

IN THE SUPREME COURT OF OHIO

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

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ARGUMENT

- I. **The fact that Jostin was Stolz’s actual employer is irrelevant since Messer is considered to be the employer for all the employees of all the enrolled subcontractors, including Stolz, for the purpose of applying and interpreting the workers’ compensation statutes, including the fellow employee immunity statute (R.C. 4123.741)**

Plaintiff/respondent Daniel Stolz (“Stolz”) admits that petitioner Messer Construction Co. (“Messer”) obtained authority from the Ohio Bureau of Workers’ Compensation (the “Bureau”) pursuant to R.C. 4123.35(O) to self-insure the workers’ compensation program for the construction project where he was working at the time of his alleged injuries. (Stolz Merit Brief at 1-3.) Stolz further admits that the defendants/petitioners D.A.G. Construction Co. Inc. (“DAG Construction”), J & B Steel Erectors, Inc. (“J&B Steel”), and Triversity Construction Co. LLC (“Triversity”) (hereinafter jointly referred to as the “Subcontractor Defendants”) as well as the company for which he was working at the time of his alleged injuries, Jostin Construction, Inc. (“Jostin”), were all enrolled subcontractors participating in Messer’s workers’ compensation program for that project. (*Id.*) Additionally, Stolz admits that he received and retained workers’ compensation benefits for his alleged injuries through Messer’s program. (*Id.*)

R.C. 4123.35(O) provides that Messer is to be treated as the employer for all the employees of enrolled subcontractors for the purposes of applying and interpreting the provisions within Chapter 4123. Thus, Stolz was co-employees with the persons working for the Subcontractor Defendants at the construction project site for the purposes of applying and interpreting R.C. 4123.741, and Stolz’s claims against the Subcontractor Defendants are prohibited by that statute as being based on the alleged negligence of his fellow employees.

Stolz attempts to avoid this result by arguing that he had two employers for the purpose of applying R.C. 4123.741. (Stolz Merit Brief at 13-16.) According to Stolz, because Messer

was his statutory employer and Jostin was his actual employer, the fellow employee immunity within R.C. 4123.741 only applies to claims Stolz may make against either Messer or Jostin. (*Id.*)

That argument, however, ignores the plain language of R.C. 4123.35(O), which unambiguously provides that Messer is considered to be **the** employer for **all** of the employees of **all** the enrolled subcontractors for **all** purposes of applying the workers compensation statutes, which would obviously include R.C. 4123.741. Nothing within R.C. 4123.35(O) creates a two tiered system whereby a worker is considered for workers' compensation purposes to be **both** the employee of the company for which he is working and the employee of the self-insuring general contractor. Rather, the statute plainly and unambiguously states that the self-insuring general contractor alone is the employer for workers' compensation purposes. To hold otherwise would create an exception not found within the plain language of the statute whereby workers of enrolled subcontractors participating in a self-insured construction project pursuant to R.C. 4123.35(O) are treated as employees of the their own companies under R.C. 4123.741, but treated as employees of the self-insuring general contractor for all other workers' compensation statutes.

Stolz's argument is also contrary to the undisputed facts. Stolz admits that he received and retained workers' compensation benefits from **Messer's** plan, and there are no claims or allegations that Stolz any in manner participated in Jostin's workers' compensation plan. Therefore, there is no factual basis for Jostin to be treated as Stolz's employer for the purpose of applying the workers' compensation statutes.

While Stolz certainly was Jostin's employee for **some purposes** related to the construction project, he was not in any manner Jostin's employee for **workers' compensation**

purposes. Likewise, while Messer was Stolz's employer for workers' compensation purposes, it was not Stolz's employer for all purposes related to the construction project. For instance, Jostin was Stolz's employer for issues regarding remuneration for the services he performed at the construction site, but Messer, and not Jostin, was Stolz's employer for any purpose relating to workers' compensation issues, including the application of R.C. 4123.741.

Stolz's argument also misstates the applicable question regarding the application of R.C. 4123.741. The question is not whether he had two employers (Messer as his statutory employer for workers' compensation purposes and Jostin as his actual employer for all other purposes). The question is whether he was considered to be co-**employees** for the purposes of R.C. 4123.741 with the persons against whom he is attempting to establish negligence. Regardless of whether Stolz had more than one employer, there is no basis for Stolz to argue that he and the persons working for the Subcontractor Defendants were not fellow employees under R.C. 4123.741. To the contrary, Stolz and the persons working for the Subcontractor Defendants were all considered to be Messer's employees for the purpose of applying that statute, which means that Stolz's claims against the Subcontractor Defendants are based on the alleged negligence of his fellow employees and are prohibited by R.C. 4123.741. *See Natl. Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth*, 122 Ohio St.3d 594, 600, 2009-Ohio-3601, ¶ 23 (holding that an employer is only liable for tortious actions attributed to its employees); *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).

II. Stolz’s argument relies on a portion of R.C. 4123.35(O) taken out of context and without consideration for the entirety of that statute and the other workers’ compensation statutes

In arguing that the Subcontractor Defendants are not entitled to immunity from his claims, Stolz relies on one line taken out of context within R.C. 4123.35(O) referring to enrolled subcontractors in the singular possessive. (Stolz Merit Brief at 6-10.) However, that sentence must be considered within the context of the entirety of that statute and the other workers’ compensation statutes in order to determine whether Stolz can bring claims against the Subcontractor Defendants. *State ex rel. Herman v. Klopfleisch*, 72 Ohio St.3d 581, 585 (1995) (“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.”) As noted by this Court, “[i]n 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 v. Ish*, 134 Ohio St.3d 48, 2012-Ohio-5333, ¶ 10.

The self-insured construction project scheme established by R.C. 4123.35(O) creates a workers’ compensation system wherein all the persons working for enrolled subcontractors on a construction project participate in the self-insured general contractor’s plan rather than individually through their own actual employer’s plan. Thus, the persons working for enrolled subcontractors all become co-employees of the self-insured general contractor for workers’ compensation purposes regardless of their actual employer. When the line within R.C. 4123.35(O) relied upon by Stolz is considered within this context, the use of the singular possessive to refer to the subcontractors is irrelevant since all of the employees are considered

Messer employees for workers' compensation purposes rather than employees of the individual subcontractors.

Moreover the first portion of R.C. 4123.35(O) provides that enrolled subcontractors are entitled to all the protections of R.C. 4123 without exception, which would include the immunity within R.C. 4123.741. The use of the singular possessive in reference to the subcontractor's employees later in the section is merely qualifying the persons to whom this section applies by confirming that R.C. 4123.35(O) only applies to those persons working for an enrolled subcontractor at the applicable construction project rather than all of the enrolled subcontractors in general. The use of the singular possessive is not, as Stolz maintains, a limitation on the protections afforded to subcontractors.

III. The quid pro quo and underlying purposes of the self-insured construction project statute (R.C. 4133.35(O)) and the fellow employee immunity statute (R.C. 4123.741) support immunity for the Subcontractor Defendants

As discussed above and in more detail within Messer's Merit Brief, the plain language of R.C. 4123.35(O) and 4123.741 is sufficient to establish that the Subcontractor Defendants are immune from Stolz's claims. Accordingly, it is unnecessary to consider either the underlying purposes of those statutes or whether the Subcontractors Defendants immunity thereunder is supported by quid pro quo. "[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*, at ¶ 10. However, even if these issues are considered, they support, rather than detract from, the argument that the Subcontractors Defendants are entitled to immunity.

“By enacting R.C. 4123.741, the General Assembly extended the theory of economic loss which forms the basis of the Ohio workers' compensation system to employees who injure co-workers while both are acting within the scope of their employment. Again, prompt, certain recovery is favored over prolonged litigation which could lead to recovery of either a greater or lesser amount, or no recovery at all.” *Caygill v. Jablonski*, 78 Ohio App. 3d 807, 814-15 (6th Dist. 1992) (quoting *Couch v. Thomas*, 26 Ohio App.3d 55, 58 (12th Dist. 1985)). “More specifically, the justification for the legislative extension of employer immunity to the coemployee is that, like the employer, the coemployee is entitled to quid pro quo for the rights he forfeits to a system of workers' compensation.” *Caygill*, 78 Ohio App.3d at 815. “One of the things [the coemployee] is entitled to expect in return for what he has given up is freedom from common-law suits based on industrial accidents in which he is at fault.” *Id.*

Contrary to Stolz's assertions, the co-employee immunity within R.C. 4123.741 does not require direct contribution by the party seeking immunity toward the injured party's workers' compensation. *Id.* The underlying purpose of this immunity is to prevent claims from arising among the parties participating in a workers' compensation program, which would undermine the public policy of ensuring quick and sure recovery in exchange for abrogating liability. *Id.*

Likewise, the purpose of R.C. 4123.35(O) is to bring all the injury claims for a large scale construction project under one workers' compensation policy and provide uniform workers' compensation benefits to all the workers while avoiding litigation related to those injuries. Thus, like R.C. 4123.741, R.C. 4123.35(O) is designed to limit the exposure to litigation for all the parties participating in the workers' compensation program. The quid received by Stolz is the guaranteed benefits he received and retained for his injuries and the quo is the forfeiture of his right to bring claims against other the parties participating in that program related to those

injuries. This assurance of no other litigation is enjoyed by all of the parties jointly participating in the workers' compensation program, including both Messer and the Subcontractor Defendants.

Indeed, if Stolz is permitted to pursue a claim against the Subcontractor Defendants it would create a potential backdoor avenue for injured employees to avoid the express immunity afforded to Messer under R.C. 4123.35(O). Additionally, Stolz's interpretation of the statutes would, at the very least, force Messer to participate in the litigation, even if only as a secondary party. Just as in a typical case where an employer is entitled to rely on R.C. 4123.741 to prevent suits among its employees related to workplace accidents, in this case Messer is entitled to rely on R.C. 4123.741 to prevent suits among persons considered to be its employees for workers' compensation purposes. Stolz's attempt to bring suit against the Subcontractor Defendants thus violates the underlying purpose of the immunities recognized and established by Ohio's workers' compensation statutes.

Stolz asserts throughout his merit brief that he is entitled under Ohio law to bring claims related to his accident against **third parties**. Such an assertion is, however, irrelevant to the certified question of law before the Court. The Subcontractor Defendants were not unrelated third parties; they were parties participating in Messer's workers' compensation program pursuant to R.C. 4123.35(O) along with both Stolz and his actual employer Jostin. The statutes are clear; a party participating in a workers' compensation program cannot bring a claim against either the party providing the benefits or the other parties participating in the program. Accordingly, the fact that Stolz may have had claims against unrelated third parties has no bearing on the question of whether his claims against the Subcontractor Defendants are prohibited by R.C. 4123.741.

CONCLUSION

Stolz's claims against the Subcontractor Defendants are based on the alleged negligence of persons considered to be his co-employees per R.C. 4123.35(O). Therefore, his claims are prohibited by the fellow employee immunity within R.C. 4123.741. This interpretation is supported by the plain language of those statutes, as well as the underlying purposes of those statutes and Ohio's worker's compensation scheme.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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