

# SUPREME COURT OF LOUISIANA

No. 95-C-2446

EDWARD D. MILSTEAD

versus

DIAMOND M OFFSHORE, INC., ET AL.

## ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, THIRD CIRCUIT, STATE OF LOUISIANA

KIMBALL, J., Concurring in Part, Dissenting in Part.

While I agree with the majority that there is no error in the trial court's decision on the merits of plaintiff's claim,<sup>1</sup> as well as its determination that the trial court erred in awarding prejudgment interest on future damages, I write separately to note my disagreement with the majority's conclusion that Louisiana standards of appellate review are applicable to maritime cases decided in Louisiana state courts under the "saving to suitors" clause.

In my view, the majority's reasoning in determining that appellate review standards are procedural in nature and, therefore, state appellate review standards should be applied in maritime cases brought in state courts under the "savings to suitors" clause is correct insofar as the other states of the United States are concerned. However, in Louisiana, unlike other states or federal courts, the scope of appellate review in civil cases extends to issues of both law *and fact*. See Art. 5, Secs. 5(C) and 10(B), Louisiana Constitution of 1974. This extension of the scope of appellate review in Louisiana's appellate courts allows an appellate court in Louisiana to do that which a federal court cannot do, i.e., review fact determinations made by the trier of fact in plenary fashion.<sup>2</sup>

As the majority acknowledges, the key consideration in determining whether state laws apply

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<sup>1</sup> My determination of the correctness of the trial court's decision is made under what I believe to be the appropriate standard of appellate review, i.e., federal principles of appellate review.

<sup>2</sup> While application of the manifestly erroneous/clearly wrong standard of appellate review for factual findings in Louisiana appellate courts ameliorates, at least to some degree, the differences in federal and Louisiana standards of appellate review of factual findings, Louisiana's standard for appellate review of factual findings nevertheless remains much more expansive in scope than that of the federal standards.

in maritime "saving to suitors" cases is uniformity. In my view, the expansive review of fact determinations allowed under Louisiana standards of appellate review, but not available in a similar suit applying the same substantive law in a federal court, works a substantive change to a characteristic feature of general maritime law and is therefore not proper. I therefore respectfully dissent from the portion of the majority opinion which holds that Louisiana standards of appellate review apply in maritime cases brought in Louisiana state courts under the "saving to suitors" clause.