IN THE SUPREME COURT OF THE STATE OF DELAWARE

MATTHEW BAILEY,	§	
	§	No. 547, 2013
Respondent Below-	§	
Appellant,	§	Court Below: Family Court
	§	of the State of Delaware in
v.	§	and for Kent County
	§	
KRYSTAL BAILEY,	§	File No. CK13-01938
	§	Petition No. 13-16219
Petitioner Below-	§	
Appellee.	§	

Submitted: March 12, 2014
Decided: March 13, 2014

Before **STRINE**, Chief Justice, **HOLLAND**, and **JACOBS**, Justices.

O R D E R

This 13th day of March 2014, upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

(1) The respondent-appellant, Matthew Bailey, Jr. (the "Husband"), filed an appeal from the Family Court's July 8 and September 11, 2013 orders denying his request to reopen the Family Court's May 28, 2013 order granting the motion of petitioner-appellee Krystal Bailey (the "Wife") for a protection from abuse ("PFA") order against the Husband.[1] We find no merit to the appeal. Accordingly, we affirm.

[1] This Court has assigned pseudonyms to the parties under Supreme Court Rule 7(d).

(2) The record before us reflects that, on May 22, 2013, the Wife filed a motion for entry of a PFA order against the Husband after he tried to gain access to her house using a crowbar. A hearing was held on May 28, 2013, at which the Husband, the Wife, and other witnesses testified and were cross-examined and video evidence was presented. At the close of the hearing, a Family Court Commissioner granted the PFA order against the Husband.

(3) Sometime after the hearing, the Husband subpoenaed a recording of the 911 call made by the Wife during the incident. The Husband received a copy of the recording on June 10, 2013. On June 21, 2013, the Husband filed a Motion to Reopen the PFA Order based on Family Court Rule 60(b)(2) and (3), claiming that the 911 recording was newly discovered evidence and that it showed misrepresentation or other misconduct by the Wife during her testimony at the hearing about her knowledge of the Husband's motives for being at her house and whether she felt threatened by the Husband.

(4) On July 8, 2013, the Family Court Commissioner denied the Husband's motion. On September 11, 2013, a Family Court Judge affirmed the Commissioner's order based on unrebutted testimony at the hearing that (i) the Husband went to the house with his father and brother, (ii) they had video cameras and were recording the incident, (iii) they also brought a crowbar and a sledgehammer, and (iv) the Wife's mother witnessed the

Husband trying to force open an exterior door with the crowbar.[2] Based on this record, the Family Court Judge determined that the Husband's behavior was "alarming and abusive."

(5) This appeal by the Husband followed. In his appeal, the Husband claims that the Family Court erred and abused its discretion when it denied his request to reopen the PFA order.

(6) This Court reviews the Family Court's denial of a Rule 60(b) motion only for an abuse of discretion.[3] "An abuse of discretion occurs when 'a court has . . . exceeded the bounds of reason in view of the circumstances, [or] . . . so ignored recognized rules of law or practice so as to produce injustice.'"[4] This Court will not disturb the Family Court's findings of fact unless they are clearly erroneous and justice requires that they be overturned.[5]

(7) In a Rule 60(b)(2) motion that is predicated on newly discovered evidence, the movant must show that he did not know of the existence of the evidence when the hearing was held and that it could not have been discovered with

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[2] The Husband even admits at page 5 of his Reply that he "did come to the marital home with family and tools to gain entry to his residence."

[3] *Johnston v. Johnston*, 65 A.3d 616 (Del. 2013); *Hoffman v. Hoffman*, 616 A.2d 294, 297 (Del. 1992) (citing *Wife B. v. Husband B.*, 395 A.2d 358, 359 (Del. 1978)).

[4] *Lilly v. State*, 649 A.2d 1055, 1059 (Del. 1994) (quoting *Firestone Tire & Rubber Co. v. Adams*, 541 A.2d 567, 570 (Del. 1988)); *see also Harper v. State*, 970 A.2d 199, 201 (Del. 2009); *Culp v. State*, 766 A.2d 486, 489 (Del. 2001).

[5] *Snyder v. Snyder*, 3 A.3d 1098 (Del. 2010); *Adams-Hall v. Adams*, 3 A.3d 1096 (Del. 2010); *Solis v. Tea*, 468 A.2d 1276, 1279 (Del. 1983).

due diligence in time to move for a new trial under Rule 59(b).[6] The Family Court's decision that the 911 recording was not newly discovered evidence is supported by the record. The 911 call was made on May 22, 2013. The record supports the Family Court's finding that the Husband knew that the Wife had called 911 during the incident. Even the Husband's testimony acknowledges that four State troopers arrived, indicating that, at the very least, he knew that someone had called 911. The hearing was held six days later, on May 28, 2013. Thus, the Husband knew that a 911 call had been made, and the recording of that call was reasonably discoverable with due diligence. There is no evidence that the Husband made any attempt to obtain the recording before the hearing or requested a continuance to give him more time to obtain it. Therefore, it was not an abuse of discretion for the Family Court to deny the Husband's request to reopen the PFA order under Rule 60(b)(2).

(8) A Rule 60(b)(3) motion may be granted where it is shown by clear and convincing evidence that there was fraud, misrepresentation, or other misconduct on the part of an adverse party.[7] The Family Court was within its discretion to conclude that the Husband had not met his "heavy burden"

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[6] *Stevens v. Stevens*, 702 A.2d 927 (Del. 1997) (citing WRIGHT & MILLER § 2859); *Bachtle v. Bachtle*, 494 A.2d 1253, 1255 (Del. 1985) (quoting the rule).
[7] *Wilson v. Montague*, 19 A.3d 302 (Del. 2011).

of proving "the most egregious conduct involving a corruption of the judicial process itself."[8] That a witness's testimony is arguably inconsistent in some respects with evidence that another party belatedly discovered does not satisfy the stringent standard to reopen a case for misrepresentation or fraud. Here, the Husband did not demonstrate any affirmative effort by the Wife to misrepresent the facts. In this case, even if inconsistencies existed between the Wife's testimony and the recording of the 911 call — for example, about why the Husband was at the house — those inconsistencies were at best impeachment evidence. Even more important, the alleged inconsistencies were related to aspects of the Wife's testimony that were not material to the result, and on which the Wife did not affirmatively rely. Thus, the inclusion of this evidence would not have produced a different outcome.

(9) Abuse is defined in 10 *Del. C.* 1041(1)(h) as "conduct which a reasonable person under the circumstances would find threatening or harmful." The Family Court based the PFA order on the Husband's conduct when he went to the house. That conduct included bringing multiple relatives, carrying equipment such as a sledgehammer and a crowbar, and attempting to commit a forced entry. From that record, which is clear and not inconsistent

[8] *Hawk v. Div. of Child Support Enforcement*, 47 A.3d 971 (Del. 2012) (citing *MCA, Inc. v. Matsushita Elec. Indus. Co.*, 785 A.2d 625, 639 (Del.2001)).

with the 911 call, the Family Court was permitted to determine that the Husband "was not entitled to act in such an alarming manner."

(10) It was within the discretion of the Family Court to decide that the 911 recording did not provide a sufficient basis to justify the extraordinary remedy of reopening a final judgment. There being no abuse of discretion, the judgment of the Family Court must be affirmed.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Family Court is AFFIRMED.

BY THE COURT:

/s/ Leo E. Strine, Jr.
Chief Justice