SUMMARY JUDGMENT TACTICS: PRACTICE AND PROCEDURE[1]

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In unusually direct language, in 1996 the Louisiana Legislature instructed that the summary judgment motion is now favored and should be used to secure the "just, speedy, and inexpensive determination of every action."[2] At this point, members of the bar may legitimately question whether the courts are actually following those instructions and whether litigants are getting speedy and inexpensive resolutions of their legal problems.

As judges grow more accustomed to granting summary judgments, however, the procedure will become an increasingly important procedural device and tactical weapon in the litigator's arsenal. The purpose of this presentation is several-fold. The materials examine the fundamental elements of the summary judgment procedure under Louisiana state law, including a discussion of the current statutory rules, the changes

[1] The author presented this paper at the continuing legal education seminar referenced above. It was provided for educational purposes only and should be treated as such. This paper should not be construed as providing legal advice or as the basis for an attorney-client relationship.

[2] La. Code Civ. Pro. Art. 966(A)(2).

made by the Legislature in 1996 and 1997, the uniform rules for Louisiana state courts and the use of partial summary judgments.

The materials also discuss some of the many evidentiary issues and problems that come up in summary judgment procedure. This includes a discussion of what evidence may be admissible, the procedure for dealing with evidence submitted in support or opposition to a motion, problems related to affidavits and testimonial evidence, and the use of "no evidence" summary judgments. In addition, the paper examines the use of expert testimony in connection with summary judgment.

The materials also focus on several other topics including common "do's" and "don'ts" for summary judgment procedure. In addition, the materials will examine (on a cursory basis only) various issues related to appealing summary judgment motions, and in particular, "partial" summary judgment rulings.

PART 1: FUNDAMENTALS OF SUMMARY JUDGMENT PROCEDURE

The statutory provisions for summary judgment motions are straightforward and, in our civilian jurisdiction, must be the starting point for the analysis. Louisiana Code of Civil Procedure Article 966 (A) provides:

> (A)(1) The plaintiff or defendant in the principal or incidental action, with or without supporting affidavits, may move for summary judgment in his favor or all or part of the relief for which he has prayed. The plaintiff's motion may be made at any time after the answer is filed. The defendants' motion may be made at any time.
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> (A)(2) The summary judgment motion is designed to secure the just, speedy and inexpensive determination of every action, except those as disallowed by Article 969. The procedure is favored and shall be construed to accomplish these ends.

The summary judgment is available to both defendants and plaintiffs; the motion is most often used by defendants. The moving party virtually always submits affidavits and other evidence in support of the motion, although he or she is not technically required to do so, as the motion may be filed "with or without supporting affidavits."[3]

The use of evidence in connection with the motion for summary judgment obviously separates it from other dispositive pleadings that a defendant may file. Under Louisiana procedure, the defendant can test the allegations of plaintiff's claims with the peremptory exception of no cause of action. Generally, while evidence is admissible as to other exceptions, no evidence is admissible on the exception of no cause of action; the exception is triable on the face of the petition only. If the Court sustains the exception of no cause of action, rather than order an outright dismissal, the Court must afford the plaintiff a fair opportunity to amend his petition and add additional facts to state a cause of action.[4]

The summary judgment motion has a different focus. The text of Article 966 instructs the court to grant the motion when "the pleadings, depositions, answers to interrogatives and admissions on file, together with the affidavits, if any, show that there

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[3] *Id.*

[4] *Sanborn v. Oceanic Contractors*, 448 So. 2d 91 (La. 1984). In fact, Louisiana Code of Civ. Pro. Art. 934 recognizes that the Court should give a plaintiff an opportunity to amend his or her pleading. That requirement is not absolute, however, and the Court need not do so if the amendment would be useless and would not correct the defect in the pleading. *Vieux Carre Property Owners, et al. v. Decator Hotel Corporation,*746 So. 2d 806 (La. App. 4th Cir. 1999). Moreover, the Court has wide discretion to determine whether amendment is proper. *Broussard v. F.A. Richard & Associates, Inc.,* 740 So. 2d 156, 160 (La. App. 3rd Cir. 1999).

is no genuine issue as to material fact, and that the mover is entitled to a judgment as matter of law."[5]

A. Key Concepts in Article 966:

1. Are there "genuine" issues of fact?

An important component to the summary judgment procedure is that there must be "genuine" issues of material fact in dispute, in the absence of which the court should grant the motion, if the mover is entitled to judgment as a matter of law. This concept makes sense. The summary judgment motion is intended to cut through the pleadings and decide whether there are real factual issue disputes between the parties that require a trial. Otherwise, the court should take action to quickly and inexpensively dispose of the matter if the law is clear.

While the concept is simple, it is not always easy to determine whether a factual dispute is "genuine." A "genuine issue" of material fact is one "as to which reasonable persons could disagree; if reasonable persons could reach only *one* conclusion, there is no need for trial on that issue and summary judgment is appropriate."[6] Properly identifying issues as "genuine" is important both at the trial court level and beyond. As the First Circuit explained, in reviewing a trial court's summary judgment ruling, the first question the appellate court must answer is whether "genuine" issues of material fact exist."[7]

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[5] Article 966(B).

[6] *Watters v. Department of Social Services*, 2003-0703 (La. App 4th Cir. 5/14/03), 849 So. 2d 724, 730 (La. App. 4th Cir. 2003).

[7] *Wicker v. Harmony Corporation*, 784 So. 2d 660 (La. App. 1st Cir. 2001).

Generally, in deciding whether an issue is "genuine," a court cannot consider the merits of the underlying claims, or make a credibility call about the evidence at issue.[8] As Professor Maraist has explained, the motion is appropriate when the plaintiff alleges facts that *may* arguably state a cause of action (*i.e.,* they are sufficient to withstand an exception of no cause of action), but the defendant can show, "without the necessity of any 'credibility' calls" by the court, that the plaintiff has failed to allege an essential fact that is necessary for the plaintiff's claims.[9]

Although the credibility determination is ultimately left to the trier of fact, as it should be, we cannot ignore the fact that the trial court must have some flexibility to make *limited* credibility determinations. The court's focus on summary judgment is to decide whether the factual issues are such that "a reasonable jury could return a verdict for the non-moving party."[10] In other words, the court must decide whether there is a possibility that the factfinder could reach different outcomes at trial on a particular factual issue. That necessarily involves a form of credibility determination.

To accomplish this goal and to carry out the Legislature's instructions that summary judgment is a favored procedure, the court must look at the evidence submitted by the parties in connection with the summary judgment motion and determine whether evidence is legitimate or not. As one authority pointed out, "nothing

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[8] *Morales v. Davis Bros. Construction Co*., 712 So. 2d 226 La. App. 4 Cir. 1998), *writ denied*, 724 So. 2d 209, *writ denied*, 724 So. 2d 743.

[9]Maraist, *Evidence and Proof*, §2.5 , p. 15.

[10] *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248, 106 S. Ct. 2505 (1986).

prohibits a judge from discounting affidavits or depositions containing chimerical factual accounts."[11] That process inevitably involves some degree of credibility assessment.

A common example of this process was discussed in *Holden Business Forms Co., Inc. v. Louisiana State University Health Sciences Center*, *Shreveport*.[12] In that case, an employer asserted claims against the LSU Medical Center to recover payments it made through its third-party administrator, for the plan member's injuries. The employer's argument was that it learned, after making the payments, that the plaintiff/plan member was drunk at the time of the car accident that injured the member, and, therefore, coverage was not available under an exclusion from the policy. The plaintiff apparently contended that it made payment under the mistaken belief that coverage was available.

In support of its motion for summary judgment, the plaintiff attached an affidavit from the CEO of the administrator of its health plan. The plaintiff intended to establish that the plan member was drunk at the time of the accident--the key premise for the plaintiff's argument. The trial court considered the affidavit and entered summary judgment in the plaintiff's favor. On appeal, the First Circuit ruled that the affidavit was improper because it was not based on the CEO's personal knowledge, and the First Circuit reversed the trial court's ruling. Instead, according to the First Circuit, it appeared that the affidavit was based on "information contained in a police report or

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[11] Tatum, "Summary Judgment and Partial Judgment in Louisiana: The State We're In," 59 La. Law Review 131, 151.

[12] 811 So. 2d 1102 (La. App. 2nd Cir. 2003).

from sources other than his personal knowledge."[13] The First Circuit reversed the trial court's rulings. That decision necessarily involved making a limited credibility call about the affidavit.

A trial court should not, however, make a determination about which outcome or interpretation of the facts is more plausible.[14] That determination certainly involves a credibility call that is not appropriate. For example in *Ravy v. Bridge Terminal Transport*,[15] the Fourth Circuit found that a trial court made an impermissible credibility determination and weighing of evidence in the context of a summary judgment granted in a workers' compensation case. There, the defendant employer argued that under La. R.S. 23:1208, the plaintiff made false statements in connection with her workers' compensation claim and subsequent lawsuit because she failed to disclose her prior medical conditions and accidents. The trial court agreed with this argument and entered summary judgment in favor of the employer. On appeal, the First Circuit reversed and chastised the trial court for improperly weighing the evidence.[16]

The Third Circuit has put the prohibition on weighing the evidence in more pointed terms. It said that "issues of credibility have no place in summary judgment procedure. It is not the court's function on a motion for summary judgment to determine

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[13] *Id.* at 1106.

[14] Tatum, 59 La. Law Review at 150.

[15] 2004 WL 2291460 (La. App 4th Cir 2004), ____So.2 d _____.

[16] *Id.* at p. 5 ("However, because the ultimate conclusion that Ravy willfully made false statements for the purpose of obtaining benefits required the weighing of evidence and the making of credibility calls in the context of a motion for summary judgment.").

or even inquire into the merits of the issues presented."[17] The court further explained that "while deposition testimony may be used to support or oppose a motion for summary judgment, it must not be weighed."[18]

The issue of making credibility calls is particularly problematic if the court attempts to make a determination about subjective facts, such as facts relating to motive or intent,[19] knowledge,[20] malice or good faith. Those issues cannot be resolved with a summary judgment motion.

2. Are the issues of fact "material?"

In addition to showing an absence of genuine issues of fact, the mover must show that those missing facts are "material." Generally, a fact is "material" if its existence or nonexistence may be essential to the plaintiff's cause of action under the applicable theory of recovery.[21] More simply put, a material fact is one that would matter on the trial of the merits.[22] The question of materiality is determined on a case-

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[17] *Lexington House v. Gleason*, 733 So. 2d 123, 126 (La. App. 3rd Cir. 1999), *writ denied*, 746 So. 2d 603 (1999).

[18] *Id.* at 126.

[19] *ACMG of Louisiana, Inc. v. Jones*, 796 So. 2d 704 (La. App. 2nd Cir. 2001)(Second Circuit noted that at the summary judgment stage, the trial judge could not consider a corporate president's subjective belief, presented in affidavit, that he was acting in his corporation's best interest in terminating a contract with the corporation).

[20] *Cunningham v. Northland Ins*. Co., 769 So. 2d 689 (La. App. 5 Cir. 2000), *writ denied*, 776 So. 2d 470 (La. 2000)(question of whether plaintiff knew of "open and obvious" hazards on property leased by hunting club was a subjective issue of fact that was not appropriately decided on summary judgment).

[21] *Stroder v. Horowitz*, 775 So. 2d 1261 (La. App. 3rd Cir 2001).

[22] *Smith v. Our Lady of the Lake Hospital*, 639 So. 2d 730 (La. 1994). Pre-1996 cases such as *Smith* cite the rule that any doubt as to a dispute regarding a material

by-case basis because the facts must be viewed in light of the substantive law involved in the plaintiff's claims.[23]

A factual dispute, when it is unrelated to the elements of the plaintiff's claims, is not enough to overcome a motion for summary judgment. For example, the First Circuit found that in a case involving a breach of an employment contract, a factual dispute about whether other employees had been promised employment benefits was not material and was, thus, insufficient to defeat summary judgment because those facts had nothing to do with whether the plaintiff had a valid contract with the defendant. [24] Similarly, in *Lane v. State Farm Mutual*,[25] the Fourth Circuit observed that in a negligence case, factual discrepancies are not material when they have no bearing on the defendants' duty to the plaintiff. There, the Fourth Circuit affirmed a summary judgment ruling in favor of the Orleans Parish School Board and one of its school crossing guards on a claim brought by a student injured at an intersection several blocks from a public school. The Court concluded that factual discrepancies about whether the school principal gave the student permission to leave the school did not

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issue of fact must be resolved against granting the motion for summary judgment and in favor of a trial on the merits. Query whether this presumption is still valid in light of the 1996 and 1997 changes to the summary judgment articles.

[23] *Blue Williams & Buckley v. Brian Investments, Ltd*., 706 So. 2d 999 (La. App 1st Cir. 1997), *writ denied*, 703 So. 2d 1311 (La. 1997).

[24] *Trigg v. Pennington Oil Co., Inc*., 835 So. 2d 845, 847 (La. App. 1st Cir. 2002)("Although the factual content of the depositions is inconsistent, the inconsistencies are not material facts; therefore, they do not preclude summary judgment).

[25] 883 So. 2d 5 (La. App. 4th Cir. 2003).

relate (and, therefore, were not material) to whether the crossing guard owed a duty to the student under the duty-risk analysis used for negligence cases.[26]

B. Evidentiary Considerations on Summary Judgment

1. What evidence may the court consider?

A court may consider pleadings, depositions, answers to interrogatories, admissions "on file" and affidavits when ruling on summary judgment motions.[27] As discussed in other sections of these materials, affidavits are frequently the battleground at the summary judgment stage. La. Code of Civil Pro. Article 967(A) sets out the familiar framework for affidavits:

- Affidavits must be made on personal knowledge;
- Affidavits must "set forth such facts as would be admissible in evidence"; and
- Affidavits must show affirmatively that the affiant is competent to testify to the matters stated therein.

Generally, summary judgment is tried on the papers and arguments of counsel. The court cannot receive or consider live testimony to decide the motion, even if the testimony is offered with the consent of the parties.[28]

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[26] *Id*. at 8.

[27] La Code of Civil Procedure Art. 966(B). The reference to items being "on file" is a holdover from the days when discovery requests, responses and depositions were filed in the court record. Since 1989, the original discovery requests and responses are filed with the party "provoking" the discovery. *See generally*, La Code of Civ. Pro. Arts. 1446 and 1474.

[28] 667 So. 2d 1190 (La. App. 4th Cir. 1996) ("Testimony should neither be received nor considered, even with the consent of counsel, to decide a motion for

Theoretically, the parties may also submit other documents, so long as the documents are attached to an affidavit or supported by sworn testimony, or are "certified" copies of the documents.[29] By contrast, an unsworn document or uncertified document is "not of sufficient evidentiary quality to be given weight in determining whether or not genuine issues of material fact exist."[30] In short, an "unsworn and unverified document is insufficient."[31]

The case law presents many examples of issues relating to documentary evidence submitted with summary judgment motions. For example, one court found that an emergency room record that was not certified or identified by affidavit was not sufficient summary judgment evidence.[32] Not surprisingly, an unsigned and un-

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summary judgment.") *But see Leflore v. Coburn*, 665 So. 2d 1323 (La. App. 4th Cir. 1995). In the *Leflore* case, the trial court allowed live testimony on the premises that: (a) depositions may be used to support or oppose summary judgment motions, so long as the court does not make credibility determinations about the testimony; and (b) depositions can be given in open court. *Id* at 1331, fn 5. On appeal, the Fourth Circuit stated that it "found no fault with this reasoning" and that the trial only used the testimony to determine whether there were any disputed issues of fact. The trial court, according to the Fourth Circuit, did not attempt to "resolve any such dispute by way of summary judgment." *Id.* at 1331.

[29] *See* La. Code of Civ. Pro. Art. 967 (C)("Sworn or certified copies of all papers or parts thereof shall be attached thereto or served therewith."). Professor Maraist opines, however, that the case law is unclear as to what extent "other documents" may be considered on summary judgment. *See* Maraist and Lemmon, *Civil Procedure*, Section 6.8, Fn. 78 (2004 Pocket part).

[30] *Premier Restaurants, Inc. v. Kenner Plaza Shopping Center, LLC*, 767 So. 2d 927, 932 (La. App. 5th Cir. 2000).

[31] *Id.* (citations omitted).

[32] *Stuart v. New City Diner,* 758 So. 2d 345, 350 (La. App. 4 Cir. 2000)("This evidence is insufficient for two reasons. First, the emergency room report is not certified or identified by affidavit.")

notarized affidavit is also not proper evidence.[33] Where the parties both submit copies of the same uncertified document, expressing their agreement about the authenticity of the document, the Court may consider the document.[34]

Another rule is important and appears peculiar to Louisiana state court practice and not federal court practice. Because Louisiana courts do not consider memoranda in support of motions as "pleadings" under Louisiana Code of Civil Procedure Article 852, documents attached to memoranda are not properly considered as summary judgment exhibits.

As the First Circuit noted in the *Anderson* decision, "memoranda are not considered pleadings….consequently, attachments thereto should not be considered by the trial court in resolving motions for summary judgment."[35] For many years, this principle was reflected in the various local rules of court that only permitted the parties to file motions and exceptions in the record; memoranda were submitted directly to the trial judge. Now, the Uniform Rules of Court provide that a party may, but need not, file

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[33] *Anderson v. Allstate Insurance Company,* 642 So. 2d 208 *(La. App. 1st Cir. 1994), citing, Porche v. City of New Orleans*, 648 So. 2d 208,210 *(*La. App. 4th Cir. 1988*).*

[34] *Harvey v. Francis*, 785 So. 2d 893, 896 (La. 4th Cir. 2000) ("Neither the lease or the arson report was properly identified by affidavit. However, as both the plaintiff and defendant offered identical copies of these documents indicating that there is an agreement between them as to their authenticity, we will accept them.").

[35] *Anderson*, *supra*, 642 So. 2d at 210.

the memorandum in the record, except as otherwise provided by an order of the particular court.[36]

Customarily, in part for the trial court's convenience, parties attach to their motion for summary judgment copies of the relevant pleadings, depositions, answers to interrogatories and admissions of fact "on file." That is not required, however. In a recent case, the First Circuit considered whether a trial court could only consider evidence attached to a motion for summary judgment. Rejecting that suggestion, the court wrote that "there is no statutory indication or suggestion that the court should not consider all pleadings, depositions, answers to interrogatories and admissions of fact in circumstances in which said supporting documents were previously filed into the court record, but were not resubmitted as part of the motion for summary judgment."[37]

2. How to deal with improper summary judgment evidence.

If the court determines that an affidavit is submitted in bad faith or to delay the proceedings, the court shall "immediately" order the party offering the affidavit to pay the other party's reasonable attorney's fees and costs.[38] Moreover, "any offending party or attorney may be adjudged guilty of contempt."[39] This relief is similar to that provided

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[36] Louisiana Uniform Rule 9.9 (e). Some districts still follow the rule that memoranda must only be submitted to the judge. *See* Uniform Rules, Appendix 7. *But see Frisard v. Autin*, 747 So. 2d 813 (La. App. 1 Cir. 1999)(Trial court properly considered documents attached to memorandum because motion contained statement that memorandum and exhibits attached to memorandum were "filed contemporaneously herewith, as though copied herein *in extensio.*")

[37] *Thibodaux v. Tilton*, 2003 CA 2220, p. 3, fn. 3 (La. App. 1st Cir. 10/22/04), ___So.2d ___.

[38] La Code of Civil Procedure Art. 967 (D).

[39] La Code of Civil Procedure Art. 967 (D).

in Article 863, but does not require hearing and notice, as is required under that article.[40]

A party should also timely object to any improper summary judgment evidence, or risk waiving the right to complain about the defect.[41] To voice this objection, the party may use the motion to strike under La. Code of Civ. Pro. Art. 964.

C. Procedural Requirements.

1. What must be included in the summary judgment motion?

Obviously, a motion for summary judgment must comply with the usual pleading requirements.[42] The Uniform Local Rules also contain special rules that apply to summary judgment memoranda. The memorandum in support of motion for summary judgment must contain:

- A list of the essential legal elements necessary for the mover to be entitled to a judgment;

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[40] La Code of Civ. Pro. Art. 863(D) and (E). Under Article 863, a court can impose sanctions (including attorney's fees and costs) for improperly submitting pleadings on its own motion or the motion of any party. Sanctions may only be imposed after the party is given notice and the Court holds a hearing "at which any party or his counsel may present any evidence or argument relevant to the issue of imposition of sanctions."

[41] *Barnes v. Sun Oil Co*. 362 So. 2d 761, 763 (La. 1978)("The record does not disclose that the plaintiffs filed a motion to strike or otherwise objected to the affidavit. We consider the inadequacy of the affidavit to be a formal defect which is deemed to be waived and conclude that the trial court properly considered [the affidavit] in ruling on the summary judgment offer.").

[42] *See* La. Code of Civ. Pro. arts. 863, 853 and 962. The requirement of matching facts with documents is a recent one. It requires that the parties specifically tie a disputed (or undisputed) fact to a particular document. It is no longer sufficient to simply identify a disputed fact or undisputed fact.

- A list of the material facts that the mover contends are not genuinely disputed; and
- A reference to the document providing each such fact, with the pertinent part containing proof of the fact designated.[43]

Correspondingly, the memorandum in opposition to the summary judgment motion must contain:

- A list of material facts that the opponent contends are genuinely disputed; and
- A reference to the document proving that each such fact is genuinely disputed, with the pertinent part designated.[44]

Many lawyers assume that the motion for summary judgment, similar to an exception, may be filed in lieu of an answer. That assumption may not be a safe one, however. Louisiana Code of Civ. Pro. Art. 1001 provides that the delay for filing an answer is extended by the timely filing of an *exception* prior to filing the answer; the article does not mention filing a summary judgment motion. A prudent strategy may be to file an answer in addition to the summary judgment motion, to prevent the plaintiff from taking a default judgment.[45]

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[43] Louisiana Uniform Rule 9.10.

[44] I*d*.

[45] The writer realizes that many practitioners may not regard this step as unnecessary, but under the language of the Code of Civil Procedure, it is theoretically required.

2. Time for filing the motion for summary judgment.

A party moving for summary judgment must file the motion and supporting affidavits at least fifteen days before the hearing date.[46] In addition, the moving party shall "concurrently furnish the trial judge and serve on all other parties a supporting memorandum that cites both the relevant facts and applicable law."[47] The memorandum must be served on all parties so that it is received at least fifteen days before the hearing date, unless the court sets a shorter time period.[48]

The party opposing summary judgment must furnish the court with his or her opposition brief and opposing affidavits and serve all parties at least eight days before the hearing date. That eight-day period is counted as eight calendar days. [49] The sanction for failing to file a timely opposition brief is losing the "privilege" of oral argument.[50]

The courts of appeal are divided about whether a trial court should consider affidavits that are filed late.[51] A recent Third Circuit case found that the trial court's

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[46] *See* La. Code of Civ. Pro. Art. 966(B) and Louisiana Uniform Rule 9.9(a). Prior to 2003, Article 966 provided that the motion and affidavits had to be filed at least 10 days before the hearing date. Act 867 lengthened that time period to the current fifteen-day period.

[47] Uniform Rule 9.9 (a).

[48] *Id.*

[49] *See* La. Code of Civ. Proc. Art. 5059.

[50] Louisiana Uniform Rule 9.9 (d).

[51] Compare *Johnson v. Ouachita Parish Police Jury*, 353 So. 2d 1114 (La. App. 2nd Cir. 1977)(allowing consideration of late filed affidavit) and *Acme Refrigeration of*

decision to do so is only reversible error if the other party is prejudiced by the late filing.[52] In another decision, the Third Circuit found that where the party opposing summary judgment served an unsigned affidavit within the appropriate time period, but did not provide the signed affidavit until the day of the hearing, the trial court properly considered the affidavit.[53] The court's reasoning was that the rule is intended to give the other parties fair warning of the factual basis for the motion and the supporting affidavits.[54] Because the unsigned and signed affidavits were identical, the Court concluded that the parties had adequate notice of the content of the affidavit and the trial court was correct in considering it.[55]

In addition, a party may file successive summary judgment motions and the court may consider the same summary judgment on multiple occasions.[56] A defendant may move for summary judgment at any time, while the plaintiff may only move for summary judgment after the defendant has filed an answer.[57]

Baton Rouge, Inc. v. Caljoan, Inc., 346 So. 2d 743 (La. App. 1st Cir. 1977)(not allowing consideration of late filed affidavit).

[52] *Peoples State Bank v. Highway One Crawfish, Inc*., 771 So. 2d 101 (La. App. 3rd Cir. 2000).

[53] *Thomas v. De St. James*, 846 So. 2d 765 (La. App. 3rd Cir. 2003).

[54] *Id.* at 770.

[55] *Id.*

[56] *Rogers v. Horseshoe Entertainment*, 766 So. 2d 595 (La. App. 2nd Cir. 2000)("A trial judge Is not barred from entertaining a motion for summary judgment a second time."), *writs denied*, 776 So. 2d 463 (La. 2000) 776 So. 2d 464 (La 2000), and 771 So. 2d 690 (La. 2000).

[57] La Code of Civ. Pro. Art. 966(A).

The Court must hear and rule on a motion for summary judgment at least ten days before the trial date.[58]

D. Burden Shifting under Article 966--the "no evidence" summary judgment motion

The 1996 and 1997 amendments to the Code of Civil Procedure's summary judgment articles represented a significant departure from Louisiana's summary judgment procedure in the past. In particular, the 1997 amendments to Article 966 statute clarified the burden of proof for the moving and non-moving parties:

> C(2) The burden of proof remains with the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, if the adverse party fails to introduce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact.

Under these amendments to Article 966, which the Louisiana Supreme Court observed parallel the U.S. Supreme Court's ruling in *Celotex Corp. v. Catrett,*[59] the burden is initially on the moving party to produce evidence to show that the opponent is missing factual support for a key element of his or her claim.[60] At that point, the burden shifts to the party who will bear the burden of persuasion at trial (ordinarily the plaintiff).

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[58] La Code of Civ. Pro. Art. 966(D).

[59] 477 U.S. 317, 106 S. Ct. 2458 (1986).

[60] *See* generally, *Babin v. Winn-Dixie Louisiana, Inc*., 764 So. 2d 37 (La. 2000).

That party must come forward with evidence that demonstrates he or she will be able to meet the evidentiary burden at trial. If that party cannot do so, however, there are no material issues of fact, and assuming the law is clear, the summary judgment motion must be granted. As the Supreme Court noted, "once the summary judgment motion has been properly supported by the moving party, the failure of the non-moving party to produce evidence of a material factual dispute mandates granting of the motion."[61]

The Louisiana Supreme Court's opinion in *Babin v. Winn Dixie, et al,*[62] opinion contains a straightforward set of facts to explain the burden-shifting procedure. There, the plaintiff alleged that he slipped on a box of toothpicks in a Winn Dixie store. The plaintiff asserted claims under Louisiana's premises liability statute and alleged that the store had constructive notice of the dangerous condition caused by the toothpicks. Winn Dixie moved for summary judgment and argued that the plaintiff could not prove constructive notice, and, therefore, lacked proof as to a key element of his claim. To support its motion, Winn Dixie submitted two affidavits from employees who stated that they had inspected the area near the plaintiff's fall shortly before the fall and had not seen any toothpicks on the floor. The plaintiff apparently did not submit any affidavits to oppose Winn Dixie's motion. Instead, he submitted a copy of the store's daily "zone" log and the store manager's incident report. The plaintiff also relied on excerpts from his own deposition testimony.

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[61] *Id.* at 40.

[62] 764 So. 2d 37 (La. 2000).

The trial court granted Winn Dixie's motion and found that the plaintiff had failed to come forward with any "positive" evidence[63] to show that the tooth picks had been on the floor for long enough to establish that Winn Dixie knew or should have known about them. In an unpublished opinion, the court of appeal reversed the trial court ruling and found that Winn Dixie's affidavits were "insufficient" to dispose of the notice issue.

Applying the new procedure under Article 966(C), the Supreme Court found that the defendant's summary judgment motion should have been granted. According to the court, Winn Dixie sufficiently demonstrated that the plaintiff failed to allege proper factual support to show that the store had constructive notice of the dangerous condition, one of the required elements for his claims. At that point, the responsibility shifted to the plaintiff to show that he could meet his burden at trial, *i.e*., that he would be able to demonstrate that Winn Dixie had constructive notice that the toothpicks were on the floor at the time of the accident. The Supreme Court concluded that the plaintiff failed to meet this burden.

The dissenting opinion uncovers a weakness, perhaps unknowingly, with the procedure in Article 966(C). The majority opinion concluded, without much analysis, that even though the plaintiff brought forward *some* evidence to show that the toothpicks had been on the floor for some length of time, any speculation about that evidence "falls far short of the factual support required to establish that plaintiff will be able to satisfy his evidentiary burden at trial."[64] In her dissent, Justice Johnson concluded that the majority's opinion did not give proper significance to the plaintiff's evidence. She found

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[63] *Id.* at 39.

[64] *Id.* at 40.

that the majority incorrectly concluded that the evidence did not "constitute factual support sufficient" to show that the plaintiff could satisfy his burden at trial.

The weakness, or at least cause for some concern, is that the majority appears to give the trial court some latitude in determining whether the plaintiff's evidence is sufficient to show that the plaintiff will be able to sustain his burden of proof at trial. Without much discussion, the majority in *Babin* concluded that the plaintiff's evidence came up short.

The question, then, is how the trial court should decide whether the plaintiff's evidence is "sufficient" to show that he or she will be able to meet the evidentiary burden of proof at trial. The Supreme Court's opinion in *Babin* does not give us any guidance on the answer to this question. Instead, without much discussion, the court simply rejected the evidence brought forward by the plaintiff as not sufficient.

Article 966(C) provides some help, however. As Professor David Robertson pointed out, the Legislature's choice of wording in Article 966 is significant.[65] Once confronted with a properly-supported motion for summary judgment, the non-moving party must show that it can meet its burden of "proof" at trial. Article 966 does not require, however, that the non-moving party show he or she will be able to meet the burden of "persuasion" at trial. Robertson suggests the use of the term "proof" versus "persuasion" means that the non-mover must only show that he will be able to come

[65] Robertson, "Summary Judgment and Burden of Proof," 45 La. Bar Journal 331 (December, 1997).

forward with facts "from which a reasonable juror could conclude in his favor."[66] Article 966 does not require that the non-mover show that he or she will win with those facts.

While the Court's decision in *Babin* may give the plaintiffs' bar some cause for concern, a very recent First Circuit opinion appears to turn the tables in the other direction. In *Sheppard v. City of Baton Rouge,*[67] the First Circuit considered a trial court ruling that granted summary judgment against one defendant in a civil rights action brought against the City of Baton Rouge and several police officers.

In *Sheppard*, one of the defendant police officers moved for summary judgment, but did not offer any evidence to support the motion. Instead, in brief, he argued that the plaintiffs' claims totally lacked factual support. The plaintiffs filed an opposition to the motion, but likewise, did not submit any evidence to refute the defendant's arguments. Instead, the plaintiffs relied on the allegations in their petition. The trial court granted the motion and dismissed the plaintiffs' claims against the police officer.

On appeal, the First Circuit, through Judge Downing, concluded that because the defendant failed to provide any factual support for his motion, the plaintiffs were able to rely on the allegations in their petition to overcome summary judgment.[68] The Court acknowledged that <u>if</u> the defendant offered factual support for his motion (*e.g.,* an affidavit, discovery responses, other pleadings, or the like), the plaintiffs could not simply rely on the allegations in their petition--they would be required to come forward

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[66] *Id.* at 335.

[67] 2004 WL 2071704 (La. App. 1st Cir. 9/17/04), ____ So.2d _____ .

[68] *Id.* at p. 5.

with factual support for the claims.[69] But, because the defendant did not do so, the plaintiffs could rely on their allegations with no additional proof.

The result of the *Sheppard* decision is wrong for several reasons and the Louisiana Supreme Court should correct it. The First Circuit essentially acknowledged that the weight of authority supports not requiring the mover to offer evidence to support his or her motion. First, the court noted that under Code of Civil Procedure Articles 966 and 967, a moving party (if he or she will not bear the burden of proof at trial), may satisfy its burden on summary judgment by simply "pointing out" the absence of factual support for one or more of the plaintiff's claims.[70] According to the Court,

> Since a party does not point out things in a factual affidavit, the obvious implication is that a litigant does not have to file affidavits to "point out." Therefore, a defendant's motion for summary judgment pointing out that the other side cannot prove its case should be sufficient to trigger the requirement that an adverse party file affidavits and that he not be able to rest on the mere allegations of his petition.[71]

The court also acknowledged that under federal law, and the U.S. Supreme Court's ruling in a *Celotex Corp. v. Carrett*, the result is the same--a party is not required to file affidavits in support of its motion, but can simply point out that the other side's case lacks an essential element of evidence.[72]

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[69] *Id.* at 7.

[70] *Id.* At 2-3.

[71] *Id.* At p. 3.

[72] *Id.*

Despite the clear language of the Code of Civil Procedure articles[73] and the federal jurisprudence (on which our articles are based), the court ultimately concluded that the Louisiana Supreme Court has not directly ruled that a non-moving party cannot rely on the allegations of his petition in response to an unsupported summary judgment motion.[74] For that reason, the court found that if a motion for summary judgment is not supported, the non-moving party may rely on his or her pleadings.

The *Sheppard* opinion also creates practical problems that must be considered. How does a party moving for summary judgment offer facts to show the *absence* of facts? Under the court's reasoning in *Sheppard*, at least until the Louisiana Supreme Court addresses the issue, if a defendant asserts that the plaintiff's claims lack factual support, but cannot offer any evidence to support the motion, a plaintiff can easily defeat the motion by pointing to the allegations in her petition. One wonders whether a defendant, faced with having no evidence to show the absence of facts (as may frequently be the case), can simply submit an affidavit that swears the plaintiff's claims lack factual support. This seems likes a nonsensical step, but may be one way to get around the First Circuit's ruling, at least until the Louisiana Supreme Court addresses the issue.

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[73] Some may legitimately question the court's analysis and reading of Article 967. The court noted that Article 967 provides that when a summary judgment article is made and "supported as provided above," the adverse party may not rest on the mere allegations or denials of his pleading, but must set forth specific facts to show there is a genuine issue for trial. The court then jumped to consider the converse of this concept: [t]he inverse implication is that if an unsupported motion for summary judgment is made, then the opposing party may rely on his pleadings." The court cites a single First Circuit case as authority for this interpretation of Article 967, *Estain v. U.S. Department of Transportation and Development*, 819 So. 2d 375 (La. App. 1st Cir. 2002).

[74] *Id.* at 8.

One of the primary goals of the summary judgment motion is to accomplish a speedy and inexpensive resolution of matters that need not go to trial. In the *Sheppard* scenario, we may quickly find ourselves back in the same pre-1996/1997 era when summary judgment motions were not favored and where courts rarely granted the motions.

Another recent First Circuit opinion, *Peters v. Hortman*,[75] seems to also undercut the utility of the summary judgment motion, and demonstrates the reluctance by some courts to grant the motions. In *Peters*, a medical malpractice action, the defendant sent discovery requests seeking the identity of the plaintiff's expert witnesses. The plaintiff failed to respond to the discovery.

The defendant then moved for summary judgment and submitted an affidavit from a member of the medical review panel to support the motion. The defendant argued that the plaintiff failed to identify an expert witness in response to its discovery requests. Without one, according to the defendant, the plaintiff could not meet his burden of proof at trial.

In response to the motion, the plaintiff submitted an unsworn letter from a doctor who purported to be the plaintiff's expert. Finding that the plaintiff failed to offer sworn proof in support its opposition, the trial court granted the summary judgment motion.

The plaintiff then filed a timely motion for new trial, and submitted an affidavit from the doctor (rather than the unsworn letter previously provided). The plaintiff also

[75] 2004 WL 2415156 (La. App 1st Cir. 2004), __ So. 2d__.

served updated discovery responses on the defendant that identified the doctor as the plaintiff's expert. The trial court denied the motion for new trial.

On appeal, the First Circuit found that the trial court improperly denied the new trial motion. The court found that "there were no genuine issues of fact as to whether Dr. Hortman breached the applicable standard of care" at the time when the trial court ruled on the motion for summary judgment because the expert letter was insufficient.[76] But, because the plaintiff subsequently submitted proper proof in the form of an affidavit with its new trial motion, the court ruled that "given the peculiar circumstances of this case, a miscarriage of justice would result by depriving plaintiff an opportunity to defend the summary judgment. To allow the judgment below to stand would be to permit technical pleading rules to triumph over actual justice." [77]

Peters is problematic and may have unintended consequences. The principal problem is that the ruling seems contrary to the purpose of the summary judgment motion--to quickly and inexpensively dispose of matters that need not be tried. The court of appeal effectively gave the plaintiffs two bites at the apple.

In addition, creative plaintiffs (and plaintiffs' lawyers) may also see a strategic advantage in *Peters*. To avoid initially submitting a sworn expert report or statement, plaintiffs may first submit an unsworn report. If the trial court denies summary judgment, the plaintiff has gained the advantage of not committing his or her expert to a sworn position.

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[76] *Id.* at p. 3.

[77] *Id.* at p. 4.

If, on the other hand, the trial court grants the motion, the plaintiff can simply file a motion for new trial to submit the appropriate sworn report or testimony. In addition, the plaintiff can tailor the report to those issues needed to create material issues of fact. That result should not stand, but under the First Circuit's ruling in *Peters*, it might unless the Supreme Court says otherwise.

PART II: SELECTED TOPICS

A. Experts and Summary Judgment

In increasing numbers, parties are using expert testimony to support or oppose motions for summary judgment. Although the federal courts have long allowed expert testimony at the summary judgment stage, many Louisiana state courts have been reluctant to do so until very recently. The courts' rationale was that the summary judgment articles in the Code of Civil Procedure require that affidavits must be based on personal knowledge. Because expert testimony, by its nature, is *not* based on first-hand factual information, Louisiana courts often concluded that expert testimony was not proper summary judgment evidence.

The 2000 decision by the Louisiana Supreme Court in *Independent Fire Insurance Company v. Sunbeam Corporation*,[78] substantially changed the landscape regarding expert evidence and summary judgment. In that case, the court held that a trial court must consider expert opinion evidence submitted in connection with a summary judgment motion, provided that the evidence satisfies the *Daubert* factors.

[78] 755 So. 2d 226 (La. 2000).

Before the *Independent Fire* decision, the Louisiana appellate courts frequently disagreed about how and whether to consider expert evidence on summary judgment. As Professor Maraist indicates, the law in the area was both "unsettled and unsettling."[79] The First Circuit opinions generally refused to allow the court to consider expert evidence.[80] The Third and Fifth Circuits similarly concluded that the trial court could not consider expert evidence (either by affidavit or testimony) because such evidence was not based on first-hand knowledge.[81] The Second Circuit's opinions were not consistent--some cases allowed expert testimony to be considered and others did not.[82]

It is against this backdrop that the Louisiana Supreme Court granted writs in the *Independent Fire* case and addressed the issue of "whether Louisiana Code of Civil Procedure Article 967 prohibits the consideration of opinion evidence, in the form of either affidavits or depositions, by the trial judge in deciding a motion for summary judgment."[83]

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[79] Maraist and Lemon, *Civil Procedure*, § 6.8, p. 143.

[80] *See Independent Fire Insurance Company Co. v. Sunbeam Corp*., 733 So. 2d 743 (La. App. 1st Cir.1999).

[81] *See Read v. State Farm Mutual Ins. Co.,* 725 So. 2d 85 (La. App. 3rd Cir. 1998)(affidavit from expert not admissible); *McElreath v. Progressive Insurance Co.*, 595 So. 2d 693 (La. App. 5th Cir. 1992), *writ denied*, 596 So.2d 557 (La. 1992).

[82] *See McCoy v. Physicians & Surgeons Hospital, Inc*., 452 So.2d 308 (La. App. 2nd Cir. 1984) (statements in affidavits and depositions by experts do not meet personal knowledge requirements); *See also Gardner on Behalf of Gardner v. Louisiana State University Medical Center in Shreveport*, 702 So. 2d 53 (La. App. 2nd Cir. 1997)(affidavit containing expert opinion is permissible summary judgment evidence).

[83] *Independent Fire Insurance Company*, *supra*, 755 So. 2d at 228.

The facts of this case were straightforward. A homeowner's insurer sued a barbeque grill manufacturer and a service station alleging that the homeowner's grill caught fire. The manufacturer filed a third-party demand against the service station and claimed that the station's employee overfilled an extra propane tank the owner stored under the grill.

The service station filed a motion for summary judgment, asserting that there was no evidence that the station overfilled the spare tank or that the service station's actions proximately caused the plaintiff's damages. The service station supported its motion with deposition testimony from the station owner and three expert witnesses who offered opinions about the cause of the grill fire (all of which, not surprisingly, pointed the finger at the manufacturer).[84]

In opposition to the service station's motion, the plaintiff and manufacturer relied on their own expert report and excerpts of the expert's deposition. According to the court, the expert's testimony indicated that his conclusions were "not based on any first-hand knowledge as to how the tank was filled because he was not present at the time the tank was filled."[85] The trial court granted the service station's motion for summary judgment. The court ruled that the expert had not established any first-hand information about how the station filled the propane bottle.

The First Circuit affirmed the trial court ruling, but ruled that the trial court should not have considered the expert evidence because it was not based on "personal

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[84] *Id.* at 229.

[85] *Id*.

knowledge" as required by Article 967.[86] The First Circuit concluded that "statements of an expert as to his professional opinion or belief, based upon his special training and experience, do not meet the requirement of 'personal knowledge,' and for that reason do not qualify as proper foundation in support of a motion for summary judgment."[87]

The Supreme Court reversed the First Circuit's ruling and found that the trial court must consider expert evidence at the summary judgment stage. The court based its conclusion on several factors. First, the court correctly observed that Louisiana's summary judgment procedure is based on and similar to Rule 56(c) of the Federal Rules of Civil Procedure. Federal courts, as recognized by the Louisiana Supreme Court, have "routinely considered expert opinion evidence in affidavits or depositions at the summary judgment stage under the factors enumerated in *Daubert*…."[88]

Second, the court found the result of not considering the expert evidence inequitable. The court said it would be illogical to grant summary judgment in favor of a party who has eyewitness testimony against a party who does not, but who has expert testimony, which, if believed, would contradict the eyewitness testimony.[89] In that case, the party with expert testimony (but no eyewitness testimony) might prevail at trial, but

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[86] *Id.*, *citing* , *Independent Fire Ins. Company v. Sunbeam Corp*., 733 So. 2d 743, 746 (La. App. 1st Cir. 1999).

[87] *Independent Fire Ins. Company*, 733 So. 2d at 746.

[88] *Independent Fire Ins. Company*, 755 So. 2d at 233.

[89] *Id.* at 235.

would lose at the summary judgment stage under the First Circuit's strict adherence to the personal knowledge requirement.[90]

The Supreme Court also recognized that the drafters of the Code of Civil Procedure likely did not have expert evidence in mind when they used the term "personal knowledge" in Article 967. As the Court observed, Article 967 was enacted in 1960, "well before the proliferation of expert opinion evidence on summary judgment."[91]

The court, perhaps realizing the practical implications of its decision, ruled that in considering an expert's affidavits or deposition testimony, the court should consider the *Daubert* factors.[92] The court noted that the lower courts should remember not to make credibility determinations on a motion for summary judgment, and in the context of expert issues, should not attempt to evaluate the persuasiveness of competing scientific studies.[93] The court also noted that summary judgments deprive the litigants of their "day in court" and, therefore, can only be granted when there is no genuine issue of

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[90] The majority opinion used the following hypothetical example to explain its argument. If a driver of a vehicle claimed her brakes were defective and claimed she was pressing the brakes but the car continued to move forward, she could file a motion for summary judgment supported by an affidavit with her version of the facts. The brake manufacturer likely would not be able to offer any eyewitness testimony to oppose the plaintiff's motion, but might be able to offer expert testimony about the likely events of the car crash. Under the majority's hypothetical situation, the jury might, after considering the expert's testimony, conclude that the plaintiff's version of the facts was not credible. This result would be illogical--how could this plaintiff prevail on summary judgment, even though she would not have won at trial because the defendant's expert's testimony was not based on personal knowledge? *Id.* at 235.

[91] *Id.*

[92] *Id.* at 236.

[93] *Id.*

material fact in dispute. If, however, a "party submits expert opinion evidence in opposition to a motion for summary judgment that would be admissible under *Daubert-Foret*, and the other applicable evidentiary rules, and is sufficient to allow a reasonable juror to conclude that the expert's opinion on a material fact more likely than not is true, the trial judge should deny the motion and let the issue be decided at trial."[94]

The preceding quote is the real linchpin of the *Independent Fire* decision and may cause concern for some. Essentially, the court is saying that if a party submits an expert affidavit, that expert affidavit can be used to create material issues of fact and that can be used to defeat a properly-supported summary judgment motion. The dissenting opinion is critical of this point and notes that in some cases, the majority's holding will allow a plaintiff to get a "free pass to trial."[95] In other words, as the dissent pointed out was the situation in the *Independent Fire* case, a party could offer a factually-bare affidavit and defeat a summary judgment motion which was otherwise properly pleaded.

The dissent suggested an intermediate position. While the dissent found that a party could rely on expert evidence to oppose summary judgment, that evidence should not "defeat summary judgment when such an opinion is not grounded on specific facts that are material to the genuine issue for trial."[96]

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[94] *Id.*

[95] *Id.* at 237.

[96] *Id.*

The *Independent Fire* decision is certainly a good result to the extent that it resolves a conflict among the courts of appeal. The practical impact of the decision remains to be seen, and several questions arise:

(1) Should a party be allowed to "create" material issues of fact with expert testimony, thereby defeating summary judgment; and, if so, is this inconsistent with the Legislature's instruction that summary judgment is intended to be a "just, speedy and inexpensive" method of resolving disputes?[97]

(2) Does the majority's opinion further encourage the already widespread use of "professional experts" who offer their services to the highest bidder?

(3) Does the court's opinion stack the odds <u>against</u> the party who cannot afford an expert?

(4) Is requiring the parties to engage in a *Daubert* battle at the summary judgment stage consistent with objectives of summary judgment?

(5) Will the Louisiana trial courts have the time and energy needed to properly evaluate expert evidence under the *Daubert* analysis?

Moreover, with the Supreme Court's endorsement of expert evidence at the summary judgment stage, litigants may need to plan their strategy out several steps in advance. To avoid "surprise" expert testimony, it may be advisable to ask the court to enter a case management or scheduling order that establishes expert identification and report deadlines. These orders are routinely used by federal courts but they are used

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[97] Ultimately, defendants may be hurt by the court's ruling in *Independent Fire* more than plaintiffs. In many cases, plaintiffs may be able to create material issues of fact and fend off summary judgment with a properly-worded expert affidavit. In light of this result, the trial courts may be faced with an ever increasing number of *Daubert* motions.

much less frequently in state courts. It may be helpful to have those deadlines well in advance of any dispositive motion deadlines.

Once experts are identified and reports are provided, the parties may file *Daubert* motions to attack the other side's experts. This will allow the court to resolve the questions of expert testimony well in advance of the summary judgment stage.

As a final note on this topic, in 2003, the Legislature added a phrase to Article 967 that clearly endorsed the Louisiana Supreme Court's ruling in *Independent Fire*: "The supporting and opposing affidavits of experts may set forth such expert's opinions on facts as would be admissible under Louisiana Code of Evidence 702, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."[98]

B. Partial Summary Judgment Motions

For many years, Louisiana's courts did not permit piecemeal summary judgment rulings, although the jurisprudence and statutes recognized some exceptions to that rule. Under 1997 legislation, however, the trial court may grant a partial summary judgment.[99] Article 967 now permits a summary judgment to be "rendered dispositive of a particular issue, theory of recovery, cause of action, or defense, in favor of one or

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[98] La Code of Civil Proc. Art. 967(A), Acts 2003, No. 545. According to the 2003 comments to Article 967, the "the 2003 amendment is intended to make it clear that Article 967 does not preclude the use of qualified expert witness in support or in opposition to motion for summary judgment." Interestingly, the Legislature not only referred to LRE Art. 702, but said that the expert's affidavit must also show that he or she is "competent" to testify to the matters set out in the affidavit. It is unclear whether the Legislature intended to add an additional requirement for expert affidavits, or whether this is simply redundant of requiring the expert to pass the test under Article 702.

[99] La. Acts 1997, No. 483.

more parties, even though the granting of the summary judgment does not dispose of the entire case."

C. Appealing Partial Summary Judgment Rulings

A party does not have a right of appeal from a denial of a summary judgment motion.[100] While the action is still pending, the only option for a party facing a denial is to seek supervisory relief from the court of appeal. A denial of a motion for summary judgment may be reviewed in an appeal of a final judgment in the suit.[101]

A summary judgment that disposes of an entire suit, or dismisses one or more defendants from the suit, may be appealed of right, subject to the applicable time period for suspensive or devolutive appeals. The Court of Appeal's review of the evidence involving a summary judgment is *de novo*, under the same criteria that governed the trial court's determination of whether summary judgment would be appropriate.[102]

Parties may also appeal *partial* summary judgment rulings, subject to the provisions of Louisiana Code of Civil Procedure Article 1915. Partial summary judgments are recognized in Louisiana Code of Civil Procedure Article 966(A) which provides that a party may "…move for a summary judgment in his favor for all or part of the relief for which he has prayed." The right of appeal differs, however, depending on whether the partial judgment dismisses claims or defendants.

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[100] La. Code of Civ. Pro. Art. 968 ("An appeal does not lie from the court's refusal to render any judgment on the pleading or summary judgment.").

[101] *Board of Trustees of State Employees Group Benefit Plan v. St. Landry Parish School Board*, 844 So. 2d 90 (La. App. 1st Cir. 2003), *writ denied*, 843 So. 2d 404 (La. 2003).

[102] *Sanders v. Ashland Oil*, 696 So. 2d 1031, 1035 (La. App. 1st Cir. 1997), *writ denied*, 703 So. 2d 29 (La. 1997).

The Legislature patterned Article 1915 after Federal Rule 54 and intended to give parties a vehicle to take appeals without enduring the "hardship of awaiting final disposition of all claims."[103] Unfortunately, despite five different amendments to the article,[104] the courts of appeal have debated and differed on the proper interpretation of Article 1915 since it was first adopted in 1960.

The text of the article is straightforward enough. Article 1915(A) lists the instances in which a partial judgment (including a partial summary judgment) is final for purposes of appeal, including where the judgment dismisses some, but not all, of the parties to the suit. A partial judgment rendered under Section (A) is final and immediately appealable without any designation or explanation by the trial court. Article 1915(B) applies to a judgment that dismisses some of the claims in the lawsuit and mandates that the judgments "shall not constitute a final judgment unless it is designated as a final judgment by the court after an express determination that there is no just reason for delay."[105] Moreover, a judgment that does not contain an "express

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[103] *Motorola v. Associated Indemnity Corporation,* 867 So. 2d at 723, 727 (La. App. 1st Cir. 2003), citing Brook, *Symposium on Civil Procedure, Rendition of Judgments*, 21 La. Rev. 168, 235 (1960).

[104] *See* Acts 1983, No. 534, §3, Acts 1992, No. 71, §1, Acts 1997, No. 483, §2, Acts 1999, No. 89, §1, Acts 2001, No. 533, §1.

[105] La. Code Civ. Pro. Art. 1915(B). Article 1915(B) does not have an analogue in Federal Rule 54(b). That rule does not permit a partial appeal by designation of the trial court.

determination and designation" is not a "final judgment for purpose of an immediate appeal."[106]

The courts of appeal have differed on how to interpret Article 1915(B)'s requirement that the trial court make "an express determination that there is no just reason for delay." Since 1997, the decisions have questioned whether this language means the trial court must give an explicit written explanation of why the partial judgment is final and appealable, or whether the appellate court can rely on something short of an express explanation.

The First Circuit's decision in *Motorola v. Associated Indemnity Corporation*[107] illustrates how Article 1915(B) issues can come up in the context of a summary judgment ruling. In that case, Motorola brought a declaratory judgment action against its primary and excess insurers for coverage and indemnity related to two class action lawsuits. The insurers and Motorola filed cross motions for partial summary judgment on coverage issues. The trial court granted several of the motions in favor of the insurers.[108]

In one of its summary judgment rulings, the trial court disposed of some, but not all, of the claims against one of the insurer defendants. The trial court designated that

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[106] La Code of Civ. Pro. Art. 1915(B)(2).

[107] 867 So. 2d 723.

[108] *Motorola*, 867 So. 2d at 726-727. As to two of the three insurers in the case, the First Circuit found that the trial court's judgments were immediately appealable under Article 1915(A)(1) and (3). *See Motorola, Inc. v. Associated indemnity Corp*., 867 So. 2d 715 (La. App. 1st Cir. 2003).

ruling as a "final judgment" under Article 1915. The trial court did not provide any explanation of the "reasoning upon which it based that designation," however.[109]

As the First Circuit explained, the issue on appeal in *Motorola* was how to interpret Article 1915(B)'s requirement of an "express determination" and whether "such a determination requires the trial court to give specific reasons for designating a partial final judgment as final."[110] The court observed that federal cases were split on the proper interpretation of the "express determination" language contained in Federal Rule 54(b).[111] The majority of federal courts require that the trial court explain why its ruling is immediately appealable. The U.S. Sixth Circuit is the only court, however, that requires a trial court to provide written reasons for its designation.[112]

In several cases before *Motorola*, the First Circuit wrestled with the question of how to treat an appeal where the trial court failed to designate a partial judgment as final and appealable. To deal with this problem, the court frequently allowed appellants to supplement the record with a designation from the trial court.[113] This required that the appellant return to the trial court and ask for a designation under Article 1915(B).

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[109] *Motorola*, 867 So. 2d at 727.

[110] *Id*.

[111] *Id.*

[112] *See General Acquisition Inc. v. GenCorp. Inc.*, 23 F. 3d 1022, 1026 (6th Cir. 1994).

[113] *Motorola*, 867 So. 2d at 730. The Court adopted this procedure as an "internal policy."

The First Circuit followed this internal procedure for several years, but its decisions were not entirely consistent. In several cases, the court conducted a *de novo* review and determined that the trial court improperly designated the judgments as appealable.[114] In another case, the court adopted a standard of review followed in other Louisiana circuits--an abuse of discretion review if the trial court provided written reasons for its designation and a *de novo* review if the trial court provided no reasons for its designation.[115] Heading in a completely different direction, the court dismissed an appeal in one case for lack of jurisdiction where the trial court did not designate the judgment as final or explain its designation.[116] In yet another case, the court observed that "a valid certification of a partial judgment as final requires that the trial court give explicit reasons on the record as to why there is no just reason for delay; mere conclusory statements do not suffice."[117]

In *Motorola*, perhaps recognizing the inconsistency in its previous opinions, the First Circuit apparently intended to establish a bright-line procedure under Article 1915(B):

> What is more difficult, however, is the trial court's designation as final of the summary judgment in favor of Continental. That judgment clearly falls within the ambit of Article 1915(B), and despite the clear designation of the

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[114] *See Doyle v. Mitsubishi Motor Sales*, 764 So. 2d 1041 (La. App. 1st Cir. 2000), *writ denied*, 765 So. 2d 338.

[115] *See Van ex rel. White v. Davis*, 808 So. 2d 478 (La. App. 1st Cir. 2001).

[116] *See Boudreaux v. Audubon Ins. Co*., 835 So. 2d 681 (La. App. 1st Cir. 2001).

[117] *See Shapiro v. L. & L. Fetter, Inc*., 845 So. 2d 406, 410 (La. App. 1st Cir. 2003).

> summary judgment as final and appealable by the trial court, the reasoning upon which it is based is unstated. We will therefore address what constitutes proper designation of a partial judgment for purposes of appeal under Louisiana law.[118]

Although the court noted that "[a] trial court's explication of its designation of a judgment as final is the most desirable practice," it refused to impose "undue labor, however, on already overburdened trial courts in cases where the reasons are obvious."[119] Instead, the Court found that a failure to provide written reasons for a designation was not fatal to an appeal:

> Moreover, while written or oral reasons are desirable, we do not believe the trial court's failure to give reasons when it designates a judgment as final is a jurisdictional defect. The legislature has had many opportunities to impose this requirement for our jurisdiction but has failed to do so. We shall not usurp the legislature's authority by invoking a self-imposed jurisdictional requirement.[120]

The court's ruling in *Motorola* appears to adopt parts of the procedure that it followed in earlier cases. In cases where the trial court designates a partial judgment under Article 1915(B) and the reasons are "neither apparent nor provided," the court will conduct a *de novo* review of the record. In doing so, the court said it would continue to use the non-exclusive five-factor test adopted from federal jurisprudence to decide whether the judgment is "final":

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[118] *Motorola*, 867 So. 2d at 727.

[119] *Id.* at p. 732.

[120] *Id.*

(1) The relationship between the adjudicated and unadjudicated claims;

(2) The possibility that the need for review might or might not be mooted by future developments in the district court;

(3) The possibility that a reviewing court might be obliged to consider the same issue a second time;

(4) The presence or absence of a claim or counterclaim which could result in a setoff against the judgment sought to be made final; and

(5) Miscellaneous factors such as delay, economic insolvency considerations, shortening the time of trial, frivolity of competing claims, expense and the like.[121]

If, based on these factors, the court determines that the trial court mistakenly designated the judgment as final, the appeal should be dismissed.[122]

If the party appeals a partial judgment without any designation under Article 1915(B), however, the First Circuit will continue to follow its own internal policy of allowing the parties to supplement the record. In explaining this process, the court wrote: "We shall continue to employ the internal policy adopted by this court in 1999 of ordering the parties to show cause why the appeal should not be dismissed and permitting supplementation of the record with a proper designation."[123]

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[121] *Id*., *citing Banks v. State Farm Insurance Company,* 708 So. 2d 523, 525 (La. App 2nd Cir. 1998).

[122] *Motorola,* 867 So. 2d at 732.

[123] *Id.*

The procedure in *Motorola* is based in part on the Second Circuit's ruling in *Banks v. State Farm Insurance Company*.[124] In that case, the Second Circuit ruled that the *trial court* should consider the non-exclusive five facts in determining whether a judgment is appealable. Unlike *Motorola*, in *Banks*, the Second Circuit put the burden of weighing these factors on the trial court and was not willing to conduct a *de novo* review of the judgment where no written reasons are provided.[125]

Other courts of appeal have adopted a different procedure of which practitioners should be aware. In the Fourth Circuit, the trial court must make a "clear and concise" designation. Without such a designation, the appellate court will not certify the judgment as appealable, apparently ruling out the possibility of allowing the parties to supplement the record as allowed in *Motorola*.[126] In the Fifth Circuit, the appellate court uses the same five-factor test in *Motorola*.[127] If the trial court gives written reasons, the trial court's ruling is reviewed for abuse of discretion.[128] If the trial court fails to give

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[124] 708 So. 2d 523 (La. App. 2nd Cir. 1998).

[125] *Id*. at 525.

[126] *Jackson v. America's Favorite Chicken Company*, 729 So. 2d 1060 (La. App. 4th Cir. 1999). In a subsequent decision, the Fourth Circuit ruled that in the absence of a proper designation, the appellate court should convert the appeal to a request for supervisory relief. *See Evans v. Charity Hospital in New Orleans*, 801 So. 2d 1192, 1194 (La. App. 4th Cir. 2001).

[127] *See Berman v. De Chazal*, 717 So. 2d 658 (La. App. 5th Cir. 1998).

[128] *Id*. at 660.

written reasons for the designation, the appellate court will review the judgment *de novo*. [129]

D. Summary Judgment "Do's and Don'ts"

As a recap, below are several tips for summary judgment practice:

- ✓ Do object to improper summary judgment evidence or the objection may be waived;
- ✓ Do base your summary judgment affidavits (except for experts) on personal knowledge; in addition, make sure they contain facts that would be admissible in evidence" and show that the affiant is competent to testify to the matters in the affidavit;
- ✓ Do attach any documents you want to rely on to an affidavit, or provide "certified" copies of any documents if that is available;
- ✓ Do include a list of legal elements and material facts in your supporting brief and tie the facts to particular documents;
- ✓ Do consider expert issues well in advance of the summary judgment stage and get those deadlines in place in a scheduling order;
- ✓ Do ask the court to do a full *Daubert* review of any expert affidavits submitted in connection with a summary judgment motion (both for and against);
- ✓ Do ask the court to put its express reasons on the record for allowing you to appeal a partial summary judgment ruling under Article 1915(B)(if you lose);
- ✓ Don't attach exhibits to your supporting memorandum; and
- ✓ Don't file affidavits after the deadline because they may not be considered.

[129] *Id*.

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