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E.C. ,

Plaintiff,

v.

R.H. ,

Defendant .

SUPERIOR COURT OF NEW JERSEY
OCEAN COUNTY
CHANCERY DIVISION
FAMILY PART

DOCKET NO. FV-15-194-16
CIVIL ACTION

OPINION

Decided: August 11, 2015

E.C., plaintiff, pro se
R.H., defendant, pro se

L.R. Jones, J.S.C.

This case presents a question of trial evidence which arises on an extraordinarily frequent basis in contested domestic violence cases: What happens at final hearing when a party seeks to introduce texts, e-mails, social media messages, or audio/visual evidence directly from his or her cell phone?

Plaintiff and defendant are former dating partners. Plaintiff alleges that defendant has been harassing her by sending her many unwanted text and social media messages, along with voice mails, filled with profanities and derogatory and upsetting comments. She wants defendant to leave her alone, and she asks the court to enter final restraining order against him.

The final hearing was originally scheduled for August 11, 2015. At the start of the proceeding, plaintiff wished to introduce evidence of multiple allegedly harassing communications stored her cell phone. The question is how to appropriately accept evidence from plaintiff's cell phone into the court record.

LEGAL ANALYSIS

Pursuant to N.J.R.E. 201, this court takes judicial notice that over the past decade, electronic communication has for most Americans become a component of routine everyday life. With portable, multi-functional cell phones containing ever-expanding capacities, people can easily maintain electronic communications, scanned documents, photographs, audio recordings, and video streams in mass volume, and conveniently carry this information with them wherever they go. Put another way, cell phones now function as pocket-size file cabinets.

Accordingly, a litigant's reliance upon potential evidence stored on a cell phone is highly commonplace. Unfortunately, however, our laws of evidence

and civil procedure have at times struggled to adequately keep up with the explosive pace of technological advancement. Courtroom rules, procedures and protocols developed long ago were simply not initially crafted with cell phone technology in mind. As a result, some of the more traditional methods of introducing evidence into court do not address the specialized needs and practical problems which may arise when parties come into court and seek to introduce information stored on their cell phones directly into evidence.

Not surprisingly, the issues and inherent problems of cell phone evidence arise very frequently in domestic violence cases, which are expedited summary proceedings that often involve self-represented litigants who have little or no legal training at all. The reality, however, is that cell phone evidence, particularly stored text messages and e-mails, often go right to the heart of a plaintiff's claim of harassment, and/or a defendant's defenses to same.

Under the Prevention of Domestic Violence Act, there is a large spectrum of identified forms of violence. See N.J.S.A. 2C:25-19, et seq. Of all forms of violence, harassment has been recognized as the most frequently reported predicate offense for a finding of domestic violence. See L.M.F. v. J.A.F., Jr., 421 N.J. Super 523, 533 (App. Div. 2011). By statutory definition, harassment is largely a communication-based offense. N.J.S.A 2C:33-4(a) defines harassment to occur when one. with purpose to harass, or causes to be made, a

communication or communications anonymously or at extremely inconvenient hours, or in offensively coarse language, or any other manner likely to cause annoyance or alarm. In 2014, the New Jersey Legislature amended the harassment statute, so as to add the act of "cyber-harassment" to cover circumstances when one attempts to harass another through an electronic device or social networking site. N.J.S.A. 2C:33-4.1.

The ability to quickly and effortlessly send electronic messages logically increases the prevalence of harassment. As noted by the court in L.M.F., *supra*, our modern technological means of communication inherently includes the potential for misuse. Id., at 523. The L.M.F. court further opined that the convergence of modern technology and the foibles of human judgment "has created a gateway to instantaneously and effortlessly send electronic messages" which are unfettered by reflection and transmitted by senders who are " open to rash, emotionally driven decisions." Id., at 534. Accordingly, electronic communications are now a frequent basis for alleged harassment claims in domestic violence proceedings. See also McGowan v. O'Rourke, 391 N.J. Super 502, 504 (App. Div., 2007) (photographs, together with emails and a print-out from a website constituted basis for domestic violence)." Pazienza v. Camarata, 381 NJ Super 173, 183-84 (App. Div., 2005) (evidence may

support finding of harassment when text communication message is sent to annoy disturb, or irritate the recipient).

Electronically stored evidence may also be very significant in reflecting the nature of the prior relationship between the parties in a domestic violence case. As set forth by the New Jersey Supreme Court in Cesare v. Cesare,154 N.J. 394 (1998), the prior relationship between the parties is relevant in analyzing whether some acts of alleged harassment constitute domestic violence or warrant a restraining order. Hence, consideration of prior communications and conduct between the parties is not only permitted, but in some cases highly material in the context of adjudicating a domestic violence proceeding. In determining whether a defendant's past conduct reflects an intent to harass and cause required annoyance or alarm to the victim under the Act, a defendant's past conduct toward a plaintiff and the history of the relationship may be taken into account. See Pazienza v. Camarta, 381 N.J. Super 173 (App. Div., 2005) .

In the present case, plaintiff alleges ongoing harassment through recent unwanted and threatening messages**.** Thus, the substance of recent, ongoing electronic communications between the parties may well be relevant in casting light upon the parties' actual relationship and the veracity of their respective positions. For this reason, alleged recent communications between the parties,

presently stored on cell phones, may have a highly appropriate place in this hearing, both with reference to the alleged predicate acts as well as the nature of the past relationship between the parties.

In this case, plaintiff comes to court like so many pro se litigants before her, with no significant knowledge or experience with New Jersey's Rules of Evidence and Civil Procedure, and with the belief that all one has to do is show a judge the information appearing on a cell phone screen in order to introduce same into evidence as part of the court record. Such litigants may not know, or have any prior reason to know, the inherent logistical and procedural problems of attempting to utilize cell phone evidence at a domestic violence final hearing. Several problems, however, do exist.

First, when a litigant attempts to offer into evidence images on a cell phone screen, it is impractical if not impossible to preserve that specific image for the record, unless there is also a hardcopy printout of the image available as well. If the evidence is not preserved in hardcopy form as part of the record, there may be significant difficulties in fully maintaining such evidence for further review at the trial or appellate level, or protecting same from future inadvertent or intentional deletion, modification, or other potential spoliation.

Second, a pocket cell phone is by definition small, with an even smaller screen. Consequently, only small portions of documents may be visible and

viewable at one time, often creating reading challenges even after on-screen enlargement. A court attempting to read lengthy information on a cell phone screen might have to continuously scroll upward or downward to see other parts of the same document, thereby moving other portions of the document off of the screen and out of the zone of visibility. It may be very difficult for a judicial fact finder to analyze and consider the totality of a document which can only be seen in tiny partial fragments at a time. Moreover, it can be equally challenging for the court to view and compare messages, emails, and texts side by side when a cell phone screen has no room to accommodate same. If a party is attempting to introduce a thread of ongoing text messages or emails from a lengthy electronic dialogue between the parties, the process of scrolling can be even more time-consuming and cumbersome.

Third, due to the general physical layout of most courtrooms, it is extremely impractical for the court and both parties to all view evidence on a cell phone at the same time, as compared to viewing duplicate hard copy printouts of the same document. Without such copies available, a party's cell phone may actually have to be passed around in triangular fashion between the plaintiff, the defendant, and the court. This process may then have to repeat itself for viewing each and every document, or different portions of the same document, constituting a procedure which is almost certain to

significantly slow down the trial itself. As obstructive and unnecessarily time consuming as a repetitious, pass-around-the-phone process can be, the procedure is particularly challenging in a domestic violence final hearing, where there is already a temporary restraining order (TRO) in place, and where the parties cannot physically sit or stand next to each other to jointly view the tiny cell phone screen at the same time. In fact, a sheriff's officer might literally have to sit in the middle of the parties' respective tables and pass the cell phone between them and the judge for viewing by each party and by the court. Further, if scrolling is necessary by multiple persons handling the cell phone, there is an increased risk of accidental deletion or loss of evidence in the courtroom itself.

Fourth, if a party orally reads a text or email into record, and if the other party and the court have no available hard copies from which to simultaneously read and follow along, there is no guarantee that the oral recitation is accurate. Further, the process of oral recitation can be especially time-consuming and confusing if there are multiple lengthy texts and emails between the parties from various past relevant dates and times.

Fifth, as regarding voice mail evidence stored on cell phones, it is often difficult to hear the exact words of an audio recording after only one review, and may require more attempts. A compact disc (C.D.) and/or a transcript of

the contents will be helpful for the sake of the record, and for further review as necessary by the trial court or an appellate court when applicable.

Sixth, if after the close of testimony, the court wishes to again review all electronic cell phone evidence as part of the process of judicial deliberation before rendering a decision, the court is practically unable to do so without the benefit of hardcopy forms of such evidence.

While the above-referenced challenges may at times be significant, they can potentially be mitigated if a litigant is advised in advance that if he or she wishes to introduce cell phone evidence in the hearing, such evidence should optimally be made available in tangible and organized, duplicate hard copy form for potential use at trial, as follows:

Cell Phone Evidence	Hardcopy form
A) e-mails and texts	printed on paper
B) Social media messages	printed on paper
C) Photographs	printed on paper
D) Audio Recording	duplicated on C.D. or cassette
E) Video Recording	duplicated on DVD

Such evidence can be marked for identification and into evidence when appropriate, and preserved in tangible form as part of the record. See also I.M.F. v. J.A.F., Jr. 421 N.J. Super 523, 527 n.2 (App. Div., 2011), noting how some electronic evidence may be printed out for trial (some text messages produced by plaintiff were forwarded from her cellular phones to her email, which were then printed, marked for identification, and ultimately admitted into evidence).

In summary proceedings, hard copy forms of electronically stored evidence provide the other party with a reasonable opportunity to review or re-review evidence during breaks without having to digest everything all at once off of the adversary's cell phone in the middle of a contested courtroom proceeding. By contrast, in a more traditional, non-summary proceeding in family court such as a contested divorce, a party generally has the right to engage in pre-trial discovery. Rule 5:5-1 (e) provides a party with a 120 time frame in standard track matters, and 90 days in expedited track matters. During the discovery period, a litigant's preparation opportunities include but are not limited to the right to request production of copies of documents (Rule 5:5-1(d); Rule 4:18-1, et. seq), and serve written interrogatory questions (Rule 5:5-1 (a); Rule 4:17, et. seq.) Through these discovery mechanisms, parties have a reasonable opportunity well before trial to request, receive, and review

print out copies of electronic evidence such as relevant e-mail and text communications, audio recordings and video recordings of relevance.

A domestic violence hearing, however, is an expedited summary proceeding where there is no automatic right or opportunity for extensive pre-trial discovery. See Depos v. Depos, 307 N.J. Super 396 Ch. Div., 1997). While a domestic violence court may in some circumstances permit limited discovery in order to prevent an injustice (see Crespo v. Crespo, 408 N.J. Super 25, 44 (App. Div., 2009), aff'd 201 N.J. 207 (2010)), the time periods for discovery are generally nowhere near as long as those permitted in divorces and other contested family court actions under Rule 5:5-1 (e). The reason for this distinction is because under the Prevention of Domestic Violence Act, N.J.S.A 2C:25-17 et. seq., final hearings are statutorily supposed to take place within ten days of the filing of the complaint. N.J.S.A. 2C:25-29(a). Thus, the concept of a party preparing and providing copies of relevant texts, emails and other writings in tangible form, preferably in triplicate for simultaneous use by the parties and the court , is sound and logical.

As in any other type of proceeding, at least one goal in a domestic violence case is for each party to have the opportunity to present relevant evidence to be in a fair, practical, and time-efficient manner. As noted in N.J.R.E. 611, the

court may ultimately exercise reasonable control over the mode and order of presenting evidence so as to make the presentation of evidence effective for the ascertainment of the truth, and also to avoid needless consumption of time. This is especially critical in domestic violence cases, where the court docket is often filled to capacity with numerous cases which must be addressed in an expedited but fair manner. If even one case slows down to an otherwise avoidable crawl due to evidentiary complications over cell phone evidence, there can be a very profound and negative domino effect on all of the other domestic violence litigants awaiting their day in court and opportunity to present their own claims and defenses, as applicable.

For this reason, the court finds that in the present matter, it is fair and appropriate to adjourn the domestic violence final hearing for one week. Both parties are instructed that if either party wishes to introduce evidence which is presently stored on his or her pocket cell phone, he or she should have tangible hard copies of such evidence for the court, with courtesy copies for the other party, available by the next court date. The fact that such adjournment necessarily extends the scope of these domestic violence proceedings beyond ten days does not in any fashion render same inappropriate. To the contrary, the New Jersey Supreme Court has recently held that an adjournment is permissible to allow a party reasonable

opportunity and time to prepare. J.D. v. M.D.F. 207 N.J. 458, 480 (2011) ("Our courts have broad discretion to reject a request for an adjournment that is ill founded or designed only to create delay, but they should liberally grant one that is based on an expansion of factual assertions that form the heart of the complaint for relief)." Further, the Appellate Division has held that the ten day provision does not preclude a continuance where fundamental fairness dictates allowing additional time. H.E.S., 349 N.J. Super. 332, 342-43 (App. Div. 2002) affirmed, 175 NJ at 323. See also Crespo v. Crespo, 408 N.J. Super. 25, 43-44 (App. Div. 2009), aff'd o.b., 201 N.J. 207, 209-10 (2010) (the statutory requirement for a hearing within ten days passes constitutional muster as adequate due process, especially where the judge is empowered to grant a continuance); Depos, *supra*, 307 N.J. Super 396, 402-03 (Ch. Div., 1997), (when one testifies about matters which go beyond what plaintiff alleges in the complaint, the defendant may request a continuance of the trial in order to prepare a defense, either at the end of plaintiff's direct testimony of after plaintiff's case).

In the interim, the court in the present case is in fact amending the prior TRO to include additional language:

If either party is seeking to introduce information stored on his/her cell phone (emails/texts/Facebook posts, etc.), such information should be printed out in triplicate in organized fashion with page numbers on the

bottom right hand corner for easy reference. Additionally, if either party is seeking to introduce evidence from their cell phone relating to voice mails, video streams or photographs, same should be duplicated onto a CD or DVD as applicable so that same may be marked for identification in a tangible form.

The court finds that this language will help efficiently move the case along at final hearing and may potentially obviate the need for further adjournments, while helping both plaintiff and defendant prepare and achieve trial readiness by the next scheduled hearing date.

Finally, the court notes that in this day and age, the cost of providing cell phone evidence in hardcopy form is relatively inexpensive. Nonetheless, the court is also aware that some litigants are indigent and/or so financially challenged that they truly cannot afford the cost of preparing copies of text message and emails, or CDs and DVDs containing downloaded and relevant photographs, audio messages or video streams. If a litigant is in fact in such a dire financial circumstance and unable to afford to provide the cell phone evidence in a more tangible form, then the court in its discretion may potentially dispense with the preference for tangible copies of same, and may instead proceed as best as possible under the circumstances by viewing evidence directly on the cell phone and describing same in the record. In the present case, however, there is no showing by plaintiff or defendant of any

such circumstance, and the parties should thereafter be prepared on the next court date to proceed with hard copies of any relevant evidence which she or he seeks to introduce from a cell phone at that time.