SUMMARY JUDGMENT AND EXPERT TESTIMONY

In *Independent Fire Insurance Company v. Sunbeam Corporation*,[1] an important recent decision which will be of special interest to toxic tort litigators, the Louisiana Supreme Court clarified the role of expert testimony in supporting and opposing a motion for summary judgment. The Court also reiterated several traditional principles of summary judgment law which endure even after the 1996 and 1997 amendments to La. Code Civ. P. art. 966.

Before *Sunbeam*, supporting or opposing a motion for summary judgment using expert testimony was an uncertain practice. Courts of appeal inconsistently applied La. Code Civ. P. art. 967, describing the type of documentation a party may submit. The First Circuit held that expert opinions do not meet article 967's requirement of "personal knowledge", though it tempered that stance to allow expert opinions submitted by way of deposition. The Third and Fifth Circuits disallowed expert opinions not based on first-hand observation or knowledge, whether by affidavit or deposition. The Fourth Circuit allowed expert opinion to support a motion for summary judgment. The Second Circuit has held both ways. In *Sunbeam*, the Supreme Court resolved the conflict among the circuits by deciding that expert opinion testimony, whether by affidavit or deposition, may be considered in support of or in opposition to a motion for summary judgment. Assuming the testimony would be admissible at trial, it must be considered at the summary judgment stage.

The case began after homeowners and their insurer filed suit against the manufacturer of a propane gas barbecue grill, contending a fire in the home was caused by a defective grill or by a defective safety valve on the propane tank attached to the grill. The grill manufacturer third-partied a service station, who the plaintiff then added as a direct defendant, claiming the service station negligently overfilled a spare propane tank, causing vented vapors to ignite during grill use while cooking hamburgers. The third-party defendant service station filed a motion for summary judgment, asserting there was no evidence it had overfilled the spare propane tank nor any evidence it had contributed causally to the fire. Along with the deposition of the homeowner and a service station employee (who testified he didn't remember filling the spare tank, described the customary procedure for filling a propane tank like the one at issue, and testified that the service station had state inspected equipment and proper training to fill propane tanks), the service station also produced three expert witnesses by deposition. The first expert, a mechanical engineer, testified the spare tank was not overfilled, based on the eyewitness testimony of the homeowner and his own examination of the service station facility, which met applicable safety standards for filling propane gas tanks. Another engineer opined the fire started from a gas discharge from the safety valve of the operating grill tank where it was subjected to excessive heat. The third expert said the most likely cause was the malfunction of the hose line connected to the operating grill tank.

In opposition to the service station's motion for summary judgment, the plaintiffs and third-party plaintiffs produced the report and deposition of the grill manufacturer's own expert employee. That expert performed tests using equipment similar to the homeowner's grill but with a properly filled spare propane tank and a non-defective operating tank and grill. After testing the grill by replicating the facts as described by the homeowner, he concluded it was not

possible that the flames came from the operating tank. This expert opined that, counter to the homeowner's eyewitness testimony and recollection of the fire, the only possible scenario was that the fire occurred from the accidental venting of the safety relief valve of an overfilled spare tank. The expert's conclusion was that the fire was the service station's fault. This was not based on any first-hand knowledge.

The Supreme Court found a genuine issue of material fact existed, reversing the court of appeal which had affirmed the trial court's granting of summary judgment for the service station. The Court commented that "it would be inequitable and illogical to allow a party who has eyewitness testimony to be granted summary judgment over a party who has no eyewitness testimony, but who does have expert opinion evidence, which if believed, would contradict the eyewitness testimony." The Court thus adopted the *Daubert* standards[ii] for admissibility of expert opinion evidence at the summary judgment stage, as have the federal courts. The Court pointed out that although no affidavits were submitted in connection with the motion at issue, they may properly be used in support of or in opposition to a motion for summary judgment and are subject to challenge by way of a *Daubert* hearing, a motion to strike, or counter affidavits.

The Court emphasized four principles in its decision. The first is that the trial judge cannot make credibility determinations on a motion for summary judgment. Second, the court must not attempt to evaluate the persuasiveness of competing scientific studies. In performing its gatekeeping analysis at the summary judgment stage, the court must "focus solely on the principles and methodology, not on the conclusions they generate."[iii] Third, the court "must draw those inferences from the undisputed facts which are most favorable to the party opposing the motion."[iv] Fourth, and most importantly, summary judgments deprive the litigants of the opportunity to present their evidence to a jury and should be granted only when the evidence presented at the motion for summary judgment establishes that there is no genuine issue of material fact in dispute. If a party submits expert opinion evidence in opposition to a motion for summary judgment that would be admissible under *Daubert* and the other applicable evidentiary rules, and is sufficient to allow a reasonable juror to conclude that the expert's opinion on a material fact more likely than not is true, the trial judge should deny the motion and let the issue be decided at trial.

The Court's decision in reversing a grant of summary judgment allowed the opinion of one expert to successfully counter eyewitness testimony and three other experts. *Sunbeam* lays down a uniform approach to the role of expert testimony in supporting and opposing summary judgment. Equally important, it restates the overall law of summary judgment in a manner which restores some of the imbalances created by overly expansive interpretations of the 1996 and 1997 amendments.

i 99-2257 (La. 2/29/00), 2000 WL 225869.

ii *Daubert v. Merrell Dow Chemicals, Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.ED.2d 469 (1993).

iii Citing *Daubert*, at 595.

iv Citing Frank L. Maraist and Harry T. Lemmon, 1 Louisiana Civil Law Treatise, Civil Procedure, § 6,8, p. 145 (1999).