PLUNKETT COONEY

08-CV-137

January 26. 2009

VIA E-MAIL AND U.S. MAIL

Honorable Mark R. Kravitz
Richard C. Lee United States Courthouse
141 Church St.
New Haven, CT 06510
mark_ kravitz@ctd uscourts.gov

Re: Federal Rule Civil Procedure 56

Dear Judge Kravitz.

Thank you for the opportunity to present my thoughts regarding proposed amendments to Federal Rule of Civil Procedure 56 and to summarize the testimony I plan to present at the hearing next Monday, February 2, 2009 in San Francisco.

I write as an appellate lawyer who practices in both state and federal courts on behalf of individuals, local governments, and corporations. I began my career as a law clerk to Associate Justice Patricia J. Boyle of the Michigan Supreme Court, and have practiced as an appellate lawyer at Plunkett Cooney since then. In that capacity, I have handled appeals both as appellant and appellee from trial court orders granting and denying summary judgment. Since the Michigan rule for summary judgment (called summary disposition in our state) is modeled on the language of Federal Rule of Civil Procedure 56 before the Style Project, I have experience with the rule when it is enforced as mandatory as well as when it is treated as discretionary. In addition, because my clients include plaintiffs and defendants, I have experience with the rule as it applies to both.

Federal Rule of Civil Procedure 56 provides a critically important procedural vehicle for ending cases or eliminating defenses that are without merit early in the process. The recent amendment to the rule, made as part of the Style Project, substituted "should grant" for "shall grant." This change altered the meaning of the rule and changed the standard in fundamental ways I urge the Committee to change the wording to employ "must" or to restore "shall" to ensure the continued viability of summary judgment as a tool to secure the just and speedy outcome of litigation.

Prior to the change, Federal Rule of Civil Procedure 56 required district courts to grant a properly supported motion for summary judgment. The language in the rule evidenced this mandate in several ways. First, the drafters of the rule employed "shall," a word which both in the legal community and in common parlance conveys a mandatory directive, not a mere suggestion or hope Second, the drafters of the rule indicated that the court was obligated to

grant the motion on condition that "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." F.R.C P. 56. If, as the rule states, no factual dispute exists and "the movant is *entitled* to judgment as a matter of law," then a trial court must lack discretion under the rule of law to deny the motion

If there was doubt about the mandatory nature of the rule, a series of decisions from the United States Supreme Court should have put it to rest. In *Celotex Corp. v. Catrett*, 477 U S. 317, 323-24, 106 S.Ct 2548, 91 L.Ed.2d 265 (1986), the Court taught that once the moving party has sufficiently informed the district court of the basis for its motion, the burden shifts to the non-moving party to demonstrate why summary judgment would be inappropriate, and the opposing party must do more than simply show that there is some metaphysical doubt as to the material facts. *Id.* See also *Matsushita Elec. Indus. Co. v Zenith Radio Corp.*, 475 U.S. 574, 586-88, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The mere existence of a scintilla of evidence in support of the moving party's position is not sufficient; rather, the moving party must come forward with affirmative evidence upon which a rational jury could find for that party See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 252, 256-57, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). This series of cases made clear that a litigant's right to summary judgment amounts to a legal entitlement, and that the trial court is bound to grant the motion if the opposing party fails to create a fact question requiring trial or the litigant offers an affidavit showing that further discovery is needed to obtain evidence necessary to oppose the motion.

Federal Rule of Civil Procedure 56 offers a marvelous vehicle for ensuring that weak claims and defenses are dismissed before the litigants and courts are forced to expend unnecessary resources in discovery and trial. The rule protects a litigant's right to trial by allowing the motion to be opposed with affidavits or other evidentiary materials showing disputed facts. And if the party is unable to respond because affidavits are unavailable, the rule provides for a showing regarding the reasons for being unable to present facts creating a dispute and allows the court to deny the motion or grant additional time for necessary discovery. At the same time, the rule permits a litigant to put his opponent to the test, and to end the litigation where the opponent lacks support for a claim or defense, and is unable to demonstrate to the judge the reasons for the lack of support and the potential to overcome them with further steps.

In Michigan, the moving party must specifically identify the issues as to which no genuine factual dispute exists. *Maiden v. Rozwood*, 461 Mich. 109, 120; 597 N.W.2d 817 (1999) The court must then review all of the pleadings, depositions, affidavits, and documentary evidence in a light most favorable to the non-moving party. *Smith v Globe Life Ins Co.*, 460 Mich. 446, 455; 597 N.W.2d 28 (1999). The party opposing the motion may not rest on its pleadings and allegations, but must, by affidavits or other offers of proof, set forth specific facts showing that there is a genuine issue of fact. MCR 2.116(G)(4). Summary

disposition is appropriate where the non-moving party's proffered evidence fails to establish a genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Maiden, supra* at 120, 597 N.W.2d 817. Since the Michigan Supreme Court issued its decisions in *Maiden* and *Smith*, summary disposition as a tool for litigants in Michigan has become more useful. Lawyers can offer better advice concerning whether to bring such a motion, and the outcome is more predictable. In those cases in which a claim or defense is weak, litigants can bring properly supported motions, and obtain relief. This has the added benefit of avoiding trial in those cases in which the claims are weak, and of simplifying trials by eliminating many claims, in those in which partial summary disposition is appropriate

The utility of this tool is severely hampered when the rule permits unbridled discretion to deny summary judgment as to a claim or defense even though the moving party has properly supported the motion and the opposing party has failed to come forward with affidavits or other proofs necessary to create a fact question Allowing for such discretion creates a series of problems for the civil justice system.

First, allowing unbridled discretion (even with a precatory note suggesting the hope that motions will be granted where appropriate) cannot help but undermine the confidence of litigants in the civil justice system and its ability to effectuate the rule of law. A right to exercise discretion, when the rule offers no standard for its exercise, may readily be seen as arbitrary.

Second, the costs of litigation continue to increase. Bearing these costs is particularly difficult for small businesses, individuals, and local governments. Some of my local government clients are rural villages or townships, with no paid staff, and only a part-time legislative body comprised mostly of area farmers. These small entities struggle to find funds to pay the costs of defending against lawsuits. Their difficulties in managing litigation costs might not garner much sympathy if a well-founded lawsuit has been filed, but civil rights suits are regularly filed without factual or legal support. And it is vitally important that the baseless suits be dismissed as soon as possible.

Third, summary judgment plays an important role in simplifying those cases which do proceed through a trial and appeal. Complaints are all-too-frequently filed listing multiple theories and claims against multiple defendants. Such lawsuits are more complex and expensive, both in terms of discovery and trial. They tend to be more difficult to present to a jury, often requiring special verdict forms that ask scores of questions and include decision-trees of great length. In some complex cases, that is necessary and must be managed by the court and lawyers But in many cases, after discovery has proceeded, it becomes apparent that only some of the claims against some of the defendants require a trial. Rule 56 offers an important mechanism for the litigants to simplify the trial by disposing of meritless claims and defenses by motion. It is especially important in these complex cases, to ensure that the parties spend the resources to file

the motion, and that the trial judge spend the time to carefully study the motions and dispose of the claims and defenses as to which no genuine issue of material fact remains.

Fourth, summary judgment offers a key procedural mechanism that benefits both plaintiffs and defendants by allowing each to put the opposing side to the test to see if a trial is necessary While some critics of summary judgment decry the "vanishing trial," in fact, the rule ensures that litigants will continue to use the federal courts as an efficient, just, and speedy dispute resolution mechanism. It affords both sides the opportunity to protect themselves against meritless defenses or meritless claims. And it facilitates both sides in their efforts to simplify cases that will be tried by paring away the inessential and leaving for the jury's consideration the factual disputes that require their attention.

I hope that these comments are helpful in considering the important matters before the committee. And I look forward to discussing my thoughts with you in person next week at the hearing.

Very truly yours,

PLUNKETT COONEY

MARY MASSARON ROSS
Direct Dial: (313) 983-4801
E-mail: mmassaron@plunkettcooney.com

MMR/mer
cc: Rules_Comments@ao.uscourts.gov
john_rabiej@ao.uscourts.gov
Hon. Lee H. Rosenthal (lee_rosenthal@txs.uscourts.gov)
Hon. Michael M. Baylson (Michael_Baylson@paed.uscourts.gov)
Prof. Daniel R. Coquillette (coquille@bc.edu)
Prof. Edward H. Cooper (coopere@umich.edu)