

**NORTH CAROLINA
COUNTY OF HENDERSON**

**IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
06 CVS 1959**

ARNOLD SMITH, et al.,

Plaintiffs,

v.

BRYAN KEITH NOEL, et al.,

Defendants.

**NORTH CAROLINA
COUNTY OF HENDERSON**

**IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
07 CVS 597**

RICHARD BUECHE, et al.,

Plaintiffs,

v.

BRYAN KEITH NOEL, et al.,

Defendants.

**NORTH CAROLINA
COUNTY OF HENDERSON**

**IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
07 CVS 603**

CAROL BOWDEN, et al.,

Plaintiff,

v.

BRYAN KEITH NOEL, et al.,

Defendants.

**DEFENDANT HEATHER NOEL AND HEIDI GRIFFIN'S MEMORANDUM OF
LAW IN SUPPORT OF MOTION TO STRIKE ERRATA SHEET OF DEPONENT
CAROLYN COOKE**

NOW COME Defendants Heather Noel and Heidi Griffin, by and through counsel, and respectfully state as follows for their Memorandum of Law in Support of Motion to Strike Errata Sheet of Deponent Carolyn Cooke:

PROCEDURAL CONTEXT

The Smith et. al., Bueche et. al., and Bowden et. al. cases are consolidated civil actions predicated on, *inter alia*, alleged fraud in connection with Plaintiffs' investments in and with certain Defendants.

On October 17, 2007, Plaintiffs' served a subpoena and Notice of Deposition on fact witness Carolyn Cooke, commanding her to appear at the Henderson County Courthouse on October 31, 2007 for her deposition. On October 31, 2007, Ms. Cooke appeared for her deposition and Plaintiffs' counsel, Mr. Frank Jackson, Esq., deposed Ms. Cooke. (Ex. 1, Deposition of Carolyn Cooke [Hereinafter "Cooke Depo.'])

Prior to providing her testimony, Ms. Cooke notified the court reporter that she reserved her right to read over and sign the transcript. (Cooke Depo., p. 4, line 21-22) She additionally swore under oath to tell the "truth of her own knowledge." (Cooke Depo., p. 4, lines 23-25) Ms. Cooke is a former attorney who was once licensed to practice in the states of California and Texas. (Cooke Depo., p. 5, lines 6-13) At the outset of her testimony, Ms. Cooke acknowledged that she required no instruction as to the intricacies of a deposition based on her training as an attorney. (Cooke Depo., p. 5, lines 14-17) Later in her deposition, Ms. Cooke was asked to alert counsel examining her if she had any questions regarding any question posed to her. (Cooke Depo., p. 57, lines 2-4) Ms. Cooke responded that she would so inform counsel. (Coke Depo., p. 57, line 5)

During her testimony, Ms. Cooke objected to a number of questions posed to her. (See, e.g., Cooke Depo., p. 63, line 24 ("Objection. Relevance"), p. 64, lines 6-10 ("Asked and answered")) On occasion, Cooke refused to answer specific questions and requested that the court reporter leave blank spaces or lines so that she could supplement her answers at a later date. (See, e.g., Cooke Depo., p. 90, line 23 to p. 91 line 3 ("I'm not going to repeat my answer.

You can ask the court reporter to leave some blank lines there, and if I think of some things . . . I'll add it in.”), p. 93, lines 20-24 (“I testified what I could think of at the moment and if the court reporter would add some lines in there, I'd be glad to add any other if I could recall any other.”), p. 100, lines 5-7 (“There's nothing I can think of, but if you would like to draw us a line in there, I'll think about it and fill it in.”))

On November 14, 2007, the court reporter completed the deposition transcript of Ms. Cooke's testimony. (Cooke Depo. p. 126) On that same day, Ms. Cooke was sent a copy of her transcript with an accompanying letter requesting that she “read it over and make any corrections you wish to make on the enclosed signature page.” The letter further instructed Cooke to return her signature page “within 30 days from the date of [the] letter.” (See Ex. 2, Letter from Asheville Reporting Service)

On January 7, 2008, Ms. Cooke signed the signature page of her deposition and sometime thereafter sent the signature page to the court reporter. Included with this signature sheet was a fifteen (15) page document with corrections, alterations and additional testimony which Ms. Cooke requested to be included within her deposition. (See Ex. 3, Coke Errata Sheet) On January 22, 2008, Defendants Heather Noel and Heidi Griffin received Carolyn Cooke's signature page and additional fifteen page errata sheet.

Defendants Heather Noel and Heidi Griffin now move the Court to strike Ms. Cooke's purported additional deposition testimony in the form of the errata sheet on the following grounds:

1. Cooke's signature page and accompanying errata sheets were not received by the court reporter within 30 days, and, as a matter of law and in accordance with North Carolina Rule of Civil Procedure 30(e), the deposition should be considered “signed” and complete as of December 14, 2007.

2. Cooke's errata sheets materially alter her testimony under oath at her deposition and allowing such purported "corrections" is unfair and wholly prejudicial to counsel who were relying on Ms. Cooke's deposition testimony.

ARGUMENT

I. Deponent Carolyn Cooke did not timely submit her revisions, certification, and signature sheet in accordance with the time limits contained in North Carolina Rule of Civil Procedure 30(e) and her errata sheets should be stricken from the record of her deposition testimony based on the plain meaning of North Carolina Rule of Civil Procedure 30(e).

North Carolina Rule of Civil Procedure 30(e) states that unless a deponent waives the right to read and sign the transcript of his or her testimony, the transcript "shall be submitted to the deponent for examination and shall be reviewed by the deponent." N.C. Rule Civ. Pro. 30(e) (2008). The rule provides that for all changes in the form or substance of the deposition, the deponent must sign a statement "reciting such changes and the reasons given by the deponent for making them." *Id.* The rule further states, "[i]f the certificate is not signed by the deponent within 30 days of its submission to [her], the person before whom the deposition was taken *shall* sign the certificate and state on that certificate . . . the failure to sign together with the reason of the refusal to sign, if any." *Id.* (emphasis added). Following the expiration of the thirty day period, "the deposition may then be used as fully as though the certificate were signed." *Id.*

The comments accompanying Rule 30(e) provide insight on the limitations of the rule and demonstrate the strict thirty day rule governing a deponent's submission of an errata sheet to a court reporter for appendage with the original copy of the deposition. The notes state, "[t]he provision relating to the refusal of a deponent to sign his deposition is tightened through insertion of a 30-day time period and a provision allowing use of the deposition upon the refusal or failure of the deponent to sign and return it within the required time." N.C. Rule Civ. Pro. 30(e), comment to 1975 amendments (2008).

Clearly, as a matter of statutory law, Carolyn Cooke's deposition transcript should consist of her oral testimony exclusive of any additions or changes made by Ms. Cooke after the fact. Ms. Cooke was provided with a copy of her deposition on November 14, 2007. She did not sign or return her certificate until January 7, 2008. Cooke submitted her signature and certification twenty five days **after** the time allotted by Rule 30(e). If this court allows Cooke to render changes to her deposition outside of the allotted statutory time period of 30 days, the rule becomes useless, unenforceable, and prejudicial to counsel. See Blundell v. Wake Forest Univ. Baptist Med. Ctr., 2006 U.S. Dist. LEXIS 11713, *12 (M.D.N.C.) (2006) (striking a deponent's deposition errata sheet for, among other reasons, not submitting her changes within 30 days). By rule, the deposition should be considered "signed" and recorded as completed on December 14, 2007. As a result, the alterations and additions provided by Ms. Cooke should not be considered a part of her deposition testimony and stricken from her deposition record.

II. Deponent Carolyn Cooke's excessive errata sheet submitted as a purported addendum to her deposition testimony does not comport with North Carolina Rules of Civil Procedure 30(e) and should be stricken from the record of her deposition testimony.

In addition to the foregoing, Ms. Cooke's errata sheet must be stricken from her deposition testimony because it exceeds the types of deposition testimony changes Rule 30(e) contemplates. The errata sheet submitted by Ms. Cooke includes **fifteen pages** of additional textual material supplementing and altering her deposition testimony. As detailed below, some of Ms. Cooke's purported changes include attempts to strike entire answers and substitute wholly new statements which are inconsistent with her previous testimony.

Although North Carolina case law does not disclose a case precisely addressing this issue, Federal Rule of Civil Procedure 30(e) and case law construing this rule provide authority for this Court to strike Ms. Cooke's purported errata sheet from the original deposition transcript of her testimony. See, e.g., Johnson v. Johnson, 14 N.C. App. 40, 187 S.E.2d 420 (1972), (stating

that “[a]lthough [the North Carolina Rules of Civil Procedure] differ somewhat from the federal rules, the federal rules are one of the sources of the North Carolina rules; and decisions under them are pertinent for guidance and enlightenment to develop the philosophy of the new rules.”).

Federal Rule of Civil Procedure 30(e) provides similar constrictions as North Carolina Rule of Civil Procedure 30(e) on a deponent’s ability to subsequently alter or change deposition testimony. The Rule states:

“[o]n request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which: (A) to review the transcript or recording; and (B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.” Fed. R. Civ Pro. 30(e)(1) (2004).

Similar to the North Carolina Rule, the federal rule allows a deponent to change deposition testimony in “form or substance” up to 30 days after the completion of the deposition transcript by the court reporter. Compare Id. with N.C. R. Civ. Pro. 30(e) (stating that the deponent has 30 days to review and submit changes with the certification). Additionally, the manner in which the deponent must submit these changes is identical – she must sign a statement listing the changes and the reasons for those changes.

The federal courts in this state have ruled that subsequent and material changes to deposition testimony, offered through an errata sheet, should not be allowed to supplement and alter the original testimony. See, e.g., Barlow v. Esselte Pendaflex Corp., 111 F.R.D. 404 (M.D.N.C. 1986); The Attic Tent, Inc., v. Copeland, 2007 U.S. Dist. LEXIS 5240 (W.D.N.C. 2007).

In Barlow, the Plaintiff requested to review her deposition and was sent the original transcript by the court reporter. Barlow, 111 F.R.D. at 406. Upon its return, she submitted a 7-page “corrections list” with over 100 corrections to her 260-page deposition, including deletions of “large blocks” of her testimony. Id. The Court ruled that the plaintiff’s submitted changes

were not “with the letter and spirit of Rule 30(e) and, therefore, her attempted ‘changes’ [were] simply inoperable or a nullity.” Id. The Barlow court stated, the “manner and number of changes disclose[d] a lack of good faith by the plaintiff.” Id. The Court reasoned that such a result “protects the [other party] who had already spent hours at the original deposition trying to ascertain [the deponents] position.” Id. at 407. As a result, the court deemed the transcript “signed” and excluded the deponent’s desired additions. Id. at 406.

Recently, the United States District Court for the Western District of North Carolina similarly curtailed a deponent’s attempt to use an errata sheet to substantively alter her previous deposition testimony. See Attic Tent, 2007 U.S. Dist. LEXIS 5240. In Attic Tent, a previous corporate officer of the defendant corporation was deposed as a fact witness in the litigation. Id. at *9. Following that deponent’s testimony, she submitted an errata sheet altering and contradicting her earlier testimony. Id. at *13. Plaintiffs motioned the court to strike the errata sheet based on the material alterations and excessive changes. Id. at *14. Judge Horn struck the purported errata sheet, stating that the deponent could not use the errata sheet to convert her deposition into a “take home exam.” Id. at *20 (quoting Greenway v. International Paper Co., 144 F.R.D. 322, 325 (W.D.La. 1992)). Additionally, Judge Horn stated, “the errata sheet does not afford the deponent a second bite at the apple” and does not provide a deponent a clean slate upon which the deponent could recast her testimony after the fact. Id. Consequently, Judge Horn disallowed the deponent to utilize her errata sheet to change her sworn testimony. Id. at *21.

Here, Ms. Cooke’s attempt to alter her deposition testimony is similar to the Barlow and Attic Tent cases and this Court should similarly strike the purported errata sheet from Ms. Cooke’s deposition transcript. Ms. Cooke, on numerous occasions, refused to answer questions asked of her and specifically requested that additional space be allotted for her to ponder her answer and provide additional testimony at a later date. In many instances, her errata sheet

requests that entire answers be “deleted” and replaced with paragraphs of new material which Ms. Cooke ostensibly crafted out of thin air at her leisure while the undersigned counsel did not have any opportunity to examine her concerning her purported new testimony (See Ex. 3, p. 9, line 3 (replacing page 67, lines 18-19); Ex. 3, p. 10, line 1 (replacing p. 69, lines 13); Ex. 3, p. 12, line 1 (deleting the word “Yes” at p. 97, line 9 and adding a page of new testimony); Ex. 3, p. 14, line 1 (deleting entire answer on p. 114, lines 10-23 and replacing with new paragraph)

On one occasion, counsel for Defendants Heather Noel and Heidi Griffin questioned Ms. Cooke regarding her duties as a corporate secretary and why she did not report corporate waste to shareholders of a corporation. (Cooke Depo., p. 69, lines 7-8, 11-12) Ms. Cooke’s response at the time was, “[i]t didn’t occur to me to do it.” (Cooke Depo., p. 69, line 13) In her errata sheet, to the complete prejudice of undersigned counsel, who was relying on Ms. Cooke’s deposition testimony, Ms. Cooke attempts to add three additional paragraphs of material, consisting of over two hundred additional words of testimony, adding information as to her understanding of the legal duties of a corporate officer and the circumstances surrounding her tenure at the Defendant Bryan Noel’s company. (See Ex. 3, p. 10, line 1 (replacing p. 69, lines 13)

Later in her testimony, Cooke was asked questions regarding her knowledge of a purported separation between Defendants Heather Noel and Bryan Noel. She was asked if Mr. Noel executed the separation because of his anticipation of litigation. Ms. Cooke simply answered “Yes.” (See Cooke Depo., p. 97, line 9) Cooke’s errata sheet purportedly operates to delete the one word “yes” response and supplant that response with an entire page of single spaced information regarding her knowledge of the situation, including new details she could not “remember” during that deposition.

Finally, and again by way of illustration only of Ms. Cooke's attempt to re-write major portions of her deposition testimony, Ms. Cooke attempts to strike thirteen lines of her deposition testimony and replace it to purportedly "correct a rambling, incoherent sentence and clarify the testimony." (Ex. 3, p. 14, line 1) Originally, Cooke stated, "[t]he-trading account. I don't know much about it,-- all the details of it" and continued to provide some account of what she knew about the trading account. (Cooke Depo., p. 114, lines, 10-11) Cooke's errata sheet now seeks to wholly remove this testimony and replace it with a more detailed explanation of her memory of the trading account despite the fact that Ms. Cooke previously testified she did not know much about the account at issue. (Ex. 3, p. 14, line 1) Such changes should be impermissible under the scope of North Carolina Rule of Civil Procedure 30(e) and the illustrative cases discussed herein – particularly in light of the grave prejudice this would work on counsel for Defendants Heather Noel and Heidi Griffin, who were relying on Ms. Cooke's original deposition testimony.

Viewed in its entirety, Ms. Cooke has attempted, through her errata sheet, to utilize her deposition as a "take home exam" where she may add, delete or completely change her testimony to provide answers which are more suitable to her - - all to the complete prejudice of undersigned counsel who were relying on Ms. Cooke's deposition testimony as her actual testimony.² Just as in Barlow, Cooke's *post hoc* changes to her deposition testimony demonstrate her lack of good faith in answering the questions posed to her at her oral deposition. As such, this Court should strike her errata sheet.

² Indeed, to the prejudice of Defendant Heather Noel, Plaintiffs have relied on Ms. Cooke's purported errata sheet testimony to further prosecute their case against Defendant Heather Noel. See Question Seven (7) of Plaintiff's Third Request for Production of Documents to Defendant Heather Noel dated February 1, 2008 annexed hereto as Exhibit 4, which seeks further documents from Defendant Heather Noel based on Ms. Cooke's purported errata sheet modifications.

CONCLUSION

WHEREFORE, based on the foregoing, Defendants Heather Noel and Heidi Griffin respectfully request the Court to strike the purported errata sheet submitted by fact witness Carolyn Cooke from the original copy of her deposition transcript and enter such other and further relief as the Court deems necessary.

This the 27TH day of FEBRUARY, 2008.

**HEDRICK, GARDNER, KINCHELOE &
GAROFALO, L.L.P.**

/s/ LUKE SBARRA
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**Attorneys for Defendants Heather Noel and
Heidi Griffin**

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Memorandum of Law in Support of Motion to Strike** was served upon all counsel of Record by depositing a copy of the same in an official depository of the United States mail in a postage-page envelope addressed as follows:

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This the 27TH day of FEBRUARY, 2008.

**HEDRICK, GARDNER, KINCHELOE &
GAROFALO, L.L.P.**

**/s/ JON S. PLAYER
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CERTIFICATE OF COMPLIANCE

I hereby certify that the attached Memorandum of Law in Support of Motion to Strike Errata Sheet of Deposition of Carolyn Cooke complies with Business Court Rule 15.8.

This the 27th day of FEBRUARY, 2008.

**HEDRICK, GARDNER, KINCHELOE &
GAROFALO, L.L.P.**

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