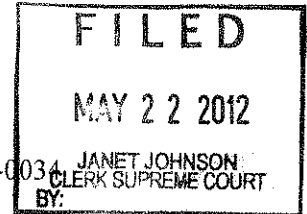


IN THE SUPREME COURT OF THE STATE OF ARIZONA



In the Matter of:)
)
PETITION TO AMEND RULE 56)
OF ARIZONA RULES OF CIVIL)
PROCEDURE)
_____)

Supreme Court Rule No. R-11-0034

STAFF ATTORNEYS
COPY

The Civil Bench of the Arizona Superior Court in Pima County hereby makes the following comments regarding various aspects of R-11-0034, the Petition to Amend Rule 56 of the Arizona Rules of Civil Procedure. The comments are divided into the various subparts of the proposed Rule.

Rule 56(a)

With respect to Rule 56(a), the last sentence is an aspirational statement that is inappropriate in the body of a procedural rule. Aspirational statements are best left to the comments following the Rule. In the alternative, the word “should” ought to be replaced with the word “may.” This change of wording would remove the aspirational aspect from the sentence and would merely recognize that the Court in its discretion may state on the record reasons for its decision.

Rule 56(b)(1)(A)

Proposed Rule 56(b)(1)(A) provides for the filing of a Motion for Summary Judgment before an Answer or other responsive pleading is filed. It allows a party to file a Motion for Summary Judgment after the expiration of 20 days after service of process on an adverse party, but no sooner than the date on which the Answer is due.

There is no need for this provision. While this language is found in the existing Rule, perpetuating this language serves no purpose. If a party has been served, but has not answered, the plaintiff can seek a default where the allegations contained in the Complaint are deemed true. If a party has answered, but has admitted the allegations of the Complaint, then a Motion for Judgment on the Pleadings could be made. Rule 56(b)(1)(B) allows for a Motion for Summary Judgment after a Motion to Dismiss or a Motion for Summary Judgment has been filed by the adverse party. This could be expanded to also include after an Answer has been filed. Thus, there are alternative procedures provided for in the Rules to allow a claimant to obtain a judgment for an essentially uncontested matter. There is no need to continue to provide the summary judgment process prior to any filing by the adverse party.

If a plaintiff were to file a Motion for Summary Judgment prior to an Answer or Motion to Dismiss, there are several problematic outcomes. First, one would expect the non-moving party to file an Answer denying the allegations of the Complaint and also request Rule 56(f) relief claiming the Motion was premature, as no disclosures had been made and no opportunity for discovery had been afforded. No

Court could realistically, deny a Rule 56(f) request under these circumstances. In addition, in a multiple defendant case, unserved defendants may well want to oppose the Motion, but would have no notice of the lawsuit let alone the Motion. Finally, the moving party would have to personally serve the non-moving party, since the non-moving party had not yet entered an appearance in the case.

It would seem perpetuation of this unused and ill-conceived portion of the Rule is not appropriate and subsection 56(b)(1)(A) should be deleted.

Rule 56(c)(2)

The Pima County Civil Bench is also concerned about Rule 56(c)(2) and specifically the sentence that provides the time periods for the briefs may be shortened or enlarged by the parties or by Court order. This language needs to be clarified or expanded upon in order to assure a timely consideration and/or disposition of the Motion. Generally and by Rule, Motions for Summary Judgments are filed at least 90 days prior to the trial date. The briefing schedule, without a Cross-Motion for Summary Judgment, takes at least 55 days (30 days plus 5 mailing days for a Response and 15 days plus 5 mailing days for a Reply). With the proposed clarification that the response time is calculated from the date of service, more time is needed. If the parties are permitted to simply file a stipulation to enlarge the response and/or reply times which in turn would delay a hearing on the Motion, the Court's consideration of the Motion may well fall on the eve of trial. This would leave the Court with little or no time to take the Motion under advisement to consider the issues, let alone live up to the proposed aspirational language of Rule 56(a) to state on the record the reasons for granting or denying the request. The Court should have at least two weeks, if not three, prior to trial to consider and decide the Motion. This isn't to say the Court could not decide the matter earlier. However, if the Motion presents complex issues that require some additional thought and research and if a written opinion is expected that explains the decision together with the other demands on the Court's time for other trials and Motions, at least two or three weeks ought to be afforded the Court. In addition, a late decision on a Motion will require the parties to incur the trial preparation expense unnecessarily if the Motion is granted. Allowing the parties to stipulate to expanding the briefing schedule and/or hearing into this period without Court approval is unwise. Any stipulation expanding the timeframe to the eve of trial should require approval of the Court.

Separate and apart from Motions that fall within the 90 day pretrial period are those stipulations that allow for briefs to be filed a day or two before the scheduled hearing on the Motion. The parties have the right to expect the Court to have read the briefs prior to a hearing on the Motion. However, if the parties' stipulation calls for the Reply to be filed the Friday before the scheduled Monday hearing on the Motion, when is the Court supposed to review the Reply? This becomes more problematic with the advent of e-filing, the Arizona Supreme Court's insistence that the Superior Court cannot require written copies, and the inaccessibility to the Court file from remote locations (i.e. the judge's home computer).

Any stipulation to expand the time for response should be limited so that the judge has the complete briefings at least seven days prior to any scheduled hearing on the Motion.

Finally, any stipulations entered into by the parties should be copied to the assigned division. It is not uncommon for the Court to rule upon motions after the time provided for the briefing has expired and where no hearing had been requested, only to be confronted later with a Motion to Vacate the ruling because the parties had entered into an agreement expanding the time for briefing, but failed to inform the Court of the agreement.

Rule 56(e)(3)

The next area of comment relates to Rule 56(e)(3). The requirement, that all or part of the deposition be submitted in writing, is at odds with the Court's move to electronic filing. With electronic filing the submission of written transcripts will be prohibited. The language should be revised to conform with the new electronic filing requirements.

Rule 56(f)

With respect to the changes to this portion of the Rule, there are two comments to be made. First, the Rule ought to expressly state what the case law requires. The party requesting Rule 56(f) relief shall specifically state (1) the particular evidence that is being sought which is beyond the control of the requesting party, (2) the location of the evidence, (3) what the evidence will demonstrate, (4) the discovery methods that will be used to obtain the evidence, and (5) an estimation of the time required to obtain the information. Far too often a party requesting Rule 56(f) relief will simply state that discovery is incomplete and more time is needed to respond to the Motion. By requiring the requesting party to specify the basis of the request, the parties may well be able to resolve the issue without the need for court intervention.

The second comment deals with the accelerated hearing for the Rule 56(f) request. This process is unnecessary and has been effectively dealt with in the past as part of the Opposition to the Motion for Summary Judgment. If one asserts the need for more time to gather the evidence, this position, typically, is included as a portion of the Opposition. The typical Opposition normally asserts that more time is needed, but even under the existing state of the evidence summary judgment is not appropriate. With this type of Opposition the Court will be apprised of the applicable law, the facts of the case, and the contested issues. The Court can make an informed decision whether there is merit to the request for additional time.

In contrast, with the proposed two step process, the Court will receive a brief request for Rule 56(f) relief. It then must set a hearing within seven days. The moving party may submit, on an accelerated basis, a brief within, at most, five days. If the Rule 56(f) request is mailed to the moving

party, such response time will be further shortened due to delays in the mail. In order for the Court to appreciate the request, it will probably have to review the Motion for Summary Judgment.

If the Court is in trial, it will have to interrupt the trial proceeding to conduct the accelerated hearing. In Pima County, Mondays are reserved to hear Motions and Tuesdays through Fridays are reserved for trials. It is unlikely a Rule 56(f) request will only be filed on a Monday so that the accelerated hearing can be set for the following Monday. The more likely scenario is the request will be filed on a day other than Monday. In that case, the Court can either set the accelerated hearing for the following Monday and deprive the moving party of a chance to respond in writing to the request or the Court may be required to interrupt a trial to conduct the hearing.

The question then arises as to what the real benefit is to justify the above procedure. At most, it may relieve the party requesting the Rule 56(f) relief from fully briefing the issues immediately. However, that savings is offset by having both the accelerated hearing on the Rule 56(f) relief and the later substantive briefing and hearing on the actual Motion.

When viewed from the burdens placed on all the participants, both the parties and the Court, there is little savings to be gained. In fact, one could strongly argue that overall the costs of this process would be greater.

Finally, the party seeking Rule 56(f) relief should be expressly required to obtain the date for the accelerated hearing and give immediate notice of the hearing to all parties.

Rule 56(g)

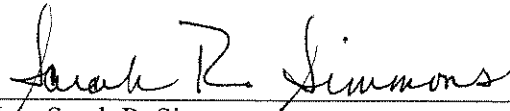
As to this proposed Rule change, the sanction should apply equally to a party who in bad faith or solely for delay opposes a Rule 56(f) request.

Rule 56(h)

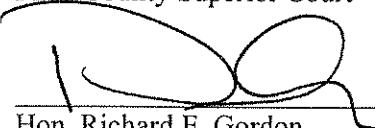
The last comment to be made is with respect to Rule 56(h). When the term "Motion" is used, does this refer only to the Motion for Summary Judgment? Technically, an Opposition to a Motion for Summary Judgment, that does not include a Cross-Motion for Summary Judgment, is not a Motion. If an issue is raised in the Opposition and addressed in the Reply, why is it necessary to require additional notice and briefing. A better term would be "briefs." The use of this term would allow the Court to enter a judgment on grounds raised in the briefs, but not cited in the original Motion without further notice and additional response time. The change in the term "motion" to "briefs" would still require the

Court to give notice and additional time for briefing on issues not raised by any of the parties in their briefs.

DATED: May 17th, 2012



Hon. Sarah R. Simmons
Presiding Judge
Pima County Superior Court



Hon. Richard E. Gordon
Civil Presiding Judge
Pima County Superior Court.