MCILVEEN FAMILY LAW FIRM
WHEN RESULTS MATTER

ENCLOSURE MEMORANDUM

TO: **Amber R. Morris**
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RE: Brown v. Rodriguez; 23-CVD-2969; COA 24-449

DATE: 07-15-2024

(X) Please find enclosed:

- ☐ Notice of Hearing
- ☐ Motion
- ☐ Complaint
- ☐ Answer and/or Counterclaim
- ☐ Order or Judgment
- ☐ Separation Agreement
- ☐ Premarital or Postmarital Agreement
- **X** **Other: Defendant-Appellee's Reply Brief**

(X) For your records

( ) For signature in each place indicated and return to the Mailing Address listed below

( ) For signature before a Notary Public and return to the Mailing Address listed below

( ) For filing and return to the enclosed, self-addressed stamped envelope

( ) For judge's signature, filing, and return to the enclosed, self-addressed stamped envelope

( ) Other/Additional Information:_____

No. COA 24-449 JUDICIAL DISTRICT 25

NORTH CAROLINA COURT OF APPEALS

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COURTNEY BROWN,	)	
	)	
Plaintiff-Appellant,	)	
	)	From Cabarrus County
v.	)	No. 23-CVD-002969
	)	
FABIALBERT RODRIGUEZ,	)	
	)	
Defendant-Appellee.	)	
	)	

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DEFENDANT-APPELLEE'S REPLY BRIEF

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SUBJECT INDEX

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DEFENDANT-APPELLEE'S REPLY BRIEF

****

STANDARD OF REVIEW

In reviewing a trial court's dismissal of Appellant's request for issuance of a domestic violence protective order, the Appellate Court must determine if the trial court's findings of facts are supported by substantial evidence. *Pulliam v. Smith,* 348 N.C. 616, 624, 501 S.E.2d 898, 902 (1998); *Shipman v. Shipman,* 357 N.C. 471, 473-75, 586 S.E.2d 250, 253-54 (2003). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Shipman,* 357 N.C. at 474, 586 S.E.2d at 253 (quoting *State v. Smith,* 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)). The trial court has the ability to "detect tenors, tones, and flavors that are lost in the bare printed record read months later by appellate judges." *Pulliam,* 348 N.C. at 624-25, 501 S.E.2d at 902-03 (quoting *Newsome v. Newsome,* 42 N.C. App. 416, 426, 256 S.E.2d 849, 855 (1979)). Thus, the trial court's "decision ought not to be upset on appeal absent a clear showing of abuse of discretion." *Pulliam,* 348 N.C. at 624-25, 501 S.E.2d at 902-903 (quoting *Falls v. Falls,* 52 N.C. App. 203, 209, 278

S.E.2d 546, 551 (1981)).

The trial court has broad discretion in these matters. It is well established that "an Appellate Court is not required to, and should not, assume error by the trial judge when none appears on the record before the Appellate Court." *Spoon v. Spoon,* 233 N.C. App. 38, 755 S.E.2d 66 (2014) (quoting *State v. Williams,* 274 N.C. 328, 333, 163 S.E.2d 353, 357 (1968)).

"The abuse of discretion standard of review is applied to those decisions which necessarily require the exercise of judgment. The test for abuse of discretion is whether a decision "is manifestly unsupported by reason," or "so arbitrary that it could not have been the result of a reasoned decision." *Little v. Penn Ventilator* Co., 317 N.C. 206,218,345 S.E.2d 204, 212 (1986) (quoting *White u. White,* 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985); *State v. Wilson,* 313 N.C. 516, 538, 330 S.E.2d 450, 465 (1985)).

When the trial court's findings of fact are supported by substantial evidence, the Court of Appeals must then determine

if the findings of fact support the trial court's conclusions of law. *Shipman,* 351 N.C. at 475, 586 S.E.2d at 254 (citing *Pulliam,* 348 N.C. at 628, 501 S.E.2d at 904). Ultimately, "the trial court's conclusions of law are reviewable de novo." *Browning v. Helf,* 136 N.C. App. 420, 423, 524 S.E.2d 95, 98 (2000).

ARGUMENT

I. THE TRIAL COURT MADE SUFFICIENT FINDINGS OF FACT TO SUPPORT THE DENIAL OF A DOMESTIC VIOLENCE ORDER OF PROTECTION.

Appellant argues that the Findings of Facts in the October 25, 2023 Order are insufficient to support the denial of the Domestic Violence Protective Order. Appellant points to four perceived issues that she contends establish this "error:" (1) Domestic Violence: Chapter 50B, (2) Domestic Violence AOC Forms, (3) [That] The trial court erred by not including findings regarding the allegations in Ms. Brown's verified Complaint and testimony, and (4) [That] The trial court erred by not including 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

Complain and Motion for Domestic Violence Protective Order. Therefore, the case must be remanded for further evidentiary findings. Appellee addresses each of these in turn.

a. <u>Domestic Violence: Chapter 50B</u>

North Carolina does provide protection to its residents from domestic violence as correctly stated in Appellant's Brief. However, for the trial court to enter an order of domestic violence, the moving party must prove by a preponderance of the evidence that the defendant either:

> (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).

Should the moving party be unable to prove either the commission of one or more of these acts beyond a preponderance of the

evidence, the matter must rightfully be dismissed. After hearing the testimony of Appellant and taking into consideration the documentary evidence presented by Appellant, the trial court concluded as a matter of law that the Appellant failed to prove grounds for issuance of a domestic violence protective order (R. at 22) and dismissed the matter (R. p 23).

b. Domestic Violence AOC Forms

Next, Appellant contends that the AOC forms themselves do not contain sufficient Findings of Fact or Conclusions of Law to support the dismissal of a request for a domestic violence protective order.

Appellant mistakenly relies on *Brandon v. Brandon,* 132 N.C. App. 646, 513 S.E.2d 589 (1999) to support her position. However, the trial court in *Brandon* granted the domestic violence protective order. That was reversed by this Court, finding that "the trial court's conclusion that acts of domestic violence had occurred is unsupported by findings of fact; accordingly, no acts of domestic violence have been shown of which the court may "bring about a cessation." *Brandon,* 132 N.C. App. at 655, 513 S.E.2d at 595.

In this matter, the trial court specifically made three findings of fact: (1) "The Plaintiff was dishonest during her testimony;" (2) After expressing her devotion and love for the [Defendant], she then made a decision to proceed on old allegations that appeared to have no imminent threat of harm;" and (3) "The Plaintiff's credibility did not survive cross examination." (Although this was included under paragraph 14 of the decree, presumedly due to lack of writing space.) (R. at 21, 23). Those specific three Findings of Fact support the dismissal of the request for a domestic violence protective order. No additional findings of fact would be necessary for the entry of this order, regardless of whether it was written on Form AOC-CV-306 or in another form.

c. The trial court included sufficient findings regarding the allegations in Ms. Brown's verified Complaint and testimony

Appellant asserts that the trial court erred by not including findings regarding the allegations in Ms. Brown's verified Complaint and testimony. While Appellant acknowledges that the trial court did make findings of fact that, "The Plaintiff was dishonest during her testimony" and that, "After expressing her devotion and love

for the [Defendant], she then made a decision to proceed on old allegations that appeared to have no imminent threat of harm." (R. at 21), Appellant goes on to state that the trial court failed to make additional findings of what the trial court believed happened or conversely didn't happen.

The trial court sits as the finder of fact, "and where different reasonable inferences can be drawn from the evidence, the determination of which reasonable inferences shall be drawn is for the trial court." *Repair Co. v. Morris & Associates,* 2 N.C. App. 72, 75, 162 S.E.2d 611, 613 (1968). This Court can only read the written record. But the trial judge, "is present for the full sensual effect of the spoken word, with the nuances of meaning revealed in pitch, mimicry and gestures, appearances and postures, shrillness and stridency, calmness and composure, all of which add to or detract from the force of spoken words". *State v. Sessoms,* 119 N.C. App. 1, 6, 458 S.E.2d 200, 203 (1995). The trial court's findings "turn in large part on the credibility of the witnesses [and] must be given great deference by this Court." *Id.* Accordingly, where the trial court's findings of fact are supported by

competent evidence, they are binding on appeal. *Harris v. Harris,* 51 N.C. App. 103, 105, 275 S.E.2d 273, 275 (1981).

Appellant's argument that the trial court failed to include as findings of fact, allegations contained in the Complaint is contrary to N.C.G.S. 1A-1, Rule 56(e). This Court has stated that, "Rule 56(e) clearly states that the unsupported allegations in a pleading are insufficient to create a genuine issue of fact where the moving adverse party supports his motion by allowable evidentiary matter showing the facts to be contrary to that alleged in the pleadings." *Lowe v. Bradford,* 305 N.C. 366, 370, 289 S.E.2d 363, 366 (1982).

Appellant, in her brief, refers to allegations made in the initial Complaint, that were not testified to at the trial of this matter. Because no testimony regarding those allegations was received at trial, the trial court cannot rely on those unsupported allegations contained in the Complaint as evidence.

The trial court, as sole determiner of both the credibility of Appellant and of the veracity of her statements, found that, "The Plaintiff was dishonest in her testimony". (R. at 21). Appellant did not call any additional witnesses to support her allegations. (T. at 40). The

sole testamentary evidence for the trial court to consider was that of Appellant. And the trial court found her to be dishonest. That alone is sufficient to support a conclusion of law that Appellant failed to prove grounds for the issuance of a domestic violence protective order.

d. The trial court included sufficient 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

Appellant asserts that the trial court erred not including 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. That position is not supported by the order in this matter.

Appellant relies on *D.C. v. D.C.*, 279 N.C. App 371, 865 S.E.2d 889 (2021) to support her position, however that support is misplaced. This Court in D.C. remanded the matter for further findings of fact because the trial court "failed to make any findings of fact, much less specific

findings, in the Orders." *D.C.*, 279 N.C. App. at 376, 865 S.E.2d 892. The trial court was required to enter findings of fact supporting its conclusions of law that the Plaintiff failed to prove grounds for issuance of an order. The trial court in D.C. made no findings whatsoever outside of stating who was present that date. Such a failure to make findings of fact prevented the Court from making a meaningful appellate review.

That is not the case in this matter. The trial court in this matter made three specific findings that, (1) "the Appellant was dishonest during her testimony;" (2) that, "After expressing her devotion and her lover for the [Defendant], she then made a decision to proceed on old allegations that appeared to have no imminent threat of harm;" and that (3) "The Plaintiff's credibility did not survive cross examination." (R. at 21, 23). These findings of fact led to the conclusion of law that Appellant "failed to prove grounds for issuance of an order", and therefore to the necessity of the decree that the matter be dismissed.

The trial court did not believe that Appellee assaulted Appellant, nor did the trial court believe that Appellee placed Appellant or a member of Appellant'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, nor that Appellee committed any act defined in G.S. 14-27.21 through G.S. 14-27.33.

II. THE TRIAL COURT DID NOT ACT UNDER A MISAPPREHENSION OF THE LAW WHEN IT DENIED THE DOMESTIC VIOLENCE PROTECTIVE ORDER

a. Subjective Standard

Appellant correctly states that 50B-1(a)(2) imposes only a subjective test, rather than an objective reasonableness test. However, that is not applicable to the case at hand. The trial court did not make a determination of whether Appellant was or was not in fear of imminent seriously bodily injury or continued harassment.

The trial court's findings of fact were that Appellant was dishonest and that she lacked credibility as the only witness in the matter. The trial court's findings "turn in large part on the credibility of the witnesses and must be given great deference by this Court." *Sessoms,* 119 N.C. App. at 6, 458 S.E.2d 202. Where the trial court's

findings of fact are supported by competent evidence, they are binding on appeal. *Harris,* 51 N.C. App. at 105, 275 S.E.2d 275.

b. <u>The time limit requirement in Chapter 50B</u>

Appellant next contends that the trial court imposed a "recency bias" on Appellant's allegations. Appellant correctly states that there is no time limit requirement for allegations arising from 50B-1(a)(1). But, just as in Brandon, there was no credible evidence that was presented that Appellee caused or attempted to cause bodily injury or committed any sex offense against Appellant or a minor child in her custody. Therefore, as stated in *Brandon*, the trial court could not have concluded that an act of domestic violence had occurred pursuant to definitions in subsection (1) or (3) of section 50B-1(a). *Brandon,* 132 N.C. App. at 653, 513 S.E.2d at 594.

There was also no competent or credible evidence that Appellee placed, "the aggrieved party or a member of the aggrieved party's family or household in fear of imminent serious bodily injury" (50B-1(a)(2)). Section 2, unlike section 1 or 3, does contain a "time limit requirement".

The clear language of section 2 of the statute requires threat of "imminent" serious bodily harm. The trial court's reference to allegations that occurred years prior was an acknowledgement that even if true, Appellant's allegations would not rise to the threat of "imminent serious bodily harm." To support a claim under section 2, Appellant must show that actually feared Appellee and that such fear was a result from a perceived threat of imminent serious bodily harm. *Brandon,* 132 N.C. App. at 654, 513 S.E.2d 594-595. Imminent in this matter means, "there will be no significant delay" *Dickens v. Puryear*, 302 N.C. 437, 446, 276 S.E.2d 325 (1981). Because of Appellant's lack of credibility during testimony, we cannot now determine if she actually feared Appellee would commit imminent serious bodily harm to her or a member of her family or household even if those statements were in fact made.

Given the statutory language of *N.C. Gen. Stat. § 50B-1(a)(2)*, this Court examines only whether Appellant was subjectively afraid and does not examine whether her fear was objectively reasonable. *Brandon,* N.C. App. at 654-55, 513 S.E.2d at 595. Accordingly, this Court should defer to the trial court's assessment of Appellant's

credibility. *Stancill v. Stancill*, 241 N.C. App 529, 542, 773 S.E.2d 890, 898 (2015).

c. The trial court properly considered the dismissal of Appellant's claim

Appellant contends that the trial court based its decision in this matter on her expressed devotion and love for Appellee and her decision to proceed on old allegations. This is not the case.

The trial court made its determination that no domestic violence had occurred between the parties because Appellant was unable to prove grounds for the issuance of a domestic violence order. The written ruling specifically finds that Appellant was dishonest in her testimony and that she lacked credibility. (R. at 21, 23). As a result, the trial court could not believe her unsupported allegations. References to proceeding on "old allegations" from the trial court did not go to the validity or non-validity of those allegations. They were indicative to the trial court of Appellant's lack of honesty and credibility issues.

CONCLUSION

The trial court properly dismissed Appellant's complaint for

the issuance of a domestic violence protective order. The October 25, 2023 did contain sufficient findings of fact to allow why the request was dismissed: Specifically, Appellant was "dishonest during her testimony" and that her credibility "did not survive cross examination." It was exactly those facts that the trial court relied upon to find that Appellant did not meet her burden of proof for the issuance of a domestic violence protective order. As such, the trial court's order should be affirmed.

Respectively submitted this the 15th day of July 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the North Carolina Rules of Appellate Procedure, counsel for Defendant-Appellee certifies that the forgoing brief, which was prepared using a 14-point proportionally spaced font with serifs, is less than 2,712 words (excluding covers, captions, indexes, tables of authorities, counsels' signature block, certificates of service, this certificate of compliance, and appendixes) as reported by Microsoft Word processing software.

This the 15th day of July 2024.

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CERTIFICATE OF SERVICE

It is hereby certified that I have served a copy of the foregoing brief on counsel for Plaintiff-Appellant by confirmed facsimile, email, and by depositing a copy, contained in a first-class postage-paid wrapper, into a depository under the exclusive care and custody of the United States Postal Service addressed as follows:

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