SUPREME COURT OF LOUISIANA

No. 99-C-2181
consolidated with
99-C-2257

INDEPENDENT FIRE INSURANCE COMPANY,
ELIZABETH CANNON, WIFE OF AND NARY CANNON

versus

SUNBEAM CORPORATION, SUNBEAM-OSTER COMPANY, INC.
AND SUNBEAM-OSTER HOUSEWARES, INC.,
D/B/A SUNBEAM OUTDOOR PRODUCTS, AND RAY JENKINS AND/OR
OTHA JENKINS D/B/A JENKINS TOWING AND
JENKINS SHELL SERVICE STATION

KNOLL, JUSTICE, dissenting in part.

I agree with the majority's analysis that this Court adopt the federal *Daubert-Foret* standards for admissibility of expert opinion evidence at the summary judgment stage. I disagree, however, with the majority's conclusion that the evidence submitted by plaintiffs and third-party plaintiffs (nonmovers in the motion for summary judgment) created a genuine issue of material fact, *i.e.*, that Jenkins Shell overfilled the spare tank and this tank caused the plaintiffs' harm. The majority's error arises from its failure to appreciate that the nonmovers' evidence, *i.e.*, Sunbeam's engineer's naked expert opinion, did not meet the requirement of LA. CODE CIV. P. art. 967 in that it did not "set forth *specific facts* showing that there is a genuine issue for trial" that Jenkins Shell overfilled the spare tank and that this tank caused the plaintiffs' harm. (emphasis added). *See Monks v. G.E. Co.*, 919 F.2d 1189, 1192 (6th Cir. 1990) ("[T]he issue of admissibility of an expert's affidavit is distinct from the issue of whether the affidavit is sufficient to withstand a summary judgment motion.") A party opposing summary judgment may not rely on bare ultimate expert conclusions to secure a free pass to trial.

Jenkins Shell filed its motion for summary judgment and supported its motion with the deposition of Mr. Cannon. Pertinent to the issues of whether Jenkins Shell

overfilled the spare tank and whether this tank was the cause of plaintiffs' damage, Mr. Cannon testified that he did not remember when or where he last had the spare tank filled and that the spare tank had been used once or twice after it was allegedly overfilled but before the fire. As the majority correctly points out, a party opposing summary judgment may not rest on the mere allegations or denials in his pleading. LA. CODE CIV. P. art. 967. Instead, his opposition, by affidavits or other evidence, must set forth "*specific facts* showing that there is a genuine issue for trial." *Id.* (emphasis added); *see also Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578, 2598 (1993) (explaining that "[w]hen an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict" and summary judgment is appropriate); *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421 (9th Cir. 1995) (noting that an "expert opinion is admissible and may defeat summary judgment if it appears that the affiant is competent to give an expert opinion and the factual basis for the opinion is stated in the affidavit"); *In re* Agent Orange Prod. Liab. Litig., 818 F.2d 187, 193 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988) (noting that to defeat summary judgment, expert affidavits cannot involve "mere speculation or idiosyncratic opinion"). Thus, federal jurisprudence has held that an expert's naked opinion, although admissible at trial, may not suffice to defeat summary judgment.[1] *Hayes*, 8 F.3d at 92 (concluding that the federal rules of

[1] *See Williams v. Ford Motor Co.*, 187 F.3d 533, 543 (6th Cir. 1999) (holding that to defeat summary judgment an expert's opinion must be more than a conclusory assertion about ultimate legal issues); *Huey v. United Parcel Serv., Inc.*, 165 F.3d 1084, 1087 (7th Cir 1999) (stating that an expert must "substantiate his opinion; providing only an ultimate conclusion with no analysis is meaningless"); *Boyd v. State Farm Ins.* Co., 158 F.3d 326, 331 (5th Cir 1998) (affirming the court's position that, in the context of summary judgment, FED. R. EVID 705 requires an expert's affidavit contain factual support for the opinion expressed therein); *Hayes v. Douglas Dynamics, Inc.*, 8 F.3d 88, 92 (1st Cir. 1993) (emphasizing that although "expert testimony may be more inferential than that of fact witnesses, in order to defeat a motion for summary judgment an expert opinion must be more than a conclusory assertion about ultimate legal issues"); *Richardson v. Richardson-Merrell, Inc.*, 857 F.2d 823, 829-32 (D.C. Cir. 1988) (holding that an expert's declaration, full of assertion but

evidence regarding expert testimony were not intended "to make summary judgment impossible whenever a party has produced an expert to support its position"). This results from the rigor of FED. R. CIV. P. 56(e), *i.e.*, requiring the party opposing summary judgment to "set forth specific facts," compared with the wide latitude of FED. R. EVID. 703-705 governing expert testimony.

Sunbeam's expert opinion does not contain a scintilla of specific facts pertinent to the material claim at issue that Jenkins Shell overfilled the spare tank and that this tank was the cause of plaintiffs' harm. These are the only specific facts that bring Jenkins Shell into this litigation. A simple reading of the expert report and opinion reveals no facts to support an assertion that Jenkins Shell overfilled the spare tank or that a tank was even overfilled, but only argument, supposition, and bare conclusions concerning irrelevant details and general assertions to this claim. Simply stated, Sunbeam's expert opinion is nothing more than a simple assumption lacking any factual support that Jenkins Shell overfilled the spare tank and that this tank was the cause of plaintiffs' harm. The expert opinion assumes the ultimate fact in this claim, *i.e.*, that Jenkins Shell overfilled that spare tank. (*See* Expert Report of Bill Baynes, Opinions #9 & #10).[2] There are simply no facts in the Sunbeam expert opinion to create a question of fact that Jenkins Shell overfilled the spare tank. Indeed, as the trial court stated in its oral reasons for granting summary judgment:

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empty of facts and reason, will not defeat a motion for summary judgment, for the trial court must "look behind [the expert's] ultimate conclusion . . . and analyze the adequacy of its foundation") *Mid-State Fertilizer Co. v. Exchange Nat'l Bank*, 877 F.2d 1333, 1339 (7th Cir. 1989).

[2] Opinions #9 & #10 of Mr. Baynes' expert report state:

> 9. It is not foreseeable that a liquid propane cylinder would be overfilled as this practice is in contravention to all published guidelines, industry standards, regulations and the law.
>
> 10. The only way a cylinder can be overfilled in [sic] through the filler's failure to exercise reasonable care in filling of the cylinder.

> There is no fact that I can find anywhere that indicates that [Jenkins Shell] overfilled that tank.
>
> In fact, everything is to the contrary, that there is nothing shown that he overfilled the tank. Mr. Bains' [sic] report from my point of view is - - doesn't even include the testing of a similar type of charbroil [sic] tank. But more importantly, there is nothing that indicates that Mr. Bains [sic], who was - - upon whose report you are relying, that he did anything to show or based his opinion on any facts that had to do with exactly what happened at Jenkins Service Station as to the filling of the tank.
>
> And, specifically, his deposition states categorically that, no, he doesn't know how it was filled. . . .

In my view, opinions in expert affidavits do not automatically create a genuine issue of material fact. Given the codal dictate that summary judgment is "favored and shall be construed to accomplish these ends," I cannot agree that the evidence submitted by plaintiffs and third-party plaintiffs created a genuine issue of material fact that would defeat granting summary judgment in favor of Jenkins Shell. While an expert opinion is deemed admissible in opposing summary judgment, it should not defeat summary judgment when such an opinion is not grounded on specific facts that are material to the genuine issue for trial. Nonmovers have failed to establish a genuine issue of fact regarding their claims against Jenkins Shell, and the trial court properly granted summary judgment on those claims. Absent specific facts, the majority's conclusion does nothing more than frustrate this codal dictate and will render summary judgment practice a battle of baseless expert opinions. Accordingly, I respectfully dissent in part.