IN THE SUPREME COURT OF OHIO

DANIEL STOLZ,	:	**Case No. 17-1245**
	:	
Plaintiff-Respondent,	:	On a Certified Question of State Law
	:	from the U.S. District Court, Southern
vs.	:	District of Ohio, Western Division
	:	
J & B STEEL ERECTORS, INC., et al.	:	Case No. 1:14-cv-44
	:	
Defendants-Petitioners.	:	

JOINT REPLY BRIEF OF PETITIONERS J & B STEEL ERECTORS, INC., D.A.G. CONSTRUCTION CO., INC., AND TRIVERSITY CONSTRUCTION CO., LLC

Colleen M. Blandford #0061877 (Counsel of Record)
Jordan T. Steiner #0093760
Kohnen & Patton LLP
PNC Center, Suite 800
201 East Fifth Street
Cincinnati, OH 45202
Phone: (513) 381-0656
Fax: (513) 381-5823
cblandford@kplaw.com
Attorneys for Petitioner, J & B Steel Erectors, Inc.

Susan M. Salyer, Esq. #0076623 (Counsel of Record)
Stephen M. Yeager, Esq.
Stephen J. Patsfall, Esq.
Patsfall, Yeager & Pflum LLC
Textile Building, Suite 1280
205 W. Fourth Street
Cincinnati, Ohio 45202
Attorneys for Petitioners, TriVersity Construction Co., LLC, and D.A.G. Construction Co., Inc.

Brett Goodson, Esq. #0023163
Goodson & Company, Ltd.
110 East Eighth Street, Suite 200
Cincinnati, Ohio 45202-2132
Attorney for Respondent

Stephanie M. Day, Esq. #0073006
Beckman Weil Shepardson LLC
895 Central Ave., Suite 300
Cincinnati, OH 45202
Attorney for Respondent

Mike DeWine, Attorney General of Ohio
Eric E. Murphy (0083284), State Solicitor
Michael J. Hendershot (0081842)
Chief Deputy Solicitor
30 East Broad Street, 17th Floor
Columbus, OH 43215
Counsel for *Amicus Curiae* State of Ohio

Jane M. Lynch, Esq. #0012180
Jared A. Wagner, Esq. #0076674
Green & Green
800 Performance Place, Suite 109
Dayton, OH 45402
Counsel for *Amicus Curiae* Messer Construction Co.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

INTRODUCTION

Respondent Daniel Stolz requests this Court abandon its decision in *Stolz v. J & B Steel Erectors, Inc.*, 146 Ohio St. 3d 281, 2016-Ohio-1567, 55 N.E.3d 1082 ("*Stolz I"*). However, Mr. Stolz has not established why this Court should find R.C. 4123.35(O) unconstitutional, which is the certified question before this Court. Contrary to Mr. Stolz's arguments, neither the right to a remedy nor the right to a jury trial is a fundamental right here, within this workers' compensation legislation. Thus, Mr. Stolz's constitutional challenges to due process and equal protection should be analyzed under a rational basis test. In accordance with that test, R.C. 4123.35(O) is rationally related to the goals of workers' compensation. Even if the strict scrutiny test argued by Mr. Stolz somehow applies, this statute is constitutional. As such, the Court should answer the certified questions in the negative, and should find Ohio Revised Code 4123.35(O) is constitutional 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's workers' compensation laws.

I. ARGUMENT

PROPOSITION OF LAW

Ohio Revised Code 4123.35(O) is constitutional 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's workers' compensation laws.

A. If this Court accepts Mr. Stolz's contention that this is a facial challenge to the constitutionality of R.C. 4123.35(O), such facial challenge fails.

Mr. Stolz states that he has raised a facial challenge to this statute, rather than a challenge to the statute as applied. (Respondent's Brief, p. 4). This position is curious in light of Mr.

Stolz's acknowledgement that the statute is valid as applied to Messer Construction, Inc. ("Messer"). As Mr. Stolz recognizes in his Merit Brief, to successfully present such a facial challenge, he must demonstrate that there is no set of circumstances in which this statute would be valid. *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶ 25 (citing *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095 95 L.Ed. 2d 697 (1987)). However, by acknowledging the validity of the statute as applied to Messer, Mr. Stolz identifies a set of circumstances in which this statute is valid:

> Notably, Mr. Stolz does not dispute that Messer is entitled to the immunity traditionally reserved for an injured worker's employer. The statute clearly designates Messer as Mr. Stolz's statutory employer and Messer has participated in the quid pro quo by providing Mr. Stolz's workers' compensation coverage.

(Respondent's Brief, p. 6). This admission identifies a set of circumstances that by its existence renders the statute facially valid, and as such defeats any facial challenge.

Indeed, later in his Merit Brief, Mr. Stolz states, "The statute's language is not ambiguous in that the self-insured employer (Messer) is an 'employer' for purposes of worker's compensation." (Respondent's Brief, p. 34). Mr. Stolz acknowledges that the statute creates a valid bar against any negligence claim he would otherwise be able to bring against Messer, and in fact those negligence claims against Messer were dismissed on summary judgment by the federal district court based on R.C. 4123.35(O). Since that decision, Mr. Stolz has acknowledged that the statute applies to prohibit his claims against Messer. If Mr. Stolz truly is making a facial challenge to the statute, the challenge fails immediately by his own admission that a set of circumstances exists in which the statute is valid.

As it is clear that Mr. Stolz's facial challenge to the statute must fail, Petitioners moved to certify to this Court the question of whether R.C. 4123.35(O) is unconstitutional as applied. That certified question accepted by this Court states as follows:

> 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.

Stolz v. J & B Steel Erectors, Inc., No. 2017-1245 (Entry accepting certified question of law Dec. 6, 2017) (emphasis added). Therefore, any facial challenge by Mr. Stolz should fail, and Petitioners address herein the question which was certified, the constitutionality of the statute as applied to the facts of this case.

B. Neither the right to a jury trial nor the right to a remedy is implicated with regard to the workers' compensation provisions of R.C. 4123.35(O).

In his Merit Brief, Mr. Stolz argues the burden of proving the constitutionality of R.C. 4123.35(O) is on the government, because strict scrutiny applies to review of this statute. In making this argument, Mr. Stolz does not argue any suspect class is at issue, and instead tries to argue the fundamental right to a jury trial and/or the fundamental right to a remedy are implicated by this statute. As addressed in more detail below, neither such right is implicated in this workers' compensation statute. Accordingly, as Mr. Stolz recognizes, "this Court is to assume the statute is constitutional and the burden falls on the party challenging the statute to prove otherwise beyond a reasonable doubt." (Respondent's Brief, p. 3). Under either the rational basis or the strict scrutiny standard, R.C. 4123.35(O) is constitutional, and thus Petitioners urge this Court to answer the certified question in the negative.

Mr. Stolz relies on *Arbino* to argue that the right to a jury trial and the right to a remedy are fundamental rights. However, Mr. Stolz's reliance is misplaced. In order to be properly analyzed under *Arbino*, not only must the rights be fundamental, but they also must be violated. In *Arbino*, this Court concluded that although the rights to a jury trial and to a remedy are fundamental rights, they were not violated by the statutes at issue. *Arbino v. Johnson &*

Johnson, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420. Likewise, such rights are not violated by R.C. 4123.35(O) here. Second, and more importantly, *Arbino* did not involve workers' compensation statutes. Within the workers' compensation scheme, the rights to a jury trial and to a remedy are not fundamental rights. Thus, analysis of R.C. 4123.35(O) differs from the statutes at issue in *Arbino* because R.C. 4123.35(O) is within the workers' compensation scheme rather than common law. Accordingly, in order to successfully argue that the rights to a jury trial and to a remedy are violated here, Mr. Stolz must first establish that the General Assembly created those rights in the statute and then show that they were violated. Mr. Stolz has done neither.

1. R.C. 4123.35(O) does not violate the right to jury trial.

Arbino set forth that the right to trial by jury protects a plaintiff's right to have a jury determine all issues of fact; however, *Arbino* did not extend the right to trial by jury to the determination of questions of law. *Arbino* at ¶ 37. Importantly, 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, 1992-Ohio-133, 595 N.E.2d 862; *Siegel v. State*, 2015-Ohio-441, 28 N.E.3d 612, ¶ 16 (10th Dist.).

Also, the right to a jury trial is not absolute, and does not act as "a limit on the ability of the legislature to act within its constitutional boundaries." *Arbino* at ¶ 126 (Cupp, J., concurring). "[I]t 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." *Id*. at ¶ 131. Thus, contrary to Mr. Stolz's argument, the right to trial by jury does not prevent the General Assembly from altering a cause of action. *Id*. at ¶¶ 131-132; *Stetter v. R.J.*

Corman Derailment Servs., L.L.C., 125 Ohio St. 3d 280, 2010-Ohio-1029, 927 N.E.2d 1092, ¶¶ 63-64.

In *Arrington*, this Court reiterated that the right to a jury trial does not extend to workers' compensation cases in a portion of the opinion titled, "**Section 5, Article I Does Not Confer a Fundamental Right to Trial by Jury in Workers' Compensation Cases**." *Arrington v. DaimlerChrysler Corp.*, 109 Ohio St.3d 539, 2006-Ohio-3257, 849 N.E.2d 1004, ¶ 19 (emphasis in original). Therein, the Court explained that a cause of action under R.C. 4123.74 is not a common-law negligence claim, but instead is a basic claim to participate in a compensation scheme created by statute for workers who are injured in the workplace – a scheme specifically designed to avoid the common law. *Id.* at ¶ 24 (citing R.C. 4123.74). The workers' compensation scheme "abolishes all right of recovery in ordinary cases, and therefore leaves nothing to be tried by jury." *Mountain Timber Co. v. Washington*, 243 U.S. 219, 235, 37 S.Ct. 260, 61 L.Ed.2d 685 (1917).

The Court explained in *Arrington* that "[a] claim for benefits pursuant to Ohio workers' compensation statutes clearly differs from a common-law tort in significant ways." *Arrington* at ¶ 29 (citations omitted.) The Court stated, "We have never held that a worker seeking to participate in the fund is entitled to a trial by jury because of Section 5, Article I, Section 35, Article II, or any other constitutional provision. Rather, we consistently have held that the rights associated with the act are solely those conferred by the General Assembly." *Id.* (citations omitted.) As workers' compensation claims are removed from common-law tort claims, the right to a jury trial is not a fundamental one. "It is a right conferred by the General Assembly, not the Constitution, and therefore may be constrained." *Id.*

Here, the General Assembly may constrain the right to a jury trial under R.C. 4123.35(O) by providing immunity to the self-insuring employer and to the contractors and subcontractors. Mr. Stolz was entitled to workers' compensation benefits without a jury trial before R.C. 4123.35(O) was applied to his case, and he remains entitled to workers' compensation benefits still without a jury trial. The Constitution simply does not prevent the General Assembly from bestowing immunity in this manner in the workers' compensation context, and R.C. 4123.35(O) does not violate the right to a jury trial.

2. R.C. 4123.35(O) does not violate the right to a remedy.

As to the right to a remedy, in *Arbino*, this Court reviewed whether statutes limiting noneconomic damages in tort actions and limiting punitive damages were unconstitutional. The Court discussed several constitutionally sound ways in which a court may apply the law to limit damage awards. *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶ 38. This Court found that limitations of noneconomic damages do not violate the right to a remedy because even though the recovery is limited, the limitations "do not wholly deny persons a remedy for their injuries." *Id.* at ¶ 47. The available remedies may be limited, but they are still meaningful. *Id.* The right to a remedy provision "does not provide for remedies without limitation or for any perceived injuries." *Ruther v. Kaiser*, 134 Ohio St. 3d 408, 2012-Ohio-5686, 983 N.E.2d 291, ¶ 12.

Workers' compensation law also limits the available remedies, but it is well-settled law in Ohio that the remedies are meaningful and do not violate the constitutional rights to a jury trial and to a remedy. *Stetter v. R.J. Corman Derailment Servs., L.L.C.*, 125 Ohio St. 3d 280, 2010-Ohio-1029, 927 N.E.2d 1092; *Arrington*, 109 Ohio St.3d 539, 2006-Ohio-3257, 849 N.E.2d 1004, at ¶¶ 19-27. This Court has unequivocally held that "workers' compensation recovery is a

meaningful remedy for workers." *Stetter* at ¶ 59. Mr. Stolz simply does not distinguish any of this well-settled law in his Merit Brief.

Instead, Mr. Stolz sets forth a lengthy explanation of how the workers' compensation system does not allow claimants to be fully compensated. Mr. Stolz clearly does not want his claim against the subcontractors to be covered under workers' compensation. He admittedly disagrees with this Court's prior interpretation making R.C. 4123.35(O) applicable to the subcontractors and urges the Court to revise its decision. However, in claiming that the statute violates the right to a jury trial and the right to a remedy, he sets forth no argument explaining why this workers' compensation statute should be treated differently than every other workers' compensation statute in Ohio.

Mr. Stolz vehemently disagrees with this Court's prior interpretation of R.C. 4123.35(O) in *Stolz I* and implores this Court to overturn its previous decision. However, Mr. Stolz fails to consider the possibility that this Court's decision in *Stolz I* was correct. This Court determined that the subcontractors at issue are included in the workers' compensation scheme. Mr. Stolz never accepts that decision in order to explain why that decision violates the rights to a jury, to a remedy, to due process, or to equal protection. Mr. Stolz has failed to explain why the traditional notion that workers' compensation is removed from common law negligence should not apply to this statute. Quite simply, the answer is: the constitutionality of the workers' compensation scheme is well-settled. This Court's determination that the subcontractors at issue are entitled to workers' compensation immunity raises no constitutional issues.

R.C. 4123.35 is undeniably part of the workers' compensation system. It is unequivocal that the workers' compensation system is outside common law tort principles. As such, the right to a jury trial and the right to a remedy are not fundamental rights, but instead are rights

conferred or constrained by the General Assembly. The power to constrain those rights by granting immunity is within the General Assembly's authority. The statute as written by the General Assembly and interpreted by this Court does not violate the right to a jury trial or the right to a remedy, and accordingly Petitioners urge this Court to answer the certified question in the negative.

C. Even if strict scrutiny somehow applies, R.C. 4123.35(O) is constitutional.

As set forth above, Mr. Stolz's contention that strict scrutiny applies is based on the incorrect conclusion that the statute violates the rights to a jury trial and a remedy. Because the statute is within the workers' compensation scheme and does not violate the rights to a jury trial or a remedy, strict scrutiny does not apply. Nevertheless, even though strict scrutiny does not apply, the state of Ohio does have a compelling governmental interest in compensating workers and their dependents for death, occupational disease, and injury arising out of and occurring during the course of employment, which is accomplished through the workers' compensation system. *See S. Ridge Baptist Church v. Indus. Com. of Ohio*, 676 F. Supp. 799, 805 (S.D. Ohio 1987). Moreover, the statute has particular compelling purposes including centralizing safety programs and compensation for large construction projects, encouraging economic development via large scale construction projects, minimizing litigation, and promoting inclusion of a potentially more diverse pool of subcontractors. It is narrowly tailored to apply to large scale construction projects exceeding costs of $100 million with duration lasting up to 6 years. Even Mr. Stolz acknowledges that the state has a compelling interest in allowing for self-insurance. (Respondent's Brief, p. 19).

Additionally, in arguing for strict scrutiny, Mr. Stolz relies on *Gaines v. Preterm-Cleveland, Inc.*, 33 Ohio St. 3d 54, 514 N.E. 2d 709 (1987). However, Mr. Stolz's argument is

undercut by this Court conducting its analysis in *Gaines* under the rational basis test, since that case (like this case) involved neither a fundamental right nor a suspect class. *Id.* at 54.

D. R.C. 4123.35(O) is valid under a rational basis analysis.

Mr. Stolz argues that even under the proper rational basis analysis, there is no legitimate government purpose for the legislature to extend immunity to subcontractors as set forth in R.C. 4123.35(O) and *Stolz I*. However, Mr. Stolz ignores the overarching purposes behind workers' compensation statutes. These purposes have been discussed by Petitioners and in both amicus curiae briefs. Undoubtedly, the Court is well-aware of the legitimate interests the government has in protecting Ohio's workers' compensation system. This statute within the workers' compensation system streamlines large scale construction projects. In doing so, it allows general contractors to self-insure; thereby, leading to better protections of workers. Additionally, every worker covered by a plan is provided with the same benefits provided by one entity, which presumably has better negotiating power given the large number of workers covered by the plan. Litigation is eliminated – or should be. Mr. Stolz's argument that he has been required to wade through court after court to get relief is rather disingenuous given that court after court has denied him relief based on the immunity provided in the statute. Moreover, the statute has particular rational bases as stated above.

Contrary to Mr. Stolz's arguments, this Court's interpretation in *Stolz I* does not further curtail his rights, but rather, it ensures that the rights set forth in the statute are similar to the same extent as in tort law. In tort law, an injured employee is restricted from bringing suit against a fellow worker. *Kaiser v. Strall*, 5 Ohio St. 3d 91, 449 N.E. 2d 1 (1983). R.C. 4123.35(O) ensures that the fellow servant rule is followed. The fellow servant rule prevents an injured worker from suing a co-employee, and therefore the worker cannot claim the co-

employee's employer is vicariously liable. R.C. 4123.35(O) follows the principles of the fellow servant rule and vicarious liability in light of the legal fiction that the self-insuring general contractor is the employer of all workers on the jobsite. *Stolz v. J & B Steel Erectors, Inc.*, 146 Ohio St. 3d 281, 2016-Ohio-1567, 55 N.E.3d 1082, ¶ 22.

E. R.C. 4123.35(O) does not violate procedural or substantive due process.

Mr. Stolz's Merit Brief also alleges violations of procedural and substantive due process. Mr. Stolz contends that R.C. 4123.35(O) violates the fundamental requirement of due process: the opportunity to be heard "at a meaningful time and in a meaningful manner." (Respondent's Brief, p. 25). In making this argument, Mr. Stolz again finds fault with this Court's interpretation of the statute in *Stolz I*.

1. R.C. 4123.35(O) does not violate substantive due process.

Mr. Stolz's argument regarding substantive due process is meritless. Beyond the analysis standard, Mr. Stolz again argues against this Court's previous interpretation of the statute, which fails as set forth below. Additionally, the only case cited by Mr. Stolz in support of his substantive due process violation claim is *Gaines v. Preterm-Cleveland, Inc.* 33 Ohio St. 3d 54, 58, 514 N.E.2d 709, 714 (1987). However, Mr. Stolz's attempt to equate *Gaines* to the facts of this case further lacks merit. *Gaines* involved a question of medical fraud and addressed whether a statute of repose was constitutional when the cause of action was not discovered due to fraud. Mr. Stolz invokes *Gaines* for the proposition that "a legislative enactment may lawfully shorten the period of time in which the remedy may be realized 'as long as the claimant is still afforded a reasonable time in which to enforce his right.'" *Id.* at 60 (quoting *Adams v. Sherk*, 4 Ohio St. 3d 37, 39, 446 N.E. 2d 165, 167 (1983). Mr. Stolz argues that the plaintiff in *Gaines* only had six and one-half months to bring a claim, while he is completely barred. This conflates two separate

causes of action. A medical malpractice claim is a negligence action. Workers' compensation is a separate scheme outside the realm of negligence actions, making the considerations completely different. Furthermore, by conceding that Messer is entitled to the immunity conferred by R.C. 4123.35, Mr. Stolz acknowledges that immunity does not violate the right to a remedy simply because it bars a claim.

2. R.C. 4123.35(O) does not violate procedural due process.

Mr. Stolz also claims the statute violates procedure by failing to inform the public that other subcontractors on self-insured jobsites will have immunity. Mr. Stolz's misreading of the statute continues to ignore the decision reached by a majority of this Court that was "based on the plain, unambiguous language of the statute." *Stolz v. J & B Steel Erectors, Inc.*, 146 Ohio St. 3d 281, 2016-Ohio-1567, 55 N.E.3d 1082, ¶ 25. "When the legislature passes a law of general application, there is no question about the adequacy of the procedures; the legislative process provides all the process that is due." *State v. Aalim*, 150 Ohio St. 3d 489, 2017-Ohio-2956, 83 N.E.3d 883, ¶ 41 (DeWine, J., concurring). Here, R.C. 4123.35(O) went through the legislative process. That process provided the statute all the process that was due.

Mr. Stolz has not alleged that any of the procedures employed by the legislature in passing R.C. 4123.35 were inadequate. Instead, he argues with this Court's interpretation of the statute. Mr. Stolz essentially argues that this Court did not interpret the statute as written, and the unexpected interpretation prevented workers on self-insured jobsites from having proper notice. Mr. Stolz accuses this Court of engaging in "ex post facto judicial revision" of the statute, which he alleges violates procedural due process. However, this Court clearly made its decision "based on the plain, unambiguous language of the statute." *Stolz* at ¶ 25.

This Court began its analysis in *Stolz I* by providing an explanation of the statutory canons of construction. This Court did not engage in judicial revision of the statute, but instead applied the canons of statutory construction to read words and phrases "in context and construed according to the rules of grammar and common usage," and giving "effect to all of the statute's words." *Id.* at ¶ 9 (citing *Bryan v. Hudson*, 77 Ohio St.3d 376, 380, 674 N.E.2d 678 (1997)). This court explained, "If the meaning of the statute is unambiguous and definite, it must be applied as written and no further interpretation is necessary." *Id.* at ¶ 9 (citing *State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Educ.*, 74 Ohio St.3d 543, 545, 660 N.E.2d 463 (1996)). Finally, this Court noted, "Additionally, a court must give effect to the natural and most obvious import of a statute's language, avoiding any subtle or forced constructions." *Id.* at ¶ 9 (citing *Ohio Neighborhood Fin., Inc. v. Scott*, 139 Ohio St. 3d 536, 2014-Ohio-2440, 13 N.E.3d 1115, ¶ 22).

Mr. Stolz argues that if the legislature had intended the decision set forth in *Stolz I* to result from the statute, it would have included such language in the statute. However, in this Court's holding, it expressly noted that such language was found within the statute:

> It is with this language that the General Assembly established the legal fiction that the self-insuring employer is the employer of all covered employees, including employees of enrolled subcontractors, for purposes of workers' compensation. That fiction is reiterated later in R.C. 4123.35(O) with the instruction that "[t]he contractors and subcontractors included under a certificate issued under this division shall identify in their payroll records the employees who are considered the employees of the self-insuring employer listed in that certificate for purposes of this chapter * * *." (Emphasis added).
>
> When R.C. 4123.35(O) is read in conjunction with R.C. 4123.74, as it must be, see *Bryan v. Hudson*, 77 Ohio St.3d 376, 380, 1997 Ohio 261, 674 N.E.2d 678 (1997), the statute provides that the self-insuring employer, who through the legal fiction is the only employer on the project, will "not be liable to respond in damages at common law or by statute for any injury, or occupational disease, or bodily condition, received or contracted by any employee in the course of or arising out of" work on the self-insured construction project, R.C. 4123.74.

Stolz v. J & B Steel Erectors, Inc., 146 Ohio St. 3d 281, 2016-Ohio-1567, 55 N.E.3d 1082, ¶¶ 19-20. Thus, this Court found that the language in the statute unambiguously compelled the conclusion it reached. This statutory language existed long before Mr. Stolz started working on this project, and long before this Court interpreted it in *Stolz I.* This Court did not "extend" or "overextend" the immunity set forth in R.C. 4123.35(O). Likewise, this Court's decision in *Stolz I* did not deprive Mr. Stolz or any other self-insured jobsite workers of procedural due process. Instead, this Court interpreted the existing statute in *Stolz I* in accordance with its unambiguous language, in a manner that is constitutional and should be upheld here.

F. R.C. 4123.35(O) does not violate equal protection.

As set forth above, the statute does not violate a fundamental right. It also does not affect a suspect class. Therefore, in analyzing Mr. Stolz's equal protection challenge, the Court should not use the strict scrutiny standard argued by Mr. Stolz, but instead the Court should "uphold the classification if it is rationally related to a legitimate government interest." *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶ 66.

Classifications created by statute are not inherently unconstitutional. "The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Harsco Corp. v. Tracy*, 86 Ohio St. 3d 189, 192, 712 N.E.2d 1249, 1252 (1999). Under a rational basis 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 v. R.J. Corman Derailment Servs., L.L.C.*, 125 Ohio St.3d 280, 2010-Ohio-1029, 927 N.E.2d 1092, ¶ 80.

Mr. Stolz's equal protection argument disregards similar valid classifications that bear rational relationships to the same legitimate government interest. This Court previously rejected an argument comparable to Mr. Stolz's fictional twin scenario in *Holeton v. Crouse Cartage Co.*, 92 Ohio St. 3d 115, 131-32, 748 N.E.2d 1111, 1126 (2001). *Holeton* involved an injured worker who received workers' compensation benefits. Mr. Holeton disputed a statute allowing employers to recover their workers' compensation expenditures through subrogation while maintaining their immunity from suit created arbitrary classifications. Mr. Holeton argued, among other things, that the statute at issue created "arbitrary classifications of tort victims – employees injured on the job and employees injured off the job." *Id.* at 131. Like Mr. Stolz, Mr. Holeton contended that a strict scrutiny analysis applied. *Id.* However, the Court found "in drawing a distinction between workers' compensation claimants and other tort victims, the statute does not involve any fundamental right." *Id.* Furthermore, the Court found that tort victims who are injured in the course of and arising out of their employment, are <u>not</u> similarly situated to tort victims who do not receive an injury in the course of and arising out of their employment. The former tort victim recovers compensation and medical benefits under the Workers' Compensation Act; the latter does not. Therefore, the Court held that the statute in question did not violate equal protection under that argument.

Distinct classifications are permissible for tort victims injured in the course and scope of business and those who are injured outside the course and scope of business. This is true even if maintaining the separate classifications causes twin brothers in each class to be treated differently. Treating workers' compensation claimants different than other civil plaintiffs "is especially reasonable given the differences between the workers' compensation system and the civil justice system." *Ferguson v. State,* 151 Ohio St. 3d 265, 2017-Ohio-7844, 87 N.E.3d 1250,

¶ 39. The person injured on the job may be compensated through workers' compensation, while someone injured while not on the job is free to pursue a negligence claim in tort. Such a distinction is allowed because of the state's interest in protecting injured workers through workers' compensation, which is a legitimate government interest.

A similar classification occurs with the immunity provided to general contractors in R.C. 4123.35(O), which immunity to Messer herein Mr. Stolz has not challenged. Under traditional workers' compensation laws, an injured employee of a subcontractor is not precluded from asserting negligence claims against an at fault general contractor; however, under R.C. 4123.35(O), the general contractor is immune from such claims. Under Mr. Stolz's fictional twin scenario, a twin who is injured on a jobsite covered by traditional workers' compensation could maintain a claim against the general contractor of the jobsite whereas a twin injured on a jobsite covered by the statute could not maintain a similar claim against the self-insuring general contractor. Yet, Mr. Stolz concedes that these classifications are allowed, presumably because of the government interest in allowing self-insured jobsites.

As discussed above, the government's interest in placing contractors and subcontractors in the same classification as self-insuring general contractors herein follows the fellow servant rule. "A party who is injured as a result of a co-employee's negligent acts, who applies for benefits under Ohio's workers' compensation statutes, and whose injury is found to be compensable thereunder is precluded from pursuing any additional common-law or statutory remedy against such co-employee." *Kaiser v. Strall*, 5 Ohio St. 3d 91, 94, 449 N.E.2d 1, 3 (1983). The parties agree that R.C. 4123.35(O) confers immunity on a general contractor such as Messer through a legal fiction. The immunity extends to the contractors and subcontractors on the job and in so doing, maintains the fellow servant rule and prevents an inequality by treating

fellow servants differently on self-insured jobsites. Mr. Stolz's injury was compensable under the workers' compensation statutes, thus in accordance with Ohio law, his common-law claims against co-employees for negligent acts must be precluded.

G. Mr. Stolz's attempts to reargue this Court's statutory interpretation that was decided in *Stolz I* should fail.

Mr. Stolz's argument that the legal fiction created by the statute is overextended fails to consider that his claims are within the scope of workers' compensation. The parties agree that the Ohio Bureau of Workers' Compensation approved Messer self-administering the workers' compensation program for all enrolled subcontractors on the job. (Respondent's Brief, p. 1). The subcontractors in question enrolled in the program, and Mr. Stolz received benefits through the program. Mr. Stolz points out that his own employer paid his wages and controlled his employment, but the statute acknowledges that the legal fiction it creates for employers and co-employees exists only for purposes of workers' compensation. The portion of R.C. 4123.35(O) excerpted by Mr. Stolz answers the argument he attempts to raise:

> No employee of the contractors and subcontractors covered under a certificate issued under this division shall be considered the employee of the self-insuring employer listed in that certificate for any purpose other than this chapter and Chapter 4121 of the Revised Code. Nothing in this division gives a self-insuring employer authority to control the means, manner, or method of employment of the employees of the contractors and subcontractors covered under a certificate issued under this division.

This section of the statute makes clear that it only applies to workers' compensation.

The legal fiction that workers on the job are employees of Messer and co-employees with each other is not "overextended" as argued by Mr. Stolz, but instead is limited solely to workers' compensation issues. For all other purposes, the self-insuring employer is not considered the employer of the subcontractor workers. This restriction is quite narrow. Unfortunately for Mr. Stolz, it is this restriction that prohibits his claims against the subcontractors. Mr. Stolz has set

forth all the reasons why he would like to avoid the immunity established in workers' compensation, but his claim is solidly within the statute. This Court already has held that for purposes of workers' compensation, Mr. Stolz was an employee of Messer, just as the other subcontractor employees were employees of Messer. *Stolz v. J & B Steel Erectors, Inc.*, 146 Ohio St. 3d 281, 2016-Ohio-1567, 55 N.E.3d 1082. This status means that the subcontractor employees are Mr. Stolz's co-employees for purposes of workers' compensation and are immune from his suit. *Id.*

Mr. Stolz's argument that this Court interpreted the statute in a way that violates the Ohio Constitution ignores constitutional avoidance principles, which were set forth in the Amicus Curiae brief the State of Ohio. "A court is bound to give a statute a constitutional construction, if one is reasonably available, in preference to one that raises serious questions about the statute's constitutionality." *State v. Keenan*, 81 Ohio St. 3d 133, 150, 689 N.E.2d 929, 946 (1998).

As the State of Ohio pointed out, the dissent in *Stolz I* provided the statutory interpretation Mr. Stolz argues is the proper constitutional construction. If Mr. Stolz's argument were correct, the majority of this Court issued a decision that is unconstitutional while ignoring a constitutional alternative. Yet, constitutional avoidance principles dictate that if this Court had any qualms about the constitutionality of its decision in *Stolz I*, it would have given preference to the interpretation that does not raise constitutional questions. However, in *Stolz I*, the dissent's interpretation is not considered in the majority opinion. Nor did the dissent question the constitutionality of the majority's decision. Because the interpretation urged by Mr. Stolz was available in *Stolz I*, this Court was bound to adopt it over an interpretation that allegedly raises serious questions about the statute's constitutionality. The fact that the majority of this Court did

not even consider the dissent's construction demonstrates that the plain language reading of the statute as set forth by this Court does not raise constitutional issues.

H. Issues not addressed by Mr. Stolz are abandoned.

Finally, it should be noted that Mr. Stolz's Second Amended Complaint claims that R.C. 4123.35(O) violates Article II, Section 32 of the Ohio Constitution, which prohibits the General Assembly from exercising judicial power, Article IV, Section 1 of the Ohio Constitution, which vests superintending authority over the court system to the Ohio Supreme Court, and Article IV, Section 5 of the Ohio Constitution, which vests in the courts the exclusive authority over the rules governing judicial practice and procedure. Petitioners raised these claims in their Merit Brief and explained why the claims lack merit. (Petitioner's Brief, pp. 15-22). Mr. Stolz has remained silent as to these claims. Petitioners contend that it is unequivocal that R.C. 4123.35(O) is constitutional as to these claims, which Mr. Stolz's silence acknowledges.

CONCLUSION

Based on this Court's longstanding precedent, Respondent Daniel Stolz cannot prevail on any of his constitutional challenges. R.C. 4123.35(O) does not violate any provision of the Ohio Constitution. Therefore, Petitioners J & B Steel, D.A.G., and TriVersity respectfully request that the Court answer the certified question in the negative and hold R.C. 4123.35(O) constitutional.

Respectfully submitted,

/s/ Colleen M. Blandford
Colleen M. Blandford #0061877
Jordan T. Steiner #0093760
Kohnen & Patton LLP
PNC Center, Suite 800
201 East Fifth Street
Cincinnati, OH 45202
Phone: (513) 381-0656
Fax: (513) 381-5823
cblandford@kplaw.com
Attorneys for Petitioner, J & B Steel Erectors, Inc.

/s/ Susan Salyer
Susan M. Salyer, Esq. #0076623
Stephen M. Yeager, Esq.
Stephen J. Patsfall, Esq.
Patsfall, Yeager & Pflum LLC
Textile Building, Suite 1280
205 W. Fourth Street
Cincinnati, Ohio 45202
Attorneys for Petitioners, TriVersity Construction Co., LLC, D.A.G. Construction Co., Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certify that a copy of the foregoing was served via email and/or U.S. Mail this 7th day of March 2018 upon the following:

Brett Goodson, Esq.
Goodson & Company, Ltd.
110 East Eighth Street, Suite 200
Cincinnati, OH 45202-2132
Attorney for Respondent

Stephanie M. Day, Esq.
Beckman Weil Shepardson LLC
895 Central Ave., Suite 300
Cincinnati, OH 45202
Attorney for Respondent

Robert W. Hojnoski, Esq.
Nathan A. Lennon, Esq.
Reminger Co., LPA
525 Vine St., Suite 1700
Cincinnati, OH 45202
Attorneys for Defendant Terracon Consultants, Inc.

Jane M. Lynch, Esq.
Jared A. Wagner, Esq.
Green & Green, Lawyers
800 Performance Place, Suite 109
Dayton, OH 45402
Attorneys for Amicus Curiae Messer Construction Co.

Mike DeWine, Attorney General of Ohio
Eric E. Murphy, Esq., State Solicitor
Michael J. Hendershot, Esq., Chief Deputy Solicitor
30 East Broad Street, 17th Floor
Columbus, OH 43215
Attorneys for Amicus Curiae State of Ohio

/s/ Colleen M. Blandford
Colleen M. Blandford #0061877

/s/ Susan M. Salyer
Susan M. Salyer, Esq. #0076623