AN UNFAIR ALLOCATION OF FAULT AND LIABILITY: A Proposal to Remedy an Unjust Legal Precedent and to Reconcile Comparative Fault and the Workers’ Compensation Act By Amending Tennessee Code Annotated § 50-6-112

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TABLE OF CONTENTS

EXECUTIVE SUMMARY…………………………………………………………………………3

BACKGROUND……………………………………………………………………………………..4

PROPOSED AMENDMENTS TO TENNESSEE CODE ANNOTATED § 50-6-112…..8

EXTRAJURISDICTIONAL SUPPORT…………………………………………………………10

CONCLUSION……………………………………………………………………………………12

CITATIONS……………………………………………………………………………………14
EXECUTIVE SUMMARY

Seeking a fair and tight fit between fault and liability, the Tennessee Supreme Court adopted a modified system of comparative fault in *McIntyre v. Balentine*. Under this system, a defendant would only be liable for the percentage of damages caused by that defendant’s negligence. To permit the defendant to take advantage of this new system linking more closely liability to fault, the Court adopted a nonparty defense whereby a defendant could allege that a nonparty caused or contributed to the injury or damage for which recovery is sought. The Tennessee Supreme Court later explained that a jury can assess comparative fault against even immune nonparties, reasoning, “It would be patently unfair in many cases to require a defendant to be dragged into court for the malfeasance of another and to thereupon forbid the defendant from establishing that fault should properly lie elsewhere.”

While all other defendants in Tennessee tort cases enjoy the ability to assess fault against others who may be responsible for the plaintiff’s damages, one class of defendants has been consistently denied this opportunity, often bearing a burden of liability that is far in excess of their fault. In fact, such defendants can be assessed 100% liability when they are only 1% at fault, a result that hearkens back to the days of joint and several liability. In *Troup v. Fischer Steel Corp.*, the Tennessee Supreme Court clarified that in an action brought by or on behalf of an employee who has suffered a compensable injury under the Tennessee Workers’ Compensation Law against a third party defendant, the third party defendant cannot raise the comparative fault of the employer as an affirmative defense. The Court justified the need for this exception to the equitable principles of comparative fault by explaining that if comparative fault could be alleged against an employer, the employee’s award would often be defeated by a “double reduction,” the first reduction occurring when fault is assessed against the employer, and the second reduction occurring when the employer pursues its statutory right of subrogation against the employee’s award pursuant to T.C.A. § 50-6-112(c).

In her majority opinion in *Troup*, Justice Holder noted that this “double reduction” could be prevented by allowing juries to apportion fault to employers and then limiting an employer’s subrogation recovery against the employee’s award to the extent that the employer was allocated fault. However, T.C.A. § 50-6-112(c) currently
forecloses this possibility by allowing an employer to pursue its full subrogation interest against an employee’s recovery regardless of the employer’s degree of fault. Justice Holder admitted that prohibiting defendants from alleging comparative fault against the employer “is, of course, an exception to the general rule. . .and will sometimes result in third parties being attributed liability in excess of their fault.” Importantly, Justice Holder concluded, “Such difficulties could be avoided if Tennessee Code Annotated 50-6-112(c) were amended to allow an employer to recover from an employee’s third-party tort recovery only insofar as the employer was not allocated fault in the third-party tort case. We invite the General Assembly to consider such an amendment.” To complete the mission of achieving a fair and tight fit between fault and liability that the Tennessee Supreme Court began in McIntyre, the Tennessee General Assembly should heed the invitation of the Tennessee Supreme Court and amend to T.C.A. § 50-6-112 to (1) allow a jury to apportion fault to employers, and (2) limit the employer’s subrogation recovery to the extent that the employer was allocated fault.

BACKGROUND

The Tennessee Supreme Court has long been plagued by “the thorny problems created by the interplay between the tort system’s doctrine of comparative fault and the workers’ compensation system’s doctrine of no-fault recovery.” Under the Tennessee Worker’s Compensation Law, employers are required to pay compensation for an employee’s personal injury or death by accident arising out of and in the course of employment, without regard to fault. The employee’s remedies under the Workers’ Compensation Law are exclusive. Thus, an employee injured in an accident during the course of his employment may recover only workers’ compensation benefits from his employer; the statutes bar the employee from filing a personal injury lawsuit for damages against the employer. Even when the employee’s injury is compensated under the Workers’ Compensation Law, however, the statutes expressly do not preclude the employee from filing a lawsuit “against some person other than the employer to pay damages. . .” If the employee recovers damages from such a third party, the employer
then has a subrogation lien against the recovery for the amount of workers’ compensation benefits paid.\(^{16}\)

In 1992, in an attempt to more closely link liability with fault in negligence actions, the Tennessee Supreme Court cast aside the deeply rooted legal doctrine of contributory negligence and adopted the modified comparative fault system.\(^{17}\) As a consequence, the doctrines of remote contributory negligence, last clear chance, and joint and several liability were rendered obsolete.\(^{18}\) Modified comparative fault requires that, so long as the plaintiff’s negligence is less than the defendant’s negligence, the plaintiff may recover damages commensurate with the proportion of the total negligence attributable to the defendant being sued.\(^{19}\)

In considering the fault of a nonparty to the litigation, the Tennessee Supreme Court stated,

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\text{[F]airness and efficiency require that defendants called upon to answer allegations in negligence be permitted to allege, as an affirmative defense, that a nonparty caused or contributed to the injury or damages for which recovery is sought. In cases where such a defense is raised, the trial court shall instruct the jury to assign this nonparty the percentage of the total negligence for which he is responsible.}\(^{20}\)
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Thus, generally, a defendant accused of negligently causing the injuries of a plaintiff could assert the fault of a nonparty in an effort to mitigate the defendant’s liability, even though the plaintiff would not recover against that nonparty in the immediate litigation.\(^{21}\)

However, in subsequent litigation involving the Workers’ Compensation Law, the Tennessee Supreme Court adopted a limited exception to the general rule that fault may be assessed against non-parties. The interaction of comparative fault and the Workers’ Compensation Law was first addressed by the Tennessee Supreme Court in its 1996 decision, \textit{Ridings v. Ralph M. Parsons Co.}\(^{22}\), in which the Court considered whether a defendant could assert, as an affirmative defense, that a nonparty employer caused or contributed to injuries suffered by a plaintiff in the scope and course of his employment. The Court rejected this argument because it interpreted \textit{McIntyre} to require that fault may be attributed only to those persons against whom the plaintiff has a cause of action in tort.\(^{23}\) Because the plaintiff’s employer was immune from tort actions under the Workers’ Compensation Law, no fault could be attributed to his employer.\(^{24}\)

The Court next addressed the interrelationship of comparative fault and workers’ compensation in
Snyder v. LTG Lufitechnische, GmbH, in which the Court concluded that although the defendant could not introduce evidence that the employer proximately caused the plaintiff’s injuries, a jury could, nevertheless, consider whether the employer’s negligence was a cause in fact of the plaintiff’s injuries.

Both Snyder and Ridings were severely scrutinized by the Tennessee Supreme Court in Carroll v. Whitney, in which the Court considered whether fault could be assessed against an immune non-party. The Carroll Court noted that its holding in Ridings relied on the distinction in McIntyre between parties and nonparties. The Court explained, “[A] careful reading of McIntyre, however, suggests that neither the holding of the case nor its underlying rationale limits the attribution of fault only to persons against whom the plaintiff has a cause of action in tort. Our treatment of nonparties in McIntyre simply examined a plaintiff’s ability to recover damages from a nonparty, and our holding was limited accordingly.” The Carroll Court observed that fairness required that defendants in a negligence action be permitted to assert that a nonparty caused or contributed to the plaintiff’s injury, hearkening back to the stated desire in McIntyre to achieve a “tighter fit between liability and fault.” Ultimately, the Carroll Court held “that when a defendant raises the nonparty defense in a negligence action, a jury may generally apportion fault to immune nonparties.”

The Carroll Court stated pointedly that it was not overruling Ridings and Snyder. To reconcile Carroll with the earlier decisions, the Court explained that Ridings and Snyder would “remain uniquely applicable with regard to the allocation of fault to employers in workers’ compensation cases.” This limited exception in workers’ compensation cases was necessary, the Court found, to achieve fairness to the employee. A successful employee’s recovery could be reduced by operation of the Worker’s Compensation Act. The Court observed that under T.C.A. § 50-6-112(a), an employer who has paid full workers’ compensation benefits to its employee is entitled to a subrogation lien against the employee’s recovery from any third party tortfeasor who may bear some responsibility for the employee’s injuries. The Court used the following hypothetical to illustrate the unfairness that would result from a decision not to retain a limited workers’ compensation exception:
An employee injured by a piece of equipment may have a cause of action for products liability against the machine’s manufacturer. However, the manufacturer could assert at trial that the employer altered the machine, and that this alteration caused the employee’s injury. A jury, acting on this use of the nonparty defense, could then allocate fault between the manufacturer and the immune employer, thereby reducing the employee’s recovery. Subsequently, the employer could exercise its right of subrogation with regard to the damages assessed against the manufacturer and recovered by the employee. Essentially then, the employer’s right of subrogation would defeat the employee’s statutory right to seek damages from other tortfeasors.\(^{36}\)

To avoid this result, the Court held that the rule in *Ridings* and *Snyder* would be retained only in the workers’ compensation context.\(^{37}\) However, in other comparative fault cases, the Court held that “a jury may still allocate fault to other tortfeasors against whom a plaintiff, for any reason, could not recover.”\(^{38}\) Therefore, the allocation of fault to immune non-parties was permitted in most cases, with the application of *Ridings* and *Snyder* limited to workers’ compensation cases.\(^{39}\)

Most recently, the Tennessee Supreme Court reaffirmed that comparative fault cannot be alleged against an immune employer by a third party defendant in *Troup v. Fischer Steel Corp.*\(^{40}\) In *Troup*, the appellee argued that where no actual threat of subrogation by the employer exists, thereby eliminating the “double reduction” problem, a defendant should be allowed to assert comparative fault against the employer.\(^{41}\) The *Troup* Court disagreed, stating that the potential for “double reduction” of a plaintiff’s recovery was prevalent enough to justify a special bright-line rule for cases when a plaintiff injured on the job files a tort claim against a third party.\(^{42}\)

In summary, the potential for “double reduction” of a plaintiff’s recovery when a plaintiff injured on the job files a tort claim against a third party has been utilized by the Tennessee Supreme Court to justify a significant departure from the otherwise harmonious comparative fault system that champions a fair and tight fit between fault and liability. As things now stand, a third-party stranger to the workers’ compensation system is made to bear the burden of a full common-law judgment despite possibly much greater fault on the part of the employer. In fact, the third party can be assessed 100% liability when it is only 1% at fault. This obvious inequity if further exacerbated by the right of the employer to recover from the third party the amount it has paid in
compensation regardless of the employer’s own negligence. Thus, the third party is forced to subsidize a workers’ compensation system in a proportion greater than his own fault, while the employer is able to benefit from its own malfeasance.

PROPOSED AMENDMENTS TO TENNESSEE CODE ANNOTATED § 50-6-112

In her majority opinion in *Troup*, Justice Holder explained that there are two potential methods for preventing the “double reduction” problem. The first is the method prescribed by *Ridings* and *Snyder* prohibiting juries from apportioning fault to employers in third-party tort cases. The second would be to allow juries to apportion fault to employers and then limit an employer’s recovery to the extent that the employer was allocated fault. Justice Holder pointed out that T.C.A. § 50-6-112(c) currently forecloses the second possibility by allowing an employer to pursue its full subrogation interest against an employee’s recovery regardless of the employer’s degree of fault. Accordingly, Justice Holder explained that the only method available to the Tennessee Supreme Court for protecting employees from a double reduction in their tort recoveries is to follow *Ridings* and *Snyder* and to prohibit juries from apportioning fault to employers. Pertinently, Justice Holder offered a simple and concise remedy to this complicated situation, concluding,

This method is, of course, an exception to the general rule provided in *Carroll* and will sometimes result in third parties being attributed liability in excess of their fault. Such difficulties could be avoided if Tennessee Code Annotated section 50-6-112(c) were amended to allow an employer to recover from an employee’s third-party tort recovery only insofar as the employer was not allocated fault in the third-party tort case. We invite the General Assembly to consider such an amendment.

To complete the mission of achieving a fair and tight fit between fault and liability that the Tennessee Supreme Court began in *McIntyre*, the Tennessee General Assembly should heed the invitation of the Tennessee Supreme Court and amend to T.C.A. § 50-6-112 to (1) allow a jury to apportion fault to employers, and (2) limit the employer’s subrogation recovery to the extent that the employer was allocated fault. The
following proposed amendments to Tennessee Code Annotated § 50-6-112 both solve the “double reduction” problem and bring harmony to Tennessee comparative fault law:

**Tennessee Code Annotated § 50-6-112. Actions Against Third Persons.**

(a) When the injury or death for which compensation is payable under this chapter was caused under circumstances creating a legal liability against some person other than the employer to pay damages, the injured worker, or the injured worker’s dependents, shall have the right to take compensation under this chapter, and the injured worker, or those to whom the injured worker’s right of action survives at law, may pursue the injured worker’s or their remedy by proper action in a court of competent jurisdiction against the other person. **In any such action, the defendant may raise the comparative fault of the employer as an affirmative defense.**

(b) In the event of a recovery from the other person by the worker, or those to whom the worker’s right of action survives, by judgment, settlement or otherwise, the attorney representing the injured worker, or those to whom the injured worker’s right of action survives, and effecting the recovery, shall be entitled to a reasonable fee for the attorney’s services, and the attorney shall have a first lien for the fees against the recovery; provided, that if the employer has engaged other counsel to represent the employer in effecting recovery against the other person, then a court of competent jurisdiction shall, upon application, apportion the reasonable fee between the attorney for the worker and the attorney for the employer, in proportion to the services rendered.

(c) (1) In the event of a recovery against the third person by the worker, or by those to whom the 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 against the recovery **to the extent that such payments by the employer exceed the proportionate share of damages attributable to the employer’s fault, if any.** The employer may intervene in any action to protect and enforce the lien.

(2) In the event the net recovery by the worker, or by those to whom the 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 worker’s 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. **The employer shall be entitled to such credit only to the extent that its payment for workers’ compensation under this chapter exceeds the proportionate share of damages attributable to the employer’s fault, if any.**

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\[a\] Proposed amendments are highlighted by bold text.
In the event the worker, or those to whom the worker’s right of action survives, effects a recovery, and collection of that recovery, from the other person, by judgment, settlement or otherwise, without intervention by the employer, the employer shall nevertheless be entitled to a credit on the employer’s future liability for worker’s compensation, as it accrues under this chapter, to the extent of the net recovery. **The employer shall be entitled to such credit only to the extent that its payment for workers’ compensation under this chapter exceeds the proportionate share of damages attributable to the employer’s fault, if any.**

The amendments make clear that comparative fault may be alleged against employers in third party actions (T.C.A. § 50-6-112(a), proposed). Additionally, the employer’s subrogation interest in the employee’s award is limited to the extent that compensation payments by the employer exceed the proportionate share of damages attributable to the employer’s fault. (T.C.A. § 50-6-112(c)(1), proposed). Finally, the employer is entitled to a credit for its future liability for worker’s compensation only to the extent that its payment for worker’s compensation exceeds the proportionate share of damages attributable to the employer’s fault. (T.C.A. §§ 50-6-112(c)(2)-(3), proposed).

With four (4) simple clauses added to the body of T.C.A. § 50-6-112, the “double reduction” problem is eliminated, and harmony within Tennessee comparative fault law is achieved. Third party defendants will no longer be forced to bear a burden of liability far in excess of their fault, while employers will no longer be able to benefit from their malfeasance. In short, the proposed amendments help to achieve a fair and tight fit between fault and liability.

**EXTRAJURISDICTIONAL SUPPORT**

Should the General Assembly adopt the proposed amendments to T.C.A. § 50-6-112, Tennessee would join a growing list of states that allow fault to be assessed against employers in third party actions brought by or on behalf of employees. The California Court of Appeals, when faced with the same issue, allowed comparative fault to be assessed against the employer, and limited the employer’s subrogation remedy, stating:

In this type of case, the third party tortfeasor should be required to reimburse the employer or his insurance carrier for compensation benefits paid only to the extent that such benefits have exceeded the proportionate share of damages attributable to the employer’s negligence. . .This approach is thus in accord with the concern shown by the court . . .that the
entire burden of a loss for which two or more defendants were responsible should not be shouldered by one alone. Furthermore, implementation of the above-described rule will not contravene the policies of the workers’ compensation system: employer liability will still be limited to the payment of compensation benefits, while the employer’s incentive for maintaining safe working conditions will be reinforced.\textsuperscript{46}

Likewise, Idaho courts have limited the employer’s right to subrogation in cases where the employer has been determined to be negligent.\textsuperscript{47} The courts have commented that this scheme satisfies several public policy interests, including balancing the competing interest of a sheltered employer and an overburdened third party, preventing an employer and its insurer from profiting by the employer’s own wrong, and protecting the third party’s right to allege the comparative negligence of others.\textsuperscript{48} Additionally, North Carolina statutes permit a third party to raise the employer’s negligence for the purpose of reducing the plaintiff’s recovery by the amount of the employer’s subrogated interest.\textsuperscript{49}

Illinois courts have gone a step beyond the previously mentioned states, allowing a third party tortfeasor to seek contribution from a negligent employer.\textsuperscript{50} The Illinois scheme is driven by the courts’ concern that a third party stranger to the workers’ compensation system could otherwise be made to bear the full burden of a tort judgment despite possibly greater fault on the part of the employer.\textsuperscript{51} Likewise, the Minnesota Supreme Court, citing the need for an approach that is both equitable and consonant with compensation policy, has held that a third party may seek contribution from a negligent employer in proportion to the employer’s fault, but in no event beyond the employer’s workers’ compensation liability.\textsuperscript{52}

It is clear that the inequities of allowing a negligent employer to benefit from its wrongdoing while leaving a third party to bear liability in excess of its fault have been shared, considered, and addressed by various legislatures and courts around this country. Tennessee should join the growing list of concerned states that have sought to remedy this problem by adopting the proposed amendments to T.C.A. § 50-6-112.
CONCLUSION

The timing is ripe to complete the mission of achieving a fair and tight fit between fault and liability in employee actions against third parties by amending the Tennessee third party action statute. The Tennessee Supreme Court has made a direct appeal to the General Assembly, articulating the changes to the Tennessee Code that are necessary to solve the problems presented by this convoluted issue. The Tennessee General Assembly should therefore heed the invitation of the Tennessee Supreme Court and amend T.C.A. §50-6-112 to (1) allow a jury to apportion fault to employers, and (2) limit the employer’s subrogation recovery to the extent that the employer was allocated fault.

Perhaps nothing can illustrate the inequities in the current system and the corresponding need for statutory amendments better than personal examples encountered in the author’s daily law practice. The author has experienced several situations in which a settlement was forced on a third party defendant because the risk of an adverse verdict above the tortfeasor’s insurance policy limits was too substantial to proceed to trial. Significantly, these settlements occurred in situations in which there was substantial evidence that the employer had a higher degree of fault than the third party defendant. In one instance, three (3) mock juries were empanelled on a catastrophic injury case. Although one (1) of the three (3) juries found 100% negligence on the part of the employer, the remaining two (2) did not reach 100%, and therefore found against the third party defendant. In discussions with the juries thereafter, they all felt that there was substantial fault on the part of the employer, but since the fault did not amount to 100%, they were forced to allocate fault only between the defendant and the plaintiff. The mock verdict amounts were in excess of $20,000,000.00, the corresponding limits of insurance for the third party defendant. Based on all of the evidence in the case and conversations with the mock juries, the third party defendant most likely would have been apportioned negligence totaling 30% or less. The carriers for the third party defendant were forced to settle the case for nearly $10,000,000.00, an amount far in excess of defendant’s proportional fault. Had comparative fault of the employer been available as an affirmative defense, the case could have been resolved for substantially less, and more
importantly the award would have reflected the tight fit between fault and liability desired by the McIntyre Court.

In McIntyre, the Tennessee Supreme Court rejected contributory negligence and joint and several liability in favor of comparative negligence to achieve a fairer and tighter fit between fault and liability. The fair and tight fit is lost, however, when some participants to an act of negligence are excluded from the apportionment of fault. Logic dictates that, if the negligence of an actor who is not a party is not included in the comparative negligence calculation, the percentage of negligence of defendants who are parties will be inflated. Throughout the state of Tennessee, juries, unable to allocate fault to immune employers, are holding defendants liable not only for their own proportionate share of fault, but also for the proportionate share of fault attributable to the immune employer, reviving one of the evils of joint and several liability that McIntyre sought to cure. Although the comparative fault system has brought a great deal of fairness into Tennessee tort litigation, it remains patently unfair to require third party defendants to be summoned into court for the malfeasance of the employer and to thereupon forbid the third party defendants from establishing that fault should properly lie with the employer.

Fortunately, the solution to this problem is simple. With four (4) straightforward clauses added to the body of T.C.A. § 50-6-112, the inequities inherent in the current scheme are remedied, the “double reduction” problem enunciated by the Tennessee Supreme Court is eliminated, and harmony within Tennessee comparative fault law is achieved. Third party defendants will no longer be forced to bear a burden of liability far in excess of their fault, while employers will no longer be able to benefit from their malfeasance. The General Assembly should therefore take this critical opportunity to unify Tennessee comparative fault law, achieving for all defendants a fair and tight fit between fault and liability.
AN UNFAIR ALLOCATION OF FAULT AND LIABILITY

1 McIntyre v. Balentine, 833 S.W.2d 52 (Tenn. 1992).
2 Id. at 58.
3 Id.
5 Troup v. Fischer Steel Corp., 236 S.W.3d 143 (Tenn. 2007).
6 Id. at 149.
7 Id. at 148, fn. 2.
8 See, Castleman v. Ross Eng’g, Inc., 958 S.W.2d 720, 723-24 (Tenn. 1997).
9 Troup, 236 S.W.3d at 148, fn. 2.
10 Id.
11 Id. at 146.
12 T.C.A. § 50-6-103(a).
13 Id.
15 T.C.A. § 50-6-112(a).
16 T.C.A. § 50-6-112(c).
17 McIntyre, 833 S.W.2d at 57.
18 Id. at 57-58.
19 Id. at 57.
20 Id. at 58.
21 Id.
22 Ridings v. Ralph M. Parsons Co., 914 S.W.2d 79 (Tenn. 1996).
23 Id. at 81.
24 Id. at 82.
25 Snyder v. LTG Luftechnische, GmbH, 955 S.W.2d 252 (Tenn. 1997).
27 Id. at 18.
28 Id.
29 Id. at 16-17.
30 Id. at 19.
31 Id.
32 Id.
33 Id.
34 Id.
35 Id.
36 Id.
37 Id.
38 Id.
39 Id. at 22.
40 Troup v. Fischer Steel Corp., 236 S.W.3d 143 (Tenn. 2007).
41 Id. at 148.
42 Id. at 149.
43 Id. at 148, fn. 2.
44 Id.
45 Id.
51 Id.
52 See, Lambertson v. Cincinnati Corp., 257 N.W.2d 679 (Minn. 1977).