IN THE UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 91-4655

DONALD J. MELANCON and DOROTHY MARIE MELANCON,

Plaintiffs-Appellants,

Versus

CHEVRON U.S.A., INC. and
DANOS & CUROLE MARINE CONTRACTORS, INC.

Defendants-Appellees.

Appeal From The United States District Court
For The Western District Of Louisiana
(90-0798)

(February 9, 1993)

Before GARWOOD and DEMOSS, Circuit Judges.[*]

PER CURIAM:[**]

Donald J. Melancon, Sr. and Dorothy Marie Melancon filed suit against Chevron U.S.A (Chevron) and Danos & Curole Marine Contractors, Inc. (D & C) for injuries suffered in a slip and fall accident. Melancon sought to recover damages for personal injuries sustained while working as a cook on a Chevron-owned fixed

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[*] Judge John R. Brown heard oral argument in this case but died prior to issurance of the final decision, which is accordingly rendered by a quorum. 28 U.S.C. § 46(d).

[**] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

production platform. Melancon alleged that the accident was caused by co-worker Mike Smith's negligence. The district court granted summary judgment for Chevron on the grounds that Melancon was Chevron's borrowed servant and Chevron was shielded from tort action by the Longshoremen's and Harbor Workers' Compensation Act. 33 U.S.C. § 905(a) (LHWCA). The district court granted summary judgment for D & C on the grounds that Melancon and its nominal employee, Smith, were "fellow employees" and that D & C likewise was shielded from tort action by the LHWCA. The Melancons appeal. We affirm.

I.

On May 17, 1989, while on the payroll of Offshore Food Services, Inc. (OFI), but working on a platform owned and operated by Chevron designated as Grand Isle 37 Zulu platform located on the Outer Continental Shelf off the coast of Louisiana, Donald Melancon sustained personal injuries in the course of his work. Melancon alleges that these injuries were caused by the negligence of D & C's nominal employee Mike Smith.

On the date of the accident, Melancon was nominally employed by OFI as a cook. OFI was under contract to provide catering and housekeeping services to Chevron on the Zulu platform. For a two-year period ending May 17, 1989, Melancon had been assigned to and worked exclusively as a cook on Chevron's Zulu platform.

During this time, Melancon was the only OFI employee working on the platform. His only contact with OFI was submitting periodic requests for groceries and written meal rosters. Chevron would

then transport the requested supplies to the platform. OFI's only communication with Melancon while he was working consisted of visits by an OFI representative once every six weeks.

While working on the platform, Melancon was directly accountable to a Chevron employee. Any supervision or direction regarding his work was provided to him by the Chevron employee. While Chevron could not terminate Melancon's employment with OFI, Chevron could ask that Melancon would be replaced on the Zulu platform at Chevron's request.

On May 17, 1989, Michael Smith was nominally employed by D & C as a contract labor roustabout assigned to work exclusively for Chevron on the Zulu platform for approximately one and one-half years. Smith, while generally working seven days on and seven days off on the Zulu platform, was the only D & C employee permanently assigned to that platform. There was no contractual relationship between OFI and D & C. Melancon's complaint alleged that Chevron and D & C both had a responsibility to maintain the deck of the platform where he fell.[1]

On October 9, 1990, Chevron filed a Motion for Summary Judgment. Chevron's motion asserted that because Melancon was Chevron's borrowed servant at the time of the accident, Chevron was

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[1] Specifically, the complaint alleged:

> "Complainant exited the living quarters to get a five (5) gallon water bottle stored underneath a stairway adjacent to a wireline shed. Complainant picked up the water jug and suddenly and without warning, he slipped and fell on oil on the deck, causing him to sustain severe and disabling injuries to his lower back."

immune from suit in tort under the provisions of 33 U.S.C § 905(a)[2], the Longshoremen's and Harbor Worker's Compensation Act. In support for its motion, Chevron filed the deposition of Donald Melancon taken on September 6, 1990. On May 28, 1991, D & C, tracking the argument asserted in Chevron's motion, filed its Motion for Summary Judgment. In opposition to both of these motions, Melancon filed (i) his own affidavit, taken on January 18, 1991, (ii) an affidavit and deposition of Geneva Ann Neill, the personnel manager of OFI, (iii) deposition testimony of Clara Reid, an OFI supervisor, (iv) deposition testimony of Huey Oglesby, a Chevron employee, and (v) the written contract between Chevron and OFI. Despite Melancon's arguments that all of his submitted evidence created genuine issues of material fact regarding his status as Chevron's borrowed servant, the district court granted both Motions for Summary Judgment.

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[2] LHWCA, 33 U.S.C. § 905(a) provides as follows:

> "(a) **Employer liability; failure if employer to secure payment of compensation**
>
> The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee . . . except that if an employer fails to secure payment of compensation as required by this chapter . . ."

33 U.S.C § 933(i) furthermore, precludes suits against fellow employees under the LHWCA:

> "The right to compensation or benefits under this Chapter shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or legal representatives if he is killed by the negligence or wrong of any other person or persons in the same employ."

On appeal, Melancon argues that the district court erred in concluding: (1) that he was Chevron's borrowed servant; and (2) that he and Smith were "fellow employees" of Chevron, precluding tort liability for D & C.

II.

In ruling on a motion for summary judgment, the Court must be convinced that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. FRCivP 56(c). In Anderson v. Liberty Lobby Inc., 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d. 202 (1986), the Supreme Court held that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment--the requirement is that there is no genuine issue of material fact. There must be evidence on which a jury could reasonably find for complainant. 106 S. Ct. at 2510. In reviewing summary judgment, we apply the same standard ~~of review~~ as did the district court. Perron v. Bell Maintenance and Fabricators, Inc., 970 F.2d 1409, 1411 (5th Cir. 1992); Sims v. Monumental General Ins. Co., 960 F.2d 478, 479 (5th Cir. 1992).

In Matsushita Electric Indus. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986), the Supreme Court emphasized that summary judgments are a favored procedural vehicle to dispose of claims when there are no genuine issues for trial. The Court reiterated the well-established proposition that "when the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some

metaphysical doubt as to material facts." Id. 106 S. Ct. at 1356; First Nat. Bank v. Cities Service Co., 391 U.S. 253, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968). Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial. Matsushita, 106 S. Ct. at 1356.

Summary judgment on the issue of borrowed servant status may be appropriate where "sufficient 'determinative factual ingredients,' [are] undisputed," since "the issue of whether a relationship of borrowed servant existed is a matter of law," Gaudet v. Exxon Corp., 562 F.2d 351, 357-358 (5th Cir. 1977), *cert. denied*, 436 U.S. 913, 98 S. Ct. 2253, 56 L. Ed. 2d 414 (1978).

III.

Although the court must resolve all factual inferences in favor of the nonmovant, the nonmovant cannot manufacture a disputed material fact where none exists. Russell v. Harrison, 736 F.2d 283, 287 (5th Cir. 1984). In Perma Research & Development Co. v. Singer Co., 410 F.2d 572 (2d Cir. 1969), the Second Circuit held that a district court may grant summary judgment where an issue raised by affidavit is clearly inconsistent with earlier deposition testimony. The court in Perma Research concluded that the district court had properly granted summary judgment since the statement in the affidavit was blatantly inconsistent with the earlier deposition. "If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly

diminish the utility of summary judgment as a procedure for screening out sham issues of fact." 410 F.2d 572, 578 (2d Cir. 1969).

The Perma Research rationale has been followed by other courts faced with a party's attempt to inject a factual dispute through a contradictory affidavit. For example, in Radobenko v. Automated Equipment Corp., 520 F.2d 540 (9th Cir. 1975), the Ninth Circuit affirmed a grant of summary judgment in a breach of contract case where the only factual issues were raised in a party's affidavit in contradiction of earlier statements in his deposition. The court acknowledged that the statements in the affidavit were material, but rejected the argument that they created a genuine issue within the meaning of Rule 56. "The very object of summary judgment is to separate real and genuine issues from those that are formal or pretended, so that only the former may subject the moving party to the burden of trial." 520 F.2d at 544.

The Fifth Circuit followed this line of reasoning in Albertson v. T.J. Stevenson & Co., Inc., 749 F.2d 223, (5th Cir. 1984), where the court held that "[u]nder Fed.R.Civ.P. 56(c), summary judgment is appropriate 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 any material fact and that the moving party is entitled to judgment as a matter of law.' The party seeking summary judgment bears the burden of establishing the absence of any disputed material fact. Although the court must resolve all factual inferences in favor of

the nonmovant, the nonmovant cannot manufacture a disputed material fact when none in fact exists. Thus, the nonmovant cannot defeat a motion for summary judgment by submitting an affidavit which directly contradicts, without explanation, his previous testimony." 749 F.2d at 228. (citations omitted).

The United States District Court for the Eastern District of Louisiana has also reached the same result on the issue. In Holifield v. Cities Service Tanker Corp., 421 F. Supp. 131 (E.D. La. 1976), aff'd 552 F.2d 367 (5th Cir. 1977), the court held that "from the standpoint of the policy and requirements of Rule 56 of the Federal Rules, we decline to allow the plaintiff to raise an issue of fact by contradicting his own sworn statement of an earlier date; it is only genuine issues of fact and not simply issues created by the self-contradictions of an opposing party that are intended to preclude resort to the device of summary judgment." 421 F. Supp at 136.

In the case at hand, if there is any issue of fact, it exists only because of the inconsistent statements made by Melancon the deponent and Melancon the affiant. We are thus presented with the question of whether contradictory testimony of a plaintiff alone can be used by him to defeat a defendant's summary judgment motion where the only issue of fact results from the necessity of choosing between the plaintiff's two conflicting versions. Melancon's affidavit, on the basis of which he resisted the summary judgment motions, is conclusory in nature and does not even attempt to explain his earlier specific, contrary deposition testimony.

Here the issues of fact created by Melancon are not issues which this court should reasonably characterize as genuine. The district court correctly found that there was no genuine issue as to any material fact and properly granted summary judgment.

IV.

Chevron's liability is to be determined in accordance with the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 et seq., which incorporates the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq. as the applicable workers' compensation statute. The LHWCA was designed to provide an injured employee with certain and absolute benefits in lieu of possible common law benefits obtainable only in tort actions against his employer. Gaudet, 562 F.2d at 356. *See also* Haynes v. Rederi A/S Aladdin, 362 F.2d 345 (5th Cir. 1966), *cert. denied,* 385 U.S. 1020, 87 S. Ct. 731, 17 L. Ed. 2d 557 (1967).

The "borrowed servant" doctrine was initially recognized by the Supreme Court in Standard Oil Co. v. Anderson, 212 U.S. 215, 29 S. Ct. 252, 53 L. Ed. 480 (1909).[3] The doctrine held a borrowing employer liable under *respondeat superior* for the

[3] The Court explained the doctrine as follows:

> "One may be in the general service of another, and, nevertheless, with respect to particular work, may be transferred, with his own consent and acquiescence, to the service of a third person, so that he becomes the servant of that person with all legal consequences of the new relation."

212 U. S. at 220.

negligence of any employee he had borrowed. The courts have followed the same rationale in "exclusive remedy" cases. Only beginning with Ruiz v. Shell Oil Co., 413 F.2d 310 (5th Cir. 1969), however, did the Fifth Circuit adopt the "borrowed servant" doctrine to give borrowing employers a shield from tort liability to their borrowed servants under the LHWCA. Gaudet, 562 F.2d at 355-366.

The issue of whether a relationship of borrowed servant existed is, where the controlling facts are undisputed, a matter of law for the district court to determine. Gaudet, 562 F.2d at 357; Ruiz v. Shell Oil Co., 413 F.2d at 314. According to the Supreme Court in Standard, to determine whether an employee is the employee of the original employer or the borrowed servant of another "we must inquire whose work is the work being performed, a question which is usually answered by ascertaining who has the power to control and direct the [servant] in the performance of [his] work." 215 U. S. at 221-222, 29 S. Ct. 254, 53 L. Ed at 483-484.

In Ruiz, we established nine factors or indices of employment for the factfinder to be considered in determining whether a general employee of one had become the borrowed servant of another. These nine factors are as follows:

(1) Who has control over the employee and the work he is performing, beyond mere suggestion of details or cooperation?

(2) Whose work is being performed?

(3) Was there an agreement, understanding, or meeting of the

minds between the original and the borrowing employer?

(4) Did the employee acquiesce in the new work situation?

(5) Did the original employer terminate his relationship with the employee?

(6) Who furnished the tools and place for performance?

(7) Was the new employment over a considerable length of time?

(8) Who had the right to discharge the employee?

(9) Who had the obligation to pay the employee?

413 F.2d at 312-313.

In Gaudet, this court explained that these factors are to be weighed as appropriate in each particular case. 562 F.2d at 356. No single factor or any combination thereof is decisive. Ruiz, 413 F.2d at 312. We explained further that "the central question in borrowed servant cases is whether someone has the power to control and direct another person in the performance of his work. Gaudet, 562 F.2d at 356; Hebron v. Union Oil Co., 634 F.2d 245, 247 (5th Cir. 1981)." The district court considered these nine factors and concluded that the summary judgment evidence established that Melancon was the borrowed servant of Chevron.

With respect to the first factor, the right of control, Melancon's own deposition testimony established that Chevron's employees totally supervised the performance of his catering duties on the platform. OFI had no supervision of him and very little contact with him. It made no effort to supervise his work. Control was conferred on Chevron. Melancon v. Amoco Production

Co., 834 F. 2d 1238 (5th Cir. 1988); Gaines v. Chevron U.S.A., Inc., No. 89-3890 (5th Cir. May, 17 1990) (unpublished opinion) at 5. Because Melancon's own deposition testimony establishes that he received his orders from Chevron employees and never was in touch with OFI employees, the right of control test is resolved in Chevron's favor.

As to the second factor, it is clear that it was Chevron's work that was being performed. Melancon worked only for Chevron at the time of his accident. The sole purpose of his being on the platform was to provide services to Chevron and Chevron personnel. Although his duties were an incidental aspect of Chevron's business, his primary job was an essential element thereof. Melancon, 834 F.2d at 1245; Gaines at 5. Therefore, the second test of Ruiz is settled in Chevron's favor.

The third factor focuses on whether the "lending employer" (OFI) and the "borrowing employer" (Chevron) have agreed to allow the employee to work for someone other than his regular, nominal employer. Melancon's most persuasive disagreement with the district court's conclusion is that the contract between O.F.I. and Chevron precludes a finding that he is Chevron's borrowed servant. The pertinent portion of the contract provides:

> "All personnel furnished by contractor hereunder are the sole employees of CONTRACTOR and 'shall not be considered the employees of COMPANY'."
>
> "In the performance of all services and work hereunder, CONTRACTOR is an independent CONTRACTOR. . ."

In disputing that the application of the facts to the third

Ruiz factor favors Chevron's position, Melancon poses a familiar and clearly previously rejected argument: that the existence of a service agreement between Chevron and OFI precludes a finding of borrowed employment. Where, as here, there is no specific contractual prohibition against the application of the doctrine, the mere existence of a service contract is of no consequence. Alexander v. Chevron, 806 F. 2d 526 (5th Cir. 1986), *cert. denied*, 483 U. S. 1005, 107 S. Ct. 3229, 97 L. Ed. 2d 735 (1987).

In Alexander, this court interpreted a service contract almost identical in all respects to the Chevron/OFI contract agreement and concluded that there was nothing in the contract that prohibited Chevron from becoming the borrowing employer of the lending employer's employees. Id. at 528.[4] The Melancon court reaffirmed the holding in Alexander, noting that a contractual provision specifying "no Beraud employee is to be considered the agent, servant or representative of Amoco," did not preclude a finding of "borrowed servant" status. In so holding, the court stated that "in the case at bar, Beraud clearly understood that Melancon would

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[4] The pertinent portion of the contract at issue in Alexander provides as follows:

> "Contractor agrees to perform the work as an independent contractor and not as an employee of Company; to indemnify and hold Company harmless from and against claims or liens of workmen and materialmen; to defend at its own expense any and all suits or actions; and to pay any judgments against Company arising out of the alleged infringement of patent rights occasioned by performance of servants hereunder."

806 F.2d at 528.

be taking his instructions from Amoco, notwithstanding provision 6 of the contract." Melancon, 834 F.2d at 1245. Parties to a contract cannot automatically prevent a legal status like "borrowed servant employee" from arising merely by stating in a provision in their contract that borrowed servant status cannot arise. Id. at 1245. Melancon cites Alday v. Patterson Truck Line Inc., 750 F.2d 375 (5th Cir. 1985) and West v. Kerr-McGee Corp., 765 F.2d 526 (5th Cir. 1985), for the proposition that this type of contractual language conclusively precludes the existence of a borrowed servant relationship between Melancon and Chevron. The contract language in the case at bar is substantially the same as that in Alexander, where the court stated that Alexander's reliance on Alday[5] and West[6] is misplaced. Alexander, 806 F.2d at 528. The court observed that in those cases the contract explicitly prohibited application of the borrowed servant doctrine; in contrast the language in the Champion-Chevron contact, relied on by Alexander, did not purport to prohibit Chevron from becoming the borrowing employer of

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[5] In Alday, the contract provides as follows:

> "Under no circumstances shall an employee of CONTRACTOR be deemed an employee of COMPANY; neither shall CONTRACTOR act as an agent or employee of COMPANY."

750 F.2d at 377.

[6] In West the contract provides as follows:

> "Neither contractor nor any person used or employed by contractor shall be deemed for any purpose to be the representative of Kerr-McGee in performance of any work or services . . . under this agreement."

765 F.2d at 528.

Champion's payroll employees. Alexander, 806 F.2d at 528. Melancon's reliance on Alday and West in the present case is similarly misplaced.

Also, the terms of the contract between the borrowing employer and payroll employer do not ordinarily provide a sufficient basis to deny summary judgment when the remaining Ruiz factors point toward borrowed servant status. Gaudet, 562 F.2d at 358. Despite the clear meaning of the contract, however, It is well established that "parties to a contract cannot automatically prevent a legal status like 'borrowed employee' from arising merely by saying in a provision in their contract that it cannot arise." Melancon, 834 F.2d at 1245. That is, the reality of the worksite and the parties' actions in carrying out a contract can implicitly modify, alter, or waive express contract provisions of this sort. Id. at 1245.

In this case, OFI understood, and Melancon acknowledged, that all of his orders would come from Chevron supervisory personnel. Just as in Melancon and Alexander, Melancon cannot rely on a contractual provision to prevent him from becoming a borrowed servant. The factual reality of Melancon's employment on the platform reflected at least an implicit understanding between Chevron and OFI that during the two years Melancon worked as a cook for Chevron, he would act, *de facto*, as Chevron's employee. The third factor falls in Chevron's favor.

The next factor, employee's acquiescence in the work situation, is met. The central question on this prong of the test

was set out by this court in Gaudet: "[W]as the employment with the new employer of such duration that the employee could have reasonably presumed to have evaluated the risks of the work situation and acquiesced thereto?" 562 F.2d at 357. It is uncontroverted that for two years prior to his accident, Melancon worked, slept and ate on the Zulu platform. He was aware of the work conditions on the platform, chose to continue to work in those conditions for two years, and never made a complaint regarding these conditions to OFI or Chevron. See Melancon, 834 F.2d at 1246. As this court stated in Gaudet, "if an employee continues working in a new location, exposed to risks resulting from the direction and control of the new employer, there must come a time when policy dictates the LHWCA should apply, and the new employer, and new co-employees, should no longer be considered third parties but a true employer and true co-employees, liable only under the LHWCA." 562 F.2d at 357. These facts adequately establish Melancon's acquiescence in his new work environment. This fourth factor favors Chevron.

Melancon argues that the fifth factor is not met and contends that OFI never terminated its relationship with him and, therefore, he cannot be Chevron's borrowed servant. However, as we held in Melancon, 834 F.2d at 1246, a lending employer is not required to sever its relationship with the employee. In fact, we have stated:

> "We do not believe that this factor requires a lending employee to completely sever his relationship with the employee. Such a requirement would effectively eliminate the borrowed employee doctrine as there could never be two employers. The emphasis when considering this factor should focus on the lending employer's

> relationship with the employee when the borrowing occurs."

Capps v. N.L. Baroid-NL Industries, Inc., 784 F.2d 615, 618 (5th Cir. 1986). We conclude that due to Melancon's infrequent contacts with OFI and his daily adherence to Chevron's orders, OFI terminated its relationship with Melancon sufficiently to resolve this Ruiz factor in Chevron's favor.

The sixth factor to be considered is who furnished the tools and place or performance. Chevron argues here, as in Melancon, that there was a mix in the provision of equipment and supplies by OFI and Chevron. Basically consumable items were provided by OFI, while non-consumables and place of performance were provided by Chevron. Here, as in Melancon, this mix satisfies the requirement for borrowed servant status. 834 F.2d at 1246. Based on the facts of this case, the "tools" used by Melancon were supplied by Chevron and the sixth Ruiz factor falls in its favor.

No bright line test exists to establish what comprises a "considerable length of time" under the seventh Ruiz factor. However, this court has upheld borrowed servant status where the claimant was injured after working only a year for the borrowing employer. Alexander, 806 F.2d at 527. Additionally, Capps reminds us that "this court has previously affirmed a finding of borrowed servant status when the employee's injury occurred on the first day of the job." Capps, 784 F.2d at 618 (quoting Champagne v. Penrod Drilling Co., 341 F. Supp. 1282, 1284 (W.D. La. 1971), aff'd per curiam, 459 F.2d 1042 (5th Cir. 1972), cert. denied, 409 U.S. 1113, 93 S. Ct. 927, 34 L. Ed. 2d 696 (1973)). Hence, Melancon's two-

year stay on the Zulu Platform is consistent with supports borrowed servant status.

Regarding the eighth Ruiz factor, Chevron had the right to terminate Melancon's work at the Zulu Platform. Chevron does not contend that it could have forced Melancon from his position with OFI; Chevron only argues that it could certainly dismiss Melancon from Chevron's employ. Chevron's ability to terminate Melancon's status as a worker on the Zulu platform is sufficient to sustain support borrowed servant status. Melancon, 834 F.2d at 1246; Gaines at 7.

Finally, Chevron argues that while it did not have the obligation to directly pay Melancon (i.e., cut him a check), it did sign off on all his time sheets which were later submitted to OFI. The time sheets were then delivered to OFI and OFI then paid Melancon. Time sheet approval previously has been determined by this court to satisfy the "obligation to pay" inquiry of Ruiz. Alexander, 806 F.2d at 528; Green v. Chevron U.S.A., Inc. No. 88-3860 (5th Cir. May 23, 1989) at 9; Gaines at 7. This final element of Ruiz is resolved in Chevron's favor.

The district court conducted a thorough "borrowed servant" status analysis under the nine factor Ruiz test, and We find no clear error in any of the district court's factual findings, and the court correctly concluded that, under the material facts as to which there was no genuine dispute, Melancon was Chevron's "borrowed servant" for LHWCA purposes.

V.

Melancon does not explain exactly what role Smith or D & C played in his fall. Nevertheless, Melancon argues that because Smith was responsible for his fall, he should be able to sue D & C as a third party, free from the tort immunity doctrine of the LHWCA. However, we hold D & C's obligations also are to be determined by LHWCA.

We recently addressed this issue in Perron v. Bell Maintenance and Fabricators, Inc., 970 F.2d 1409 (5th. Cir. 1992). In that case, the plaintiff and a co-worker were both nominal employees of different companies. The court found both workers to be "borrowed servants" of Gulf Oil, however, when the plaintiff was allegedly injured on Gulf Oil's platform by his co-employee's negligence. The issue for appeal was "whether the bar under the [(LHWCA)], 33 U.S.C. §933(i), for suits against a co-employee likewise applies to the tort action *(respondeat superior)* by [plaintiff] against [his co-employee's] employer, Bell Maintenance and Fabricators, Inc., as held by the district court in granting summary judgment for Bell." Perron, 970 F.2d at 1410.

In affirming summary judgment, this court stated that the LHWCA remedies were exclusive concerning an action for an injury caused by a person "in the same employ." The court found that the provision of §933(1)[7], while limiting an employee's rights, also expanded his rights by "immunizing him against suits where he negligently injured a fellow worker." Id. at 1411; Sharp v. Elkins, 616 F. Supp. 1561, 1565 (W.D. La. 1985) (emphasis omitted)

[7] *See* note 2.

(quoting Congressional comments on §933(i)). As stated, the injured co-employee's exclusive remedy is payments guaranteed under the LHWCA.

Given that Melancon is barred by § 933(i) from bringing an action against Smith, the next question is whether Melancon can bring this *respondeat superior* action against D & C, Smith's nominal employer. Consistent with the LHWCA's comprehensive scheme, and with this court's holding in Perron, Melancon is barred from doing so.

This *respondeat superior* action against D & C arises out of its employee's, Smith's, alleged negligence. However, Melancon has no right to recover for Smith's negligence except as provided by the LHWCA's comprehensive scheme; the LHWCA payments are substituted for any right Melancon might have had to sue Smith's employer under *respondeat superior*. Simply put, Melancon cannot assert against D & C, the employer, his non-existent right against Smith, its employee. The fact that D & C is not Melancon's employer is irrelevant to whether § 933(i) bars his action against D & C. Perron, 970 F.2d at 1413.

VI.

The district court was correct in holding that Melancon was Chevron's "borrowed servant," thus barring the Melancons' suit against Chevron under the LHWCA, 33 U.S.C. § 905(a). Therefore, Melancon may not sue Chevron in tort. Likewise, because Michael Smith was Chevron's borrowed servant, and Melancon's borrowed co-employee, at the time of Melancon's accident, D & C is not

vicariously liable in any way for Melancon's injury on account of being Smith's nominal employer. Again, it is Chevron, through its borrowed servant Smith, that is liable under the LHWCA for Melancon's injury. As a result, Melancon may sue neither Chevron nor D & C in tort. His sole remedy is under the LHWCA.

Accordingly, the judgment is AFFIRMED.