

IN THE SUPREME COURT OF OHIO

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

PETITIONERS D.A.G. CONSTRUCTION CO., INC. AND TRIVERSITY
CONSTRUCTION CO., LLC'S REPLY BRIEF

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INTRODUCTION

The facts of this case are undisputed. All parties agree that Messer Construction Company ("Messer") complied with R.C. 4123.35(O) to self-insure the workers on the Horseshoe Casino Construction Project ("Casino Project") within the workers' compensation program. Messer enrolled subcontractors D.A.G. Construction Co., Inc. ("D.A.G."), TriVersity Construction Co., LLC ("TriVersity"), J&B Steel Erectors, Inc. ("J&B Steel"), and Jostin Construction, Inc. ("Jostin") and other subcontractors in its workers' compensation plan. Respondent Daniel Stolz was working for subcontractor Jostin on the Casino Project when he was injured. Under traditional workers' compensation, only Jostin would be immune from the Respondent's negligence claims. However, the traditional workers' compensation analysis is supplanted by R.C. 4123.35, which provides immunity for all subcontractors enrolled in the plan.

I. ARGUMENT

Proposition of Law

Ohio Revised 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.

The premise of the Respondent's argument is that the statute provides additional immunity beyond traditional workers' compensation law only to the general contractor. If the purpose of the statute was to extend immunity solely to the general contractor, it could have simply stated that. However, it is clear that the drafters of the statute intended to go farther than establishing additional immunity only for a general contractor.

As the Respondent repeatedly emphasizes, the law is well-established in Ohio: a subcontractor who has procured workers' compensation coverage for its employees is immune to

claims from those employees. If the legislature sought to ensure that subcontractors are immune to claims from their own employees, no action was needed. Ohio law already provides that immunity through the traditional workers' compensation scheme. R.C. 4123.35(O) was not written to reiterate that immunity. If that was the intent, the drafters could have used the language the Respondent uses throughout its brief and stated that immunity protection is provided with respect to a subcontractor's own employees. Similarly, if the goal was to expand immunity only to encompass general contractors such as Messer, a provision could have been written that simply stated that.

If the drafters of the statute intended only the general contractors' employees to be fellow servants with the subcontractors' employees, limiting language would have been included. A plain reading of the statute indicates that the employees of the contractors and subcontractors on the construction project are to be considered "as if the employees were employees of the self-insuring employer. . . ." This means that the employees of D.A.G., TriVersity, J&B Steel, and Jostin are to be considered employees of Messer. If they are all considered employees of Messer, they are all fellow servants. As fellow servants, all of the employees on the construction project are prohibited from bringing claims against each other pursuant to R.C. 4123.741.

The pertinent section of R.C. 4123.741 provides that no employee of any employer shall be liable for any injury received by any other employee of such employer. Contrary to the Respondent's argument, the statute does not consider the workers on the job to be employees of Messer in order to exclude only Messer from liability, but not to prohibit claims against each other. Such a distinction simply does not exist. None of Messer's employees, whether they be Messer's true employees or fictitious employees created by R.C. 4123.35, may be liable for injuries received by any other Messer employees. D.A.G. and TriVersity's employees may not be liable for injuries received by Jostin's employee. If there is no liability assigned to the agent,

it logically follows that there can be no liability imposed upon the principal for the agent's actions. *Comer v. Risko*, 106 Ohio St. 3d 185, 189, 2005-Ohio-4559, 833 N.E.2d 712, 716-717 (Ohio 2005). Therefore, no liability can be assigned to D.A.G. and TriVersity.

The fiction created by R.C. 4123.35 that all employees are to be considered as if they are employees of Messer is the factor that distinguishes Ohio law from the Wisconsin law discussed in *Pride v. Liberty Mutual Insurance Company*, 2007 U.S. Dist. LEXIS 40833 (E.D. Wis. 2007). The Wisconsin statute in *Pride* considers each subcontractor as a separately insured entity. The *Pride* court noted that the drafters could have included a provision that deemed the owner of the project the employer of all employees on the project, but such a provision was not included. However, the Ohio legislature did include that provision.

The Respondent mistakenly interprets the discussion of *Pride* in the *Lancaster* court's decision to mean that the *Lancaster* holding prohibits all third-party liability claims. See *Lancaster v. Pendleton Constr. Group, LLC, et al.*, Hamilton C.P. No. A1208721 (Mar. 25, 2013). Because the Wisconsin statute considered each subcontractor as a separate entity, it referred to subcontractors that did not employ the injured worker as third parties. In *Lancaster*, the injured party attempted to align Ohio law with Wisconsin law and denominated the subcontractors on the Casino project that did not employ the injured worker as "third-parties." However, the *Lancaster* court rejected interpretation of third party claims because under R.C. 4123.35, the subcontractors are not third parties. The *Lancaster* court stated, "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." *Id.* at 7. The *Lancaster* decision did not attempt to alter Ohio law regarding third party claims, but merely recognized that the subcontractors are not third parties under R.C. 4123.35. Thus, pursuant to

both R.C. 4123.35 and the *Lancaster* decision, nothing prevents an injured worker from asserting a third party claim against an entity that was not included in the wrap up agreement.

The fellow servant rule, third party liability, and other well-established points of law involving quid pro quo and the traditional workers' compensation schemes frame the issue before the Court, but there is only one question of law to be decided. That question turns on who is entitled to immunity protection. The answer to this question is plainly stated in the statute: "The contractors and subcontractors included under a certificate issued under this division are entitled to the protections provided under this chapter. . . ." This clause clearly indicates who is entitled to the protections. Contractors, like Messer, and subcontractors, like D.A.G. and TriVersity, are entitled to immunity protection.

The issue before the Court has been raised because of the clause that clarifies the clear directive of who is entitled to protection. The clause states, ". . . with respect to the contractor's or subcontractor's employees who are employed on the construction project which is the subject of the certificate." This clause contains no limitation stating that subcontractors are only entitled to immunity from claims presented by their own employees. Instead, this clause clarifies that only employees that were employed on the construction project are covered by this statute. In this case, this means that that the statute applies only to employees who worked on the Casino Project, and it does not apply to any employees of the subcontractors that were not employed on the Casino Project. The Respondent's assertion that this interpretation is an abrupt jump within the sentence between two different groups being protected is a mischaracterization. The clarifying clause limits the protections provided to employers to prevent the statute from being over-broadly applied to employees that were not employed on the project in question.

When R.C. 4123.35(O) is read in its entirety, it is clear that all employees of the subcontractors on the Casino Project are to be considered as Messer's employees for workers'

compensation coverage. Therefore, pursuant to the plain language of the statute, all subcontractors are entitled to immunity protections set forth within it. Accordingly, D.A.G. and TriVersity are entitled to immunity from the Respondent's claims.

II. CONCLUSION

Based on the foregoing, Petitioners D.A.G. Construction Co., Inc. and TriVersity Construction Co., LLC respectfully request that the Court answer the certified question in the affirmative.

Respectfully submitted,

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The undersigned hereby certifies that a copy of the foregoing Reply Brief was served via U.S. Mail and/or e-mail this 21st day of September, 2015 upon the following:

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