



# **ATTORNEY'S FEES AND COSTS THE TIMING OF AN ORDER AWARDING FEES: JURISDICTIONAL ISSUES**

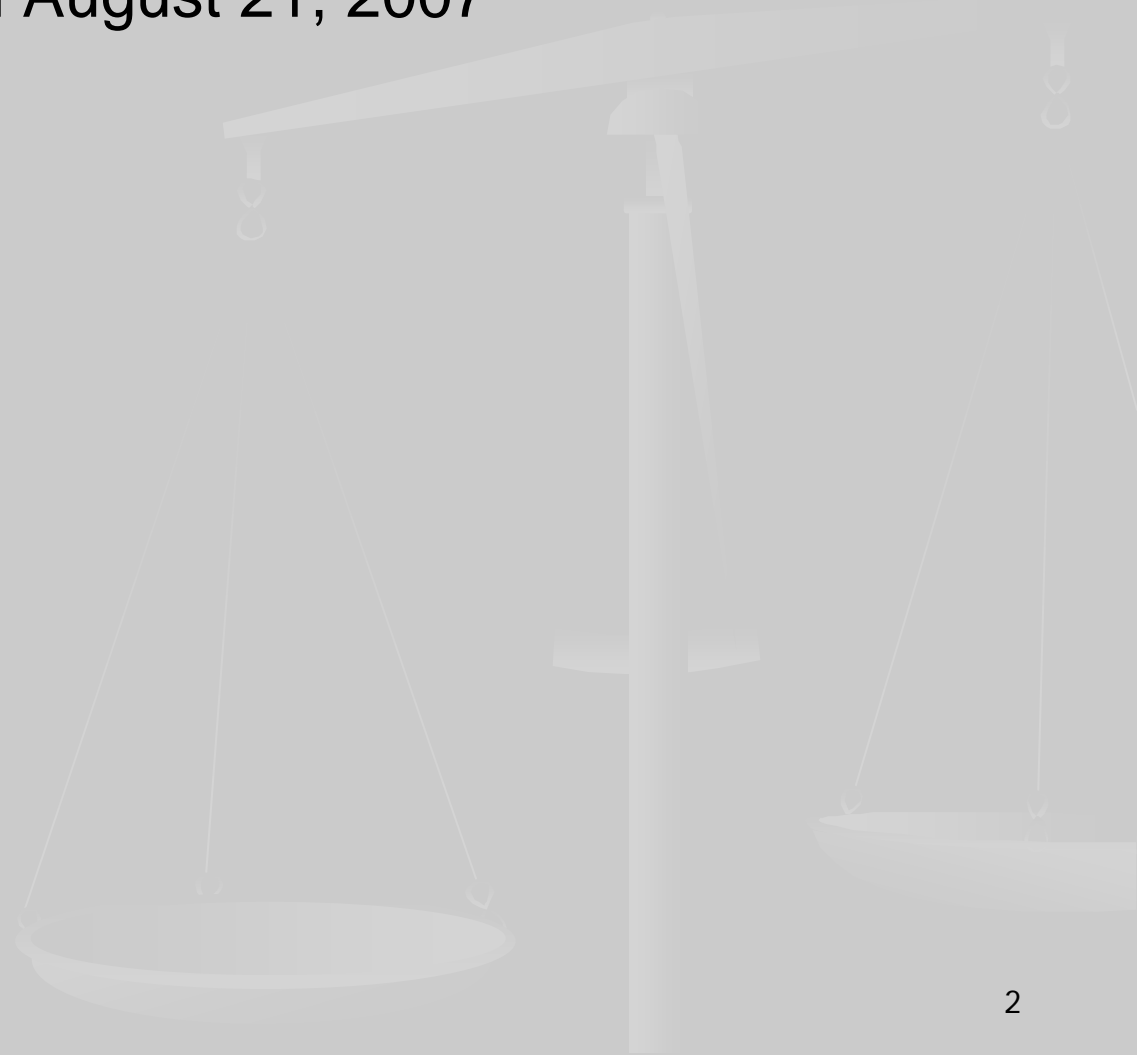
NC CONFERENCE OF SUPERIOR COURT JUDGES  
SUMMER CONFERENCE  
JUNE 17-20, 2008

MICHAEL R. MORGAN  
SUPERIOR COURT JUDGE  
WAKE COUNTY

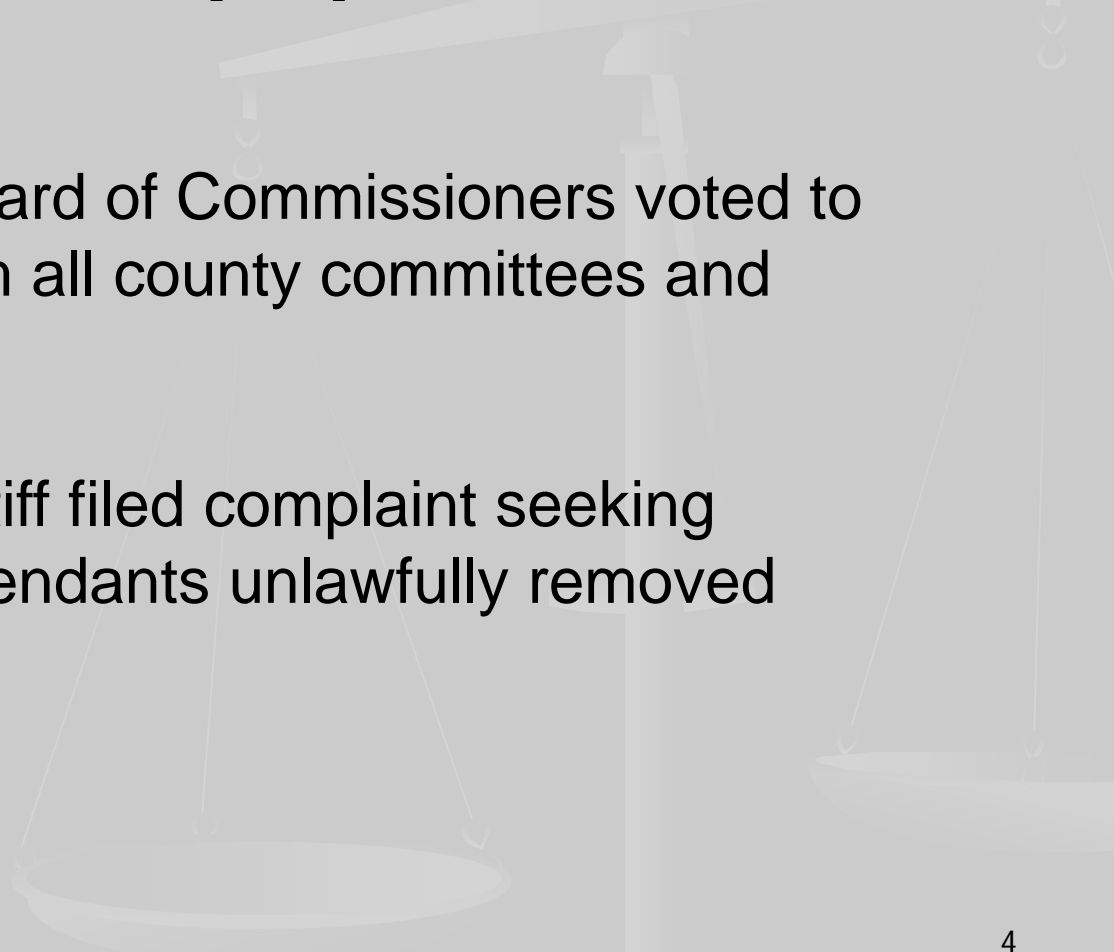
**McCLURE,et al v. THE COUNTY OF JACKSON, et al**

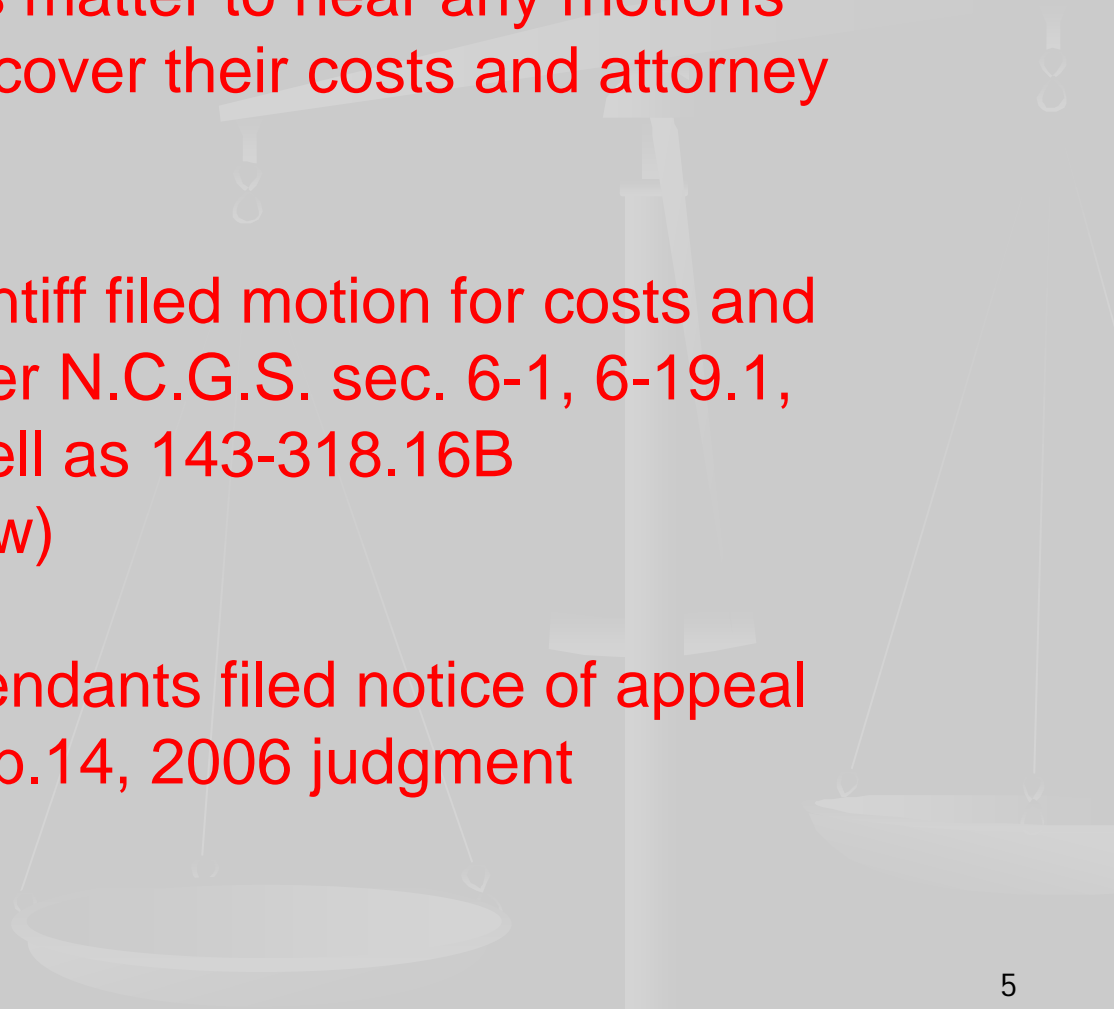
648 S.E. 2d 546, 2007 N.C. App. LEXIS 1814

Filed August 21, 2007



- Aug. 2000: Plaintiff appointed by Board of Commissioners to serve on Jackson County Airport Authority
- Plaintiff elected Chair of Airport Authority
- Plaintiff later appointed to Economic Development Commission of Jackson County
- Plaintiff elected Chair of Economic Development Commission

- 
- Jan.12, 2005: Jackson Co. Board of Commissioners, in closed session, discussed “qualifications, competence, performance [and] fitness” of Plaintiff in those positions
  - In open session, Board of Commissioners voted to remove Plaintiff from all county committees and appointments
  - Mar. 23,2005: Plaintiff filed complaint seeking declaration that Defendants unlawfully removed him from positions

- 
- Feb. 14, 2006: Declaratory judgment for Plaintiff, including statement that “[t]he Court will retain jurisdiction over this matter to hear any motions by the Plaintiff to recover their costs and attorney fees.”
  - Feb. 23, 2006: Plaintiff filed motion for costs and attorney’s fees under N.C.G.S. sec. 6-1, 6-19.1, 6-20, 7A-314, as well as 143-318.16B (Open Meetings Law)
  - Mar. 16, 2006: Defendants filed notice of appeal from trial court’s Feb.14, 2006 judgment

- Apr. 3, 2006: Trial court heard Plaintiff's motion for costs and attorney's fees
- Apr. 21, 2006: Trial court granted Plaintiff's motion, entering order awarding costs and attorney's fees totalling \$36,347.75
- May 5, 2006: Defendants filed notice of appeal from trial court's order awarding costs and attorney's fees

# ISSUE IN McClure:

WHETHER THE TRIAL COURT HAD JURISDICTION TO ENTER AN AWARD OF COSTS AND ATTORNEY'S FEES AFTER DEFENDANTS HAD FILED NOTICE OF APPEAL



# **N.C.G.S. sec. 1-294**

“When an appeal is perfected...it stays all further proceedings in the court below upon the judgment appealed from...; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from.”



## Court of Appeals analysis in McClure:

- General rule: A timely notice of appeal removes jurisdiction from the trial court and places it in the appellate court
- Cites Brooks v. Giesey, 106 N.C. App. 586, 590-91, 418 S.E.2d 236,238 (1992)

“Under a statute such as section 6-21.5...the parties should not be required to litigate fees when the appeal could moot the issue. Furthermore, upon filing of a notice of appeal, a trial court in North Carolina is divested of jurisdiction with regard to all matters embraced within or affected by the judgment which is the subject of the appeal.”

## Court of Appeals analysis in McClure (cont.):

- Cites Gibbons v. Cole, 132 N.C. 777,782, 513 S.E.2d 834,837(1999), which applies logic of Brooks v. Giesey
- Gibbons procedural facts: (1) Trial court entered order dismissing plaintiff's complaint; (2) Defendants moved for attorney's fees and filed supporting affidavits; (3) In dismissal order, trial court set a hearing on defendants' motion for attorney's fees for a later date, in order to allow plaintiffs an opportunity to review and respond to the affidavits; (4) Prior to hearing on attorney's fees, plaintiffs filed notice of appeal; (5) Upon attorney's fees hearing, defendants were awarded them

## Court of Appeals analysis in **McClure** (cont.):

- Gibbons court: “the appeal by plaintiffs from the judgment on the pleadings deprived the superior court of the authority to make further rulings in the case until it returns from this Court.”
- Gibbons fact pattern is indistinguishable from **McClure** fact pattern

DID THE TRIAL COURT'S PURPORTED  
"RESERVATION" OF THE ATTORNEY'S  
FEES ISSUE IN McClure ALLOW IT TO  
RETAIN JURISDICTION OF THAT ISSUE?



# NO



# Court of Appeal analysis in McClure (cont.):

- “A court cannot create jurisdiction where none exists. N.C.G.S. sec.1-294 specifically divests the trial court of jurisdiction unless it is a matter ‘not affected by the judgment appealed from’.”
- “When, as in the instant case, the award of attorney’s fees was based upon the plaintiff being the ‘prevailing party’ in the proceedings, the exception set forth in N.C.G.S. sec.1-294 is not applicable.”

## Court of Appeals analysis in McClure (cont.):

- “We cannot create jurisdiction for the trial court to enter the award of attorney’s fees in violation of N.C.G.S. sec.1-294.”
- **Decision:** The trial court’s order awarding attorney’s fees to Plaintiff was reversed for lack of jurisdiction and remanded to superior court for consideration of the question of attorney’s fees, and for entry of an appropriate order containing findings of fact and conclusions of law pertinent to the statutory provisions under which Plaintiff seeks attorney’s fees.

IN LIGHT OF McClure, WHAT SHOULD A SUPERIOR COURT JUDGE DO REGARDING AN AWARD OF ATTORNEY'S FEES AND COSTS?



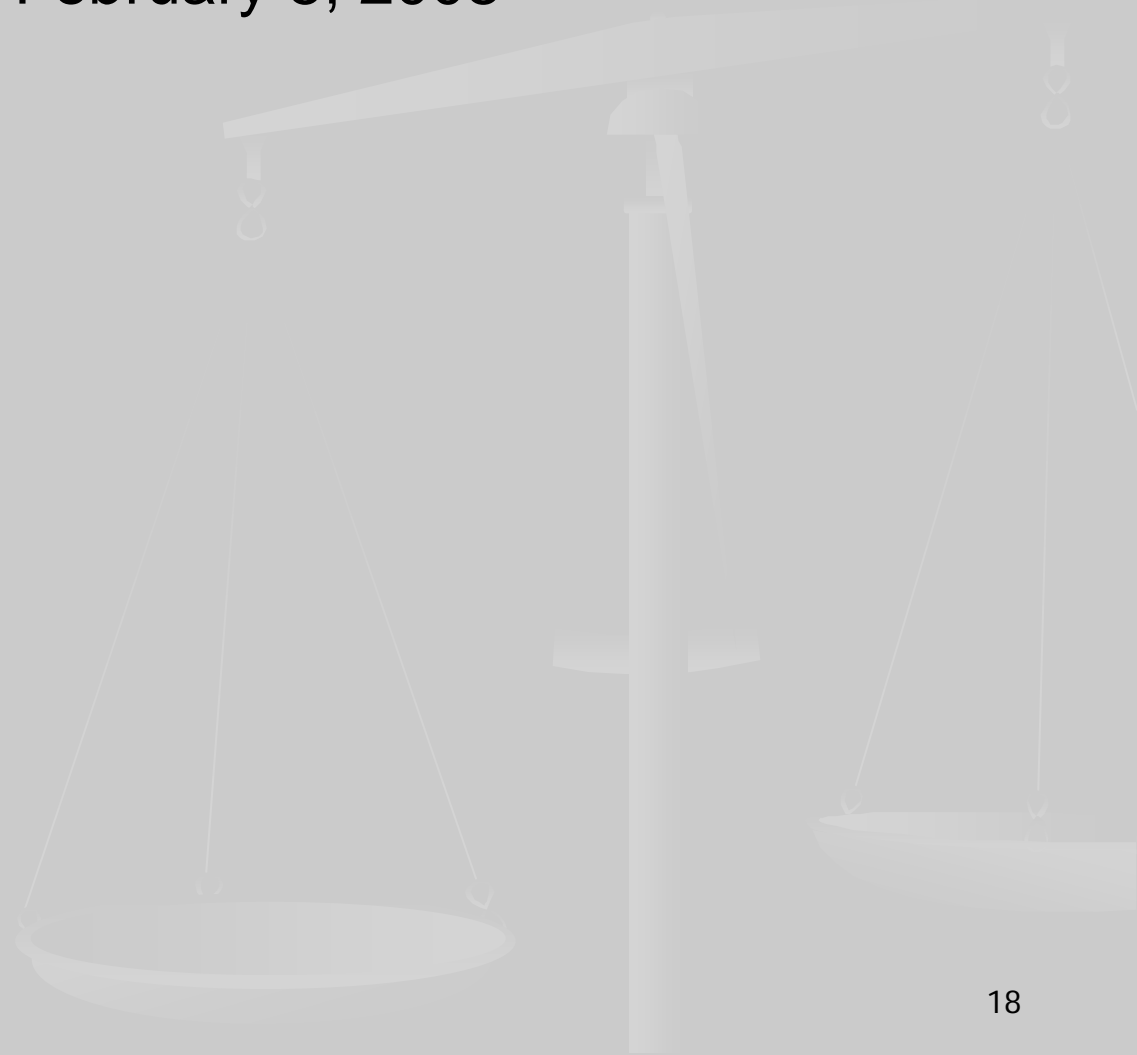


“When faced with the possibility of an award of attorney’s fees, the better practice is for the trial court to defer entry of the written judgment until after a ruling is made on the issue of attorney’s fees, and incorporate all of its rulings into a single, written judgment. This will result in only one appeal, from one judgment, incorporating all issues in the case.” (Court of Appeals in **McClure**)

# **CLAYBORN v. NOVANT HEALTH, INC., et al**

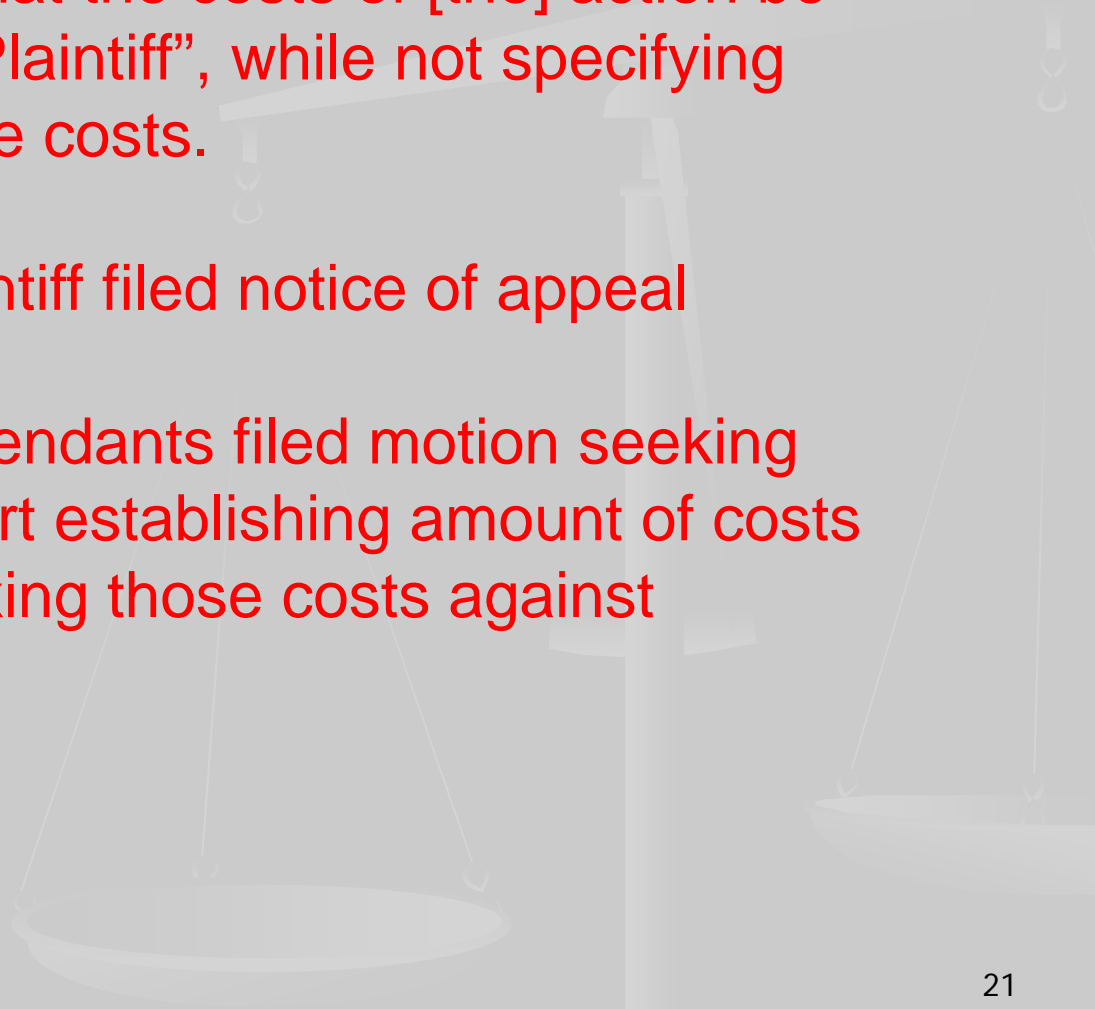
656 S.E.2d 15, 2008 N.C.App. **LEXIS** 173

Filed February 5, 2008



- July 2, 2001: 102-year-old Grier admitted to Defendants' hospital
- July 3, 2001: Grier fell in hospital room and fractured her hip
- July 4, 2001: Grier died while recovering from surgery on her fractured hip

- June 25, 2004: Plaintiff estate administrator brought survival action against Defendants for Grier's pain and suffering experienced due to fall
- Feb. 20, 2006: Trial began
- Mar. 8, 2006: Jury verdict for Defendants

- 
- Mar. 13, 2006: Trial court entered judgment upon verdict, ordering “that the costs of [the] action be taxed against the Plaintiff”, while not specifying the amount of those costs.
  - Apr. 11, 2006: Plaintiff filed notice of appeal
  - May 25, 2006: Defendants filed motion seeking order from trial court establishing amount of costs to be taxed and taxing those costs against Plaintiff

- June 21, 2006: Trial court entered order that Plaintiff's April 11, 2006 notice of appeal deprived it of jurisdiction to hear Defendants' motion concerning costs
- June 28, 2006: Defendants appealed trial court's order declining to hear their motion to tax costs

# Court of Appeals decision in Clayborn:

- Cites McClure
- “Pending appeal, ‘the trial judge is [generally] functus officio’ and without jurisdiction to enter such an order”
- The trial court’s June 21, 2006 order declining to hear Defendants’ motion to tax costs based on lack of jurisdiction was affirmed

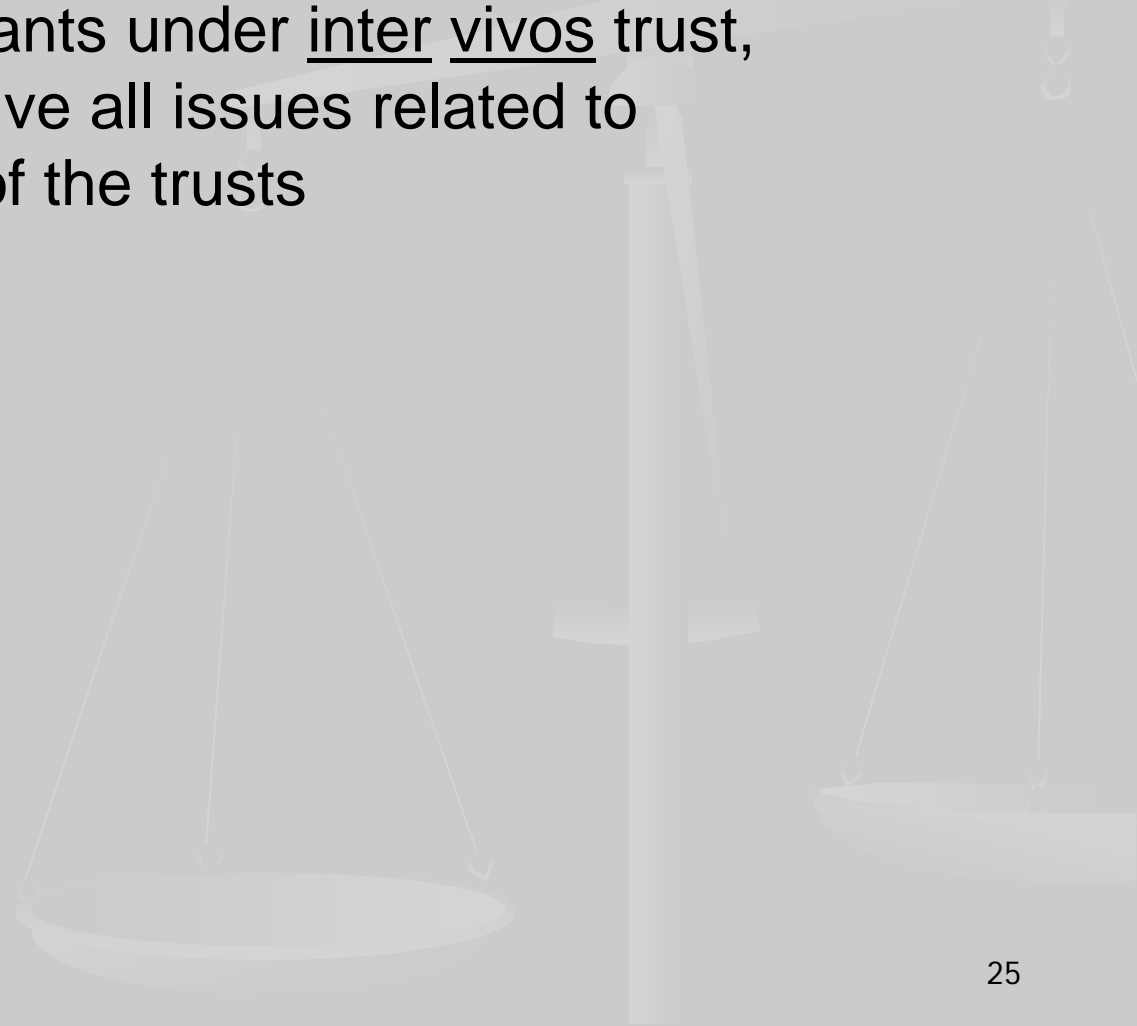
# **BABB, et al v. GRAHAM, et al**

\_\_\_S.E.2d\_\_\_, 2008 WL 2095606 (N.C.App.)  
Filed May 20,2008



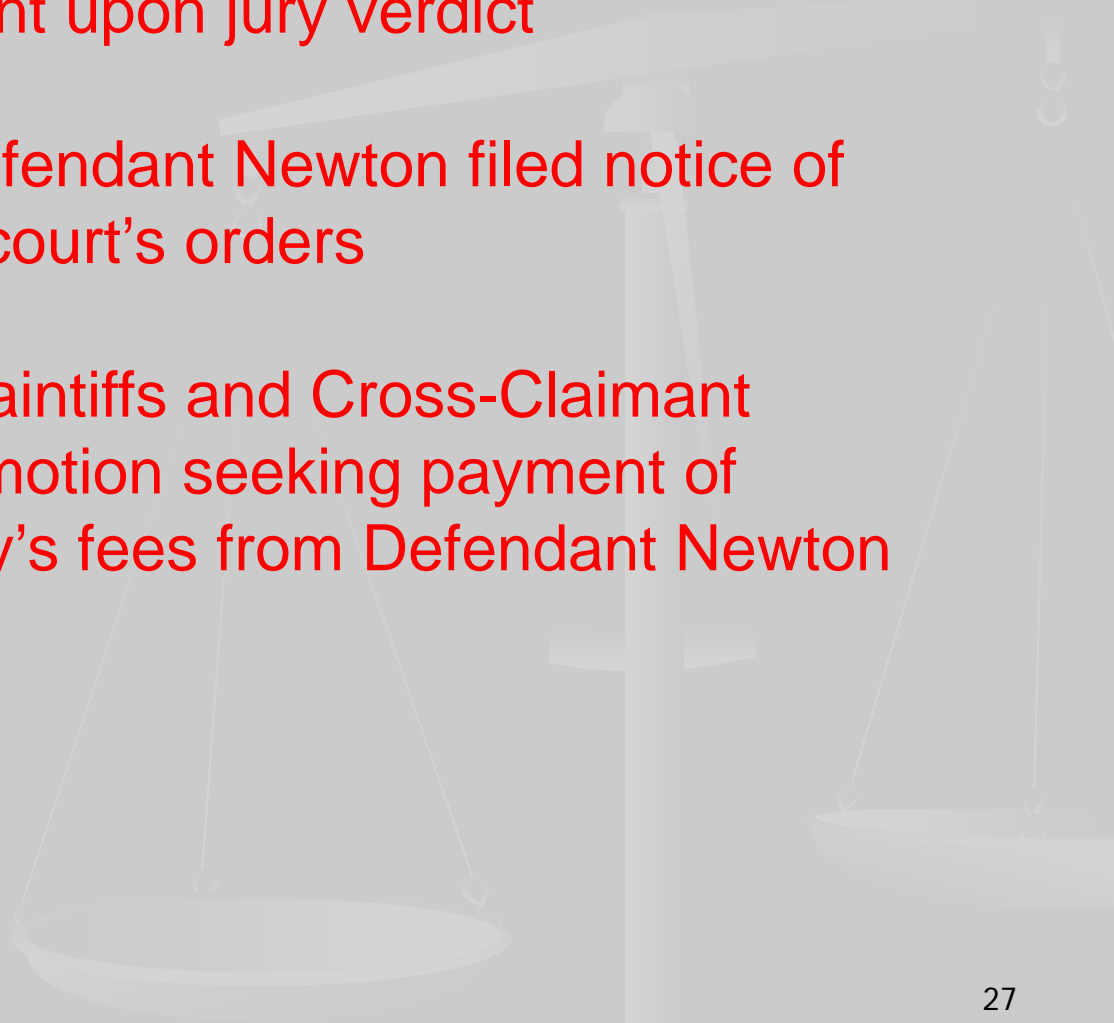


Feb. 18, 2002: Plaintiff estate administrator filed a complaint for declaratory judgment against Defendants under inter vivos trust, seeking to resolve all issues related to administration of the trusts

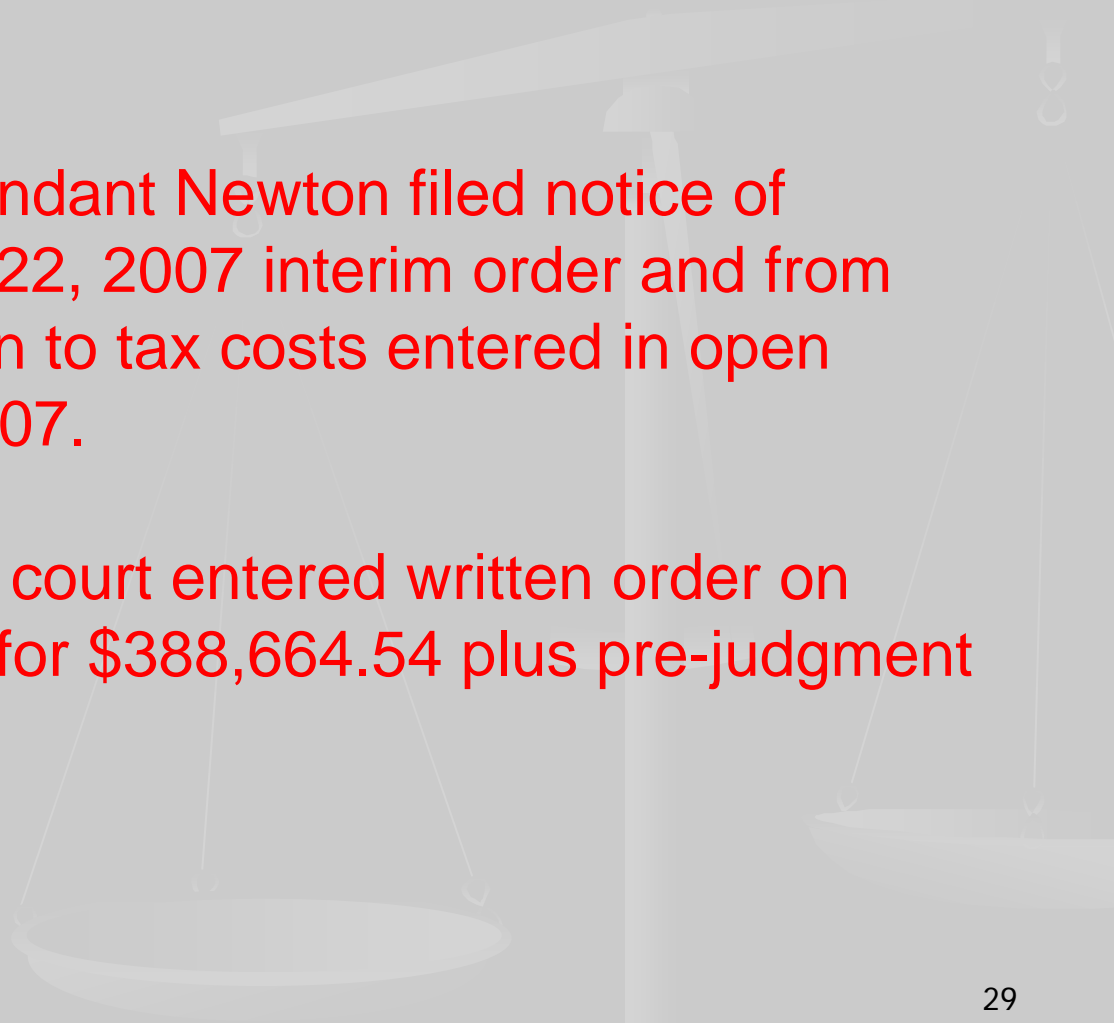


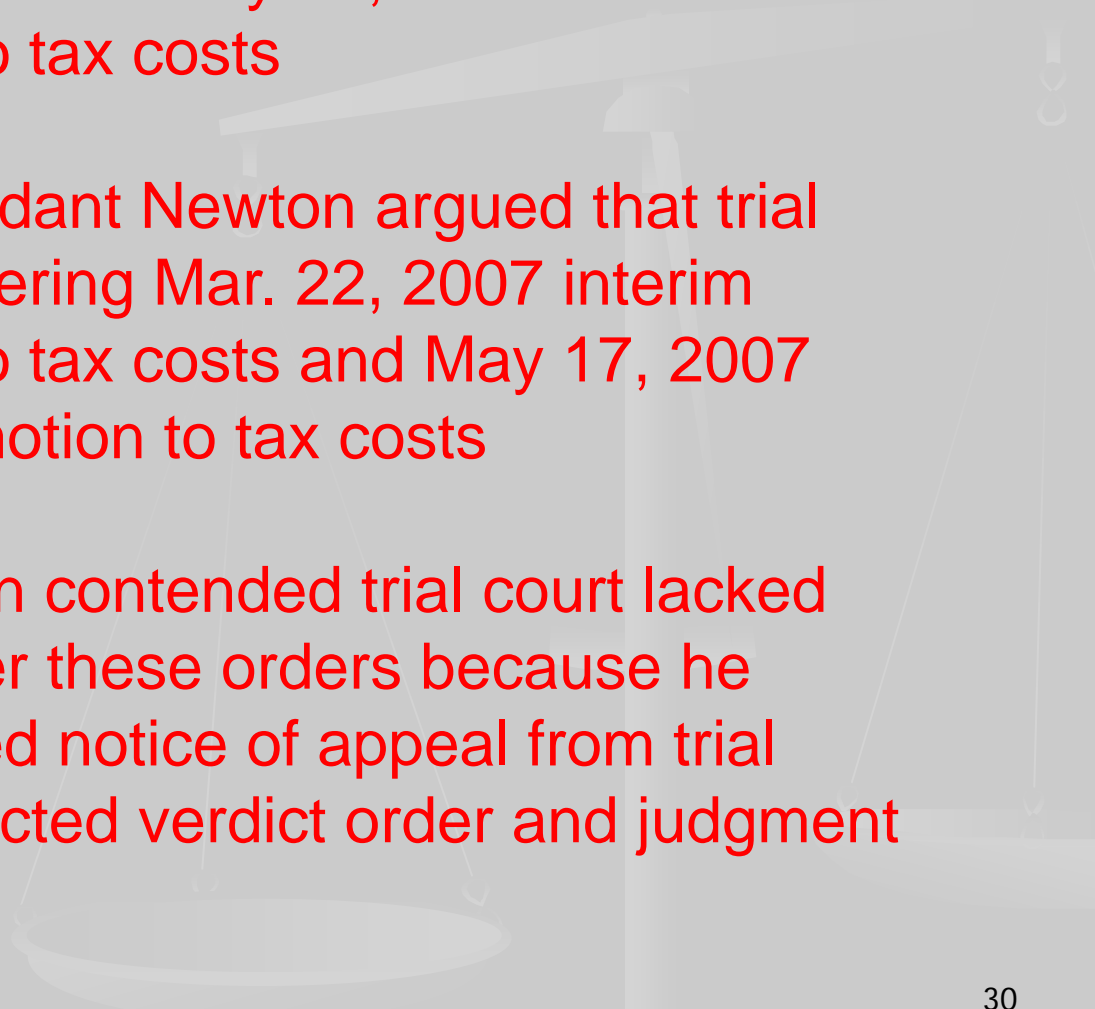
## At trial:

- 1) Trial court granted motions for directed verdict by some parties at the close of Plaintiffs'/Cross-Claimant Defendants' evidence;
- 2) Trial court submitted remaining issues to jury for verdicts, upon which trial court entered judgment which included taxing costs of action against individual defendant Jerry L. Newton, III

- 
- Dec. 29, 2006: Trial court entered directed verdict order and judgment upon jury verdict
  - Jan. 25, 2007: Defendant Newton filed notice of appeal as to trial court's orders
  - Feb. 15, 2007: Plaintiffs and Cross-Claimant Defendants filed motion seeking payment of costs and attorney's fees from Defendant Newton

- Feb. 28, 2007: Trial court conducted hearing on motion to tax costs
- Mar. 22, 2007: Trial court entered interim order following hearing on motion to tax costs, ruling that: (1) it had jurisdiction to hear motion; (2) the motion was not stayed under N.C.G.S. sec.1-294; and (3) the Feb. 28, 2007 hearing was adjourned and would reconvene on Apr. 17, 2007 for consideration of attorney's fees and other costs being sought

- 
- Apr. 17, 2007: Trial court resumed hearing on costs and attorney's fees, and entered final order in open court
  - Apr. 24, 2007: Defendant Newton filed notice of appeal from March 22, 2007 interim order and from final order on motion to tax costs entered in open court on Apr. 17, 2007.
  - May 17, 2007: Trial court entered written order on motion to tax costs for \$388,664.54 plus pre-judgment interest.

- 
- June 16, 2007: Defendant Newton filed notice of appeal from final order entered in open court on Apr. 17, 2007 and from May 17, 2007 written order on motion to tax costs
  - On appeal, Defendant Newton argued that trial court erred by entering Mar. 22, 2007 interim order on motion to tax costs and May 17, 2007 written order on motion to tax costs
  - Defendant Newton contended trial court lacked jurisdiction to enter these orders because he had previously filed notice of appeal from trial court's earlier directed verdict order and judgment

# Court of Appeals analysis in Babb:

- Cited N.C.G.S. sec. 1-294, including its closing provision “but the court below may proceed upon any other matter included in the action and **not affected by the judgment appealed from.**”

# Court of Appeals analysis in Babb (cont.):

- Quoted In re Will of Dunn, 129 N.C.App.321,500 S.E. 2d 99, disc rev den 348 N.C. 693, 511 S.E.2d 645 (1998): “The trial court’s decision to award costs and attorney’s fees was **not affected by the outcome of the judgment from which caveator appealed**;



# Court of Appeals analysis in **Babb** (cont.):

- [**Dunn** quote continued:] “therefore, the trial court could properly proceed to rule upon the petitions for costs and attorneys’ fees after notice of appeal had been filed and served.”

# Court of Appeals decision in Babb:

- “[T]he **judgment from** which Defendant Newton **appealed was not affected** by the interim order and final order on the motion to tax costs. Accordingly, the trial court retained jurisdiction to enter the challenged orders.”

# REMEMBER

- The **McClure** better practice to incorporate all rulings - -including any award of costs and attorney's fees - -into a single, written judgment.
- Although **Babb** allows bifurcation of the award of costs and attorney's fees from legal rulings under N.C.G.S. sec. 1-294, DON'T BIFURCATE AND RISK MISINTERPRETING WHAT IS "NOT AFFECTED BY THE JUDGMENT APPEALED FROM."





**ONE SINGLE, WRITTEN JUDGMENT!**