[Cite as *Ohio Bur. of Workers' Comp. v. Miller*, 2013-Ohio-2072.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio Bureau of Workers' Compensation,	:	
Plaintiff-Appellee,	:	No. 12AP-753
	:	(C.P.C. No. 11CVH06-6755)
v.	:	(REGULAR CALENDAR)
Gary T. Miller and Big G Inc., dba Pickett Concrete,	:	
Defendants-Appellants.	:	

D E C I S I O N

Rendered on May 21, 2013

Cooke, Demers & Gleason, LLC, Adams J. Bennett and *Andrew P. Cooke*, for appellee.

Dawson Disantis & Myers, LLC, and *Shane M. Dawson*, for appellant Big G Inc., dba Pickett Concrete.

APPEAL from the Franklin County Court of Common Pleas

KLATT, P.J.

{¶ 1} Defendants-appellants, Gary T. Miller and Big G Inc., appeal a judgment of the Franklin County Court of Common Pleas granting summary judgment to plaintiff-appellee, the State of Ohio Bureau of Workers' Compensation ("BWC"). For the following reasons, we affirm.

{¶ 2} On June 2, 2009, Miller was injured in the course and scope of his employment with Big G. Miller applied for workers' compensation benefits, and BWC paid him $31,466.12 in medical and wage benefits.

{¶ 3} On October 30, 2009, Miller and Big G entered into a "Release and Indemnity Agreement" that provided:

> In consideration of the payment, to the undersigned, of the sum of TWENTY FOUR THOUSAND SIXTY FOUR & NO/100 ($24,064.00) DOLLARS ($4,064.00) having already been advanced). FIFTEEN THOUSAND & NO/100 ($15,000.00) DOLLARS to be paid upon the execution of this Release and Indemnity Agreement, with the remaining FIVE THOUSAND ($5,000.00) to be paid upon Gary F. Miller's return to work with no work restrictions, as well as a valid commercial driver's license, the receipt of which is hereby acknowledged, the undersigned, GARY F. MILLER, Single, Individually, forever releases, discharges and covenants to indemnify and hold harmless BIG G., INC. * * * and any other person, firm or corporation charged or chargeable with responsibility or liability, their heirs, administrators, executors, successors and assigns, from any and all claims, demands, damages, costs, expenses, loss of service, actions and causes of action, belonging to the undersigned, arising out of any act or occurrence up to the present time, and particularly on account of all personal injury, disability, property damage, loss or damages of any kind sustained or that may hereafter be sustained by him or by the undersigned, in consequences of an accident that occurred on or about the 2nd day of June, 2009.
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> * * *
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> The undersigned understands that the parties released admit no liability of any sort by reason of said accident, and that said payment in compromise is made to terminate further controversy respecting all claims for damages that the said undersigned has heretofore asserted or might personally or through personal representatives hereafter assert because of said accident.

{¶ 4} Neither Miller nor Big G notified BWC that they planned to enter into the "Release and Indemnity Agreement" before executing that agreement. BWC never received any reimbursement for amounts that it paid to Miller in workers' compensation benefits from either Miller or Big G.

{¶ 5} On June 1, 2011, BWC filed the instant lawsuit to recover the amount of workers' compensation benefits that it paid to Miller. In its complaint, BWC asserted that

R.C. 4123.931(G) made Miller and Big G jointly and severally liable for that amount because they settled without reimbursing BWC for the payments that it made.

{¶ 6} BWC moved for summary judgment. In its memoranda in opposition, Big G first argued that it was not liable to make payments to Miller other than those associated with its obligations under the workers' compensation statutory scheme. Thus, Big G contended that R.C. 4123.931(G) did not apply to it. Second, Big G argued that it and Miller did not settle any claim. Big G alleged that Miller never filed a lawsuit, made a claim, or issued any sort of demand to Big G. According to Big G, it did not pay Miller to settle a claim, but to financially assist a loyal employee.

{¶ 7} Relying on the plain language of the "Release and Indemnity Agreement," the trial court concluded that Miller and Big G had, indeed, settled Miller's putative claims. Because Miller and Big G settled without timely notifying or reimbursing BWC, the trial court granted BWC's motion and entered judgment in its favor.

{¶ 8} Big G now appeals from the final judgment, and it assigns the following error:

> The trial court erred in granting Plaintiff BWC's motion for summary judgment because there are genuine issues of material fact.

{¶ 9} Summary judgment is appropriate when the moving party demonstrates that: (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion when viewing the evidence most strongly in favor of the nonmoving party, and that conclusion is adverse to the nonmoving party. *Hudson v. Petrosurance, Inc.*, 127 Ohio St.3d 54, 2010-Ohio-4505, ¶ 29; *Sinnott v. Aqua-Chem, Inc.*, 116 Ohio St.3d 158, 2007-Ohio-5584, ¶ 29. Appellate review of a trial court's ruling on a motion for summary judgment is de novo. *Hudson* at ¶ 29. This means that an appellate court conducts an independent review, without deference to the trial court's determination. *Zurz v. 770 W. Broad AGA, L.L.C.*, 192 Ohio App.3d 521, 2011-Ohio-832, ¶ 5 (10th Dist.); *White v. Westfall*, 183 Ohio App.3d 807, 2009-Ohio-4490, ¶ 6 (10th Dist.).

{¶ 10} Under Ohio's workers' compensation statutes, the entity that pays workers' compensation benefits has the right to reimbursement out of any recovery the claimant may obtain from the third party responsible for causing the injury. *Ohio Bur. of Workers'*

Comp. v. McKinley, 130 Ohio St.3d 156, 2011-Ohio-4432, ¶ 27. This right is expressed in R.C. 4123.931(A), which reads:

> The payment of compensation or benefits pursuant to this chapter or Chapter 4121., 4127., or 4131., of the Revised Code creates a right of recovery in favor of a statutory subrogee against a third party, and the statutory subrogee is subrogated to the rights of a claimant against that third party. The net amount recovered is subject to a statutory subrogee's right of recovery.

{¶ 11} Pursuant to R.C. 4123.931(G), a claimant must notify the statutory subrogee (and, in certain instances, the attorney general) of the identity of all third parties against whom the claimant has a right of recovery. No settlement or compromise between a claimant and a third party is final unless the claimant provides the statutory subrogee (and, if necessary, the attorney general) with prior notice and an opportunity to assert its subrogation rights. R.C. 4123.931(G). "If a statutory subrogee and, when required, the attorney general are not given that notice, or if a settlement or compromise excludes any amount paid by the statutory subrogee, the third party and the claimant shall be jointly and severally liable to pay the statutory subrogee the full amount of the subrogation interest." R.C. 4123.931(G).

{¶ 12} In this case, the parties agree that Miller, as the person who received workers' compensation benefits, is the claimant. *See* R.C. 4123.93(A) (" 'Claimant' means a person who is eligible to receive compensation, medical benefits, or death benefits under this chapter."). The parties also agree that BWC is the statutory subrogee. *See* R.C. 4123.93(B) (" 'Statutory subrogee' means the administrator of workers' compensation."). The parties, however, dispute whether Big G qualifies as a third party. Big G contends that it is not a third party, and therefore, no part of R.C. 4123.931 applies to its dealings with Miller.

{¶ 13} A "third party" is "an individual, private insurer, public or private entity, or public or private program that is or may be liable to make payments to a person without regard to any statutory duty contained in this chapter." R.C. 4123.93(C). Big G argues that it is not liable and could not be liable to pay Miller (outside of its statutory workers' compensation obligations) because Miller did not pursue any tort claim against it for damages arising out of Miller's workplace accident. We disagree with Big G's argument.

While Miller did not file or threaten a lawsuit against Big G, he possessed a potential claim against Big G for intentional tort. The existence of the potential claim, regardless of its merit, meant that Big G could have been liable in tort for Miller's damages. Consequently, Big G falls within the statutory definition of "third party."

{¶ 14} Big G next argues that the "Release and Indemnity Agreement" is not a settlement or compromise of any claim Miller may have had against Big G due to the accident. Absent a settlement or compromise between Big G and Miller, the parties' failure to comply with the R.C. 4123.931(G) requirements would not render Big G and Miller jointly and severally liable for the amounts BWC paid in workers' compensation benefits. Consequently, we must determine whether the "Release and Indemnity Agreement" constitutes a "settlement" or "compromise" as those terms are used in R.C. 4123.931(G).

{¶ 15} Neither R.C. 4123.93 nor R.C. 4123.931 defines "settlement" or "compromise." When the legislature fails to define a specific word, courts give that word its common, ordinary meaning. R.C. 1.42; *Smith v. Landfair*, 135 Ohio St.3d 89, 2012-Ohio-5692, ¶ 18. As it is used in R.C. 4123.931(G), the common, ordinary meaning of "settlement" is "[a]n agreement ending a dispute or lawsuit." *Black's Law Dictionary* 326 (9th Ed.2009). A "compromise" is "[a]n agreement between two or more persons to settle matters in dispute between them; an agreement for the settlement of a real or supposed claim in which each party surrenders something in concession to the other." *Id.*

{¶ 16} Here, by the terms of the "Release and Indemnity Agreement," Big G paid Miller in exchange for Miller's release of any claims arising out of his workplace accident. The "Release and Indemnity Agreement" explicitly states that Big G made the payment "to terminate further controversy" regarding claims Miller might assert because of the accident. Given the plain, unambiguous language of the "Release and Indemnity Agreement," we conclude that it is a settlement and/or compromise.

{¶ 17} In arguing to the contrary, Big G relies on the affidavit testimony of its president, John Galloway. According to Galloway, he felt a moral obligation to assist Miller with the financial difficulties that Miller encountered after his accident. Galloway asked Miller to sign the "Release and Indemnity Agreement" due to pressure from family members who also worked for Big G and "afterthought." Galloway affidavit, at ¶ 7.

Galloway denies seeking the "Release and Indemnity Agreement" to avoid litigation with Miller.

{¶ 18} Galloway's testimony does not preclude summary judgment for two reasons. First, the "Release and Indemnity Agreement" clearly and unambiguously expresses the parties' intent. Courts will not refer to extrinsic evidence, such as Galloway's testimony, to discern the intent behind a clear and unambiguous agreement. *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, ¶ 11. Second, even if we consider Galloway's testimony, we conclude that it would not warrant reversal. Although Galloway disclaims any intent to avoid litigation, the only benefit that Big G gained from the "Release and Indemnity Agreement" was the termination of Miller's potential claims. Without that benefit serving as Big G's consideration, no agreement would exist. Galloway may have initially intended to give Miller money, but he ultimately required Miller to concede his potential claims in return for payment. Consequently, we conclude that no reasonable finder of fact could find that the "Release and Indemnity Agreement" is not a settlement and/or compromise.

{¶ 19} In sum, we reject both of Big G's arguments that R.C. 4123.931 does not apply to it, Miller, or the "Release and Indemnity Agreement." As Big G does not contest that neither it nor Miller followed the procedures set forth in R.C. 4123.931(G), we conclude that the trial court did not err in granting BWC summary judgment.

{¶ 20} For the foregoing reasons, we overrule the sole assignment of error, and we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN and SADLER, JJ., concur.