

89-R-99001

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OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

IN RE: AMENDMENT OF M.R.C.P. 6 and 56

MOTION TO AMEND M.R.C.P. 6 AND 56

Comes now the Supreme Court Advisory Committee on Rules, pursuant to M.R.A.P. 27(f), and moves the Mississippi Supreme Court to amend M.R.C.P. 6 and 56. The proposed amendments to Rule 56 are intended to establish specific deadlines and requirements for summary judgment motions and responses thereto. The proposed amendment to Rule 6 would simply clarify that the deadlines for filing affidavits established by proposed M.R.C.P. 56(c), rather than the deadline established in Rule 6(d), applies to affidavits filed in connection with summary judgment motions or responses thereto.

Timing of the Motion, Response and Rebuttal

The proposed amendment to M.R.C.P. 56(c) would require that a motion for summary judgment shall be filed at least sixty days before the hearing date. The responding party must file its response in opposition within thirty days of service of the motion for summary judgment. Then, within fifteen days of service of the response in opposition, the moving party may file a rebuttal. The sixty-day period from the filing of the motion until the hearing provides a sufficient amount of time for the response in opposition and the rebuttal. The current rule contemplates a ten-day period between the filing of the motion for summary judgment and the hearing. The ten-day period is unlikely to be sufficient in a majority of cases. Proposed M.R.C.P. 56(c)(5) would give the trial court discretion to alter the time periods by court order.

Content of the Motion and Response

The proposed amendment to M.R.C.P. 56(c) would require the moving party to incorporate an itemization of undisputed facts into the motion. The itemization must be numbered and must

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refer with particularity to the portion of the record relied upon. Movants shall attach any affidavits, depositions, responses to interrogatories, admissions or stipulations that have not been previously filed. The responding party shall indicate agreement or specific reasons for disagreement with the moving party's itemization of facts. The responding party shall refer with particularity to the portions of the record upon which it relies and shall file any affidavits, depositions, responses to interrogatories, admissions or stipulations that have not been previously filed. These requirements are commensurate with the requirements imposed by F.R.C.P. 56(c)(1) and (2).

Hearing on the Motion

Proposed M.R.C.P. 56(c)(6) provides that a court may rule on a motion for summary judgment without oral hearing and further provides that if a hearing is held, the court will not consider live testimony without leave of court. The Committee believes that requiring leave of court for live testimony will best serve the interests of judicial economy and will also provide adequate notice to the parties.

Deletion of Subsection (h)

The proposed amendment would delete existing subsection (h). The Committee believes that M.R.C.P. 11 and the Litigation Accountability Act adequately address the award of sanctions based on motions for summary judgment or responses thereto. It appears that attorneys' fees are rarely awarded pursuant to M.R.C.P. 56(h), given that there are only a handful of appellate opinions citing the provision. Moreover, there is no clear explanation of the "without good cause" standard in the provision. The standards under M.R.C.P. 11 and the Litigation Accountability Act are fully established and articulated. In addition, there is currently a pending motion to amend M.R.C.P. 11 that would further clarify the standard for sanctions and the award of attorneys' fees.

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counter-claim, or cross-claim, or to obtain a declaratory judgment may, at any time after the expiration of thirty days from the commencement of the action, or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counter-claim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon.

(1) Form of Motion. Movants for summary judgment shall file with the clerk as a part of the motion an itemization of the facts relied upon and not genuinely disputed. Movants shall attach any relied upon affidavits, depositions, responses to interrogatories, admissions or stipulations that have not been previously filed with the court as exhibits to the itemization of facts. The itemized facts shall be numbered and must refer with particularity to those portions of the record upon which the movant relies.

(2) Response. The responding party shall file its response in opposition to the motion for summary judgment within 30 days after service of the movant's motion. The responding party shall indicate either agreement or specific reasons for disagreement with the movant's itemization of facts. To the extent the responding party relies upon any affidavits, depositions, responses to interrogatories, admissions or stipulations that have not been previously filed with the court to contest the movant's itemization of facts or to establish additional facts that are not in dispute, the responding party must attach such affidavits, depositions, responses to interrogatories, admissions or stipulations as exhibits to the response. The responding party shall refer with particularity to those portions of the record upon which the responding party relies.

(3) Rebuttal. Within 15 days after service of the responding party's opposition to the motion for summary judgment, the moving party may file a rebuttal.

(4) Time. The motion for summary judgment shall be filed and served at least ten 60 days before the time fixed for the hearing. The adverse party prior to the day of the hearing may serve opposing affidavits.

(5) The time periods in Rule 56(c)(2), (3) and (4) may be altered by court order.

(6) Hearing. Pursuant to M.R.C.P. 78, the court may, by rule or order, rule on the motion for summary judgment without oral hearing. If a hearing is held, the court will hear oral argument but not live testimony, unless leave of court is obtained.

(7) Judgment. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone, although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered on the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matter stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

~~(h) Costs to Prevailing Party When Summary Judgment Denied.~~ If summary judgment is denied the court shall award to the prevailing party the reasonable expenses incurred in attending the hearing of the motion and may, if it finds that the motion is without reasonable cause, award attorneys' fees.

Advisory Committee Historical Note

Effective _____, M.R.C.P. 56(c) was amended to specify the form of the motion and response and to alter the time periods for filing and responding to a motion for summary judgment. The amendment also prohibits live testimony at the summary judgment hearing unless leave of court is obtained.

Advisory Committee Notes

It is important to distinguish between a Rule 56 motion for summary judgment, a Rule 12(b)(6) motion to dismiss for failure to state a claim, and a Rule 12(c) motion for judgment on the pleadings. When ruling on a Rule 56 motion for summary judgment, the trial court may "pierce the pleadings" and consider extrinsic evidence, such as affidavits, depositions, answers to interrogatories, and admissions. When ruling on a Rule 12(b)(6) motion to dismiss for failure to state a claim, the trial court may not "pierce the pleadings" and shall only consider the allegations contained in the pleading asserting the claim. Similarly, when ruling on a Rule 12(c) motion on the pleadings, the trial court shall only consider the allegations within the pleadings. If matters outside the pleadings are presented to and considered by the trial court in connection with a motion for judgment on the pleadings or a motion to dismiss for failure to state a claim, the trial court must treat the motion as one for summary judgment and give all parties a reasonable opportunity to respond accordingly present pertinent material. See M.R.C.P. 12(b) and (c); Huff-Cook, Inc. v. Dale, 913 So. 2d 988, 992 (Miss. 2005). If the trial court converts a Rule 12 motion into a Rule 56 motion, the trial court must give the parties notice of the motion's changed status and at least ten days' notice of its intent to conduct a summary judgment hearing on a date certain. See Dale, 913 So. 2d at 988. A trial court's failure to give proper notice constitutes reversible error. See Palmer v. Biloxi Reg'l Med. Ctr., Inc., 649 So. 2d 179, 183 (Miss. 1994).

A trial court need not make findings of fact when ruling on a motion for summary judgment because "a Rule 56 summary judgment hearing is not an action 'tried upon the facts

without a jury' so as to trigger Rule 52 applicability." See Harmon v. Regions Bank, 961 So. 2d 693, 700 (Miss. 2007). See also Uniform Rules of Circuit and County Court Practice. Movant must do more than simply state a meritorious defense.

Pursuant to Rule 78, oral hearing on a motion for summary judgment is not necessary where such hearing is dispensed with by court order or rule.

[Advisory Committee Note adopted effective July 1, 2014, amended _____.]

Amendment to Rule 6

The proposed amendment to Rule 6 is only necessary in the event the Court grants the motion to amend Rule 56 so as to establish the deadlines for motions for summary judgment, responses in opposition, and rebuttals. Currently, M.R.C.P. 6(d) allows an opposing party to serve an affidavit not later than one day prior to the hearing. By separate motion, the Committee moved to amend Rule 6(d) to require opposing affidavits be filed not later than two days before the hearing.¹ Regardless of whether the time period established by Rule 6(d) is one day or two days, the proposed amendment to Rule 6(d) in this motion would clarify that the time periods and deadlines established by proposed M.R.C.P. 56(c), rather than the one or two-day period in Rule 6, apply to affidavits filed in connection with motions for summary judgment and responses thereto.

Rule 6. Time

(a) Computation.

(b) Enlargement.

(c) Unaffected by Expiration of Term.

(d) Motions. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than five days before the time fixed for the hearing,

¹ Given that a separate earlier motion has been previously made to amend Rule 6(d) to require opposing affidavits be filed at least two days before the hearing, that proposal is not included in this motion.

unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rules 56(c) and 59(c), opposing affidavits may be served not later than one day before the hearing, unless the court permits them to be served at some other time.

(e) Additional Time After Service by Mail.

[Amended effective March 1, 1989; amended effective June 24, 1992; amended effective July 1, 2008; amended effective _____.]

Advisory Committee Historical Note

Effective _____, Rule 6(d) was amended to clarify that Rule 56(c) governs the deadline for filing affidavits in connection with motions for summary judgment and responses thereto. XX So. 3d XX (Miss. 20).

Effective June 24, 1992, Rule 6(a) was amended to provide that the legal holidays which cause a period of time to be enlarged are those defined by statute. 598-602 So. 2d XXII-XXIII (West Miss. Cas. 1992).

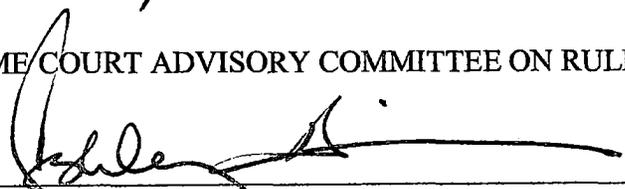
Effective March 1, 1989, Rule 6(a) was amended to abrogate the inclusion of time periods established by local court rules. 536-538 So. 2d XXI (West Miss. Cas. 1989).

The motion to amend M.R.C.P. 6 was unanimously approved by the Committee on December 6, 2019. The motion to amend M.R.C.P. 56 was approved by the Committee on December 6, 2019, with twelve members voting in favor and two members voting against. The two members voting against were not in favor of deleting subsection 56(h).

The Supreme Court Advisory Committee on Rules therefore moves that the above proposed amendments to M.R.C.P. 6 and 56 be considered by the Mississippi Supreme Court.

SO MOVED, this the 10th day of January, 2020.

SUPREME COURT ADVISORY COMMITTEE ON RULES



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