

IN THE SUPREME COURT OF OHIO

DANIEL STOLZ,	:	Case No. 2015-0628
	:	
Plaintiff-Respondent,	:	Judge Timothy Black
	:	
vs.	:	On a Certified Question of State Law
	:	from the U.S. District Court, Southern
J & B STEEL ERECTORS, INC., et al.	:	District of Ohio, Western Division
	:	
Defendants-Petitioners.	:	Case No. 1:14-cv-44
	:	

**PRELIMINARY MEMORANDUM OF J & B STEEL ERECTORS,
INC. IN SUPPORT OF CERTIFIED QUESTION OF STATE LAW**

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INTRODUCTION

Defendant-Petitioner, J & B Steel Erectors, Inc. (“J & B Steel”) was a subcontractor on the Horseshoe Casino construction project in Cincinnati, Ohio (“Project”) for which Messer Construction Company (“Messer”) served as the general contractor. In conjunction with the Project, Messer obtained authority from the Ohio Bureau of Workers Compensation (“BWC”) to self-administer the workers’ compensation claims for the Project pursuant to R.C. 4123.35. As such, Messer implemented its Workers’ Compensation Wrap-Up Insurance Plan in which certain subcontractors, including J & B Steel, enrolled. On January 27, 2012, Plaintiff-Respondent, Daniel Stolz, was working as a concrete finish supervisor on behalf of subcontractor Jostin Construction, Inc. (“Jostin”) when he was allegedly injured on the Project. Jostin, like J & B Steel, was an enrolled subcontractor under Messer’s Wrap-Up Plan. Mr. Stolz then brought negligence claims against J & B Steel and others related to his injuries. However, as an enrolled subcontractor under Messer’s Wrap-Up Plan, J & B Steel is immune from Mr. Stolz’s claims pursuant to R.C. 4123.35 and 4123.74.

On April 13, 2015, Judge Timothy S. Black of the United States District Court, Southern District of Ohio, certified the following question of State law to this Court:

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.

J & B Steel respectfully requests that the Court accept the certified question and order full merits briefing. Pursuant to S.Ct.Prac.R. 9.01(A),

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.

In this case, the interpretation of R.C. 4123.35 and 4123.74 is a question of Ohio law and is determinative of Mr. Stolz's claims against J & B Steel. Moreover, there is no controlling precedent in the decisions of this Court. In fact, there appear to be no decisions rendered from this Court or any Ohio appellate court regarding this issue.

STATEMENT OF THE CASE AND FACTS

On January 14, 2014, Plaintiff-Respondent, Daniel Stolz ("Mr. Stolz"), filed the within action in the United States District Court for the Southern District of Ohio ("District Court") against Messer, J & B Steel, Pendleton Construction Group, LLC ("Pendleton"), D.A.G. Construction Co., Inc. ("DAG"), TriVersity Construction Co., LLC ("TriVersity") and Terracon Consultants, Inc. ("Terracon") relating to injuries he allegedly suffered while he was performing work on the Project. In his Complaint, Mr. Stolz asserted that while working on the Project, he was employed by Jostin as a concrete finish supervisor and that Messer served as the general contractor. He further alleged that J & B Steel, DAG and TriVersity worked as subcontractors on the Project. Mr. Stolz brought negligence and punitive damages claims against J & B Steel, Pendleton, DAG, TriVersity, Messer and Terracon, as well as an intentional tort claim against Messer which was dismissed on May 21, 2014.

Messer answered the Complaint and soon thereafter filed a Motion for Summary Judgment ("Motion") relating to Mr. Stolz's claims for negligence and punitive damages. Messer argued in its Motion that it was entitled to summary judgment based on its immunity from the claims brought by Mr. Stolz given the workers' compensation protections afforded by R.C. 4123.35 and 4123.74. In short, Messer asserted that because Mr. Stolz acknowledged that his alleged injuries occurred while he was working in the course and scope of his employment

for Jostin on the Project and because he had received benefits for those injuries under Messer's Wrap-Up Plan for the Project, Messer was entitled to immunity under Ohio's Workers' Compensation laws as the benefits Mr. Stolz received for his injuries under the Wrap-Up Plan constituted his exclusive remedy.

In support of its Motion, Messer filed the Affidavit of Angela Guenther, Messer's Claims and Insurance Administrator, who confirmed that Messer had obtained authority from the Ohio Bureau of Workers' Compensation ("BWC") to self-administer the Workers' Compensation claims for the Project and that certain subcontractors on the Project were enrolled in Messer's Workers' Compensation Wrap-Up Insurance Plan ("Plan"). Further, the Affidavit confirmed that Mr. Stolz had received workers' compensation benefits through the Plan for the alleged injuries he sustained while working on the Project. In addition, J & B Steel was specifically named in the Certificate identifying the enrolled subcontractors under the Plan.

On July 16, 2014, J & B Steel filed its Motion for Summary Judgment and argued that as an enrolled subcontractor under the Plan, J & B Steel was entitled to Workers' Compensation immunity from the claims asserted by Mr. Stolz pursuant to R.C. 4123.35 and 4123.74. J & B Steel also relied upon the decision that had previously been issued by the Court of Common Pleas in the related case of *Lancaster v. Pendleton Constr. Group, LLC*, Hamilton C.P. No. A1208721 (Mar. 25, 2013) ("Lancaster"), which held that the enrolled subcontractors under the Plan were immune from tort liability for Project-related injuries.

Mr. Stolz initially filed his action in Ohio state court in *Stolz v. J & B Steel Erectors, Inc.*, Hamilton C.P. No. A1208595. However, he voluntarily dismissed his action after J & B Steel and other subcontractors filed motions for summary judgment in the *Lancaster* case. Like this case, *Lancaster* involved several plaintiffs who were allegedly injured on the Project on January

27, 2012 while pouring concrete on behalf of Jostin. As set forth above, the motions for summary judgment filed in *Lancaster* by J & B Steel and other subcontractors were granted based on the court's determination that as enrolled subcontractors under Messer's Workers' Compensation Plan, the subcontractor defendants were entitled to immunity from plaintiffs' claims pursuant to R.C. 4123.35 and 4123.74.

On December 31, 2014, the District Court granted Messer's Motion for Summary Judgment but, unlike the *Lancaster* court, denied the Motions for Summary Judgment filed by J & B Steel, DAG and TriVersity. The District Court concluded that as the self-insuring employer on the Project, as approved by the Ohio Bureau of Workers' Compensation, Messer was immune from Mr. Stolz's negligence claims pursuant to R.C. 4123.35 and 4123.74. However, with regard to the subcontractor defendants, the District Court determined that those same statutes provided them with protection from liability only for tort claims brought against them by their own employees. Consequently, pursuant to that rationale, only Jostin would have been entitled to immunity from Mr. Stolz's claims. Given the disparity in the two decisions related to the same issue of law, J & B Steel respectfully requests that the Court accept the certified question.

ARGUMENT IN SUPPORT OF THE CERTIFIED QUESTION

A. Answering the Question May Be Determinative of the Proceeding in the District Court

When Mr. Stolz's claim was filed in the District Court, it was agreed that the issue of workers' compensation immunity as it applied to Messer, J & B Steel and the other subcontractor defendants should be addressed prior to the merits of the underlying claims because its resolution was determinative of the case. In the event this Court finds that R.C. 4123.35 and 4123.74 provide immunity to J & B Steel from tort claims of workers injured on the Project, Mr. Stolz's claims against J & B Steel would no longer be viable. Without a definitive ruling from this

Court on the interpretation of R.C. 4123.35, the parties will incur the potentially unnecessary costs of discovery and trial.

As set forth in the District Court's Order granting J & B Steel's Motion to Certify the Question to this Court, the District Court found 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." (April 13, 2015 Certified Order at 4). Consequently, based on the foregoing, and the District Court's finding that the certified question of Ohio law may be determinative of the proceeding, the first condition for acceptance of a certified question under S.Ct.Prac.R. 9.01(A) has been met.

B. There Is No Controlling Ohio Supreme Court Precedent Resolving the Question

The parties agree that this Court has not previously addressed the certified question. In fact, it appears that the only decisions rendered regarding this question were issued by the Hamilton County Common Pleas court in *Lancaster* and by the District Court in this case.

The Common Pleas court worded the issue as "whether immunity afforded to an employer-subcontractor also applies to other non-employer subcontractors covered under a 'wrap up' policy approved by the Ohio Bureau of Workers' Compensation." *Lancaster v. Pendleton Const. Group, LLC*, Hamilton C.P. No. A1208721, at 2. The court held that R.C. 4123.35(O) does provide immunity to the enrolled subcontractors under the Plan. *Id.* at 5. The court further explained, "[a]s constructive employees of Messer, the Plaintiffs received from their constructive employer the benefits of the 'social bargain' to which they were entitled under the Workers' Compensation statute. Plaintiffs' desire to hold 'third parties responsible for the collapse of the casino floor' liable for negligence does not comport with the scheme laid out by §4123.35(O)." *Id.* at 6.

The District Court decided the issue oppositely and held that the tort immunity provided to the enrolled subcontractors under the Plan only pertained to their own employees who were injured on the Project. This disagreement between the only two courts which appear to have addressed the question underscores the need for this Court to clarify the construction and application of R.C. 4123.35 and 4123.74. Because there is no controlling precedent relating to the question from this Court, the second condition for acceptance of a certified question under S.Ct.Prac.R. 9.01(A) has been met.

C. Principles of Federalism Support Acceptance of the Certified Question

Because the District Court's jurisdiction in this case is based upon diversity of citizenship, the substantive law of the forum state must be applied. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). There is no disagreement between the parties that Ohio law governs the issue of subcontractor immunity in this case, and specifically the interpretation of R.C. 4123.35 and related workers' compensation statutes with regard to enrolled subcontractor immunity from tort claims. However, as set forth above, this Court has not addressed this issue and the question has now been answered differently by a federal court and an Ohio court.

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, 577 N.E.2d 1077 (1991). "From the state's viewpoint, losing part of its sovereignty is no small matter, especially since a federal court's error may perpetuate itself in state courts until the state's highest court corrects it." *Id.* The Court's acceptance of the certified question of enrolled subcontractor immunity from tort claims on a self-insured project will ensure that federal and state courts in the future are applying Ohio law consistently, pursuant to the determination of this

Court. Consequently, J & B Steel respectfully requests that the Court accept certification of the question.

D. The Court Should Answer the Certified Question in the Affirmative

The workers' compensation system in Ohio provides broad immunity to employers and entitles employees to immediate and unquestioned medical treatment for work-related injuries. "The Act 'operates as a balance of mutual compromise between the interests of the employer and the employee whereby employees relinquish their common law remedy and accept lower benefit levels coupled with the greater assurance of recovery and employers give up their common law defenses and are protected from unlimited liability.'" *Sutton v. Tomco Mach., Inc.*, 129 Ohio St.3d 153, 2011-Ohio-2723, 950 N.E.2d 938, ¶34 citing *Bickers v. W. & S. Life Ins. Co.*, 116 Ohio St.3d 351, 2007-Ohio-6751, 879 N.E.2d 201, ¶19 quoting *Blankenship v. Cinti. Milacron Chem., Inc.*, 69 Ohio St.2d 608, 614, 433 N.E.2d 572 (1982).

In the event an employee is injured in a work related incident, the employee is entitled to workers' compensation benefits even if the employer is not to blame for the employee's injury. In exchange, the employer receives tort immunity for work-related injuries. R.C. 4123.35 and 4123.74. This "exclusivity rule" dictates that employees cannot sue employers for negligence but must accept the workers' compensation benefits as their sole remedy. *Freese v. Consol. Rail Corp.*, 4 Ohio St.3d 5, 445 N.E.2d 1110 (1983); *Saunders v. Holzer Hosp. Found.*, 4th Dist. Gallia No. 08CA11, 2009-Ohio-2112, ¶21 ("[c]laimants enjoy no prerogative, constitutional or otherwise, to choose between workers' compensation and common-law remedies where the former has been legislatively deemed to provide the exclusive means of recovery."); *State ex rel. Goodyear Tire & Rubber Co. v. Tracey*, 66 Ohio App.3d 71, 74, 583 N.E.2d 426 (1st Dist.1990).

On most construction projects, contractors and subcontractors provide their own liability and workers' compensation coverage. However, contractors on large scale construction projects,

like the Horseshoe Casino, are eligible to self-insure the project whereby the employees of subcontractors enrolled in the self-insurer's plan for that project are treated as employees of the self-insuring contractor for purposes of workers' compensation. R.C. 4123.35(O). Under R.C. 4123.35(O), a contractor may be eligible to self-insure only those construction projects which are scheduled for completion within six years and at a total cost estimated to exceed One Hundred Million Dollars. Thus, self-insurance for a construction project is a relatively rare circumstance and R.C. 4123.35(O) is tailored to address that unique situation.

R.C. 4123.35(O) sets forth how workers' compensation immunity applies when a contractor has been approved as a self-insuring contractor on a construction project and provides, in pertinent 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.

Further, R.C. 4123.74 sets forth:

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.

As set forth above, the Ohio legislature has expressly provided that for purposes of workers' compensation, the self-insured employer on a construction project is the employer of all enrolled subcontractors' employees who are working on that construction project. Further, both the self-insured employer and the enrolled subcontractor under a self-insured plan are entitled to immunity from claims arising out of injuries to the employees of the enrolled subcontractors on that project.

In this case, Messer was granted approval by the BWC to self-insure the workers' compensation Plan for workers injured while employed on the Project. Further, J & B Steel, Jostin and other subcontractors were enrolled in the Plan. There is no dispute that Mr. Stolz received medical care and treatment under the Plan for the injuries he suffered while working on the Project. In addition, both the *Lancaster* court and the District Court found that Messer had complied with its obligations as a self-insuring employer under the statute. Thus, because Ohio's workers' compensation statutes dictate that the workers' compensation benefits Mr. Stolz received through the Plan are his exclusive remedy for any work-related injuries on the Project, J & B Steel, like Messer and the other enrolled subcontractors, is entitled to the immunity from Plaintiff's claims afforded by R.C. 4123.35 and 4123.74.

Although the issue has not yet been decided by this Court, other jurisdictions have addressed subcontractor immunity under self-insured workers' compensation plans. For example, in *Etie v. Walsh & Albert Co., Ltd.*, 135 S.W.3d 764 (Tex.App. 2004), a Texas

appellate court held that tort immunity applied to all contractors enrolled in a self-insured workers' compensation plan regardless of their connection to the injured worker. Etie was employed by a subcontractor on a construction project in Houston, Texas for which the general contractor had purchased a wrap-up policy of insurance including workers' compensation, covering the subcontractors and their employees who worked on the project. Etie was injured while working on the project due to the negligence of another subcontractor. Although Etie received workers' compensation benefits for his injuries he brought a claim for negligence against the subcontractor that caused his injuries. The subcontractor argued that Etie's exclusive remedy for his injuries was workers' compensation benefits.

The court first recognized that, like Ohio, the Texas statutes authorized a contractor to provide workers' compensation insurance for subcontractors and their employees. *Id.* at 766. It further acknowledged that the statute deemed employees of the subcontractors to be employees of the general contractor for purposes of the workers' compensation act. *Id.* at 767.

The court ultimately held, "the employer/employee relationship extends throughout all tiers of subcontractors when the general contractor has purchased workers' compensation insurance that covers all of the workers on the site. **All such participating employers/subcontractors are thus immune from suit.**" (Emphasis added.) *Id.* at 758. In addition, the court held "the participating employees are fellow servants, equally entitled to workers' compensation benefits and equally immune from suit." *Id.* Consequently, Etie was precluded from suing the subcontractor in tort and his exclusive remedy for his injuries was receipt of workers' compensation benefits. *Id.*

Like the Texas workers' compensation provisions, R.C. 4123.35(O) considers all of the employees of the contractors and subcontractors enrolled under the Plan to be employees of the

self-insured contractor for purposes of workers' compensation. As in *Etie*, Mr. Stolz is a fellow servant of J & B Steel's employees and the employees of the other enrolled subcontractors, equally entitled to workers' compensation benefits under the same Plan. Thus, J & B Steel and the other enrolled subcontractors are equally immune from suit and the certified question should be answered in the affirmative.

CONCLUSION

Based on the foregoing, J & B Steel respectfully requests that the Court accept the certified question in order to avoid any potential future conflict on the issue and to promote judicial economy. Acceptance of the certified question would not only be beneficial in this proceeding but would provide all Ohio and federal courts with clarification regarding the applicability of Workers' Compensation immunity to subcontractors enrolled under a self-insurance plan pursuant to R.C. 4123.35 and 4123.74. Furthermore, clarification on the issue will provide guidance to contractors and subcontractors in future construction projects which are self-insured by the contractor in drafting, negotiating, and bidding their contracts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served via U.S. Mail this 7th day of May, 2015 upon the following:

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