

STATE OF NORTH CAROLINA
COUNTY OF HENDERSON

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NUMBER: 07 CVS 597

RICHARD BUECHE, ET AL.
Plaintiffs,

v.

**PLAINTIFFS' OBJECTION TO
MOTION TO STRIKE**

BRYAN KEITH NOEL, and wife HEATHER NOEL,
ALEXANDER G. KLOSEK, ET AL.
Defendants.

STATE OF NORTH CAROLINA
COUNTY OF HENDERSON

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NUMBER: 07 CVS 603

CAROL BOWDEN, ET AL.
Plaintiffs,

v.

**PLAINTIFFS' OBJECTION TO
MOTION TO STRIKE**

BRYAN KEITH NOEL, and wife HEATHER NOEL,
ALEXANDER G. KLOSEK, ET AL.
Defendants,

STATE OF NORTH CAROLINA
COUNTY OF HENDERSON

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NUMBER: 06 CVS 1959

ARNOLD AND MARJORIE SMITH
Plaintiffs,

v.

**PLAINTIFFS' OBJECTION TO
MOTION TO STRIKE**

BRYAN KEITH NOEL, and wife HEATHER NOEL,
Defendants

NOW COME PLAINTIFFS, who respectfully submit the following Objection to Defendant
Heather Noel's and Heidi Griffin's Motion to Strike Errata Sheet of Deponent Carolyn Cooke.

The Plaintiffs took the deposition of Carolyn Cooke (and who appeared *pro se* at her deposition), upon proper notice given, on October 31, 2007, in Henderson County, North Carolina.

I.. **North Carolina Rule of Civil Procedure 30(e)**

These Defendants argue that they have been prejudiced by the failure of Ms. Cooke to submit her revisions, certification, and signature sheet within 30 days. Asheville Court Reporting took Ms. Cooke's deposition on October 31, 2007, and they mailed her a copy of the transcript for review on November 14, 2007. It is the habit and custom of Asheville Court Reporting to allow the deponent an additional 30 days to review the transcript if requested by the deponent. (See attached Affidavit of Mai-Beth Ketch, CVR, attached hereto and dated March 7, 2008.)

In this case, the deponent, a non-party attorney, with health problems (a stroke, see deposition transcript pp. 57-58) requested additional time to review the transcript, which was granted by Asheville Court Reporting. Allowing 3 days by mail, the normal 30-day deadline would have expired about 1-week before Christmas, and apparently the deponent had a good-faith belief that she had an additional 30 days to respond, as she completed certification and revisions was returned to Asheville Court Reporting in January 2008 approximately 60 days from when it was received by the deponent in November.

These Defendants do not argue how they have been prejudiced by the failure of Ms. Cook for the alleged violation of Rule 30(e). These cases are all relatively new (filed in April 2007 and November 2006), and the trial date has not been set, nor is the discovery period closed. Although these Defendants additionally state in their brief that they were relying on Ms. Cooke's deposition testimony, there is no allegation on how exactly they were relying, nor was there any objection during the deposition to Ms. Cooke's suggestion to leave blanks for her to better explain her answer.

In Blundell v. Wake Forest Univ. Baptist Medical Center (2006 WL 694630, M.D.N.C. 2006) (cited by these Defendants, but which apparently has little or no precedential value as an unpublished opinion) under Federal Rule of Civil Procedure 30(e), the court struck a *pro se* Plaintiff's "Addendums" and a hearsay statement to *his own deposition transcript*, which the Court found was his attempt to get in information (including audio tapes) for the purpose of a summary judgment hearing against him. Further, his changes were not sworn. Although the Court did strike the changes, the Court did not explain which of several grounds were the basis for its decision.

II. The Defendant's Contention that the changes to the Transcript were Excessive

Although the Deponent made revisions to the transcript, Rule 30 of the NC Rules of Civil Procedure does not require that the errata sheet be stricken. The Defendants cite Barlow v. Esselte Pendaflex Corporation, 111 F.R.D. 404 (M.D.N.C. 1986), in which the Court sanctioned the *pro se* Plaintiff "returned the transcript to the court report with ink corrections, comments, and cross references to other parts of the deposition." Further, the *pro se* Plaintiff effectively destroyed the deposition by apparently cutting and pasting portions of the transcript to the point where the court reporter was "unable to reassemble the transcript into usable form." The *pro se* Plaintiff also changed several answers from "yes" to "no" and *deleted* portions of the deposition, to the point where the Court found that it was "virtually impossible" for the court reporter to make the changes upon the deposition.

Regarding Ms. Cooke's deposition, no "cutting and pasting" occurred, the court reporter apparently has had no such difficulty in reassembling the transcript, and it is suggested that the Court should give Ms. Cooke greater latitude as she is not a party to either of these three lawsuits.

As the Court is aware, both the original deposition and the revised version can be offered at trial, and these Defendants may examine or attempt to impeach Ms. Cooke regarding the changes at trial, or may re-open the examination as to the basis of the changes, if they so desire.

Allen & Company v. Occidental Petroleum Corporation, 49 F.R.D. 337 (S.D.N.Y. 1970) (cited in Shuford, N.C. Civil Practice and Procedure, 6th ed. (2008) Section 30:8) (In Allen, the Defendants took the deposition of a non-party who made 377 changes on the face of the transcript, including 12 pages of corrections and changes (although the original deposition was longer).

As noted in Lutig v. Thomas, 89 F.R.D 639 (D.C. Ill. 1981) (cited in Wilson, North Carolina Civil Procedure 3rd ed., (2007) pp. 30-24) “deponents are allowed to make any changes in form or substance which deponent desires in deposition, even if the changes contradict original answers or even if the deponent’s reasons for making changes are unconvincing” and allowing a witness to change his deposition before trial eliminates the likelihood of deviations in testimony at trial and reduces surprise at trial, which is an efficient procedure.

In Attic Tent, Inc. v. Jerry Copeland and Progressive Energy Solutions, Inc., (2007 WL 174679 (W.D.N.C.)) the Defendant-Deponent (and his wife) attempted to change certain answers in their deposition transcripts from “yes” to “no” and the court said that it was an “attempt to reverse potentially damaging admissions, apparently to conform their testimony to what [the attorney for the Defendant] now believes would be if not a more favorable, then at least a less damaging set of facts.”

As to Ms. Cooke, she is a non-party and is not related to anyone involved in any of the three lawsuits (or any others filed elsewhere regarding “Certified Estate Planners”).

These Defendants again claim that they have been prejudiced by Ms. Cooke’s revisions to her deposition transcript in that they “were relying on Ms. Cooke’s deposition testimony.” The Defendants contend the Plaintiffs used the errata sheet to “further prosecute their case against the Defendant Heather Noel” in that Item 7 (a 3-part Request) of the Plaintiffs’ Request for Production of Documents (relating to documents to refute the testimony of the deponent regarding hiding of assets by Bryan Noel) originated from the errata sheet of Ms. Cooke. This overlooks the fact that the Plaintiffs could have obtained this information from other sources, including other parts of her own deposition for which Ms. Cooke had no revisions (including pp.

110 and 124 of her deposition). The Plaintiffs in their Complaints assert that Mr. Noel has at the very least used some of the Plaintiffs' money for his personal use and has secreted their money.

In Ms. Cooke's typed errata sheets (pp. 151-164 of the Defendants' Exhibit), she had her signature page notarized properly, and lists the reasons for every change, the majority of which are to "correct scrivener's error," "to clarify my testimony," to "correct grammar," and in other cases it was simply to clarify her answer or "to prevent ambiguity".

The longest revision (1-page) occurs on page 12 of the Signature Page (p. 97, ln 9, of the deposition) under cross-examination of the deponent by attorney Winson (at that time attorney for Bryan Noel, Titan Composites, Masters, Hughes, and Pinnacle Advisory Group, LLC), in which Ms. Cooke originally answered "yes" to the question ""During those occasions, did he tell you that he was doing that because of anticipated litigation?" Ms. Cooke's reason for the revisions are "to clarify my answer and supplement it" explain her previous answer of "Yes" and does not materially change her original response.

CONCLUSION AND CERTIFICATION

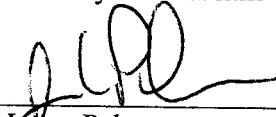
The Court should deny the Motion of the Defendants Heather Noel and Heidi Griffin to Strike the Errata Sheet of the Deponent, Carolyn Cooke (a non-party with no interest in the outcome of the litigation), as her revisions do not arise to the level of that in Attic Tent or Barlow, nor have these Defendants demonstrated they have been prejudiced in any way.

Further, this brief complies with the word count requirement of Business Court Rule 15.8.

This the 18th day of March, 2008.

LAW OFFICE OF FRANK B. JACKSON
Attorneys for Plaintiff

By: _____


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N.C. State Bar No.: 28731

ATTACHMENT – 1

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing document was served upon the following by depositing a copy of the same in an official depository of the U.S. Mail in a postage paid envelope addressed to the following, and by electronic filing at the NC Business Court website:

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Roy Masters, III
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Chris Hughes
129 Westwood Dr.
Hendersonville, NC 28792

This the 18th day of March, 2008.

By: 

James Palmer
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Hendersonville, NC 28793
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St. Bar # 28731



STATE OF NORTH CAROLINA
COUNTY OF HENDERSON

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FILE NUMBER: 06 CVS 1959

ARNOLD SMITH, et. al.
Plaintiffs

**AFFIDAVIT OF MAI-BETH KETCH
CVR**

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BRYAN NOEL, et. al.

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RICHARD BUECHE, et. al.
Plaintiffs,

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STATE OF NORTH CAROLINA
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CAROL BOWDEN, et. al.
Plaintiffs,

**AFFIDAVIT OF MAI-BETH KETCH
CVR**

v

BRYAN KEITH NOEL, et. al.
Defendants.

The undersigned, Mai-Beth Ketch, first being duly sworn, depose and says:

1. I am a Certified Verbatim Reporter and have been since 2001.
2. I have been employed with Asheville Reporting Service for approximately 10 years.

3. On October 31, 2007 I took the deposition of Carolyn Cooke in the above referenced matter. Ms Cooke was sworn to testify truthfully before the depositions.
4. The deposition was completed and sent to Ms. Cooke on approximately November 14, 2007 for her review, corrections (if any), and signature.
5. It is the Standard of Practice of Asheville Reporting Service to allow a deponent an extension of time if, they request it, to submit their Errata sheet
6. In December 2007, Ms. Cooke, or someone on her behalf, called Asheville Reporting Service and asked for an extension to submit her Errata Sheet and was given an extension of time to submit her sheet.
7. On January 18, 2008 the Errata Sheet and the original deposition were mailed to Mr. Frank Jackson. Defendants were also mailed the Errata Sheet on the same date.

This the 7th day of March, 2008.

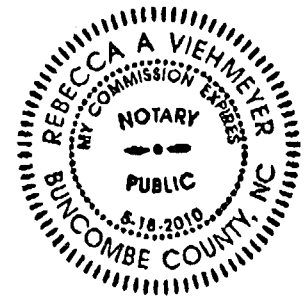
Mai-Beth Ketch
 Mai-Beth Ketch, CVR

Sworn and subscribed before me,
 this the 7th day of March, 2008.

Rebecca A. Viehmeyer
 Notary Public

Printed name of Notary: Rebecca A. Viehmeyer

My commission expires: May 18, 2010



Mai-Beth Ketch
 Mai-Beth Ketch, CVR