

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2021 CA 0540

DERRICK DAIGREPONT

VERSUS

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

CONSOLIDATED WITH

2021 CA 0541

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

Judgment Rendered: **DEC 22 2021**

**Appealed from the 19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Case No. C657026 C/W C658372**

The Honorable Trudy M. White, Judge Presiding

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BEFORE: LANIER, WOLFE, AND BURRIS,¹ JJ.

¹ The Honorable William J. Burris, retired, is serving *pro tempore* by special appointment of the Louisiana Supreme Court.

LANIER, J.

This matter is before us on appeal by plaintiff, Rodney Wanner, from the district court's summary judgment, dismissing his claims against defendant, Jacobs Engineering Group, Inc. with prejudice. For the reasons that follow, we affirm in part and vacate in part.

FACTS AND PROCEDURAL BACKGROUND

On November 22, 2016, an explosion occurred in the West Alkylation Unit (hereinafter "Alky unit") of the ExxonMobil Refinery located in Baton Rouge, Louisiana ("the Baton Rouge refinery").² At the time of the explosion, the Baton Rouge refinery was undergoing maintenance and repair work. Mr. Wanner, who was employed by Turner Industries, LLC ("Turner"), was working atop scaffolding that was erected directly above various valves that were in active operation, including the valve in question. Directly below where Mr. Wanner was working, Jonathan Zachary, an employee of ExxonMobil and the Alky unit operator on the day of the incident, was performing work on a valve that had previously been frozen open. Mr. Zachary was unable to operate the valve using the hand-wheel installed on top of the valve. Rather, with the hand-wheel and gearbox still attached to the valve, Mr. Zachary removed the support bracket from the valve by removing the four vertical bolts on the bonnet/top-cap of the valve. These four bolts were used to secure the bonnet/top-cap of the valve, which is a pressure containing component of the valve. Mr. Zachary then used a pipe wrench to open the valve stem. Suddenly, the valve Mr. Zachary was working on came apart, and

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 is a consolidated action involving suits by two different plaintiffs stemming from the November 22, 2016 explosion at the ExxonMobil refinery. The underlying suits were consolidated by the district court on April 16, 2018 for trial and discovery purposes. However, the only issue before us in the instant appeal is the motion for summary judgment filed by Jacobs Engineering Group Inc. against Rodney Wanner and intervenor, Indemnity Insurance Company of North America, the workers' compensation insurer of Mr. Wanner's employer, Turner Industries, LLC.

approximately 2,000 pounds of pressurized isobutane gas began oozing out. The isobutane vapor cloud subsequently ignited, reaching an ignition source believed to be a welding machine located approximately seventy feet north of the release point.

After hearing a loud noise, Mr. Wanner walked to the edge of the scaffolding and peered below to see the escaping gas. According to Mr. Wanner, as soon as he "turned around and hollered 'run,' it all went up." The next thing Mr. Wanner recalled was hanging from the scaffolding by his harness. Mr. Wanner stepped back onto the scaffold rail, with fire all around him, and used both hands to release his leg straps and drop out of the harness. Mr. Wanner indicated it was only a second or two between the time he saw the release of the gas and the explosion. He also denied hearing any alarms, sirens, or warnings, adding that it all happened so quickly.

As a result of the fire and explosion, Mr. Wanner sustained serious injuries, including severe burns. He filed suit against various defendants, including, among others, Jacobs Engineering Group, Inc. ("JEG").³ Mr. Wanner alleged that the valve was unreasonably dangerous, raising several different causes of action against the different parties involved.

With regard to his negligence claim against JEG, Mr. Wanner argued that JEG was negligent in failing "to exercise adequate due diligence in the selection of equipment" and in failing "to provide adequate warning of known and/or potential hazards." Mr. Wanner further alleged that JEG was negligent in the fire watch services it provided on the day in question as follows:

³ Indemnity Insurance Company of North America ("Indemnity Insurance") intervened in Mr. Wanner's suit, praying for reimbursement of workers' compensation benefits made to Mr. Wanner on behalf of Turner. Although the judgment before us dismissed the claims asserted against JEG by both Mr. Wanner and Indemnity Insurance, we note that Indemnity Insurance has not appealed. Thus, the October 28, 2019 judgment rendered against Indemnity Insurance is a final judgment and not before us in this appeal.

... Defendant [JEG] had personnel and equipment in the area of the explosion for purposes of, including but not limited to, hazard and fire watch/prevention. [JEG] failed to identify and warn about hazardous conditions, including those hazards associated with hot work occurring near work on valves containing the flow of explosively flammable hydrocarbons, as was the case in the [Alky unit] that day.

In response to Mr. Wanner's claims, JEG filed a motion for summary judgment asserting that there was no genuine issue as to any material fact in dispute and that JEG was entitled to summary judgment as a matter of law because JEG was not performing fire watch duties at the time of the accident and JEG had no involvement with the subject valves. In support of the motion for summary judgment, JEG submitted a copy of the agreement between Procurement, a division of ExxonMobil Global Services Company ("Procurement") and Jacobs Field Services North America, Inc. ("JFSNA"); excerpts from the depositions of Peter Paul Howell, Leroy Sexton, III, Michael A. Galloway, Rodney Wanner, Byron Gregory Sevin, Randy Tadlock, David Ross, and Terry Mack Blackard; and copies of the Alky unit work permits from the day in question.

Mr. Wanner opposed the motion for summary judgment, arguing that there were genuine issues of material fact remaining that precluded summary judgment. Mr. Wanner argued that as fire watch, JEG breached its duty of watching for fire hazards, preventing fires, and communicating with personnel to ensure their safety from fires associated with the welding operations. He further asserted that JEG could not definitively show that it did not procure the valve in question, thus creating a genuine issue of material fact that precluded summary judgment. In opposition to the motion for summary judgment, Mr. Wanner submitted excerpts from the deposition of Gregory M. McCormack, along with a copy of his May 17, 2019 report and his August 27, 2019 supplemental report concerning the explosion; excerpts from the depositions of James Soukup and Jonathan T. Zachary; excerpts from the deposition of Gregg S. Perkin, along with a copy of his

report dated May 17, 2019; excerpts from the deposition of Byron Gregory Sevin, along with a copy of the December 21, 2016 "ExxonMobil Baton Rouge Refinery ... Investigation Report"; and excerpts from the deposition of Peter Paul Howell, along with a copy of his Updated Findings and Conclusions dated July 12, 2019.

Following a hearing on the motion for summary judgment, the district court signed a judgment on October 28, 2019, granting summary judgment in favor of JEG and dismissing, with prejudice, all claims filed by Mr. Wanner against JEG. The sole issue for our review is whether the district court erred in granting summary judgment in favor of JEG.

DISCUSSION

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. 1 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. La. Code Civ. P. art. 966(D)(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. Code Civ. P. art. 966(A)(4). Because the applicable substantive law determines materiality, whether a particular fact in dispute is material must be viewed in light of the substantive law applicable to the case. **Bryant v. Premium Food Concepts, Inc.**, 2016-0770 (La. App. 1 Cir. 4/26/17), 220 So.3d 79, 82, writ denied, 2017-0873 (La. 9/29/17), 227 So.3d 288.

Once the mover properly establishes the material facts by its supporting documents, the mover does not have to negate all of the essential elements of the

adverse party's claims, actions, or defenses if he will not bear the burden of proof at trial. La. Code Civ. P. art. 966(D)(1); **Horrell v. Alltmont**, 2019-0945 (La. App. 1 Cir. 7/31/20), 309 So.3d 754, 758. 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. Code Civ. P. art. 966(D)(1); **Horrell**, 309 So.3d at 758.

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. Code Civ. P. art. 966(D)(1); see also La. Code Civ. P. art. 966, comments-2015, comment (j). 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, Article 966(D)(1) mandates the granting of the motion for summary judgment. **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. 1 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. Center for Pediatric and Adolescent Medicine, L.L.C.**, 2017-1088 (La. App. 1 Cir. 3/15/18), 244 So.3d 441, 445, writ denied, 2018-0583 (La. 6/1/18), 243 So.3d 1062.

Substantive Law

Louisiana courts have adopted a duty-risk analysis in determining whether to impose liability under the general negligence principles as set forth in the Civil Code. **Brewer v. J.B. Hunt Transport, Inc.**, 2009-1408 (La. 3/16/10), 35 So.3d 230, 240. In order for liability to attach under the duty-risk analysis, the plaintiff must prove the following separate elements: (1) the defendant had a duty to conform his conduct to a specific standard (the duty element); (2) the defendant failed to conform his conduct to the appropriate standard (the breach of duty element); (3) the defendant's substandard conduct was a cause-in-fact of the plaintiff's injuries (the cause-in-fact element); (4) the defendant's substandard conduct was a legal cause of the plaintiff's injuries (the scope of liability or scope of protection element); and (5) actual damages (the damages element). **Roberts v. Rudzis**, 2013-0538 (La. App. 1 Cir. 5/28/14), 146 So.3d 602, 608-609, writ denied, 2014-1369 (La. 10/3/14), 149 So.3d 797.

A negative answer to any of the elements of the duty-risk analysis prompts a no-liability determination. **Daniels v. USAgencies Cas. Ins. Co.**, 2011-1357 (La. App. 1 Cir. 5/3/12), 92 So.3d 1049, 1055. The plaintiff has the burden of proving negligence on the part of the defendant by a preponderance of the evidence. **Hanks v. Entergy Corp.**, 2006-477 (La. 12/18/06), 944 So.2d 564, 578.

The threshold issue in any duty-risk analysis is whether the defendant owed a duty to the plaintiff. Whether a duty is owed is a question of law, which involves a determination of whether the duty the defendant allegedly breached extends to the risk of harm suffered by the plaintiff. The determination of whether a duty exists as a result of the relationship between the parties must be made on a case by case basis. **Haynes Interests, LLC v. Garney Companies, Inc.**, 2019-0723 (La. App. 1 Cir. 2/26/21), 322 So.3d 292, 303, writ denied, 2021-00451 (La. 5/25/21), 316 So.3d 447.

In this case, JEG's motion for summary judgment pointed out that Mr. Wanner had no evidence to support his argument that JEG was the entity that provided the fire watch services at the time of the explosion. In fact, JEG alleged that Mr. Wanner sued the wrong entity, adding that it was JFSNA that provided fire watch services on the day in question. JEG noted that the only contract in the record was the contract between JFSNA and Procurement and that the record contained no contractual agreement between JEG and any ExxonMobil entity. Furthermore, JEG asserted that there was no evidence in the record that JFSNA's fire watch personnel deviated from the terms of the work permits issued by ExxonMobil.

Concerning procurement of the valve in question, JEG noted that despite extensive discovery, no evidence in the case revealed how the valve found its way from the manufacturer to the Baton Rouge refinery over 30 years ago. Thus, JEG concluded, there was no evidence to suggest that JEG had any involvement with the valve and, therefore, could have no duty to warn ExxonMobil about the valve's alleged design hazards.

Analysis

The evidence submitted by JEG in support of its motion for summary judgment included an agreement dated December 6, 2010, ("the agreement") between JFSNA and Procurement (a division of ExxonMobil Global Services Company) for JFSNA to provide "General Mechanical and Construction Services" to ExxonMobil. JEG alleged that JFSNA, not JEG, provided fire watch services on the day of the explosion pursuant to the agreement.⁴ Our review of the record before us reveals that this is the only contract that was submitted as evidence at the hearing on the summary judgment. The only other document in the record

⁴ Although both JEG and JFSNA have "Jacobs" as part of their name, they are two distinct entities, and each is a juridical person. See La. Civ. Code art. 24. We note that JFSNA has not been named as a party in this case.

regarding fire watch services on the day in question is the Hot Work Permit issued to "SWS, Jacobs." Concerning the work to be done, the following notes are included in the permit, "Use hand & power tools to burn, weld, grind as needed to weld flange & plugs on exchangers. Replace valves as needed. Jacobs to fire watch." Special instructions for the fire watch included, "Keep sparks contained & sewers covered."

This fire watch duty prescribed by the work permit was consistent with that duty imposed by federal law:

Fire watchers shall have fire extinguishing equipment readily available and be trained in its use. They shall be familiar with facilities for sounding an alarm in the event of a fire. They shall watch for fires in all exposed areas, try to extinguish them only when obviously within the capacity of the equipment available, or otherwise sound the alarm. A fire watch shall be maintained for at least a half hour after completion of welding or cutting operations to detect and extinguish possible smoldering fires.

29 C.F.R. § 1910.252(a)(2)(iii)(B).

The evidence further established that no employee of JEG had any involvement with the work being performed by Mr. Zachary that caused the release on the day of the explosion. Specifically, the evidence showed that even if JEG employees had been responsible for fire watch at the time, preventing a hydrocarbon release from turning into an explosion would not have been one of their functions:

Q. Is the purpose of a firewatch to help prevent hydrocarbon releases from turning into an explosion?

A. No.

Q. Okay. They are not to do that?

A. No.

Q. Okay. Why wouldn't that be one of their functions?

A. Because the firewatch does not control the hydrocarbon. They have no dealings with that side of it.

Q. I don't believe I asked you if they control hydrocarbons.

A. Well, the only way that the hydrocarbon can cause a fire is if it becomes uncontrolled, and that wasn't Jacob's responsibility.

Furthermore, the evidence established that one of Mr. Wanner's co-workers had finished the welding work he was doing, without incident, approximately 20 minutes before Mr. Zachary began working on the valve in question. And, even if the hydrocarbon release caused by Mr. Zachary had triggered a duty on the part of the fire watch to sound an alarm, the evidence clearly shows that it would have had no bearing on the outcome of this case as the time between when Mr. Wanner saw the release and the time of the explosion was only a second or two.

With regard to the valve in question, the evidence revealed that there are approximately 500,000 block valves of different types and sizes at the Baton Rouge refinery. ExxonMobil's corporate representative, Byron Gregory Sevin, testified that they were unable to find a record of who actually supplied the valve back in the late 1970s or early 1980s. However, based on the information they had, they were able to determine that it was a Durco plug valve purchased from Durco as a manufactured valve. Mr. Sevin further indicated that it was his understanding that Flowserve manufactured these particular Durco valves at the time in question. Finally, the evidence submitted by JEG showed that there were many ways that the valve in question could have found its way into the Baton Rouge refinery, *e.g.*, Flowserve could have sold it directly to the Baton Rouge refinery as part of a project or an engineering firm could have procured it and installed it as part of a project.

In light of the foregoing, we conclude that JEG satisfied its burden of proof as the mover. They demonstrated that JEG owed no duty to Mr. Wanner to perform fire watch duties on the day of the explosion. Rather, it was JFSNA that was responsible for fire watch duties. Nonetheless, even if Mr. Wanner had sued

the proper entity, the evidence is insufficient to prove that any alleged breach of the fire watch duties occurred or was a cause of his injuries. JEG also showed that it had no involvement with the valve and, therefore, could have no duty to warn ExxonMobil about the valve's alleged design hazards. Because JEG established that there was an absence of factual support for one or more elements essential to the Mr. Wanner's negligence action, it was incumbent upon Mr. Wanner to produce factual support sufficient to establish that he would be able to satisfy his evidentiary burden of proof at trial. We cannot find that Mr. Wanner sustained this burden.

In his opposition, Mr. Wanner submitted the deposition testimony of James Soukup, who testified in his capacity as corporate representative for JEG and JFSNA. Mr. Soukup indicated that the Baton Rouge refinery is the third largest refinery in the United States and one of the largest chemical plants in the world, employing approximately 3,800 workers. Mr. Soukup verified that JEG has engineers who have offices at the Baton Rouge refinery and work with ExxonMobil "to either design a piping system or a structural steel or something of that nature." There is also a JFSNA Site Manager at the Baton Rouge refinery who is "responsible for the safety, health, and conduct of all personnel on site, and is ultimately accountable for a safe working environment" and implementation of the "Health and Safety Action Plan." According to the "Health and Safety Action Plan" developed by the JFSNA Site Manager, "All JFSNA employees have been given the direct authority to STOP any unsafe work, condition or behavior without fear of reprimand or retaliation." When asked if Jacobs had individuals who were on fire watch on the day of the explosion, Mr. Soukup replied yes.

Mr. Wanner argues that because Mr. Soukup did not distinguish between employees of JEG and employees of JFSNA, his testimony creates a genuine issue of material fact as to whether JEG was responsible for the negligent acts of the fire

watch that contributed to Mr. Wanner's injuries. We find no merit to this argument. As previously noted, Mr. Wanner bore the burden of proving JEG's negligence by a preponderance of the evidence. Thus, Mr. Wanner was required to come forward with evidence to distinguish between JEG and JFSNA as it related to any alleged negligence concerning the fire watch on the day in question. The record before us does not contain any evidence tending to show that JEG was either involved with or responsible for fire watch duties on the day of the explosion. Mr. Wanner's mere suggestion that it was JEG and not JFSNA, without any factual support, is simply not enough to carry his burden on summary judgment.

Similarly, on the issue of JEG's alleged duty to warn of the valve's alleged design hazards, we find no evidence in the record to support Mr. Wanner's claim that JEG had anything to do with the procurement or use of the allegedly defective valve. Mr. Soukup testified that Jacobs had been providing services such as procurement of equipment at the Baton Rouge refinery for over 30 years. However, there is absolutely no evidence in the record directly connecting JEG to the valve in question.

Moreover, although Mr. Soukup acknowledged that the hazards associated with the particular valve configuration that was in use at the time of the explosion were known by ExxonMobil and throughout the industry, the evidence does not support a finding that JEG had any direct involvement with the valve that Mr. Zachary was working on at the time of the explosion. There is clearly no issue of material fact that supports a finding that JEG either knew or should have known that this particular configuration was in use in the Alky unit on the day of the explosion. Nor is there evidence that JEG knew or should have known that in connection with work on the valve, an ExxonMobil operator would remove the four bolts that secured the pressure containing component of the valve. Again, Mr.

Wanner's mere speculation that JEG, as an embedded contractor at the Baton Rouge refinery for over 30 years, should have been aware of what valves ExxonMobil had in use is insufficient to defeat summary judgment in this case. As pointed out by JEG in brief to this court,

If one could defeat a motion for summary judgment based on a mere conjectural possibility, it would render the summary judgment procedure useless. This is why a "mere allegations" and "argument of counsel and briefs, no matter how artful, are not sufficient to raise a genuine issue of material fact."

McGee v. Mutter, 2010-1334 (La. App. 4 Cir. 5/12/11), 67 So.3d 517, 523-524, writ denied, 2011-1240 (La. 9/23/11), 69 So.3d 1162.

We have thoroughly reviewed the evidence in the record and agree with the district court's conclusion that summary judgment was warranted in this case. Mr. Wanner's arguments on appeal are without merit. Mr. Wanner failed to bear his burden of producing evidence that there were genuine issues of material fact remaining as to any of the issues relative to JEG's alleged negligence. Accordingly, summary judgment was appropriate.

However, our analysis does not end here. Although not argued by any party, we note on our own that the judgment rendered by the district court is different in kind than that which was prayed for in JEG's motion for summary judgment. See La. Code Civ. P. art. 966(F). The district court's October 28, 2019 judgment found JFSNA to be free of fault, prevented evidence of any alleged fault of JFSNA to be presented during the course of the trial, prohibited any reference to any alleged fault of JFSNA, and prohibited any alleged fault of JFSNA from being submitted to the jury or included in the jury verdict form. As previously noted, JFSNA was not a named party in this suit. Accordingly, we vacate that portion of the judgment.⁵

⁵ We further note our authority under La. Code Civ. P. art. 2164 to vacate a part of the appealed judgment to delete JFSNA from the judgment as a nonparty. See Fagan v. LeBlanc, 2005-1845 (La. App. 1 Cir. 2/10/06), 928 So.2d 576, 584-585.

CONCLUSION

For the above and foregoing reasons, we affirm that portion of the October 28, 2019 judgment of the district court that granted summary judgment in favor of defendant, Jacobs Engineering Group, Inc., and dismissed, with prejudice, all claims filed by plaintiff, Rodney Wanner, against Jacobs Engineering Group, Inc. We vacate that portion of the judgment that found Jacobs Field Services North America, Inc. to be free of fault, prevented evidence of any alleged fault of Jacobs Field Services North America, Inc. to be presented during the course of the trial, prohibited any reference to any alleged fault of Jacobs Field Services North America, Inc., and prohibited any alleged fault of Jacobs Field Services North America, Inc. from being submitted to the jury or included in the jury verdict form. We assess all costs of this appeal against plaintiff/appellant, Rodney Wanner.

AFFIRMED IN PART; VACATED IN PART.