No. COA\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ DISTRICT

NORTH CAROLINA COURT OF APPEALS

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IN THE MATTER OF: )

)

INITIALS ) From \_\_\_\_\_\_\_\_\_\_\_ County

) File Nos.

APPELLANT RESPONDENT’S

MOTION TO STRIKE PORTIONS OF DSS’S APPELLEE BRIEF

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NOW COMES Appellant Respondent Mother/Father, by and through counsel, and respectfully moves the Court, pursuant to Rules 9(a), 28(b), and 37(a) of the Rules of Appellate Procedure, to strike from Appellee DSS’s Brief all references to matters not contained in the filed record. In support of this motion, Appellant shows the following:

1. This matter comes before this Court as an appeal of the trial court’s **[NAME]** Order, filed on **[DATE]**. Appellant’s Notice of Appeal was filed on **[DATE]**. Appellant’s brief was served via email on **[DATE]**.

2. Appellee GAL and Appellee DSS’s briefs were served via U.S. mail on **[DATE]**.

3. It is settled law that the “North Carolina Rules of Appellate Procedure are mandatory and ‘failure to follow [them] will subject an appeal to dismissal.’” *Viar v. N.C. Dep’t of Transp*., 359 N.C. 400, 401, 610 S.E.2d 360, 360, *reh’g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005) (internal citation omitted). *But see Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 200, 657 S.E.2d 361, 366-67 (2008) (only a jurisdictional defect or a “substantial failure” to comply with the Rules of Appellate Procedure will subject an dismissal of the appeal.) “In appeals from the trial division of the General Court of Justice, review is solely upon the record on appeal, the verbatim transcript of proceedings, if one is designated, and any other items filed pursuant to this Rule 9. Parties may cite any of these items in their briefs and arguments before the appellate courts.” N.C. R. App. P. 9. “‘Matters discussed in the brief outside the Record are not properly considered on appeal since the Record imports verity and binds the reviewing court.’” *In re L.B.*, 181 N.C. App. 174, 185, 639 S.E.2d 23, 28 (2007) (citation omitted).

4. Rule 28(c) of the North Carolina Rules of Appellate Procedure permits the appellee to include a statement of facts if the appellee disagrees with the appellant’s statements and desires to make a restatement. An Appellee is nonetheless bound by the other provisions of Rule 28 as to the content of their brief.

5. Rule 28 of the North Carolina Rules of Appellate Procedure requires that an appellant’s brief contain “[a] full and complete statement of the facts,” which “should be a non-argumentative summary of all material facts underlying the matter in controversy which are necessary to understand all issues presented for review, *supported by references to pages in the transcript of proceedings, the record on appeal, or exhibits, as the case may be*.” N.C. R. App. P. 28(b)(5) (emphasis added). Rule 28(b) also requires that “[t]he body of the argument and the statement of applicable standard(s) of review shall contain citations of the authorities upon which the appellant relies. Evidence or other proceedings material to the issue *may be narrated or quoted in the body of the argument, with appropriate reference to the record on appeal, the transcript of proceedings, or exhibits*.” R. 28(b)(6). These same requirements apply to briefs submitted by all parties.

6. In their brief, DSS makes multiple unsupported statements:

a. “**[STATEMENT]**.” (DSS Brief p. \_\_, top) This statement contains no citation to the record and is directly contrary to the facts found at adjudication that **[CONTRARY EVIDENCE]**. (R p \_\_\_\_\_ ¶\_\_; p \_\_\_ ¶\_\_)

b. “**[STATEMENT]**” (DSS Brief p \_\_\_, 2nd full paragraph) This statement contains no citation. **[CONTRARY EVIDENCE]**. (R p \_\_\_) The “STATEMENT” is not contained in any document or testimony presented to the court and is outrageous.

c. “STATEMENT.” (DSS Brief p \_\_\_) There is no citation for these statements, nor could there be since they are not found in the record. The transcript from that hearing was not prepared since that was not an appealable order and the written order does not contain said findings of fact.

d. An entire paragraph makes statutory cites to the felonies charged, when the record itself only refers generically to two charges of Felony Child Abuse – Prostitution and Felony Child Abuse – Sexual Act, without reference to the statute. (DSS Brief p \_\_\_, ROA p \_\_\_, \_\_\_\_ ¶\_\_). The second half of the paragraph is a reference to subsequent charges, none of which appear in the record, as reflected by the lack of citation. To footnote that the charges are still pending as of the time of the appeal is a violation of the Rules because it is not information that was available while the case was heard. (DSS Brief, p \_\_\_)

7. This Court should at minimum order that the violating portions of Appellee DSS’s Brief be stricken, particularly the Statement of Facts, and decline to consider them or any inferences or assertions that rely upon them. See *In re L.B.*, 181 N.C. App. at 185, 639 S.E.2d at 28. *L.B.* involved a motion to strike an affidavit submitted by DSS with its brief—which was not part of the record on appeal—and to strike all references to the contents of the affidavit in DSS’s brief. 181 N.C. App. at 185, 639 S.E.2d at 28. This Court held that “[a]s this affidavit was not included in the settled record, it was inappropriate, under Rule 9, for DSS to provide and then rely on this document.” *Id*. This *L.B.* court ordered that the DSS affidavit, and any portions of the DSS brief that relied upon the affidavit, be struck from the brief and not considered by the reviewing panel. *Id*.

WHEREFORE, Appellant respectfully requests that this Court:

1. Strike the Statement of Facts from Appellee DSS’s Brief for violation of the Rules of Appellate Procedure; and

2. Order that any text passages that are supported by misrepresentation of facts listed above; be stricken from Appellee DSS’s Brief and not considered by the reviewing panel; and

3. Any other or further relief that this Court shall deem just and proper.

This \_\_\_\_\_ day of \_\_\_\_\_\_\_\_, 20\_\_\_.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Attorney Name, Bar No.

Attorney for Appellant-Respondent

Address

City, State, Zip

(phone)

e-mail address

CERTIFICATE OF FILING AND SERVICE

This is to certify that the undersigned has this date filed and served a copy of the APPELLANT RESPONDENT’S MOTION TO STRIKE PORTIONS OF DSS’S APPELLEE BRIEF upon the parties and counsel of record by electronic filing and serving, a copy of said instrument as follows:

Dan Horne, Clerk electronic filing site

North Carolina Court of Appeals

P.O. Box 2779

Raleigh, NC 27602

*All other counsel*

This the \_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_ 20\_\_\_\_.

Electronically submitted

Appellate Counsel