DISSENTING OPINION BY NAKAMURA, C.J.

In my view, the record in this case is not sufficient to support the District Court's grant of summary judgment in favor of either Carolyn Uyeda (Carolyn) or Jay Uyeda (Jay) on their petition for an injunction against harassment against Evan Schermer (Schermer). I therefore respectfully dissent from the majority's decision to affirm the District Court's grant of summary judgment in favor of Carolyn.

I.

The Uyedas filed a petition for an injunction against harassment pursuant to Hawaii Revised Statutes (HRS) § 604-10.5 (2016). This statute authorizes a court to enjoin for up to three years further harassment if it finds by clear and convincing evidence that harassment as defined by HRS § 604-10.5 exists. HRS § 604-10.5(g). Pertinent to this case, HRS § 604-10.5(a) defines "harassment" to mean: "An intentional or knowing course of conduct directed at an individual that seriously alarms or disturbs consistently or continually bothers the individual and serves no legitimate purpose; provided that such course of conduct would cause a reasonable person to suffer emotional distress."[1/]

In their petition, the Uyedas claimed that they were entitled to an injunction against harassment pursuant to HRS § 604-10.5 based Schermer's alleged breach of a private settlement agreement between the Uyedas and Schermer. The settlement agreement provided that the Uyedas and Schermer mutually agreed not to contact each other and that if one party breached the settlement agreement, the other party would be entitled to a permanent injunction against harassment.

II.

In support of their motion for summary judgment on their petition for injunction against harassment in this case, the Uyedas did not present any evidence or supporting affidavits. Instead, the Uyedas relied on the District Court's findings in a

[1/] HRS § 604-10.5(a) also defines "course of conduct" to mean "a pattern of conduct composed of a series of acts over any period of time evidencing a continuity of purpose."

separate action they had brought for breach of the settlement agreement in Civil No. 3RC15-1-639K (Case 639).[2/] They also asked the District Court to take judicial notice of the settlement agreement. Schermer opposed the Uyedas' motion for summary judgment, arguing that the alleged contact by Schermer did not constitute harassment as defined by HRS § 604-10.5 and asserting that he has never admitted to commission of acts of harassment.

The District Court granted the Uyedas' motion for summary judgment. In support of its ruling, the District Court, among other things, took judicial notice pursuant to Hawaii Rules of Evidence (HRE) Rule 201 (2016) of the pleadings and holdings in Case 639, the testimony introduced at trial in Case 639, and the content of the settlement agreement. The District Court concluded that the Uyedas had proven by clear and convincing evidence that they were entitled to an injunction against harassment based on (1) the provision of the private settlement agreement entitling a party to a permanent injunction against harassment as a remedy for the other party's breach of the agreement; (2) the District Court's findings in Case 639; and (3) HRS § 604-10.5.

III.

In my view, the District Court erred in granting summary judgment in favor of the Uyedas.

The District Court erred in taking judicial notice of the testimony presented at trial in Case 639. Such testimony was not the proper subject of judicial notice under HRE Rule 201.[3/]

[2/] In Case 639, the District Court, after a trial, had found that Schermer had breached the settlement agreement by contacting Carolyn, and it had awarded the Uyedas nominal damages of $1 plus attorneys' fees and costs.

[3/] HRE 201 provides in relevant part:

> (a) Scope of rule. This rule governs only judicial notice of adjudicative facts.
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> (b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial

(continued...)

The Uyedas' burden of proof in their breach-of-contract action in Case 639 (preponderance of the evidence) was lower than their burden of proof in this case (clear and convincing evidence). Given this difference in the Uyedas' burden of proof, I do not believe it was appropriate for the District Court to apply collateral estoppel to, or take judicial notice of, its findings in Case 639 as a basis for granting summary judgment. See Cobb v. Pozzi, 363 F.3d 89, 113-14 (2d Cir. 2004) ("A party's success in an earlier proceeding where it faced a lower burden of proof does not mean that, against a higher burden of proof in a subsequent proceeding, that party would achieve the same result."); Dias v. Elique, 436 F.3d 1125, 1129 (9th Cir. 2006); In re K.A., 756 S.E.2d 837, 842-43 (N.C. Ct. App. 2014).

Moreover, even assuming that collateral estoppel and judicial notice did apply, the District Court's findings in Case 639 that Schermer breached the settlement agreement by contacting Carolyn and a third-party were not sufficient to establish that, as a matter of law, Schermer had committed harassment within the meaning of HRS § 604-10.5.[4/] As noted, the Uyedas relied on the District Court's findings in Case 639 and judicial notice of the settlement agreement, and they did not present any independent evidence to support their motion for summary judgment in this case. In particular, the Uyedas did not present any admissible

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[3/](...continued)
court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

[4/] The pertinent factual findings of the District Court in Case 636 were as follows:

> The Court finds that [Schermer] has breached the Settlement Agreement by: (1) indirect contact with the [Uyedas] by placing an advertisement in the *West Hawaii Today* newspaper on August 7, 8, and 9, 2015, containing the picture of Plaintiff CAROLYN UYEDA, with the caption "Happy Birthday Carolyn!!! Wishing you a great day!!!; (2) direct contact with [the Uyedas] by sending two (2) Facebook messages to Plaintiff CAROLYN UYEDA on October 4, 2015, one at 1:45 a.m. (HST) and one at 2:25 a.m. (HST); and (3) communication by [Schermer] with a third-party, Flavio Nucci, through a Facebook message on November 2, 2015.

evidence regarding the circumstances surrounding the contacts the District Court found had breached the settlement agreement or Carolyn's reaction to those contacts. Schermer opposed the Uyedas' motion for summary judgment, and he disputed that the contacts the District Court found had breached the settlement agreement constituted harassment within the meaning of HRS § 604-10.5. In my view, when viewed in the light most favorable to Schermer, the District Court's findings in Case 639 that Schermer breached the settlement agreement by contacting Carolyn and a third-party, without more, were not sufficient to prove, as a matter of law, that Schermer had engaged in an intentional or knowing course of conduct directed at Carolyn that seriously alarmed, disturbed consistently, or continually bothered her, that served no legitimate purpose, and that would cause a reasonable person to suffer emotional distress. See HRS § 604-10.5.

Finally, an injunction against harassment under HRS § 604-10.5 can only be imposed if the requirements of the statute are satisfied. The District Court was not a party to the private settlement agreement between the Uyedas and Schermer, and the District Court was not bound by this agreement. The provision in the private settlement agreement that the breach by one party will entitle the other to an injunction against harassment did not authorize the District Court to automatically impose an injunction against harassment under HRS § 604-10.5 upon a finding that the agreement had been breached. The breach of the private settlement agreement did not necessarily constitute harassment, and the breaches found by the District Court in Case 639 did not establish harassment as a matter of law under HRS § 604-10.5.

I express no opinion on whether the Uyedas can establish their entitlement to an injunction against harassment under HRS § 604-10.5. However, I believe that based on what the Uyedas presented in support of their motion for summary judgment, neither Carolyn nor Jay established that they were entitled to summary judgment on their petition for an injunction against

harassment under HRS § 604-10.5. In my view, based on the record before it, the District Court erred in granting the Uyedas' motion for summary judgment.