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Protecting a Defendant's Right to Appeal Adverse Judgments Under Louisiana Code of Civil Procedure Article 966(G)

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Protecting a Defendant’s Right to Appeal Adverse Judgments Under Louisiana Code of Civil Procedure Article 966(G)

*William Bell**

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* J.D./D.C.L. 2020, Paul M. Hebert Law Center, Louisiana State University. My Comment is dedicated in memory of my grandfather, James A. Young, who passed away shortly before publication. Additionally, I would like to thank the Honorable Guy Holdridge, Louisiana First Circuit Court of Appeal, for his guidance in writing this Comment. I also thank my parents for their support not only in the writing of this paper but in all of my endeavors. Finally, I would like to thank the *Louisiana Law Review* Volume 79 Board of Editors for guiding me through the writing process.

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INTRODUCTION

Tobias Dixon, driving a motorcycle, hit Devyn Allen upon Allen merging into the center turn lane.¹ The hit ejected Dixon from his motorcycle onto the highway, and then Patrick Jackson's vehicle struck him.² Dixon, the motorcycle driver, proceeded to sue: (1) Allen; (2) Progressive Security Insurance, Allen's motor vehicle insurer; (3) Louisiana Pizza Group ("LPG"), Allen's employer; (4) Tudor Insurance Company, LPG's insurer; (5) Jackson; (6) Command Construction, Jackson's employer; and (7) Gray Insurance Company, Command Construction's insurer.³ The trial court dismissed the claims against Jackson, Command Construction, and Gray Insurance Company (collectively, "Jackson") on summary judgment because a lack of evidence existed as to whether Jackson ran over Dixon.⁴

Dixon did not appeal the summary judgment dismissal of Jackson.⁵ LPG was the only party to timely appeal Jackson's dismissal, contending that the trial court erred in granting summary judgment for Jackson.⁶ On appeal, the Louisiana Fifth Circuit Court of Appeal held that the summary judgment ruling for Jackson was not appealable by LPG, a co-defendant, because Dixon, the plaintiff, did not appeal Jackson's dismissal.⁷

1. Dixon v. Gray Ins., 223 So. 3d 658, 659 (La. Ct. App. 5th Cir. 2017).

2. *Id.* at 659–60.

3. *Id.* at 660.

4. *Id.*

5. Dixon originally filed an appeal, but he dismissed it before any record of his appeal was filed. *Id.*

6. *Id.*

7. *Id.* at 660–61; *see also* Grimes v. La. Med. Mut. Ins. Co., 36 So. 3d 215, 217 (La. 2010) (establishing that parties can only appeal adverse portions of the trial court's judgment).

In *Dixon v. Gray Insurance Co.*, the court determined that LPG could not appeal Jackson's summary judgment dismissal on the merits. Louisiana Code of Civil Procedure article 966 governs motions for summary judgment in Louisiana.⁸ Article 966(G) states that when a court dismisses a party on summary judgment, it cannot consider the dismissed party in any subsequent allocation of fault; evidence cannot be admitted; the dismissed party cannot be referenced in any attempt to establish its fault; and the dismissed party cannot be placed on the jury verdict form.⁹ Article 966(G), therefore, prevents parties like LPG from attempting to establish the dismissed party's liability and deprives them of the opportunity to appeal the trial court's grant of summary judgment.¹⁰

The Louisiana Legislature substantially revised article 966 in 2015, which has led to a circuit split in the Louisiana appellate courts as to whether an absurd result occurs when a co-defendant is dismissed on summary judgment, the plaintiff does not appeal the co-defendant's dismissal, and the remaining defendants do not have the right to appeal the dismissal.¹¹ In *Dixon*, the Louisiana Fifth Circuit did not hear LPG's appeal of the Jackson defendants' dismissal on summary judgment because the court determined that the dismissal did not create an absurd result.¹² The Third Circuit in *Mire v. Guidry*, however, considered this same scenario as an absurd result and gave co-defendants the opportunity to appeal the summary judgment dismissal of a fellow co-defendant.¹³ Louisiana appellate courts, therefore, are split on whether co-defendants have the opportunity to appeal a fellow co-defendant's summary judgment dismissal.¹⁴

Louisiana courts must apply laws that are clear and unambiguous as written unless their application leads to absurd consequences.¹⁵ A law has absurd consequences when the court determines "that the specific application at issue arising from the literal wording [of the statute] would, if judicially enforced, produce a factual result so inappropriate as to be

8. LA. CODE CIV. PROC. art. 966 (2018).

9. *Id.* art. 966(G).

10. *Dixon*, 223 So. 3d at 661.

11. *Compare* LA. CODE CIV. PROC. art. 966 (2016), *with id.* art. 966 (2015); *Mire v. Guidry*, 250 So. 3d 383 (La. Ct. App. 3d Cir. 2018); *Dixon*, 223 So. 3d at 658.

12. *Dixon*, 223 So. 3d at 661.

13. *Mire*, 250 So. 3d at 383.

14. *Compare Dixon*, 223 So. 3d 658, *with Mire*, 250 So. 3d 383.

15. LA. CIV. CODE art. 9 (2018).

deemed outside the ‘purpose’ of the law.”¹⁶ Article 966(G) can lead to absurd consequences when a co-defendant is not allowed to appeal the summary judgment dismissal of a fellow co-defendant.¹⁷ A defendant has the right to appeal adverse judgments and should not lose that right to appeal, so absurd consequences result when a defendant loses the right to appeal solely because the plaintiff elects not to appeal the summary judgment dismissal of one of multiple co-defendants.¹⁸ The plaintiff and defendant have significantly different interests in a lawsuit—mainly, a defendant has a substantial interest in keeping other co-defendants in a lawsuit for liability and comparative fault purposes.¹⁹ A defendant’s ability to appeal an adverse judgment, therefore, should not depend on the plaintiff’s decision to appeal the summary judgment dismissal of another defendant to the plaintiff’s suit.

Part I of this Comment introduces the history of motions for summary judgment, discusses the summary judgment process in Louisiana, and articulates the goals of summary judgment. Part II discusses the most recent revisions to article 966(G) and the implications surrounding these revisions. Part III elaborates on the different interpretations of article 966(G) in the Louisiana appellate courts after these revisions. In conclusion, Part IV proposes a recommendation to the Louisiana courts and the Louisiana Legislature on how to implement and revise article 966(G) to ensure the protection of defendants’ appeal rights. Additionally, Part IV will elaborate on how a trial court should proceed when a co-defendant is erroneously dismissed from the suit on summary judgment.

I. WHAT IS A MOTION FOR SUMMARY JUDGMENT, AND HOW DO COURTS USE IT?

The scope and purpose of motions for summary judgment have significantly evolved over time. Specifically, understanding a motion for summary judgment’s current purpose, effect, and implementation is fundamental in learning how Louisiana courts have become divided on article 966(G)’s effect on a party’s appeal rights.

16. P. Raymond Lamonica & Jerry G. Jones, *Legislative Law & Procedure*, in 20 LOUISIANA CIVIL LAW TREATISE § 7:4, 20 (3d ed. 2017).

17. LA. CODE CIV. PROC. art. 966(G) (2018).

18. *See* Grimes v. La. Med. Mut. Ins. Co., 36 So. 3d 215, 217 (La. 2010); LA. CODE CIV. PROC. art. 2083; *Mire*, 250 So. 3d at 383.

19. *See* LA. CODE CIV. PROC. art. 966(G) (limiting the remaining defendants’ ability to lower their liability by establishing the fault of the dismissed party).

A. Summary Judgment: “Summary”

The motion for summary judgment is a procedural device used to expedite the determination of a civil action without the need for trial.²⁰ Summary judgment originated during the 19th century in England for the same purpose as today’s summary judgment: to reduce delay in the court system.²¹ Several U.S. states have enacted similar summary judgment statutes to England, and the Federal Rules of Civil Procedure (FRCP) incorporated summary judgment into the federal courts in 1938.²² Initially, litigants infrequently used summary judgment in the United States because summary judgment imposed an onerous burden of proof on the moving party.²³ Additionally, summary judgment also appeared infrequently because courts desired to protect a party’s right to a trial by jury.²⁴ In 1986, the United States Supreme Court in *Celotex v. Catrett*,²⁵ *Anderson v. Liberty Lobby, Inc.*,²⁶ and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*²⁷ established the foundation for modern summary judgment in courts across the United States.²⁸

Under the framework established by these cases, any party to a suit can bring a motion for summary judgment to challenge the existence or legal sufficiency of another party’s claim or defense before trial.²⁹ When hearing a motion for summary judgment, the trial court reviews the permitted evidence that the parties file in support or in opposition of the motion.³⁰ After reviewing the relevant evidence, the court determines

20. Garrett Filetti, *22nd Time’s the Charm: The 2015 Revisions to Summary Judgment in Louisiana*, 77 LA. L. REV. 479, 482–83 (2016).

21. *Id.*

22. FED. R. CIV. PROC. 56; Filetti, *supra* note 20, at 483.

23. The moving party is the party requesting summary judgment from the court, and if the moving party was a defendant, summary judgment required the defendant to show that a genuine issue of material fact existed by disproving an essential element of the plaintiff’s claim. Filetti, *supra* note 20, at 483.

24. *Id.*

25. *Celotex v. Catrett*, 477 U.S. 317 (1986).

26. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

27. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 572 (1986).

28. Filetti, *supra* note 20, at 484.

29. *Id.* at 482.

30. In Louisiana, a party may only submit pleadings, memoranda, affidavits, depositions, answers to interrogatories, certified medical records, written stipulations, and admissions in support or in opposition of a motion for summary judgment. LA. CODE CIV. PROC. art. 966(A)(4) (2018). In federal court, parties can only submit evidence in support or in opposition of a motion for summary

whether a genuine issue of material fact exists that requires a trial on the merits.³¹ The party moving for summary judgment bears the burden of proving that it is entitled to summary judgment,³² meaning that the moving party must make a prima facie case³³ that no genuine issue of material fact exists and all essential elements of its claim are met.³⁴ The Supreme Court in *Celotex*, however, established that when the moving party does not bear the burden of proof at trial, it does not have to fully disprove the non-moving party's claim.³⁵ To prevail on summary judgment,³⁶ the moving party only has to show that the evidence does not support the non-moving party's claim.³⁷ In either case, the burden shifts to the party opposing the motion to provide evidence supporting its claim.³⁸ The trial court, after reviewing all of the evidence submitted by the parties, should only grant the summary judgment motion if it determines, under a reasonable person standard, that there is no genuine issue of material fact that precludes the moving party's desired conclusion. If the court makes this finding, the moving party is entitled to judgment as a matter of law.³⁹

Following *Celotex*, *Anderson*, and *Matsushita*, summary judgment has evolved into a case management tool used to narrow the issues disputed at trial, reduce litigation costs, and promote judicial efficiency.⁴⁰ Summary

judgment that is in a form that would be admissible at trial. FED. R. CIV. PROC. 56(c)(2).

31. A genuine issue of material fact exists when reasonable persons could reach separate conclusions about the disputed facts of the case and could find in favor of the non-moving party. Filetti, *supra* note 20, at 481.

32. *Id.* at 484.

33. To make a prima facie case, a party must produce "enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favor." *Prima Facie Case*, BLACK'S LAW DICTIONARY (10th ed. 2014).

34. *Id.*

35. *Celotex v. Catrett*, 477 U.S. 317, 324–26 (1986).

36. Prior to *Celotex*, when the moving party did not have the burden of proof at trial, summary judgment required the party to show that a genuine issue of material fact existed by disproving an essential element of the plaintiff's claim. Filetti, *supra* note 20, at 484.

37. *Id.* (providing that *Celotex* made bringing a summary judgment motion easier).

38. *Matsushita* requires that the opposing party must specifically show that a genuine issue of material fact exists instead of only showing that there is doubt over whether the moving party's claim is true. *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 572 (1986).

39. Filetti, *supra* note 20, at 483; LA. CODE CIV. PROC. art. 966(A)(3) (2018).

40. Filetti, *supra* note 20, at 482.

judgment, however, can deprive litigants of the right to trial by jury.⁴¹ Because of this concern, commentators believe that summary judgment should not be a substitute for trial when genuine issues of material fact exist.⁴²

B. Summary Judgment in Louisiana

Louisiana enacted its first summary judgment statute in 1960.⁴³ Article 966 of the Louisiana Code of Civil Procedure—modeled after FRCP Rule 56 (“Rule 56”)—codifies Louisiana’s summary judgment statute.⁴⁴ Initially, article 966 was more restrictive than Rule 56 because it did not allow for partial motions for summary judgment and prohibited summary judgment in certain family law matters.⁴⁵ The Louisiana Legislature initially did not intend for the original article 966 to be used frequently; instead, the legislature envisioned it as a preventive tool to discourage the filing of frivolous claims.⁴⁶ After *Celotex*, *Anderson*, and *Matsushita*,⁴⁷ the Louisiana Legislature revised article 966 in 1996 to modernize summary judgment and to include the burden-shifting analysis established in those cases.⁴⁸ Additionally, the 1996 revisions explicitly provided that summary judgment is the preferred method for resolving cases.⁴⁹

The 1996 revisions contained conflicting provisions that divided the Louisiana appellate courts over whether the use of summary judgment changed in Louisiana.⁵⁰ Some appellate courts analyzed motions for

41. *Id.*

42. *Id.* at 481.

43. LA. CODE CIV. PROC. art. 966 (1960).

44. *Id.* art. 966 cmt. a (1960); Filetti, *supra* note 20, at 486–87.

45. Rule 56 of the Federal Rules of Civil Procedure initially allowed summary judgment to all plaintiffs and defendants regardless of the issue of the case and allowed the courts to grant partial summary judgment. FED. R. CIV. PROC. 56.

46. Filetti, *supra* note 20, at 486–87; LA. CODE CIV. PROC. art 966 cmt. a (1960).

47. *Celotex v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 572 (1986).

48. LA. CODE CIV. PROC. art. 966 (1996); Filetti, *supra* note 20, at 487.

49. LA. CODE CIV. PROC. art. 966 (1996); Filetti, *supra* note 20, at 487.

50. In addition to establishing the burden-shifting approach to summary judgment, the 1996 revisions to article 966 included a provision stating: “Notwithstanding any other provisions of this Article to the contrary, the burden of proof shall remain with the mover.” LA. CODE CIV. PROC. art. 966(G) (1996). This provision led to the Louisiana appellate courts’ split on how to apply article 966 after the 1996 revisions. Stephen Anthony Pitre, *The Pelican State Amends*

summary judgment using the burden-shifting approach articulated in the revisions.⁵¹ Other appellate courts, although acknowledging the change in the summary judgment law, analyzed the motion for summary judgment as they would have prior to the 1996 revisions.⁵²

In response to this circuit split, article 966 underwent further revisions in 1997, which more closely aligned Louisiana's motion for summary judgment to Rule 56.⁵³ The repeated revisions made article 966 disorganized and confusing, complicating Louisiana's summary judgment process.⁵⁴ Because of these issues and ongoing concern from attorneys, the Louisiana Law Institute,⁵⁵ per the request of the Louisiana Legislature, appointed a subcommittee of lawyers, judges, and law professors to study the use of summary judgment in Louisiana.⁵⁶ The Louisiana Legislature enacted the Louisiana Law Institute's recommended revisions in 2015, and the revisions took effect on January 1, 2016.⁵⁷ Among the 2015 article 966 revisions, article 966(G)—which outlines the effects of a successful motion for summary judgment on parties who remain in the suit—underwent substantial changes.⁵⁸

Summary Judgment: Recent Louisiana Jurisprudence Uncertain About Legislative Intent, 43 LOY. L. REV. 97, 110–11 (1998); Filetti, *supra* note 20, at 488–89.

51. Filetti, *supra* note 20, at 488; *see, e.g.*, Hayes v. Autin, 685 So. 2d 691 (La. Ct. App. 3d Cir. 1996) (electing to use the burden-shifting approach in a motion for summary judgment).

52. Filetti, *supra* note 20, at 488–89.

53. The 1997 revisions to article 966 repealed Louisiana Code of Civil Procedure article 966(G). LA. CODE CIV. PROC. art. 966 (1997).

54. Filetti, *supra* note 20, at 489–91.

55. The Louisiana Law Institute is “an official, advisory law revision commission, law reform agency and legal research agency of the State of Louisiana.” *Purpose*, LOUISIANA STATE LAW INSTITUTE, <http://www.lslri.org/purpose> [https://perma.cc/64PM-T644] (last visited Mar. 26, 2019).

56. The subcommittee's primary goal was to “reorganize article 966 so that the provisions of the statute that address particular issues are set forth in a logical and organized fashion.” Filetti, *supra* note 20, at 491–92 (quoting Donald Price, *An Update on Proposed Revisions to the Louisiana Summary Judgment Statutes*, in MOTIONS FOR SUMMARY JUDGMENT: A REPORT TO THE LAW INSTITUTE, PROPOSED LEGISLATIVE CHANGES TO ARTICLE 966, at 5 (2015), <http://www.lajudicialcollege.org/wp-content/uploads/2014/08/3Motions-for-Summary-Judgment.pdf> [https://perma.cc/L2DV-GME9]).

57. LA. CODE CIV. PROC. art. 966 (2016).

58. *Id.* art. 966(G) (2018).

II. HISTORY OF LOUISIANA CODE OF CIVIL PROCEDURE ARTICLE 966(G)

A trial court's summary judgment dismissal of a party implicates article 966(G). Article 966(G) applies when the court grants a motion for summary judgment and states that a party or non-party to the lawsuit is not negligent or at fault, or it did not cause in whole or in part the injury or harm alleged.⁵⁹ When article 966(G) is applicable, the dismissed party cannot be apportioned a percentage of the fault, and no party can refer to the dismissed party's fault nor introduce evidence attempting to establish the dismissed party's fault.⁶⁰ Although the 2015 revisions to article 966(G) seem straightforward, the 2015 expansion of article 966(G) has led to a circuit split in the Louisiana appellate courts regarding whether the article leads to absurd results.⁶¹

A. *Origins of Article 966(G)*

The Louisiana Legislature implemented article 966(G) into article 966 in 2010 after a few trial court judges inadvertently allowed parties dismissed on summary judgment to appear on the jury verdict forms despite the plaintiffs' inability to collect judgment from the dismissed parties.⁶² Article 966(G) clarified the summary judgment procedure used in Louisiana courts by expressly providing that the plaintiff is not allowed to recover from parties that the court, on summary judgment, determined were not at fault for the harm alleged.⁶³ Initially, article 966(G) gave courts the option to consider a party or non-party in a subsequent allocation of fault but required each court to prevent evidence of the dismissed party's fault and prohibit the issue of the party's fault from being submitted to the jury.⁶⁴ Additionally, article 966(G) did not apply when a court granted a motion for summary judgment solely when a party successfully asserted

59. *Id.*

60. *Id.*

61. *Dixon v. Gray Ins.*, 223 So. 3d 658, 659 (La. Ct. App. 5th Cir. 2017). *Mire v. Guidry*, 250 So. 3d 383, 385–86 (La. Ct. App. 3d Cir. 2018).

62. LA. CODE CIV. PROC. art. 966(F) (2010) (noting that subsection (F) was renamed subsection (G) in 2013). Interview with William R. Corbett, Frank L. Maraist Professor of Law and Wex S. Malone Professor of Law at the Paul M. Hebert Law Center (Oct. 12, 2018).

63. Interview with Judge Holdridge, Judge for the Louisiana First Circuit Court of Appeal (Oct. 11, 2018); Interview with William R. Corbett, Frank L. Maraist Professor of Law and Wex S. Malone Professor of Law at the Paul M. Hebert Law Center (Oct. 12, 2018).

64. LA. CODE CIV. PROC. art. 966(F) (2010).

an affirmative defense.⁶⁵ The Louisiana Legislature revised article 966(G) in 2012, removing the option from courts and prohibiting courts from considering a party or non-party dismissed on summary judgment in a subsequent allocation of fault.⁶⁶ Also in 2012, the legislature added article 966(G)(2), which limited article 966(G) applicability to instances where the trial court specified in its reasons for granting summary judgment that article 966(G) applied.⁶⁷ Article 966(G) did not undergo further revisions until 2015.⁶⁸

The 2015 revisions to article 966(G) removed section (G)(2) and the affirmative defense exception from the article.⁶⁹ After the 2015 revisions,⁷⁰ article 966(G) applies when summary judgment is granted and the court provides that a party or non-party to a suit is not negligent or at fault or, either in whole or in part, cause the injury or harm alleged.⁷¹ When article 966(G) applies, no party can: (1) consider the dismissed party in a subsequent allocation of fault; (2) submit evidence attempting to establish its fault; (3) refer directly or indirectly to the dismissed party's fault; or (4) submit the dismissed party's fault to the jury or include its name on the jury verdict form.⁷²

B. The Applicability of Article 966(G)

Article 966(G) primarily applies when a plaintiff sues multiple parties for the same harm and the court only dismisses one or some of those defendants on summary judgment.⁷³ The lawsuit then proceeds without the dismissed party, and article 966(G) prevents the fact-finder from considering the dismissed party's fault.⁷⁴ Article 966(G) therefore has a direct effect on fault allocation within Louisiana's comparative fault system.⁷⁵

Louisiana is a pure comparative fault state, meaning that each party who is at fault for the harm alleged is liable only for its allocated

65. *Id.*

66. *Id.* art. 966(F)(1) (2012).

67. *Id.* art. 966(F)(2).

68. Filetti, *supra* note 20, at 489–91.

69. LA. CODE CIV. PROC. art. 966(G) (2016).

70. The Louisiana Legislature has not revised article 966(G) since the 2015 revisions to article 966. *Id.* art. 966(G) (2018).

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*; see LA. CIV. CODE art. 2323(A) (2018).

percentage of fault.⁷⁶ Article 966(G) provides a reasonable limitation on when attorneys can discuss a party's fault at trial, thus limiting the use of comparative fault.⁷⁷ When the court dismisses a party on summary judgment because the party is not at fault for the harm alleged, the court should not hold the dismissed party liable for any potential damages to the plaintiff.⁷⁸ The dismissed party must be able to proceed from the litigation without the concern of being potentially liable through a comparative fault allocation.⁷⁹ Additionally, a co-defendant who planned to argue the fault of the now-dismissed party in its defense to the lawsuit can timely adjust its strategy to defending the suit.⁸⁰

After a court grants summary judgment under article 966, the judgment becomes final, enabling the remaining parties to account for the number of their co-parties and proceed accordingly.⁸¹ A final judgment is immediately appealable when a party is dismissed from a lawsuit on summary judgment.⁸² If a party fails or declines to timely appeal the trial court's ruling, the motion for summary judgment is considered to be proper and true, and an appeal is unavailable on the summary judgment ruling.⁸³ When a granted summary judgment motion dismisses one of several co-defendants, the plaintiff can typically fully recover from the parties remaining in the suit.⁸⁴ If the plaintiff can fully recover from the parties remaining in the suit, the plaintiff has little interest in appealing the summary judgment dismissal of one of several co-defendants; thus, plaintiffs often do not appeal the co-defendant's dismissal.⁸⁵ For example, a plaintiff sues three parties for the alleged harm and has estimated damages of \$1,000,000. Defendant A has an insurance policy with a limit

76. *Id.* art. 2323 ("all parties" includes the plaintiff, defendant, and non-parties to an action).

77. LA. CODE CIV. PROC. art. 966(G) (2018).

78. *See* LA. CIV. CODE art. 2323(A).

79. *See generally* LA. CODE CIV. PROC. art. 966.

80. *Id.*

81. *See generally* *Mire v. Guidry*, 250 So. 3d 383, 384–85 (La. Ct. App. 3d Cir. 2018); *Dixon v. Gray Ins.*, 223 So. 3d 658, 659 (La. Ct. App. 5th Cir. 2017); *Mercer v. Lowe*, 217 So. 3d 1235, 1237 (La. Ct. App. 2d Cir. 2017); *White v. La. Dept. Trans. & Dev.*, 258 So. 3d 11 (La. Ct. App. 3d Cir. 2017).

82. LA CODE CIV. PROC. art. 1915(A).

83. *See id.*

84. Interview with Judge Holdridge, Judge for the Louisiana First Circuit Court of Appeal (Oct. 11, 2018); *Grimes v. La. Medical Mut. Ins. Co.* 36 So. 3d 215, 217 (La. 2010); *Mire*, 250 So. 3d at 384–85; *Dixon*, 223 So. 3d at 659; *Mercer*, 217 So. 3d at 1237; *White*, 258 So. 3d 11.

85. Interview with Judge Holdridge, Judge for the Louisiana First Circuit Court of Appeal (Oct. 11, 2018).

of \$50,000; defendants B and C each have \$1,000,000 limits in their insurance policies. If defendant A is dismissed on summary judgment, the plaintiff can still fully recover from either defendant B or C; thus, the plaintiff likely will not appeal defendant A's summary judgment dismissal. Louisiana appellate courts are divided over how to handle the appeal rights of the co-defendants who are left in the suit after the plaintiff does not appeal the dismissal of a co-defendant on summary judgment.⁸⁶

III. LOUISIANA COURTS' INTERPRETATION OF ARTICLE 966(G)

Louisiana appellate courts are split on the issue of whether a defendant can appeal a co-defendant's dismissal on summary judgment when the plaintiff does not appeal the co-defendant's dismissal.⁸⁷ Article 966(G) is silent on whether the provisions of the article are subject to an appeal by any party.⁸⁸ Additionally, the Third Circuit courts are split on whether a co-defendant has the right to appeal a fellow co-defendant's dismissal and has permitted co-defendants the right to appeal in some cases, while denying co-defendants this right in other cases.⁸⁹ The Second Circuit has avoided the issue of whether a co-defendant has the right to appeal but has heard a co-defendant's appeal on the merits, therefore implicitly giving a co-defendant appeal rights.⁹⁰ The Fifth Circuit, however, does not give the co-defendant the right to appeal because it interpreted article 966(G) as clear and unambiguous.⁹¹

A. *The Third Circuit in Mire v. Guidry and White v. Louisiana Department of Transportation and Development*

The Louisiana Third Circuit Court of Appeal is split within the circuit, with conflicting opinions on whether co-defendants can appeal the summary judgment dismissal of a fellow co-defendant when the plaintiff elects not to appeal that co-defendant's dismissal.⁹² In *Mire v. Guidry*, after sustaining injuries in a three-car pileup, Gerald Mire sued Tricia Sam and Brandon Guidry, the drivers of the second and third cars, respectively.⁹³

86. *Mire*, 250 So. 3d 383; *Dixon*, 223 So. 3d 658; *Mercer*, 217 So. 3d 1235.

87. *Id.*

88. LA CODE CIV. PROC. art. 966 (G) (2016).

89. *Mire*, 250 So. 3d 383; *White*, 258 So. 3d 11.

90. *Mercer*, 217 So. 3d at 1237.

91. *Dixon*, 223 So. 3d at 659.

92. *Mire*, 250 So. 3d 383; *White*, 258 So. 3d 11.

93. Mire sued the following parties in addition to Sam and Guidry: (1) EAN Holdings, LLC, the owner of Sam's vehicle; (2) National Automotive Insurance

Sam answered the lawsuit and claimed that Guidry was wholly at fault for the accident.⁹⁴ Guidry's answer specifically alleged Sam's third-party fault and, in the alternative, Sam's comparative fault.⁹⁵ Sam then filed a motion for summary judgment seeking dismissal of Mire's claims against her because Mire testified that he only felt one impact during the car accident.⁹⁶ Guidry opposed Sam's motion for summary judgment, contending that a genuine issue of material fact existed because Mire told his physicians that he felt "two different and distinct impacts."⁹⁷ The trial court granted Sam's motion for summary judgment.⁹⁸ Mire chose not to appeal Sam's dismissal; Guidry was the only party to appeal Sam's dismissal.⁹⁹

On appeal, the Third Circuit first concluded that under the current version of article 966(G), if the plaintiff does not appeal the trial court's summary judgment dismissal of one of several co-defendants, the judgment becomes final and cannot be appealed by any other party to the suit.¹⁰⁰ Nevertheless, the Third Circuit then decided that it would be an absurd result if Guidry could not appeal the summary judgment dismissal of Sam and proceeded to hear Guidry's appeal on the merits.¹⁰¹

The *Mire* court first determined that the 2015 revisions to article 966(G) changed prior law in procedurally similar situations, such as *Grimes v. Louisiana Medical Mutual Insurance Co.*¹⁰² *Grimes* established

Company, Sam's insurer; (3) Butcher Air Conditioning, Inc., Guidry's employer, because Guidry was driving a car owned by his employer; and (4) State National Insurance Company, Inc., insurer of Butcher Air Conditioning and Guidry. *Mire*, 250 So. 3d at 384.

94. "Sam" herein refers to both Sam and National Automotive Insurance Company. EAN Holdings was dismissed from the suit without prejudice, and no party appealed its dismissal. *Id.* at 384–85.

95. "Guidry" herein refers to Guidry, Butcher Air Conditioning, and State National Insurance. Butcher Air Conditioning and State National answered the petition first, followed by Guidry. Each party answered the suit the same way. *Id.* at 385.

96. *Id.*

97. *Id.* at 384–385.

98. *Id.* at 385.

99. *Id.*

100. *Id.*

101. *Id.* at 385–87. When the court determines that a co-defendant does not have a right to appeal, the appellate court does not hear the co-defendant's appeal on whether a fellow co-defendant was erroneously dismissed from the case on summary judgment. *Dixon v. Gray Ins.*, 223 So. 3d 658 (La. Ct. App. 5th Cir. 2017).

102. *Mire*, 250 So. 3d at 386; *Grimes v. La. Medical Mut. Ins. Co.*, 36 So. 3d 215, 217 (La. 2010).

that a party can generally only appeal the portions of a judgment that are adverse to it.¹⁰³ Under article 966(G), the *Mire* trial court's summary judgment dismissal of the Sam defendants adversely affected the Guidry defendants despite Sam bringing the motion for summary judgment in response to Mire's suit.¹⁰⁴ Sam's dismissal directly affected how much liability a party could cast against Guidry for Mire's injuries because Guidry pled the third-party fault and, in the alternative, the comparative fault of Sam.¹⁰⁵ The *Mire* court found that prior to the 2015 revisions, the Guidry defendants would have been able to appeal Sam's summary judgment dismissal because the judgment was adverse to them and because they would have been within the affirmative defense exception to article 966(G).¹⁰⁶ The court, therefore, determined that under prior precedent to the 2015 revision, it would be an absurd result to prevent Guidry from having the right to plead affirmative defenses to the fact-finder without the opportunity to appeal.¹⁰⁷

Furthermore, the court stated that under article 2086, a person who could have intervened into the original suit may appeal even if no other party has taken an appeal.¹⁰⁸ The Third Circuit found it illogical for a non-party to be allowed to appeal while Guidry, a party to the suit, was forbidden.¹⁰⁹ For these reasons, the court concluded that disallowing the Guidry defendants the right to appeal an adverse judgment against them and then to not allow the Guidry defendants to exercise their right at trial to argue the third-party fault or comparative fault of Sam yields an absurd result.¹¹⁰ Upon resolving whether Guidry had the right to appeal, the Third Circuit heard the Guidry defendants' appeal on the merits and reversed the trial court's summary judgment dismissal of Sam because a genuine issue

103. *Grimes*, 36 So. 3d at 217.

104. *Mire*, 250 So. 3d at 385–86.

105. *Id.* at 384–86.

106. Article 966(G) would not have applied, and Guidry would have been under the affirmative defense exception that existed prior to the 2015 revisions of article 966(G) because article 1031 allows Guidry to plead third-party affirmative defenses or the comparative fault of Sam because Guidry pled an allowed incidental demand against a co-party. LA. CODE CIV. PROC. art. 1031 (2018); *Mire*, 250 So. 3d at 385–86; see LA CODE CIV. PROC. art. 1005 (stating what constitutes an affirmative defense). Guidry would only have to meet the *Grimes* test that Sam's dismissal on summary judgment was adverse to him. *Mire*, 250 So. 3d at 385–86; LA. CODE CIV. PROC. art. 966(G) (2015); *Grimes*, 36 So. 3d at 217.

107. *Mire*, 250 So. 3d at 385–87.

108. LA. CODE CIV. PROC. art. 2086 (2018).

109. *Mire*, 250 So. 3d at 386.

110. *Id.*

of material fact existed on whether Mire felt one or two impacts.¹¹¹ Other Louisiana appellate courts, including another panel in the Third Circuit, however, have determined that similar factual situations to *Mire* do not lead to absurd results and have denied a co-defendant the right to appeal the summary judgment dismissal of a fellow co-defendant.¹¹²

Seven months before *Mire*, the Third Circuit in *White v. Louisiana Department of Transportation and Development*, a case that is procedurally identical to *Mire*, did not permit a co-defendant to appeal a fellow co-defendant's summary judgment dismissal when the plaintiff did not to appeal.¹¹³ *White* centered on Gerald White's injuries suffered when a tree fell on his car during a thunderstorm.¹¹⁴ The tree fell from the Manguns' property onto the state highway, which was maintained by the Louisiana Department of Transportation and Development ("DOTD").¹¹⁵ The Whites¹¹⁶ sued: (1) Garold and Mickey Mangun, the owners of the house where the tree was rooted, along with their insurance providers, Church Mutual and Safeco (collectively, the "Manguns"); (2) DOTD; and (3) the City of Alexandria, alleging against each defendant negligence for failure to maintain, inspect, and remove the damaged tree.¹¹⁷

The Manguns¹¹⁸ answered, contending that they had no actual or constructive notice of the defective tree, and then filed a motion for summary judgment asserting that they had no knowledge of the tree's defect because they did not mow the state highway.¹¹⁹ DOTD opposed the motion for summary judgment, but the trial court granted summary judgment dismissal in favor of the Manguns.¹²⁰ The Whites chose not to

111. *Id.*

112. *White v. La. Dept. Trans. & Dev.*, 258 So. 3d 11 (La. Ct. App. 3d Cir. 2017); *Dixon v. Gray Ins.*, 223 So. 3d 658 (La. Ct. App. 5th Cir. 2017).

113. *White*, 258 So. 3d 11. *Mire* did not cite *White* as authority when determining that article 966(G) leads to absurd results. *Mire*, 250 So. 3d 383.

114. *White*, 258 So. 3d at 12.

115. *Id.*

116. Gerald White brought suit for general and special damages for injuries suffered from the accident. His wife also brought a loss of consortium claim against all of the parties that he sued. Gerald White and his wife are referred to hereinafter as "the Whites." *Id.*

117. The City of Alexandria was dismissed on summary judgment, and no other party appealed because DOTD was responsible for maintaining the rights-of-way and the City of Alexandria did not have notice of the defective tree. *Id.*

118. "The Manguns" refers to Garold and Mickey Mangun, Church Mutual, and Safeco.

119. *White*, 258 So. 3d at 13.

120. *Id.*

appeal, and DOTD was the only party to appeal the Manguns' summary judgment dismissal.¹²¹

In its appeal, DOTD asserted that the Manguns were negligent in failing to discover and remove the defective tree.¹²² Additionally, DOTD contended that it should be able to introduce evidence of the Manguns' fault at trial for comparative fault purposes, even if the Manguns remained dismissed from the suit, because a genuine issue of material fact existed.¹²³ The Third Circuit found that it had no authority to hear DOTD's appeal on the merits because when the Whites chose not to appeal the Manguns' dismissal, a final judgment was entered between the Whites and the Manguns.¹²⁴ Furthermore, the court reasoned that article 966(G)'s use of comparative fault clarifies Louisiana's comparative fault principles and "must prevail as a latter introduced amendment and as a clarification of the legislature's intent on the issue of comparative fault."¹²⁵ DOTD thus could not introduce evidence of the Manguns' fault throughout the remainder of the lawsuit.¹²⁶ The *Mire* court did not discuss *White* when allowing Guidry to appeal on the merits. Therefore, it is uncertain how the Third Circuit would rule in the future when faced with cases containing article 966(G) implications.¹²⁷

B. The Fifth Circuit's Interpretation of Article 966(G) in Dixon v. Gray Insurance Co.

The Fifth Circuit examined article 966(G) in *Dixon v. Gray Insurance Co.* and concluded that article 966(G) does not lead to absurd results when a co-defendant is not given the right to appeal a fellow co-defendant's summary judgment dismissal.¹²⁸ In *Dixon*, Tobias Dixon sued multiple parties after he was hit from behind by Devyn Allen and was ejected from his motorcycle and then subsequently run over by Patrick Jackson.¹²⁹ LPG, Allen's employer, was the only party to appeal the Jackson defendants'

121. *Id.*

122. *Id.*

123. DOTD claimed that a genuine issue of material fact existed over whether the Manguns: (1) exercised reasonable care over their property; (2) could have detected the defective tree; and (3) could have remedied the defect by exercising reasonable care. *Id.*

124. *Id.* at 14.

125. *Id.* at 15–16.

126. *Id.* at 14–15.

127. *Mire v. Guidry*, 250 So. 3d 383 (La. Ct. App. 3d Cir. 2018).

128. *Dixon v. Gray Ins.*, 223 So. 3d 658 (La. Ct. App. 5th Cir. 2017).

129. *See Dixon*, 223 So. 3d at 659–60.

summary judgment dismissal; in this appeal, LPG contended the existence of a genuine issue of material fact as to whether Dixon was lying on the pavement.¹³⁰

The Fifth Circuit determined that after Dixon, the plaintiff, did not appeal the summary judgment dismissal of Jackson, the judgment became final between Dixon and Jackson.¹³¹ The court, therefore, had no authority to determine the appropriateness of Jackson's summary judgment dismissal, which resulted in LPG's inability to appeal Jackson's summary judgment dismissal.¹³² First, the court determined that the revisions to article 966(G) legislatively overruled *Grimes v. Louisiana Medical Mutual Insurance Co.* because the trial court is required to follow article 966(G) when a party is dismissed on summary judgment.¹³³ Furthermore, the court concluded that article 966(G) merely serves as a limit on when a party can appeal an adverse judgment.¹³⁴ Specifically, the Fifth Circuit reasoned that there would be an absurd result if LPG was allowed to appeal Jackson's dismissal because article 966(G) would only restrict parties who did not appeal Jackson's summary judgment dismissal and would not restrict the parties who successfully appealed.¹³⁵ Under this scenario that created, according to the court, an absurd result, article 966(G) would only restrict Dixon and not LPG.¹³⁶ The Fifth Circuit viewed this absurd result¹³⁷ as counter to article 966(G)'s legislative intent.¹³⁸ The court, therefore, overturned the trial court's grant of summary judgment and concluded that LPG's appeal lacked merit and article 966(G) would restrict LPG until the lawsuit's resolution.¹³⁹

130. *Id.* at 660.

131. *Id.*

132. *Id.*

133. *Grimes* established that a party may "'appeal the portions of the judgment that were adverse to [that party],' but not 'the portions of the judgment that were adverse to the plaintiff.'" *Grimes v. La. Med. Mut. Ins. Co.*, 36 So. 3d 215, 217 (La. 2010) (citing *Nunez v. Commercial Union Ins. Co.*, 780 So. 2d 348, 349 (La. 2001)); *Dixon*, 223 So. 3d at 660–61.

134. *Dixon*, 223 So. 3d at 660–61.

135. *Id.* at 661.

136. LPG would have been able to argue and present evidence of Jackson's percentage of the fault to Dixon, while article 966(G) would have prevented Dixon. *Id.*

137. *Id.*

138. According to the *Dixon* court, article 966(G)'s legislative intent makes the article applicable in all cases, as soon as the ruling on a motion for summary judgment becomes a final judgment. *Id.*

139. *Id.*

C. How Other Louisiana Appellate Courts Have Addressed Article 966(G)

Mire and *Dixon* are the only two Louisiana appellate cases to discuss and determine whether article 966(G) leads to absurd results.¹⁴⁰ In *White*, the Third Circuit did not discuss whether article 966(G) leads to absurd results in reaching its conclusion. The Second Circuit, without addressing whether an article 966(G) issue exists, has heard appeals from co-defendants on the validity of a fellow co-defendant's dismissal on summary judgment despite the plaintiff choosing not to appeal that party's dismissal.¹⁴¹ In *Mercer v. Lowe*, the mother of a deceased child who was a suspected victim of child abuse sued multiple parties for wrongful death and survival individually and on behalf of her deceased child.¹⁴² Mercer sued nine parties, including the Department of Child and Family Services ("DCFS"), the Bossier Parish Sheriff's Office ("BPSO"), and Bossier Parish Sheriff's Office Detective McKay.¹⁴³ BPSO and Detective McKay filed motions for summary judgment, and only DCFS and Mercer filed oppositions.¹⁴⁴ The Second Circuit granted BPSO's and Detective McKay's motions for summary judgment, and only DCFS appealed.¹⁴⁵

The Second Circuit did not discuss whether DCFS had the right to appeal under article 966(G) or whether there was a final judgment for Mercer, BPSO, and Detective McKay.¹⁴⁶ The court instead discussed whether DCFS's appeal had merit and cited article 966(G) as an applicable provision for determining the appropriateness of summary judgment.¹⁴⁷ The *Mercer* case in the Second Circuit was procedurally similar to *Mire*, *White*, and *Dixon*, and the Second Circuit proceeded to hear the appeal of a motion for summary judgment on the merits without discussing whether

140. *White* did not mention whether article 966(G) leads to absurd results, but the court cited *Dixon* as authority for why it did not hear DOTD's appeal on the merits. *White v. La. Dept. Trans. & Dev.*, 258 So. 3d 11, 13–14 (La. Ct. App. 3d Cir. 2017). *Dixon*, 223 So. 3d 658; *Mire v. Guidry*, 250 So. 3d 383, 385–86 (La. Ct. App. 3d Cir. 2018).

141. *Mercer v. Lowe*, 217 So. 3d 1235, 1237 (La. Ct. App. 2d Cir. 2017).

142. *Id.*

143. Mercer only opposed the motion to the extent that if BPSO and Detective McKay were dismissed on summary judgment, no evidence of either party's fault should be considered at trial. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 1238; LA. CODE. CIV. PROC. art. 966(G) (2017).

article 966(G) limits a party's right to appeal.¹⁴⁸ *Mercer* likely establishes that the Second Circuit would follow *Mire* instead of *Dixon* or *White* because the court heard DCFS's appeal on the merits after a final judgment between *Mercer* and the parties dismissed on summary judgment.¹⁴⁹ As the consideration of these cases shows, Louisiana appellate courts are widely divided on whether article 966(G) affects a party's ability to appeal a co-defendant's dismissal on summary judgment.¹⁵⁰

IV. HOW COURTS SHOULD HANDLE APPEAL RIGHTS UNDER ARTICLE 966(G)

Louisiana appellate courts are divided on whether article 966(G) leads to absurd results when a court prevents a defendant from appealing the dismissal of a fellow co-defendant because the plaintiff does not appeal that co-defendant's dismissal.¹⁵¹ A dismissal of a party on a summary judgment motion is, however, a final judgment that is immediately appealable.¹⁵² A co-defendant, therefore, should have the right to appeal this judgment because article 966(G) does not expressly limit a co-defendant's right to appeal.¹⁵³ Additionally, if Louisiana appellate courts determine that the trial court erred in dismissing the co-defendant on summary judgment, the trial court should follow a precise procedure upon remand to ensure that each party's rights are protected.¹⁵⁴

148. *Mercer*, 217 So. 3d at 1238; *Mire v. Guidry* 250 So. 3d 383 (La. Ct. App. 3d Cir. 2018); *White v. La. Dept. Trans. & Dev.*, 258 So. 3d 11 (La. Ct. App. 3d Cir. 2017); *Dixon v. Gray Ins.*, 223 So. 3d 658 (La. Ct. App. 5th Cir. 2017).

149. In *Mire*, the court heard Guidry's appeal on the merits, while in *White* and *Dixon* the court did not hear the parties' appeals on the merits because of article 966(G). *Mercer*, 217 So. 3d at 1238; *Mire*, 250 So. 3d 383; *White*, 258 So. 3d 11; *Dixon*, 223 So. 3d. 658.

150. *Mercer*, 217 So. 3d at 1238; *Mire*, 250 So. 3d 383; *White*, 258 So. 3d 11; *Dixon*, 223 So. 3d. 658.

151. See *Mire*, 250 So. 3d at 385–86; *Dixon*, 223 So. 3d. at 660–61; *Mercer*, 217 So. 3d 1235; *White*, 258 So. 3d 11.

152. See LA. CODE CIV. PROC. art. 2083(A) (2018); *id.* art. 1915.

153. *Dixon*, 223 So. 3d at 664 (Gravois, J., dissenting).

154. See generally *id.* at 662–65 (Gravois, J., dissenting).

A. Article 966(G) Leads to Absurd Results When a Defendant Is Not Allowed to Appeal the Summary Judgment Dismissal of One of Several Co-Defendants

When applicable, article 966(G) can substantially impact a lawsuit.¹⁵⁵ At trial, article 966(G) restricts a co-defendant who is not allowed to appeal a fellow co-defendant's summary judgment dismissal.¹⁵⁶ The substantial restrictions of article 966(G) can affect a defendant's liability.¹⁵⁷ When the court dismisses a defendant on summary judgment, the court effectively states that no reasonable jury could reach the conclusion that the defendant is liable to the plaintiff for the alleged harm.¹⁵⁸ After the court reaches this conclusion, and each party's right to appeal has terminated, article 966(G)'s restrictions are reasonable on the parties remaining in the lawsuit because it is unfair to the plaintiff to discuss a dismissed party at trial and to include that party on the jury verdict form.¹⁵⁹ By restricting all references to the dismissed party for the remainder of the lawsuit, article 966(G) promotes efficiency because the parties can only discuss the potential liability of parties who can be placed on the jury verdict form.¹⁶⁰

Following civil law interpretation, courts should apply Louisiana statutes as written if they are "clear and unambiguous and [their] application does not lead to absurd consequences."¹⁶¹ If article 966(G) is "clear and unambiguous," then it "shall be applied as written and no further interpretation may be made in search of the intent of the legislature."¹⁶² The language of article 966(G) is straightforward and unambiguous¹⁶³ because all parties understand the implications when article 966(G) is applicable to a lawsuit.¹⁶⁴ For article 966(G) to lead to

155. LA. CODE CIV. PROC. art. 966(G).

156. *Id.*

157. *See id.*

158. *See id.* art. 966.

159. Once a plaintiff elects not to appeal the summary judgment dismissal of a party, it cannot recover from that party because a final judgment of dismissal was entered into between the plaintiff and dismissed party. LA. CODE CIV. PROC. art. 1915; *id.* art. 2083(A); *Dixon v. Gray Ins.*, 223 So. 3d 658, 664 (La. Ct. App. 5th Cir. 2017) (Gravois, J., dissenting).

160. *See* LA. CODE CIV. PROC. art. 966(G).

161. LA. CIV. CODE art. 9 (2018).

162. *Id.*

163. *Dixon*, 223 So. 3d at 661; *Mire v. Guidry* 250 So. 3d 383, 386 (La. Ct. App. 3d Cir. 2018).

164. LA. CODE CIV. PROC. art. 966(G) (stating the restrictions on references to parties dismissed on summary judgment by the parties remaining in the suit).

absurd results, the court must determine that “the specific application at issue arising from the literal wording would, if judicially enforced, produce a factual result so inappropriate as to be deemed outside of the ‘purpose’ of the law.”¹⁶⁵ Article 966(G) leads to absurd results when a co-defendant is prevented from appealing the summary judgment dismissal of a fellow co-defendant because a party’s appeal rights should include the right to appeal adverse judgments and not depend on whether the plaintiff elects to appeal the dismissed party’s dismissal.¹⁶⁶

Prior to the 2015 revisions to article 966(G), *Grimes* governed factual situations similar to the *Mire*, *White*, *Dixon*, and *Mercer* cases.¹⁶⁷ In *Grimes*, complications during labor led to injuries of Grimes’s newborn daughter.¹⁶⁸ Grimes, individually and on behalf of her newborn daughter, and Paul Walker, the newborn child’s father, (collectively, “Grimes”) filed a medical malpractice suit against: (1) Dr. Solar, Grimes’s obstetrician during labor; (2) Dr. Andrus, Grimes’s prenatal obstetrician; (3) Woman’s Hospital, where Grimes gave birth to her daughter;¹⁶⁹ and (4) Louisiana Medical Mutual Insurance Company.¹⁷⁰ Woman’s Hospital filed for dismissal on summary judgment, and the trial court granted its motion.¹⁷¹ Despite all of the other defendants choosing to appeal Woman’s Hospital’s summary judgment dismissal, Grimes elected not to appeal.¹⁷²

On appeal, the First Circuit concluded that the trial court erroneously dismissed Woman’s Hospital on summary judgment.¹⁷³ Grimes, therefore, could not recover from Woman’s Hospital because the court entered a final judgment between Grimes and Woman’s Hospital when Grimes chose not to appeal Woman’s Hospital’s summary judgment dismissal.¹⁷⁴ All of the defendants who successfully appealed Woman’s Hospital’s dismissal filed a writ of certiorari to the Louisiana Supreme Court, which the Court granted to address whether the defendants who successfully appealed Woman’s Hospital’s summary judgment dismissal could attempt to prove the comparative fault of Woman’s Hospital at the subsequent trial despite

165. Lamonica & Jones, *supra* note 16.

166. *Grimes v. La. Med. Mut. Ins. Co.*, 36 So. 3d 215, 217 (La. 2010).

167. *Id.*; *White v. La. Dept. Trans. & Dev.*, 258 So. 3d 11 (La. Ct. App. 3d Cir. 2017); *Dixon*, 223 So. 3d 658; *Mire*, 250 So. 3d 383.

168. *Grimes*, 36 So. 3d at 216.

169. *Id.* at 215.

170. *Id.* at 216.

171. *Id.*

172. *Id.*

173. *Grimes v. La. Med. Mut. Ins. Co.*, 29 So. 3d 505, 510 (La. Ct. App. 1st Cir. 2009).

174. *Grimes*, 36 So. 3d at 217.

Grimes being prevented from recovering from Woman's Hospital.¹⁷⁵ The Louisiana Supreme Court held that the Court of Appeal determined that Woman's Hospital was erroneously dismissed on summary judgment.¹⁷⁶ Thus, despite there being a final judgment between Grimes and Woman's Hospital, at the subsequent trial, the appealing defendants would be allowed to attempt to establish the comparative fault of Woman's Hospital.¹⁷⁷ The Supreme Court determined that an inability to prove the comparative fault of Woman's Hospital would be an adverse effect to the appealing defendants because if the defendants could successfully argue Woman's Hospital's comparative fault, their liability could be reduced.¹⁷⁸ On remand, therefore, the co-defendants could only reduce their potential liability to Grimes by the percentage of fault issued to Woman's Hospital.¹⁷⁹ *Grimes*, thus, allows a party to appeal any adverse portions of a judgment to them.¹⁸⁰ Courts, however, have determined that article 966(G) overruled *Grimes*.¹⁸¹

Mire and *Dixon* both concluded that the 2015 revisions to article 966(G) overruled *Grimes* to the extent that *Grimes* conflicts with article 966(G).¹⁸² Article 966(G) does not address the appealability of summary judgment motions.¹⁸³ Louisiana Code of Civil Procedure article 2083(A) allows final judgments to be "appealable in all cases in which appeals are given by law."¹⁸⁴ Article 1915 provides that a motion for summary judgment dismissing a party is an immediately appealable final judgment and gives parties the right to appeal a co-party's summary judgment dismissal per article 2083(A).¹⁸⁵ Without any expression in article 966(G) limiting a party's ability to appeal a motion for summary judgment when article 966(G) applies, the right to appeal should be governed by articles 1915(A) and 2083(A). These articles would allow co-defendants to appeal the dismissal of a fellow co-defendant on summary judgment when the

175. *Id.* at 216.

176. *Id.*

177. *Id.*

178. *Id.* at 217.

179. *Id.*

180. *Id.* at 215.

181. *Mire v. Guidry*, 250 So. 3d 383 (La. Ct. App. 3d Cir. 2018); *Dixon v. Gray Ins.*, 223 So. 3d 658 (La. Ct. App. 5th Cir. 2017).

182. *Mire*, 250 So. 3d at 383; *Dixon*, 223 So. 3d 658; *Grimes*, 36 So. 3d at 215.

183. LA. CODE CIV. PROC. art. 966(G) (2018); *Dixon*, 223 So. 3d at 664 (Gravois, J., dissenting).

184. LA. CODE CIV. PROC. art. 2083(A).

185. *Id.* art. 1915; *Dixon*, 223 So. 3d at 664 (Gravois, J., dissenting).

plaintiff does not appeal.¹⁸⁶ *Grimes*, however, would still limit the appealing co-defendant; the appealing co-defendant could only appeal the portions of the summary judgment motion that are adverse to it.¹⁸⁷

When a plaintiff files suit against multiple defendants, the assumption is that the plaintiff believes that all of the co-defendants are potentially liable for the alleged harm.¹⁸⁸ If summary judgment dismisses a co-defendant, the remaining co-defendants can appeal the dismissal of that fellow co-defendant because it could potentially be liable for a portion, if not all, of the harm alleged by the plaintiff.¹⁸⁹ If the court erroneously dismisses the co-defendant from the suit, at trial, the other co-defendants, after successfully appealing their fellow co-defendant's dismissal, would attempt to prove the fault of the formerly dismissed co-defendant to the plaintiff.¹⁹⁰ If, however, the co-defendant is properly dismissed from the suit, article 966(G) would be in effect, and its restrictions would limit the remaining co-defendants.¹⁹¹ Article 966(G), therefore, has an adverse effect on the co-defendants remaining in the suit because of its impacts on the amount of liability the co-defendants will have to the plaintiff.¹⁹²

Additionally, article 966(G) does not have a provision preventing co-defendants from appealing.¹⁹³ The article's implications, along with article 1915 and 2083(A) allowing a party to appeal a motion for summary judgment ruling, make it important to allow a co-defendant to appeal another co-defendant's summary judgment dismissal.¹⁹⁴ Furthermore, allowing this appeal will help protect the accuracy and fairness of the proceedings by ensuring that only parties who no reasonable jury could find to be at fault are dismissed on summary judgment.¹⁹⁵ When a co-defendant cannot appeal the summary judgment dismissal of a fellow co-defendant, an absurd result occurs because a co-defendant's appeal rights

186. See *Dixon*, 223 So. 3d at 664 (Gravois, J., dissenting).

187. *Id.*; *Grimes*, 36 So. 3d at 217.

188. See LA. CODE CIV. PROC. art. 863(B)(3).

189. See *Mire v. Guidry*, 250 So. 3d 383 (La. Ct. App. 3d Cir. 2018); *Dixon*, 223 So. 3d at 658; *White v. La. Dept. Trans. & Dev.*, 258 So. 3d 11 (La. Ct. App. 3d Cir. 2017); *Grimes*, 36 So. 3d at 215.

190. See *Mire*, 250 So. 3d at 384–86.

191. See generally *Mire*, 250 So. 3d at 383; *Dixon*, 223 So. 3d at 658; *White*, 258 So. 3d at 11; *Grimes*, 36 So. 3d at 215.

192. *Dixon*, 223 So. 3d at 664 (Gravois, J., dissenting).

193. LA. CODE CIV. PROC. art. 966(G) (2018).

194. *Id.* arts. 966(G), 1915; 2083(A); *Dixon*, 223 So. 3d at 664 (Gravois, J., dissenting).

195. In both cases, the court did not hear the summary judgment dismissal of a co-defendant on the merits. See *Dixon*, 223 So. 3d at 658; *White*, 258 So. 3d at 11.

are not limited under article 966(G) and the 2015 revisions to article 966(G) do not legislatively override *Grimes*.¹⁹⁶ The Louisiana appellate courts and the Louisiana Legislature can solve this problem to ensure that defendants keep their right to appeal.

B. Judicial and Legislative Solution

To solve this problem—and adhere to the *Grimes* opinion—the Louisiana appellate courts must consider a co-defendant’s appeal of the dismissal of a fellow co-defendant on the merits regardless of whether the plaintiff appeals the dismissal.¹⁹⁷ This approach would ensure that the appeal rights of all parties are properly protected when a co-party is dismissed on summary judgment and that no party will be subject to the limits imposed by article 966(G) without the opportunity to appeal.¹⁹⁸

The Louisiana Legislature could solve this problem by codifying the appeal rights of all parties in a suit by adding a provision to article 966(G) that states:

When the court grants a motion for summary judgment in accordance with the provisions of this Article, that a party or non-party is not negligent, is not at fault, or did not cause in whole or in part the injury or harm alleged, that party or non-party shall not be considered in any subsequent allocation of fault. Evidence shall not be admitted at trial to establish the fault of that party or non-party. During the course of the trial, no party or person shall refer directly or indirectly to any such fault, nor shall that party or non-party’s fault be submitted to the jury or included on the jury verdict form. *The provisions of this subsection are subject to any timely appeal allowed by law.*¹⁹⁹

This provision would expressly permit all parties to a lawsuit to appeal the dismissal of a co-party on summary judgment because articles 1915 and 2083(A) allow appeals of a motion for summary judgment.²⁰⁰ The suggested provision, therefore, specifically allows a defendant to timely appeal the dismissal of a co-defendant on summary judgment.²⁰¹ The

196. *Dixon*, 223 So. 3d at 664 (Gravois, J., dissenting); LA. CODE CIV. PROC. art. 966(G); *Grimes*, 36 So. 3d at 215.

197. *Grimes*, 36 So. 3d 215; *See generally* *Mire v. Guidry*, 250 So. 3d 383 (La. Ct. App. 3d Cir. 2018).

198. *See* LA. CODE CIV. PROC. arts. 1915, 2083(A), 966(G).

199. *See generally* *Dixon*, 223 So. 3d at 664 (Gravois, J., dissenting).

200. *See* LA. CODE CIV. PROC. arts. 1915, 2083(A).

201. *Id.*

appellate courts hearing a co-defendant's appeal on the merits regardless of whether the plaintiff chooses to appeal a co-defendant's summary judgment dismissal, in conjunction with this additional provision to article 966(G), achieves the same goal by ensuring that a co-defendant's appeal rights do not depend on whether the plaintiff appeals a summary judgment dismissal of another co-defendant.

C. Impact of Giving Co-Defendants the Right to Appeal

After hearing a co-defendant's appeal of the summary judgment dismissal of another co-defendant despite the plaintiff not appealing that co-defendant's dismissal, a Louisiana appellate court will remand the case if it concludes that the trial court erroneously dismissed the co-defendant on summary judgment. Upon remand, there must be an appropriate method for how the trial court should treat the formerly dismissed party and to determine who can attempt to establish the dismissed party's fault. Louisiana courts have addressed different ways of how to treat the formerly dismissed party.²⁰²

In *Stafford v. Exxon Mobile Corp.*, the Louisiana First Circuit Court of Appeal followed *Grimes* and established that if an appellate court reverses a party's summary judgment dismissal, that party would not owe the plaintiff any damages upon remand because the plaintiff did not appeal that party's summary judgment dismissal.²⁰³ The court stated, however, that if the co-defendants successfully appealed, they could attempt to prove that the previously dismissed party was liable to the plaintiff to lower the co-defendants' liability despite the plaintiff not being able to recover from the once-dismissed party.²⁰⁴

Likewise, in *Dixon*, Judge Gravois's dissent expressed the belief that LPG should have been permitted to appeal the dismissal of the Jackson defendants on the merits.²⁰⁵ Additionally, if LPG's appeal was successful, Judge Gravois provided a guide for the trial court on how to handle article 966(G).²⁰⁶ Judge Gravois believed that the trial court should allow the party who successfully appealed the dismissal, LPG,²⁰⁷ to have the opportunity to prove the fault of the Jackson defendants.²⁰⁸ Further, Judge

202. *Stafford v. Exxon Mobile Corp.*, 212 So. 3d 1257, 1263 (La. Ct. App. 1st Cir. 2017); *Dixon*, 223 So. 3d at 664 (Gravois, J., dissenting).

203. *Stafford*, 212 So. 3d at 1263; *Grimes*, 36 So. 3d at 217.

204. *Stafford*, 212 So. 3d at 1263.

205. *Dixon*, 223 So. 3d at 664 (Gravois, J., dissenting).

206. *Id.* at 664 n.8 (Gravois, J., dissenting).

207. *See supra* Introduction, Section III.B.

208. *Dixon*, 223 So. 3d at 664 n.8 (Gravois, J., dissenting).

Gravois reasoned that if LPG successfully proved the fault of the Jackson defendants, LPG would have its own fault reduced pursuant to Louisiana's comparative fault scheme.²⁰⁹ Moreover, like in *Grimes* and *Stafford*, the plaintiff who did not appeal—in this case, Dixon—would not be able to recover from the co-defendant—Jackson—because the court entered a final judgment when Dixon did not appeal Jackson's summary judgment dismissal, implicating article 966(G).²¹⁰

Each of these cases establishes that upon the formerly dismissed party returning to the suit, the plaintiff should not be able to recover from that party.²¹¹ Additionally, the parties who successfully appealed should be able to attempt to prove the formerly dismissed party's fault.²¹² When the plaintiff does not appeal the summary judgment dismissal of one of several co-defendants, the plaintiff concedes that it will not recover from that party for the harm alleged.²¹³ The co-defendant returning to the suit does not change the fact that the plaintiff conceded that it will not recover from that particular co-defendant.²¹⁴ Article 966(G), therefore, still applies between the plaintiff and the formerly dismissed co-defendant, meaning that the formerly dismissed co-defendant should not be liable to the plaintiff for any amount of liability, even if another party can establish the formerly dismissed co-defendant's fault.²¹⁵ Further, if at trial, the co-defendant that successfully appealed the formerly dismissed party's summary judgment dismissal could prove that party's fault, the successful co-defendant should have its fault reduced under Louisiana's comparative fault scheme.²¹⁶ Louisiana appellate courts, therefore, should follow this procedure when a co-defendant is successful in appealing the summary judgment dismissal of a fellow co-defendant and the plaintiff did not appeal the summary judgment motion.²¹⁷

209. *Id.*

210. *Id.*

211. *Stafford v. Exxon Mobile Corp.*, 212 So. 3d 1257, 1263 (La. Ct. App. 1st Cir. 2017); *Grimes v. La. Med. Mut. Ins. Co.*, 36 So. 3d 215, 217 (La. 2010); *Dixon*, 223 So. 3d at 664 n.8 (Gravois, J., dissenting).

212. *Id.*

213. LA. CODE CIV. PROC. art. 966(G) (2018).

214. *See generally id.*

215. *See Stafford*, 212 So. 3d at 1263; *Grimes*, 36 So. 3d at 217; *Dixon*, 223 So. 3d at 664 n.8 (Gravois, J., dissenting).

216. *See Stafford*, 212 So. 3d at 1263; *Grimes*, 36 So. 3d at 217; *Dixon*, 223 So. 3d at 664 n.8 (Gravois, J., dissenting).

217. *See Stafford*, 212 So. 3d at 1263; *Grimes*, 36 So. 3d at 217; *Dixon*, 223 So. 3d at 664 n.8 (Gravois, J., dissenting).

The Louisiana appellate courts, however, have been silent on the appropriate procedure when only some and not all of the co-defendants successfully appeal a fellow co-defendant's summary judgment dismissal, particularly on how the trial court should conduct a comparative fault allocation.²¹⁸ In *Dixon*,²¹⁹ LPG was the only co-defendant to appeal the summary judgment dismissal of Jackson.²²⁰ Progressive Security Insurance Company and Tudor Insurance Company elected not to appeal Jackson's summary judgment dismissal.²²¹ Only co-defendants who successfully appeal should receive a benefit from their successful appeal.²²² Co-defendants that do not appeal should not benefit from the return of the formerly dismissed party because article 966(G) applies between the co-defendant who did not appeal and the formerly dismissed co-defendant.²²³ The co-defendants who did not appeal should be subject to article 966(G) and should not be allowed to admit evidence attempting to establish the fault of the formerly dismissed party, nor be able to reference the formerly dismissed party's fault at trial.²²⁴ The parties who did not appeal, therefore, will not gain a direct benefit from the formerly dismissed party returning to the suit.²²⁵

The co-defendants who did not appeal, however, could potentially receive the incidental benefit of having their portion of the fault reduced by the co-defendants who successfully appealed and were then successful in establishing the fault of the formerly dismissed party.²²⁶ Instructing the jury to only allocate fault to the formerly dismissed party from the fault of the successfully appealing party would be impractical and difficult for juries to implement.²²⁷ Therefore, the court should list the formerly dismissed party on the jury verdict form.²²⁸ The formerly dismissed party, however, should not be held liable for any damages to the plaintiff who did not appeal, and only the successfully appealing co-defendants can attempt to establish the previously dismissed co-defendant's fault at

218. See *Dixon*, 223 So. 3d at 663 (Gravois, J., dissenting).

219. See *supra* Introduction, Section III.B.

220. *Dixon*, 223 So. 3d at 660.

221. *Id.*

222. See *generally id.* at 663 (Gravois, J., dissenting).

223. See *Stafford v. Exxon Mobile Corp.*, 212 So. 3d 1257, 1263 (La. Ct. App. 1st Cir. 2017); *Grimes v. La. Med. Mut. Ins. Co.*, 36 So. 3d 215, 217 (La. 2010).

224. LA. CODE CIV. PROC. art. 966(G) (2018). See *Stafford*, 212 So. 3d at 1263; *Grimes*, 36 So. 3d at 217.

225. See *Dixon*, 223 So. 3d at 664 n.8 (Gravois, J., dissenting).

226. See *generally id.* at 663 (Gravois, J., dissenting).

227. *Id.*

228. *Id.*

trial.²²⁹ The co-defendants who did not appeal will be unable to establish the formerly dismissed party's fault because they are still subject to article 966(G).²³⁰ This process aligns with Louisiana's comparative fault scheme in that each party is only liable to the plaintiff for the harm they caused, but it also gives a benefit to the co-defendants who successfully appealed a co-defendant's summary judgment dismissal.²³¹ The successful co-defendant, therefore, is allowed to prove the fault of the formerly dismissed party and likely will get a reduction in liability.²³²

When the formerly dismissed party returns to the suit, the successfully appealing parties should be given the opportunity to establish the fault of that party and, if successful, have their fault reduced pursuant to Louisiana's comparative fault scheme. The plaintiff, because of article 966(G), should not be allowed to prove the fault of nor recover from the formerly dismissed party if a successfully appealing party establishes the previously dismissed party's fault.²³³ In the event that only some of the co-defendants appealed, the co-defendants who chose not to appeal should not be given the opportunity to establish the fault of the formerly dismissed party.²³⁴ Such defendants, therefore, should not receive a direct benefit from the successful appeal.²³⁵

D. Hypothetical Example of How This Procedure Would Work in Practice

Because of this procedure's complexity when a formerly dismissed co-defendant returns to the lawsuit, a hypothetical lawsuit demonstrating this procedure is appropriate. Article 966(G) issues can arise in a variety of different legal proceedings—including medical malpractice²³⁶ and slip-and-fall cases²³⁷—but motor vehicle accidents make up the majority of the

229. *Id.*

230. *See Dixon*, 223 So. 3d at 660; *Grimes v. La. Med. Mut. Ins. Co.*, 36 So. 3d 215, 217 (La. 2010).

231. *See* LA. CIV. CODE art. 2323(A) (2018).

232. *See generally* LA. CIV. CODE art. 2323(A) (2018).

233. *See* LA. CODE CIV. PROC. art. 966(G) (2018).

234. *See generally* *Dixon*, 223 So. 3d at 663 (Gravois, J., dissenting).

235. *See generally id.*

236. *Mercer v. Lowe*, 217 So. 3d 1235, 1237 (La. Ct. App. 2d Cir. 2017); *Grimes v. La. Med. Mut. Ins. Co.*, 36 So. 3d 215, 217 (La. 2010).

237. *Stafford v. Exxon Mobile Corp.*, 212 So. 3d 1257, 1263 (La. Ct. App. 1st Cir. 2017) (noting that *Stafford* did not mention article 966(G) but is an example of a type of case where an article 966(G) issue could arise).

cases discussing a party's appeal rights under article 966(G).²³⁸ Therefore, a motor vehicle accident is an appropriate way to showcase the proper procedure.

First, the plaintiff is injured in a multiple vehicle car accident. The plaintiff does not know who caused his injuries and sues the drivers of the three other vehicles that were involved, defendants A, B, and C. Each party, including the plaintiff, is at fault for some of the plaintiff's injuries. Defendants A, B, and C each plead that the other defendants are liable for the harm to the plaintiff. Defendant A files a motion for summary judgment stating that no genuine issue of material fact existed regarding his fault to the plaintiff and that he should be dismissed from the suit. The trial court grants defendant A's motion for summary judgment. Defendant B elects to appeal defendant A's summary judgment dismissal, but the plaintiff and defendant C choose not to appeal. After a determination on the merits because defendant B has the right to appeal defendant A's dismissal, the appellate court reverses, finding that the trial court erred in dismissing defendant A on summary judgment.

At trial, defendant B is the only defendant in the suit allowed to reference or provide evidence of defendant A's fault because of defendant C's failure to timely appeal. Following trial, defendants A, B, C, and the plaintiff will be on the jury verdict form. The jury will then allocate fault to each of the four parties. Upon deliberation, the jury returns a verdict that each of the four parties were liable for the harm alleged by the plaintiff. The jury determines that: (1) the plaintiff is owed \$100,000; (2) defendant A was 20% at fault; (3) defendant B was 30% at fault; (4) defendant C was 40% at fault; and (5) the plaintiff was 10% at fault for the harm. The court will then prohibit the plaintiff from recovering the 20% of the verdict amount from defendant A because a final judgment resulted between plaintiff and defendant A when the plaintiff did not appeal the summary judgment dismissal of defendant A. The plaintiff will receive \$30,000 from defendant B and \$40,000 from defendant C for a total of \$70,000. Through the appeal, therefore, defendant B reduced his fault to the plaintiff by up to 20% by establishing the fault of defendant A. If the jury determined that defendant C was less at fault because defendant B established defendant A's fault, defendant C will have received an incidental benefit of a reduction in its fault.

This solution accomplishes several goals that enable the implementation of the principles of article 966(G). First, a co-defendant's right to appeal will not depend on whether the plaintiff chooses to appeal.

238. *Mire v. Guidry*, 250 So. 3d 383 (La. Ct. App. 3d Cir. 2018); *Dixon*, 223 So. 3d at 660.

Next, if the appellate court overturns the summary judgment dismissal of a co-defendant, article 966(G) will remain in effect between the formerly dismissed party and the parties who did not appeal. Finally, a successfully appealing co-defendant will have the opportunity to prove the fault of the formerly dismissed party and potentially lower its liability to the plaintiff, while not giving a direct benefit to the co-defendants who did not appeal.

CONCLUSION

Louisiana appellate courts are divided on whether article 966(G) leads to absurd results when a co-defendant is not allowed to appeal the summary judgment dismissal of a fellow co-defendant because the plaintiff chooses not to appeal the co-defendant's dismissal.²³⁹ All parties, like LPG in *Dixon*, have the right to appeal adverse judgments to them, and article 966(G) results in co-defendants being adversely affected by a fellow co-defendant's summary judgment dismissal.²⁴⁰ The co-defendants, therefore, should be able to appeal a motion for summary judgment dismissing one of several co-defendants regardless of whether the plaintiff chooses to appeal and, if successful, be given the opportunity to prove the fault of the formerly dismissed co-defendant. In turn, this change will prevent situations that are unfair to co-defendants.²⁴¹

239. *Mire*, 250 So. 3d 383; *Dixon*, 223 So. 3d 658; *Mercer*, 217 So. 3d at 1235; *White v. La. Dept. Trans. & Dev.*, 258 So. 3d 11 (La. Ct. App. 3d Cir. 2017); LA CODE CIV. PROC. art. 966(G) (2018).

240. *Dixon*, 223 So. 3d at 660.

241. *Id.*