

In the  
Supreme Court of Ohio

DANIEL STOLZ,	:	Supreme Court Case No.: 2015-0628
	:	
Plaintiff-Respondent,	:	On Order of Certified Question of State Law
	:	From the United States District Court
vs.	:	Southern District of Ohio Western Division
	:	
J&B STEEL ERECTOR, INC., et al.,	:	Southern District Court
	:	Case No.: 1:14cv00044
Defendants-Petitioners.	:	

RESPONDENT'S PRELIMINARY MEMORANDUM ON CERTIFIED QUESTION

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RECEIVED  
 MAY 08 2015  
 CLERK OF COURT  
 SUPREME COURT OF OHIO

FILED  
 MAY 08 2015  
 CLERK OF COURT  
 SUPREME COURT OF OHIO

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## **I. INTRODUCTION**

The United States District Court for the Southern District of Ohio has asked this Court to answer a question of law presented by the Defendants'–Appellants' implicating R.C. 4123.35(O):

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.

Plaintiff–Respondent respectfully requests that this Court decline to answer the certified question. First, Ohio law is well settled that the Revised Code must be interpreted as written by the Ohio General Assembly. Section 4123.35(O), by its express terms, does not grant subcontractors immunity from negligence claims of another subcontractor's employee. Second, it is will settle law in Ohio that the foundation of the workers' compensation program is based on the formation of a "social bargain," wherein each party, the employee and the employer, gives up their rights vis-a-vis the other. To interpret Section 4123.35(O) in a matter that conflicts with the Southern District Court's decision subverts the social bargain and destroys the principle foundation of Ohio's workers' compensation program. Third, the only known Ohio court to directly interpret this particular statute misunderstood and misapplied Ohio workers' compensation law. Ohio has, and continues to, allow injured employees, covered by their employer's workers' compensation plan, to bring negligence claims against non-employer third parties. This fundamental tenant of workers' compensation law was not altered by R.C. 4123.35(O).

## **II. STATEMENT OF THE CASE AND FACTS**

Plaintiff–Respondent was employed as a concrete finisher by Jostin Construction, Inc. ("Jostin") at the Horseshoe Casino construction project in Cincinnati, Ohio ("Casino Project").

Defendant Messer Construction Co. (“Messer”) was the general contractor of the Casino Project. Jostin and Defendants J&B Steel Erectors, Inc. (“J&B”), The Pendleton Construction Group, LLC (“Pendleton”), D.A.G. Construction Co., Inc. (“D.A.G.”), and TriVersity Construction Co., LLC (“TriVresity”) were subcontractors of Messer on the Casino Project. Defendant Terracon Consultants, Inc. (“Terracon”) was responsible for providing engineering and safety consulting services for the Casino Project.

R.C. 4123.35(O) permits general contractors of large-scale construction projects to “self-insure” the construction project, whereby the employees of the subcontractors enrolled in the self-insuring contractor’s plan are treated as employees of the self-insuring contractor for workers’ compensation purposes. On March 11, 2011, Messer submitted its application to the Ohio Bureau of Workers’ Compensation (“BWC”) for self-insured status for the Casino Project pursuant to R.C. 4123.35(O). The BWC approved Messer’s application to self-administer the workers’ compensation program for all enrolled subcontractors on the Casino Project. Defendants Jostin, J&B, D.A.G., and TriVersity were listed as “enrolled subcontractors.”

On January 27, 2012, Plaintiff–Respondent was working as a Jostin employee at the Casino Project. As concrete was being poured, the metal decking of the structure gave way and caused the floor beneath him to collapse. Plaintiff–Respondent fell 25 feet and sustained serious and permanent injuries as a result. Plaintiff–Respondent filed a civil action against Defendants herein in the United States District Court for the Southern District of Ohio Western Division (“Southern District Court”). Defendants J&B, D.A.G., and TriVersity (collectively the “Subcontractor Defendants”) filed Motions for Summary Judgment, arguing that they were entitled to immunity under R.C. 4123.35(O) as enrolled subcontractors in Defendant Messer’s workers’ compensation plan. Defendant Messer also filed a Motion for Summary Judgment on

the same basis. Pursuant to R.C. 4123.35(O), the Southern District Court granted Messer's Motion.

In its December 31, 2014 Order, the Southern District Court denied Defendants' Motions. The Southern District Court stated that "As [R.C. 4123.35(O)] is written, each subcontractor is only protected from liability for injuries to one of the subcontractor's employees—its own. . . . If the General Assembly intended for immunity to extend to all subcontractors for injuries sustained by the employees of *all* the subcontractors, it would have written the statute in a manner that indicated such." (S.D. Ohio Case No. 1:14cv00044, Order Denying the Motions for Summary Judgment of Defendants D.A.G., TriVersity, and J&B ("MSJ Order"), Doc. 68, p. 14) (Exhibit A). Interpreting the plain language of the statute, the Southern District Court held that "The clear and unambiguous meaning of the statute, as written, is that immunity does not extend to the Subcontractor Defendants with respect to the employees of other subcontractors." (MSJ Order, p. 15).

On February 6, 2015, after the Southern District Court had rendered its decision against them, the Subcontractor Defendants filed a Motion to Certify Question of State Law to the Ohio Supreme Court. The Southern District Court granted the Subcontractor Defendants' Motion and certified the above question to this Court.

### **III. ARGUMENT OPPOSING CERTIFICATION**

Supreme Court Rule of Practice 9.01(A) permits this Court to answer a question of law certified to it by a court of the United States if the question is one of Ohio law that may be determinative of the proceedings and for which there is no controlling precedent in the decisions of this Court. Since the Southern District Court's decision rests on well-defined principles of Ohio law, Plaintiff-Respondent respectfully requests that this Court decline to answer the question certified and return this case to the Southern District so that it may proceed on the

merits.

*A. Ohio Supreme Court precedent dictates that courts must enforce a statute as written according to its plain language.*

The court's paramount concern in construing a statute is legislative intent. *State ex rel. Steele v. Morrissey*, 103 Ohio St.3d 355, 2004-Ohio-1445, 815 N.E.2d 1107, ¶ 21. To discern legislative intent, the court must first consider the statutory language, reading all words and phrases in context and in accordance with rules of grammar and common usage. *Id.*; R.C. 1.42. "If the meaning of the statute is unambiguous and definite, it must be applied as written and no further interpretation is necessary." *State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Edn.*, 74 Ohio St.3d 543, 545, 660 N.E.2d 463 (1996). A court must "read and understand statutes 'according to the natural and most obvious import of the language, without resorting to subtle and forced constructions.'" *Ohio Neighborhood Fin., Inc. v. Scott*, 139 Ohio St.3d 536, 2013-Ohio-0103, 13 N.E.3d 1115, ¶ 22 (quoting *Lancaster v. Fairfield Cty. Budget Comm.*, 83 Ohio St.3d 242, 244, 699 N.E.2d 473 (1998)). Unambiguous statutes are to be applied according to the plain meaning of the words used, *Roxane Laboratories, Inc. v. Tracy*, 75 Ohio St.3d 125, 127, 661 N.E.2d 1011 (1996), and courts are not free to delete or insert other words. *State ex rel. Cassels v. Dayton City School Dist. Bd. of Edn.*, 69 Ohio St.3d 217, 220, 631 N.E.2d 150 (1994). These principles of law are well settled by this Court. This Court has not, and likely never will, address every section of the Revised Code enacted by the General Assembly. These foundational principles, as established by this Court, serve as a guide to other courts as they encounter and interpret provisions of the Revised Code.

R.C. 4123.35(O) provides in pertinent part:

A self-insuring employer who complies with this division is entitled to the protections provided under this chapter . . . with respect to the employees of the contractors and subcontractors covered under a certificate issued. . . . The contractors and subcontractors included under a certificate issued under this

division are entitled to the protections provided under this chapter . . . with respect to the contractor's or subcontractor's employees who are employed on the construction project which is the subject of the certificate.

To read this section of the statute in a manner which grants tort immunity to the Subcontractor Defendants for injuries sustained by another subcontractor's employee is clearly erroneous and contrary to the plain language of the statute. Section O states "the contractors and subcontractors included under a certificate . . . 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 . . ." R.C. 4123.35(O) (emphasis added). The words "contractor's" and "subcontractor's" are singular possessive in the statute, not plural possessive. As the statute is written, each subcontractor is only protected from liability for injuries to one of the subcontractor's employees—their own.

R.C. 4123.35(O) is not susceptible to contrary construction. As the Southern District Court noted, by the statute's plain language, R.C. 4123.35(O) does not provide immunity for non-employer subcontractors. "To read section 4123.35(O) in a manner which grants tort immunity to Subcontractor Defendants for injuries sustained by another subcontractor's employee is contrary to the plain language of the statute." (MSJ Order, p. 13). "As the statute is written, each subcontractor is only protected from liability for injuries to one of the subcontractor's employees—its own." (*Id.* at p. 14). The result of the General Assembly's chosen language is clear, non-employer subcontractors are not entitled to immunity.

The Supreme Court of Ohio has ruled on how courts are to interpret unambiguous statutes according to their plain language, and that is all the Southern District Court did, interpret the statute according to its plain terms. If the Ohio legislature intended for R.C. 4123.35(O) immunity to extend to all subcontractors for injuries sustained by the employees of all the other

subcontractors, it would have written the statute in a manner that indicated such. The court “must apply the section in a manner consistent with the plain meaning of the statutory language; [it] cannot add words.” *Holmes v. Crawford Machine, Inc.*, 134 Ohio St.3d 303, 2011-Ohio-2040, 982 N.E.2d 643, ¶ 10 (citing *State ex rel. Burrows v. Indus. Comm.*, 78 Ohio St.3d 78, 81, 676 N.E.2d 519 (1997)). Simply put, the clear and unambiguous meaning of the statute is that self-insuring immunity does not extend to the non-employer Subcontractor Defendants in this case.

*B. Ohio Supreme Court precedent makes clear that the foundation of Ohio’s workers’ compensation program is based on the social bargain between the employer and employee.*

“Workers compensation law is principled on an exchange of rights between employers and employees; specifically, the exclusive remedy protections afforded to employers and the guaranteed ‘no-fault’ workers compensation benefits provided to employees. This exchange of rights is referred to as the *quid pro quo*.” DAVID G. JORDAN & JEFFREY J. VITA, *Application of the Workers Compensation Exclusivity Rule Under Wrap-Up Insurance Programs*, 24 THE JOHN LINER REV. 44, 45 (2010). “Summarily stated, the *quid pro quo* is the foundation upon which workers compensation laws are based.” *Id.* at 46. “By purchasing workers compensation insurance, employers receive tort immunity for work-related injuries to their employees. This means that employees cannot sue their employers for negligence but instead must accept, as the sole remedy, payment of benefits set forth under the relevant state or federal workers compensation statutes. This statutory restriction is known as the ‘exclusivity rule.’” *Id.* at 44; *Freese v. Consolidated Rail Corp.*, 4 Ohio St. 3d 5, 445 N.E.2d 1110 (1983).

Under Ohio law, this is considered a “social bargain.” *Sutton v. Tomco Mach., Inc.*, 129 Ohio St.3d 153, 2010-Ohio-0670, 950 N.E.2d 938, ¶33 (citing *Blankenship v. Cinti Milacron Chem., Inc.*, 69 Ohio St. 2d 608, 614, 433 N.E.2d 572 (1982)). In exchange for greater assurance

of coverage, employees give up the right to sue their employer; likewise, in exchange for protection from unlimited liability, employers pay workers' compensation premiums. *Id.* Under Ohio law, the exclusivity rule does not act to prohibit an injured employee from filing a negligence action against a company other than their direct employer.

Generally, construction contractors and subcontractors provide their own workers' compensation coverage. However, under certain circumstances, a general contractor may choose to assume responsibility for the workers' compensation payments, thus becoming the "statutory employer." *See* R.C. 4123.35(O). When a general contractor chooses to "self-insure" a construction project through complying with the requirements of an R.C. 4123.35(O) wrap-up plan, it likewise receives the protections of the exclusivity rule discussed above. R.C. 4123.74. "There is an intuitive logic behind the extension of this entitlement, insofar as the company that actually provides the injured employee with workers compensation benefits receives the right of exclusivity, thereby maintaining the purpose of the *quid pro quo*." *JORDAN & VITA, supra*, at 47.

Ohio law is clear, the *quid pro quo*, or social bargain, forms the basis of workers' compensation coverage. If there is no bargain, there is no place for workers' compensation coverage. The Subcontractor Defendants are not, and do not claim to be, the self-insuring employer of the Casino Project and recognize that they have made no "bargain" with Plaintiff-Respondent. The Southern District Court said:

In relation to Plaintiff, the Subcontractor Defendants have not met their end of the social bargain. They have not made contributions to the workers' compensation fund on Plaintiff's behalf, nor have they self-administered workers' compensation benefits to him on the instant project. It contravenes the workers' compensation scheme to provide Subcontractor Defendants immunity when they have not earned it. To do so would not uphold the social bargain, rather, it would constitute a "free pass" on their alleged liability for their role in the injuries sustained by Plaintiff.

(MSJ Order, p. 15).

Subcontractor Defendants have not met their end of the bargain as required by Ohio law and are simply not entitled to immunity from Plaintiff–Respondent’s tort claims, in contrast to Defendant Messer who was the statutory employer and contributed to the workers’ compensation fund on behalf of Plaintiff–Respondent.

*C. Ohio Supreme Court precedent permits employees accepting workers’ compensation benefits from their employer to assert a negligence claim against a liable third party.*

The only Court to specifically address R.C. 4123.35(O), *Lancaster v. Pendleton Construction Group, LLC*, Hamilton C.P. No. A1208721 (Mar. 25, 2013), misunderstood and misapplied basic Ohio workers’ compensation and tort law principles. The *Lancaster* Court primarily based its decision on *Pride v. Liberty Mutual Ins. Co.*, E.D. Wisc. No. 04-C-703, 2007 WL 1655111 (June 5, 2007), a factually similar Wisconsin case that declined to extend immunity to enrolled subcontractors. The *Pride* Court noted that extending immunity did not comport with the *quid pro quo* of workers’ compensation because there was no indication that the plaintiff “bargained away any of his rights” to the fellow subcontractor and concluded that allowing the contractor and subcontractors “to contract each other out of tort liability would afford the other employers a quid without any additional quo going to the injured employee.” *Id.* at \*4. The *Lancaster* Court found what it claimed to be a “glaring distinction” between the Wisconsin statute and the Ohio statute: Wisconsin’s statute states that an employee’s claim against an employer does not affect the right of the employee to bring suit against a third party, while “Ohio’s Workers’ Compensation Act provides no such allowance for third party claims.” *Lancaster*, at \*6-7.

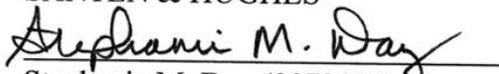
The *Lancaster* Court’s statement is patently false. As the default provision, an employee, receiving workers’ compensation benefits from an employer, *can* bring a negligence claim against a liable third party. The relevant fact is not that the Ohio workers’ compensation act does

not grant this right to plaintiffs; the relevant fact is that section 4123.35(O) does not take this right away from plaintiffs. *See* R.C. 4123.35(O) (“Nothing in this division shall be construed as altering the rights of employees under this chapter and Chapter 4121 of the Revised Code as those rights existed prior to September 17, 1996.”). “[T]he law is well settled in Ohio that, if a person is injured at such a time and in such a manner by the negligence of a third person, while engaged in an occupation for which he would be entitled to compensation against his employer, he may still sue and recover against the third party who causes the injury.” *Trumbull Cliffs Furnace Co. v. Shackovsky*, 27 Ohio App. 522, 526, 161 N.E. 238 (8th Dist. 1923), *aff’d*, 111 Ohio St. 791, 146 N.E. 306 (1924); *George v. City of Youngstown*, 139 Ohio St. 591, 594, 41 N.E.2d 567 (1942) (“[W]orkmen’s compensation statutes relate solely to the relationship of employer and employee.”).

#### IV. CONCLUSION

For the foregoing reasons, Plaintiff-Respondent respectfully requests that this Court decline to answer the certified question presented.

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