NOT FOR PUBLICATION

NO. 25212

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

LAURA LEA FERREIRA, Petitioner-Appellee, v.
GWEN BITTAN, Respondent-Appellant

APPEAL FROM THE DISTRICT COURT OF THE THIRD CIRCUIT,
PUNA DIVISION
(S.P. NO. 02-0049PN)

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

Upon a review of the record, we summarily affirm the June 14, 2002 Order Granting Petition for Injunction Against Harassment (Injunction).

This case started on April 12, 2002 when, pursuant to Hawaii Revised Statutes (HRS) § 604-10.5 (Supp. 2003),[1]

[1] Hawaii Revised Statutes (HRS) § 604-10.5 (Supp. 2003) states 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

Petitioner-Appellee Laura Lea Ferreira (Ferreira) filed a Petition for Ex Parte Temporary Restraining Order and for Injunction Against Harassment (Petition). In the Petition, Ferreira alleged that (1) Ferreira is a preschool teacher, (2) the two-year-old child of Respondent-Appellant Gwen Bittan (Bittan) was placed in Ferreira's care by Child Protective

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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.

Services (CPS),[2] and (3) at Ferreira's home and place of employment Bittan had said and done various and sundry things in harassment of Ferreira.

On April 12, 2002, Judge Barbara T. Takase entered a Temporary Restraining Order Against Harassment (TRO) forbidding Bittan from contacting Ferreira or visiting Ferreira's residence or place of employment, and from possessing or controlling any firearm(s) and/or ammunition.

On June 14, 2002, after hearing Ferreira's Petition, Judge K. Napua Brown entered the Injunction making the TRO absolute for a period of one year. Bittan filed a notice of appeal on July 15, 2002. Her appeal was assigned to this court on August 6, 2003.

An appeal is moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome". Powell v. McCormack, 395 U.S. 486, 496, 89 S.Ct. 1944, 1951 23 L.Ed.2d 491 (1969). "In civil litigation, a case is not moot, even if the plaintiff's primary injury is resolved, so long as the plaintiff continues to suffer some harm that a favorable court decision would resolve." Neshaminy Sch. Dist. v. Karla B., 1997 WL 137197, *6 (E.D.Pa.1997) (quoting E. Chemerinsky, Federal Jurisdiction 130 (2d ed. 1994) (brackets

[2] Child Protective Services, Department of Human Services, State of Hawai‘i, Child Protective Act, HRS Chapter 587 (Supp. 2003).

omitted)). An exception to the mootness doctrine occurs when the issues on appeal affect the public interest and are capable of repetition yet evading review. Okada Trucking Co., Ltd. v. Bd. of Water Supply, 99 Hawai‘i 191, 196 53 P.3d 799, 805 (2002) (citation omitted).

The record does not contain sufficient information for us to decide the question whether this case is moot or not. Therefore, we move on to the merits of this appeal.

Malea Briski (Malea) testified, in relevant part, as follows:

> BY MS. FERREIRA: Q. Malea, on the day that [Bittan's] baby got removed from her care and placed in my care, did [Bittan] come to the preschool?
>
> A. Yes, she did.
>
> Q. Can you tell us, in your words, what she behaved like and words she was using.
>
> A. . . . [S]he said that you're a rich lady who's trying to steal her child and tricked her. And she's [sic] also said mean things about your family, and she said this in the presence of other parents.
>
> Q. Were there children present?
>
> A. Yes, there was.
>
> Q. Did [Bittan] swear?
>
> Q. Yes, she did.
>
> . . . .
>
> Q. Then another time that [Bittan] came to the preschoool. . . .
>
> . . . .
>
> A. She was outside of our gate, and she was trying -- trying to hand other parents a paper. And as she was handing them the paper, she . . . said, "Don't trust [Ferreira] with your child, she'll try to steal them," and that "Just because she has money, . . . she'll take your child away."

Bittan testified in relevant part as follows:

> MS. BITTAN: Okay. Well, on April 4th, I did go to the preschool. I went to see if my daughter was still there. When I found she wasn't there, I had to try to cope with the situation of trying to figure out if Heidi Hauki and [Ferreira] had actually been terrible influences in taking my child away or not, and I was upset.
>
> . . . .
>
> The CPS worker had used hearsay comment supposedly from [Ferreira]. I still don't even know if [Ferreira] actually made that comment. And it was one reason to have kept my child away from me . . . except for two hours a week. . . .
>
> On April 4th, evening of April 4th, I called [Ferreira's] home. And I had been free to call there before. I had been told by the Court I should not be calling, but I was not given anything in writing. I left a message saying that I hoped she would understand that her actions have not been good for my child and to recognize when she should admit to her wrongs to help return my child to me.
>
> . . . .
>
> On April 11th, I went to the preschool. . . .
>
> I got out of the van, I gave the petition to Karen Smith, and I got back in the van with . . . Mr. Ebesugawa, and he drove up the road, and he parked up there. He walked towards the gate. I encouraged him to walk there.
>
> He brought the petition to the preschool workers, and I stood a good distance away, because I wasn't sure what kind of restraining order this was. As I say, turns out there wasn't one at all, cause it wasn't given to me. But I was still trying to be respectful of the situation. And he returned and he encouraged me to just go and talk to them myself.
>
> I had a few words with the employee of [Ferreira]. This woman was extremely hostile, and it was very shocking to me, because I did not know until then that these people had been in a position as they were. I had sensed throughout this time that I was going to this preschool that there was a problem there, but since the people that worked there tried to be very accommodating, very kind, I could only give them the benefit of the doubt that they were, hopefully, honest people.
>
> But that was when I actually found out that there really was a problem from Paradise Preschool towards me. This is when it was clear to me that these people did not like me and that at least this employee had been ordered to keep me from there and was following the influence of her boss, which is what this entire case is about, CPS case is about, is about influence, people holding on to their jobs. And it's a -- a travesty and an atrocity to my child and to me. I know there's other cases like this. All CPS cases are not warranted.

In her opening brief, Bittan contends, in relevant part, as follows:

> Primarily, the violent threats alleged by [Ferreira] as cause for the declaration of [Ferreira] on 4/12/02 is [sic] not alleged [sic] in her testimony. At the trial on 6/14/02, her nebulous and discordant testimony to continue the TRO proved there is no grounds [sic] to have ever alerted the authorities to the order.
>
> Both [Ferreira], as stated in the preceding, and her employees, witnesses Heidi Hauki and Malia Briski, are evidently impeachable witnesses in unjustified opposition to [Bittan]. [Ferreira] and her employees controverted the testimonies of each of their own statements, as well as the statements of each other, and of the other two parties who witnessed the instance on 4/11/02.

Essentially, Bittan's first contention is that Ferreira failed to prove everything she alleged in her Petition. The relevant question, however, is whether Ferreira's Petition and evidence satisfy the requirements of HRS § 604-10.5. Upon a review of the record, our answer is that they do. The fact that the evidence proved a harassment slightly different than the harassment alleged in the Petition is inconsequential.

Bittan's second contention is that the evidence in support of the Injunction was inconsistent and impeached to such a degree that it was not the "clear and convincing evidence" required by HRS § 604-10.5(f). However, the rule is that "[g]enerally, the credibility of witnesses and the weight to be given their testimony are within the province of the trial court and, generally, will not be disturbed on appeal." Bank of Hawaii v. Kunimoto, 91 Hawai‘i 372, 390-91, 984 P.2d. 1198, 1216-17 (1999). There being no applicable exception, this general rule applies in this case.

Accordingly, we summarily affirm the June 14, 2002 Order Granting Petition for Injunction Against Harassment.

DATED: Honolulu, Hawai‘i, May 26, 2004.

On the brief:

Gwen Bittan,
Respondent-Appellant.

Chief Judge

Associate Judge

Associate Judge