

NOT FOR PUBLICATION

NO. 26041

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

BERT MISHIMA, JONI MISHIMA and on behalf of RISHA MISHIMA
and KAYLA MISHIMA, Petitioners-Appellees, v.
EDGAR LUCZON IBERA, Respondent-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
HONOLULU DIVISION
(CIVIL NO. 1SS03-1-972)

SUMMARY DISPOSITION ORDER

(By: Burns, C.J., Nakamura and Fujise, JJ.)

Respondent-Appellant Edgar Ibera (Appellant) appeals from the District Court of the First Circuit's October 28, 2003 First Amended Order Granting Petition for Injunction Against Harassment in favor of Petitioners-Appellees Bert Mishima, Joni Mishima, Risha Mishima and Kayla Mishima (Appellees) pursuant to Hawaii Revised Statutes (HRS) § 604-10.5 (1993).¹ This appeal was assigned to this court on August 24, 2004. After reviewing the record and the relevant law, we resolve Appellant's points of error as follows:

Regarding Appellant's challenge to the constitutionality of the order's Special Condition No. 5, the 20-foot distance restriction, we conclude that the court's ruling is

¹ The Honorable Peter T. Stone presided.

NORMA T. YARA
CLERK, APPELLATE COURTS
STATE OF HAWAII

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correct.² Contrary to Appellant's contention, an individual's constitutional right to freedom of movement is not absolute. Coyle v. Compton, 85 Hawai'i 197, 940 P.2d 404 (App. 1997); Bailey v. Sanchez, 92 Hawai'i 312, 990 P.2d 1194 (App. 2000). The distance restriction does not unreasonably infringe upon Appellant's fundamental rights and is, thus, sound. See id. Additionally, we conclude that Appellant had proper notice that a restriction in the nature of Special Condition No. 5 could result from Appellees' petition.

Regarding Appellant's challenge to the sufficiency of the evidence, we conclude that the injunction order was indeed supported by clear and convincing evidence of harassment. Given the testimony elicited by the parties as to Appellant's verbal and physical confrontations with Appellees, a finding of harassment by physical harm or the threat of imminent physical harm toward Appellees was not clearly erroneous, and is alone sufficient to affirm the October 28, 2003 injunction. See Booth v. Booth, 90 Hawai'i 413, 978 P.2d 851 (1999); Bailey v. Sanchez, 92 Hawai'i 312, 990 P.2d 1194 (App. 2000). Furthermore, we conclude upon *de novo* review, that the incidents could have caused a reasonable person to suffer emotional distress, further supporting the injunction order. See Luat v. Cacho, 92 Hawai'i 330, 991 P.2d 840 (App. 1999).

² As a question of constitutional law, we review this issue *de novo*. See Gardens at West Maui Vacation Club v. County of Maui, 90 Hawai'i 334, 978 P.2d 772 (1999).

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Regarding Appellant's challenge to the court's exclusion of rebuttal testimony from his daughters, we conclude that this exclusion of evidence was not an abuse of discretion.³ The courts may properly exclude relevant evidence pursuant to Hawaii Rules of Evidence, Rule 403 (1981) and, here, the court's determination that the probative value of such testimony was outweighed by other concerns was not an abuse of discretion. Additionally, we point out that Appellant submitted to the court declarations from his daughters prior to the October 28, 2003 hearing.

Regarding Appellant's challenges to the court's July 28, 2003 costs and fees award, we conclude that this award was not an abuse of discretion.⁴ Contrary to Appellant's assertion, the court afforded him the opportunity to be heard regarding the award in his July 31, 2003 motion to alter or amend judgment, his subsequent motion to dissolve Special Condition No. 5 and the October 28, 2003 hearing on that motion. Hawaii Revised Statutes section 604-10.5(g) (1993) provided the court with the authority to make the costs and fees award and this authority is not subject to HRS section 607-14.5 (1993). Furthermore the July 28, 2003 Affidavit of Counsel Re: Attorneys' Fees and Costs, provided in the record, constitutes support for

³ Exclusion of this testimony is reviewed for abuse of discretion as Hawaii Rules of Evidence, Rule 403 (1981) does not require one correct result. Kealoha v. County of Hawaii, 74 Haw. 308, 844 P.2d 670 (1993).

⁴ See Canalez v. Bob's Appliance Service Center, Inc., 89 Hawai'i 292, 972 P.2d 295 (1999).

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the award; and, finally, the court's decision to not order the parties to mediate does not render the award unjust.

Therefore,

IT IS HEREBY ORDERED that the October 28, 2003 First Amended Order Granting Petition for Injunction Against Harassment is affirmed.

DATED: Honolulu, Hawai'i, September 16, 2005.

On the briefs:

Roy Y. Yempuku,
for Respondent-Appellant.


Chief Judge

Dexter T. Higa and
Craig H. Hirai,
(Hirai, Lum, Tomita, & Higa),
for Petitioners-Appellees.


Associate Judge


Associate Judge