Circuit Court for Prince George's County
Case No. CAL15-00150

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2223

September Term, 2016

RACHEAL SHAW

v.

SMS ASSIST, LLC

Meredith,
Arthur,
Eyler, James R.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: January 3, 2018

Under the Maryland workers' compensation statutes, if an employee is injured in the course of employment as a result of the negligence of a person other than his or her employer, the employee may recover workers' compensation benefits from the employer and may also bring a civil action for damages against the tortfeasor. If, however, the employee recovers damages from the tortfeasor, a self-insured employer or the employer's insurer has what is variously described as a statutory lien or a right of subrogation in the employee's recovery. *See* Maryland Code (1991, 2016 Repl. Vol.) § 9-902(e) of the Labor and Employment Article ("LE").

In this case, the employer settled a workers' compensation claim with an injured employee. The employee had common-law claims for damages against two tortfeasors, the first of which had funded the workers' compensation settlement in accordance with a contractual obligation to indemnify the employer against such claims. When the employee settled her tort claim against the second tortfeasor, the first tortfeasor claimed the right to assert the employer's statutory lien or right of subrogation in that settlement.

The circuit court ordered the employee to reimburse her employer, which, in turn, apparently will reimburse the first tortfeasor. The employee appealed. We affirm.

FACTUAL AND PROCEDURAL HISTORY

On January 17, 2012, Racheal Shaw slipped and fell on a wet floor at the Family Dollar store in Temple Hills at which she worked. Ms. Shaw asserted a workers' compensation claim, in which she identified Family Dollar as her employer. Twenty months after the injury, Ms. Shaw, Family Dollar, and its insurer settled the workers'

compensation claim for $45,596.20. The settlement agreement specifically stated that Family Dollar and its insurer "do not waive any of their statutory lien rights with regard to any third-party action filed or to be filed in the future relating to the accidental injury." In other words, Family Dollar and its insurer did not waive their rights under LE § 9-902(e) to require Ms. Shaw to reimburse them out of any funds that she might receive in a civil action against a third-party tortfeasor.

Family Dollar had contracted with SMS Assist, LLC, to provide floor cleaning services in the store where Ms. Shaw was injured. In the contract with Family Dollar, SMS was required to indemnify Family Dollar for the costs that it incurred in connection with workers' compensation claims that resulted from acts or omissions by SMS or its subcontractors. In accordance with that obligation, SMS paid $78,472.00 to Family Dollar for expenses related to Ms. Shaw's claim. In exchange, Family Dollar released SMS from any claims relating to Ms. Shaw's workers' compensation claim.

On January 9, 2015, several months after the settlement of the workers' compensation claim and Family Dollar's release of SMS, Ms. Shaw filed suit against SMS and its subcontractor, MK Commercial Cleaning, in the Circuit Court for Prince George's County. SMS responded with a cross-claim against MK, in which it asserted a contractual and a common-law right of indemnification. In addition, SMS asserted that because it had indemnified Family Dollar for the employer's liability to Ms. Shaw under the workers' compensation laws, it (SMS) had a right of subrogation under LE § 9-902 in up to $78,472.00 in payments from MK to Ms. Shaw.

After more than a year of litigation, Ms. Shaw agreed with MK to settle her claims for $50,000.00. On November 7, 2016, the court approved the dismissal of Ms. Shaw's claims against SMS and MK, with prejudice.

Meanwhile, on October 19, 2016, SMS had filed what it called a "Line Asserting Statutory Lien," in which it claimed that under LE § 9-902(e) it had the right to assert Family Dollar's statutory lien or right of subrogation in the settlement between Ms. Shaw and MK. On November 10, 2016, the circuit court held a hearing on SMS's entitlement to a lien in the settlement proceeds.

At the end of that hearing, the court ruled that under LE § 9-902 Ms. Shaw was required to reimburse Family Dollar from the settlement proceeds, after deducting the costs and expenses that she had incurred in prosecuting the case against SMS and MK. Although the court did not expressly address SMS's interest in the settlement proceeds, it appears to have understood that SMS would assert a claim of subrogation against Family Dollar to recover the money that Family Dollar would receive from Ms. Shaw.

On November 18, 2016, the court dismissed SMS's cross-claims for indemnification with prejudice and its cross-claim for subrogation without prejudice. On December 6, 2016, the clerk docketed a written order that reflected the court's earlier, oral ruling that, after deducting the costs and expenses of prosecuting this action, Ms. Shaw was required to pay the net settlement proceeds to Family Dollar from the settlement proceeds.

Ms. Shaw moved for reconsideration of the order requiring her to pay a portion of the settlement proceeds to Family Dollar.[1] The court denied her motion on December 6, 2016. She noted a timely appeal on December 19, 2016.

SMS'S MOTION TO DISMISS THE APPEAL

SMS has moved to dismiss the appeal. It argues that Ms. Shaw did not appeal from a final judgment and, hence, that this Court lacks appellate jurisdiction. Because of this challenge to our power to decide the case, we must evaluate SMS's motion to dismiss before we consider the merits of Ms. Shaw's appeal.

Generally, parties may appeal only upon the entry of a final judgment. Md. Code (1974, 2013 Repl. Vol.), § 12-301 of the Courts and Judicial Proceedings Article ("a party may appeal from a final judgment entered in a civil or criminal case by a circuit court").

> "[A] ruling must ordinarily have the following three attributes to be a final judgment: (1) it must be intended by the court as an unqualified, final disposition of the matter in controversy, (2) unless the court acts pursuant to Maryland Rule 2-602(b) to direct the entry of a final judgment as to less than all of the claims or all of the parties, it must adjudicate or complete the adjudication of all claims against all parties; [and] (3) it must be set forth and recorded in accordance with Rule 2-601."

[1] Ms. Shaw filed her motion on November 21, 2016, after the court had announced its rulings, but before it had signed the order. Under Rule 2-534, "A motion to alter or amend a judgment filed after the announcement or signing by the trial court of a judgment but before entry of the judgment on the docket shall be treated as filed on the same day as, but after, the entry on the docket."

Metro Maint. Sys. South, Inc. v. Milburn, 442 Md. 289, 298 (2015) (citing *Rohrbeck v. Rohrbeck*, 318 Md. 28, 41 (1989)); *Md. Bd. of Physicians v. Geier*, 225 Md. App. 114, 129-30 (2015).

According to SMS, the order requiring Ms. Shaw to pay most of the settlement proceeds to Family Dollar was not a final judgment, because, SMS says, it did not "concern any of the claims made in the underlying litigation." Although SMS itself had claimed a lien or right of subrogation in the net settlement proceeds under LE § 9-902(e), it asserts that "[t]he operation of § 9-902(e) was never a matter in controversy in the action before the Circuit Court." SMS goes on to assert that, by ordering Ms. Shaw to pay a portion of the settlement to Family Dollar, the circuit court "did not grant relief to any party in the action" and that its ruling "did not dispose of any claims in controversy between the parties." On the basis of these assertions, SMS concludes that Ms. Shaw has appealed from an order that is not a final judgment.

SMS's position is incorrect. Until the court had decided whether SMS had a statutory lien or right of subrogation in the settlement proceeds (as it claimed) or whether Ms. Shaw could take the proceeds free and clear (as she claimed), it had not yet reached "an unqualified, final disposition of the matter in controversy." *Metro Maint. Sys. South, Inc. v. Milburn*, 442 Md. at 298. Until then, therefore, the court had not yet entered a final judgment. Although the order in question may not have "grant[ed]" relief to Ms. Shaw or SMS (in that it did not award the net settlement proceeds to either of them), it certainly "dispos[ed] of" the remaining "claims in controversy," by requiring Ms. Shaw

to pay the net proceeds to SMS's subrogor, Family Dollar. Because all of the other claims and cross-claims had been dismissed, the order concerning the settlement proceeds was the final judgment.

Alternatively, if we viewed the final judgment as the order of November 18, 2016, in which the court formally dismissed all of the remaining claims framed by the pleadings in the case by dismissing SMS's cross-claims against MK, Ms. Shaw would still have the right to bring this challenge to the circuit court's subsequent ruling regarding the statutory lien in the settlement proceeds. If the final judgment was the order of November 18, 2016, the order concerning the settlement proceeds would be "collateral" to the merits, much like an order that awards sanctions for litigation abuses (*see, e.g.*, *Johnson v. Wright*, 92 Md. App. 179, 181-82 (1992)) and an order that awards attorneys' fees under a statute or rule. *See, e.g.*, *Blake v. Blake*, 341 Md. 326, 336-38 (1996). A party aggrieved by such an order has the right to challenge it on appeal, as long as he or she notes an appeal within 30 days of when the order is entered on the docket. *E.g. Grove v. George*, 192 Md. App. 428, 431 (2010) (considering appeal taken from post-judgment award of attorneys' fees). Ms. Shaw met that criteria in this case, because she noted her appeal 13 days after the clerk entered the relevant order on the docket.

If SMS's position on finality were correct, it would appear that Ms. Shaw would never have a right to appeal an order requiring her to pay most of the settlement proceeds to Family Dollar. Because SMS's position leads directly to that completely absurd conclusion, it cannot possibly be correct. We have jurisdiction to consider her appeal.

QUESTIONS PRESENTED

Ms. Shaw presents four questions for review, which we consolidate to one basic underlying question: Did the circuit court err in ordering Ms. Shaw to pay the net settlement proceeds, after deducting the costs and expenses of this litigation, to Family Dollar?[2] We see no error.

DISCUSSION

I. The Alleged Lack of Subject Matter Jurisdiction

As a preliminary issue, Ms. Shaw argues that the circuit court "exceeded its jurisdiction" in ordering her to pay the net settlement proceeds to Family Dollar. She contends that the Workers' Compensation Commission, and not the court, should have decided any questions concerning the operation of the statutory lien or right of subrogation. She does not base her argument on the language of LE § 9-902(e), but on

[2] Ms. Shaw presents her questions as follows:

1. Did the Circuit Court error [sic] when it ruled on a workers' compensation issue not previously addressed by the Maryland Workers' Compensation Commission?

2. Did the Circuit Court error [sic] in allowing Appellee SMS-Assist to assert a workers' compensation lien against Ms. Ms. Shaw, when SMS-Assist is not an entity entitled to lien rights under the Maryland Workers' Compensation Act?

3. Did the Circuit Court error [sic] when it ordered Family Dollar to be indemnified twice for the same workers' compensation injury?

4. Was it error for the Circuit Court to consider the assertion of the lien, since the lien was not asserted for almost two years after the commencement of the action?

the proposition that the Commission has "sole original jurisdiction over settlements after a claim has been filed with the Commssion." *Altman v. Safeway Stores, Inc.*, 52 Md. App. 564, 568 (1982). We are unpersuaded.

LE § 9-901(2) states that when a person other than the employer is liable for the harm to the injured employee, the employee may "bring an *action for damages* against the person liable for the injury or death or, in case of joint tort feasors, against each joint tort feasor." (Emphasis added.) LE § 9-902(e) states that if an injured employee "recover[s] *damages*" from a third-party tortfeasor, the employee must "reimburse the self-insured employer, insurer, Subsequent Injury Fund, or Uninsured Employers' Fund" for "the compensation already paid or awarded" and other amounts after deducting the costs and expenses of the action. (Emphasis added.)

The language of these statutes is clear and unambiguous. *See Podgurski v. OneBeacon Ins. Co.*, 374 Md. 133, 144 (2003) (holding that LE § 9-902(e) "is clear and unambiguous on its face"). They contemplate that an injured employee can bring an "action for damages," but that if the employee "recovers damages," he or she must reimburse the person who paid workers' compensation benefits.

An injured employee, however, could not bring an "action for damages" against a third-party tortfeasor before the Workers' Compensation Commission. Nor could an employee "recover damages" from a third-party tortfeasor anywhere other than in a civil action in a court of law. Nothing in LE § 9-902(e) suggests that, once the injured employee "recover[s] damages" in a civil action against a third-party tortfeasor, the

parties must return to the Workers' Compensation Commission to obtain an order concerning whether the employer or its insurer has a lien in the recovery. Indeed, it is unclear how the Commission could obtain any authority over a third-party tortfeasor like SMS or MK, which is neither an employer nor an employer's insurer.

Furthermore, Maryland courts have long recognized that the right of subrogation against a third-party tortfeasor is independent of the workers' compensation statute; the statute simply creates a mechanism for enforcing the right. *See W. Md. Ry. Co. v. Emp'rs' Liab. Assur. Corp.*, 163 Md. 97, 102 (1932); *Saadeh v. Saadeh Inc.*, 150 Md. App. 305, 314 (2003). SMS therefore had no obligation to go before the Workers' Compensation Commission to assert a right in the proceeds of the settlement of the civil suit for damages that Ms. Shaw brought against MK. Even though the Commission has "sole original jurisdiction over settlements" of "a claim" for workers' compensation benefits (*Altman v. Safeway Stores, Inc.*, 52 Md. App. at 568), it has no such jurisdiction over settlements of civil actions for damages in a circuit court.

II. SMS's Alleged Lack of "Standing"

Under LE § 9-902(e), when an injured employee recovers damages from a third-party tortfeasor, he or she must "reimburse the self-insured employer, insurer, Subsequent Injury Fund, or Uninsured Employers' Fund" for "the compensation already paid or awarded" and for an assortment of other benefits. Ms. Shaw contends that SMS lacked "standing" to assert a lien or right of subrogation against her recovery, because, she says,

SMS was neither her employer, nor its insurer, nor one of the State funds. Her contention has at least two defects.

First, SMS correctly asserted that it was subrogated to the rights of Ms. Shaw's employer, Family Dollar, because SMS had discharged Family Dollar's obligation to her under the settlement of her workers' compensation claim. *See Bachmann v. Glazer & Glazer, Inc.*, 316 Md. 405, 412 (1989) ("[u]nder the doctrine of subrogation 'one who has been compelled to pay a debt which ought to have been paid by another is entitled to exercise all the remedies which the creditor possessed against that other'") (quoting *Amer. Surety Co. v. Bethlehem Bank*, 314 U.S. 314, 317 (1941)); *Poteet v. Sauter*, 136 Md. App. 383, 401 (2001). Hence, SMS could plausibly claim to have "standing" as Ms. Shaw's employer, or at least as the entity that had acquired the right to assert her employer's rights under the statute.

Second, it does not matter whether SMS was or was not Ms. Shaw's "employer" under LE § 9-902(e), because the court did not order Ms. Shaw to reimburse SMS. Instead, the court ordered Ms. Shaw to reimburse Family Dollar, which was unquestionably her employer. Since the court did not actually order Ms. Shaw to reimburse someone other than her employer, its insurer, or one of the State funds, we do not need to decide whether it could properly have done so.

At oral argument before this Court, Ms. Shaw argued that because Family Dollar evidently had some insurance at some level, it was not a "*self-insured* employer" and, hence, had no right to reimbursement under LE § 9-902(e). In her brief, however, Ms.

Shaw made no such argument. To the contrary, her brief listed Family Dollar as one of the parties that was "entitled to lien reimbursement upon a third party recovery." Because Ms. Shaw asserted her new argument for the first time at oral argument, it is not before us. *See, e.g.*, *Degroft v. Lancaster Silo Co.*, 72 Md. App. 154, 159 (1987) (refusing to address a question "for the simple reason that appellant did not present or argue the issue in his brief"); *see also* Md. Rule 8-504(a)(5) (stating that an appellate brief "shall . . . include . . . [a]rgument in support of the party's position").

But even if the argument were before us, it was not preserved, because Ms. Shaw did not present it to the circuit court. Md. Rule 8-131(a). As a result of Ms. Shaw's failure to present (let alone develop) the argument in the circuit court, we cannot rule out the possibility that Family Dollar was self-insured for claims of this magnitude. In this regard, we note that SMS indemnified Family Dollar, not Family Dollar's insurer. Furthermore, had Ms. Shaw raised the question of whether Family Dollar was self-insured, the court could easily have adjusted its order to require her to reimburse the insurer rather than Family Dollar. There is no serious question that SMS, having discharged the insurer's obligation to fund the workers' compensation settlement, would have been subrogated to the insurer's rights with respect to Ms. Shaw.

III. Estoppel and Detrimental Reliance

At the hearing in the circuit court, Ms. Shaw's attorneys represented that, before they filed suit against SMS and MK, they spoke with an undisclosed representative of Family Dollar's insurer, who informed them that the insurer "had no intention of trying to

enforce this lien." In contravention of Md. Rule 2-311(d), however, the attorneys did not support that representation with an affidavit or with any papers on which it was based.

After the court announced its ruling, Ms. Shaw moved for reconsideration. As an attachment to that motion, Ms. Shaw included an email, in which a Family Dollar employee (who is evidently not an attorney) wrote that the workers' compensation lien "has been satisfied by SMS."

On appeal, Ms. Shaw argues that, but for the employee's representation (that Family Dollar's lien had "been satisfied"), she would not have filed suit against SMS and MK. She seems to argue that because of the representations of the Family Dollar employee, SMS is somehow estopped from asserting a right in her recovery (or perhaps estopped from asserting that she must reimburse anyone for the funds that she received in the workers' compensation settlement). We reject her argument.

Before the court made its initial ruling on the merits, it had nothing before it on this issue, except an unsworn representation of counsel about someone else's alleged conversation with an unnamed representative of an insurer. The court was not required to accept that representation. In any event, Ms. Shaw no longer appears to contend that the representation to the court was even accurate, as she focuses now not on an alleged conversation with the insurer, but on the email from the Family Dollar employee.

Ms. Shaw did not bring that email to the court's attention until she filed her post-judgment revisory motion under Rule 2-534, the denial of which we review for abuse of discretion. *Morton v. Schlotzhauer*, 449 Md. 217, 232 & n.10 (2016). "A circuit court

does not abuse its discretion when it declines to entertain a legal argument made for the first time in a motion for reconsideration that could have, and should have, been made earlier, and consequently was waived." *Id.* at 232 n.10. As Judge Moylan has explained:

> What is, in effect, a post-trial motion to reconsider is not a time machine in which to travel back to a recently concluded trial in order to try the case better with hindsight. The trial judge has boundless discretion not to indulge this all-too-natural desire to raise issues after the fact that could have been raised earlier but were not or to make objections after the fact that could have been raised earlier but were not. Losers do not enjoy *carte blanche*, through post-trial motions, to replay the game as a matter of right.

Steinhoff v. Sommerfelt, 144 Md. App. 463, 484 (2002).

Even if Ms. Shaw had properly presented the email to the court before the ruling on the merits, the court would not have erred in discounting it. The employee's representation flatly contradicts Ms. Shaw's settlement agreement with Family Dollar, which states that Family Dollar and its insurer "do *not* waive any of their statutory lien rights with regard to any third-party action filed or to be filed in the future relating to the accidental injury." (Emphasis added.) Furthermore, because the Family Dollar employee told Ms. Shaw's attorneys that the lien "has been satisfied by SMS," her attorneys could not reasonably have believed that SMS would acquiesce in Ms. Shaw's effort to make SMS pay her twice for the same injury. The claim of detrimental reliance has no merit.

IV. Double-Recovery

Ms. Shaw argues that the court's order allows Family Dollar to obtain a "double-recovery." She appears to reason that the court required her to send some of the MK

settlement to Family Dollar even though SMS has already indemnified Family Dollar for the sums that it paid to her in the workers' compensation settlement.

Ms. Shaw ignores the virtual certainty that SMS will assert (if it has not already asserted) its right of subrogation in every dollar of what Family Dollar will receive under the circuit court's order. She also ignores the indisputable fact that *she* would receive a double-recovery if she could evade her statutory obligation to reimburse her employer for the compensation that she had previously received in the workers' compensation settlement. *Podgurski v. OneBeacon Ins. Co.*, 374 Md. at 154 ("'the claimant should not be allowed to keep the entire amount both of his award and his common law damage recovery'" (quoting *Chesapeake Haven Land Corp. v. Litzenberg*, 141 Md. App. 411, 420 (2001)). Because the circuit court understood that SMS would assert a right of subrogation in the funds that it ordered Ms. Shaw to pay to Family Dollar, its order was designed to ensure that no one – neither Ms. Shaw nor Family Dollar – would receive a double-recovery.

V. The Allegedly Untimely Counterclaim

Finally, Ms. Shaw argues that SMS's assertion of a statutory lien was "effectively" a counterclaim against her. Citing Md. Rule 2-331(d), she argues that SMS was required to file its putative counterclaim within 30 days of its answer. Because SMS did not assert its right to a lien until more than a year after its answer, Ms. Shaw argues that she could move to strike it under Rule 2-331(d) and the court was required to grant the motion

"unless there [was] a showing that they delay d[id] not prejudice other parties to the action." *Id.* Her argument has at least two problems.

First, Ms. Shaw never actually filed a formal motion to strike the alleged counterclaim. She did not even mention the prospect of striking SMS's "line" until she filed her motion for reconsideration, after the court had ruled. The circuit court had almost "boundless discretion" not to consider that argument. *Steinhoff v. Sommerfelt*, 144 Md. App. at 484.

Second, even if Ms. Shaw had filed a timely motion to strike, and even if SMS's assertion of a statutory right in the settlement proceeds is correctly understood to be a "counterclaim," the court could readily have found that Ms. Shaw did not suffer the prejudice necessary to strike SMS's pleading. *See* Md. Rule 2-331(d). Because the employer's statutory lien or right of subrogation takes effect by operation of law, Ms. Shaw would have had an obligation to indemnify her employer under LE § 9-902(e), regardless of whether SMS had ever claimed that it was entitled to assert the employer's rights. Furthermore, not only did Ms. Shaw's attorneys file suit against SMS with full knowledge that it had indemnified Family Dollar for the workers' compensation settlement with Ms. Shaw, but in its cross-claim against MK, SMS had expressly asserted that it had a right to up to $78,472.00 in payments from MK to Ms. Shaw because it had indemnified Family Dollar for the employer's liability to Ms. Shaw under the workers'

compensation laws. In these circumstances, it should have come as no surprise that SMS intended to assert Family Dollar's rights under LE § 9-902(e).

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.