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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-932

Filed 7 May 2025

Rowan County, No. 20 CVD 001698

CHIP E. PALMER & ZACHARY A. PALMER, Plaintiffs,

v.

DEQUARN M. HARTE, Defendant,

v.

ROWAN COUNTY DEPARTMENT OF SOCIAL SERVICES, Defendant.

Appeal by Plaintiffs from order entered 26 March 2024 by Judge Chris Sease in Rowan County District Court. Heard in the Court of Appeals 5 March 2025.

Collins Family & Elder Law Group, by Rebecca K. Watts, for Plaintiffs-Appellants.

Martin, Van Hoy & Raisbeck, LLP, by Cindy Ellis & Spencer Newsome, for Defendant-Appellee.

GRIFFIN, Judge.

Plaintiffs Chip E. Palmer and Zachary A. Palmer, appeal from the trial court's order dismissing their custody action. Plaintiffs contend the trial court erred by (1) dismissing Plaintiffs' custody complaint for lack of subject matter jurisdiction; and

(2) dismissing Plaintiff's custody complaint for failure to state a claim upon which relief could be granted. We hold the trial court properly dismissed Plaintiffs' custody complaint for lack of subject matter jurisdiction, but erred by dismissing their custody complaint for failure to state a claim upon which relief can be granted.

I. Factual and Procedural Background

This appeal arises from a custody dispute concerning the minor child, Ella¹. Plaintiffs are the foster parents of Ella, and Defendant Dequarn M. Harte ("Defendant Father") is Ella's biological father.

On 19 February 2016, the day after Ella was born, Ella's biological mother relinquished her parental rights to Defendant Rowan County Department of Social Services ("Defendant DSS") for the purpose of adoption. It was later confirmed through paternity testing that Defendant Father is the biological father of Ella. Defendant Father expressed interest in having custody of his child and worked on a case plan with Defendant DSS.

When Ella was three months old, Defendant DSS placed Ella with Plaintiffs. Upon Ella's placement with Plaintiffs, it became apparent that Ella had immediate health needs, including pulmonary obstructive disease, bronchiolitis, respiratory syncytial virus (RSV), other respiratory issues, and acid reflux. Plaintiffs have cared for all of Ella's health needs, including taking her to routine doctor's appointments

¹ We use a pseudonym for ease of reading and to protect the identity of the juvenile. See N.C. R. App. P. 42(b).

and ensuring she has the appropriate medication and resources she needs.

Defendant Father has four other children, in addition to Ella. Three of them share the same mother, and one of them he had with his fiancé. Defendant DSS has not been involved with any of Defendant Father's children except for Ella. Three of Defendant Father's children live with him. Defendant Father's fiancé and the child they share together live in a separate residence.

When Ella was two years old, on 10 April 2018, Defendant DSS filed a juvenile petition to terminate Defendant Father's parental rights. On 30 November 2018, the trial court terminated Defendant Father's parental rights based on neglect, failure to make reasonable progress, and willful abandonment. Defendant Father filed a notice of appeal. On 15 October 2019, this Court issued an opinion affirming the trial court's order based on willful abandonment. *In re E.B.*, 268 N.C. App. 23, 834 S.E.2d 169 (2019). The decision of this Court was then appealed to the North Carolina Supreme Court. On 25 September 2020, the Supreme Court issued an opinion reversing the decision of this Court. *In re E.B.*, 375 N.C. 310, 847 S.E.2d 666 (2020). The Supreme Court held Defendant DSS "failed to prove by clear, cogent, and convincing evidence that respondent willfully abandoned his child" and "failed to prove that any other ground existed to terminate respondent's parental rights." *Id.* at 312, 847 S.E.2d at 669.

On 13 October 2020, the trial court entered an Ex Parte Order granting Plaintiffs custody of Ella. Defendant Father had no visitation. Defendant Father

responded with a Motion to Dismiss and Review of the Ex Parte Order. While Defendant Father's Motion was pending, on 12 November 2020, a temporary order was entered maintaining Plaintiffs have temporary legal and physical custody, and Defendant Father have no visitation. The court ordered for reunification therapy to begin.

Defendant Father attended reunification therapy with Ella in 2021 and later contacted Plaintiffs to inquire about visitation. Plaintiffs told Defendant Father to reach out to his attorney. Up until the Supreme Court decision, Defendant Father did not reach out to Plaintiffs, and October 2021 was the last time Defendant Father reached out to Plaintiffs for an update about Ella. Defendant Father stopped attempting to contact Plaintiffs because he felt they were unresponsive. Plaintiffs did not reach out to Defendant Father and update him on how Ella was doing. In the seven and a half years that Ella has resided with Plaintiffs, they have only reached out to Defendant Father twice.

On 7 August 2023, Plaintiffs filed an Amended Complaint for Custody, and Defendant Father responded with a Motion to Set Aside Order, Affirmative Defenses, Answer to Plaintiffs' Amended Complaint, and Motion to Dismiss pursuant to Rule 12(b)(6). Father's Motion to Dismiss was denied on 9 November 2023, but the court sua sponte modified the existing temporary custody order, recognizing Defendant Father's "constitutional right to parent is still intact and it is necessary for him to have visitation with the child." On 9 November 2023, a new custody order was

entered granting Defendant Father visitation once per week at the Visitation Station.

Plaintiffs Amended Complaint was heard on 13 December 2023 and 24 January 2024 in Rowan County District Court. At the close of Plaintiffs' evidence, Defendant Father made an oral Motion to Dismiss for lack of standing. The trial court denied Defendant Father's Motion at the close of evidence but preserved the right to rule on the issue of standing. On 26 March 2024, the trial court entered an order dismissing Plaintiffs' Amended Complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. Plaintiffs timely appeal from the trial court's order.

II. Analysis

Plaintiffs allege the trial court erred by dismissing Plaintiffs' Amended Complaint. Specifically, Plaintiffs contend the trial court had proper subject matter jurisdiction, and Plaintiffs alleged facts that support legal relief which could be granted on one or more grounds.

We review a trial court's decision to dismiss a complaint "for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) or for failure to state a claim upon which relief could be granted pursuant to Rule 12(b)(6)" de novo. *United Daughters of the Confederacy v. City of Winston-Salem*, 383 N.C. 612, 624, 881 S.E.2d 32, 43 (2022). "Under a de novo review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Wellons v. White*, 229 N.C. App. 164, 173, 748 S.E.2d 709, 717 (2013) (citation and internal quotations omitted).

A. Subject Matter Jurisdiction

Rule 12(b)(1) of the North Carolina Rules of Civil Procedure allows a complaint to be dismissed due to lack of subject matter jurisdiction over the claims asserted. N.C. R. Civ. P. 12(b)(1) (2023). “Subject matter jurisdiction refers to ‘the legal power and authority of a court to make a decision that binds the parties to any matter properly brought before it.’” *Watson v. Joyner-Watson*, 263 N.C. App. 393, 394, 823 S.E.2d 122, 124 (2018) (quoting *Catawba Cty. ex rel. Rackley v. Loggins*, 370 N.C. 83, 88, 804 S.E.2d 474, 478 (2017)). “[T]he issue of a court’s jurisdiction over a matter may be raised at any time, even for the first time on appeal or by a court sua sponte.” *State v. Webber*, 190 N.C. App. 649, 650, 660 S.E.2d 621, 622 (2008). “An appellate court considering a challenge to a trial court’s decision to grant or deny a motion to dismiss for lack of subject[-]matter jurisdiction may consider information outside the scope of the pleadings in addition to the allegations set out in the complaint.” *Pugh v. Howard*, 288 N.C. App. 576, 580, 887 S.E.2d 734, 738 (2023) (quoting *United Daughters of the Confederacy*, 383 N.C. at 624, 881 S.E.2d at 43).

Issues pertaining to jurisdiction of the trial court, which consists of superior and district courts, are governed by Chapter 7A of our General Statutes. *Watson*, 263 N.C. App. at 394–95, 823 S.E.2d at 124. District courts exercise subject matter jurisdiction over all “civil actions and proceedings for . . . child support, child custody and the enforcement of separation or property settlement agreements between spouses, or recovery for the breach thereof.” N.C. Gen. Stat. § 7A-244 (2023).

Here, Plaintiffs filed a Chapter 50 third-party custody action in district court seeking custody of Ella. The law is well-established in our State that “[p]arents have a fundamental right ‘to make decisions concerning the care, custody, and control of their children.’” *Rodriguez v. Rodriguez*, 211 N.C. App. 267, 276, 710 S.E.2d 235, 242 (2011) (quoting *Troxel v. Granville*, 530 U.S. 57, 66 (2000)). In custody actions between parents, courts generally apply the “best interest of the child standard.” *Boseman v. Jarrell*, 364 N.C. 537, 549, 704 S.E.2d 494, 503 (2010). However, this standard is heightened for third-party custody actions. Third parties seeking custody of a minor child must show the child’s legal parents are unfit or have acted in a manner inconsistent with their constitutionally protected parental status. *See Rodriguez*, 211 N.C. App. at 276–77, 710 S.E.2d at 242 (“[T]he paramount status of parents may be lost ‘in one of two ways: (1) by a finding of unfitness of the natural parent, or (2) where the natural parent’s conduct is inconsistent with his or her constitutionally protected status.’” (quoting *David N. v. Jason N.*, 359 N.C. 303, 307, 608 S.E.2d 751, 753 (2005))).

Absent a showing of one of the two prongs, third parties do not have standing to bring a custody action, and the district court is without jurisdiction to hear the case. *Deanes v. Deanes*, 294 N.C. App. 29, 33, 901 S.E.2d 880, 883–84 (2024). *See Est. of Apple v. Com. Courier Express, Inc.*, 168 N.C. App. 175, 177, 607 S.E.2d 14, 16 (2005) (“If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim.”).

This Court has previously held “[a] trial court’s subject matter jurisdiction over a particular matter is invoked by the pleading” itself. *Thomas v. Oxendine*, 280 N.C. App. 526, 530–31, 867 S.E.2d 728, 733 (2021) (quoting *Boseman*, 364 N.C. at 546, 704 S.E.2d at 501) (cleaned up). “At the motion to dismiss stage, all factual allegations in the pleadings are viewed in the light most favorable to the plaintiff, granting the plaintiff every reasonable inference.” *Id.* In fact, this Court has warned against confusing “(1) the standing and pleading requirements of the complaint at the motion to dismiss stage, and (2) the burden of producing evidence at the custody hearing sufficient to prove that a parent has waived the constitutional protections guaranteed to them.” *Id.* at 534, 867 S.E.2d at 735 (citation omitted). See *Perdue v. Fuqua*, 195 N.C. App. 583, 588, 673 S.E.2d 145, 149 (2009) (“Intervenor failed to allege conduct sufficient to support a finding that the parents engaged in conduct inconsistent with their parental rights and responsibilities. Therefore intervenor could not overcome the presumption that the parents have the superior right to the care, custody, and control of the child, and lacked standing to intervene.”); *Sharp v. Sharp*, 124 N.C. App. 357, 363, 477 S.E.2d 258, 262 (1996) (“We hold accordingly that G.S. § 50-13.1(a) grants [third parties] the right to bring an initial suit for custody when there are allegations that the child’s parents are unfit.”).

However, this Court has also recognized that when there is no objection by either party about the allegations set forth in the pleadings and the trial court holds an evidentiary hearing instead of ruling on the pleadings themselves, we base our

review on the trial court's order. *See Deanes*, 294 N.C. App. at 37, 901 S.E.2d at 886 (“[A]lthough standing would normally be based upon the allegations of the pleadings alone, we are basing our review on the trial court's order because of the procedure used in this case, without objection from [the p]arents or [the g]randparents.”).

In *Deanes*, this Court affirmed a trial court's order denying the grandparents' motion to intervene based on lack of standing. *Id.* There, this Court held that even though “grandparents alleged sufficient facts in their [m]otion to [i]ntervene to survive a motion to dismiss for standing based on the pleadings,” neither party objected, and “the trial court held an evidentiary hearing instead of ruling based upon the pleadings.” *Id.* at 43, 901 S.E.2d at 889. As a result, this Court reviewed the trial court's order and held “[t]he trial court's findings of fact are supported by the evidence and these findings support the trial court's conclusion that [the g]randparents have failed to prove either [p]arent acted inconsistently with their constitutionally protected status or [is] unfit.” *Id.*

The present case is similar to *Deanes*. The trial court held an evidentiary hearing instead of deciding whether Plaintiffs lacked standing based upon the pleadings alone. Even though Defendant Father moved to dismiss for lack of standing at the close of Plaintiffs' evidence, neither party objected to the trial court's holding of an evidentiary hearing. Because an evidentiary hearing occurred, this case took on the same posture as *Deanes*.

In a custody case, “the trial court’s findings of fact are conclusive on appeal if supported by substantial evidence, even if there is sufficient evidence to support contrary findings.” *Sherrill v. Sherrill*, 275 N.C. App. 151, 157, 853 S.E.2d 246, 251 (2020) (citation, quotation marks, ellipsis, and brackets omitted). “Unchallenged findings of fact are binding on appeal” and we review de novo “[w]hether the trial court’s findings of fact support its conclusions of law.” *Id.* “If the trial court’s uncontested findings of fact support its conclusions of law, we must affirm the trial court’s order.” *Id.*

Here, Plaintiffs challenge the following findings:

FOF 64: The Court finds Defendant Father is fit and has not acted inconsistently with his constitutionally protected status as [a] natural parent. Since [Ella’s] birth, Defendant Father has been at an involuntary arm’s length with [Ella].

FOF 65: Defendant Father has never relinquished his rights as the father of [Ella]. Indeed, Defendant Father has fought to be part of [Ella’s] life.

FOF 66: For the first four and a half years of [Ella’s] life—that is, from her birth to the North Carolina Supreme Court’s decision on September 25, 2020—Defendant DSS’s improper decisions and handling of non-secure custody of [Ella] has largely precluded Defendant Father from forming a lasting bond and relationship with [Ella], consistent with his protected status as [a] parent.

FOF 67: Methods of preclusion continued after our Supreme Court’s decision. Less than a month after the decision, Plaintiffs sought and obtained an Ex Parte Order granting them custody of [Ella]. A Consent Order was later entered but included various hurdles with which

Defendant Father would have to overcome in order to begin to form a relationship with [Ella].

FOF 68: The Court finds Defendant Father’s lack of communication with Plaintiffs to be in response to the same behavior by Plaintiffs. Overall, the Court finds that Defendant Father has been required to earn and prove his constitutionally protected status as [a] natural parent.

Plaintiffs’ challenge rests on the contention that there was evidence presented to show Defendant Father was unfit or had acted contrary to his protected status. We hold there was substantial evidence presented to support the challenged findings. *See Id.*

Plaintiffs’ challenged findings are ultimate findings of fact that are supported by the trial court’s evidentiary findings. “An ultimate fact is the final resulting effect which is reached by processes of logical reasoning from the evidentiary facts.” *In re G.C.*, 384 N.C. 62, 65, n.3, 884 S.E.2d 658, 661, n.3 (2023) (citation omitted). Evidentiary facts are “subsidiary facts required to prove the ultimate facts.” *Id.* “Ultimate facts are those found in that vaguely defined area lying between evidential facts on the one side and conclusions of law on the other.” *Id.* “A trial court’s finding of an ultimate fact is conclusive on appeal if the evidentiary facts reasonably support the trial court’s ultimate finding of fact.” *Id.* (citation and internal quotations omitted).

Here, the ultimate findings are supported by the trial court’s evidentiary findings. The evidentiary findings show Defendant Father has participated in

ongoing litigation concerning custody of his child, which included an attempt to terminate his parental rights. Immediately following the Supreme Court's decision reversing the termination of Defendant Father's parental rights, the trial court entered an Ex Parte Order awarding custody to Plaintiffs, and Defendant Father had no visitation. Defendant Father responded with a Motion to Dismiss and Review of the Ex Parte Order. While Defendant Father's Motion was pending, a temporary order was entered maintaining Plaintiffs have temporary legal and physical custody, and Defendant Father have no visitation. Reunification therapy was ordered, and Defendant Father attended. Three years later, Plaintiffs filed an Amended Complaint for Custody and Defendant Father responded with a Motion to Set Aside Order, Affirmative Defenses, Answer to Plaintiffs' Amended Complaint, and Motion to Dismiss.

Despite Ella being placed with Plaintiffs when she was three months old, it was the child's biological mother who "relinquished her parental rights to Defendant DSS for the purpose of adoption." Defendant DSS has not been involved with any of Defendant Father's other children outside of Ella. Defendant Father has custody of his four other children. The trial court acknowledged Defendant Father's lack of communication with Plaintiffs, but the trial court also found "[i]n the seven and a half years that [Ella] has been placed with Plaintiffs, they have only reached out to Defendant Father twice."

Because the evidentiary findings reasonably support the ultimate findings, they are conclusive on appeal. *Id.* We now review “[w]hether the trial court’s findings of fact support its conclusions of law[.]” *Sherrill*, 275 N.C. App. at 157, 853 S.E.2d at 251 (citation and internal marks omitted). Plaintiffs challenge all of the trial court’s conclusions of law. We hold the findings are sufficient to support the trial court’s conclusions.

Here, the trial court made the conclusion it was without subject matter jurisdiction and dismissed Plaintiffs’ Amended Complaint. The court made this determination because it also concluded “Defendant Father, as the biological father of [Ella], has a constitutionally protected paramount interest in the companionship, custody, care, and control of [Ella],” and Plaintiffs have failed to show Defendant Father is unfit or has acted in a manner inconsistent with his constitutionally protected status as a natural parent. We hold the trial court did not err by dismissing Plaintiffs’ Amended Complaint.

In determining whether a legal parent has acted in a manner “inconsistent with his or her constitutionally-protected status, the focus is not on whether the conduct consists of good acts or bad acts. Rather, the gravamen of inconsistent acts is the volitional acts of the legal parent that relinquish otherwise exclusive parental authority to a third party.” *Mason v. Dwinnell*, 190 N.C. App. 209, 228, 660 S.E.2d 58, 70 (2008) (internal marks omitted).

Here, although “we relied upon the trial court’s findings of fact instead of the pleadings,” *Deanes*, 294 N.C. App. at 42, 901 S.E.2d at 889, Defendant Father did not voluntarily relinquish his custodial rights to a third party or fail to pursue any action to develop or maintain a relationship with Ella. *See Price v. Howard*, 346 N.C. 68, 84, 484 S.E.2d 528, 537 (1997) (holding a parent’s “failure to maintain personal contact with the child or failure to resume custody when able” could be considered conduct inconsistent with protected parental rights); *In re B.R.W.*, 381 N.C. 61, 86, 871 S.E.2d 764, 781 (2022) (holding the minimal degree of contact respondent-mother had with the children prior to their placement in HSA custody indicates she intended for the paternal grandmother to continue to provide primary care for the children for an indefinite period of time, “particularly given respondent-mother’s failure to take any steps to regain custody of [the children] until after they entered HSA custody[.]” (citing *Price* 346 N.C. at 83, 484 S.E.2d at 537)), overruled on other grounds by *In re K.C.*, 386 N.C. 690, 909 S.E.2d 170 (2024); *Harney v. Harney*, __, N.C. App. __, __, 907 S.E.2d 23, 38–39 (2024) (affirming the trial court’s decision the mother had acted inconsistent with her parental rights, because despite having the means to do so, the mother maintained “limited” contact and was minimally involved in the minor child’s life while he was in the custody of his grandfather).

Here, unlike *B.R.W.*, Defendant Father did not voluntarily relinquish his parental rights to Plaintiffs or Defendant DSS. Ella’s mother placed Ella in the custody of Defendant DSS the day after she was born for the purpose of adoption. It

was later confirmed through paternity testing that Defendant Father is the biological father of Ella. Defendant Father expressed interest in having custody of his child and worked on a case plan, but DSS arranged for Plaintiffs to be the foster parents of Ella, and Ella was placed with Plaintiffs when she was three months old. On 10 April 2018, when Ella was two years old, Defendant DSS filed a petition to terminate Defendant Father's parental rights. Over two years later, after the trial court made its determination to terminate Defendant Father's parental rights, and Defendant Father appealed the trial court's decision to this Court and then to our Supreme Court, the Supreme Court reversed the decision of the trial court, holding Defendant DSS "failed to prove by clear, cogent, and convincing evidence that respondent willfully abandoned his child" and "failed to prove that any other ground existed to terminate [Defendant Father's] parental rights." *In re E.B.*, 375 N.C. at 312, 847 S.E.2d at 669.

There has been no shy attempt by Defendant Father to gain custody of Ella as he has persisted through custodial legal action, which included the attempt to terminate his parental rights. Moreover, after the Supreme Court's decision, Defendant Father has continued to engage in a legal battle against Plaintiffs for custody of Ella.

Additionally, unlike the facts in *Harney*, Defendant Father, through his actions, has attempted to develop a parental relationship with Ella. The record reflects Defendant Father would inquire about the child, attempted to exercise

visitation, and attended reunification therapy. Although we recognize there were gaps of time where Defendant Father did not contact Plaintiffs to inquire about Ella, we also recognize there were other factors which could have prevented his contact. For several years, there has been ongoing legal action consisting of a challenge to terminate Defendant Father's parental rights, and only as recently as 9 November 2023, has Father been allowed to have visitation per a court order.

Additionally, in *Harney*, and unlike the present case, the third-party grandfather attempted to facilitate a relationship between the minor child and his mother. *Harney*, __, N.C. App. at __, 907 S.E.2d at 38–39. The grandfather kept the mother informed of the child's medical appointments, notified her of important information and updates, and paid for her transportation to fly from New York City to North Carolina to visit with the minor child. *Id.* Here, the evidence shows quite the contrary. Instead of Plaintiffs facilitating a relationship with Defendant Father like the grandfather did in *Harney*, Plaintiffs here restricted such communication with Defendant Father. The court found that “[i]n the seven and a half years that [Ella] has been placed with Plaintiffs, they have only reached out to Defendant Father twice.” The court also found Defendant Father stopped contacting Plaintiffs “because he felt they were unresponsive.” The court ultimately found Plaintiffs were equally part of the problem for any lack of communication by Defendant Father.

We hold the trial court's findings support the trial court's conclusions of law, and Plaintiffs do not have standing as they have failed to show Defendant Father is

unfit or has acted in a manner inconsistent with his constitutionally protected status. As a result, we conclude the trial court did not err in dismissing Plaintiffs' Amended Complaint.

B. 12(b)(6)

While the trial court properly dismissed Plaintiffs' Amended Complaint based on lack of subject matter jurisdiction, the trial court erred by holding Plaintiffs failed to state a claim upon which relief can be granted. When a trial court does not have jurisdiction to hear a matter, as the trial court here correctly determined, it does not follow that the court may then decide the merits of a Rule 12(b)(6) motion. *United Daughters of the Confederacy*, 383 N.C. at 650, 881 S.E.2d at 60.

Here, the trial judge did not address the application of Rule 12(b)(6) to any of the claims raised in Plaintiffs' complaint because he arguably dismissed Plaintiffs' Complaint for lack of jurisdiction. However, the court did state in its written order that "since Plaintiffs failed to establish standing, they failed to state a claim upon which relief can be granted."

Our Supreme Court has previously held the legal effects of granting dismissal under Rules 12(b)(1) and 12(b)(6) are "quite different." *Id.* (internal citation and quotations omitted). When a court lacks subject matter jurisdiction over certain claims, it does not have the ability to decide the merits of the case. *Id.* It follows that a court can only dismiss those claims without prejudice, since it cannot render a final judgment. *Id.*; *Pugh*, 288 N.C. App. at 588, 887 S.E.2d at 744. Put another way, if a

trial court lacks jurisdiction to hear a case, it cannot then hold Plaintiffs failed to state a claim upon which relief can be granted, because a dismissal under Rule 12(b)(6) requires the court to reach the merits of the case. *United Daughters of the Confederacy*, 383 N.C. at 650, 881 S.E.2d at 60.

We vacate the trial court's dismissal, and remand for entry of dismissal based on lack of subject matter jurisdiction pursuant to Rule 12(b)(1) alone.

III. Conclusion

We hold the trial court properly dismissed Plaintiffs' Amended Complaint pursuant to Rule 12(b)(1) but erred by dismissing Plaintiffs' Amended Complaint pursuant to Rule 12(b)(6).

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Chief Judge DILLON and Judge HAMPSON concur.

Report per Rule 30(e).