

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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**BRIEF OF APPELLANT**

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VS.

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APPELLEE

**CERTIFICATE OF INTERESTED PERSONS**

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 Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Liberty Mutual Insurance Company – Appellant/Plaintiff.
2. Tara S. Clifford, Esq., of Daniel Coker Horton & Bell, P.A. – Attorney for Appellant/Plaintiff.
3. Richard Shoemake – Appellee/Defendant.
4. David C. Dunbar, Esq. and Lindsey T. Simmons, Esq. of DunbarMonroe, P.A. – Attorneys for Appellee/Defendant.
5. Honorable Marcus D. Gordon – Newton County Circuit Court Judge.

Respectfully submitted, this the 21<sup>st</sup> day of July, 2011.



Tara S. Clifford  
Attorney of Record for Appellant  
Liberty Mutual Insurance Company

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### STATEMENT REGARDING ORAL ARGUMENT

Appellant submits that oral argument is unnecessary because the facts and legal arguments are adequately presented in the Appellant's brief and the Appellate Record. Accordingly, this Court's decisional process will not be aided by oral argument.

# I. STATEMENT OF THE ISSUES

Whether the trial court erred in granting summary judgment for Richard Shoemake and denying Liberty Mutual Insurance Company's Motion for Summary Judgment.

## II. STATEMENT OF THE CASE

### A. **Nature of the Case**

This is claim to recover the balance of Liberty Mutual Insurance Company's statutory workers' compensation lien, which Richard Shoemake refuses to repay despite the clear mandate of Miss. Code Ann. § 71-3-71 (2000). (R.E. 2; R. 4-6). The trial court granted summary judgment in favor of Richard Shoemake and denied summary judgment in favor of Liberty Mutual Insurance Company. (R.E. 5; R. 92.)

### B. **Course of Proceedings and Disposition in the Court Below**

Plaintiff, Liberty Mutual Insurance Company (hereinafter "Liberty Mutual"), filed its Complaint against Defendant, Richard Shoemake (hereinafter referred to as "Defendant" or "Shoemake"), in the Circuit Court of Newton County, Mississippi, on April 14, 2009. (R.E. 2; R. 4-6.) Liberty Mutual charged Defendant with failure to reimburse Liberty Mutual the balance of its statutory workers' compensation lien from a third party settlement. *Id.* Defendant filed his Answer and Affirmative Defenses on November 15 17, 2009 and his Amended Answer on March 26, 2010, (R. 7-9, 10-13), and filed his Motion for Summary Judgment and his memorandum in support on May 14, 2010. (R.E. 3; R. 14-46.) Liberty Mutual filed its response to the motion for summary judgment and its memorandum in opposition along with its cross motion for summary judgment and memorandum in support on May 26, 2010, (R. E. 4; R. 47-73), and its rebuttal in support on July 9, 2010. (R. 86-90.)

The Circuit Court of Newton County, Mississippi, granted Defendant's Motion for Summary Judgment and denied Liberty Mutual's Motion for Summary Judgment on January 4, 2011. (R.E. 5; R. 92.) Liberty Mutual then filed its notice of appeal on February 2, 2011. (R. 99.)



### **C. Summary of the Facts**

Richard 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. (R.E. 2; R. 4). 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 \$132,402.65. (R.E. 4; R. 54).

Shoemake filed a third-party lawsuit in Alabama against the tortfeasors responsible for his accident. (R.E. 4; R. 60.) 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. (R.E. 4; R. 57). 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). To date, Shoemake has reimbursed Liberty Mutual only \$82,226.84 from the proceeds of his third-party lawsuit. (R.E. 4; R. 55).

### **III. SUMMARY OF THE ARGUMENT**

Liberty Mutual filed the subject Complaint to recover the balance it is owed pursuant to the express mandate of Miss. Code Ann. §71-3-71. 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.

#### **IV. THE ARGUMENT**

##### **A. Standard of Review**

This matter is before the Court on review of the trial court's decision to grant summary judgment. This Court utilizes a *de novo* standard when examining a grant or denial of summary judgment. *Evan Johnson & Sons Constr., Inc. v. State*, 877 So. 2d 360, 364 (Miss. 2004) (citing *Short v. Columbus Rubber & Gasket Co.*, 535 So. 2d 61, 65 (Miss. 1988))

Rule 56 of the Mississippi Rules of Civil Procedure provides that summary judgment shall be rendered if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there are no genuine issues as to any material fact and that the moving party is entitled to a judgment as a matter of law. MISS. R. CIV. P. 56. Evidence is analyzed in the light most favorable to the non-moving party. *Short*, 535 So. 2d at 65. However, the presence of a hundred contested issues of fact will not prevent summary judgment where there is no genuine dispute regarding material issues of fact. *Shaw v. Burchfield*, 481 So. 2d 247, 252 (Miss. 1985). A fact is "material" if it "tends to resolve any of the issues properly raised by the parties," *Morgan v. City of Ruleville*, 627 So. 2d 275, 277 (Miss. 1993), and a dispute over a material fact is "genuine" only if the evidence is such that "reasonable minds in a jury could differ on such an issue." *Strantz v. Pinion*, 652 So. 2d 738, 741 (Miss. 1995).

If the moving party's evidence satisfies the initial burden, the adverse party must produce "significant probative evidence showing that there are indeed genuine issues for trial." *Price v. Purdue Pharma Co.*, 920 So. 2d 479, 485 (Miss. 2006) (emphasis added). The party opposing the motion must be diligent and may not rest upon mere allegations or denials in the pleadings, but must

set forth specific facts showing there are genuine issues for trial. *Richmond v. Benchmark Constr. Corp.*, 692 So. 2d 60, 61 (Miss. 1997). If the nonmoving party fails to set forth specific facts to rebut the showing that no genuine issues of material fact exist, summary judgment should be entered in the moving party's favor. *Coleman Powermate, Inc. v. Rheem Mfg. Co.*, 880 So. 2d 329 (Miss. 2004).

**B. Trial Court Improperly Granted Summary Judgment to the Defendant Richard Shoemake and Improperly Denied Summary Judgment to the Plaintiff, Liberty Mutual Insurance Company.**

On September 18, 2003, the Defendant, Richard Shoemake, was injured while in the course and scope of his employment with Simmons Wrecker Service. (R.E. 4; R. 60). The Defendant, Richard Shoemake, brought a third-party suit against CSX Transportation, Inc. and said parties reached a settlement. (R.E. 4; R. 61). At the time of the accident, Simmons Wrecker Service maintained a policy of workers' compensation insurance with Liberty Mutual, Plaintiff herein. As a result of the above-described accident, Shoemake was entitled to workers' compensation benefits which were paid pursuant to the Mississippi Workers' Compensation Act. Richard Shoemake's worker's compensation claim for his September 18, 2003 accident bears MWCC No. 0311118 before the Mississippi Workers Compensation Commission.

By reason of said payments to Shoemake, Liberty Mutual was entitled to a lien against any settlement between Shoemake and CSX Transportation, Inc., pursuant to Miss. Code Ann. §71-3-71. A settlement agreement was reached between Shoemaker and CSX Transportation, Inc. in the amount of \$315,000 prior to any agreement with Liberty Mutual as to the repayment of its statutory lien. (R.E. 4; R. 56).

Pursuant to Miss. Code Ann. §71-3-71, the balance, after deduction for attorney's fees and expenses, is first payable to Liberty Mutual in satisfaction of its subrogation lien. The balance after

both deductions are then paid to the claimant. After deducting Ms. Watson's (Defendant's counsel) fees and expenses, a balance of \$195,625.37 remains from the settlement, which is more than enough to satisfy Liberty Mutual's statutory lien. (R.E. 4; R. 56-57). To date, Liberty Mutual has been paid \$82,226.84. Liberty Mutual is still owed a balance of \$50,175.81. (R.E. 4; R. 54-55).

In the circuit court, the crux of Shoemake's argument is that Alabama workers' compensation law somehow applies to Liberty Mutual's claim. Shoemake argues that Alabama law applies since he litigated his third-party action in Alabama. To be clear, there is no dispute that Shoemake was injured in Alabama and prosecuted his third-party suit against CSX in Alabama. However, at the time of the subject accident, Shoemake was a resident of the state of Mississippi, employed by a Mississippi company and received – without complaint – workers' compensation benefits pursuant to Mississippi law. Liberty Mutual provided medical and indemnity payment to Shoemake as required by Mississippi law and thus, Mississippi law applies to its statutory lien and Shoemake's obligation with respect to disbursement of this third-party proceeds. It is the relationship between Liberty Mutual and Shoemake which is at issue here. That relationship has been governed by the Mississippi Workers' Compensation Act at all times. *See, Ellis, et al. v. Trustmark Builders, Inc., et al.*, 625 F.3d 222 (5<sup>th</sup> Cir. 2010) (weighing choice of law issues found the law wherein the workers' compensation benefits were paid controlled); *see also, Duhon v. Union Pacific Resources Co.*, 43 F.3d 1011 (5<sup>th</sup> Cir. 1995).

The applicable substantive law determinative of an workers' compensation carrier's subrogation rights is the law of the state under which workers' compensation benefits are paid. *See, McDonald v. E.J. Lavino Co.*, 430 F.2d 1065, 1069 (5<sup>th</sup> Cir. 1970). *McDonald* is factually analogous to this case. In *McDonald*, the claimant was employed by a Meridian, Mississippi company. The claimant was injured in Alabama while in the course in scope of his employment with a Mississippi

company. As a result of the accident, the claimant received workers' compensation benefits pursuant to the Mississippi Workers' Compensation Act. Following the accident, the employee retained an Alabama attorney and brought suit against a third party for his injuries. His tort claim was filed in an Alabama federal court. 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.* Shoemake relies upon *O'Neal v. Kennamer*, 958 F.2d 1044 (11<sup>th</sup> Cir. 1992) (reaching a different conclusion) which is not controlling in this state. Mississippi law pursuant to *McDonald* is controlling.

Pursuant to Miss. Code Ann. §71-3-71, Shoemake's third-party settlement proceeds are disbursed directly to the workers' compensation carrier after the deduction of costs of collection and attorneys' fees and expenses. According to Shoemake's Alabama attorney, his third-party claim was settled for \$315,000.00. After the deduction of Ms. Watson's 35% contingency fee and \$9,124.63 in expenses, a balance of \$195,625.37 remained. (R.E. 4; R. 56). Liberty Mutual's statutory lien totaled \$132,402.65 and Shoemake has repaid \$82,226.84, leaving a balance of \$50,175.81 due Liberty Mutual. (R.E. 4; R. 54-55). No agreement was reached between Liberty Mutual and Ms. Watson to reduce Liberty Mutual's lien. *Id.* The email from Liberty Mutual discussing the amount of the lien requested Ms. Watson contact Liberty Mutual to discuss its lien (R.E. 4; R. 58-59). Absent from the affidavit Ms. Watson submitted to the trial court, however, is any proof that she and Liberty Mutual reached an agreement to reduce the lien amount. (R.E. 3; R. 27). It is absent because no such agreement was reached and Liberty Mutual demanded the full amount of its lien. (R.E. 4; R. 54).

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. Thus, as the sole issue before this Court is a question of law – whether Alabama common law or the Mississippi Workers’ Compensation Act applies– this matter is ripe for adjudication by summary judgment. Liberty Mutual submits judgement should be granted in its favor since its relationship with Shoemake has governed by the Mississippi Workers’ Compensation Act at all times.

Shoemake argued in the trial court, that Liberty Mutual’s claims are barred due to its failure to intervene in the Alabama action. However, 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). The Supreme 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.

As the Supreme 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. 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 is entitled to judgment as a matter of law.

## V. 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 is entitled to summary judgment and requests that judgment be entered in its favor for \$50,175.81.

Under clear precedent, 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. Therefore, there can be no doubt 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. As such, Shoemake's Motion for Summary Judgment should not have been granted and Liberty Mutual's Motion for Summary Judgment should have been granted.

Liberty Mutual Insurance Company is entitled to summary judgment in its favor, requiring the Defendant to re-pay the balance of the workers' compensation lien. Construing the evidence in the light most favorable to Appellant, there clearly is no genuine issue of material fact regarding whether the Defendant owes Liberty Mutual the balance of its lien pursuant to § 71-3-71. Therefore, the trial court's grant of summary judgment to Shoemake was improper and Liberty Mutual respectfully requests that the trial court's decision be reversed and a judgment in favor Liberty Mutual Insurance Company in the amount of \$50,175.81 with interest and costs be rendered.

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  
Decatur, MS 39327

David C. Dunbar, Esq.  
Lindsey T. Simmons, Esq.  
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THIS, the 21<sup>st</sup> day of July, 2011.

  
TARA S. CLIFFORD