respondent is deemed to have received notice of a restraining order or injunction order, any knowing or intentional violation of the restraining order or injunction order shall subject the respondent to the provisions in subsection (h).

Any order issued shall be transmitted to the chief of police of the county in which the order is issued by way of regular mail, facsimile transmission, or other similar means of transmission.

(g) The court may grant the prevailing party in an action brought under this section, costs and fees, including attorney's fees.

(h) A knowing or intentional violation of a restraining order or injunction issued pursuant to this section is a misdemeanor. The court shall sentence a violator to appropriate counseling and shall sentence a person convicted under this section as follows:

- (1) For a violation of an injunction or restraining order that occurs after a conviction for a violation of the same injunction or restraining order, a violator shall be sentenced to a mandatory minimum jail sentence of not less than forty-eight hours; and
- (2) For any subsequent violation that occurs after a second conviction for violation of the same injunction or restraining order, the person shall be sentenced to a mandatory minimum jail sentence of not less than thirty days.

The court may suspend any jail sentence, except for the mandatory sentences under paragraphs (1) and (2), upon appropriate conditions, such as that the defendant remain alcohol[-] and drug-free, conviction-free, or complete court-ordered assessments or counseling. The court may suspend the mandatory sentences under paragraphs (1) and (2) where the violation of the injunction or restraining order does not involve violence or the threat of violence. Nothing in this section shall be construed as limiting the discretion of the judge to impose additional sanctions authorized in sentencing for a misdemeanor offense.

(i) Nothing in this section shall be construed to prohibit constitutionally protected activity.

In this case, the district court issued the Mutual Injunction Order after determining that both Denise and Natalie had committed harassment, as the term is defined in HRS § 604-10.5(a)(2). In Luat v. Cacho, 92 Hawai'i 330, 342, 991 P.2d 840, 852 (App. 1999), this court, after discussing the language and legislative history of HRS § 604-10.5, concluded that

the type of harassment that the courts are mandated to restrain or enjoin under paragraph (2) involves an intentional or knowing pattern of conduct composed of a series of acts over any period of time and evidencing a continuity of purpose that is not legitimate, and is directed at, seriously alarms, disturbs consistently, or continually bothers an individual and would cause a reasonable person to suffer emotional distress. It is conduct that involves systematic and continuous intimidation that stops short of assault or threats and cannot be controlled effectively by resort to criminal processes and penalties.

We also explained that an objective standard is applied in determining whether a course of conduct "would cause a reasonable person to suffer emotional distress." Id. at 343, 991 P.2d at 853 (internal quotation marks omitted). That is, "we are required to determine whether a reasonable person, normally

constituted, would have suffered emotional distress as a result of a particular course of conduct." Id. (internal quotation marks omitted).

There was evidence adduced below that Denise intentionally or knowingly engaged in a course of conduct directed at Natalie that disturbed consistently or continually bothered Natalie and served no legitimate purpose. For example, when Carlie was being exchanged, Denise had a way of "pushing Natalie's buttons" and irritating Natalie. Natalie testified that if she was parked in a stall in a corner of a parking lot, Denise would "park right in the middle, right smack in front of me, blocking my car in, and blocking traffic from going by. I've asked her to park in stalls--you know, there's many parking stalls on the side of me. She doesn't." There was also testimony that during exchanges of Carlie, Denise purposely ignored Natalie's simple questions and requests, aggravating Natalie. On one occasion, Denise ignored Natalie's request that Denise turn over Carlie's slippers, which Denise was carrying; as a result, Natalie snatched the slippers from Denise's hands. There was also testimony that Denise went out of her way to disturb and bother Natalie by: yelling at Natalie in front of Carlie, competing publicly for Carlie's affection by telling Carlie in front of Natalie how much "Mommy" loved her, changing Carlie's clothes in the Pali Longs parking lot as soon as an exchange had taken place (suggesting that Natalie had not



properly dressed Carlie), and snickering and laughing at Natalie during exchanges of Carlie. Additionally, there was testimony that Denise threatened to have Natalie fired, and despite many letters from Natalie instructing Jeffrey and Denise not to do so, Denise's handwritten notes appeared on numerous personal letters from Jeffrey that were faxed to Natalie at Natalie's workplace, the Hilton Hawaiian Village, where the letters could be picked up and seen by other individuals. Copies of letters from Jeffrey were also faxed to the Human Resources Department, Executive Business Services Center, and Executive Office of the Hilton Hawaiian Village, in what Natalie characterized as an "intent to make [her] look bad to those who intercepted the faxes." On one occasion, Natalie received "an attacking letter with numerous other awful letters attached" and discovered that, according to the confirmation report, the same letter and attachments had been sent to the Executive Office. Natalie states that she

immediately went to the Executive Office to find this awful letter was in fact held by the Executive Secretary to the General Manager. The Executive Secretary was holding this letter to give to the General Manager of the Hilton Hawaiian Village. She advised me that this fax number is unlisted and is not given out. She was surprised that [Jeffrey] had the number and must have been deceptive and posed as a corporation to get it.

Finally, there was testimony that Denise had, on one occasion, "slammed her hand against [Natalie's] car" and "flung [Natalie's] car door open as [Natalie was] driving away[,]" with Carlie in the back seat.

The foregoing evidence was clearly sufficient for the district court to determine that Denise had engaged in an "intentional or knowing course of conduct directed at [Natalie] that seriously alarm[ed] or disturb[ed] consistently or continually bother[ed Natalie], and that serve[d] no legitimate purpose[.]" HRS § 604-10.5(a)(2). There was also substantial evidence that the conduct engaged in by Denise would have caused a reasonable person to suffer emotional distress.

B. The Consolidation of the Two Harassment Cases

Denise complains that the district court erred in consolidating the two cases because Natalie was allowed to give a second rebuttal after Denise gave her final rebuttal, thus causing Denise "a great disadvantage." Pursuant to Rule 42(a) of the District Court Rules of Civil Procedure, "[w]hen actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."

In this case, common questions of law or fact were involved in both cases. The district court was quite patient in allowing both sides to present their evidence. Furthermore, the district court explained at the outset of the hearing on the motion for injunction the ground rules for presentation of the evidence. Under the circumstances, and in light of the record,

it seems clear that the district court did not abuse its discretion in hearing both cases together.

C. Whether Denise Intended to Harass Natalie

Denise contends that because there were several occasions when she could have pressed charges or made official complaints against Natalie but didn't, "[t]his argues against an intent on the part of [Denise] to harass [Natalie]." Denise also suggests that if she had an intent to harass Natalie, she would have called Natalie's workplace and spoken to Natalie's bosses "much sooner[.]" According to Denise, she made only one telephone call to Natalie's workplace, for the purpose of warning her that "continued telephoning to [Denise's] work telephone after repeated requests to stop would result in [Denise] calling one of the bosses at [Natalie's] workplace." Denise also maintains that she warned Natalie of the boundaries for phone calls and faxes and maintained great restraint when she was harassed or abused by Natalie. Furthermore, she and Jeffrey have "very busy and productive lives" and Natalie "is clearly not their focus."

This argument really relates to the sufficiency of the evidence argument, discussed in Section A above, which we have already concluded has no merit.

CONCLUSION

Based on the foregoing discussion, we affirm the Mutual Injunction Order, entered by the district court on September 8, 2000.

DATED: Honolulu, Hawai'i, August 12, 2002.

On the briefs:

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