Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **21st day of October, 2022** are as follows:

BY McCallum, J.:

2021-OC-01906 STEPHEN AMEDEE & TANYA AMEDEE VS. AIMBRIDGE HOSPITALITY LLC D/B/A EMBASSY SUITES NEW ORLEANS & THE CITY OF NEW ORLEANS (Parish of Orleans Civil)

REVERSED AND REMANDED. SEE OPINION.

Crain, J., concurs.

SUPREME COURT OF LOUISIANA

No. 2021-OC-01906

STEPHEN AMEDEE & TANYA AMEDEE

VS.

AIMBRIDGE HOSPITALITY LLC D/B/A EMBASSY SUITES NEW ORLEANS & THE CITY OF NEW ORLEANS

On Supervisory Writ to the Orleans Civil District Court, Parish of Orleans Civil

McCallum, J.

We granted certiorari in this matter to resolve a split among the courts of appeal concerning a specific procedural issue – where multiple defendants are named in a lawsuit and one is dismissed by a summary judgment motion, may another defendant appeal that dismissal if the plaintiff failed to similarly appeal? The appellate court in this case raised this issue *sua sponte* and determined that, absent an appeal by a plaintiff, a defendant has no right to appeal the dismissal of a co-defendant. *Amedee v. Aimbridge Hosp. LLC*, 2020-0590 (La. App. 4 Cir. 12/1/21), 332 So. 3d 212. It then dismissed the appeal taken by Premium Parking of South Texas, L.L.C. ("Premium Parking") of a summary judgment in favor of the City of New Orleans (the "City"), a co-defendant.

The court of appeal's decision focused largely on La. C.C.P. art. 966 G, which provides that the fault of a party or non-party "shall not be considered in any subsequent allocation of fault," where a finding has been made by summary judgment that the "party or non-party is not negligent, is not at fault, or did not cause in whole or in part the injury or harm alleged." We agree with the court of appeal that Article 966 G prohibits the introduction of evidence at trial of the fault of a party dismissed by summary judgment and further prohibits consideration of that party's fault in the ultimate allocation of fault. Importantly, however, Article 966 addresses

summary judgments and the summary judgment procedure, exclusively. It neither references nor establishes the rights of any party to appeal a summary judgment. Thus, while Article 966 G must be considered in evaluating the issue presented by this case, we must also consider other codal and jurisprudential authorities concerning appeals, particularly given the effect that the application of Article 966 G has on our comparative fault system and a defendant's right to present its defense.

After reviewing the law and argument of counsel, we hold that a defendant may appeal the summary judgment dismissal of a co-defendant even when the plaintiff chose not to appeal that judgment. Our decision is limited to the narrow issue before us, and we decline to issue an advisory opinion on any other issue raised by the parties in their briefs.[1] *See, e.g., Kocher v. Truth in Pol., Inc.*, 2020-01153, p. 2 (La. 12/22/20), 307 So. 3d 182, 184 ("courts should not decide abstract, hypothetical or moot controversies, or render advisory opinions with respect to such controversies.") (Citation omitted). We likewise decline to address the City's argument that its dismissal by summary judgment should be affirmed on the merits because there are no genuine issues of material fact as to its lack of liability; the court of appeal did not reach the merits of that underlying motion.[2]

[1] In its brief to this Court, for example, the City submits that, in the event this Court finds that Premium Parking has a right to appeal the judgment, this Court should make the additional finding that, although evidence of the City's fault may be admissible at trial, the City cannot be held liable for any damages to the plaintiffs because the plaintiffs did not appeal the judgment dismissing the City and thus, the judgment is final as to them.

[2] *See Boudreaux v. State, Dep't of Transp. & Dev.*, 2001-1329, p. 9 n.6 (La. 2/26/02), 815 So. 2d 7, 10 (the "ABA STANDARDS RELATING TO APPELLATE COURTS state that 'review by a supreme court should be available only after review has been had before an intermediate appellate court, and then only if the supreme court determines that such review is warranted in a specific case.' ").

FACTS AND PROCEDURAL BACKGROUND

Plaintiff, Stephen Amedee,[3] brought this lawsuit for personal injuries sustained when he tripped and fell on the driveway entrance to the Embassy Suites Hotel in New Orleans, Louisiana. The named defendants include Premium Parking, the City, Aimbridge Hospitality L.L.C., d/b/a Embassy Suites New Orleans ("Aimbridge"), Mydatt Services, Inc., d/b/a/ Block by Block ("Block by Block"), and the Downtown Development District ("DDD").

After conducting discovery, a number of the defendants filed motions for summary judgment, several of which were denied. Three of the summary judgment motions were granted, including one in favor of the City, and the plaintiffs' claims against the City were dismissed. Premium Parking had been the only party to oppose the City's summary judgment motion in the trial court and was the only party to appeal the judgment.[4]

After oral argument, the court of appeal raised the issue of whether Premium Parking had a legal right to appeal the trial court's judgment dismissing a co-defendant and ordered briefing on the issue. The court then issued its opinion, noting a split among the circuits, and joining those decisions which hold that a defendant has no right to appeal the dismissal of a co-defendant when the plaintiff did not appeal.

In dismissing Premium Parking's appeal, the court of appeal cited this Court's decision in *Nunez v. Commercial Union Insurance Company*, 2000-3062, p. 1 (La. 2/16/01), 780 So. 2d 348, 349, for the principle that "[w]hen a judgment dismisses one of several claims by the plaintiff, *the plaintiff must appeal* the adverse judgment to obtain affirmative relief." *Amedee*, 2020-0590, p. 3, 332 So. 3d at 214-15.

[3] Mr. Amedee's wife, also a plaintiff in this action, has asserted a loss of consortium claim.

[4] While the plaintiffs opposed the motions of some of the defendants, they did not oppose the City's motion. Nor did plaintiffs appeal the judgment in the City's favor.

(Emphasis in the original). It reasoned that the failure of the plaintiff to appeal a judgment rendered it final and, once "a final judgment acquires the authority of the thing adjudged, no court has jurisdiction to change the judgment, regardless of the magnitude of the final judgment's error." *Id*., 2020-0590, p. 3, 332 So. 3d at 215 (quoting *Barrasso Usdin Kupperman Freeman & Darver, L.L.C. v. Burch*, 2014-1020, p. 10 (La. App. 4 Cir. 3/18/15), 163 So.3d 201, 208).

The court of appeal found its decision to be consistent with La. C.C.P. art. 966 G, observing that the article is "clear and unambiguous that once a court grants a motion for summary judgment, the dismissed party 'shall not be considered in any subsequent allocation of fault.'" *Amedee*, 2020-0590, pp. 9-10, 332 So. 3d at 218. Thus, because the trial court determined "that the City is free from fault, the City may not be reintroduced into the litigation pursuant to La. C.C.P. art. 966(G)." *Id*., 2020-0590, p. 10, 332 So. 3d at 218. Although it found Premium Parking's appeal to be "meritless" based on its finding that it could not appeal the City's dismissal, the court made no finding as to the actual merits of the City's summary judgment motion.

Premium Parking thereafter filed a writ application with this Court which was granted. *Amedee v. Aimbridge Hosp. LLC*, 2021-01906 (La. 4/5/22), 335 So. 3d 248.

LAW AND DISCUSSION

Our task in this matter is to examine the question of *who* may appeal a judgment and, more specifically, whether a defendant has the right to appeal a judgment granting a co-defendant's motion for summary judgment where the plaintiff chose not to appeal that judgment. We recognize competing interests here: (1) a plaintiff's right to choose (and pursue claims against) defendants in a lawsuit (subject, of course, to a defendant's right to urge the fault of others under La. C.C.P. art. 2323, *infra*, or to file incidental demands), and (2) a defendant's right to put on

its defense, which, too, implicates its right to establish the comparative fault of others (both named and unnamed) under La. C.C.P. arts. 2323 and 2324.

We start by setting forth the general legal principles implicated by this case which guide our analysis of the issue presented.

Appeals, generally

This Court has recognized that "[a]n appeal is a constitutional right and any doubt as to the right of an appeal must be resolved in favor of the appeal." *Harnischfeger Corp. v. C.W. Greeson Co*., 53 So. 2d 488, 489 (La. 1951); *Tennessee Gas Transmission Co. v. Violet Trapping Co*., 176 So. 2d 425, 431 (1965) ("The right of an appeal in Louisiana is a constitutional right in most instances. . . .").[5] This right, one that "should be construed liberally,"[6] is derived from Article I, §22 of our constitution, which provides that "[a]ll courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights." We have interpreted this Section to afford "every individual" the "right to an adjudication by some tribunal having original jurisdiction" and "to additionally afford[] the right of appeal." *Bienvenu v. Angelle*, 223 So. 2d 140, 145 (La. 1969), *rev'd on other grounds* by *Gonzales v. Xerox Corp*., 320 So. 2d 163 (La. 1975) (interpreting the substantively indistinguishable predecessor to Article 1, §22, then-Article I, §6).

The right to an appeal is not unfettered, and our law imposes certain restrictions on this right. The time delays for taking an appeal, for example, vary

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[5] In the criminal context, our Constitution's Declaration of Rights expressly grants the right to an appeal in Article I, § 19 ("No person shall be subjected to imprisonment or forfeiture of rights or property without the right of judicial review based upon a complete record of all evidence upon which the judgment is based"). *See also, State v. Clark*, 2019-1077, p. 1 (La. 5/1/20), 295 So. 3d 935, 936 ("There is a constitutional right to appeal (or to other review on the record) in criminal cases in Louisiana when the defendant is to be subjected to imprisonment or fine.").

[6] *Deichmann v. Moeller*, 2018-0358, p. 11 (La. App. 4 Cir. 12/28/18), 318 So. 3d 833, 840, *writ denied*, 2019-0162 (La. 3/25/19), 267 So. 3d 601 (quoting *Succession of Bongiovanni*, 183 So. 570, 572 (La. App. 1 Cir. 1938)).

depending on the nature of the judgment appealed and the court from which the judgment was rendered.[7] The only statutory bar to an appeal is found at La. C.C.P. art. 2085, entitled "Limitations on appeals," which precludes an appeal "by a party who confessed judgment in the proceedings in the trial court or who voluntarily and unconditionally acquiesced in a judgment rendered against him."

The right of appeal is so significant that it is even granted to those who are not parties to a lawsuit. *See* La. C.C.P. art. 2086 ("Right of third person to appeal" – "A person who could have intervened in the trial court may appeal, whether or not any other appeal has been taken."); *see also, Rourke v. Est. of Dretar*, 2017-672, p. 5 (La. App. 5 Cir. 5/23/18), 248 So. 3d 653, 657 (the right to appeal under Article 2086 "is extended not only to the parties to the action in which the judgment is rendered, but also to a third-party when such party is allegedly aggrieved by the judgment.").

An appeal is defined simply as "the exercise of the right of a party to have a judgment of a trial court revised, modified, set aside, or reversed by an appellate court." La. C.C.P. art. 2082. There is no codal or statutory authority that limits the right of appeal to any particular party (or non-party as in the case of an appeal by a third party pursuant to Article 2086). Our statutes only define those judgments for which appeals may be taken. Louisiana Code of Civil Procedure art. 2083 A provides that a "final judgment is appealable in all causes in which appeals are given by law. . . ." In certain cases, a partial judgment may be final (and thus, appealable),

[7] The time delays for appealing a judgment to a court of appeal and to this Court are limited under La. C.C.P. arts. 2086 and 2121, and La. C.C.P. art. 2166, respectively. Our laws set forth a variety other limitations on time periods for taking an appeal. *See, e.g.*, La. C.C.P. art. 5002 (delay period for appealing judgments of city and parish courts); La. C.C.P. art. 4735 (appeal of a judgment of eviction); La. R.S. 13:5033 (appeal of judgment in an action by the state for the determination of collection of any tax, license, interest, or penalty claimed to be due under any statute).

as is the case here, where the court "[g]rants a motion for summary judgment, as provided by Articles 966 through 969. . . ." La. C.C.P. art. 1915 A(3).[8]

Louisiana Code of Civil Procedure article 966 G

The summary judgment article, La. C.C.P. art. 966, underwent substantial revisions in 1996 by Act No. 9 of the First Extraordinary Session of 1996. The article has been revised several times, and in the 2010 revision, the legislature added subpart F, which provided at the time as follows:

> When the court determines, in accordance with the provisions of this Article, that a party or nonparty is not negligent, not at fault, or did not cause, whether in whole or in part, the injury or harm alleged, that party or nonparty may not be considered in any subsequent allocation of fault. Evidence shall not be admitted at trial to establish the fault of that party or nonparty nor shall the issue be submitted to the jury. This Paragraph shall not apply when a summary judgment is granted solely on the basis of the successful assertion of an affirmative defense in accordance with Article 1005.

Subpart F was amended in 2012 and read:

> (1) When the court grants a motion for summary judgment in accordance with the provisions of this Article, that a party or nonparty is not negligent, not at fault, or did not cause, whether in whole or in part, the injury or harm alleged, that party or nonparty shall not be considered in any subsequent allocation of fault. Evidence shall not be admitted at trial to establish the fault of that party or nonparty nor shall the issue be submitted to the jury nor included on the jury verdict form. This Paragraph shall not apply when a summary judgment is granted solely on the basis of the successful assertion of an affirmative defense in accordance with Article 1005, except for negligence or fault.
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> (2) If the provisions of this Paragraph are applicable to the summary judgment, the court shall so specify in the judgment. If the court fails to specify that the provisions of this Paragraph are applicable, then the provisions of this Paragraph shall not apply to the judgment.

[8] Article 1915 A(1) also provides that a partial final judgment is one that "[d]ismisses the suit as to less than all of the parties, defendants, third party plaintiffs, third party defendants, or intervenors."

In 2013, paragraph F was re-designated as paragraph G, without any other change. The last revision of Article 966 G occurred in 2015, and it now provides:

> When the court grants a motion for summary judgment in accordance with the provisions of this Article, that a party or non-party is not negligent, is not at fault, or did not cause in whole or in part the injury or harm alleged, that party or non-party shall not be considered in any subsequent allocation of fault. Evidence shall not be admitted at trial to establish the fault of that party or non-party. During the course of the trial, no party or person shall refer directly or indirectly to any such fault, nor shall that party or non-party's fault be submitted to the jury or included on the jury verdict form.

Defendant's right to appeal

Historically, our jurisprudence recognized that a defendant could appeal the dismissal of a co-defendant, even when the plaintiff did not appeal that dismissal. This Court first addressed the issue in *Emmons v. Agric. Ins. Co*., 158 So. 2d 594, 597 (1963), and framed the issue as "the right of appeal of one defendant against his co-defendant where no third-party pleading was filed by appellant in the trial court." After observing that appeals are favored, this Court determined that a defendant could appeal the dismissal of a co-defendant, even absent an appeal by the plaintiff. We reasoned that, under the (then-controlling) law of solidary liability and contribution among joint tortfeasors,[9] the appeal by a defendant of a co-defendant's dismissal brought the latter "before the appellate court; such appeal was tantamount to filing a third-party action." *Id*., 158 So. 2d at 600. We also observed that La. C.C.P. art. 2086 allowed anyone "aggrieved by the judgment of a trial court . . . to appeal" and thus, a "party to a suit is given an unqualified right to appeal from

[9] At the time, La. C.C.P. art. 2103 allowed a defendant who was cast in judgment to seek contribution from a solidary co-obligor "by making him a third-party defendant in the suit. . . whether or not the third party defendant was sued by the plaintiff initially. . . ." *Id*., 158 So. 2d at 597.

adverse final judgment and need not allege and show a direct pecuniary interest in order to be entitled to appeal." *Id*., 158 So. 2d at 424-25.[10]

That a defendant is entitled to appeal a judgment against a co-defendant was again acknowledged by this Court in *Nunez v. Com. Union Ins. Co*., 2000-3062 (La. 2/16/01), 780 So. 2d 348,[11] and later, in *Grimes v. Louisiana Med. Mut. Ins. Co*., 2010-0039 (La. 5/28/10), 36 So. 3d 215. Both *Nunez* and *Grimes* focused on whether a plaintiff's failure to appeal a judgment rendered the judgment final as to the plaintiff when the only appeal of the judgment is taken by a co-defendant. However, each case implicitly recognized that a defendant may appeal a judgment in favor of a co-defendant.

Grimes involved medical malpractice claims against two physicians, a hospital and their insurer. After the hospital obtained a summary judgment dismissal from the suit, the two physicians and the insurer appealed, and the judgment was reversed. The hospital then sought review in this Court and argued that, because the plaintiffs had not appealed the judgment, they could not benefit from the reversal of the summary judgment as the judgment was final as to them. The physicians' and

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[10] Subsequent cases applied the holding in *Emmons*, allowing an appeal by a defendant even when it had not filed a third-party pleading against a dismissed co-defendant. *See*, *e.g*., *Theriot v. Com. Union Ins. Co.*, 478 So. 2d 741, 745 (La. App. 3 Cir. 1985); *Wheat v. Ford, Bacon & Davis Const. Corp*., 424 So. 2d 293 (La. App. 1 Cir. 1982); *McCall v. United Bonding Ins. Co*., 232 So. 2d 913 (La. App. 4 Cir. 1970).

Other cases found that a defendant could appeal the summary judgment dismissal of another defendant when it was aggrieved by the judgment and had "an actual interest in [the] appeal and the issue of the correctness of the summary judgment dismissing" the co-defendant. *Andrade v. Shiers*, 516 So. 2d 1192, 1193 (La. App. 2 Cir. 1987); s*ee also*, *Delanzo v. ABC Corp*., 572 So. 2d 648, 650 (La. App. 5 Cir. 1990); *Andrus v. Police Jury of Lafayette Par*., 266 So. 2d 535 (La. App. 3 Cir. 1972).

[11] In *Nunez*, judgment was rendered against one of several defendants, finding it 100 percent at fault for the plaintiffs' claims. The only appeal taken was that of the defendant cast in judgment and, on appeal, it successfully had fault reallocated. The defendant was then reassigned with 65 percent fault, with 15 percent assigned to another defendant and 10 percent assigned to the plaintiffs. The co-defendant sought review with this Court. After addressing the effects of the plaintiffs' failure to appeal the judgment, the Court implicitly acknowledged the right of a defendant to appeal a judgment favorable to a co-defendant, by finding that the court of appeal's judgment reallocating fault, "could only flow in favor of the party who appealed. . . the judgment dismissing [the co-defendant] . . . ." *Id*., 2000-3062, p. 2, 780 So.2d at 349.

insurer's position was that the trier of fact should nevertheless be permitted to allocate fault against the hospital. Citing *Nunez*, this Court found that, "when plaintiffs failed to appeal or answer the appeal, the summary judgment dismissing [the hospital] acquired the authority of a thing adjudged and is now final between the parties." *Id*., 2010-0039, p. 3, 36 So. 3d at 217. We then held that "if [the co-defendants] are able to prove the fault of the hospital's employees/nurses, [they] are still entitled to a reduction in judgment by the percentage of fault allocated to the hospital in accordance with the general principles of comparative fault set forth in La. Civ. Code art. 2323(A)." *Id*.

It is clear that *Nunez* and *Grimes* were concerned with the consequences of a plaintiff's failure to appeal a judgment and not specifically on a defendant's right to appeal a judgment against a co-defendant. At the time that *Nunez* and *Grimes* were decided, Article 966 had no provision concerning the effect of the grant of summary judgment finding a party to be free of fault. A month after the *Grimes* decision was issued, however, and clearly in response to it, the legislature adopted the original version of then-subpart F to Article 966. Some cases after paragraph F was enacted (and later re-designated as paragraph G) continued to follow *Grimes* and *Nunez*, however, and allowed a defendant, who pleaded the comparative fault of co-defendants, to seek a reduction in judgment based on the comparative fault of the dismissed parties.

In *State Farm Mut. Auto. Ins. Co. v. McCabe*, 2014-501 (La. App. 3 Cir. 11/5/14), 150 So. 3d 595, 597, for example, the trial court granted a motion for summary judgment on the basis that there was no genuine issue of material fact as to the lack of fault of a driver involved in an automobile accident. Two of the remaining defendants appealed, arguing, first, that genuine issues remained concerning their fault and, second, that any judgment rendered against them should be reduced by the comparative fault of the dismissed parties. The court of appeal

first looked to *Nunez* for the principle that "[w]hen a party appeals a judgment of the trial court, the party may only appeal 'the portions of the judgment that were adverse to [that party].'" *Id*., 2014-501, p. 4, 150 So. 3d at 598. Citing *Grimes*, the court then noted that, although a determination as to whether the trial court properly granted summary judgment could not be made because the plaintiffs did not appeal the dismissal of those defendants, under La. C.C.P. art. 2323, the remaining defendants could be entitled to a reduction in judgment based on the percentage of fault allocated to the dismissed defendants:

> Comparative fault in Louisiana allows a percentage of fault to be assigned to all parties contributing to the injury or loss. This distribution is made "regardless of whether the person is a party to the action or a nonparty . . . or that the other person's identity is not known or reasonably ascertainable." La.Civ.Code art. 2323. "Comparative negligence is determined by the reasonableness of the party's behavior under the circumstances." *Khaled v. Windham*, 94-2171, p. 4 (La. App. 1 Cir. 6/23/95), 657 So.2d 672, 676. The determination of [the driver's] fault and percentage of fault in this collision is appropriate for jury determination.

Id., 2014-501, p. 6, 150 So. 3d at 599.[12] Thus, the dismissed driver's fault and percentage of fault were "appropriate for jury determination." *Id*. *See also*, *Stafford v. Exxon Mobile Corp*., 2016-1067, p. 7 (La. App. 1 Cir. 2/17/17), 212 So. 3d 1257, 1263 (where plaintiff did not appeal the dismissal of one defendant, under *Grimes*, the remaining defendants who appealed the dismissal "may reduce their liability to plaintiff, based upon the principles of comparative fault set forth in LSA-C.C. art. 2323(A), by establishing the fault, negligence or breach of care by" the dismissed defendant); *Cotton v. Kennedy*, 2015-1392, p. 3 (La. App. 1 Cir. 9/19/16), 2016 WL 5061113 at *7-8 (unpub.)("Based on *Grimes*, while the judgment granting the

[12] Later decisions by the Third Circuit, too, found that a defendant has the right to appeal a judgment in favor of a co-defendant where it had an interest in the whether a summary judgment motion was reversed. *See Moran v. Colomb Found., Inc*., 2017-915 (La. App. 3 Cir. 1/31/18), 2018 WL 632085 (unpub.); *Collette v. Allen*, 2016-846 (La. App. 3 Cir. 12/28/16), 210 So. 3d 373, 377. Both decisions relied on *Emmons* and made no mention of Articles 966 G or 2323.

motion for summary judgment is final between the . . . plaintiffs and the [dismissed] defendants because the . . . plaintiffs did not oppose the motion or thereafter appeal, this Court can consider the issue of whether the [remaining] defendants may reduce or defeat their liability to the . . . plaintiffs by establishing the fault or negligence of [the dismissed defendant and his insurer]".).

The *McCabe*, *Stafford* and *Cotton* decisions focused exclusively on comparative fault under Article 2323 and made no findings as to whether Article 966 (F/G) factors into the question of a defendant's right to appeal the summary judgment dismissal of a co-defendant. However, by considering the defendants' appeals, the courts implicitly found a right of appeal.[13] This right to appeal is the focus of the case at hand, and the issue became more significant following the 2015 revisions of Article 966 G which led to the varying appellate court decisions. Three circuits have expressly addressed this issue: the Third and Fifth Circuits and now, with *Abedee*, the Fourth Circuit.[14]

The Fifth Circuit in *Dixon v. Gray Ins. Co*., 2017-29 (La. App. 5 Cir. 6/15/17), 223 So. 3d 658, found no right of a defendant to appeal the judgment of a co-

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[13] The *Cotton* court did not address Article 966 F because the trial court's judgment failed to specify that the provisions of the paragraph were applicable to the summary judgment as Article 966 F(2) then required. It did comment, though, that, had the judgment found the dismissed defendant to be free of fault, "he would not be able to be considered in the allocation of fault and subsequent evidence could not be introduced to establish his fault." *Cotton*, 2015-1392, p. 3, 2016 WL 5061113 at *8.

[14] The Second Circuit touched on this issue in *Robert v. Turner Specialty Servs., L.L.C*., 50,245 (La. App. 2 Cir. 11/18/15), 182 So. 3d 1069, where summary judgment was entered in favor of one defendant and the judgment was appealed by another defendant but not by the plaintiffs. Although the court of appeal acknowledged both Articles 966 G and 2323, it did not reach the merits of whether the defendant could appeal the judgment. The defendant had not asserted the affirmative defense of comparative fault in its answer (or otherwise) and thus, although the defendant had opposed the summary judgment motion, with the dismissal of the plaintiffs' claims against the co-defendant "there [were] no properly pled claims currently pending against [the dismissed defendant]." *Id*., 50,245, p. 15, 182 So. 3d at 1077.

In the later decision of *Mercer v. Lowe*, 51,333 (La. App. 2 Cir. 4/5/17), 217 So. 3d 1235, the Second Circuit addressed an appeal by a defendant of a co-defendant's dismissal. Although the court cited Article 966 G, it made no express finding concerning a defendant's right to appeal the dismissal. However, by addressing the merits of the appeal, the Second Circuit implicitly acknowledged a defendant's right to appeal.

defendant when the plaintiff did not appeal. The plaintiff in *Dixon* was injured while riding his motorcycle when a vehicle changed into his lane of travel, causing him to hit the rear of the vehicle. He was thrown from his motorcycle and claimed to have thereafter been hit by a pickup truck. The plaintiff's suit named as defendants both drivers, their employers and the insurers of their vehicles. The driver of the pickup truck, his employer and insurer were dismissed by summary judgment on the basis that there was no evidence that the truck struck the plaintiff after he had been thrown from his motorcycle. Their motion had been opposed by the plaintiff and the first driver's employer. Only the employer appealed the judgment.

The court of appeal majority, noting that *Grimes* was decided prior to the revisions of Article 966 G, found subpart G to be "clear and unambiguous, and [to] not lead to absurd results." *Dixon*, 2017-29, p. 3 (La. App. 5 Cir. 6/15/17), 223 So. 3d at 661. To the contrary, it found, "La. C.C.P. art. 966 G is an emphatic expression by the legislature that there *shall* be no evidence admitted, nor any consideration of the fault or comparative fault of a party or non-party who has been adjudicated to be without negligence or fault at summary judgment." *Id*. (Emphasis in original). It further noted that the judgment finding the truck driver free of fault was final, and thus, because, "under the provisions of La. C.C.P. art. 966 G, [the employer] may not introduce, and the trial court may not admit or allow evidence, argument, or reference to, or any consideration of, fault on the part of [the pickup truck driver] at trial," the employer's appeal was "without merit." *Id*., 2017-29, p. 4, 223 So. 3d at 661. It reasoned:

> A finding to the effect that La. C.C.P. art. 966 G does not preclude all parties from attempting to show fault on the part of a party dismissed in summary judgment could lead to the absurd result that during trial, [the employer] would be permitted to argue and present evidence of [the pickup truck driver's] percentage of fault, while the plaintiff, Dixon, against whom summary judgment was adverse, could not. That result would disregard the current law and

> would allow [the employer] to circumvent the intent of the legislature.

Id., 2017-29, pp. 3-4, 223 So. 3d at 661. The *Dixon* court, thus found that a defendant may no longer obtain a reduction in judgment based on the fault of a co-defendant dismissed on summary judgment.

In his dissenting opinion, Judge Gravois noted that "Article 966(G) does not address the appealability of summary judgments; rather, it is completely silent regarding appeal rights." *Dixon*, 2017-29, p. 9, 223 So. 3d at 663 (Gravois, J., dissenting). Nor is there anything "in Article 966(G) that prohibits a party such as LPG [the employer] under the procedural posture of this case from appealing an adverse ruling on a motion for summary judgment. This is because the judgment granting [the pickup truck driver's] motion for summary judgment is not final as to LPG, as LPG has timely appealed that judgment." *Id*. In Judge Gravois' view, the revisions to Article 966 G did not "legislatively overrule" *Grimes*;[15] "the prohibition contained in Article 966(G) against admitting evidence at trial 'to establish the fault of that party or non-party' only comes into play once summary judgment is final as to 'that party or non-party.' " *Id*. Therefore, because the judgment had been appealed by the defendant, it was not a final judgment and the merits of the summary judgment motion were properly before the court of appeal.

The Third Circuit is split on the issue and has issued conflicting decisions. In *White v. Louisiana Dep't of Transportation & Dev*., 2017-629 (La. App. 3 Cir. 12/6/17), 258 So. 3d 11, an appeal of several dismissed defendants was taken by another defendant, alone. Citing *Dixon*, the court of appeal found that the judgment was final as to the plaintiffs. The court then considered whether the fault of the dismissed party could nonetheless be referenced at a subsequent trial, given that

[15] Technically speaking, a case cannot be "legislatively overruled." The legislature can alter the law to change the result in a subsequent case. *See St. Paul Fire & Marine Ins. Co. v. Smith*, 609 So. 2d 809, 818-20 (La. 1992).

Article 2323 A requires the fault of all parties to be determined. Noting an apparent conflict between Article 2323 A and Article 966 G, the court looked to and quoted the "House Summary of Senate Amendments" as "shed[ding] light that the proposed law, [Article 966 G], is a clarification of 'present law provisions relative to a party who is found not at fault, who shall not be considered in any subsequent allocation of fault, and submission of the issue to the jury.' " *Id*., 2017-629, p. 9 (La. App. 3 Cir. 12/6/17), 258 So. 3d at 16. The court concluded:

> . . . we find the amendment to La. Code. Civ.P. art 966(G) is a clarification of La. Civ.Code. art. 2323, and must prevail as a latter introduced amendment and as a clarification of the legislature's intent on the issue of comparative fault when a party has been dismissed from litigation upon a finding that the party was not at fault.
>
> We conclude that [the appealing defendant] shall not refer directly or indirectly to the fault of the [dismissed defendants] nor shall the [the dismissed defendants] be considered in any allocation of fault at trial. Accordingly, in the absence of an appeal seeking affirmative relief by the Plaintiffs, this court does not reach the merits of [the] appeal as to whether the summary judgment is proper because procedurally it is moot.

Id., 2017-629, pp. 9-10, 258 So. 3d at 17.

A different panel of the Third Circuit reached the opposite conclusion in *Mire v. Guidry*, 2017-745 (La. App. 3 Cir. 6/27/18), 250 So. 3d 383, declining to follow *Dixon*. It agreed with *Dixon* that the revisions to Article 966 G were clear and unambiguous, but disagreed that it would not lead to absurd results:

> The defendant bears the burden of proof on an affirmative defense. However, the change in the summary judgment law, combined with the line of cases finding that, when a judgment dismisses one of several cumulated claims by the plaintiff, the plaintiff must appeal the trial court decision or else the judgment becomes final, leaves the co-defendant unable to prove its own claims for third party and comparative fault against the other co-defendant. This most certainly is an absurd result.

Id., 2017-745, p. 4, 250 So. 3d at 386. The *Mire* court found further support for its holding in Article 2086, which, again, allows a third party to appeal a judgment,

stating: "It seems illogical to allow a non-party, but not an actual party, an appeal in a case." *Id*., 2017-745, pp. 4-5, 250 So. 3d at 386. It then held that "barring a co-defendant from appealing a decision of the trial court that adversely affects them, and then not allowing that same co-defendant to argue comparative and third-party fault to the factfinder even though it was plead in their answer, is unjust and improper. The . . .Defendants pled the fault of the [co-] Defendants, and they have a right to prove that affirmative defense." *Id*., 2017-745, p. 5, 250 So. 3d at 386.[16]

Although the *Dixon* Court's decision was based on Article 966 G, it did not address its interplay with Article 2323. The *White* and *Mire* courts, though, considered both articles.

Analysis

The issue presented by this case is a purely legal issue involving the interpretation, and interplay, of several codal articles. As such, we apply a *de novo* standard of review. *Benjamin v. Zeichner*, 2012-1763, p. 5 (La. 4/5/13), 113 So. 3d 197, 201. We are also mindful that "[t]he function of statutory interpretation and the construction given to legislative acts rests with the judicial branch of the government;" the "rules of statutory construction are designed to ascertain and enforce the intent of the Legislature." *Gloria's Ranch, L.L.C. v. Tauren Expl., Inc*., 2017-1518, p. 20 (La. 6/27/18), 252 So. 3d 431, 445 (quoting *M.J. Farms, Ltd. v. Exxon Mobil Corp*., 2007-2371, p. 13 (La. 7/1/08), 998 So. 2d 16, 27).

As previously observed, La. C.C.P. art. 2082 defines an appeal as "the exercise of the right of **a party** to have a judgment of a trial court revised, modified, set aside, or reversed by an appellate court." (Emphasis added). A final, appealable judgment includes a judgment granting a summary judgment and dismissing a party.

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[16] Most recently, the Fourth Circuit, in *Varnado v. 201 St. Charles Place, LLC*, 2022-0038 (La. App. 4 Cir. 6/29/22), 344 So. 3d 241, considered an appeal by a defendant of a co-defendant's summary judgment dismissal even though the plaintiff did not appeal that judgment. It did so because the dismissed defendants were also third-party defendants who had been added as direct defendants after third-party demands had been filed.

See La. C.C.P. art. 1915 A(3); *Herrera v. First Nat. Ins. Co. of Am.*, 2015-1097 (La. App. 1 Cir. 6/3/16), 194 So. 3d 807, 811 (a judgment granting a summary judgment and dismissing a party from an action is "a final judgment subject to immediate appeal."). Article 2082 contains no restriction as to what "party" may appeal a final judgment; a "party" even includes a third party who is not otherwise involved in a lawsuit. *See* La. C.C.P. art. 2086; *see also, ASI Fed. Credit Union v. Leotran Armored Sec., LLC*, 2018-341, p. 5 (La. App. 5 Cir. 11/7/18), 259 So. 3d 1141, 1146 ("The sole object of an appeal is to give an aggrieved party to an action recourse to a superior tribunal for the correction of a judgment of an inferior court, and such right is extended, not only to the parties to the suit in which the judgment is rendered, but also to a third party when such third party is aggrieved by the judgment.").

Against this general right of a party to appeal a final judgment, we must weigh other interests in determining whether a defendant has a right to appeal the dismissal of a co-defendant. We first consider the interests of a defendant in asserting affirmative defenses.

Louisiana law mandates that a defendant assert its affirmative defenses, including the affirmative defense of the fault of others, in its answer. Louisiana Code of Civil Procedure art. 1005 provides that a defendant's answer "*shall* set forth affirmatively negligence, or fault of the plaintiff and others . . . and any other matter constituting an affirmative defense." (Emphasis added.). *See also, Keller v. Amedeo*, 512 So. 2d 385, 387 (La. 1987) ("[a] defendant's answer must set forth any matter constituting an affirmative defense."). The failure to set forth affirmative defenses waives those defenses and bars the introduction of evidence offered in connection with an affirmative defense. *See Davis v. Nola Home Constr., L.L.C.*, 2016-1274, p. 9 (La. App. 4 Cir. 6/14/17), 222 So. 3d 833, 841.[17]

[17] This general rule is subject to the caveat that, where the plaintiff does not object to the introduction of such evidence, the evidence is admissible. *See Dupont v. Hebert*, 2006-2334, p. 8 (La. App. 1 Cir. 2/20/08), 984 So. 2d 800, 807 ("the general rule is that pleadings may be enlarged

The burden of proof of an asserted affirmative defense rests with a defendant. *Lagrange v. Boone*, 2021-560, p. 11 (La. App. 3 Cir. 4/6/22), 337 So. 3d 921, 928, *writ denied*, 2022-00738 (La. 6/22/22), 339 So. 3d 1185; *Fin & Feather, LLC v. Plaquemines Par. Gov't*, 2016-0256, p. 9 (La. App. 4 Cir. 9/28/16), 202 So. 3d 1028, 1034. This rule also applies when the affirmative defense is the comparative fault of others. As we found in *Hankton v. State*, 2020-00462 (La. 12/1/20), 315 So.3d 1278, 1284 (quoting *Dupree v. City of New Orleans*, 1999-3651, p. 18 n.13 (La. 8/31/00), 765 So.2d 1002, 1014), "[t]o the extent that a party defendant seeks to have the benefit of comparative fault of another as an affirmative defense, . . . it bears the burden of proof by a preponderance of the evidence that the other party's fault was a cause-in-fact of the damage being complained about."

Obviously, a defendant who pleads an affirmative defense must be given the opportunity to prove that defense. Where the affirmative defense is the comparative fault of others, La. C.C.P. art. 2323 requires the trier of fact to make a determination as to the fault of all parties. It expressly states that "the degree or percentage of fault of all persons causing or contributing to the injury, death, or loss *shall* be determined, regardless of whether the person is a party to the action or a nonparty. . . ." (Emphasis added). Article 2323 was enacted when the Louisiana legislature adopted our pure comparative fault system in 1980, and as this Court noted in *Dumas v. State ex rel. Dep't of Culture, Recreation & Tourism*, 2002-0563, p. 11 (La. 10/15/02), 828 So. 2d 530, 537, it "clearly requires that the fault of every person responsible for a plaintiff's injuries be compared, whether or not they are parties, regardless of the legal theory of liability asserted against each person." We explained in *Dumas* that "Louisiana's policy is that each tortfeasor pays only for that portion of the damage he has caused and the tortfeasor shall not be solidarily liable with any other

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by evidence adduced without objection when such evidence is not pertinent to any other issue raised by the pleadings and hence would have been excluded if objected to timely.").

person for damages attributable to the fault of that other person." *Id*., 2002-0563, p. 14, 828 So. 2d at 538.[18]

While Article 2323 requires a trial court to consider the fault of all parties, Article 966 G prohibits consideration of the fault of parties dismissed on summary judgment in the allocation of fault. The courts which most recently considered this issue have focused on the 2015 revisions to Article 966 G. Our review of those revisions, however, reflect only subtle differences between the 2013 and 2015 versions. Those differences are as follows:

> 2013 version: . . . Evidence shall not be admitted at trial to establish the fault of that [dismissed] party or nonparty nor shall the issue be submitted to the jury nor included on the jury verdict form.
>
> 2015 version: . . . Evidence shall not be admitted at trial to establish the fault of that [dismissed] party or non-party. During the course of the trial, no party or person shall refer directly or indirectly to any such fault, nor shall that party or non-party's fault be submitted to the jury or included on the jury verdict form.

The Official Comments regarding the 2015 amendment explain that its purpose is to "establish[] the rule that, at trial, evidence of that person's [the party found free of fault by summary judgment] fault shall not be admitted, nor shall that person's fault be referred to by any person or be submitted to the jury on the jury verdict form."[19]

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[18] That a defendant is only liable for its share of fault is also evidenced by La. C.C.P. art. 2324 B which makes clear that "[a] joint tortfeasor shall not be liable for more than his degree of fault."

[19] The Comments concerning subpart G read, in full:

> Paragraph G, which is new, adopts the rule from prior Article 966(G)(1) that if a person is found in a summary judgment not to be negligent, not at fault, not to have caused the injury or harm, that person cannot be considered in any allocation of fault. The requirement of former Article 966(G)(2) is removed. The trial judge does not have to specifically provide in the judgment on the motion that the person is not to be part of any allocation of fault at trial for this rule to apply. The Paragraph also establishes the rule that, at trial, evidence of that person's fault shall not be admitted, nor shall that person's fault be referred to by any person or be submitted to the jury on the jury verdict form.

Both the prior and current versions of subpart G prohibit the parties from submitting the fault of a dismissed party to the jury and the inclusion of a dismissed party on the jury verdict form. The only material difference is the added language that "[d]uring the course of the trial, no party or person shall refer directly or indirectly to any such fault." As a practical matter, because a dismissed party's fault can neither be submitted to the jury nor included on a jury verdict form, it seems rather obvious that no reference should be made to a dismissed party during a trial. It also seems readily apparent that a defendant's reference to a dismissed party at trial would produce no actual consequences, given that its fault would never reach the jury. Thus, the objective of the 2015 revision is unclear. We can only deduce that, in amending the article in 2015, the legislature intended to prevent potential jury confusion by expressly prohibiting references to a dismissed defendant whose fault would never actually be presented to the jury.

In our view, Article 966 G and Article 2323 are compatible and do not conflict, as the *White* court found. Together, they signify that, although the fault of all parties is to be quantified under Article 2323, the trier of fact cannot consider the fault of those parties who are dismissed from a suit on a summary judgment pursuant to Article 966 G. Importantly, and in furtherance of a desire for fairness and justice to all parties, it is incumbent that a determination by summary judgment that a party is free of fault be correct. That determination can only be accomplished by making the judgment subject to review, whether that review be sought by a plaintiff or one of the remaining defendants. The fact that summary judgments are sometimes reversed on appeal reflects that these judgments are not unassailable. Accordingly, to prohibit appellate review of a summary judgment by a co-defendant, even where a plaintiff did not appeal, diminishes the search for truth – the object of a lawsuit – and denies a defendant the ability to fully defend itself.

Recently, in *Hicks v. USAA Gen. Indem. Co*., 2021-00840, pp. 7-8 (La. 3/25/22), 339 So. 3d 1106, 1112 (quoting *State, Through Dept. of Highways v. Spruell*, 142 So. 2d 396, 397 (1962)), we observed that the purpose of the discovery process is: "to afford all parties a fair opportunity to obtain facts pertinent to litigation, to discover the true facts and compel disclosure of these facts wherever they may be found." We further noted that additional objectives include "assist[ing] litigants in preparing their cases for trial." *Id*., 2021-00840, p. 8, 339 So. 3d at 1112 (quoting *Hodges v. S. Farm Bureau Cas. Ins. Co*., 433 So. 2d 125, 129 (La. 1983)). These objectives should apply equally to the general litigation process as well.

Mire, supra, highlights the problematic result in barring a defendant from appealing the dismissal of a co-defendant. *Mire* involved a 3 vehicle rear-end accident. In their answers, the defendants each raised the comparative fault of the other defendants. The driver of the middle vehicle asserted that the accident was caused exclusively by the third vehicle when it struck her vehicle and pushed it into the plaintiff's vehicle. At issue was whether the plaintiff's vehicle had been struck once or twice by the following vehicles. The record before the court of appeal reflected a genuine issue of material fact: although the plaintiff testified in his deposition that he felt only one impact, he had reported to his treating physician that he felt two impacts. Nevertheless, the trial court granted a summary judgment dismissing the claims against the middle driver. Only the co-defendant appealed the judgment.

As the Third Circuit correctly found in reversing the judgment, the number of impacts in the accident presented a genuine issue of material fact. Had the court of appeal simply dismissed the defendant's appeal, that defendant would have had no ability to prove its affirmative defense – the comparative fault of the dismissed driver – or seek to reduce its liability on a comparative fault basis, as La. C.C.P. art. 966 G prohibits the mention of dismissed defendants at trial.

In the instant matter, while we recognize the plaintiff's position that he did not appeal the summary judgment dismissing the City because he does not believe that it has any fault for the incident, we find no legal basis for denying Premium Parking the right to seek review of the trial court's summary judgment determining the City to be without fault. If, after appellate review of this finding, the trial court's determination is affirmed, under Article 966 G, the City's fault cannot be mentioned at trial, presented to the jury or considered in the allocation of fault. But, we find no support in Article 966 G for the principle that a defendant cannot appeal the dismissal of a co-defendant; as Judge Gravois cogently observed in his dissent, Article 966 G is silent regarding appeals of summary judgments. *Dixon*, 2017-29, p. 8, 223 So. 3d at 663 (Gravois, J., dissenting).

We agree with *Mire* that it is patently unjust to bar a defendant from appealing a trial court's summary judgment determination that a co-defendant is free of fault when the defendant has pleaded the affirmative defense of comparative fault. It is illogical that a defendant participating in opposing a summary judgment would not be allowed to appeal an adverse result, particularly given that Article 2086 allows a non-party to do so. That a non-party would have greater rights than a party to a lawsuit is nonsensical.

Moreover, as Premium Parking points out, had judgment been rendered against it after a full trial on the merits, it certainly would have the right to appeal the adverse judgment, including the trial court's apportionment of fault, even absent an appeal by the plaintiff. We find no valid reason that a defendant's right to appeal a finding of fault following a trial on the merits should differ from the right to appeal a determination of fault by summary judgment motion.

DECREE

For the foregoing reasons, we hold that a defendant who pleads the affirmative defense of comparative fault may appeal a summary judgment dismissing a co-

defendant, even absent an appeal by a plaintiff. We therefore reverse the court of appeal's judgment and remand this matter to the court of appeal for a consideration of the merits of Premium Parking's appeal.