NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2009 CA 1546

CHRISTOPHER LEE THERRELL

VERSUS

ROWAN COMPANIES, INC.

Judgment Rendered: December 22, 2010

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Appealed from the
Seventeenth Judicial District Court
In and for the Parish of Lafourche
State of Louisiana
Docket Number 104088

The Honorable John E. LeBlanc, Judge Presiding

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BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

McDonald, J. concurs and will assign reasons

McClendon, J. concurs and assigns reasons.

WHIPPLE, J.

This matter is before us on appeal by defendant, Rowan Companies, Inc., from a judgment of the trial court granting summary judgment in favor of third-party defendant, NES Equipment Rentals, L.P. ("NES"). For the following reasons, we reverse and remand.

BACKGROUND FACTS

This matter is the first of four related appeals. Plaintiff, Christopher Therrell, was a seaman employed by Rowan Companies, Inc. ("Rowan") as a driller and crew member assigned to work on the "ROWAN MIDLAND," a semi-submersible drilling rig vessel. On March 23, 2004,[1] plaintiff was injured while troubleshooting, testing, and using a man-lift.[2] At the time of the accident, Rowan was refurbishing the vessel at Rowan's dock in Fourchon, Louisiana. These facts are not in dispute.

Further, the parties do not dispute that in order to refurbish the vessel, Rowan had contracted with Tidewater Dock, Inc./Blue Tide, Inc. ("Tidewater") to provide contract welders and necessary equipment, including a barge and two man-lifts. Tidewater, in turn, had contracted with NES to provide the man-lifts to be used on the Rowan project. The man-lift at issue was manufactured by JLG Industries, Inc. ("JLG").

On the date of the accident, Tidewater's third-party contract welders were using the man-lift in question to weld on the underside of the ROWAN MIDLAND, when the man-lift started "hanging up." The welders shut down the man-lift and reported the problem to David Burcham, Rowan's senior employee on the job site. Burcham then instructed plaintiff to "rinse it off,"

[1]Although the date of the accident is stated in the petition as March 23, 2006, the accident actually occurred on March 23, 2004.

[2]A "man-lift" is a mobile machine consisting of a wheeled base unit, a telescoping boom, and a work platform.

"lubricate it," and see if he could determine what was wrong with the man-lift. Plaintiff went down to the man-lift, extended the boom, and greased the boom skids. At some point thereafter, when plaintiff attempted to retract the boom, the boom telescoped in a free fall approximately 40 feet, injuring plaintiff. These facts, likewise, are not disputed.

PROCEDURAL HISTORY

As a result of the accident, plaintiff, Therrell, sued Rowan under the Jones Act and under general maritime law for his injuries. Rowan then filed third-party claims against NES, Tidewater, and JLG, seeking contribution under general maritime law. According to Rowan, a post accident investigation revealed that the man-lift had a broken pin in the boom's retraction chain, which, at the time of the accident, was hidden from the operator's view. Rowan further contended that the retraction chains themselves were in such a degraded or sub-standard condition that the equipment would not have passed a proper pre-use inspection, had such occurred.

In response to Rowan's third-party demands, JLG, NES, and Tidewater each filed separate motions for summary judgment, making the common argument that Burcham's instructions to plaintiff to try to make the man-lift work, after being told by the contract welders that the man-lift was not working properly, constituted a "superseding cause" of plaintiff's accident, thereby releasing the third-party defendants from any liability whatsoever to plaintiff or Rowan as a matter of law. Specifically, NES contended that Rowan undisputedly knew that the man-lift was not functioning, yet chose to direct plaintiff, who had no certification, training, or repair experience, to attempt to "trouble shoot" or determine what was wrong with the man-lift without notice to NES, Tidewater, or JLG, and without requesting or allowing NES to repair or replace the unit. Thus, NES contended, Rowan was not entitled to contribution

or indemnity from NES, as a matter of law, for Rowan's own negligence in placing its seaman in harm's way.

In opposition to the motions, Rowan filed and relied upon the affidavit of its expert, G. Fred Liebkemann, IV (a professional engineer who attested that the man-lift was defective in design) to establish that JLG (the manufacturer of the man-lift) was at fault in causing the accident. As further support for its opposition, Rowan also submitted: (1) excerpts of JLG's Service and Maintenance Manual for the man-lift; (2) NES's repair and service call log for the man-lift; (3) JLG's "New Machine Inspection/First Delivery/End of Warranty" Report; (4) various photographs of the man-lift and accident site; (5) excerpts of David Burcham's deposition testimony; (6) excerpts of Christopher Therrell's deposition testimony; (7) a statement by Ray Taylor; (8) excerpts from JLG's Operators and Safety Manual for the man-lift; (9) the affidavit of Brent M. Hoover, Product Safety and Reliability Engineer for JLG Industries; (10) an Accident Investigation Report also prepared by Liebkemann; (11) excerpts of Brent Hoover's deposition testimony; and (12) excerpts of Ray Taylor's deposition testimony.

Rowan also submitted and relied upon an "Accident Investigation Report Supplement" by Liebkemann, to establish that NES, as owner of the man-lift, and Tidewater, as lessor of the man-lift, were likewise at fault in causing the accident: (1) in providing Rowan with a defective man-lift; (2) in failing to adhere to the service manual's requirements and warnings applicable to the equipment furnished to Rowan, including known restrictions on use of the man-lift in dangerous jobsites and sandblasting operations such as the jobsite at issue; and (3) in failing to provide notice to Rowan through the service manual or otherwise of the dire warnings contained in the service manual.

After hearing arguments on the third-party defendants' motions for summary judgment, the trial court found that the actions of Rowan's employee/supervisor, Burcham, in ordering plaintiff to attempt to fix the man-lift without calling for a repair and without first giving notice to Tidewater, JLG, and NES, constituted a superseding cause of plaintiff's accident relieving these parties of liability for the ensuing accident. Accordingly, the trial court granted the motions for summary judgment and dismissed with prejudice all claims asserted by Rowan against the third-party defendants, stating as follows, "Servicing this product was not an issue for Rowan. Fixing it or trying to fix it was not an internal matter that Rowan should have attempted to do." Rowan then filed the instant appeal from the May 12, 2009 judgment of the trial court granting NES's motion for summary judgment.

On appeal, Rowan contends in its sole assignment of error that the trial court erred when it held, as a matter of law, that Burcham's instruction to plaintiff to see if he could determine what was wrong with the man-lift was a superseding cause of plaintiff's accident and injuries, which thereby relieved NES of any liability.

APPLICABLE LAW

The parties do not dispute that this matter falls squarely within maritime jurisdiction. See Giorgio v. Alliance Operating Corporation, 2005-0002 (La. 1/19/06), 921 So. 2d 58, 66-67 (providing the test for admiralty tort jurisdiction). The United States Constitution grants to federal district courts jurisdiction in "all Cases of admiralty and maritime Jurisdiction." U.S. Const. art. III, section 2; Green v. Industrial Helicopters, Inc., 593 So. 2d 634, 637 (La. 1992), cert. denied, 506 U.S. 819, 113 S. Ct. 65, 121 L.Ed.2d 32 (1992). State courts have concurrent jurisdiction by virtue of the "savings to suitors" clause of the Judiciary Act of 1789. Green v. Industrial Helicopters, Inc., 593 So. 2d at 637; 28 U.S.C.A. §

1333 (1948); Trinh ex. rel. Tran v. Dufrene Boats, Inc., 2008-0824 (La. App. 1st Cir. 1/22/09), 6 So. 3d 830, 838, writs denied, 2009-0406, 2009-0411 (La. 4/13/09), 5 So. 3d 166, cert. denied, ___ U.S. ___, 130 S. Ct. 228, 175 L.Ed.2d 128 (2009). As a general proposition, a maritime claim brought in a state court is governed by the same principles as govern actions brought in admiralty, by federal maritime law. See Giorgio, 921 So.2d at 67. Generally, state courts exercising concurrent maritime jurisdiction are bound to apply substantive federal maritime statutory law and to follow United States Supreme Court maritime jurisprudence. See Green, 593 So. 2d at 637-38; see also Milstead v. Diamond M Offshore, Inc., 95-2446 (La. 7/2/96), 676 So. 2d 89, 94.

MOTION TO DISMISS

After this matter was docketed for appeal, NES filed a motion to dismiss the appeal, which was referred to the merits. In its motion, filed on March 26, 2010, NES contends that during the pendency of these appeals by Rowan from the May 12, 2009 dismissal of Rowan's third-party demands on summary judgment, Rowan apparently settled the main demand by plaintiff against Rowan, as shown by the October 22, 2009 order of the trial court dismissing plaintiff's claims against Rowan with prejudice, but "reserving the third party claims of [Rowan] for contribution against third party defendants [NES, JLG, and Tidewater]." NES contends that Rowan's appeal is now moot in that Rowan extinguished any right of contribution it may have had against NES when it settled the underlying lawsuit with plaintiff.

NES contends that given Rowan's settlement with Therrell, Rowan's appeal seeks to preserve, at most, the unasserted claims of its "seaman employee." Relying upon McDermott, Inc. v. AmClyde, 511 U.S. 202, 114 S. Ct. 1461, 128 L.Ed.2d 148 (1994), NES contends that because the only viable claims Therrell could have settled were the claims he asserted against Rowan, under the

proportionate liability rule established in McDermott, Rowan could only have settled its proportionate share of damages, no more and no less.

Rowan counters that McDermott is not applicable herein because, unlike the instant case, McDermott involved a settlement where the third-party defendant was **not** released from its liability to **plaintiff**. As further support, Rowan notes the U.S. Eleventh Circuit Court of Appeal's interpretation of McDermott in Murphy v. Florida Keys Electric Co-op Association, Inc., 329 F.3d 1311 (11th Cir. 2003), where the court held that while a contribution claim by a settling tortfeasor against a non-settling tortfeasor was barred where the non-settling defendant **was not released from liability**, McDermott's prohibition denying a settling party the right to contribution from a non-settling party does not preclude a contribution claim against a purported tortfeasor **who is released** by the settlement **even though not an actual party to the settlement**. See Murphy v. Florida Keys Electric Co-op Association, Inc., 329 F.3d at 1318.

Rowan further contends that the recent decision of the U.S. Fifth Circuit Court of Appeal, Combo Maritime, Inc. v. U.S. United Bulk Terminal, LLC, 615 F.3d 599, (5th Cir. 2010), is directly on point and clearly dispositive of the motion to dismiss herein. In Combo, Combo Maritime sued United for damages caused by United's barges after they broke free from their moorings and collided into Combo's vessel. United filed a third-party demand against Carnival Cruiselines, alleging that the barge breakaway was caused by Carnival's negligent navigation of Carnival's cruise ship, Fantasy. Thus, in its posture as third-party plaintiff, United asserted claims against Carnival for contribution and indemnity (of Combo Maritime's claims against United) and for United's own claim for damage to United's fleet, equipment and barges. Additionally, United proffered Carnival as

a defendant in the case under Rule 14(c) of the Federal Rules of Civil Procedure.[3] Carnival then moved for partial summary judgment on United's complaint. The district court granted Carnival's motion for partial summary judgment and held that United could not present evidence that Carnival's alleged negligence contributed to the barge breakaway. The district court further ordered that United's third-party complaint against Carnival be dismissed with prejudice. See Combo Maritime, Inc. v. U.S. United Bulk Terminal, LLC, 626 F.Supp.2d 635, 642 (E.D. La. 2009). However, on appeal, the Fifth Circuit Court of Appeal, like the Eleventh Circuit Court of Appeal in Murphy, held that McDermott does not prevent or preclude an action for contribution asserted by a settling tortfeasor who obtains, as part of its settlement agreement with the plaintiff, a full release for all parties. Combo Maritime, Inc. v. U.S. United Bulk Terminal, LLC, 615 F.3d at 603.[4]

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[3]Rule 14 (c) of the Federal Rules of Civil Procedure provides that in an admiralty or maritime case a defendant may, as a third-party plaintiff, bring in a third-party defendant who may be wholly or partly liable either to the plaintiff or to the third-party plaintiff for contribution. The third-party plaintiff may demand judgment in the plaintiff's favor against the third-party defendant. In that event, the third-party defendant must defend under Rule 12 against the plaintiff's claim as well as the third-party claim; and the action proceeds as if the plaintiff had sued both the third-party defendant and the third-party plaintiff.

[4]In reversing the district court, the U.S. Fifth Circuit further distinguished McDermott, as follows:

> [I]n order to bring a claim for contribution, the settling tortfeasor must have (1) paid more than he owes to the plaintiff, and (2) have discharged the plaintiff's entire claim. The *Amclyde* court held that a litigating defendant could not pursue a settling defendant for contribution, because the litigating defendant would, under the proportionate share rule, pay only his share of the judgment. *Amclyde*, 511 U.S. at 221, 114 S. Ct. 1461. Because a right of contribution requires that a defendant pay more than he owes, and the proportionate share rule dictates that a defendant pays only his share of the judgment-no more, no less-a litigating defendant could never have a contribution claim, by definition. By extension, the amount a settling defendant, who obtains only a release for himself, pays represents only his share of the judgment, regardless of the actual dollar amount. *Id.; Murphy v. Fla. Keys Elec. Coop. Assoc.*, 329 F.3d 1311, 1314 (11th Cir. [2003]). Therefore, he too has no claim for contribution as long as the settlement represents only his portion of the damages.
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> **Where the settling tortfeasor takes an assignment of the plaintiff's claim, then the settling tortfeasor essentially steps into the plaintiff's shoes and pursues the plaintiff's claim. In that scenario, the plaintiff's claim is not extinguished.** And, as we discussed in *Ondimar*, allowing assignment of a claim undermines the goals of *AmClyde*. *Ondimar [Transportes v. Beatty St. Props., Inc.*, 555 F.3d 184, 188-189.] Further, there are strong policy reasons for

Rowan contends that pursuant to the settlement agreement it entered into with Therrell, it paid 100% of plaintiff's damages, but, importantly, expressly reserved its contribution actions against the third-party defendants and obtained a full release of all parties and potential defendants, including the third-party defendants. Thus, Rowan contends, *inter alia*, that because it secured the release of the third-party defendants in its settlement agreement with Therrell, it retains the right to seek contribution from the third-party defendants herein under the holdings in Murphy and Combo. Accordingly, Rowan argues its appeal from the trial court's granting of summary judgment remains viable and is not mooted by the subsequent settlement.

Although the settlement agreement is not contained in the record, the parties do not dispute the confection of a settlement between Therrell and Rowan. Indeed, Rowan attached what purports to be the first three unsigned pages of a "Settlement Agreement and Release" to its opposition to NES's motion to dismiss the appeal. Although this court issued a rule to show cause requesting that the parties either supplement the appellate record with a copy of the settlement agreement or show cause why the record should not be so supplemented, the record has not been supplemented with a complete and signed copy of the

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not allowing a settling defendant to take an assignment of a tort claim under these circumstances. *Id.* at 188 (citing *Beech Aircraft Corp. v. Jinkins*, 739 S.W.2d 19, 22 (Tex.1987)).

If, however, the settling defendant discharges the plaintiff's entire claim as evidenced by a total release of all potential joint tortfeasors, then the settling defendant has met the requirements for a contribution claim. Because he is responsible for only his portion of damages, and he paid the entire amount, he has paid more than he owes. And, because he has obtained a release of all other potential joint tortfeasors, he has extinguished the plaintiff's claim. Therefore, he may bring a claim for contribution against the non-settling potential tortfeasors.

Combo Maritime, Inc. v. U.S. United Bulk Terminal, LLC, 615 F.3d at 603-604. (Emphasis added.)

agreement for our review.[5] For these reasons, and because appeals are favored in law, the motion to dismiss is denied on the showing made.

DISCUSSION

Appellate courts review summary judgments *de novo* under the same criteria that govern the trial judge's consideration of whether a summary judgment is appropriate. Seivers v. Epoch Well Logging, Inc., 2003-0282 (La. App. 1st Cir. 12/31/03), 868 So. 2d 732, 734, writ denied, 2004-0314 (La. 4/2/04), 869 So. 2d 892. A motion for summary judgment is properly granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that the mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966(B). The summary judgment procedure is favored and shall be construed to accomplish the just, speedy, and inexpensive determination of actions. LSA-C.C.P. art. 966(A)(2).

The initial burden of proof is on the mover to show that no genuine issue of material fact exists. LSA-C.C.P. art. 966(C)(2). However, once the mover has made a prima facie showing that the motion should be granted, if the non-movant bears the burden of proof at trial on the issue before the court, the burden shifts to him to present evidence demonstrating that material factual issues remain. LSA-C.C.P. art. 966(C)(2); J. Ray McDermott, Inc. v. Morrison, 96-2337 (La. App. 1st Cir. 11/7/97), 705 So. 2d 195, 202, writs denied, 97-3055, 97-3062 (La. 2/13/98), 709 So. 2d 753, 754. The applicable substantive law

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[5]In response to the show-cause order, NES stated that it was not provided with a copy of the settlement agreement by Rowan or the plaintiff. Rowan responded that the relevant portions were attached to its memorandum in opposition and argued that the order of dismissal, by its very terms, preserves Rowan's right to assert the claims under review on appeal. In response to this court's concerns expressed at oral argument, Rowan acknowledged that if this court were to find merit to the appeal and determine that summary judgment was improperly granted and that the case should be remanded to the trial court for a trial on the merits of Rowan's third-party demands, the issue of the effect, if any, of Rowan's settlement with plaintiff upon Rowan's right to contribution could be raised at that time. We agree.

determines the materiality of facts in a summary judgment setting. See J. Ray McDermott, Inc. v. Morrison, 705 So. 2d at 203. Therefore, the issue before us is whether, as a matter of law, Burcham's instructions to Therrell constitute or amount to a "superseding cause" of the accident sufficient to release NES from liability under the overall circumstances, as required by the law and jurisprudence.

DOCTRINE OF SUPERSEDING CAUSE

The factors to be examined in determining whether an intervening force supersedes prior negligence are:

> (a) the fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the actor's negligence;
>
> (b) the fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of its operation;
>
> (c) the fact that the intervening force is operating independently of any situation created by the actor's negligence, or, on the other hand, is or is not a normal result of such a situation;
>
> (d) the fact that the operation of the intervening force is due to a third person's act or to his failure to act;
>
> (e) the fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him;
>
> (f) the degree of culpability of a wrongful act of a third person which sets the intervening force in motion.

Donaghey v. Ocean Drilling & Exploration Company, 974 F.2d 646, 652 (5th Cir. 1992) (quoting Nunley v. M/V Dauntless Colocotronis, 727 F.2d 455, 464 (5th Cir. 1984), cert. denied by Dravo Mechling, Inc. v. Combi Lines, 469 U.S. 832, 105 S. Ct. 120, 83 L.Ed.2d 63 (1984)).[6]

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[6]While the U.S. Fifth Circuit Court of Appeal has determined that the doctrine of superseding cause applies in maritime cases, see Donaghey v. Ocean Drilling & Exploration Company, 974 F.2d at 652-653, the Eleventh Circuit Court of Appeal has rejected its application in maritime cases finding that:

The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm to another, which the actor's negligent conduct is a substantial factor in bringing about, if: (a) the actor at the time of his negligent conduct should have realized that a third person might so act; or (b) a reasonable man knowing the situation existing when the act of the third person was done would not regard it as highly extraordinary that the third person had so acted; or (c) the intervening act is a normal consequence of a situation created by the actor's conduct and the manner in which it is done is not extraordinarily negligent. Donaghey v. Ocean Drilling & Exploration Company, 974 F.2d at 652 (quoting Nunley v. M/V Dauntless Colocotronis, 727 F.2d at 464-465).

NES argues that the trial court correctly granted its motion for summary judgment where the undisputed facts show that Rowan knew that there was a problem with the man-lift, yet did not call NES to fix it. NES further contends that once the welders put Rowan on notice that the man-lift was malfunctioning, Rowan knew it could call NES or Tidewater, as it had done in the past, to have the man-lift repaired. NES argues that Rowan's failure to do so, and its decision to send its own inexperienced employee to trouble-shoot a piece of equipment known to be malfunctioning, constitutes negligence. As such, NES contends that Rowan breached its non-delegable duty to provide Therrell with a safe place to work and that Rowan's actions of sending Therrell into harm's way and failing to

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> Under a "proportional fault" system, no justification exists for applying the doctrines of intervening negligence and last clear chance. Unless it can truly be said that one party's negligence did not in any way contribute to the loss, complete apportionment between the negligent parties, based on their respective degrees of fault, is the proper method for calculating and awarding damages in maritime cases.

Hercules, Inc. v. Stevens Shipping Company, 765 F.2d 1069, 1075 (11th Cir. 1985)(citations omitted).

call NES or Tidewater to repair the man-lift were the superseding, intervening cause of this accident.

Contrariwise, Rowan contends that the trial court erred in granting summary judgment where, under the applicable law, Burcham's instruction to Therrell to trouble shoot the man-lift, while possibly negligent, was not so "extraordinarily negligent" or "highly extraordinary" as to constitute a "superseding cause" to be determined, on summary judgment, as a matter of law. We agree.

Burcham testified in his deposition that the man-lifts were in operation daily and that in general, personnel using them had encountered problems with the starters, belts, and electronic switches and levers, as evidenced by the service records. Burcham further testified that customarily, if Rowan employees were able to determine what was wrong with the man-lift and could repair it, they generally did not call a mechanic, unless the repair required the changing of parts. Burcham or the maintenance worker would look at the unit and determine if it required a mechanic to repair it. Burcham testified that his instructions to Therrell were to rinse off the man-lift, lubricate it, and see if anything was wrong with it. Therrell complied with Burcham's instructions, and while attempting to get the man lift running again, the retraction chain broke, causing the fall and Therrell's resulting injuries.

Given Burcham's testimony that Rowan employees had routinely "looked at" the unit to see if they could fix the problem before calling either Tidewater or NES to send a mechanic to repair it, Burcham's actions, while ultimately contributing to the accident, could equally be characterized as a "normal consequence" and not so "highly extraordinary considering the whole of the circumstances" as to rise to the level of an independent, superseding cause, as a matter of law. See Donaghey v. Ocean Drilling & Exploration Company, 974

F.2d at 653; Becker v. Tidewater, Inc., 586 F.3d 358, 372 (5th Cir. 2009). Moreover, given the remainder of the record before us and applying the above criteria to the evidence adduced thus far, we are unable to say that Burcham's actions, *per se,* "supersede" any potential liability of the third-party defendant entitling it to judgment in its favor as a matter of law. See Nunley v. M/V Dauntless Colocotronis, 727 F.2d at 464-465 (5th Cir.).[7]

Thus, we find merit to Rowan's assignment of error.

CONCLUSION

For the above and foregoing reasons, the motion to dismiss the appeal filed by NES is hereby denied on the showing made. The May 12, 2009 judgment of the trial court, dismissing Rowan's third-party demand against NES and granting summary judgment in favor of NES, is hereby reversed and the matter is remanded to the trial court for further proceedings. Costs of this appeal are assessed to the third-party defendant/appellee, NES Equipment Rentals, L.P.

MOTION TO DISMISS APPEAL DENIED ON THE SHOWING MADE; JUDGMENT REVERSED AND REMANDED.

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[7]Specifically, there is evidence that at the time of the accident, the rig was "stacked" or tied to the dock at Port Fourchon for general maintenance and repairs, which included sandblasting, painting, and replacing water lines. Equipment located on the dock and on a barge positioned underneath the rig between the pontoons that supported the floating rig was used to perform the general maintenance and repairs. In particular, two man-lifts and air hoists were stored on the barge. The man-lifts were used to lift workers on the barge to the underside of the rig to sandblast, paint, and replace salt water lines. In addition to Rowan employees, other personnel performed general maintenance and repairs on the rig. As a driller, Therrell was responsible for supervising maintenance and repair work, and on an average day, Therrell would operate the man-lift to go down beneath the rig to conduct inspections on the work being performed.

After receiving instructions from Burcham, Therrell was lowered onto the barge in a personnel basket by a crane. Once on the barge, Therrell "greased" the man lift, got into the basket, and began to "work the boom," telescoping it in and out at various angles by using the controls in the basket. After working it in and out several times with no problems, Therrell concluded that oiling the boom had "fixed" the problem, when suddenly, as soon as he began to retract the boom, the basket fell straight down in a "free fall." Upon inspection, it was determined that the outer mid retract chains were broken, which could have contributed to an uncontrolled retraction of the boom.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 CA 1546

CHRISTOPHER LEE THERRELL

VERSUS

ROWAN COMPANIES, INC.

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McCLENDON, J., concurs and assigns reasons.

I agree that NES Equipment Rentals, L.P. is not entitled to summary judgment as a matter of law. Thus, I respectfully concur with the result reached by the majority.