



# 22nd Time's the Charm: The 2015 Revisions to Summary Judgment in Louisiana

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## Repository Citation

Garrett Filetti, *22nd Time's the Charm: The 2015 Revisions to Summary Judgment in Louisiana*, 77 La. L. Rev. (2016)  
Available at: <http://digitalcommons.law.lsu.edu/lalrev/vol77/iss2/10>

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# 22nd Time's the Charm: The 2015 Revisions to Summary Judgment in Louisiana

## INTRODUCTION

Since its inception, the motion for summary judgment has progressed from rarely utilized to a commonplace procedural occurrence.<sup>1</sup> In 2015 alone, Louisiana appellate courts decided well over 400 appeals concerning motions for summary judgment.<sup>2</sup> In 2014, the number of appeals reached more than 500.<sup>3</sup> This number stands in stark contrast to the six summary judgment appeals heard in 1996 and the 14 summary judgment appeals heard in 1997.<sup>4</sup> As cases continue to grow in size and complexity, summary judgment and related appeals will likely maintain this commonplace status and may occur even more frequently.

Louisiana Code of Civil Procedure Article 966 governs motions for summary judgment in Louisiana state courts.<sup>5</sup> As the frequency and complexity of motions for summary judgment increased over time,<sup>6</sup> the Louisiana legislature attempted to keep the article, and the motion practice it governs, in line with the current needs of litigation. As a result, Article 966 has undergone repeated revisions.<sup>7</sup> Yet another attempt at updating Article 966 took place in 2015, when the Louisiana legislature, in

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1. Brooke D. Coleman, *Summary Judgment: What We Think We Know v. What We Ought to Know*, 43 LOY. U. CHI. L.J. 705, 708–09 (2012); *see, e.g., infra* notes 2–4.

2. This number is based on a LexisNexis search of summary judgment cases, limited to cases heard by Louisiana appellate courts between January 1, 2015 and December 31, 2015. This search does not include cases that were disposed of on summary judgment at the trial court level that were not appealed.

3. This number is based on a LexisNexis search of summary judgment cases, limited to cases heard by Louisiana appellate courts between January 1, 2014 and December 31, 2014. This search does not include cases that were disposed of on summary judgment at the trial court level that were not appealed.

4. These numbers are based on a LexisNexis search of summary judgment cases heard between January 1, 1996 and December 31, 1996 and January 1, 1997 and December 31, 1997, respectively. This search does not include cases that were disposed of on summary judgment at the trial court level that were not appealed.

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

6. *See supra* notes 1–4.

7. *See, e.g.,* LA. CODE CIV. PROC. art. 966 (1996); LA. CODE CIV. PROC. art. 966 (1997); LA. CODE CIV. PROC. art. 966 (1998); LA. CODE CIV. PROC. art. 966 (1999); LA. CODE CIV. PROC. art. 966 (2000); LA. CODE CIV. PROC. art. 966 (2001). The preceding list contains only some of the prior versions of Article 966. All archived versions of the code article are available on WestLaw or LexisNexis.

conjunction with the Louisiana Law Institute (the “Law Institute”), comprehensively rewrote Article 966.<sup>8</sup> The 2015 revisions were intended to reconstruct the article<sup>9</sup> and included changes to the layout and language of the article in general, the deadlines for timing and briefing, the required evidentiary procedure, the effects of partial motions for summary judgment, and the process for appealing trial court rulings on motions for summary judgment.<sup>10</sup> This Comment argues that the 2015 revisions to Article 966 successfully remedied the practical problems that existed in the article. However, a few concerns still remain—namely problems with delay and increasing complexity of the summary judgment process—and care should be taken to ensure that these problems do not undermine the changes that were made by the revisions.

Part I of this Comment provides a brief overview of summary judgment, the process for making the motion, and the history of the procedure in both federal and Louisiana state courts. Part II discusses the revisions made to Article 966 during the 2015 legislative session, focusing in particular on the changes to the timing and briefing deadlines, the required evidentiary procedure, the effects of partial summary judgment, and the changes to the appeals process. Part III analyzes the practical effects of the 2015 revisions on summary judgment procedure. Finally, Part IV addresses some remaining concerns and urges Louisiana courts and practitioners to make motions for summary judgment an integral part of trial preparation, ensuring that the process remains efficient and that the changes brought by the 2015 revisions are not undermined by delay.

#### I. HOW DID WE GET HERE? THE HISTORY AND DEVELOPMENT OF SUMMARY JUDGEMENT IN FEDERAL COURTS AND LOUISIANA STATE COURTS

To fully understand the changes brought about by the 2015 revisions to Article 966, an understanding of the concept of summary judgment, its

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8. Donald Price, *An Update on Proposed Revisions to the Louisiana Summary Judgment Statutes*, in MOTIONS FOR SUMMARY JUDGMENT: A REPORT TO THE LAW INSTITUTE, PROPOSED LEGISLATIVE CHANGES TO ARTICLE 966, at 1 (2015), <http://www.lajudicialcollege.org/wp-content/uploads/2014/08/3Motions-for-Summary-Judgment.pdf> [<https://perma.cc/L2DV-GME9>].

9. *The Legal Ease: Guy Holdridge, Skip Phillips & Donald Price: 6 Things to Know about the New MSJ Article* at 27:30, LA. L. REV. (November 15, 2015), <https://soundcloud.com/the-legal-ease/ep-3-hon-guy-holdridge-skip-phillips-donald-price-6-things-you-need-to-know-about-the-new-msj-article> [<https://perma.cc/NW6T-P5RG>]; see also Price, *supra* note 8, at 5.

10. See *infra* Part II.

purpose, and its functionality is necessary. Additionally, a review of the history of federal summary judgment and its influence on the development of summary judgment in Louisiana is helpful to illustrate why the 2015 revisions were necessary and whether the changes were effective.

#### A. *The Fundamentals of Summary Judgment*

Summary judgment is a procedural mechanism by which a party can challenge the existence or legal sufficiency of another party's claim or defense and determine the need for a trial.<sup>11</sup> This mechanism is intended to remedy excessive or unnecessary delay and congestion in courts and avoid unnecessary trials by permitting parties to seek final adjudication of an action without a full trial.<sup>12</sup> On a motion for summary judgment, the trial court judge determines, on the basis of the evidence submitted by the parties, whether there is a genuine issue of material fact that makes a trial necessary.<sup>13</sup> A genuine issue of material fact is a dispute over facts of consequence to the outcome of the action under the governing law.<sup>14</sup> For the dispute to be genuine, the evidence must be such that a reasonable jury could find in favor of either party.<sup>15</sup> Summary judgment is properly granted "only when the court determines that the [evidence] in support of the motion demonstrate[s] that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law."<sup>16</sup> Conversely, if a genuine issue of material fact does exist, the case is suitable for trial and summary judgment must be denied.<sup>17</sup>

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11. 10A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2711, at 191 (3d ed. 1998).

12. *Id.* § 2712; WILLIAM SCHWARZER ET AL., FED. JUDICIAL CTR., THE ANALYSIS AND DECISION OF SUMMARY JUDGMENT MOTIONS: A MONOGRAPH ON RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE 2, 8 (1991) (citing Charles E. Clark & Charles U. Samenow, *The Summary Judgment*, 38 YALE L.J. 423 (1929)).

13. WRIGHT ET AL., *supra* note 11, § 2711, at 191; *see also* Ben R. Miller, *Summary Judgment*, 21 LA. L. REV. 209, 210 (1960).

14. *See, e.g.*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Jackson v. City of New Orleans*, 144 So. 3d 876, 882 (La. 2014); *Phipps v. Schupp*, 163 So. 3d 212, 224 (La. Ct. App. 2015) ("A genuine issue of material fact is one as to which reasonable persons could disagree. . . .").

15. *Anderson*, 477 U.S. at 248.

16. STEVEN R. PLOTKIN & MARY BETH AKIN, 2 LOUISIANA PRACTICE SERIES: LOUISIANA CIVIL PROCEDURE 231, 263 (2015); *see, e.g.*, *Jackson*, 144 So. 3d at 882; *Phipps*, 163 So. 3d at 225.

17. Miller, *supra* note 13, at 211.

As litigation has increased and modern case management techniques have developed, the legal profession has moved away from viewing motions for summary judgment merely as a means of disposing of cases that are unfit for trial, particularly in more complex litigation.<sup>18</sup> Motions for summary judgment are now considered a case management tool, and they are used in complex litigation to identify and narrow issues for trial in order to minimize litigation costs and congestion of court dockets.<sup>19</sup> However, summary judgment was never intended to be a substitute for a trial of a case with disputed factual issues.<sup>20</sup> The procedure should not be used to deprive a party of his right to a full trial when necessary.<sup>21</sup> Further, because motions for summary judgment can deprive litigants of their right to a jury trial and dispose of their cause of action, a court considering a motion for summary judgment is required only to determine if genuine issues of material fact exist, which would necessitate a trial.<sup>22</sup>

*B. The History and Development of Summary Judgment in Federal Court*

Summary judgment originated in 19th century England.<sup>23</sup> The earliest record of a true summary procedure is the 1855 Summary Procedure on Bills of Exchange Act, which applied to actions to collect on bills of exchange and promissory notes.<sup>24</sup> This procedure was later extended to other types of claims, usually arising out of bond, statutory penalty, guarantee, trust, or landlord-tenant relations.<sup>25</sup> At the time, the procedure was available only to plaintiffs—usually creditors—allowing them to quickly and easily collect debts that could be proven by documentary

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18. See SCHWARZER ET AL., *supra* note 12, at 8.

19. *Id.* at 2, 4. See generally Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669, 674–88 (2010) (discussing changes to the Federal Rules of Civil Procedure that encouraged an increase in judicial case management); William W. Schwarzer, *Summary Judgment and Case Management*, 56 ANTITRUST L.J. 213 (1987) (discussing the use of summary judgment to narrow issues and focus discovery in the complex litigation context); see also Steven S. Gensler & Lee H. Rosenthal, *Managing Summary Judgment*, 43 LOY. U. CHI. L.J. 517, 518 (2012); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Libaility Crisis,” and Efficiency Cliches Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U.L. Rev. 1041, 1042 (2008).

20. WRIGHT ET AL., *supra* note 11, § 2712, at 205 & n.14.

21. *Id.*

22. *Id.*

23. *Id.* § 2711. See also SCHWARZER ET AL., *supra* note 12.

24. The Summary Procedure on Bills of Exchange Act, 18 & 19 Vict. c. 67 (1855); WRIGHT ET AL., *supra* note 11, § 2711, at 191.

25. JUDICATURE ACT OF 1873, 36 & 37 Vict. c. 66 (1873).

evidence.<sup>26</sup> Much like it is today, the procedure was meant to “reduce delay and expense resulting from frivolous defenses.”<sup>27</sup>

In the United States, several states enacted summary judgment rules similar to those found in England by the late 1800s.<sup>28</sup> These statutes were similar to the English rule in that summary judgment was limited to plaintiff’s claims and to transactions that could be proven using documentary evidence.<sup>29</sup> American courts were initially reluctant to utilize this procedure, viewing it as a drastic remedy that should rarely be used.<sup>30</sup> This reluctance was largely due to widespread concern with preserving parties’ rights, particularly the right to a jury trial.<sup>31</sup> This concern is one that persists even today.<sup>32</sup>

The Federal Rules of Civil Procedure (the “Federal Rules”) were adopted in 1938, and they incorporated summary judgment in Rule 56.<sup>33</sup> This new rule was much more progressive than the process previously utilized in the states.<sup>34</sup> Rule 56 extended the use of motions for summary judgment to both plaintiffs and defendants and required a new, increased level of proof from the opposing party.<sup>35</sup> However, the onerous burden of proof imposed on a moving party by the new rule and the overarching desire to preserve parties’ right to a jury trial discouraged the use of summary judgment even in cases in which it might have been

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26. SCHWARZER ET AL., *supra* note 12.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *See, e.g.*, Whitaker v. Coleman, 115 F.2d 305, 307 (5th Cir. 1940); Avrick v. Rockmont Envelope Co., 155 F.2d 568, 571 (10th Cir. 1946); Heyman v. Commerce & Indus. Ins. Co., 524 F.2d 1317, 1320 (2d Cir. 1975); SCHWARZER ET AL., *supra* note 12, at 3–4. *See also* US CONST. amend. VII.

32. *See, e.g.*, Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA. L. REV. 139 (2007); *but see*, Edward Brunet, *Summary Judgment Is Constitutional*, 93 IOWA L. REV. 1625 (2008).

33. FED. R. CIV. P. 56.

34. WRIGHT ET. AL., *supra* note 11, § 2711 (“The applicability and utility of the summary-judgment devices was sharply increased by the federal rules.”).

35. Previously, parties opposing a summary judgment were permitted to “rest on the pleadings” or simply come forward with a sworn statement of the grounds for opposition to the motion. At its introduction, Rule 56 required the court to consider relevant evidence presented with a motion for summary judgment to determine whether a genuine issue of material fact exists, thus requiring opposing parties to introduce their own evidence, rather than merely resting on the pleadings. FED. R. CIV. P. 56; *see also* SCHWARZER ET AL., *supra* note 12, 1–3.

appropriate.<sup>36</sup> This outlook on motions for summary judgment remained for nearly 20 years, until the Supreme Court of the United States handed down decisions in three cases: *Celotex v. Catrett*,<sup>37</sup> *Anderson v. Liberty Lobby, Inc.*,<sup>38</sup> and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*<sup>39</sup> Collectively, these cases clarified federal summary judgment procedure and greatly increased its utility.<sup>40</sup> The cases created the foundation for modern summary judgment that would later be used as a model by states drafting their own summary judgment rules, including Louisiana.<sup>41</sup>

*Celotex* primarily addressed the burdens of proof and production required by Rule 56.<sup>42</sup> The majority opinion clarified that although the moving party initially bears the burden of production—to make a prima facie showing that the party is entitled to summary judgment—the burden shifts to the other party if the moving party would not bear the burden of proof on the issue at trial.<sup>43</sup> In that instance, the moving party is merely required to show that there is insufficient or no evidence to support the non-moving party's claim.<sup>44</sup> Thus, the burden of production shifts to the party opposing the motion.<sup>45</sup> After *Celotex*, a moving party who would not bear the burden of proof on an issue at trial is no longer required to fully negate an opposing party's claim to prevail on a motion for summary judgment.<sup>46</sup>

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36. The burden of proof imposed on a moving defendant was particularly heavy, requiring that a defendant show a genuine issue of material fact by disproving an essential element of the plaintiff's case. *Adickes v. S. H. Kress Co.*, 398 U.S. 144, 148 (1970); SCHWARZER ET AL., *supra* note 12, at 6; *see, e.g.*, *Poller v. Columbia Broad. Sys.*, 368 U.S. 464, 473 (1962) (later clarified by *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968)); *S.J. Groves & Sons Co. v. Ohio Turnpike Comm'n*, 315 F.2d 235, 237 (6th Cir.), *cert. denied*, 375 U.S. 824 (1963).

37. 477 U.S. 317 (1986).

38. 477 U.S. 242 (1986).

39. 475 U.S. 572 (1986).

40. SCHWARZER ET AL., *supra* note 12, at 7.

41. *See* discussion *infra* Part I.C.

42. FED. R. CIV. P. 56; *Celotex*, 477 U.S. 317.

43. *Celotex*, 477 U.S. at 232–33; WRIGHT ET AL., *supra* note 11, § 2727.

44. *Celotex*, 477 U.S. at 323–24; Mark Tatum & William Norris, III, *Summary Judgment and Partial Judgment in Louisiana: The State We're In*, 59 LA. L. REV. 131, 141 (1998).

45. *Celotex*, 477 U.S. at 330; *see also* WRIGHT ET AL., *supra* note 11, at 472.

46. *Celotex*, 477 U.S. at 323.

In conjunction with *Celotex*, *Anderson* set out a more explicit definition for the phrase “genuine issue of material fact.”<sup>47</sup> An “issue” was defined by the Court as a “dispute[] over facts that might affect the outcome of the suit under the governing law.”<sup>48</sup> An issue is “genuine” if the evidence is such that a reasonable jury could find in favor of the non-moving party.<sup>49</sup> The *Anderson* holding was subsequently reinforced by *Matsushita*, which required the opposing party to show specifically that a genuine issue of material fact exists, rather than merely casting doubt on the moving party’s claim.<sup>50</sup> Put simply, *Celotex* made bringing a motion for summary judgment easier, while *Anderson* and *Matsushita* increased the chance that the motion would be granted.<sup>51</sup>

Notably, the Court stated in *Celotex* that summary judgment is not a “disfavored procedural shortcut” as many in the profession viewed it.<sup>52</sup> Instead, the Court referred to the procedure as an integral part of the Federal Rules, which are intended to secure the just, speedy, and inexpensive resolution of every action.<sup>53</sup> This acknowledgment, combined with the changes made by the Court’s holdings in the *Celotex* cases, signaled the beginning of a shift in judicial and practitioner attitudes towards the procedure. After this trilogy of cases, summary judgment became the most frequently used legal mechanism for resolving disputes.<sup>54</sup> A study conducted by the Federal Judicial Center found that in the years after the *Celotex* trilogy, courts saw a significant increase in the rate of motions for summary judgment filed.<sup>55</sup> The rate of summary judgments granted doubled, as did the percentage of cases that were terminated by motions for summary judgment.<sup>56</sup>

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47. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (emphasis omitted).

48. *Id.*; see *Jackson v. City of New Orleans*, 144 So. 3d 876, 882 (La. 2014).

49. *Anderson*, 477 U.S. at 248; *Jackson*, 144 So. 3d at 882.

50. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585–86 (1986).

51. *Miller*, *supra* note 18, at 1041; see also WRIGHT ET AL., *supra* note 11, § 2727, n.24.

52. *Celotex v. Catrett*, 477 U.S. 317, 327 (1986); see also SCHWARZER ET AL., *supra* note 12, at 3–4; *Whitaker v. Coleman*, 115 F.2d 305, 307 (5th Cir. 1940); *Avrick v. Rockmont Envelope Co.*, 155 F.2d 568, 571 (10th Cir. 1946); *Heyman v. Commerce & Indus. Ins. Co.*, 524 F.2d 1317, 1320 (2d Cir. 1975).

53. *Id.*; FED. R. CIV. P. 1.

54. Justin J. Boron, *Admissibility Tolerance: Limited Latitude for Summary Judgment Material Under Rule 56*, 56 LOY. L. REV. 221, 233 (2010).

55. *Coleman*, *supra* note 1, at 708–09.

56. *Id.* (“[T]he rate of summary judgment motion practice in filed cases increased from 12% in 1975, to 17% in 1986, and 19% in 1988. The rate of

In the years since the *Celotex* trilogy, the role of summary judgment in litigation has continued to expand, arguably overshadowing the role and importance of the trial.<sup>57</sup> A motion for summary judgment now resembles a trial itself, at least with regard to the massive amount of time and resources devoted to the motion and the level of technicality and formality that the motion now involves.<sup>58</sup> Further, courts and practitioners have drastically changed their views on what summary judgment is intended to achieve.<sup>59</sup> Summary judgment is no longer viewed merely as a means to eliminate entire suits or defenses to suits deemed to be “frivolous.”<sup>60</sup> Instead, contemporary summary judgment is applied more aggressively than any other motion as a case management tool, used to trim individual claims and defenses found to be without merit from the main suit.<sup>61</sup> Summary judgment is now often the centerpiece of case resolution in federal courts, rather than just an ancillary procedural tool.<sup>62</sup>

### C. Summary Judgment in Louisiana State Courts

Twenty-two years after the Federal Rules of Civil Procedure and Rule 56 were adopted, summary judgment was first introduced in Louisiana with the promulgation of the Code of Civil Procedure and Article 966 in 1960.<sup>63</sup> Although it was modeled on Rule 56, the original version of Article 966 was more limited than the corresponding federal rule. The article prohibited motions for summary judgment in certain family law matters<sup>64</sup> and partial motions for summary judgment,<sup>65</sup> suggesting that the Louisiana legislature was even more skeptical of summary judgment procedure than Congress and the federal courts. An official revision comment on the 1960 version of Article 966 indicated that the legislature anticipated the motion would not be utilized often, but rather the mere existence of the rule would act as a deterrent against bringing frivolous

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motions granted in whole or in part increased from 6% in 1975 to 12% in 2000. The percentage of cases that summary judgment terminated similarly doubled from 4% in 1975 to 8% in 2000.”).

57. Boron, *supra* note 54, at 233.

58. *Id.*; see also EDWARD J. BRUNET & MARTIN H. REDISH, SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE § 10:2 (3d ed. 2006).

59. Boron, *supra* note 54, at 233.

60. *Id.*

61. *Id.*

62. *Id.*

63. LA. CODE CIV. PROC. art. 966 (1960); see also Price, *supra* note 8, at 1.

64. LA. CODE CIV. PROC. art. 969 (1960); Miller, *supra* note 13, at 213.

65. Miller, *supra* note 13, at 213 (1960); Price, *supra* note 8, at 1.

demands or defenses.<sup>66</sup> Like the federal courts before *Celotex*, Louisiana courts remained skeptical about the summary judgment process for years after its introduction and were hesitant to grant the motions, opting instead to preserve the party's right to a jury trial.<sup>67</sup>

Louisiana was also slow to adopt changes modernizing summary judgment after the Supreme Court's rulings in *Celotex*, *Anderson*, and *Matsushita*. In fact, after the introduction of Article 966 in 1960, no further significant revisions were made to the article until 1996, 36 years after the article was enacted and ten years after the trilogy.<sup>68</sup> In 1996, the Louisiana legislature adopted the burden-shifting approach established by the Supreme Court in *Celotex*,<sup>69</sup> largely because Article 966 was modeled after Federal Rule of Civil Procedure Rule 56.<sup>70</sup> The 1996 revisions also included an explicit statement that summary judgment is a preferred means for resolving cases, adopting an outlook similar to that espoused by the Court in the *Celotex* trilogy.<sup>71</sup>

Unfortunately, the 1996 revisions were not readily accepted by all Louisiana courts. The circuits diverged on how much the revisions

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66. LA CODE CIV. PROC. art. 966 cmt. a (1960) ("Even though, in all probability, it will not be successfully utilized often, the availability of the device and its potential for expeditious disposition of frivolous, but well-pleaded, demands and defenses should go very far in discouraging such demands and defenses."). Partial summary judgments are those that dispose of a particular issue, theory, cause of action, or defense, even if they do not dispose of the entire case. LA. CODE CIV. PROC. art. 966(E) (2015).

67. *See, e.g.*, *Haas v. Gill*, 531 So. 2d 457 (Cole, J., dissenting); *Kidder v. Anderson*, 345 So. 2d 922, 925–26 (La. Ct. App. 1970).

68. *See* 1996 La. Acts 759 (codified at LA. CODE CIV. PROC. art. 966 (1997)).

69. *Price*, *supra* note 8, at 2; *see also* LA. CODE CIV. PROC. art. 966 (1997).

70. *Tatum & Norris*, *supra* note 44, at 136–37 ("When Louisiana adopted the Code of Civil Procedure in 1960 . . . the provisions of Article 966 were based upon Rule 56(a)-(c) . . .").

71. "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." LA. CODE CIV. PROC. art. 966 (1997). *See also* CATHERINE PALO, LOUISIANA SUMMARY JUDGMENT AND RELATED TERMINATION MOTIONS, § 5:4 (2014 ed.); *Celotex v. Catrett*, 477 U.S. 321, 327 (1986) ("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.") (internal citations omitted).

changed summary judgment procedure in practice.<sup>72</sup> For example, the Third Circuit found the amendments substantially changed the law of summary judgment in Louisiana.<sup>73</sup> In *Hayes v. Autin*, the court reasoned that before 1996, motions for summary judgment in Louisiana were not favored and were to be used only sparingly.<sup>74</sup> A jurisprudential presumption against granting motions for summary judgment existed, arising out of a desire to preserve parties' rights to a jury trial.<sup>75</sup> Because of this presumption, the moving party's evidence was to be strictly scrutinized by the court, and any doubt was to be resolved by denying the motion.<sup>76</sup> The court found that this presumption was legislatively overruled by the 1996 revisions to Article 966 to bring Louisiana summary judgment more closely in line with the federal procedure.<sup>77</sup> In fact, the court explicitly adopted the federal courts' determination that summary judgment is not to be disfavored.<sup>78</sup>

On the other hand, some circuits did not seem as concerned with the effects of the 1996 amendments. In multiple cases, courts merely acknowledged that Article 966 had been amended and proceeded to analyze the question of law exactly as they would have under the prior version of the article.<sup>79</sup> On one occasion, the Fourth Circuit was much more explicit in its rejection of the potential changes brought by the 1996 amendments, holding that the amendments were merely a reiteration of the current state of the law.<sup>80</sup>

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72. Compare *Hayes v. Autin*, 685 So. 2d 691 (La. Ct. App. 1996), with *Adamson v. State Farm Mutual Automobile Ins. Co.*, 676 So. 2d 227 (La. Ct. App. 1996).

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

74. *Id.* at 691.

75. *Id.* at 696 (first citing *Sassone v. Elder*, 626 So. 2d 345 (La. 1993); and then citing *Vermillion Corp. v. Vaughn*, 397 So. 2d 490 (La. 1981)) (discussing the previously existing jurisprudential presumption against granting motions for summary judgment and the strict level of scrutiny applied to the motions by courts as a result).

76. *Id.* at 694–95.

77. *Id.*

78. *Id.*; see also *Celotex v. Catrett*, 477 U.S. 317, 327 (1986).

79. See, e.g., *Adamson v. State Farm Mutual Automobile Ins. Co.*, 676 So. 2d 227, 231 (La. Ct. App. 1996); *Dempsey v. Automotive Casualty Ins. Co.*, 680 So. 2d 675, 679 (La. Ct. App. 1996); *Billingsley v. Mitchel*, 676 So. 2d 208, 211 (La. Ct. App. Cir. 1996), *writ denied*, 681 So. 2d 1265 (La. 1996).

80. See, e.g., *Walker v. Kroop*, 678 So. 2d 580, 583 (La. Ct. App. 1996); Stephen Anthony Pitre, *The Pelican State Amends Summary Judgment: Recent Louisiana Jurisprudence Uncertain About Legislative Intent*, 43 LOY. L. REV. 97 (1998).

Considering the vastly different approaches that Louisiana courts of appeal took when applying the 1996 amendments, the goals of the 1996 legislature were clearly not accomplished. As a result, the legislature determined that another set of revisions was necessary.<sup>81</sup> In 1997, the legislature adopted the position taken by the Third Circuit in *Hayes v. Autin* and legislatively overruled any cases that were inconsistent with that court's reasoning, officially bringing Louisiana summary judgment procedure more closely in line with the Federal Rules.<sup>82</sup> The 1997 revisions also added the language that would become the foundation for the current language of Article 966 governing the burden of proof, language largely borrowed from *Celotex v. Catrett*.<sup>83</sup> The amendments further provided for partial summary judgments in Louisiana state court—a mechanism that was already available at the federal level—for the first time.<sup>84</sup>

*D. Frequent Revision, Confusion, and Disorder: The Necessity of More Revision to Louisiana's Summary Judgment Procedure*

After the 1996 and 1997 revisions brought Article 996 closer in line with the Federal Rules, Louisiana began experiencing general problems arising from the structure of the article. For 20 consecutive years, the legislature revised the article to resolve particular problems as they arose.<sup>85</sup> Although this reactionary, piecemeal legislation is a direct way of dealing with problems as they develop, it made Article 966 disorganized and confusing.<sup>86</sup> By the most recent round of revisions, the article no longer

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81. See, e.g., Pitre, *supra* note 80; David W. Robertson, *Summary Judgment and Burden of Proof*, 45 LA. B.J. 331 (1997).

82. Tatum & Norris, *supra* note 44, at 132; see also 1997 La. Acts 806 (codified at LA. CODE CIV. PROC. art. 966 (1998)).

83. LA. CODE CIV. PROC. art. 966(C)(2) (1998) (“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 . . . the movant’s burden does not require him to negate all essential elements of the adverse party’s claim . . . but rather to point out to the court that there is an absence of factual support for one or more [essential] elements.”).

84. LA. CODE CIV. PROC. art. 966(E) (1998) (“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 [motion] does not dispose of the entire case.”).

85. A LexisNexis or WestLaw search indicates 22 archived versions of Article 966, 20 of those revisions or amendments occurred between 1996 and 2015.

86. Price, *supra* note 8.

progressed in a logical or organized manner.<sup>87</sup> This disorganization led to confusion, as the practical application of the rules varied across jurisdictions within the state,<sup>88</sup> and the repeated revisions forced courts to spend unnecessary time considering the retroactivity of the amendments.<sup>89</sup> A court's decision regarding the retroactivity of a given change to the article was often determinative of the outcome of the motion—or even the entire civil action—particularly when evidentiary issues were involved.<sup>90</sup> One court in particular even expressed some apparent frustration with the “legislature’s continuous revisions to this ever-changing [article].”<sup>91</sup> The 2015 revisions were undertaken with the goals of rectifying the existing confusion and making Article 966 and summary judgment motion practice more orderly.<sup>92</sup>

In the years leading up to the 2015 revisions, Louisiana was hesitant to fully embrace motions for summary judgment and consistently lagged behind federal courts when it came to modernizing the procedure.<sup>93</sup> However, Louisiana courts also experience some of the same general problems faced by federal courts when dealing with motions for summary judgment, such as delay and the complication of the summary judgment process. In Louisiana, just as in federal court, summary judgment is no longer the quick and efficient process that it was originally intended to be. Full trials are fewer now than in the years before the expansion of summary judgment, “[b]ut judges confront more summary judgment motions, [and] other duties interrupt the time and attention they demand.”<sup>94</sup> When asked, a majority of attorneys who responded to a Federal Judicial Center survey reported that federal judges routinely do

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87. See, e.g., LA. CODE CIV. PROC. art. 966 (2015).

88. *The Legal Ease*, *supra* note 9, at 27:15.

89. See, e.g., *First Bank & Trust v. Proctor’s Cove II, L.L.C.*, 150 So. 3d 418 (La. Ct. App. 2014); *Evans v. Bordelon*, 161 So. 3d 674 (La. Ct. App. 2014); *Marengo v. Harding*, 118 So. 3d 1200 (La. Ct. App. 2013). See also *infra* Part II.B.2.

90. See, e.g., *First Bank & Trust*, 150 So. 3d 418; *Evans*, 161 So. 3d 674; *Marengo*, 118 So. 3d 1200; *Mason v. T.M. Boat Rentals, L.L.C.*, 137 So. 3d 741 (La. Ct. App. 2014); *Woodlands Dev., L.L.C., v. Regions Bank*, 164 So. 3d 226 (La. Ct. App. 2014); *Midland Funding v. Urrutia*, 131 So. 3d 474 (La. Ct. App. 2013). See also *infra* Part II.B.2.

91. *First Bank & Trust*, 150 So. 3d, at 430 (Wicker, J., concurring).

92. *The Legal Ease*, *supra* note 9, at 27:30.

93. See *supra* Part I.C.

94. D. Brock Hornby, *Summary Judgment Without Illusions*, 13 GREEN BAG 273, 277 (2010).

not rule promptly on summary judgment motions.<sup>95</sup> Not surprisingly, this failure to rule promptly was also cited as a primary cause of delay as suits proceed toward trial.<sup>96</sup> Little to no data is available regarding the frequency of summary judgment filings in Louisiana or the amount of time generally spent on them, but the frequency of summary judgment motions in Louisiana has drastically increased over the years.<sup>97</sup> As a result, it is not difficult to see how Louisiana motions for summary judgment—which are modeled after the Federal Rules—would experience some of the same problems.

## II. STRUCTURE, STYLE, AND SUBSTANCE: THE 2015 REVISIONS TO CODE OF CIVIL PROCEDURE ARTICLE 966

In response to ongoing concerns regarding summary judgment in Louisiana, the Law Institute appointed, at the request of the legislature, a subcommittee of lawyers, judges, and law professors to study the procedure.<sup>98</sup> The subcommittee proposed revisions to the Law Institute, which in turn recommended revisions to the Louisiana legislature.<sup>99</sup> The approved revisions, which made both substantive and structural changes to the article, were enacted as Act 422 of the 2015 legislative session and took effect on January 1, 2016.<sup>100</sup>

### *A. Seeking Logic and Organization: Structural Changes to Article 966*

In its report to the Law Institute, the subcommittee stated that one of its primary goals was to address the piecemeal revisions of the past 20 years and “reorganize [A]rticle 966, so that provisions of the statute that address particular issues are set forth in a logical and organized

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95. *Id.* at 278. The variance in percentage depends on the practice area asked. A smaller percentage of plaintiff’s lawyers blames delayed motions rulings for delay. *Id.*

96. *Id.* It is important to note that this response was in reference to all motions rulings, not strictly rulings on motions for summary judgment. However, motions for summary judgment make up a large part of the motions filed and ruled on.

97. “A simple Westlaw search for summary judgment cases by the Louisiana Supreme Court returns 576 such cases in the 35 years before the effective date of the 1996 amendment, but it returns 581 in the 18 years following the amendment.” Price, *supra* note 8, at 2. *See also supra* notes 2–4 and accompanying text.

98. Price, *supra* note 8, at 5.

99. *Id.*

100. 2015 La. Sess. Law Serv. 876 (West) (codified at LA. CODE CIV. PROC. art. 966 (2016)).

fashion.”<sup>101</sup> Article 966 now begins with a statement of what summary judgment is, why it exists, and when the motion may be brought.<sup>102</sup> The article then sets out timing and briefing requirements.<sup>103</sup> The next paragraph contains the burden of proof, provisions governing what evidence the court may consider, and how evidentiary objections are to be raised and resolved.<sup>104</sup> Subsequent paragraphs provide for partial summary judgment, limit the court’s review to only those issues presented in the motion, and set out the effects of grants of summary judgments on remaining parties in multi-party litigation.<sup>105</sup> The final paragraph contains provisions concerning appeals.<sup>106</sup>

In addition to organizational changes, the subcommittee also made changes that modernized and simplified the language used throughout the article. For example, the antiquated and awkward term “movant” was replaced with “mover.”<sup>107</sup> Additionally, references to “the plaintiff or defendant” were replaced with the more general phrase “a party.”<sup>108</sup> These changes both simplify the rule and make it explicit in the text of the article that any party to a case can move for summary judgment. Further, the language of Paragraph (G), which deals with the effects of granting a partial summary judgment on remaining parties to the suit, was also substantially reworked in order to eliminate confusion that existed regarding the applicability of the provision and its effect on a case.<sup>109</sup> The revision to this paragraph also removed unnecessary words and eliminated the rule’s confusing exception for affirmative defenses, as well as the exceptions to that exception.<sup>110</sup>

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101. Price, *supra* note 8, at 5.

102. LA. CODE CIV. PROC. art. 966 (A) (2016).

103. LA. CODE CIV. PROC. art. 966(B), (C) (2016).

104. LA. CODE CIV. PROC. art. 966(D) (2016).

105. LA. CODE CIV. PROC. art. 966(E), (G) (2016).

106. LA. CODE CIV. PROC. art. 966(H) (2016).

107. LA. CODE CIV. PROC. art. 966(D)(1) (2016).

108. LA. CODE CIV. PROC. art. 966(A)(1) (2016).

109. LA. CODE CIV. PROC. art. 966(G) (2016). *See also* discussion *infra* Part II.B.3.

110. LA. CODE CIV. PROC. art. 966(G) (2016). Previously, Paragraph (G) included an exception, stating that the paragraph would not apply when summary judgment was granted solely on the basis of a successful assertion of an affirmative defense, other than negligence or fault. LA. CODE CIV. PROC. art. 966(G) (2015).

*B. Substantive Changes to Summary Judgment Procedure: Four Areas of the Law*

The 2015 revisions did not merely make structural and stylistic changes to Article 966. Substantive changes to the article were also made in multiple areas. These changes were intended to make Louisiana summary judgment procedure itself, not just the article, more orderly and streamlined.<sup>111</sup> This Comment does not address every substantive change that was made, but focuses on four specific areas: timing and briefing, evidence and supporting documents, effects on remaining parties when a partial motion for summary judgment is granted, and appeals.

*1. The Elimination of District Court Rule 9.9 and Extended Deadlines*

Perhaps the most significant substantive changes were made to the timing and briefing deadlines in the article. Before the 2015 revisions, Article 966 relied on District Court Rule 9.9 (“Rule 9.9”) to set the timeline for filing motions for summary judgment, opposition briefs, reply memoranda, and other supporting documents.<sup>112</sup> Rule 9.9 requires a party who files a motion or opposition “[to] furnish the trial judge and serve on all other parties a supporting memorandum that cites both the relevant facts and applicable law.”<sup>113</sup> This memorandum must be served on the parties so that it is received at least 15 calendar days before the hearing.<sup>114</sup> The party opposing the motion is required to furnish the trial judge and serve on the moving party his or her opposition memorandum at least eight calendar days before the hearing.<sup>115</sup> Finally, the moving party may file a reply to the opposition memorandum, which must be furnished to the judge and served on the opposing party before 4:00 p.m. on the last day that allows one full working day in advance of the hearing.<sup>116</sup> In all instances, the rule makes it clear that the court can set shorter deadlines, but does not expressly provide for extension of deadlines.<sup>117</sup>

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111. See Price, *supra* note 8. See also *The Legal Ease*, *supra* note 9, at 27:30.

112. LA. CODE CIV. PROC. art. 966(B)(1) (2015) (“The motion for summary judgment, memorandum in support thereof, and supporting affidavits shall be served within the time limits provided by District Court Rule 9.9.”).

113. LA. DIST. CT. R. 9.9(b).

114. *Id.*

115. LA. DIST. CT. R. 9.9(c).

116. For example, if the hearing was set for a Monday, the reply memorandum must have been filed by 4:00 p.m. on Thursday. LA. DIST. CT. R. 9.9(d).

117. LA. DIST. CT. R. 9.9(b), (c).

Courts have long interpreted the language of Rule 9.9 as “mandatory and substantive.”<sup>118</sup> As a result, parties who file late may waive their opportunity to orally argue their case, may be required to pay attorney’s fees, or—more importantly—may be considered not to have filed the motion or supporting documents at all.<sup>119</sup> Because summary judgment motions are often dispositive of entire causes of action, the stakes are much higher for missing a filing deadline on a motion for summary judgment than most other pre-trial motions, such as motions to compel discovery.<sup>120</sup> Practitioners and the revision subcommittee were concerned that the consequences of missing a filing deadline under Rule 9.9 were inappropriate for summary judgment motions because of these high stakes.<sup>121</sup> This concern is amplified further when considered in conjunction with the “magnitude of evidence now required for [summary judgment] motions and oppositions.”<sup>122</sup>

Another factor cited by members of the subcommittee as compelling revisions in this area was concerns about parties using unscrupulous motions practice to gain an unfair advantage for their clients.<sup>123</sup> Because the law did not impose a deadline to file a motion for summary judgment, a moving party could postpone making his or her motion until the last day possible, taking great care to ensure that it was well-written, comprehensive, and legally sound.<sup>124</sup> The opposing party, on the other hand, would have a comparatively short timeline in which to respond with an opposition memoranda.<sup>125</sup> This last-minute filing also worked against

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118. *See, e.g.*, *Guillory v. Chapman*, 38 So. 3d 573, 575–76 (La. Ct. App. 2010) *rev’d* 44 So. 3d 272 (La. 2010); *Buggage v. Volks Constructors*, 928 So. 2d 536 (La. 2006) (“The time limitation established by La. C.C.P. art. 966(B) for the serving of affidavits in opposition to the motion for summary judgment is mandatory; affidavits not timely filed can be ruled inadmissible and properly excluded by the trial court.”); *Gisclair v. Bonneval*, 928 So. 2d 39 (La. Ct. App. 2005) (holding that because evidence was untimely submitted, the trial court was legally correct in refusing to consider the evidence); *Price*, *supra* note 8, at 7.

119. *Price*, *supra* note 8, at 6. *See also* *Newsome v. Homer Memorial Med. Ctr.*, 32 So. 3d 800 (La. 2010); *Guillory*, 44 So. 3d 272 (2010); *Mor-Tem Risk Mgmt. Serv., Inc., v. Shore*, 978 So. 2d 588 (La. Ct. App. 2008); *but see* *Sims v. Hawkins-Sheppard*, 65 So. 3d 588 (La. Ct. App. 2008).

120. *The Legal Ease*, *supra* note 9, at 29:00.

121. *Id.*

122. *Price*, *supra* note 8, at 6.

123. *The Legal Ease*, *supra* note 9, at 29:48.

124. Under Article 966 as it read prior to 2015, a plaintiff could move for summary judgment “any time after the answer has been filed” and the defendant could move for summary judgment “at any time.” LA. CODE CIV. PROC. art. 966(A)(1) (2014).

125. *The Legal Ease*, *supra* note 9, at 30:00.

the purpose of summary judgment. While the moving party waits to file, the other parties are working towards preparing for trial. If the motion for summary judgment is then granted, terminating the litigation, the time and resources invested into trial preparation are wasted.<sup>126</sup> Further, if the trial court's ruling on a motion for summary judgment is taken up on a supervisory writ,<sup>127</sup> late filed motions risk substantially increasing the delay, as the trial court proceeding will be stayed to allow the appellate court time to issue a ruling.<sup>128</sup>

The 2015 revisions eliminated the references to Rule 9.9 and instead set out deadlines directly in Article 966. These deadlines significantly change the timeline for making, opposing, and ruling on summary judgment. Now, a motion for summary judgment and all supporting documents must be served on all parties not less than 65 days in advance of the trial date.<sup>129</sup> Any opposition to the motion, and all documents in support of the motion, must be filed no less than 15 days before the hearing on the motion.<sup>130</sup> This deadline is a significant extension from Rule 9.9, which requires filing no less than eight days prior to the hearing.<sup>131</sup> Any reply memoranda must be served and filed not less than five days before the hearing, which is another significant extension from the mere one day prior to the hearing required by Rule 9.9.<sup>132</sup> Finally, the revisions require that the hearing be set not less than 30 days after the filing of the motion and not less than 30 days in advance of the trial date, and courts are required to render judgment on the motion not less than 20 days prior to trial.<sup>133</sup> In contrast, prior to the 2015 revisions, the trial court could rule on a motion for summary judgment at "a reasonable time," but no less than ten days prior to the trial.<sup>134</sup> After the 2015 revisions, courts are given express permission to extend filing and

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126. *Id.* at 30:50.

127. In Louisiana, appellate courts can exercise their supervisory jurisdiction over trial courts by granting a supervisory writ to review interlocutory judgments. Raymond P. Ward, *A Writ in Time*, 51 LA. B.J. 338, 338–39 (2004). Interlocutory judgments are those that do not determine the merits, but only preliminary matters in the course of an action. See LA. CODE CIV. PROC. art. 1841 (2015).

128. *The Legal Ease*, *supra* note 9, at 30:50.

129. LA. CODE CIV. PROC. art. 966(B)(1) (2016).

130. LA. CODE CIV. PROC. art. 966(B)(2) (2016).

131. LA. DIST. CT. Rule 9.9(c).

132. LA. DIST. CT. Rule 9.9(d).

133. LA. CODE CIV. PROC. art. 966(C) (2016).

134. LA. CODE CIV. PROC. art. 966(D) (2015).

briefing deadlines if necessary and agreed to by all the parties.<sup>135</sup> The courts are also prohibited from shortening the deadlines.<sup>136</sup>

## 2. *Introducing and Objecting to Evidence*

The 2015 revisions also addressed the manner for determining proper evidence associated with motions for summary judgment.<sup>137</sup> Since the article's introduction into the Code of Civil Procedure, the means for introducing and objecting to evidence in conjunction with a motion for summary judgment have been inconsistent and confusing.<sup>138</sup> These concerns led to significant changes in Article 966's provisions governing evidence.

### *a. Documents "On File" or "Deemed Admitted": Confusing Language and the Necessity of Revision*

Before 2012, evidence supporting a motion for summary judgment could be considered if it was placed "on file" by the parties.<sup>139</sup> Though this rule appears relatively simple, it proved too vague in practice. Louisiana courts diverged on the correct interpretation of the phrase "on file."<sup>140</sup> Some circuits, including the First Circuit, interpreted the provision more loosely, allowing evidence that was not previously on file to be introduced at the hearing on the motion for summary judgment.<sup>141</sup> That court held that "as an alternative to filing, any documents could be considered by the trial court if offered and accepted into evidence at the hearing on the motion, even if previously not 'on file.'"<sup>142</sup> The Third Circuit, on the other hand,

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135. LA. CODE CIV. PROC. art. 966(B) (2016).

136. LA. CODE CIV. PROC. art. 966 cmt. d (2016).

137. See LA. CODE CIV. PROC. art. 966(A), (F) (2016).

138. William R. Forrester, Jr., *2013 Changes to Code of Civil Procedure: Recent Amendments Create Evidentiary Traps for the Unwary*, 61 LA. B.J. 98, 99 (2013).

139. LA. CODE CIV. PROC. art. 966(B) (2011) ("The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions *on file* . . . show that there is no genuine issue of material fact, and that the mover is entitled to judgment as a matter of law."); see also Forrester, *supra* note 138, at 99.

140. Compare *Mapp Constr., L.L.C. v. Southgate Penthouses, L.L.C.*, 29 So. 3d 548 (La. Ct. App. 2009), with *Ultra Pure Water Techs. Inc. v. Standex Int'l Corp.*, 89 So. 3d 1282 (La. Ct. App. 2012).

141. *Mapp Constr., L.L.C.*, 29 So. 3d at 563.

142. Forrester, *supra* note 138, at 99 (citing *Mapp Constr., L.L.C.*, 29 So. 3d at 563).

did not allow evidence to be introduced at the hearing.<sup>143</sup> That court would reverse a motion for summary judgment if evidence that was not previously on file was introduced at the hearing.<sup>144</sup>

In an attempt to correct this problem, the legislature amended Article 966 in 2012, removing the “on file” language and adding a requirement in Paragraph (E) that evidence had to be “admitted” in support of the motion.<sup>145</sup> Although this change may have eliminated the concerns arising from the “on file” language, the new language created new interpretive problems. The admission requirement was interpreted in some cases to mandate a formal admission by court ruling at the hearing on the motion.<sup>146</sup> Other courts continued to allow evidence to be introduced before the hearing.<sup>147</sup> Introducing evidence at the hearing can be problematic for a few reasons. First, the opposing party could be surprised by evidence at the hearing and not prepared to counter because the evidence was not on file or referenced in the motion.<sup>148</sup> Additionally, requiring formal admission at the hearing could create a risk that the formality of admitting and memorializing the admission of each document on the court record would be overlooked.<sup>149</sup> This requirement would encourage appellate courts to reverse otherwise properly granted motions for summary judgment for lack of evidence properly admitted into the record and not because the motion was improperly granted.<sup>150</sup>

The legislature again attempted to clarify these provisions in 2013, adding language that stated “evidence *cited in and attached to* the motion for summary judgment or memorandum filed by an adverse party is *deemed admitted* for purposes of the motion for summary judgment.”<sup>151</sup> This change appeared to eliminate the need for formal admission into the

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143. *Ultra Pure Water Techs., Inc.*, 89 So. 3d at 1288–89.

144. Forrester, *supra* note 138, at 99. *See, e.g., Ultra Pure Water Techs., Inc.*, 89 So. 3d at 1288.

145. 2012 La. Acts 1697 (codified at LA. CODE CIV. PROC. art. 966(E)(2) (2013)); Forrester, *supra* note 138, at 99.

146. *Marengo v. Harding*, 118 So. 3d 1200, 1202 (La. Ct. App. 2013) (interpreting the 2012 amendment to mean that “only evidence formally admitted into evidence during the summary judgment hearing can be considered by the trial court.”); *see also Cook v. Asbestos Corp. Ltd.*, 123 So. 3d 731 (La. Ct. App. 2013).

147. *Ultra Pure Water Techs., Inc.*, 89 So. 3d at 1288; Forrester, 61 LA. B.J. at 99.

148. *The Legal Ease*, *supra* note 9, at 26:32.

149. Forrester, *supra* note 138, at 99.

150. *Id.*

151. 2013 La. Acts 2258 (codified at LA. CODE CIV. PROC. art. 966(F)(2) (2014) (emphasis added)).

record at a hearing. However, the addition of this provision created yet another issue: the potential that by deeming the attachments “admitted,” courts would simply admit evidence without actually considering its admissibility at trial.<sup>152</sup> This improper admission of evidence could result in cases being terminated by granted motions for summary judgment based on evidence that would not have been admissible at trial, despite the fact that evidence submitted in support of or opposition to motions for summary judgment must be admissible at trial.<sup>153</sup>

Though the article was amended again in 2014, no changes were made to the provisions that governed admitting evidence.<sup>154</sup> As a result, the problems created by the 2013 amendments still existed.<sup>155</sup> However, some jurisprudence appears to indicate that in practice, courts began to move away from requiring formal introduction into evidence.<sup>156</sup> Thus, simply citing the document in the motion or memorandum and attaching the document was sufficient.<sup>157</sup> However, a problem existed because “extraneous” documents were placed on file and were “deemed admitted,” influencing the trial court’s decision on the motion, even though those documents would not be admissible at trial.<sup>158</sup> Further, some disparity in practice still existed across the state courts with regard to what would be admitted and how.

#### *b. The 2015 Revisions*

The subcommittee addressed the problems with evidentiary procedure in multiple places in Article 966 with the 2015 revisions. First, the list of the types of documents that can be submitted in support of or in opposition to motions for summary judgment was expanded to include certified medical records, written stipulations, and memoranda.<sup>159</sup> These documents

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152. *The Legal Ease*, *supra* note 9, at 26:42.

153. See BRUNET & REDISH, *supra* note 58, § 8:6, at 220 (“It is clear that the evidence submitted by the parties to support or oppose a motion for summary judgment must be admissible under the Federal Rules of Evidence.”). This principle is supported by a significant amount of case law. *Id.* at n.3.

154. LA. CODE CIV. PROC. art. 966(F)(2) (2014).

155. See *First Bank & Trust v. Proctor’s Cove II, L.L.C.*, 150 So. 3d 418, 428 (La. Ct. App. 2014); see also *Martinez v. Jefferson Parish Sch.*, 166 So. 3d 273 (La. Ct. App. 2014).

156. *Ventura v. McCune*, 184 So. 3d 46 (2014); *Mason v. T & M Boat Rentals, L.L.C.*, 137 So. 3d 741, 743–44 (La. Ct. App. 2014).

157. *Id.*

158. *The Legal Ease*, *supra* note 9, at 25:50. See also *First Bank & Trust*, 150 So. 3d at 428; *Martinez*, 166 So. 3d 273.

159. LA. CODE CIV. PROC. art. 966(A)(4) (2016).

are in addition to the pleadings, affidavits, depositions, answers to interrogatories, and admissions that were previously included in the list.<sup>160</sup> The revisions also clarified that this list of documents is “exclusive,” which means that if the type of document is not on the list, it is not admissible.<sup>161</sup> However, the 2015 revision comments indicate that other documentary evidence can be filed if it is “properly authenticated by an affidavit or deposition to which they are attached,” or in other words, if the evidence would be admissible at trial, it can be filed.<sup>162</sup>

Second, the revision combined former Paragraphs (F)(2) and (3) into new Paragraph (D)(2) to address the confusion that previously existed regarding the process by which evidence could be brought before the court for consideration on a motion for summary judgment. Previously, Paragraph (F) read as follows:

(2) Evidence *cited in and attached to* the motion for summary judgment or memorandum filed by an adverse party is *deemed admitted* for purposes of the motion for summary judgment unless excluded in response to an objection made in accordance with Subparagraph (3) of this Paragraph. . . . (3) Objections to evidence in support of or in opposition to a motion for summary judgment may be raised in a memorandum or motion to strike stating the specific grounds therefor.<sup>163</sup>

The language governing the admission of evidence in conjunction with motions for summary judgment now simply states:

The court may consider only those documents *filed in support of or in opposition to* the motion for summary judgment and *shall* consider any documents to which no objection is made. Any objection to a document shall be raised in a timely filed opposition or reply memorandum.<sup>164</sup>

The 2015 revisions removed the “deemed admitted” language that was previously problematic and replaced it with a requirement that any

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160. LA. CODE CIV. PROC. art. 966(B)(2) (2015).

161. LA. CODE CIV. PROC. art. 966 cmt. c (2016); *see also The Legal Ease*, *supra* note 9, at 23:50.

162. LA. CODE CIV. PROC. art. 966 cmt. c (2016). Other documentary evidence was listed as “photographs, pictures, video images, or contracts” and “an opinion of the medical review panel.” *Id.*

163. LA. CODE CIV. PROC. art. 966(F)(2), (3) (2015) (emphasis added).

164. LA. CODE CIV. PROC. art. 966(D)(2) (2016) (emphasis added).

document to be considered by the court must be filed with the motion or opposition to the motion.<sup>165</sup>

Finally, the process for objecting to evidence submitted in conjunction with motions for summary judgment was significantly altered by the revisions. Previously, a party could object to evidence via a written motion to strike or in writing via the opposition or reply memorandum.<sup>166</sup> Problems arose from the use of the motion to strike because an additional hearing would have to be held on that motion, and that motion would also be subject to the deadlines set out in Rule 9.9.<sup>167</sup> These rules led to unnecessary delay and would postpone the hearing on the motion for summary judgment until the evidentiary issues were resolved.<sup>168</sup>

The 2015 revisions eliminated motions to strike and oral objections.<sup>169</sup> Now, objections *must* be made in either the opposition memorandum or the moving party's reply, both of which must be timely filed.<sup>170</sup> Failure to make these written objections will result in the party waiving his or her right to object.<sup>171</sup> The elimination of the motion to strike was intended to streamline the process.<sup>172</sup> It remedies problems with delay arising from the need to hold an additional hearing on the motion and allows time for opposition and reply memoranda regarding the motion to strike under Rule 9.9. The prohibition on oral objections was logical, as the 2015 revisions appear to prohibit the introduction of new evidence at the hearing on the motion for summary judgment.<sup>173</sup> After an objection is raised in writing, the court is now explicitly required to consider all objections before rendering judgment, and the court also must state on the record or in written reasons what evidence was found inadmissible or was not

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165. *Id.*

166. LA. CODE CIV. PROC. art. 966(F)(3) (2015).

167. *The Legal Ease*, *supra* note 9, at 40:00; LA. DIST. CT. R. 9.9.

168. *See The Legal Ease*, *supra* note 9, at 40:24.

169. LA. CODE CIV. PROC. art. 966(D)(2) (2016); *see also* LA. CODE CIV. PROC. art. 966 cmt. k (2016).

170. LA. CODE CIV. PROC. art. 966(D)(2) (2016).

171. LA. CODE CIV. PROC. art. 966(D)(2) (2016).

172. *The Legal Ease*, *supra* note 9, at 38:32.

173. The revisions tend to indicate a prohibition on new evidence at the hearing when the provisions are read together. "Subparagraph (D)(2) makes clear that the court can consider only those documents filed in support of or in opposition to the motion" and "an oral objection to any document cannot be raised at the hearing on the motion for summary judgment . . ." Further, all documents must be filed no less than five days before the hearing on the motion and no additional documents may be filed after the opposition memorandum is filed. *See* LA. CODE CIV. PROC. art. 966(D)(2) cmt. k (2016); LA. CODE CIV. PROC. art. 966(B)(1)–(3) (2016).

considered by the court.<sup>174</sup> If no objection is raised, the court must consider all the evidence submitted, regardless of whether that evidence would be admissible at trial.<sup>175</sup>

### *3. Paragraph (G) and the Effect of Granting Partial Motions for Summary Judgment*

Another important change to Article 966 was the redrafting of Paragraph (G), which addressed the effects of a granted partial motion for summary judgment on remaining parties to a case.<sup>176</sup> Prior to 2015, when a partial motion for summary judgment was granted and one of multiple defendants was found not at fault or not liable, that party was not to be considered later in any allocation of fault or placed on the jury verdict form.<sup>177</sup> However, there was an exception for summary judgments granted solely because of a successful assertion of an affirmative defense.<sup>178</sup> To further complicate the matter, the affirmative defense exception did not apply in cases where the affirmative defense involved an assertion of negligence or fault of the plaintiff.<sup>179</sup> Additionally, in order for Paragraph (G) to apply, the trial court judge had to explicitly specify its applicability in the judgment.<sup>180</sup>

The requirement that the trial court specifically state in the judgment that Paragraph (G) applied created a risk that merely because of judicial oversight or an incorrect omission, parties who were dismissed from the case would be considered in the allocation of fault or placed on the jury verdict form.<sup>181</sup> When the court failed to specify that Paragraph (G) applied, defense counsel could continue to present to the jury a theory of third-party fault that ought to have been eliminated by the granted motion for summary judgment.<sup>182</sup> In addition to concerns caused by the procedural

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174. Price, *supra* note 8, at 7.

175. LA. CODE CIV. PROC. art. 966(D)(2) (2015).

176. LA. CODE CIV. PROC. art. 966(G) (2015). For an interpretation of Paragraph (G) as it read prior to the 2015 revisions, *see* Barrilleaux v. Bd. of Supervisors of La. State Univ., 170 So. 3d 1015, 1019–21 (La. Ct. App. 2015).

177. LA. CODE CIV. PROC. art. 966(G)(1) (2014).

178. *Id.* Affirmative defenses can be found in LA. CODE CIV. PROC. art 1005 (listing “negligence, or fault of the plaintiff and others, duress, error or mistake, estoppel, extinguishment of the obligation in any manner, failure of consideration, fraud, illegality injury by fellow servant, and any other matter constituting an affirmative defense” as affirmative defenses applicable under Paragraph (G)).

179. *Id.*

180. LA. CODE CIV. PROC. art. 966(G)(2) (2014).

181. *The Legal Ease*, *supra* note 9, at 50:22.

182. *Id.* at 50:35.

requirements of the paragraph, the language of the paragraph was cumbersome and confusing.<sup>183</sup> It was unclear to both courts and parties when the paragraph applied, especially given the affirmative defense exception and the exceptions to that exception. To address this problem, the 2015 revisions eliminated the affirmative defense exception entirely, as well as the requirement that the trial court explicitly specify in the judgment when Paragraph (G) applied.<sup>184</sup>

#### *4. Entirely New Law: The Addition of Paragraph (H) and its Effect on Appeals*

Before 2015, if a motion for summary judgment was denied, a supervisory writ could be taken to a court of appeal, and if the court of appeal reversed, granting summary judgment, the case would terminate.<sup>185</sup> Often, the parties would not have had a chance to argue their case in front of the court that ultimately granted the motion for summary judgment.<sup>186</sup> This scenario was particularly problematic for practitioners whose clients would believe they had won their case—and sometimes even twice—only to then have the case terminated by summary judgment on a writ.<sup>187</sup> This fostered a perception of unfairness in the system and deprived the parties of their day in court, which is an overarching concern with the motion for summary judgment process.<sup>188</sup>

To address this concern, the 2015 revisions added an entirely new paragraph to Article 966.<sup>189</sup> The addition of Paragraph (H) requires appellate

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183. LA. CODE CIV. PROC. art. 966(G)(1) (2016).

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

185. *The Legal Ease*, *supra* note 9, at 53:46.

186. *Id.*

187. *Id.* at 54:30. For example, often defendants filed motions for summary judgment that were denied by the trial court. Defendants then took writs to the appellate court, where the writ was denied without reasons. As a result, the plaintiff would believe they had defeated the motion twice. Frequently though, defendants took writs to the Louisiana Supreme Court on the appellate court's ruling. The Supreme Court did not rule on the writs immediately and without much notice, the Supreme Court would grant the writ, reverse the lower courts' denials of the motion, and summarily dismiss the case, thereby completely changing the outcome with little to no notice to the parties. *Id.* at 54:10.

188. See discussion *supra* Part I.C; see also *Whitaker v. Coleman*, 115 F.2d 305, 307 (5th Cir. 1940); *Avrick v. Rockmont Envelope Co.*, 155 F.2d 568, 571 (10th Cir. 1946); *Heyman v. Commerce & Indus. Ins. Co.*, 524 F.2d 1317, 1320 (2d Cir. 1975); see generally *Thomas*, *supra* note 32.

189. LA. CODE CIV. PROC. art. 966(H) (2016) (“On review, an appellate court shall not reverse a trial court’s denial of a motion for summary judgment and grant

courts to assign a case for briefing and to permit the parties to request oral argument in the event that the court considers reversing a lower court and granting a motion for summary judgment.<sup>190</sup> This addition was intended to foster fairness by leveling the playing field and to ensure that parties get a chance to argue their case in court.<sup>191</sup> Members of the subcommittee also expressed a desire to treat supervisory writs dealing with motions for summary judgment more like true appeals.<sup>192</sup> Because of the high stakes associated with the grant of a motion for summary judgment,<sup>193</sup> courts should take great care to ensure that granting a motion for summary judgment is appropriate. Access to briefs written by the parties and oral argument when requested will help the appellate court better understand the case at hand and better equip the court to reach a proper result in the case.

*C. What the Revisions Did Not Change: Burdens of Proof and Production*

Although the 2015 revisions brought about a number changes to the substantive law of Article 966, the legal standard for summary judgment did not change with the 2015 revisions. To prevail on a motion for summary judgment, the moving party is still required to show that there is no genuine issue of material fact and that the party is entitled to judgment as a matter of law.<sup>194</sup> The technicalities of the burdens of proof and production also did not change.<sup>195</sup> The revision comments—though not substantive law—indicate that the purpose of the changes made to the paragraphs dealing with the burden of proof was merely to clarify and make explicit the existing burden of proof.<sup>196</sup> The revision comments also state that the provisions are meant to be consistent with the 1997 revisions

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a summary judgment dismissing a case or a party without assigning the case for briefing and permitting the parties an opportunity to request oral argument.”).

190. LA. CODE CIV. PROC. art. 966(H) (2015).

191. *The Legal Ease*, *supra* note 9, at 57:00.

192. *Id.* at 57:39. “True appeal” refers to an appeal taken from a final judgment of the trial court and are generally accompanied by extensive briefing and oral argument, as opposed to supervisory writs, which are taken from interlocutory judgments and are generally not accompanied by briefs or oral arguments. *See supra* note 127 and accompanying text; *The Legal Ease*, *supra* note 9, at 1:01:07.

193. *Id.*

194. LA. CODE CIV. PROC. art. 966 (A)(3) (2016); *see* discussion *supra* Part I.A.

195. LA. CODE CIV. PROC. art. 966 (D)(1) (2016).

196. Price, *supra* note 8, at 7; LA. CODE CIV. PROC. art. 966 cmt. j (2016).

that overruled all cases inconsistent with *Hayes v. Autin*.<sup>197</sup> Therefore, the mover still carries the burden of production.<sup>198</sup> If the mover will not bear the burden of proof on the issue at trial, the mover must only demonstrate a lack of support for the opposing party's claim or defense.<sup>199</sup> The non-moving party still carries the burden to establish the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law, and the facts are still viewed in the light most favorable to the non-moving party.<sup>200</sup> The fact that the underlying legal standards governing motions for summary judgment remain unchanged is important to determining the effectiveness and success of the 2015 revisions and whether the legislature achieved its goals.

### III. MISSION ACCOMPLISHED? EVALUATING THE SUCCESS OF THE 2015 REVISIONS TO ARTICLE 966

Although the fundamentals of summary judgment motion practice and Article 966 remain unchanged, the 2015 revisions did bring many positive changes to Louisiana's summary judgment procedure. The changes effectively simplified and modernized the language and format of the article while correcting the piecemeal nature of the article created by frequent past revisions.<sup>201</sup> The revisions also successfully addressed some of the practical problems that judges and lawyers experienced surrounding summary judgment procedure prior to 2015.<sup>202</sup> Importantly, the changes were made without requiring potentially disruptive substantive changes to well-settled law involving a widely used procedural motion.<sup>203</sup> The revisions changed how summary judgment works in practice, while also trying to avoid exacerbating existing problems or creating new ones. Though the revisions were largely successful in this regard, there is still some concern that certain problems that existed prior to 2015 were not adequately addressed.

#### *A. Extended Deadlines: Balancing Needs with Increased Delay*

The extension of the timing and briefing deadlines successfully addressed the revision subcommittee's concern that the filing deadlines

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197. LA. CODE CIV. PROC. art. 966 cmt. j (2016); *see also supra* Part I.C.

198. LA. CODE CIV. PROC. art. 966(D)(1) (2016).

199. *Id.*

200. *Id.*

201. *See supra* Parts I.D, II.A.

202. *See supra* Part II.B.

203. *See supra* Part II.C.

were much too short.<sup>204</sup> Given the severity of potential consequences for missing a deadline to file a motion for summary judgment and the amount of evidence and briefing that is now common with the motions, a longer period for filing was necessary.<sup>205</sup> The extension of the deadlines helps to ensure that parties moving for summary judgment will have adequate time to craft a well-framed motion and that the opposing party will not be caught unprepared or with inadequate time to respond in opposition to the motion.<sup>206</sup> Further, the extensions also help to ensure that the trial court judge has adequate time to rule on the motion without disrupting the trial process. By clarifying that the court and the parties involved may lengthen the filing and briefing deadlines when necessary, and prohibiting courts from shortening deadlines, parties are now afforded much more flexibility in case management.<sup>207</sup> Further, extending the deadlines counteracts parties who would potentially use unscrupulous practices to unfairly disadvantage the opposing party.<sup>208</sup>

Although the revisions to the timing and briefing deadlines help correct the previous problems, the lengthening of the deadlines might still cause significant delay. As a result of this delay, summary judgment will likely continue to absorb more time and more resources, and it will become even farther removed from the quick means to dispose of cases prior to trial that it was intended to be. This potential consequence is particularly relevant when combined with the changes made to evidentiary procedure and the appeals process, as those changes might also exacerbate the delay.<sup>209</sup>

#### *B. Admitting Inadmissible Evidence: Changes to Evidentiary Procedure Remedy Problems, but Require Caution*

The changes to evidentiary procedure help to resolve the practical problems that existed prior to 2015 and prevent problems that have arisen with a similar rule at the federal level. The evidentiary guidance set forth in the Federal Rules illustrates this point.<sup>210</sup> Federal Rule 56 permits federal courts to consider “materials in the record, including depositions, documents, electronically stored information, affidavits or declarations,

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204. *See supra* Part II.B.1.

205. Price, *supra* note 8, at 6.

206. *The Legal Ease*, *supra* note 9, at 30:15.

207. LA. CODE CIV. PROC. art. 966(B), (C)(1)(a) (2016); *The Legal Ease*, *supra* note 9, at 29:48.

208. *The Legal Ease*, *supra* note 9, at 29:48; *see discussion supra* Part II.B.1.

209. *See infra* Part III.D.

210. FED. R. CIV. P. 56.

stipulations (including those made for the purposes of the motion only), admissions, interrogatory answers, or other materials.”<sup>211</sup> This list is expansive, prompting some commentators writing on the Federal Rules to reason that this list has led to increasing delay and confusion as more evidence is submitted in conjunction with a motion for summary judgment—with more evidence, courts must necessarily spend more time reviewing what is submitted.<sup>212</sup>

The 2015 revisions avoid the problem experienced in federal courts by explicitly prohibiting Louisiana courts from considering anything in the record other than the documents filed in support of or in opposition to the motion and by restricting the admissible documents to the exclusive list in Article 966.<sup>213</sup> Though it may seem counterintuitive that the 2015 revisions first expanded the list of permitted documents before restricting the admissible documents to those explicitly listed, this change in fact addresses multiple problems at once. The expanded but exclusive list makes it clear to practitioners what types of evidence are not admissible, thus limiting the filing of extraneous documents.<sup>214</sup> The list also makes it clear when objections should be made and eliminates the need to sort through a huge number of supporting documents to find which ones are admissible,<sup>215</sup> because now certain documents are clearly permitted and other types of evidence are admissible only when properly authenticated.<sup>216</sup> Importantly, however, the court must consider all documents to which no party objects.<sup>217</sup> As a result of this caveat, poor lawyering or mere oversight could cause the court to consider evidence that is not proper evidence and that would not be admissible at trial.<sup>218</sup>

The 2015 revisions also addressed the problems arising from evidence being “deemed admitted” when it was cited in and attached to a motion

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211. *Id.*

212. See, e.g., Diane P. Wood, *Summary Judgment and the Law of Unintended Consequences*, 36 OKLA. CITY U.L. REV. 231, 241–42 (2011); Boron, *supra* note 54; BRUNET & REDISH, *supra* note 58, § 10:2.

213. LA. CODE CIV. PROC. art. 966(A)(4) (2016); LA. CODE CIV. PROC. art. 966 cmt. c (2016).

214. *The Legal Ease*, *supra* note 9, at 25:50.

215. *Id.*

216. LA. CODE CIV. PROC. art. 966(A)(4) (2016); see also LA. CODE CIV. PROC. art. 966 cmt. c (2016).

217. LA. CODE CIV. PROC. art. 966(D)(2) (2016) (“The court may consider only those documents filed in support of or in opposition to the motion for summary judgment and *shall* consider any documents to which no objection is made.”) (emphasis added).

218. *The Legal Ease*, *supra* note 9, at 42:00.

for summary judgment.<sup>219</sup> According to comments from members of the subcommittee, to bring evidence before the court, it now must be filed with the motion for summary judgment.<sup>220</sup> No consideration of the admissibility of the evidence will occur unless a party objects to the evidence.<sup>221</sup> Although removing the unclear “deemed admitted” language will remedy the problems that arose from it, the problem with improper evidence being considered on motions for summary judgment still exists. Before 2015, improper evidence would be “deemed admitted” if it was merely cited in and attached to a motion for summary judgment.<sup>222</sup> Now, however, improper evidence can be admitted simply because a lawyer does not object. This risk means that summary judgment motions could be decided on evidence that would not be admissible at trial—and this scenario is problematic given the high stakes attached to summary judgment motions, a concern acknowledged by the revision committee.<sup>223</sup>

Finally, by eliminating the motion to strike, the revisions help streamline the summary judgment process and combat concerns about delay. Hearings on motions to strike will no longer occur in summary judgment proceedings and will ideally speed up the summary judgment process.<sup>224</sup> Requiring any evidentiary objections to be made in writing and included in a memorandum and requiring the trial court to provide reasons for their rulings on the objections help to create a clearer record for appeals. Logically, a clear record will help appellate courts make better determinations as to whether the trial court’s grant or denial of the motion was proper and allow practitioners to understand why certain evidence was not admitted, providing resources for future cases in which similar situations may arise.

### *C. Paragraph (G) and the Law of the Case: Simple Changes Create Clarity*

The changes made to Paragraph (G)<sup>225</sup> mean that now when a party is dismissed from a suit on a motion for summary judgment, the party’s

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219. LA. CODE CIV. PROC. art. 966(F)(2) (2016).

220. *The Legal Ease*, *supra* note 9, at 35:20.

221. LA. CODE CIV. PROC. art. 966(D)(2) (2016); *see also* LA. CODE CIV. PROC. art. 966 cmt. k (2016).

222. *The Legal Ease*, *supra* note 9, at 25:40; *see also* LA. CODE CIV. PROC. art. 966(F)(2) (2016).

223. *The Legal Ease*, *supra* note 9, at 42:40.

224. *Id.*

225. LA. CODE CIV. PROC. art. 966(G) (2016); *see supra* Part II.B.3 for a discussion of these changes.

dismissal becomes the law of the case—binding the parties by operation of law.<sup>226</sup> The judge is not required to state that Paragraph (G) applies and there are no exceptions to its applicability.<sup>227</sup> These small changes remedy a great deal of confusion with regard to the paragraph's applicability.<sup>228</sup> The changes to Paragraph (G) also affect parties relying on theories of third-party liability as a defense.<sup>229</sup> The revisions make it clear that when a party is found not negligent or not at fault through a motion for summary judgment, that party cannot be mentioned at trial or placed on the jury verdict form to be considered in the ultimate allocation of fault.<sup>230</sup> As a result, defendants who wish to rely on a theory of third-party liability will be motivated to defend against the motion that would eliminate the third party.<sup>231</sup>

*D. Appellate Procedure: Benefits of the New Law Will Outweigh the Burden of Delay*

The addition of Paragraph (H), which created a new procedure for the review of motions for summary judgment by appellate courts, was described as “perhaps the most controversial” portion of the 2015 revisions by members of the subcommittee.<sup>232</sup> The addition of this paragraph, which requires appellate courts to assign summary judgment appeals for briefing,<sup>233</sup> will greatly benefit practitioners and parties involved in litigation, particularly when a motion for summary judgment is denied, appealed, and subsequently granted by an appellate court. When the parties are notified that briefs are to be submitted, they are effectively put on notice that their case is going to be considered by the appellate court.<sup>234</sup> Even more importantly, the brief request puts the party who won the summary judgment motion at the trial court level on notice that the case is potentially going to be dismissed via a granted summary judgment motion.<sup>235</sup> These circumstances encourage settlement negotiations and out-of-court resolution, which helps to further the purpose of summary

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

227. LA. CODE CIV. PROC. art. 966 cmt. m (2016).

228. See discussion *supra* Part II.B.3.

229. *The Legal Ease*, *supra* note 9, at 50:35.

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

231. *The Legal Ease*, *supra* note 9, at 50:35.

232. Price, *supra* note 8, at 8.

233. LA. CODE CIV. PROC. art. 966(H) (2016).

234. *The Legal Ease*, *supra* note 9, at 56:10.

235. *Id.*

judgment—the expeditious disposition of cases.<sup>236</sup> Additionally, permitting the parties to request oral argument counteracts the concern that summary judgment deprives parties of their day in court by giving them an opportunity to argue their case before the appellate court. The oral argument provision, combined with the now-required briefing, will help the appellate court to make a better, more informed decision regarding whether to grant the motion for summary judgment.<sup>237</sup>

Though the changed requirements for appeals are likely to cause some additional delay, particularly if the parties request oral argument, the benefits will outweigh the potential downsides. Treating motions for summary judgment before appellate courts more like true appeals—rather than normal supervisory writs<sup>238</sup>—will help to ensure the proper disposition of cases on motions for summary judgment. This result is particularly important given the high stakes attached to a granted motion for summary judgment.<sup>239</sup>

#### IV. MOVING FORWARD WITH MOTIONS FOR SUMMARY JUDGMENT

The 2015 revisions were largely successful in achieving the goals set out by the Law Institute and the subcommittee. However, judges and practitioners ought to keep in mind a few important considerations when working with the new Article 966. First, the extension of the timing and briefing deadlines increases the possibility of delay,<sup>240</sup> especially when combined with the new required briefing and the potential for oral argument at the appellate level.<sup>241</sup> Though this increased possibility for delay does run counter to the true purpose of motions for summary judgment, the benefits of these changes will likely outweigh the potential downsides. Regardless of these benefits, courts and practitioners should not needlessly delay the summary judgment. Courts ought to resist the urge to grant extensions unless an extension is absolutely necessary. Similarly, lawyers ought to avoid requesting extensions when possible, especially now that the deadlines provided by the revisions are more generous.<sup>242</sup>

Second, concerns still remain regarding summary judgment evidentiary procedure and the possibility that otherwise inadmissible evidence can be considered by the trial court on motions for summary judgment, even after

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236. LA. CODE CIV. PROC. art. 966 cmt. a (1960).

237. *The Legal Ease*, *supra* note 9, at 51:30.

238. *See supra* note 109.

239. *See supra* Part II.B.1.

240. *See supra* Part II.B.1.

241. *See supra* Part II.B.4.

242. *See supra* Part II.B.1, III.A.

the 2015 revisions.<sup>243</sup> Because no consideration of the admissibility of evidence is required to occur if no objections are made regarding that evidence, poor lawyering or even mere oversight could allow inadmissible evidence to be considered. This scenario can result in a motion for summary judgment being decided on improper evidence, which is particularly important in light of the high stakes. Although it is beyond the scope of this Comment to propose a formal solution to this problem, practitioners ought to take great care to ensure that they are objecting to any potentially inadmissible evidence in their memoranda and that they are attentive to the admissibility of the evidence that they are submitting in conjunction with the motion.

To further combat issues with delay, it may also be beneficial for Louisiana courts to consider adopting rules that incorporate summary judgment more thoroughly into pre-trial planning. Courts could incorporate motions for summary judgment into case management orders and discovery planning and even hold special pre-motion conferences.<sup>244</sup> These conferences, particularly in complex cases, would allow the parties to discuss and streamline issues to be raised in the motion. These conferences in turn would reduce the amount of briefing necessary, thereby reducing both delay and the costs of filing the motion, simply because of increased communication between the court and the parties.<sup>245</sup> Some individual judges at the federal level already require similar conferences, and the use of these conferences has been met with some success.<sup>246</sup> Further, courts can include these conferences in their own local procedural rules, given that the local rules remain in line with the requirements of the Code of Civil Procedure. This incorporation would allow additional changes to summary judgment procedure to occur on a case-by-case basis, without requiring further revision to Article 966. Minimizing the need to repeatedly revise the article makes it possible to reap the full benefits of the revisions without returning to the disorganized state of the article prior to the 2015 revisions.

#### CONCLUSION

The comprehensive 2015 revisions to Louisiana Code of Civil Procedure Article 966 governing motions for summary judgment made numerous changes to both the structure and substance of the article. Structurally, the article was reorganized, correcting for the repeated piecemeal revisions of the past 20 years and creating a logical flow through the article. The substantive changes include significant extensions of the

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243. *See supra* Part III.B.

244. Gensler & Rosenthal, *supra* note 19, at 520–21.

245. *Id.*

246. *Id.*, at n.145–48; *see generally* BRUNET & REDISH, *supra* note 58, § 3:3.

timing and briefing deadlines, expansion of the exclusive list of documents that can be submitted as evidence, streamlining the process for objecting to evidence, clarifying the provisions of Paragraph (G), and adding an entirely new provision governing appellate procedure. These changes successfully addressed the practical problems that existed in Louisiana summary judgment procedure and helped to make the process as a whole more logical and orderly. Though some concerns still remain, particularly regarding delay and the consideration of potentially inadmissible evidence, the benefits of the 2015 revisions largely outweigh these downsides. Further, the effects of these downsides can be mitigated to the extent that lawyers and judges keep the true purpose of motions for summary judgment in mind and seek to act efficiently within the bounds of the new Article 966.

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\* J.D./D.C.L., 2017, Paul M. Hebert Law Center, Louisiana State University. The author thanks her husband, John Filetti, for his unending love, encouragement, and patience. She also thanks her family—Brad and Kelley Cook—for their unwavering love and support throughout her life. Special thanks are also due to Professor P. Raymond Lamonica and to the editorial boards of Volume 76 and 77 of the *Louisiana Law Review*, for their thoughtful comments and edits during the writing process.

