No. COA 24-449 JUDICIAL DISTRICT 25

NORTH CAROLINA COURT OF APPEALS

****

COURTNEY BROWN,	
Plaintiff,	
v.	From Cabarrus County
FABIALBERT RODRIGUEZ,	
Defendant.	

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PLAINTIFF-APPELLANT'S BRIEF

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COURTNEY BROWN, Plaintiff, v. FABIALBERT RODRIGUEZ, Defendant.	From Cabarrus County

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PLAINTIFF-APPELLANT'S BRIEF

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Issues Presented

I. DID THE TRIAL COURT ERR BY FAILING TO MAKE SUFFICIENT FINDINGS OF FACT TO SUPPORT THE DENIAL OF A DOMESTIC VIOLENCE ORDER OF PROTECTION?

II. DID THE TRIAL COURT ACT UNDER A MISAPPREHENSION OF THE LAW WHEN IT DENIED THE DOMESTIC VIOLENCE PROTECTIVE ORDER?

STATEMENT OF THE CASE

On 7 September 2023, Plaintiff filed a Complaint and Motion for Domestic Violence Protective Order. (R pp 6-9). An Ex Parte Order was granted. (R pp 10-14). The case was set to be heard on 13 September 2023. (R pp 15). On 13 September 2023, Defendant requested a continuance, and the hearing was continued to 25 October 25 2023. (R pp 16). The case was tried on 25 October 2023 before the Honorable D. Brent Cloninger, who entered an order denying a domestic violence protective order. (R pp 20-23).

On 20 November 2023, Plaintiff filed a timely Notice of Appeal of the court's denial of her claim. (R pp 24-25). Transcripts of the proceedings heard on 25 October 2023 were ordered on 11 November 2023 and were delivered on 20 March 2024. (R 26-29).

On 24 April 2024, Plaintiff served the proposed record on appeal on Defendant's counsel. (R pp 34). On 29 April 2024, Defendant's counsel served amendments. On 8 May 2024, counsel settled the record on appeal. The record was filed with the North Carolina Court of Appeals on 21 May 2024 and docketed on the 28 May 2024.

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

The denial of a domestic violence order of protection entered on 20 November 2023 was entered after an evidentiary hearing resolves the only issue brought in this action and as such is a final order of the trial court from which a party may appeal. *Doyle v. Doyle*, 176 N.C. App. 547, 626 S.E.2d 845 (2006). Therefore, this Court has jurisdiction pursuant to N.C. Gen. Stat. § 7A-27(b) (2024).

STATEMENT OF THE FACTS

Ms. Brown and Mr. Rodriguez were in a tumultuous seven-year relationship and were engaged. (T p 4). During their relationship they attempted couples therapy twice, but never completed more than a few sessions either time. (T p 26). Ms. Brown is in individual therapy due to the extreme, prolonged emotional and psychological distress suffered during the relationship and takes medication for post-traumatic stress disorder. (R p 6). With the help of Ms. Brown's therapist, she developed a safety plan that she put into place once Mr. Rodriguez was away at

training. (T p 38). Ms. Brown did not feel safe due to Mr. Rodriguez's "behaviors, words, and actions". (R p 6, T p 38).

On at least two occasions, Mr. Rodriguez took explicit videos and photographs of Ms. Brown without her permission. (R p 7). In 2019, Mr. Rodriguez sexually assaulted Ms. Brown in the shower. (R p 7). Mr. Rodriguez went on to give Ms. Brown a sexually transmitted disease and assaulted her during sexual intercourse. (R p 7).

Mr. Rodriguez is a trained military specialist, who specializes in weapons; is a Green Beret; a bridger; and chosen as a candidate for US Army Special Forces. (T p 20). Throughout their relationship, Mr. Rodriguez lived on base and the parties never resided together. (T p 5, 8). Mr. Rodriguez, while visiting Ms. Brown's home, spontaneously detailed each and every point of entry that would allow him to easily access and break into her home without her knowledge or invitation. (T p 11). This unexpected and unsolicited conversation led Ms. Brown to take additional security measures in August 2023. (R p 11, 12).

Mr. Rodriguez would show up at Ms. Brown's home after being told she did not want him to come. (R p 6-9, T 8-10, 20). On or about July 21, 2023, Mr. Rodriguez messaged Ms. Brown late at night that he was

coming from the military base to pick up his things. (T p 8, 10) (Ex 2 p 5). He showed up at 3:00 am, after Ms. Brown told him not to come. *Id.* Ms. Brown told him again she did not want him at her house. (T p 8) (Ex 2 p 6). In late August 2023, Mr. Rodriguez again announced he coming to Ms. Brown's house to pick up his things. (T 10). Ms. Brown hurriedly installed cameras at her home and fled with her dog prior to Mr. Rodriguez appearing. (T p 9, 10). Ms. Brown installed the cameras and fled her home because she felt unsafe due to the parties' history and Mr. Rodriguez's escalation over the past year. (T p 10, 11). Mr. Rodriguez also had a garage door opener that he refused to return. (T p 11). Ms. Brown's fear of Mr. Rodriguez and his trained military skills caused her to replace her back door, install extra window locks, change her passwords, change all locks, and install security cameras at all corners to cover the blind spots. (R p 6, T p 11- 12).

Throughout the relationship, Mr. Rodriguez had a history of claiming injuries and different ailments to get Ms. Brown's attention and sympathy. (T p 38, 40). When Ms. Brown responded she discovered Mr. Brown was not in fact injured or ill. *Id.*

In August 2023, Mr. Rodriguez left for Special Training, during which he would not have access to communicate with anyone outside of training, including Ms. Brown. (T p 28-30). Despite supposedly being away at a training facility with no contact to the outside world, Mr. Rodriguez appeared at Ms. Brown's home uninvited and unwelcome on 31 August 2023. (T p 13, Ex 4, Ex 5) Ms. Brown's cameras show him arriving at 6:03 pm. (T p 13, Ex 4). He told her he was "standing there to fight." (T p 12). However, at 11:49 am on 31 August 2023, earlier *the same day*, Mr. Rodriguez sent a text message to Ms. Brown stating,

"I am on the way to the hospital right now

Have COVID and phenomena [sic] and can't breathe

Got med dropped from The course

Don't know if messages are sending

You can call me whenever I'm at the hospital

Pneumonia" (Ex 5 p 13)

Then at 2:51 pm, Mr. Rodriguez texted:

"Oh.. you took me off our email and our Amazon?

So you're ignoring me right now..

Ok well I don't know what's going on but I'm feeling like death. I hope to hear from you soon.

I hope this isn't the end. Please call.

Ok. I think I am understanding.

...

I remember you're supposed to leave tomorrow so just let me know. If not then I'll be there by 7." (Ex 5 p 14)

Then at 6:04 PM he texted "Hey I'm here What's up with all the security?" (Ex 5 p 15)

Mr. Rodriguez called Ms. Brown approximately 39 times between 31 August 2023 and 2 September 2023. (T p 19, Ex 6 p 23). During that time, he was also texting Ms. Brown stating he was in the hospital on a ventilator and with COVID despite showing up at Ms. Brown's home *after* stating he was in the hospital. (T p 30-31, Ex 5). Ms. Brown blocked Mr. Rodriguez after sending him a text message saying she was ending their relationship. (T p 17 Ex 5 p 20). Mr. Rodriguez called 15 times after Ms. Brown asked him to cease contact. (T p 19 Ex 6).

In February 2023, during a facetime call Mr. Rodriguez became irate regarding Ms. Brown's change in hair color and stated he "didn't

like it, and that I made him angry inside and that it made him want to physically harm" her. (T p 5). The following morning, he sent a text message to Ms. Brown stating, "I wanna say sorry for last night It's not that big of a deal and I should've let it got or just been nicer with my words. I'm sorry." (Ex 2). When Mr. Rodriguez asked to meet to talk with Ms. Brown, she stated she "would only talk to him with a third party present" due to her fear. (T p 7, Ex 2 p 3).

Ms. Brown experienced numerous miscarriages during her relationship and was fearful of conceiving additional children with Mr. Rodriguez. (R p 7, 15, T p 15). Mr. Rodriguez did not support Ms. Brown during the miscarriages. (R p 7, T p 15). Mr. Rodriguez did not respect Ms. Brown's decision to use contraception and refrain from ejaculating inside her during sexual intercourse. (T p 15). Mr. Rodriguez told Ms. Brown that he was trying to get her pregnant without her consent to trap her so that she would not move away. (R p 7, T p 15).

THE STANDARD OF REVIEW

> [W]hen the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. Where there is competent evidence to

> support the trial court's findings of fact, those findings are binding on appeal.
> *Burress v. Burress*, 195 N.C. App. 447, 449-50, 672 S.E.2d

732 (2009). (internal citations omitted).

On appeal, "the question of the sufficiency of the evidence to support the findings may be raised on appeal whether or not the party raising the question has made in the trial court an objection to such findings or has made a motion to amend them or a motion for judgment, or a request for specific findings." N.C. Gen. Stat. § 1A-1, Rule 52 (2024).

Sufficient evidence is synonymous with competent evidence, which is evidence "that a reasonable mind might accept as adequate to support the finding.'" *Ward v. Ward*, 252 N.C. App. 253, 256, 797 S.E.2d 525, 528 (2017) (citation omitted). "Competent evidence, in the form of victim testimony and a detailed history of domestic violence, supports a court's finding that an act of domestic violence occurred." *Bunting v. Bunting*, 266 N.C. App. 243, 251, 832 S.E.2d 183, 189 (2019) (*citing Thomas v. Williams*, 242 N.C. App. 236, 773 S.E.2d 900 (2015)).

ARGUMENT

I. THE TRIAL COURT ERRED BY FAILING TO MAKE SUFFICIENT FINDINGS OF FACT TO SUPPORT

THE DENIAL OF A DOMESTIC VIOLENCE ORDER OF PROTECTION

A. Domestic Violence: Chapter 50B

North Carolina law provides protections to its residents from domestic violence with N.C. Gen. Stat. § 50B. The definition of domestic violence is:

> the commission of one or more of the following acts upon an aggrieved party or upon a minor child residing with or in the custody of the aggrieved party by a person with whom the aggrieved party has or has had a personal relationship, but does not include acts of self-defense:
> (1) Attempting to cause bodily injury, or intentionally causing bodily injury; or
> (2) Placing the aggrieved party or a member of the aggrieved party's family or household in fear of imminent serious bodily injury or continued harassment, as defined in G.S. 14-277.3A, that rises to such a level as to inflict substantial emotional distress; or
> (3) Committing any act defined in G.S. 14-27.21 through G.S. 14-27.33."

N.C. Gen. Stat. § 50B-1(a) (2024).

When the trial court finds domestic violence has occurred, the trial court is mandated by statute to grant a protective order restraining he defendant from further acts of domestic violence. N.C. Gen. Stat. § 50B-3(a) (2024).

B. Domestic Violence AOC Forms

Ms. Brown filed a Complaint seeking a Domestic Violence Order of Protection on September 7, 2023. Ms. Brown's complaint included an addendum text overflow form where she went into the long history of the parties' seven-year relationship starting in 2016 and continuing to the events up to and following August 31, 2023. The trial court used an AOC form to deny the Complaint and Ex Parte Order. The AOC form has a fill in line under "Additional Findings" for "date of most recent conduct" boxes allowing the court to check boxes regarding domestic violence and a text box to "describe defendant's conduct" as well as an "Other" box that allows the court to "specify". Following the "Additional Findings" section the form has a section titled "Conclusions" under which the form states, "Based on these facts, the Court makes the following conclusions of law."

The Court of Appeals has issued numerous opinions which contained directions to "trial judges to exercise caution in completing the standard Domestic Violence Protective Order, Form AOC-CV-306. While we appreciate the convenience such forms provide the trial courts, given the large number of domestic violence cases filed, we stress the importance of ensuring that each finding of fact, conclusion of law, and mandate of the order is supported by competent evidence." *See Brandon*

v. Brandon, 132 N.C. App. 646, 651, 513 S.E.2d 589, 593 (1999) (specifically disapproving of the preprinted Form AOC-CV-306).

C. The Court Erred by Not Including Findings of Fact Regarding the allegations in Ms. Brown's verified Complaint and her testimony.

In the Order denying Ms. Brown's Complaint and Motion for Domestic Violence Order of Protection, the only findings included were in the "Other" text section, in which the court wrote, "The Plaintiff was dishonest during her testimony. After expressing her devotion and love for the Plaintiff, she then made a decision to proceed on old allegations that appeared to have no imminent threat [illegible]." (R p 6-9). The Order fails to contain any findings of what the court believed happened or conversely didn't happen.

Pursuant to N.C. Gen. Stat. § 1A-1, Rule 52, "(a)(1)[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." In the absence of findings of fact, "appellate courts cannot appropriately determine whether the order of the trial court is adequately supported by competent evidence, and therefore such an order must be vacated and the case

remanded for necessary findings." *Myers v. Myers*, 269 N.C. App. 237, 257, 837 S.E.2d 443, 457 (2020) (citations omitted).

D. The trial court erred by not making findings of fact based upon the definition of domestic violence in G.S. 50B-1(a) to support the conclusion of law that no acts of domestic violence existed prior to denying Plaintiff's Complaint and Motion for Domestic Violence Protective Order. Therefore, the case must be remanded for further evidentiary findings.

In D.C. v. D.C., this Court held that Rule 52 of the North Carolina Rules of Civil Procedure requires a Judge in a domestic violence case to make specific findings of fact to support either the grant or the denial of relief pursuant to Chapter 50b. Specifically, this Court stated:

> When a trial court sits without a jury in a hearing regarding a motion for a domestic violence protection order under Chapter 50B of our General Statutes, Rule 52(a)(1) of the North Carolina Rules of Civil Procedure requires the trial court to make findings of fact, as well as separately state its conclusions of law based on those findings of fact. After making the required findings of fact and conclusions of law, the trial court "shall" direct the entry of the appropriate judgment.

D.C. v. D.C., 279 N.C. App. 371, 865 S.E.2d 889 (2021).

In *D.C.*, the trial court denied plaintiff's request for a domestic violence protective order, but did not make any findings of fact in its order denying relief. The trial court's denial in that case was entered on the

AOC form. On appeal, plaintiffs argued that the order denying relief was facially defective due to the failure of the trial court to make findings of fact. This Court agreed, stating that, even though this was a case in which relief was denied, the trial court was still required to "enter findings of fact supporting its conclusions of law that each Plaintiff 'failed to prove grounds for issuance of a [DVPO]." This Court further stated that "[s]uch failure to make findings of fact prevents us from conducting meaningful appellate review" and so the order would have to vacated and the case remanded for entry of an order that complies with the Rules of Civil Procedure. *Id.*

This Order, just like the one in *D.C.*, does not contain findings of fact sufficient to support its judgment, as such it should reversed, and the judgment vacated. *Id.* "Where the provisions of a Domestic Violence Protective Order are not supported by the facts, the order will be reversed." *Wilson v. Wilson*, 134 N.C. App. 642, 645, 518 S.E.2d 255, 257 (1999) (citing *Price v. Price* 133 N.C. App. 440, 514 S.E.2d 553 (1999)).

In the instant case, the trial court failed to include any findings of fact regarding whether acts of domestic violence occurred. Ms. Brown filed a Complaint seeking a Domestic Violence Order of Protection on

September 7, 2023, just one week after Mr. Rodriguez showed up at her home uninvited and unexpected due to his scheduled training. Mr. Rodriguez showed up the same day he claimed to be in the hospital and called her in excess of 36 times. Ms. Brown's complaint included an addendum text overflow form where she went into the long history of the parties' seven-year relationship starting in 2016 and continuing to the events up to and following August 31, 2023. Ms. Brown numerous allegations included, but are not limited to, Mr. Rodriguez took explicit videos and photos of her without her consent; sexually assaulted her in the shower; physically assaulted her during sex after being told no; and gave her a sexually transmitted disease. (R p 6-9). Ms. Brown stated "My 7 year relationship with Fabio involved many incidents of domestic violence and has caused me to experience extreme prolonged emotional and psychological distress[.] I am in therapy and on psychiatric mediation for PTSD. Because of his behaviors, words, and actions I do not feel safe in my home or vehicles." (R p 6). Ms. Brown testified about her therapy due to the relationship and Mr. Rodriguez's manipulation. (T p 37). Ms. Brown testified about Mr. Rodriguez's extensive military training and how she was forced to take added security precautions at

her home following Mr. Rodriguez pointing out the numerous ways he could gain entry to her home. (T p 11). As the record contains a plethora of evidence that Ms. Brown met her burden to show that domestic violence occurred pursuant to N.C. Gen. Stat. § 50B-1, it would not be moot to reverse and remand this case.

II. THE COURT ACTED UNDER MISAPPREHENSION OF THE LAW WHEN IT DENIED THE DOMESTIC VIOLENCE PROTECTIVE ORDER.

A. Subjective Standard.

"The plain language of section 50B-1(a)(2) imposes only a subjective test, rather than an objective reasonableness test, to determine whether an act of domestic violence has occurred." *Brandon v. Brandon*, 132 N.C. App. 646, 655, 513 S.E.2d 589, 595 (1999).

The court when entering the ruling denying the Order, stated, "The Court cannot determine, based on some statements, that – and things that were done throughout this time period, that there was a *threat* or *imminent* threat or even a *reasonable* threat presented to the defendant [sic]." (T p 48). Based on the court's ruling it appears the court applied a "reasonableness standard" which is contrary to the plain, unambiguous language of N.C. Gen. Stat. §50B-1 (2024). *See Avco Financial Services*

v. Isbell, 67 N.C. App. 341, 343, 312 S.E.2d 707, 708 (1984) (noting that clear and unambiguous language in a statute leaves "no room for judicial construction").

Furthermore, N.C. Gen. Stat. §50B-1 does not limit the definition of domestic violence to that of a "threat". "The statutory definition of domestic violence does not depend on whether a threat has been uttered, but on whether the plaintiff is "in fear of imminent serious bodily injury." *Brandon v. Brandon*, 132 N.C. App. 646, 654 n.7, 513 S.E.2d 589, 595 n.7 (1999) (citing *See* N.C.G.S. § 50B-1(a)(2)).

B. There is no time limit requirement in Chapter 50B.

In its order, the trial court mentioned that Ms. Brown chose to proceed on old allegations and made mention of whether a threat was imminent. (R p ----). By making this comment, it appears that the trial court believed that there must be a very recent event or that there must be an immediate threat in order for a domestic violence protective order to be granted. There is simply no time limit expressed in Chapter 50B regarding how recent an event must be for a party to seek relief. In fact, Chapter 50B expressly states that if the court finds that an act of domestic violence has occurred, the court shall grant relief. (Statute

citation) The statue itself does not say that an act of domestic violence has to have happened within a certain amount of time to be eligible fore relief.

Ms. Brown filed her Complaint for Domestic Violence Order of Protection on Thursday, September 7, only a week after the events on August 31. Her previous attempt for a *Complaint and Motion* filed on August 29 was denied. After the earlier complaint was denied, Mr. Rodriguez's behaviors escalated on August 31, when he showed up at her home uninvited *after* claiming he was in the hospital ill and proceeded to call ceaseless and text after being asked to stop. (T 13, 19, 30-31 Ex 5). Mr. Rodriguez's actions meet the grounds for stalking pursuant to N.C.G.S §14-277.3A (2024). As with any Complaint for domestic violence protection, Ms. Brown only had to allege one act of domestic violence, in this situation she alleged over 9 instances, instances that covered bodily injury (sexual assaults, physical abuse during sexual intercourse) and harassment that led to substantial emotional distress (showing up at her home uninvited and unwelcome, repetitive calls and texts). (R p 6-9). As for any question of a delay, this case is similar to *Rollins v. Shelton*, in that Ms. Brown and that the court agreed that an incident five days prior

to filing the complaint "can barely be characterized as a delay." *Rollins v. Shelton* 286 N.C. App. 693, 700, 882 S.E.2d 70, 74 (2022).

Furthermore, the statute allows relief when "the aggrieved party ... [is] in fear of imminent serious bodily injury *or continued harassment*, as defined in G.S. 14-277.3A, that rises to such a level as to *inflict substantial emotional distress*". N.C. Gen. Stat. § 50B-1(a)(2) (2024). Harassment is defined as "[k]nowing conduct, including written or printed communication or transmission, telephone, cellular, or other wireless telephonic communication, ... or voice mail messages or transmissions, and electronic mail messages or other computerized or electronic transmissions directed at a specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose." N.C. Gen. Stat. § 14-277.3A(b)(2) (2024). Substantial emotional distress is defined as "[s]ignificant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling." N.C. Gen. Stat. § 14-277.3A(b)(4) (2024).

C. The trial court improperly based the denial on Plaintiff's profession of love to him and on the trial court's belief that there had to be an imminent threat to grant the domestic violence protective order.

In the order court denying the Complaint and Motion for Domestic Violence Order of Protection wrote, "The Plaintiff was dishonest during her testimony. After expressing her devotion and love for the Plaintiff, she then made a decision to proceed on old allegations that appeared to have no imminent threat [illegible]." (R p 6-9). The court stated in open court: "The Court cannot determine, based on some statements, that – and things that were done throughout this time period, that there was a *threat* or *imminent* threat or even a *reasonable* threat presented to the defendant [sic]." (T p 48). The written ruling and oral dictation show a misapplication of the requirements set out in N.C. Gen. Stat. § 50B-1(a) (2024).

A review of Ms. Brown's Complaint and testimony show allegations of domestic violence spanning over the parties' seven-year relationship. Based on her allegations alone that Mr. Rodriguez showed up at her home multiple times after she told him not to come and continued to call and text, she has stated grounds for harassment pursuant to N.C. Gen. Stat. § 14-277.3A. (R p 6, T p 8-10,13, 17-19 Ex 3, 4, 5). Mr. Rodriguez's behavior caused her substantial emotional distress to the point she was in therapy and taking medication. (R p 6). These specific allegations fall

under a different prong of the statute because although she was "in fear of ... continued harassment ... that rises to such a level as to inflict substantial emotional distress." N.C. Gen. Stat. § 50B-1(a)(2) (2024).

The courts have found "imminent" to differ from "immediate"; "it means ... that there will be no significant delay." *Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981) (considering "imminent" in the context of a civil assault and battery); *Brandon v. Brandon*, 132 N.C. App. 646, 654 n.7, 513 S.E.2d 589, 595 n.7 (1999). Additionally, the statute is written such that "imminent" applies only to "serious bodily injury". *See Burress v. Burress*, 195 N.C. App. 447, 449, 672 S.E.2d 732, 734 (2009). Ms. Brown has no burden to prove "imminent continued harassment" just that she is afraid of continued harassment.

CONCLUSION

The trial court denied Plaintiff's complaint and motion absent any findings of fact regarding any acts of domestic violence occurred. Absent findings of fact, this Court cannot properly determine why the domestic violence order of protection was denied. As such the trial court's order denying the Plaintiff's complaint should be reversed and remanded for a new trial.

Respectfully submitted this the 20th day of June 2024.

/s/ Amber R. Morris
Amber R. Morris
N.C. State Bar Number 44638
Attorney for Plaintiff-Appellant
Collins Family Law Group
P.O. Box 787, Monroe, NC 28111
704-289-3250
ambermorris@collinsfamilylaw.com

CERTIFICATE OF WORD COUNT

Pursuant to N.C. R. App. P. 28(j)(2), I hereby certify that the word count of Plaintiff-Appellant's Brief is no more than 8,750 words, including footnotes and citations as reported by the word-processing software.

This the 20th day of June 2024.

/s/ Amber R. Morris
Amber R. Morris
N.C. State Bar Number 44638
Attorney for Plaintiff-Appellant
Collins Family Law Group
P.O. Box 787, Monroe, NC 28111
704-289-3250
ambermorris@collinsfamilylaw.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date this paper was filed with the North Carolina Court of Appeals through electronic submission at www.ncappellatecourts.org and served upon Defendant-Appellee by email to his attorney of record addressed as follows:

Mr. Sean McIlveen: sean@mcilveenfamilylaw.com

This the 20th day of June 2024.

/s/ Amber R. Morris
Amber R. Morris
N.C. State Bar Number 44638
Attorney for Plaintiff-Appellant
Collins Family Law Group
P.O. Box 787, Monroe, NC 28111
704-289-3250
ambermorris@collinsfamilylaw.com