Supreme Court of Ohio Clerk of Court - Filed September 21, 2015 - Case No. 2015-0628

IN THE SUPREME COURT OF OHIO

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

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INTRODUCTION

It is undisputed that Petitioner, J & B Steel Erectors, Inc. ("J & B Steel"), was an enrolled subcontractor under Messer Construction Company's ("Messer") self-insured Workers' Compensation Program ("Plan") for the Horseshoe Casino Construction Project ("Project"). It is also undisputed that Respondent, Daniel Stolz ("Mr. Stolz"), was working for Jostin Construction, Inc. ("Jostin"), another enrolled subcontractor under the Plan, on January 27, 2012 when he allegedly sustained injuries while performing concrete work on the Project. Further, the evidence shows that Mr. Stolz received workers' compensation benefits through the Plan for the alleged injuries he sustained while working on the Project. Consequently, J & B Steel is entitled to workers' compensation immunity from Mr. Stolz's tort claims pursuant to the language of R.C. 4123.35(O) and 4123.74.

Mr. Stolz's Brief attempts to apply traditional notions of workers' compensation to an atypical self-insured construction project, the Horseshoe Casino, which is specifically addressed by R.C. 4123.35(O) and 4123.74. On such uncommon projects, the legislature has enacted a specific statutory scheme regarding self-insurance approval requirements and the protections provided to the self-insured employer and enrolled subcontractors under such plans. R.C. 4123.35(O). Under R.C. 4123.35(O) and 4123.74, both the self-insured employer, Messer, and the enrolled subcontractors under the Plan, including J & B Steel, are entitled to immunity from tort liability. Although such projects are unusual, the law relating thereto is clear and unambiguous. Consequently, J & B Steel, as an enrolled subcontractor under Messer's Plan, is entitled to workers' compensation immunity from Mr. Stolz's claims.

Mr. Stolz's argument in opposition to J & B Steel's Brief is that R.C. 4123.35(O) and 4123.74 do not provide workers' compensation immunity to the enrolled subcontractors on the

Project, other than Mr. Stolz's own employer, Jostin. However, Mr. Stolz's contention is contradicted by the plain language of the statutes, has been flatly rejected by an Ohio court in *Lancaster v. Pendleton Constr. Group, LLC, et al*., Hamilton C.P. No. A1208721 (March 25, 2013) with regard to this very Project (Summary Judgment Entry of the Hamilton Co. Court of Common Pleas at 1; J & B Appx. at 27) and is unsupported by case law in other states with similar workers' compensation provisions for self-insured employers. Accordingly, J & B Steel urges this Court to answer the certified question in the affirmative, and hold that J & B Steel and other enrolled subcontractors are entitled to workers' compensation immunity from Mr. Stolz's tort claims pursuant to R.C. 4123.35 and 4123.74.

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.

A. ENROLLED SUBCONTRACTORS ARE IMMUNE UNDER R.C. 4123.35 AND 4123.74 FROM TORT CLAIMS MADE BY EMPLOYEES OF OTHER ENROLLED SUBCONTRACTORS INJURED WHILE WORKING ON A SELF-INSURED PROJECT.

Mr. Stolz acknowledges that the Ohio legislature can and did create a unique application of workers' compensation coverage and immunity for those contractors and subcontractors involved in self-insured construction projects such as the Horseshoe Casino Project. (Stolz Brief, p. 5) As a result, the specific protections set forth in R.C. 4123.35(O) and 4123.74 with regard to self-insured construction projects apply in this case to J & B Steel and the other enrolled subcontractors in a manner that they might not otherwise apply on a project that was not

self-insured. Pursuant to those particular statutes, J & B Steel is immune from Mr. Stolz's tort claims.

R.C. 4123.35(O) allows an employer to be eligible to self-insure certain construction projects which are scheduled for completion within six years and at a total cost estimated to exceed One Hundred Million Dollars. Such self-insurance for a construction project is a relatively rare circumstance, and R.C. 4123.35(O) is tailored to address that unique situation. Given the scale of construction projects which are eligible for self-insured status, R.C. 4123.35(O) necessarily provides blanket coverage and blanket immunity to enrolled subcontractors in order to ensure that the self-insured employer and the employees of all of the enrolled subcontractors on such a project are able to receive workers' compensation benefits even if a subcontractor employer were to fold or fail to pay workers' compensation premiums. In exchange, the employees of all enrolled subcontractors on that project are assured that they will be covered for their project-related injuries.

Specifically, R.C. 4123.35(O) 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….
>
> **<u>The contractors and subcontractors included under a certificate issued under this division are entitled to the protections provided under this chapter</u>** 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.

(Emphasis added.)

In R.C. 4123.35(O), the Ohio legislature has expressly provided that for purposes of workers' compensation, the self-insured employer on a construction project is the employer of all enrolled subcontractors' employees who are working on that construction project. Further, R.C. 4123.35(O) provides that both the self-insured employer <u>and</u> the enrolled subcontractor under a self-insured plan are entitled to immunity from claims arising out of injuries to the employees of the enrolled subcontractors on that project. Thus, J & B Steel is immune from Mr. Stolz's claims because it is entitled to the protection of R.C. 4123.35(O) and 4123.74 as an enrolled subcontractor under Messer's Plan.

In conjunction with the foregoing excerpt from R.C. 4123.35(O), R.C. 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…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…is compensable under this chapter.

Tellingly, the only reference to R.C. 4123.74 in Mr. Stolz's Brief, other than when repeating the certified question, is on page 5, where Mr. Stolz indicates that, "When a general contractor chooses to 'self insure' a construction project through complying with the requirements of an R.C. 4123.35(O) wrap up plan, it likewise receives the protections of the exclusivity rule discussed above. R.C. 4123.74." (Stolz Brief, p. 5.) In fact, R.C. 4123.74 does not speak in terms of a "general contractor" or even a "self-insured employer", but instead broadly extends its immunity to "employers who comply with section 4123.35 of the Revised

Code." R.C. 4123.74. J & B Steel is such an employer, and is entitled to immunity from Mr. Stolz's tort claims.

Mr. Stolz agrees that the immunity provided by R.C. 4123.35(O) applies to enrolled subcontractors on a self-insured construction project, but argues it applies only to those subcontractors which directly employ the injured workers. Mr. Stolz states, "As the statute is written, each subcontractor is only protected from liability for injuries to one of the subcontractor**'s** employees – their own." (Stolz Brief, p. 7). Mr. Stolz's purported interpretation of R.C. 4123.35(O) is contrary to the statute's following explicit language, which plainly states that "contractors and subcontractors included under a certificate issued under this division are entitled to protection provided under this Chapter…" R.C. 4123.35(O).

R.C. 4123.35(O) does not state that enrolled subcontractors are only entitled to immunity from the claims of their <u>own</u> employees. If the legislature wanted to limit the immunity of subcontractors in such a way it could have simply included the word "own" in the statute. Instead, this section of the statute relates to the employees of enrolled subcontractors who are working on the self-insured construction project. In other words, the immunity provided to enrolled subcontractors on a self-insured construction project does not apply to employees of those enrolled subcontractors who are injured on a separate job site or who have not been employed to work on the self-insured construction project. Indeed, the enrolled subcontractors on the Project were required to have their own insurance coverage, including workers' compensation, for their operations that were off the Project site.

Moreover, if this statutory language is somehow found to be ambiguous, the rules of statutory construction make it clear that "the singular includes the plural, and the plural includes the singular." R.C. 1.43(A). In the absence of clear language in the statute to the contrary, or

evidence which adequately demonstrates that such a construction is out of context with the remaining language of the statute or its related provisions, "the legislative guidelines as set forth in R.C. 1.43(A) will be applied." *State ex rel Republic Steel Corp. v. Quinn*, 12 Ohio St.3d 57, 59, 465 N.E.2d 413 (1984), citing *Wingate v. Hordge*, 60 Ohio St.2d 55, 58, 396 N.E.2d 770 (1979). Here, it is clear R.C. 1.43(A) applies if R.C. 4123.35(O) is found to be ambiguous, and "the singular includes the plural," confirming immunity for J & B Steel.

In addition, Mr. Stolz asserts that because R.C. 4123.931 allows the BWC to bring subrogation claims against third parties, if claims like his against J & B Steel were prohibited by Ohio law, R.C. 4123.931 would be "completely superfluous." (Stolz Brief, p. 12-13.) However, Mr. Stolz has ignored the express language of R.C. 4123.35(O) and 4123.74 regarding enrolled subcontractors in the unique circumstance of a self-insured workers' compensation plan, such as the one in this case. As set forth repeatedly above, enrolled subcontractors are immune from tort claims of injured workers on self-insured construction projects. R.C. 4123.35(O) and 4123.74. Regardless, under a self-insured workers' compensation project, the BWC would have no basis to assert a subrogation claim against a third-party under R.C. 4123.931 because the workers' compensation benefits are paid by the self-insured employer, not the BWC.

Moreover, Mr. Stolz alleges there is no fellow servant issue here, suggesting "the instant case requires **two** fellow servant inquiries, the first as to Messer, and the second as to each Subcontractor Defendant." (Stolz Brief, p. 14-15). Mr. Stolz provides no authority for this claim, other than R.C. 4123.741. However, R.C. 4123.741 does not support Mr. Stolz's suggestion. Instead, his strained reading of that statute further confirms that the plain language of R.C. 4123.35(O) and 4123.74 must be applied here, extending immunity to J & B Steel. Whether Mr. Stolz is considered to have one employer or two under this statutory scheme does

not change the fact that Messer is Mr. Stolz's employer for purposes of this statute, and Messer is the employer of the employees of other enrolled subcontractors on this project for purposes of this statute, rendering these employees fellow servants, immune from tort claims like that brought by Mr. Stolz.

While Mr. Stolz cites many cases in his Brief, primarily focusing on "traditional notions of workers' compensation," which are not applicable in this unique large project situation, only one Ohio case has addressed this unique statutory scheme established by R.C. 4123.35(O), *Lancaster v. Pendleton, supra*. (Stolz Brief, p. 16.) In *Lancaster*, the plaintiffs made the very argument that Mr. Stolz is making in the within matter, specifically 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." (*Lancaster* Entry at 3; J & B Appx. at 29). However, the court rejected plaintiffs' claims in *Lancaster* and held that "Plaintiffs' desire to hold 'third parties responsible for the collapse of the casino floor' liable for negligence does not comport with the scheme laid out by §4123.35(O)." (*Id*. at p. 6; J & B Appx. at 32.)

As Mr. Stolz acknowledges in his Brief, the court in *Lancaster* found a significant distinction between the Wisconsin Workers' Compensation statute at issue in *Pride v. Liberty Mut. Ins. Co.,* E.D.Wis. No. 04-C-703, 2007 U.S. Dist. LEXIS 40833 (June 5, 2007) and R.C. 4123.35(O) – namely Wisconsin's express allowance of third-party claims.

> [T]his 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: '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….'
>
> 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.

(*Lancaster* Entry at p. 6-7; J & B Appx. at pp. 32-33). Furthermore, the Court in *Pride* specifically stated that,

> If the legislature had truly intended to allow employees at a construction site to bundle together their workers' compensation liability, it would have been simple enough to craft a provision stating that the owner of an OCIP-insured project is deemed the sole employer of any employee of any contractor injured on that project. Instead of grouping the contractors together, however, the OCIP treats each contractor as a separate insured.

Pride v. Liberty Mut. Ins., supra at *7-8.

The language that the *Pride* decision suggests the Wisconsin legislature could have included to provide subcontractor immunity is the very language the Ohio legislature did include in R.C. 4123.35(O). R.C. 4123.35(O) provides that the self-insuring employer will serve as the employer of all enrolled subcontractors' employees for purposes of workers' compensation. Thus, the *Pride* decision is easily distinguishable from this case and *Lancaster,* given the statutory differences between Ohio and Wisconsin regarding self-insured construction projects, and confirms J & B Steel should be immune here.

In an effort to discount the decision in *Lancaster*, Mr. Stolz asserts that simply because Ohio's workers' compensation statutes do not <u>expressly</u> state that a plaintiff is entitled to bring a third party claim, it does not mean that plaintiffs do not have the right to do so, relying on "the default position." (Stolz Brief, pp. 17-18.) However, that "default position" does not apply to those subcontractors enrolled in a self-insurance plan as set forth in R.C. 4123.35(O) and 4123.74, as instead the plain language of the statutory scheme governs. Further, the *Lancaster* decision related only to the immunity of the enrolled subcontractors, not the immunity of parties that were not included in the self-insured plan. Such true third parties, who are not participants

in the self-insured plan, could still be liable for tort claims under R.C. 4123.35(O) and 4123.74, since there is no statute exempting them from the "default position."

As such, J & B Steel urges this Court to answer the certified question in the affirmative, and hold that J & B Steel and other enrolled subcontractors are entitled to workers' compensation immunity from Mr. Stolz's tort claims pursuant to R.C. 4123.35 and 4123.74.

B. OTHER JURISDICTIONS HAVE PROVIDED WORKERS' COMPENSATION IMMUNITY TO ENROLLED SUBCONTRACTORS ON SELF-INSURED PROJECTS.

Contrary to Mr. Stolz's contention, cases from other jurisdictions are applicable, and confirm that immunity should be extended to enrolled subcontractors like J & B Steel on this self-insured project.

In *Etie v. Walsh & Albert Co., Ltd.*, 135 S.W. 3d 764 (Tex.App.2004), for example, as Mr. Stolz expressly acknowledged, a Texas appellate court expressly held that "the employer/employee relationship extends throughout all tiers of subcontractors when the general contractor has purchased workers' compensation insurance that covers all of the workers on the site. All such participating employers/subcontractors are thus immune from suit." Rather than distinguishing the facts or law in *Etie*, Mr. Stolz argues that a more recent case somehow undermines *Etie*. However, nothing in *TIC Energy and Chemical, Inc. v. Martin*, Tex.App. No. 13-14-00278-CV, 2015 Tex. App. LEXIS 121 (Jan. 8, 2015) undermines *Etie*, as the court in *TIC* merely denied a motion for summary judgment and remanded the case for further consideration. *Etie* remains good law and suggests enrolled subcontractors like J & B Steel should be immune from Mr. Stolz's tort claims.

In *Stevenson v. HH&N/Turner*, E.D.Mich. No. 01-CV-71705, 2002 U.S. Dist. LEXIS 26831 (April 22, 2002), the court acknowledged a purpose of a statutory scheme like that in R.C.

4123.35(O) and 4123.74 is "to reduce the cost of insurance and to allow for a coordinated risk management and safety program at the Project for all program participants and insureds…." *Id.* at *39. Mr. Stolz suggests *Stevenson* supports his claim that "since subcontractors do not participate in the *quid pro quo* bargain, they are not entitled to the statute's protections." (Stolz Brief, p. 21.) However, *Stevenson* simply does not support that contention. Instead, the policy at issue in *Stevenson* was an owner policy, not a contractor policy, and the case involved the owner and a construction manager, not a general contractor. Moreover, the language cited by Mr. Stolz on page 44 of *Stevenson* was set forth by the Court in response to the plaintiff's argument that extending immunity pursuant to Michigan's statutory scheme "to the owner and <u>all</u> contractors on the work site" would allow parties to "enter into contracts that effectively limit <u>all</u> tort liability for personal injury on behalf of <u>all</u> entities on the Project," *Stevenson* at *18, 43, emphasis added. This contention was rejected, and immunity extended, confirming why immunity for J & B Steel is appropriate here.

Amorin v. Gordon, 996 So.2d 913 (Fla.2008) is also applicable here, providing further support for the concept of horizontal immunity. Just like R.C. 4123.35(O) and 4123.74, the legislative intent recognized in *Amorin* was to see that workers were awarded "reasonably adequate and certain payment for workplace accidents," and "to replace an unwieldy tort system that made it virtually impossible for businesses to predict or insure for the cost of industrial accidents." *Id.* at 918. Such purposes are also served here.

Given this applicable law, and the lack of contrary law, J & B Steel urges this Court to answer the certified question in the affirmative, and hold that J & B Steel and other enrolled subcontractors are entitled to workers' compensation immunity from Mr. Stolz's tort claims pursuant to R.C. 4123.35 and 4123.74.

II. CONCLUSION

Based on the foregoing, Petitioner, J & B Steel Erectors, Inc., respectfully requests that the Court answer the certified question in the affirmative.

Respectfully submitted,

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