

STATE OF 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.

STATE OF 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.

STATE OF 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.

**REPLY OF DEFENDANTS HEATHER NOEL AND HEIDI GRIFFIN TO OBJECTION  
OF PLAINTIFFS TO STRIKE ERRATA SHEET OF DEPONENT CAROLYN COOKE**

NOW COME Defendants Heather Noel and Heidi Griffin (collectively, "Defendants"), by and through their counsel and pursuant to Business Court Rule 15.7 and the Case Management Orders governing these consolidated cases, and respectfully state as follows for their Reply to Plaintiffs' Objection to the Motion of Defendants to Strike Errata Sheet of Deponent Carolyn Cooke (the "Motion"):

**I. The Court Should Overrule Plaintiffs' Objections and Grant Defendants' Motion.**

Plaintiffs object to the Motion on two primary grounds. First, Plaintiffs urge this Court to overlook the plain language of Rule 30(e) of the North Carolina Rules of Civil Procedure (“Rule 30(e)”) even though Ms. Cook did not submit her errata sheet to the court reporter within the strict thirty day period contained in Rule 30(e). Second, Plaintiffs contend that Ms. Cooke’s purported errata sheet is not prejudicial to Defendants and such lack of prejudice is a reason to deny Defendants’ Motion. Plaintiffs also object to the Motion on other miscellaneous grounds, none of which should be sustained.

For the reasons discussed herein and in the Motion, Defendants contend the Court should overrule Plaintiffs’ Objections and grant their Motion.

**A. Plaintiffs’ Inappropriately Request the Court to Enter an Order Contrary to the Plain Meaning of Rule 30(e) of the North Carolina Rules of Civil Procedure.**

Plaintiffs argument that the “habit and custom” of Asheville Reporting Services allowing a deponent additional time to complete an errata sheet in excess of the period of time contained in Rule 30(e) is not a valid reason to defeat Defendants’ Motion as it invites the Court to take action inconsistent with the plain language of Rule 30(e).

Rule 30(e) provides, in pertinent part, “if 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.” N.C.R R. Civ. P. 30(e) (emphasis supplied). Rule 30(e) provides, following the expiration of the thirty day period, “the deposition may then be used as fully as though the certificate were signed.” Id.

The Court should construe Rule 30(e) according to its plain language, which mandates, in the absence of an errata sheet timely returned, the court reporter’s sealing of a deposition. In the

absence of any ambiguity in a statute, courts are bound to construe a statute according to its plain language. See, e.g., Puckett v. KPMG, LLP, 2006 NCBC 19 ¶¶ 37, 38 (2006) (stating, in the absence of any binding precedent, “the primary rule of statutory construction is to effectuate the intent of the legislature.”) (citations omitted); Preston v. Thompson, 53 N.C. App. 290, 292, 280 S.E.2d 780, 783, disc. review denied and appeal dismissed, 304 N.C. 392, 285 S.E.2d 833 (1981) (stating, when according a statute its plain meaning, courts “may not interpolate or superimpose provisions and limitations not contained therein.”) (citations omitted).

For example, in the case of Roberts v. Young, 120 N.C. App. 720, 464 S.E.2d 78 (1995), the North Carolina Court of Appeals construed Rule 42(b) of the North Carolina Rules of Civil Procedure according to its plain meaning. The Roberts court stated, “statutory interpretation properly begins with an examination of the plain words of the statute.” 120 N.C. App. at 724, 464 S.E.2d at 81. In Roberts, the unnamed defendant, State Farm Automobile Insurance Company, assigned error to the trial court’s failure to bifurcate the compensatory and punitive damages portions of a trial. Id. at 722, 464 S.E.2d at 80. The Roberts court, noting the word “may” in Rule 42(b), held that the trial court did not err when it refused to bifurcate the trial because the word “may” in Rule 42(b), as opposed to the word “shall”, afforded the trial court broad discretion when refusing to bifurcate the trial. Id. at 724, 464 S.E.2d at 82. The Roberts court specifically underscored its ruling with the important recognition that “the use of ‘may,’ as opposed to ‘shall,’ is indicative of discretion or choice between two or more alternatives.” Id. (citations omitted).

In the instant matter, Rule 30(e) contains the mandatory word “shall,” meaning that the North Carolina Rules of Civil Procedure, in the absence of a court order, do not afford a deponent additional time to complete an errata sheet in excess of the thirty day period allotted in

Rule 30(e). Indeed, as our Supreme Court has articulated, “the word ‘shall’ is generally imperative or mandatory.” State v. Johnson, 298 N.C. 355, 361, 259 S.E.2d 752, 757 (1979).

Here, as detailed on page five of the Motion, Ms. Cooke submitted her errata sheet twenty five days beyond the period of time allotted in Rule 30(e) without any court order allowing her such an extension of time. As a matter of simple statutory construction, the Court should strike Ms. Cooke’s errata sheet.

**B. Despite Plaintiffs’ Contentions, Defendants are Prejudiced and Will Continue to be Prejudiced if Deponent Carolyn Cooke’s Errata Sheet Remains a Part of Her Deposition Transcript.**

Plaintiffs’ second primary objection to the Motion – that Ms. Cooke’s purported errata sheet does not prejudice Defendants – is without merit and is insufficient to deny the relief Defendants request in the Motion. In fact, Ms. Cooke’s purported errata sheet is currently prejudicial to Defendants in this case and will continue to be prejudicial to Defendants in this case absent an Order from this Court striking the purported errata sheet from her deposition. For example, by way of illustration only, as detailed at length on page seven and eight of the Motion, Ms. Cooke’s errata sheet re-writes major portions of her testimony in a fashion that could be construed as detrimental to Defendants’ defense in this case. Defendants, through counsel, sought to question Ms. Cooke during her deposition as to each area of her statements that could or might be detrimental to Defendants. However, following the deposition and after the thirty day period of time contained in Rule 30(e), Ms. Cooke, through her purported errata sheet, attempts to delete, modify, and completely change her prior testimony. If the Court does not strike Ms. Cooke’s purported errata sheet, the purported errata sheet contains statements that Plaintiffs may utilize for a panoply of purposes, all of which could be prejudicial to Defendants, to wit: potential cross examination of Defendants and others, potential use to prevent summary

judgment in favor of Defendants, potential use to defeat a directed verdict in favor of Defendants, potential use as substantive evidence, and use to greatly expand the scope of relevant discovery in these actions.

All of this prejudice will be avoided if this Court applies the plain language of Rule 30(e) and strikes the errata sheet.

C. **Plaintiffs' Additional Arguments Objecting to the Motion are Insufficient Objections.**

Plaintiffs also posit several miscellaneous objections to the Motion, all of which are of no avail and should not prevent the Court from granting the Motion.

First, Plaintiffs argue that Defendants' counsel did not object to Ms. Cooke's statements during the deposition that she was going to "fill in the blanks" after the deposition. This argument overlooks the fact that Defendants' objections, pursuant to the Business Court Rule 18.3 and North Carolina Rule of Civil Procedure 32(d), would be improper and obstructive during the course of the deposition. The Defendants Motion, made pursuant to North Carolina Rules of Civil Procedure 32(d)(4) and other applicable rules of procedure, is the proper way to object to Ms. Cooke's actions.

Second, Plaintiffs argue that Ms. Cooke is not a party to this lawsuit and therefore the Court should provide her more latitude with respect to the timing of her purported errata sheet modifications. The North Carolina Rules of Civil Procedure do not support this argument in any fashion – indeed, Rule 30(e) makes plain that a court reporter **must** sign a certificate accompanying the deposition noting the failure of the deponent to tend to the errata sheet within the statutorily allotted period of time. The North Carolina Rules of Civil Procedure, as they do in other areas, do not draw any distinction between a non-party and a party.

Third, Plaintiffs suggest that Defendants may re-examine Ms. Cooke in lieu of the Court

striking her purported errata sheet. This suggestion, which runs contrary to the dictates of Rule 30(e), is rife with problems because Ms. Cooke may again elect to either refuse to answer certain questions or attempt to make changes to an additional errata sheet. In addition, this approach is very expensive to these Defendants as they will be forced to travel and attend another deposition that is unnecessary in light of the requirement that the court reporter timely seal an original deposition notating a deponent's failure to timely submit an errata sheet.

### **CONCLUSION**

Based on the foregoing and the Motion, Defendants respectfully request the Court to grant their Motion.

**This the 28<sup>TH</sup> day of MARCH, 2008.**

**/S/LUKE P. SBARRA  
NC State Bar No. 29429  
/S/JON S. PLAYER  
NC State Bar No. 36997  
Attorney for Defendants Heather Noel & Heidi  
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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing **Reply of Defendants' Heather Noel and Heidi Griffin to Plaintiffs' Objection to Motion to Strike Errata Sheet of Deponent Carolyn Cooke** was served upon all parties and 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 28<sup>TH</sup> day of MARCH, 2008.**

**/S/LUKE P. SBARRA  
NC State Bar No. 29429  
/S/JON S. PLAYER  
NC State Bar No. 36997  
Attorney for Defendants Heather Noel & Heidi  
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**CERTIFICATE OF COMPLIANCE**

I hereby certify that the attached Reply to Objection of Plaintiffs to Strike Errata Sheet of Deponent Carolyn Cooke complies with Business Court Rule 15.8.

**This the 28<sup>TH</sup> day of MARCH, 2008.**

**/S/LUKE P. SBARRA**

**NC State Bar No. 29429**

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