

NO. 27022

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

MALCOM K. CHUNG, et al., Petitioners-Appellees, v.
JACK THOMAS, Respondent-Appellant

APPEAL FROM THE DISTRICT COURT OF THE THIRD CIRCUIT,
NORTH AND SOUTH HILO DIVISION
(CIVIL NO. 3SS 04-1-258)

MEMORANDUM OPINION

(By: Watanabe, Presiding Judge, Foley and Fujise, JJ.)

Respondent-Appellant Jack Thomas (Thomas or Respondent) appeals from the November 26, 2004 Order Granting Petition For Injunction Against Harassment (Order) filed in the District Court of the Third Circuit, North and South Hilo Division (district court).^{1/} Pursuant to Hawaii Revised Statutes (HRS) § 604-10.5 (Supp. 2006), Petitioners-Appellees Malcom Chung (Malcom), April Chung (Mrs. Chung), and their four minor children (collectively, the Chungs or Petitioners)^{2/} filed a Petition for Ex Parte Temporary Restraining Order and for Injunction Against Harassment (Civil No. 3SS 04-1-258) (Petition) against Thomas on October 11, 2004 in the district court. Without entering findings of fact or

^{1/} Per diem District Court Judge John P. Moran presided.

^{2/} The Chungs did not file an answering brief. Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(c) states that "the appellee shall file an answering brief." HRAP Rule 30 states in relevant part:

When the brief of an appellee is not filed within the time required, or is not in conformity with these rules, the brief may be stricken and monetary or other sanctions may be levied by the appellate court. In addition, the appellate court may accept as true the statement of facts in the appellant's opening brief.

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conclusions of law to support its Order, the district court granted the Petition, enjoining Thomas from contacting the Chungs for three years from the date of the Order.^{3/}

On appeal, Thomas raises six points of error: (1) the Order was void because it failed to state clear and convincing evidence of Thomas's acts of harassment necessary to support an injunction under HRS § 604-10.5, (2) the Order was void because the district court failed to apply the standard of clear and convincing evidence necessary to support an injunction under HRS § 604-10.5, (3) the Order was void because it violated due process under the doctrine of issue preclusion, (4) the Order violated due process because the district court prejudged the case and improperly limited Thomas's presentation of evidence, (5) the district court violated Thomas's due process rights by improperly involving a disqualified district court judge in reaching its decision, and (6) the district court's judgment infringed upon Thomas's right to travel under the United States and Hawai'i Constitutions.

^{3/} The November 26, 2004 Order Granting Petition For Injunction Against Harassment (Order) specifically stated:

3. The Respondent(s) and any other person acting on behalf of the Respondent(s) is hereby restrained and enjoined from:
 - a. Contacting, threatening, or physically harassing the Petitioner(s) and any person(s) residing at Petitioner(s)' residence
 - b. Telephoning the Petitioner(s)
 - c. Entering or visiting the Petitioner(s)' residence, including yard and garage and place of employment.

(Checked boxes omitted.) The Order was for three years and expires on November 26, 2007.

Upon a careful review of the record and briefs submitted by the parties, and having given due consideration to the arguments advanced and the issues raised, we hold that the district court failed to comply with District Court Rules of Civil Procedure (DCRCP) Rule 52(c). Accordingly, we vacate the Order and remand this case to the district court to enter findings of fact and conclusions of law to support the Order.

I. BACKGROUND

In their Petition, the Chungs alleged that Thomas had engaged in numerous incidents that constituted harassment: (1) on September 16, 2004, Thomas falsely accused Malcom of masturbating in front of Malcom's children; (2) on September 24, 2004, Thomas "stalked" Mrs. Chung and her daughter as they walked to Longs Drug Store; (3) on September 24, 2004, Thomas took pictures of Malcom without Malcom's approval and held "out his voice-recorder towards [Malcom's] direction"; (4) on September 26, 2004, Malcom requested Hilo Police Department assistance because Thomas appeared at Health-Works (where Malcom performed his community service); and (5) on September 27, 2004, Thomas approached Malcom while making "assaulting gestures with some sort of club/umbrella like object."

The district court issued on October 11, 2004 a Temporary Restraining Order Against Harassment, which commanded Thomas to appear before the court on October 22, 2004 for a hearing. On October 22, 2004, Malcom, Mrs. Chung, Thomas, Thomas's wife (Mrs. Thomas), and Thomas's counsel appeared before the district court. At this hearing, the presiding judge offered the parties two options: (1) both parties could either agree to a mutual restraining order for the next three years, or (2) a hearing could be set for another day so that both parties could present their case. The Chungs agreed to a mutual restraining

order. However, Thomas chose the second option. The district court scheduled a hearing for November 26, 2004.

At the November 26, 2004 hearing, the district court asked Malcom: "What specific incidents of harassment or imminent acts of harassment have you -- you, [Malcom], experienced since June 15th at the hands of Jack Thomas?" Malcom testified that on July 20, 2004, while in the hallway of the courthouse, Thomas purposely approached Malcom's six-year old daughter so the daughter would "whack" Thomas's walker and cause an accident. The district court then asked Malcom:

THE COURT: What other incident have you, Malcom Chung, experienced at the hands of Jack Thomas since June 15th of this year?

[MALCOM]: When I was doing my community service here in the purple building. I was not located on the sidewalk, I was down into the parking lot. Prior before that my wife --

THE COURT: This is the blower incident?

[MALCOM]: Yes.

. . . .

THE COURT: Did you have a leaf blower?

[MALCOM]: I have a leaf blower, Your Honor.

THE COURT: Did you see Mr. Thomas walk by?

[MALCOM]: No, actually not until I face that direction and notice that he were behind of the tree. When I recognize him he move out of the tree onto the sidewalk and continued down, taking more pictures, taking more pictures. And holding on his voice recorder. Yes, Your Honor.

* * *

THE COURT: Any other incident?

[MALCOM]: When I'm disturbed on -- the 13th that they both made allegations through Child Protective Service, which I have documents saying that I masturbated on Barenaba Lane in front of my childrens, I continued to do drugs. I had been investigated, my children have been questioned. I have a clearance and notification from Child Protective Service saying that all allegations have not -- they have been completed, the allegations is not found to be true.

. . . .

THE COURT: Alright. Anything else that you have to report about -- you understand now your TRO is only as against Mr. Thomas.

[MALCOM]: Yes.

THE COURT: So what I'm interested in is any incident involving Mr. Thomas.

[MALCOM]: Yes. At my work place. Maybe I would say about two days before that leaf blower incident that he come by my work place. I have it mentioned on the TRO.

THE COURT: The Linen Supply?

[MALCOM]: Yes. And the police wasn't reported because the TRO had not been in effect.

. . . .

THE COURT: And what happened on the second one?

[MALCOM]: The second one when I was unloading my linens coming from Kona Mr. Thomas came on the side between the truck and the fence. Which the fence separates the Old Quality Washerette. Not the place where I work. There's -- the laundromat actually. He walked between there, look at me like kind of gave me that look with the -- could be an umbrella --

THE COURT: How far was he from you? How far was he from you?

[MALCOM]: Maybe from here to [Thomas's counsel].

THE COURT: From here to [Thomas's counsel] I would estimate that to be 10, 15 feet?

. . . .

[MALCOM]: Eight to ten feet.

* * *

THE COURT: Alright. Any other incident since June 15th where you alleged that you have had harassment or acts of imminent harassment from Mr. Thomas?

[MALCOM]: Yes. On the 26th, I have again on my TRO, that Mr. Thomas also came by to make contact.

THE COURT: Where was that?

[MALCOM]: At the Health Works.

* * *

THE COURT: What did Mr. Thomas do?

[MALCOM]: He actually made his way down to the driveway. I don't know if he made contact with my supervisor. Um, when he -- he were there for I would say maybe about a good six to ten minutes. I was waiting for police to arrive. Mr. Thomas came out, he made his way to the stoplight, crossed the street, and he made his way home.

THE COURT: So you never talked to him that day?

[MALCOM]: No.

THE COURT: You never felt threatened? He never had anything to cause you to be threatened?

[MALCOM]: -- feel threaten, yes. When I see him I feel threatened. I feel threatened. I feel hurt because there's so much of false evidence that he try use and things. I even mentioned to him, "Mr. Thomas, can you please don't even take picture." And he don't respect that. He continue to take it, and take it, and take it, and take it.

The district court then questioned Mrs. Chung about any incidents that had occurred with Thomas:

THE COURT: Mrs. Chung, since June 15th of this year, what specific acts have you experienced that directly relate to Jack Thomas?

. . . .

MRS. CHUNG: . . . September 24th. I have my daughter, my twenty-month-old daughter. We were walking to, um, Longs Drugs.

THE COURT: Over here on Pauahi?

MRS. CHUNG: Yeah, from Health Works. From Health Works I walked on Kilauea to go to Longs Drugs to go get some medication. And when I was there, as I exited out of Longs Drugs, I turned my head, there were Jack Thomas standing by -- between two cars. So I felt I was threatened.

. . . .

THE COURT: What was he doing?

MRS. CHUNG: He was standing between cars with his hand in his backpack. So I grabbed my daughter --

THE COURT: Why didn't you just walk into Longs and ignore him?

MRS. CHUNG: No, I walking out of Longs.

THE COURT: Oh, alright.

MRS. CHUNG: Going back to the Health Works where he was doing his community service.

So as I was walk -- I seen Jack with his hand in his backpack, so I grabbed my daughter and I -- you know, I made it back. Then I felt like Jack was following me. Then I told my friend.

THE COURT: But he did -- did he or did he not follow you?

MRS. CHUNG: He did follow me, but my friend was there. She seen him too.

. . . .

THE COURT: Alright. But as you come out of Longs, you see Mr. Thomas in the parking lot --

MRS. CHUNG: Yes.

THE COURT: -- that makes you uncomfortable?

MRS. CHUNG: Oh, yes.

THE COURT: Did you -- did he approach you?

MRS. CHUNG: Oh, no. But just seeing him there, you know.

* * *

THE COURT: You're coming back from Longs, he's on the other side of the street.

MRS. CHUNG: Yes. Yes.

THE COURT: And you feel that that was harassment?

MRS. CHUNG: Oh, yes. I felt threatened.

THE COURT: Did you ever have any conversation with him at either time?

MRS. CHUNG: No, but I just ignore him and just -- you know, just --

THE COURT: What other incident? Any other incidents?

MRS. CHUNG: That's all.

The district court questioned Thomas about the alleged incidents, and Thomas denied each allegation:

THE COURT: . . . You're on the other side of the street. [Mrs. Chung] goes into Longs, comes out, you're in the parking lot, she walks back to Health Works, and you're on the other side of the street. Tell me about that incident.

[THOMAS]: One, I have no memory of that incident. Two, if I'm on the other side of the street walking home, not looking, not gesturing, not making a sound --

THE COURT: I'll make that decision. What I'd like to know, Mr. Thomas, is were you in the parking lot, waiting when she came out --

[THOMAS]: No. My wife and I were here. I have an alibi. We were doing something together.

THE COURT: You said you were doing the [B]ible study work, okay.

[THOMAS]: No, that was another time. We were doing our daily worship in the morning and then --

THE COURT: What about the two occasions that [Malcom] alleges that you went to his place of employment? One them was when he was unloading his truck and you actually went past the fence to get near his truck, according to him. What's your response to that?

[THOMAS]: Okay. Well first of all he says I'm on the street, which is Maunaloa. There is no mention of a truck. I wasn't here. We have the documentations on that, Your Honor. Also, I signed in about this time, little later, at the -- you know, they have a court library computer and you sign in.

THE COURT: So your contention is you were not there and these events never happened?

[THOMAS]: And my wife's there and I have the document from the --

THE COURT: Just stick to the point, please.

[THOMAS]: Yes.

THE COURT: Are you alleging that you were not there on both occasions?

[THOMAS]: I was not there. I was not there.

THE COURT: That's all I'm asking. That's all I'm asking.

[THOMAS]: Yes.

THE COURT: Then there's two incidents where he -- [Malcom] is at banyan tree -- excuse me, at Health Works. On one occasion you're behind the big -- allegation is you're behind the big banyan tree which would be just the Hamakua side of the little parking lot for that area and taking pictures. And there was another occasion where you actually walked down into the parking lot as he was reporting to do his work. He was in a car, you guys never had contact. But he saw you walking down to where he was doing this work. What's your response to those situations?

. . . .

[THOMAS]: Sir, I don't hide behind a tree. We have --

THE COURT: Were you standing behind the banyan tree and taking photos?

[THOMAS]: No, sir.

. . . .

THE COURT: . . . Please, sir, did you walk by the Health Works and go down into the parking lot?

[THOMAS]: No, I didn't go down the parking lot.

THE COURT: Okay. Did you walk by and have this incident where he talks about and you talked about the blower? The leaf blower. Did that occur?

[THOMAS]: My incident. The one I described happened. I was on the public sidewalk.

THE COURT: Okay. Alright.

Last one, you heard [Malcom] talk about the incident where you came into court -- I think it was July 20th of this year. Where you're in the walker. Apparently you had some crutches also in the front part of the walker?

[THOMAS]: No, just forearm crutches, Your Honor.

THE COURT: Okay. Fine. And that he stepped between you and his six-year-old child. Did that happen?

[THOMAS]: No. Impossible. I was with my wife. There's no six year old child.

THE COURT: His six year old child he's alleging came over to you and he stepped in between two of you.

[THOMAS]: No. No such thing. There's never been a report of any of this stuff.

THE COURT: Alright. Okay. Thank you.

After hearing the testimonies of the parties, the district court granted the Chungs' petition for injunction against harassment. The district court stated:

THE COURT: . . . [R]epeatedly there are a number of occasions where you folks should not have come in contact or so close to one another as to give rise to incidents which were testified to and --

. . . .

[THE COURT:] It is clear to me, based on the evidence before this Court and the pleadings before this Court, that unless I issue a restraining order against Mr. Thomas we are going to have some problems. And the purpose of this Court and the purpose of restraining orders is to make sure that this community is safe. And I am not going to be the court or the judge who's responsible for allowing what I consider to be inappropriate.

* * *

[THE COURT:] The order is issued as against Jack Thomas regards the Chungs. The matter's been decided. I wish you all luck. I hope you all get along.

[Thomas's Counsel]: Your Honor, may we have a finding of facts and conclusions of law?

THE COURT: You want to draft them, have them approved by the other side; that's fine.

The district court issued its Order, and Thomas timely appealed. No findings of fact and conclusions of law were filed.

II. DISCUSSION

Thomas contends the district court's Order is not supported by any findings of fact or conclusions of law. Specifically, he argues that "[o]nce the Notice of Appeal was filed, the District Court was required to 'find the facts specially and state separately its conclusions of law thereon.'"

Under DCRCP Rule 52(c), "[w]henver a notice of appeal is filed and findings of fact and conclusions of law have not been made, unless such findings and conclusions are unnecessary as provided by subdivision (a) of this rule, the court shall find the facts specially and state separately its conclusions of law

thereon."^{4/} However, we have held that an "appellate court may also waive the district court findings required under DCRCP Rules 52(a) and (c) where the record is clear and such findings are unnecessary to a determination of the issues on appeal."

Richards v. Kailua Auto Mach. Serv., 10 Haw. App. 613, 621, 880 P.2d 1233, 1238 (1994); see also, Luat v. Cacho, 92 Hawai'i 330, 338, 991 P.2d 840, 848 (App. 1999) ("Although . . . the appellate court may proceed where the record is clear and findings are unnecessary, . . . it is preferable for the district court to enter such findings and conclusions once an appeal is filed.").

Here, however, the record does not afford us a clear understanding of the ground or basis of the district court's decision. Moreover, a finding of whether or not Thomas committed the alleged acts is necessary to address the issues now raised on appeal. Although the Chungs alleged several incidents of harassment, Thomas denied every allegation. The Chungs proffered no evidence other than their testimony to establish that they were harassed by Thomas.

HRS § 604-10.5 requires that the clear and convincing standard of proof be applied in determining whether conduct rises to the level of paragraph (2) harassment.^{5/}

^{4/} District Court Rules of Civil Procedure Rule 52(a) states:

(a) **Effect.** In all actions tried upon the facts, the court upon request of any party shall find the facts specially and state separately its conclusions of law thereon. Judgment shall be entered pursuant to Rule 58. Unless findings are requested, the court shall not be required to make findings of fact and conclusions of law. If an opinion or memorandum of decision is filed, stating the facts and the court's opinion on the law, it will be unnecessary to make other findings of fact and conclusions of law. Findings of fact and conclusions of law are unnecessary on decisions of motions except as provided in Rule 41(b).

^{5/} Hawaii Revised Statutes § 604-10.5 (Supp. 2006) defines "harassment" as:

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

(continued...)

The Hawai'i Supreme Court has stated that clear and convincing evidence is

an intermediate standard of proof greater than a preponderance of the evidence, but less than proof beyond a reasonable doubt required in criminal cases. It is that degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established, and requires the existence of a fact be highly probable.

Masaki v. General Motors Corp., 71 Haw. 1, 15, 780 P.2d 566, 574 . . . (1989).

Luat, 92 Hawai'i at 342-43, 991 P.2d at 852-53 (footnote not in original). The alleged wrongdoer's interests are deemed to be more substantial under the clear and convincing standard of proof. Luat, at 343, 991 P.2d at 853.

The district court failed to enter findings regarding the alleged incidents of harassment by Thomas. At most, the district court stated:

[THE COURT]: . . . [R]epeatedly there are a number of occasions where you folks should not have come in contact or so close to one another as to give rise to incidents which were testified to and --

MRS. THOMAS: He makes them up, Your Honor.

THE COURT: Mrs. Thomas, please. He may make them up, that's your allegation.

It is clear to me, based on the evidence before this Court and the pleadings before this Court, that unless I issue a restraining order against Mr. Thomas we are going to have some problems. And the purpose of this Court and the purpose of restraining orders is to make sure that this community is safe. And I am not going to be the court or the judge who's responsible for allowing what I consider to be inappropriate.

Without knowing which evidence the district court considered in rendering its decision, we cannot conclude that the court issued

²/ (...continued)

- (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.

the Order on the basis of clear and convincing evidence that Thomas harassed the Chungs. The record is not sufficiently clear to allow this court to waive the district court findings required by DCRCP Rule 52(c).

III. CONCLUSION

Accordingly, the Order Granting Petition For Injunction Against Harassment filed on November 26, 2004 in the District Court of the Third Circuit, North and South Hilo Division, is vacated, and this case is remanded.

DATED: Honolulu, Hawai'i, October 18, 2007.

On the briefs:

Steven D. Strauss
for Respondent-Appellant.


Presiding Judge


Associate Judge


Associate Judge