

Consultants, Inc. (“Terracon”), Pendleton Construction Group, LLC (“Pendleton”), D.A.G. Construction Co., Inc. (“D.A.G.”), and Triversity Construction Co., LLC (“Triversity”), each of whom Plaintiff alleges had responsibilities related to the Casino Project, for negligence.¹

2. Circumstances Giving Rise To the Question of Law

At the time of his alleged injuries, Plaintiff was working for Jostin as a concrete finisher at the Casino Project. (Doc. 49 at ¶ 1). Defendant Messer was the general contractor for the Casino Project, and Jostin was one of its subcontractors. (Doc. 49 at ¶¶ 1, 4; Doc. 14-2 at ¶¶ 1-4).

Prior to Plaintiff’s accident, Defendant Messer had obtained authority from the Ohio Bureau of Workers’ Compensation (“BWC”) to self-administer the workers’ compensation program for all of the enrolled subcontractors on the Casino Project. (Doc. 14-2 at ¶¶ 1-4; Doc. 14-3). Jostin and Defendants and J & B Steel, D.A.G., and Triversity were enrolled subcontractors participating in Defendant Messer’s workers’ compensation program for the Casino Project under the certificate of authority issued by the BWC to Defendant Messer. (Doc. 14-2 at ¶¶ 1-4; Doc. 14-3; Doc. 14-4).

Defendants Messer, J & B Steel, D.A.G., and Triversity moved for summary judgment on the grounds that they are entitled to immunity from Plaintiff’s negligence claim pursuant to Ohio’s workers’ compensation laws, including Ohio Revised Code

¹ Plaintiff also seeks punitive damages. Plaintiff asserted an employer intentional tort claim against Defendant Messer (only), which was dismissed. (*See* Doc. 33).

§§ 4123.35 and 4123.74. (Docs. 14, 37, and 40).² The Court found that Defendant Messer was entitled to immunity as the self-insuring employer on the Casino Project. (Doc. 68 at 6). The Court found that Defendants J & B Steel, D.A.G., and Triversity (“Subcontractor Defendants”) were not entitled to immunity because an enrolled subcontractor is only entitled to immunity vis-à-vis its own employees under the above-cited statutes. (*Id.* at 13-14). Accordingly, the Court granted Defendant Messer’s motion for summary judgment and denied the Subcontractor Defendants’ motions for summary judgment. (*Id.* at 19).

² Section 4123.35(O) provides, in relevant part:

A self-insuring employer who complies with this division is entitled to the protections provided under this chapter and Chapter 4121. of the Revised Code with respect to the employees of the contractors and subcontractors covered under a certificate issued under this division for death or injuries that arise out of, or death, injuries, or occupational diseases that arise in the course of, those employees’ employment on that construction project, as if the employees were employees of the self-insuring employer, provided that the self-insuring employer also complies with this section. . . . The contractors and subcontractors included under a certificate issued under this division are entitled to the protections provided under this chapter and Chapter 4121. of the Revised Code with respect to the contractor’s or subcontractor’s employees who are employed on the construction project which is the subject of the certificate, for death or injuries that arise out of, or death, injuries, or occupational diseases that arise in the course of, those employees’ employment on that construction project.

Section 4123.74 provides:

Employers who comply with section 4123.35 of the Revised Code shall not be liable to respond in damages at common law or by statute for any injury, or occupational disease, or bodily condition, received or contracted by any employee in the course of or arising out of his employment, or for any death resulting from such injury, occupational disease, or bodily condition occurring during the period covered by such premium so paid into the state insurance fund, or during the interval the employer is a self-insuring employer, whether or not such injury, occupational disease, bodily condition, or death is compensable under this chapter.

3. Question of Law To Be Answered

The question of law to be answered by the Supreme Court of Ohio is as follows:

Whether Ohio Rev. Code §§ 4123.35 and 4123.74 provide immunity to subcontractors enrolled in a Workers' Compensation self-insurance plan from tort claims made by employees of [other] enrolled subcontractors injured while working on the self-insured project.

As set forth in its Order granting the Subcontractor Defendants' motion to certify a question of state law to the Supreme Court of Ohio (Doc. 73), the Court finds that this is a question of Ohio law that may be determinative of the proceeding and for which there is no controlling precedent in the decisions of this Supreme Court.

C. Names of the Parties

Plaintiff

Daniel Stolz

Defendants

J & B Steel Erectors, Inc.
Messer Construction Co.³
Terracon Consultants, Inc.
Pendleton Construction Group, LLC
D.A.G. Construction Co., Inc.
Triversity Construction Co., LLC

³ Defendant Messer Construction Co. was terminated from the case on December 31, 2014, when the Court granted its motion for summary judgment. Plaintiff's negligence claim remains pending against all other Defendants. Defendants Terracon Consultants, Inc. and Pendleton Construction Group, LLC have not asserted an immunity defense.

D. Counsel for Each Party

Plaintiff's Counsel

Brett Colbert Goodson
Goodson & Company Ltd
110 E 8th Street
Suite 200
Cincinnati, OH 45202-2132
513-621-5631
Email: brettgoodson@goodsonandcompany.com
Attorney Registration Number: 0023163

Stephanie M Day
Santen & Hughes
600 Vine Street
Suite 2700
Cincinnati, OH 45202
513-721-4450
Fax: 513-721-0109
Email: smd@santen-hughes.com
Attorney Registration Number: 0073006

Defendants' Counsel

For Defendant J & B Steel Erectors, Inc.:

Kimberly A Pramaggiore
Kohnen & Patton
PNC Center
201 East Fifth Street
Suite 800
Cincinnati, OH 45202
513-381-0656
Email: kpramaggiore@kplaw.com
Attorney Registration Number: 0066618

For Defendant Messer Construction Co.:

Jane Michele Lynch
Green & Green - 3
800 Performance Place
109 North Main Street
Dayton, OH 45402
937-224-3333
Fax: 937-224-4311
Email: jmlynch@green-law.com
Attorney Registration Number: 0012180

Jared A Wagner
800 Performance Place
109 North Main Street
Dayton, OH 45402
937-224-3333
Fax: 937-224-4311
Email: jawagner@green-law.com
Attorney Registration Number: 0076674

For Defendant Terracon Consultants, Inc.:

Robert W Hojnoski
Reminger Co LPA
525 Vine Street
Suite 1700
Cincinnati, OH 45202
513-721-1311
Fax: 513-721-2553
Email: rhojnoski@reminger.com
Attorney Registration Number: 0070062

Nathan Andrew Lennon
Reminger Co, LPA
525 Vine Street
Suite 1700
Cincinnati, OH 45202
513-544-4012
Fax: 513-721-2553
Email: nlennon@reminger.com
Attorney Registration Number: 0091743

For Defendants Pendleton Construction Group, LLC, D.A.G. Construction Co., Inc., and Triversity Construction Co., LLC:

Stephen James Patsfall
Patsfall Yeager & Pflum LLC - 1
One W Fourth Street
Suite 1800
Cincinnati, OH 45202
513-721-4500
Email: spatsfall@pyplaw.com
Attorney Registration Number: 0012271

Stephen Michael Yeager
Patsfall Yeager & Pflum LLC - 1
205 W Fourth Street
Suite 1280
Cincinnati, OH 45202
513-721-4500
Email: syeager@pyplaw.com
Attorney Registration Number: 0011841

E. Designation of the Moving Party

Defendants J & B Steel Erectors, Inc., D.A.G. Construction Co., Inc., and Triversity Construction Co., LLC are the moving parties.

IT IS SO ORDERED.

Date: 4/13/15

s/ Timothy S. Black
Timothy S. Black
United States District Judge

Other Orders/Judgments

1:14-cv-00044-TSB Stolz v. J & B
Steel Erectors, Inc. et al

JURY,LC3

**U.S. District Court
Southern District of Ohio**

Notice of Electronic Filing

The following transaction was entered on 4/13/2015 at 1:58 PM EDT and filed on 4/13/2015

Case Name: Stolz v. J & B Steel Erectors, Inc. et al**Case Number:** 1:14-cv-00044-TSB**Filer:****Document Number:** 74**Docket Text:****CERTIFICATION ORDER. Signed by Judge Timothy S. Black on 4/13/2015. (mr1)****1:14-cv-00044-TSB Notice has been electronically mailed to:**

Stephen James Patsfall spatsfall@pyplaw.com, bwhite@pyplaw.com

Jane Michele Lynch jmlynch@green-law.com, sedwards@green-law.com

Stephen Michael Yeager syeager@pyplaw.com, mhayes@pyplaw.com

Brett Colbert Goodson brettgoodson@goodsonandcompany.com

Kimberly A Pramaggiore kpramaggiore@kplaw.com, jcohn@kplaw.com, mholland@kplaw.com

Robert W Hojnoski rhojnoski@reminger.com, jleta@reminger.com, mwhite@reminger.com

Jared A Wagner jawagner@green-law.com, aarmstrong@green-law.com

Stephanie M Day smd@santen-hughes.com

Nathan Andrew Lennon nlennon@reminger.com, shenry@reminger.com

1:14-cv-00044-TSB Notice has been delivered by other means to:

The following document(s) are associated with this transaction:

Document description:Main Document**Original filename:**n/a**Electronic document Stamp:**

[STAMP dcecfStamp_ID=1040326259 [Date=4/13/2015] [FileNumber=4856485-0
] [0c31af08d89fa23b456358ceb653ce253772d4c42689b75f6df1a30fce2a1913985
59f36f1e7e1069cd6c71da81a43f4f0b85546fa04aaf6f283636b68c554dc]]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

I CERTIFY THAT THIS IS A
TRUE AND CORRECT COPY OF THE
ORIGINAL FILED IN MY OFFICE
ON 4/13/15
RICHARD W. NAGEL, Clerk of Court
By: [Signature]
Deputy Clerk
4/15/15

DANIEL STOLZ,

Plaintiff,

vs.

J & B STEEL ERECTORS, INC., *et al.*,

Defendants.

Case No. 1:14-cv-00044

Judge Timothy S. Black

**ORDER GRANTING DEFENDANTS J & B STEEL ERECTORS, INC.,
D.A.G. CONSTRUCTION CO., INC.,
AND TRIVERSITY CONSTRUCTION CO., LLC'S
MOTION TO CERTIFY A QUESTION OF STATE LAW
TO THE SUPREME COURT OF OHIO (Doc. 70)**

This civil action is before the Court on Defendants J & B Steel Erectors, Inc., D.A.G. Construction Co., Inc., and Triversity Construction Co., LLC's motion to certify a question of state law to the Supreme Court of Ohio (Doc. 70),¹ Plaintiff's response in opposition (Doc. 71), and movants' reply. (Doc. 72).²

I. BACKGROUND

Plaintiff alleges he was injured while working as a concrete finisher for Jostin Construction, Inc. ("Jostin") at the Horseshoe Casino construction project in Cincinnati ("Casino Project"). Plaintiff brings this civil action against Defendants J & B Steel

¹ In the alternative, the movants ask the Court to certify its Order denying their motions for summary judgment to the United States Court of Appeals for the Sixth Circuit, for an interlocutory appeal pursuant to 28 U.S.C. §1292(b). Because the Court will certify the proposed question to the Supreme Court of Ohio, this Court need not address whether certification of an interlocutory appeal is warranted.

² Defendants Messer Construction Co., Terracon Consultants, Inc., and Pendleton Construction Group, LLC did not respond to the motion.

Erectors, Inc. (“J & B Steel”), Messer Construction Co. (“Messer”), Terracon Consultants, Inc. (“Terracon”), Pendleton Construction Group, LLC (“Pendleton”), D.A.G. Construction Co., Inc. (“D.A.G.”), and Triversity Construction Co., LLC (“Triversity”), each of whom Plaintiff alleges had responsibilities related to the Casino Project, for negligence.³

Defendants Messer, J & B Steel, D.A.G., and Triversity moved for summary judgment on the grounds that they are entitled to immunity from Plaintiff’s negligence claim pursuant to Ohio’s workers’ compensation laws, including Ohio Revised Code (“O.R.C.”) §§ 4123.35 and 4123.74. (Docs. 14, 37, and 40).⁴ The Court found that Defendant Messer was entitled to immunity as the self-insuring employer of the Casino

³ Plaintiff also seeks punitive damages. Plaintiff asserted an employer intentional tort claim against Defendant Messer (only), which was dismissed. (*See* Doc. 33).

⁴ Section 4123.35(O) provides, in relevant part:

A self-insuring employer who complies with this division is entitled to the protections provided under this chapter and Chapter 4121. of the Revised Code with respect to the employees of the contractors and subcontractors covered under a certificate issued under this division for death or injuries that arise out of, or death, injuries, or occupational diseases that arise in the course of, those employees’ employment on that construction project, as if the employees were employees of the self-insuring employer, provided that the self-insuring employer also complies with this section. . . . The contractors and subcontractors included under a certificate issued under this division are entitled to the protections provided under this chapter and Chapter 4121. of the Revised Code with respect to the contractor’s or subcontractor’s employees who are employed on the construction project which is the subject of the certificate, for death or injuries that arise out of, or death, injuries, or occupational diseases that arise in the course of, those employees’ employment on that construction project.

Section 4123.74 provides:

Employers who comply with section 4123.35 of the Revised Code shall not be liable to respond in damages at common law or by statute for any injury, or occupational disease, or bodily condition, received or contracted by any employee in the course of or arising out of his employment, or for any death resulting from such injury, occupational disease, or bodily condition occurring during the period covered by such premium so paid into the state insurance fund, or during the interval the employer is a self-insuring employer, whether or not such injury, occupational disease, bodily condition, or death is compensable under this chapter.

Project, having been issued a certificate of authority by the Ohio Bureau of Workers' Compensation. (*See* Doc. 68 at 6). The Court found that Defendants D.A.G., Triversity, and J & B Steel ("Subcontractor Defendants") were not entitled to immunity because an enrolled subcontractor is only entitled to immunity vis-à-vis its own employees under the above-cited statutes. (*Id.* at 13-14). Accordingly, the Court granted Defendant Messer's motion for summary judgment and denied the Subcontractor Defendants' motions for summary judgment. (*Id.* at 19).

The Subcontractor Defendants now move the Court to certify the following question to the Supreme Court of Ohio:

Whether Ohio Rev. Code §§ 4123.35 and 4123.74 provide immunity to subcontractors enrolled in a Workers' Compensation self-insurance plan from tort claims made by employees of [other] enrolled subcontractors injured while working on the self-insured project.

("Proposed Question") (Doc. 70 at 1).

II. STANDARD OF REVIEW

Federal courts are authorized to certify questions to a state supreme court. *Pennington v. State Farm Mut. Auto. Ins. Co.*, 553 F.3d 447, 450 (6th Cir. 2009). The Supreme Court of Ohio may answer questions of Ohio law certified to it by federal courts as set forth in the following Rule of Practice:

The Supreme Court may answer a question of law certified to it by a court of the United States. This rule is invoked if the certifying court, in a proceeding before it, issues a certification order finding there is a question of Ohio law that may be determinative of the proceeding and for which there is no controlling precedent in the decisions of this Supreme Court.

S.Ct.Prac.R. 9.01(A).

Whether to certify a question to a state supreme court is within the sound discretion of a district court. *Transamerica Ins. Co. v. Duro Bag Mfg. Co.*, 50 F.3d 370, 372 (6th Cir. 1995) (citing *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974)). Mere “difficulty in ascertaining local law provides an insufficient basis for certification.” *Duryee v. U.S. Dep’t of the Treasury*, 6 F.Supp.2d 700, 704 (S.D. Ohio 1995) (citing *Transcontinental Gas Pipeline Corp. v. Transportation Ins. Co.*, 958 F.2d 622 (5th Cir. 1992)). If the Court “believes it can resolve an issue of state law with available research materials already at hand, and makes the effort to do so,” certification is unwarranted. *Drown v. Wells Fargo Bank, NA*, No. 2:10–CV–00272, 2010 WL 4939963, at *1 (S.D. Ohio Nov. 30, 2010) (citing *Lehman Bros.*, 416 U.S. at 395 (Rehnquist, J., concurring)). “[F]ederal courts generally ‘will not trouble our sister state courts When we see a reasonably clear and principled course, we will seek to follow it ourselves.’” *Pennington*, 553 F.3d at 450 (quoting *Pino v. United States*, 507 F.3d 1233, 1236 (10th Cir. 2007)).

“[U]se of the certification procedure is most appropriate when the question of state law is new or state law is unsettled.” *Transamerica Ins. Co.*, 50 F.3d at 372. “Novel or unsettled questions of state law may be appropriate for certification where certification will save time, energy and resources, or where there are conflicting federal interpretations of an important state law question which would otherwise evade state court review.” *Metz*

v. *Unizan Bank*, 416 F.Supp.2d 568, 574 (N.D. Ohio 2006) (citing *Arizonans for Official English v. Arizona*, 520 U.S. 43, 77, (1997)); see also *Geib v. Amoco Oil Co.*, 29 F.3d 1050, 1060 (6th Cir. 1994)).

III. ANALYSIS

The parties agree that Ohio law governs the issue of subcontractor immunity in this case. (*See generally* Docs. 37, 40, 63). The facts, for the purposes of the subcontractor immunity inquiry, are largely undisputed. (*See* Doc. 68). Thus, the Proposed Question is a question of Ohio law. Further, the Proposed Question may be determinative of the proceeding as to the Subcontractor Defendants, because the determination of whether Plaintiff can assert his negligence claim against the Subcontractor Defendants is at issue.

The parties have not presented the Court with any case law from the Supreme Court of Ohio that addresses subcontractor immunity in the context of a self-insurance plan, and this Court has not found any in the course of its independent research. In fact, it does not appear that the Question Presented has been addressed by an Ohio Court of Appeals either. This question of Ohio law appears only to have been previously addressed in *Lancaster, et al. v. Pendleton Construction Group, LLC, et al.*, Hamilton C.P. No. A1208721 (Mar. 25, 2013). As this Court has acknowledged, it reached a conclusion contrary to that of the *Lancaster* court, which found that enrolled subcontractors were entitled to immunity under similar circumstances.⁵

⁵ Plaintiff's suggestion that Section 4123.35(O) is not susceptible to a contrary construction is belied by the result in *Lancaster*.

Because the Proposed Question has been answered differently by an Ohio court and a federal court, and because those two courts are the only courts to have addressed the question, it is both new and unsettled. When federal courts apply state law that is not well settled, it has the potential to diminish the state's sovereignty. *Scott v. Bank One Trust Co., N.A.*, 62 Ohio St.3d 39, 43 (1991). A determination by the Supreme Court of Ohio would provide clarification for both courts *and* contractors and subcontractors who seek to draft, negotiate, and bid future large-scale construction project contracts.⁶

Given the current posture of this case, the parties would be required to complete extensive discovery on liability and a jury trial before the Subcontractor Defendants could appeal the Court's decision. *See Fed. R. Civ. P. 54; White by Swafford v. Gerbitz*, 860 F.2d 661, 662 n. 1 (6th Cir. 1988) ("absent certification for an interlocutory appeal under 28 U.S.C. § 1292(b) or Fed. R. Civ. P. 54(b), an order disposing of fewer than all of the parties or claims in an action is not appealable"). For this reason, a determinative ruling from the Supreme Court of Ohio would also promote judicial economy.⁷

Plaintiff claims that the instant request for certification of the Proposed Question is simply Subcontractor Defendants' attempt to garner "a second bite at the apple."

⁶ In order for a contractor to be eligible to act as a self-insurer with regard to workers' compensation, the project must be scheduled for completion within six years after the date it begins and have an estimated total cost to exceed \$100 million. O.R.C. § 4123.35(O).

⁷ Pursuant to Fed. R. Civ. P. 54, the Court may revise its Order on Subcontractor Defendants' motion for summary judgment at any time before the entry of final judgment. Therefore, in the event that the Supreme Court of Ohio concludes that Ohio Rev. Code §§4123.35 and 4123.74 *do* provide enrolled subcontractors with immunity from tort claims brought by other enrolled subcontractors' employees, the Court could reconsider its Order before the matter proceeded to trial.

However, Plaintiff cites no authority for the proposition that a party seeking certification must do so prior before the relevant issue is decided by the certifying court.⁸

This Court does not believe that it erred in its finding that the Subcontractor Defendants were not entitled to the immunity they sought. Nevertheless, having weighed the relevant factors the Court finds that certification of the Proposed Question to the Supreme Court of Ohio is appropriate.

IV. CONCLUSION

Accordingly, for the foregoing reasons:

1. Defendants J & B Steel Erectors, Inc., D.A.G. Construction Co., Inc., and Triversity Construction Co., LLC's joint motion to certify a question of state law to the Supreme Court of Ohio (Doc. 70) is **GRANTED**; and
2. The Court will docket a Certification Order by separate entry.

IT IS SO ORDERED.

Date: 4/13/15

s/ Timothy S. Black
Timothy S. Black
United States District Judge

⁸ Plaintiff first filed his action in Hamilton County, Ohio and voluntarily dismissed his case after the Subcontractor Defendants and others filed motions for summary judgment in *Lancaster*. See *Stolz v. J & B Steel Erectors, Inc., et al.*, Hamilton C.P. No. A1208595 (Feb. 4, 2013). After those motions for summary judgment were granted, Plaintiff refiled his action in this Court. A determinative ruling from the Supreme Court would facilitate consistent outcomes in federal and state courts. "Like cases should end in like judgments. Once a court decides questions of law presented in a dispute, a nearly identical dispute ought to yield a similar outcome." *Rutherford v. Columbia Gas*, 575 F.3d 616, n.1 (6th Cir. 2009).

Orders on Motions

1:14-cv-00044-TSB Stolz v. J & B
Steel Erectors, Inc. et al

JURY,LC3

**U.S. District Court
Southern District of Ohio**

Notice of Electronic Filing

The following transaction was entered on 4/13/2015 at 1:56 PM EDT and filed on 4/13/2015

Case Name: Stolz v. J & B Steel Erectors, Inc. et al**Case Number:** 1:14-cv-00044-TSB**Filer:****Document Number:** 73**Docket Text:**

ORDER GRANTING DEFENDANTS J & B STEEL ERECTORS, INC., D.A.G. CONSTRUCTION CO., INC., AND TRIVERSITY CONSTRUCTION CO., LLC'S MOTION TO CERTIFY A QUESTION OF STATE LAW TO THE SUPREME COURT OF OHIO (Doc. 70). Signed by Judge Timothy S. Black on 4/13/2015. (mr1)

1:14-cv-00044-TSB Notice has been electronically mailed to:

Stephen James Patsfall spatsfall@pyplaw.com, bwhite@pyplaw.com

Jane Michele Lynch jmlynch@green-law.com, sedwards@green-law.com

Stephen Michael Yeager syeager@pyplaw.com, mhayes@pyplaw.com

Brett Colbert Goodson brettgoodson@goodsonandcompany.com

Kimberly A Pramaggiore kpramaggiore@kplaw.com, jjohn@kplaw.com, mholland@kplaw.com

Robert W Hojniski rhojniski@reminger.com, jleta@reminger.com, mwhite@reminger.com

Jared A Wagner jawagner@green-law.com, aarmstrong@green-law.com

Stephanie M Day smd@santen-hughes.com

Nathan Andrew Lennon nlennon@reminger.com, shenry@reminger.com

1:14-cv-00044-TSB Notice has been delivered by other means to:

The following document(s) are associated with this transaction:

Document description:Main Document**Original filename:**n/a**Electronic document Stamp:**

[STAMP dcecfStamp_ID=1040326259 [Date=4/13/2015] [FileNumber=4856476-0
] [329aca0dbca6a7dac872dea93610aeba1ef42330005b75fcba618325d8b44c10840
720fe91130a3e779e5a5ec7f0406df6619114740190c6f3c122887851d3b6]]