

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. 2011-CA-00179

LIBERTY MUTUAL INSURANCE COMPANY

APPELLANT

VS.

RICHARD SHOEMAKE

APPELLEE

BRIEF OF THE APPELLEE

Appealed from the Circuit Court of
Newton County, Mississippi

ORAL ARGUMENT NOT REQUESTED

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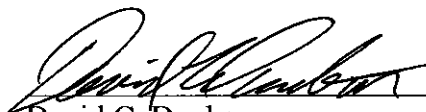
CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rules 28(a)(1) and 28(b) of the Mississippi Rules of Appellate Procedure, the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Mississippi Supreme Court and/or the judges of the Mississippi Court of Appeals may evaluate possible disqualification or recusal.

1. Liberty Mutual Insurance Company
Appellant
2. Richard Shoemake
Appellee
3. David C. Dunbar, Esq.
Lindsey T. Simmons, Esq.
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Counsel for Appellant

5. Honorable Marcus D. Gordon
Newton County Circuit Court
Trial Judge

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "David C. Dunbar", written over a horizontal line.

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Attorney for Appellee

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STATEMENT OF THE ISSUES

The trial court's grant of summary judgment in favor of Richard Shoemake and denial of summary judgment for Liberty Mutual Insurance Company should be affirmed because:

- I. The trial judge correctly determined that Liberty Mutual's claims were barred by the doctrines of *res judicata* and waiver because Liberty Mutual failed to intervene in the original matter; and
- II. The trial judge correctly determined that Alabama substantive law must be applied to determine workers' compensation subrogation rights in an Alabama tort lawsuit arising from an accident that occurred in Alabama, even if workers compensation benefits were paid in Mississippi.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition in the Court Below.

Liberty Mutual Insurance Company (“Liberty Mutual”) filed its Complaint on April 19, 2009, claiming that it was owed \$50,175.81 from Richard Shoemake (“Shoemake”) for re-payment of workers’ compensation benefits that had been paid to Shoemake by Liberty Mutual. [R. at 4]. Shoemake filed a Motion for Summary Judgment because Liberty Mutual’s claims were barred by *res judicata* and Liberty Mutual had been reimbursed the full amount to which it was entitled. [R. at 14, 33; R.E. at 1, 20]. Liberty Mutual filed a Cross-Motion for Summary Judgment reiterating its contention that it was owed \$50,175.81 from Shoemake’s tort settlement. [R. at 47]. Shoemake responded in opposition to Liberty Mutual’s Cross-Motion. [R. at 74, 78; R.E. at 34, 38]. The trial court granted Shoemake’s Motion for Summary Judgment and denied Liberty Mutual’s Cross-Motion for Summary Judgment. An Order and Final Judgment was entered on December 28, 2010. [R. at 92; R.E. at 46]. It is from said Order and Final Judgment that Liberty Mutual appeals.

B. Statement of the Facts.

Shoemake was injured in a motor vehicle accident on September 18, 2003, when a CSX train collided with his truck in Tuskegee, Macon County, Alabama. [R. at 15, 19; R.E. at 2, 6]. The accident occurred while Shoemake was acting within the course and scope of his employment with Simmons Wrecker. [R. at 15, 20; R.E. at 2, 7]. Shoemake was paid workers’ compensation benefits in the amount of \$132,402.65 by Liberty Mutual, the workers’ compensation carrier for Simmons Wrecker. [R. at 15, 20; R.E. at 2, 7]. On February 19, 2004, Shoemake and his wife filed suit against CSX Transportation and its engineer in the Circuit Court of Macon County, Alabama. [R. at 15; R.E. at 2]. Shoemake’s employer, Simmons Wrecker, was also a plaintiff in the Alabama tort action. [R. at 15; R.E. at 2].

Liberty Mutual was aware of the Alabama litigation at all relevant times and Liberty Mutual had an opportunity to intervene but chose not to do so. [R. at 15, 28; R.E. at 2, 15]. The case was litigated in Alabama, by Alabama lawyers, and Alabama law was followed. [R. at 15, 28-29; R.E. at 2, 15-16]. The case was settled on June 27, 2007 and an Order was entered on January 16, 2008, dismissing the case with prejudice. [R. at 15, 18; R.E. at 2, 5]. Following the Alabama tort case, Shoemake reimbursed Liberty Mutual with \$82,226.84 pursuant to the Alabama “common fund” doctrine, an amount that was actually suggested by Liberty Mutual. [R. at 15, 29-31; R.E. at 2, 16-18]. Liberty Mutual filed this action on April 14, 2009, seeking an additional \$50,175.81 from Shoemake. [R. at 4].

STANDARD OF REVIEW

The reviewing court “employs a *de novo* review” of a trial court’s grant or denial of summary judgment and examines all of the evidentiary matters. *Simmons v. Thompson Machinery of Mississippi, Inc.*, 631 So. 2d 798, 801 (Miss. 1994). Under Rule 56(c) of the Mississippi Rules of Civil Procedure, summary judgment is appropriate “where there are no genuine issues of material fact such that the moving party is entitled to judgment as a matter of law.” *Travis v. Stewart*, 680 So. 2d 214, 216 (Miss. 1996). This Court has explained, “The presence of fact issues in the record does not *per se* entitle a party to avoid summary judgment. The court must be convinced that the factual issue is a material one, one that matters in an outcome determinative sense.” *Simmons*, 631 So. 2d at 801. The moving party has the burden of proving that no triable genuine issue of fact exists, and the non-moving party is given the benefit of reasonable doubt. *Newell v. Hinton*, 556 So. 2d 1037, 1041 (Miss. 1990). However, the non-moving party cannot just remain silent and do nothing, it must bring forward “significant probative evidence showing that there are indeed genuine issues for trial.” *Id.*

SUMMARY OF THE ARGUMENT

Summary judgment was correctly granted for Shoemake and against Liberty Mutual and Shoemake requests that this Court affirm the trial court's judgment. First, Liberty Mutual's lawsuit is barred under the doctrines of *res judicata* and waiver because Liberty Mutual had notice of the Alabama tort action and failed to intervene when it had the opportunity. Liberty Mutual may have had a claim if it had intervened in the tort action, but it does not have a claim now because the tort action was fully adjudicated and dismissed with prejudice and *res judicata* applies. The subrogation claim was extinguished with the tort claim, and Liberty Mutual waived any claim it may have had by failing to intervene in the Alabama case. Full faith and credit is owed to the Alabama court's final adjudication of the matter.

Second, Liberty Mutual's subrogation right to any of the proceeds of the Alabama tort action were determined by Alabama law and Liberty Mutual has been paid all that it is due. Liberty Mutual is a subrogee and it has no greater rights than Shoemake, its subrogor. Alabama law applied to determine Shoemake's rights because the accident occurred in Alabama and that was the correct venue for Shoemake's tort action. Alabama employs the "common fund doctrine," under which Liberty Mutual is entitled to subrogation for the amount of benefits paid less its share of attorney's fees and expenses. Shoemake has paid Liberty Mutual the full amount that it is owed under the common fund doctrine. Liberty Mutual does not have a claim against Shoemake and the trial court's grant of summary judgment in favor of Shoemake was proper.

ARGUMENT

Summary judgment was correctly granted for Shoemake because Liberty Mutual does not have a claim against Shoemake. Liberty Mutual's lawsuit is barred by the doctrines of *res judicata* and waiver because Liberty Mutual failed to intervene in the Alabama tort case. Liberty Mutual cannot now re-litigate issues in Mississippi after there was a full adjudication of this matter in the Circuit Court of Macon County, Alabama. Further, Liberty Mutual has been paid all that it is due under Alabama law, which was the correct law to apply. This Court should affirm the trial court's grant of summary judgment for Shoemake.

I. The trial judge correctly determined that Liberty Mutual's claims were barred by the doctrines of *res judicata* and waiver because Liberty Mutual failed to intervene in the original matter.

Liberty Mutual had actual notice of Shoemake's tort action filed in the Circuit Court of Macon County, Alabama. [R. at 15, 28; R.E. at 2, 15]. Despite having actual knowledge of the tort case, which decided substantive legal issues on which Liberty Mutual's rights were determined, Liberty Mutual did not intervene in that lawsuit. Liberty Mutual has admitted that it had notice of the lawsuit and that it chose not to intervene. [R. at 47-48]. Liberty Mutual could have intervened at anytime to establish or protect its rights, if any, to subrogation, including the right to request that Mississippi law be applied to its subrogation claim. By failing to intervene in the Alabama tort case, Liberty Mutual waived any claims that it may have had. Liberty Mutual waited until the Alabama case was settled and dismissed with prejudice and then filed suit in the Circuit Court of Newton County, Mississippi. *Res judicata* bars Liberty Mutual's attempt to re-litigate this matter. Summary judgment was correctly granted because waiver and *res judicata* bar Liberty Mutual's claims and full faith and credit is owed to the Alabama Circuit Court's full and final adjudication of this matter.

A. Failure to intervene in the Alabama case resulted in waiver.

According to Mississippi law, which Liberty Mutual so badly wants to apply to this case, if an insurer has notice of a tort action that affects its liens or claims, the insurer should intervene because all claims must be determined in said tort action. *See* MISS. CODE ANN. § 71-3-71 (2000).

The Mississippi Code provides:

The acceptance of compensation benefits from or the making of a claim for compensation against an employer or insurer for the injury or death of an employee shall not affect the right of the employee or his dependents to sue any other party at law for such injury or death, but the employer or his insurer shall be entitled to reasonable notice and opportunity to join in any such action or may intervene therein.

* * *

If reasonable notice and opportunity to be represented in such action by counsel shall have been given to the compensation beneficiary, all claims of such compensation beneficiary shall be determined in such action, *as well as the claim of the employer or insurer.*

MISS. CODE ANN. § 71-3-71 (emphasis added). Liberty Mutual had notice of the tort action and it should have intervened in order for its claims to be determined in the tort action. Alabama law, which was correctly applied in the Alabama tort case, also recognizes the employer or insurer's right to intervene in a third-party tort action. *Orum v. Employers Cas. Co.*, 348 So. 2d 792, 794 (Ala. Civ. App. 1977) (citing *Hughes v. Newton*, 324 So. 2d 270 (Ala. 1975); *Liberty Mutual Insurance Co. v. Manasco*, 123 So. 2d 527 (Ala. 1960)).

Liberty Mutual claims that an insurer is not required under Mississippi law "to intervene in a claimant's third-party action in order to receive full reimbursement of its lien." *Appellant's Brief* at 9. Shoemake does not dispute that intervention is not a strict requirement in order for an insurer to receive its statutory reimbursement. However, if the insurer disputes the amount of reimbursement or has other issues to raise, such as the correct law to apply, the appropriate time to raise those issues is during the third-party action. This is clearly set forth in § 71-3-71, which provides that "all claims ...

shall be determined in such action, as well as the claim of the employer or insurer.” MISS. CODE ANN. § 71-3-71 (emphasis added). In *Federated Mutual Insurance Co. v. McNeal*, cited by Liberty Mutual in support of its argument, the Court stressed “that the better practice for insurers who anticipate the possible need for judicial assistance in enforcing their liens is to file a formal intervention.” 943 So. 2d 658, 663 (Miss. 2006). Rather than intervening in the Alabama lawsuit and presenting its position there, Liberty Mutual waited until that case was settled and dismissed with prejudice before filing a claim in Mississippi claiming inadequate recovery. Applying either Mississippi or Alabama law, Liberty Mutual should have intervened in the underlying action in Alabama and by failing to do so Liberty Mutual waived its opportunity to bring its claim.

B. Res judicata precludes Liberty Mutual’s claims.

Under both Mississippi and Alabama law, Liberty Mutual should have raised its claims in the previous action. Therefore, *res judicata* precludes Liberty Mutual from raising its claim in a subsequent action. “The doctrine of *res judicata* stands for the premise that a judgment is final on all matters which ***might have been litigated*** and determined in a previous suit, as well as matters which were actually litigated and decided.” *Lackey v. Fuller*, 755 So. 2d 1083, 1086 (Miss. 2000) (emphasis added).

In Mississippi, the doctrine of *res judicata* requires four identities to be present before it applies: (1) identity of the subject matter of the action; (2) identity of the cause of action; (3) identity of the parties to the cause of action; and (4) identity of the quality or character of a person against whom the claim is made. ... Additionally, once the four identities of *res judicata* have been established, any claims that could have been brought in the prior action are barred.

Hill v. Carroll County, 17 So. 3d 1081, 1085 (Miss. 2009) (internal citations omitted). In determining whether the claims are of the same cause of action, “the Court looks past the legal bases asserted and relies more on the factual and transactional relationship between the original action and

the subsequent action.” *Id.* at 1086. Shoemake’s injury and subsequent award of workers’ compensation benefits were the same facts and circumstances underlying the tort action and underlying the claim that Liberty Mutual now asserts. Liberty Mutual’s claim would have been appropriate if raised in the tort action, but it is inappropriate at this time.

Res judicata is a doctrine meant to promote judicial efficiency and it “reflects the refusal of the law to tolerate a multiplicity of litigation.” *Id.* at 1084. “It is a doctrine of public policy designed to avoid the expense and vexation attending multiple lawsuits, conserve judicial resources, and foster reliance on judicial action by minimizing the possibilities of inconsistent decisions.” *Id.* Liberty Mutual’s claims are “within the scope of the judgment” in the previous case and certainly should have been raised in that suit. *Id.* Liberty Mutual should not be allowed to sit idly by and then file a suit in Mississippi years after the tort action was settled in Alabama and claim inadequate recovery. Allowing Liberty Mutual to proceed in this action would not only reward Liberty Mutual for sitting idly while the tort action was litigated, but also result in a waste of judicial time and resources and additional burden to Shoemake.

C. Full faith and credit is owed to the Alabama court.

Because the original matter was litigated and settled in Alabama, this Court should give full faith and credit to the Alabama court and refuse to disturb its decision. If Liberty Mutual wanted to pursue its subrogation right or contest the amount thereof, the Alabama Circuit Court would have been the appropriate forum. However, Liberty Mutual cannot re-litigate these issues in Mississippi after this action was fully adjudicated in the Circuit Court of Macon County, Alabama. [R. at 18; R.E. at 5]. If Liberty Mutual wanted to appeal the action, it should have done so in Alabama because the underlying claim was fully adjudicated in the State of Alabama and Alabama law governs all claims and defenses.

Comity exists between the states and full faith and credit should be given to the laws of Alabama. Comity is defined as, "The principle in accordance with which the courts of one state or jurisdiction will give effect to the laws and judicial decisions of another, not as a matter of obligation, but out of deference and respect." *Church v. Massey*, 697 So. 2d 407, 410 (Miss. 1997). "The principle of comity is similar to full faith and credit except that it is not governed by Federal statutes and that its application rests in the discretion of the trial judge." *Laskosky v. Laskosky*, 504 So. 2d 726, 729 (Miss. 1987). To undermine another state's proper judgment would allow parties to circumvent the laws of one state by simply re-filing the matter in another state. By enforcing the principle of comity and refusing to undermine another state's prior judgment, parties are prevented from being able to circumvent the laws and practices of a state with proper jurisdiction over a matter when they do not like the outcome.

Article IV, Section 1 of the United States Constitution provides that each state shall give full faith and credit to the judicial proceedings of other states. U.S. Const. art. IV, § 1. The United States Supreme Court has articulated the obligation of full faith and credit as follows:

Regarding judgments, however, the full faith and credit obligation is exacting. A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land. For claim and issue preclusion (*res judicata*) purposes, in other words, the judgment of the rendering State gains nationwide force. ...

Baker by Thomas v. General Motors Corp., 522 U.S. 222, 233 (1998). Mississippi is obligated to enforce judgments of other states and is entitled to have its own judgments enforced by sister states, which promotes judicial efficiency. Therefore, summary judgment was correctly granted because this matter was fully adjudicated in the Circuit Court of Macon County, Alabama and that judgment deserves full faith and credit by Mississippi courts.

II. The trial judge correctly determined that Alabama substantive law must be applied to determine workers' compensation subrogation rights in an Alabama tort lawsuit arising from an accident that occurred in Alabama, even if workers compensation benefits were paid in Mississippi.

The accident from which this case arises occurred in Alabama, the tort action was filed by Shoemake in Alabama and was litigated by Alabama lawyers applying Alabama law. [R. at 15, 28-29; R.E. at 2, 15-16]. Liberty Mutual voluntarily paid workers' compensation benefits to Shoemake following the accident, refused to intervene in the Alabama tort case, approved of the amount of reimbursement, and then filed a separate suit in Mississippi claiming the reimbursement amount was insufficient. [R. at 15, 29-31; R.E. at 2, 16-18]. Liberty Mutual is a subrogee for the proceeds of the third-party action brought under Alabama law. Shoemake is the subrogor and Shoemake had no claim in Mississippi, thus, Liberty Mutual has no claim in Mississippi. Liberty Mutual as the statutory subrogee steps into the shoes of Shoemake, and because Shoemake's shoes stood in an Alabama tort case on Alabama soil, Liberty Mutual's rights are determined according to Alabama law. *Swain v. D&R Transport Co.*, 735 F. Supp. 425 (M.D. Ga. 1990) (applying Alabama law).

A. Alabama law applied to the tort case and to Liberty Mutual's subrogation.

When a worker is injured within the boundaries of one state, the substantive law of the state where the injury occurred governs, not the law of the state where workers' compensation benefits were paid. See *O'Neal v. Lend Lease Trucks, Inc.*, 958 F. 2d 1044 (11th Cir. 1992); *Powell v. Sappington*, 495 So. 2d 569 (Ala. 1986); *Graham v. Red Ball Motor Freight, Inc.*, 262 F. Supp. 49 (N.D. Miss. 1966). The accident in this case occurred in Alabama and the trial court correctly determined that Liberty Mutual's rights as subrogee to the proceeds of the third-party suit brought by Shoemake in Alabama, were determined under Alabama law.

In *O'Neal v. Lend Lease Trucks*, a Tennessee resident who worked for a Tennessee employer was injured in an accident in Alabama. 958 F. 2d 1044, 1045 (11th Cir. 1992). He received workers' compensation benefits under Tennessee workers' compensation laws but filed his tort lawsuit in Alabama, where the accident occurred. *Id.* The employer and the workers' compensation carrier, which happened to be Liberty Mutual, moved to intervene to recover disability and medical benefits. *Id.* However, under Alabama law at that time medical benefits could not be recovered. *Id.* at 1046. Liberty Mutual and the employer sought to have Tennessee law applied in the Alabama case so that they could recover medical benefits. *Id.* On appeal, the Eleventh Circuit confirmed that this was "a tort action for damages," not a suit for workers' compensation. *Id.* The Court explained:

Alabama characterizes this as a tort case, which under Alabama conflicts of laws rules requires application of the *lex loci*, and ... these same principles apply to a determination of the right to proceeds of a third party suit brought in Alabama by the employee. The district court did not err in following Alabama law and denying subrogation to medical benefits and in declining to follow Tennessee law.

Id. at 1047. The facts in the case at hand are very similar to the *O'Neal* case and the trial court correctly determined that Liberty Mutual's rights as subrogee to the proceeds from Shoemake's third-party lawsuit were determined under Alabama law.

Liberty Mutual relies on the Fifth Circuit case of *McDonald v. E.J. Lavino Co.*, to support its argument and contends that it is factually analogous to this case. 430 F. 2d 1065 (5th Cir. 1970). However, Liberty Mutual omits a crucial point. In *McDonald*, the parties **stipulated and agreed** that Mississippi law would apply to determine subrogation. *Id.* at 1068. In the case at hand, the parties have no such agreement. Shoemake contends, consistent with Alabama law, that Alabama substantive law governs what is allowable subrogation on an Alabama tort case, regardless of the state laws under which the compensation claim was paid. Alabama courts have held that in tort suits arising from accidents that occurred in Alabama, workers' compensation subrogation rights are to be

determined under Alabama law, regardless of the law under which the benefits were originally paid. *See O'Neal*, 958 F. 2d 1044; *Powell*, 495 So. 2d 569. "An Alabama court will determine the substantive rights of an injured party according to the law of the state where the injury occurred." *Powell*, 495 So. 2d at 570.

In *Powell*, the plaintiff was a resident of Alabama and was employed by an Alabama company. *Id.* at 569. While driving back to Alabama on a work-related trip, he had a wreck in Georgia. *Id.* He received benefits under the Alabama Workmen's Compensation Act and also brought a tort action in Alabama against his two co-workers. *Id.* The co-workers moved for summary judgment arguing that Georgia law applied and Georgia law forbids co-employee suits. *Id.* The trial court agreed and granted the co-workers' motion for summary judgment. *Id.* On appeal, the Supreme Court of Alabama rejected the plaintiff's argument that Alabama law applied to the suit against his co-workers because he had pursued benefits under the Alabama Workmen's Compensation Act rather than under the Georgia Workmen's Compensation Act. *Id.* The Court explained:

In essence, the *Powells* argue that an exception to the *lex loci delicti* rule is applicable in a workmen's compensation context where an injured employee invokes that exception by electing to accept benefits under the workmen's compensation act of his state of employment and not of the state where the injury occurred. Recognition of such an exception, however, would create a broad avenue for abuse. As another court has stated, "[adoption of this exception would allow] a claimant with a choice of jurisdictions in a compensation claim ... to juggle with the substantive law uniformly applied ... and thus defeat its application." ... We therefore hold that a claimant who is injured in another state cannot evade the application of the *lex loci delicti* rule merely by filing his workmen's compensation claim in Alabama.

Powell, 495 So. 2d at 570 (internal citations omitted).

Liberty Mutual contends that the Alabama cases discussed above are not binding on Mississippi courts, however, these case are very relevant to this matter because Alabama law applies, not Mississippi. Regardless, Mississippi follows the same principle -- when a worker is injured

within the boundaries of Mississippi, the substantive law of Mississippi governs, not the law of the state where the workers' compensation benefits were paid. *See Graham v. Red Ball Motor Freight, Inc.*, 262 F. Supp. 49 (N.D. Miss. 1966). In *Graham*, a Tennessee resident was operating a vehicle for his a Tennessee employer and was injured in an accident in Mississippi. *Id.* at 50. He was paid benefits under the Workmen's Compensation Law of Tennessee and then 18 months after the accident he filed suit in Mississippi against the alleged negligent third party. *Id.* The defendant claimed that, under the provisions of Tennessee workmen's compensation law, any third-party action must be brought within one year of the date of injury. *Id.* The district court denied the defendant's motion to dismiss and explained:

The cause of action here arose from a motor vehicle accident in Mississippi and resolution of the issues on the merits will thus be governed by the laws of Mississippi. Absent any Tennessee Workmen's Compensation Law, there is no question but that the Mississippi six year statute of limitations ... would apply.

Graham, 262 F. Supp. at 51.

If Liberty Mutual had intervened in the tort case filed in Macon County, Alabama, against CSX Transportation, and asserted its subrogation rights in that court, the Circuit Court of Macon County, Alabama, would have determined the amount of subrogation according to principles of Alabama law. Furthermore, under the principles of the above-cited Mississippi cases, this Court should also direct that because the accident arose in Alabama and was adjudicated in Alabama, that the subrogation is determined by Alabama, and not by Mississippi law. Liberty Mutual should gain no advantage by sitting out the Alabama tort case and later filing its claim in the Mississippi courts.

B. Liberty Mutual has been paid all that it is due.

Liberty Mutual seeks application of Mississippi law, which never applied to Shoemake, the subrogor. As a subrogee, Liberty Mutual steps into Shoemake's shoes and Liberty Mutual cannot

obtain the advantage of laws of which Shoemake did not have the benefit in his tort case. Liberty Mutual cannot transform Shoemake's original Alabama tort action into a Mississippi workers compensation case. Liberty Mutual has a subrogation interest only, and "[t]he subrogee steps into the shoes of the subrogor." *St. Paul Property and Liability Ins. Co. v. Nance*, 577 So. 2d 1238, 1241 (Miss. 1991).

Subrogation is the substitution of one person in place of another, whether as a creditor or as the possessor of any rightful claim, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim, and to its rights, remedies, or securities.

Id. at 1240-41. The Mississippi Workers' Compensation Act gives Liberty Mutual only a "rightful claim" of subrogation. Liberty Mutual as the subrogee, has no greater or different rights than Shoemake. Shoemake could not have demanded the application of Mississippi law to determine damages of his Alabama tort case, nor can Liberty Mutual demand the application of Mississippi law to determine the amount of subrogation. Alabama law applies and under Alabama law, Liberty Mutual has been paid all that it is due.

Alabama follows traditional equitable principles and subrogation will be denied until the injured party has been made whole. *Int'l Underwriters/Brokers, Inc. v. Liao*, 548 So. 2d 163, 165 (Ala. 1989). The only recognized exception to this rule is when the insurer and the insured have made an agreement to alter the subrogation interest, an event that did not occur in the Shoemake case. *Id.* at 166. Alabama applies the "common fund doctrine" to subrogation, which charges the insurer with a *pro rata* share of the attorney fees and expenses incurred by its insured to obtain the verdict or settlement. *Id.* Under the "common fund doctrine" Liberty Mutual is entitled to subrogation for the amount of benefits paid *less* thirty-five percent (35%) for attorney's fees and a *pro rata* share of the expenses. [R. at 29, 31; R.E. at 16, 18]. Liberty Mutual paid benefits in the

amount of \$132,402.65 to Shoemake. [R. at 15, 20; R.E. at 2, 7]. The amount of benefits minus 35% for attorney's fees and a *pro rata* share of the expenses equals \$82,226.84 due to Liberty Mutual. [R. at 29, 31; R.E. at 16, 18]. Shoemake has already paid this amount to Liberty Mutual. [R. at 15, 20, 30; R.E. at 2, 7, 17].

Although not called the "common fund doctrine," Mississippi also provides that the employer and carrier are entitled to repayment of workers' compensation benefits from the proceeds of a third-party recovery *after* deducting the reasonable costs of collection, which includes attorney fees and expenses. MISS. CODE ANN. § 71-3-71. *See Federated Mutual*, 943 So. 2d at 660; *St. Paul Travelers Ins. Co. v. Burt*, 982 So. 2d 992, 994 (Miss. App. 2008). Therefore, under Mississippi law, the result would be the same. In addition, Liberty Mutual actually suggested the settlement amount of \$82,226.84 and agreed to accept that amount. [R. at 31; R.E. at 18]. Shoemake's Alabama counsel provided Liberty Mutual the amount of the entire settlement, the contingency fee contract, and the case expenses. Liberty Mutual did the calculation and arrived at the figure of \$82,226.84 as its amount of subrogation. [R. at 31; R.E. at 18]. Shoemake has already paid \$82,226.84 to Liberty Mutual and nothing more is owed under Mississippi or Alabama law.

CONCLUSION

For the reasons set forth above, the trial court's Final Judgment should be affirmed. Summary judgment was correctly granted because there are no genuine issues of material fact in this matter. Liberty Mutual should have intervened in the previous Alabama action but it failed to do so and its claims are now barred by the doctrines of waiver and *res judicata*. Further, full faith and credit is owed to the final adjudication of this matter by the Alabama Circuit Court. Finally, Shoemake has already repaid Liberty Mutual the full amount to which it is entitled under Alabama law, which applies to this matter because the accident occurred in Alabama and the underlying tort action was

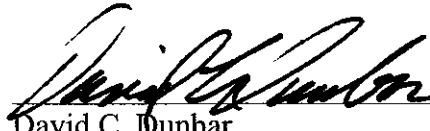
adjudicated there. Summary judgment was correctly granted for Shoemake and Shoemake respectfully requests that this Court affirm the trial court's grant of summary judgment.

This the 16 day of August, 2011.

Respectfully submitted,

RICHARD SHOEMAKE

By His Attorneys,
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CERTIFICATE OF SERVICE

I, David C. Dunbar, attorney for the Appellee, do hereby certify that I have this day delivered a true and correct copy of the above and foregoing *Brief of the Appellee* via United States Mail, postage prepaid, to the following:

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Honorable Marcus D. Gordon
Newton County Circuit Court
Post Office Box 220
Decatur, Mississippi 39327

This the 16 day of August, 2011.



David C. Dunbar