

IN THE SUPREME COURT OF MISSISSIPPI

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CASE NO. 2011-CA-00179

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LIBERTY MUTUAL INSURANCE COMPANY

APPELLANT

VS.

RICHARD SHOEMAKE

APPELLEE

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ON APPEAL FROM THE  
CIRCUIT COURT OF NEWTON COUNTY, MISSISSIPPI

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**REPLY BRIEF OF APPELLANT**

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## **TABLE OF CONTENTS**

Table of Contents .....	i
Table of Authorities .....	ii
I. Summary of Reply Argument .....	1
II. Reply Argument .....	3
A. Liberty Mutual was not Required to Intervene .....	3
B. Res Judicata or Full Faith and Credit does not Bar this Action .....	3
III. Conclusion .....	5
Certificate of Service .....	6

## **TABLE OF AUTHORITIES**

### **FEDERAL CASES**

<i>McDonald v. E.J. Lavino Co.</i> , 430 F.2d 1065, 1069 (5 <sup>th</sup> Cir. 1970) .....	2, 3, 4
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### **STATE CASES**

<i>Federated Mutual Ins. Co. v. McNeal</i> , 948 So. 2d 658 (Miss. 2006) .....	3
<i>Kidwell v. Gulf, Mobile &amp; Ohio R.R.</i> , 251 Miss. 152, 168 So. 2d 735, 736 (1964) .....	3
<i>Litton Systems, Inc. v. Murphree</i> , 301 So. 2d 850 (Miss. 1974) .....	3
<i>Mandle v. Kelly</i> , 90 So. 2d 645 (Miss. 1956) .....	4
<i>McCluskey v. Thompson</i> , 363 So. 2d 256 (Miss. 1978) .....	3
<i>Powe v. Jackson</i> , 236 Miss. 11, 109 So. 2d 546 (1959) .....	3
<i>Sawyer v. Head</i> , 510 So. 2d 472 (Miss. 1987) .....	3
<i>Sneed v. Verdun</i> , 611 So. 2d 947, 948 (Miss. 1992) .....	3

### **STATUTES**

MISS. CODE ANN. § 71-3-71. ....	2, 3, 4
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### **MISCELLANEOUS**

John R. Bradley & Linda A. Thompson, <u>Mississippi Workers' Compensation</u> , § 10:2 (2009) .....	4
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## **I. SUMMARY OF REPLY ARGUMENT**

Richard Shoemake (“Shoemake”) was injured on September 18, 2003, in a collision between his truck and a CSX train in Tuskegee, Macon County, Alabama. (R.E. 4; R. 60). At the time of the accident, Shoemake was in the course and scope of his employment with Simmons Wrecker Service. (*Id.*) Simmons Wrecker Service maintained a policy of workers’ compensation insurance with Liberty Mutual Insurance Company (“Liberty Mutual”). As a result of his accident, Shoemake received worker’s compensation benefits from Liberty Mutual pursuant to the Mississippi Workers’ Compensation Act in the amount of \$136,787.69.

Shoemake filed a third-party lawsuit in Alabama against the tortfeasors responsible for his accident. (*Id.*) He settled his third-party claim for \$315,000.00 on June 27, 2007. (*Id.*) After payment of attorneys’ fees and costs of collection, a balance of \$195,625.37 remained from the settlement funds. At the time he reached the settlement, Shoemake had no agreement with Liberty Mutual to reduce its statutory subrogation lien. (R.E. 4; R. 56).

Shoemake argues that this claim is barred by the doctrines of *res judicata*, waiver and full faith and credit. Shoemake’s entire argument is premised on faulty assumption that Alabama common governs his relationship with Liberty Mutual. However, Shoemake’s reliance is misguided. It is undisputed that Shoemake was employed at the time of the accident by a Mississippi company and received benefits pursuant to the Mississippi Workers’ Compensation Act (“the Act”). Thus, as it is the relationship between Liberty Mutual and Shoemake which is dispositive of this matter, and Shoemake admittedly received benefits pursuant to the Mississippi Act, this case – and Liberty Mutual’s statutory right to reimbursement – is governed by Mississippi law. Under controlling Mississippi precedent, Shoemake cannot avoid summary judgment in Liberty Mutual’s favor.

The facts of this case are simple and clear. Shoemake was injured in Alabama and prosecuted his third-party suit against CSX in Alabama. However, at the time of his accident, Shoemake was a resident of the state of Mississippi, employed by a Mississippi company and received – without any objection or complaint – workers’ compensation benefits from Liberty Mutual pursuant to Mississippi law. After settling his third-party claim against CSX, Shoemake refuses to reimburse Liberty Mutual as required by Mississippi law. Shoemake asserts he is not required to comply with Miss. Code Ann. § 71-3-71 (1972) because he chose to prosecute his third-party action in Alabama.

Shoemake argues Alabama common law should apply to his statutory relationship with Liberty Mutual and that he should be excused from his obligation to comply with the reimbursement provision of the same workers’ compensation act under which he gladly received benefits. Liberty Mutual asserts Shoemake’s obligation to reimburse it is governed by substantive law of the state in which Shoemake received workers’ compensation benefits, Mississippi.

Shoemake’s reliance on certain case law is misplaced. Shoemake argues that a virtually identical case to the one at bar, *McDonald v. E.J. Lavino Co.*, 430 F.2d 1065, 1069 (5<sup>th</sup> Cir. 1970), should be disregarded since the parties in *McDonald* understood and agreed that Mississippi law governs a claimant’s obligation to reimburse a carrier. Shoemake claims this Court should overlook *McDonald* because he did not agree Mississippi law applies. What Shoemake fails to recognize, however, is the *McDonald* court specifically agreed Mississippi law applied to the facts of that case (which are identical to those in this suit). The 5<sup>th</sup> Circuit agreed with the lower court that the workers’ compensation carrier, “is entitled, as a matter of substantive right, to receive satisfaction of its subrogation claim pursuant to the Mississippi statute”. *Id.* (Emphasis added). Under clear precedent, then, the substantive law of the state in which workers’ compensation benefits were paid to Shoemake – in this case, Mississippi – governs his responsibility to reimburse Liberty Mutual.

There can be no doubt, therefore, that this suit is governed by Mississippi law, specifically § 71-3-71, and that Shoemake owes Liberty Mutual the remaining balance of \$50,175.81 sought.

## **II. REPLY ARGUMENT**

### **A. LIBERTY MUTUAL WAS NOT REQUIRED TO INTERVENE**

Shoemake argues Liberty Mutual's claims are barred due to its failure to intervene in the Alabama action. As previously noted in its original brief and incorporated herein by reference, though, Miss. Code Ann. §71-3-71 and the case law interpreting the Act do not require Liberty Mutual to intervene in a claimant's third-party action in order to receive full reimbursement of its lien. *Federated Mutual Ins. Co. v. McNeal*, 948 So. 2d 658 (Miss. 2006). This Court "has never required the insurance carrier to join or intervene in an employee's third-party litigation to validate or enforce its subrogated claim to the proceeds recovered in that litigation". *Id.*, See, e.g., *Sneed v. Verdun*, 611 So.2d 947, 948 (Miss. 1992); *Kidwell v. Gulf, Mobile & Ohio R.R.*, 251 Miss. 152, 168 So.2d 735, 736 (1964); *McDonald v. E. J. Lavino Co.*, 430 F.2d 1065 (5th Cir. 1970); *Litton Systems, Inc. v. Murphree*, 301 So.2d 850 (Miss. 1974); *Powe v. Jackson*, 236 Miss. 11, 109 So.2d 546 (1959); *McCluskey v. Thompson*, 363 So. 2d 256 (Miss. 1978). Therefore, Shoemake's argument has no merit.

### **B. RES JUDICATA OR FULL FAITH AND CREDIT DO NOT BAR THIS ACTION**

Shoemake's assertion that *res judicata* and the Full Faith and Credit Clause bar this action is erroneous. Shoemake's third-party claim against CSX concerned the fault of the third-party as related to Shoemake's accident. Liberty Mutual does not dispute CSX was at fault. Rather, this suit is to compel Shoemake's compliance with the law. As this Court has previously noted, the purpose of the reimbursement provision of § 71-3-71 is to prevent a claimant from receiving a double recovery for a workers' compensation injury. *Sawyer v. Head*, 510 So. 2d 472 (Miss. 1987).

Essentially, that is what Shoemake asks this Court to endorse. Such a proposition is abhorred by Mississippi law and is not supported by any judicial decision since the inception of the Mississippi Workers' Compensation Act. Regardless, as Liberty Mutual "succeeds by operation of law to the rights of" Shoemake for the amount of benefits it paid in the workers' compensation context, res judicata can no more bar Liberty Mutual's right to reimbursement than it could bar Shoemake's initial right to sue the third party. See John R. Bradley & Linda A. Thompson, Mississippi Workers' Compensation, § 10:2 (2009).

Similarly, Shoemake's claim that the Full Faith and Credit Clause of the United States Constitution, U.S. Const. Art. IV, § 1, bars this action is misplaced. Addressing this argument in another workers' compensation case, this Court rejected the notion that the Full Faith and Credit Clause required Mississippi to yield to another state's law. *Mandle v. Kelly*, 90 So. 2d 645 (Miss. 1956). In *Mandle*, this Court found:

This State has a substantial and legitimate interest in these matters and its policy has been declared in its own compensation act. . . It has been held that the full faith and credit clause does not go so far as to require this State to withhold the application of its own laws because they conflict with the laws of another State . . .

*Mandle* at 648.

Thus, according to this Court, Shoemake's argument is without merit. Indeed, this Court's own words reinforce that Mississippi law, specifically § 71-3-71, governs the case at bar and requires that Shoemake reimburse Liberty Mutual. To date, Shoemake has come forward with no case law on point to suggest foreign law governs his obligation to reimburse Liberty Mutual, whereas the *McDonald* case clearly supports Liberty Mutual's claim. As such, Liberty Mutual was entitled to judgment as a matter of law and this Court should reverse the trial court's grant of summary judgment.

### III. CONCLUSION

Shoemake has refused to repay Liberty Mutual its lien and thus, Liberty Mutual has had to bring suit to compel Shoemake's compliance with black letter law. Pursuant to unambiguous and controlling Mississippi law, Liberty Mutual has a statutory right to \$132,402.65 from the proceeds of Shoemake's third-party claim. Shoemake settled his Alabama case without reaching any agreement with Liberty Mutual to reduce its lien. Mississippi law clearly applies to Liberty Mutual's claim against Shoemake and requires Shoemake be compelled to remit the remaining \$50,175.81 still due on the lien. Therefore, Liberty Mutual was entitled to summary judgment and requests that judgment or the trial court be reversed and rendered with a judgment in its favor for \$50,175.81.

Respectfully submitted,

LIBERTY MUTUAL INSURANCE COMPANY,  
APPELLANT

BY:

  
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**CERTIFICATE**

I, Tara S. Clifford, of counsel for Liberty Mutual Insurance Company, do hereby certify that I have this day served by United States mail a true and correct copy of the above and foregoing document to:

Honorable Marcus D. Gordon  
Circuit Court Judge  
Post Office Box 220  
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THIS, the 2<sup>nd</sup> day of September, 2011.

  
TARA S. CLIFFORD