

Fifth Circuit Court of Appeal
State of Louisiana

No. 25-CA-100 C/W 25-C-85

JANIS H. GORDON

versus

FORD MOTOR COMPANY D/B/A THE LINCOLN MOTOR COMPANY

ON REMAND FROM THE LOUISIANA SUPREME COURT

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT
COURT PARISH OF JEFFERSON, STATE OF LOUISIANA

NO. 828-376, DIVISION "A"

HONORABLE RAYMOND S. STEIB, JR., JUDGE PRESIDING

August 25, 2026

SCOTT U. SCHLEGEL

JUDGE

Panel composed of Judges Fredericka Homberg Wicker, Marc
E. Johnson, Stephen J. Windhorst, Scott U. Schlegel, and
Timothy S. Marcel

AFFIRMED

SUS

SJW

WICKER, J., CONCURS WITH REASONS

FHW

JOHNSON, J., CONCURS FOR THE REASONS ASSIGNED BY WICKER, J.

MEJ

MARCEL, J., CONCURS WITHOUT REASONS

TSM



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SCHLEGEL, J.

This matter is before us on an application for supervisory writs (Docket No. 25-C-85) filed herein by plaintiff-appellant, Janis Gordon, from the district court's January 14, 2025 judgment granting defendant-appellee's *Daubert Motion/Motion in Limine to Exclude Certain Expert Opinions of Mr. Kurt Weiss* (the "Daubert Motion") and on appeal (Docket No. 25-CA-100) by plaintiff-appellant from the district court's judgment, entered on the same day, granting defendant-appellee's *Motion for Summary Judgment* (the "Summary Judgment Motion") and dismissing plaintiff-appellant's case under the Louisiana Product Liability Act, La. R.S. 9:2800.51, *et seq.* (the "LPLA"). The plaintiff-appellant's writ application and appeal have been consolidated by us for disposition. For the reasons stated below, we affirm the district court's judgments granting the Daubert Motion and the Summary Judgment Motion, and dismissing plaintiff-appellant's claims with prejudice.

FACTS AND PROCEDURAL HISTORY

On May 22, 2021, Janis Gordon was driving her 2012 Lincoln Navigator (the "2012 Navigator") northbound on State Hwy. 43, in Pearl River County, Mississippi. Ms. Gordon was in the process of making a left-hand turn into a private driveway when her vehicle was struck by a 2016 Honda Civic, which was also traveling northbound on Hwy. 43 and, at the time, was illegally attempting to pass Ms. Gordon's vehicle on the left.

The right front bumper of the Honda struck the left front wheel of Ms. Gordon's vehicle. Ms. Gordon, who was wearing her seat belt at the time of the collision, suffered a 1 cm puncture-type laceration to the left side of her scalp. She experienced pulsatile bleeding and significant loss of blood. The car's air bags did not deploy. Ms. Gordon told EMTs at the scene that she did not lose

consciousness during the accident.¹ She went to the hospital by ambulance, where her injury was cleaned and sutured. She was released from the hospital the same day. Ms. Gordon claimed that days after the accident, she began to experience headaches, tiredness, fatigue, and vision problems that she did not have prior to the accident. She attributed these conditions to the head wound she sustained in the accident.

Ms. Gordon filed suit against the Ford Motor Company (“FMC”), the manufacturer of the 2012 Navigator, on May 18, 2022. In her petition, she alleged that, as a result of the collision, she struck her head on the driver’s side seat belt guide (hereinafter, the “D-ring”), which pivoted upward upon impact.² She alleged that when her head struck the D-ring, an artery in her head was punctured or lacerated, causing her to sustain serious injuries. Ms. Gordon further alleged that at the time of the collision, she was using the seat belt for its intended purposes and in a reasonably foreseeable manner but that the D-ring was unsafe, defective, and/or that it malfunctioned at the time of the accident. Ms. Gordon alleged various acts of negligence on the part of FMC in the design and manufacture of the D-ring, and in the sale and distribution of the vehicle containing the allegedly faulty D-ring.

FMC filed an Answer on July 26, 2022. Thereafter the parties engaged in discovery. On March 7, 2024, Ms. Gordon retained Kurt D. Weiss, a collision reconstructionist and forensic engineer, as an expert witness.

¹ Sometime later, at the suggestion of her son, who is a surgeon, but was not Ms. Gordon’s treating physician, she formed the opinion that, based on the nature of her injuries, she “must have” briefly lost consciousness.

² This piece of equipment tends to be shaped like the letter “D,” hence the name, “D-ring.” The D-ring in the 2012 Lincoln Navigator being driven by Ms. Gordon at the time of the accident, consisted of a metal ring, partially encased in a plastic housing or overmold, which ran around its perimeter. The restraint system height adjuster and D-ring were attached to the B-pillar, which sits between the driver’s seat and the seat directly behind the driver.

Mr. Weiss produced a report entitled “Restraint System Analysis Report,” dated April 15, 2024 (the “Original Report”). Mr. Weiss’s opinions in the Original Report related solely to the design of the seat belt system. He did not address or opine on Ms. Gordon’s claims that the D-ring was unreasonably dangerous in construction or composition, failed to conform to an express warranty of the manufacturer, and/or that FMC failed to warn of the hazard posed by the D-ring design. Ms. Gordon testified in her deposition that she was only pursuing her claim that the D-ring was unreasonably dangerous due to faulty design.

In preparation for his deposition, which occurred on October 11, 2024, Mr. Weiss produced a supplemental report (the “Supplemental Report”), dated September 9, 2024. At his deposition, Mr. Weiss testified that the Supplemental Report was intended to be an “opinion page,” because the Original Report did not set forth the supporting bases for his opinions. He described the Supplemental Report as a “cheat sheet,” created so that he would not forget anything when he testified at his deposition. Mr. Weiss said that the Supplemental Report did not contain any new opinions, but memorialized the opinions already presented and provided support for those opinions.³

FMC filed a Motion for Summary Judgment on December 2, 2024. The basis of the Summary Judgment Motion was that Ms. Gordon would not be able to produce evidence at trial to substantiate each essential element of her defective design claim under the LPLA. The bases of FMC’s Summary Judgment Motion were first, that Mr. Weiss’s opinion that Ms. Gordon struck her head on the exposed metal portion of the D-ring was based on the faulty assumption that the plastic overmold portion of the D-ring had become dislodged when Ms. Gordon’s head allegedly struck the D-ring, exposing the metal underneath. Second, FMC

³ As discussed in footnote five below, the opinions were not listed in the same order in the Supplemental Report as they had been in the Original Report.

contended that to show that an alternative design would have prevented Ms. Gordon's injuries, Mr. Weiss was required to submit design drawings, specifications for materials, and manufacturing tolerances, which he had not produced. Third, FMC contended that Ms. Gordon, through Mr. Weiss, had not undertaken the risk-utility analysis required under La. R.S. 9:2800.56(2). Finally, FMC asserted, in the alternative, that Ms. Gordon's damages should be limited to those incurred as a direct result of the laceration/puncture injury. FMC contended that Ms. Gordon could not produce evidence at trial sufficient to demonstrate that her alleged post-accident conditions were attributable to that injury.

Ms. Gordon opposed FMC's Summary Judgment Motion. She asserted that genuine issues of material fact existed as to whether her head struck the metal D-ring, whether the plastic overlay covering a portion of the D-ring was dislodged during the accident when her head allegedly struck it, whether the D-ring design was unreasonably dangerous, whether a safer alternative was feasible and could be implemented without significant burden or expense to FMC, and whether her post-concussion injuries were related to the alleged head strike to the D-ring.⁴

On December 12, 2024, FMC filed the Daubert Motion, challenging Mr. Weiss's opinions 6 through 10.⁵ Specifically, the Challenged Opinions were that: (6) In response to the impact, Ms. Gordon's head moved rearward and to the left, striking the D-ring; (7) The component D-ring of the 2007-2017 Lincoln Navigator (as well as the comparable Ford Expedition) was defective because it failed to

⁴ In its Summary Judgment Motion, FMC also argued that Ms. Gordon would be unable to sustain her burden of proof at trial as to her claims that the D-ring was unreasonably dangerous due to its construction or composition, the inadequacy of warnings, or breach of an express warranty. Ms. Gordon conceded these claims at the hearing on the Summary Judgment Motion, leaving her with a single claim for defective design.

⁵ The Daubert Motion sought to have the district court exclude Mr. Weiss's opinions 6 through 10, contained in his Original Report (the "Challenged Opinions"). In the Supplemental Report where Mr. Weiss added the bases for his opinions, those opinions became renumbered. For purposes of clarity and consistency, we will address the Challenged Opinions 6 through 10 as they appeared in the Original Report.

align with long established practices of vehicle occupant safety, one of which was to yield and distribute or absorb applied energy. Instead, Mr. Weiss opined, the subject D-ring presented a uniquely conspicuous, narrow metal edge surrounding the shoulder belt webbing and was the most likely cause of Ms. Gordon's head wound; (8) A field study comparing the driver D-ring height adjuster and plastic cover design of 2007-2017 Lincoln Navigators (and the comparable Ford Expeditions) with thirty-eight domestic, European and Asian SUVs was performed by Mr. Weiss. The findings of the study led Mr. Weiss to conclude that several vehicles in the study, including the 2008 Lincoln MKX and the 2011 Ford Flex, demonstrated a head strike injury mitigating construction by completely encasing the D-ring in plastic, thereby eliminating the potential of an exposed metal edge; (9) The 2003 Lincoln Navigator D-ring offered these similar advantages (*i.e.*, a D-ring that was completely encased in plastic, eliminating the exposed metal edge) over the design found in the 2007-2017 Lincoln Navigators; and, (10) Numerous other SUVs in the field study, *e.g.*, the 2005 Land Rover Range Rover, 2008 GMC Acadia, 2010 Hyundai Santa Fe, and 2007 Volvo XC90 demonstrated D-ring height adjuster and plastic cover designs that addressed head strike potential by concealing the D-ring behind the B-pillar trim, and eliminating force concentrating rigid structures. The D-ring in the Lincoln Navigator (and comparable Ford Expedition) was similarly concealed by the B-pillar trim beginning with the 2018 model year.

As an initial matter, FMC challenged Mr. Weiss's qualifications to render the opinion that Ms. Gordon's head struck the D-ring at all. According to FMC, only a biomechanical engineer and/or a kinematics expert was qualified to so opine. FMC contended that Mr. Weiss was not qualified to opine that the cause of Ms. Gordon's head wound was contact with the exposed metal portion of the D-ring because he was not a medical doctor.

FMC further challenged the factual basis for Mr. Weiss's opinion that the D-ring's partial plastic housing was displaced or dislodged by Ms. Gordon's alleged head-strike, fully exposing the metal underneath, causing her laceration/puncture injury. The basis for this challenge was that John Gordon, Ms. Gordon's husband, testified at his deposition that he removed the plastic trim from the D-ring after the accident and did not replace it until approximately September 2024. FMC also argued that Mr. Weiss failed to consider that Ms. Gordon was wearing a clawed/toothed hairclip at the time of the accident. FMC finally asserted that Mr. Weiss's methodology was faulty.

Ms. Gordon opposed the Daubert Motion. She contended that Mr. Weiss was adequately qualified to opine that her head struck the D-ring on impact and was not required to be a biomechanical engineer to render such an opinion. Ms. Gordon also represented that Mr. Weiss would not be offering any opinions at trial related to the cause of her injuries other than the laceration/puncture wound and that he did not need to be a medical doctor to render that opinion. She further argued that FMC's remaining challenges to Mr. Weiss's opinions involved his credibility and ultimate conclusions, not his methodology.

Trial was scheduled for February 10, 2025. Both the Daubert Motion and the Summary Judgment Motion were heard on January 2, 2025. The Daubert Motion was taken up first and granted from the bench, excluding Mr. Weiss's Challenged Opinions 6 through 10, as set forth in his Original Report. The district court agreed with FMC's argument as to Challenged Opinions 6 and 7, on the basis that Mr. Weiss was not a biomechanical engineer or a medical doctor and thus lacked the requisite qualifications to render these opinions. Challenged Opinions 9 and 10 were excluded by the district court due to a lack of qualifications because Mr. Weiss was not an expert in vehicle design. FMC's Daubert Motion as to Challenged Opinion 8 was granted because the district court found that it was

based on faulty facts and assumptions. As a result of the district court's rulings on Mr. Weiss's qualifications and the factual basis for Challenged Opinion 8, the district court did not discuss whether Mr. Weiss's methodology was reliable.

The Summary Judgment Motion was heard immediately after the Daubert Motion. It was also granted from the bench based on the fact that, without Mr. Weiss's excluded testimony, Ms. Gordon would be unable to satisfy her burden at trial to demonstrate that the D-ring presented an unreasonable risk of harm due to a design defect and that there were other available, financially-feasible designs that would have prevented her injury or made it substantially less likely.

Ms. Gordon filed a Notice of Intent to file Supervisory Writ from the trial court's judgment on the Daubert Motion on January 8, 2025. She also filed, on the same date, a Motion for Appeal from the district court's judgment granting FMC's Summary Judgment Motion. Her Motion for Appeal was granted on January 12, 2025. Written judgments on the Daubert and Summary Judgment Motions were entered on January 14, 2025. Once the written judgment on the Daubert Motion was entered, Ms. Gordon filed an Amended Notice of Intent to file Supervisory Writ, and a return date was set for thirty days from the mailing of notice of the written judgment. This writ application and appeal timely followed.

ASSIGNMENTS OF ERROR

Ms. Gordon assigns four errors. Her first three assignments of error relate to the district court's judgment granting the Daubert Motion. She contends that the district court committed reversible legal error in: (1) "ignoring the ample evidence in the record of Mr. Weiss's qualifications as an occupant kinematic and seat belt performance expert and [assuming] that he was merely an accident reconstructionist;" (2) "ruling that because Mr. Weiss is not a biomechanical engineer or a medical doctor, he is not qualified to opine on a vehicle occupant's movement during a motor vehicle accident and/or whether certain seat belt D-ring

designs subject the vehicle occupant to exposed metal;” and (3) “assuming, contrary to the evidence, that it was an established fact in this matter that the partial plastic overmold of the subject D-ring was not displaced, even partially, during the subject accident.” In her fourth assignment of error, Ms. Gordon contends that the district court “reversibly erred in granting Defendant’s Motion for Summary Judgment.”

DISCUSSION

A. THE DAUBERT MOTION

1. Standard of Review – Daubert Motion

The trial judge has great discretion concerning the admissibility and relevancy of evidence, including expert testimony. As an initial matter, the trial court has wide latitude to determine whether an expert has the competence, background, and experience to testify. *Lataxes v. Louisiana Home Specialists, LLC*, 24-129 (La. App. 5 Cir. 12/30/24), 409 So.3d 1010, 1015, citing *Williams v. State Farm Mut. Auto. Ins. Co.*, 20-248 (La. App. 5 Cir. 2/17/21), 314 So.3d 1010, 1018, *writ denied*, 21-402 (La. 5/11/21), 315 So.3d 871. A trial court’s ruling permitting or excluding expert testimony at trial will not be disturbed on appeal absent a clear abuse of discretion. *Id.*; see also *Giavotella v. Mitchell*, 19-100 (La. App. 1 Cir. 10/24/19), 289 So.3d 1058, 1069-70, *writ denied*, 19-1855 (La. 1/22/20), 291 So.3d 1044; and *Harvey v. Hamby*, 23-84 (La. App. 4 Cir. 10/4/23), 376 So.3d 225, 234.

If, however, the trial court failed to comply with the requirements of La. C.C.P. art. 1425(F) and conducted no *Daubert* analysis of any kind, this constitutes a legal error. *Leininger v. Heaney*, 23-574 (La. App. 4 Cir. 8/15/24), 414 So.3d 535, 543-44; *Arceneaux v. Shaw Grp., Inc.*, 12-135 (La. App. 1 Cir. 9/24/12), 103 So.3d 1086, 1091, *writ denied*, 12-2732 (La. 3/1/13), 108 So.3d 1177; see also *Taylor v. Exxon Mobil Corp.*, 23-759 (La. App. 4 Cir. 12/27/23), 381 So.3d 108, 110; *Carpenter v. Thomas*, 22-872 (La. App. 1 Cir. 3/13/23), 362 So.3d 977, 982;

Robertson v. Doug Ashy Bldg. Materials, Inc., 10-1552 (La. App. 1 Cir. 10/4/11), 77 So.3d 339, 355, *writ denied*, 11-2468 (La. 1/13/12), 77 So.3d 972, and 11-2430 (La. 1/13/12), 77 So.3d 973, citing *Corkern v. T.K. Valve*, 04-2293 (La. App. 1 Cir. 3/29/06), 934 So.2d 102, 107. In such an instance, the appellate court reviews the matter *de novo*. *Leininger*, 414 So.3d at 544; *Arceneaux*, 103 So.3d at 1091.

In this appeal, Ms. Gordon has urged us to apply a *de novo* standard of review to our consideration of the district court's judgment on the Daubert Motion. She contends that "[g]iven the Trial Court's granting of the Motion for Summary Judgment because of its prior ruling on the *Daubert* Motion, all issues herein should be analyzed under a *de novo* standard, as the two judgments cannot be separated for purposes of appeal." Ms. Gordon cites our decision in *Lloyd's Syndicate 1861 v. Darwin Nat'l Assurance Co.*, 17-623 (La. App. 5 Cir. 5/23/18), 248 So.3d 709, 714, in support of this proposition; however, *Lloyd's Syndicate* involved cross-motions for summary judgment. There was no *Daubert* issue in that case.

Motions for summary judgment and *Daubert* motions are separate and distinct procedural devices. The purpose of a *Daubert* motion is to ensure that scientific or other technical evidence is reliable and to allow a party to challenge a witness's qualifications to testify as an expert by knowledge, skill, experience, training, or education and/or to challenge the methodology used by the expert in reaching his opinion. *Nolaluna, LLC v. Crosby*, 24-555 (La. App. 4 Cir. 5/6/25), 421 So.3d 125, 129, *writ denied*, 25-717 (La. 10/7/25), 418 So.3d 364. On the other hand, the purpose of the summary judgment procedure is to "pierce the pleadings and to assess the evidence to determine if there are any genuine issues of material fact requiring a trial." *Id.* at 130. In the context of a motion for summary judgment, the district court is not entitled to weigh evidence or make credibility determinations.

The grant or denial of a summary judgment motion warrants *de novo* review, while the grant or denial of a *Daubert* motion is reviewed for abuse of discretion.

We have found no legal error in the district court’s judgment on FMC’s *Daubert* Motion that would justify the application of the *de novo* standard of review in this appeal. Accordingly, we will apply the appropriate standards of review to the district court’s judgments on the two motions before us.

2. Standards for Admission of Expert Testimony

Article 702 of the Louisiana Code of Evidence governs the admissibility of expert testimony. It provides, in pertinent part:

- A. A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that:
 - (1) The expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
 - (2) The testimony is based on sufficient facts or data;
 - (3) The testimony is the product of reliable principles and methods; and
 - (4) The expert’s opinion reflects a reliable application of the principles and methods to the facts of the case.

In *State v. Foret*, 628 So.2d 1116, 1121 (La. 1993), the Louisiana Supreme Court found that Article 702 is “virtually identical to its source provision in the Federal Rules of Evidence, F.R.E. 702.” As a result, the Court found it appropriate to consider the opinion of the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), the seminal case interpreting F.R.E. 702. *Id.*

Under Federal Rule 702, the trial judge must “ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.” *Daubert*, 509 U.S. at 589, 113 S.Ct. at 2795. The expert’s testimony must be

grounded in “scientific knowledge,” *i.e.*, it must be based upon the methods and procedures of science as applied to the facts or to any body of ideas inferred from such facts or accepted as truths on good grounds. *Id.* at 590, 113 S.Ct. at 2795. There is no requirement that the “subject of scientific testimony must be ‘known’ to a certainty,” but “[p]roposed testimony must be supported by appropriate validation” *Id.*

In exercising its “gatekeeping” function, the court must determine whether: (1) the evidence or testimony will “assist the trier of fact to understand the evidence or to determine a fact in issue” – *i.e.*, whether the evidence is relevant and helpful; and (2) the expert’s testimony or evidence has a reliable basis in the knowledge and experience of his discipline. *Id.* at 591-92, 113 S.Ct. at 2796. The *Daubert* court found that in order to determine whether the expert’s testimony is reliable, the court must determine whether the reasoning or methodology is scientifically valid and observed that consideration of the following factors should inform that decision: (1) whether the theory or technique can be and has been tested; (2) whether the theory or technique has been subjected to peer review and/or publication; (3) the known or potential rate of error; and (4) whether the theory is generally accepted in the relevant scientific community. *Id.* at 593-94.

The *Daubert* “observations” are not exclusive. In *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141-42, 119 S.Ct. 1167, 1171, 143 L.Ed.2d 238 (1999), the Supreme Court held that:

We also conclude that a trial court *may* consider one or more of the more specific factors that *Daubert* mentioned when doing so will help determine that testimony’s reliability. But, as the Court stated in *Daubert*, the test of reliability is ‘flexible,’ and ***Daubert’s* list of specific factors neither necessarily nor exclusively applies to all experts or in every case. Rather, the law grants a district court the same broad latitude when it decides *how* to determine reliability as it enjoys in respect to its ultimate reliability determination.**

(Emphasis added). See also *Independent Fire Ins. Co. v. Sunbeam Corp.*, 99-2181 (La. 2/29/00), 755 So.2d 226, 234; *Lavigne v. Allied Shipyard, Inc.*, 18-66, 18-1077 (La. App. 4 Cir. 1/15/20), 289 So.3d 1088, 1096.

Generally, the evidence and testimony presented by an expert is reliable if it meets accepted standards in the expert's field of expertise. *Lavigne*, 289 So.3d at 1098. If the proposed testimony or evidence is found to be reliable and helpful, the court must still weigh its probative value against potential for unfair prejudice, confusion of the issues or misleading the jury. *Daubert*, 509 U.S. at 595, 113 S.Ct. at 2798; F.R.E. 403.

In *Foret*, the Court found that *Daubert*'s approach to admissibility aligned with its own view that scientific evidence should be admitted whenever, after “balancing the probative value of the evidence against its prejudicial effect, [the trial court] determines that ‘the evidence is reliable and will aid in a decision,’” all subject to the discretion of the trial judge. *Foret*, 628 So.2d at 1123, citing *State v. Catanese*, 368 So.2d 975, 978-79, 983 (La. 1979). Accordingly, the Louisiana Supreme Court adopted “*Daubert*'s requirement that expert scientific testimony must rise to a threshold level of reliability in order to be admissible under La. C.E. art. 702.” *Id.* Finding “the *Daubert* court's ‘observations’ on what will help to determine this threshold level of reliability to be an effective guide,” the Court also adopted the “observations.” *Id.*

The standard for admissibility under F.R.E. 702, as interpreted by *Daubert*, which applies, by extension to La. C.E. art. 702, “is a flexible one [which has as its] overarching subject...the scientific validity and thus the evidentiary relevance and reliability – of the principles that underlie a proposed submission.” *Daubert*, 509 U.S. at 594-95, 113 S.Ct. at 2797. “The focus...must be solely on principles and methodology, not on the conclusions that they generate.” *Id.* at 595, 113 S.Ct. at 2797. See also *Harvey Canal Ltd. P'ship v. Lafayette Ins. Co.*, 09-605 (La. App.

5 Cir. 3/9/10), 39 So.3d 619, 627-28. (“*Daubert* comes into play only when the methodology of the expert is being questioned.”)

The court’s role as a gatekeeper, however, does not replace the traditional adversarial system. “Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence” presented by experts. *Daubert*, 509 U.S. at 596, 113 S.Ct. at 2798.

In rendering his opinion, an expert may rely on facts or data “perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.” La. C.E. art. 703. Additionally, testimony in the form of an opinion or inference otherwise admissible is not to be excluded solely because it embraces an ultimate issue to be decided by the trier of fact. La. C.E. art. 704.

The procedure for challenging an expert’s qualifications and/or methodologies is set forth in La. C.C.P. art. 1425(F), which provides, in pertinent part:

- (1) A party seeking to challenge whether a witness qualifies as an expert or whether the methodologies employed by the witness are reliable under Code of Evidence Articles 702 through 705 shall file a motion for a pretrial hearing. The motion shall be filed not later than sixty days prior to trial and shall set forth sufficient allegations showing the necessity for these determinations by the court.
- (2) The court shall hold a contradictory hearing and shall rule on the motion not later than thirty days prior to the trial. At the hearing, the court shall consider the qualifications and methodologies of the proposed witness based upon the provisions of Code of Evidence Articles 104(A) and 702 through 705. For good cause shown, the court may allow live testimony at the contradictory hearing.
- (3) If the ruling of the court is made at the conclusion of the hearing, the court shall recite orally its findings of fact, conclusions of law, and reasons for judgment. If the matter is taken under advisement, the court shall render its ruling and provide written findings of fact,

conclusions of law, and reasons for judgment not later than five days after the hearing.

3. Ms. Gordon's Assignments of Error Nos. 1 and 2: Mr. Weiss's Qualifications

The district court found that Mr. Weiss lacked the knowledge, skill, experience, training, or education to render his opinion that Ms. Gordon's head contacted the D-ring upon impact, causing her head wound. The district court accepted FMC's arguments and held that because Mr. Weiss is not a biomechanical engineer, he lacked the expertise to opine on the movement of Ms. Gordon's body at the point of impact or to opine as to whether the seat belt design was defective and/or presented an unreasonable risk of harm. The district court found that Mr. Weiss lacked the qualifications to opine that safer designs were available and feasible because he was not an expert in vehicle design. The district court further accepted FMC's argument and held that because Mr. Weiss is not a medical doctor, he lacked the qualifications to opine that the likely cause of Ms. Gordon's head laceration/puncture wound was contact with the metal portion of the D-ring. Ms. Gordon contends that these rulings were erroneous. We agree.

The record shows that Mr. Weiss holds a Bachelor of Science degree in Mathematical Sciences and a Master of Science degree in Mechanical Engineering. Mr. Weiss was employed for some thirty-two years at Automotive Safety Research, Inc., where he rose to the level of head of collision reconstruction. He is also an accredited collision reconstructionist through the Accreditation Commission for Traffic Accident Reconstruction and is a Crash Data Retrieval system operator and analyst. Mr. Weiss claims specialized professional competence in the areas of comprehensive traffic collision reconstruction, event data recorder (EDR) analysis, failure mode forensic testing, seat belt assembly performance evaluations, surveillance video analysis, and occupant kinematics.

Mr. Weiss has nearly forty years' experience in "case study collision science," including conducting vehicle and collision site inspections, technical research, seat belt performance evaluations and forensic testing, full-scale vehicle and sled testing, EDR analysis, comprehensive traffic collision reconstruction, and computer reconstruction and simulation analysis. Mr. Weiss has testified as an expert witness in traffic collision reconstruction, EDR data analysis, forensic video analysis, and restraint performance analysis in state and federal courts. Mr. Weiss testified in his deposition that he has never been prevented by any court from providing testimony relative to occupant kinematics in conjunction with his opinions. Mr. Weiss has published extensively on traffic collision science, and seat belt construction, performance, and safety, among many other topics relating to traffic accidents.

Mr. Weiss testified at his deposition that "you have to have an understanding of the collision to then apply an understanding or perform an analysis of the performance of the restraint system. So, they go hand in hand. Of course, then there's injury causation and injury analysis as well." He explained that there is "overlap between the restraint system performance evaluation and the reconstruction to . . . the field of biomechanics." Although he does not hold a degree in biomechanics, he has received training and attended courses in that field in conjunction with his work evaluating restraint systems and performing accident reconstructions. Mr. Weiss stated that he is qualified to offer opinions on how the body would move in light of its musculature, bones, joints, and muscle activation in a vehicle crash situation.

In this case, Mr. Weiss was tasked with investigating the collision and evaluating the design of the front outboard safety belt assembly, *i.e.*, the D-ring and the plastic D-ring cover attached to the interior B-pillar inside Ms. Gordon's vehicle, for head strike potential in conjunction with the accident. Mr. Weiss

explained that his opinion in this case involved occupant kinematics, a field in which he claimed specialized knowledge. He stated that “occupant kinematics comes up in every study of a restraint system performance, you know, a body’s response to a certain severity of crash . . . it just comes up in everything we do.”⁶

Although we acknowledge the deference afforded to the district court, we find the district court abused its discretion in ruling that Mr. Weiss lacked the expertise to offer testimony as to Challenged Opinions 6 through 10, which Ms. Gordon characterizes in her appeal brief as “his opinions that (a) Plaintiff’s head struck the metal D-ring (Opinions No. 6 and 7) and (b) that the proposed alternative designs eliminate the potential to strike a rigid metal surface (Opinions 8 [sic], 9 and 10)” on the basis that Mr. Weiss was only an accident reconstructionist, not a biomechanical engineer, medical doctor, or vehicle design engineer.⁷ Mr. Weiss’s knowledge, skill, experience, training, and education gained throughout his nearly forty years of conducting seat belt performance evaluations and comprehensive accident reconstructions qualified him to render the Challenged Opinions. It was not necessary that he hold a degree in biomechanics in order to render Challenged Opinions 6 through 10 or that he be an expert in vehicle design to render Challenged Opinions 9 and 10.

Nor did Mr. Weiss have to qualify as a medical doctor to opine that Ms. Gordon’s head struck the metal portion of the D-ring and that the head-strike was the most likely cause of the puncture/laceration wound to her head. Mr. Weiss testified at his deposition that he was not offering medical testimony as to the

⁶ An excerpt of the Deposition of FMC’s corporate representative and expert engineer, Ram Krishnaswami, was attached to Ms. Gordon’s opposition to FMC’s Daubert Motion. In that excerpt, Mr. Krishnaswami testified that one does not have to be a biomechanical engineer to opine on occupant kinematics.

⁷ Challenged Opinion 8 was not excluded due to a perceived lack of qualifications but was excluded on the basis that Mr. Weiss’s Challenged Opinion 8 was based on his erroneous factual assumption that the D-ring’s polymer trim was dislodged and displaced due to contact with Ms. Gordon’s head. As discussed below, that assumption was contradicted by the facts.

nature of Ms. Gordon's injuries or as to causation relative to her injuries; he was only testifying that her head contacted the D-ring, which could have lacerated/punctured her scalp. Ms. Gordon's counsel stipulated at the hearing on the Daubert Motion that Mr. Weiss would not be providing "any medical opinion whatsoever" and has reiterated this representation in this appeal.⁸

Accordingly, we find that Mr. Weiss possessed the requisite expertise to render Challenged Opinions 6 through 10.

4. Ms. Gordon's Assignment of Error No. 3: Mr. Weiss's Opinion that the D-ring's Plastic Overmold Became Displaced or Dislodged as a Result of Contact with Ms. Gordon's Head

In her third assignment of error, Ms. Gordon argues that the district court erred in "striking Mr. Weiss' opinion No. 8 on the basis it was an undisputed fact that the partial plastic overmold of the subject D-ring did not become displaced, even partially, during the subject accident." Ms. Gordon represents that the district court found that "because Mr. Weiss relied on information that the partial plastic overmold became displaced during the accident, which the Trial Court found inaccurate, he cannot state that a D-ring design fully encased in plastic (one of the proposed alternative designs) would not expose an occupant to metal during an accident." This assertion misrepresents the district court's holding.

The district court found that "opinion number eight is that completely encasing the D-ring in plastic would eliminate the potential of an unexposed (sic) metal edge." This opinion presupposes that there was an exposed metal edge on the D-ring of the 2012 Navigator because the plastic trim cover became dislodged upon making contact with Ms. Gordon's head. This supposition was inaccurate; the evidence showed that "the cover was removed by the husband" *after* the accident. Therefore, the district court found that Mr. Weiss was "relying upon

⁸ Ms. Gordon's counsel pointed out that Mr. Weiss's Challenged Opinions 6 through 10, did not contain the words "laceration," "puncture wound," or "concussion."

inaccurate information . . . that the – [the metal underneath the plastic overlay] was exposed.”

Article 702(A)(2) provides that the proponent of the expert’s testimony, in this case, Ms. Gordon, has the burden of proving that the testimony is based on sufficient facts or data. We agree with the district court that Ms. Gordon has not carried that burden.

After he was retained as an expert witness in this case, Mr. Weiss retained a local expert, Michael Sunseri of Sunseri Consulting Company, to assist in inspecting the 2012 Navigator, imaging the 2012 Navigator’s EDR data, photographing the tires and the D-ring, and photographing Ms. Gordon sitting inside the vehicle as she would drive it to determine the location of her head relative to the D-ring height measurements and her seated height relative to various pillars in the car.

Mr. Sunseri inspected the vehicle on March 20, 2024, nearly three years after the accident. The photographs (the “Sunseri Photographs”) of the D-ring taken by him on that date do not depict the plastic trim that should have been around the D-ring’s outer rim. The Sunseri Photographs, instead, show a fully metal D-ring. It is clear from Mr. Weiss’s testimony that, based on the Sunseri Photographs, he concluded that the plastic trim had been either dislodged or displaced in the accident.⁹ In fact, however, the plastic trim had been removed *after* the accident by Ms. Gordon’s husband. Ms. Gordon asserts that her husband’s testimony was equivocal and that FMC did not “pin him down” when he testified regarding whether the D-ring was intact when he first inspected the 2012 Navigator after the accident.

⁹ Mr. Weiss relied, in part, on Ms. Gordon’s testimony that her head made contact with the D-ring. She testified that she did not know at first that her head hit the D-ring, but after an investigation, concluded that her head had made contact with the D-ring.

Mr. Gordon testified that he looked at the inside of the 2012 Navigator either the day after or two days after the accident and saw no damage to the inside of the vehicle other than blood on the seat, kick board, and seat belt. He did not observe any blood on the D-ring but “[i]t seemed like there was some spatter on the [B-] pillar.” He was asked whether the plastic trim around the perimeter of the D-ring was in place at that time, to which he replied, “I think so.” When questioned about how the plastic trim came to be removed, he stated:

I think that I had pulled that thing off just to see what was underneath it, and it was – and I don’t know if I left it off or whatever, but I had found it before you guys [FMC’s experts] came. It was under a seat in the back, so I just – I don’t know how it got away from me, but it was in the process of cleaning the car. The D-ring was under – the D-ring cover was underneath one of the seats.

Mr. Gordon stated that he then put the D-ring cover back after he found it. He was then asked:

Q. [Mr. Crochet]: All right. So let me make sure. I think I understand, but let me try to make sure I understand. So, at some point after the accident, you removed the D-ring cover that wraps around the perimeter of the D-ring to see what was going on under that cover?

A. [Mr. Gordon]: That’s right.

Q. And then you’re not sure exactly what happened, but, apparently, it got at least temporarily lost and was under a car seat somewhere in the vehicle?

A. Yes, sir.

Q. And then, later on, you found it and put it back in place?

A. That’s right.

We disagree with Ms. Gordon’s characterization of this testimony. Mr. Gordon unequivocally testified that on the day following the accident or the day after, he observed no damage to the interior of the vehicle, other than blood splatter in areas other than the D-ring, which had no blood on it, and that he believed that the D-ring was intact when he first saw it after the accident. He further affirmatively testified that he was the one who pulled the plastic cover off the D-

ring. The plastic overlay then remained off the D-ring until sometime between March 20, 2024, and September 4, 2024 – approximately three years after the accident – when Mr. Gordon found it underneath a seat in the back of the vehicle and reattached it.¹⁰ In her brief, Ms. Gordon represents that Mr. Gordon testified that when FMC first came to inspect the vehicle, “the plastic overmold was missing because at some point after the accident he removed it . . . However, Mr. Gordon was not asked about the condition or placement of the D-ring prior to him removing it.” Again, this is a mischaracterization of Mr. Gordon’s testimony. He testified that he *replaced* the plastic D-ring trim *prior* to FMC’s first inspection (which occurred on September 4, 2024). Thus, it was *missing* at the time of Mr. Sunseri’s inspection on March 20, 2024.

Ms. Gordon goes on to assert that “any question regarding those key issues is absent from Defendant’s questioning, and all Mr. Gordon’s testimony does is establish that he was the one who completely removed it.” In fact, Mr. Gordon *was* questioned about the condition of the D-ring immediately after the accident and he testified that he believed it to have been intact. Photographs taken immediately after the accident depict the plastic trim surrounding the D-ring’s outer rim as being intact. Thus, photographic evidence does not support Mr. Weiss’s testimony and opinion(s) that the D-ring became dislodged, displaced or dislocated as a result of Ms. Gordon’s head striking it.

Moreover, Article 702(A) places the burden on Ms. Gordon, not FMC, to demonstrate that her expert witness relied on sufficient facts and data. She did not meet this burden.

Mr. Weiss also opined that had the plastic trim remained in place, Ms. Gordon would not have experienced a head wound. Mr. Weiss testified:

¹⁰ Mr. Gordon was deposed on September 23, 2024. FMC’s experts inspected the 2012 Navigator on September 4, 2024. The D-ring cover was intact when they inspected the vehicle. It was not intact when Mr. Sunseri inspected the vehicle on March 20, 2024.

Q. [By Mr. Crochet]: I just want to make sure I understand.

You don't have any direct evidence telling you that this trim piece moved during this collision, but you're inferring that it may have because you see some pictures where it is not present; is that correct?

A. [By Mr. Weiss]: In addition it takes very little force to slip it off the edge. We have a laceration to the head which wouldn't have occurred if the trim had stayed in place. It's –

Q. Is it your opinion that the trim moved during this accident or do you not know?

A. It likely moved in response to the head contact, thereby exposing the metal edge, causing the laceration. Whether or not it dislodged completely, we don't know.

Q. So, if I'm understanding your opinion correctly, she sustained her laceration according to you by contacting the metal on the D-ring after movement, displacement, if you will, of the trim?

A. Yes.

Q. Could she have sustained her laceration if the trim did not dislodge?

A. No.

(Emphasis added).

Mr. Weiss went on to testify that the plastic trim, once dislodged or displaced, would not have slipped back into place on its own. He speculated that this piece could have been pushed back into place by someone. He knew of no evidence, however, that would support such a scenario. When asked how he determined whether Ms. Gordon would have suffered a laceration if the trim had not moved, Mr. Weiss stated that his opinion was based on his “understanding that it takes 100 pounds or so to create a laceration. And the ten pounds it takes to displace the trim.”¹¹

¹¹ Mr. Weiss relied solely upon information provided to him by Mr. Bob Anderson, a biomechanical engineer and colleague to determine that it would take one hundred pounds of force for a head hitting a metal D-ring to cause a laceration/puncture wound to the scalp. FMC contends that because Mr. Weiss did not independently confirm this information, his methodology was flawed. An expert witness may testify based on information obtained from others and the character of evidence upon which the expert bases an opinion affects only the weight to be afforded the expert's conclusion. *State v. Fallon*, 290 So.2d 273 (La. 1974); *State v. Austin*, 282 So.2d 711 (La. 1973); La. C.E. art. 703. The expert witness testifying in court need not be the person who actually compiled the statistics for comparison. He or she may rely on data prepared by others. *Fallon*, 290 So.2d at 291.

FMC also contends that Mr. Weiss's methodology is flawed because he used a pressure gauge with a hook on the end of it to pry off the outer plastic trim of a similarly constructed D-ring, at a forty-five degree angle, and concluded that ten pounds of force would be required for Ms. Gordon's head to strike the D-ring. FMC contends that Mr. Weiss should have used a head

Mr. Weiss testified that he considered, and dismissed, the other components of the restraint system as causes of Ms. Gordon's head wound because those components were encased in plastic. Mr. Weiss identified the metal portion of the D-ring that sat underneath the plastic trim surrounding the D-ring's perimeter as the sole source of Ms. Gordon's head wound. The only explanation that he offered as to how the metal would have been exposed was that the plastic trim became displaced due to making contact with Ms. Gordon's head. By his own testimony, however, if the plastic trim was not displaced or dislodged, but was in place, she could not have sustained a head laceration/puncture wound.¹² Mr. Gordon's testimony and the photographs of the 2012 Navigator taken immediately after the accident demonstrate that the plastic trim was not dislodged as a result of coming into contact with Ms. Gordon's head or otherwise. Mr. Weiss produced no evidence that the polymer casing of the D-ring dislodged or moved; his opinion was based on his own supposition.

Accordingly, we agree with the district court that Mr. Weiss's Challenged Opinion No. 8 hinges on an assumption that is contrary to and unsupported by the facts. The district court did not abuse its discretion in granting the Daubert Motion as to that opinion. Challenged Opinions No. 6, 7, 9, and 10 are also based on the same flawed assumption and were correctly excluded by the district court, although not for the reasons stated. Although we exclude Challenged Opinions 6,

form. Mr. Weiss admitted that prying the trim off with the pressure gauge did not approximate a head strike.

Because we have determined that Mr. Weiss relied on a fact not supported by the evidence, which caused him to make a faulty assumption, we do not opine on these issues.

¹² Mr. Weiss admitted that the 2012 Navigator was compliant with federal safety standards applicable to seat belt construction and performance that were in place at the time of the accident. He was not aware of FMC or any other automobile manufacturer changing the design of the D-rings in their vehicles expressly due to safety concerns. He had not read any literature discussing safety concerns with visible D-rings. Mr. Weiss stated that, other than Ms. Gordon, he had not been asked to opine on any injury caused by occupant contact with a D-ring. He also testified that he was unaware of anyone other than Ms. Gordon having alleged to have been injured by contact with a D-ring.

7, 9, and 10 on different grounds than those stated by the district court at the hearing on the Daubert Motion, we observe that this Court reviews judgments, not reasons for judgment, and judgments are often upheld on appeal for reasons different than those assigned by the trial court. *Jessie v. Wendy's Co.*, 22-156 (La. App. 5 Cir. 12/7/22), 356 So.3d 467, 471; *Wooley v. Luck singer*, 09-571, 09-584, 09-585, 09-586 (La. 4/1/11), 61 So.3d 507, 572. Having found that Mr. Weiss's Challenged Opinions are based on information and an assumption that is not supported by the facts, we do not address FMC's other bases for challenging Mr. Weiss's methodology.¹³

B. THE SUMMARY JUDGMENT MOTION

1. Summary Judgment Standards and Standard of Review

Appellate courts review summary judgments *de novo*, under the same criteria as the district courts to determine whether summary judgment is appropriate. *Neville v. Redmann*, 22-175 (La. App. 5 Cir. 12/31/22), 356 So.3d 568, 575, *writ denied*, 23-126 (La. 4/4/23), 358 So.3d 861, citing *Lapuyade v. Rawbar, Inc.*, 18-474 (La. App. 5 Cir. 12/27/18), 263 So.3d 508, 511-12, *writ denied*, 19-315 (La. 4/15/19), 267 So.3d 1126. Under La. C.C.P. art. 966(A)(3), summary judgment “shall be granted if the motion, memorandum, and supporting documents show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law.” The burden of proof rests with the mover, unless the mover will not bear the burden of proof at trial on the issue before the court on summary judgment. La. C.C.P. art. 966(D)(1). In that instance, the mover need only show the court the absence of factual support for one

¹³ We observe, however, that as to these challenged opinions, there has been no showing, for purposes of a *Daubert/Foret* analysis that (1) Mr. Weiss's theory or technique can be and has been tested; (2) his theory or technique has been subjected to peer review and/or publication; (3) the known or potential rate of error; and (4) his theory is generally accepted in the relevant scientific community. *Daubert*, 509 U.S. at 593-94.

or more essential elements of the adverse party's claim. *Id.* The burden then shifts to the adverse party to establish factual support sufficient to demonstrate the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law. *Id.*

A court's determination of whether a genuine issue of material fact exists requires reference to the applicable substantive law. *Hacienda Holding Co., L.L.C. v. Home Bank*, 20-189 (La. App. 5 Cir. 12/30/20), 309 So.3d 435, 445, citing *Stephens v. Southern Sweeping Servs.*, 03-826 (La. App. 5 Cir. 11/25/03), 862 So.2d 197, 199.

2. Applicable Substantive Law

Ms. Gordon's claims arise under the Louisiana Products Liability Act ("LPLA"), La. R.S. 9:2800.51, *et seq.*, which establishes "the exclusive theories of liability for manufacturers for damage caused by their products." La. R.S. 9:2800.52. La. R. S. 9:2800.54 sets forth the elements of a products liability claim:

A. The manufacturer of a product shall be liable to a claimant for damage proximately caused by a characteristic of the product that renders the product unreasonably dangerous when such damage arose from a reasonably anticipated use of the product by the claimant or another person or entity.

Thus, a claimant may recover damages caused by a characteristic of a product, rendering it unreasonably dangerous when being used for its reasonably anticipated use. La. R.S. 9:2800.54(A). Section 2800.54(B) provides that a product is unreasonably dangerous if and only if: (1) it is unreasonably dangerous in construction or composition; (2) it is unreasonably dangerous in design; (3) it is unreasonably dangerous due to inadequate warning about the product; or (4) it is unreasonably dangerous because it does not conform to an express warranty of the manufacturer about the product.

Ms. Gordon's petition set forth claims under each subsection of La. R.S. 9:2800.54(B), but she has only pursued her claim for damages due to the design of

the D-ring. Section 2800.56 provides that a product is unreasonably dangerous in design if, at the time it left the manufacturer's control: (1) there existed an alternative design for the product that was capable of preventing the claimant's damage; and (2) the likelihood that the product's design would cause the claimant's damage and the gravity of that damage outweighed the burden on the manufacturer of adopting such alternative design and the adverse effect, if any, of such alternative design on the utility of the product. The claimant has the burden of proof on all issues.

“Under the LPLA, a manufacturer is liable only for those uses it should reasonably expect of an ordinary consumer.” *Butz v. Lynch*, 99-1070 (La. App. 1 Cir. 6/23/00), 762 So.2d 1214, 1218, *writ denied*, 00-2660 (La. 11/17/00), 774 So.2d 980. “Reasonably anticipated use” is defined under the LPLA as “a use or handling of a product that the product's manufacturer should reasonably expect of an ordinary person in the same or similar circumstances.” La. R.S. 9:2800.53(7). “The standard for determining a reasonably anticipated use is an objective one (an ordinary person in the same or similar circumstances).” *Butz*, 762 So.2d at 1218. And “what constitutes a reasonably anticipated use is ascertained from the point of view of the manufacturer at the time of manufacture,” thus precluding “the factfinder from using hindsight.” *Payne v. Gardner*, 10-2627 (La. 2/18/11), 56 So.3d 229, 231. There is no dispute that Ms. Gordon was using the allegedly defective product in the manner reasonably anticipated by FMC at the time of the accident.

The question of whether a product is unreasonably dangerous in design is a question of fact. *Walker v. Manitowoc Co., Inc.*, 16-897 (La. App. 3 Cir. 10/10/18), 259 So.3d 465, 478. A product is not automatically unreasonably dangerous as the result of a design defect just because someone was injured by it.

Tuminello v. ABC Ins. Co., 23-446 (La. App. 3 Cir. 2/28/24), 381 So.3d 320, 338, writ denied, 24-401 (La. 5/29/24), 385 So.3d 702.

In *Johnson v. Black & Decker U.S., Inc.*, 29,996 (La. App. 2 Cir. 10/31/97), 701 So.2d 1360, 1363, writ denied, 97-2971 (La. 2/6/98), 709 So.2d 741, the court set forth the elements of a claim that a product is unreasonably dangerous due to its design, stating:

[A]fter establishing that his damage arose from a reasonably anticipated use of the product, a claimant who alleges defect by design under La. R.S. 9:2800.56 must prove three elements. First, he must prove that another way to design the product existed at the time the manufacturer placed the chosen design on the market. . . Next he must prove that the alternative design was capable or would have been ‘significantly less likely’ than the chosen design to cause the claimant's complained of damages, or that the alternative design would have significantly reduced such damage. . . Finally, the claimant must prove that, at the time the product left the manufacturer's control, the likelihood that the product as designed would cause the claimant's damage and the gravity of that damage outweighed the burden on the manufacturer of adopting the alternative design identified by claimant, and the adverse effect, if any, this different mode of design would have on the product's utility.

We now turn to a *de novo* review of the district court's judgment granting the Summary Judgment Motion. At the hearing on the summary judgment motion, FMC argued that without Mr. Weiss's Challenged Opinions 6 – 10, Ms. Gordon lacked evidence to support the elements of her defective design LPLA claim. FMC specifically argued that Ms. Gordon could not prove that the alleged design defect was the proximate cause of her injury and she did not have any evidence to prove that an alternative design would have prevented her injuries without Mr. Weiss's expert testimony. In response, Ms. Gordon argues that her own testimony indicating that her head hit the D-ring is sufficient to create a genuine issue of material fact. She further contends that testimony from FMC's corporate representative, Ram Krishnaswami, confirming that FMC previously used a D-ring

completely covered in plastic, creates a genuine issue of material fact as to the alternative design elements.

Upon *de novo* review, we find that Ms. Gordon has failed to meet her burden to establish the existence of any genuine issue of material fact as to these elements of her defective design LPLA claim. Mr. Weiss opined that the only way the D-ring could have caused the injury at issue was if the overmold came off during the accident. However, the undisputed evidence establishes that the overmold was not removed until after the accident thereby resulting in the exclusion of this expert testimony. Thus, the only remaining evidence to support Ms. Gordon's claim that the design of the D-ring is unreasonably dangerous and a proximate cause of her injury is her own testimony that her head hit the D-ring. However, as explained above, mere evidence that an accident and injury occurred is not sufficient to establish that a product is unreasonably dangerous by design.

In addition, without Mr. Weiss's expert testimony, we find that Ms. Gordon cannot satisfy her burden to prove that an alternative design existed at the time the product left the manufacturer's control, that the alternative design was capable of preventing the damage, and that the risk avoided by that alternative outweighed the burden and adverse utility consequences of adopting it. Louisiana courts have consistently required expert testimony to establish the elements of a defective design products liability claim, unless the product is relatively uncomplicated and the judge or jury can rely on common sense to resolve the issues. See *Stewart v. Capital Safety USA*, 867 F.3d 517, 521 (5th Cir. 2017). As outlined above, this matter involves causation and design issues that are of sufficient complexity to be beyond the expertise of the average judge and juror and that are not resolved by simply employing common sense.

Further, we find that testimony from FMC's corporate representative confirming that FMC used a complete plastic overmold in the Lincoln Navigator

from 2003 to 2007 is not sufficient to satisfy Ms. Gordon's burden to establish a genuine issue of material fact as to the elements of her defective design LPLA claim. In addition, we agree with the district court that Ms. Gordon did not point to any evidence supporting her construction or composition, inadequate warning, and express warranty claims under the LPLA. Accordingly, we affirm the district court's grant of summary judgment dismissing with prejudice, all of Ms. Gordon's claims against FMC.

DECREE

For the reasons stated above, we affirm the district court's judgments granting defendant Ford Motor Company's Daubert Motion and Summary Judgment Motion, and dismissing plaintiff Janis Gordon's claims against defendant Ford Motor Company with prejudice.

AFFIRMED

Fifth Circuit Court of Appeal State of Louisiana

No. 25-CA-100 C/W 25-C-85

JANIS H. GORDON

versus

FORD MOTOR COMPANY D/B/A THE LINCOLN MOTOR COMPANY

WICKER J., CONCURS WITH REASONS

While I agree with the majority's opinion, I respectfully write separately to express my concern that there is a need for clarity relative to the mandatory sequencing provision of La. C.C.P. art. 966(D)(3), either from the legislature or the Louisiana Supreme Court. In my opinion, it is unclear whether the article requires that a separate motion challenging the qualifications and/or methodology of a party's expert under La. C.C.P. art. 1425 must be heard in sufficient time prior to the summary judgment hearing to enable a party whose expert is excluded to obtain a substitute expert and/or to seek appellate review of the trial court's ruling on the Article 1425 Motion, or whether Article 966(D)(3) contemplates what occurred in this case – the virtually simultaneous consideration of both motions, precluding the party whose expert is excluded from obtaining another expert and/or obtaining appellate review prior to having her case dismissed on summary judgment.

La. C.C.P. art. 966(D)(3) states:

If a timely objection is made to an expert's qualifications or methodologies in support of or in opposition to a motion for summary judgment, ***any motion in accordance with Article 1425(F)*** to determine whether the expert is qualified or the expert's methodologies are reliable ***shall be filed, heard, and decided prior to***

the hearing on the motion for summary judgment. (Emphasis added).

The triggering event for Article 966(D)(3) is *a timely objection* to an expert's qualifications or methodologies in support of or in opposition to a motion for summary judgment. The manner of objecting to evidence submitted in support of or in opposition to a motion for summary judgment is set forth in La. C.C.P. art. 966(D)(2), which states:

The court shall consider only those documents filed or referenced in support of or in opposition to the motion for summary judgment but shall not consider any document that is excluded pursuant to a timely filed objection. Any objection to a document *shall be raised* in a timely filed opposition or reply memorandum. The court shall consider all objections prior to rendering judgment. The court shall specifically state on the record or in writing whether the court sustains or overrules the objections raised.

Under that provision, if the non-moving party objects to summary judgment evidence submitted by the mover, she must file her objection in a timely-filed opposition memorandum and if the moving party objects to evidence attached to the opposition to the motion for summary judgment, he must file his objection in a timely-filed reply memorandum. *Only if a timely objection is made* to an expert, does the second part of Article 966(D)(2) providing that *any motion in accordance with Article 1425(F) be filed, heard, and decided prior to the summary judgment hearing* become operative. Article 966(D)(2) does not *require* that an Article 1425(F) motion (commonly referred to as a "Daubert Motion") be filed in order to challenge an expert, it only requires that a timely filed objection to the expert's summary judgment evidence be filed, and if a Daubert Motion is filed, it must be heard and decided prior to the summary judgment hearing.

The statutory deadlines for summary judgment submissions are: the motion for summary judgment and all documents in support of the motion must be filed and served not less than sixty-five days prior to trial; any opposition and

all documents in support of the opposition must be filed and served not less than fifteen days prior to the hearing on the motion; and any reply memorandum must be filed and served not less than five days inclusive of legal holidays prior to the hearing on the motion. La. C.C.P. art. 966(B)(1)-(3). The trial court's pre-trial order in this case adopted the statutory deadlines. The hearing on the motion for summary judgment must be held not less than thirty days after the filing of the motion but not less than thirty days prior to trial.

In this case, trial was scheduled for February 10, 2025. The discovery cutoff was November 8, 2024. FMC¹ filed its motion for summary judgment on December 2, 2024, seventy days prior to trial, and the hearing was set for January 2, 2024 – exactly thirty days after the filing of the motion and thirty-eight days prior to trial.² Ms. Gordon's Opposition to the Motion for Summary Judgment was filed on December 18, 2024, fifteen days prior to the hearing on the motion for summary judgment. Attached to Ms. Gordon's opposition were excerpts of the deposition of her expert, Mr. Kurt Weiss, and Mr. Weiss' Restraint System Analysis Report. FMC filed a *Reply Memorandum in Further Support of its Motion for Summary Judgment* on December 27, 2024. FMC's reply memorandum did not contain an objection to Mr. Weiss' deposition excerpts or his expert report.

On December 12, 2024, however, FMC filed a separate motion, pursuant to La. C.C.P. art. 1425(F) challenging Mr. Weiss' qualifications and methodologies. Article 1425(F)(1) provides that any such motion shall seek a

¹ FMC refers to defendant-appellee Ford Motor Company.

² FMC represented in its Motion for Summary Judgment that the exhibits to its motion were attached to its Memorandum in Support of its motion for summary judgment. The record as filed in this Court contains no exhibits that were attached to FMC's memorandum in support of its motion for summary judgment and no exhibits that were introduced by FMC at the summary judgment hearing. One of the exhibits that FMC alleged it had submitted was the deposition of Mr. Weiss, Ms. Gordon's expert, and one or more exhibits to Mr. Weiss' deposition.

pre-trial hearing and shall be filed not later than sixty days prior to the trial. Again, the trial court's pre-trial scheduling order in this case adopted the statutory deadline. The trial court is required to conduct a contradictory hearing and rule on the motion not later than thirty days prior to trial. La. C.C.P. art. 1425(F)(2). FMC's Daubert Motion was filed sixty days prior to the trial date and was timely under Article 1425(F). The hearing on FMC's Daubert Motion was set for the same day as the summary judgment hearing. Ms. Gordon did not object to having the hearings on both motions on the same date. Nor did she seek a continuance of the summary judgment motion or of the trial date.

On the date appointed for the hearings on FMC's motions, the trial court first took up the Daubert Motion, which it granted, effectively excluding the testimony of Ms. Gordon's expert relative to the alleged defective design of the D-ring with which her head made contact at the time of the accident, or as to any alternative designs that would have prevented her injuries. As Ms. Gordon was asserting only a defective design claim under the Louisiana Product Liability Act, La. R.S. 9:2800.51, *et seq.* (the "LPLA"), the trial court's ruling left her without any expert opinion to establish essential elements of her claim. Ms. Gordon did not formally object on the record to the trial court's ruling; nor did she request any continuance of the motion for summary judgment or request a continuance of the trial date to permit her to obtain a supplemental report or to obtain a substitute expert.

The trial court called the summary judgment motion for hearing immediately after its ruling on the Daubert Motion. Ms. Gordon did not object to proceeding with the hearing on the motion for summary judgment. The trial court then granted the motion for summary judgment and dismissed Ms. Gordon's case with prejudice, on the ground that "there was no theory put forth

on alternative design.”³ Written judgments were entered on January 14, 2025, less than thirty days prior to trial.

La. C.C.P. art. 1425(F)(5), as in effect at the time of the trial court’s rulings, provided that “[a] ruling of the court pursuant to a hearing held in accordance with the provisions of this Paragraph *shall be subject to appellate review as provided by law.*”⁴ (Emphasis added). The signing of a final judgment is required in all contested cases and notice of the signing must be given to all parties. La. C.C.P. art. 1913. Interlocutory judgments shall be reduced to writing if the court so orders. La. C.C.P. art. 1914. Here, the transcript reveals that it was contemplated at the hearings that judgments would be prepared and signed by the court, which they were, and notice was mailed to the parties. Written judgments are required for applications for supervisory writs and appeals to this Court. Thus, the timeline of the ruling on the Daubert and summary judgment motions made it impossible for Ms. Gordon to seek appellate review of the trial court’s ruling on FMC’s Daubert Motion prior to trial, retain another expert in time for trial, or seek a continuance.⁵

³ Initially, the trial court indicated that it was granting a partial summary judgment “as to the fact that there’s no expert to testify to the unreasonably dangerous construction of the D-ring or that there was an inadequate warning or that it didn’t conform to an expressed warranty; however, I’m not going to dismiss the case with prejudice. I believe they’re entitled to go forward and have their day in court.” Defense counsel agreed to prepare the judgment, but counsel for Ms. Gordon asked the trial court to clarify that Ms. Gordon still had a claim for a design defect. The court stated that the case could go forward on that claim. Thereafter, the court stated: “Okay. Looking at it again, I believe we’re going to grant the motion for summary judgment because of the fact there was no, there was no theory put forth on an alternative design. So, the Motion for Summary Judgment would be granted in full.” The court then stated: “Okay. But we are still going forward with trial.” At that point, plaintiffs’ and defense counsel pointed out to the court that if the summary judgment were granted in full, there would be no trial. Upon being so informed, the court stated: “Oh, okay. Without the expert, then we’ll grant the motion for summary judgment. Okay.” Plaintiffs’ counsel asked whether the dismissal was with prejudice, and the court confirmed that it was. Plaintiffs’ counsel then asked to order a transcript.

⁴ La. C.C.P. art. 1425(F)(5) was amended by 2026 La. Acts No. 127, passed May 15, 2026, and now reads: “A ruling allowing or excluding an expert or an expert’s report due to the expert’s lack of qualifications or use of unreliable methodology is an interlocutory order that is not appealable in accordance with Article 2083.”

⁵ This case had been actively litigated since its inception in May 2022. There was only one continuance of the trial, and it was for a period of approximately four months. This was not a case that had lingered for an inordinate amount of time on the court’s docket. La. C.C.P. art.

In *Nolaluna, LLC v. Crosby, et al.*, 24-555 (La. App. 4 Cir. 5/6/25), 421 So.3d 125, *writ denied*, 25-717 (La. 10/7/25), 418 So.3d 364, the defendants filed three pre-trial three motions – a motion for summary judgment seeking to have the district court rule that plaintiff’s future lost profits were impermissibly speculative, and two motions to exclude the testimony of plaintiff’s expert witnesses as to damages, arguing that neither was qualified to opine on plaintiff’s claims for damages and that the evidence of plaintiff’s damages was too speculative to prove at trial. 418 So.3d at 128.

On May 13, 2024, the district court conducted a hearing on both motions to exclude plaintiff’s experts and granted both motions in open court. Four days later, on May 17, 2024, the district court conducted a hearing on the defendant’s motion for summary judgment, which was granted, and a written judgment was signed the same day. Also, on May 14 and May 17, 2024, the district court signed written judgments granting the motions to exclude the plaintiff’s experts. The plaintiff appealed, assigning as error the district court’s exclusion of its expert witnesses and the district court’s grant of summary judgment dismissing its claims for damages. Notably, the court’s opinion does not indicate that the plaintiff raised any issue relative to Article 966(D)(3)’s mandatory sequencing requirement.⁶

The Fourth Circuit initially observed:

The current version of Article 966 contains mandatory deadlines for filing and serving a motion for summary judgment, opposition, and reply, and for conducting a summary judgment hearing. The record shows no dispute that the motions were filed and heard timely within the mandatory pretrial deadlines in La. C.C.P. arts. 1425(F) and 966(B)-(C). Even so, in 2023, the legislature amended La. C.C.P. art. 966 to add Subsection (D)(3), explicitly requiring that *Daubert*

967(C) provides that “[i]f it appears from the affidavits of a party opposing the motion that for reasons stated he cannot present by affidavit facts essential to justify his opposition, the court may refuse the application for [summary] judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or make any such order as is just.” Thus, the summary judgment procedure gives the trial court discretion to take action to ensure that a party is afforded fundamental fairness.

⁶ Ms. Gordon also did not raise any issue relative to Article 966(D)(3) in her appeal.

challenges to summary judgment evidence must be heard and disposed of before the summary judgment hearing[.]

Id.

The court ruled that the defendants had introduced conflicting evidence of Nolaluna's damages in conjunction with their summary judgment motion, thereby precluding summary judgment. *Id.* at 132. The *defendants* attached the plaintiffs' experts' reports and deposition testimony to their summary judgment motion, without objecting to the admissibility of the expert testimony under La. C.C.P. art. 966(D)(2), which provides that an objection to a document filed in support of or in opposition to a motion for summary judgment "**shall** be raised in a timely filed opposition or reply memorandum." *Id.* The court found that "an objection to an expert's qualifications or methodology under article 1425(F) is a distinct, separate inquiry and is not a replacement for an objection to the admissibility of summary judgment evidence under article 966(D)(2)."⁷ *Id.*; see also, *Adolph v. Lighthouse Property Insurance Corporation*, 16-1275 (La. App. 1st Cir. 9/8/17), 227 So. 3d 316, 320.⁸

In *Nolaluna*, as is the case here, the motions were filed and heard within the mandatory pretrial deadlines established in Articles 1425(F) motion and 966. Nevertheless, the court expressed its concern that as a result of the timing of the

⁷ The court also found that the expert testimony submitted by the plaintiffs should have been considered by the trial court in determining whether a material issue of fact was presented, even though the trial court had granted a motion to exclude the experts, since no objection pursuant to La. C.C.P. art. 966(D)(2) had been interposed. "In the absence of an objection raised in a timely opposition or reply memorandum, the district court is 'statutorily obligated to consider the expert's opinions' introduced in support of a summary judgment motion." *Id.* at 132. (Citations omitted). Similarly, in this case, FMC attached portions of Mr. Weiss' testimony to its summary judgment motion and failed to object to Ms. Gordon's evidence relative to Mr. Weiss' opinions attached to her opposition to FMC's motion.

⁸ *Adolph*, which was decided prior to the amendment to Article 966 in 2023, which added Section (D)(3), held that the only proper procedure to challenge the qualifications of an expert who has prepared an affidavit in opposition to a motion for summary judgment is pursuant to La. C.C.P. art. 1425, which provides guidelines and a procedure for determining the admissibility of expert opinion." The party opposing a motion for summary judgment had filed a motion to strike the plaintiff's expert. The 2015 amendments to Article 966 had removed the motion to strike as a procedure for objecting to summary judgment evidence.

hearing on the 1425(F) and summary judgment hearing, which occurred a month prior to trial and following the lapse of discovery deadlines, the plaintiff “was left with no recourse to obtain any other expert or seek a continuance of trial to do so.” *Id.* at 133. (Citation omitted). Under the procedural circumstances presented in *Nolaluna* (which are strikingly similar to those in this case), the Court stated that it was “disinclined to permit technical pleading rules to triumph over actual justice.” *Id.*

The Louisiana legislature was mindful of these concerns in enacting La. C.C.P. art. 966(D)(3), explicitly requiring that *Daubert* challenges to summary judgment evidence must be heard and disposed of **before the summary judgment hearing**. In the comments to this 2023 amendment, the legislature instructed courts: [t]o avoid any possible conflict between the time delays in this Article and Article 1425(F), the court should set appropriate deadlines for the Article 1425(F) hearing in a scheduling or pretrial order.

Id. at 133. (Internal citations and quotation marks omitted).

FMC addressed the mandatory sequencing issue in its briefing and therein referred to the Minutes of the Louisiana Law Institute Meeting of the Council, 01-2023 and 12-2022, wherein Judge Guy Holdridge of the Code of Civil Procedure Committee, discussed then-proposed Section (D)(3) to Article 966 with the Council. Those minutes indicate that the drafters and proponents of Article 966(D)(3) were primarily concerned that any motion filed in accordance with Article 1425(F) during summary judgment proceedings is heard and decided prior to the hearing on the motion for summary judgment and that trial courts are encouraged to utilize scheduling orders to accomplish that goal. The discussions, however, indicated that “the Committee plans to subsequently address additional issues in Article 1425.”⁹ Ms. Gordon did not submit any briefing to us on the

⁹ The discussions also observed that appellate review of summary judgments has become more prevalent than appellate review after trial and that the body of law dedicated to summary judgments is becoming “over expanded.” Additionally, the council members voiced concerns that summary judgment procedure should not be amended to include too many steps for the unwary. This writer believes that Article 966(D)(3) sets up just such a trap for the unwary, as discussed herein.

sequencing issue and offered no arguments counter to those set forth in FMC’s brief or oral arguments to this Court.

The Fourth Circuit, in *Nolaluna*, raised the Article 966(D)(3) issue *sua sponte*. Article V, § 10 of the Louisiana Constitution of 1974 extends appellate review to both law and facts. La. C.C.P. art. 2164 states, in pertinent part, that “the appellate court shall render any judgment that is just, legal, and proper on the record on appeal.” The purpose of Article 2164 is “to give the appellate court complete freedom to do justice on the record irrespective of whether a particular legal point or theory was made, argued, or passed on by the court below.” La. C.C.P. art. 2164, Rev. comment (a). Uniform Rules of Louisiana Courts of Appeal, Rule 1-3 provides that the courts of appeal “shall review issues that were submitted to the trial court and that are contained in specifications or assignments of error, *unless the interest of justice requires otherwise*.” (Emphasis added).

In some instances, appellate courts have a duty to raise an issue – for example, subject matter jurisdiction – *sua sponte*. *In re Med. Rev. Panel Proc. of Foster*, 17-653 (La. App. 5 Cir. 3/28/18), 243 So. 3d 1282, 1285, citing *Lynch–Ballard v. Lammico Ins. Agency, Inc.*, 13-475, p. 4 (La. App. 5 Cir. 11/19/13), 131 So.3d 908, 910. Failure to state a cause of action or to demonstrate a right of action are also matters that may be noticed by appellate courts for the first time on appeal. La. C.C.P. art. 927(B); *Moreno v. Entergy Corp.*, 10–2268 (La.2/18/11), 64 So.3d 761, 762; *Warren v. HDI Global Insurance Company*, 21-570 (La. App. 5 Cir. 5/16/22), 341 So.3d 1249, 1253 n. 1, *writ denied*, (La. 11/1/22), 349 So.3d 10; *Ezzell v. Miranne*, 13-349 (La. App. 5 Cir. 12/30/13), 131 So. 3d 1093, 1098, n.4. Other matters, such as declinatory or dilatory exceptions, which are waived unless timely filed in the trial court,

cannot be raised by the appellate court for the first time on appeal. La. C.C.P. arts. 925(C), 926(B); see also *Moreno*, 64 So.3d at 762-63.

It is clear that, under La. C.C.P. 2164 and Rule 1-3, the *Nolaluna* court had, and this Court has, the power to consider issues that were not presented to the trial court or raised in the appeal if the interests of justice so require.

Nevertheless, as stated by the First Circuit Court of Appeal in *McLane S., Inc. v. Bridges*, 13-1819, 2014 WL 5588893 at * (La. App. 1 Cir. 11/3/14):

Our jurisprudence generally precludes this court from considering a contention raised for the first time on appeal . . . The supreme court follows an analogous practice . . . Similarly, Rule 1–3 of the Uniform Rules of Louisiana Courts of Appeal articulates the same principle this way: ‘[t]he Courts of Appeal will review only issues which were submitted to the trial court and which are contained in specifications or assignments of error, unless the interest of justice clearly requires otherwise.’^[10] (Internal citations omitted).

Third Circuit Court of Appeal has explained that the “interest of justice” exception “is not without limitation” and has listed the following “limited circumstances” when courts have applied it:

(a) when fundamental constitutional due process is involved; (b) when a jurisdictional concern is implicated; (c) when a trial judge may have had improper ex parte communication; (d) where the proper resolution of an issue is beyond a doubt or where injustice might occur; (e) when an incorrect law has been applied; and (f) when a pure question of law is involved and the failure to consider it would result in the miscarriage of justice.

Bayou Bridge Pipeline, LLC v. 38.00 Acres, 19-565 (La. App. 3 Cir. 7/15/20), 304 So.3d 529, 539, quoted with approval by *Reissland v. Valluzzo Companies, LLC*, 25-379, 2025 WL 3754077 at *12 (La. App. 4 Cir. 12/29/25), ___ So. 3d ___, *writ denied*, 26-184 (La. 5/12/26), 430 So. 3d 1084.

If the interest of justice exception does not apply and a party presents an argument for the first time on appeal, then that party **“seek[s] to introduce a completely new issue to th[e] case,”** one which **“was neither presented ... to the trial court, nor ruled upon by the trial court.”** . . . Were an appellate court to consider that new issue, it

¹⁰ The word “clearly” does not actually appear in Rule 1-3. It simply states “unless the interest of justice requires otherwise.”

would be equivalent to permitting a party to shift to a new argument and to ‘a better horse to ride’ at the appellate level after ‘**[h]aving met with a lack of success at the trial court with**’ her original argument. . . This is unfair to the opposing party and presents potential judicial inefficiency problems by not permitting the trial court to resolve issues in the first place. In discussing Uniform Rule 1-3, the Louisiana First Circuit Court of Appeal has explained that ‘**[La.] C.C.P. art. 2164 provides authority for [an appellate] court to take up an issue raised ... for the first time under special circumstances,**’ such as “**a workers’ compensation case, [or] one in which a party is appearing without the benefit of legal counsel.**”

Reissland, 2025 WL 37540077 at *13. (Emphasis in original; internal citations omitted).

The filings of both motions in this case and the timing of the hearings and rulings on them were compliant with the trial court’s pre-trial scheduling order and applicable law. When the trial court set the hearing of the Daubert Motion for the same date as the summary judgment hearing, Ms. Gordon did not object or ask for the summary judgment hearing and/or the trial to be continued should the Daubert Motion be granted.

At the January 2, 2025 hearing, the trial court first took up the Daubert Motion, which it granted, and stated, “With that, we can take up the motion for summary judgment now.” Ms. Gordon interposed no objection to proceeding with the summary judgment hearing. No allegations of prejudice resulting from the exclusion of her expert were raised in oral argument on the summary judgment motion. No request to continue or stay the summary judgment hearing and/or the trial, either to permit Ms. Gordon to apply to this Court for supervisory writs, or to attempt to identify a replacement expert was made. The parties simply proceeded to argue the merits of the summary judgment motion, which the trial court granted.

Following the trial court’s ruling granting the motion for summary judgment and dismissing Ms. Gordon’s case with prejudice, Ms. Gordon’s counsel requested to order a transcript, but did not lodge a formal objection to

either of the court's rulings. No argument was made that it was unfair for the court to exclude Ms. Gordon's expert and to then then immediately thereafter grant summary judgment based on the exclusion of the expert.

Ms. Gordon filed a Notice of Intent to file Supervisory Writ from the trial court's judgment on the Daubert Motion on January 8, 2025. She also filed, on the same date, a Motion for Appeal from the district court's judgment granting FMC's Summary Judgment Motion. Her Motion for appeal was granted on January 12, 2025. Written judgments on the Daubert and Summary Judgment Motions were entered on January 14, 2025. Once the written judgment on the Daubert Motion was entered, Ms. Gordon filed an Amended Notice of Intent to file Supervisory Writ, and a return date was set for thirty days from the mailing of the notice of the written judgment. Her writ application and appeal were consolidated by this Court for disposition.

In her brief to this Court, Ms. Gordon raised no issue relative to the timing of the hearing on the Daubert Motion and the summary judgment motion. Indeed, she failed to brief the issue even after being alerted to the fact that this Court was considering it.¹¹ She did not allege in this Court that she was prejudiced in any

¹¹ We initially issued an opinion, which was vacated by the Louisiana Supreme Court, as discussed below, that would have affirmed the trial court's granting of the Daubert Motion and reversed the trial court's judgment granting FMC's motion for summary judgment, based upon the trial court's failure to comply with the mandatory sequencing provision of La. C.C.P. art. 966(D)(3). The portion of the opinion reversing the summary judgment was not unanimous. FMC then applied to the Louisiana Supreme Court for a supervisory writ, which was granted on the basis that the nonunanimous decision should have been presented to a five judge panel. *Gordon v. Ford Motor Co., Inc.*, No. 26-371 (La. 6/2/26) (*per curiam*). The matter was remanded with instructions to conduct a hearing before a five-judge panel. We invited the parties to submit such supplemental briefings on the issues as they deemed necessary and appropriate. (See *Wooley v. Lucksinger*, 09-571, 09-584, 09-585, 09-586 (La. 4/1/11), 6 So.3d 507, 564-65 (when an appellate court raises an issue *sua sponte*, it is required to give the parties an opportunity to be heard on the issue.) The matter was thereafter orally argued before a five-judge panel. This Court has now unanimously affirmed the trial court's judgment granting FMC's motion to exclude certain opinions of Kurt Weiss, the expert for plaintiff-appellant, and the trial court's judgment granting FMC's motion for summary judgment, dismissing Ms. Gordon's lawsuit with prejudice. I reversed my position on the summary judgment for the reasons stated herein.

way by the trial court's action in taking up the summary judgment motion immediately after ruling on the Daubert Motion. She did not allege that the summary judgment hearing or the trial should have been stayed, delayed, or continued to give her the opportunity to identify another expert.

Under these circumstances, I have come to the conclusion that the interests of justice either require, or would be served by, consideration, on our own motion, of the mandatory sequencing issues presented in this case. Nevertheless, I am concerned that when, in compliance with the letter of the law and the trial court's pre-trial scheduling order, a defendant files an Article 1425(F) motion and a summary judgment motion at or about the same time, *after* the lapse of the deadlines for identifying experts and exchanging reports and discovery, but in close proximity to the trial date, the plaintiff is deprived not only of the opportunity to seek a continuance to find another expert, as observed by the *Nolaluna* court, but is also deprived of pre-trial appellate review of the trial court's judgment excluding the expert prior to having their case dismissed with prejudice on summary judgment. In my view, this result is fundamentally unfair and contrary to the letter of Article 1425(F)(5) and the spirit of Article 966(D)(3) and encourages zealous advocates to – legally and permissibly – utilize the mandatory sequencing provisions of Article 966(D)(3) as an ambush tactic.

As it stands, however, nothing in the language of Article 966(D)(3) requires the trial court to observe any particular interval between hearing the Article 1425(F) motion and the summary judgment motion. Nor does Article 1425 or Article 966(D)(3) require a trial court to give the party whose expert has been excluded a continuance to obtain a substitute expert.¹² I believe that the

¹² A trial court has great discretion in granting or denying a motion for a continuance under La. C.C.P. art. 1601, and that discretion will not be disturbed on appeal in the absence of clear abuse of discretion. *Morris v. Westside Transit Line*, 02-1029 (La. App. 5 Cir. 2/25/03), 841 So.2d 920,

legislature or the Louisiana Supreme Court should provide clarity as to these issues.

928, *writ denied*, 03-852 (La. 5/16/03), 843 So.2d 1132. An abuse of discretion occurs when such discretion is exercised in a way that deprives a litigant of his day in court. *Succession of Maloney*, 21-618 (La. App. 5 Cir. 11/9/22), 353 So. 3d 292, 298, citing *Louisiana State Bd. of Dentistry v. Baker*, 33,828 (La. App. 2 Cir. 9/27/00), 768 So.2d 683, 684. Revision comment 2024 to Article 1425(F), after discussing the mandatory nature of a pre-trial hearing to determine whether a witness qualifies as an expert or whether the methodologies employed by the witness are reliable, appears to leave the door open for the party whose expert has been excluded to obtain a supplemental opinion. It states, in pertinent part: “The amendment does not preclude an opportunity to oppose ***any supplemental opinion given by the expert on any grounds after a determination has been made as to the expert’s qualifications or methodologies.***” This implies that a ruling excluding the expert does not prevent the expert from attempting thereafter to “cure” the defects in his methodologies. In this case, however, it is unlikely that Mr. Weiss could have cured the defects in his report, which was based on inaccurate facts.

Fifth Circuit Court of Appeal
State of Louisiana

No. 25-CA-100 C/W 25-C-85

JANIS H. GORDON

versus

FORD MOTOR COMPANY D/B/A THE LINCOLN MOTOR COMPANY

JOHNSON, J. CONCURS FOR THE REASONS ASSIGNED BY WICKER, J.

Fifth Circuit Court of Appeal
State of Louisiana

No. 25-CA-100 C/W 25-C-85

JANIS H. GORDON

versus

FORD MOTOR COMPANY D/B/A THE LINCOLN MOTOR COMPANY

MARCEL, J. CONCURS WITHOUT REASONS

SUSAN M. CHEHARDY
CHIEF JUDGE

FREDERICKA H. WICKER
JUDE G. GRAVOIS
MARC E. JOHNSON
STEPHEN J. WINDHORST
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NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED
IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 2-16.4 AND 2-16.5** THIS DAY
AUGUST 25, 2026 TO THE TRIAL JUDGE, CLERK OF COURT, COUNSEL OF RECORD AND ALL PARTIES
NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

CURTIS B. PURSELL
CLERK OF COURT

25-CA-100
C/W 25-C-85

E-NOTIFIED

24TH JUDICIAL DISTRICT COURT (CLERK)
HON. RAYMOND S. STEIB, JR. (DISTRICT JUDGE)
MATTHEW A. SHERMAN (APPELLANT)
KIM M. BOYLE (APPELLEE)
CRAIG J. HEBERT (APPELLEE)

NICHOLAS R. VARISCO (APPELLANT)
STEPHANIE M. POUCHER (APPELLEE)
MARY W. DALE (APPELLEE)

KEITH W. MCDANIEL (APPELLEE)
QUINCY T. CROCHET (APPELLEE)

MAILED

NO ATTORNEYS WERE MAILED