STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2021 CA 0536

DERRICK DAIGREPONT

VERSUS

EXXON MOBILE CORPORATION, EXXONMOBIL OIL CORPORATION, EXXONMOBIL PIPELINE COMPANY, TURNER INDUSTRIES GROUP, LLC, TURNER INDUSTRIAL MAINTENANCE, LLC, AND FLOWSERVE US, INC.

CONSOLIDATED WITH

2021 CA 0537

RODNEY WANNER

VERSUS

EXXON MOBIL CORPORATION, EXXONMOBIL GLOBAL SERVICES COMPANY, EXXONMOBIL CHEMICAL COMPANY, EXXONMOBIL RESEARCH & ENGINEERING COMPANY, BROCK INDUSTRIAL SERVICES LLC, TOTAL SAFETY U.S., INC., UNITED RENTALS (NORTH AMERICA), INC., FLOWSERVE US, INC. AND JONATHON ZACHARY

DATE OF JUDGMENT: DEC 2 2 2021

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT NUMBER C657026 CONSOLIDATED WITH C658372, SECTION 27, PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA

HONORABLE TRUDY WHITE, JUDGE

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BEFORE: GUIDRY, HOLDRIDGE, AND CHUTZ, JJ.

Disposition: MOTION TO DISMISS DENIED; REVERSED AND REMANDED.

CHUTZ, J.

Plaintiff-appellant, Rodney Wanner, appeals the trial court's judgment, granting summary judgment and dismissing his claims against plug valve distributor/seller, defendant-appellee Setpoint Integrated Solutions, Inc. (Setpoint),[1] for damages for personal injuries arising from an explosion at a refinery and chemical plant. For the following reasons, we reverse and remand.

FACTUAL AND PROCEDURAL BACKGROUND

On November 22, 2016, an explosion occurred in the chemical plant of the Exxon Mobil Corporation (ExxonMobil) facility located in Baton Rouge.[2] Wanner, an employee of Turner Industries, LLC, was working in the alkylation unit (Alky Unit) on scaffolding erected directly above various valves, which were in active operation processing isobutane. ExxonMobil employee, Jonathan Zachary, had been instructed to work on a compressor in the Alky Unit, changing out the motor and a check valve during post-turnaround maintenance. In conjunction with the compressor motor replacement, Zachary had to turn a plug valve (the subject plug valve) to fill the line. When he turned the handwheel of the subject plug valve, the handle free spun. Since he had encountered free-spinning handwheels before, Zachary realized that he had to remove the gearbox of the valve to properly operate the subject plug valve. Unaware that the design of the subject plug valve was different from other plug valves that he had previously worked on, Zachary took off the support bracket, as he had done with other plug valves. In so doing, he removed four bolts that secured the top cap of the subject plug valve. Zachary then

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[1] According to this record, Setpoint is a successor company of Carter Chambers, LLC, which underwent name changes including DMC Carter Chambers. Throughout this opinion, we refer to this party and its predecessors by its present corporate name of Setpoint.

[2] We note the complexity of the procedural background of this case as there are multiple parties and multiple judgments currently before this court on review. The case before us was consolidated on February 7, 2018 for trial and discovery purposes with the suit filed by Derrick Daigrepont, another person injured in the November 22, 2016 explosion. Daigrepont, however, subsequently filed a motion to dismiss his claims against Setpoint with prejudice, which was granted by the trial court on January 15, 2021. Thus, only the trial court's judgment dismissing Setpoint's claims against Wanner is before us in this review.

placed a wrench on the subject plug valve stem and turned the subject plug valve to the open position. The subject plug valve fell apart and approximately 2,000 pounds of pressurized isobutane was released. A nearby welding machine ignited the isobutane causing the explosion and seriously injuring Wanner. Three other workers in the vicinity were injured as well.

Wanner subsequently filed this lawsuit, naming numerous defendants, including Setpoint, ExxonMobil, Zachary, and Flowserve US, Inc. (Flowserve), the manufacturer of the subject plug valve,[3] asserting various claims against each.[4] Insofar as his claims against Setpoint, Wanner maintained that the subject plug valve was unreasonably dangerous because of an inadequate warning. Setpoint answered the petition, generally denying Wanner's claims against it. Subsequently, Setpoint filed a motion for summary judgment, averring it was not liable to Wanner and seeking dismissal from the lawsuit. After a hearing, the trial court granted Setpoint's motion and, in a judgment signed on October 18, 2019, dismissed Setpoint from Wanner's lawsuit. This appeal followed.

VIABILITY OF THE APPEAL

During the pendency of this appeal, Setpoint filed a motion to dismiss, averring that Wanner's devolutive appeal was untimely. The record shows that notice of the trial court's summary judgment dismissal of Setpoint was mailed on December 13, 2019, and that the trial court granted Wanner's appeal on December 18, 2019, prior to the expiration of the new trial delays. See La. C.C.P. art. 1974 ("A party may file a motion for a new trial not later than seven days, exclusive of legal holidays, after the clerk has mailed ... the notice of judgment."). Setpoint

[3] The subject plug valve was a "Durco" valve, which was manufactured by Duriron Company d/b/a Durco, a predecessor company that changed its name to Flowserve after 2000. Although the subject plug valve is referenced as "the subject Durco plug" valve at times in this opinion, we refer to the manufacturer and its predecessor by its present corporate name of Flowserve.

[4] The appellate record, which was designated by Wanner, does not include his original petition.

maintains that the time delay for Wanner to have filed a new trial expired on December 26, 2019.[5]

According to La. C.C.P. art. 2087:

> Except as otherwise provided in this Article or by other law, an appeal which does not suspend the effect or the execution of an appealable ... judgment may be taken within sixty days of any of the following.
>
> (1) The expiration of the delay for applying for a new trial ... as provided by Article 1974 ... if no application has been filed timely.

Relying on Article 2087, Setpoint asserts that the 60-day time delay for Wanner to file his devolutive appeal began to run on December 27, 2019 and ended 60 days later on February 24, 2019. According to Setpoint, "Wanner undeniably failed to file his devolutive appeal within these [60] days." Because Wanner filed his devolutive appeal before the 60-day time period began to run, Setpoint contends that it is untimely.

The immediate effect of perfecting an appeal from a final judgment is to prevent the judgment from acquiring the authority of the thing adjudged. This is because if a final judgment acquires the authority of the thing adjudged, no court has the jurisdictional power and authority to modify or revise that judgment. See Frank L. Maraist, 1 ***La. Civ. Law Treatise***, Civil Procedure, § 14:6 (2d ed.); see also ***Lay v. Stalder***, 99-0402(La. App. 1st Cir. 3/31/00), 757 So.2d 916, 919 (failure of appellant to timely file a devolutive appeal from a final judgment results in the judgment acquiring the authority of the thing adjudged, and the court of appeal has no jurisdiction to alter that judgment). In light of the purpose of an appeal, it is evident that Article 2087 establishes the outer time limit in which a devolutive appeal may be taken to avoid a jurisdictional defect and preclude a court from reviewing the propriety of a final judgment. Here, Wanner filed his

[5] Setpoint cites La. R.S. 1:55(A)(1), (B)(3), and Proclamation No. 170 JBE 2019 in support of its time calculations, which include Christmas eve and Christmas day as legal holidays.

appeal on the fifth day after rendition of the trial court's final judgment, well within 60 plus seven days, exclusive of legal holidays, after the clerk mailed the notice of judgment. Thus, it was filed within the outer limit for taking an appeal under Article 2087.

Additionally, we are aware of jurisprudence holding that when an order of appeal is granted prior to rendition of a final judgment, once the final judgment is signed, any previously existing defect is cured, and there is no useful purpose in dismissing the otherwise valid appeal. See ***Overmier v. Traylor***, 475 So.2d 1094, 1094-95 (La. 1985). By analogy it follows that once the delays elapsed with no party having filed a motion for new trial, any previously existing defect was cured, and there is no useful purpose in dismissing the otherwise valid appeal. Therefore, once seven days, exclusive of legal holidays, after the clerk mailed the notice of judgment lapsed and no motion for new trial had been filed, the previously existing defect was cured. Thus, no useful purpose is served by dismissing Wanner's valid appeal.

Given that appeals are favored in the law, see ***Edgefield v. Audubon Nature Institute, Inc.***, 2018-1782 (La. 1/18/19), 261 So.3d 776 (per curiam), for the forgoing reasons, we maintain Wanner's appeal. Accordingly, Setpoint's motion to dismiss is denied.

SUMMARY JUDGMENT

A motion for summary judgment is a procedural device used to avoid a full-scale trial when there is no genuine issue of material fact. ***Georgia-Pacific Consumer Operations, LLC v. City of Baton Rouge***, 2017-1553 (La. App. 1st Cir. 7/18/18), 255 So.3d 16, 21, writ denied, 2018-1397 (La. 12/3/18), 257 So.3d 194. The Code of Civil Procedure places the burden of proof on the party filing a motion for summary judgment. See La. C.C.P. art. 966D(1). The mover can meet its burden by filing supporting documentary evidence consisting of pleadings,

memoranda, affidavits, depositions, answers to interrogatories, certified medical records, written stipulations, and admissions with its motion for summary judgment. La. C.C.P. art. 966A(4).

Once the mover properly establishes by its supporting documents that there are no genuine issue of material facts, the mover does not have to negate all of the essential elements of the adverse party's claims, actions, or defenses if it will not bear the burden of proof at trial. La. C.C.P. art. 966D(1). The moving party must only point out to the court the absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. La. C.C.P. art. 966D(1).

The burden then shifts to the non-moving party to produce factual support, through the use of proper documentary evidence attached to its opposition, which establishes the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law. La. C.C.P. art. 966D(1). It is only if the non-moving party fails to produce sufficient factual support in its opposition which proves the existence of a genuine issue of material fact that Article 966D(1) mandates the granting of the motion for summary judgment. See ***Babin v. Winn-Dixie Louisiana, Inc.***, 2000-0078 (La. 6/30/00), 764 So.2d 37, 40.

In reviewing the trial court's decision on a motion for summary judgment, this court applies a de novo standard of review using the same criteria applied by the trial courts to determine whether summary judgment is appropriate. ***Jackson v. Wise***, 2017-1062 (La. App. 1st Cir. 4/13/18), 249 So.3d 845, 850, writ denied, 2018-0785 (La. 9/21/18), 252 So.3d 914. Factual inferences reasonably drawn from the evidence must be construed in favor of the party opposing a motion for summary judgment, and all doubt must be resolved in the opponent's favor. ***Thompson v. Ctr. for Pediatric and Adolescent Medicine, L.L.C.***, 2017-1088 (La. App. 1st Cir. 3/15/18), 244 So.3d 441, 445, writ denied, 2018-0583 (La. 6/1/18), 243 So.3d 1062. Because it is the applicable substantive law that determines

materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. ***Dyess v. American Nat'l Prop. and Cas. Co.***, 2003-1971 (La. App. 1st Cir. 6/25/04), 886 So.2d 448, 451, writ denied, 2004-1858 (La. 10/29/04), 885 So.2d 592.

LIABILITY OF NON-MANUFACTURER DISTRIBUTOR/SELLER

The parties do not dispute that Setpoint was a seller under the definition of the Louisiana Products Liability Act (LPLA). See La. R.S. 9:2800.53(2) (Under the LPLA, a seller "means a person or entity who is not a manufacturer and who is in the business of conveying title to or possession of a product to another person or entity in exchange for anything of value.").[6] To find a non-manufacturer distributor/seller like Setpoint liable for breaching a duty to warn, an injured person has to prove that the distributor/seller: sold a defective product to the end user; had actual or constructive knowledge that the product was defective; and failed to declare the defect to the end user. See ***Alexander v. Toyota Motor Sales, U.S.A.***, 2013-0756 (La. 9/27/13), 123 So.3d 712, 714.

In its motion for summary judgment, without challenging Wanner's allegation that the subject plug valve is defective, Setpoint asserted that Wanner lacked sufficient "positive evidence" to show Setpoint either sold the subject plug valve to the ExxonMobil Baton Rouge facility or that Setpoint received notice that that four pressure-containing bolts attached to the top cap of the subject plug valve could inadvertently be removed by a technician accessing the gearbox such that Setpoint could have passed knowledge of that hazard onto personnel at the ExxonMobil Baton Rouge facility. In support of its motion, Setpoint filed into the record the deposition testimony of ten witnesses, including that of several

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[6] Wanner does not contend on appeal that Setpoint fell within the ambit of the definition of a manufacturer under the LPLA. See La. R.S. 9:2800.53(1)(b) & (d) ("A seller of a product who exercises control over or influences a characteristic of the design, construction or quality of the product that causes damage" and "[a] seller of a product of an alien manufacturer if the seller is in the business of importing or distributing the product for resale and the seller is the alter ego of the alien manufacturer" are manufacturers under the LPLA).

ExxonMobil employees, the ExxonMobil corporate representative, a representative of ExxonMobil Research & Engineering (EMRE), and the corporate representatives of Setpoint and Flowserve. Based on that evidence, Setpoint maintained that it was entitled to dismissal from Wanner's lawsuit.

Relying on the deposition of ExxonMobil corporate representative, Byron Gregory Sevin, Setpoint has accurately pointed out that the only thing ExxonMobil could determine about the subject Durco plug valve was that it was manufactured by Flowserve. Sevin did not know how the subject plug valve was procured, did not understand how ExxonMobil's procurement process worked, and did not believe information about how the subject plug valve was acquired was available anymore.

In further support of its motion for summary judgment, Setpoint relied on the testimony of former ExxonMobil employee, Terry Blackard, who retired shortly after the November 22, 2016 accident. According to his recollection, although Setpoint supplied plug valves to ExxonMobil, Setpoint was not the sole supplier of plug valves at the Baton Rouge facility. Additionally, Setpoint pointed to the testimony of two ExxonMobil employees, Randy Tadlock, who was a first-line supervisor and the Alky Unit foreman, and John Florez, who ExxonMobil brought in from its Baytown, Texas facility to lead its accident investigation of the Baton Rouge facility. Neither was able to identify when the subject plug valve was purchased; and Tadlock additionally testified that he did not from whom it was purchased.

The final deposition testimony Setpoint indicated supports its summary judgment dismissal from Wanner's lawsuit is that of David Ross, its corporate representative. Setpoint maintains Ross established that Setpoint had no records to show that it had sold the subject plug valve to ExxonMobil; there were other possible ways ExxonMobil could have procured the subject valve rather than from

Setpoint, suggesting it could have been an engineering firm in conjunction with construction of the Alky Unit; and that a review of Setpoint's sales records was never undertaken because the specific date of manufacture of the subject valve was unavailable since no identification mark based on the casting date has been ascertained.

With this showing, Setpoint maintains that it demonstrated that Wanner has no positive evidence to establish that Setpoint was the seller of the subject Durco plug valve and, therefore, the trial court correctly dismissed Setpoint from the lawsuit. In response to the burden of proof shifting to him, and pointing out that factual inferences reasonably drawn from the evidence must be construed in his favor, see ***Thompson***, 244 So.3d at 445, Wanner identifies the following deposition testimony as sufficient circumstantial evidence to allow the issue of whether Setpoint sold the subject plug valve to ExxonMobil to be presented to the trier of fact.[7]

Flowserve corporate representative, Roger Freeze, explained that Flowserve markets its products through distributors rather than directly to end users like ExxonMobil. According to Freeze, as an independent company corporately unrelated to Flowserve, Setpoint buys product from Flowserve, taking ownership of the product. Setpoint stocks the product in its inventory and, in turn, sells the Flowserve product to end users. Freeze testified that plug valves of the same configuration as the subject plug valve, which were designed by Flowserve, were initially released between 1973 and 1974. He identified Setpoint as the Flowserve distributor to the ExxonMobil Baton Rouge facility in the 1970s and 1980s. If the

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[7] Compare ***White v. Wal-Mart Stores, Inc.***, 97-0393 (La. 9/9/97), 699 So.2d 1081, 1082, followed by ***Flowers v. Wal-Mart Stores, Inc.***, 12-140 (La. App. 5th Cir. 7/31/12), 99 So.3d 696, 699 ("Because the [Merchants' Liability Statute, La. R.S. 9:2800.6] is clear and unambiguous and contains no provision for shifting the burden to the defendant to prove his lack of culpability, the claimant must come forward with "positive evidence."). Here, Wanner's burden is not statutorily limited in the same manner as that of claimants seeking relief under the Merchants' Liability Statute.

subject plug valve was acquired by normal channels and in new condition, Freeze stated that Setpoint would have been the distributor who procured the subject Durco plug valve on behalf of ExxonMobil for its Baton Rouge plant.

Setpoint corporate representative Ross testified that when he started with the company in 2008, he was the ExxonMobil Baton Rouge plant distributor of Flowserve products. He was unaware how long the relationship between Flowserve and the Baton Rouge facility had been in existence but agreed it was a longstanding, ongoing relationship and that the subject plug valve was in the Alky Unit before he started working for Setpoint. As far as Ross knew, Setpoint was the only distributor in the Gulf South that sold plug valves to the ExxonMobil Baton Rouge facility during the 1970s and 1980s when the subject Durco plug valve was sold.

Ross was unable to confirm or deny Setpoint as the distributor of the subject Durco plug valve, stating he had "no proof" that Setpoint sold it to the Baton Rouge facility. But he acknowledged that Setpoint was an ExxonMobil Baton Rouge distributor of Durco plug valves of the exact same configuration as the subject plug valve when Setpoint was selling that type of plug valve and stated that he did not know whether Flowserve had any other distributors that serviced the ExxonMobil Baton Rouge facility besides Setpoint. He also testified that Setpoint purged its documents every five or seven years and, therefore, no longer had documentary information from the 1980s, indicating that Setpoint simply did not keep records for 30 years. Ross also testified that before 2008, Setpoint had no way of identifying the customers to whom it sold Durco plug valves.

Mindful that factual inferences reasonably drawn from the evidence must be construed in favor of the opponent to summary judgment and that any doubt must be resolved in favor of denying the motion for summary judgment, see ***Thompson***, 244 So.3d at 445, we conclude that, on the showing made, whether Setpoint sold

the subject Durco plug valve to ExxonMobil for its Baton Rouge Alky Unit is an outstanding issue of material fact properly submitted to the trier of fact. A trier of fact could infer from Freeze's and Ross's testimonies that the subject Durco plug valve was sold by Setpoint. Ross's suggestion that an engineering firm may have procured the subject Durco plug valve in conjunction with the construction of the Alky Unit was not supported by any showing of when the unit was built or what role, if any, the engineering firm may have had in that construction. And while Blackard may have indicated others distributed plug valves to the ExxonMobil Baton Rouge facility, he did not identify others who supplied Durco plug valves. As such, at trial it is within the trier of fact's province to disregard these aspects of Ross's and Blackard's testimonies. See ***Duet v. Landry***, 2017-0937 (La. App. 1st Cir. 4/30/18), 250 So.3d 918, 926 ("A trier of fact is free to believe in whole or part the testimony of any witness."). Thus, the trial court's grant of summary judgment and dismissal of Setpoint on this basis is not supported by the record as there remains genuine issues to be determined at the trial where the trier of fact was can make any credibility determinations, as well as draw any inferences from the witness testimony.

Setpoint also failed to show it is entitled to summary judgment dismissal on the basis that Setpoint established it lacked actual notice that the four pressure-containing bolts attached to the top cap of the subject plug valve could inadvertently be removed such that Setpoint should have passed that knowledge onto ExxonMobil. While recognizing that Flowserve produced three general memoranda to "All Valve Distributors," dated September 8, 1982, May 31, 1985, and May 9, 1986, respectively, which addressed the exact hazard that Wanner alleges in his petition constituted a defect in the subject valve, Setpoint nevertheless maintains the record is devoid of any evidence to support a factual

finding that the manufacturer sent out any of the memoranda or that Setpoint received them.

Based on his knowledge of the company, Flowserve corporate representative Freeze testified that given that the memoranda were addressed to all Flowserve valve distributors, all valve distributors of record would have received copies. And as we have already noted, Setpoint corporate representative Ross testified that Setpoint was a Flowserve distributor in the 1970s and 1980s. Additionally, as Ross explained, Setpoint purged its documentary information every five or seven years. Therefore, that Setpoint was unable to find a copy of any of the memoranda does not establish as a matter of fact that Flowserve never sent the memoranda or that Setpoint never received them.

Since on appellate review we are directed to construe factual inferences reasonably drawn from the evidence in Wanner's favor, see ***Thompson***, 244 So.3d at 445, whether Setpoint actually had notice that the four pressure-containing bolts attached to the top cap of the subject Durco plug valve could inadvertently be removed is a genuine issue of material fact properly resolved by the trier of fact.[8] Accordingly, the trial court's grant of summary judgment and dismissal of Wanner's claims against Setpoint on this basis is not supported by the record.

Setpoint alternatively claims that ExxonMobil is a sophisticated user to whom no duty to warn of any defect was owed. A sophisticated user is defined as one who is "familiar with the product." ***Bates v. E.D. Bullard Co.***, 2011-187 (La. App. 3d Cir. 10/5/11), 76 So.3d 111, 114, quoting ***Hines v. Remington Arms Co., Inc.***, 94-455 (La. 12/8/94), 648 So.2d 331, 337. A sophisticated user is also

[8] As it did insofar as the viability of the issue of whether Setpoint sold the subject Durco plug valve to ExxonMobil, Setpoint asserts that the record is devoid of positive evidence it was provided and received notice of the alleged defect in plug valves in the same configuration as the subject Durco plug valve. But for the reasons set forth supra, see n.7, in this proceeding for dismissal via summary judgment, Wanner's responsive burden of proof to Setpoint's showing is not statutorily limited in the same manner as that of those who seek relief under the Merchants' Liability Statute.

defined as one who "possesses more than a general knowledge of the product and how it is used." ***Bates*** 76 So.3d at 114, quoting ***Asbestos v. Bordelon, Inc.***, 96-525 (La. App. 4th Cir. 10/21/98), 726 So.2d 926, 955. As a result of their familiarity with a product, sophisticated users are presumed to know the dangers presented by the product, hence, there is no duty to warn them. ***Bates***, 76 So.3d at 114. Whether an individual is a sophisticated user is ordinarily a question of fact to be decided by the trier of fact. See ***Breaux v. Goodyear Tire & Rubber Co.***, 2020-0477 (La. App. 4th Cir. 5/12/21), 320 So.3d 1197, 1203, writ denied, 2021-00811 (La. 10/5/21), 325 So.3d 363.

In support of its motion for summary judgment on this issue, Setpoint pointed to the testimonies of Blackard, who worked as a block and pressure-relief valve specialist for ExxonMobil for approximately 17 years; and Raphael "Ray" Bojarczuk, a retired representative of EMRE who worked with ExxonMobil companies for 40 years, consults for EMRE part-time, and considers himself to be a valve expert.

As Setpoint noted in its memorandum in support of summary judgment, Blackard was tasked with looking at root cause failures of valves and reviewing problem installations, including in the Baton Rouge Alky Unit. Blackard answered questions presented to him throughout the ExxonMobil plant and made recommendations on whether a type of valve in use should be changed. But Blackard also testified that he was not tasked with and did not look at every valve that ExxonMobil procured; it was when a particular valve gave rise to constant complaints that he worked with vendors to find solutions. According to Blackard, ExxonMobil did not change equipment simply because it was old and he "[a]bsolutely" agreed that a valve could operate at the Baton Rouge plant for 40 years without having ever been surveyed or inventoried.

Additionally, Blackard testified that he determined the subject Durco plug valve met industry standards on the date of the accident; it was only when a valve did not meet industry standards that Blackard believed it to be unsafe. Although he may have seen a plug valve in the same configuration as the subject plug valve, Blackard did not appreciate that it was different from other plug valve configurations in use at the ExxonMobil Baton Rouge plant until his participation in ExxonMobil's November 22, 2016 accident investigation. Blackard was unaware that four different configurations of Durco plug valves existed on the date of the accident and indicated that in his 40 years at ExxonMobil he was aware of only one configuration of Durco plug valves, which was a different configuration from that of the subject plug valve. His post-accident communications with other U.S. ExxonMobil facilities revealed that since there had been no incidents, none had ever identified the differences in the various Durco plug valve configurations either. Any alerts that either Flowserve as manufacturer or Setpoint as distributor may have sent to ExxonMobil would have been received by the safety department and not by Blackard.

Blackard explained that if Flowserve had a valve it wanted to sell to ExxonMobil, he was the person that would be contacted. Post-accident, Blackard contacted Flowserve which advised that in the 1980s, plug valves of the same configuration as that of the subject plug valve were changed, but the manufacturer did not and could not demonstrate to him that it had alerted ExxonMobil of the change. Blackard stated that likewise Setpoint had not notified him of the change in design of the Durco plug valves, although he did not know if Setpoint had notified anyone else at ExxonMobil of the change.

Pointing to EMRE representative Bojarczuk's testimony, Setpoint suggests that EMRE's familiarity with valves and technological advances in fixed equipment is imputable to ExxonMobil so as to establish that ExxonMobil was a

sophisticated user on November 22, 2016. Our review of its attachments to its motion for summary judgment shows that Setpoint has correctly indicated EMRE is a consulting organization which assists in evaluating and determining appropriate valves for refineries to use, including ExxonMobil's refinery in Baton Rouge. Setpoint also demonstrated through Bojarczuk's testimony that EMRE met with others in the industry at trade shows where new technology was discussed; evaluated vendors to ensure the equipment they provided met ExxonMobil and industry standards; provided advice and suggested modifications to ExxonMobil sites regarding appropriate equipment standards; and evaluated new technology, recommending changes when EMRE thought it might be beneficial to an ExxonMobil site. And Setpoint accurately pointed out that Bojarczuk testified that, where possible, EMRE identified mishaps in the oil and chemical industry and passed along recommendations such that an ExxonMobil site could avoid a similar scenario.

But Bojarczuk explained EMRE was a consulting organization that provides consultation services upon request, usually for capital projects (new construction) rather than for maintenance purposes. He delineated that EMRE is an independent corporation housed in Houston, which provides support for refineries across the nation and indicated that EMRE has no presence at the Baton Rouge plant and no involvement in the site's Alky Unit operations. Although Bojarczuk stated he was "pretty sure" he had provided advice to the Baton Rouge facility, he described any need for EMRE consultation as likely minimal, because that site had its own collection of valve experts. Nothing in Setpoint's offering contradicted this relationship between EMRE and ExxonMobil. More importantly, the record is devoid of anything to show EMRE passed along to the Baton Rouge facility any specific knowledge about Durco plug valves in general or Durco plug valves with the same configuration as the subject plug valve in particular. Therefore, Setpoint

did not sustain its initial burden of proving that ExxonMobil was a sophisticated user because of EMRE's familiarity with Durco plug valves or EMRE's possession of more than general knowledge of Durco plug valves and how they are used.

Insofar as Bojarczuk's testimony, like Blackard, he testified that the subject plug valve met industry standards on the date of the accident and, therefore, was safe. Bojarczuk elaborated that because the subject plug valve was a commodity valve, rather than a custom design by ExxonMobil, the industry standard (derived by consensus of 30 or 40 valve manufacturers) was sufficient as far as EMRE was concerned. Also similar to Blackard, Bojarczuk was unaware of the various configurations of Durco plug valves and likewise stated that ExxonMobil did not track valve replacements unless an individual valve required frequent replacement. Bojarczuk estimated that valves can last 50 years, indicating there was no fixed life for a valve replacement.

According to Bojarczuk, he was unaware of EMRE having received notice of a prior incident along with a notification from the Occupational Safety and Health Administration (OSHA) in 1981, advising that a configuration like that of the subject plug valve was unsafe because a technician could inadvertently remove the pressure-containing bolts from the top cap of the valve. Further, there was no suggestion that Flowserve's decision to abandon the manufacture of plug valves with the same configuration as the subject plug valve was offered up to industry so as to require a change in the industry standard. Thus, Bojarczuk believed EMRE was unaware of the hazard of inadvertent removal of the four bolts securing the top cap present in the subject Durco plug valve until after the November 22, 2016 release of isobutane. But Bojarczuk admitted it would have been highly unusual for EMRE not to have received the OSHA notification if it had been sent out in 1981 and believed if EMRE had been made aware of the OSHA notification, an EMRE representative would have discussed it with the Baton Rouge facility and allowed

the facility to decide how to address the concern. Bojarczuk noted that a lot of changes to valves are not passed along to end users like ExxonMobil when the valve meets the industry standard.

Even if Bojarczuk's knowledge could have been imputed to ExxonMobil, on the showing made, we conclude an issue of material fact exists as to whether ExxonMobil was a sophisticated user of Durco plug valves in the same configuration as the subject plug valve precludes summary judgment. Neither Blackard nor Bojarczuk admitted to having actual knowledge of any risk of inadvertent removal of the four pressure-containing bolts that secured the top cap in the subject plug valve prior to the date of the isobutane release. Both deponents testified that the subject plug valve met industry standards and, therefore, was safe. Additionally, Blackard and Bojarczuk each stated he was unaware of the four different configurations of Durco plug valves in existence prior to November 22, 2016. And both deponents indicated ExxonMobil did not track its replacement of valves unless it was as a result of a habitual failure, noting the many-decades-long lifespans of some valves. Both also explained that it was only upon request that each provided information to a processing unit about a problem valve within the Baton Rouge plant. And nothing was offered to suggest that Blackard or Bojarczuk had been charged with inspecting the premises in search of aging plug valves.

This evidence, if accepted by the trier of fact, could support a finding that ExxonMobil did not have familiarity with Durco plug valves or, in particular, Durco plug valves of the same configuration as the subject plug valve and, therefore, was not a sophisticated user. Or based on this same testimony, the trier of fact could conclude that ExxonMobil did not possess more than a general knowledge of plug valves and, in particular, Durco plug valves of the same configuration as the subject plug valve, so as to find ExxonMobil was not a sophisticated user. Therefore, on the showing made, outstanding issues of material

fact preclude Setpoint's summary judgment dismissal on the basis that ExxonMobil was a sophisticated user that did not need any warning.

Setpoint urges that federal law supports the conclusion that ExxonMobil was a sophisticated user. Pointing to the ExxonMobil corporate testimony of Sevin confirming that ExxonMobil was subject to the OSHA Process Safety Management regulations, Setpoint suggests ExxonMobil was required to identify and understand all of the hazards posed by the chemical processes in operation at the Baton Rouge plant and, as such, was aware of the risk of inadvertent removal of pressure-containing bolts secured to the top cap of the subject plug valve.

29 C.F.R. § 1910.119 provides in pertinent part:

> Purpose. This section contains requirements for preventing or minimizing the consequences of catastrophic releases of toxic, reactive, flammable, or explosive chemicals. These releases may result in toxic, fire or explosion hazards.

Subsection (d)(3)(iii) of § 1910.119 states in relevant part:

> [T]he employer shall complete a compilation of written process safety information before conducting any process hazard analysis required by the standard. The compilation of written process safety information is to enable the employer and the employees involved in operating the process to identify and understand the hazards posed by those processes involving highly hazardous chemicals. This process safety information shall include information ... pertaining to the equipment in the process. ... **For existing equipment designed and constructed in accordance with codes, standards, or practices that are no longer in general use**, the employer shall determine and document that the equipment is designed, maintained, inspected, tested, and operating in a safe manner. [Emphasis added.]

The testimonies of both Blackard and Bojarczuk established that on November 22, 2016, the subject valve complied with the codes, standards, or practices in place at that time. Thus, ExxonMobil's compliance with OSHA's Process Safety Management regulations did not require that the Baton Rouge facility determine and document that Durco plug valves in the same configuration as the subject plug valve was designed, maintained, inspected, tested, and operated in a safe manner. As such, Setpoint could not demonstrate that ExxonMobil had

familiarity with Durco plug valves with a configuration like the subject plug valve or possessed more than a general knowledge of such plug valves and how they are used so as to have been a sophisticated user on this basis.

Accordingly, the trial court erred in concluding Setpoint established that ExxonMobil was a sophisticated user such that Setpoint was not required to warn ExxonMobil of the risk of inadvertent removal of the four pressure-containing bolts securing the top cap in the subject valve. Setpoint was also unable to show Wanner lacked any evidence to support a finding by the trier of fact that Setpoint sold the subject plug valve to the Baton Rouge facility or that Setpoint lacked notice of the risk of inadvertent removal of the four pressure-containing bolts securing the top cap in the subject valve. Thus, the trial court erred in granting the summary judgment dismissal of Setpoint.

DECREE

Setpoint's motion to dismiss the appeal is denied. The trial court's judgment, dismissing Wanner's claims against Setpoint and ordering that evidence of Setpoint's fault was inadmissible and disallowing any reference to Setpoint's fault at the trial on the merits, is reversed. Appeal costs are assessed against defendant-appellee, Setpoint Integrated Solutions, Inc. The matter is remanded for further proceedings.

MOTION TO DISMISS DENIED; REVERSED AND REMANDED.