SD33817

IN THE MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT

STEVEN PERREN,

Respondent,

vs.

DANIEL A. PERREN,

Appellant.

On Appeal from the Circuit Court of Ripley County
Honorable John Shock, Associate Circuit Judge
Case No. 15RI-CV00014

BRIEF OF THE RESPONDENT

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Preliminary Statement

After Daniel Perren assaulted his brother, Steven Perren, Steven obtained a full order of protection against Daniel. Daniel appeals, admitting he assaulted Steven, which he concedes met Steven's burden, but arguing his actions were justified because he was defending his automobile from what he believed was Steven's attempt to tamper with it.

Daniel waived this defense. As with any other affirmative defense, the law of Missouri is that he had to raise justification by defense of property in a timely answer, alleging specific facts to support it. This requirement applies to Adult Abuse Act cases just as it does to any other civil action. Daniel did not raise his affirmative defense at any time below, let alone by timely, proper answer. As a result, it is waived.

Daniel also failed to preserve his point on appeal. He argues that the trial court, which expressly found he had *not* shown that his assault on Steven was justified in any manner, erred in failing to find that his assault on Steven was justified by his defense of property. This is a challenge to the language of the judgment, which Rule 78.07(c) required Daniel first to bring to the trial court's attention in a motion to amend the judgment. He did not. As a result, his point is not preserved for appellate review.

Even if Daniel's affirmative defense somehow had been raised and preserved, the Court still would have to affirm the trial court's judgment. Viewing the evidence and inferences in a light most favorable to the judgment, which Daniel does not, the trial court was not bound to find either that Daniel met the threshold requirement for defense of property of first demanding Steven desist, or that he had reasonable beliefs about Steven's actions, the requirement of force, or the amount of force he used.

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Jurisdictional Statement

This is an appeal from a judgment of the Circuit Court of Ripley County granting the respondent a full order of protection against the appellant.

This case does not involve the validity of a Missouri statute or constitutional provision or of a federal statute or treaty, the construction of Missouri's revenue laws, the title to statewide office, or the death penalty. Thus, under Mo. Const. art. V, § 3, this case does not fall within the Supreme Court of Missouri's exclusive appellate jurisdiction, and jurisdiction of this appeal lies in the Missouri Court of Appeals. This case arose in Ripley County. Under § 477.060, R.S.Mo., venue lies in the Southern District.

Statement of Facts

A. Events Leading to the Proceedings Below

Respondent Steven Perren lived in Wichita, Kansas, but since 2001 also had owned 80 acres of property in Ripley County, Missouri, of which his brother, James Perren, became a joint owner in 2014 (Tr. 3, 10).

Steven and James[1] also have two other brothers, Daniel Perren and Timothy Perren (Tr. 3, 7, 20, 37). At trial, both Steven and Daniel agreed they have a "strained" relationship, which Daniel described as "not brotherly" (Tr. 7, 35). Steven said that he and James are "on one side" and Daniel and Timothy are "on the other side" (Tr. 7).

1. The January 12, 2015 Incident

In January 2015, Steven and James were in the process of logging their Ripley County land (Tr. 4). They were building a landing area where the logs would be brought to be loaded onto trucks and then hauled out (Tr. 4). Because this would be "awfully muddy and messy" without some foundation for the trucks on the landing, they sought to put gravel down on the landing area and smooth it out (Tr. 4).

On January 12, 2015, Steven had hired a gravel truck and crew to bring in gravel, and they were in the process of bringing in and operating a backhoe to put down the gravel (Tr. 4). The pile of gravel was placed next to an existing gravel road adjacent to the property (Tr. 5).

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[1] This brief refers to the four Perren brothers by their first names only for ease of reference. No disrespect is intended.

Around 10:00 a.m., Daniel, who owns no property along this road, drove his truck by Steven's property, parked, got out of the truck, walked over to the gravel pile, and began yelling at Steven's workers (Tr. 5-6). Daniel was "agitated" and was "intimidating" the working crew, who complained to Steven about this (Tr. 6). Daniel stayed there for 40 or 50 minutes and interrupted the work by setting a steel T-post in front of the gravel pile and then standing on the gravel pile, continuing to yell (Tr. 6, 25).

Ultimately, Steven "motioned to Danny to get off the gravel pile … at the point that we were getting to the point to move the gravel, and Danny refused to … move off the gravel pile" (Tr. 7). As a result, Steven "picked up the T-post" Daniel had placed in front of the pile, "walked it away from him and" proceeded with the work (Tr. 7).

Daniel, however, continued to refuse to move off the gravel pile, which "prohibited [Steven] and [his] workers from moving the gravel" (Tr. 7). He remained standing on the gravel pile and began filming Steven and the workers with a camera (Tr. 8). Daniel did all this "with the intention of … preventing [Steven] from moving the gravel" (Tr. 8). Daniel had no reason to be there that day "other than to harass" Steven (Tr. 17).

Steven then went to Daniel's truck and opened the door to see whether it was movable, because in its present position his workers could not bring in the backhoe as needed (Tr. 8-9). Steven said he also wanted to see whether, given Daniel's behavior, Daniel had anything in the truck "that could harm anybody" (Tr. 16).

As Steven looked in Daniel's truck, Daniel suddenly and without saying anything surprised Steven by coming around and using his body to push Steven hard up against the

truck and pin Steven there (Tr. 9). Steven tried to get away, but he could not go backwards and felt trapped (Tr. 9). The only way he could go was up, so he struggled and got into the truck in order to get out of Daniel's hold (Tr. 9, 14-15). At that point, Daniel started "beating" Steven, punching Steven five times in a row and repeatedly hitting him in the back of the head (Tr. 9). Steven did not fight back, did not strike Daniel, did not touch Daniel, did not threaten Daniel, and was not armed (Tr. 9).

After this incident, Steven was "fearful that" Daniel's behavior and assaults on him would "continue unless" an order of protection were issued against Daniel, which Steven believed was "necessary for [his] safety" (Tr. 10). He wanted "a protective order that prevents [Daniel] from doing this same kind of thing again" (Tr. 10).

2. Daniel's Claims About the Incident

Daniel claimed the incident arose "out of a running family dispute concerning real estate" (Tr. 21). He claimed the road Steven and the workers were on was Timothy's property, on which he has a lease to hunt, camp, maintain the land, and keep people from trespassing (Tr. 21-22). He claimed there was ongoing litigation as to whether the road was a private road or a public road (Tr. 22).

Daniel said that, on January 12, 2015, he was driving by Steven's property to go check on an ill friend when he saw "two dump truck loads" of gravel "dumped onto my leased property and my brother Tim's property," and called Timothy and let him know (Tr. 23). He claimed he stopped, videotaped the gravel piles, and had an argument with Steven about whose land the gravel was on (Tr. 24).

Daniel claimed he was trying to help the backhoe operator avoid Timothy's property, when, suddenly, Steven "lunged forward at [him], tried to grab [his] phone out of [his] hand," and an argument ensued (Tr. 26). Daniel claimed Steven then went to his truck and opened the door, he told Steven not to, and he then grabbed Steven, who pushed him, got into the truck, grabbed the keys, and tried to start it (Tr. 26). He claimed Steven was "laughing hysterically like a maniac," "hysterically manic," and he was just trying to get his keys back, so he "punched [Steven] in the head a couple times just to try to stun him to get him to drop my keys because I'm trying to protect my truck from being stolen or moved" (Tr. 27).

Daniel claimed that Steven then ripped his camera off the truck's windshield, so he "punch[ed] [Steven] in the head a few more times trying to get [his] camera back from" Steven (Tr. 27).

When asked about Steven's contrary recounting of the events of January 12, Daniel claimed Steven's story was a lie (Tr. 28-29). He claimed that Steven later was arrested for his conduct (Tr. 33). Still, Daniel ultimately admitted that Steven did not hit him, did not cuss at him, and merely demanded he move his truck (Tr. 33, 35).

3. Other Witnesses' Accounts

Timothy claimed the road along which Steven and his workers had the gravel on January 12 was his private road and he owned the property on both sides of it (Tr. 38-39). He said Daniel had permission to be on his property and wanted Daniel to keep an eye on it (Tr. 39). He said Steven and James did not have permission to use the road (Tr. 39). He also said the gravel was on his property without his consent (Tr. 43-44).

Timothy acknowledged, though, that he did not see the incident between Steven and Daniel on January 12 except a little and from afar (Tr. 45). He said he did not see Steven punch, kick, or cuss at Daniel (Tr. 45). Additionally, Timothy admitted that, at the time of trial, an order of protection from Steven was in effect against him in Howell County (Tr. 44-45).

Richie Phillips, Chief Deputy for the Ripley County Sherriff's office, said he investigated the incident on January 12, 2015, which led him to believe Steven was "in Dan's truck and trying to move it, which is tampering with a motor vehicle" (Tr. 47). He said his investigation revealed that 95% of the gravel was on Timothy's property (Tr. 47). He admitted, though, that he did not see anything that happened that day and instead heard about it only secondhand (Tr. 48).

B. Proceedings Below

On January 14, 2015, Steven filed a petition for order of protection against Daniel in the Circuit Court of Ripley County (L.F. 1, 5). He alleged he and Daniel were related by blood and previously resided together, Daniel stalked him and caused him violence, he was afraid of Daniel as a result, and he was in immediate danger of domestic violence from Daniel (L.F. 5-6). He requested a full order of protection, court ordered counseling for Daniel, and awards of his costs and attorney fees (L.F. 8).

The court immediately issued an ex parte order of protection (L.F. 1, 9). Between then and trial, Daniel did not file any answer or motion (L.F. 1-2).

The case went to trial on February 23, 2015 (L.F. 2; Tr. 1). Steven testified on his own behalf, and Daniel, Timothy, and Chief Deputy Phillips testified on Daniel's behalf

(Tr. 2, 20, 37, 46). During trial, parties and witnesses referred to several alleged documents and a video, which was played before the court, but none of which actually were admitted into evidence (Tr. 11, 19, 29-30, 33). At the close of all evidence, the court took the case under advisement (L.F. 2; Tr. 48).

On March 2, 2015, the trial court issued a judgment granting Steven a full order of protection against Daniel effective until March 1, 2016 (L.F. 3, 12, 14). It found Steven and Daniel were "related by blood," Steven had "proven allegations of domestic violence … against" him, and Daniel did not "show that his … actions alleged to constitute abuse were otherwise justified under the law" (L.F. 12). The court ordered Daniel not to communicate with Steven, not "to commit or threaten domestic violence, molest, stalk or disturb the peace of" Steven, and not to enter onto the premises of Steven's residence (L.F. 13). It did not award Steven any costs or attorney fees (L.F. 14).

Daniel did not file any post-judgment motion (L.F. 3). Instead, he appealed to this Court (L.F. 3, 17).

Argument

Standard of Review

As an order of protection case is "a court-tried civil case," this Court's "review is governed by *Murphy v. Carron*, 536 S.W.2d 30 (Mo. banc 1976)." *E.M.B. v. A.L.*, 462 S.W.3d 450, 452 (Mo. App. 2015). This Court must affirm the judgment below "unless there is no substantial evidence to support it, … it is against the weight of the evidence, … it erroneously declares the law, or … it erroneously applies the law." *Murphy*, 536 S.W.2d at 32.

"In reviewing the trial court's decision, this Court is primarily concerned with the correctness of the trial court's result, not the route taken by the trial court to reach that result." *Trimble v. Pracna*, 167 S.W.3d 706, 716 (Mo. banc 2005). The judgment below "will be affirmed under any reasonable theory supported by the evidence …." *Id.*

* * *

A. Summary

In his sole point relied on, Daniel argues the trial court should have found that he proved an affirmative defense that his violence against Steven was justified by defense of property under § 563.041, R.S.Mo. The Court should not reach his point, and instead should dismiss Daniel's appeal. First, Daniel never raised an affirmative defense of justification below by stating it in answer, alleging specific facts in support. As a result, the law of Missouri is that he waived it. Second, he did not move to amend the judgment, apprising the trial court of his allegation that it had erred in failing to find his use of force was justified, as Rule 78.07(c) requires. As a result, his point is not preserved for review.

Even if it were raised and preserved, though, Daniel's point is without merit. The trial court is the sole arbiter of credibility and can believe or disbelieve all, some, or none of any testimony. Viewing the evidence in a light most favorable to the judgment, taking all evidence and inferences in its favor as true and ignoring all contrary evidence and inferences, Steven proved that Daniel committed domestic violence against him and the trial court disbelieved any testimony that Daniel was defending his property.

The Court should dismiss Daniel's appeal or affirm the trial court's judgment.

B. Daniel waived any affirmative defense that his use of physical force against Steven was justified under § 563.041, because he did not raise it below.

1. Justification by defense of property is an affirmative defense that must be pleaded in the defendant's answer or else is waived.

Daniel's argument is grounded in § 563.041, R.S.Mo. (Brief of the Appellant ("Aplt.Br.") 8, 10-11), which provides:

> 1. A person may … use physical force upon another person when and to the extent that he or she reasonably believes it necessary to prevent what he or she reasonably believes to be the commission or attempted commission by such person of stealing, property damage or tampering in any degree. …
>
> 4. The defendant shall have the burden of injecting the issue of justification under this section.

If a defendant establishes that his use of physical force was justified in this way, it "shall be an absolute defense to … civil liability." § 563.074.1, R.S.Mo.

As § 563.041.4 suggests, in civil cases the "use of force in defense of property" described in that section is an affirmative defense. *Zink v. Hile*, 594 S.W.2d 344, 346 (Mo. App. 1980). As a result, it is subject to all the same requirements to be pleaded, raised, and preserved just as with any other affirmative defense to civil liability. *Id.*

"In pleading to a preceding pleading, a party shall set forth all applicable affirmative defenses and avoidances," which pleading "shall contain a short and plain statement of the facts showing that the pleader is entitled to the defense or avoidance." Rule 55.08. "The purpose of the requirement that an affirmative defense needs to be pled pursuant to Rule 55.08 is to give the plaintiff notice and the opportunity to prepare for trial." *Thompson v. Brown & Williamson Tobacco Corp.*, 207 S.W.3d 76, 122-23 (Mo. App. 2006). Rule 55.08 uses the word "shall," which is mandatory language. *Jarman v. Eisenhauser*, 744 S.W.2d 780, 781 (Mo. banc 1988). Thus, "Failure to plead an affirmative defense constitutes a waiver of the defense." *Leo's Enters. v. Hollrah*, 805 S.W.2d 739, 740 (Mo. App. 1991).

It is well-established in Missouri that this principle applies to affirmative defenses of justification by defense of self, others, or property, just as it does to any other affirmative defense. *See Zink*, 594 S.W.2d at 346; *Atchison v. Procise*, 24 S.W.2d 187, 190 (Mo. App. 1930); *Brown v. Barr*, 171 S.W. 4, 6 (Mo. App. 1914); *Sloan v. Speaker*, 63 Mo.App. 321, 325 (1895). Indeed, our Supreme Court first mandated this **over 150 years ago**, *see O'Leary v. Rowan*, 31 Mo. 117, 119 (1860).

Thus, "The weight of case authority has long held that self-defense and its offspring, defense of [property], are affirmative defenses and must be pled and proven as

such …. 'The plea of *son assault demesne*,[2] or of self-defense, is an affirmative one which, if not specifically pleaded, will be deemed waived.'" *Zink*, 594 S.W.2d at 346 (quoting *Atchison*, 24 S.W.2d at 190).

In *Zink*, an assault and battery suit, the defendant's answer generally denied the plaintiffs' allegations but did not state any affirmative defenses. *Id.* at 345. At trial, however, the defendant requested and obtained jury instructions on an affirmative defense of his allegedly having acted in defense of others. *Id.* After a defense verdict, the trial court realized that, as the defendant had not actually raised this defense in his answer, issuing those instructions was error. *Id.* It granted the plaintiffs a new trial. *Id.*

This Court affirmed. *Id.* at 346-47. As the defendant "did not raise the issue of defense of another in [his] pleadings," he had waived it. *Id.* at 346.

Atchison, on which *Zink* relied, *id.*, also was a suit for assault. 24 S.W.2d at 187-88. The defendant's answer generally denied the plaintiff's allegations, but also conclusorily said, "[W]hatever injury was sustained by plaintiff and inflicted by defendant was in the necessary defense of defendant's home." *Id.* at 188. After a

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[2] "*Son assault demesne*" is French for "his own assault." BLACK'S LAW DICT. 1429 (8th ed. 2004). It is the "plea of self-defense in a tort action, by which the defendant alleges that the plaintiff originally engaged in an assault and that the defendant used only the force necessary to repel the plaintiff's assault and to protect … property." *Id.* Even at common law, it was a "special plea in bar" that had to be pleaded in the defendant's answer or else was waived. 3 WILLIAM BLACKSTONE, COMMENTARIES *306.

directed verdict for the plaintiff, the defendant appealed, arguing that his affirmative defense of defense of property was at issue, precluding a directed verdict. *Id.* at 190.

This Court disagreed. *Id.* Defense of property was an affirmative defense that, to be raised, had to be stated in the defendant's answer and backed up by specific facts, or else was waived. *Id.* But the "statement in the answer that the injury sustained by plaintiff was inflicted by defendant in the necessary defense of his home is a mere conclusion," which was insufficient. *Id.* The defendant's answer did not "presen[t] a valid plea of self-defense against plaintiff," and he had waived that defense. *Id.*

In *Brown*, another assault suit, and on which *Atchison* relied, *id.*, the defendant's answer generally denied the plaintiff's allegations but did not state any affirmative defenses. 171 S.W. at 4. After a verdict for the plaintiff, the defendant appealed, arguing that the trial court had erred in refusing to instruct the jury on a justification defense of self-defense. *Id.* at 6. This Court disagreed and affirmed. *Id.* "The defense of *son assault demesne* is an affirmative defense, which if not specially pleaded in the answer will be deemed waived." *Id.* As "it was not specially pleaded in the answer, the instruction under consideration should not be condemned for ignoring it." *Id.*

In *Sloan*, another assault suit, and on which *Brown* relied, *id.*, the defendant's answer generally denied the plaintiff's allegations but did not state any affirmative defenses. 63 Mo.App. at 325. On appeal from a verdict for the plaintiff, the defendant argued the jury should have been instructed on a justification defense of self-defense. *Id.* This Court disagreed and affirmed. *Id.* "[I]f any first assault by plaintiff on defendant, or any voluntary entering upon the struggle by plaintiff was relied upon, as set out in the

instructions, it should have been set up in the answer, which, in this case, was a mere general denial." *Id.* "If defendant … sought to excuse or justify his assault, he should have set up such defense by answer." *Id.* He had not, and the defense was waived. *Id.*

Finally, in *O'Leary*, which first stated this principle in Missouri, and on which *Sloan* relied, *id.*, a defendant answered an assault and battery suit by general denial, without raising any affirmative defenses. 31 Mo. at 118-19. After a verdict for the plaintiff, the defendant appealed, arguing that the trial court had erred in refusing to instruct the jury on his theory of self-defense. *Id.* at 118. The Supreme Court affirmed. *Id.* at 119-20. "The answer of the defendant is a denial of the battery; he does not justify under the plea of *son assault demesne*." *Id.* at 119. As a result, the defendant had waived this defense, and the jury could not be instructed on it. *Id.*

Plainly, the law of Missouri is and has been for over 150 years that justification by defense of property must be specifically pleaded in the defendant's answer. If not, it is waived both at trial and on appeal. Every appellate decision on this issue in Missouri history, including from the Supreme Court, has confirmed and reiterated this.

2. This requirement applies to Adult Abuse Act cases just as in any other civil action.

As Daniel points out, an affirmative defense of justification by defense of property is permissible in cases under the Adult Abuse Act, Chapter 455, R.S.Mo. (Aplt.Br. 10-11) (citing *McAllister v. Strohmeyer*, 395 S.W.3d 546, 551-52, 554 (Mo. App. 2013)).

But "[a] case filed in circuit court pursuant to Chapter 455 seeking relief from adult abuse is a civil action" just like any other. *State ex rel. Meeks v. Reaves*, 416

S.W.2d 351, 352 (Mo. App. 2013). The Supreme Court's rules of civil procedure apply to it just as in any other. *Id.*

This is true at all stages:

- The petition must allege sufficient facts, taken as true, to state a claim for relief under the Adult Abuse Act. *M.D.L. v. S.C.E.*, 391 S.W.3d 525, 531 (Mo. App. 2013).
- A timely motion for change of judge under Rule 51.05(a) by either party must be granted. *Jenkins v. Croft*, 63 S.W.3d 710, 712 (Mo. App. 2002); *Minor v. Minor*, 901 S.W.2d 163, 167 (Mo. App. 1995).
- The parties have the right to timely discovery, including deposing witnesses under Rule 57.03. *Meeks*, 416 S.W.2d at 352.
- The trial court retains discretion under Rule 65.01 whether or not to grant continuances. *D.A.T. v. M.A.T.*, 413 S.W.3d 665, 670 (Mo. App. 2013).
- A record of the proceedings capable of transcription must be kept under § 512.180.2, R.S.Mo. *A.L.C. v. D.A.L.*, 421 S.W.3d 569, 570-71 (Mo. App. 2014).
- The hearing must be adversarial, with all witnesses sworn and both parties given the opportunity to offer evidence and to cross-examine each other's witnesses. *Doza v. Kitcher*, 987 S.W.2d 826, 827 (Mo. App. 1999); *Grist v. Grist*, 946 S.W.2d 780, 782 (Mo. App. 1997); *Ehrhart v. Ehrhart*, 776 S.W.2d 450, 451 (Mo. App. 1989).
- All ordinary rules governing default judgments and setting them aside apply. *T.T. v. Burgett*, 380 S.W.3d 577, 580-81 (Mo. App. 2012); *In re C.W.*, 317 S.W.3d 204, 204 (Mo. App. 2010); *Sastry v. Sastry*, 302 S.W.3d 264, 266-67 (Mo. App. 2010).

- All ordinary rules for finality of judgment and timeliness for filing a notice of appeal apply. *Redden v. Redden*, 279 S.W.3d 240, 241-42 (Mo. App. 2009).
- In reviewing an Adult Abuse Act judgment, this Court uses the ordinary *Murphy v. Carron* standard of review applicable to any other judge-tried civil case. *Capps v. Capps*, 715 S.W.2d 547, 549 (Mo. App. 1986).
- All ordinary requirements to raise and preserve issues for appeal apply. *S.A. v. Miller*, 248 S.W.3d 96, 100 (Mo. App. 2008).

Simply put, "[i]n the absence of a civil rule or statute that makes [a given rule] inapplicable to Chapter 455 proceedings," ***all ordinary rules of civil procedure apply***. *Meeks*, 416 S.W.3d at 352.

As Daniel observes, while Steven's case against him was brought under the Adult Abuse Act, essentially it was a civil case seeking an injunction for battery (Aplt.Br. 11-12). No "civil rule or statute [makes the requirement in Rule 55.08 to file affirmative defenses in a responsive pleading] inapplicable to Chapter 455 proceedings." *Meeks*, 416 S.W.3d at 352. As a result, just as in any other assault or battery case, in order properly to raise an affirmative justification defense of defense of property, the defending party in a Chapter 455 proceeding must plead it in a timely answer, properly setting forth specific facts to support that defense, or else it is waived. *Supra* at 9-13.

That no responsive pleading is required in Adult Abuse Act cases, § 455.040.1, R.S.Mo., does not change this. To the contrary, it is well-established that the lack of a *requirement* to file a responsive pleading in a given type of action does not absolve a defendant to that action who *chooses* to rely on an affirmative defense of the requirement

to file a responsive pleading anyway or else waive his defense. *See, e.g.*, *Becker Glove Int'l, Inc. v. Jack Dubinsky & Sons*, 41 S.W.3d 885, 888 (Mo. banc 2001); *Manor Square, Inc. v. Heartthrob of Kan. City, Inc.*, 854 S.W.2d 38, 41-42 (Mo. App. 1993); *Smith v. Thomas*, 210 S.W.3d 241, 243 (Mo. App. 2006); *Jamestowne Homeowners Ass'n Trustees v. Jackson*, 417 S.W.3d 348, 358-59 (Mo. App. 2013).

Smith was a landlord-tenant action filed in associate circuit court. *Id.* In landlord-tenant actions, just as in Adult Abuse Act cases, while a plaintiff is required "to file a written petition," "a defendant is not required to file an answer." *Id.* Rather, "[t]he allegations are deemed to be denied, without the need for a responsive pleading, and the issues for trial are framed by the petition." *Id.* (citation omitted).

"**However, if a defendant wishes to raise any affirmative defenses, … they" still "must be filed in writing in a timely responsive pleading.**" *Id.* (citing *Becker Glove*, 41 S.W.3d at 888) (emphasis added). As such, just as in any other civil case, and even though no responsive pleading is required, "where an affirmative defense is not properly pleaded" in such an action, "that defense is deemed to have been waived." *Id.*

Thus, following *Smith* and *Becker Glove*, in *Jamestowne*, 417 S.W.3d at 358-59, this Court affirmed a trial court's refusal to consider a landlord-tenant defendant's affirmative defenses where, though no responsive pleading was required, she did not file a timely one raising those defenses. *Id.* It previously had done the same in *Manor Square*, 854 S.W.2d at 41-42.

The same principle applies here. The Adult Abuse Act did not require Daniel to file a responsive pleading, and instead left all issues to be framed by Steven's petition. §

455.040.1. But no "civil rule or statute [made the requirement in Rule 55.08 to file affirmative defenses in a responsive pleading] inapplicable to Chapter 455 proceedings." *Meeks*, 416 S.W.3d at 352.

To the contrary, it is well-established that, just as in other actions where a responsive pleading is not required, the Adult Abuse Act *does* give a respondent the *option* to file an answer as well as any other standard pretrial motions, which, if timely and properly filed, the trial court must consider as in any other civil case. *See, e.g.*:

- *Nenninger v. Smith*, 400 S.W.3d 400, 402, 407 (Mo. App. 2013) (respondent in Adult Abuse Act case "filed an answer challenging [the petitioner]'s petition" as well as a "motion to dismiss" that underwent a "pre-trial hearing");
- *M.L.G. v. R.W.*, 406 S.W.3d 115, 118 n.4 (Mo. App. 2013) (respondent in Adult Abuse Act case filed a pretrial motion to dismiss under Rule 55.27(a) for failure to state a claim on which relief could be granted, which trial court properly considered);
- *Skovira v. Talley*, 369 S.W.3d 780, 782 (Mo. App. 2012) (respondent in Adult Abuse Act case filed timely motion for more definite statement under Rule 55.27(d), which trial court granted, prompting amended petition);
- *M.R. v. S.R.*, 238 S.W.3d 205, 207 (Mo. App. 2007) (respondent in Adult Abuse Act case filed timely motion for change of venue alleging improper venue under Rule 51.045, raising and preserving issue of propriety of venue for appeal);
- *Glover v. Michaud*, 222 S.W.3d 347, 348 (Mo. App. 2007) (respondent in Adult Abuse Act case moved for judgment at the close of petitioner's evidence under Rule 73.01(b), which trial court denied but Court of Appeals reversed);

- *Chavez v. Walters*, 78 S.W.3d 234, 236 (Mo. App. 2002) (respondent in Adult Abuse Act case filed timely motion under Rule 55.27(a) to dismiss for lack of personal jurisdiction, which trial court properly granted);
- *Jenkins*, 63 S.W.3d at 712 (respondent in Adult Abuse Act case filed timely motion for change of judge under Rule 51.05(a), which was granted, as well as timely motion to dismiss for lack of subject matter jurisdiction, which trial court properly considered and denied, and was subject of appeal);
- *Kennedy v. Kennedy*, 924 S.W.3d 579, 579 (Mo. App. 1996) (respondent in Adult Abuse Act case filed timely answer to petitioner's petition);
- *Reller v. Hamline*, 895 S.W.2d 659, 660 (Mo. App. 1995) (respondent in Adult Abuse Act case filed timely motion to dismiss for lack of personal jurisdiction under Rule 55.27(a); trial court's denial of motion was reversed on appeal).

At the same time, ordinary rules of issue preservation still apply. *S.A.*, 248 S.W.3d at 100. As a result, and just as in any other case in which responsive pleadings are optional, Rule 55.08 still required Daniel to raise an affirmative defense of justification by defense of property under § 563.041.1 in an answer, stating the specific facts on which his affirmative defense rested.

If not, the law of Missouri is and has been for over 150 years that Daniel waived that defense.

3. Daniel did not file an answer raising any affirmative defense of justification by defense of property, waiving that defense.

Daniel did not file any responsive pleading to Steven's petition of any kind (L.F. 1-2), let alone one raising an affirmative defense that his violence against Steven was justified under §§ 563.041, annulling any liability under 563.074, because he was defending his property and stating specific facts in support of that defense. He also did not file any motion to dismiss, motion for judgment on the pleadings, or other pretrial motion of any kind (L.F. 1-2), again let alone one raising this defense. As a result, the law of Missouri is he waived this defense. *Supra* at 9-13.

Daniel might respond that he testified at trial that he was defending his property, which is "good enough." If so, this would be without merit.

First, no law supports that notion. All five Missouri decisions addressing the requirements to raise this defense, all of which are discussed *supra* at 9-13, uniformly hold that it must be raised in a timely answer, *not* at trial.

And this, too, is true of any affirmative defense – even one, like failure to state a claim for which relief could be granted, which under Rule 55.27(a) does not have to be raised in an answer, but instead can be raised by pretrial motion. *Heins Implement Co. v. Mo. Highway & Transp. Comm'n*, 859 S.W.2d 681, 685 (Mo. banc 1993). Even then, allowing the plaintiff to raise this claim by first stating it at trial would be an impermissible "stealth defense." *Id.* Such a claim must be raised by motion "well before trial," *id.* (citing *Johnson v. Raban*, 702 S.W.2d 134, 135-36 (Mo. App. 1985)), and not "immediately before trial." *Stine v. Warford*, 18 S.W.3d 601, 604 (Mo. App. 2000).

Second, and more importantly, Daniel *did not* raise this defense at trial. While Timothy conclusorily remarked, "I'm within my rights to defend my property" (Tr. 41), Daniel did not testify anything of the sort. The terms "justification," "justified," "defense," "defending," "reasonable," "reasonably," and citations to the statutes Daniel now places at issue *do not appear anywhere in the transcript*.

Neither Daniel nor his counsel made any argument to the trial court that an order of protection should be denied because he was reasonably defending his property under § 563.041. Daniel certainly did not testify, nor did his counsel argue, that he "use[d] physical force upon" Steven "to the extent that he … reasonably believe[d] necessary to prevent what he … reasonably believe[d] to be the commission or attempted commission by" Steven "of stealing, property damage or tampering in any degree." § 563.041.1.

But this is why pleading such a defense and the specific facts to support it is necessary. The plaintiff and the trial court have to be apprised of the defendant's specific defense and the specific allegations constituting it. *Thompson,* 207 S.W.3d at 122-23.

Plainly, Daniel did not raise an affirmative defense of justification by defense of property under § 563.041 at any time before the trial court: in an answer, in a pretrial motion, or even – where it still would be impermissible – at trial. Instead, it appears he first thought it up on appeal to this Court.

For over 150 years, the law of Missouri has been that is wholly insufficient. Daniel's sole point on appeal, arguing for the conclusiveness of an affirmative defense he never raised below, let alone properly so, is waived.

The Court should dismiss Daniel's appeal.

C. Daniel's sole point, alleging the trial court erred in failing to find that his use of physical force against Steven was justified, is not preserved for review under Rule 78.07(c), because he did not bring this allegation of error to the trial court's attention in a motion to amend the judgment.

Daniel's argument is that the trial court failed to "fin[d] that [he] ha[d] an absolute defense" of defense of property under §§ 563.041 and 563.074 – that the court "failed to properly consider" his affirmative defense in entering its judgment (Aplt.Br. 18-19). *Sub silentio*, he challenges the trial court's express written finding that he did not "show that his … actions alleged to constitute abuse were otherwise justified under the law" (L.F. 12). He simultaneously argues: (1) that the trial court erred in entering this finding because it *should instead have found* he was justified; and (2) that the trial court erred in *not* finding he was justified.

But Daniel did not file any post-judgment motion to amend the judgment under Rule 78.07(c), let alone one apprising the trial court of this allegation of error. As a result, under that rule, the law of Missouri is Daniel's point is not preserved for review, and the Court must dismiss his appeal.

Generally, in a judge-tried case, "neither a motion for a new trial nor a motion to amend the judgment or opinion is necessary to preserve any matter for appellate review." Rule 78.07(b). The exception to this, however, is that, "In all cases, allegations of error relating to the form or language of the judgment … must be raised in a motion to amend the judgment in order to be preserved for appellate review." *Id.* at (c) (emphasis added).

The primary purpose behind the adoption of Rule 78.07(c) in 2005 was to alleviate this Court of child custody appeals in which required statutory findings were not made unless that failure first was brought to the trial court's attention. *In re Holland*, 203 S.W.3d 295, 302 (Mo. App. 2006).

Subsequently, however, this Court has held it applies to *any* allegation on appeal that either the failure to make any finding or making any finding in *any* type of judge-tried case was error. *Roberts Holdings, Inc. v. Becca's Bakery, Inc.*, 423 S.W.3d 920, 930 (Mo. App. 2014). Simply put, "'**in all cases**' [a] claim regarding the sufficiency of the findings in the judgment must be preserved by including it in a motion to amend the judgment," and otherwise is not preserved for appeal. *Id.* (emphasis added).

This applies both to allegations that a trial court erred in failing to make a finding, *id.*, or erred in making a finding it did, both of which Daniel argues in his point. *See, e.g., In re Marriage of Adams*, 414 S.W.3d 29, 37 (Mo. App. 2013) (argument that "trial court erred by finding that the parties had agreed to split post-secondary educational expenses because no evidence to that effect was presented at trial" was not preserved where appellant failed to file Rule 78.07(c) motion alleging this).

Here, Daniel did not file a post-trial motion of any kind (L.F. 3), let alone a Rule 78.07(c) motion to amend the judgment raising an allegation that the trial court had erred in making a finding that he was not justified or failing to make a finding that he was justified, which Daniel now argues for the first time on appeal. As a result, Daniel's sole point on appeal is not preserved for review.

The Court should dismiss Daniel's appeal.

D. Viewing the evidence in a light most favorable to the judgment, there was sufficient evidence to enter the full order of protection against Daniel and reject any affirmative defense that Daniel's admitted use of force against Steven was justified by defense of property.

Even if Daniel somehow properly had raised his affirmative defense below and had preserved his argument that the trial court's findings were error, the trial court's judgment still would have to be affirmed.

Daniel openly, expressly "concedes that his actions" in restraining Steven and then striking Steven repeatedly "constitute an act of abuse under [§] 455.010.1[, R.S.Mo.], which" met Steven's burden to obtain a full order of protection against him under the Adult Abuse Act (Aplt.Br. 18). Instead, citing a paucity of authority (Aplt.Br. 2, 8-10), he argues that "even if the trial court believed each and every word by [Steven, his] actions were entirely justifiable use of physical force in defending his property," which he argues excuses his liability (Aplt.Br. 14). He argues, "Even if the trial court completely disbelieved the testimony of [Daniel] and completely believed the testimony of [Steven], all actions by [Daniel] fall precisely in the category of justified use of force on [Steven] to defend his property" (Aplt.Br. 17).

Daniel's arguments are without merit. Viewing the evidence in a light most favorable to the judgment, taking all evidence and inferences in the judgment's favor as true and ignoring all contrary evidence and inferences, which is *not* the same as "believing Steven" and "disbelieving Daniel," the trial court was not bound to agree with Daniel's defense. First, Daniel had not demanded Steven desist before using physical

force, which is a threshold requirement for his defense. Second, whether Daniel's beliefs were reasonable was itself a question of fact, which the trial court was not bound to find in Daniel's favor. The circumstances were sufficient for the trial court to reject Daniel's self-serving claim of reasonableness and, thus, reject his affirmative defense.

If Daniel's point somehow was not waived and is preserved for appeal, the Court must affirm the trial court's judgment.

1. **Viewing the evidence in a light most favorable to the judgment means accepting as true any evidence and inferences favorable to the judgment and rejecting any contrary evidence and inferences; the trial court is free to believe all, some, or none of any testimony.**

Daniel's sole point argues that "the evidence was insufficient to enter the full order of protection" (Aplt.Br. 8).[3] But he entirely fails to view the evidence in a light most favorable to the trial court's judgment.

A trial court "is in a better position" than an appellate court "not only to judge the credibility of witnesses and the persons directly, but also their sincerity and character and

[3] As Daniel argues only sufficiency of the evidence, he has waived any argument that the trial court's judgment was against the weight of the evidence. That would have required a separate point relied on. A point governed by the *Murphy v. Carron* standard that argues *both* that the evidence was insufficient *and* that the trial court's judgment was against the weight of the evidence would be impermissibly multifarious. *Sauvain v. Acceptance Indem. Ins. Co.*, 437 S.W.3d 296, 299 n.1 (Mo. App. 2014).

other trial intangibles which may not be completely revealed by the record." *White v. Dir. of Revenue*, 321 S.W.3d 298, 308-09 (Mo. banc 2010). As such, this Court confines its review of the facts "to determining whether substantial evidence exists to support the trial court's judgment …." *Id.* at 309 (citations omitted).

"When determining the sufficiency of the evidence," this Court "will accept as true the evidence and inferences from the evidence that are favorable to the trial court's [judgment] and disregard all contrary evidence." *Watson v. Mense*, 298 S.W.3d 521, 526 (Mo. banc 2009). "A trial court is free to disbelieve any, all, or none of th[e] evidence," and "this Court defers to [its] determination of credibility." *White*, 321 S.W.3d at 308.

But this is not as simple as the trial court merely believing the plaintiff and disbelieving the defendant, as Daniel suggests (Aplt.Br. 14, 17). Rather, the trial court "is free to believe none, part, or all of the testimony of any witness." *Wennihan v. Wennihan*, 452 S.W.3d 723, 729 (Mo. App. 2015). It also may "assess the weight to be given to any evidence found to be credible." *Id.*

As a result, it is virtually impossible for a losing party who had the burden of proof on an issue, as Daniel did on his affirmative defense, to prevail on a sufficiency of the evidence argument on appeal. *England v. England*, 454 S.W.3d 912, 919 (Mo. App. 2015).[4] "When the burden of proof is placed on a party for a claim that is denied, the

[4] Indeed, only one Missouri appellate decision ever reversed a judgment because a defendant conclusively established self-defense. *See State v. Rash*, 221 S.W.2d 124 (Mo. 1949). *Rash* was a criminal case reviewed under an outdated, overly lenient standard.

trier of fact has the right to believe or disbelieve that party's uncontradicted or uncontroverted evidence." *White*, 321 S.W.3d at 305. "If the trier of fact does not believe the evidence of the party bearing the burden, it properly can find for the other party." *Id.* "'Generally, the party not having the burden of proof on an issue need not offer any evidence concerning it.'" *Id.* (citation omitted).

Rather, "[I]t is only when the evidence is uncontested that no deference is given to the trial court's findings." *Id.* at 308. But evidence only is "uncontested in a court-tried civil case when the issue before the trial court involves only stipulated facts and does not involve resolution by the trial court of contested testimony …." *Id.* Indeed, "[t]o contest evidence, a party need not present contradictory or contrary evidence." *Id.* A party might also contest evidence by, for example, cross-examination, pointing out internal inconsistencies in the evidence, or arguing to the trial court that the witness is not credible as is apparent from the witness's demeanor, bias, or incentive to lie. *Id.*

Daniel wholesale fails this standard. He discusses a wide variety of supposed "facts" stated by various witnesses, including Steven, and inferences in his favor from those supposed "facts," all of which that the trial court obviously disbelieved or gave little weight to and which, as a result, this Court must ignore. This includes:

- who owned the road alongside which the incident at issue took place, the location of the gravel, and the location of Daniel's truck (Aplt.Br. 12-13, 15);
- what Daniel "believed" about his property rights (Aplt.Br. 15)
- Daniel's testimony of anything Steven did while in his truck except being punched by Daniel (Aplt.Br. 14, 17);

- an inference that Steven intended to operate Daniel's truck (Aplt.Br. 14-15);
- an inference that it was reasonable for Daniel to believe Steven intended to operate his truck (Aplt.Br. 15-17);
- an inference that Steven "took a substantial step in committing the offense of tampering in the first degree" (Aplt.Br. 16);
- an inference that Daniel "terminat[ed]" his physical "restraint" of Steven "as soon as it [was] reasonable to do so" (Aplt.Br. 16);
- an inference that Steven "did not intend to exit the truck" once in it (Aplt.Br. 17);
- an inference that Steven committed any "crimes" (Aplt.Br. 18); and
- any testimony by Timothy or Chief Deputy Phillips (Aplt.Br. 12, 18).

Rather, truly viewing the evidence and any inferences from the evidence in a light most favorable to the judgment, regardless of what any witness may have testified in whole or in part to the contrary, these are the facts as this Court must view them:

On January 12, 2015, Steven and some workmen he had hired were preparing gravel for a landing along a road in Ripley County (Tr. 4-5). Steven's brother, Daniel, with whom Steven did not get along, drove by, saw Steven, and stopped with an intention to harass Steven (Tr. 3, 5-7, 17, 20, 37). Daniel, who was agitated, yelled at and intimidated Steven's workers, purposefully interrupting and impeding the work by placing materials and his truck in the workers' way and prohibiting Steven and the workmen from completing their work (Tr. 5-8, 25). After this continued for nearly an hour, Steven demanded Daniel move his truck and, when Daniel refused, ultimately

approached Daniel's truck and opened its door to see whether, given Daniel's behavior, the truck could be moved and whether Daniel had any weapons in the truck (Tr. 16, 35).

At this, without any warning, and without asking Steven to desist, Daniel ran up, pushed Steven hard against the truck, and pinned him there (Tr. 9). Trapped, Steven struggled to get out of Daniel's hold, but could not, and to do so the only place he could escape was into the truck (Tr. 9, 14-15). At this, Daniel punched and hit Steven repeatedly (Tr. 9, 27). Steven did not fight back, did not touch Daniel, did not threaten or curse at Daniel, and was not armed (Tr. 9, 33, 45).

This incident made Steven "fearful that" Daniel's behavior and assaults on him would "continue unless" an order of protection were issued against Daniel, which Steven reasonably believed was "necessary for [his] safety" (Tr. 10).

The law of Missouri is that, viewed this way, the trial court was not commanded to agree with Daniel that his actions were justified by defense of property under § 563.041.

2. Daniel did not demand Steven desist before using physical force, which alone defeats Daniel's point.

Section 563.041 allows a defendant to "use physical force upon another person when and to the extent that he or she reasonably believes it necessary to prevent what he or she reasonably believes to be the commission or attempted commission by such person of stealing, property damage or tampering in any degree." A threshold requirement is that the defendant first must demand that the other person desist from his alleged activity. *State v. Leuschen*, 724 S.W.2d 340, 341 (Mo. App. 1987). Otherwise, "there [is] no basis for defendant to have 'reasonably' believed it necessary to use physical force …." *Id.*

This is a well-known rule from English common law:

> [I]f one enters into my ground, in that case the owner must request him to depart before he can lay hands on him to turn him out; for every [touching of the hands] is an assault and battery, which cannot be justified on account of breaking the close in law, without a request.

Green v. Goddard, (1702) 91 Eng.Rep. 540 (K.B.).

Thus, "Ordinarily, before force may be used in defense of property, a warning or notice to desist must be given to the unlawful intruder." 6 AM.JUR.2D *Assault & Battery* § 134 (Aug. 2015 ed.) (emphasis added). "[O]ne claiming title and rightfully in possession" of property "may … use such force as may be reasonably necessary to prevent an unlawful entry, or to remove trespassers or intruders, where … such persons have been given, and have refused, a request or notice to leave." 6A C.J.S. *Assault* § 32 (June 2015 ed.) (emphasis added). "An actor is privileged to use reasonable force … to prevent or terminate another's intrusion upon the actor's … chattels, if … the actor has first requested the other to desist and the other has disregarded the request …." RESTATEMENT (SECOND) OF TORTS § 77 (June 2015 ed.) (emphasis added).

And this long has been the law of Missouri. "[I]t makes no difference whether [the victim is] a trespasser, licensee, or invitee since ***no force of any kind may be used to expel a trespasser without first requesting [him] to leave and giving [him] a reasonable opportunity to do so.***" *Quinn v. Rosenberg*, 399 S.W.2d 433, 440 (Mo. App. 1966) (emphasis added). "If [a victim] was intruding himself where he had no right to be, then [the defendant] may have ordered him away and, if he refused, then [the defendant]

would have been justified in using such force as was reasonably necessary to expel him," but, otherwise, an assault was not justified. *Canfield v. Chicago, R.I. & P. Ry. Co.*, 59 Mo.App. 354, 362 (1894) (emphasis added); *see also State v. Kaiser*, 78 Mo.App. 575, 575 (1899) (same in context of propriety of jury instruction).

In *Leuschen*, a defendant convicted of a criminal assault argued on appeal that the trial court had erred in not instructing the jury on his justification defense that he had been defending his property. 724 S.W.2d at 341. The evidence, however, was that he never had demanded that the victim leave before striking the victim twice in the face. *Id.* This Court affirmed. *Id.* "Without asking [the victim] to leave or some indication that he would not leave, there was no basis for defendant to have 'reasonably' believed it necessary to use physical force to oust [him]." *Id.*

The same is true here. Steven testified that Daniel had attacked him without warning and without saying anything (Tr. 9). While Daniel testified to the contrary (Tr. 26), the Court must ignore Daniel's testimony and take Steven's as true. *Supra* at 24-28.

As a result, "Without asking [Steven] to [desist from intruding on his truck], there was no basis for Daniel to have 'reasonably' believed it necessary to use physical force to oust [Steven]. As Daniel could not reasonably have believed that physical force was necessary," the trial court did not err in not finding his assault justified. *Leuschen*, 724 S.W.2d at 341. Daniel "may have ordered [Steven] away and, if he refused, then [Daniel] would have been justified in using such force as was reasonably necessary to expel him," but, as Daniel had not, he could not assault Steven. *Canfield*, 59 Mo.App. at 362.

For this reason alone, the Court must affirm the trial court's judgment.

3. The trial court was not bound to infer from the evidence that Daniel held the required beliefs or that those beliefs, if held, were reasonable.

As Daniel acknowledges, to prove a "defense of property" justification defense under § 563.041, he had to prove he "reasonably believed" that: (1) Steven was committing or attempting to commit stealing, property damage or tampering; (2) using physical force upon Steven was necessary to prevent this; *and* (3) the extent to which he used that force was necessary to prevent it (Aplt.Br. 11, 14-16).

Daniel argues that trial court was bound to determine that his belief that Steven was attempting to commit tampering in the first degree was reasonable, and that his belief that punching Steven five times and hitting Steven repeatedly in the back of the head was necessary to prevent this was reasonable (Aplt.Br. 14-16). But whether someone "had a reasonable belief" as to something "is a question of fact" for the trial court. *Haulers Ins. Co. v. Pounds*, 272 S.W.3d 902, 907 (Mo. App. 2008).

Daniel's argument rests on inferences in his favor, which the Court must ignore. The trial court was free to draw contrary inferences from the evidence, which the Court must accept as true. It was free to determine that, in fact, under these circumstances either Daniel did not hold these beliefs or, if he did, they were not reasonable.

Daniel argues "it was unmistakably the intention of [Steven] to operate [Daniel]'s automobile without his consent," which would be "committing the offense of tampering in the first degree" (Aplt.Br. 14-15). As a result, he argues "it was clearly reasonable for [him] to use physical force to prevent the attempted commission of this offense" (Aplt.Br. 15). The trial court was not bound to agree.

First, it was *not* "unmistakably" Steven's intention to operate Daniel's truck. Steven explained that he opened the door to Daniel's truck both to see whether it was movable and to determine whether, given Daniel's harassing, belligerent behavior, Daniel had any weapons with him (Tr. 8-9). It was inferable from that testimony that Steven wanted to determine how easy it would be for an authorized tow company or the police to move the truck, which was blocking the road, an action itself in violation of § 300.440.1(1)(a), R.S.Mo. (making it unlawful to park automobile on public highway).

Steven never testified that he, himself, personally sought to operate the truck (Tr. 8-9). Even if that were inferable, the trial court was free to disbelieve that part of his testimony or give it little weight and must be taken as having done so. As such, the court could find that, if Daniel believed Steven was going to do so, that was unreasonable.

Second, the trial court was not bound to find that, especially under these circumstances, Daniel actually believed Steven was going to tamper with his truck at all. Daniel seeks to recast himself as the victim and Steven as the bad actor (Aplt.Br. 14-16). But the trial court plainly was free not to see it that way. The court could find that it was Daniel who was the initial aggressor, coming to the worksite to harass Steven and aggressively impede Steven's work. Due to Daniel's behavior, it could infer that Daniel was waiting for the right circumstance to assault Steven. It could disbelieve Daniel's self-serving testimony and find that, upon seeing Steven approach his truck, Daniel used that action as a mere excuse to assault Steven. As a result, it could find it was *not* Daniel's belief *at all* that Steven was going to tamper with his truck.

Finally, the trial court was not bound to determine that Daniel's punching Steven five times and hitting him repeatedly in the back of the head was reasonable. Especially with Daniel having given Steven no warning, *supra* at 28-30, the trial court could find that punching and hitting Steven so many times was unreasonable. That was a pure question of fact, and it was the trial court's call based on its "better position" than this Court "not only to judge the credibility of witnesses and the persons directly, but also their sincerity and character and other trial intangibles which may not be completely revealed by the record." *White*, 321 S.W.3d at 308-09. The trial court made the call it did, and this Court cannot find otherwise from a cold review of the transcript. *Id.*

That *McAllister* is the only decision Daniel cites in support of the substance of his argument (Aplt.Br. 8, 10) is telling. In *McAllister*, the trial court *denied* an order of protection, *holding* that the respondent had acted in self-defense. 395 S.W.3d at 548-49, 554. Viewing the evidence in a light most favorable to *that* factual determination in *that* posture, this Court affirmed. *Id.* at 554-55. But *McAllister* does not support Daniel's converse proposition that, here, viewing the evidence in a light most favorable to the trial court's *grant* of an order of protection, his affirmative defense requires reversal.

There plainly was sufficient evidence for the trial court to enter a full order of protection against Daniel as a result of his domestic violence against Steven. Daniel concedes Steven met his burden to prove Daniel had assaulted him (Aplt.Br. 18). Viewing the evidence in a light most favorable to the trial court's judgment, the law of Missouri is the trial court was not bound to hold that Daniel's assault was justified.

This Court should affirm the trial court's judgment.

Conclusion

The Court should dismiss this appeal or affirm the trial court's judgment.

Respectfully submitted,

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Certificate of Compliance

I certify that I prepared this brief using Microsoft Word 2013 in Times New Roman size 13 font. I further certify that this brief complies with the word limitations of Supreme Court Rule 84.06(b), as this brief contains 10,640 words.

/s/Jonathan Sternberg
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Certificate of Service

I certify that, on September 23, 2015, I filed a true and accurate Adobe PDF copy of this Brief of the Respondent via the Court's electronic filing system, which notified the following of that filing:

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