

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-113

Filed 3 October 2023

Mecklenburg County, No. 20CVD6864

JASON LEVINE, Plaintiff,

v.

SHARETTA S. CARTER, Defendant.

Appeal by plaintiff from orders entered 8 August 2022 and 17 October 2022 by Judge Gary L. Henderson in Mecklenburg County District Court. Heard in the Court of Appeals 5 September 2023.

*Sabrina Blain, for plaintiff-appellant.*

*Sharetta S. Carter, pro se, for defendant-appellee.*

FLOOD, Judge.

Jason Levine (“Plaintiff”) appeals from two orders: one that set aside a prior permanent custody order, and another that granted Plaintiff and Sharetta S. Carter (“Defendant”) joint legal and physical custody of their minor child. On appeal, Plaintiff argues the trial court erred by: (1) failing to grant his motion to dismiss for lack of proper service; (2) “converting” a motion to modify hearing into a Rule 60 Order; and (3) neglecting to consider the best interests of the child in its permanent

custody order. For the reasons discussed below, we decline to review Plaintiff's first two arguments and affirm the trial court's permanent custody order.

### **I. Facts and Procedural Background**

On 11 February 2017 a child (the "minor child") was born to Defendant. In late 2020, following a paternity test, it was established that Plaintiff was the biological father of the minor child. On 3 December 2020, Plaintiff filed a complaint for custody and visitation. Following a hearing on the matter, a temporary custody and visitation order was entered (the "Temporary Order"), which found both Plaintiff and Defendant to be fit parents and granted Defendant primary custody while allowing Plaintiff regular visitation. The Temporary Order noted that a permanent custody hearing would occur at a future date.

On 11 January 2022, the permanent custody hearing took place; Defendant, however, was absent. Despite Defendant's absence, the trial court entered a permanent child custody order (the "January Order") which granted Plaintiff primary legal and physical custody of the minor child. The January Order noted that "Defendant did not appear but was properly noticed at her address of record." One day after entry of the January Order, the Notice of Hearing that had been sent to Defendant was returned to the sender, showing Defendant was not given notice of the permanent custody hearing.

On 19 January 2022, Defendant filed both a motion for modification of custody as well as an ex parte motion for temporary emergency custody. The Record contains

a verification and certificate of service for the ex parte temporary emergency custody but not for the motion to modify. Defendant's ex parte request for temporary emergency custody was denied the same day it was filed.

A hearing on Defendant's motion to modify was held on 15 July 2022, at which both parties were present. The trial court found the following facts:

2. On 1/12/22 Defendant completed and filed a Change of Address form stating her new address[.]

...

4. In review of the Court file, the Court finds that the Notice of Hearing for the 1/11/22 Custody trial and the [January] Order were sent to Defendant at [the incorrect address.]

[5]. Defendant's 1/19/22 Motion for Modification is inadequate for modification. However, based on the presentation and the best interest of justice, the Court is going to treat the 1/19/22 Motion for Modification as a Rule 60 Motion to set aside the [January] Order based on lack of notice to the Defendant. The Court finds that it was Excusable Neglect for Defendant to not have updated her address with the Court in a more timely fashion prior to the 1/11/22 Custody hearing.

Following the hearing, the trial court entered an order (the "August Order"), which set aside the January Order on the basis of "excusable neglect" and granted a new hearing on permanent child custody to take place on 11 August 2022.

On 11 August 2022, a hearing on permanent child custody took place with Plaintiff represented by counsel and Defendant appearing pro se. While the Record on appeal does not contain a transcript of the proceeding, the trial court found the following facts "[b]ased on the testimony and other evidence presented":

7. At the beginning of the [15 July 2022] trial, [Plaintiff's] attorney made an oral Motion to Dismiss for failure of [Defendant's] Motion to set forth a substantial change of circumstances. The motion was denied.

8. At the close of [Defendant's] case, [Plaintiff's] attorney made another oral Motion to Dismiss for failure of proof regarding a substantial change of circumstances. That Motion was denied and the Court, on its own motion, granted [Defendant] relief from the [January Order] granting [Plaintiff] primary custody and directed that the Temporary Order. . . would be reinstated.

9. Neither party [has] shown that the other is unfit.  
. . . .

12. The January Order was set aside because of a notice issue.  
. . . .

14. Neither party is unfit so neither party will be granted sole custody.

Based on those findings of fact, the trial court entered an order (the "October Order"), granting Plaintiff and Defendant joint legal and physical custody of the minor child. On 15 November 2022, Plaintiff filed a notice of appeal from both the August Order and the October Order.

## **II. Jurisdiction**

We begin by considering this Court's jurisdiction to review the two respective orders from which Plaintiff appeals.

In his brief, Plaintiff incorrectly states that both the August and October orders are "final judgments on the merits and appeal therefore lies to the Court of Appeals pursuant to N.C. Gen. Stat. § 7A-27(b)." This is factually inaccurate.

While it is true that an appeal of right lies directly to this Court from a final judgment or from certain interlocutory orders, the August Order was not a final judgment on the merits, nor does Plaintiff assert grounds for this Court to review it as interlocutory; therefore, in the absence of any proffered basis for this Court to review the August Order, we conclude it is not properly before us. N.C.R. App. P 28(b)(4); *see Chahdi v. Mack*, 886 S.E.2d 900, 907 (N.C. Ct. App. 2023) (holding that because Plaintiff failed to assert grounds for this Court to review an interlocutory order, we did not have jurisdiction to consider it on appeal). For those reasons, we decline to review any arguments relating to the August Order.

This leaves us to consider on appeal *only* those issues raised pertaining to the October Order, which was a final judgment on the merits and is therefore properly before this Court.

### **III. Analysis**

On appeal, Plaintiff argues the trial court abused its discretion when it entered the October Order without (1) making sufficient findings of fact to support its conclusion of law and (2) considering the best interests of the child. We disagree.

#### **A. Standard of Review**

Our Supreme Court has recognized “[i]t’s a long-standing rule that the trial court is vested with broad discretion in cases involving child custody.” *Pullman v. Smith*, 348 N.C. 616, 624, 501 S.E.2d 898, 902 (1998). To that end, “[a]bsent an abuse of discretion, the trial court’s decision in matters of child custody should not be upset

on appeal.” *Everette v. Collins*, 176 N.C. App. 168, 171, 625 S.E.2d 796, 798 (2006). The trial court’s findings of fact, however, “must be supported by substantial evidence, and its conclusions of law are reviewable *de novo*.” *Scott v. Scott*, 157 N.C. App. 382, 385, 579 S.E.2d 431, 433 (2003).

### **B. Findings of Fact and Conclusions of Law**

On appeal, Plaintiff brazenly refers to the trial court’s twenty-five “*purported* Findings of Fact” as failing to support the conclusions of law. (emphasis added). For the reasons discussed below, we disagree.

As an initial matter, this Court notes the Record on appeal was settled by operation of Rule 11(c) of the North Carolina Rules of Appellate Procedure. N.C.R. App. P. 11(c). Rule 11(c) provides that an appellee has thirty days after being served the proposed record on appeal to make amendments or objections if “the content of a statement or narration is factually inaccurate.” *Id.*

Here, Defendant was served the proposed Record on appeal, which contained an eleven page “Narration of Proceedings,” written from the perspective of Plaintiff. Defendant did not make any amendments or objections; therefore, under our *de novo* review, we are required to consider Plaintiff’s re-telling of the hearing on permanent custody as uncontroverted evidence. Even after reviewing Plaintiff’s partial narration of the proceedings, however, we still conclude the trial court’s conclusions of law were supported by competent findings of fact.

Further, our Supreme Court notes that unchallenged findings of fact are “presumed to be supported by competent evidence and [are] binding on appeal.” *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). “A party abandons a factual [argument] when [they] fail to argue specifically in [their] brief that the contested finding of fact was unsupported by the evidence.” *Peters v. Pennington*, 210 N.C. App. 1, 16, 707 S.E.2d 724, 735 (2011).

In the case at bar, Plaintiff fails to make any specific arguments that challenge the veracity of the evidence used to support the majority of the trial court’s findings of fact. By failing to make out specific arguments regarding Findings of Fact 1–9, 10–13, and 15–25, Plaintiff abandons his factual arguments as to these findings, and these findings are binding on appeal. *See Peters*, 210 N.C. App at 16, 707 S.E.2d at 735; *Koufman*, 330 N.C. at 97, 408 S.E.2d at 731.

To the extent that we are able to decipher a disjointed brief, it appears Plaintiff’s only meritorious challenges are to Findings of Fact 9 and 14, each regarding the parties’ fitness as a parent and the ability to provide the minor with an adequate home environment.

Without any citation to applicable case law regarding a trial court’s findings on parental fitness, Plaintiff challenges Findings of Fact 9 and 14, claiming that, “[w]ithout any weighing or comparison that can be [g]leaned from the [R]ecord, the Court states in conclusory terms: neither party is unfit.”

Findings of Fact 9 and 14 from the October Order state:

9. Neither party [has] shown that the other is unfit.

....

14. Neither party is unfit so neither party will be granted sole custody.

To support the argument that the trial court erred in finding neither party was unfit, Plaintiff points to the minor child's medical records, developmental delays, housing, and allegations of sleep deprivation. Our *de novo* review of the Record, however, tells a different story. To name a few examples: the minor child scored between "Ok" and "Very Well" on a social diagnostic signed by her teacher; no potential delays in motor skills or language were noted on the minor child's Development Indicators for the Assessment of Learning exam; a lease agreement shows Defendant has stable housing; and the minor child's medical records show that, save for a recurring ear infection, she is a healthy child. For those reasons, we conclude Findings of Fact 9 and 14 were both supported by competent evidence. Further, because Plaintiff failed to make any cognizable argument regarding any of the other twenty-three findings of fact, we find those are binding on appeal. See *Koufman*, 330 N.C. at 97, 408 S.E.2d at 731.

### **C. Best Interests**

Finally, Plaintiff argues the trial court "focused on [Defendant's] best interests, not the child's[.]" and therefore the October Order is "fatally defective." We are not persuaded.



Custody awards must include findings of fact that support such a determination of the child's best interests. See N.C. Gen. Stat. § 50-13.2(a) (2021). "These findings may concern physical, mental, or financial fitness or any other factors brought out by the evidence and relevant to the issue of the welfare of the child." *Steele v. Steele*, 36 N.C. App. 601, 604, 244 S.E.2d 466, 468 (1978).

Here, the trial court's October Order included findings of fact regarding the fitness of both Plaintiff and Defendant, as well as their respective lives and familial support structures. Additionally, the trial court made findings about the minor child's schooling and extra-curricular activities. As we have concluded the trial court's findings of fact were supported by competent evidence, we hold the trial court did in fact consider the best interests of the child in its October Order.

#### **IV. Conclusion**

Plaintiff's arguments pertaining to the August Order are not properly before this Court and accordingly, we decline to review them. Upon thorough review, we hold the trial court's findings of fact and conclusions of law were based on competent evidence; therefore, we affirm the trial court's order.

AFFIRMED.

Judges ZACHARY and HAMPSON concur.

Report per Rule 30(e).