STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2339

Jeff Quinn, et al.,
Respondents,

vs.

Excelsior & Grand II, LLC, et al.,
Respondents,

Bor-Son,
Appellant.

Filed August 5, 2013
Affirmed in part, reversed in part, and remanded
Smith, Judge

Hennepin County District Court
File No. 27-CV-11-13846

Richard C. Lund, Noack Law Office, Mound, Minnesota (for respondents Jeff Quinn, et al.)

Terri L. Hommerding, John G. Ness & Associates, St. Paul, Minnesota (for respondents Excelsior & Grand II, LLC, et al.)

Larry J. Peterson, Krista L. Hiner, Peterson, Logren & Kilbury, P.A., St. Paul, Minnesota (for appellant)

Considered and decided by Chutich, Presiding Judge; Smith, Judge; and Klaphake, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

SMITH, Judge

We affirm the district court's ratification of the validity of a settlement agreement between respondent Jeff Quinn and respondents Excelsior & Grand II, LLC, et al. (collectively Excelsior). Quinn's injuries were sustained during his employment with appellant Bor-Son Construction Company, Inc. Quinn's workers-compensation settlement with Bor-Son reserved Bor-Son's subrogation interests. Quinn failed to give Bor-Son timely and adequate notice of settlement negotiations. Because the district court erred in not providing a remedy for this lack of notice, we reverse and remand to the district court for it to determine the distribution, as opposed to credit, that Bor-Son will receive as a result of the Quinn-Excelsior settlement.

FACTS

Quinn sustained a workplace injury when he was an employee of Bor-Son. Quinn and Bor-Son settled his workers-compensation claims in November 2005. The settlement provided that Bor-Son and its insurer "reserve and retain any and all subrogation or indemnity rights under Minn. Stat. § 176.061." Quinn then sued Excelsior, the owner of the property where the injury occurred, but did not serve Bor-Son or its insurer with a copy of the complaint, as required by Minnesota law.

On Monday April 30, 2012, Bor-Son's attorney, Larry Peterson, received a voicemail from Quinn,[1] informing Bor-Son that Quinn and Excelsior were to proceed with mediation later that morning. Peterson had scheduled other settlement conferences for that morning and was unable to attend the mediation. Peterson contacted Quinn and Excelsior, informing each that Bor-Son and its insurer would object to any attempted settlement between Quinn and Excelsior. During the first two hours of the mediation, Quinn attempted to contact Peterson but stopped after Bor-Son staff refused to contact Peterson on his cellular telephone. Later that day, Peterson was notified by telephone that the mediation resulted in the Quinn-Excelsior settlement, which provided that the payment "include[s] subrogation claims or liens" but also included a "*Naig* settlement" as a handwritten notation. *See Naig v. Bloomington Sanitation*, 258 N.W.2d 891, 894 (Minn. 1977) (holding that an employee may settle a claim with third-party tortfeasor so long as the employer-insurer receives reasonable notice of settlement negotiations and settlement does not affect the employer's subrogation rights). The following day, Peterson contacted Quinn and Excelsior, informing each that Bor-Son and its insurer objected to the Quinn-Excelsior settlement.

Quinn moved to ratify the Quinn-Excelsior settlement and to deny Bor-Son's objection to the settlement. Bor-Son responded to Quinn's motion and moved to intervene. The district court granted Bor-Son's motion to intervene, as well as Quinn's motion to approve the Quinn-Excelsior settlement. The district court later ratified the

[1] Quinn notes that he called Peterson on Friday, April 27, moments after the settlement negotiations with Excelsior began, but Peterson did not retrieve the voicemail until the morning of Monday, April 30.

settlement, permitting Quinn and Excelsior to "distribute the settlement proceeds without providing a share for employer and insurer." This appeal followed.

D E C I S I O N

Bor-Son argues that (1) Quinn's notice to Bor-Son was insufficient, (2) the Quinn-Excelsior settlement is not a *Naig* settlement, and (3) Bor-Son is entitled to a share of the Quinn-Excelsior settlement. We address each argument in turn.

I.

The parties dispute whether Quinn provided Bor-Son with sufficient notice in two ways. Bor-Son challenges the validity of the Quinn-Excelsior settlement because Quinn's notice did not inform Bor-Son of the negotiations between Quinn and Excelsior until the morning of the scheduled mediation, and because Quinn failed to serve Bor-Son with the complaint. Bor-Son asserts that both of these actions violate Minn. Stat. § 176.061, subd. 8a (2012). The district court determined that Quinn's notice of settlement negotiations and failure to serve Bor-Son with the complaint comported with Minnesota law. We focus on the adequacy of the notice of the settlement negotiations because we conclude that that issue is dispositive.

We do not defer to the district court's conclusion when reviewing questions of law. *Jadwin v. Minneapolis Star & Tribune Co.*, 367 N.W.2d 476, 483 (Minn. 1985). Instead, we conduct an independent review of the record in light of the relevant law to determine whether the district court made the proper legal conclusion. *Id.*

To protect the employer's and insurer's subrogation interests, Minnesota law requires an employee instituting a third-party action arising out of a workplace injury to

serve a copy of the complaint and notice of trial on the employer or insurer, and any judgment rendered in the action is subject to a lien of the employer for the amount of its statutory subrogation interest. *Adams v. DSR Sales, Inc.*, 727 N.W.2d 139, 141 (Minn. 2007). Specifically, Minn. Stat. § 176.061, subd. 8a, provides for notice to the employer of an intention to settle a third-party action and such an agreement is not valid unless such notice is given to the employer "within a reasonable time." In addition, subdivision 8a provides that if the employer or insurer pays compensation to the employee under the provisions of chapter 176 and becomes subrogated to the right of the employee or the employee's dependents or has a right of indemnity, any settlement between the employee or the employee's dependents and a third party is void as against the employer's right of subrogation or indemnity. Moreover, the employer is entitled to notice of the institution of a third-party action and to notice of trial. If the action proceeds to judgment, the employer's subrogation interest becomes a lien on the judgment. Minn. Stat. § 176.061, subd. 8a.

The Minnesota Supreme Court addressed the sufficiency of notice in *Easterlin v. State*, stating that "notice of settlement negotiations for a *Naig* settlement must be given to the employer-insurer in a manner and at a time such that the employer-insurer has a reasonable opportunity to participate in the negotiations and to appear or intervene in any litigation to protect its interests." 330 N.W.2d 704, 708 (Minn. 1983). "Lack of such notice is presumptively prejudicial to the employer's exercise of its subrogation rights." *Ruddy v. Ford Motor Co.*, 399 N.W.2d 634, 636 (Minn. App. 1987), *review denied* (Minn. Mar. 25, 1987). After the presumption arises, the employee must rebut the

presumption to prevent the employer-insurer from asserting a credit against the *Naig* settlement proceeds. *Easterlin*, 330 N.W.2d at 708.

The facts here are similar to those in *Ruddy*, in which the employer-insurer did not receive reasonable notice of the trial date, nor did it receive notice when settlement negotiations began. 399 N.W.2d at 637. Notably, the Ruddys served the employer-insurer with a copy of the summons and complaint, whereas Quinn failed to do so here. *See id.* at 635. However, the Ruddys did not inform the employer-insurer that settlement negotiations were taking place until three days before the *Naig* settlement was reached. *Id.* at 637. On appeal, we held that, "[g]iven this evidence, it is clear that employer-insurer was not given reasonable notice of the pending settlement nor an opportunity to participate in the negotiations in a manner necessary to protect its interests." *Id.*

Similarly here, we conclude that the notice of settlement negotiations provided by Quinn to Bor-Son was inadequate. A voicemail late in the day Friday, which was retrieved on Monday, for a Monday-morning settlement, did not provide Bor-Son with the opportunity to which it is entitled. Minnesota law makes apparent that notice of the settlement negotiations to the employer-insurer is vital. Minn. Stat. § 176.061, subd. 8a (stating that "a settlement between the third party and the employee is not valid unless prior notice of the intention to settle is given to the employer within a reasonable time"); *Easterlin*, 330 N.W.2d at 708 (holding that "lack of notice is presumptively prejudicial to the employer").

Quinn argues that, even if notice of the settlement negotiations failed to comply with the statutory directive, he is able to rebut the presumption of any prejudice. As

support, he notes that he had a weak case for liability but substantial damages and therefore Excelsior had an incentive to eliminate his lawsuit because of the substantial damages and sympathy he would garner. Quinn also highlights that, even if Bor-Son had attended the mediation, "it is unlikely any offer would have been made to [Bor-Son] for its subrogation interest." This information does not assist Quinn in carrying his burden to rebut the presumption of prejudice, and Quinn offers no caselaw identifying cases similar in which the burden was successfully rebutted. *See Ruddy*, 399 N.W.2d at 636 n.2 (noting that even if the employer would be unable to settle its claim "it should not be deprived of the opportune time to try").

Regarding service of the complaint, we agree that the consequences for failure to give notice of the initiation of an action is the same as that for failing to give notice of an intention to settle. *See Benjamin B. Womack v. Fikes of Minn.*, 61 W.C.D. 574, 583 (Minn. Workers' Comp. Ct. App. 2001), *overruled on other grounds by Adams*, 727 N.W.2d at 143 n.4[2]. Quinn violated the plain language of the statute by not serving Bor-Son with the complaint. *See* Minn. Stat. § 176.061, subd. 8a. Because lack of notice of the settlement already grants Bor-Son its requested relief, we will not further address Quinn's failure to timely serve the complaint on Bor-Son.

In sum, Bor-Son did not receive information about the mediation until the morning of the settlement, and Quinn failed to rebut the presumption of prejudice. Accordingly,

[2] We note that, although the supreme court summarily affirmed *Womack*, it specifically rejected its rationale as to computation of the penalty for lack of notice. *Adams*, 727 N.W.2d at 143 n.4. We are also mindful that "[s]ummary affirmances have no precedential value because they do not commit the [supreme] court to any particular point of view." *Hoff v. Kempton*, 317 N.W.2d 361, 366 (Minn. 1982).

we are persuaded by Bor-Son's assertion that notice, as required by Minn. Stat. § 176.061, subd. 8a, was lacking.

II.

Because notice was lacking, Bor-Son contests the district court's determination that the settlement was a valid *Naig* settlement. In *Naig*, the supreme court authorized an employee to settle non-subrogable claims so long as notice to the employer is proper and the employee establishes "that the settlement concerns only damages not recoverable under worker's compensation, or allocates the settlement into recoverable and nonrecoverable claims." 258 N.W.2d at 894.

Agreements relating to the settlement of litigation are interpreted as contracts. *Ryan v. Ryan*, 292 Minn. 52, 55, 193 N.W.2d 295, 297 (1971). If the terms of a settlement agreement are unambiguous, the language of the agreement must be given its plain and ordinary meaning. *Humphrey v. Philip Morris USA, Inc.*, 713 N.W.2d 350, 355 (Minn. 2006). On appeal, questions of contractual and statutory interpretation are legal issues, which we review de novo. *Id.*

The settlement agreement is contradictory on its face because it includes the notation "*Naig* settlement," and also contains language purporting to "include subrogation claims or liens." This contradiction was eliminated at oral argument before this court when Quinn conceded that the Quinn-Excelsior settlement was not a general release. If the Quinn-Excelsior settlement includes a settlement of subrogation interests, the settlement would be void because, in a *Naig* settlement, the employer retains its subrogation rights. *See Ruddy*, 399 N.W.2d at 636. This is because a *Naig* settlement, by

definition, protects the employer's subrogation claims and permits the employee to settle only non-subrogable claims. *See Naig*, 258 N.W.2d at 894.

We note that, even with these rights preserved, Bor-Son is prejudiced because in instances such as this, "the employer should not be denied whatever tactical advantage there might be in attempting to settle its subrogation claim at the same time the employee is settling his claim for non-workers' compensation damages." *Easterlin*, 330 N.W.2d at 708. Moreover, because the notice was lacking, Bor-Son is entitled to a remedy, as discussed in section III of this opinion. This treatment comports with our past caselaw in which lack of notice did not invalidate the agreement altogether, but instead provided the employer with a remedy regarding the proceeds of the settlement. *See, e.g.*, *Modjeski v. Fed. Bakery of Winona, Inc.*, 307 Minn. 432, 438, 240 N.W.2d 542, 546 (1976) (holding that even though the settlement by its terms excluded employer's subrogation rights, employer was entitled to a credit for future benefits because notice was lacking). Therefore, a *Naig* settlement resulted, despite Quinn's faulty notice. We proceed with our analysis, next identifying the appropriate remedy for this situation.

III.

Because it did not receive proper notice of the settlement negotiations, Bor-Son contends that it is entitled to a share of the $57,500 Quinn-Excelsior settlement, rather than a credit. The credit remedy would be inappropriate, Bor-Son argues, because Bor-Son will not pay Quinn any additional amounts under the workers' compensation act, and therefore, there is no future compensation to take a credit against. Instead, Bor-Son

argues for a share of the settlement as calculated by Minn. Stat. § 176.061, subd. 6 (2012).

The parties did not make apparent to this court which claims are subject to subrogation. Quinn received $57,500 as a result of the Quinn-Excelsior settlement, but the settlement provided to us is a one-page form document with handwritten notations. Surprisingly, it is unclear what, exactly, is included in the Quinn-Excelsior settlement agreement. This is particularly evident by the seemingly conflicting settlement language that it is a *Naig* settlement that includes subrogation claims. Quinn's complaint establishes that Quinn sought compensation because Excelsior's negligence caused "severe and painful injuries"; that, as a result, Quinn incurred present and future medical expenses; and that Quinn is unable to engage in his usual occupation because of his injuries.

As Quinn highlights, longstanding precedent holds that, "when an employee settles with a third[-]party tortfeasor without giving sufficient notice to his employer, the employer is entitled to a credit for future benefits payable in addition to its right to bring an action against the third party based on its subrogation claim." *See Ruddy*, 399 N.W.2d at 637. Thus, he argues, because notice was lacking, the employer-insurer is entitled to a credit "for future compensation payable against [Quinn's] *Naig* settlement recovery." *Easterlin*, 330 N.W.2d at 708.

But a 2007 supreme court case informs our analysis regarding allocation. In *Adams*, the supreme court discussed *Womack*, in which the employee failed to provide the employer notice of the institution of a third-party suit and trial, as required by Minn.

Stat. § 176.067, subd. 8a. *Adams*, 727 N.W.2d at 142; *Womack*, 61 W.C.D. at 586. The supreme court declared that *Womack*'s dollar-for-dollar offset for worker's compensation claims is inappropriate and instead concluded that, "when there is no notice and the presumption of prejudice is not rebutted, the employer and insurer are entitled to have the statutory distribution formula applied to the *Naig* settlement proceeds." *Adams*, 727 N.W.2d at 142-43.

Here, the district court distinguished *Adams*, determining that the *Adams* language was dicta. Our review of *Adams* does not lead us to the same conclusion. Although *Easterlin* contemplated credit only for non-subrogable claims without notice, *Adams* permits a district court to apply the statutory distribution formula in such instances. *Adams*, 727 N.W.2d at 142-43. Quinn describes *Adams* as "questionable precedent," describe the supreme court as going "awry," and assert that "*Adams* did not overrule *Easterlin*; rather, it misinterpreted *Easterlin* while purporting to endorse it." We are unconvinced that the supreme court "misinterpreted" its own precedent, and it is not our role to review decisions of the supreme court. Bor-Son is entitled to relief from the Quinn-Excelsior settlement. However, it is not our role to calculate the amount of the share to which Bor-Son is entitled.

In sum, we affirm the district court's finding that the Quinn-Excelsior settlement was a *Naig* settlement. But we reverse the district court as to its calculation of Bor-Son's subrogation interest and remand to the district court for it to determine the particular distribution that Bor-Son will receive as a result of the Quinn-Excelsior settlement.

Affirmed in part, reversed in part, and remanded.