

IN THE SUPREME COURT OF OHIO

Daniel Stolz,	:	Supreme Court Case No. 2015-0628
Respondent,	:	On a certified question of state law from the
vs.	:	U.S. Southern District of Western Ohio
J & B Steel Erectors, et al.	:	Trial Court Case No. 1:14-CV-44
Petitioners/Respondents.	:	

PRELIMINARY MEMORANDUM OF RESPONDENT MESSER CONSTRUCTION CO. IN
SUPPORT OF THIS COURT ANSWERING THE CERTIFIED QUESTION OF STATE LAW

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Pursuant to S.Ct.Prac.R. 9.05(A)(1), respondent Messer Construction Co. (“Messer”) submits the following preliminary memorandum in support of this Court answering the following question of law certified to it by the United States Southern District Federal 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.

It is necessary and appropriate for the Court to answer this question of law because:

- This question is the first opportunity for the Court to address the scope of immunity afforded by R.C. 4123.35(O);
- The answer to this question will determine whether petitioners D.A.G. Construction Co. Inc. (“DAG Construction”), J & B Steel Erectors, Inc. (“J&B Steel”), and Triversity Construction Co., LLC (“Triversity”) are entitled to immunity and is thus potentially determinative of the claims against them in the underlying federal action;
- There is a direct conflict of opinion regarding the answer to this question between the U.S. District Federal Court and the Hamilton County, Ohio Common Pleas Court;
- That conflict of opinion has resulted in differing applications of the law regarding employees of **the same company injured during the same accident**, with some of those employees being prohibited from bringing claims against enrolled subcontractors and respondent Daniel Stolz (“Stolz”) being allowed to pursue such claims;
- If the question is not answered by the Court, the current state of the law will be confused and contradictory, with disparate treatment among not only the persons injured in the accident underlying this case, but also potentially different treatment among future injured persons, with those injured parties residing outside of the state of Ohio, who can seek relief in federal court through diversity jurisdiction, possibly bringing claims that

have not been recognized in state court. Allowing the conflicting interpretations of R.C. 4123.35(O) to go unaddressed would thus violate the principles of stare decisis providing that the law should be applied similarly in similar situations, encourage forum shopping by injured employees, and give non-resident employees potentially greater rights under Ohio law than Ohio residents;

- This question relates to an important area of law that will have a widespread, statewide impact on commerce as it will affect the costs and expectations associated with large scale construction projects that have estimated costs exceeding \$100 million.

MEMORANDUM

I. Relevant Undisputed Facts¹ and Procedural History

In January 2012, construction of the Horseshoe Casino in Cincinnati, Ohio (the “Casino”) was underway. Messer was the general contractor and had obtained authority from the Ohio Bureau of Workers’ Compensation (the “Bureau”) to self-administer the Workers’ Compensation program for this project pursuant to R.C. 4123.35(O). Many of the subcontractors working on the project were enrolled subcontractors participating in Messer’s Workers’ Compensation program under the certificate of authority issued to Messer by the Bureau. The enrolled subcontractors included Jostin Construction, Inc. (“Jostin”) and the petitioners D.A.G. Construction, J&B Steel, and Triversity.

On January 27, 2012, Jostin employees were pouring concrete for the second floor of the Casino. Unfortunately, the floor collapsed as they were working, and several Jostin employees, including Stolz, were injured.

¹ The relevant facts, as well as the observation that those facts are undisputed, are also set forth within the Certification Order from the U.S. District Court and its Order granting the Petitioners’ motion to certify a question of state law, which is attached to the Certification Order.

Subsequent to the accident, all of the injured employees, including Stolz, participated in Messer's Workers' Compensation plan and received medical care, treatment, and attention at no cost to themselves under that plan since they were injured employees of the enrolled subcontractor Jostin. Nevertheless, despite having received and accepted Workers' Compensation benefits from Messer as enrolled subcontractor employees under the certificate issued to Messer by the Bureau for this project, several of the injured employees, including Stolz, brought suit against Messer, DAG Construction, J&B Steel, and Triversity.

The first such suit was filed by Stolz on October 31, 2012, in Hamilton County Common Pleas Court, Case No. A1208595.² A few days later, on November 5, 2012, several of Stolz's fellow Jostin employees also filed suit in Hamilton County Common Pleas Court, Case No. A1208721 (the "Lancaster Action").

Messer moved for summary judgment in both of these cases, arguing that it was entitled to Workers' Compensation immunity as to the claims of injured employees of an enrolled subcontractor. This claim was based on the "vertical" immunity granted by R.C. 4123.35(O), which provides that a self-insuring employer such as Messer is to be treated for the purpose of Workers' Compensation as if it were the employer of any injured employees of subcontractors enrolled under a certificate allowing for self-administration of a large scale construction project. Again, it is undisputed that Messer was granted such authority and that Jostin, the employer for all of the injured parties, including Stolz, was enrolled under Messer's certificate.

Additionally, it is also undisputed that all of the injured parties, including Stolz, received and retained Workers' Compensation benefits for their injuries from Messer. Thus, Messer was also entitled to immunity from the injured employees' claims under the doctrine of election of

² The docket and documents filed in the Hamilton County Common Pleas Court cases can be viewed online by the Court by case number at <http://www.courtclerk.org/case.asp>.

remedies. *Smith v. Turbo Parts LLC*, No. 2:10-CV-00202, 2011 WL 796793, at *4-*5 (S.D. Ohio Mar. 1, 2011); *Saunders v. Holzer Hosp. Found.*, 4th Dist. No. 08CA11, 2009-Ohio-2112, ¶ 19-22; *Catalano v. Lorain*, 161 Ohio App.3d 841, 2005-Ohio-3298, ¶12-13; *Switka v. Youngstown*, 7th Dist. No. 05MA74, 2006-Ohio-4617, ¶31.

DAG Construction, J&B Steel, and Triversity also moved for summary judgment on the basis of immunity in the Lancaster Action. This “horizontal” immunity between enrolled subcontractors was based on the principles and social bargain underlying Ohio’s Workers’ Compensation system, as well as the relevant Workers’ Compensation statutes, which, as previously stated, provide that Messer is to be treated as the singular employer of **all** the employees of the enrolled subcontractors for Workers’ Compensation purposes. In response, the plaintiffs in the Lancaster Action argued that enrolled subcontractors were only immune from claims made by their own actual employees, but were not immune from claims made by employees of other subcontractors.

Stolz voluntarily dismissed his state court action in its entirety pursuant to Civ.R. 41(A) before the immunity issues in the Lancaster Action could be decided. The Plaintiffs in the Lancaster Action voluntarily dismissed their claims against Messer, acknowledging that it was entitled to “vertical” immunity from their claims, but they did not voluntarily dismiss their claims against DAG Construction, J&B Steel, and Triversity.

On March 25, 2013, the court in the Lancaster Action issued a decision, finding that DAG Construction, J&B Steel, and Triversity were entitled to immunity from the claims of employees of fellow enrolled subcontractors.³ That decision was based on the plain language of R.C. 4123.35(O) and the principles of the social bargain underlying Ohio’s Workers’

³ Because the decision in the Lancaster Action granting summary judgment to DAG Construction, J&B Steel, and Triversity is generally accessible through an online database (the Hamilton County Clerk’s website), it is not being attached hereto. S.Ct.R.Prac. 3.09(B)(2).

Compensation scheme. As noted by the court in its decision, Messer is to be treated as if it were the employer for all employees of enrolled subcontractors for the purpose of Workers' Compensation issues, including immunity. Thus, the injured employees, including Stolz, were all constructive employees of Messer for Workers' Compensation purposes, as were all of the employees of DAG Construction, J&B Steel, and Triversity, whose allegedly negligent actions purportedly caused the Jostin employees' injuries.

This meant that the injured employees were essentially seeking to bring claims against DAG Construction, J&B Steel, and Triversity on the basis of allegedly negligent acts of constructive co-employees. It is well established that an employer is only liable in tort where tortious actions can be established on the part of its employees. *Natl. Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth*, 122 Ohio St.3d 594, 600, 2009-Ohio-3601, ¶ 23. Therefore, any liability of DAG Construction, J&B Steel, and Triversity would require establishing negligence on the part of the injured parties' constructive co-employees. *Id.* As such, the decision of the court in the Lancaster Action was in keeping with the fellow employee immunity rule, recognized by both this Court and Statute. R.C. 4123.741; *Kaiser v. Strall*, 5 Ohio St.3d 91, at the syllabus of the Court (1983) ("A party who is injured as a result of a co-employee's negligent acts, who applied for benefits under Ohio's workers' compensation statutes, and whose injury is found to be compensable thereunder is precluded from pursuing any additional common-law or statutory remedy against such co-employee.")

The decision in the Lancaster Action was also in keeping with the underlying principles of Ohio's Workers' Compensation scheme, which "represents a social bargain in which employers and employees exchange their respective common-law rights and duties for a more certain and uniform set of statutory benefits and obligations." *Holeton v. Crouse Cartage Co.*,

92 Ohio St.3d 115, 119, 2001-Ohio-109. By accepting and retaining Workers' Compensation benefits from Messer, Stolz and the other injured parties voluntarily participated in this system, and accepted the fact that Messer was their constructive employer for the purpose of Workers' Compensation issues related to the Casino construction project. Moreover, by seeking to bring claims against their constructive co-employees, the injured parties are attempting to reap the benefits of the Workers' Compensation but avoid its limitations.

After the decision in the Lancaster Action recognizing "horizontal" immunity between enrolled subcontractors, Stolz, who is a Kentucky resident, re-filed his claims in federal court on the basis of diversity of citizenship in order to avoid the implications of that adverse decision in the Lancaster Action. Stolz brought claims for negligence against Messer, DAG Construction, J&B Steel, and Triversity, and he also brought an employer intentional tort claim against Messer.

Messer moved for judgment on the pleadings as to the employer intentional tort claim and for summary judgment on the negligence claim. As to the negligence claim, Messer again argued that it was entitled to "vertical" immunity pursuant to R.C. 4123.35(O) and 4123.74. The trial court granted both of Messer's motions, and there are no more pending claims against Messer in the federal action.

DAG Construction, J&B Steel, and Triversity moved for summary judgment on the basis of the "horizontal" immunity recognized in the Lancaster Action. The United States District Court, however, issued a decision directly contrary to the decision in the Lancaster Action, finding that subcontractors enrolled under Messer's certificate were only entitled to immunity from the claims of their own actual employees and were not entitled to immunity from the claims of injured employees of other subcontractors. This was the exact interpretation of the law argued by the plaintiffs and rejected by the Court in the Lancaster Action.

Upon motion of DAG Construction, J&B Steel, and Triversity, the District Court recognized that its decision was in direct conflict with the state court decision in the Lancaster Action and involved an interpretation of Ohio law that was potentially dispositive and has not yet been addressed by this Court. Accordingly, the District Court appropriately certified to this Court the question of whether “horizontal” immunity is available to subcontractors enrolled under a certificate issued pursuant to R.C. 4123.35(O).

II. **The Court should answer the certified question of law because this is its first opportunity to address the scope of immunity afforded by R.C. 4123.35(O)**

As noted by the Federal District Court in its decision certifying the pending question of law, this Court has never addressed the scope of the Workers’ Compensation immunity provided to subcontractors enrolled under a certificate of self-administration issued pursuant to R.C. 4123.35(O). In fact, this Court has never addressed any of the provisions of R.C. 4123.35(O), and it appears that the only two courts that have done so are the Hamilton County Common Pleas Court in the Lancaster Action and the Southern District Court in Stolz’s Federal action.

Thus, this question involves a novel area of law and an issue of first impression for this Court. As such, certification was appropriate and the Court should elect to answer the question.

III. **The Court should answer the certified question of law because it is potentially dispositive of the claims against DAG Construction, J&B Steel, and Triversity**

The answer to the certified question will determine whether DAG Construction, J&B Steel, and Triversity are entitled to immunity and is thus potentially determinative of the claims against them. Accordingly, answering this question is in the interest of judicial economy as it will prevent the need for DAG Construction, J&B Steel, and Triversity to continue litigating potentially moot claims for which they may ultimately be entitled to immunity. Likewise, it is also in the best interests of all the injured parties, including Stolz, to have the Court answer this

question now so that this issue can be determined as quickly and definitively as possible. The injured parties will be able to more accurately assess and prosecute their claims once the various liabilities and immunities of all the potential tortfeasors are determined.

IV. **The Court should answer the certified question of law because there is a direct conflict of opinion regarding the answer to that question between the U.S. District Court and the Hamilton County, Ohio Common Pleas Court**

As outlined above, two separate trial courts have come to two diametrically opposed conclusions regarding the application of R.C. 4123.35(O). Moreover, one of those courts is a federal district court. Thus, even if both of the opposing interpretations could go through the appellate process, the federal district court's interpretation can only be reviewed by this Court upon certification. Accordingly, answering the certified question of law is the **only** manner by which this Court can resolve the conflicting interpretations of the law. Otherwise, if the Court declines to answer the question, it will effectively be allowing the federal courts to, at least in part, dictate the interpretation of an Ohio law. Only this Court, as the final arbiter regarding the interpretation of Ohio law, can conclusively resolve the disputing interpretations regarding enrolled subcontractor immunity under R.C. 4123.35(O).

V. **The Court should answer the certified question because the law is being applied differently to employees of the same company injured during the same accident**

This Court has recognized that stare decisis is a bedrock principle of the American judicial system, with “[w]ell-reasoned opinions becom[ing] controlling precedent, thus creating stability and predictability in our legal system.” *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, ¶ 1. “The doctrine of stare decisis is designed to provide continuity and predictability in our legal system. We adhere to stare decisis as a means of thwarting the arbitrary administration of justice as well as providing a clear rule of law by which the citizenry can organize their affairs. Those affected by the law come to rely upon its **consistency**.” *Id.* at ¶

43 (emphasis added) (citing *Rocky River v. State Emp. Relations Bd.*, 43 Ohio St.3d 1, 4–5 (1989) and *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)).

“The doctrine of stare decisis provides solid rocks upon which men and women can build and arrange their affairs with confidence. The doctrine serves to remove the capricious element from the law and lends stability to society.” *Rocky River*, 43 Ohio St.3d at 5. As the Sixth Circuit has put it, “[l]ike cases should end in like judgments. Once this 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, 617 (6th Cir. 2009). Thus, numerous courts have held that later cases should be decided in a similar fashion as those previously decided with similar facts. *State v. Buelow*, 2d Dist. No. 24570, 2012-Ohio-832, ¶ 10-17 (holding that under the doctrine of stare decisis, one panel cannot overrule a previous panel’s decision, even if two of the three judges on the later panel would have ruled differently if it had been an issue of first impression); *Kozar v. Bio-Med. Applications of Ohio, Inc.*, No. 21949, 2004-Ohio-4963, ¶ 9 (9th Dist. Summit); *Cooper v. Iiams*, 2d Dist. Nos. 18146, 18192, 96 1125, 2000 WL 1299517, at *1 (Sept. 15, 2000); *Jarvis v. Schindler*, 20 Ohio App.3d 227 (9th Dist. 1984) (in which the authoring judge recognized that his previous dissenting opinion was ineffective based on stare decisis).

If the Court does not answer the question of law certified to it in this action, the result will not only be disparate treatment among similarly situated individuals, but disparate treatment among identically situated individuals. Stolz and the plaintiffs in the Lancaster Action were all employees of the same company injured during the same accident. However, given the conflicting interpretations of the law, Stolz is being permitted to pursue claims for his injuries against DAG Construction, J&B Steel, and Triversity, whereas the plaintiffs in the Lancaster

Action are not. Such inconsistent application of the law with regard to identically situated parties violates not only a common sense notion of fairness, but also violates the principles underlying stare decisis. Accordingly, answering this certified question is necessary so that the Court can prevent such an inherent inequitable application of the law.

VI. **If the Court does not answer the certified question of law, injured employees living outside of Ohio will possibly be entitled to greater benefits than those living within the State and parties would be encouraged to engage in forum shopping, essentially abdicating interpretation and application of state law to the federal courts**

Related to the argument above, if the Court does not resolve the current conflicting opinions between the Hamilton County Common Pleas Court and the Federal District Court regarding the interpretation of R.C. 4123.35(O), there will be an ongoing possibility of disparate treatment of future similarly situated persons. For instance, an employee working on a project covered by R.C. 4123.35(O) who is injured and lives in Cincinnati would have to file any tort claims he may have related to the injury in state court. In doing so, he would be arguably precluded from bringing claims against other enrolled subcontractors based on the decision in the Lancaster Action.

If, however, the injured employee is injured in Cincinnati but happens to live in Indiana, which is not an uncommon occurrence, he would be able to file his claim in the U.S. Southern District Federal court based on diversity of citizenship and bring claims against enrolled subcontractors based on the decision in the Stolz action. The result would be the potential for additional uneven applications of the law, possibly give greater rights under Ohio law to non-residents, and encourage forum shopping among injured employees. At the very least, this potential scenario illustrates why the Court must answer the certified question now in order to remove all doubt regarding the application of the law.

VII. **The Court should answer this question because it relates to an important area of law that will have a widespread, statewide impact on commerce as it will affect the costs and expectations associated with large scale construction projects with estimated costs exceeding \$100 million**

Finally, an answer to the certified question is also necessary to bring stability and assurance to Ohio businesses regarding their potential costs and scope of liabilities for large scale construction projects. The immunity issues involved in this case are applicable to construction projects that are scheduled for completion within six years with estimated costs of over \$100 million.⁴ R.C. 4123.35(O). Such projects obviously have a tremendous positive impact on the economy of this State, and the General Assembly sought to encourage the development and efficiency of these projects through statutes such as R.C. 4123.35(O).

As the law currently stands, subcontractors bidding to participate on a project covered by this statute cannot definitively determine whether they will be immune from negligence claims of employees of other subcontractors. The uncertainty of such liability means that subcontractors end up either presenting too high of a bid to cover potential risks for which there is not actual exposure, or underbidding by failing to account for all of their potential risks. Either way, the uncertainty inherent in the current status of the law necessarily increases the costs and decreases the efficiency of large scale construction projects in this state. By answering the certified question, the Court can provide a measure of stability on this issue.

VIII. **Conclusion**

The Court should answer the question of law certified to it by the Southern District because: (1) it is an issue of first impression for this Court regarding the scope of immunity afforded to subcontractors under R.C. 4123.35(O); (2) it is potentially dispositive of the claims

⁴ It should also be noted that RC 4123.35(O) gives the Bureau authority to waive the six year time limit and approve self-administration of projects estimated to cost 50 million dollars or more. This further illustrates why this section is such an important and versatile tool for self-insured contractors in Ohio.

against DAG Construction, J&B Steel, and Triversity; (3) it is necessary in order to resolve conflicting interpretations of the statute between the state and federal courts; (4) it is necessary in order to avoid disparate treatment between identically situated parties in this case; (5) it is necessary in order to avoid disparate treatment between similarly and/or identically situated parties in future cases; (6) it is necessary in order to avoid forum shopping and prevent non-Ohio residents from potentially obtaining greater benefits under Ohio law than residents; and (7) it is necessary in order to provide a definitive answer regarding the immunities and liabilities of subcontractors working on large scale construction contracts. For all these reasons, Messer respectfully submits that the Court should elect to answer the certified question.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been served via electronic mail upon the following on the 11th of May 2015:

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