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# Admissibility of Expert Testimony at Summary Judgment in Louisiana: Examining the Embers of *Independent Fire Insurance Co. v. Sunbeam Corp.*

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## Admissibility of Expert Testimony at Summary Judgment in Louisiana: Examining the Embers of *Independent Fire Insurance Co. v. Sunbeam Corp.*

The interplay between advances in modern technology and expanding notions of tort law has spurred a sharp rise in the use of expert testimony in trials in the past two decades.<sup>1</sup> This increase has been so dramatic that some scholars have declared that the American judicial hearing is becoming "trial by expert."<sup>2</sup> Not surprisingly, parties seeking to extinguish litigation by moving for summary judgment have sought to capitalize on the "trial by expert" trend by supporting such a motion with affidavits and depositions from experts.<sup>3</sup> Federal courts have traditionally admitted expert testimony in support of motions for summary judgment.<sup>4</sup> Louisiana circuit courts, however, have resisted allowing this type of evidence at summary judgment stage.<sup>5</sup> The issue did not squarely reach the Louisiana Supreme Court until last year.

In *Independent Fire Insurance Co. v. Sunbeam Corp.*,<sup>6</sup> the Louisiana Supreme Court considered the admissibility of expert opinion testimony in summary judgment proceedings. Noting that the redactors of the Louisiana Code of Evidence patterned the articles after the Federal Rules of Evidence,<sup>7</sup> the court overruled a number of circuit decisions excluding expert opinion evidence and instead adopted the federal rule.<sup>8</sup> The standard announced in *Independent Fire* requires that a trial judge admit expert testimony produced at summary judgment stage if the evidence would be admissible at trial.<sup>9</sup>

This casenote examines the holding in *Independent Fire* as well as the implications of the new rule. Part I surveys the relevant provisions of the Louisiana

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1. Frank L. Maraist, Evidence and Proof § 11.3, at 196 in 19 Louisiana Civil Law Treatise (1999); 1 Charles McCormick, McCormick on Evidence §13, at 23 (John W. Strong ed., 5th ed.).

2. William T. Pizzi, *Expert Testimony in the U.S.*, 145 New L. J. 82 (1995).

3. See e.g., *McCoy v. Physicians & Surgeons Hospital*, 452 So. 2d 308, 309 (La. App. 3d Cir. 1984) (defendant supported motion for summary judgment with deposition of neurosurgeon and affidavit of neurologist).

4. See, e.g., *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993) (applying the rule of expert testimony admissibility used at trial to a motion for summary judgment); *First United Financial Corp. v. United States Fidelity & Guar. Co.*, 96 F. 3d 135, 136-37 (5th Cir. 1996) (noting that the "admissibility of expert testimony is governed by the same rules, whether at trial or on summary judgment").

5. See, e.g., *Harris v. Landry*, 734 So. 2d 1 (La. App. 1st Cir. 1998) (holding that neither affidavits nor depositions of experts were admissible at summary judgment stage); *Bockman v. Caraway*, 691 So. 2d 815 (La. App. 2d Cir. 1997) (holding that expert affidavits produced at summary judgment are inadmissible); *Ivy v. Freeland*, 576 So. 2d 1117 (La. App. 3d Cir. 1991) (holding that expert depositions were inadmissible at summary judgment); *Weston v. Raymond Corp.*, 531 So. 2d 528 (La. App. 5th Cir. 1988), *writ denied*, 533 So. 2d 360 (La. 1988) (holding that expert affidavits were inadmissible in support of motion for summary judgment). *But see* *Richoux v. Tulane Medical Ctr.*, 617 So. 2d 13 (La. App. 4th Cir 1993) (admitting expert testimony of medical review panel).

6. 755 So. 2d 226 (La. 2000).

7. *Id.* at 234.

8. *Id.* at 237.

9. *Id.*

Code of Civil Procedure and the Louisiana Code of Evidence, comparing them to their counterparts in the federal system. Part I also explores the confusion of the lower courts prior to *Independent Fire* and summarizes the federal rule of law on admissibility of expert testimony at summary judgment. Part II discusses the majority opinion in *Independent Fire*, focusing on the decision's (1) adherence to legislative intent, (2) principle of deference to federal evidence law, (3) effect on the judicial economy, (4) accordance with fairness, and (5) impact on the trial court's *Daubert-Forêt* analysis. This casenote approves the decision on a whole while noting that this change in the law comes with a price.

### I. *INDEPENDENT FIRE*—THE SETTING

#### A. *Facts and Procedural History of Independent Fire*

*Independent Fire* is a classic example of the relationship between expert opinion testimony and the motion for summary judgment. Often the trier of fact can only comfortably determine an issue of causation with the aid of scientific or technical expert testimony. In such cases, the admission (or denial) of expert testimony, in support of or opposition to a motion for summary judgment, potentially determines the success or failure of the motion.

*Independent Fire* involved a suit for damages resulting from a fire that severely damaged the home of Mr. and Mrs. Nary Cannon.<sup>10</sup> On September 19, 1992, a fire started in Cannon's propane barbecue grill, which was manufactured by Sunbeam Corporation ("Sunbeam"). The fire spread to plaintiffs' home causing damage. The grill contained an undercarriage rack designed for storage. Two propane tanks rested on the rack. The first tank, manufactured by Sunbeam, was connected to the grill and in use at the time the fire started. The other, a spare tank manufactured by Char-Broil, was not in use at the time of the fire. Although Mr. Cannon could not specifically remember when or where he refilled the spare tank, he stated that he routinely filled his tanks at Jenkins Shell Service Station ("Jenkins Shell"). Cannon did, however, recall that he had used the spare tank several times since last refilling it.<sup>11</sup>

Immediately prior to the accident, Mr. Cannon had cooked hamburgers on his grill, which was located inside an enclosed patio. When finished cooking, he turned the heat selection knob to "clean mode" and went inside his home. Shortly thereafter, he heard a loud hissing sound coming from the grill area. Looking out the patio door, Cannon saw flames spewing from the Sunbeam gas tank and up the wall. He went to a neighbor's house and called for help. Cannon returned to view the fire from a location outside the patio and saw that the flames were still coming from the Sunbeam tank.

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10. *Independent Fire Ins. Co. v. Sunbeam Corp.*, 733 So. 2d 743, 744-45 (La. App. 1st Cir. 1999), *rev'd*, 755 So. 2d 226 (La. 2000).

11. *Independent Fire Ins. Co.*, 755 So. 2d at 228.

The Cannons and their homeowners' insurer, Independent Fire Insurance Company, brought suit against Sunbeam under the Louisiana Products Liability Act. They alleged that an unreasonably dangerous and/or defective condition of the grill or Sunbeam propane tank caused the fire. In response, Sunbeam filed a third party demand against Jenkins Shell alleging that Jenkins Shell overfilled the spare Char-Broil tank. Jenkins Shell filed a motion for summary judgment, asserting that plaintiffs produced no evidence indicating that Jenkins Shell overfilled the spare tank; and, in the alternative, even if the spare tank was overfilled, eyewitness testimony established that the Char-Broil tank was not cause-in-fact of the fire; and that no evidence suggested that plaintiffs' property damage was proximately caused by an act of Jenkins Shell.<sup>12</sup> In support of its motion for summary judgment, Jenkins Shell offered the depositions of Mr. Cannon and Mr. Otha Ray Jenkins of Jenkins Shell. Mr. Jenkins testified that he did not remember filling the spare Char-Broil tank. Mr. Jenkins also stated that his propane facility had state-inspected equipment and that he received proper training on filling propane tanks.<sup>13</sup> Jenkins Shell also produced the reports of three expert witnesses and portions of their depositions. Fred Liebkemann, a mechanical engineer, opined in his expert report that propane gas discharged by the Sunbeam tank caused the fire. He further concluded, based on his examination of the Jenkins Shell facility and Cannon's eyewitness testimony, that the spare Char-Broil tank had not been overfilled. Another engineer, Harold Myers, agreed that the fire originated from gas escaping from the Sunbeam tank. Finally, Randall Bruff, an investigator for the INS Investigative Bureau, maintained that the most likely cause of the fire was a defect in the hose line connected to the Sunbeam tank.<sup>14</sup>

In opposition to the motion for summary judgment, the plaintiffs and Sunbeam produced the expert report and partial deposition of William Baynes, the director of engineering services for Sunbeam. Based on tests performed on equipment similar to plaintiffs' propane grill, Baynes concluded that, contrary to Mr. Cannon's eyewitness testimony, it was not possible that the flames came from the operating Sunbeam tank. In Bayne's opinion the only possible source of the flames was an overfilled spare tank.<sup>15</sup>

Following a hearing, the trial court granted Jenkins Shell's motion for summary judgment.<sup>16</sup> The court of appeal affirmed,<sup>17</sup> but held that the trial court could not

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12. *Independent Fire Ins. Co.*, 733 So. 2d at 745.

13. *Independent Fire Ins. Co.*, 755 So. 2d at 228.

14. *Id.* at 229.

15. *Id.*

16. The trial court orally offered the following rationale:

There is no fact I can find anywhere that indicates that Mr. Jenkins overfilled the tank.... In fact, everything is to the contrary, that there was nothing shown that he overfilled the tank.... [T]here is nothing that indicates that Mr. Bains [sic]... did anything to show or based his opinion on any facts that had to do with exactly what happened at Jenkins Service Station as to the filling of the tank.... From what I see, I think the motion for summary judgment is well founded.

*Id.*

17. *Independent Fire Ins. Co.*, 733 So. 2d at 747.

consider the expert opinions at the summary judgment stage.<sup>18</sup> Nevertheless, the court of appeal concluded that plaintiffs and Sunbeam failed to produce evidence sufficient to prove all the elements of their negligence claims against Jenkins Shell.<sup>19</sup>

### B. "Certworthiness" of Independent Fire

Understanding why writs were granted in *Independent Fire* begins with an examination of the relevant articles of the Louisiana Code of Civil Procedure and the Louisiana Code of Evidence, the corresponding Federal Rules, the inconsistent views of Louisiana's appellate courts prior to *Independent Fire*, and the relevant federal jurisprudence. A study of these materials reveals that federal and state summary judgment legislation, while textually similar, has been interpreted differently.

#### 1. Overview of Summary Judgment and Expert Testimony Legislation

If one of the parties to litigation can demonstrate by affidavits, depositions, and an opponent's admissions that a case presents no genuine issue of material fact,<sup>20</sup> the trial court may render judgment as a matter of law through a procedure known as summary judgment.<sup>21</sup> The Louisiana Code of Civil Procedure provides for summary judgment in Article 966, in particular that a motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law."<sup>22</sup> In recent years, the Legislature and the Judiciary have battled over the standard applicable in summary judgment proceedings. Before 1996, Louisiana courts granted summary judgment "cautiously and sparingly."<sup>23</sup> During that time, courts favored trial on the merits.<sup>24</sup> However, in 1996 the Legislature amended Article 966 to provide that "summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action."<sup>25</sup> The revision added that the procedure is "favored"<sup>26</sup> and that a motion which shows that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law shall be granted.<sup>27</sup> Finally, the amendment stated, "[n]otwithstanding

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18. *Id.* at 746-47.

19. *Independent Fire Ins. Co.*, 755 So. 2d at 230.

20. This includes any mixed question of fact and law.

21. 1 Frank L. Maraist & Harry T. Lemmon, Civil Procedure § 6.8, at 139 in 1 Louisiana Civil Law Treatise (1999).

22. La. Code Civ. P. art. 966(B) (1984).

23. Maraist & Lemmon, *supra* note 21, § 6.8, at 140 (quoting *Riviere v. Bethard*, 422 So. 2d 1341 (La. App. 3d Cir. 1982)).

24. *Id.* (citing *Blount v. Exxon Corp.*, 395 So. 2d 355 (La. App. 1st Cir. 1981)).

25. La. Code Civ. P. art 966(A)(2), added by La. Acts 1996, 1st Ex. Sess., No. 9, § 1.

26. *Id.*

27. La. Code Civ. P. art 966(C), added by La. Acts 1996, 1st Ex. Sess., No. 9, § 1.

any other provision of this Article to the contrary, the burden of proof shall remain with the mover."<sup>28</sup>

The purpose of the 1996 amendment was to incorporate into Louisiana jurisprudence the holding of *Celotex Corp. v. Catrett*,<sup>29</sup> a United States Supreme Court case which adopted a liberal summary judgment standard.<sup>30</sup> However, despite the design of the 1996 amendment, most Louisiana circuit courts held that the amendment did not represent a change in the burden of proof in a summary judgment proceeding.<sup>31</sup> The sole exception was *Hayes v. Autin*,<sup>32</sup> which declared that the amendment "levels the playing field"<sup>33</sup> between the two parties to a motion for summary judgment in two ways: (1) the supporting documentation submitted by the parties should be scrutinized equally and (2) the overriding presumption in favor of a trial on the merits is removed.<sup>34</sup> However, when it became apparent that *Hayes* only reflected a minority view amongst the appellate courts, the Legislature again amended Article 966. The 1997 amendment repealed a portion of the 1996 amendment<sup>35</sup> and added specific instructions to the courts for deciding motions for summary judgment:

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 on the motion 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 produce 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.<sup>36</sup>

The amending act declared a purpose in part to "clarify" the 1996 amendments and "to legislatively overrule all cases inconsistent with *Hayes v. Austin*."<sup>37</sup>

The current form of Article 966 closely resembles the federal jurisprudential rule in *Celotex*.<sup>38</sup> First, it places the burden of producing evidence at summary

28. La. Code Civ. P. art 966(G), added by La. Acts 1996, 1st Ex. Sess., No. 9, § 1, repealed by La. Acts 1997, No. 483 § 3.

29. 477 U.S. 317, 106 S. Ct. 2548 (1986) (interpreting Fed. R. Civ. P. 56 not to favor a trial on the merits, but to mandate summary judgment against a party who fails to establish the existence of an element essential to that party's case, on which the party will bear the burden of proof at trial).

30. Maraist & Lemmon, *supra* note 21, § 6.8, at 147.

31. *Id.* (citing, e.g., *McKey v. General Motors Corp.*, 691 So. 2d 164 (La. App. 1st Cir. 1997); *Short v. Griffin*, 682 So. 2d 249 (La. App. 4th Cir. 1996), *writ. denied*, 689 So. 2d 1372 (La. 1997)).

32. 685 So. 2d 691 (La. App. 3d Cir. 1996), *writ denied*, 690 So. 2d 41 (La. 1997).

33. *Hayes*, 685 So. 2d at 694.

34. *Id.*

35. La. Acts 1997, No. 483 § 3.

36. La. Code Civ. P. art 966(C), added by La. Acts 1996, 1st Ex. Sess., No. 9.

37. La. Acts 1996, 1st Ex. Sess., No. 9, § 1.

38. Maraist & Lemmon, *supra* note 21, § 6.8, at 147; *see also Hardy*, 744 So. 2d at 694 ("[T]he amendment to Art. 966 brings Louisiana's standard for summary judgment closely in line with the federal standard.").

judgment upon the moving party.<sup>39</sup> The moving party can meet this burden by "submitting affidavits or by 'point[ing] out' the lack of factual support for an essential element in the opponent's case."<sup>40</sup> Second, it requires the party shouldering the burden of persuasion at trial to produce evidence showing that the burden at trial will be met.<sup>41</sup> At this point, the trial judge determines whether or not the motion should be granted. Because the ultimate burden remains with the moving party, if the evidence creates a genuine issue of material fact, the judge should deny the motion.<sup>42</sup>

Louisiana Code of Civil Procedure article 967 supplements the summary judgment procedure provided in Article 966 by describing the type of documentation admissible in support of, or in opposition to, a motion for summary judgment.<sup>43</sup> Article 967, which mirrors Federal Rule 56(e),<sup>44</sup> requires that supporting and opposing affidavits (1) be made on personal knowledge, (2) set forth such facts as would be admissible in evidence, and (3) show affirmatively that the affiant is competent to testify to the matters stated therein. This article—particularly its requirement that affidavits be made "on personal knowledge"—poses the most consistent obstacle to the admissibility of expert opinion testimony in support of or opposition to a motions for summary judgment.<sup>45</sup>

Finally, Louisiana Code of Evidence article 702 and Federal Rule of Evidence 702 are identical in providing that witnesses who qualify as experts may testify without firsthand knowledge of the facts if their knowledge will assist the trier of fact in understanding the evidence or determining a fact at issue.<sup>46</sup> It would seem that both Article 702 and Rule 702 relax the requirement of firsthand knowledge based upon a helpfulness standard.

## 2. *Split in the Courts*

Prior to *Independent Fire*, Louisiana's appellate courts disagreed as to whether expert opinion testimony was admissible at summary judgment stage.<sup>47</sup> Most circuits

39. Maraist & Lemmon, *supra* note 21, § 6.8, at 147.

40. *Id.* at 148.

41. *Id.*

42. *Id.*

43. La. Code Civ. P. art. 967 (1984).

44. La. Code Civ. P. art 967 and Fed. R. Civ. P. 56(e) both provide in pertinent part:

Supporting and opposing affidavits shall be made *on personal knowledge*, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or by further affidavits. (emphasis added)

45. See *infra* Part I.B.2.

46. La. Code Evid. art. 702 and Fed. R. Evid 702 both provide in full:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

47. Maraist & Lemmon, *supra* note 21, § 6.8, at 143.

did not consider expert opinion evidence at summary judgment hearings.<sup>48</sup> The first circuit adhered to the majority position prohibiting expert testimony at summary judgment in *Independent Fire*.<sup>49</sup> There, the court held that Code of Civil Procedure article 967 requires that expert affidavits in support of a summary judgment be based on personal knowledge.<sup>50</sup> According to the first circuit, 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."<sup>51</sup> Thus, expert opinion testimony presented through an affidavit did not qualify as proper support for a motion for summary judgment.<sup>52</sup> The first circuit initially applied the same standard of exclusion to expert depositions.<sup>53</sup> However, that court overruled the jurisprudence excluding depositions in *Simmons v. Berry*.<sup>54</sup> After *Berry*, expert opinion evidence, which would be excluded under Article 967 if submitted by affidavit, was admissible at a summary judgment hearing if submitted by deposition.<sup>55</sup>

The third circuit adopted a similar rule, that expert opinions, in the form of affidavits or depositions not based on firsthand observation, failed to meet the admissibility standards of Article 967.<sup>56</sup> Likewise, the fifth circuit embraced the majority view, disallowing expert opinion testimony in the form of affidavits and depositions at summary judgment.<sup>57</sup> The second circuit has been less consistent in its treatment of the issue of admissibility of expert opinion evidence at summary judgment.<sup>58</sup> Some decisions held that affidavits or depositions based on expert opinion were not admissible under Article 967 in support of or opposition to a motion for summary judgment.<sup>59</sup> However, other recent second

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48. See sources cited *supra* note 5.

49. *Independent Fire Ins. Co. v. Sunbeam Corp.*, 733 So. 2d 743, 746 (La. App. 1st Cir. 1999), *rev'd*, 755 So. 2d 226 (La. 2000)

50. *Id.*

51. *Id.*

52. *Id.* (citing *Jones v. Allstate Ins. Co.*, 619 So. 2d 111, 114 (La. App. 1st Cir. 1993).

53. See *Miceli v. Armstrong World Indus.*, 691 So. 2d 283, 290 (La. App. 1st Cir. 1997).

54. 748 So. 2d 473 (La. App. 1st Cir. 1999) (en banc).

55. *Id.* at 477.

56. See *Read v. State Farm Fire & Cas. Ins. Co.*, 725 So. 2d 85 (La. App. 3d Cir. 1998) (holding that affidavits containing expert opinion testimony does not meet the article 967 personal knowledge requirement); *Duhon v. Southern Pac. Transp. Co.*, 720 So. 2d 117 (La. App. 3d Cir. 1998) (holding that expert depositions which contain opinion not based on personal knowledge are not admissible at summary judgment).

57. See *McElreath v. Progressive Ins. Co.*, 596 So. 2d 693 (La. App. 5th Cir. 1992) *writ denied*, 596 So. 2d 693 (La. 1992) (holding that opinions of an expert based on special training and experience do not meet the personal knowledge requirement of article 967); *Weston v. Raymond Corp.*, 531 So. 2d 528 (La. App. 5th Cir. 1988), *writ denied*, 533 So. 2d 360 (La. 1988) (holding that expert affidavits were inadmissible in support of motion for summary judgment).

58. *Independent Fire Ins. Co. v. Sunbeam, Corp.*, 755 So. 2d 226, 232 (La. 2000).

59. See *Bockman v. Caraway*, 691 So. 2d 815 (La. App. 2d Cir. 1997) (expert affidavits are not admissible at summary judgment); *Barnett v. Staats*, 631 So. 2d 84 (La. App. 2d Cir. 1994) (affidavits and depositions of experts as to opinion do not meet personal knowledge requirement); *McCoy v. Physicians & Surgeons Hosp., Inc.*, 452 So. 2d 308 (La. App. 2d Cir. 1984), *writ denied*, 457 So. 2d 1194 (La. 1984) (expert affidavits and depositions do not meet the personal knowledge requirement and



circuit cases have admitted expert affidavits in support of motions for summary judgment.<sup>60</sup>

The only appellate court to defy the majority rule [consistently] was the fourth circuit. In that jurisdiction, judges regularly allowed expert opinion in support of motions for summary judgment.<sup>61</sup> In fact, in one decision the court went so far as to say, “[a]n expert opinion...derived from scientific/medical data...is more a statement of fact based on personal knowledge acquired through research and experience.... There is no firm line between opinion and fact.”<sup>62</sup> However, rather than directly refute the notion that the personal knowledge requirement of Article 967 applied to expert opinion, the opinions of the fourth circuit typically circumvented the majority rule by noting characteristics that distinguished its cases from those of other circuits.<sup>63</sup>

Contrary to the unsettled status of the Louisiana jurisprudence prior to *Independent Fire*, federal courts have customarily admitted expert opinion testimony in the form of affidavits and depositions at summary judgment.<sup>64</sup> Although Federal Rule 56(e) includes a personal knowledge requirement that is identical to Louisiana Code of Civil Procedure article 967,<sup>65</sup> federal courts do not impose this constraint on expert testimony. Instead, federal courts apply a single rule for expert testimony admissibility, the *Daubert* “gatekeeper” test,<sup>66</sup> at summary judgment hearings and at trials.<sup>67</sup>

## II. THE *INDEPENDENT FIRE* DECISION

### A. *Justice Victory's Victory*

Writing for the majority, Justice Victory torched the notion that Louisiana Code of Civil Procedure article 967, with its requirement that affidavits supporting or opposing a

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are therefore inadmissible at summary judgment).

60. See *Gardner on Behalf of Gardner v. Louisiana State Univ. Med. Ctr.* in Shreveport, 702 So. 2d 53 (La. App. 2d Cir. 1997); *Bailey v. United Gas Pipe Line Co.*, 665 So. 2d 664 (La. App. 2d Cir. 1995), *writ denied*, 668 So. 2d 372 (La. 1996).

61. See *Buffa v. Lawrence's Bakery, Inc.*, 615 So. 2d 418 (La. App. 4th Cir. 1993) (allowing expert affidavit because it “include[d] facts derived from his own personal observation and inspection of plaintiffs' property as well as his opinion as a professional”); *Richoux v. Tulane Medical Ctr.*, 617 So. 2d 13, 16 (La. App. 4th Cir. 1993) (admitting expert testimony of medical review panel at summary judgment).

62. *Obiago v. Merrell-National Laboratory, Inc.*, 560 So. 2d 625, 627-28 (La. App. 4th Cir. 1990), *writ denied*, 565 So. 2d 445 (La. 1990).

63. See, e.g., sources cited *supra* notes 61-62.

64. See, e.g., sources cited *supra* note 4; *Ruffin v. Shaw Indus., Inc.*, 149 F.3d 294 (4th Cir. 1998) (holding that because an expert opinion would be admissible at trial under *Daubert*, it is admissible on a motion for summary judgment); *Hayes v. Douglas Dynamics, Inc.*, 8 F.3d 88 (1st Cir. 1993) (stating that “the evidentiary rules were not intended...to make summary judgment impossible whenever a party has produced an expert to support its position”).

65. See *supra* note 46.

66. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993).

67. *First United Financial Corp. v. United States Fidelity & Guar. Co.*, 96 F. 3d 135, 136 (5th Cir. 1996).

motion for summary judgment be made on personal knowledge, precludes expert opinion testimony from consideration at summary judgment proceedings.<sup>68</sup> In the course of his opinion, Justice Victory described the split in the Louisiana appellate courts. He also noted that federal court decisions concerning the admissibility of expert testimony at summary judgment were construing a statutory personal knowledge requirement that was textually identical to that of Louisiana Code of Civil Procedure article 967.<sup>69</sup> The court observed that the federal courts routinely consider expert testimony at summary judgment stage under the *Daubert* factors.<sup>70</sup> This observation led to an extended discussion of the *Daubert* decision.<sup>71</sup>

Justice Victory took notice of the United States Supreme Court's lack of interest in the personal knowledge requirement of Rule 56(e) in *Daubert*.<sup>72</sup> His opinion referred to the *Daubert* Court's emphasis on Rule 702's "helpfulness" standard as evidence of an exception to the firsthand knowledge requirement that binds the testimony of an ordinary witness.<sup>73</sup> Indeed, according to Justice Victory, *Daubert* stood for the proposition that experts who meet the requirements of Rule 702 are not subject to the lay witness's firsthand/personal knowledge requirement at summary judgment or at trial; thus, experts may rely upon hearsay in supporting testimony.<sup>74</sup>

Finally, Justice Victory's opinion noted that the Louisiana Supreme Court had previously elected to follow the *Daubert* ruling in adopting general expert admissibility standards in *State v. Foret*.<sup>75</sup> There, the court determined that because much of the Louisiana Code of Evidence was patterned after the Federal Rules of Evidence (in an attempt to facilitate a more uniform national law of evidence), Louisiana courts should use the body of federal authorities because it may be instructive in interpreting the Louisiana code.<sup>76</sup> Furthermore, the *Foret* decision concluded that because the Louisiana Code of Evidence provision on expert evidence is identical to the federal rule, Louisiana should follow the established federal standard.<sup>77</sup> Citing the principle of deference established in *Foret*, the similarity between Article 966 and Rule 56, and the fact that Louisiana adopted the

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68. *Id.* at 235.

69. *Id.* at 232.

70. *Id.* (citing sources *supra* notes 4 and 69).

71. *Daubert* involved a plaintiff seeking to oppose a defendant's motion for summary judgment with expert opinion testimony. The United States Supreme Court granted certiorari because the federal circuits were split regarding the proper standard for the admission of expert testimony. The *Daubert* opinion took no notice of the personal knowledge requirement. Instead, the Court focused on the application of Federal Rule of Evidence 702 to the general question of admissibility of expert testimony, implicitly assuming that expert opinion evidence admissible at trial would also be admissible at summary judgment.

72. *Independent Fire Ins. Co. v. Sunbeam, Corp.*, 755 So. 2d 226, 233 (La. 2000).

73. *Id.*

74. *Id.*

75. 628 So. 2d 1116, 1122-23 (La. 1993).

76. *Foret*, 628 So. 2d at 1122-23.

77. *Id.*

federal courts' more liberal summary judgment standard in *Hardy v. Bowie*,<sup>78</sup> the court extended the adoption of the *Daubert* standards to summary judgment proceedings.<sup>79</sup>

### B. Examining the Court's Rationale

The Louisiana Supreme Court's decision in *Independent Fire* represents a major change in the law governing the admissibility of expert opinion evidence at summary judgment proceedings in Louisiana. By holding that Article 967 of the Louisiana Code of Civil Procedure does not preclude expert opinion testimony from consideration in summary judgment hearings,<sup>80</sup> the court resolved an issue of dispute between the circuits and brought Louisiana law in line with the federal jurisprudence. This development in the law constitutes progress for reasons discussed below but is not without costs.

#### 1. Legislative Intent

Adherence to legislative intent proved central to the Louisiana Supreme Court's decision in *Independent Fire* to overturn Louisiana circuit jurisprudence denying expert testimony at summary judgment. By adopting the federal jurisprudential rule, the court squared the law with the intent of redactors of the Louisiana Code of Civil Procedure and the drafters of Louisiana Code of Evidence, both of whom sought uniformity with federal procedure.<sup>81</sup> As the similarities in the articles' text suggest, the drafters of the Louisiana Code of Civil Procedure based Articles 966 and 967 on Federal Rule 56.<sup>82</sup> In fact, Article 967 comment (a), describes the statutory duplication by stating "[t]his article is substantially the same as Fed Rule 56(e)-(g)." Furthermore, official comments to the Louisiana Code of Evidence assert that the Legislature also patterned Article 702 after its federal counterpart, Rule 702, in an attempt to facilitate a "movement towards a uniform national law of evidence."<sup>83</sup> Clearly, these comments suggest that the Legislature sought procedural uniformity with federal standards when they adopted Articles 966, 967 and 702. That being the case, the deferential *Independent Fire* decision serves legislative intent by promoting uniformity in admission of evidence at summary judgment.

The view that experts are not subject to the personal knowledge requirement is sound based on the United States Supreme Court's rule in *Daubert*. However,

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78. 744 So. 2d 606, 610 (La. 1999).

79. *Independent Fire Ins. Co.*, 755 So. 2d at 234.

80. *Id.* at 237.

81. See La. Code Civ. P. art. 967, comment (a) (1984); La. Code. Evid. art 102, comment (a) (1995).

82. See La. Code Civ. P. art. 966, comment (b) (1984) (comparing La. Code Civ. P. art. 966 to Rule 56); La. Code Civ. P. art. 967, comment (b) (1984) (referring to the comments of La. Code Civ. P. art. 966).

83. La. Code. Evid. art 102, comment (a) (1995).

this theory rests upon either the assumption that the authors of Article 967 did not intend it to apply to experts, or that if they did, an exception was created in Article 702. The *Independent Fire* opinion first addressed the issue of drafters' intent with this reference to the doctrine: "It is doubtful that the redactors of the Code had experts in mind when they used the term 'personal knowledge.'"<sup>84</sup> Indeed, the opinion points out that Article 967 was passed in 1960, long before the dramatic increase in the use of expert opinion evidence.<sup>85</sup> Since then, the Legislature crafted Article 702, which allows an expert to testify to matters about which they have no personal knowledge by virtue of his or her knowledge, skill, experience, training, or education.<sup>86</sup>

Although the opinion did not elaborate on the preceding argument, the inference to be drawn is that because experts were so seldom used when Article 967 was last revised, it is doubtful that the Legislature contemplated expert testimony when drafting the article's personal knowledge requirement. An alternate conclusion is that even if the redactors did intend the personal knowledge requirement to apply to experts, the more recent law—Article 702—abrogates Article 967. A counter-argument to this interpretation is that Article 967, because it refers only to affidavits, is more specific than Article 702 and thus abrogates the more general provision. However, considering the historical development of the articles alongside the legal maxim, *lex posterior derogat anterior*,<sup>87</sup> the better conclusion to draw is that the personal knowledge requirement of Article 967 does not apply to experts.

## 2. Deference to Federal Jurisprudence

Adopting the *Daubert* rationale serves the practical purpose of furnishing lower courts with a wealth of potentially enlightening federal case law on the procedure of admitting expert opinion testimony at summary judgment. By stating and adhering to a goal of evidence law uniformity, the Louisiana supreme court has implicitly endorsed evidence rules established in federal jurisprudence. It follows that federal rules demarcating areas of evidence law not yet resolved in Louisiana should be highly persuasive authorities.

Encouraging deference to federal jurisprudence when interpreting Louisiana evidence law no doubt alarms the ranks of Louisiana attorneys and judges dedicated to the proposition that Louisiana possesses the sovereignty necessary to decide its own evidence standards. To comfort such discontent, ardent federalists should comprehend that the *Independent Fire* principle of interpretation did not surrender any of Louisiana's power to govern the procedure of its court system. Rather, the state, acting through its supreme court, exercised that autonomy by choosing to

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84. *Independent Fire Ins. Co.*, 755 So. 2d at 235 (quoting Maraist & Lemmon, *supra* note 21, § 6.8, at 145).

85. *Independent Fire Ins. Co.*, 755 So. 2d at 235.

86. *Id.*

87. See La. Civ. Code art. 8 (1999).

pursue uniformity in evidence law. The legislature, the Louisiana supreme court, and even lower courts remain capable of creating evidence law that contradicts federal standards.

### 3. *Judicial Economy*

The driving force behind the summary judgment proceeding and the *Independent Fire* decision is judicial economy. The purpose of summary judgment is to "secure the just, speedy, and inexpensive determination of every action."<sup>88</sup> *Independent Fire*, like the aforementioned amendments which replaced the "cautious and sparingly" standard with a "favored" status, aimed to better facilitate summary judgment's docket-clearing effect in cases which fail to show a genuine issue as to a material fact. Determining the likely effect of the *Independent Fire* holding upon judicial economy begins with ascertaining whether the new rule will result in more summary judgments.

At first glance, the new rule allowing expert testimony at summary judgment seems to supply defendants with an opportunity to halt litigation in its early stages with scientific and/or technical testimony at summary judgment. Such a change in the law should result in an increased amount of summary judgments, especially in cases where defense experts are used to prove a lack of causation evidence. However, several factors should limit the new rule's effect of increasing summary judgments.

First, because the trial judge must refrain from making credibility calls<sup>89</sup> and must draw inferences from undisputed facts most favorable to the party opposing the motion,<sup>90</sup> plaintiffs opposing a motion for summary judgment may defeat the motion by submitting contradictory expert testimony, thereby creating a genuine issue of material fact.<sup>91</sup> Given the availability of "professional" expert witnesses who are willing to testify in conformity with the needs of the advocate who hires them,<sup>92</sup> shrewd parties opposing a motion for summary judgment should be able to field contradictory expert testimony. Deadlock will result, creating a genuine issue of material fact. Consequently, the *Independent Fire* rule will not lead to a substantial increase in summary judgments. By admitting expert testimony at summary judgment while reversing a lower court's judgment granting the motion, the *Independent Fire* decision provides a noteworthy example of countervailing expert testimony prohibiting the new rule from leading to more summary judgments.

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88. La. Code Civ P. art. 966 (1984).

89. See *Sportsman Store of Lake Charles, Inc. v. Sonitrol Security Systems of Calcasieu, Inc.*, 748 So. 2d 417 (La. 1999).

90. Maraist & Lemmon, *supra* note 21, § 6.8, at 145.

91. Edward Brunet, *The Use and Misuse of Expert Testimony in Summary Judgment*, 22 U.C. Davis L. Rev. 93 (1988).

92. For an excellent discussion of the "professional" expert issue, see W. Raley Alford, Comment, *The Biased Expert Witness in Louisiana Tort Law: Existing Mechanisms of Control and Proposals for Change*, 61 La. L. Rev. 181 (2001).

Second, considering that *Celotex* established that summary judgments are to be granted when the plaintiff cannot prove an element of his case (rather than when the defendant has ample evidence to disprove a claim), *Independent Fire* creates a new avenue for the plaintiff to effectively oppose summary judgment.

#### 4. Fairness

The *Independent Fire* opinion also cites equity and logic as additional reasons why the court adopted the federal rule.<sup>93</sup> To establish these concepts as support for the court's decision, Justice Victory began by creating a hypothetical that describes a situation under the majority circuit rule in which a party who has eyewitness testimony obtains summary judgment against a party who does not possess eyewitness evidence but does hold expert opinion evidence that, if considered, would controvert the eyewitness testimony.<sup>94</sup> The court's opinion claims that, under the appellate majority rule, the party with only the expert evidence would lose at summary judgment because his expert's testimony is not based on personal knowledge, even though he might have prevailed at trial.<sup>95</sup> Justice Victory's opinion asserts that such an outcome would be both "inequitable and illogical"<sup>96</sup> and implies that such outcomes would not result under the federal rule.

This hypothetical represents a persuasive appeal to logic and fairness if one observes the implied assumption that the mentioned eyewitness and expert testimony are the only evidence submitted at the summary judgment hearing. If that assumption is accepted, then the hypothetical decision is illogical because it produces a different outcome—exclusion of evidence—than the one that would result if a similar conflict would arise at trial, where the expert testimony is admissible. This is inequitable because it arbitrarily excludes evidence that could prove a party's claim or defense while permitting the evidence of his opponent. *Independent Fire* promotes logic and equity by eliminating such a questionable result; however, this protection is narrow. If one assumes that each party submitted accompanying evidence sufficient to raise a dispute as to the material facts, the law would not call for the result the hypothetical commands—granting of the summary judgment—because a dispute would exist as to the material facts.

To further support the equitable nature of the decision, the *Independent Fire* opinion concludes by reinforcing four previously unmentioned "important underlying principles" of summary judgment. The first two listed principles protect the jury's role as trier in fact. First, the trial judge cannot make credibility determinations on a motion for summary judgment.<sup>97</sup> Second, the trial court must not attempt to evaluate the persuasiveness of competing scientific studies. In performing its *Daubert-Forêt* gatekeeping analysis at summary judgment, the court

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93. *Independent Fire Ins. Co.*, 755 So. 2d at 235.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* See *Sportsman Store of Lake Charles, Inc. v. Sonitrol Security Systems of Calcasieu, Inc.*, 748 So. 2d 417 (La. 1999).

must focus on principles of methodology of the experts rather than the conclusions they generate.<sup>98</sup> The effect of prohibiting the trial judge from making judgments as to the credibility and persuasiveness of expert testimony is to ensure that the trier of fact, instead of the trial court, decides the issues as to the facts. These two "important underlying principles" provide perhaps the best defense to the visceral claim that admitting expert testimony at summary judgment potentially unfairly deprives a litigant of his or her day in court. To be admitted, expert evidence first must pass the reliability and relevance "gates" imposed by the *Daubert-Foret* standards, which focus on methodology rather than result. Assuming that a party moving for summary judgment presents expert testimony that meets the *Daubert-Foret* criteria, the nonmoving party can still ensure a trial on the merits by presenting contradictory *Daubert*-proof expert testimony. The resulting trial on the merits is guaranteed by the prohibition on credibility calls at summary judgment. Because the trial court cannot determine the credibility of the opposing experts, an issue on the facts exists which should prohibit the granting of summary judgment.<sup>99</sup>

The third principle outlined by Justice Victory requires that the court must draw those inferences from the undisputed facts that are most favorable to the party opposing the motion.<sup>100</sup> Finally, Justice Victory labeled as most important the rule that summary judgment should only be granted when the evidence presented establishes that there is no genuine issue of material fact in dispute.<sup>101</sup> As the first two principles did, the latter two serve to protect a litigant's entitlement to a trial on the merits, seeking to guarantee a trial on the merits so long as a genuine issue of material fact exists.

While these principles provide safeguards for plaintiffs seeking to avoid summary judgment, they also demarcate the gains made by the defense bar in *Independent Fire*. Although *Independent Fire* should not lead to a significant increase in summary judgments, the decision will likely lead to increased litigation costs due to the "expertification" of the summary judgment process. The initial critique of such a claim is that costs are not increased, but rather merely hastened, because experts hired at summary judgment will eventually be needed at trial. This contention would be true but for the fact that an overwhelming majority of litigation is settled prior to trial. Summary judgment is a critical stage in the settlement process. Even if *Independent Fire* has not significantly heightened the danger to plaintiffs that summary motions will be granted, the decision has driven up the costs of opposing such a motion. Such an increase surely benefits the bargaining stance of the party seeking summary judgment. Furthermore, as with all increases in the costs of litigation, the new rule is most likely to prejudice the poorest of litigants.

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98. *Independent Fire Ins. Co.*, 755 So. 2d at 235 (citing *Daubert*, 509 U.S. at 595 n.6, 113 S. Ct. at 2786).

99. Brunet, *supra* note 92, at 93.

100. *Id.* (quoting *Maraist & Lemmon*, *supra* note 21, § 6.8, at 145).

101. *Id.*

### 5. Daubert-Foret Determination

In addition to driving up litigation costs, the *Independent Fire* decision intensifies the trial court's burden of determining whether expert testimony meets *Daubert-Foret* standards because summary judgment supplies less security against unhelpful expert evidence than trial on the merits.<sup>102</sup> Unlike summary judgment, trial offers immediate cross-examination as an agent for tempering an expert's testimony and attacking credibility. This element of trial allows opposing counsel to instantly confront and correct an expert witness. While Louisiana Code of Civil Procedure article 967 provides for analogous confrontation devices such as supplemental affidavits and depositions,<sup>103</sup> it is unlikely that such procedures will eliminate unreliable expert testimony as effectively as trial methods.<sup>104</sup>

The primary reason that summary judgment procedure offers less protection than the trial standard is that it allows for a lapse in time before requiring response and therefore enables experts to evade questions that would be effective in conventional cross-examination.<sup>105</sup> One argument countering this point focuses on the fact that, unlike live cross-examination, the delay-filled summary judgment process allows the party opposing an expert extra time to carefully plan an attack on the expert testimony. A second counter-argument points out that Article 967 allows for live cross-examination in depositions to supplement the motion for summary judgment. The problem, though, with expecting depositions to provide a cross-examination analogous to that of trials is that such a view incorrectly assumes that lawyers approach a deposition cross-examination as they would a trial cross-examination. The two encounters are not equivalent because lawyers seeking to capitalize off of suspense and surprise save their most scorching questions for trial. Because tactical concerns often require lawyers to save their best attacks for the jury, supplemental affidavits, depositions, and interrogatory answers fail to provide an amount of protection against unhelpful testimony equal to cross-examination at trial. This hinders the trial court's *Daubert-Foret* determination.

### III. CONCLUSION

Without a doubt, the *Independent Fire* standard of allowing expert testimony at summary judgment effects a significant change to Louisiana's law of evidence and procedure. Primarily because the decision satisfies legislative intent, but also because it promotes uniformity, the decision represents a positive shift. However, since *Independent Fire* fails to significantly alleviate the judicial economy, affects

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102. Brunet, *supra* note 92, at 134.

103. La. Code Civ. P. art. 967 provides that "[t]he court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or by further affidavits."

104. Brunet, *supra* note 92, at 134.

105. *Id.*



poor litigants most adversely by increasing and hastening the costs of litigation, and hinders the *Daubert-Forêt* determination, its smoky ashes cloud this decision's flame of progress.

*J. Parker Layrisson\**

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