Organizing Evidence and Drafting Judgments

Judge Donna Stroud
May 17, 2013

The need:

An Order which will:

1. Accurately memorialize the court's ruling, including any required findings of fact, conclusions of law, and decretal provisions.
2. Provide a clear basis for appellate review.
3. Guide actions of the parties and avoid future conflict.
4. Provide a foundation for future modifications or contempt actions.

The challenge:

- No time
- No staff
- Ancient technology
- Dueling attorneys who don't know how to draft an order properly and/or are seeking to gain advantages (either on appeal or in the future) from the current order.
- *Pro se* cases

Some ways to meet the challenge:

- Remember that your order preparation begins as soon as the hearing begins (or before.)
- Use attorneys as much as possible but you must clearly direct them and hold them accountable.
- Use Forms and Templates
- Have a system to remind you of due dates
  - Orderstatuslist(1).xls
- Keep your notes and use timelines
- Get help from other judges and UNC SOG
- But always remember: **It's YOUR order.**

During the hearing….
At the start, know and make clear

What are we hearing?

Temporary or permanent? Prior orders to consider? Other related cases? Any pending motions? Service or notice issues? What is the burden of proof, and who has it?

Perhaps several motions, claims, etc. in case. Clarify each one that is being heard— perhaps some motions are abandoned, but have the parties make this clear on the record.

Hearing notes template.docx

Smith v. Barbour, 195 N.C.App. 244, 671 S.E.2d 578 (2009).

Importance of preliminary issues in the course of the trial and appeal.

- Trial– parties and scope of issues
- Appeal--
  - Issue of whether prior order (which was intended as permanent custody order) was really temporary so that mother's motion to change custody was governed by "best interests" standard rather than substantial change in circumstances
  - Standing of grandparents to intervene
  - Adequacy of findings to support:
    - Allocation of payment for psychological evaluation of child;
    - Notice as to grandparents' motion for attorney fees;
    - Attorney fee award and father's ability to pay

Findings of fact

- Know the statutory requirements and case law requirements.
  - Statutes
  - Bench Books
  - Attorneys
- Track the relevant statute (or case) in findings and conclusions, but always explain WHY.
- Use templates. Ex. Bollinger CS deviation analysis.docx
- Give more detail on areas of dispute in announcing your ruling.
- Do your work during the hearing— you won't have time later. (spreadsheets, timeline, fill in template on required FOF, note important exhibits)

Stump_ED_spreadsheet_for_order,_DSS_12-29.xls, Stump_Exhibit_List_rec[1] hearing complete 6-21.doc, Stump_Timeline_rec[1].doc

You *are* the scales of justice! Weigh the evidence!

Recitations of evidence are not findings!

If it starts like this, it's probably not a finding of fact:

- Mrs. Jones testified that ….
- The plaintiff presented evidence that showed…
- There is a dispute about …
- The parties disagree about…
- Defendants contended that …
- Plaintiff claims that …, while defendant claims that …..

You are the judge!! Turn it into a finding:

- ~~Mrs. Jones testified that~~ The car was red.
- The plaintiff presented evidence that showed… *and the court finds that ….*
- There is a dispute about …. *The court finds that plaintiff has not met his burden of proof on this issue.*
- The parties disagree about…. *The court finds that …*
- Defendants contended that … *but the court finds that the evidence does not support defendant's claim.*
- Plaintiff claims that …, while defendant claims that ….. *The court finds that the greater weight of the evidence supports plaintiff's claim*.

Practical tips:

- Use templates and spreadsheets.
  - Ex. FA analysis with PSS calculation form.xls
- Give detail on areas of dispute in announcing your ruling.
- Beware of games with findings by the parties.
- Do your work during the hearing— you won't have time later. (spreadsheets, timeline, fill in template on required FOFs, note important exhibits) Spann v. Cooper notes 03 CVD 8555.docx

Carpenter v. Carpenter, COA 12-280, filed 5 Feb. 2013.

The order addresses other disputed issues, such as the residential situations of each party and their financial provision for George, in similar fashion, without relating the findings to George's needs or best interest. It is difficult to discern the meaning of some of the findings, or at least how the findings relate to the child's welfare. For example, finding 79 states that "Jessie Wayne Haynes is a 22 year old friend of the Plaintiff. Traci Sigmon is a 25 year old friend of the Plaintiff. Both are males." There is no other mention of either of these persons in the order, so we do not know why they are mentioned or what they have to do with George. Finding 72 states that "[George] has returned from visitation with his father with muddy shoes and dirty clothes." We are unable to discern if this is a positive finding, as it may indicate that plaintiff has been engaging in healthy outdoor activities with his son, or if it is negative, as it may indicate that plaintiff has failed to properly address the child's hygiene issues. Perhaps it is both.

At the end of the hearing… How to Announce the ruling

- **On the record, after hearing (Rendition)**
  - Legal? Of course. But **not** required….
  - Practical? Yes, but only if you're sure of the ruling. And how much will they remember? How much will they argue about what your ruling really was? How much detail can you give? Make sure the written order matches what you said, unless you changed your mind, and make sure everyone knows if you did and why.

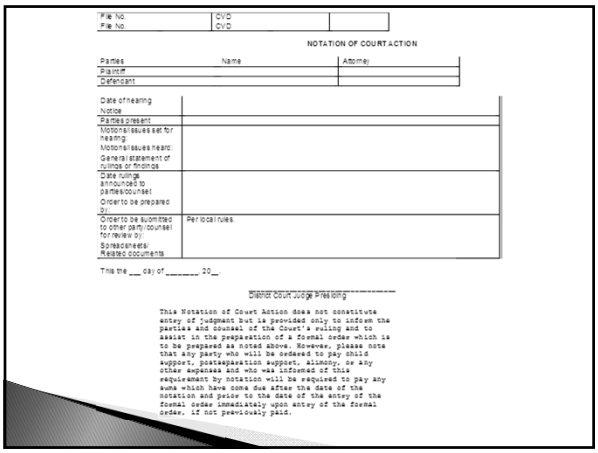
"Even a fool when he holds his peace is considered wise; when he closes his lips he is esteemed a man of understanding."
Proverbs 17:28 (AMP)

How to Announce the ruling

- **Take case under advisement**

Announce ruling later, either in open court or by written order.

  - Legal? Yes
  - Practical? Yes, but keep up with what you have under advisement and do ruling in a timely manner. (Notation, set calendar date for ruling, etc.) Orderstatuslist(1).xls
    - Be careful with communications re: order.
    - Be careful with *nunc pro tunc* orders!
- Notation of Court Action (Avoid dueling emails and attorney conferences.) Notation of Court Action form.wpd



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NOTATION OF COURT ACTION

Parties	Name	Attorney
Plaintiff		
Defendant		

Date of hearing: Notice:	
Parties present:	
Motions/issues set for hearing: Motions/issues heard: General statement of rulings or findings:	
Date rulings announced to parties/counsel: Order to be prepared by:	
Order to be submitted to other party/counsel for review by: Scheduled events: Related documents:	Per local rules

This the ___ day of _____ 20__

District Court Judge Presiding

This Notation of Court Action does not constitute entry of judgment but is provided only to inform the parties and counsel of the Court's ruling and to assist in the preparation of a formal order which is to be prepared as noted above. However, please note that any party who will be ordered to pay child support, postseparation support, alimony, or any other expenses and who was informed of this requirement by notation will be required to pay any sums which have come due after the date of the notation and prior to the date of the entry of the formal order immediately upon entry of the formal order, if not previously paid.

Preparing the order

- Use the attorneys but don't let them use drafting the order for their own ends at the expense of a proper order.
- Give the attorneys a specific deadline and method of presenting draft order to other side and to court and hold them to it. Set a deadline if local rules don't; even if they do, reiterate the deadline from the local rules. In case of drafting impasse, do your job. The parties will blame you for the delay, not their own attorneys.
- Resolving disputes— use of notes and notation
- Anticipate obvious potential problems if you can (based on the facts) in orders and address them. http://ourfamilywizard.com/ofw/index.cfm/courts/
- Forms are really nice BUT YOU DO HAVE TO READ THEM AND FILL THEM OUT CORRECTLY. Use AOC forms when you can and make/find forms for orders you have to do often. Child Custody and Visitation Order 1-29.docx
- Deal with changes that are likely to occur to avoid need for motions to amend (ex. Wake County changes in schools and schedules)

Delay in entering orders

Delay increases risk of problems under Canon 3, Code of Judicial Conduct:

(4) A judge should accord to every person who is legally interested in a proceeding, or the person's lawyer, full right to be heard according to law, and, except as authorized by law, *neither knowingly initiate nor knowingly consider ex parte or other communications concerning a pending proceeding*. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge.

(5) A judge should *dispose promptly* of the business of the court.

Delay in entering orders

Most frequent complaints to Judicial Standards Commission about entry of orders:

1. Delay in entry of order- How long is too long?

2. Ex Parte Communications regarding orders
Make sure communications are simultaneous with both sides. Never call or email (or talk in the hallway to) one attorney unless you include the other in this conversation.

Plomaritis v. Plomaritis, 730 S.E.2d 784 (2012)

"It is a truism that justice delayed is frequently justice denied." Rice v. Rigsby, 259 N.C. 506, 519, 131 S.E. 2d 469,478 (1963).The complaint in this matter was filed in 2003, the equitable distribution trial was held in 2006, and, by this opinion, we unfortunately must reverse the equitable distribution order and remand for a new trial. It is particularly troubling that this case has been so protracted as equitable distribution is one of the few types of claims which has time goals for completion of various steps of the case set forth by statute. See N.C. Gen.Stat. § 50-21 (2006).

Plomaritis v. Plomaritis, 730 S.E.2d 784 (2012)

Partial timeline:

11-30-03	Marital home destroyed by fire
12-4-03	Plaintiff Wife files complaint with ED claim
3-15-04	Defendant Husband files counterclaim for ED
2005	Various orders regarding ED issues
10-19-06	ED Pretrial order filed with numerous stipulations by parties as to values, classifications, and distribution of items of property and debts and limiting issues for trial
10-19 to 10-27-06	ED trial- taken under advisement
4-9-08	Trial court *ex mero motu* set aside the ED PTO
4-14-08	ED judgment filed
4-21-08	D motion for reconsideration and to amend order setting aside PTO
4-24-08	D motion for mistrial, new trial and reconsideration of ED (Plaintiff is now prime suspect in arson of marital home.)
5-9-08	Order staying ED order pending disposition of motions
6-29-09	Order granting D's motion for leave to amend original motion for reconsideration and D's Amended motion for reconsideration
10-28-09	Hearing on D's motions
4-12-10	Order with partial ruling
4-30-10	Order denying D's motions in part and allowing in part and amending some portions of ED order
5-10-10	D's motion for reconsideration of 4-30-10 order
6-30-10	Hearing on last motion
11-30-10	Order entered allowing D's motion in part and denying in part
12-28-10	D's Notice of appeal to multiple orders

Plomaritis v. Plomaritis, 730 S.E.2d 784 (2012)

On Appeal:

1. Trial court erred in setting aside PTO with stipulations after trial and without notice to parties– Reversed ED order and new trial granted
2. Although decision was based upon setting aside of PTO, Court noted that 18 month delay between ED trial and entry of ED order was prejudicial, based upon *Wall v. Wall*:

"We recognize there is inevitably some passage of time between the close of evidence in an equitable distribution case and the entry of judgment. That is particularly true in a lengthy, complicated matter such as the case before us. Competent counsel for the parties carried out extensive discovery, submitted numerous legal briefs and responded to the briefs filed by their opponents.

In many cases, a delay in the entry of judgment for 30 or 60 days following trial would not be prejudicial because there would be little or no change in the situation of the parties or the values assigned to the items of property. In this case, however, there was a nineteen-month delay between the date of trial and the date of disposition. This was more than a de minimis delay, and requires that the trial court enter a new distribution order on remand. Where there is such an extensive delay, even though it be due to factors beyond the trial court's control, we believe it would be consistent with the goals of the Equitable Distribution Act that the trial court allow the parties to offer additional evidence as to any substantial changes in their respective conditions or post-trial changes, if any, in the value of items of marital property." 140 N.C.App. 303, 313-14, 536 S.E.2d 647, 654 (2000).

Nunc pro tunc…

- It sounds official!
- It's Latin!!
- It even sounds really smart!!!
- Why not???

Nunc pro tunc order may be entered IF:

1. You have actually made and announced (rendered) the judgment (in sufficient detail) on the date that the order says but it has not been formally entered as a written order yet, AND
2. No "intervening rights" will be prejudiced by the late entry of the order.

"Nunc pro tunc" does not magically change the past.

"Nunc pro tunc" is defined as "now for then." Black's Law Dictionary 1174 (9th ed.2009). It signifies " 'a thing is now done which should have been done on the specified date.'...

Nunc pro tunc orders are allowed only when "a judgment has been actually rendered, or decree signed, but not entered on the record, in consequence of accident or mistake or the neglect of the clerk ... provided [that] the fact of its rendition is satisfactorily established and no intervening rights are prejudiced."...

See also Rockingham Cnty. Dep't of Soc. Servs. v. Tate, 202 N.C.App. 747, 751, 689 S.E.2d 913, 916 (2010) (holding that when no substantive ruling was made at hearing and written order was prepared long after hearing, "[e]ntry of the order nunc pro tunc does not correct the defect" because "[w]hat the court did not do then ... cannot be done now ... simply by use of these words")

Hill v. Hill, 105 N.C.App. 334, 340, 413 S.E.2d 570, 575 (1992) (holding that "like any other court order, an alimony order cannot be ordered (nunc pro tunc) to take effect on a date prior to the date actually entered, unless it was decreed or signed and not entered due to mistake and provided that no prejudice has arisen"), rev'd on other grounds, 335 N.C. 140, 435 S.E.2d 766 (1993).

Whitworth v. Whitworth 731 S.E.2d 707 (N.C. App) 2012.

What the judge said on 14 August 2007...

The trial judge, after hearing oral argument, announced:

> I don't see any way for the company not to be a part of this. It's just simply to pass their opinion as to whether it's going to affect the company or not...
>
> So Mr. Vannoy, if you'll do an Order for me—we'll get on to the Restraining Order today, but if you'll do an Order for you to intervene, I'll allow you to at least take part in what discussions I think you all were already in the middle of when I called you in here. Is that okay?
>
> MR. VANNOY: Yes, I'll draw that Order.

Mr. Vannoy, however, apparently failed to draft this order.

Whitworth v. Whitworth 731 S.E.2d 707 (N.C. App) 2012.

3 years later... the order appears.

"In the meantime, on 12 August 2010, an order was filed in this action purportedly nunc pro tunc to 14 August 2007 allowing Window World's motion to intervene. According to Mr. Vannoy's testimony at the hearing below, he drafted the order, handed it up to the trial judge in a regular session of court, and asked her to sign and enter it. Mr. Vannoy acknowledged that prior to submitting the order to the trial judge, he did not provide a copy of it to Marie's or Leon's counsel. Mr. Vannoy also admitted that he did not serve Marie or Leon with a copy of the signed order."

Whitworth v. Whitworth 731 S.E.2d 707 (N.C. App) 2012.

What the order said…

The 12 August 2010 intervention order included a finding of fact that "Window World, Inc. is a closely held corporation owned in part by Leon, Marie, and Todd Whitworth." This finding of fact was contrary to findings in the 6 November 2007 consent order. The order also included the following conclusions of law:

1. This Court has jurisdiction over the subject matter and the parties to this action.

2. Window World, Inc. as Intervenor has an interest in the property which is the subject matter of this action.

3. The rights, obligations, and interests of Window World, Inc. will be impaired and impeded if it is not allowed to intervene in this action.

4. Since the parties to the underlying action are now adversaries, they cannot adequately represent the interests of Window World, Inc.

5. Window World, Inc. should be allowed to intervene as a matter of right in this matter.

Whitworth v. Whitworth 731 S.E.2d 707 (N.C. App) 2012.

Result: Reversed

The Rendition was not detailed enough to support the later order.

1. No oral findings of fact

2. No legal basis for allowing intervention was stated and judge did not say how much Window World would be allowed to participate in the case.

3. There is "no evidence and the trial court made no finding regarding why no written order was signed in 2007. It appears from Mr. Vannoy's testimony that he simply never got around to submitting the order to the trial judge for her signature."

"It is apparent that the trial court expected the details of the order granting intervention to be fleshed out in a written order. This non-specific ruling is not a sufficient rendering to support the entry three years later of a detailed written order nunc pro tunc."

Whitworth v. Whitworth 731 S.E.2d 707 (N.C. App) 2012.

Shortcuts? Use with caution.

- Judicial notice

  What can be judicially noticed? What is the legal basis for the notice? Standard of proof?
- Incorporation by reference is useful but not a substitute for findings.
- Déjà vu?

(But I already heard (and decided) this case!)

Hensey v. Hennessy, 201 N.C.App. 56, 685 S.E.2d 541(2009)

The Judge's memory is not evidence.

At the 14 April 2008 hearing on defendant's motion, inter alia, for a new trial, **the trial judge stated that he had presided over the defendant's trial in criminal court** and that at that trial

> we weren't beyond a reasonable doubt which is a higher standard in criminal court but in civil court but that we would be to a preponderance of the evidence. That's why I indicated at that time to the defense attorney that it would probably be appropriate that I hear the civil case so that I can enter the Order having already used a lot of Court time hearing the criminal case and indicated at that time that I would more than likely be inclined to enter that Order.

Although we appreciate the trial court's concern for judicial economy, a judge's own personal memory is not evidence. The trial court does not have authority to issue an order based solely upon the court's own personal memory of another entirely separate proceeding, and it should be obvious that the evidence which must "be taken orally in open court" must be taken in the case which is at bar, not in a separate case which was tried before the same judge. [5] Appellate review of the sufficiency of the evidence to support the trial court's findings of fact is impossible where the evidence is contained only in the trial judge's memory.

FN 5. Certainly the transcript of testimony from the criminal trial, assuming that one existed, could have been used as evidence if the transcript had been properly offered and admitted into evidence at the DVPO hearing.

Rule 201. Judicial notice of adjudicative facts

(a) Scope of rule.--This rule governs only judicial notice of adjudicative facts.

(b) Kinds of facts.--A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When discretionary.--A court may take judicial notice, whether requested or not.

(d) When mandatory.--A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to be heard.--In a trial court, a party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of taking notice.--Judicial notice may be taken at any stage of the proceeding.

In re W.L.M., 181 N.C.App. 518, 640 S.E.2d 439 (2007).

"[T]his Court repeatedly has held that a trial court may take judicial notice of earlier proceedings in the same case. Moreover, the trial court " 'is presumed to have disregarded any incompetent evidence.' "

But…..

1st Trip to COA: Reversed and Remanded

Crocker v. Crocker, 190 N.C.App. 165, 660 S.E.2d 212 (2008)

[W]ife argues that the trial court erred in entering its order of permanent alimony where it failed to make required findings of fact pursuant to N.C.G.S. § 50-16.3A. **The court purported to make extensive findings of fact by taking judicial notice of the postseparation support order, the consent judgment regarding equitable distribution, the child custody and support order, and various wage affidavits and amended alimony affidavits and incorporating by reference the facts in these documents.** As we previously noted, when determining an alimony award, "[t]he trial court must at least make findings sufficiently specific to indicate that the trial judge properly considered each of the [statutory] factors." Skamarak, 81 N.C.App. at 128, 343 S.E.2d at 561. **The general incorporation of all findings from other court documents is not sufficiently specific to demonstrate whether the trial judge properly considered the statutory factors for awarding alimony.** Therefore, these findings of fact cannot be considered in determining whether the court's findings of fact are adequate under N.C.G.S. § 50-16.3A

…

Orders for postseparation support and alimony are reversed and remanded for additional findings.

2nd trip to COA

Crocker v. Crocker, 206 N.C.App. 596, 698 S.E.2d 768 (2010) Unpublished

"As our Supreme Court has explained:

Effective appellate review of an order entered by a trial court sitting without a jury is largely dependent upon the specificity by which the order's rationale is articulated. Evidence must support findings; findings must support conclusions; conclusions must support the judgment. Each step of the progression must be taken by the trial judge, in logical sequence; each link in the chain of reasoning must appear in the order itself. Where there is a gap, it cannot be determined on appeal whether the trial court correctly exercised its function to find the facts and apply the law thereto. Coble v. Coble, 300 N.C. 708, 714, 268 S.E.2d 185, 190 (1980)."

2nd trip to COA: Reversed and remanded.

"Crocker I holds, instead, that a trial court cannot abdicate its responsibility for making specific statutorily-required findings of fact in a particular proceeding by incorporating by reference a prior order in lieu of making its own findings of fact." …

"When the trial court merely incorporated by reference other orders wholesale, this Court could not determine that the trial court had considered those factors even if there were, within the separate prior orders, findings of fact pertinent to those factors."

"On remand, as to the amended postseparation support order, the trial court must make additional findings setting out its basis for the calculation of plaintiff's reasonable monthly expenses. With respect to the amended alimony order, the trial court must make additional findings (1) regarding its treatment of the KinderCorp rental income and (2) explaining the reason for the duration and manner of payment of the alimony award."

Forms

In using form orders, make a point of saying what you believe actually happened in the space allowed for that purpose.

Make sure that there is competent evidence to support the finding. Burress v. Burress, 195 N.C.App. 447, 672 S.E.2d 732 (2009)

The handwritten (or typed) findings you add to the form should not conflict with the printed language of the form. In re B.E., 186 N.C.App. 656, 652 S.E.2d 344 (2007)

In re B.E. 186 N.C.App. 656, 652 S.E.2d 344 (2007)

Juvenile next contends that the trial court erred when it adjudicated him delinquent by clear, cogent and convincing evidence, instead of beyond a reasonable doubt. We agree.

The adjudication order contains the following relevant finding:

> The following facts have been proven beyond a reasonable doubt:
>
> 1. That on or about July 15, 2005 the juvenile, [B.E.] did unlawfully and willfully commit indecent liberties between children against [the victim], a child who was at least three (3) years younger than the juvenile, being an offense in violation of G.S. 14–202.2, by clear, cogent & convincing evidence.

The underlined portion of the above finding is the pre-printed wording of a standard form Juvenile Adjudication Order (Delinquent), AOC-J-460, New 7/99. The remainder of the finding was typed into a blank on the form.

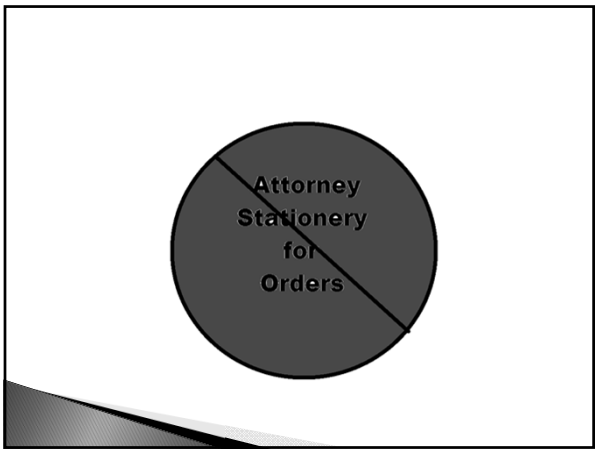
Burress v. Burress, 195 N.C.App. 447, 672 S.E.2d 732 (2009)

"Finally, regarding any alleged domestic violence between defendant and plaintiff, the trial court made an additional handwritten finding that defendant "committed allegations in paragraph 4 of the Complaint, which are hereby incorporated by reference." Paragraph 4 of plaintiff's complaint alleged "open DSS investigation as of 2-13-08 on Jacob Ware and Daniel Burress. There has been previous domestic violence between Gary and Debra where Gary was the perpetrator."

BUT:

Only evidence of sexual abuse was of ongoing DSS investigation and one hearsay statement.

Evidence showed no prior DV proceeding had ever been filed.



Attorney Stationery

We note that Judge Webb's order was printed, signed and filed on the ruled stationery of Habitat's trial attorney. Without deciding whether this practice violates either the Code of Judicial Conduct or the Revised Rules of Professional Conduct, **we strongly discourage lawyers from submitting or judges from signing orders printed on attorneys' ruled stationery bearing the name of the law firm.** Such orders could call into question the impartiality of the trial court. In re TMH, 186 N.C.App. 451, 652 S.E.2d 1 (2007).

Habitat for Humanity of Moore County, Inc. v. Board of Com'rs of the Town of Pinebluff,187 N.C.App. 764, 653 S.E.2d 886 (2007)