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## Summary Judgment and Partial Judgment in Louisiana: The State We're In

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Act 483 of 1997<sup>1</sup> significantly changed Louisiana Code of Civil Procedure article 966<sup>2</sup> regarding summary judgment, and largely rewrote Louisiana Code of Civil Procedure Article 1915<sup>3</sup> regarding partial judgment. One change in

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1. Act 483 became effective when approved by the Governor on July 1, 1997.

2. La. Code Civ. P. art. 966:

A. (1) The plaintiff or defendant in the principal or any incidental action, with or without supporting affidavits, may move for a summary judgment in his favor for all or part of the relief for which he has prayed. The plaintiff's motion may be made at any time after the answer has been filed. The defendant's motion may be made at any time.

(2) The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action, except those disallowed by Article 969. The procedure is favored and shall be construed to accomplish these ends.

B. The motion for summary judgment and supporting affidavits shall be served at least ten days before the time specified for the hearing. The adverse party may serve opposing affidavits prior to the date of the hearing. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law.

C. (1) After adequate discovery or after a case is set for trial, 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.

(2) The burden of proof remains with the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden 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.

D. The court shall hear and render judgment on the motion for summary judgment within a reasonable time, but in any event judgment on the motion shall be rendered at least ten days prior to trial.

E. A summary judgment may be rendered dispositive of a particular issue, theory of recovery, cause of action, or defense, in favor of one or more parties, even though the granting of the summary judgment does not dispose of the entire case.

3. La. Code Civ. P. art. 1915:

A. A final judgment may be rendered and signed by the court, even though it may not grant the successful party or parties all of the relief prayed for, or may not adjudicate all of the issues in the case, when the court:

(1) Dismisses the suit as to less than all of the parties, defendants, third party plaintiffs, third party defendants, or intervenors.

Article 966 attempts to clarify 1996 legislation whose purpose had been to bring Louisiana summary judgment procedure more closely in line with federal summary judgment procedure.<sup>4</sup> Because our case law developed divergent views on how much the 1996 legislation had changed our procedure,<sup>5</sup> Act 483 legislatively overruled all cases inconsistent with *Hayes v. Autin*<sup>6</sup>—the case our legislature chose as expressing the correct view. Another change in Article 966 appears to have greatly broadened the scope of summary judgment to include a disposition of a particular issue, theory of recovery, cause of action, or defense, even when the summary judgment grants no “relief” as that term has been understood in our jurisprudence.<sup>7</sup>

Furthermore, Act 483’s rewriting of Article 1915 effected a very different approach to determining the finality and immediate appealability of partial judgments. Unlike the former approach under which Article 1915’s exclusive list of permissible partial final judgments controlled these matters, the new approach is patterned after Federal Rule of Civil Procedure 54(b)<sup>8</sup> under which the trial

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(2) Grants a motion for judgment on the pleadings, as provided by Articles 965, 968, and 969.

(3) Grants a motion for summary judgment, as provided by Articles 966 through 969, including a summary judgment granted pursuant to Article 966(E).

(4) Signs a judgment on either the principal or incidental demand, when the two have been tried separately, as provided by Article 1038.

(5) Signs a judgment on the issue of liability when that issue has been tried separately by the court, or when, in a jury trial, the issue of liability has been tried before a jury and the issue of damages is to be tried before a different jury.

B. (1) When a court renders a partial judgment or partial summary judgment or sustains an exception in part, as to one or more but less than all of the claims, demands, issues, theories, or parties, whether in an original demand, reconventional demand, cross-claim, third party claim, or intervention, the judgment shall not constitute a final judgment unless specifically agreed to by the parties or unless designated as a final judgment by the court after an express determination that there is no just reason for delay.

(2) In the absence of such a determination and designation, any order or decision which adjudicates fewer than all claims or the rights and liabilities of fewer than all the parties, shall not terminate the action as to any of the claims or parties and shall not constitute a final judgment for the purpose of an immediate appeal. Any such order or decision issued may be revised at any time prior to rendition of the judgment adjudicating all the claims and the rights and liabilities of all the parties.

C. If an appeal is taken from any judgment rendered under the provisions of this Article, the trial court shall retain jurisdiction to adjudicate the remaining issues in the case.

4. See *infra* text under subheading *Platitudes and Attitudes*.

5. See Stephen Anthony Pitre, Comment, *The Pelican State Amends Summary Judgment: Recent Louisiana Jurisprudence Uncertain About Legislative Intent*, 43 Loy. L. Rev. 97 (1997); David W. Robertson, *Summary Judgment and Burden of Proof*, 45 La. B.J. 331 (1997).

6. 685 So. 2d 691 (La. App. 3d Cir. 1996), *writ denied*, 690 So. 2d 41 (1997).

7. See *infra* text under subheading *Confusion on Partial Summary Judgments*.

8. Fed. R. Civ. P. 54(b):

**Judgment Upon Multiple Claims or Involving Multiple Parties.** When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim,

court's discretion essentially governs the finality and immediate appealability of partial adjudications.<sup>9</sup>

Both Article 966 and Article 1915 now borrow heavily from the Federal Rules of Civil Procedure, but neither article has fully adopted the corresponding federal provisions. As a result, the current state of our law poses important and importunate procedural problems that need both judicial and legislative solutions. In this article we will examine the current state of Louisiana law in the key procedural areas of summary judgment and partial judgment, indicate matters needing clarification and revision, and propose possible solutions.

We will begin our examination of summary judgment by making side-by-side comparisons of corresponding state and federal provisions on summary judgment procedure, and by reviewing their legislative histories in order to: (1) demonstrate that the core procedures for seeking and opposing summary judgment always have been virtually the same under both Louisiana and federal law; and (2) set the stage for questioning the correctness of views expressed in *Hayes v. Autin* concerning the effect of legislative changes to Article 966.<sup>10</sup> We next will examine the 1996 and 1997 amendments to Article 966 in light of state and federal jurisprudence in order to develop our thesis that the changes in Article 966 should not be viewed as changes in Louisiana's summary judgment standard, but should result in significant changes inside Louisiana's courtrooms by prompting a better understanding of basic principles underlying summary judgment procedure.<sup>11</sup>

We will begin our examination of partial judgment by investigating discrepancies between state and federal law that have created confusion concerning the triggering of appellate delays,<sup>12</sup> the certification of a partial adjudication for immediate appeal,<sup>13</sup> and the scope of a partial summary judgment.<sup>14</sup> We conclude by suggesting specific language changes in the Code of Civil Procedure to eliminate this confusion.<sup>15</sup>

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or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

9. See *infra* notes 93-95 and accompanying text.

10. See *infra* text under subheading *Comparing State and Federal Procedures*.

11. See *infra* text under subheading *Platitudes and Attitudes*.

12. See *infra* text under subheading *Confusion on Appellate Delays*.

13. See *infra* text under subheading *Confusion on Certification*.

14. See *infra* text under subheading *Confusion on Partial Summary Judgments*.

15. See *infra* text under heading CONCLUSIONS AND SUGGESTIONS.

## I. SUMMARY JUDGMENT: A STATE OF REEXAMINATION

A. *Comparing State and Federal Procedures*

Under both Louisiana and federal law, the absence of a genuine issue of material fact always has been the *sine qua non* for summary judgment.<sup>16</sup> Furthermore, both Louisiana and federal law have the same core procedures for seeking and opposing summary judgment. Corresponding provisions include the following:

## Louisiana Provisions

The plaintiff or defendant in the principal or incidental action, with or without supporting affidavits, may move for a summary judgment in his favor for all or part of the relief for which he has prayed. The plaintiff's motion may be made at any time after the answer has been filed. The defendant's motion may be made at any time. Louisiana Code of Civil Procedure article 966(A)(1).

## Federal Provisions

A party seeking to recover upon a claim, counter claim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof. Federal Rule of Civil Procedure 56(a).

A party against whom a claim, counter claim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for summary judgment in the party's favor as to all or any part thereof. Federal Rule of Civil Procedure 56(b).

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16. See La. Code Civ. P. art. 966(B) and Fed. R. Civ. P. 56(e).

The motion for summary judgment and supporting affidavits shall be served at least ten days before the time specified for the hearing. The adverse party may serve opposing affidavits prior to the date of the hearing. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law. Louisiana Code of Civil Procedure article 966(B).

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.

When a motion for summary judgment is made and supported as provided above, an adverse party may not rest on the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided above, must set

The motion shall be served at least ten days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. Federal Rule of Civil Procedure 56(c).

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 further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as other-

forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be rendered against him.

If it appears from the affidavits of a party opposing the motion that for reasons stated he cannot present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

If it appears to the satisfaction of the court at any time that any of the affidavits presented pursuant to this article are presented in bad faith or solely for the purposes of delay, the court immediately shall order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees. Any offending party or attorney may be adjudged guilty of contempt. Louisiana Code of Civil Procedure article 967.

wise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party. Federal Rule of Civil Procedure 56(e).

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just. Federal Rule of Civil Procedure 56(f).

Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney maybe adjudged guilty of contempt. Federal Rule of Civil Procedure 56(g)

When Louisiana adopted the Code of Civil Procedure in 1960,<sup>17</sup> the provisions of Article 967 were substantially the same as Federal Rule of Civil Procedure 56(e)-(g). Likewise, the provisions of Article 966 were based upon

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17. See 1960 La. Acts 15.

Rule 56(a)-(c) with two minor differences: first, the Louisiana provisions permitted a party to move for summary judgment at a slightly different point in an action; second, the Louisiana provisions did not permit interlocutory summary judgments on the issue of liability.

Congress amended Rule 56 in 1963 to add "answers to interrogatories" to the materials that a court may consider on a motion for summary judgment, and to add the final two sentences of subdivision (e) that deal with an adverse party's response to a summary judgment motion.<sup>18</sup> In turn, the 1966 amendments to Articles 966 and 967 incorporated these changes into Louisiana law.<sup>19</sup> Congress made only technical amendments to Rule 56 after 1963.<sup>20</sup> Similarly, the Louisiana legislature made no changes to Article 967 after 1966, and made only two related and relatively minor adjustments to Article 966 prior to 1996. One was the 1983 adoption of the federal provisions allowing a summary judgment, "interlocutory in character," on the issue of liability alone;<sup>21</sup> the other was the 1984 deletion of the words "interlocutory in character," making such a partial summary judgment into a partial final judgment.<sup>22</sup>

Prior to 1996, the one notable difference between Rule 56 and Articles 966 and 967 concerned cases not fully adjudicated on a motion for summary judgment. In such cases Rule 56(d)<sup>23</sup> requires a federal court, if practicable, to ascertain the material facts that are and are not controverted, and then to make an order specifying the facts that appear without substantial controversy. At trial, facts specified in the order are deemed established, and the trial is conducted accordingly. The more accurate term for such an order is "interlocutory adjudication," rather than "partial summary judgment." Rule 56, standing alone, is intended neither to affect appellate jurisdiction, nor to make any interlocutory order appealable.<sup>24</sup> The primary purpose of a Rule 56(d) order is to salvage all constructive results from a hearing on a motion for summary judgment, even

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18. See Fed. R. Civ. P. 56 Advisory Committee Notes (1963).

19. See 1966 La. Acts 36, § 1.

20. See Fed. R. Civ. P. 56 Advisory Committee Notes (1987).

21. See 1983 La. Acts 101, § 1.

22. See 1984 La. Acts 89, § 1.

23. Fed. R. Civ. P. 56(d):

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

24. See 2 James Wm. Moore et al., *Moore's Manual: Federal Practice and Procedure* § 17.14[1] (1998).



though the motion is denied or only partially granted.<sup>25</sup> Because such a pretrial order is interlocutory, it is subject to revision or vacation.<sup>26</sup>

The only Louisiana procedure somewhat similar to Rule 56(d) is found in Louisiana Code of Civil Procedure article 1551<sup>27</sup> under which a state district court at a pretrial conference can direct counsel to consider what material facts and issues exist without substantial controversy, and can render an order reciting the agreements made by the parties and limiting the issues for trial to those not disposed of by admissions or agreements of counsel. Like an order under Rule 56(d), a pretrial order under Article 1551, unless modified, controls the subsequent course of the action. Nevertheless, the state and federal provisions concerning pretrial orders do not alter procedures for seeking or opposing summary judgment.

In 1996 the legislature made language changes in Article 966 that were acclaimed in *Hayes v. Autin* as substantially changing the law of summary judgment, "leveling the playing field" between the moving and the opposing parties, and bringing Louisiana's standard for summary judgment closely in line with the federal courts' "more liberal standard" under Rule 56(c).<sup>28</sup> The

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25. *Id.*

26. *Id.*

27. La. Code Civ. P. art. 1551:

A. In any civil action in a district court the court may in its discretion direct the attorneys for the parties to appear before it for conferences to consider any of the following:

(1) The simplification of the issues, including the elimination of frivolous claims or defenses.

(2) The necessity or desirability of amendments to the pleadings.

(3) What material facts and issues exist without substantial controversy, and what material facts and issues are actually and in good faith controverted.

(4) Proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence.

(5) Limitations or restrictions on or regulation of the use of expert testimony under Louisiana Code of Evidence Article 702.

(6) The control and scheduling of discovery.

(7) The identification of witnesses, documents, and exhibits.

(8) Such other matters as may aid in the disposition of the action.

B. The court shall render an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel. Such order controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice.

C. If a party's attorney fails to obey a pretrial order, or to appear at the pretrial and scheduling conference, or is substantially unprepared to participate in the conference or fails to participate in good faith, the court, on its own motion or on the motion of a party, after hearing, may make such orders as are just, including orders provided in Article 1471 (2), (3) and (4). In lieu of or in addition to any other sanction, the court may require the party or the attorney representing the party or both to pay the reasonable expenses incurred by noncompliance with this Paragraph, including attorney fees.

28. *Hayes v. Autin*, 685 So. 2d 691, 694-95 (La. App. 3d Cir. 1996), *writ denied*, 690 So. 2d 41 (1997).

legislature designed Act 483 of 1997 to clarify the 1996 changes and to overrule all cases inconsistent with *Hayes*.<sup>29</sup> Yet, the absence of a genuine issue of material fact continues to be the ultimate standard for granting summary judgment under both Louisiana and federal law, and the core procedures for seeking and opposing summary judgment also continue to be virtually the same under both. Thus, questions linger as to the correctness of the amendments' underlying premise—that Louisiana and federal courts have applied different standards for summary judgment. We now will examine the 1996 and 1997 language changes and the state and federal jurisprudence concerning standards for summary judgment.

### B. *Platitudes and Attitudes*

The 1996 amendments to Article 966 added four new paragraphs:<sup>30</sup>

The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action, except those disallowed by Article 969. The procedure is favored and shall be construed to accomplish these ends.<sup>31</sup>

After adequate discovery or after a case is set for trial, a motion which shows that there is no genuine issue as to material fact and that mover is entitled to judgment as a matter of law shall be granted against an adverse party who fails to make a showing sufficient to establish the proof of an element essential to his claim, action, or defense and on which he will bear the burden of proof at trial.<sup>32</sup>

The court shall hear and render judgment on the motion for summary judgment within a reasonable time, but in any event judgment on the motion shall be rendered at least ten days prior to trial.<sup>33</sup>

Notwithstanding any other provision of this Article to the contrary, the burden of proof shall remain with the mover.<sup>34</sup>

The primary source of this new language was the United States Supreme Court case of *Celotex Corporation v. Catrett*.<sup>35</sup> The case is an excellent primer on summary judgment when the five-justice majority opinion is read together with the three-justice dissenting opinion. While disagreeing with the majority on application of summary judgment principles to the case's unique facts, the cogent dissent is fully consistent with the majority's legal analysis concerning

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29. See 1997 La. Acts 483, § 4.

30. See First Extraordinary Session of 1996 La. Acts 9, § 1.

31. La. Code Civ. P. art. 966(A)(2).

32. La. Code Civ. P. art. 966(C).

33. La. Code Civ. P. art. 966(D).

34. La. Code Civ. P. art. 966(G).

35. 477 U.S. 317, 106 S. Ct. 2548 (1986).

summary judgment, and the case as a whole is very helpful in analyzing Louisiana's summary judgment law.

*Celotex* was a wrongful death action in which Catrett alleged her husband's death was due to exposure to asbestos products manufactured or distributed by defendants. The District Court granted a *Celotex* motion for summary judgment because Catrett was unable to produce evidence of exposure to *Celotex* asbestos products. However, the Court of Appeals reversed, holding that *Celotex* failed to support its summary judgment motion with evidence tending to negate such exposure.<sup>36</sup> The appellate court referred to language in Rule 56(e) stating that when a motion for summary judgment is made *and supported* as provided in the rule, an adverse party may not rest upon mere allegations or denials of his pleadings; the court also referred to language in the Advisory Committee Note to Rule 56 stating that where the *evidentiary matter in support of the motion* does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidence is presented. Additionally, the court cited the United States Supreme Court's opinion in *Adickes v. S.H. Kress & Co.*<sup>37</sup> as holding not only that the moving party has the burden of initially showing the absence of a genuine issue of material fact, but also that the opposing party "bears the burden of responding only after the moving party has met its burden of coming forward with proof of the absence of any genuine issues of material fact."<sup>38</sup> Thus, the appellate court essentially concluded that proper support for a motion for summary judgment under Rule 56 must include a positive evidentiary showing. Eight of nine Supreme Court justices expressly disagreed with this conclusion; one voted to affirm on other grounds.

The Supreme Court majority opinion found the Court of Appeals' position to be inconsistent with the standard for summary judgment set forth in Rule 56(c):

In our view the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.<sup>39</sup>

The obvious source of paragraph (C) and the apparent source of paragraph (G) of the 1996 amendments to Article 966<sup>40</sup> are, respectively, the *Celotex* language quoted above and *Celotex* discussion of the burden of proof discussed below.

The *Celotex* majority agreed with *Adickes* in placing the burden on the moving party to show initially the absence of a genuine issue of material fact.

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36. See *Catrett v. Johns-Manville Corp.*, 756 F.2d 181 (D.C. Cir. 1985).

37. 398 U.S. 144, 90 S. Ct. 1598 (1970).

38. *Catrett*, 756 F.2d at 184.

39. See *Celotex*, 477 U.S. at 322, 106 S. Ct. at 2552.

40. See *supra* note 30 and accompanying text.

However, the majority did not think, as had the Court of Appeals, that *Adickes* placed a burden on the moving party to *produce evidence* showing the absence of genuine issue of material fact, even for an issue on which the nonmoving party bears the burden of proof at trial. Instead, the moving party could discharge its burden by “showing” the district court the absence of evidence to support the nonmoving party’s claim. The Court found no express or implied requirement in Rule 56 that the moving party support its motion “with affidavits or other similar materials” negating the opponent’s claims:

On the contrary, Rule 56(c), which refers to “the affidavits, *if any*,” suggests the absence of such a requirement. And if there were any doubt about the meaning of Rule 56(c) in this regard, such doubt is clearly removed by Rules 56(a) and (b), which provide that claimants and defendants, respectively, may move for summary judgment “*with or without supporting affidavits*.” The import of these subsections is that, regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied.<sup>41</sup>

As previously noted, the three-justice dissenting opinion is fully consistent with the five-justice majority opinion regarding summary judgment principles; moreover, the dissent more clearly explains the moving party’s burden where the nonmoving party cannot prove its case. The dissent explains that the burden of establishing the non-existence of a genuine issue of material fact is on the moving party and has two distinct components: (1) an initial burden of production; and (2) an ultimate burden of persuasion. While the initial burden of production, if satisfied by the moving party, can be shifted to the nonmoving party, *the burden of persuasion always remains on the moving party*. (Note the close match with the language of Article 966(G) of the 1996 amendments.) Unless the court finds the moving party has met its initial burden of production, the court need not decide whether the moving party has met the ultimate burden of persuasion.<sup>42</sup>

The dissent further explains that the burden of production requires the moving party to make a *prima facie* showing of entitlement to summary judgment, and that the manner in which this showing can be made depends upon which party will bear the burden of persuasion on the challenged claim at trial. If the moving party will bear the burden of persuasion, the moving party must support its motion with credible evidence consisting of any of the items specified in Rule 56(c). If this evidence would entitle the moving party to a directed

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41. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986) (emphasis added).

42. *Id.* at 330-31, 106 S. Ct. at 2556.

verdict if not controverted at trial, then the burden of production shifts to the nonmoving party either to produce evidence showing that a genuine issue of material fact exists, or to submit an affidavit requesting more discovery time. On the other hand, if the nonmoving party will bear the burden of persuasion at trial, the moving party may satisfy its burden of production in two ways: (1) submit affirmative evidence negating an essential element of the nonmoving party's claim; or (2) demonstrate to the court the insufficiency of the nonmoving party's evidence on an essential element of the nonmoving party's claim.<sup>43</sup>

Significantly, the dissent clearly points out that in the latter instance:

*[A] conclusory assertion that the nonmoving party has no evidence is insufficient. Such a burden of production is no burden at all and would simply permit summary judgment procedure to be converted into a tool for harassment.*<sup>44</sup>

Instead, the moving party must affirmatively demonstrate the absence of sufficient evidence, and this may require the moving party to depose the nonmoving party's witnesses or to establish the inadequacy of documentation. The moving party may demonstrate the literal absence of evidence in the record "by reviewing for the court the admissions, interrogatories, and other exchanges between the parties that are in the record."<sup>45</sup>

The preceding discussion of *Celotex* reveals the source and presumably reveals the intent of paragraphs (C) and (G) of the 1996 amendments to Article 966. The source of paragraph (A)(2)<sup>46</sup> also may be found in the *Celotex* majority opinion:

The Federal Rules of Civil Procedure have for almost 50 years authorized motions for summary judgment upon proper showings of the lack of a genuine, triable issue of material fact. Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action."<sup>47</sup>

While Article 966(A)(2) provides that Louisiana summary judgment procedure is favored, whereas the above-quoted *Celotex* language provides that federal summary judgment procedure is not disfavored, our legislature arguably intended for summary judgment procedure in Louisiana to have the same status

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43. *Id.* at 331, 106 S. Ct. at 2557.

44. *Id.* at 332, 106 S. Ct. at 2557 (emphasis added).

45. *Id.*, 106 S. Ct. at 2557.

46. See *supra* text accompanying note 30.

47. See *Celotex*, 477 U.S. at 327, 106 S. Ct. at 2555.

as under federal law. Thus, the pre-*Celotex* Louisiana case of *Butler v. K-Mart Corporation*<sup>48</sup> seems to capture the intent of Article 966(A)(2) in these words:

Summary judgment can avoid delay and expense for both litigants and the court if it is appropriate. If the procedure is to have meaning, it must be applied in cases . . . where it is obviously warranted.<sup>49</sup>

An important point here is that in both Article 966(A)(2) and *Celotex*, summary judgment *procedure* is lauded—not the granting of summary judgment.

Act 483 of 1997 condensed and reworded paragraphs (C) and (G) of the 1996 amendments into a single new paragraph (C) that provides:

- (1) After adequate discovery or after a case is set for trial, a motion which shows that there is no genuine issue as to material fact and that mover is entitled to judgment as a matter of law shall be granted.
- (2) The burden of proof remains with the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden 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>50</sup>

Plainly, *Celotex* is the source of this new language, just as *Celotex* was the source of the 1996 amendments. Therefore, the new language strongly suggests an intention to clarify rather than change the law, and this intent is confirmed by Section 4 of Act 483:

The purpose of Sections 1 and 3 of this Act is to clarify Acts 1996, No. 9, § 1 of the First Extraordinary Session of 1996 and to legislatively overrule all cases inconsistent with *Hayes v. Autin*, 96-287 (La. App. 3rd Cir. 12/26/96), 685 So. 2d 691.<sup>51</sup>

What problem was the legislature attempting to address in the 1996 and 1997 amendments, and what practical procedural changes were intended? Some

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48. 432 So. 2d 968 (La. App. 4th Cir. 1983).

49. *Id.* at 969.

50. 1997 La. Acts No. 483, § 1.

51. 1997 La. Acts No. 483, § 4.

answers appear discernible from three cases: *Dietrich v. Allstate Ins. Co.*,<sup>52</sup> *Sassone v. Elder*,<sup>53</sup> and *Hayes v. Autin*.<sup>54</sup>

*Dietrich* was a post-*Celotex* tort case notable for its dissenting opinion disagreeing with the reversal of a summary judgment. Suggesting that "it is time the judicial attitude toward summary judgment be reexamined,"<sup>55</sup> the dissent remarked that even conceding the differences between state and federal law, the case illustrated what the United States Supreme Court had in mind when stating in *Celotex*:

One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose.<sup>56</sup>

The *Dietrich* dissent perceived Louisiana's attitude toward summary judgment, after *Celotex* and before the recent amendments to Article 966, to be somewhat penurious, and perceived the federal attitude to be more liberal.

Similarly, the Louisiana Supreme Court's dictum in *Sassone v. Elder* referred to "the difference in state and federal practice in summary judgment procedures in non-defamation cases,"<sup>57</sup> and then proceeded to summarize federal procedure:

In the federal system, when the nonmoving party bears the burden of proof at trial, there is no genuine issue of material fact if the nonmoving party cannot come forward at the summary judgment stage with evidence of such sufficient quantity and quality for a reasonable juror to find the party can satisfy his substantive evidentiary burden.<sup>58</sup>

In contrast, the court made these statements about Louisiana procedure:

In Louisiana, however, there is a strong preference for full trial on the merits in non-defamation cases. Because of the resulting heavy burden on the mover, a showing by the mover that the party with the ultimate burden of proof likely will not meet his burden at trial is an insufficient basis for summary judgment. Summary judgments are to be sparingly granted. Any doubt is to be resolved against granting the motion.<sup>59</sup>

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52. 540 So. 2d 358 (La. App. 1st Cir. 1989).

53. 626 So. 2d 345 (La. 1993).

54. 685 So. 2d 691 (La. App. 3d Cir. 1996), *writ denied*, 690 So. 2d 41 (1997).

55. 540 So. 2d at 363.

56. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 2553 (1986).

57. *Sassone*, 626 So. 2d at 351.

58. *Id.* (citing *Celotex*).

59. *Id.* at 352 (citations omitted).

The *Sassone* statements of federal and Louisiana law are misleading. The dictum correctly states federal law, but only where the moving party already has carried the initial burden of production. The dictum also correctly states that the moving party cannot obtain summary judgment under Louisiana law simply by showing that the party with the burden of proof at trial "likely" will not meet his burden. However, this statement does not conflict with federal procedure, but simply recognizes that where reasonable minds *could* differ summary judgment is inappropriate, even though the case appears *likely* to go against the party with the burden of proof at trial.

In *Anderson v. Liberty Lobby, Inc.*,<sup>60</sup> decided the same day as *Celotex*, the United States Supreme Court stated that the standard for granting summary judgment mirrors the standard for granting a directed verdict. In discussing this standard the Court explained:

If the defendant in a run-of-the-mill civil case moves for summary judgment or for a directed verdict based on a lack of proof of a material fact, the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented.<sup>61</sup>

Put another way, the Court stated *if reasonable minds could differ as to the import of evidence, then a verdict should not be directed.*<sup>62</sup> This same "reasonable minds" standard was applied by the Louisiana Supreme Court in *Sanders v. Hercules Sheet Metal, Inc.*:<sup>63</sup>

A motion for summary judgment must be granted when reasonable minds must inevitably conclude that the mover is entitled to judgment on the facts before the court.<sup>64</sup>

Not only do both Louisiana and Federal law use the same "reasonable minds" standard, but under that standard both would reject a motion for summary judgment showing merely that a plaintiff was not "likely" to meet his burden of proof. Thus, any *reasonable* doubt is to be resolved against granting summary judgment: to conclude that reasonable doubt exists is to conclude that reasonable minds could differ.

A salient point to be drawn from *Dietrich* and *Sassone* is that often-cited summary judgment principles, through jurisprudential devolution, can become meaningless or even misleading legal platitudes. Even though rooted in well-reasoned procedural law, these principles can slip their contextual tether over time, and can adversely affect judicial attitudes toward summary judgment. In

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60. 477 U.S. 242, 106 S. Ct. 2505 (1986).

61. *Id.* at 252, 106 S. Ct. at 2512.

62. *Id.* at 251-52, 106 S. Ct. at 2512.

63. 385 So. 2d 772 (La. 1980).

64. *Id.* at 775.



turn, judicial attitudes and perceptions thereof can be the impetus for "reform" legislation.

This point is further illustrated in *Hayes v. Autin*.<sup>65</sup> In discussing the 1996 amendments to Article 966, the court correctly stated the intent of the legislature to bring Louisiana's standard for summary judgment "closely in line with the federal standard under Fed. Rule Civ. Proc. 56(c)."<sup>66</sup> The court also gave a correct summary of the burden-shifting aspects of summary judgment procedure. However, the court additionally made these statements about Article 966 as amended:

We find that the amended article substantially changes the law of summary judgment. Under the existing jurisprudence, the summary judgment was not favored and was to be used only cautiously and sparingly. The pleadings and supporting documents of the mover were to be strictly scrutinized by the court, while the documents submitted by the party in opposition were to be treated indulgently. Any doubt was to be resolved against granting the summary judgment, and in favor of trial on the merits . . . .

The jurisprudential presumption against granting the summary judgment has been legislatively overruled by La. Code Civ. P. art. 966 as amended. In effect, the amendment "levels the playing field" between the parties in two ways: first, the supporting documentation submitted by the parties should be scrutinized equally, and second, the overriding presumption in favor of trial on the merits is removed.<sup>67</sup>

By twice amending Article 966, and by legislatively overruling all cases inconsistent with *Hayes*, our legislature also appears to subscribe to *Hayes*' perception of "the federal courts' more liberal standard for summary judgment."<sup>68</sup> However, while our legislature was amending Article 966, the federal appellate courts were rendering cases reciting basic summary judgment principles that run counter to the above-quoted statements from *Hayes*. As part of a reexamination of attitudes toward summary judgment, we would do well to review the following principles as set forth in 1996 and 1997 cases from each of the eleven federal circuits:

*First Circuit:* "At the summary judgment stage, the trial court examines the entire record 'in the light most flattering to the nonmovant and indulg[es] all reasonable inferences in that party's favor.' Only if the record, viewed in that manner and without regard to credibility

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65. 685 So. 2d 691 (La. App. 3d Cir. 1996), writ denied, 690 So. 2d 41 (1997).

66. *Id.* at 694.

67. *Id.*

68. *Id.* at 695.

determinations, reveals no genuine issue as to any material fact may the court enter summary judgment.”<sup>69</sup>

*Second Circuit:* “The court must resolve all ambiguities and draw all inferences in favor of the non-moving party. If there is any evidence in the record from which a reasonable inference could be drawn in favor of the non-moving party on a material issue of fact, summary judgment is improper.”<sup>70</sup>

*Third Circuit:* “In considering a motion for summary judgment, a court does not resolve factual disputes or make credibility determinations, and must view the facts and inferences in the light most favorable to the party opposing the motion.”<sup>71</sup>

*Fourth Circuit:* “Summary judgment is proper if no material facts are in dispute. In deciding whether facts are in dispute, the evidence of the non-moving party is to be believed and all justifiable inferences must be drawn in his favor.”<sup>72</sup>

*Fifth Circuit:* “We review a grant of summary judgment *de novo* . . . . We construe all evidence in the light most favorable to the non-moving party without weighing the evidence, assessing its probative value, or resolving any factual disputes.”<sup>73</sup>

*Sixth Circuit:* “When reviewing a summary judgment motion, it is essential that we view the evidence in a light most favorable to the nonmoving party. ‘[A]t the summary judgment stage the judge’s function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.’”<sup>74</sup>

*Seventh Circuit:* “We review the district court’s grant of summary judgment *de novo*, taking the record in the light most favorable to the non-movant . . . . Although summary judgment is an effective tool for district courts to manage their caseload, they must avoid the temptation to use summary judgment ‘as an abbreviated trial.’”<sup>75</sup>

*Eighth Circuit:* “Importantly, ‘a party moving for summary judgment is not entitled to a judgment merely because the facts he offers appear more plausible than those tendered in opposition, or because it appears that the adversary is unlikely to prevail at trial.’”<sup>76</sup>

69. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997) (citations omitted).

70. *Catlin v. Sobol*, 93 F.3d 1112, 1116 (2d Cir. 1996) (citations omitted).

71. *Orson, Inc. v. Miramax Film Corp.* 79 F.3d 1358, 1362 n.1 (3d Cir. 1996) (citations omitted).

72. *Jakubiak v. Perry*, 101 F.3d 23, 26 (4th Cir. 1996) (citations omitted).

73. *Williams v. Time Warner Operation, Inc.*, 98 F.3d 179, 181 (5th Cir. 1996) (citations omitted).

74. *Terry Barr Sales Agency, Inc. v. All-Lock Co.*, 96 F.3d 174, 178 (6th Cir. 1996) (citations omitted).

75. *American Int’l Adjustment Co. v. Galvin*, 86 F.3d 1455, 1459 (7th Cir. 1996) (citations omitted).

76. *Handeen v. Lemaire*, 112 F.3d 1339, 1354 (8th Cir. 1997) (citations omitted).

*Ninth Circuit:* "In considering a motion for summary judgment, the court must examine all of the evidence in the light most favorable to the nonmoving party. However, 'in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden,' while leaving 'credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts' to the jury."<sup>77</sup>

*Tenth Circuit:* "Summary judgment is appropriate when there is no genuine dispute over a material fact and the moving party is entitled to judgment as a matter of law,' but the court 'must view the record in a light most favorable to the parties opposing the motion for summary judgment.'"<sup>78</sup>

*Eleventh Circuit:* "Where the non-movant presents direct evidence that, if believed by the jury, would be sufficient to win at trial, summary judgment is not appropriate even where the movant presents conflicting evidence. It is not the court's role to weigh conflicting evidence or to make credibility determinations; the non-movant's evidence is to be accepted for purposes of summary judgment."<sup>79</sup>

Moreover, in 1996 the United States Supreme Court stated that when conducting a qualified immunity inquiry upon a motion for summary judgment, the court looks to the evidence before it *in the light most favorable to the plaintiff* (the non-moving party).<sup>80</sup> This statement does not indicate any change in the Court's view of summary judgment procedure from views expressed in *Anderson*:

Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial.<sup>81</sup>

The recent federal jurisprudence unmistakably reveals that the playing field is *not* level under Rule 56: the evidence still is construed in the light most

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77. *Reynolds v. San Diego*, 84 F.3d 1162, 1166 (9th Cir. 1996) (citations omitted).

78. *Wolford v. Lasater*, 78 F.3d 484, 488 (10th Cir. 1996) (citations omitted).

79. *Mize v. Jefferson City Bd. of Educ.*, 93 F.3d 739, 742 (11th Cir. 1996) (citations omitted).

80. *See Behrens v. Pelletier*, 516 U.S. 279, 309, 116 S. Ct. 834, 840 (1996).

81. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 2513-14 (1986) (citations omitted).

favorable to the nonmoving party; determining credibility and weighing conflicting evidence still are trial matters. Nevertheless, to properly understand the federal standard under Rule 56 is not to conclude that Louisiana's amendments to summary judgment procedure were meaningless or unnecessary. Changes in judicial attitudes toward summary judgment procedure through reexamination and return to the norm have the same kind of practical results as a substantive change in the law. By causing such reexamination, Act 483 and its predecessor should result in judicial attitude adjustments for many, although the adjustments will not all be in the same direction. Those who have been applying a more conservative standard than proper under Rule 56 must take a more liberal attitude toward summary judgment procedure, being mindful of the *Celotex* analysis, especially where the non-moving party will have the burden of persuasion at trial. On the other hand, those who would read *Hayes* as requiring a more liberal standard than Rule 56 must adopt a more conservative view, being mindful that a fair playing field is one on which summary judgment evidence is viewed in the light most favorable to the non-moving party, and on which jury functions are not usurped. The danger of improper use of summary judgment procedure exists at both extremes. If we only exchange one set of platitudes for another, the proper attitudes toward summary judgment procedure still will elude us.

### C. Understanding Key Concepts

Judicial attitudes toward summary judgment procedure should be shaped not only by an understanding of the burdens of production and persuasion as explained in *Celotex*, but also by an understanding of the following: (1) a genuine issue of material fact; (2) credibility determinations and evidence weighing; and (3) "the prism of the substantive evidentiary burden."<sup>82</sup> A proper understanding of these concepts is the key both to correctly assaying the procedural boilerplate we see in the cases and to correctly assessing the practical procedural changes we should see in the courtroom.

The only reason for a trial is to resolve genuine issues of material fact. By determining whether or not such issues are present, summary judgment procedure *only* determines whether or not a trial is necessary; thus, we see jurisprudence condemning the use of summary judgment procedure as an abbreviated trial. A trial is unnecessary if only legal issues are presented, and the elimination of factual disputes through well planned discovery can lead to situations ripe for summary judgment. Trial also is unnecessary if factual issues are not material. Only disputes over facts "that might affect the outcome of the suit under the governing law"<sup>83</sup> are material. For example, whether a tort defendant adequately maintained the roof of a building may present a genuine factual issue,

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82. *Id.* at 254, 106 S. Ct. at 2513.

83. *Id.* at 248, 106 S. Ct. at 2510.

but that issue is not material if the roof was destroyed by tornadic winds that clearly would have destroyed a perfectly maintained roof.

While the "factual" and "material" requirements for issues are relatively easy to understand, the requirement that a factual issue be "genuine" has been problematic. The very mission of summary judgment procedure is to go behind the pleadings in order to see whether there is a genuine need for trial. However, in light of the often-cited admonition against making credibility determinations or weighing evidence on summary judgment, how can this mission be fully accomplished if the non-moving party responds with any evidence, no matter how implausible, such as an affidavit asserting the occurrence of events through metaphysical means? The answer is that judges can, and do, weigh evidence and make credibility determinations in a limited way when deciding if a material factual issue is "genuine," i.e., "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."<sup>84</sup> Implicit in the "reasonable minds" standard is a weighing process through which a court eliminates material factual issues with only one reasonably possible outcome. Importantly, this weighing only considers the reasonableness of the possibility that the fact finder could reach different outcomes on a factual issue after a full trial on the merits; the weighing does not consider which reasonably possible outcome is more plausible. Understood in this way, the boilerplate warnings against weighing evidence make sense.

When engaging in this weighing process, the judge must keep in mind that witness credibility ordinarily cannot be adequately determined in advance of trial simply from reading a piece of paper. Any attorney with significant trial experience can relate both to the unexpected pleasure of having a seemingly shaky witness give convincing testimony, and to the nightmare of having a seemingly confident witness completely fall apart on the witness stand. Likewise, a judge must understand that even though a deposition or affidavit may indicate a well qualified witness who will give credible testimony, the witness's trial demeanor, tone of voice, and responses to cross-examination may destroy credibility. The inability to adequately assess credibility in advance of trial underlies the warnings to view the record without regard to credibility determinations. On the other hand, nothing prohibits a judge from discounting affidavits or depositions containing chimerical factual accounts.

A third concept affecting an understanding of summary judgment procedure is the idea of viewing the evidence through what *Anderson* called "the prism of the substantive evidentiary burden."<sup>85</sup> This simply means that in determining whether a genuine issue exists a judge must ask whether reasonable minds, *applying the proper evidentiary standard*, could find for either the plaintiff or the defendant. Accordingly, if the substantive evidentiary standard at trial would be "a preponderance of the evidence," then the question is whether reasonable minds

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84. *Id.*, 106 S. Ct. at 1510.

85. *Id.* at 254, 106 S. Ct. at 2513.

could find for either side under that standard. However, if the intermediate standard of "clear and convincing evidence" would apply at trial, then that standard is factored into the question of whether a genuine issue exists. In *Anderson*, the Court held that the "clear and convincing" standard of proof should be taken into account in ruling on summary judgment motions in libel suits brought by public figures. Likewise, in *Mashburn v. Collin*,<sup>86</sup> the Louisiana Supreme Court stated:

Moreover, if the New York Times standards may be invoked in a case, the courts must apply them in assessing the summary procedure evidence. Accordingly, in order for a genuine issue to exist concerning the material fact of defendant's state of mind in making the alleged defamatory expression of fact or opinion, the plaintiff-mover [sic] must show that a judge or jury reasonably could find by clear and convincing evidence that the expression of fact or opinion was made with knowing or reckless falsity. Also, if there is no genuine issue of material fact, the plaintiff-mover [sic] must show that a judge or jury reasonably could find by clear and convincing evidence, after construing all of the facts and inferences reasonably to be drawn therefrom in favor of the plaintiff—mover [sic], that the alleged defamatory statement was made with knowing or reckless falsity.<sup>87</sup>

Although the United States and Louisiana Supreme Courts independently have reached the same conclusion about the role of the substantive evidentiary standard in summary judgment procedure, the dissenters in *Anderson* may suggest correctly that requiring application of the same standard of proof on summary judgment that is applied at trial may be of little practical importance. Certainly, the same concerns about chilling effects on First Amendment rights that justify a more stringent standard of proof at trial also are present at earlier stages of litigation, but the utility of the higher standard when asking only whether a genuine issues exists is more limited than might be expected. To fully appreciate why, we invite the reader to create a factual scenario in which reasonable minds, on the one hand, might differ as to whether the plaintiff could carry his burden under a "preponderance of the evidence" standard, but, on the other hand, could not differ as to whether the plaintiff could carry his burden under a "clear and convincing" standard. Justice Brennan could not; neither could we.

#### D. Summary

The recent significant changes in the language of Louisiana Code of Civil Procedure Article 966 concerning summary judgment can translate into significant changes in the courtroom through a reexamination of and reunification

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86. 355 So. 2d 879 (La. 1977).

87. *Id.* at 890 (footnotes omitted).

with the federal law and jurisprudence upon which our law is based, and toward which our legislature plainly intended to steer us. While some would see a reunification occurring through a change in Louisiana's summary judgment standard, we would suggest that the better view is a reunification occurring through a change in judicial attitudes toward summary judgment procedure. This change should be based not only on an understanding of the evidentiary burdens regulating the "who, what, and when" of summary judgment procedure, but also on an understanding of the procedure's purpose and the judge's role regarding the "why and how." This latter, more fundamental understanding of the procedure is necessary to go behind the jurisprudential boilerplate and strike the proper balance between preventing unnecessary trials and preserving the right to try genuine issues of material fact.

A final discussion topic is the scope of summary judgment. While a summary judgment properly can terminate a lawsuit, our Code of Civil Procedure always has allowed summary judgment for only part of the relief sought,<sup>88</sup> and Act 483 seems to have significantly broadened that scope.<sup>89</sup> However, this topic is more closely associated with the subject of partial judgment than with summary judgment procedure. Accordingly, we now turn to an examination of the rewriting of Louisiana Code of Civil Procedure Article 1915 and "the perplexing problems of partial judgments."<sup>90</sup>

## II. PARTIAL JUDGMENT: A STATE OF CONFUSION

Because litigation often involves multiple parties and multiple claims, every civil procedure system must address the sometimes difficult problems associated with appellate review of partial judgments. As explained by the Louisiana Supreme Court in *Everything on Wheels Subaru, Inc. v. Subaru South, Inc.*:<sup>91</sup>

Before the adoption of procedural rules liberalizing cumulation of actions and joinder of parties, only judgments which finally adjudicated all claims with regard to all parties were appealable. When liberal joinder provisions were adopted, it became obvious that appeals should be available from some partial judgments when a party had a clearly distinct claim or defense and should not be required to remain in the action awaiting lengthy litigation by other parties. On the other hand, there were efficiency advantages to limiting the number of appeals in multiple-party and multiple-claim litigation.<sup>92</sup>

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88. See La. Code Civ. P. art. 966 under which one may move for a summary judgment for "all or part of the relief for which he has prayed."

89. See *infra* text under subheading *Confusion on Partial Summary Judgments*.

90. See *Douglass v. Alton Ochsner Med. Found.*, 695 So. 2d 953, 957 (La. 1997).

91. 616 So. 2d 1234 (La. 1993).

92. *Id.* at 1239-40.

Ordinarily, immediate review of a partial judgment is not necessary because the judgment can be reviewed on appeal of the final judgment rendered at the end of case. But even so, when both fairness to the litigants and efficiency of the judicial process are considered in a particular case, the balance may tip in favor of immediate review. As a result, a civil procedure system must develop rules to deal with two related problems: (1) identifying with clarity when an immediate appeal of a partial judgment is proper; and (2) identifying with certainty when appellate delays begin to run for partial judgments.

Ever since the enactment of our Louisiana Code of Civil Procedure, up until the passage of Act 483 of 1997, Louisiana Code of Civil Procedure Article 1915 addressed these problems by setting forth an exclusive list of immediately appealable partial final judgments.<sup>93</sup> What this approach lacked in terms of flexibility was balanced by what it provided in terms of certainty and uniformity. Largely eliminated were appeals taken out of caution caused by uncertainty, as well as missed appeals caused by failure to recognize the start of appellate delays. Largely avoided also were judge-to-judge differences in allowing immediate appeals of partial judgments.

The new version of Article 1915, although still containing a list of partial adjudications, largely has abandoned the prior approach in favor of one closely paralleling Federal Rule of Civil Procedure 54(b).<sup>94</sup> Under the federal approach, the immediate appealability of a partial final decision essentially is left to the discretion of the trial judge who knows the case and can balance competing factors.<sup>95</sup> This approach allows greater flexibility to fit the particular case, but also allows for greater judge-to-judge differences in application, as long as the differences fall within the judges' broad discretion.

The relative virtues of the approaches used in old Article 1915 and new Article 1915 are debatable. Of more immediate concern are practical implementation problems with the new approach. Because the new approach is a drastic departure from its predecessor, some preparation of the judiciary would have been advisable to promote both a smooth transition and a more uniform application. However, the act not only caught many judges by surprise, but also gave judges no guidance on how to perform their new roles.

Presumably, the parallels between Article 1915 and Rule 54 indicate a legislative intent for courts to seek guidance from the federal provisions and jurisprudence. However, our courts' ability to do so is seriously undercut by discrepancies between state and federal law concerning the triggering of appellate delays, the certification of a partial adjudication for immediate appeal, and the scope of a partial summary judgment. Because of the many questions raised by Act 483, this area of the law has been placed in a state of confusion.

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93. *Id.* at 1240-41.

94. *See supra* note 8.

95. *See infra* note 112 and accompanying text.



### A. Confusion on Appellate Delays

New Article 1915 creates confusion on appellate delays because it is an imperfect amalgam of state and federal elements. Under Louisiana law, the immediate trigger for the running of appellate delays typically is either the expiration of new trial delays or the mailing of notice of a court's refusal to grant a timely application for new trial.<sup>96</sup> In turn, new trial delays typically begin to run either on the day after a final judgment is signed, or on the day after notice of judgment, when required, has been mailed or served.<sup>97</sup> Thus, the signing of a final judgment is the initial trigger for the running of appellate delays; without a signed judgment an appeal is improper.<sup>98</sup>

In contrast, the immediate triggering event in the federal system is entry of judgment, which occurs when the clerk makes an entry in the civil docket, briefly showing the substance of the judgment.<sup>99</sup> The appellate delays begin to run from entry of judgment; a district court judgment is ineffective until entered.<sup>100</sup> In cases with multiple claims or parties, a federal court under Rule 54(b) may direct the entry of a final judgment as to one or more but fewer than all the claims or parties "only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."<sup>101</sup> This process of express determination and direction is commonly referred to either as "certification" of the adjudication, or as making a "certificate,"<sup>102</sup> even though these words are not actually used in Rule 54(b). In the absence of certification, a partial adjudication under Rule 54(b) does not terminate the action as to any claims or parties, and the partial adjudication is subject to revision.<sup>103</sup> Therefore, certification is an initial trigger for the running of appellate delays for partial adjudications; without proper certification no final judgment can be entered.

New Article 1915(B) borrows heavily from Rule 54(b), but fails to account for the different triggering events used in the state and federal systems. Compare the provisions of Article 1915(B) with those of Rule 54(b):

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96. See La. Code Civ. P. art. 2087.

97. See La. Code Civ. P. art. 1974.

98. See La. Code Civ. P. art. 1911.

99. See Fed. R. Civ. P. 58 and 79(a).

100. See Fed. R. App. P. 4(A) and 3 Moore et al., *supra* note 24, § 25.03[4], [5].

101. See *supra* note 8.

102. See 3 Moore et al., *supra* note 24, § 25.05[3].

103. See *supra* note 8.

## Article 1915(B)

(1) When a court renders a partial judgment or partial summary judgment or sustains an exception in part, as to one or more but less than all of the claims, demands, issues, theories, or parties, whether in an original demand, reconventional demand, cross-claim, third party claim, or intervention, the judgment shall not constitute a final judgment unless specifically agreed to by the parties or unless designated as a final judgment by the court after an express determination that there is no just reason for delay.

(2) In the absence of such a determination and designation, any order or decision which adjudicates fewer than all claims or the rights and liabilities of fewer than all the parties, shall not terminate the action as to any of the claims or parties and shall not constitute a final judgment for the purpose of an immediate appeal. Any such order or decision issued may be revised at any time prior to the rendition of the judgment adjudicating all the claims and the rights and liabilities of parties.

## Rule 54(b)

When more than one claim for relief is presented in an action, whether as a claim, counter claim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

This comparison shows that Louisiana now has its own "certification" requirement that must be met before a partial adjudication can become "a final judgment for the purpose of an immediate appeal." This new triggering event consists of a determination and designation, rather than the federal rule's determination and direction, because Louisiana has not adopted the federal provisions on entry of judgment. We continue to use the signing of a judgment as the initial triggering event for appellate delay purposes. Confusion on appellate delays arises in cases where the court does not certify a partial

adjudication at the time of signing, but subsequently does so either after a party's request, or *sua sponte*. Appellate delays plainly cannot begin to run until certification occurs, but are delays immediately triggered by certification? The Louisiana Code of Civil Procedure certainly does not say so.

Furthermore, like Rule 54, Article 1915 sets no time limit for seeking certification.<sup>104</sup> Accordingly, the certification provisions of Article 1915 should not be interpreted to trigger appellate delays retroactively to signing. Such an interpretation would trap litigants who waited beyond what would have been the expiration of appellate delays under the old law to seek certification under the new law. On the other hand, for certification to immediately trigger appeal delays prospectively, must this certification be in writing and signed by the court as required for final judgments? Must notice of certification be given? If so, can mailing of certification suffice, or is actual notice necessary? These are some of the basic, important questions spawned by the mismatch of state and federal provisions.

Appellate courts might avoid what could be substantial judicial legislation by holding that because the current codal provisions for appellate delays do not clearly apply to partial final judgments, the appellate delays for such judgments do not begin to run before the signing of the final judgment that ends the case. Such a holding would solve some problems, but would cause others.

Consider, for example, a partial adjudication that dismisses a party from the lawsuit. Until certified, the adjudication is not a final judgment for purposes of an immediate appeal either in state or federal court, and the dismissed party possibly could be called back into the litigation later. To prevent this result, a dismissed party strategically might seek certification in the federal system to trigger the running of appellate delays. However, if certification does not immediately trigger the running of appellate delays in Louisiana, this strategy would be ineffective. Of course, a certified judgment could become definitive following an appeal.<sup>105</sup> But by the time the appeal was concluded the remaining trial court litigation also might be concluded. Moreover, a party should not be allowed to appeal a judgment just to make the judgment definitive. An appeal is proper only when a party seeks to have a judgment "revised, modified, set aside, or reversed."<sup>106</sup>

The appellate delay problems generated by new Article 1915 call for a legislative solution. If Louisiana continues to follow the federal approach and requires certification for some or all partial adjudications listed under Article 1915(A), then the legislature will need to amend a number of procedural articles

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104. *Schaefer v. First National Bank of Lincolnwood*, 465 F.2d 234 (7th Cir. 1972), held that as a general rule it is an abuse of discretion for a district judge to grant a motion for a Rule 54(b) order when the motion is filed more than 30 days after entry of the adjudication to which it relates. This holding has not been followed in other cases, but has been criticized in *Bank of New York v. Hoyt*, 108 F.R.D. 184, 185-86 (D.R.I. 1985).

105. See La. Code Civ. P. art. 2167.

106. La. Code Civ. P. art. 2082.

to properly link certification provisions with appellate delay provisions. Before discussing ways this task could be accomplished, we next examine problems associated with the process of certification.

### B. Confusion on Certification

Louisiana's certification process has two related sources of confusion. First, because of the language differences between Article 1915(B) and Rule 54(b), we have confusion concerning how similar the legislature intended the state and federal certification processes to be. Second, because we are patterning the state certification process on the federal certification process, we have confusion borrowed from the federal jurisprudence under Rule 54(b).

To sort through this confusion, we begin by considering that both Louisiana courts and federal courts have historic policies against piecemeal appeals.<sup>107</sup> Our supreme court observed in *Subaru* that Article 1915 was designed to limit a court's authority to render an appealable partial final judgment, and that if all such judgments were immediately appealable, "there would be intolerable problems of multiple appeals and piecemeal litigation."<sup>108</sup> In a similar vein, federal courts have disfavored routine use of Rule 54(b). Judge (now Justice) Kennedy explained in *Morrison-Knudsen Co., Inc. v. Archer*:<sup>109</sup>

Judgments under Rule 54(b) must be reserved for the unusual case in which the costs and risks of multiplying the number of proceedings and of overcrowding the appellate docket are outbalanced by pressuring needs of the litigants for an early and separate judgment as to some claims or parties.<sup>110</sup>

These policy considerations indicate that a Louisiana trial judge should employ a careful and conservative approach to certification.

Consider next the proper function of a district court and an appellate court in Rule 54(b) cases. In *Curtiss-Wright Corp. v. General Electric Co.*,<sup>111</sup> the United States Supreme Court outlined the steps for a district court to follow in making a determination under Rule 54(b):

A district court must first determine that it is dealing with a "final judgment." It must be a "judgment" in the sense that it is a decision upon a cognizable claim for relief, and it must be "final" in the sense that it is "an ultimate disposition of an individual claim entered in the course of a multiple claims action."

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107. See *Banks v. State Farm Ins. Co.*, 708 So. 2d 523 (La. App. 2d Cir. 1998).

108. *Everything on Wheels Subaru, Inc. v. Subaru South, Inc.*, 616 So. 2d 1234, 1241 (La. 1993).

109. 655 F.2d 962 (9th Cir. 1981).

110. *Id.* at 965.

111. 446 U.S. 1, 100 S. Ct. 1460 (1980).

Once having found finality, the district court must go on to determine whether there is any just reason for delay. Not all final judgments on individual claims should be immediately appealable, even if they are in some sense separable from the remaining unresolved claims. The function of the district court under the Rule is to act as a "dispatcher." It is left to the sound judicial discretion of the district court to determine the "appropriate time" when each final decision in a multiple claims action is ready for appeal. This discretion is to be exercised "in the interest of sound judicial administration."<sup>112</sup>

The Court also stated that there are two aspects to the proper function of an appellate court in Rule 54(b) cases:

The court of appeals must, of course, scrutinize the district court's evaluation of such factors as the interrelationship of the claims so as to prevent piecemeal appeals in cases which should be reviewed only as single units. But once such juridical concerns have been met, the discretionary judgment of the district court should be given substantial deference, for that court is "the one most likely to be familiar with the case and with any justifiable reasons for delay." The reviewing court should disturb the trial court's assessment of the equities only if it can say that the judge's conclusion was clearly unreasonable.<sup>113</sup>

Cued by the federal approach, a Louisiana trial judge's first certification questions should concern "finality," followed by questions concerning whether to certify a proper partial final judgment. Louisiana defines a final judgment as one "that determines the merits in whole or in part."<sup>114</sup> In contrast, an interlocutory judgment does not determine the merits, "but only preliminary matters in the course of the action."<sup>115</sup> Judgments denying exceptions, denying motions for summary judgments, ruling on discovery or evidentiary issues, or deciding purely procedural issues generally are examples of judgments that cannot be properly certified because they are not final. A judge cannot, through certification, turn an interlocutory judgment into a final judgment, and a Louisiana appellate court should *not* review the question of finality under an abuse of discretion standard. Instead, that question should be reviewed *de novo* in every case where a partial adjudication is certified.

112. *Id.* at 7-8, 100 S. Ct. at 1465-65 (citations omitted).

113. *Id.* at 10, 100 S. Ct. at 1466 (citations omitted).

114. La. Code Civ. P. art. 1841 provides:

A judgment is the determination of the rights of the parties in an action and may award any relief to which the parties are entitled. It may be interlocutory or final.

A judgment that does not determine the merits but only preliminary matters in the course of the action is an interlocutory judgment.

A judgment that determines the merits in whole or in part is a final judgment.

115. *Id.*

Because Louisiana has its own codal definition of "final judgment," as well as its own jurisprudence thereon, we need not borrow confusion from federal law where a "verbal formula" for finality has proved elusive.<sup>116</sup> Still, we have our own finality problems under Article 1915. The first problem concerns the exclusivity *vel non* of the list in Article 1915(A):

A final judgment may be rendered and signed by the court, even though it may not grant the successful party or parties all of the relief prayed for, or may not adjudicate all of the issues in the case, when the court:

(1) Dismisses the suit as to less than all of the parties, defendants, third party plaintiffs, third party defendants, or intervenors.

(2) Grants a motion for judgment on the pleadings, as provided by Articles 965, 968 and 969.

(3) Grants a motion for summary judgment, as provided by Articles 966 through 969, including a summary judgment granted pursuant to Article 966(E).

(4) Signs a judgment on either the principal or incidental demand, when the two have been tried separately, as provided by Article 1038.

(5) Signs a judgment on the issue of liability when that issue has been tried separately by the court, or when, in a jury trial, the issue of liability has been tried before a jury and the issue of damages is to be tried before a different jury.

Because the listing in old Article 1915 was exclusive, we might conclude the same is true of the new listing. After all, Act 483 did not change items one, two, four, and five, and even item three still concerns partial summary judgments. Furthermore, if we were completely adopting the federal approach, there would be no necessity for any listing. On the other hand, Article 1915(B)(1) addresses finality when a court renders a partial judgment or partial summary judgment *or sustains an exception in part*.<sup>117</sup> Could the latter reference be to a partial exception of no cause of action? If so, such a judgment is not on the list. If not, the latter reference appears unnecessary because item one covers a judgment sustaining an exception in part and dismissing less than all parties, and the term "partial judgment" in Paragraph (B)(1) covers such a judgment as well. Of course, "partial judgment" also covers "partial summary judgment," yet Article 1915(B)(1) refers to both.

Because a trial court can determine whether there is any just reason to delay an immediate appeal of a final adjudication, an exclusive listing arguably is

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116. In *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 94 S. Ct. 2140 (1974), the court stated: No verbal formula yet devised can explain prior finality decisions with unerring accuracy or provide an utterly reliable guide for the future.

417 U.S. at 170, 94 S. Ct. at 2149.

117. See *supra* note 3.

unnecessary, and a trial court arguably should be able to certify any final adjudication, including one resulting from a partial exception of no cause of action<sup>118</sup> or from a "mini-trial." Nevertheless, because Article 1915(A) still contains a listing, and because piecemeal appeals are not favored, a litigant would be wise still to consider the possibility that the listing is exclusive. We suggest that the legislature amend Article 1915 to make its intent clear. In the meantime, as discussed subsequently,<sup>119</sup> a litigant apparently can obtain a partial adjudication on virtually any "merits" issue via a motion for partial summary judgment covered by item three.

Another finality problem arises from language in Article 1915(B)(1) that allows a partial adjudication to constitute a "final judgment" not only if certified by the court, but also if "specifically agreed to by the parties."<sup>120</sup> This curious language has no counterpart in Rule 54(b), and the meaning of "final judgment" is unclear. The sharp contrast between "final judgment" in Article 1915(B)(1) and "final judgment for the purpose of an immediate appeal" in Article 1915(B)(2),<sup>121</sup> as well as the close proximity of these two terms, strongly suggests that only certification by the trial court creates an immediately appealable partial judgment. The Second Circuit Court of Appeal so held in *Banks v. State Farm Insurance Co.*<sup>122</sup> where the trial court granted a partial summary judgment on the issue of liability alone, the parties agreed that the partial adjudication was a "final judgment" in accordance with Article 1915(B)(1), but the trial court made no express determination that there was no just reason for delay of an immediate appeal.

The court first observed that the 1997 amendments to Article 1915 were patterned on Rule 54 under which a trial court only could enter a final judgment if the trial court certified the judgment; the court also considered *Subaru's* warning about the danger of "intolerable problems of multiple appeals and piecemeal litigation,"<sup>123</sup> especially in light of the amendments' apparent expansion of the scope of summary judgments. After concluding that Louisiana's current protection against intolerable piecemeal appeals is the certification requirement in Article 1915(B), the court addressed the issue before it:

Considering: (1) historic state and federal policies against piecemeal appeals; (2) the fact that the appealability of judgments has never been a matter controlled by the litigants in either state or federal

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118. Note, however, that under Louisiana Code of Civil Procedure article 934 a judgment sustaining an exception of no cause of action must allow amendment of the petition when the grounds of the objection pleaded may be removed by amendment. For this reason certification often will be inappropriate for a judgment sustaining a partial exception of no cause of action.

119. See *infra* discussion under subheading *Confusion on Partial Summary Judgment*.

120. See *supra* note 3.

121. See *id.*

122. 708 So. 2d 523 (La. App. 2d Cir. 1998).

123. *Everything on Wheels Subaru, Inc. v. Subaru South, Inc.*, 616 So. 2d 1234, 1241 (La. 1993).

courts; and (3) the prohibition in federal courts against certification as a courtesy or accommodation to counsel, we conclude that our legislature did not intend for the parties, by agreement, to be able to create a final judgment *for the purpose of an immediate appeal*, despite language in Article 1915(B)(1) that allows the parties to specifically agree for a judgment to constitute a "final judgment." Our conclusion is supported by the language of Article 1915(B) that contrasts the term "final judgment" in 1915(B)(1) with the term "final judgment for the purpose of an immediate appeal" in 1915(B)(2) . . . .

Thus, although the presence of a particular type of partial judgment on the list of Article 1915(A), as well as the agreement of the parties for there to be a "final judgment" under Article 1915(B)(1) are matters for the trial court to consider for purposes of certification, neither factor mandates certification. Instead, partial judgments should be certified only after a case-by-case consideration of the judicial administrative interests and equities involved.<sup>124</sup>

The court's decision is in harmony with the policies against piecemeal appeals. A contrary decision would have taken from the courts a matter very important to the interest of sound judicial administration.

Granting that certification by the litigants is a bad idea, what reasonable interpretation can be given to the language concerning "final judgment" by agreement of the parties? One interpretation could recognize the parties' ability to agree that future litigation will turn on appellate resolution of a partial adjudication. For example, a trial court might be unwilling to certify a partial adjudication solely declaring the existence of insurance coverage. Such an adjudication would not require any payment to be made, and the need for appellate review could disappear if the insured was found to have no liability. However, the parties all might agree to a settlement, the terms of which depended on a definitive resolution of the coverage question. This agreement would make the trial court's judgment "final" to the extent that no further decisions on the merits would be necessary in the trial court. Although certification by the court still should be employed, a trial court could abuse its discretion by failing to certify in such instances. This interpretation of the language concerning agreement of the parties does not interfere with the interests of sound judicial administration, but neither cures the language's obscurity, nor adds much to the article that logic would not dictate in the language's absence.

Another interpretation could recognize the parties' agreement as one simply expressing the desire, or at least the willingness, for a judgment to be immediately appealable. This interpretation would give a novel meaning to the word

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124. The court cited *United States General, Inc. v. Albert*, 792 F.2d 678 (7th Cir. 1986), for holding that certification of a judgment should not be granted as a courtesy or accommodation to counsel.



"final," but would be acceptable from the perspective of sound judicial administration if the agreement were viewed merely as a factor for the trial court to consider for certification purposes. Still, the more important consideration would be why the parties entered the agreement. In federal court, agreement of the parties is one way to properly bring the matter of certification to the district court's attention; this also may be done by motion of a party, and a district court on its own motion may decide whether or not to certify.<sup>125</sup> All in all, the language concerning "final judgment" by agreement of the parties seems to obfuscate more than improve. We suggest the legislature delete this language.

After a Louisiana trial judge has favorably determined finality questions, the next step in certification is deciding whether there is any just reason for delay of an immediate appeal. A trial court's discretion comes into play here; such decisions should be reviewed under an abuse of discretion standard because the trial court is "the one most likely to be familiar with the case and with any justifiable reasons for delay."<sup>126</sup> Furthermore, while the proper appellate role should not include reweighing the equities or reassessing the facts underlying a decision to certify, an appellate court should make certain "that the conclusions derived from those weighings and assessments are juridically sound and supported by the record."<sup>127</sup>

The United States Supreme Court has admitted that in Rule 54(b) cases the question of when a district court should exercise its discretion to certify "presents issues not always easily resolved,"<sup>128</sup> and because of the large number of possible situations that can occur, the Court was reluctant "either to fix or sanction narrow guidelines for the district courts to follow."<sup>129</sup> Nevertheless, the court in *Banks*,<sup>130</sup> cited the listing in *Allis-Chalmers Corp. v. Philadelphia Electric Co.*<sup>131</sup> for its guiding factors that a trial court may consider:

- (1) The relationship between the adjudicated and unadjudicated claims;
- (2) The possibility that the need for review might or might not be mooted by future developments in the district court;
- (3) The possibility that the reviewing court might be obliged to consider the same issue a second time;
- (4) The presence or absence of a claim or counterclaim which could result in setoff against the judgment sought to be made final;

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125. See 3 Moore et al., *supra* note 24, § 25.05[3].

126. *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 10, 100 S. Ct. 1460, 1466 (1980).

127. *Id.*, 100 S. Ct. at 1466.

128. *Id.*, 100 S. Ct. at 1466.

129. *Id.* at 10-11, 100 S. Ct. at 1466.

130. See *Banks v. State Farm Ins. Co.*, 708 So. 2d 523 (La. App. 2d Cir. 1998).

131. 521 F.2d 360 (3d Cir. 1975).

(5) Miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like.<sup>132</sup>

Because Louisiana trial courts should give written reasons for certification to facilitate appellate review,<sup>133</sup> the listed factors may prove helpful in articulating the certification rationale.

Judges also should consider that the mere presence of an adjudication on the list in Article 1915(A) does not automatically warrant certification. The presence of a judgment on the list certainly can be a strong indicator that there are factors favoring certification, but as observed in *Banks*, the list is better viewed as containing judgments that may be certified after a case-by-case consideration of the judicial administrative interests and equities involved.<sup>134</sup>

One additional certification problem considered here is the requirement of "an express determination that there is no just reason for delay."<sup>135</sup> The trouble is well illustrated by and discussed in the Federal Fifth Circuit's opinion in *Kelly v. Lee's Old Fashion Hamburgers, Inc.*<sup>136</sup> The court took up the case en banc to consider whether a district could certify a judgment under Rule 54(b) without reciting that "no just reason for delay" existed for entry. The ten-judge majority concluded:

If the language in the order appealed from, either independently or together with related portions of the record referred to in the order, reflects the district court's unmistakable intent to enter a partial final judgment under Rule 54(b), nothing else is required to make the order appealable. We do not require the judge to mechanically recite the words "no just reason for delay."<sup>137</sup>

Nevertheless, the majority admitted that the close vote therein demonstrated that the majority's conclusion obviously was not the only interpretation possible, and noted that the federal circuits were sharply divided on the issue.<sup>138</sup>

The brisk seven-judge dissent criticized the majority for at worst declaring "express" to mean the same thing as "implied," and at best discarding the plain meaning of the rule for the sake of the majority's own policy preferences.<sup>139</sup> The dissent considered the majority's opinion to cloud the rule,<sup>140</sup> and noted that some circuits impose much more exacting requirements: some insist on a

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132. *Id.* at 364.

133. *See Banks v. State Farm Ins. Co.*, 708 So. 2d 523 (La. App. 2d Cir. 1998).

134. *Id.*

135. *See supra* note 8.

136. 908 F.2d 1218 (5th Cir. 1990).

137. *Id.* at 1220.

138. *Id.* at 1221 n.2.

139. *Id.* at 1222.

140. *Id.*

statement of reasons for concluding that there is no just reason for delay; others require recitation of the "talismanic" seven words; still others hold that merely mentioning Rule 54(b) in the order is insufficient.<sup>141</sup>

A jurisdictional defect exists when a litigant appeals an uncertified partial adjudication. Absent certification there is no final judgment to appeal. A similar jurisdictional defect exists when an appeal is taken before a final judgment has been signed.<sup>142</sup> In *Overmier v. Traylor*,<sup>143</sup> the supreme court held that while an appeal was premature prior to the signing of judgment, the defect was cured once the court signed the final judgment. By analogy, the premature appeal of an uncertified partial adjudication can be cured by subsequent certification. The court in *Banks*, rather than dismiss the appeal, remanded an uncertified partial adjudication for the trial court's express determination, with written reasons, of whether there was no just reason for delay.<sup>144</sup> Certainly, when a district court gives written reasons for certification, there can be no doubt that certification was intended, and written reasons often will be very helpful, if not essential for an appellate court to perform its duty of reviewing the propriety of certification. Thus, if a Louisiana appellate court has any doubt whatsoever about whether certification was intended, or about why certification was granted, the court can remand for written reasons for certification, regardless of what language the trial court did or did not use when granting the motion for appeal. If our appellate courts uniformly follow this approach, problems concerning the adequacy of certification should be minimal.

### C. Confusion on Partial Summary Judgments

To attempt to assess the law's direction in this confusing area, one first should trace the path our case law already has traversed. A good place to pick up the trail is *Subaru*,<sup>145</sup> which correctly held that because the exclusive list in former Article 1915 did not specifically authorize a partial judgment on an exception of no cause of action, such a judgment (that dismissed no litigants) was not immediately appealable. Significantly, the court stated in a footnote:

We . . . reserve for another day the question of whether a partial summary judgment that merely decides one of several claims, defenses, or issues without dismissing any party, is a final judgment which is authorized by Article 1915 and which therefore must be appealed immediately in order to prevent the judgment from acquiring the authority of a thing adjudged.<sup>146</sup>

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141. *Id.* at 1228.

142. *See* La. Code Civ. P. art. 1911 (requiring every final judgment to be signed by the judge before an appeal may be taken).

143. 475 So. 2d 1094 (1985).

144. *See* *Banks v. State Farm Ins. Co.*, 708 So. 2d 523 (La. App. 2d Cir. 1998).

145. *See* *Everything on Wheels Subaru, Inc. v. Subaru South, Inc.*, 616 So. 2d 1234 (La. 1993).

146. *Id.* at 1241 n.12.

By further stating in dictum that there appeared to be no logical reason to treat a partial summary judgment differently from a partial judgment on an exception of no cause of action, the court strongly hinted that it would answer the reserved question in the negative.<sup>147</sup> However, this hint subsequently turned out to be an excellent example of the treachery of dictum. In a four-to-three opinion in *Douglass v. Alton Ochsner Medical Foundation*,<sup>148</sup> the court answered the question in the affirmative.

In *Ochsner*, a patient who received several units of blood and blood products subsequently was diagnosed as positive for HIV. She filed suit, alleging in part that Oschner Medical Foundation was negligent and was strictly liable for a defective product (blood) and breach of an implied warranty of merchantability. The trial court dismissed the latter two claims via partial summary judgment, and the plaintiff sought supervisory writs rather than appealing. The appellate court denied writs, as well as the plaintiff's subsequent request to treat her writ application as a motion and order for appeal. The supreme court then granted writs to review the partial summary judgment.

In holding that the proper vehicle for seeking review of a partial summary judgment was an appeal and normally not a writ, the *Oschner* majority relied on several procedural articles: (1) Article 1915 that specifically refers to the appealability of a partial summary judgment; (2) Article 966 that provides either party may move for summary judgment for all *or part* of the relief for which he has prayed; (3) Article 968 that states summary judgments are final judgments; and (4) Article 1841 that states a judgment that decides the merits in whole *in part* is a final judgment.<sup>149</sup> The court stated:

These articles clearly authorize the rendition of a summary judgment which disposes of one or more, but less than all, of the claims or issues presented in a case. These articles also clearly provide that such a judgment is final.<sup>150</sup>

The majority still was willing to convert the plaintiff's writ application into an appeal because the law regarding the finality and appealability of partial summary judgments arguably was not settled prior to *Oschner*.

Justice Lemmon (who wrote *Subaru*) dissented in *Oschner*, considering the case to be "a classic example of the improper use of a summary judgment to decide a single issue without granting any of the *reliefs* sought by either party."<sup>151</sup> He noted that under Article 1841 a judgment is a determination of rights of the parties and may award any *relief* to which the parties are entitled, and that Article 966(A)(1) provides that a party

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147. *Id.*

148. 695 So. 2d 953 (La. 1997), writ denied, 713 So. 2d 473 (1998).

149. *Id.* at 955.

150. *Id.*

151. *Id.* at 956.

may move for summary judgment for all or a part of the *relief* for which he has prayed. However, the trial court's striking of one of the plaintiff's theories of recovery did not grant the defendant all or part of the relief sought (denial of the asserted obligation to pay money damages). Thus, Justice Lemmon did not consider the judgment to be a valid partial final judgment requiring an immediate appeal. Instead, the plaintiff could seek immediate review by applying for a supervisory writ.<sup>152</sup>

Likewise, Justice Kimball's dissent focused on the fact that the partial summary judgment merely eliminated some theories of liability. She cited numerous Louisiana cases that rejected partial summary judgments deciding only issues or theories of recovery, but determining no part of the relief claimed by any party. She also criticized the majority opinion for being contrary to the court's reasoning in *Subaru*, and concluded that unnecessary piecemeal litigation would result.<sup>153</sup>

The *Oschner* dissents emphasized the importance of the word "relief" with respect to partial summary judgments. Without question our courts had long required a summary judgment to grant relief beyond merely determining a legal issue. The Supreme Court explained the rationale for this requirement in *Dryades Savings and Loan Association v. Lassiter*,<sup>154</sup> where the district court had granted the plaintiff's motion for summary judgment on a constitutionality issue without adjudicating the plaintiff's claim for relief:

[T]he use of a motion for summary judgment to determine the issue of the constitutionality of the statute in controversy would result in piecemeal adjudication and appeal. As Judge Pike Hall, Jr., stated in *Smith v. Hanover Insurance Co.*, *supra*:

Plaintiff's use of the motion for summary judgment to obtain a ruling on his cause of action without seeking any part of the relief he claims is an unauthorized use of a procedural vehicle and illustrates the problem of piecemeal adjudication and appeal which can result from the misuse of provisions intended to streamline our civil procedure.<sup>155</sup>

Once again we see the importance of Louisiana's policy of avoiding piecemeal adjudications and appeals. The *Oschner* majority opinion did not necessarily overrule the jurisprudence requiring that summary judgments grant some relief. Under a narrow reading of the majority opinion, a party aggrieved by such a partial adjudication simply was required to immediately seek an

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152. *Id.*

153. *Id.* at 958-59.

154. 400 So. 2d 894 (La. 1981).

155. *Id.* at 896 (quoting 363 So. 2d 719, 721 (La. App. 2d Cir. 1978)).

appeal; perhaps a party at least still could have objected in the trial court to a motion seeking an improper summary judgment.<sup>156</sup> However, Act 483 obviated any need to puzzle over *Ochsner*.

After Act 483, Article 966(E) provides:

A summary judgment may be rendered dispositive of a particular issue, theory of recovery, cause of action, or defense, in favor of one or more parties, even though the granting of the summary judgment does not dispose of the entire case.

Furthermore, Article 1915(A)(3) specifically refers to the granting of a summary judgment pursuant to Article 966(E).<sup>157</sup> Thus, Act 483 appears to be inconsistent with the case law recognized in Justice Kimball's *Ochsner* dissent.<sup>158</sup>

The legislative adoption of the federal approach to partial adjudications did not mandate Act 483's inconsistency with the case law. Rule 54(b) expressly is limited to instances where more than one claim for relief is presented or multiple parties are involved.<sup>159</sup> The rule does not apply when a single claim is based on multiple theories of liability. For example, where a plaintiff sought recovery of cleanup costs for a chemical leak, both on a negligence theory and a strict liability theory, and a district court granted summary judgment solely on the strict liability theory and certified the judgment under Rule 54(b), the Seventh Circuit dismissed the appeal, holding that the two liability theories constituted only one claim.<sup>160</sup>

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156. *Ochsner* was puzzling because it recognized that the summary judgment therein was improper, but then seemed to approve examination of the merits of the judgment on appeal. The specific holding was: "[T]he proper vehicle for seeking review of the grant of a partial summary judgment is by way of appeal and . . . a supervisory writ normally will not lie to correct an improperly granted partial summary judgment." 695 So. 2d at 955 (emphasis added). One might read this holding, standing alone, as being in harmony with *Smith v. Hanover Insurance Co.* (quoted with approval in *Dryades* 400 So. 2d 894). In *Smith* the appellate court observed that an improper summary judgment should go back to the trial court because the partial judgment either was not appealable or was inappropriate procedurally. The court concluded the judgment was appealable and the appellate court had jurisdiction, but the judgment was "not authorized by procedural law and, therefore, should be set aside." 363 So. 2d at 720. Thus, the *Smith* court never reached the merits of the partial judgment.

However, *Ochsner* observed that *Herlitz Const. Co. v. Hotel Investors of New Iberia, Inc.*, 396 So. 2d 878 (La. 1981), had upheld the appropriateness of deciding the merits of a supervisory writ which could terminate litigation and avoid a possibly useless future trial on the merits. *Ochsner* correctly stated that the action in *Herlitz* was taken in the interest of judicial efficiency and fundamental fairness to the litigants, but then stated that an immediate appeal of a partial summary judgment was "equally fundamentally fair," and would "terminate the litigation and avoid the wastes and possibly useless future trial with equal efficiency." 695 So. 2d at 956.

After *Ochsner* and before enactment of Act 483, the extent of an appellate court's power to correct a trial court's error in granting an improper summary judgment was unclear.

157. See *supra* note 3.

158. *Douglass v. Alton Ochsner Medical Foundation*, 695 So. 2d 953 (La. 1997), writ denied, 713 So. 2d 473 (1998).

159. See *supra* note 8.

160. See *Indiana Harbor Belt Ry. Co. v. American Cyanamid Co.*, 860 F.2d 1441 (7th Cir. 1988).

Similarly, the Fifth Circuit dismissed an appeal where the district court adjudicated only one of two alternative theories of liability.<sup>161</sup> The court stated:

True multiplicity is not present where, as here, the plaintiff merely presents alternative theories, drawn from the law of the same sovereign, by which the same set of facts might give rise to a single liability.<sup>162</sup>

While the requirement of "relief" for a proper summary judgment under former state law and the requirement of "multiplicity" for a properly certifiable judgment under current federal law may at first glance bear no similarity, both ultimately are concerned with protecting the interests of sound judicial administration and the historic policies against piecemeal appeals. Unless properly interpreted and applied, current state law could set the stage for piecemeal litigation on a scale never before possible in Louisiana, and still not possible in federal courts.

One might attempt to argue that summary judgment in Louisiana still requires the granting of "relief" as understood under prior jurisprudence because Article 966(A)<sup>163</sup> was not amended by Act 483 and still refers to moving for a summary judgment for all or part of the relief for which one has prayed. However, in light of the plain language of Article 966(E), the reference to that language in Article 1915(A)(3), and the fact that the language would have been totally unnecessary unless a change was intended, the more plausible argument is that Act 483 gave a new definition to "relief." Can a new definition be made to fit the current codal scheme?

Article 1841 always has defined a final judgment as one that determines the merits in whole *or in part*,<sup>164</sup> while Article 1915 continues to permit rendition of a final judgment that may not grant all of the relief prayed for, *or may not adjudicate all the issues in the case*.<sup>165</sup> Furthermore, Article 1871 on declaratory judgments permits courts to declare rights, status, and other legal relations whether or not *further relief* is or could be claimed.<sup>166</sup> Such a declaration has the force and effect of a final judgment.<sup>167</sup>

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161. See *Schexnaydre v. Travelers Ins. Co.*, 527 F.2d 855 (5th Cir. 1976).

162. *Id.* at 856.

163. See *supra* note 2.

164. See *supra* note 114.

165. See *supra* note 3.

166. La. Code Civ. P. art. 1871:

Courts of record within their respective jurisdictions may declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for; and the existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The declaration shall have the force and effect of a final judgment or decree.

167. *Id.*

The language of these articles can be read to allow a partial final judgment that decides some of the merits issues (rights, status, and other legal relations), but awards no "further relief." Such a reading would be compatible with Article 966(E) and would allow virtually any merits issue to be addressed through a motion for summary judgment. Of course, that reading apparently is not what the Official Revision Comment to Article 1871 had in mind when stating:

The conventional type of judgment embodies two elements: (1) an ascertainment or declaration of the rights of the parties (usually implied); and (2) a specific award of relief. The declaratory judgment embodies only the first element which, of course, is always express.

Still, the idea of allowing a partial summary judgment to decide issues that properly could be adjudicated by a declaratory judgment action has merit both because it helps make the codal provisions compatible, and because it helps to distinguish between issues that are and are not appropriate for resolution via partial summary judgment.

But for the certification requirements of Article 1915, such a reading would create the "intolerable problems of multiple appeals and piecemeal litigation" referred to in *Subaru*.<sup>168</sup> Therefore, it is of paramount importance that a trial court judge fully understand and carefully perform the role of "dispatcher,"<sup>169</sup> rather than routinely certifying partial judgments.

### III. CONCLUSIONS AND SUGGESTIONS

Act 483 of 1997 amended both our codal provisions on summary judgment and partial judgment. The 1997 summary judgment amendments primarily were designed to clarify 1996 amendments, and both sets of amendments were designed to bring Louisiana summary judgment procedure more closely in line with federal summary judgment procedure. We suggest that resulting changes in our courtrooms are better viewed as adjustments to judicial attitudes toward summary judgment procedure than as changes to our procedural law, and that this area of the law needs a rest from further legislative changes to allow time for the jurisprudence to establish some equilibrium through a process of reexamination. This reexamination should focus on fundamentals including not only the evidentiary burdens as explained in *Celotex*,<sup>170</sup> but also the procedure's purpose and the judge's role therein. With a proper fundamental understanding of the procedure, future jurisprudence can strike the proper balance between preventing unnecessary trials and preserving the right to try genuine issues of material fact.

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168. Everything on Wheels Subaru, Inc. v. Subaru South, Inc., 616 So. 2d 1234, 1241 (La. 1993).

169. See *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 8, 100 S. Ct. 1460, 1465 (1980).

170. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986).



In contrast, legislative changes are needed in the area of partial judgments where we have a state of confusion as to appellate delays, certification of partial judgments, and partial summary judgments. This confusion is the result of an imperfect union of state and federal elements, as well as an apparent broadening of the scope of summary judgment. Elimination of this confusion will require careful consideration, clarification, and revision of codal provisions.

To clarify the law concerning the running of appeal delays and certification of partial judgments we recommend that the legislature amend Articles 1911, 1913, 1914, 1915, and 1974. The suggested changes below should bring certainty to the running of appellate delays and the process of certification by clarifying whether the list of Article 1915(A) is exclusive, by eliminating language allowing the parties to agree that a partial judgment constitutes a "final judgment," by requiring a signed certificate by the trial court expressly stating why an immediate appeal under Article 1915(A) is warranted, and by harmonizing the amended articles both with each other and with the remainder of the Code (new language in italics):

**Article 1911. Final judgment; signing; appeals**

Except as otherwise provided by law, every final judgment shall be signed by the judge. For the purpose of an appeal as provided in Article 2083, no appeal may be taken from a final judgment until the requirement of this Article has been fulfilled. *Even after signing, no appeal may be taken from a partial judgment under Article 1915(A) until the judgment has been certified as provided in Article 1915(B)(1).*

**Article 1913. Notice of judgment**

A. Notice of the signing of a default judgment against a defendant on whom citation was not served personally, or on whom citation was served through the secretary of state, and who filed no exceptions or answer, shall be served on the defendant by the sheriff, by either personal or domiciliary service, or in the case of a defendant originally served through the secretary of state, by service on the secretary of state.

B. Except as other provided by Article 3307, in every contested case, except in the case where the judgment rendered is signed the same day as trial and all counsel or parties not represented by counsel are present, notice of the signing of a final judgment therein shall be mailed by the clerk of court of the parish where the case was tried to the counsel of record for each party, and to each party not represented by counsel.

C. *Where a partial judgment under Article 1915(A) becomes a partial final judgment for purposes of an immediate appeal through certification under Article 1915(B)(1), either notice of the signing of a judgment containing the required certificate, or notice of the separate signing of the required certificate, as the case may be, shall be mailed by the clerk*

*of court of the parish where the case is pending to the counsel of record for each party, and to each party not represented by counsel.*

D. The clerk shall file a certificate in the record showing the date on which, and the counsel and parties to whom, notice of the signing of the judgment or notice of the signing of the required certificate was mailed.

E. Except as otherwise provided in the first three paragraphs of this Article, notice of the signing of a final judgment is not required.

**Article 1914. Interlocutory order or judgment; notice; delay for further action when notice required.**

A. When a case has been taken under advisement by the court for the purpose of deciding whether an interlocutory order or judgment should be rendered, the clerk shall make an entry in the minutes of the court of any such interlocutory order or judgment rendered thereafter, including a partial judgment under Article 1915(A) that is not certified pursuant to Article 1915(B)(1).

B. The clerk shall mail notice of the rendition of the interlocutory order or judgment to the counsel of record for each party and to each party not represented by counsel. *Except as provided in the next Paragraph, and excluding both the seeking of certification under Article 1915(B)(1) and the seeking of supervisory writs under Article 2201,* each party shall have ten days from the date of the mailing of the notice to take any action or file any pleadings as he deems necessary.

C. If the interlocutory order or judgment is one refusing to grant a new trial or a judgment notwithstanding the verdict, regardless of whether the motion is taken under advisement, the delay for appealing commences to run only from the date of the mailing of the notice, as provided in Articles 2087 and 2123.

D. The provisions in this Article do not apply to an interlocutory injunctive order or judgment.

**Article 1915. Partial judgment.**

A. A judgment that does not grant the successful party or parties all the relief prayed for, or that does not adjudicate all of the issues in the case, may be rendered and signed by the court, only in instances when the court:

- (1) Dismisses the suit as to less than all of the parties, defendants, third party plaintiffs, third party defendants, or intervenors.
- (2) Grants a motion for judgment on the pleadings, as provided by Articles 965, 968, and 969.
- (3) Grants a motion for summary judgment as provided by Articles 966 through 969, including a summary judgment granted pursuant to Article 966(E).

(4) Signs a judgment on either the principal or incidental demand, when the two have been tried separately, as provided by Article 1038.

(5) Signs a judgment on the issue of liability when that issue has been tried separately by the court, or when, in a jury trial, the issue of liability has been tried before a jury and the issue of damages is to be tried before a different jury.

[Alternative language for Paragraph A.]

A. A court may render and sign a judgment that grants the successful party or parties only part of the relief prayed for, or that adjudicates only part of the issues on the merits.

B. (1) When a court renders a partial judgment *as provided in the preceding Paragraph, the judgment shall not constitute a final judgment for the purpose of an immediate appeal until the court signs a certificate expressly stating why an immediate appeal is warranted.*

(2) In the absence of such a *certificate, the partial judgment shall not terminate the action as to any of the claims or parties and shall not constitute a final judgment for the purpose of an immediate appeal. Any such order or decision issued may be revised at any time prior to the rendition of the judgment adjudicating all the claims and the rights and liabilities of all the parties.*

C. If an appeal is taken from any judgment rendered under the provisions of this Article, the trial court shall retain jurisdiction to adjudicate the remaining issues in the case.

#### Article 1974. Delay for applying for new trial.

The delay for applying for a new trial shall be seven days, exclusive of legal holidays. Except as otherwise provided in the *next two paragraphs hereof*, this delay commences to run on the day after the judgment was signed.

When notice of the judgment is required under Article 1913, the delay for applying for a new trial commences to run on the day after the clerk has mailed, or the sheriff has served, the notice of judgment as required by Article 1913.

*When notice of the signing of a certificate is required under Article 1913(C), the delay for applying for a new trial commences to run on the day after the clerk has mailed, or the sheriff has served, the notice of the signing of the certificate as required by Article 1913(C).*

To clarify the proper scope of partial summary judgments, we recommend the legislature amend Article 966(E) and Article 968 to read as follows (new language is italics):

**Article 966(E).**

*A summary judgment may decide rights, status, and other legal relations whether or not further relief is or could be claimed.*

**Article 968. Effect of judgment on pleadings and summary judgment.**

Judgments on the pleadings, and summary judgments, are final judgments, *except when they are partial judgments under Article 1915(A) that have not been certified under Article 1915(B)*, and shall be rendered and signed in the same manner and with the same effect as if a trial had been had upon evidence regularly adduced.

An appeal does not lie from the court's refusal to render any judgment on the pleadings or summary judgment.

Because the suggested language gives a broad scope to partial summary judgments, a careful and conservative approach to certification is imperative.

Our suggestions assume that the legislature will continue to follow the federal approach and require certification for all partial adjudications under Article 1915. As an alternative to our suggestions, the legislature could call upon the Louisiana State Law Institute, as our official advisory law revisions commission, law reform agency, and legal research agency,<sup>171</sup> to formulate a different approach. For example, a "hybrid" approach could allow immediate appeals of partial judgments on an exclusive list, but only allow immediate appeals of other types of partial judgments after certification. The legislature also could opt to repeal the new provisions and reinstate the former law. However, whether the legislature adopts our suggestions, seeks guidance from the Louisiana State Law Institute, reinstates the former law, or takes yet another tack, the legislature needs to take comprehensive action; mere judicial interpretation of existing provisions or piecemeal legislative "patching" of those provisions would be a poor solution. At the same time, through necessary interpretations of existing provisions, careful review of certification choices, and discretionary exercise of plenary supervisory powers, our appellate courts must oversee the use of the current provisions until our legislature can address the state we're in.

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171. See La. R.S. 24:201 (1989).

