No. 2014-0795

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY, OHIO
CASE NO. 12-CO-41

OHIO BUREAU OF WORKERS' COMPENSATION,
Plaintiff-Appellant,

v.

JEFFREY McKINLEY and HERITAGE-WTI, INC.,
Defendants-Appellees.

BRIEF OF AMICUS CURIAE OHIO ASSOCIATION OF CIVIL TRIAL ATTORNEYS IN SUPPORT OF DEFENDANT-APPELLEE HERITAGE-WTI, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. STATEMENT OF INTEREST

The Ohio Association of Civil Trial Attorneys (OACTA) is a statewide organization of attorneys, corporate executives and managers who devote a substantial portion of their time to defending civil lawsuits and managing claims against individuals, corporations and government entities.

OACTA has long been a voice in the ongoing effort to improve the administration of justice in Ohio. The Bureau of Workers' Compensation's (Bureau) position in this appeal undermines this effort by seeking to impose, for the first time in Ohio history, untold liability on third parties for settlements with workers' compensation claimants that do not specifically mention — let alone exclude — the benefits paid by the Bureau or its interest in the claimant's recovery. The court of appeals correctly construed the relevant statute and properly held that it imposes liability only where settling parties extinguish the Bureau's subrogation interest. That did not occur here. The appellate court's judgment should be affirmed.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

This case requires this Court to determine whether a third party is liable to the Bureau because it settled with a claimant and signed an agreement that did not list the workers' compensation benefits the Bureau paid, or specifically mention the Bureau's lien. The Bureau is wrong to suggest a third party "*remain[s]*" jointly and severally liable to the Bureau in this scenario. (Merit Br. 1 (emphasis added).) A third party *has no direct liability* to the Bureau absent a settlement that fails to

comply with R.C. 4123.931(G), and nothing in that section creates third-party liability for failing to earmark specific settlement funds to pay the Bureau's lien.

The court below correctly focused on the key statutory language, which imposes third-party liability if a settlement "excludes any amount paid by" the Bureau. As the Seventh District Court of Appeals explained, this language "is written to address an exclusion of the subrogation lien from the settlement[.]" Appellate Opinion ("App. Op."), ¶ 27 (Merit Br. App'x Ex. 3, ¶ 27). The Bureau cannot meet this standard; the settlement between Jeffrey McKinley and Heritage-WTI, Inc. did not exclude the benefits paid by the Bureau or its lien.

Unable to meet the statutory standard, the Bureau seeks to rewrite it. The Bureau insists liability for "exclud[ing] any amount paid *by*" the Bureau requires a third party to "include payment *to*" the Bureau in the settlement agreement. (Merit Br. 1 (emphasis added).) Its argument focuses on the meaning of "exclude" (Merit Br. 17), but ignores what must be excluded. The statute does not impose liability for excluding payments *to the Bureau*; it imposes liability for excluding payments *by the Bureau*. This distinction goes to the heart of the statute's purpose. The statute targets collusive settlements that release a third party from all liability for a lower payment that does not encompass injuries compensated *by* the Bureau — not settlements that fail to mandate payments *to* the Bureau to satisfy its lien.

The Bureau misreads the statute when it assumes a purpose of the workers' compensation subrogation "scheme" is to make third parties guarantors of a

claimant's payment to the Bureau. (Merit Br. 26.) This assumption is not supported by the statute's text or its history, which the Bureau ignores. Prior legislation creating a subrogation interest in settlement funds included similar language to prevent collusive settlements that thwarted the Bureau's ability to collect from the claimant on its lien. It makes no sense to conclude that when the General Assembly set out to fix the constitutional flaws in the prior legislation, it suddenly elected to pursue a new — and unexpressed — goal of making third parties guarantors of payments to the Bureau.

It may well be true that "[n]o savvy tortfeasor will sign a contract that, by expressly purporting to disclaim liability, will instead guarantee liability." (Merit Br. at 2.) But this means only that the General Assembly accomplished what it set out to do — prevent collusive settlements. This success is not an excuse to rewrite the subrogation statute to impose a new liability the General Assembly never contemplated.

III. STATEMENT OF FACTS AND THE CASE

Amici adopts and incorporates the Statement of Facts and the Case as set forth in the merit brief of Defendant-Appellee Heritage-WTI, Inc.

IV. LAW AND ARGUMENT

Proposition of Law:

> **A claimant's settlement with a third party for more than a statutory subrogee's interest does not exclude payments by the subrogee, unless it says the amount is for injuries not compensated by the subrogee or otherwise makes the settlement not subject to subrogation. (R.C. 4123.931(G) construed.)**

The Seventh District correctly concluded that a settlement between a claimant and a third party that fails to earmark a portion of the amount for payment of the Bureau's lien does not "exclude any amount paid *by*" the Bureau under R.C. 4123.931(G). The Bureau's Proposition of Law, which roots liability in a failure to "include the required payment *to* the subrogee" (Merit Br. 12), cannot be squared with the text or history of Ohio's workers' compensation statute; an alternative proposition of law consistent with both is suggested above.

A. A settlement "excludes any amount paid" by the Bureau if, and only if, its terms make the settlement amount not subject to subrogation.

The workers' compensation subrogation statute imposes joint and several liability on third-party settlements in two scenarios:

> If a statutory subrogee and, when required, the attorney general are not given [prior notice of a settlement], 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). This appeal does not present the former scenario; the court of appeals concluded "[t]he question of whether BWC received notice of the settlement

negotiations is *res judicata*" (Merit Br. App'x Ex. 3, ¶ 20), and the Bureau did not take issue with that determination in its Proposition of Law. *See, e.g., Corporex Dev. & Constr. Mgt. Inc. v. Shook, Inc.*, 106 Ohio St.3d 412, 2005-Ohio-5409, ¶ 5, fn. 1.

1. <u>That is what the plain language of the statute means.</u>

As the court below correctly concluded, the plain and ordinary meaning of a liability for "a settlement or compromise [that] excludes any amount paid by the statutory subrogee" is that it attaches only where "the amounts paid by [the Bureau] *cannot be recovered from* the settlement[.]" App. Op. at ¶ 31 (Merit Br. App'x Ex. 3, ¶ 31 (emphasis added)). This interpretation also best fits the "statutory and historical context of the words chosen by the General Assembly[.]" *Hauser v. Dayton Police Dept.*, 140 Ohio St.3d 268, 2014-Ohio-3636, ¶ 9; *see also Houdek v. ThyssenKrupp Materials N.A., Inc.*, 134 Ohio St.3d 491, 2012-Ohio-5685, ¶ 14-25 (construing R.C. 2745.01(B) in light of intentional tort jurisprudence). This context shows a third party's direct liability guards against collusive settlements that purport to extinguish the Bureau's interest in the settlement funds.

2. <u>That is what the historical context indicates.</u>

Three times the General Assembly enacted a workers' compensation subrogation statute to reach "double recoveries" — i.e., workers' compensation benefits and tort damage awards compensating the same claimant twice for the same injuries. *See Holeton v. Crouse Cartage Co.*, 92 Ohio St.3d 115, 2001-Ohio-109; *Modzelewski v. Yellow Freight Sys., Inc.*, 102 Ohio St.3d 192, 2004-Ohio-2365; *Groch*

v. Gen. Motors Corp., 117 Ohio St.3d 192, 2008-Ohio-546. The first two were declared unconstitutional. *Holeton*, *supra*; *Modzelewski*, *supra*. Both the concept of direct third-party liability and the concern with excluding from settlements amounts paid by the Bureau, however, appeared in one of these prior statutes. This prior experience sheds light on the meaning and intent of current R.C. 4123.931(G).

The first statute created a subrogation right that did not reach settlements; it "applie[d] only if the employee is a party to an action involving the third-party tortfeasor." *Modzelewski*, 2004-Ohio-2365, ¶ 11. This Court struck that statute down as unconstitutional, because (among other things) it "favor[ed] out-of-court settlement over litigation[.]" *Id.* at ¶ 13.

The second statute reached settlements, but did so in a manner this Court concluded was unconstitutional. The statute (a) said the "entire amount" of any settlement was subject to a right of subrogation and (b) prevented parties from drafting around this right, declaring that "[a]ny settlement or compromise that excludes the amount of the compensation or medical benefits shall not preclude a statutory subrogee from enforcing its rights under this section." *Holeton*, 92 Ohio St.3d at 117 (quoting former R.C. 4123.931(D)). The statute also required the claimant to give the Bureau notice of a settlement, imposing joint and several liability on the third party and claimant if notice was not given. *Id.*

Holeton found this statute unconstitutional, because: (i) a subrogation right in the "entire amount" of a settlement was overinclusive, since a double recovery does

not occur when the combined recoveries received by a claimant do not make him whole; and (ii) settling claimants were subjected to disparate treatment, since those who proceeded to trial could show that a portion of their damages did not represent a double recovery.[1] 92 Ohio St.3d at 125-128, 132. Chief Justice Moyer's dissent argued that this disparate treatment was rational and prevented collusion by the settling parties: "[w]ithout the restriction regarding settlement awards in R.C. 4123.931(D), employees could accept a lower settlement amount from the tortfeasor, in exchange for an agreement stating that the entire amount was not subject to subrogation." 92 Ohio St.3d at 138 (Moyer, C.J., dissenting).

The current statute is "the General Assembly's statutory response" to *Holeton*. *Groch*, 2008-Ohio-546, ¶ 22. The legislature fixed the overinclusion problem by adopting a formula that divides the "net amount recovered"[2] by a claimant from a third party "in such a way that the subrogee receives a proportionate share based on its 'subrogation interest' and the claimant receives an amount proportionate to his 'uncompensated damages.'" 2008-Ohio-546, ¶ 72, 79-80. The legislature also fixed the disparate treatment identified in *Holeton* by making "the current statutory

[1] Claimants who proceeded to trial could "obtain[] a special verdict or jury interrogatories indicating that the award or judgment represents different types of damages" not subject to the Bureau's subrogation rights. 92 Ohio St.3d at 117.

[2] "Net amount recovered" is a defined term meaning "the amount of any award, settlement, compromise or recovery by a claimant against a third party." R.C. 4123.93(E).

formula for dividing the 'net amount recovered' [apply] both to claimants who settle and to claimants who recover at trial." *Id.* at ¶ 87.

The current statute also carries forward, however, the concern with collusive settlements noted in the late Chief Justice Moyer's *Holeton* dissent. The General Assembly supplemented the joint and several liability provision in the prior legislation by adding the clause imposing liability "if a settlement or compromise excludes any amount paid by" the Bureau. R.C. 4123.931(G). This new language echoed a clause in former R.C. 4123.931(D), which also focused on amounts the Bureau paid and said exclusion of those amounts from a settlement did not prevent the Bureau from enforcing its lien. *See* p. 6, *supra*. Chief Justice Moyer correctly recognized this old language targeted collusive settlements. *See Holeton*, 92 Ohio St.3d 138 (Moyer, C.J., dissenting). And there is no reason to suspect the General Assembly intended to accomplish something entirely different when it included similar language in R.C. 4123.931(G). Then and now, the General Assembly's concern with settlements that exclude amounts paid by the Bureau shows an intent to ban collusive settlements that thwart the Bureau's ability to recover from the claimant on its lien.

3. That is the only interpretation that gives meaning to the entire statute.

Once it is understood that third-party liability for excluding from a settlement "any amount paid by" the Bureau addresses collusion, there are powerful reasons to interpret that liability as attaching only to settlements that "specifically *exclude[]* the

amount paid by" the Bureau. App. Op. at ¶ 25 (Merit Br. App'x Ex. 3, ¶ 25; emphasis in original); *see also Ohio Bureau of Workers' Comp. v. McKinley*, 130 Ohio St.3d 156, 2011-Ohio-4432, ¶ 48 (Pfeifer, J., concurring) ("The BWC's only hope for recovery from Heritage would be a provision in the settlement agreement that specifically excludes payments made by the BWC.").

First, this is the most reasonable — indeed, the only reasonable — interpretation of the plain language. The definitions of "exclude" cited by the Bureau are a head fake. (Merit. Br. 17.) As discussed, the question is not what exclude means, but what must be excluded to trigger joint and several liability. The Bureau's efforts to dance around the true trigger — i.e., the exclusion of "any amount paid *by*" the Bureau — confirm its position cannot be reconciled with the statutory text. (Merit Br. 17-18.) And, in any event, "the common sense definition of 'exclude' means that the amounts paid by [the Bureau] cannot be recovered from the settlement, whether through an express provision in the settlement or as a practical matter based on the terms of the settlement." *Id.* at ¶ 31.

Second, this interpretation gives meaning to the preceding clause in R.C. 4123.931(G). If the statute required third-party settlements to "provide for the Bureau to be paid" (Merit. Br. 12), then liability for failing to "give[] . . . notice" of a settlement would be meaningless. This liability has no purpose if, as a matter of substance, any settlement must include payment to the Bureau. After all, as the Bureau correctly points out, the "formula for the amount to which the Bureau is

entitled" cannot "be lowered or eliminated by the other two parties' unilateral action." (Merit Br. 25.) The obvious reason for the notice provision is to permit the Bureau to step in and protect its interest during settlement negotiations — precisely because third parties have no duty to craft settlements that "include payment *to*" the Bureau. (Merit Br. 1 (emphasis added).)

B. The Bureau's flawed efforts to extract a different meaning from surrounding statutory provisions are meritless.

The Bureau advances a variety of other arguments to support its interpretation, ostensibly based on the structure of the workers' compensation subrogation statute. None have merit.

First, the Bureau insists that allowing the defendant to "escape" liability here would "conflict[] with the entire notion of this cause of action as an *independent* right of recovery — one not derivative of the claimant's recovery[.]" (Merit Br. 24.) Not true. The question here is the *scope* of the liability created by R.C. 4223.931(G), not whether it is derivative or direct. Limiting recovery to collusive settlements that prevent the Bureau from recovering what it paid is consistent with a rule of law making this liability "direct."

Second, the Bureau urges that a third party cannot "contract[] with its co-liable party, [the claimant], to make [the claimant] solely liable." (Merit Br. 24.) This argument wrongly assumes joint and several liability exists absent a collusive settlement or a failure to provide notice. No statute creates such a liability. Unless liability is imposed by statute, "a statutory subrogee has no basis to pursue any

portion of a claimant's personal-injury award from a third party as reimbursement for workers' compensation benefits paid to the claimant." *Ohio Bureau of Workers' Comp. v. McKinley*, 130 Ohio St.3d 156, 2011-Ohio-4432, ¶ 31.

Third, the Bureau suggests its "approach is supported by both R.C. 4123.931(H), regarding a Bureau-driven action against the tortfeasor, and by R.C. 4123.93, which establishes the formula for recovery and the process for a conference with the administrator's designee." (Merit Br. 25.) This suggestion is puzzling, as neither provision has anything to do with R.C. 4123.931(G). R.C. 4123.931(H) creates a separate cause of action that "is derivative, arising directly from the injury to the claimant." *McKinley*, 2011-Ohio-4432, ¶ 45 (Pfeifer, J., concurring). This *derivative* claim is irrelevant to the scope of *direct* liability under R.C. 4123.931(G). Nor does the statutory formula for the Bureau's *recovery* say anything about the scope of a third party's liability for excluding from a settlement "amounts paid *by*" the Bureau.

Finally, the Bureau argues that, unless its interpretation prevails, "R.C. 4123.931(G) would never serve any practical function because no tortfeasors would ever include a provision expressly indicating that the payment excludes amounts paid by the Bureau." (Merit Br. 27.) As discussed, however, that *is* the practical function — to prevent collusive settlements that, in the words of the late Chief Justice Moyer, give the claimant "a lower settlement amount from the tortfeasor, in exchange for an agreement stating that the entire amount was not subject to

subrogation." *Holeton,* 92 Ohio St.3d at 138 (Moyer, C.J., dissenting). On this subject, the Bureau's failure to even cite *Holeton* in its Merit Brief speaks volumes.

V. CONCLUSION

R.C. 4123.931(G) targets collusive settlements, imposing liability on third parties when they pay the claimant a smaller amount in exchange for an agreement that this payment will not be subject to subrogation. Nothing of the sort occurred here. The judgment of the Seventh District Court of Appeals should be affirmed.

Respectfully submitted,

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