

RECORD IMPOUNDED

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court."
Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4858-15T3

T.H.,

Plaintiff-Respondent,

v.

C.B.,

Defendant-Appellant.

Submitted June 26, 2017 – Decided July 13, 2017

Before Judges Fisher and Fasciale.

On appeal from the Superior Court of New
Jersey, Chancery Division, Family Part,
Middlesex County, Docket No. FV-12-1861-16.

Jabin & Fleming, LLC, attorneys for appellant
(Christian P. Fleming, on the brief).

Respondent has not filed a brief.

PER CURIAM

Plaintiff commenced this action, pursuant to the Prevention
of Domestic Violence Act, N.J.S.A. 2C:25-17 to -35, alleging
defendant harassed her on April 19, 2016, as they ended their two-
and-one-half-year dating relationship. Defendant also filed a

domestic violence complaint, and the two matters were the subject of one final hearing on April 27, 2016, at which time both parties appeared without counsel. At the hearing's conclusion, the trial judge granted a final restraining order (FRO) in favor of plaintiff; defendant's action was dismissed.

Defendant appeals from the entry of the FRO in plaintiff's favor,¹ arguing:

I. THE TRIAL COURT IMPROPERLY DETERMINED THAT THE ALLEGED CONDUCT CONSTITUTED HARASSMENT, AND THUS THERE WAS NO PREDICATE ACT OF DOMESTIC VIOLENCE UPON WHICH TO BASE A FINAL RESTRAINING ORDER.

II. THE COURT ABUSED ITS DISCRETION AND IMPROPERLY DENIED ADMISSION OF VIDEOTAPE EVIDENCE.

Because we agree with defendant's second argument – that the judge mistakenly denied admission of video evidence – we vacate the FRO and remand for further proceedings. For that reason, we need not reach defendant's first argument regarding whether the conduct found by the judge to have occurred constituted harassment.

In support of her complaint, plaintiff asserted defendant telephoned her fifty-one times on the day in question. Plaintiff answered only one of these calls; that caller was defendant. The judge, however, found the evidence was insufficient to support a

¹ Defendant did not appeal the order dismissing his domestic violence action.

finding that defendant made the many other calls that day. Instead, the judge found that defendant harassed plaintiff with regard to what he said and did when he arrived at plaintiff's residence at 3:30 p.m. on the same day. Having found plaintiff to be a credible witness, the judge determined that when defendant appeared at plaintiff's residence he "threatened to show pictures"² of plaintiff "to people if [she] did not speak to him," and he accused her of "sleeping around." The judge also found that, on an occasion a week earlier, defendant "got upset" and called plaintiff "bitch, whore, et cetera."

During the presentation of her evidence, plaintiff asserted that she had taken a video of what transpired. When she offered to show the judge the video that was accessible from her smartphone, the judge responded she would have "a problem with getting that into evidence" because she lacked "a separate preserved recording." Defendant, however, immediately responded he had no objection to the judge viewing the video. Indeed, later in the proceeding, as defendant presented his own evidence, he asked to have plaintiff "show her video," and when the judge asked if that was what defendant wanted, defendant twice responded,

² We discern from the judge's other findings that these were intimate photographs.

"[a]bsolutely." Notwithstanding, the judge did not permit a showing of the video.

Defendant later moved for reconsideration, arguing in part that the video, which had been excluded, would have supported defendant's factual contentions. In denying the motion, the judge explained that the video was not considered

because no foundation was laid, and she was a pro se litigant. We don't just bring the video in. . . . I have no obligation to bring that video in. And typically when we have a pro se litigant, without laying that foundation, it's not coming in.

We reject this rationale.

In considering the sufficiency of the judge's exclusion of the video, we first note that it is self-evident that there are no separate evidence rules that apply only to litigants who are self-represented. Consequently, the judge erred when he barred the video's admission because plaintiff "was a pro se litigant."

As for the need for a foundation, we observe that the trial judge, as gatekeeper, has "some degree of latitude" when determining the sufficiency of evidence offered in support of the authentication of evidence. State v. Hockett, 443 N.J. Super. 605, 614 (App. Div. 2016). But we find it an abuse of discretion for a judge to fail to permit a proponent the opportunity to present grounds for admission. Here, the judge denied admission without

offering either party with an opportunity to authenticate the video.

The burden of authenticating evidence "was not designed to be onerous." Id. at 613. The proponent need only present evidence "sufficient to support a finding that the matter is what its proponent claims." N.J.R.E. 901. Here, the proposed evidence was a video contained on plaintiff's smartphone that was available when the evidence was offered. It is not clear what the judge required for a foundation other than the testimony of a witness that the images reflected in the video "reproduce[d] phenomena actually perceived by the witness." State v. Wilson, 135 N.J. 4, 15 (1994) (internal quotation omitted). Proponents of a video or motion picture are no longer required to detail the methods of taking, processing, or storing the film. Id. at 14. Moreover, even with such a low bar for authentication, the bar here was lowered even further by the absence of an objection to its admission. Indeed, as we have observed, both parties sought its admission, implicitly conveying to the judge that they both believed the video to be authentic.

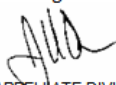
We also do not find the video's exclusion to be harmless. Both parties thought it highly relevant because it depicted some or all the events giving rise to the FRO in question. Consequently,

we conclude the judge's erroneous exclusion of that evidence was prejudicial.

The FRO is vacated,³ and the matter remanded for the reopening of the record to allow for the submission of the video and for a reconsideration or reexamination of the evidence previously adduced in light of this additional evidence.

Vacated and remanded. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION

³ The temporary restraining order shall stand in place of the FRO pending the completion and disposition of the final hearing.