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08-CV-158

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Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

Re: Proposed Amendments to Federal Rule of Civil Procedure 56

Dear Mr. McCabe and Members of the Rules Committee·

I write to oppose the proposed amendments to Federal Rule of Civil Procedure 56, and particularly the point-counterpoint change in Rule 56(c). I applaud the Committee for its request of the Federal Judicial Center to study the proposed point- counterpoint change.[1] As set forth below, with support from the FJC study, I argue that the proposed amendments likely will not accomplish the goals that the Committee has sought to achieve, and instead the amendments appear to be contrary to those goals.

The Proposed Amendments Are Not Only Procedural and Instead Effectively Change the Summary Judgment Standard Contrary to the Goal of the Proposed Amendments

The Committee has stated

> "[f]rom the beginning, the Committee has been determined that *no change* should be attempted in the summary-judgment standard or in the assignment of burdens between movant and nonmovant. The amendments are designed to be *neutral as between plaintiffs and defendants. . . No prediction* is offered whether the result will be more or fewer motions, or *more or fewer summary judgments* "[2]

The Committee also stated a few paragraphs later

> "[i]t bears emphasizing again that the summary-judgment project began with the determination that *the standard for granting summary judgment should not be reconsidered.* . . It is better to leave these matters to continuing evolution under the 1986 Supreme Court decisions that have guided practice for the last twenty years and more "[3]

[1] Joe Cecil & George Cort, The Federal Judicial Center, Report on Summary Judgment Practice Across Districts with Variations in Local Rules (August 13, 2008)
[2] Report of the Civil Rules Advisory Committee, at 21 (May 9, 2008, as supplemented June 30, 2008) [hereinafter "Report"] (emphasis added)
[3] *Id*

Contrary to these stated goals, the results of the FJC study demonstrate that the summary judgment standard effectively will change if the proposed Amendments are adopted and the Amendments will not be only procedural as has been asserted. The FJC study showed that under the proposed Amendments, courts are likely to grant more summary judgments of whole cases. Table 3 states that in districts in which there was no structure at all (like that proposed by the Amendments) or only the point structure (where the movant states undisputed facts), grants of summary judgment of whole cases were respectively 19% and 18%, while districts that used the proposed Amendments' point-counterpoint structure granted summary judgment at a much higher rate of 24%. An even more significant difference is seen in employment discrimination cases specifically. In districts in which there was no structure or only the point structure, grants of summary judgment of whole cases were respectively 25% and 27%, while districts that used the point-counterpoint structure granted summary judgment at the much higher rate of 37% While the very able authors of the study attempt to discount differences in these districts that have the point-counterpoint structure,[4] the significant difference in grants of summary judgment shown by the study should not be ignored nor should the proposed Amendments be adopted without further study that definitely shows that the proposed structure is not the cause for this larger grant of summary judgment.

The FJC findings must be examined in the context of the significant literature that shows that courts tend to grant summary judgment more often in civil rights cases, including employment discrimination cases,[5] some of the most factually intensive cases in the court system.[6] This phenomenon is additional reason why the proposed Amendments, which likely could increase summary judgment in these types of cases, need further study before any implementation.

I would add that the language "should" in Rule 56(a) should not be changed to "must," because courts should be given discretion in tough cases As the committee has recognized "the summary-judgment standard, however clearly expressed, is not always clear in application. The question whether there is a genuine dispute may balance on the sharpest edge of close judgment."[7] Indeed, judges in the same case often disagree on what the evidence shows and thus whether summary judgment should be granted.[8] This result also shows that court discretion ("should") is warranted.

The Proposed Amendments Effectively Increase the Burden on the Courts and the Parties Contrary to the Goals of the Committee

> In support of the Amendments to Rule 56, the Committee stated
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> "[i]mproved procedures may, for example, reduce strategic use of summary-judgment motions as a short-cut means to discover an adversary's positions and evidence or as unworthy means of increasing delay and expense."[9]

Again, contrary to the Committee's goals, the FJC report shows that the proposed new structure will increase the summary judgment burden on the courts Table 5 shows in districts in which there was no such structure or only the point structure, the median weeks to dispose of summary judgment motions were respectively 15 and 17, while districts that used the point-counterpoint structure took 23 weeks to dispose of the motions. While the authors of the FJC study attempt to explain the differences in time by

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[4] *See* Cecil, *supra* note 1, at 3

[5] *See* Suja A Thomas, *Why Summary Judgment Is Unconstitutional*, 93 Va L Rev 139, 141 n 5 (2007) (citing articles on this topic); *see also* Cecil, *supra* note 1, at 3 ("the prominent role of summary judgment in such cases is striking")

[6] *See* Suja A Thomas, *The Unconstitutionality of Summary Judgment A Status Report*, 93 Iowa L Rev 1613, 1622-23 (2008).

[7] *See* Report, *supra* note 2, at 24

[8] *See* Suja A Thomas, *The Fallacy of Dispositive Procedure*, 50 Boston College L Rev __ (forthcoming 2009), available at http //papers ssrn.com/sol3/papers cfm?abstract_id=1323484, at 18-19.

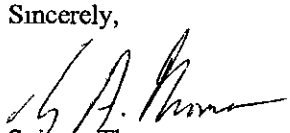
[9] Report, *supra* note 2, at 21

showing other differences in the districts that have the point-counterpoint structure,[10] further study should be conducted to ensure that time would not increase or such increases in time are otherwise justifiable. Along with increases in costs to the courts, the structure clearly requires more time by both parties and thus more cost to both parties on already costly summary judgment motions.[11] Moreover, increased cost at the summary judgment stage may lead to more motions to dismiss prior to discovery and the grants of such motions, results that clearly are not a goal of the proposed Amendments.

I also note that the FJC study took prisoner plaintiffs out of the study "because such cases are likely to be exempt from the proposed rule due to the pro se nature of the plaintiff."[12] I hope that the Amendment specifies that pro se plaintiffs are exempt from the point-counterpoint requirement in any future attempts to adopt these Amendments.

In summary, I oppose the proposed Amendments in the absence of further study because the increased grant of summary judgment or other dispositive procedures is not the goal of this amendment process Without evidence that the proposed Amendments will improve civil procedure in the courts, change should not be made. I make these remarks mindful of the threat that dispositive procedures pose to the right to a jury trial guaranteed by the Seventh Amendment and the division of authority between judiciary and jury set forth in the Seventh Amendment.[13]

Sincerely,



Suja A. Thomas
Professor of Law

[10] *See* Cecil, *supra* note 1, at 2.

[11] *See* Suja A Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 Minn. L. Rev 1851, 1862, 1864 (2008) (discussing Supreme Court's reference to cost in *Twombly* and *Tellabs*).

[12] Cecil, *supra* note 1, at 5

[13] *See* Thomas, *supra* note 5; Suja A. Thomas, *Judicial Modesty and the Jury*, 76 Colo. L. Rev 767 (2005). Many fine articles have been written on the vanishing trial and the effect of summary judgment on particular cases by other commentators including Professors Burbank and Schneider I do not cite all of those articles here for sake of brevity, and because the Committee has received such citations in other commentary.