

IN THE SUPREME COURT OF OHIO

Daniel Stolz, : Supreme Court Case No. 2017-Ohio-1245  
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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MERIT BRIEF OF AMICUS CURIAE MESSER CONSTRUCTION CO.  
IN SUPPORT OF PETITIONERS

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## STATEMENT OF THE FACTS

Plaintiff/respondent Daniel Stolz and several of his fellow coworkers were injured while working for Jostin Construction, Inc. (“Jostin”) on the construction project for the Horseshoe Casino in Cincinnati, Ohio (the “Project”). (Federal court decision certifying a question of law to this Court at pages 1-2 (“Cert. Decision”) (a certified copy of that decision was filed with this Court on September 20, 2017)); *see also Stolz v. J & B Steel Erectors, Inc.*, 146 Ohio St.3d 281, 2016-Ohio-1567, ¶ 4-5 (“*Stolz I*”). Amicus Curiae Messer Construction Co. (“Messer”) was the general contractor for the Project and Jostin was one of its subcontractors. *Id.*

Prior to the accident in which Stolz was injured, Messer had obtained authority from the Ohio Bureau of Workers’ Compensation (the “Bureau”) to act as the self-insuring employer for the Project per R.C. 4123.35(O). Cert. Order at 2; *Stolz I* at ¶ 6. Pursuant to that authority, many of the subcontractors working on the Project enrolled in Messer’s workers’ compensation program, including Stolz’s employer, Jostin, and the defendants/petitioners D.A.G. Construction Co. Inc. (“DAG”), J & B Steel Erectors, Inc. (“J&B Steel”), and Triversity Construction Co., LLC (“Triversity”) (hereinafter collectively referred to as the “Petitioners”). *Id.* Despite receiving, accepting, and retaining workers’ compensation benefits from Messer as an employee of an enrolled subcontractor, Stolz brought suit against Messer and several of its other enrolled subcontractors, DAG, J&B Steel, and Triversity. *Stolz I* at ¶ 5.

Stolz first filed suit against these parties on October 31, 2012, in Hamilton County Common Pleas Court (Case No. A1208595), but voluntarily dismissed that action in response to dispositive motions filed by Messer, DAG, J&B Steel, and Triversity seeking immunity pursuant

to R.C. 4123.35(O).<sup>1</sup> Stolz re-filed his claims in federal court, seeking to avoid the application of a decision in a related Hamilton County Common Pleas Court case involving claims brought by his injured coworkers for the same accident in which it was found that Petitioners are entitled to “horizontal” immunity under R.C. 4123.35(O). *Lancaster v. Pendleton Constr. Group, LLC*, Hamilton C.P. No. A1208721, 2013 Ohio Misc. LEXIS 112, at \*6-\*12 (March 25, 2013).

The federal district court granted Messer judgment on the pleadings as to Stolz’s punitive damages and employer intentional tort claims. *Stolz v. J&B Steel Erectors, Inc.*, S.D. Ohio No. 1:14-cv-44, 2014 U.S. Dist. LEXIS 69753, at \*2-\*13 (May 21, 2014). The district court also granted Messer summary judgment on Stolz’s negligence claim, correctly holding that Messer is entitled to “vertical” immunity pursuant to R.C. 4123.35(O) and 4123.74. *Stolz v. J & B Steel Erectors, Inc.*, 76 F.Supp.3d 696, 699-703 (S.D. Ohio 2014). However, the district court incorrectly denied summary judgment to the Petitioners on the grounds that enrolled subcontractors are not entitled to horizontal immunity as to the injury claims brought by employees of other enrolled subcontractors. *Id.* at 703-707. Recognizing the direct conflict between its decision and the state court decision in *Lancaster*, the district court certified the question to this Court for a determination, which it accepted and decided as follows:

We conclude that R.C. 4123.35 and 4123.74 create a legal fiction that a self-insuring employer for a self-insured construction project is the single employer, for workers' compensation purposes, of all employees working for enrolled subcontractors on that project. Accordingly, Ohio's workers' compensation scheme provides immunity to subcontractors enrolled in a self-insured construction project from the claims of employees of other enrolled subcontractors who are injured or killed while working on the project, provided that the injury, illness, or death is compensable under Ohio's workers' compensation laws.

*Stolz I* at ¶ 27.

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<sup>1</sup> The docket and documents filed in the Hamilton County Common Pleas Court cases can be accessed and viewed by case number online at <http://www.courtclerk.org/case.asp>.

Unfortunately, rather than accept this Court's decision, on remand Stolz amended his complaint in order to raise, for the first time, constitutional challenges to the immunity recognized by this Court in *Stolz I*. Cert. Order at 4. Stolz's amended complaint challenged the Court's decision in *Stolz I* under both the U.S. and Ohio Constitutions, including several unique provisions of the Ohio Constitution for which there are no similar federal counterparts. *Id.* Accordingly, the federal district court wisely certified the issue of constitutionality to this Court so that it could have the first opportunity to consider whether Ohio's workers' compensation statutes as interpreted by the Court in *Stolz I* violate the Ohio Constitution. (*Id.*) On December 6, 2017, this Court accepted for review the following question:

Whether [R.C.] 4123.35(O) is unconstitutional as applied to the tort claims of an enrolled subcontractor's employee who is injured while working on a self-insured construction project and whose injury is compensable under Ohio workers' compensation laws.

## **ARGUMENT**

### **Proposition of Law**

**The immunity created by Ohio's workers' compensation statutes and recognized by this Court in *Stolz v. J & B Steel Erectors, Inc.*, 146 Ohio St.3d 281, 2016-Ohio-1567, which affords subcontractors enrolled in a self-insured construction project under R.C. 4123.35(O) immunity from the claims of employees of other enrolled subcontractors who are injured or killed while working on the project, does not violate the Ohio Constitution.**

- I. Standard of Review – Ohio's workers' compensation statutes are presumed to be constitutional and it is Stolz's burden to clearly and convincingly prove otherwise

Unlike the U.S. Constitution, which grants power to the U.S. Congress, Ohio's Constitution is primarily a limitation on the legislative power of the General Assembly. *State ex rel. Jackman v. Court of Common Pleas*, 9 Ohio St.2d 159, 162 (1967). Thus, the General Assembly's ability to pass laws is limited only to the extent that such laws are specifically prohibited by either the U.S. or Ohio Constitutions. *Id.* Indeed, the General Assembly is free to



alter, revise, modify, or abolish the common law as it deems necessary. *Stetter v. R.J. Corman Derailment Servs., L.L.C.*, 125 Ohio St.3d 280, 2010-Ohio-1029, ¶ 36; *see also Thompson v. Ford*, 164 Ohio St. 74, 79 (1955) (“There is no question that the legislative branch of the government, unless prohibited by constitutional limitations, may modify or entirely abolish common-law actions and defenses.”)

Accordingly, Ohio statutes enjoy a strong presumption of constitutionality, which requires a party challenging legislation to prove that it is clearly incompatible with specific constitutional provisions. *Jackman* 9 Ohio St.2d at 161 (quoting *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142 (1955) paragraph one of the syllabus). Moreover, a statute is entitled to the benefit of every presumption in favor of its constitutionality. *Dickman*, 164 Ohio St. at 147. This Court has articulately summarized these principles as follows:

In determining whether an act of the legislature is or is not in conflict with the constitution, it is a settled rule that the presumption is in favor of the validity of the law. The legislative power of the state is vested in the general assembly, and whatever limitation is placed upon the exercise of that plenary grant of power must be found in a clear prohibition by the constitution. The legislative power will generally be deemed ample to authorize the enactment of a law, unless the legislative discretion has been qualified or restricted by the constitution in reference to the subject matter in question. **If the constitutionality of the law is involved in doubt, that doubt must be resolved in favor of the legislative power.** The power to legislate for all the requirements of civil government is the rule, while a restriction upon the exercise of that power in a particular case is the exception. As said by WAITE, C. J., in the Sinking Fund Cases, 99 U.S., 700: "One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule."

*State ex rel. Poe v. Jones*, 51 Ohio St. 492, 503-504 (1894) (emphasis added).

Furthermore, when a party alleges that the application of a statute is unconstitutional in a particular factual context, the party making that challenge bears the burden of presenting clear and convincing evidence that the statute is unconstitutional. *Simpkins v. Grace Brethren Church*

of *Delaware*, 149 Ohio St.3d 307, 2016-Ohio-8118, ¶ 20-22. Therefore, because Stolz is challenging the immunity created by Ohio’s workers’ compensation statutes as recognized by this Court in *Stolz I* and as applied to the facts of this case, he has the heavy burden of overcoming the presumed constitutionality of those statutes by clearly and convincingly demonstrating that such immunity violates the Ohio Constitution. *Id.* Each of the seven provisions of the Ohio constitution cited in Stolz’s amended complaint is discussed below.

II. The right to trial by jury, Article I, Section 5 of the Ohio Constitution

Article I, Section 5 of the Ohio Constitution provides that "[t]he right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury."

That right, while fundamental and long-standing, is not absolute. *Stetter* at ¶ 61-63. Specifically, this provision only guarantees “that a jury will resolve any questions of fact, and a challenge to a statute under that section will succeed ‘only if the statute actually intrudes upon the jury’s fact-finding function.’” *Id.* at ¶ 63 (quoting *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, ¶ 34, 90). As such, courts have recognized that the issue of whether a defendant is entitled to statutory immunity does not invoke the right to a jury trial because it involves a question of law to be determined by a court. *Conley v. Shearer*, 64 Ohio St.3d 284, 292, 1992-Ohio-133; *Siegel v. State*, 10th Dist. Franklin No. 14AP-279, 2015-Ohio-441, ¶ 16.

Furthermore, the right to trial by jury does not limit “the ability of the legislature to act within its constitutional boundaries.” *Stetter* at ¶ 64. As discussed above, “it is long-settled constitutional law that it is within the power of the legislature to alter, revise, modify, or abolish the common law as it may determine necessary or advisable for the common good. Thus, the right to trial by jury does not prevent the General Assembly from altering a cause of action.” *Id.*

In other words, there is no violation of a right to a trial by jury when the General Assembly decides to abolish a common law cause of action, because there is no right to have a jury determine a cause of action that does not exist. *Id.* Yet, that is exactly the argument raised by Stolz in this case.

This Court correctly found in *Stolz I* that the Petitioners are immune from Stolz's claims pursuant to Ohio's worker's compensation statutes, thereby recognizing that the General Assembly had modified, altered, and/or abolished any ability Stolz may have had under the common law to bring claims against the other subcontractors involved in the construction project where he was injured. Put simply, Stolz does not, as a matter of law, have a right to a jury trial for a claim that the General Assembly has determined does not exist. *Id.*

III. The right to a remedy guaranteed by Article I, Section 16 of the Ohio Constitution

Article I, Section 16 of the Ohio Constitution provides that “[a]ll courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.” This provision includes both a right to a remedy, which is addressed in this section of the brief, and a right to due process, which will be addressed below in a separate section of the brief.

Ohio's right-to-remedy clause “does not provide for remedies without limitation or for any perceived injury” and does not hinder the General Assembly's “right to determine what causes of action the law will recognize and to alter the common law by abolishing the action \* \* \*.” *Ruther v. Kaiser*, 134 Ohio St.3d 408, 2012-Ohio-5686, ¶ 12, 14 (citing *Strock v. Pressnell*, 38 Ohio St.3d 207 (1988) paragraph one of the syllabus (upholding as constitutional the statute that abolished "amatory actions")). Indeed, this Court has continuously “rejected the notion that ‘causes of action as they existed at common law or the rules that govern such causes are immune

from legislative attention.” *Stetter* at ¶ 52 (quoting *Hardy v. VerMeulen*, 32 Ohio St.3d 45, 49 (1987)). “No one has a vested right in rules of the common law. \* \* \* The great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to new circumstances.” *Stetter* at ¶ 52 (quoting *Fassig v. State ex rel. Turner*, 95 Ohio St. 232, 248 (1917) and citing *Leis v. Cleveland Ry. Co.*, 101 Ohio St. 162 (1920) paragraph one of the syllabus (“there is no property or vested right in any of the rules of the common law, as guides of conduct, and they may be added to or repealed by legislative authority.”) and *Munn v. Illinois*, 94 U.S. 113, 134 (1876) (there is no vested interest in any rule of the common law; alteration of the common law is permissible unless prohibited by specific constitutional limitations)).

Stolz argues that his “right” to bring suit against the Petitioners was improperly abolished by the immunity afforded to them under Ohio’s workers’ compensation statutes. However, the statutes and immunity in question were in place well before Stolz was injured, and he did not retroactively lose a claim after it had accrued. Indeed, the statutes interpreted by this Court in *Stolz I* were enacted prior to even the beginning of the construction project let alone the accident. Stolz did not have a “right” to bring a common law claim against the Petitioners. Therefore, the immunity afforded to them does not violate Ohio’s right-to-remedy clause. *Id.* Moreover, Stolz was not left without any remedy whatsoever for his injuries since he in fact received and retained workers’ compensation benefits from Messer. “This court would encroach upon the Legislature's ability to guide the development of the law if we invalidated legislation simply because the rule enacted by the Legislature rejects some cause of action currently preferred by the courts. \* \* \* Such a result would offend our notion of the checks and balances between the various branches of government, and the flexibility required for the healthy growth of the law.” *Stetter* at ¶ 53 (quoting *Groch v. GMC*, 117 Ohio St.3d 192, 2008-Ohio-546, ¶ 118).

IV. Prohibition against the General Assembly exercising judicial powers, Article II, Section 32 of the Ohio Constitution and Article IV, Section 1 of the Ohio Constitution

Unlike some other jurisdictions, Ohio's Constitution does not have a provision specifically establishing the doctrine of separation of powers; rather, the "doctrine is implicitly embedded in the entire framework of those sections of the Ohio Constitution that define the substance and scope of powers granted to the three branches of state government." *S. Euclid v. Jemison*, 28 Ohio St.3d 157, 158-159 (1986). Article II, Section 32 of the Ohio Constitution provides that "[t]he general assembly shall grant no divorce, nor exercise any judicial power not herein expressly conferred." Article IV, Section 1 of the Ohio Constitution provides that "[t]he judicial power of the state is vested in a supreme court, courts of appeals, courts of common pleas and divisions thereof, and such other courts inferior to the supreme court as may from time to time be established by law."

These provisions reflect the separation of powers doctrine within Ohio's Constitution and hold that judicial power may not be infringed upon by the General Assembly. *Arbino* at ¶ 73-76; *Stetter* at ¶ 86-92. These provisions do not, however, prevent the General Assembly from defining the contours and scope of the common law and the nature of claims pursuant to which Ohio citizens may recover. *Id.* Again, it is within the General Assembly's purview to alter, revise, modify, or abolish the common law. *Stetter* at ¶ 36. Thus, the General Assembly did not violate Ohio's notions of separation of powers by enacting statutes that provide Petitioners with immunity from Stolz's claims. *Arbino* at ¶ 73-76; *Stetter* at ¶ 86-92.

V. Authority over the rules for judicial practice and procedure vested with the courts, Article IV, Section 5 of the Ohio Constitution

Article IV, Section 5(B) of the Ohio Constitution provides in relevant part that "[t]he supreme court shall prescribe rules governing practice and procedure in all courts of the state,

which rules shall not abridge, enlarge, or modify any substantive right. \* \* \* All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.” “This constitutional provision recognizes that ‘where conflicts arise between the Civil Rules and the statutory law, the rule will control the statute on matters of procedure and the statute will control the rule on matters of substantive law.’” *Ferguson v. State*, 2017-Ohio-7844, ¶ 20 (S.Ct.) (quoting *Boyer v. Boyer*, 46 Ohio St.2d 83, 86 (1976)).

Statutory immunity, such as that afforded to Petitioners, is a matter of substantive law rather than a matter of procedure. See *Sumwalt v. Allstate Ins. Co.*, 12 Ohio St.3d 294, 296 (1984) (citing *York v. State Farm Fire & Cas. Co.*, 64 Ohio St. 2d 199 (1980)); *T.B.Y. v. City of Martins Ferry*, 7th Dist. Belmont No. 16 BE 0002, 2016-Ohio-8482, ¶ 17 (“The material issues of each case are identified by substantive law, which in this case is the law on political subdivision immunity.”); *Jones v. Shelly Co.*, 106 Ohio App.3d 440, 445 (5th Dist. 1995). Thus, the horizontal immunity established by Ohio’s workers’ compensation statutes involves a substantive matter and does not violate Article IV, Section 5(B) of the Ohio Constitution.

#### VI. Due Process, Article I, Section 16 of the Ohio Constitution

The Due Process clause in Ohio’s Constitution “is the equivalent of the Due Process Clause of the United States Constitution.” *Stetter* at ¶ 69 (citing *Arbino* at ¶ 48). In applying this clause to the review of a statute, a court will utilize the rational-basis test unless the statute in question restricts the exercise of fundamental rights. *Stetter* at 69-72; *Arbino* at ¶ 48-49. As discussed above, the horizontal immunity afforded to the Petitioners by Ohio’s workers’ compensation statutes does not infringe upon Stolz’s fundamental rights. Accordingly, the question of whether this immunity violates due process must be considered under the rational-

basis test, which requires a two part determination: (1) is the statute rationally related to a legitimate government purpose and (2) is it unreasonable or arbitrary. *Id.*

Courts must “grant substantial deference to the predictive judgment of the General Assembly” when determining whether a statute is related to a legitimate government interest. *Stetter* at ¶ 77 (quoting *Arbino* at ¶ 58). “[I]t is not the function of the courts to substitute their evaluation of legislative facts for that of the legislature.” *Arbino* at ¶ 58 (quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 470 (1981)). Thus, “[c]ourts may not ‘usurp the legislative function’ by substituting their judgment for that of a legislative authority.” *Stetter* at ¶ 77 (quoting *Cent. Motors Corp. v. Pepper Pike*, 73 Ohio St.3d 581, 584, 1995-Ohio-289).

There are well established legitimate governmental interests in both the overall implementation of Ohio’s workers’ compensation statutes with respect to self-insured construction projects and the horizontal immunity recognized in *Stolz I*. The provisions of R.C. 4123.35(O) are applicable to large scale construction projects with estimated costs of over \$100 million that are scheduled for completion within six years. These sorts of projects have a tremendous positive impact on the economy of this State, and the General Assembly sought to encourage the development and efficiency of such projects through R.C. 4123.35(O) and the immunities created therein.

Horizontal immunity gives subcontractors bidding to participate on a project covered by R.C. 4123.35(O) assurance that they will generally not be subject to accident related litigation. Such litigation is expensive and complex on even small projects and is even more so on the sort of large scale projects that are subject to the provisions of R.C. 4123.35(O). Accordingly, the immunity challenged by *Stolz* encourages and allows more subcontractors to participate in large scale projects, including smaller and less established contractors who might otherwise be

concerned about their ability to endure a potential law suit. This, in turn, ensures a larger, more diverse pool of potential subcontractors, giving more companies an opportunity to participate and driving down the costs of these projects through increased competition.

Additionally, horizontal immunity also increases the overall efficiency of the project, both generally and with respect to the administration of workers' compensation benefits. Subcontractors can bid and complete their work without fear of a potentially crippling law suit brought by an injured employee of another subcontractor. Furthermore, rather than a patchwork of disparate workers' compensation programs being utilized throughout the project, every injured worker on a self-insured project under R.C. 4123.35(O) is entitled to the same immediate benefits administered through one central entity, which in this case was Messer. This is not only more efficient, both for the subcontractors and their employees, but also ensures that all persons working on such projects obtain the appropriate benefits for their injuries as quickly as possible.

Moreover, without horizontal immunity, the efficiencies and benefits of having a single statutory "employer" administering the workers' compensation program for an entire project is lost. If *Stolz* succeeds in persuading this Court that the horizontal immunity it recognized in *Stolz I* is unconstitutional, then injured employees will be permitted to bring claims against other enrolled subcontractors. Such suits would have the potential to completely paralyze a project while the various parties sorted out the issues necessary to determine liability and damages. The sheer number of persons and companies working on the sort of large scale construction projects covered by R.C. 4123.35(O) means that the number of potential defendants in a lawsuit arising out of an accident on the site of such a project is bounded only by the imagination of the injured party's lawyer. The time, costs, and expense of even one such suit would immediately eradicate any savings and efficiencies obtained through the implementation of R.C. 4123.35(O).



Additionally, even if such an injured party could not bring a claim directly against either his statutory or actual “employer”, those parties would still be pulled into litigation as witnesses at the very least, and potentially as third party defendants. Such a result would be particularly incongruous with the fact that the plaintiff would still be able to reap the benefits of R.C. 4123.35(O) by receiving and retaining workers’ compensation benefits from his statutory “employer,” as Stolz has done in this case, but then seek to avoid the protections afforded by that statute to the other parties participating in the project.

Regardless of whether this Court agrees with the wisdom of the horizontal immunity created by Ohio’s workers’ compensation statutes and recognized by it in *Stolz I*, there can be no doubt that the immunity is rationally related to a legitimate government interest and there is no evidence that the immunity is either unreasonable or arbitrary. In fact, as recognized by this Court in *Stolz I*, horizontal immunity is consistent with the general prohibition within Ohio’s workers’ compensation laws preventing co-employees from suing one another. *Stolz I* at ¶ 22. Furthermore, horizontal immunity is also consistent with the manner in which similar workers’ compensation statutes have been interpreted by other jurisdictions. *Etie v. Walsh & Albert Coin*, 135 S.W.3d 764, 765-68 (Tex. App. 2004); *Amorin v. Gordon*, 996 So.2d 913, 915-18 (Fla. App. 2008). Thus, Stolz has failed to meet his burden of clearly and convincingly demonstrating that the horizontal immunity created by Ohio’s workers’ compensation statutes and recognized in *Stolz I* violates the Due Process Clause.

#### VII. Equal Protection, Article I, Section 2 of the Ohio Constitution

Article I, Section 2 of the Ohio Constitution provides in relevant part that “[a]ll political power is inherent in the people. Government is instituted for their equal protection and benefit.”

“This provision is interpreted as the equivalent of the federal Equal Protection Clause.” *Stetter* at ¶ 79 (citing *Arbino* at ¶ 63).

When neither a fundamental right nor a suspect class is implicated, an equal protection analysis is subject to the rational-basis test. *Stetter* at ¶ 80; *Arbino* at ¶ 64. “Under this test, a challenged statute will be upheld if the classifications it creates bear a rational relationship to a legitimate government interest or are grounded on a reasonable justification, even if the classifications are not precise.” *Stetter* at ¶ 80. “A classification having some reasonable basis does not offend against the Equal Protection Clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.” *State ex rel. Powhatan Mining Co. v. Indus. Comm. of Ohio*, 125 Ohio St. 272, 279 (1932) (quoting *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911)).

As discussed above, horizontal immunity does not infringe upon a fundamental right, and *Stolz* has not raised even an allegation that it implicates a suspect class. Thus, a determination of whether such immunity violates constitutional notions of equal protection is subject to the rational-basis test.

*Stolz* argues that he is being treated differently than other Jostin employees who worked on construction projects that were not self-insured under R.C. 4123.35(O). However, as the Court pointed out in *Stolz I*, horizontal immunity actually has the opposite effect and ensures that persons working on a self-insured construction projects are treated similarly to persons working on other construction projects. *Stolz I* at ¶ 22. In fact, without horizontal immunity, *Stolz* would be able to bring claims against persons considered by statute to be his co-employees for workers’

compensation purposes, whereas his fellow Jostin employees working on other projects would not be entitled to do so. *Id.*

Moreover, even if it is determined that persons working on self-insured construction projects are treated differently than persons working on construction projects not covered by R.C. 4123.35(O), such differential treatment would not violate the Equal Protection Clause because horizontal immunity, as discussed above, clearly bears a rational relationship to a legitimate governmental interest and is grounded on a reasonable justification. “This court is not the forum in which to second-guess such legislative choices; we must simply determine whether they comply with the Constitution.” *Arbino* at ¶ 71 (citing *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn.*, 111 Ohio St.3d 568, 2006-Ohio-5512, ¶ 20). Accordingly, Stolz has also failed to meet his burden of clearly and convincingly establishing that horizontal immunity pursuant to R.C. 4123.35(O) violates the Equal Protection Clause.

#### VIII. Conclusion

Stolz cannot overcome the strong presumption of constitutionality afforded to Ohio’s workers’ compensation statutes by clearly and convincingly establishing that the horizontal immunity created by those statutes, and recognized by this Court in *Stolz I*, is unconstitutional. Neither the right to a jury trial nor the right to a remedy are relevant because the immunity was created and in place before Stolz’s accident occurred, and he did not have a vested right under the common law to bring claims against the Petitioners. Horizontal immunity does not violate Ohio’s notions of separation of powers because it is within the General Assembly’s province to alter, modify, revise, or abolish common law causes of action. The right of courts to promulgate rules and regulations is not implicated by horizontal immunity, because it involves a matter of substantive law and relates to the General Assembly’s ability to address the common law of this

state. Finally, horizontal immunity does not violate either the Due Process or the Equal Protection Clause because it relates to a legitimate governmental interest and does not infringe upon Stolz's fundamental rights or implicate a suspect class. Accordingly, horizontal immunity does not violate the Ohio Constitution and the certified question of law should be answered in the negative.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing has been served via electronic mail upon the following on the 16<sup>th</sup> day of January 2018: Counsel of record for Plaintiff/Respondent Daniel Stolz (**Stephanie M. Day** ([sday@beckman-weil.com](mailto:sday@beckman-weil.com)) and **Brett Goodson** ([brettgoodson@goodsonandcompany.com](mailto:brettgoodson@goodsonandcompany.com))); Counsel for Defendant/Respondent Pendleton Construction Group and Defendants/Petitioners D.A.G. Construction Co., Inc.; and Triversity Construction Co., LLC (**Steve Patsfall** ([spatsfall@pyplaw.com](mailto:spatsfall@pyplaw.com)); **Stephen M. Yeager** ([syeager@pyplaw.com](mailto:syeager@pyplaw.com)); and **Susan M. Salyer** ([ssalyer@pyplaw.com](mailto:ssalyer@pyplaw.com)); Counsel for Defendant/Petitioner J&B Steel Erectors, Inc. (**Colleen M. Blandford** ([cblandford@kplaw.com](mailto:cblandford@kplaw.com)); and Counsel for Defendant/Respondent Terracon Consultants, Inc. (**Robert W. Hojnoski** ([rhojnoski@reminger.com](mailto:rhojnoski@reminger.com))).

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