Supreme Court of Ohio Clerk of Court - Filed July 31, 2015 - Case No. 2015-0628

IN THE SUPREME COURT OF OHIO

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

MERIT BREIF OF PETITIONER MESSER CONSTRUCTION CO.

Jane M. Lynch (0012180) (COUNSEL OF RECORD)
Jared A. Wagner (0076674)
Green & Green, Lawyers
800 Performance Place
109 North Main Street
Dayton, Ohio 45402-1290
Tel. 937.224.3333
Fax 937.224.4311
jmlynch@green-law.com
jawagner@green-law.com

COUNSEL FOR PETITIONER MESSER CONSTRUCTION CO.

Steve Patsfall (0012271) (COUNSEL OF RECORD)
Stephen M. Yeager (0011841)
205 West Fourth Street, Suite 1280
Cincinnati, Ohio 45202
Tele.513.721.4500
Fax.513.639.7554
spatsfall@pyplaw.com
syeager@pyplaw.com

COUNSEL FOR PETITIONERS D.A.G. CONSTRUCTION CO. INC., TRIVERSITY CONSTRUCTION CO., LLC., AND PENDLETON CONSTRUCTION GROUP, LLC

Kim Pramaggiore (0066618) (COUNSEL OF RECORD)
201 East Fifth Street
PNC Center, Suite 800
Cincinnati, Ohio 45202-4190
Tele.513.381.0656
kpramaggiore@kplaw.com

COUNSEL FOR PETITIONER J & B STEEL ERECTORS, INC.

Robert W. Hojnoski (0070062) (COUNSEL OF RECORD)
Nathan Lennon (0091743)
525 Vine Street, Suite 1700
Cincinnati, Ohio 45202
Tele.513.721.1311
Fax.513.721.2553
rhojnoski@reminger.com
nlennon@reminger.com

COUNSEL FOR RESPONDENT TERRACON CONSULTANTS, INC.

Brett Goodson (0023163) (COUNSEL OF RECORD)
110 East Eighth Street, Suite 200
Cincinnati, Ohio 45202-2132
Tele.513.621.5631
Fax.513.621.3855
brettgoodson@goodsonandcompany.com

Stephanie M. Day (0073006)
600 Vine Street, Suite 2700
Cincinnati, Ohio 45202
Tele.513.721.4450
Fax.513.852.5994
smd@santen-hughes.com

COUNSEL FOR RESPONDENT DANIEL STOLZ

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES ..... ii-iii

STATEMENT OF FACTS 1-5

ARGUMENT 5-19

Proposition of Law 5

Subcontractors covered by a certificate permitting the self-insurance of the workers' compensation program for a construction project pursuant to R.C. 4123.35(O) are entitled to immunity under R.C. 4123.741from negligence claims related to the construction project brought by the employees of other covered subcontractors.

CONCLUSION 19-20

CERTIFICATE OF SERVICE 21

APPENDIX — Appx. Pages

A. Certification Order from the U.S. District Court for the Southern District of Ohio (April 13, 2015) 1-7

B. Decision from the U.S. District Court for the Southern District of Ohio Granting Petitioner's Motion to Certify a Question of State Law to the Ohio Supreme Court (April 13, 2015) 8-14

C. Decision from the U.S. District Court for the Southern District of Ohio Granting Petitioner Messer Construction Co.'s Motion for Summary Judgment and Denying the Motions for Summary Judgment of Petitioners D.A.G. Construction, Co., Inc., Triversity Construction Co., LLC, and J&B Steel Erectors, Inc. (December 31, 2014) 15-33

D. Decision from the Hamilton County, Ohio Common Pleas Court Granting the Motions for Summary Judgment of Petitioners D.A.G. Construction, Co., Inc., Triversity Construction Co., LLC, and J&B Steel Erectors, Inc. (May 23, 2013) 34-43

E. R.C. 4123.35 44-55

F. R.C. 4123.74 56

G. R.C. 4123.741 57

TABLE OF AUTHORITIES

I. CASES

Amorin v. Gordon, 996 So.2d 913 (Fla.App. 2008) 17-19

Beach v. Beach, 99 Ohio App. 428 (2d. Dist. 1955) 12

Becon Const. Co. v. Alonso, 444 S.W.3d 824 (Tex.App. 2014) 18

Blair v. Sugarcreek Twp. Bd. of Trustees, 132 Ohio St.3d 151, 2012-Ohio-2165 13-14

Caldwell v. State, 115 Ohio St. 458 (1926) 14

Cleveland Clinic Found. v. Cleveland Bd. of Zoning Appeals, 141 Ohio St.3d 318, 2014-Ohio-4809 6

Cline v. Ohio Bur. of Motor Vehicles, 61 Ohio St.3d 93 (1991) 11

Elston v. Howland Local Schools, 113 Ohio St.3d 314, 2007-Ohio-2070 9

Etie v. Walsh & Albert Coin, 135 S.W.3d 764 (Tex.App. 2004) 17

Garza v. Zachry Constr. Corp., 373 S.W.3d 715 (Tex.App. 2012) 18

General Assembly. State v. Hairston, 101 Ohio St.3d 308, 2004-Ohio-969 7

HCBeck, Ltd. v. Rice, 52 Tex. Sup. Ct. J. 555, 284 S.W.3d 349 (2009) 18

Holeton v. Crouse Cartage Co., 92 Ohio St.3d 115, 2001-Ohio-109 14

Horvath v. Ish, 134 Ohio St.3d 48, 2012-Ohio-5333 ..... 7, 12

Hulsmeyer v. Hospice of Southwest Ohio, Inc., 142 Ohio St.3d 236, 2014-Ohio-5511 7

Kaiser v. Strall, 5 Ohio St.3d 91 (1983) 9

Kelbley v. Hurley, 94 Ohio App.3d 409 (3d Dist. 1994) 10

Maxfield v. Brooks, 110 Ohio St. 566 (1924) 12-13

Natl. Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth, 122 Ohio St.3d 594, 2009-Ohio-3601 9

Ohio Bus Sales, Inc. v. Toledo Bd. of Edn., 82 Ohio App.3d 1 (6th Dist. 1992) 12-13

Pride v. Liberty Mutual Ins. Co., No. 04-C-703, 2007 WL 1655111 (E.D. Wis. June 5, 2007) 15

State ex rel. Cordray v. Midway Motor Sales, Inc., 122 Ohio St.3d 234, 2009-Ohio-2610 13

State ex rel. Herman v. Klopfleisch, 72 Ohio St.3d 581 (1995) 12

Suez Co. v. Young, 118 Ohio App. 415 (6th Dist. 1963) 13

Sutton v. Tomco Machining, Inc., 129 Ohio St.3d 153, 2011-Ohio-2723 7

Virginia Sur. Co. v. Adjustable Forms, Inc., 888 N.E.2d 733 (Ill.App. 2008) 15

II. **STATUTES**

Fla. Stat. 440.10 19

R.C. 1.42 11

R.C. 1.49 14

R.C. 4123.35 ..... i,1-19

R.C. 4123.74 ..... 3-5, 7, 11, 19

R.C. 4123.741 ..... i, 3, 5-15, 17, 19

Tex. Code 406.123 18

STATEMENT OF THE FACTS

In January 2012, the Horseshoe Casino in Cincinnati, Ohio (the "Casino") was under construction. (Federal Court Decision Granting Certification at appx. pg 8; Federal Court Decision on Motions for Summary Judgment at appx. pg 16; State Court Decision on Motions for Summary Judgment at appx. pgs 34-35.) Messer Construction Co. ("Messer") was the general contractor for the Casino construction project, and Jostin Construction, Inc. ("Jostin") was one of Messer's subcontractors. (Federal Court Certification Order at appx. pg 2; Fed MSJ Dec. at appx. pg 17; State MSJ Dec. at appx. pgs 34-35.)

On January 27, 2012, several Jostin workers, including plaintiff/respondent Daniel Stolz ("Stolz"), were pouring concrete at the Casino construction project when the floor collapsed as they were working, causing them to fall and sustain injuries. (Fed. Cert. Order at appx. pgs 1-2; Fed. Cert. Dec. at appx. pgs 8-10; Fed MSJ Dec. at appx. pgs 16-17; State MSJ Dec. at appx. pgs 34-35.) Stolz admits that all of the injuries for which he is seeking to recover in this litigation occurred as a result of that fall and were sustained during the course and scope of his employment while working for Jostin at the Casino construction project. (*Id.*)

Prior to the accident, Messer had obtained authority pursuant to R.C. 4123.35(O) from the Ohio Bureau of Workers' Compensation (the "Bureau") to self-insure the workers' compensation program for the Casino construction project. (*Id.*) The subcontractors for Messer that were covered by this certificate and who participated in its workers' compensation plan for the Casino construction project included Stolz's employer Jostin, as well as defendants/petitioners D.A.G. Construction Co. Inc. ("DAG Construction"), J & B Steel Erectors, Inc. ("J&B Steel"), and Triversity Construction Co. LLC ("Triversity"). (*Id.*; see also Fed. MSJ Dec. at appx. pg 26 n. 10; State MSJ Dec. at appx. pg 41.)

After the accident, all of the injured Jostin employees, including Stolz, participated in Messer's workers' compensation program and received medical care, treatment, and attention at no cost to themselves under that plan as injured employees of the covered subcontractor Jostin. (Fed MSJ Dec. at appx. pgs 17, 21-25, n. 7 and 9; State MSJ Dec. at appx. pgs 41-42.) Nevertheless, despite having received, accepted, and retained workers' compensation benefits from Messer, several of the injured employees, including Stolz, filed civil actions against Messer, DAG Construction, J&B Steel, and Triversity. (Fed MSJ Dec. at appx. pgs 15-33; State MSJ Dec. at appx. pgs 34-43.)

The first such suit was filed by Stolz in Hamilton County Common Pleas Court, Case No. A1208595. (Fed. Cert. Dec. at appx. pg 14 n. 8.) The next suit was filed a few days later by several of Stolz's fellow Jostin co-workers in Hamilton County Common Pleas Court, Case No. A1208721 (the "Lancaster Action"). (*Id.*; State MSJ Dec. at appx. pgs 34-36.)[1]

Messer moved for summary judgment in both of those cases, arguing that it was entitled to workers' compensation immunity as to the claims of injured employees of enrolled subcontractors who had participated in Messer's worker's compensation plan for the Casino construction projected and received, accepted, and retained benefits under that plan. (Fed. Cert. Order at appx. pgs 2-3; Fed. Cert. Dec. at appx. pgs 8-9; Fed MSJ Dec. at appx. pgs 16-25; State MSJ Dec. at appx. pgs 35, 39-41.) Messer's argument was based on the "vertical" immunity created by R.C. 4123.35(O), which provides that a self-insuring employer, such as Messer, is to be treated for workers' compensation purposes as if it is the employer for all of the workers of all the covered subcontractors. (*Id.*) Thus, because all of the injured persons, including Stolz, were working for a covered subcontractor (Jostin) at the time of the accident, Messer was their

[1] Because both cases were filed in Hamilton County Common Pleas Court, the dockets for these cases as well as the documents filed therein can be viewed online by the Court by case number at the Hamilton County Clerk of Court's website (http://www.courtclerk.org/case.asp).

constructive "employer" for the purpose of applying Ohio's Worker's Compensation statutes. (*Id.*) As such, Messer was entitled to the immunity afforded to employers by R.C. 4123.74 as to any negligence claims made by injured persons working for a covered subcontractor. (*Id.*)

DAG Construction, J&B Steel, and Triversity also moved for summary judgment in the Lancaster Action on the basis of the "horizontal" immunity between covered subcontractors created by R.C. 4123.35(O). (Fed. Cert. Dec. at appx. pgs 12-14; Fed. MSJ Dec. at appx. pgs 29-32; State MSJ Dec. at appx. pgs 34-43.) Again, that statute provides that Messer is to be treated for workers' compensation purposes as the singular employer for **all** the employees of **all** the covered subcontractors and specifically states that both Messer and the covered subcontractors are entitled to the protections provided within Chapter 4123. Thus, claims by injured persons working for one covered subcontractor against another covered subcontractor are based on claims alleging the negligence of co-employees and are prohibited by the fellow employee immunity set forth in R.C. 4123.741. In response to the subcontractors' motions for summary judgment, the plaintiffs in the Lancaster Action argued that enrolled subcontractors are only immune from claims made by their own actual employees, and are not immune from claims made by employees of other enrolled subcontractors. (State MSJ Dec. at appx. pg 36.)

Stolz voluntarily dismissed his state court action before these issues could be decided by the state courts. (Fed. Cert. Dec. at appx. pg 14 n. 8.) The Plaintiffs in the Lancaster Action voluntarily dismissed their claims against Messer, acknowledging its right to "vertical" immunity, but they would not acknowledge the "horizontal" immunity DAG Construction, J&B Steel, and Triversity sought to establish. (State Court MSJ at appx. pgs 35-36, 41-42, n. 28.)

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. (*Id.* at appx. pgs 34-43.) That decision was based on the plain language of R.C. 4123.35(O) rendering Messer the constructive employer for all persons working for a covered subcontractor at the Casino construction project, and the principles of the social bargain underlying Ohio's workers' compensation scheme. (*Id.*)

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 the adverse state court decision. (Fed. Cert. Dec. at appx. pg 14 n. 8.) In his re-filed federal action, Stolz brought negligence claims against Messer, DAG Construction, J&B Steel, and Triversity, and he also brought an employer intentional tort claim against Messer. (Fed. MSJ Dec. at appx. pg 16, n. 2.)

Messer moved for judgment on the pleadings as to the employer intentional tort claim and for summary judgment on the negligence claim. (*Id.*) As to the negligence claim, Messer again argued that it was entitled to summary judgment based on both the "vertical" immunity afforded to it pursuant to R.C. 4123.35(O) and 4123.74 as Stolz's constructive employer for workers' compensation purposes and pursuant to the election of remedies doctrine since it is undisputed Stolz received, accepted, and retained workers' compensation benefits from Messer. (*Id.* at appx. pgs 18-25.) The federal court granted Messer's motions, and there are no pending claims against Messer in the federal action, but the Court has not yet issued a determination rendering those decisions final and appealable. (*Id.*; Fed. Cert. Dec. at appx. 9-10, n. 3.)

DAG Construction, J&B Steel, and Triversity also moved for summary judgment in the federal action on the basis of the "horizontal" immunity that had already been recognized by the state court in the Lancaster Action. (Fed. MSJ Dec. at appx. pgs 16-17, 25-32; Fed. Cert. Order at appx. pgs 1-3; Fed. Cert. Dec. at appx. pgs 9-14.) The federal court, however, rejected the

state court's reasoning and found that subcontractors enrolled under Messer's certificate are only entitled to immunity from the claims of their own actual employees and are not entitled to immunity from the claims of injured workers of other enrolled subcontractors, even though the statute considers them all to be co-employees of Messer for workers' compensation purposes. (*Id.*) This was the exact interpretation of the law argued by the plaintiffs and rejected by the state court in the Lancaster Action. (State MSJ Dec. at appx. pgs 36-43.)

Upon motion of DAG Construction, J&B Steel, and Triversity, the federal court, recognizing that its decision was in direct conflict with the state court decision in the Lancaster Action and involved a potentially dispositive issue of law that has not yet been addressed by this Court, appropriately certified to this Court the question of whether R.C. 4123.35(O) grants "horizontal" immunity to enrolled subcontractors from claims brought by employees of other enrolled subcontractors. (Fed. Cert. Order at appx pgs 1-7; Fed. Cert Dec. at appx. pgs 8-14.) On June 24, 2015, this Court accepted for review the following question:

> 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.

ARGUMENT

Proposition of Law

Subcontractors covered by a certificate permitting the self-insurance of the workers' compensation program for a construction project pursuant to R.C. 4123.35(O) are entitled to immunity under R.C. 4123.741from negligence claims related to the construction project brought by employees of other covered subcontractors.

As noted by the federal court in granting the request for certification of a question of law to this Court, the relevant facts in this matter are undisputed and the disagreement between the parties involves the interpretation and application of Ohio's workers' compensation statutes.

(Fed. Cert. Dec. at appx. pg 12; see also, Fed. Cert. Order at appx. pgs 1-4.) It is undisputed that the Bureau issued a certificate to Messer pursuant to R.C. 4123.35(O) prior to Stolz's accident, which allowed Messer to self-insure the workers' compensation program at the Casino construction project for all of the employees of all the subcontractors enrolled under that certificate. (Fed. Cert. Order at appx. pgs 1-2; Fed. Cert. Dec. at appx. pgs 8-10; Fed MSJ Dec. at appx. pgs 16-17; State MSJ Dec. at appx. pgs 34-35.) It is also undisputed that Stolz was injured while working at the Casino construction project for a subcontractor enrolled under Messer's certificate and that Stolz received, accepted, and retained workers' compensation benefits from Messer as an injured employee of an enrolled subcontractor. (Fed MSJ Dec. at appx. pgs 16-17, 21-25, n. 7 and 9.) Finally, there is no dispute that the entities against which Stolz seeks to recover, D.A.G. Construction, J&B Steel, and Triversity, were all also enrolled subcontractors participating in Messer's self-insured workers' compensation program along with Stolz's employer, Jostin. (*Id.* at appx. pgs 16-17, 26 n. 10; State MSJ Dec. at appx. pg 41.)

Thus, there are no relevant facts in dispute and the question before the Court is a legal one, regarding whether Ohio's workers' compensation statutes create "horizontal" immunity for negligence claims between enrolled subcontractors participating in a self-insured construction project and the employees of other enrolled subcontractors. Such an issue involves a question of law and is appropriately decided by this Court. *Cleveland Clinic Found. v. Cleveland Bd. of Zoning Appeals*, 141 Ohio St.3d 318, 2014-Ohio-4809, ¶ 25.

I. **Pursuant to the Plain Language Within R.C. 4123.35(O), Enrolled Subcontractors Participating in a Self-Insured Construction Project Under that Statute are Entitled to the Immunity Provided by R.C. 4123.741 from Negligence Claims Related to the Construction Project Made by Workers of Other Enrolled Subcontractors**

The goal of interpreting a statute is to ascertain and give effect to the legislature's intent by reviewing the statutory language and determining the purpose sought to be accomplished by

the statute. *Hulsmeyer v. Hospice of Southwest Ohio, Inc.*, 142 Ohio St.3d 236, 2014-Ohio-5511, ¶ 21 (citing *General Assembly. State v. Hairston*, 101 Ohio St.3d 308, 2004-Ohio-969, ¶ 11; and quoting *Sutton v. Tomco Machining, Inc.*, 129 Ohio St.3d 153, 2011-Ohio-2723, ¶ 12). "[T]he intent of the law-makers is to be sought first of all in the language employed, and if the words be free from ambiguity and doubt, and express plainly, clearly and distinctly, the sense of the law-making body, there is no occasion to resort to other means of interpretation." *Horvath v. Ish*, 134 Ohio St.3d 48, 2012-Ohio-5333, ¶ 10.

R.C. 4123.35(O) provides in part as follows:

> 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.

Stolz's position is that because this language refers to a subcontractor's employees in the singular possessive, the immunities within Chapter 4123 only protect subcontractors from claims made by their own actual workers and do not extend to claims made by workers of other enrolled subcontractors. (Fed. MSJ Dec. at appx. pgs 25-32.) This position, however, ignores the other provisions of R.C. 4123.35(O), which clearly, unequivocally, and repeatedly state that all of the employees of all the enrolled subcontractors are to be considered as the employees of the self-insuring employer for workers' compensation purposes, which includes the immunities set forth in R.C. 4123.74 and R.C. 4123.741.

The express language within R.C. 4123.35(O) makes clear that a self-insuring employer, such as Messer, applies to self-insure the **employees** of any subcontractors enrolled under its certificate. In other words, because a subcontracting company is not an entity that would be

entitled to workers' compensation coverage itself, the statute clarifies the fact that the coverage being provided by the self-insured employer extends to the subcontractors' **employees** rather than the subcontractors.

Additionally, R.C. 4123.35(O) specifically states several times that all the employees of enrolled subcontractors are to be jointly treated "as if the employees were employees of the self-insuring employer" for the purposes of interpreting and applying Chapter 4123. R.C. 4123.35(O) further emphasizes this point by establishing the following manner for calculating how workers' compensation premiums and compensations are to be allocated with regard to persons working on a self-insured construction project:

> The contractors and subcontractors included under a certificate issued under this division shall identify in their payroll records the employees **who are considered the employees of the self-insuring employer listed in that certificate for purposes of this chapter and Chapter 4121. of the Revised Code**, and the amount that those employees earned for employment on the construction project that is the subject of that certificate. Notwithstanding any provision to the contrary under this chapter and Chapter 4121. of the Revised Code, the administrator shall exclude the payroll that is reported for employees **who are considered the employees of the self-insuring employer listed in that certificate**, and that the employees earned for employment on the construction project that is the subject of that certificate, when determining those contractors' or subcontractors' premiums or assessments required under this chapter and Chapter 4121. of the Revised Code. A self-insuring employer issued a certificate under this division shall include in the amount of paid compensation it reports pursuant to division (L) of this section, the amount of paid compensation the self-insuring employer paid pursuant to this division for the previous calendar year.

Emphases added.

This language and manner of calculating premiums and reporting compensation reemphasizes the fact that **all** of the persons working for enrolled subcontractors on a self-insured construction project are considered to be **solely** the employees of the self-insuring employer for the purposes of applying the workers' compensation statutes, including R.C. 4123.741. In fact, R.C. 4123.35(O) specifically acknowledges that "[f]or purposes of this

chapter and Chapter 4121. of the Revised Code, a claim that is administered and paid in accordance with this division is considered a claim against the self-insuring employer listed in the certificate." Such language reinforces Messer's treatment under the statute as the **sole** employer of **all** the employees of enrolled subcontractors for workers' compensation purposes.

It is well established that an employer is only liable in tort where tortious actions undertaken during the course and scope of employment can attributed to its employees. *Natl. Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth*, 122 Ohio St.3d 594, 600, 2009-Ohio-3601, ¶ 23; see also *Elston v. Howland Local Schools*, 113 Ohio St.3d 314, 2007-Ohio-2070, ¶ 19 (recognizing that an entity can only act through its employees). Therefore, Stolz can only establish liability against DAG Construction, J&B Steel, and/or Triversity by first establishing negligence on the part of one or more of their workers at the Casino construction project, who were, pursuant to R.C. 4123.35(O), his co-employees for the purpose of applying Ohio's workers' compensation statutes. *Id.* Accordingly, Stolz is seeking to bring claims against DAG Construction, J&B Steel, and Triversity on the basis of the allegedly negligent acts of his co-employees. *Id.*

R.C. 4123.741 specifically prohibits injured employees who have participated in an employer's workers' compensation program from bringing claims against their co-employees. *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." *Id.* Thus, a party is "precluded from pursuing a common-law remedy of negligence against her

fellow employee" where that claim has been acknowledged and paid under Ohio's workers' compensation statutes. *Kelbley v. Hurley*, 94 Ohio App.3d 409, 414 (3d Dist. 1994).

It is undisputed that Stolz received, accepted, and retained workers' compensation benefits from Messer pursuant to the dictates of R.C. 4123.35(O). (Fed MSJ Dec. at appx. pgs 17, 21-25, n. 7 and 9.) Under such circumstances, R.C. 4123.35(O) provides that Messer is considered to be the employer for both Stolz and all of the other workers for all of the other enrolled subcontractors for workers' compensation purposes. Stolz is prohibited by R.C. 4123.741 from pursuing claims for the alleged negligence of his co-employees, which, pursuant to R.C. 4123.35(O), include the allegedly negligent workers for DAG Construction, J&B Steel, and Triversity.

Put simply, under R.C. 4123.35(O) Messer is considered, for the purpose of interpreting and applying Ohio's workers' compensation laws, to be the employer for all of the persons who were working on the Casino construction project for subcontractors covered by and participating in Messer's self-insured workers' compensation program. Thus, all of the workers injured in the January 2012 accident at the Casino construction project, including Stolz, were considered Messer employees for workers' compensation purposes, including the application of the fellow servant immunity established by R.C. 4123.741, as were all of the employees of DAG Construction, J&B Steel, and Triversity, whose allegedly negligent actions purportedly caused and/or contributed to the accident. Therefore, Stolz would have to first establish the negligence of his constructive co-employees in order to prove his claims against DAG Construction, J&B Steel, and Triversity, and his claims against these entities are prohibited by R.C. 4123.741.

Under Stolz's reading of R.C. 4123.35(O), he would be considered Messer's employee for the purpose of applying the workers' compensation statutes with regard to his claims against

Messer and for the purpose of applying the immunity in R.C. 4123.74, but he would be treated as Jostin's employee with regard to regard to his other claims arising out of the same accident and for the purpose of applying the immunity in R.C. 4123.741. Such an interpretation is contrary to the plain language within 4123.35(O), which establishes that he and all of the other persons working for enrolled subcontractors at the Casino construction project are jointly considered to be Messer's employees for **all** purposes of applying the workers' compensation statutes without exception. This necessarily means that Stolz and the allegedly negligent workers for DAG Construction, J&B Steel, and Triversity must be considered co-employees for the purpose of determining the extent of the immunity afforded to those parties and in applying R.C. 4123.741.

When interpreting and applying a statute the words and phrases in the statute must "be read in context and construed according to the rules of grammar and common usage." R.C. 1.42. Additionally, the Court may neither delete words that are used nor add words that are not used. *Cline v. Ohio Bur. of Motor Vehicles*, 61 Ohio St.3d 93, 97 (1991). Stolz is asking the Court to create a distinction in the treatment of his employment status under R.C. 4123.35(O) depending on whom his claims are against even though no such distinction is found within the statute. This further demonstrates why Stolz's interpretation of R.C. 4123.35(O) must be rejected.

Moreover, the use of the singular possessive in the portion of R.C. 4123.35(O) that Stolz relies upon is irrelevant because the statute, when read in its entirety, unambiguously states that all the employees of the enrolled subcontractors are to be treated as Messer's employees for the purpose of applying Ohio's workers' compensation statutes. "In reviewing a statute, a court cannot pick out one sentence and disassociate it from the context, but must look to the four corners of the enactment to determine the intent of the enacting body. A court must examine a statute in its entirety rather than focus on an isolated phrase to determine legislative intent."

Horvath at ¶ 10. Therefore, when the portion of the statute Stolz relies upon is read in context with the other portions of R.C. 4123.35(O), the use of the plural possessive was unnecessary, since all of the employees to which it is referring are considered to be co-employees of the self-insuring employer, and the use of the singular possessive does not indicate any sort of intention to limit the scope of the statutory immunities afforded to enrolled subcontractors.

R.C. 4123.35(O) establishes that Stolz is considered for workers' compensation purposes to be a co-employee of the other workers against whom he is seeking to establish negligence. Therefore, his claims against DAG Construction, J&B Steel, and Triversity are barred by R.C. 4123.741.

II. **R.C. 4123.35(O) Should be Read In Pari Materia With R.C. 4123.741**

As stated above, the plain language within R.C. 4123.35(O) is sufficient to establish that Stolz's claims against DAG Construction, J&B Steel, and Triversity are based on the alleged negligence of his constructive co-employees and are prohibited by R.C. 4123.741. However, this conclusion is even clearer when those statutes are considered in pari materia.

"Statutes or sections of statutes which explicitly refer to each other are regarded as being in pari materia." *Ohio Bus Sales, Inc. v. Toledo Bd. of Edn.*, 82 Ohio App.3d 1, 7 (6th Dist. 1992) (citing *Beach v. Beach*, 99 Ohio App. 428, 434 (2d Dist. 1955)); see also *Maxfield v. Brooks*, 110 Ohio St. 566, syllabus of the Court (1924). "All statutes relating to the same general subject matter must be read in pari materia, and in construing these statutes in pari materia, [courts] must give them a reasonable construction so as to give proper force and effect to each and all of the statutes." *State ex rel. Herman v. Klopfleisch*, 72 Ohio St.3d 581, 585 (1995). "It is the duty of the court to construe such statutes so that they are consistent and harmonious with a

common policy and give effect to legislative intent." *Ohio Bus Sales*, 82 Ohio App.3d at 7 (citing *Suez Co. v. Young*, 118 Ohio App. 415 (1963)); see also *Maxfield*, 110 Ohio St. at 572-73.

This Court has recognized that statutes dealing with the same subject matter and that immediately precede and refer to one another should be construed in pari materia even where there is no ambiguity in the statutory language. *Maxfield*, 110 Ohio St. at 572-73; see also *State ex rel. Cordray v. Midway Motor Sales, Inc.*, 122 Ohio St.3d 234, 2009-Ohio-2610, ¶ 25-27. To paraphrase the Court, it would be strange, indeed, if the Legislature seriously entered upon the task of enacting a statute, such as R.C. 4123.35, of great length and containing many different provisions in orderly form touching upon workers' compensation and did it all without any purpose of applying and construing the statute in connection with other statues dealing with the same subject matter. *Maxfield*, 110 Ohio St. at 572.

"In reading statutes in pari materia and construing them together, this court must give a reasonable construction that provides the proper effect to each statute." *Blair v. Sugarcreek Twp. Bd. of Trustees*, 132 Ohio St.3d 151, 2012-Ohio-2165, ¶ 18. "All provisions of the Revised Code bearing upon the same subject matter should be construed harmoniously unless they are irreconcilable." *Id.*

R.C. 4123.35(O) specifically provides that enrolled subcontractors participating in a self-insured construction project are entitled to all of the protections provided within Chapter 4123, which includes 4123.741. Thus, R.C. 4123.35(O) must be considered in pari materia with R.C. 4123.741 in determining the extent of the immunity afforded to enrolled subcontractors. *Maxfield*, 110 Ohio St. at 572-73; *Midway Motor Sales*, at ¶ 25-27; *Ohio Bus Sales*, 82 Ohio App.3d at 7.

It is impossible to reconcile Stolz's interpretation of R.C. 4123.35(O) with the immunity set forth within R.C. 4123.741. The first statute renders Stolz the co-employee of those workers whom he alleges were negligent, whereas the second statute provides that a person participating in an employer's Worker's Compensation program and receiving benefits thereunder cannot bring claims against his co-employees. The only reasonable manner of reconciling these two related statutes is to determine that subcontractors enrolled in a self-insured construction project pursuant to R.C. 4123.35(O) are entitled to immunity from negligence claims related to the construction project brought by persons working for other enrolled subcontractors.

This interpretation is a reasonable construction that gives proper force and effect to both statutes and enables them to be construed harmoniously. Therefore, it is the appropriate interpretation. *Blair* at ¶ 18.

III. **Stolz's Interpretation of R.C. 4123.35(O) Would Violate the Purpose and Public Policy of that Statute and Result in an Inequitable Application of the Law**

At most, Stolz's argument and the opposing interpretations of the federal and state courts establish an ambiguity within R.C. 4123.35(O). *Caldwell v. State*, 115 Ohio St. 458, 460 (1926) (recognizing that where, as is the case here, lower courts have reached different conclusions regarding the interpretation of a statute "that fact strongly indicates the existence of ambiguity."). To the extent an ambiguity exists within R.C. 4123.35(O), the Court may consider the purpose and public policy of the statute as well as the potential consequences of Stolz's proposed interpretation. R.C. 1.49.

Ohio's workers' compensation scheme "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 even though it was not his actual employer, Stolz voluntarily participated in the system established by R.C. 4123.35(O), and accepted the fact that Messer was his constructive employer for the purpose of workers' compensation issues related to the Casino construction project.

Stolz argues that the enrolled subcontractors should be not entitled to immunity because they did not participate in the "quid pro quo" of paying for workers' compensation coverage and should not, therefore, receive the benefits of the immunities afforded by statute. First, this argument is not relevant to the legal question of whether the plain language within R.C. 4123.35(O) and R.C. 4123.741 and the application of those statutes in pari materia bestow immunity upon enrolled subcontractors for claims made by employees of other enrolled subcontractors. Second, this argument is also factually inaccurate. The enrolled subcontractors "paid" for the cost of workers' compensation premiums by lowering their bids by an amount equivalent to what they would normally have charged on a project where they were providing the coverage directly to their employees. (Fed. MSJ Dec. at appx. pg 28 n. 14; see also *Virginia Sur. Co. v. Adjustable Forms, Inc.*, 888 N.E.2d 733, 737 (Ill.App. 2008) ("the contract price is reduced because the insurance costs are not incurred by the contractors of the project.") (quoting *Pride v. Liberty Mutual Ins. Co.*, No. 04-C-703, 2007 WL 1655111, at *2 (E.D. Wis. June 5, 2007).)

Additionally, R.C. 4123.352(O) provides that "a self-insuring employer is responsible for the administration and payment of all claims under this chapter and Chapter 4121. of the Revised Code for the employees of the contractor and subcontractors covered under the certificate who receive injuries or are killed in the course of and arising out of employment on the construction project, or who contract an occupational disease in the course of employment on the construction project." Accordingly, to allow Stolz to pursue claims against subcontractors who are covered

under the self-insurance provided by Messer would be to create a potential backdoor avenue for injured employees to avoid the express immunity afforded to the self-insured employer under R.C. 4123.35(O). Any claims by an employee of an enrolled subcontractor against the other enrolled subcontractors necessarily involves some risk of exposure for the self-insured employer and, at the very least, requires the self-insured employer to incur costs, time, and expense related to the litigation, even if only participating as a secondary party.

Indeed, Stolz's interpretation of R.C. 4123.35(O) is directly contrary to public policy considerations and the purpose of the statute. The right to self-insure the workers' compensation program for an entire construction project is generally limited to construction projects that are scheduled for completion within six years with estimated costs of over $100 million. R.C. 4123.35(O). Obviously, such projects are large in scale and typically involve a great number of subcontractors and an even greater number of workers. With such scale and numbers comes an increased complexity and difficulty in establishing the nexus and liability for any accidents that may occur. This in turn increases the complexity and cost of any related litigation. Thus, the benefits of R.C. 4123.35(O) include limiting the amount of litigation arising out of any accidents that may occur while at the same time ensuring that all workers receive the same high-level workers' compensation coverage. Stolz's attempt to bring claims against enrolled subcontractors even though he participated in, accepted, and retained benefits under Messer's plan is an attempt to reap the benefits of the workers' compensation system but avoid its limitations. (See, State MSJ Dec. at appx. pgs 41-42 (recognizing that allowing an injured worker to recover against both Messer through workers' compensation and other enrolled subcontractors through negligence would constitute "a second bite of the apple [that] would run counter to the 'social bargain' that is the workers' compensation system. The receipt of workers' compensation

benefits they received for their injuries under the Plan was the Plaintiffs' exclusive remedy.") Stolz's proposed interpretation of R.C. 4123.35(O) is contrary to not only the policy and purpose underlying that particular statue, but is also contrary to Ohio's entire workers' compensation system.

Furthermore, Stolz's proposed interpretation of R.C. 4123.35(O) would result in significant disparate treatment among similarly situated individuals. Persons working for his actual employer, Jostin, would be able to claim the co-employee immunity in R.C. 4123.741, but persons working for other enrolled subcontractors would not, even though all of the workers are considered to be co-employees for the purpose of applying that statute. This is contrary to both logic and the plain language of the statute.

Finally, the case law from other states interpreting similar workers' compensation statutes supports the proposition that enrolled subcontractors should have the same immunity as the self-insuring general contractor. *Etie v. Walsh & Albert Coin*, 135 S.W.3d 764 (Tex.App. 2004); *Amorin v. Gordon*, 996 So.2d 913 (Fla.App. 2008).

In *Etie*, the general contractor for a construction project had purchased a policy of insurance providing workers' compensation benefits to all subcontractors and employees who worked at the project, which included a contractor, Way Engineering ("Way"), and its subcontractor, Walsh & Albert LTD ("Walsh & Albert"). *Etie*, 135 S.W.3d at 765-66. Plaintiff was employed by Way and was injured on the job. *Id.* He sought and received workers' compensation benefits under the general contractor's policy but then filed suit against Walsh & Albert. *Id.* The court considered as a matter of first impression whether Texas' Workers' Compensation Act, which allows a general contractor to provide workers' compensation benefits

to all the employees of all the subcontractors on a job, also provides immunity from suit to those subcontractors under the "fellow servant" rule. *Id.*

Holding that Walsh & Albert were entitled to immunity, the court noted that the portion of Texas workers' compensation statute allowing a general contractor to provide workers' compensation insurance coverage for subcontractors and their employees (Tex. Code 406.123(e)), created the same legal fiction as R.C. 4123.35(O), rendering the general contractor "the employer of the subcontractor and subcontractor's employees for the purpose of Texas workers' compensation law." *Id.* at 766. Based on this legal fiction, and the purpose of the act, which, as in Ohio, is to ensure that injured workers receive compensation for injuries and medical treatment without having to file suit, the court held as follows:

> We are persuaded that the purposes of the Act are best served by deeming immune from suit all subcontractors and lower tier contractors who are collectively covered by workers' compensation insurance. We hold that the Act's deemed employer/employee relationship extends throughout all tiers of the 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. We further hold that the participating employees are fellow servants, equally entitled to workers' compensation benefits and equally immune from suit.

Id. at 768; see also, *HCBeck, Ltd. v. Rice,* 52 Tex. Sup. Ct. J. 555, 284 S.W.3d 349, 359-60 (2009), (wherein the Texas Supreme Court recognized that Texas' workers' compensation statute "would allow multiple tiers of subcontractors to qualify as statutory employers entitled to the exclusive remedy defense".); *Garza v. Zachry Constr. Corp.*, 373 S.W.3d 715, 721 (Tex.App. 2012); *Becon Const. Co. v. Alonso*, 444 S.W.3d 824, 832 (Tex.App. 2014).

In *Amorin*, the relevant Florida workers' compensation statutes, again like the Ohio statute, established a statutory scheme creating the legal fiction that all employees of enrolled subcontractors and contractors shall be deemed employees of the self-insuring general contractor

for the purposes of workers' compensation benefits. Fla. Stat. 440.10(1)(b). The court in *Amorin* noted that the claim by plaintiff against defendant was essentially a claim between employees of different subcontractors covered for workers' compensation coverage under the general contractor's policy. *Amorin*, 996 So.2d at 915-17. Accordingly, the court recognized that there was horizontal immunity between subcontractors, emphasizing the public policy behind the workers' compensation system, which is the quid pro quo, of receiving benefits without litigation, in exchange for immunity. *Id.* at 917-18.

IV. **Conclusion**

The plain and unambiguous language within R.C. 4123.35(O) renders Stolz Messer's employee for the purpose of interpreting and applying Ohio's workers' compensation statutes to Stolz's claims arising of the injuries he sustained while working at the Casino construction project. Thus, Stolz was the co-employee of the persons working for other enrolled subcontractors at the Casino construction project, including DAG Construction, J&B Steel, and Triversity, and his claims against those parties are based on the alleged negligence of his constructive co-employees. As such, DAG Construction, J&B Steel, and Triversity are entitled to immunity under the fellow servant doctrine as set forth in R.C. 4123.741.

Moreover, when R.C. 4123.35(O) and R.C. 4123.741 are read in pari materia, the only reasonable manner of reconciling these statutes is to hold that such horizontal immunity exists. To hold otherwise would create a distinction not found within the statute, treating Stolz as Messer's employees for the purpose of applying some statutes (such as R.C. 4123.74) but treating Stolz as Jostin's employee for the purpose of applying other statutes (such as R.C. 4123.741).

Finally, Stolz's attempt to circumvent the statutory immunities set forth within Ohio's workers' compensation scheme while participating in that system and receiving, accepting, and retaining its benefits violates the purpose and public policy underlying the entire system. Therefore, for all of the above reasons, Messer respectfully submits that DAG Construction, J&B Steel, and Triversity are entitled to immunity from Stolz's negligence claims.

Respectfully submitted,

JANE M. LYNCH (0012180)
JARED A. WAGNER (0076674)
GREEN & GREEN, Lawyers
800 Performance Place
109 N. Main Street
Dayton, Ohio 45402
Tele. 937.224.3333
Fax 937-224-4311
jmlynch@green-law.com
jawagner@green-law.com

Counsel for Petitioner
Messer Construction Co.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been served via electronic mail upon the following on the 31st day of July 2015:

Counsel of record for plaintiff/respondent

Brett Goodson, Esquire
110 East Eighth Street, Suite 200
Cincinnati, Ohio 45402-2132

and

Stephanie Day, Esquire
600 Vine Street, Suite 2700
Cincinnati, Ohio 45202

Counsel for defendants/petitioners Pendleton Construction Group; D.A.G. Construction Co., Inc.; and Triversity Construction Co., LLC

Stephen M. Yeager, Esquire
Steve Patsfall, Esquire
205 West Fourth Street, Suite 1280
Cincinnati, Ohio 45202

Counsel for defendant/petitioner J&B Steel Erectors

K. Roger Schoeni, Esquire
Kim Pramaggiore, Esquire
201 East Fifth Street
PNC Center, Suite 800
Cincinnati, Ohio 45202-4190

Counsel for defendant/respondent Terracon Consultants, Inc.

Robert W. Hojnoski, Esquire
525 Vine Street, Suite 1700
Cincinnati, Ohio 45202

JARED A. WAGNER (0076674)

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

DANIEL STOLZ,	:	Case No. 1:14-cv-44
Plaintiff,	:	Judge Timothy S. Black
vs.	:	
J & B STEEL ERECTORS, INC., *et al.*,	:	
Defendants.	:	

CERTIFICATION ORDER

Pursuant to Supreme Court of Ohio Rules of Practice 9.01 through 9.04, the Court hereby issues this Certification Order, to be served upon all parties or their counsel of record and filed with the Clerk of the Supreme Court of Ohio, under seal of the United States District Court for the Southern District of Ohio.

A. Case Name

Daniel Stolz v. J & B Steel Erectors, Inc., et al., United States District Court, Southern District of Ohio, Case No. 1:14-cv-44

B. Statement of Facts

1. Nature of the Case

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 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.[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).

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[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

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

DANIEL STOLZ,	:	Case No. 1:14-cv-44
Plaintiff,	:	Judge Timothy S. Black
vs.	:	
J & B STEEL ERECTORS, INC., *et al.*,	:	
Defendants.	:	

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

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[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."

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[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 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).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

DANIEL STOLZ,	:	Case No. 1:14-cv-44
Plaintiff,	:	Judge Timothy S. Black
vs.	:	
J & B STEEL ERECTORS, INC., *et al.*,	:	
Defendants.	:	

ORDER GRANTING DEFENDANT MESSER CONSTRUCTION CO.'S MOTION FOR SUMMARY JUDGMENT (Doc. 14) AND DENYING THE MOTIONS FOR SUMMARY JUDGMENT OF DEFENDANTS D.A.G. CONSTRUCTION CO., INC., TRIVERSITY CONSTRUCTION CO., LLC, AND J & B STEEL ERECTORS, INC. (Docs. 37 and 40)

This civil action is before the Court on Defendant Messer Construction Co.'s motion for summary judgment (Doc. 14), Defendants D.A.G. Construction Co., Inc.'s and Triversity Construction Co., LLC's motion for summary judgment (Doc. 37), Defendant J & B Steel Erectors, Inc.'s motion for summary judgment (Doc. 40), and the parties' responsive memoranda (Docs. 56, 61, 63, 65, and 66).[1]

[1] Plaintiff seeks oral argument on these motions. (*See* Doc. 56 at 1; Doc. 63 at 1). S.D. Ohio Civ. R. 7.1(b)(2) provides for oral argument where it "is deemed to be essential to the fair resolution of the case because of its public importance or the complexity of the factual or legal issues presented[.]" Here, the Court finds that the factual and legal issues are clear on their face, so oral argument is not necessary. *See Whitescarver v. Sabin Robbins Paper Co.*, Case No. C–1–03–911, 2006 WL 2128929, at *2, (S.D. Ohio July 27, 2006) (C.J. Dlott) ("Local Rule 7.1(b)(2) leaves the Court with discretion whether to grant a request for oral argument.").

I. BACKGROUND

Plaintiff was allegedly injured while working as a concrete finisher for Jostin Construction, Inc. ("Jostin") at the Horseshoe Casino construction project in Cincinnati. Plaintiff brings this civil action against Defendants Messer Construction Co. ("Messer"), D.A.G. Construction Co., Inc. ("D.A.G."), Triversity Construction Co., LLC ("Triversity"), J & B Steel Erectors, Inc. ("J & B Steel"), Terracon Consultants, Inc., and Pendleton Construction Group, LLC, each of whom allegedly had responsibilities related to the construction project. Plaintiff claims that Defendants were negligent.[2] He also seeks punitive damages.

Defendant Messer moves for summary judgment on the grounds that (1) it is entitled to immunity under Ohio's workers' compensation laws as a self-insuring employer and (2) the election of remedies doctrine bars Plaintiff from pursuing his claim against Defendant Messer.

Defendants D.A.G., Triversity, and J & B Steel argue that they are entitled to immunity under Ohio's workers' compensation laws as enrolled subcontractors under Defendant Messer's workers' compensation program.

II. UNDISPUTED FACTS[3]

1. At the time of his alleged injuries, Plaintiff Daniel Stolz was working for Jostin as a concrete finisher at the construction project for the Horseshoe Casino in Cincinnati, Ohio ("Casino Project"). (Doc. 49 at ¶ 1).

[2] Plaintiff also asserted an employer intentional tort claim against Defendant Messer only. The Court previously dismissed this claim. (*See* Doc. 33).

[3] *See* Doc. 14-1, Doc. 40-2, Doc. 56 at 12-13, and Doc. 63-1.

2. 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).

3. Prior to Plaintiff's accident, 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).

4. Plaintiff's employer, Jostin, was an enrolled subcontractor participating in Messer's workers' compensation program under the certificate of authority issued by the BWC to Messer. (Doc. 14-2 at ¶¶ 1-4; Doc. 14-3; Doc. 14-4).

5. J & B Steel was an enrolled subcontractor participating in Messer's workers' compensation program for the Casino Project under the certificate of authority issued by the BWC to Messer. (*See* Doc. 14-2 at ¶3; Doc. 14-4).

III. STANDARD OF REVIEW

A motion for summary judgment should be granted if the evidence submitted to the Court demonstrates that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The moving party has the burden of showing the absence of genuine disputes over facts which, under the substantive law governing the issue, might affect the outcome of the action. *Celotex*, 477 U.S. at 323. All facts and inferences must be construed in a light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

A party opposing a motion for summary judgment "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 248 (1986).

IV. ANALYSIS

A. Defendant Messer

1. Workers' Compensation Immunity

Workers' compensation "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, 748 N.E.2d 1111. In the event an employee is injured in a work-related incident, he 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. *See* Ohio Rev. Code ("O.R.C.") §§ 4123.35, 4123.74.[4] This exchange of rights is referred to as the *quid pro quo*. *See Washington Metro. Area Transit Auth. v. Johnson,* 467 U.S. 925, 931 (1984).

The "exclusivity rule" dictates that an employee who is injured in the course of his employment must accept workers' compensation benefits as his exclusive remedy vis-à-vis his employer. *See Freese v. Consolidated Rail Corp.*, 4 Ohio St.3d 5, 7, 445 N.E.2d 1110 (1983) (citing O.R.C. § 4123.74); *Saunders v. Holzer Hosp. Found.*, 2009-Ohio-2112, at ¶ 21 (4th Dist. April 30, 2009) (quoting *Kaiser v. Strall* (1983), 5 Ohio St.3d 91, 94, 449 N.E.2d 1) ("'[c]laimants enjoy no prerogative, constitutional or otherwise, to

[4] "[Ohio's] Workers' Compensation 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.'" *Holeton,* 92 Ohio St.3d at 119 (quoting *Blankenship v. Cincinnati Milacron Chem., Inc.,* 69 Ohio St.2d 608, 614, 433 N.E.2d 572 (1982)).

choose between workers' compensation and common-law remedies where the former has been legislatively deemed to provide the exclusive means of recovery.'").

On most projects, contractors and subcontractors provide their own liability and workers' compensation coverage. However, under certain circumstances, contractors on large-scale construction projects may 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. O.R.C. § 4123.35(O).[5] Section 4123.35(O) expressly confers on a construction project self-insurer the protections of Chapters 4123 and 4121:

> 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.

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.

[5] 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 one hundred million dollars. O.R.C. § 4123.35(O).

The Ohio Bureau of Workers' Compensation ("BWC") issued a "Certificate of Employer's Right to Pay Compensation Directly" for "Subs 2000 4170-2 Horseshoe Casino - Cincinnati Wrap Up" ("certificate of authority") to Defendant Messer, effective March 1, 2011 to March 1, 2012. (Doc. 14-2 at ¶¶ 1-2; Doc. 14-3). The list of "subs" identified under this "Wrap Up" included Plaintiff's employer, Jostin. (Doc. 14-2 at ¶¶ 3-4; Doc. 14-4). It is undisputed that Plaintiff was Jostin's employee and that Jostin was an enrolled subcontractor under Defendant Messer's workers' compensation plan. (Doc. 49 at ¶ 1; Doc. 14-2 at ¶¶ 1-4; Doc. 14-3; Doc. 14-4). Accordingly, sections 4123.35(O) and 4123.74 impart workers' compensation immunity upon Defendant Messer for any injuries sustained by Plaintiff while working on the Casino Project, since he was an employee of enrolled subcontractor Jostin.

Plaintiff argues that because Defendant Messer failed to comply with the requirements set forth in section § 4123.35, Messer is not entitled to the immunity set forth in Section 4123.74. *See* O.R.C. § 4123.35(O) (granting self-insuring employers the protections of Chapters 4123 and 4121 "provided that the self-insuring employer also complies with this section"); O.R.C. § 4123.74 (providing that "[e]mployers who comply with section 4123.35 of the Revised Code shall not be liable to respond in damages at common law or by statute"). Specifically, Plaintiff contends that Defendant Messer did not adequately comply with the requirements set forth in O.R.C. § 4123.35 (O), (P) and (E) and Ohio Adm. Code § 4123-19-16(E).

As an initial matter, the Court notes that the BWC found that Defendant Messer *had* complied with the requirements of section 4123.35. The BWC certified on the face of the Certificate of Authority that "on the date hereof the named employer [Defendant Messer] *having met the requirements provided in Section 4123.35 of the Ohio Revised Code* has been granted authority to pay compensation directly to its injured[.]" (Doc. 14-3) (emphasis supplied).[6] Plaintiff has not pointed to any case law to support its contention that an entity's deviation from technical statutory requirements allows a party who has participated in the entity's workers' compensation program, and accepted benefits thereunder,[7] to sue the entity for negligence. Nor has Plaintiff demonstrated that

[6] It was within the BWC's discretion to determine whether Messer had met the requirements to self-insure the Casino Project. *See* Ohio Adm. Code § 4123-19-16(B) ("The purpose of this rule is to establish standards by which the administrator may permit a responsible self-insuring employer to self-insure a construction project entered into by the responsible self-insuring employer pursuant to division (O) of section 4123.35 of the Revised Code."); *see also* Ohio Adm. Code § 4123-19-16(C) (acknowledging that "[t]he administrator's authority to grant self-insured status for a construction project is permissive"); *State ex rel. Vaughn v. Indus. Commission of Ohio*, 69 Ohio St.2d 115, 119, 430 N.E.2d 1332 (1982) (recognizing that the BWC has "substantial discretion" in determining whether to revoke a company's self-insured status); *State ex rel. Medcorp, Inc. v. Ryan*, 10th Dist. Franklin No. 06AP-1223, 2008-Ohio-2835, ¶¶ 51-60 (finding that the decision of whether to grant an application for self-insured status lies within the BWC's discretion).

[7] Defendant Messer proposed the following as an undisputed fact: "Plaintiff has participated in Messer's Workers' Compensation plan and received medical care, treatment, and attention at no cost to himself under that plan as an injured employee of the enrolled subcontractor Jostin." (Doc. 14-1). Plaintiff denied this proposed undisputed fact "for lack of sufficient evidence" without presenting or pointing to any evidence demonstrating that Plaintiff had not received and retained coverage for his injuries under Messer's Workers' Compensation program. (*See* Doc. 56 at 12). This denial is insufficient to avoid summary judgment under Fed. R. Civ. P. 56, which requires the party opposing summary judgment to set forth specific facts indicating the existence of a genuine issue to be litigated, *Univ. of Pittsburgh v. Townsend*, 542 F.3d 513, 522 (6th Cir. 2008), and this Court's standing order for summary judgment motions, which requires each denial of a proposed undisputed fact to be supported by "a specific citation or citations" to the evidence supporting the denial. Plaintiff has failed to present any evidence demonstrating that there is a material issue of fact as to whether he has received and retained coverage for his injuries under Defendant Messer's workers' compensation program. Indeed, the evidence before the Court clearly demonstrates that Plaintiff has in fact received and retained coverage for his injuries from Defendant Messer. (Doc. 14-2 at ¶¶ 2-4; Doc. 57-1 at 60-61).

he was harmed in any manner by the alleged deviations from the statutory and administrative requirements.

Further, Defendant Messer became liable for providing workers' compensation for injured employees of enrolled subcontractors at the Casino Project upon approval of the application, regardless of whether the rules and statutes had been strictly followed. *See* Ohio Adm. Code § 4123-19-16(F). Thus, according to Plaintiff's logic, Defendant Messer would be required to provide workers' compensation coverage upon approval of its application but would not be entitled to the benefits of immunity because Defendant Messer did not strictly comply with relevant statutes or administrative rules,

Finally, Plaintiff's attempt to bring a negligence claim against Defendant Messer runs contrary to the underlying purpose of Ohio's workers' compensation system. Plaintiff participated in Defendant Messer's workers compensation plan and received medical care, treatment, and attention at no cost to himself under that plan as an injured employee of enrolled subcontractor Jostin. Defendant Messer's risk manager testified that Defendant Messer would not have paid Plaintiff's claims if the certificate of self-insurance being challenged by Plaintiff had not been issued. (Doc. 57-1 at 61). Plaintiff seeks to retain the benefits he received under the workers' compensation system, the assurance of recovery, while simultaneously seeking to avoid his own obligations by denying Defendant Messer immunity.

For these reasons, Defendant Messer is entitled to immunity from Plaintiff's negligence claim pursuant to O.R.C. §§ 4123.35 and 4123.74.

2. Dual Capacity Doctrine

Plaintiff also argues that Defendant Messer is liable pursuant to the dual capacity doctrine.[8] The dual capacity doctrine "is a narrow exception to the general rule of employer statutory immunity in negligence suits brought by employees." *Shane v. Dlubak Glass Co.*, No. 3:03CV7721, 2005 WL 1126729, at *7 (N.D. Ohio Apr. 29, 2005).

> [I]n order for the dual-capacity doctrine to apply, there must be an allegation and showing that the employer occupied two independent and unrelated relationships with the employee, that at the time of these roles of the employer there were occasioned two different obligations to this employee, and that the employer had during such time assumed a role other than that of employer.

Freese, 4 Ohio St.3d at 12. Such a showing is not made where the injuries suffered were incurred during the course of employment as a result of the employer's alleged failure to maintain a safe work place. *See id.* "In other words, the 'dual-capacity doctrine' does not apply where the employee seeks 'to sue his employer for injuries which are predominately work-related.'" *Rivers v. Otis Elevator*, 8th Dist. Cuyahoga No. 99365, 2013-Ohio-3917, ¶14 (quoting *Schump v. Firestone Tire & Rubber Co.*, 44 Ohio St.3d 148, 150 (1989)).

Here, Defendant Messer is not Plaintiff's actual employer. Although O.R.C. § 4123.35(O) provides that Defendant Messer is treated *as if* it were Plaintiff's employer

[8] Defendant Messer contends that this argument must be disregarded because this basis for liability was not set forth within the amended complaint (Doc. 49) and is raised for the first time in Plaintiff's memorandum opposing summary judgment (Doc. 56). Because the Court finds the dual capacity argument to be without merit, the Court need not reach the question of whether the argument was forfeited.

for the purposes of determining immunity, it does not create an actual employment relationship. In fact, the statute specifically states that employees of covered subcontractors are not considered employees of the self-insuring employer for any purpose other than immunity and self-insuring employers have no authority under the statute to control the means, manner, or method of the subcontractor employee's work.

Further, Plaintiff's injuries were undisputedly work related and were allegedly related to Messer's failure to provide a safe working environment. (*See* Doc. 56 at 8-9.) Such injuries are insufficient, as a matter of law, to invoke the dual capacity doctrine. *Freese*, 4 Ohio St.3d at 12; *Rivers,* 2013-Ohio-3917, at ¶14. Here, there is no that Plaintiff's injuries were a direct result of his work at the Casino Project and were not merely incidental. (*See* Doc. 49 at ¶ 14-15). Accordingly, Plaintiff has failed to raise a genuine issue of material fact related to the applicability of the dual capacity doctrine, and the Court finds that the dual capacity doctrine does not apply.

3. Election of Remedies Doctrine

Because this Court has determined that Defendant Messer is entitled to immunity pursuant to statute, the Court need not address Defendant Messer's alternative argument, that it is entitled to summary judgment pursuant to the election of remedies doctrine. However, assuming *arguendo* that Defendant Messer is *not* entitled to such immunity, the Court finds that Defendant Messer would still be entitled to summary judgment pursuant

to the election of remedies doctrine.[9]

4. Punitive Damages

Plaintiff seeks to recover punitive damages from Defendant Messer. A punitive damages claim is a derivative action that must be dismissed where the primary claim is subject to summary judgment. *Vickers v. Wren Industries, Inc.*, 2d Dist. Montgomery No. 20914, 2005-Ohio-3656, at ¶¶ 63-65. Because this Court has already dismissed Plaintiff's intentional tort claim (*see* Doc. 33), and because this Court determines that Defendant Messer is entitled to summary judgment on Plaintiff's remaining negligence claim, the derivative punitive damages claim against Defendant Messer must also be dismissed.

B. Defendants D.A.G., Triversity, and J & B Steel

Defendants D.A.G., Triversity, and J & B Steel ("Subcontractor Defendants") were enrolled subcontractors within Defendant Messer's workers' compensation

[9] The election of remedies doctrine provides that an employee who accepts workers' compensation benefits is foreclosed from later bringing a negligence action against the provider of those benefits. *See 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. Gallia No. 08CA11, 2009-Ohio-2112, ¶¶19-22; *Switka v. Youngstown*, 7th Dist. Mahoning No. 05MA74, 2006-Ohio-4617, ¶31; *Catalano v. Lorain*, 161 Ohio App.3d 841, 2005-Ohio-3298, 832 N.E.2d 134, ¶¶12-13. In the typical case, this provider is the employee's employer. Plaintiff argues that the doctrine does not apply because Defendant Messer was not Plaintiff's employer. However, section 4123.35(O) specifically provides that a self-insuring employer of a construction project, such as Defendant Messer, is entitled to the protections of immunity under section § 4123.74 "with respect to the employees of the contractors and subcontractors . . . *as if the employees were employees of the self-insuring employer*[.]" (emphasis supplied). It is undisputed that Plaintiff received and retained workers' compensation benefits from Defendant Messer. (Doc. 14-2 at ¶¶ 2-4; Doc. 57-1 at 60-61). The provision of these benefits by Defendant Messer, and the acceptance of these benefits by Plaintiff, render the election of remedies doctrine applicable.

coverage. (Doc. 14-2 at ¶3; Doc. 14-4).[10] These Defendants argue that the receipt of workers' compensation benefits was Plaintiff's exclusive remedy and that, as enrolled subcontractors, they are also entitled to workers' compensation immunity from Plaintiff's negligence claim pursuant to O.R.C. §§ 4123.35 and 4123.74.[11] In addition to providing immunity for self-insuring employers as set forth above, section 4123.35(O) provides as follows:

> 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.

1. Workers' Compensation Immunity

The Court's paramount concern in construing a statute is legislative intent. *See State ex rel. Steele v Morrissey*, 103 Ohio St.3d 355, 2004-Ohio-4960, 815 N.E.2d 1107, ¶ 21. To discern legislative intent, the Court first considers the statutory language, reading words and phrases in context and in accordance with rules of grammar and common usage. *Id.* (citing *State ex rel. Rose v. Lorain Cty. Bd. of Elections* 90 Ohio

[10] The fact that Defendant J & B Steel was an enrolled subcontractor participating in Messer's workers' compensation program for the Casino Project under the certificate of authority issued by the BWC is undisputed. *See* Docs. 40-2, 63-1. Defendants D.A.G. and Triversity did not propose undisputed facts for Plaintiff's review. However, because Defendants D.A.G. and Triversity's contention that they were enrolled subcontractors is supported by undisputed evidence submitted to the Court (*see* Doc. 14-4) (listing "D.A.G. Construction" and "TriVersity Group LLC"), the Court considers Defendants D.A.G. and Triversity's enrollment to be an undisputed fact as well.

[11] Defendants D.A.G., Triversity, and J & B Steel admit that they were not statutory self-insuring employers. (*See* Docs. 62-1, 62-2, and 62-3; *see also* Doc 65 at 2). Accordingly, they are not entitled to immunity on that ground.

St.3d 229, 231, 736 N.E.2d 886 (2000); O.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 Sch. Dist. Bd. of Educ.*, 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, 2014-Ohio-2440, 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). Courts are not free to delete or insert other words. *See State ex rel. Cassels v. Dayton City School Dist. Bd. of Ed.*, 69 Ohio St. 3d 217, 220, 631 N.E.2d 150 (1994).

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. Section 4123.35(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 . . . ." (emphasis added). The words "contractor's" and "subcontractor's" are written in the singular possessive form, *not* in the plural possessive form.[12] If the statute read "contractors' and subcontractors'" Subcontractor Defendants

[12] *See also* Ohio Adm. Code §4123-19-16(H) ("The contracting and subcontracting employees included under the certificate are entitled to the protections provided under Chapters 4121. and 4123. of the

would have a stronger argument that they are immune from liability in regard to multiple contractors' and subcontractors' employees.[13]

As the statute is written, each subcontractor is only protected from liability for injuries to one of the subcontractor's employees—its own. Even though the subcontractor is not providing the workers' compensation coverage on the job to their own employees, the Ohio General Assembly pronounced that the subcontractors are still entitled to tort immunity from their own employees.[14] 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.[15]

Revised Code with respect to the contracting and subcontracting employer's employees who are employed on the construction project which is the subject of the certificate.")

[13] Subcontractor Defendants argue that the singular possessive form is used because the phrase simply defines the qualifying employees of an enrolled contractor or subcontractor and that it is the first phrase ("the contractors and subcontractors included under a certificate") that defines the contractors and subcontractors that are entitled to immunity. However, and notwithstanding O.R.C. § 1.43 (providing, as a rule of construction, "[t]he singular includes the plural, and the plural includes the singular"), the fact that the General Assembly referenced "the contractors and subcontractors included under a certificate" in the first phrase simply *highlights* the fact that the General Assembly did *not* use this same language in the second phrase. Accordingly, the Court finds that Ohio General Assembly intended to limit the protections afforded to these contractors and subcontractors as set forth above.

[14] Subcontractor Defendants argue that although the self-insured employer, Defendant Messer, covered the cost of the workers' compensation claims on the Project, enrolled subcontractors indirectly "paid" the cost of workers' compensation premiums and other insurance by eliminating those costs from their contract bids. (Doc. 7-1 at 13-14; Doc. 66-1at ¶ 3-4). While section 4123.35(O) may be an exception to the typical *quid pro quo* bargain underlying workers' compensation, the bargain is still intact insofar as the subcontractors are entitled to tort immunity from their own employees. Subcontractor Defendants also argue that the statute necessarily provides blanket coverage, given the scale of construction projects which are eligible for self-insured status. However, even without blanket immunity, the scheme provides immunity for the self-insured employer and the employer subcontractor.

[15] Subcontractor Defendants argue that the Ohio General Assembly could have inserted the word "own" into the statute if it intended to so limit the immunity available to enrolled subcontractors. Similarly, the Ohio General Assembly could have used "contractors' and subcontractors'" to describe the employees with respect to whom immunity applies it intended blanket immunity. The Court is tasked with interpreting the statute as written.

To grant blanket immunity to Subcontractor Defendants, the Court would have to read protections into the statute that are not there. *See Holmes v. Crawford Machine, Inc.*, 134 Ohio St. 3d 303, 2012-Ohio-5380, 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)) (The court "must apply the section in a manner consistent with the plain meaning of the statutory language; [it] cannot add words."). The clear and unambiguous meaning of the statute, as written, is that immunity does not extend to the Subcontractor Defendants with respect to employees of other subcontractors.

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.

Subcontractor Defendants cite *Lancaster, et al. v. Pendleton Construction Group, LLC, et al.*, Hamilton C.P. No. A1208721 (Mar. 25, 2013) (order granting summary judgment), as support for their argument that they should receive blanket immunity. *Lancaster* arose from the same incident that led to Plaintiff's injuries; the *Lancaster* plaintiffs were other Jostin employees who alleged that the negligence of Defendants Messer, D.A.G., Triversity, J & B Steel, and others caused their injuries. In *Lancaster*, Subcontractor Defendants moved for summary judgment on the same theory asserted in

the instant litigation. The *Lancaster* court acknowledged that whether these subcontractors would be immune from claims made against them by the employees of another subcontractor had not been decided by the Ohio courts in the context of a self-insured construction project. *Id.* at *7.

The *Lancaster* court concluded that Messer was the "constructive employer" of the three moving subcontractors and that, as "constructive employees" of Messer, "the Plaintiffs received from their constructive employer the benefits of the 'social bargain' to which they were entitled under the Worker's Compensation statute." *Lancaster,* at *6. The court acknowledged that many other jurisdictions would allow the plaintiffs to bring their claim against these subcontractors, but held that Ohio law does not. *Id.* at *7.[16]

The *Lancaster* court discussed *Pride v. Liberty Mutual Ins. Co.,* No. 04-C-703, 2007 WL 1655111 (E.D. Wisc. June 5, 2007), a factually similar Wisconsin case that declined to extend this sort of immunity. The federal court in *Pride* pointed out a number of reasons why subcontractors under a wrap-up plan should not be entitled to immunity from claims made by employees of fellow subcontractors. *Id.* at *2-4. First, a wrap-up plan saves the subcontractors money because they do not have to pay for insurance coverage. *Id.* at *3. The court questioned the logic behind allowing a subcontractor to

[16] Subcontractor Defendants cite *Stevenson v. HH &N/Turner*, 2002 U.S. Dist. LEXIS 26831 (E.D. Mich. 2002) and *Etie v. Walsh & Albert Co., Ltd.*, 135 S.W.3d 764 (Tex. App. 2004) to support their argument that immunity should be extended to enrolled subcontractors. As in *Stevenson*, the application of immunity to the participants in Defendant Messer's plan is dictated by statute and unique to large-scale construction projects. As the Texas statute discussed in *Etie*, the Ohio statute authorizes a contractor to provide workers' compensation insurance for subcontractors and their employees and deems employees of the subcontractors to be employees of the general contractor for purposes of the workers' compensation. However, this Court is bound by the statutory language of O.R.C. § 4123.35(O) which, as explained above, does *not* provide for blanket immunity for enrolled subcontractors.

not pay for its insurance coverage, and in return, granting a subcontractor immunity it would not otherwise have. *Id.* The court also 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. *Id.* at *4. The court concluded by finding 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.*[17] However, 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 fact that Ohio's workers' compensation statutes do not expressly state that one who receives workers' compensation is entitled to bring a claim against a third party tortfeasor, does not mean that they do not have the right to do so. 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* O.R.C. § 4123.35(O) ("Nothing in this division shall be construed as altering the rights of

[17] Subcontractor Defendants argue that the *Pride* decision is distinguishable from the instant case because what the *Pride* decision suggests as the language the Wisconsin legislature could have included to provide subcontractor immunity ("the owner of an OCIP-insured project is deemed the sole employer of any employee of any contractor injured on that project) is the very language the Ohio General Assembly did include in §4123.35(O). However, the Ohio General Assembly went on to specifically address the immunity of enrolled subcontractors, so that provision controls.

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, 161 N.E. 238, 239 (8th Dist. 1923) *aff'd sub nom,* 111 Ohio St. 791, 146 N.E. 306 (1924); *George v. City of Youngstown,* 41 N.E.2d 567, 569 (1942) ("[W]orkmen's compensation statutes relate solely to the relationship of employer and employee."). Since it has been established that, under the workers' compensation act, a plaintiff who has received workers' compensation payments maintains the right to make a claim against a third-party tortfeasor, and nothing in this section expressly revokes that right, Plaintiff in the present case has the right to bring a claim against any third parties that contributed to his injury, including Subcontractor Defendants.[18] In light of the fact that the plain language of the statute does not grant the broad immunity the Subcontractor Defendants seek, Plaintiff maintains the right to bring suit against them.

For the foregoing reasons, the Court decides as a matter of law that Subcontractor Defendants are not entitled to immunity under section 4123.35(O) from Plaintiff's negligence claim. Therefore, the Court denies Subcontractor Defendants' motions for summary judgment.

[18] The *Lancaster* court described the plaintiffs' position as an attempt to seek twice the benefit of their counterparties and as at odds with the spirit of the "social bargain" struck by the workers' compensation system. *Lancaster*, at *7, 9. In light of the fact that Ohio law does not prohibit third party claims, this Court cannot agree.

2. Punitive Damages

Subcontractor Defendants move the Court to dismiss Plaintiff's claim for punitive damages against them on the grounds that it is a derivative claim. *See Vickers,* 2005-Ohio-3656 at ¶¶ 63-65. Because this Court finds that Subcontractor Defendants are not entitled to summary judgment on Plaintiff's negligence claim, the Court declines to dismiss Plaintiff's claim for punitive damages.

V. CONCLUSION

Accordingly, for the foregoing reasons:

1. Defendant Messer Construction Co.'s motion for summary judgment (Doc. 14) is **GRANTED;**

2. Defendants D.A.G. Construction Co., Inc. and Triversity Construction Co., LLC's motion for summary judgment (Doc. 37) is **DENIED;**

3. Defendant J & B Steel Erectors, Inc.'s motion for summary judgment (Doc. 40) is **DENIED.**

4. The remaining parties shall jointly submit a proposed litigation calendar by January 23, 2015.

IT IS SO ORDERED.

Date: 12/31/14

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

D101528444

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

ENTERED
MAR 25 2013

Hon. Leslie Ghiz

JAMES LANCASTER, et al.	**CASE NO. A1208721**
Plaintiffs,	**JUDGE LESLIE GHIZ**
-v-	
PENDLETON CONSTRUCTION GROUP, LLC, et al.	**ENTRY GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS D.A.G. CONSTRUCTION COMPANY, INC., J&B STEEL ERECTORS, INC., AND TRIVERSITY CONSTRUCTION COMPANY, LLC**
Defendants.	

COURT OF COMMON PLEAS
ENTER
HON. LESLIE GHIZ
THE CLERK SHALL SERVE NOTICE TO PARTIES PURSUANT TO CIVIL RULE 58 WHICH SHALL BE TAXED AS COSTS HEREIN.

Presently before this Court are Motions for Summary Judgment filed by Defendants D.A.G. Construction Company, Inc. ("DAG"), J&B Steel Erectors, Inc. ("J&B"), and Triversity Construction Company, LLC ("Triversity") (hereinafter referred to collectively as the "Defendants"). This summary judgment issue involves a disagreement by the parties over Section 4123.35(O) of the Ohio Revised Code, which provides self-insurers of construction projects with workers' compensation immunity, and whether and to what extent that immunity applies.

ENTERED
MAR 25 2013

PROCEDURAL BACKGROUND

This case involves negligence claims against Defendants as well as derivative claims for loss of consortium, relating to injuries Plaintiffs allege they suffered while performing work for Defendant Jostin Construction Co. on the Horseshoe Casino project

(the "Project").[1] Specifically, the Plaintiffs allege that on January 27, 2012, as a result of Defendants' negligence, they were injured while pouring concrete for the second story of the Horseshoe Casino.[2] In their Complaint, Plaintiffs state they are bringing "claims against third parties responsible for the collapse of the casino floor".[3] The Defendants contend that workers' compensation immunity extends to them as "third parties" pursuant to §4123.35(O). The question at issue is 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 ("BWC").

Defendant Messer Construction Co. ("Messer"), the general contractor for the Project, filed a Motion for Summary Judgment on December 10, 2012. Messer argued that through Section 4123.35(O) it was entitled to immunity provided by Chapters 4123 and 4121 of the Revised Code as a self-insuring employer. In support of its position, Messer offered the Affidavit of Angela Jansing.[4] It is undisputed that Messer met the requirements of BWC to receive the "privilege to self-insure a construction project".[5] As part of the application process, Messer submitted to the Bureau a list of the subcontractors who were to be included in its self-insurance plan.[6] Upon approving Messer's application, the Bureau issued to Messer a "Certificate of Employer's Right to Pay Compensation Directly" for "Subs2000 4170-2 Horseshoe Casino – Cincinnati Wrapup", effective March 1, 2011 to March 1, 2012 (the "Plan").[7]

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[1] Complaint, at ¶15.
[2] Complaint, ¶6.
[3] Complaint, ¶1.
[4] Attached as Exhibit A to Messer's Motion for Summary Judgment.
[5] R.C. 4123.35(O), ¶1; See Messer's Motion for Summary Judgment, p. 3
[6] A copy of the list of enrolled subcontractors is attached to the Affidavit of Angela Jansing as Exhibit 2.
[7] A copy of the certificate is attached to the Affidavit of Angela Jansing as Exhibit 1.

Defendants DAG, J&B, and Triversity each filed follow-on motions for summary judgment, claiming that the immunity afforded Messer under §4123.35(O) should extend to them as "enrolled subcontractors".[8]

Plaintiffs oppose summary judgment in favor of these Defendants, arguing that subcontractors should not be afforded immunity for their negligence against third parties under Ohio law.[9] Specifically, Plaintiffs argue that §4123.35(O)(2) provides immunity to subcontractors with respect to the employees of each, but not with respect to employees of other subcontractors working on the site.[10] Plaintiffs also point out that numerous other states support subcontractor liability among and between subcontractors under their workers' compensation statutes.[11]

SUMMARY JUDGMENT STANDARD

Summary judgment is a procedural device that is employed to dispose expeditiously and economically legal claims that have no factual foundation.[12] Summary judgment was born of the belief that litigation should be promptly terminated whenever there is nothing to try.[13]

The granting of summary judgment in Ohio is governed by Rule 56(C) of the Ohio rules of Civil Procedure, which states in pertinent part as follows:

> "Summary judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written *stipulations of facts, if any, timely filed in the action, show there is* no genuine issue as to any material fact and that the moving party is

[8] Id., Exhibit 2 to Exhibit A.
[9] See *Plaintiffs' Response to Defendant J&B Steel Erectors, Inc. Motion for Summary Judgment, at p. 4.*
[10] Id., p. 4, ¶3.
[11] See Plaintiffs' Response to Defendant J&B Steel Erectors, Inc. Motion for Summary Judgment, at p. 6.
[12] See Celotex Corp. v. Catrett (1986), 477 U.S. 317, 106 S. Ct. 2548.
[13] See Norris v. Ohio Standard Oil Co. (1982), 70 Ohio St. 2d 1, 433 N.E.2d 615.

> entitled to judgment as a matter of law. No evidence of stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence of stipulation construed most strongly in his favor."

Today, the standard for rendering summary judgment is equated with that used for directed verdicts: whether there is but one reasonable conclusion as to the verdict when the evidence is construed most strongly in the non-moving party's favor.[14] Unique to the issue of summary judgment is the question of whether there is a genuine issue of material fact that must be decided by the fact finder.[15]

In response to a motion for summary judgment, the non-moving party may not simply rely on his pleadings if he bears the burden of proof at trial.[16] The law requires that the non-moving party must produce evidence, in some form permitted by Civil Rule 56(C), sufficient to justify the court's conclusion that a trier of fact could properly render a verdict in his or her favor.[17]

Following the principles of law in the cases cited above, and construing the evidence most strongly against the moving party as the rule requires, if there is not a genuine issue of material fact, a court is required to grant summary judgment in favor of the moving party.[18]

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[14] See Celotex.
[15] See Raybum v. J.C. Penney Outlet Store (1982), 4 Ohio App. 3d 463, 455 N.E.2d 1167.
[16] See Celotex.
[17] Anderson v. Liberty Lobby, Inc. (1986), 477 U.S. 242, 106 S. Ct. 2505.
[18] Harless v. Willis Day Warehouse Co. (1978), 54 Ohio St. 2d 64, 375 N.E.2d 46.

LEGAL ANALYSIS

This Court, having reviewed the Motions and arguments made by both sides, believes that Section 4123.35(O) of the Ohio Revised Code does provide immunity to the Defendants, as enrolled subcontractors under the Plan.

The Workers' Compensation immunity at issue springs from Section 4123.74 of the Ohio Revised Code, which 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.

Section 4123.35(O) of the Ohio Revised Code sets forth the scheme under which the administrator may grant a self-insuring employer the privilege to self-insure a construction project and provides, in pertinent part, as follows:

> 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.

MESSER AS CONSTRUCTIVE EMPLOYER

R.C. 4123.35(O)(2) states in clear terms, at ¶5, that any injuries sustained by employees of an enrolled subcontractor are to be viewed "as if the employees were employees of the self-insuring employer". Therefore, Plaintiffs, as employees of Jostin Construction Co., are deemed by statute to be employees of Messer. As 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.[19] 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).

Plaintiffs presented to this court case law from Wisconsin that treated a factually similar situation, where construction workers were injured while working on a large construction project and the subcontractor-employers were named in a "wrap up" policy for workers' compensation insurance purposes.[20] Plaintiffs urged this Court to consider that the Wisconsin Supreme Court declined to extend "blanket immunity" to the subcontractors on that project, and argued before this Court that Ohio's Workers' Compensation Act should be similarly construed.

However, this Court notes a glaring distinction between Ohio law and the Wisconsin law on which the Pride decision turned. Wis. Stat. §102.29 states that an employee's claim against an employer:

[19] See Affidavit of Angela Jansing, ¶4.
[20] See Pride v. Liberty Mutual Ins. Co., E.D. Wis., No. 04-C-703, 2007 WL 1655111, 2007 U.S. Dist. LEXIS 40833.

> "shall not affect the right of the employee ... to make a claim or maintain an action in tort against any other party for such injury or death, hereinafter referred to as a 3rd party ..."[21]

Wisconsin's Workers' Compensation Act expressly allows for tort claims against non-employer contractors, even when those non-employer contractors are covered under a "wrap up" policy. Ohio's Workers' Compensation Act provides no such allowance for third party claims. While it may be true that numerous other jurisdictions would allow for Plaintiffs' common law claims, Ohio law does not. This Court does not wish to expand the Ohio law as currently written.

WORKERS' COMPENSATION AS "SOCIAL BARGAIN"

There is no Ohio case law on point concerning the question of whether a subcontractor can be held liable for injuries his employees caused to the employees of another subcontractor. However, the Ohio Supreme Court has described the spirit of this state's workers' compensation system as a "social bargain", one from which the Plaintiffs are seeking to obtain twice the benefit of their counterparties.[22]

Historically, the system in which employers are entitled to broad immunity, and employees are entitled to the immediate and unquestioned medical treatment, was enacted due to the inability of the common law to adequately deal with the consequences of workplace accidents.[23] The Ohio Supreme Court explains, "it became undeniable that the tort system had failed as a regulatory device for distributing economic losses borne by injured Ohio workers and their families and that it should be replaced by a workers'

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[21] Id., at *3.
[22] See Holeton v. Crouse Cartage Co., (2001), 92 Ohio St.3d 115, 119, 748 N.E.2d 1111, 1116.
[23] See Sutton v. Tomco Machining, Inc., (2011), 129 Ohio St.3d 153, 950 N.E.2d 938, at ¶33.

compensation system in which those losses would be charged, without regard to fault or wrongdoing, to the industry rather than to the individual or society as a whole."[24]

Workers' Compensation "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."[25] Ohio's Workers' Compensation 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.'"[26] "This compromise is the basic premise underlying the workers' compensation system."[27]

There is no dispute that Messer complied with the requirements of R.C. 4123.35(O) and was thereby afforded immunity under R.C. 4123.74.[28] Likewise, there is no dispute that the Defendants were properly enrolled subcontractors under Messer's Wrap-up Plan.[29] Accordingly, the Defendants are granted workers' compensation immunity under R.C. 4123.74 pursuant to R.C. 4123.35(O).

The Plaintiffs acknowledge that their injuries occurred while they were working in the course and scope of their employment on the Project.[30] Therefore, Plaintiffs were entitled to receive workers' compensation benefits from their employer.[31] Indeed, they

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[24] Sutton, at ¶34.
[25] See Holeton v. Crouse Cartage Co., (2001), 92 Ohio St.3d 115, 119, 748 N.E.2d 1111, 1116.
[26] Holeton, 92 Ohio St.3d at 119, quoting Blankenship v. Cincinnati Milacron Chem., Inc., (1982), 69 Ohio St.2d 608, 614, 433 N.E.2d 572, 577.
[27] Holeton, 92 Ohio St.3d at 119.
[28] Complaint, ¶ 27; Affidavit of Angela Jansing, ¶2, and Exhibit 1 thereto.
[29] Affidavit of Angela Jansing, ¶3, and Exhibit 2 thereto.
[30] Complaint, ¶¶6, 15.
[31] Chapter 4123 of the Ohio Revised Code

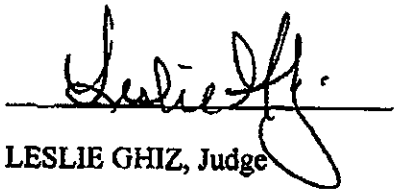
received medical treatment for their injuries as provided by the Plan: from Messer.[32] Plaintiffs are not also entitled to recover from the Defendants, who were properly enrolled subcontractors in the Plan. This legal conclusion is grounded in this Court's judgment that such a second bite of the apple would run counter to the "social bargain" that is the workers' compensation system. The receipt of workers' compensation benefits they received for their injuries under the Plan was the Plaintiffs' exclusive remedy.

CONCLUSION

Based on the above facts and analysis, it is the Court's determination that a fact finder could not rationally return a verdict in Plaintiffs' favor on any of the claims against the Defendants.[33] Construing the evidence most strongly against the Defendants, there is no genuine issue of material fact with regard to the applicability of Revised Code section 4123.35(O) to the Defendants. The Defendants have immunity against Plaintiffs' claims as a matter of law.

Summary judgment is hereby entered in favor of defendants D.A.G. Construction Company, Inc., J & B Steel Erectors, Inc., and Triversity Construction Company, LLC.

So ordered.



LESLIE GHIZ, Judge

March 25, 2013

[32] *Affidavit of Angela Jansing, ¶4.*

[33] See Anderson v. Liberty Lobby, Inc. (1986), 477 U.S. 242, 106 S. Ct. 2505.

CERTIFICATE OF SERVICE

The Court hereby certifies that a copy of the above Entry Granting Summary Judgment was served upon the following by ordinary U.S. Mail on March 25, 2013:

Eric C. Deters
5247 Madison Pike
Independence, KY 41051
Attorney for Plaintiffs

Stephen M. Yeager
Stephen J. Patsfall
Textile Building, Suite 1280
205 West Fourth Street
Cincinnati, Ohio 45202
Attorneys for Defendants Pendleton Construction Group, LLC, Triversity Construction Company, LLC, and D.A.G. Construction Company, Inc.

Lawrence A. Sutter
James M. Popson
1301 East Ninth Street
3600 Erieview Tower
Cleveland, Ohio 44114
Attorneys for Defendants Brad Henry Friedmutter & Associates, Ltd., and O'Rielly Law Group

Jane M. Lynch
Jared A. Wagner
800 Performance Place
109 North Main Street
Dayton, Ohio 45402
Attorneys for Defendant Messer Construction Company

Roger K. Schoeni
Kimberly A. Pramaggiore
PNC Center Suite 800
201 East Fifth Street
Cincinnati, Ohio 45202
Attorney for Defendant J&B Steel Erectors, Inc.

Robert W. Hojnoski
Carrie M. Starts
525 Vine Street, Suite 1700
Cincinnati, Ohio 45202
Attorneys for Defendant Terracon Consultants

Thomas J. Gruber
Michael P. Cussen
632 Vine Street, Suite 900
Cincinnati, Ohio 45202
Attorneys for Defendant Jostin Construction, Inc.

Architectural Southwest Stone
11090 Cusumano Court
Las Vegas, NV

Baldwin's Ohio Revised Code Annotated
Title XLI. Labor and Industry
Chapter 4123. Workers' Compensation (Refs & Annos)
Funds and Premiums

R.C. § 4123.35

4123.35 Payments to state insurance fund; standards, surety bonds, applications, and rules for self-insurers

Effective: September 17, 2014 to September 28, 2015
Currentness

<Note: See also version(s) of this section with later effective date(s).>

(A) Except as provided in this section, and until the policy year commencing July 1, 2015, every private employer and every publicly owned utility shall pay semiannually in the months of January and July into the state insurance fund the amount of annual premium the administrator of workers' compensation fixes for the employment or occupation of the employer, the amount of which premium to be paid by each employer to be determined by the classifications, rules, and rates made and published by the administrator. The employer shall pay semiannually a further sum of money into the state insurance fund as may be ascertained to be due from the employer by applying the rules of the administrator.

Except as otherwise provided in this section, for a policy year commencing on or after July 1, 2015, every private employer and every publicly owned utility shall pay annually in the month of June immediately preceding the policy year into the state insurance fund the amount of estimated annual premium the administrator fixes for the employment or occupation of the employer, the amount of which estimated premium to be paid by each employer to be determined by the classifications, rules, and rates made and published by the administrator. The employer shall pay a further sum of money into the state insurance fund as may be ascertained to be due from the employer by applying the rules of the administrator. Upon receipt of the payroll report required by division (B) of section 4123.26 of the Revised Code, the administrator shall adjust the premium and assessments charged to each employer for the difference between estimated gross payrolls and actual gross payrolls, and any balance due to the administrator shall be immediately paid by the employer. Any balance due the employer shall be credited to the employer's account.

For a policy year commencing on or after July 1, 2015, each employer that is recognized by the administrator as a professional employer organization shall pay monthly into the state insurance fund the amount of premium the administrator fixes for the employer for the prior month based on the actual payroll of the employer reported pursuant to division (C) of section 4123.26 of the Revised Code.

A receipt certifying that payment has been made shall be issued to the employer by the bureau of workers' compensation. The receipt is prima-facie evidence of the payment of the premium. The administrator shall provide each employer written proof of workers' compensation coverage as is required in section 4123.83 of the Revised Code. Proper posting of the notice constitutes the employer's compliance with the notice requirement mandated in section 4123.83 of the Revised Code.

The bureau shall verify with the secretary of state the existence of all corporations and organizations making application for workers' compensation coverage and shall require every such application to include the employer's federal identification number.

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A private employer who has contracted with a subcontractor is liable for the unpaid premium due from any subcontractor with respect to that part of the payroll of the subcontractor that is for work performed pursuant to the contract with the employer.

Division (A) of this section providing for the payment of premiums semiannually does not apply to any employer who was a subscriber to the state insurance fund prior to January 1, 1914, or, until July 1, 2015, who may first become a subscriber to the fund in any month other than January or July. Instead, the semiannual premiums shall be paid by those employers from time to time upon the expiration of the respective periods for which payments into the fund have been made by them. After July 1, 2015, an employer who first becomes a subscriber to the fund on any day other than the first day of July shall pay premiums according to rules adopted by the administrator, with the advice and consent of the bureau of workers' compensation board of directors, for the remainder of the policy year for which the coverage is effective.

The administrator, with the advice and consent of the board, shall adopt rules to permit employers to make periodic payments of the premium and assessment due under this division. The rules shall include provisions for the assessment of interest charges, where appropriate, and for the assessment of penalties when an employer fails to make timely premium payments. The administrator, in the rules the administrator adopts, may set an administrative fee for these periodic payments. An employer who timely pays the amounts due under this division is entitled to all of the benefits and protections of this chapter. Upon receipt of payment, the bureau shall issue a receipt to the employer certifying that payment has been made, which receipt is prima-facie evidence of payment. Workers' compensation coverage under this chapter continues uninterrupted upon timely receipt of payment under this division.

Every public employer, except public employers that are self-insuring employers under this section, shall comply with sections 4123.38 to 4123.41, and 4123.48 of the Revised Code in regard to the contribution of moneys to the public insurance fund.

(B) Employers who will abide by the rules of the administrator and who may be of sufficient financial ability to render certain the payment of compensation to injured employees or the dependents of killed employees, and the furnishing of medical, surgical, nursing, and hospital attention and services and medicines, and funeral expenses, equal to or greater than is provided for in sections 4123.52, 4123.55 to 4123.62, and 4123.64 to 4123.67 of the Revised Code, and who do not desire to insure the payment thereof or indemnify themselves against loss sustained by the direct payment thereof, upon a finding of such facts by the administrator, may be granted the privilege to pay individually compensation, and furnish medical, surgical, nursing, and hospital services and attention and funeral expenses directly to injured employees or the dependents of killed employees, thereby being granted status as a self-insuring employer. The administrator may charge employers who apply for the status as a self-insuring employer a reasonable application fee to cover the bureau's costs in connection with processing and making a determination with respect to an application.

All employers granted status as self-insuring employers shall demonstrate sufficient financial and administrative ability to assure that all obligations under this section are promptly met. The administrator shall deny the privilege where the employer is unable to demonstrate the employer's ability to promptly meet all the obligations imposed on the employer by this section.

(1) The administrator shall consider, but is not limited to, the following factors, where applicable, in determining the employer's ability to meet all of the obligations imposed on the employer by this section:

(a) The employer employs a minimum of five hundred employees in this state;

(b) The employer has operated in this state for a minimum of two years, provided that an employer who has purchased, acquired, or otherwise succeeded to the operation of a business, or any part thereof, situated in this state that has operated for at least two years in this state, also shall qualify;

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(c) Where the employer previously contributed to the state insurance fund or is a successor employer as defined by bureau rules, the amount of the buyout, as defined by bureau rules;

(d) The sufficiency of the employer's assets located in this state to insure the employer's solvency in paying compensation directly;

(e) The financial records, documents, and data, certified by a certified public accountant, necessary to provide the employer's full financial disclosure. The records, documents, and data include, but are not limited to, balance sheets and profit and loss history for the current year and previous four years.

(f) The employer's organizational plan for the administration of the workers' compensation law;

(g) The employer's proposed plan to inform employees of the change from a state fund insurer to a self-insuring employer, the procedures the employer will follow as a self-insuring employer, and the employees' rights to compensation and benefits; and

(h) The employer has either an account in a financial institution in this state, or if the employer maintains an account with a financial institution outside this state, ensures that workers' compensation checks are drawn from the same account as payroll checks or the employer clearly indicates that payment will be honored by a financial institution in this state.

The administrator may waive the requirements of divisions (B)(1)(a) and (b) of this section and the requirement of division (B)(1)(e) of this section that the financial records, documents, and data be certified by a certified public accountant. The administrator shall adopt rules establishing the criteria that an employer shall meet in order for the administrator to waive the requirements of divisions (B)(1)(a), (b), and (e) of this section. Such rules may require additional security of that employer pursuant to division (E) of section 4123.351 of the Revised Code.

The administrator shall not grant the status of self-insuring employer to the state, except that the administrator may grant the status of self-insuring employer to a state institution of higher education, including its hospitals, that meets the requirements of division (B)(2) of this section.

(2) When considering the application of a public employer, except for a board of county commissioners described in division (G) of section 4123.01 of the Revised Code, a board of a county hospital, or a publicly owned utility, the administrator shall verify that the public employer satisfies all of the following requirements as the requirements apply to that public employer:

(a) For the two-year period preceding application under this section, the public employer has maintained an unvoted debt capacity equal to at least two times the amount of the current annual premium established by the administrator under this chapter for that public employer for the year immediately preceding the year in which the public employer makes application under this section.

(b) For each of the two fiscal years preceding application under this section, the unreserved and undesignated year-end fund balance in the public employer's general fund is equal to at least five per cent of the public employer's general fund revenues for the fiscal year computed in accordance with generally accepted accounting principles.

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(c) For the five-year period preceding application under this section, the public employer, to the extent applicable, has complied fully with the continuing disclosure requirements established in rules adopted by the United States securities and exchange commission under 17 C.F.R. 240.15c 2-12.

(d) For the five-year period preceding application under this section, the public employer has not had its local government fund distribution withheld on account of the public employer being indebted or otherwise obligated to the state.

(e) For the five-year period preceding application under this section, the public employer has not been under a fiscal watch or fiscal emergency pursuant to section 118.023, 118.04, or 3316.03 of the Revised Code.

(f) For the public employer's fiscal year preceding application under this section, the public employer has obtained an annual financial audit as required under section 117.10 of the Revised Code, which has been released by the auditor of state within seven months after the end of the public employer's fiscal year.

(g) On the date of application, the public employer holds a debt rating of Aa3 or higher according to Moody's investors service, inc., or a comparable rating by an independent rating agency similar to Moody's investors service, inc.

(h) The public employer agrees to generate an annual accumulating book reserve in its financial statements reflecting an actuarially generated reserve adequate to pay projected claims under this chapter for the applicable period of time, as determined by the administrator.

(i) For a public employer that is a hospital, the public employer shall submit audited financial statements showing the hospital's overall liquidity characteristics, and the administrator shall determine, on an individual basis, whether the public employer satisfies liquidity standards equivalent to the liquidity standards of other public employers.

(j) Any additional criteria that the administrator adopts by rule pursuant to division (E) of this section.

The administrator may adopt rules establishing the criteria that a public employer shall satisfy in order for the administrator to waive any of the requirements listed in divisions (B)(2)(a) to (j) of this section. The rules may require additional security from that employer pursuant to division (E) of section 4123.351 of the Revised Code. The administrator shall not waive any of the requirements listed in divisions (B)(2)(a) to (j) of this section for a public employer who does not satisfy the criteria established in the rules the administrator adopts.

(C) A board of county commissioners described in division (G) of section 4123.01 of the Revised Code, as an employer, that will abide by the rules of the administrator and that may be of sufficient financial ability to render certain the payment of compensation to injured employees or the dependents of killed employees, and the furnishing of medical, surgical, nursing, and hospital attention and services and medicines, and funeral expenses, equal to or greater than is provided for in sections 4123.52, 4123.55 to 4123.62, and 4123.64 to 4123.67 of the Revised Code, and that does not desire to insure the payment thereof or indemnify itself against loss sustained by the direct payment thereof, upon a finding of such facts by the administrator, may be granted the privilege to pay individually compensation, and furnish medical, surgical, nursing, and hospital services and attention and funeral expenses directly to injured employees or the dependents of killed employees, thereby being granted status as a self-insuring employer. The administrator may charge a board of county commissioners described in division (G) of section 4123.01 of the Revised Code that applies for the status as a self-insuring employer a reasonable application fee to cover the

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bureau's costs in connection with processing and making a determination with respect to an application. All employers granted such status shall demonstrate sufficient financial and administrative ability to assure that all obligations under this section are promptly met. The administrator shall deny the privilege where the employer is unable to demonstrate the employer's ability to promptly meet all the obligations imposed on the employer by this section. The administrator shall consider, but is not limited to, the following factors, where applicable, in determining the employer's ability to meet all of the obligations imposed on the board as an employer by this section:

(1) The board as an employer employs a minimum of five hundred employees in this state;

(2) The board has operated in this state for a minimum of two years;

(3) Where the board previously contributed to the state insurance fund or is a successor employer as defined by bureau rules, the amount of the buyout, as defined by bureau rules;

(4) The sufficiency of the board's assets located in this state to insure the board's solvency in paying compensation directly;

(5) The financial records, documents, and data, certified by a certified public accountant, necessary to provide the board's full financial disclosure. The records, documents, and data include, but are not limited to, balance sheets and profit and loss history for the current year and previous four years.

(6) The board's organizational plan for the administration of the workers' compensation law;

(7) The board's proposed plan to inform employees of the proposed self-insurance, the procedures the board will follow as a self-insuring employer, and the employees' rights to compensation and benefits;

(8) The board has either an account in a financial institution in this state, or if the board maintains an account with a financial institution outside this state, ensures that workers' compensation checks are drawn from the same account as payroll checks or the board clearly indicates that payment will be honored by a financial institution in this state;

(9) The board shall provide the administrator a surety bond in an amount equal to one hundred twenty-five per cent of the projected losses as determined by the administrator.

(D) The administrator shall require a surety bond from all self-insuring employers, issued pursuant to section 4123.351 of the Revised Code, that is sufficient to compel, or secure to injured employees, or to the dependents of employees killed, the payment of compensation and expenses, which shall in no event be less than that paid or furnished out of the state insurance fund in similar cases to injured employees or to dependents of killed employees whose employers contribute to the fund, except when an employee of the employer, who has suffered the loss of a hand, arm, foot, leg, or eye prior to the injury for which compensation is to be paid, and thereafter suffers the loss of any other of the members as the result of any injury sustained in the course of and arising out of the employee's employment, the compensation to be paid by the self-insuring employer is limited to the disability suffered in the subsequent injury, additional compensation, if any, to be paid by the bureau out of the surplus created by section 4123.34 of the Revised Code.

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(E) In addition to the requirements of this section, the administrator shall make and publish rules governing the manner of making application and the nature and extent of the proof required to justify a finding of fact by the administrator as to granting the status of a self-insuring employer, which rules shall be general in their application, one of which rules shall provide that all self-insuring employers shall pay into the state insurance fund such amounts as are required to be credited to the surplus fund in division (B) of section 4123.34 of the Revised Code. The administrator may adopt rules establishing requirements in addition to the requirements described in division (B)(2) of this section that a public employer shall meet in order to qualify for self-insuring status.

Employers shall secure directly from the bureau central offices application forms upon which the bureau shall stamp a designating number. Prior to submission of an application, an employer shall make available to the bureau, and the bureau shall review, the information described in division (B)(1) of this section, and public employers shall make available, and the bureau shall review, the information necessary to verify whether the public employer meets the requirements listed in division (B)(2) of this section. An employer shall file the completed application forms with an application fee, which shall cover the costs of processing the application, as established by the administrator, by rule, with the bureau at least ninety days prior to the effective date of the employer's new status as a self-insuring employer. The application form is not deemed complete until all the required information is attached thereto. The bureau shall only accept applications that contain the required information.

(F) The bureau shall review completed applications within a reasonable time. If the bureau determines to grant an employer the status as a self-insuring employer, the bureau shall issue a statement, containing its findings of fact, that is prepared by the bureau and signed by the administrator. If the bureau determines not to grant the status as a self-insuring employer, the bureau shall notify the employer of the determination and require the employer to continue to pay its full premium into the state insurance fund. The administrator also shall adopt rules establishing a minimum level of performance as a criterion for granting and maintaining the status as a self-insuring employer and fixing time limits beyond which failure of the self-insuring employer to provide for the necessary medical examinations and evaluations may not delay a decision on a claim.

(G) The administrator shall adopt rules setting forth procedures for auditing the program of self-insuring employers. The bureau shall conduct the audit upon a random basis or whenever the bureau has grounds for believing that a self-insuring employer is not in full compliance with bureau rules or this chapter.

The administrator shall monitor the programs conducted by self-insuring employers, to ensure compliance with bureau requirements and for that purpose, shall develop and issue to self-insuring employers standardized forms for use by the self-insuring employer in all aspects of the self-insuring employers' direct compensation program and for reporting of information to the bureau.

The bureau shall receive and transmit to the self-insuring employer all complaints concerning any self-insuring employer. In the case of a complaint against a self-insuring employer, the administrator shall handle the complaint through the self-insurance division of the bureau. The bureau shall maintain a file by employer of all complaints received that relate to the employer. The bureau shall evaluate each complaint and take appropriate action.

The administrator shall adopt as a rule a prohibition against any self-insuring employer from harassing, dismissing, or otherwise disciplining any employee making a complaint, which rule shall provide for a financial penalty to be levied by the administrator payable by the offending self-insuring employer.

(H) For the purpose of making determinations as to whether to grant status as a self-insuring employer, the administrator may subscribe to and pay for a credit reporting service that offers financial and other business information about individual

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employers. The costs in connection with the bureau's subscription or individual reports from the service about an applicant may be included in the application fee charged employers under this section.

(I) The administrator, notwithstanding other provisions of this chapter, may permit a self-insuring employer to resume payment of premiums to the state insurance fund with appropriate credit modifications to the employer's basic premium rate as such rate is determined pursuant to section 4123.29 of the Revised Code.

(J) On the first day of July of each year, the administrator shall calculate separately each self-insuring employer's assessments for the safety and hygiene fund, administrative costs pursuant to section 4123.342 of the Revised Code, and for the portion of the surplus fund under division (B) of section 4123.34 of the Revised Code that is not used for handicapped reimbursement, on the basis of the paid compensation attributable to the individual self-insuring employer according to the following calculation:

(1) The total assessment against all self-insuring employers as a class for each fund and for the administrative costs for the year that the assessment is being made, as determined by the administrator, divided by the total amount of paid compensation for the previous calendar year attributable to all amenable self-insuring employers;

(2) Multiply the quotient in division (J)(1) of this section by the total amount of paid compensation for the previous calendar year that is attributable to the individual self-insuring employer for whom the assessment is being determined. Each self-insuring employer shall pay the assessment that results from this calculation, unless the assessment resulting from this calculation falls below a minimum assessment, which minimum assessment the administrator shall determine on the first day of July of each year with the advice and consent of the bureau of workers' compensation board of directors, in which event, the self-insuring employer shall pay the minimum assessment.

In determining the total amount due for the total assessment against all self-insuring employers as a class for each fund and the administrative assessment, the administrator shall reduce proportionately the total for each fund and assessment by the amount of money in the self-insurance assessment fund as of the date of the computation of the assessment.

The administrator shall calculate the assessment for the portion of the surplus fund under division (B) of section 4123.34 of the Revised Code that is used for handicapped reimbursement in the same manner as set forth in divisions (J)(1) and (2) of this section except that the administrator shall calculate the total assessment for this portion of the surplus fund only on the basis of those self-insuring employers that retain participation in the handicapped reimbursement program and the individual self-insuring employer's proportion of paid compensation shall be calculated only for those self-insuring employers who retain participation in the handicapped reimbursement program. The administrator, as the administrator determines appropriate, may determine the total assessment for the handicapped portion of the surplus fund in accordance with sound actuarial principles.

The administrator shall calculate the assessment for the portion of the surplus fund under division (B) of section 4123.34 of the Revised Code that under division (D) of section 4121.66 of the Revised Code is used for rehabilitation costs in the same manner as set forth in divisions (J)(1) and (2) of this section, except that the administrator shall calculate the total assessment for this portion of the surplus fund only on the basis of those self-insuring employers who have not made the election to make payments directly under division (D) of section 4121.66 of the Revised Code and an individual self-insuring employer's proportion of paid compensation only for those self-insuring employers who have not made that election.

The administrator shall calculate the assessment for the portion of the surplus fund under division (B) of section 4123.34 of the Revised Code that is used for reimbursement to a self-insuring employer under division (H) of section 4123.512 of the Revised Code in the same manner as set forth in divisions (J)(1) and (2) of this section except that the administrator shall calculate the total assessment for this portion of the surplus fund only on the basis of those self-insuring employers that retain participation

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in reimbursement to the self-insuring employer under division (H) of section 4123.512 of the Revised Code and the individual self-insuring employer's proportion of paid compensation shall be calculated only for those self-insuring employers who retain participation in reimbursement to the self-insuring employer under division (H) of section 4123.512 of the Revised Code.

An employer who no longer is a self-insuring employer in this state or who no longer is operating in this state, shall continue to pay assessments for administrative costs and for the portion of the surplus fund under division (B) of section 4123.34 of the Revised Code that is not used for handicapped reimbursement, based upon paid compensation attributable to claims that occurred while the employer was a self-insuring employer within this state.

(K) There is hereby created in the state treasury the self-insurance assessment fund. All investment earnings of the fund shall be deposited in the fund. The administrator shall use the money in the self-insurance assessment fund only for administrative costs as specified in section 4123.341 of the Revised Code.

(L) Every self-insuring employer shall certify, in affidavit form subject to the penalty for perjury, to the bureau the amount of the self-insuring employer's paid compensation for the previous calendar year. In reporting paid compensation paid for the previous year, a self-insuring employer shall exclude from the total amount of paid compensation any reimbursement the self-insuring employer receives in the previous calendar year from the surplus fund pursuant to section 4123.512 of the Revised Code for any paid compensation. The self-insuring employer also shall exclude from the paid compensation reported any amount recovered under section 4123.931 of the Revised Code and any amount that is determined not to have been payable to or on behalf of a claimant in any final administrative or judicial proceeding. The self-insuring employer shall exclude such amounts from the paid compensation reported in the reporting period subsequent to the date the determination is made. The administrator shall adopt rules, in accordance with Chapter 119. of the Revised Code, that provide for all of the following:

(1) Establishing the date by which self-insuring employers must submit such information and the amount of the assessments provided for in division (J) of this section for employers who have been granted self-insuring status within the last calendar year;

(2) If an employer fails to pay the assessment when due, the administrator may add a late fee penalty of not more than five hundred dollars to the assessment plus an additional penalty amount as follows:

(a) For an assessment from sixty-one to ninety days past due, the prime interest rate, multiplied by the assessment due;

(b) For an assessment from ninety-one to one hundred twenty days past due, the prime interest rate plus two per cent, multiplied by the assessment due;

(c) For an assessment from one hundred twenty-one to one hundred fifty days past due, the prime interest rate plus four per cent, multiplied by the assessment due;

(d) For an assessment from one hundred fifty-one to one hundred eighty days past due, the prime interest rate plus six per cent, multiplied by the assessment due;

(e) For an assessment from one hundred eighty-one to two hundred ten days past due, the prime interest rate plus eight per cent, multiplied by the assessment due;

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(f) For each additional thirty-day period or portion thereof that an assessment remains past due after it has remained past due for more than two hundred ten days, the prime interest rate plus eight per cent, multiplied by the assessment due.

(3) An employer may appeal a late fee penalty and penalty assessment to the administrator.

For purposes of division (L)(2) of this section, "prime interest rate" means the average bank prime rate, and the administrator shall determine the prime interest rate in the same manner as a county auditor determines the average bank prime rate under section 929.02 of the Revised Code.

The administrator shall include any assessment and penalties that remain unpaid for previous assessment periods in the calculation and collection of any assessments due under this division or division (J) of this section.

(M) As used in this section, "paid compensation" means all amounts paid by a self-insuring employer for living maintenance benefits, all amounts for compensation paid pursuant to sections 4121.63, 4121.67, 4123.56, 4123.57, 4123.58, 4123.59, 4123.60, and 4123.64 of the Revised Code, all amounts paid as wages in lieu of such compensation, all amounts paid in lieu of such compensation under a nonoccupational accident and sickness program fully funded by the self-insuring employer, and all amounts paid by a self-insuring employer for a violation of a specific safety standard pursuant to Section 35 of Article II, Ohio Constitution and section 4121.47 of the Revised Code.

(N) Should any section of this chapter or Chapter 4121. of the Revised Code providing for self-insuring employers' assessments based upon compensation paid be declared unconstitutional by a final decision of any court, then that section of the Revised Code declared unconstitutional shall revert back to the section in existence prior to November 3, 1989, providing for assessments based upon payroll.

(O) The administrator may grant a self-insuring employer the privilege to self-insure a construction project entered into by the self-insuring employer that is scheduled for completion within six years after the date the project begins, and the total cost of which is estimated to exceed one hundred million dollars or, for employers described in division (R) of this section, if the construction project is estimated to exceed twenty-five million dollars. The administrator may waive such cost and time criteria and grant a self-insuring employer the privilege to self-insure a construction project regardless of the time needed to complete the construction project and provided that the cost of the construction project is estimated to exceed fifty million dollars. A self-insuring employer who desires to self-insure a construction project shall submit to the administrator an application listing the dates the construction project is scheduled to begin and end, the estimated cost of the construction project, the contractors and subcontractors whose employees are to be self-insured by the self-insuring employer, the provisions of a safety program that is specifically designed for the construction project, and a statement as to whether a collective bargaining agreement governing the rights, duties, and obligations of each of the parties to the agreement with respect to the construction project exists between the self-insuring employer and a labor organization.

A self-insuring employer may apply to self-insure the employees of either of the following:

(1) All contractors and subcontractors who perform labor or work or provide materials for the construction project;

(2) All contractors and, at the administrator's discretion, a substantial number of all the subcontractors who perform labor or work or provide materials for the construction project.

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Upon approval of the application, the administrator shall mail a certificate granting the privilege to self-insure the construction project to the self-insuring employer. The certificate shall contain the name of the self-insuring employer and the name, address, and telephone number of the self-insuring employer's representatives who are responsible for administering workers' compensation claims for the construction project. The self-insuring employer shall post the certificate in a conspicuous place at the site of the construction project.

The administrator shall maintain a record of the contractors and subcontractors whose employees are covered under the certificate issued to the self-insured employer. A self-insuring employer immediately shall notify the administrator when any contractor or subcontractor is added or eliminated from inclusion under the certificate.

Upon approval of the application, the self-insuring employer is responsible for the administration and payment of all claims under this chapter and Chapter 4121. of the Revised Code for the employees of the contractor and subcontractors covered under the certificate who receive injuries or are killed in the course of and arising out of employment on the construction project, or who contract an occupational disease in the course of employment on the construction project. For purposes of this chapter and Chapter 4121. of the Revised Code, a claim that is administered and paid in accordance with this division is considered a claim against the self-insuring employer listed in the certificate. A contractor or subcontractor included under the certificate shall report to the self-insuring employer listed in the certificate, all claims that arise under this chapter and Chapter 4121. of the Revised Code in connection with the construction project for which the certificate is issued.

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. No employee of the contractors and subcontractors covered under a certificate issued under this division shall be considered the employee of the self-insuring employer listed in that certificate for any purposes other than this chapter and Chapter 4121. of the Revised Code. Nothing in this division gives a self-insuring employer authority to control the means, manner, or method of employment of the employees of the contractors and subcontractors covered under a certificate issued under this division.

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.

The contractors and subcontractors included under a certificate issued under this division shall identify in their payroll records the employees who are considered the employees of the self-insuring employer listed in that certificate for purposes of this chapter and Chapter 4121. of the Revised Code, and the amount that those employees earned for employment on the construction project that is the subject of that certificate. Notwithstanding any provision to the contrary under this chapter and Chapter 4121. of the Revised Code, the administrator shall exclude the payroll that is reported for employees who are considered the employees of the self-insuring employer listed in that certificate, and that the employees earned for employment on the construction project that is the subject of that certificate, when determining those contractors' or subcontractors' premiums or assessments required under this chapter and Chapter 4121. of the Revised Code. A self-insuring employer issued a certificate under this division shall include in the amount of paid compensation it reports pursuant to division (L) of this section, the amount of paid compensation the self-insuring employer paid pursuant to this division for the previous calendar year.

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. Nothing in this division shall be construed as altering the rights devolved under sections 2305.31 and 4123.82 of the Revised Code as those rights existed prior to September 17, 1996.

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As used in this division, "privilege to self-insure a construction project" means privilege to pay individually compensation, and to furnish medical, surgical, nursing, and hospital services and attention and funeral expenses directly to injured employees or the dependents of killed employees.

(P) A self-insuring employer whose application is granted under division (O) of this section shall designate a safety professional to be responsible for the administration and enforcement of the safety program that is specifically designed for the construction project that is the subject of the application.

A self-insuring employer whose application is granted under division (O) of this section shall employ an ombudsperson for the construction project that is the subject of the application. The ombudsperson shall have experience in workers' compensation or the construction industry, or both. The ombudsperson shall perform all of the following duties:

(1) Communicate with and provide information to employees who are injured in the course of, or whose injury arises out of employment on the construction project, or who contract an occupational disease in the course of employment on the construction project;

(2) Investigate the status of a claim upon the request of an employee to do so;

(3) Provide information to claimants, third party administrators, employers, and other persons to assist those persons in protecting their rights under this chapter and Chapter 4121. of the Revised Code.

A self-insuring employer whose application is granted under division (O) of this section shall post the name of the safety professional and the ombudsperson and instructions for contacting the safety professional and the ombudsperson in a conspicuous place at the site of the construction project.

(Q) The administrator may consider all of the following when deciding whether to grant a self-insuring employer the privilege to self-insure a construction project as provided under division (O) of this section:

(1) Whether the self-insuring employer has an organizational plan for the administration of the workers' compensation law;

(2) Whether the safety program that is specifically designed for the construction project provides for the safety of employees employed on the construction project, is applicable to all contractors and subcontractors who perform labor or work or provide materials for the construction project, and has as a component, a safety training program that complies with standards adopted pursuant to the "Occupational Safety and Health Act of 1970," 84 Stat. 1590, 29 U.S.C.A. 651, and provides for continuing management and employee involvement;

(3) Whether granting the privilege to self-insure the construction project will reduce the costs of the construction project;

(4) Whether the self-insuring employer has employed an ombudsperson as required under division (P) of this section;

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(5) Whether the self-insuring employer has sufficient surety to secure the payment of claims for which the self-insuring employer would be responsible pursuant to the granting of the privilege to self-insure a construction project under division (O) of this section.

(R) As used in divisions (O), (P), and (Q), "self-insuring employer" includes the following employers, whether or not they have been granted the status of being a self-insuring employer under division (B) of this section:

(1) A state institution of higher education;

(2) A school district;

(3) A county school financing district;

(4) An educational service center;

(5) A community school established under Chapter 3314. of the Revised Code;

(6) A municipal power agency as defined in section 3734.058 of the Revised Code.

(S) As used in this section:

(1) "Unvoted debt capacity" means the amount of money that a public employer may borrow without voter approval of a tax levy;

(2) "State institution of higher education" means the state universities listed in section 3345.011 of the Revised Code, community colleges created pursuant to Chapter 3354. of the Revised Code, university branches created pursuant to Chapter 3355. of the Revised Code, technical colleges created pursuant to Chapter 3357. of the Revised Code, and state community colleges created pursuant to Chapter 3358. of the Revised Code.

CREDIT(S)

(2014 H 493, eff. 9-17-14; 2013 H 59, eff. 9-29-13; 2012 H 487, eff. 9-10-12; 2011 H 123, eff. 7-29-11; 2011 H 153, eff. 6-30-11; 2011 S 171, eff. 6-30-11; 2009 H 15, eff. 9-29-09; 2008 H 79, eff. 1-6-09; 2007 H 100, eff. 9-10-07; 2006 S 7, eff. 6-30-06; 2004 H 223, eff. 10-13-04; 2002 H 675, eff. 3-14-03; 2002 S 227, eff. 4-9-03; 2000 S 266, eff. 3-12-01; 1997 H 361, eff. 12-16-97; 1996 H 245, eff. 9-17-96; 1995 H 278, eff. 9-29-95; 1995 H 7, eff. 9-1-95; 1993 H 107, eff. 10-20-93; 1993 S 50; 1992 S 192; 1991 H 185; 1989 H 222; 1986 S 307; 1981 H 244; 1979 H 184; 1976 S 545; 128 v 743; 1953 H 1; GC 1465-69)

Notes of Decisions (94)

R.C. § 4123.35, OH ST § 4123.35
Current through 2015 Files 1 to 10, 12 to 15 and 17 to 24 of the 131st GA (2015-2016).

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Title XLI. Labor and Industry
Chapter 4123. Workers' Compensation (Refs & Annos)
Voluntary Compliance

R.C. § 4123.74

4123.74 Employer's liability in damages

Currentness

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.

CREDIT(S)

(1993 H 107, eff. 10-20-93 (*State ex rel. Ohio AFL-CIO v Voinovich*); 1992 S 192; 1986 S 307; 128 v 1334, 743; 1953 H 1; GC 1465-70)

Notes of Decisions (597)

R.C. § 4123.74, OH ST § 4123.74
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Baldwin's Ohio Revised Code Annotated
Title XLI. Labor and Industry
Chapter 4123. Workers' Compensation (Refs & Annos)
Voluntary Compliance

R.C. § 4123.741

4123.741 Employee's liability in damages

Currentness

No employee of any employer, as defined in division (B) of section 4123.01 of the Revised Code, shall be liable to respond in damages at common law or by statute for any injury or occupational disease, received or contracted by any other employee of such employer in the course of and arising out of the latter employee's employment, or for any death resulting from such injury or occupational disease, on the condition that such injury, occupational disease, or death is found to be compensable under sections 4123.01 to 4123.94, inclusive, of the Revised Code.

CREDIT(S)
(130 v S 131, eff. 10-1-63)

Notes of Decisions (97)

R.C. § 4123.741, OH ST § 4123.741
Current through 2015 Files 1 to 10, 12 to 15 and 17 to 24 of the 131st GA (2015-2016).

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