**IN THE COURT OF APPEALS OF TENNESSEE, WESTERN SECTION AT JACKSON**

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| **BILLY CASTLEMAN,** | ) | Madison County Circuit Court |
| | ) | No. C-90-116 |
| Plaintiff/Appellant. | ) | |
| | ) | |
| VS. | ) | C. A. NO. 02A01-9508-CV-00185 |
| | ) | |
| **ROSS ENGINEERING, INC.,** | ) | |
| | ) | |
| Defendant/Appellee. | ) | |
| | ) | |



From the Circuit Court of Madison County at Jackson.
**Honorable Franklin Murchison, Judge**

**T. Robert Hill**,
**Randall J. Phillips**,
HILL BOREN, P.C., Jackson, Tennessee
Attorneys for Plaintiff/Appellant.

**William B. Walk, Jr.**,
THE HARDISON LAW FIRM, P.C., Memphis, Tennessee
Attorney for Plaintiff/Appellee.

OPINION FILED:

**AFFIRMED AND REMANDED**

**FARMER, J.**

**HIGHERS, J.** : (Concurs)
**LILLARD, J.** : (Concurs)

In this appeal, we are asked to consider whether an employer's workers' compensation carrier is entitled to be reimbursed, for benefits paid to an employee, from the "net recovery" obtained by the employee in a third party tort action, if the judgment attributes a portion of the fault for the employee's injuries to the employer. We note that this case comes to us in a rather unique posture, having been decided after ***McIntyre v. Balentine***, 833 S.W.2d 52 (Tenn. 1992), wherein the doctrine of comparative fault was adopted by our supreme court, but prior to that court's decision in ***Ridings v. Ralph M. Parsons Co.***, 914 S.W.2d 79 (Tenn. 1996). In ***Ridings***, the plaintiff employee pursued a third party action for alleged injuries sustained in the course and scope of employment. The defendants attempted to assert the employer's negligence as an affirmative defense. ***Ridings***, 914 S.W.2d at 80. ***Ridings*** held that no fault could be attributed to the employer, reasoning that there "is a well-defined public policy for not imposing tort liability on the employer." ***Id***. at 83. ***Ridings*** concluded that the employee's right to recover on allegations of negligence and strict liability would be assessed without reference to the employer's conduct. ***Id***. at 84.

In the present case, the trial court granted the appellee's, Hartford Insurance Company (Hartford), "Motion to Direct Distribution of Subrogation Funds," allowing reimbursement for the entire amount of benefits paid to the employee, Billy Castleman (Castleman), Appellant, without any consideration of the fault of his employer. The sole issue on appeal is whether the trial court erred in doing so. For reasons hereinafter set forth, we affirm.

The underlying facts of this case may be summarized as follows: On November 3, 1989, Castleman sustained an on-the-job injury while employed as an electrician's helper. His employer, Jack Castleman d/b/a J.E.C. Electric Company, a subcontractor, did not carry workers' compensation insurance. The general contractor, SECO/Warwick Corporation, through Hartford, paid benefits to Castleman totaling approximately $100,000. In April 1990, Castleman filed a third party action against Ross Engineering, Inc. and Kaizer Aluminum and Chemical Corporation. Hartford filed a petition to intervene and notice of subrogation lien. A jury trial resulted in a determination that Castleman's total damages were $1.5 million. The jury attributed 68% of the fault to Ross Engineering, 16% to J.E.C. Electric and 16% to Castleman. Castleman was awarded a judgment against Ross Engineering and thereafter executed a satisfaction of judgment

acknowledging his receipt from Ross of $1,021,134.40.[1] The parties disputed the exact amount due Hartford and agreed to place $100,000 in an escrow account pending a later ruling from the trial court.

The trial court ordered the disbursement of the subrogation funds as follows: one-third or $33,333 was awarded as attorney's fees, with $10,000 going to counsel for Hartford and the remainder to Castleman and his attorney. The court made no allocation of fault for the employer. The parties had previously agreed to equally divide suit expenses and Hartford was ordered to pay $8,178 to Castleman representing its share of expenses. All in all, Hartford received $68,489 and Castleman, $31,511.

On appeal, it is Castleman's contention that Hartford is not entitled to any of the subrogation funds because he has not been "made whole," even if he retains the entire subrogation amount in addition to the amount of the judgment. He asserts that if not for his employer's immunity, he would have been entitled to an additional $240,000 representing the 16% of fault attributable to J.E.C. Electric, for a total award of $1,260,000. Thus, Castleman asserts that a "windfall" has been created in favor of Hartford in the amount of $140,000. Castleman argues that "any consideration of Hartford's claimed subrogation must take into account the fault of J.E.C. Electric to prevent an unjust windfall to Hartford and an unfair burden on [him]."

Conversely, Hartford takes the position that Appellant is attempting to reap the benefits of both the Workers' Compensation Act and our common law tort system and the "traditional tort theories of subrogation." Hartford contends that Tennessee's workers' compensation law is not fault based and that, when Castleman was injured, benefits were provided him irrespective of any fault of his own in contributing to his injuries. Hartford reasons that if the employee is allowed to offset the negligence of his employer in a third party action, then the employer should be allowed to consider the employee's fault in determining whether to provide the employee with compensation benefits.

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[1]Of this amount, counsel for Castleman received a fee of one-third or approximately $337,000.

Our supreme court in ***Clanton v. Cain-Sloan Co.***, 677 S.W.2d 441 (Tenn. 1984), recognized that:

> [T]he Workers' Compensation Law is a comprehensive scheme enacted to provide a certain and expeditious remedy for injured employees. It reflects a careful balancing of the interest of employer and employee. . . . "[t]he Act creates a ***duty*** on the employer to compensate employees for work-related injuries . . . and a ***right*** on the employee to receive such compensation."

***Clanton***, 677 S.W.2d at 444 (quoting ***Frampton v. Central Indiana Gas Co.***, 297 N.E.2d 425, 427 (Ind. 1973)).

In 99 C.J.S. ***Workers' Compensation*** § 10 (1958), it is stated: "[i]n general, the liability and the right to recover under the compensation acts have no reference to fault, wrong doing, tort, or negligence, whether on the part of employer, his servants or agents, the injured employee, fellow servants, or third persons." Our state legislature has chosen to limit application of the foregoing principal and preclude the recovery of compensation benefits "for an injury or death due to the employee's willful misconduct or intentional self-inflicted injury, or due to intoxication, or willful failure or refusal to use a safety appliance or perform a duty required by law." T.C.A. § 50-6-110(a).[2] Moreover, an employee may maintain a common law tort action against the employer if it is shown that the employer actually intended to injure the employee. ***E.g., Gonzales v. Alman Constr. Co.***, 857 S.W.2d 42, 48 (Tenn. App. 1993). Otherwise, as expressed by our supreme court in ***Lennon Co. v. Ridge***, 412 S.W.2d 638 (Tenn. 1967), in the field of workmen's compensation insurance, "[l]iability is imposed upon the employer without regard to the fault of either party . . . ." ***Lennon Co.***, 412 S.W.2d at 641.

T.C.A. § 50-6-112 states, as here relevant:

> **Actions against third persons**. -- (a) When the injury or death for which compensation is payable under the Workers' Compensation Law was caused under circumstances creating a legal liability against some person other than the employer to pay damages,

[2]The statute has been amended since the filing of this lawsuit to, ***inter alia***, forbid compensation benefits for an injury or death due to illegal drugs.

> the injured worker, or such injured worker's dependents, shall have the right to take compensation under such law, and such injured worker, or those to whom such injured worker's right of action survives at law, may pursue such injured worker's or their remedy by proper action in a court of competent jurisdiction against such other person.
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> (c)(1) In event of such recovery against such third person by the worker, or by those to whom such worker's right of action survives, by judgment, settlement or otherwise, and the employer's maximum liability for workers' compensation under this chapter has been fully or partially paid and discharged, the employer shall have a subrogation lien therefor against such recovery, and the employer may intervene in any action to protect and enforce such lien.
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> (2) In the event the net recovery by the worker, or by those to whom such worker's right of action survives, exceeds the amount paid by the employer, and the employer has not, at the time, paid and discharged the employer's full maximum liability for workers' compensation under this chapter, the employer shall be entitled to a credit on the employer's future liability, as it accrues, to the extent the net recovery collected exceeds the amount paid by the employer.

In ***Beam v. Maryland Casualty Co.***, 477 S.W.2d 510 (Tenn. 1972), our supreme court expressly held that the legislative intent behind the enactment of T.C.A. § 50-914 (now codified as § 50-6-112) "is to reimburse an employer for payments made under a Workmen's Compensation award from 'the net recovery' obtained by the employee . . . to the extent of [the] employer's total obligation under the Compensation Act." ***Beam***, 477 S.W.2d at 513.

Under the Workers' Compensation Act, as interpreted by our supreme court, the employer is entitled to reimbursement from the employee's net recovery in a third party tort action to the extent of his "total obligation" under the Act. We do not find such interpretation affected by the decision of ***McIntyre v. Balentine*** and the adoption of comparative fault principles. Clearly, Tennessee's workers' compensation scheme is not fault based, allowing an employee compensation from his employer for work related injuries irrespective of his or his employer's fault, with certain exceptions, which do not apply here. Although ***McIntyre*** was decided in 1992, the Act has not been changed. The Act fails to speak in terms of whether an employee has been "made whole" prior to any recovery by the employer in a third party action. The Act, which operates solely by legislative mandate, is entirely separate from our common law tort system and related theories of subrogation which allow an insurer a right of subrogation after an insured has been "made whole." ***See, e.g., Wimberly v. American Casualty Co.***, 584 S.W.2d 200, 203 (Tenn. 1979). We agree with the appellee that these two theories of recovery cannot be intertwined for proper application of either.

Resolution of the issue before us is within the confines of the workers' compensation laws of our state, which we conclude allow an employer to recoup his "total obligation" from the employee in the event of a third party recovery, irrespective of the employer's fault in contributing to the employee's injuries. We, therefore, conclude that the trial court correctly disbursed the subrogation funds without considering the fault of Castleman's employer.

The judgment of the trial court is affirmed and this cause remanded for any further proceedings herewith consistent. Costs are assessed against Billy Castleman, for which execution may issue if necessary.

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FARMER, J.

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HIGHERS, J. (Concurs)

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LILLARD, J. (Concurs)