

**In the
Supreme Court of Ohio**

DANIEL STOLZ,	:	Supreme Court Case No.: 2015-0628
	:	
Plaintiff-Respondent,	:	On Order of Certified Question of State Law
	:	From the United States District Court
vs.	:	Southern District of Ohio Western Division
	:	
J&B STEEL ERECTOR, INC., et al.,	:	Southern District Court
	:	Case No.: 1:14cv00044
Defendant-Petitioners.	:	

MERIT BRIEF OF PLAINTIFF-RESPONDENT DANIEL STOLZ

Brett C. Goodson (0023163)
GOODSON & COMPANY
110 East Eighth Street, Suite 200
Cincinnati, Ohio 45202
(513) 621-5631
(513) 621-3855 *facsimile*
brettgoodson@goodsonandcompany.com
Attorney For Plaintiff-Respondent

Stephen M. Yeager
Steve Patsfall
PATSFALL YEAGER & PFLUM
205 West Fourth Street, Suite 1280
Cincinnati, Ohio 45202
*Attorneys for Defendant-Petitioners D.A.G.
Construction Co., Inc. and TriVersity
Construction Co., LLC and Defendant
Pendleton Construction Group*

Colleen M. Blandford
KOHLEN & PATTON
201 East Fifth Street, Suite 800
Cincinnati, Ohio 45202
*Attorney for Defendant-Petitioner J&B Steel
Erectors*

Jane M. Lynch
Jared A. Wagner
GREEN & GREEN
800 Performance Place, Suite 109
Dayton, Ohio 45402
*Attorneys for Defendant-Petitioner Messer
Construction Co.*

Robert W. Hojnoski
REMINER CO. LPA
525 Vine Street, Suite 1700
Cincinnati, Ohio 45202
*Attorney for Defendant Terracon Consultants,
Inc.*

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
I. INTRODUCTION	1
II. STATEMENT OF THE CASE AND FACTS	2
III. ARGUMENT	4
Proposition of Law:	
Ohio Revised Code §§ 4123.35 and 4123.74 do not 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-insurance project.	
A. Defendants are Not Entitled to Immunity Under Ohio R.C. 4123.35(O).....	4
1. Granting immunity to non-employer subcontractors is contrary to the purpose of workers' compensation and R.C. 4123.35(O).....	4
2. Granting immunity to non-employer subcontractors violates the plain language of R.C. 4123.35(O).....	6
B. There is no election of remedies issue.	10
C. There is no fellow servant issue.....	13
D. Ohio Supreme Court precedent permits employees accepting workers' compensation benefits from their employer to assert a negligence claim against a liable third party..	16
E. Cases from other jurisdictions are inapplicable.	18
IV. CONCLUSION.....	22

TABLE OF AUTHORITIES

Cases

<i>Amorin v. Gordon</i> , 996 So.2d 913 (Fla. App. 2008).....	22, 23
<i>Blankenship v. Cincinnati Milacron Chem., Inc.</i> , 69 Ohio St. 2d 608, 433 N.E.2d 572 (1982).	5
<i>Caygill v. Jablonski</i> , 92 Ohio App.3d 31, 633 N.E.2d 1220 (6th Dist. 1994).....	17
<i>Dearhouse v. Bethlehem Steel Co.</i> , 118 F.Supp. 936 (N.D. Ohio 1954).....	14
<i>Etie v. Walsh & Albert Co., Ltd.</i> , 135 S.W.3d 764 (Tx. App. 2004).	25
<i>Freese v. Consol. Rail Corp.</i> , 4 Ohio St. 3d 5, 445 N.E.2d 1110 (1983).	5, 13
<i>George v. City of Youngstown</i> , 139 Ohio St. 591, 41 N.E.2d 567 (1942).	13, 22
<i>Hartford Accident & Indem. Co. v. Procter & Gamble</i> , 91 Ohio App. 573, 109 N.E.2d 287 (1st Dist. 1952).	13
<i>Herbruck v. Burger Iron Co.</i> , 44 Ohio App. 475, 186 N.E. 372 (9th Dist. 1933).....	14, 15
<i>Holmes v. Crawford Machine, Inc.</i> , 134 Ohio St.3d 303, 2012-Ohio-5380, 982 N.E.2d 643.	11
<i>Kaiser v. Strall</i> , 5 Ohio St.3d 91, 449 N.E.2d 1 (1983).	17
<i>Lancaster v. Fairfield Cty. Budget Comm.</i> , 83 Ohio St.3d 242, 699 N.E.2d 473 (1998).	8
<i>Lancaster v. Pendleton Construction Group, LLC</i> , Hamilton C.P. No. A1208721 (Mar. 25, 2013).	20, 21
<i>Ohio Neighborhood Fin., Inc. v. Scott</i> , 139 Ohio St.3d 536, 2013-Ohio-0103, 13 N.E.3d 1115.	8
<i>Pride v. Liberty Mutual Ins. Co.</i> , E.D. Wisc. No. 04-C-703, 2007 WL 1655111 (June 5, 2007).	20

<i>Roxane Laboratories, Inc. v. Tracy</i> , 75 Ohio St.3d 125, 661 N.E.2d 1011 (1996).	8
<i>Saunders v. Holzer Hospital Foundation</i> , 4th Dist. Gallia No. 08CA11, 2009-Ohio-2112.	13
<i>Smith v. Turbo Parts LLC</i> , S.D. Ohio No. 2:10-cv-00202, 2011 WL 796793 (Mar. 1, 2011).	14, 16
<i>State ex rel. Burrows v. Indus. Comm.</i> , 78 Ohio St.3d 78, 676 N.E.2d 519 (1997).	11
<i>State ex rel. Cassels v. Dayton City School Dist. Bd. of Edn.</i> , 69 Ohio St.3d 217, 631 N.E.2d 150 (1994).	8
<i>State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Edn.</i> , 74 Ohio St.3d 543, 660 N.E.2d 463 (1996).	8
<i>State ex rel. Steele v. Morrissey</i> , 103 Ohio St.3d 355, 2004-Ohio-1445, 815 N.E.2d 1107.	7
<i>Stevenson v. HH&N/Turner</i> , E.D. Mich. No. 01-cv-71705, 2002 U.S. Dist. LEXIS 26831 (Apr. 22, 2002).	24, 25
<i>Sutton v. Tomco Mach., Inc.</i> , 129 Ohio St.3d 153, 2010-Ohio-0670, 950 N.E.2d 938.	5
<i>TIC Energy & Chem., Inc. v. Martin</i> , Tx. App. No. 13-14-00278-cv, 2015 WL 127777 (Jan. 8, 2015).	26
<i>Trumbull Cliffs Furnace Co. v. Schackovsky</i> , 111 Ohio St. 791, 146 N.E. 306 (1924).	13
<i>Trumbull Cliffs Furnace Co. v. Shackovsky</i> , 27 Ohio App. 522, 161 N.E. 238 (8th Dist. 1923), <i>aff'd</i> , 111 Ohio St. 791, 146 N.E. 306 (1924).	21

Statutes

Fla. Stat. 440.10(1)(b)	23
Fla. Stat. 440.10(1)(e)	23
R.C. 1.42	7
R.C. 4123.35(O)	passim
R.C. 4123.74	6

R.C. 4123.741	17, 19
R.C. 4123.931	15

Other Authorities

David G. Jordan & Jeffrey J. Vita, <i>Application of the Workers Compensation Exclusivity Rule Under Wrap-Up Insurance Programs</i> , 24 The John Liner Rev. 44 (2010).....	4, 6
---	------

I. INTRODUCTION

Plaintiff–Respondent, Daniel Stolz (“Mr. Stolz”), was an employee of Jostin Construction, Inc. (“Jostin”) performing work on the Horseshoe Casino Project in Cincinnati, Ohio (the “Casino Project”). On January 27, 2012, while pouring concrete, the metal decking of the structure gave way, causing Mr. Stolz to fall through the floor, thereby suffering severe and permanent injuries. Pursuant to the workers’ compensation insurance secured by the general contractor for the Casino Project, Mr. Stolz received workers’ compensation benefits. Mr. Stolz then brought negligence claims in the United States District Court for the Southern District of Ohio (“Southern District Court”) against other subcontractors performing work on the Casino Project. The Southern District Court denied the subcontractors’ Motions for Summary Judgment, finding that they were not entitled to immunity under R.C. 4123.35(O) or 4123.74. (S.D. Ohio No. 1:14cv00044, Order Denying the Motions for Summary Judgment of Defendants D.A.G., TriVersity, and J&B (“MSJ Order”)) (attached to Merit Brief of Pets.).

The Southern District Court then certified the following question of law presented by the Defendant–Petitioners to this Court:

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.

(S.D. Ohio No. 1:14cv00044, Order Granting Defendants’ Motion to Certify a Question of State Law to the Supreme Court of Ohio (“Certification Order”)) (attached to Merit Brief of Pets.).

On June 24, 2015, this court accepted certification. The foundation of the workers’ compensation program is based on the formation of a “social bargain,” wherein each party, the employee and the employer, gives up their rights vis-a-vis the other. To interpret R.C. 4123.35(O) in a matter that conflicts with the Southern District Court’s decision subverts

the social bargain and destroys the principle foundation of the Ohio workers' compensation program. Furthermore, R.C. 4123.35(O), by its express terms, does not grant subcontractors immunity from negligence claims of another subcontractor's employee as the statute only provides that subcontractors are entitled to workers' compensation protection from the subcontractor's own employees. Ohio has, and continues to, allow injured employees, covered by their employer's workers' compensation plan, to bring negligence claims against non-employer third parties and their negligent employees. This fundamental tenant of workers' compensation law and Ohio tort law was not altered by R.C. 4123.35(O).

II. STATEMENT OF THE CASE AND FACTS

Mr. Stolz was employed as a concrete finisher by Jostin at the Casino Project. (MSJ Order, p. 1). Defendant Messer Construction Co. ("Messer") was the general contractor of the Casino Project. (*Id.* at 2). Jostin and Defendants J&B Steel Erectors, Inc. ("J&B"), The Pendleton Construction Group, LLC ("Pendleton"), D.A.G. Construction Co., Inc. ("D.A.G."), and TriVersity Construction Co., LLC ("TriVresity") were subcontractors of Messer on the Casino Project (collectively, the "Subcontractor Defendants"). (*Id.* at 11). Defendant Terracon Consultants, Inc. ("Terracon") was responsible for providing engineering and safety consulting services for the Casino Project.

R.C. 4123.35(O) permits general contractors of large-scale construction projects to "self-insure" the construction project, whereby the employees of the subcontractors enrolled in the self-insuring contractor's plan are statutorily treated as employees of the self-insuring contractor for workers' compensation purposes. (*Id.* at 5). On March 11, 2011, Messer submitted its application to the Ohio Bureau of Workers' Compensation ("BWC") for self-insured status for the Casino Project pursuant to R.C. 4123.35(O). (*Id.* at 6). The BWC approved Messer's application to self-administer the workers' compensation program for all enrolled subcontractors

on the Casino Project. (*Id.*). Jostin and the Subcontractor Defendants were listed as “enrolled subcontractors.” (*Id.* at 6, 11).

On January 27, 2012, Mr. Stolz was working as a Jostin employee at the Casino Project. (*Id.* at 1). As concrete was being poured, the metal decking of the structure gave way and caused the floor beneath him to collapse. (*Id.*). Mr. Stolz fell 25 feet and sustained serious and permanent injuries. Mr. Stolz filed a civil action against Defendants herein in the Southern District Court. (*See* MSJ Order). The Subcontractor Defendants filed Motions for Summary Judgment, arguing that they were entitled to immunity under R.C. 4123.35(O) as enrolled subcontractors in Defendant Messer’s workers’ compensation plan. (*Id.*). Defendant Messer also filed a Motion for Summary Judgment on the same basis. (*Id.*). Pursuant to R.C. 4123.35(O), the Southern District Court granted Messer’s Motion. (*Id.*).

In its December 31, 2014 Order, the Southern District Court denied the Subcontractor Defendants’ Motions. (*Id.*). The Southern District Court stated that “As [R.C. 4123.35(O)] is written, each subcontractor is only protected from liability for injuries to one of the subcontractor’s employees—its own. . . . 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.” (*Id.* at 14). Interpreting the plain language of the statute, the Southern District Court held that “The clear and unambiguous meaning of the statute, as written, is that immunity does not extend to the Subcontractor Defendants with respect to the employees of other subcontractors.” (*Id.* at 15).

On February 6, 2015, after the Southern District Court had rendered its decision against them, the Subcontractor Defendants filed a Motion to Certify Question of State Law to the Ohio Supreme Court. (*See* Certification Order). The Southern District Court granted the

Subcontractor Defendants' Motion and certified the above question to this Court. (*Id.*). This Court accepted the following certified question on June 24, 2015:

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.

III. ARGUMENT

A. Defendants are Not Entitled to Immunity Under Ohio R.C. 4123.35(O).

1. Granting immunity to non-employer subcontractors is contrary to the purpose of workers' compensation and R.C. 4123.35(O).

"Workers compensation law is principled on an exchange of rights between employers and employees; specifically, the exclusive remedy protections afforded to employers and the guaranteed 'no-fault' workers compensation benefits provided to employees. This exchange of rights is referred to as the *quid pro quo*." David G. Jordan & Jeffrey J. Vita, *Application of the Workers Compensation Exclusivity Rule Under Wrap-Up Insurance Programs*, 24 The John Liner Rev. 44, 45 (2010). "Summarily stated, the *quid pro quo* is the foundation upon which workers compensation laws are based." *Id.* at 46. "By purchasing workers compensation insurance, employers receive tort immunity for work-related injuries to their employees. This means that employees cannot sue their employers for negligence but instead must accept, as the sole remedy, payment of benefits set forth under the relevant state or federal workers compensation statutes. This statutory restriction is known as the 'exclusivity rule.'" *Id.* at 44; *Freese v. Consol. Rail Corp.*, 4 Ohio St.3d 5, 445 N.E.2d 1110 (1983).

Under Ohio law, this is considered a "social bargain." *Sutton v. Tomco Mach., Inc.*, 129 Ohio St.3d 153, 2010-Ohio-0670, 950 N.E.2d 938, ¶ 33 (citing *Blankenship v. Cincinnati Milacron Chem., Inc.*, 69 Ohio St.2d 608, 614, 433 N.E.2d 572 (1982)). In exchange for greater assurance of coverage, employees give up the right to sue their employer; likewise, in exchange

for protection from unlimited liability, employers pay workers' compensation premiums. *Id.* Under Ohio law, the exclusivity rule does not act to prohibit an injured employee from filing a negligence action against a company other than their direct employer, who has participated in the *quid pro quo* bargain.

Generally, construction contractors and subcontractors provide their own workers' compensation coverage. However, under certain circumstances, a general contractor may choose to assume responsibility for the workers' compensation payments, thus becoming the "statutory employer." See R.C. 4123.35(O). 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. "There is an intuitive logic behind the extension of this entitlement, insofar as the company that actually provides the injured employee with workers compensation benefits receives the right of exclusivity, thereby maintaining the purpose of the *quid pro quo*." Jordan & Vita, 24 The John Liner Rev. at 47.

Ohio law is clear, the *quid pro quo*, or social bargain, forms the basis of workers' compensation coverage. The Subcontractor Defendants are not, and do not claim to be, the self-insuring employer of the Casino Project and recognize that they have made no "bargain" with Mr. Stolz. The Southern District Court succinctly stated:

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.

(MSJ Order, p. 15).

The Subcontractor Defendants misunderstand the significance of the reduced bids each submitted on the Casino Project. Messer and the Subcontractor Defendants assert that “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.” (Merit Brief of Pet. Messer, p. 15). Messer gives the enrolled subcontractors too much credit. The enrolled subcontractors reduced their bid on the Casino Project by the amount the enrolled subcontractor would have had to pay *for its own employees*, the burden Messer has chosen to shoulder instead through the wrap-up policy. As discussed below, R.C. 4123.35(O) recognizes this “payment” on the part of the enrolled subcontractors, who indirectly paid the workers’ compensation premiums for their own employees, by granting them immunity as to *their own employees*, in addition to the self-insuring contractor, who is the statutory employer who actually paid the premiums.

The Subcontractor Defendants have not met their end of the bargain as required by Ohio law and are simply not entitled to immunity from Mr. Stolz’s tort claims, in contrast to Defendant Messer who was the statutory employer and contributed to the workers’ compensation fund on behalf of Mr. Stolz.

2. Granting immunity to non-employer subcontractors violates the plain language of R.C. 4123.35(O).

The court’s paramount concern in construing a statute is legislative intent. *State ex rel. Steele v. Morrissey*, 103 Ohio St.3d 355, 2004-Ohio-1445, 815 N.E.2d 1107, ¶ 21. To discern legislative intent, the court must first consider the statutory language, reading all words and phrases in context and in accordance with rules of grammar and common usage. *Id.*; 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 School Dist. Bd. of*

Edn., 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, 2013-Ohio-0103, 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 and courts are not free to delete or insert other words. *Roxane Laboratories, Inc. v. Tracy*, 75 Ohio St.3d 125, 127, 661 N.E.2d 1011 (1996); *State ex rel. Cassels v. Dayton City School Dist. Bd. of Edn.*, 69 Ohio St.3d 217, 220, 631 N.E.2d 150 (1994).

R.C. 4123.35(O) provides in pertinent part:

A self-insuring employer who complies with this division is entitled to the protections provided under this chapter . . . with respect to the employees of the contractors and subcontractors covered under a certificate issued. . . . The contractors and subcontractors included under a certificate issued under this division are entitled to the protections provided under this chapter . . . with respect to the contractor’s or subcontractor’s employees who are employed on the construction project which is the subject of the certificate.

To read this section of the statute in a manner which grants tort immunity to the Subcontractor Defendants for injuries sustained by another subcontractor’s employee is clearly erroneous and contrary to the plain language of the statute. Section 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 contractorr’s or subcontractorr’s employees” R.C. 4123.35(O) (emphasis added). The words “contractorr’s” and “subcontractorr’s” are singular possessive in the statute, not plural possessive. As the statute is written, each subcontractor is only protected from liability for injuries to one of the subcontractorr’s employees—their own.

The reading of 4123.35(O) posited by Subcontractor Defendants is nonsensical. Mr. Stolz agrees with the Subcontractor Defendants' assertion that the phrase "The contractors and subcontractors included under a certificate issued under this division are entitled to the protections provided under this chapter . . ." outlines *who* is entitled to the protections of the workers' compensation statute—the contractors and subcontractors on the self-insured project. However, contrary to the meaning asserted by Subcontractor Defendants, the following clause, "with respect to the contractor's or subcontractor's employees who are employed on the construction project," describes from what the "who" is entitled to protection from—the individual contractor's and subcontractor's own employees. This clause does not provide any protections to "those employees of an enrolled contractor or subcontractor that actually worked on the project." (Merit Brief of Pet. D.A.G., p. 5). It provides that the employees of each contractor and subcontractor are from whom the contractors and subcontractors are being protected from, again, their own employees. To interpret this sentence as first explaining who is protected (the direct employer) and, without any grammatical separation, abruptly set forth the protections of another group (the employees), rather than interpreting such phrase in relation to the preceding clause by finalizing from what the who is protected, is an unnatural interpretation and makes little sense. When reduced to its most basic terms, R.C. 4123.35(O) states that a subcontractor is entitled to the protections under the workers' compensation statute with respect to the subcontractor's own employees.

R.C. 4123.35(O) is not susceptible to contrary construction. As the Southern District Court noted, by the statute's plain language, R.C. 4123.35(O) does not provide immunity for non-employer subcontractors. "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.” (MSJ Order, p. 13). “As the statute is written, each subcontractor is only protected from liability for injuries to one of the subcontractor’s employees—its own.” (*Id.* at 14). The result of the General Assembly’s chosen language is clear, non-employer subcontractors are not entitled to immunity.

This provision of R.C. 4123.35(O) was included to confirm the traditional operation of workers’ compensation immunity for direct employers. This interpretation comports with the Subcontractor Defendants’ alleged “payment” of workers’ compensation premiums through reduced bids. Through R.C. 4123.35(O), the general contractor is made the statutory employer of all employees of those subcontractors covered by its wrap-up policy. However, the General Assembly sought to maintain the traditional concept of workers’ compensation immunity for direct employers and, thus, expressly pronounced that “contractors and subcontractors . . . are entitled to the protections provided under this chapter . . . with respect to the contractor’s or subcontractor’s employees” If the Ohio legislature intended this immunity to extend to all subcontractors for the injuries sustained by the employees of all the subcontractors, it would have written the statute in a manner that indicated such. Granting immunity to the Subcontractor Defendants requires reading protections into the statute that simply are not there. The court “must apply the section in a manner consistent with the plain meaning of the statutory language; [it] cannot add words.” *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 clear and unambiguous meaning of the statute is that self-insuring immunity does not extend to the non-employer Subcontractor Defendants in this case.

Mr. Stolz’s reading of the statute is in accord with the rationale behind why a general contractor would choose to self-insure a construction project. The reason the statute refers to

self-insuring the construction project as a “privilege” is because it is beneficial for the general contractor to attempt to insulate itself from liability for injuries which happen to a subcontractor’s employee. The general contractor provides this coverage for all of the enrolled subcontractors so that the subcontractor’s employees receive workers’ compensation coverage and the general contractor, in turn, receives immunity from tort claims made by those employees. The general contractor chooses this coverage rather than risk a subcontractor’s failure to properly provide workers’ compensation coverage, and thus, exposing the general contractor to tort liability.

Finally, as discussed below, when read *in pari materia* with other portions of the workers’ compensation statute, the soundness of Mr. Stolz’s position becomes abundantly clear.

B. There is no election of remedies issue.

The Subcontractor Defendants claim that because Mr. Stolz accepted workers’ compensation benefits, “Ohio’s workers’ compensation statutes dictate that the workers’ compensation benefits Mr. Stolz received through the Plan are his exclusive remedy for any work-related injuries on the Project.” (Merit Brief of Pet. J&B, p.7). Subcontractor Defendants assert that Mr. Stolz’s reading of R.C. 4123.35(O) is “illogical” because “Jostin would enjoy immunity from Mr. Stolz’s tort claims but the other Subcontractor Defendants would not.” (*Id.* at 13). Mr. Stolz’s reading is absolutely correct under Ohio’s workers’ compensation scheme and the result is exactly the same as the result under a traditional workers’ compensation analysis. Under both R.C. 4123.35(O) and traditional workers’ compensation, Mr. Stolz may seek workers’ compensation benefits from his direct and statutory employer, here Jostin and Messer, but not pursue a civil remedy against them. Under both R.C. 4123.35(O) and traditional workers’ compensation, Mr. Stolz may simultaneously assert tort claims against any other parties liable for his injuries, here the Subcontractor Defendants.

The “exclusivity rule” provides that an employee’s acceptance of workers’ compensation benefits is the exclusive remedy for such employee *vis-a-vis* their employer. *Freese*, 4 Ohio St.3d at 7, 445 N.E.2d 1110; *Saunders v. Holzer Hospital Foundation*, 4th Dist. Gallia No. 08CA11, 2009-Ohio-2112. Therefore, an injured employee may not both accept workers’ compensation benefits and institute a negligence suit against their employer. *Saunders* at ¶¶ 20–22. The prerequisites to application of the exclusivity doctrine include: (1) the existence of two or more remedies; (2) the inconsistency of such remedies; and (3) a choice of one of them. *Id.* at ¶ 19. However, “It is generally held that workmen’s compensation statutes relate solely to the relationship of employer and employee; and that an injured employee may, in addition to receiving compensation from his employer for injuries received in the course of his employment, sue for and recover damages for the same injuries from a third person tort-feasor whose negligence has proximately caused his damage.” *Hartford Accident & Indem. Co. v. Procter & Gamble*, 91 Ohio App. 573, 576, 109 N.E.2d 287 (1st Dist. 1952) (citing *Trumbull Cliffs Furnace Co. v. Schackovsky*, 111 Ohio St. 791, 146 N.E. 306 (1924); *George v. City of Youngstown*, 139 Ohio St. 591, 41 N.E.2d 567 (1942)); *Dearhouse v. Bethlehem Steel Co.*, 118 F.Supp. 936 (N.D. Ohio 1954); *Herbruck v. Burger Iron Co.*, 44 Ohio App. 475, 186 N.E. 372 (9th Dist. 1933). “In Ohio, the receipt by an injured employee of compensation under the Workmen’s Compensation Law is not a defense to his common-law action to recover damages for his injury from any one who is not his employer under the provisions of said law.” *Herbruck* at 481.

Only when it is established that the defendant is plaintiff’s employer for workers’ compensation purposes, does the exclusivity doctrine foreclose plaintiff from instituting a civil action for negligence against the defendant. *Smith v. Turbo Parts LLC*, S.D. Ohio No. 2:10-cv-

00202, 2011 WL 796793, at *4 (Mar. 1, 2011). Here, Mr. Stolz could not seek workers' compensation benefits from the Subcontractor Defendants, as the Subcontractor Defendants are not Mr. Stolz's employers and did not contribute to his workers' compensation premiums. Rather, Mr. Stolz elected to pursue a remedy for his injuries through asserting claims of negligence against the Subcontractor Defendants. *See id.* at *5. Ohio courts will "permit an injured individual to maintain a negligence action so long as that individual is not an employee of the defendant company for workers' compensation purposes." *Id.*

The Subcontractor Defendants concede that they are not Mr. Stolz's employer. (MSJ Order, p. 12 n.11). Therefore, under traditional notions of workers' compensation, the exclusivity doctrine does not prohibit Mr. Stolz's claims against the Subcontractor Defendants. Nevertheless, the Subcontractor Defendants seek to "piggy back" on the immunity afforded to Messer in R.C. 4123.35(O). However, as discussed above, R.C. 4123.35(O) only grants immunity to the self-insuring employer, Messer, and Mr. Stolz's direct employer, Jostin. The statute does not act to grant blanket immunity to every contractor or subcontractor in relation to claims of injured employees who are not the contractor's or subcontractor's own employee. Nor does the fact that the Subcontractor Defendants were engaged in a "common enterprise" with Mr. Stolz's employer, namely the Casino Project, prohibit Mr. Stolz's claims. So long as the Subcontractor Defendants are not Mr. Stolz's direct employer, a fact they readily concede, the exclusivity doctrine does not prohibit Mr. Stolz's claims. *Herbruck*.

Furthermore, while R.C. 4123.35(O) may not expressly maintain Mr. Stolz's ability to bring a claim against a third party tortfeasor, when read *in pari materia* with the subrogation statute of the Ohio Workers' Compensation Act, R.C. 4123.35(O) clearly authorizes this claim. *See* R.C. 4123.931. R.C. 4123.931(A) grants subrogation rights to the Ohio Bureau of Workers'

Compensation when a claimant recovers from a third party. *Id.* If recovery against a third party was prohibited by Ohio law, this section of the Ohio Workers' Compensation Act would be completely superfluous. In fact, holding a negligent third party accountable for damages sustained by an injured worker is an integral part of the Ohio Workers' Compensation Act. In order to hold premiums down, it is important that self-insuring employers and the Ohio Workers' Compensation Fund be reimbursed for payments made on behalf of injured workers caused by third parties who are not paying into the Workers' Compensation system for that particular worker. The subrogation statute encourages claims against non-employers such as D.A.G., TriVersity, and J&B under these circumstances.

In fact, R.C. 4123.35(O) expressly reserves an injured employee's right to assert claims against third party tortfeasors. "Nothing in this division shall be construed as altering the rights of employees under this chapter and Chapter 4121. of the Revised Code." R.C. 4123.35(O). Under Ohio law, Mr. Stolz maintains the right to pursue claims against third parties. R.C. 413.35(O) expressly states that this right shall not be altered. Furthermore, R.C. 4123.35(O) does not grant immunity to non-employer subcontractors. Therefore, Mr. Stolz, pursuant to the express language of R.C. 4123.35(O), is not prohibited from pursuing claims against the Subcontractor Defendants.

C. There is no fellow servant issue.

For purposes of workers' compensation immunity, an individual may, under certain circumstances, be considered the employee of more than one employer. *See Smith*, 2011 WL 796793 at *2. Here, the facts, circumstances, and law establish that Mr. Stolz had two employers—Jostin, his direct employer, and Messer, his statutory employer. As explained above, both employers are entitled to the protections of the workers' compensation statute through R.C. 4123.35(O). Furthermore, just as Mr. Stolz had two employers, so to do all the

other employees on the Casino Project, excluding those direct employees of Messer. All employees on the Casino Project are the employee of a direct employer, the subcontractor, and the statutory employer, Messer. As such, the negligent employees of the Subcontractor Defendants responsible for Mr. Stolz's injuries had two employers, the individual Subcontractor Defendant and Messer.

R.C. 4123.741 provides:

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.

In *Kaiser v. Strall*, 5 Ohio St.3d 91, 449 N.E.2d 1 (1983), this Court made clear that an injured employee, who accepts workers' compensation benefits, may not pursue a common-law or statutory remedy against a *co-employee*. *Id.* at 94. However, *Kaiser* did not hold that "once an injured employee files for and receives workers' compensation he is estopped from filing *any other* common-law or civil claim." *Caygill v. Jablonski*, 92 Ohio App.3d 31, 34, 633 N.E.2d 1220 (6th Dist. 1994). An injured employee is not forced to elect between workers' compensation and a civil action if the tortfeasor is not a fellow employee. *Id.* The immunity provided by R.C. 4123.741 is premised on both the negligent employee's and the injured employee's relationship with the "employer." The application of this Section necessarily depends on who qualifies as the "employer" to determine whether the negligent employee is, in fact, a co-employee of the injured employee. Therefore, R.C. 4123.741 must be separately applied on the basis of each employer to determine who is the fellow servant of whom, so as to preclude any co-employee's liability. The instant case requires *two* fellow servant inquiries, the

first as to Messer and the second as to each Subcontractor Defendant. Contrary to the Subcontractor Defendants' assertion, R.C. 4123.741 does not provide blanket immunity to all employers from the claims of all employees. Only Messer is entitled to the legal fiction created by R.C. 4123.35(O) that all enrolled subcontractor employees are Messer's employees and, therefore, fellow servants of one another only as to Messer. This is because only Messer has made the social bargain with all employees. The Subcontractor Defendants are not entitled to rely on the legal fiction of R.C. 4123.35(O) and, therefore, their employees are only entitled to fellow servant immunity as to the Subcontractor Defendants' own employees.

It is true that all employees of enrolled subcontractors on the Casino Project are the statutory employees of Messer. However, it is not the case that *all* employees on the Casino Project are also the employees of *all* the enrolled subcontractors. The employees who negligently caused Mr. Stolz's injuries are, in addition to Messer's, the employees of a particular Subcontractor Defendant separate from Jostin. The Subcontractor Defendants have continuously asserted that they are not the employer of Mr. Stolz. Furthermore, as detailed above, the Subcontractor Defendants did not contribute to the workers' compensation benefits paid to Mr. Stolz. Therefore, Mr. Stolz is not "any other employee of such employer" from which the Subcontractor Defendant employees may be immune. The statute only provides that no employee of an employer is liable for the injuries of "any other employee of such employer." If the injured employee is not an employee of the negligent employee's employer, there is no immunity. Without R.C. 4123.741 immunity, Mr. Stolz may properly institute a civil action against the Subcontractor Defendants' negligent employees and, therefore, the Subcontractor Defendants.

This reading of R.C. 4123.741 is consistent with R.C. 4123.35(O). R.C. 4123.35(O) establishes what employers, both direct and statutory, are entitled to workers' compensation protections—Messer and Jostin. R.C. 4123.741 details from what claims employees of an employer are entitled to immunity—claims made by fellow employees of the same employer. Under both regimes, the direct and statutory employer are protected through the express immunity of R.C. 4123.35(O), and through derivative immunity of their own employees in R.C. 4123.741. This result is no different from a traditional application of workers' compensation, whereby the direct employer is statutorily immune and indirectly immune through the immunity of its own employees, and so, other negligent parties (and their employees) remain liable.

Under the statutes, Messer is immune from the claims of *all* employees covered by the wrap-up policy as the statutory employer. Jostin is immune from claims asserted by its own employees, however, it is not immune from claims asserted by other employees of Messer, because Jostin is not the employer of these other employees. Like Jostin, the Subcontractor Defendants are immune from the claims of their own employees, but are not immune from the claims asserted by the other employees of Messer with a different direct employer. As such, Messer and Jostin are immune from the claims of Mr. Stolz, however, the Subcontractor Defendants are not, as they are not Mr. Stolz's "employer" under either R.C. 4123.35(O) or 4123.741.

D. Ohio Supreme Court precedent permits employees accepting workers' compensation benefits from their employer to assert a negligence claim against a liable third party.

The only court to specifically address R.C. 4123.35(O), *Lancaster v. Pendleton Construction Group, LLC*, Hamilton C.P. No. A1208721 (Mar. 25, 2013) (attached to Brief of Pets.), misunderstood and misapplied basic Ohio workers' compensation and tort law principles. The court, while acknowledging that many other jurisdictions would allow the plaintiffs to bring

claims against the defendant subcontractors, held that Ohio law does not permit such actions. *Id.* at *7. The *Lancaster* court primarily based its decision on *Pride v. Liberty Mutual Ins. Co.*, E.D. Wisc. No. 04-C-703, 2007 WL 1655111 (June 5, 2007), a factually similar Wisconsin case that declined to extend immunity to subcontractors enrolled in a general contractor's wrap-up policy. The *Pride* court pointed out numerous 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. The *Pride* court 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 and concluded 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.* at *4. A wrap-up plan saves the subcontractors money because they do not have to provide insurance coverage. *Id.* at *3. The court questioned the logic behind allowing a subcontractor to not provide insurance coverage, yet in return, grant the subcontractor immunity it would not otherwise have. *Id.*

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 *Lancaster* court's statement is patently false. As discussed above, as the default provision, an employee, receiving workers' compensation benefits from his employer, may bring a negligence claim against a liable third party. The relevant fact is not that the Ohio Workers' Compensation Act does not grant this right to plaintiffs; the relevant fact is that section R.C. 4123.35(O) does not take this right away from plaintiffs. *See* R.C. 4123.35(O) ("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.”). “[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, 526, 161 N.E. 238 (8th Dist. 1923), *aff’d*, 111 Ohio St. 791, 146 N.E. 306 (1924); *George*, 139 Ohio St. at 594, 41 N.E.2d 567 (“[W]orkmen’s compensation statutes relate solely to the relationship of employer and employee.”).

Ohio law makes clear that an injured employee may assert a claim against a third party tortfeasor and their employees. R.C. 4123.25(O) does not alter this default provision and does not grant immunity to a non-employer, such as the Subcontractor Defendants.

E. Cases from other jurisdictions are inapplicable.

“[T]his 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.” (MSJ Order, p. 16). The cases cited by Subcontractor Defendants from other jurisdictions offer little guidance as they differ from the construction of R.C. 4123.35(O). Particularly, the statutes discussed in *Amorin v. Gordon*, 996 So.2d 913 (Fla. App. 2008), are significantly different from R.C. 4123.35(O), and expressly grant immunity to all subcontractors from the claims of all workers on a qualifying project (“horizontal immunity”).

A subcontractor providing services in conjunction with a contractor on the same project or contract work is not liable for the payment of compensation to the employees of another subcontractor or the contractor on such contract work and is protected by the exclusiveness-of-liability provisions of s. 440.11 from any action at law or in admiralty on account of injury to an employee of another subcontractor, or of the contractor, provided that: (1) the subcontractor has secured workers’ compensation insurance for its employees or the contractor has

secured such insurance on behalf of the subcontractor and its employees in accordance with paragraph (b); and (2) the subcontractor's own gross negligence was not the major contributing cause of the injury.

Fla. Stat. 440.10(1)(e); *Amorin* at 915. Subsection (1)(b) imposes responsibility for payment of workers' compensation premiums on the general contractor and states that all employees of a contractor or subcontractor working on a project are deemed to be employed by the general contractor. Fla. Stat. 440.10(1)(b); *Amorin* at 915. Furthermore, under Section 440.10, where a subcontractor fails to pay workers' compensation premiums, the general contractor is liable ("vertical immunity"). *Amorin* at 916.

In *Amorin*, the subcontractor defendants failed to pay the required workers' compensation premiums for their employees, which statutorily rendered the general contractor liable. *Id.* However, the general contractor's insurance policy, in fact, provided such coverage for the subcontractor defendants, and the general contractor, in turn had vertical immunity. *Id.* The court then concluded that, since the general contractor provided insurance for the subcontractor defendants, the first condition of horizontal immunity was satisfied: "a subcontractor is not liable . . . provided that: (1) the subcontractor has secured workers' compensation insurance for its employees or the contractor has secured such insurance on behalf of the subcontractor and its employees." *Id.* Because the plaintiff did not assert gross negligence, the subcontractor defendants were entitled to immunity. *Id.* at 917. The court's decision had little to do with whether the general contractor was the injured employee's statutory employer. Rather, the analysis focused on applying the elements of a statute that expressly granted blanket immunity to subcontractors if certain conditions were met.

Clearly, *Amorin* is inapplicable to this Court's analysis of the instant case. As discussed above, Ohio's statute does not expressly grant blanket immunity to the Subcontractor Defendants under any circumstances.

In their recitation of *Stevenson v. HH&N/Turner*, E.D. Mich. No. 01-cv-71705, 2002 U.S. Dist. LEXIS 26831 (Apr. 22, 2002), the Subcontractor Defendants seemingly gloss over a glaring distinction between the instant case and *Stevenson* which fundamentally undermines their assertion that the case stands for the proposition that the *quid pro quo* of workers' compensation protects all subcontractors working on the project from liability for all workers. In *Stevenson*, the plaintiff, an employee of a subcontractor working on the project, was injured when she fell over an ice mound that had accumulated in an open-air stadium construction site. *Id.* at *3. The plaintiff sought workers' compensation benefits under the wrap-up policy purchased by the owner of the project. *Id.* at *4, 7. The plaintiff later instituted an action against the *general contractor* and *the owner* of the project, asserting that the general contractor and owner were negligent in their failure to implement reasonable safety precautions. *Id.* at *8.

In addition to finding that the defendants did not owe plaintiff a duty and that the condition was open and obvious, the *Stevenson* court found that *quid pro quo* protected the *general contractor* and *owner* from liability, as the *owner* paid the workers' compensation premiums which plaintiff voluntarily accepted the benefit of. *Id.* at *39. In describing the *quid pro quo* bargain, the court noted that the subcontract between the subcontractor and the general contractor stated that the wrap-up policy was included in the bid package and that workers' compensation expenses for the project should be excluded from the individual subcontractor's insurance policy. *Id.* The court recognized that the Michigan statute dictates that "*only owners* of extremely large construction projects may take advantage of the benefits afforded by [a wrap-

up policy].” *Id.* at *44. Since subcontractors do not participate in the *quid pro quo* bargain, they are not entitled to the statute’s protections. Furthermore, the court recognized that, even with the altered statutory scheme wherein the general contractor and owner receive workers’ compensation immunity, the plaintiff’s traditional workers’ compensation rights still stand, such as the ability to sue the general contractor or owner for intentional torts. *Id.* at *44.

Under the *Stevenson* court’s analysis, only the owner and general contractor are entitled to workers’ compensation immunity, as they are direct participants in the *quid pro quo* bargain. Furthermore, given the reduced bid package, the injured employee’s direct employer also directly participated in the *quid pro quo* bargain and is, logically, likewise entitled to immunity. The Subcontractor Defendants did not indirectly pay the cost of workers’ compensation premiums for all employees on the project, as the purported bid reduction was only reduced by the amount of workers’ compensation payments for *their own employees* covered under Messer’s wrap-up plan. As such, the Subcontractor Defendants, like Jostin, only indirectly “paid” workers’ compensation premiums for *their own employees* and, therefore, are only entitled to workers’ compensation immunity as to *their own employees*.

In *Etie v. Walsh & Albert Co., Ltd.*, 135 S.W.3d 764 (Tx. App. 2004), a Texas court contemplated the application of a statute permitting general contractors to contractually commit to providing workers’ compensation benefits to an independent contractor hired by a subcontractor of the general contractor. *Id.* at 765–66. The court found that all subcontractors, including independent contractors, covered by the general contractor’s policy were immune from liability. Further, without analysis, the court held that all employees are fellow servants and equally immune from suit. The court in *TIC Energy & Chem., Inc. v. Martin*, Tx. App. No. 13-14-00278-cv, 2015 WL 127777 (Jan. 8, 2015), later found the arguments advanced in *Etie* were

not argued in the context of the entire workers' compensation statute and distinguishable. The section preceding that discussed in *Etie* unequivocally provides that subcontractors and subcontractors' employees are not employees of the general contractor if they are independent contractors and the subcontractor assumes written responsibility for its employees. In *Martin*, because the plaintiff identified the conflict as it applied to his case, the court, while refusing to resolve the conflict, affirmed the district court's denial of summary judgment. Like the court in *Martin*, R.C. 4123.35(O) must be read in *pari materia* with other provisions of Ohio's workers' compensation statute, as discussed above.

IV. CONCLUSION

For the foregoing reasons, Plaintiff-Respondent respectfully requests that this Court answer the certified question in the negative and affirm the Southern District Court's decision.

Respectfully submitted,

GOODSON & COMPANY

/s/ Brett C. Goodson

Brett C. Goodson (0023163)

110 E. Eighth Street, Suite. 200

Cincinnati, Ohio 45202

(513) 621-5631

(513) 621-3855 *facsimile*

brettgoodson@goodsonandcompany.com

Attorney for Plaintiff-Respondent

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing *Merit Brief of Plaintiff-Respondent Daniel Stolz* was served by ordinary U.S. Mail this 1st day of September, 2015 upon:

Stephen M. Yeager
Steve Patsfall
PATSFALL YEAGER & PFLUM
205 West Fourth Street, Suite 1280
Cincinnati, Ohio 45202
Attorneys for Defendant-Petitioners D.A.G. Construction Co., Inc. and TriVersity Construction Co., LLC and Defendant Pendleton Construction Group

Colleen M. Blandford
KOHLEN & PATTON
201 East Fifth Street
PNC Center, Suite 800
Cincinnati, Ohio 45202
Attorney for Defendant-Petitioner J&B Steel Erectors

Jane M. Lynch
Jared A. Wagner
GREEN & GREEN
800 Performance Place, Suite 109
Dayton, Ohio 45402
Attorneys for Defendant-Petitioner Messer Construction Co.

Robert W. Hojnoski
REMINER CO. LPA
525 Vine Street, Suite 1700
Cincinnati, Ohio 45202
Attorney for Defendant Terracon Consultants, Inc.

/s/ Brett C. Goodson
Brett C. Goodson (0023163)

583810_5