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FOR PUBLICATION

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Cecil Crowson, Jr.
Appellate Court Clerk

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

BILLY CASTLEMAN,
Plaintiff-Appellant,

v.

ROSS ENGINEERING, INC.,
Defendant-Appellee.

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(Madison Circuit
(
(Hon. Franklin Murchison,
(Judge
(
(Appeal No. 02S01-9703-CV-00018
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(
(
(

For Plaintiff-Appellant:

T. Robert Hill
Randall J. Phillips
Hill, Boren, P.C.
Jackson

For Defendant-Appellee:

William B. Walk, Jr.
John R. Cannon, Jr.
The Hardison Law Firm, P.C.
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O P I N I O N

JUDGMENT OF TRIAL COURT AFFIRMED;
JUDGMENT OF COURT OF APPEALS
AFFIRMED; CASE REMANDED TO TRIAL COURT.

REID, J.

1 The case was tried on March 4, 1993, 10 months after
2 the release of the decision in McIntyre v. Balentine, 833 S.W.2d
3 52 (Tenn. 1992).¹ The case was submitted to the jury on
4 instructions that fault could be apportioned among the plaintiff,
5 Castleman, the defendant, Ross Engineering, and the employer,
6 J.E.C. Electric. The jury found damages of \$1,500,000, and
7 attributed 68 percent of the fault to the defendant, 16 percent
8 of the fault to the plaintiff, and 16 percent of the fault to the
9 employer. The court entered judgment against Ross Engineering
10 for \$1,020,000, 68 percent of the \$1,500,000. The plaintiff did
11 not appeal from the judgment on the jury verdict.

12
13 On May 26, 1993, the plaintiff acknowledged full
14 satisfaction of the judgment, and the plaintiff received from
15 Ross Engineering full payment of the amount of the judgment less
16 \$100,000, which was retained by consent pending resolution of
17 Hartford's subrogation claim. By order entered on July 7, 1995,
18 Hartford was awarded the \$100,000 claimed, less attorneys fees
19 and expenses incurred in pursuing the third-party claim, a net
20 amount of \$68,489.

21
22 On appeal to the Court of Appeals, the plaintiff
23 contested the subrogation award to Hartford, insisting that
24 Hartford's right to subrogation was conditioned on the

¹In McIntyre v. Balentine, 833 S.W.2d 52 (Tenn. 1992), the "all-or-nothing rule of contributory negligence" was replaced with principles of comparative fault so that "so long as a plaintiff's negligence remains less than the defendant's negligence the plaintiff may recover; in such a case, plaintiff's damages are to be reduced in proportion to the percentage of the total negligence attributable to the plaintiff." Id. at 57.

1 plaintiff's recovery of the damages for fault attributed to the
2 employer as well as fault attributed to Ross Engineering. The
3 Court of Appeals rejected the plaintiff's contention and affirmed
4 the trial court's decision.

5
6 **II**

7
8 The plaintiff does not deny that Hartford has a
9 subrogation claim against the third party judgment for the total
10 amount of workers' compensation benefits paid to the plaintiff.
11 Section 50-6-112 (1991) provides that when the injury compensated
12 under the Workers' Compensation Law was caused by the negligence
13 of a third party, the injured employee may pursue an action
14 against the third party.² Subsection (c)(1) provides as follows:
15

16 In [the] event of such recovery against
17 such third person by the worker, or by those
18 to whom such worker's right of action
19 survives, by judgment, settlement or
20 otherwise, and the employer's maximum
21 liability for workers' compensation under
22 this chapter has been fully or partially paid
23 and discharged, the employer shall have a
24 subrogation lien therefor against such
25 recovery, and the employer may intervene in
26 any action to protect and enforce such lien.
27
28
29

30 The plaintiff insists, however, that the enforcement of that

²"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, 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." Tenn. Code Ann. § 50-6-112(a)(1991).

1 right is conditioned upon the employee, as the subrogor, being
2 "made whole." The plaintiff defines "made whole" as being able
3 to recover for all damages found by the jury except damages
4 representing fault attributed to him. In this case, recovery
5 making the plaintiff whole would include the approximately
6 \$240,000,000 for damages attributed to the fault of the employer,
7 J.E.C. Electric.³
8

9 Analysis of the plaintiff's contention requires
10 consideration of the plaintiff's alternative position, that this
11 is a transitional case (which previously has meant a case
12 commenced before the opinion in McIntyre was released) in which
13 his rights should not be unfairly compromised by the adoption of
14 the principles of comparative fault. The Court has held that
15 "transitional case[s] . . . must be tried according to the
16 principles of comparative fault to the extent that the
17 application of those principles [do] not impose upon any party a
18 substantial injustice." Ridings v. Ralph M. Parsons Co., 914
19 S.W.2d 79, 80 (Tenn. 1996). The plaintiff asserts that in this
20 case, application of "post-McIntyre" principles would work a
21 substantial injustice to him. He relies upon the decisions in
22 Owens v. Truckstops of America, 915 S.W.2d 420 (Tenn. 1996) and
23 Ridings v. Ralph M. Parsons Co., 914 S.W.2d 79 (Tenn. 1996).
24

³"The exclusive remedy provision of the Workers' Compensation Act, Tenn. Code Ann. §50-6-108(a), eliminates any tort liability on the part of the employer." Ridings v. Ralph M. Parsons Co., 914 S.W.2d 79, 81, n. 2 (Tenn. 1996).

1 The cases of Owens v. Truckstops of America and Ridings
2 v. Ralph M. Parsons Co., illustrate the Court's approach to
3 transitional cases. In Owens v. Truckstops of America, the case
4 had been pending for more than three years when the opinion in
5 McIntyre was released. The plaintiff then sought to amend his
6 complaint to add two additional alleged tortfeasors as
7 defendants; those parties claimed that the plaintiff was barred
8 from suing them by the statutes of limitations. The Court noted
9 that "application of comparative fault principles in this case
10 would limit the plaintiff's recovery to that portion of the
11 damages corresponding to the fault attributable to [the
12 originally named defendant] without granting to the plaintiff the
13 benefit of other rights recognized in McIntyre, and, therefore,
14 could impose upon him a significant unfairness." Owens v.
15 Truckstops of America, 915 S.W.2d at 426. The Court held that
16 "fairness and efficiency must be the controlling principles in
17 adjudicating those cases commenced prior to the decision in
18 McIntyre which cannot be conformed to all of the procedures
19 contemplated by the doctrine of comparative fault." Id. at 424.
20 The Court devised a remedy to prevent injustice to the parties,
21 finding, "the equitable results contemplated by the doctrine of
22 comparative fault can be best accomplished in this case by not
23 relieving [the named defendant] of the joint and several
24 liability which existed when the plaintiff's cause of action
25 against [it] accrued, and by allowing [the named defendant] to
26 pursue its third-party claims against [the other two
27 tortfeasors]." Id. at 434.

1 In the case of Ridings v. Ralph M. Parsons Co., the
2 tort defendants sought to assert as an affirmative defense that
3 the employer contributed to the employee's injuries. The
4 defendants argued that under McIntyre, "fault can be attributed
5 to the employer, and the liability of the defendants [could] be
6 decreased accordingly, without the imposition of liability upon
7 the employer." Ridings v. Ralph M. Parsons Co., 914 S.W.2d at
8 81. Though Ridings was a transitional case,⁴ the Court found
9 that "application of comparative fault principles to this case
10 requires no transitional procedure [because] the acts and
11 omissions of an employer covered by the worker's compensation law
12 neither enlarge nor limit the rights or liabilities of any party
13 to a tort action by an employee governed by the doctrine of
14 comparative fault." Id. at 80-81. The Court concluded that
15 "fault may be attributed only to those persons against whom the
16 plaintiff has a cause of action in tort." Id. at 81.

17
18 This holding was affirmed in Snyder v. LTG
19 Lufttechnische GmbH, ___ S.W.2d ___ (Tenn. 1997), where the Court
20 stated:

21
22 . . . [T]he employer cannot be found to
23 be the proximate, or legal, cause of the
24 plaintiff's injuries because the employer is
25 immune from tort liability under Tenn. Code
26 Ann. § 50-6-108(a). By enacting Tenn. Code
27 Ann. § 50-6-108(a), the legislature has
28 already determined that for policy reasons
29 the employer may not be the legal cause of

⁴The complaint in Ridings was filed over a year before the opinion in McIntyre was released.

1 the plaintiff's injuries.

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5 Id. at ____ [slip op. at 11].

6
7 A review of the proceedings in this case shows that,
8 like in Ridings, the plaintiff's rights have not been adversely
9 affected by the principles of comparative fault. The plaintiff,
10 because he was covered by the workers' compensation law, did not
11 have a right to sue his employer in tort prior to or subsequent
12 to the adoption of comparative fault. See Tenn. Code Ann. § 50-
13 6-108(a). His right to sue a third party tortfeasor was not
14 affected by the comparative fault requirement that the jury
15 reduce the award against a third party tortfeasor by the percent
16 of the total fault attributed to the plaintiff. In fact, a
17 finding by the jury that he was partially at fault would have
18 precluded any recovery by him prior to McIntyre. See McIntyre v.
19 Balentine, 833 S.W.2d at 54.

20
21 The only way in which the plaintiff's right to recover
22 has been affected adversely in this case was by the attribution
23 of a portion of the fault to the employer. As discussed
24 previously, this issue was specifically resolved in Ridings, an
25 opinion which was released after the trial in this case. Under
26 Ridings, the trial court erred in instructing the jury that fault
27 could be attributed to the employer, and the plaintiff would have
28 been entitled to relief from that error on appeal. However, the
29 plaintiff did not appeal, but instead accepted payment of the

1 judgment awarded against Ross Engineering as satisfaction in full
2 for his cause of action. Of course, this Court cannot provide
3 relief for errors that are not preserved on appeal.
4

5 The decisions governing the application of comparative
6 fault principles have sought to achieve fairness to the parties
7 within the constraints of statutory law providing immunity in
8 particular situations:
9

10 Limiting the parties to whom fault may
11 be attributed to those subject to liability,
12 accomplishes the policy objectives of
13 fairness and efficiency. Since liability is
14 several and is in direct proportion to legal
15 fault, each defendant will be liable only for
16 the percentage of the damages caused by it.
17 Since fault is limited to the plaintiff and
18 those against whom the plaintiff has a cause
19 of action, the plaintiff is not denied the
20 right to recover those damages to which it is
21 entitled. However, the plaintiff will bear
22 the loss for any liability that it fails or
23 is unable to assert and any judgment that
24 cannot be enforced.
25
26
27

28 Ridings v. Ralph M. Parsons Co., 914 S.W.2d at 83.
29

30 The plaintiff's rights as they existed prior to the
31 release of the decision in McIntyre have not been adversely
32 affected by the adoption of the principles of comparative fault;
33 consequently, this is not a transitional case entitled to special
34 consideration.
35

36 This conclusion also resolves the plaintiff's primary

1 contention, that the insurer is not entitled to enforce its right
2 of subrogation because the plaintiff has not been "made whole."
3 The plaintiff acknowledges that Hartford has a subrogation claim
4 for benefits paid under the workers' compensation law but,
5 asserting principles of equitable subrogation,⁵ insists that the
6 subrogation claim is not enforceable unless the employee has
7 recovered the full amount of the damages not attributed to his
8 own fault.

9
10 The statute creating the subrogation claim does not by
11 its terms condition the claim upon the employee obtaining a full
12 recovery of damages sustained. The subrogation lien attaches to
13 "the net recovery collected" and secures the amount "paid" by the
14 employer or the amount of the employer's "future liability, as it
15 accrues."⁶ It appears that, under the statute, the subrogation

⁵Plaintiff relies primarily on rules set forth in Castleman Construction Co. v. Pennington, 432 S.W.2d 669 (Tenn. 1968).

⁶Tenn. Code Ann. § 50-6-112(c) provides:

(1) In [the] 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.

(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.

(3) In the event the worker, or those to whom such worker's right of action survives, effects a recovery, and collection thereof, from such other person, by judgment, settlement or otherwise, without intervention by the employer, the employer

1 lien attaches to any recovery from the tortfeasor "by judgment,
2 settlement or otherwise." Id. Consequently, even if under
3 equitable principles of subrogation the employer was not entitled
4 to assert the subrogation lien, the statute specifically creates
5 that right.

6
7 The record does not support the premise on which the
8 plaintiff bases his argument, that he has not been made whole.
9 Further, the plaintiff has asserted no basis on which the
10 subrogation claim created by statute should be denied.

11
12 The judgment of the Court of Appeals is affirmed.

13
14 The case is remanded to the trial court.

15
16
17 Costs will be paid by the plaintiff.

18
19
20 _____
Reid, J.

21
22 Concur:

23
24 Anderson, C.J., Drowota, Birch,
25 and Holder, JJ.

shall nevertheless, be entitled to a credit on the employer's
future liability for workers' compensation, as it accrues under
this chapter, to the extent of the net recovery.