

NO. 23836

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

ROBERT COELLO and SARAH KELLEN, Petitioners-Appellees,  
v. TOM DONNAN, Respondent-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT,  
HONOLULU DIVISION  
(CIVIL NO. 10SS 0C-1039)

MEMORANDUM OPINION

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

Respondent-Appellant Tom Donnan (Donnan) appeals from  
an Order Granting Petition for Injunction Against Harassment (the  
Injunction)<sup>1</sup> granted to Petitioners-Appellees Robert Coello

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<sup>1</sup>The Injunction was granted pursuant to Hawaii Revised Statutes  
§ 604-10.5 (Supp. 2001), which provides, in relevant part:

- §604-10.5 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:
- (2) An intentional or knowing course of conduct directed  
at an individual that seriously alarms or disturbs  
consistently or continuously 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

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(Coello) and Sarah Kellen (Kellen) by the District Court of the First Circuit, Honolulu Division' (the district court), on September 20, 2000.

On appeal, Donnan contends that: (1) because the matter arises from a real estate dispute, the district court lacks jurisdiction; (2) the injunction unlawfully prohibits constitutionally protected activity; (3) the district court erred when it denied Donnan's Objections to Video Document and Objections to Declaration of Petitioners; and (4) the district

1/ (...continued)

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.

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

2/ The Honorable Barbara F. Richardson presided.

court denied Donnan due process of law and equal protection of the law in violation of the fourteenth amendment of the United States Constitution and article I, section 5<sup>3</sup> of the Hawaii Constitution.

#### I. BACKGROUND

Cocillo and Kellen filed an Amended Petition for Ex Parte Temporary Restraining Order and for Injunction Against Harassment (the Petition) in the district court on August 24, 2000. On the Petition, Cocillo and Kellen wrote the following declaration detailing the alleged harassment:

Since taking ownership of the house bordering Mr. Donnan's house, we have had numerous visits from several city and county departments responding to complaints from Mr. [Donnan] & his tenants. ie, [sic] Ewane Society, building inspectors, fire department, Dept. of Land Utilization, Sewer Dept., etc., with none finding any fault or wrong actions. After taking ownership, we had to evict Donnan's friend, Malou Mallison due to non-payment of rent for 5 months. After winning the court date of Aug. 15<sup>th</sup>, Donnan & all his friends & tenants on his yard, started making vulgar, racial & threating comments towards Sarah and Robert, which we recorded on video. They said they've only just begun harassing us, and we haven't seen anything yet. After surveying the property line, we posted "no trespassing" signs on Donnan's side of our property. This upset them very much since they had the illusion part of our property belonged to them. They tore off the signs & threw them in our yard. Usually the one to instigate the comments is Donnan's immediate friend & companion, Percy. We fear for the safety of Sarah, a young female who Donnan & his

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Haw. Const. art. I, § 5 (1993), provides:

#### DUE PROCESS AND EQUAL PROTECTION

Section 5. No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.

friends try & intimidate. They called her "Bitch" and also made numerous racial slurs saying no one likes us, and to go back across the border. In addition to all this, every time we leave the house to go to the beach, snide & sneerful (sic) comments are made by Donnan & friends toward Robert, Sarah & their dogs.

On August 24, 2000, a temporary restraining order was entered by the district court against Donnan and Donnan was notified that a hearing on the petition would be held on September 6, 2000, at 8:30 a.m.

On September 1, 2000, Donnan filed a Motion for Order Declaring Temporary Restraining Order Null and Void, Dissolving Same and to Dismiss Petition and for Reasonable Attorney's Fees and Costs (Motion Declaring TRO Null and Void). Donnan's motion stated that the Petition was frivolous, the district court lacked jurisdiction over a real property dispute, and the restraining order denied him his protected constitutional rights. Donnan's motion came for hearing on September 6, 2000, and was denied.<sup>4</sup>

A hearing on the Petition was held September 20, 2000, at which the following evidence was adduced.

Coello testified that he had purchased a duplex next door to Donnan's property. In order to settle a property line dispute with Donnan, Coello paid for an official survey of his property to satisfy Donnan. Coello found out that he had more

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<sup>4</sup>The Honorable Rhonda A. Kishimara presided.

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yard than he originally thought he owned. During June and July of 2000, Coello was visited by the police department, a building inspector, the Sunset Beach Fire Department, an inspector from the Department of Land Utilization, and the health department. The visits were made in response to telephone calls from Donnan's residence. No violations were found by any of these entities. There were approximately 12 people residing on Donnan's property.

On June 19, 2000, Coello was given access to clean out the possessions of Malou Mallison (Mallison), who had been evicted in April from the adjoining half of Coello's duplex. Coello had been awarded \$800 from Mallison for payment of back rent after a summary possession hearing on August 16, 2000. Mallison was a friend of Donnan.

Three hours after the August 16, 2000, hearing, Coello videotaped Donnan and his guests arguing with Kellen across the property line. Much of the speech on the videotape was transcribed as indiscernible. Donnan objected to the admission of the videotape on the basis that the tape was edited and was an invasion of Donnan's privacy. The district court overruled the objection and allowed one minute of the videotape to be played, stating:

The portions that are being shown to the Court are unedited, or unspliced and that the camera person was one of the petitioners, and the petitioner was taking the video from the petitioner's own property, and the subject of the video was in part Mr. Donnan.

The court finds that the evidence will be admitted as being relevant, and the court overrules the objection.

After viewing the videotape, Donnan again objected on the ground that there was no harassment shown by Donnan on the videotape. The district court did not find the videotape was that instructive with respect to any acts of harassment and allowed further testimony.

Coello testified that when he and Kellen walked out to the beach, Donnan and his guests would yell vulgarities and racial slurs at and make obscene gestures towards Coello and Kellen. Coello believed the animosity stemmed from an official survey that added to Coello's property and the eviction of Donnan's friend from Coello's property.

Kellen testified that Donnan had verbally harassed her by yelling racial slurs at her and had threatened future harassment.

Donnan called Samson Santos (Santos), an investigator for the Hawaiian Humane Society, as the only defense witness. Santos testified that two complaints had been made against Coello for violations of the leash law. Only one of the complaints had been made by Donnan. Santos visited Coello three times and found no violations, so the case had been closed.

At the close of evidence, Donnan moved to dismiss the complaint on the basis of insufficient evidence and lack of jurisdiction over a real property dispute. The district court denied Donnan's motion and granted the Injunction for a period of three years. The district court stated:

THE COURT: Alright, the Court does find by clear and convincing evidence that the respondent, Mr. Donnan, has intentionally or knowingly conducted himself towards the petitioners in a manner which seriously alarms or disturbs them by consistently or continually bothering the individuals with complaints to the building inspectors, fire department, land utilization, and sewage departments, et cetera, thereby which is serving no legitimate purpose other than to bother the petitioners, and that it caused the petitioners to suffer emotional distress and reasonably so.

Therefore, the Court is going to grant the order of injunction enjoining Mr. Donnan for a period of three years from further harassment of the petitioners . . . .

And with respect to your motion if it is a motion, [Defense Counsel], to dismiss on the basis that this is a real property dispute, the Court finds that the motion is going to be denied. This is a matter of harassment which the district court has the power to enjoin and which the Court is going to enjoin at this time.

With respect to any property disputes, that does belong in circuit court and the Court is not by this order preventing the respondent from filing a legitimate action with respect to a dispute of a property line in the circuit court, okay.

The Order Granting Petition for Injunction Against Harassment was filed September 20, 2000. Donnan filed his Notice of Appeal on October 16, 2000.

## II. STANDARDS OF REVIEW

### A. Interpretation of a Statute

The interpretation of a statute is a question of law reviewable de novo.

When construing a statute, our foremost obligation is to ascertain and give effect to the

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intention of the Legislature, which is to be obtained primarily from the language contained in the statute itself. And we must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose.

Ka Pa'akai O Ka'aina v. Land Use Comm'n, 94 Hawai'i 31, 41, 7 P.3d 1068, 1078 (2000) (internal quotation marks and citations omitted) (quoting Amantiad v. Odum, 90 Hawai'i 152, 160, 977 P.2d 160, 168 (1999)).

#### B. Admissibility of Evidence

[D]ifferent standards of review must be applied to trial court decisions regarding the admissibility of evidence, depending on the requirements of the particular rule of evidence at issue. When application of a particular evidentiary rule can yield only one correct result, the proper standard for appellate review is the right/wrong standard.

. . . Where the evidentiary ruling at issue concerns admissibility based upon relevance, under Hawai'i Rules of Evidence (HRE) Rules 401 and 402, the proper standard of appellate review is the right/wrong standard.

. . . Evidentiary decisions based on HRE Rule 403, which require a "judgment call" on the part of the trial court, are reviewed for an abuse of discretion. The trial court abuses its discretion when it clearly exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party litigant.

Tahieros v. Clark Equipment Co., 85 Hawai'i 336, 350-51, 944 P.2d 1279, 1293-94 (1997) (quoting State v. Arceo, 84 Hawai'i 1, 11, 928 P.2d 843, 853 (1996)) (citations and brackets omitted).

#### C. Denial of Equal Protection and Due Process

"[Where] no fundamental rights or suspect classifications are involved, the rational basis standard is

used. Only if there is no rational basis to sustain the challenged statutes will there be a violation of due process under U.S. Const. amend. XIV and Haw. Const. art. I, § 5." Washington v. Fireman's Fund Ins. Companies, 68 Haw. 192, 202, 708 F.2d 129, 136 (1985) (citation omitted).

We recognize that, unless fundamental rights or suspect classifications are implicated, we will apply the rational basis standard of review in examining a denial of equal protection claim. Under this standard, to prevail, a party challenging the constitutionality of a statutory classification on equal protection grounds has the burden of showing, with convincing clarity that the classification is not rationally related to the statutory purpose, or that the challenged classification does not rest upon some ground of difference having a fair and substantial relation to the object of the legislation, and is therefore not arbitrary and capricious.

Sandy Beach Defense Fund v. City Council, 70 Haw. 361, 380, 773 P.2d 250, 262 (1989) (citation omitted).

### III. DISCUSSION

#### A. Jurisdiction

Donnan contends that Hawaii Revised Statutes (HRS) § 604-5(d) precludes the district court from taking jurisdiction over issues of real property ownership. Section 604-5(d) (Supp. 2001) states that "[t]he district courts shall not have cognizance of real actions, nor actions in which the title to real estate comes in question[.]"

The statute granting jurisdiction in the instant case is HRS § 604-10.5(b) (Supp. 2001), which vests the district

courts with the "power to enjoin or prohibit or temporarily restrain harassment."

Furthermore, at the September 6, 2000, hearing on the Motion Declaring TRO Null and Void, the district court stated the following:

THE COURT: The Court is not, the Court is not looking at boundary disputes. The Court does not have jurisdiction. I agree with you, [Defense Counsel], in terms of determining quiet title actions or if there's ownership in dispute, but in looking at the TRO petition, there's [sic] particular statements which have been made by the petitioners, i.e., that Donnan, it's alleged that Donnan and all his friends and tenants in his yard started making vulgar, racial and threatening comments toward petitioners which was [sic] recorded on video. They said they've only just begun harassing us and we haven't seen anything yet. That's enough to have granted the TRO[.]

The district court had jurisdiction over the Petition.

#### B. Constitutionally Protected Activity

Donnan's second point states:

HRS § 604-10.5(1) enjoins the District Court from selecting out a victim of crime and preventing him, under the threat of contempt, from calling the Honolulu Police Department, or the Humane Society or other authorities, when he is a victim of criminal conduct or he observes violations of law.

Section 604-10.5(2) provides that "(n)othing in this section shall be construed to prohibit constitutionally protected activity."

The Injunction does not prevent Donnan from calling on public safety authorities "when he is a victim of criminal conduct or he observes violations of law." The Injunction, on its face, prevents Donnan from:

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- A. Contacting, threatening or physically harassing Petitioner(s). "Contacting" is defined to include but is not limited to the telephone, mail, facsimile, pager, internet, etc.
- B. Contacting, threatening or harassing any person(s) while residing at Petitioner(s)' residence.
- C. Entering and/or visiting the premises of the Petitioner(s)' residence and/or the place of the Petitioner(s)' employment.

Donnan was not enjoined from constitutionally protected activity.

C. Admission of the Videotape into Evidence

Donnan contends the district court erred when it refused to suppress the videotape. Donnan argues, "[t]he Video and the petition were acts of hate crimes and acts of revenge and retaliation against Donnan and his tenant and friend because they had followed the law and reported criminal violations thereof."

Hawaii Revised Statutes § 604-10.5(f) states that "[t]he court shall receive all evidence that is relevant at the hearing, and may make independent inquiry." The district court admitted the videotape, stating "[t]he Court finds that the evidence will be admitted as being relevant, and the Court overrules the objection."

The videotape showed Kellen interacting with Donnan and Donnan's guests and was, therefore, relevant. However, the district court did not find the videotape was "that instructive with regard to any acts of harassment[.]" The district court found clear and convincing evidence of harassment based on the

testimony of the witnesses and other evidence received, and not solely on the videotape. The district court was correct in admitting one minute of videotape as relevant to the allegations of harassment.

D. Equal Protection and Due Process of Law

Donnan contends he was denied the right to defend himself because he was "prohibited from filing any defensive response, including any counterclaim that would establish his right to a restraining order, damages, proof of ownership by way of adverse possession, a trial by jury and the right to have this case determined in a Court of competent jurisdiction, namely, the First Circuit Court."

Donnan cites Ramil v. Keller, 68 Haw. 608, 726 P.2d 254 (1986), and Hovey v. Elliott, 167 U.S. 409, 17 S. Ct. 841 (1897), in support of his argument. In Ramil, the Supreme Court of Hawai'i upheld litigation-ending sanctions after the defendants refused to comply with discovery orders. 68 Haw. at 621, 726 P.2d at 263. In Hovey, the United States Supreme Court found denial of due process of law, stating "[a] sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal." 167 U.S. at 414, 17 S. Ct. at 843 (internal quotation marks omitted).

In contrast, Donnan was given the opportunity to be heard. Donnan was not allowed a counterclaim, but was not denied the opportunity to file an adverse possession claim in circuit court.

Donnan contends he was denied the right to a jury trial. The right to a jury trial in civil cases guaranteed by the United States Constitution applies to federal, not state, courts. U.S. Const. amend VII. Trial by jury in civil cases is guaranteed by the state constitution only where the value in controversy exceeds five thousand dollars. Haw. Const. art. I, § 13. Cocillo and Kellen sought no monetary damages in this case; therefore, the value in controversy did not exceed five thousand dollars. Furthermore, HRS § 604-10.5 does not provide for trial by jury.

Donnan contends he was denied the right to subpoena records by way of deposition and written interrogatories; however, the district court granted a two-week continuance to allow Donnan to produce the city and county agency records by subpoena duces tecum. Furthermore, as the district court advised Donnan, a hearing on a petition to enjoin harassment may not be held later than ninety days after the date the temporary restraining order is granted. HRS § 604-10.5(f).

