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January 7, 2009

Via e-mail Transmission John_Rabiej@ao.uscourts.gov

Mr. John K. Rabiej
Administrative Office of the United States Courts
Washington, D.C. 20544

Re: Summary of Anticipated Testimony on Proposed
Amendments to Civil Rules 26 and 56

Dear Mr. Rabiej,

I am grateful for the opportunity to address the Advisory Committee on Civil Rules. I speak on behalf of the Texas Association of Defense Counsel, in my capacity as Executive Vice President. TADC is an association of civil trial, personal injury defense and commercial litigation attorneys. Our membership, comprised of approximately 2000 members, practice in both federal and state courts, and both inside and outside the State of Texas. As an organization, the TADC is devoted to the just and efficient administration of civil justice. I will have the honor of serving as President of the TADC in 2011. I have been in private practice in San Antonio, Texas, my home town, for approximately 27 years.

The focus of my testimony will be Rule 56 and, specifically, whether to retain the current language carrying forward the present Rule 56 language that a court "should" grant a summary judgment when the record shows that there is no genuine issue of fact and that the movant is entitled to judgment as a matter of law. I wish to advise the Committee, however, that the TADC generally supports the adoption of the other proposed amendments to Rule 56 and the set of amendments to Rule 26. The position of the TADC is well represented and has been well articulated by the comments and testimony of others, including, but not necessarily limited to, the International Association of Defense Counsel, the Lawyers for Civil Justice and the U. S. Chamber Institute for Legal Reform, the DRI, the American College of Trial Lawyers and the Hon. Frank J. Easterbrook.

We respectfully suggest that proposed Rule 56(a) should be revised to mandate that a court "must" rather than "should" grant summary judgment if there is no genuine dispute as to any material fact and the record demonstrates that the movant is entitled to judgment as a matter of law. As the Committee knows, for approximately seventy years Rule 56(c) stated that "the judgment sought *shall* be rendered forthwith . . ." In 2007, Style Rule 56(c) translated "shall" as "should". According to the Report of the Advisory Committee on Civil Rules, this was done in

order to preserve the meaning that “shall” had acquired in practice. A review of the Report of the Advisory Committee on Civil Rules and the Comments submitted to date demonstrates disagreement on this issue. The Report of the Advisory Committee on Civil Rules cites *Kennedy v Silas Mason Co*, secondary authority (Wright, Miller & Kane, Federal Practice & Procedure Civil 3rd § 2728) and decisions of lower courts cited in the secondary authority as authority for the proposition that the court has discretion to deny summary judgment, even when there is no genuine issue as to any material fact. Comments to the Civil Rules Advisory Committee by the Lawyers for Civil Justice and the U. S. Chamber Institute for Legal Reform, on the other hand, argue with some conviction that the case law in this area does not support the proposition that a district court has discretion to deny a well-founded and timely motion for summary judgment and that, despite dicta by lower courts to the contrary, the granting of a timely and well-founded motion is mandated as stated in *Celatex Corp v Catrett*, 477 U.S. 317 (1986), *Beard v Banks*, 548 U.S. 521 (2006), and by a number of lower courts.

I respectfully suggest, as a matter of common usage and common sense, that “should” has never meant “shall,” and in the absence of binding and persuasive court authority use of the term “should” will render the rule both under-utilized and ineffective. Moreover, it is contrary to the scope and purpose of the Federal Rules of Civil Procedure. With regard to this rule, the need for clear guidance, more certainty and more clarity is palpable; the need is underscored, I believe, by my recent experience here in the Western District.

Civil Action No. SA-05-CA-0622, styled *Linda Guardiola and Dolores Guardiola, as next friend of Olivia Guardiola, Melissa Guardiola, and Carlos Guardiola, III v Essex Sun Park Partners, Inc., Essex Sun Park Partners, LP, Essex Sun Park Portfolio, LP, Northland Investment Corporation, Individually and d/b/a Essex Management Company, and Frank Perez*, arose out of the shooting of Plaintiffs’ decedent, Carlos Guardiola, by the Co-Defendant, Bexar County Deputy Sheriff Officer, Frank Perez, at the Sun Park Apartments during the early morning hours of August 12, 2002. At the time of the shooting, Officer Perez was a licensed peace officer by the State of Texas, as well as a Bexar County Deputy Sheriff. Officer Perez was also a resident of the apartment complex, and while off duty also worked as a courtesy officer there. On the date of the incident, at approximately 2:40 a.m., Deputy Perez heard the squealing of tires and observed a car driving the wrong way on a one-way apartment complex roadway, coming from the direction of the exit gate of the gated community, and without any headlights on. Officer Perez observed the car park, and then saw Carlos Guardiola exit the car with a large adult aluminum baseball bat. Officer Perez immediately became suspicious, particularly since there had been a series of auto burglaries in the past few months at the complex, and two nights before, there had been a vehicle break-in where the back window was smashed out (the car belonged to Carlos Guardiola’s estranged wife). Officer Perez put on his Bexar County Sheriff’s uniform, including his BDU pants, blue Sheriff’s shirt with Sheriff’s emblem on the front and “SHERIFF” in large yellow letters on the back, full nylon duty belt, badge, duty weapon, ASP baton, magazine pouch, radio, radio holder, flashlight and spray. He had observed Guardiola run from his car toward Buildings 7 and 8. While Officer Perez was putting his uniform on,

Guardiola ran to his estranged wife's apartment and broke her bedroom window using the baseball bat. As Officer Perez came down the steps from his apartment he saw Guardiola headed back to his car, and yelled:

SHERIFF'S DEPARTMENT! SHERIFF'S DEPARTMENT! SHERIFF'S
DEPARTMENT! SHERIFF'S DEPARTMENT! STOP WHERE YOU ARE!
PUT THE BAT DOWN! POLICE!

Guardiola looked directly at Officer Perez and ignored his orders, and continued to move toward his car. He had the baseball bat raised over his right shoulder in an aggressive posture as Officer Perez approached. Officer Perez continued to approach him with his gun drawn and continued yelling loudly:

SHERIFF'S DEPARTMENT! STOP! DROP THE WEAPON! AND GET
DOWN ON THE GROUND!

This was yelled three or four times loudly and clearly. Guardiola continued to disobey the Officer's orders, and continued to move toward the left driver's door. Officer Perez continued to approach, and continued to identify himself as a peace officer. Guardiola opened his car door and got in, but did not shut the car door. At this point Officer Perez yelled: "EXIT THE VEHICLE! GET FACE DOWN ON THE FLOOR!" Guardiola continued to disregard the orders of the Officer. Officer Perez at this time suspected a crime had been committed and was following proper procedure of a licensed peace officer and Bexar County Deputy Sheriff. Officer Perez continued to yell. "SHERIFF'S OFFICE! GET OUT OF THE VEHICLE! GET OUT OF THE VEHICLE!" Guardiola continued to ignore the Officer and then, looking up at Officer Perez, said "Shoot me." At this point the baseball bat was on the floorboard of the passenger's side with its handle sticking up toward Guardiola. Guardiola reached for the baseball bat on the floorboard beside him, and a struggle ensued. Guardiola then released control of the bat and immediately reached up to start his car, while Officer Perez continued yelling "STOP! STOP! STOP! DO NOT START THE VEHICLE!" Guardiola started the vehicle and then with his right hand, placed the car in reverse and stomped on the accelerator. Officer Perez immediately tried to extricate himself from the vehicle, but was stuck between the open door and the car. Guardiola then put the car in drive and floored the accelerator once again. Officer Perez was terrified. He realized he was stuck in the vehicle. The vehicle was approaching a curbed curve in the road. Officer Perez knew that, when he hit the turn, he was going to go under the car, be run over, and killed. He brought his right hand over the top of the car and fired one shot toward the vehicle's front tire to disable the vehicle. This was unsuccessful. At this point he knew he had to use deadly force to protect himself. He brought the gun back around and, still attached to the car, fired four rounds in the direction of Guardiola. One of the shots hit Guardiola, killing him. Subsequent autopsy showed Guardiola's blood alcohol was .156, two times the legal limit.

Plaintiffs, the estranged wife and three children of Carlos Guardiola, brought suit against Officer Perez individually and, additionally, brought suit against the apartment complex, claiming that the apartment complex was liable for the acts or omissions of Officer Perez, because at the time of the shooting Officer Perez was acting in the course and scope of his employment with the apartment complex as a courtesy officer.

Motion for Summary Judgment was filed on behalf of the apartment complex approximately one year after suit was filed and argued before the Court four months later. The facts supporting the Motion for Summary Judgment were those cited above and were undisputed in the summary judgment record. Motion for Summary Judgment was filed based on these undisputed facts, which were supported by the uncontroverted testimony of Co-Defendant Officer Perez and his uncontroverted testimony that at all times he was acting in his capacity as a Texas peace officer and not as an apartment complex courtesy officer. The Motion was further based on clear Texas law that if an officer is engaged in the performance of a public duty, such as a lawful detention or arrest, his private employment is terminated and his private or temporary employer has no vicarious responsibility for his acts as a matter of law.

Despite the lack of any disputed issue of fact, and despite clear Texas law compelling judgment as a matter of law, the Motion was denied two weeks after it was argued without any stated reason, except that the Court was not prepared "on this record" to grant the Motion. As a result, many experts were retained by all six parties on the issues of ballistics, trajectory, police procedure, apartment security and use of force, and extensive discovery was conducted by all parties for the next two and one-half years. As to the apartment complex alone, expert witness fees incurred prior to the denial of the Motion for Summary Judgment totaled \$910.00. After denial of the Motion for Summary Judgment, the total amount of expert witness fees incurred was \$86,557.00 by the apartment complex alone. The total amount of attorney's fees incurred prior to the denial of the Motion for Summary Judgment was in the amount of \$30,819.00. The total amount of attorney's fees incurred on behalf of the apartment complex after denial of the Motion for Summary Judgment totaled \$112,659.00. In other words, despite being entitled to judgment as a matter of law based on the summary judgment record, an additional \$200,000 was incurred to defend the apartment complex alone. On August 7, 2008 the case settled as to the apartment complex for \$130,000.00. The primary motivating factor for the settlement was the cost of the continued defense of the action, despite my strong opinion that, regardless of the result at trial, we would ultimately be entitled to judgment as a matter of law. The settlement was nominal considering the loss of a good father by his three children, but it was essentially coerced by the prospect of expert witness fees and attorney's fees necessary to prepare for trial and for trial and, possibly, an appeal. That the case settled for such a nominal amount further demonstrates Plaintiffs' counsel's recognition that the case had little merit, even two and one-half years after the denial of the Motion for Summary Judgment.

Rule 1 of the Federal Rules of Civil Procedure provides that the rules should be construed and administered to secure the just, speedy and inexpensive determination of every action and

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proceeding. Even though I have the greatest respect for the Judge who presided over the case, there was nothing just, speedy or inexpensive about the result

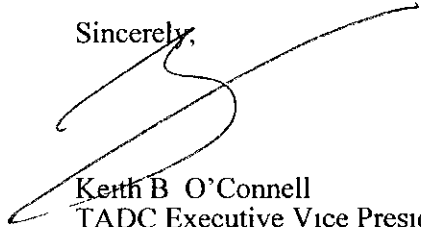
So that there is no misimpression, the summary judgment was denied in 2006. The case is not offered as anecdotal evidence that use of the word "should" resulted in denial of the Motion. The case is offered, however, as anecdotal evidence that allowing unmeritorious cases to remain in the system increases litigation costs for all parties and keeps meritorious cases from being heard, and as anecdotal evidence of the need for a clear, unequivocal bright line mandate.

As practitioners, we personally know that judges are honorable, intelligent and work hard to get it right. Allowing unmeritorious cases to proceed through the system, in my opinion, does nothing to foster respect for the judiciary by non-practitioners.

Proponents for discretion or "flexibility" may argue the sanctity of jury trials and that motions for summary judgment are granted too often. I agree that the jury trial is vanishing. I respectfully suggest, however, that it is due in significant part to the increased costs of litigation and the loss of confidence in our jury system in general, which are forcing parties to move outside of our civil justice system.

Rule 56(a) should mandate the granting of a Motion for Summary Judgment when there is no genuine or disputed issue of a material fact and movant is entitled to judgment as a matter of law

Sincerely,

A handwritten signature in black ink, appearing to read "Keith B. O'Connell", written over a horizontal line.

Keith B. O'Connell
TADC Executive Vice President

KBO/bb