SUPREME COURT OF LOUISIANA

No. 95-C-1425

JAMES BILLY RAY FONTENOT, ET AL.

versus

CHEVRON U.S.A. INC., DANTZLER BOAT AND BARGE CO., AND AETNA CASUALTY AND SURETY CO.

ON WRIT OF REVIEW TO THE COURT OF APPEAL, FOURTH CIRCUIT, STATE OF LOUISIANA

KIMBALL, J., Concurring in result only.

The validity of the waiver of subrogation clause contained in the Aetna policy issued to Hercules is, at least initially, dependent upon the resolution of the issue presented to this Court (but not squarely addressed in the majority opinion), i.e., "does federal maritime law apply to Aetna's claim for subrogation?" In my view, under the particular facts of this case, it does.

Though Fontenot was on the Chevron platform and, prior to his accident, performing workover activities pursuant to a workover contract between Chevron and Hercules which might, for many other purposes and in many other circumstances be characterized as a "non-maritime" contract, at the time Fontenot was injured he was evacuating the Chevron platform by swinging over the side of the platform on a rope to a vessel. In the course of utilizing this method of evacuating the platform, Fontenot fell from the rope to the deck of the Dantzler vessel, sustaining injuries in the fall. Fontenot's activities at the time of his accident satisfy both the situs (on navigable waters) and the status (maritime nexus requirement) tests for claims cognizable in admiralty, as Fontenot was swinging from a rope over the Gulf of Mexico attempting to board an unmoored, unanchored vessel during evacuation of a platform due to an approaching hurricane. *See Randall v. Chevron U.S.A., Inc.*, 13 F.3d 888, 894-98 (5th Cir. 1994). Recognizing as much, Hercules, through its Longshore and Harbor Workers Compensation Act insurer, Aetna, voluntarily paid benefits and medical expenses to Fontenot for his injuries. Fontenot, as he had a right to do under the Longshore and Harbor Worker's Compensation Act, then sued Chevron, the platform owner and charterer of the

vessel, and Dantzler, the vessel owner, under general maritime law for negligence. In this regard, Fontenot's claim against Chevron, *pro hac vice,* was a general maritime negligence action against a time-charterer for its negligent land-based decision to evacuate the platform by waterborne vessel during obviously rough weather conditions, a claim which is clearly cognizable in admiralty. *Id.* at 898-900. Aetna, asserting its non-statutory subrogation claim for recovery of benefits paid, intervened in Fontenot's suit against Chevron and Dantzler, and Fontenot's claim against Chevron and Dantzler was later compromised without notice to or consent by Aetna, in violation of 33 U.S.C. 933(g).

In my view, the primary error of the majority opinion's analysis, as well as the primary error of the lower courts' analyses in this case, is the focus on the contract of insurance between Aetna and Hercules, which contains the waiver of Aetna's right of subrogation. Aetna's asserted right of subrogation is not contractual; it is a non-statutory federal maritime law claim which Aetna waived in its contract of insurance with Hercules. Fontenot sued Chevron and Dantzler for negligence under general maritime law, i.e., Fontenot asserted a *federal* maritime claim of negligence against Chevron and Dantzler. Aetna asserted its *federal* non-statutory right of subrogation and indemnification to recover benefits it had paid on behalf of Hercules to Fontenot under the Longshore and Harbor Worker's Compensation Act, a *federal* Act. *See Pallas Shipping Agency, Ltd. v. Duris,* 461 U.S. 529, 538, 103 S.Ct. 1991, 1996 (1983)("[E]ven without a statutory assignment of the longshoreman's claims, an employer can seek indemnification from negligent third parties for payments it has made to the longshoreman."); Francis J. Gorman, *Indemnity and Contribution Under Maritime Law,* 55 Tul.L.Rev. 1165 (1981)(explaining the differences between contractual and restitution based indemnification claims). As such, Aetna intervened in a suit brought under *federal* maritime law to assert a *federal* non-statutory claim for indemnification of benefits it had paid pursuant to a policy issued to cover its insured's liability under a *federal* Act. "There is admiralty jurisdiction over claims for contribution and indemnity if jurisdiction exists over the underlying cause of action. If there is admiralty jurisdiction, the substantive and legal rights of the parties are determined by federal maritime law, not state law." Thomas J. Schoenbaum, *Admiralty and Maritime Law,* §5-18 (2d ed. 1994). Both Fontenot's claim's against Chevron and Dantzler as well as Aetna's claimed right of subrogation are based on and governed by *federal* law. Therefore, under the particular facts of this case, it matters not that Aetna's waiver of its federal right of subrogation occurred in the context of

a contract which might be construed to be non-maritime in some other situation, e.g., if Fontenot had been injured while performing workover activities on the platform, the Chevron workover contract with Hercules as well as the Aetna contract of insurance with Hercules might well be considered non-maritime. *See Herb's Welding, Inc. v. Gray,* 470 U.S. 414, 105 S.Ct. 1421 (1985). However, that is not what happened in this case. Instead, Fontenot was injured on navigable waters beyond Louisiana's territorial limits while performing a traditional maritime activity, boarding a vessel. Federal maritime law therefore governs, and the nature of the document in which Aetna waived this claim as well as the law which governs the interpretation of that document under some other factual setting is simply of no import in the instant case. There is therefore no need, as the majority does in the instant case, to determine the effect of the Louisiana Oilfield Anti-Indemnity Act on such a waiver as the Anti-Indemnity Act has no application in this case: the case, including Aetna's ability to assert its right of subrogation as well as Aetna's waiver of that right of subrogation, is governed by federal maritime law.

Furthermore, even if the majority were correct in this case in its determination that federal maritime law does not govern Aetna's claim for subrogation and, instead, Louisiana law applies, I cannot agree with the majority's interpretation of the Louisiana Oilfield Anti-Indemnity Act's provisions against indemnification agreements of the sort contained in the workover contract and the Aetna policy. As the majority acknowledges, *ante* at 10-11, the Act explicitly covers insurance contracts collateral to or affecting agreements pertaining to a well for oil or gas. *See* La. R.S. 9:2780(B), (C), (D), and (G). The Aetna policy at issue herein is clearly collateral to and pertains to the Hercules workover contract with Chevron. As such, if federal maritime law does not apply in this case, the Louisiana Oilfield Anti-Indemnity Act specifically invalidates the waiver of subrogation clause contained in the Aetna policy.

The majority, though acknowledging "the insurance contract does contain a waiver of subrogation which violates Subsection G," *ante* at 11, nevertheless decides that "in this case the waiver does not frustrate or circumvent the prohibitions of the Act." *Id.* This analysis is both a *non-sequitur* and incorrect as a matter of fact. Contrary to the majority's assertion that "[t]he waiver of subrogation clause in the insurance contract at issue does not fall within these prohibitions because it does not require indemnification or the shifting of liability from the tortfeasor to another party," *ante* at 10, the waiver of subrogation clause at issue specifically requires a shifting of liability from

Chevron, the tortfeasor, to Aetna, the compensation carrier subrogated to Hercules', its insured's, rights. By requiring Hercules to cause its insurer to waive its right of subrogation in exchange for an increased premium, which Hercules, of course, had to pay, Chevron has effectively avoided liability at the expense of its subcontractor, Hercules. This is exactly what the Louisiana Oilfield Anti-Indemnity Act was designed to prevent.

In my view, the majority's analysis of the pertinent provisions of the Louisiana Oilfield Anti-Indemnity Act will henceforth allow oil companies to circumvent the prohibitions contained in the Act by simply requiring their contractors to provide them with the same indemnification agreements prohibited in the Act through insurance agreements procured by the contractor at the contractor's expense. As this is the exact evil the legislature sought to remedy when it made the provisions of the Act applicable to insurance agreements collateral to or pertaining to agreements concerning oilfield work, I cannot agree with the majority's analysis of the Act. For the reasons stated herein, I would hold that Aetna's claim for subrogation is governed by federal maritime law, which allows both Aetna's claim and the waiver of such a claim. As Aetna has waived its right of subrogation, it may not now assert that same right in these proceedings.