

SUPREME COURT OF OHIO TO HEAR CASE ADDRESSING SUBCONTRACTOR HORIZONTAL IMMUNITY

AUGUST 2015

On June 24, 2015, the Supreme Court of Ohio accepted a certified question submitted by the United States District Court for the Southern District of Ohio. The question certified is whether Ohio Rev. Code §§ 4123.35 and 4123.74 provide immunity to subcontractors re-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. If the Supreme Court of Ohio holds that Ohio law provides such immunity to subcontractors enrolled in controlled insurance programs, those subcontractors will be immune from suit by all employees injured on the project, regardless of the subcontractors' employment relationship with those individuals.

BACKGROUND

Ohio Revised Code § 4123.35(O) permits a self-insuring employer under Ohio's Workers' Compensation System the privilege of self-insuring construction projects that are scheduled for completion within six years with estimated costs of over \$100 million. These insurance programs are either controlled by the owner of the project (Owner Controlled Insurance Program (OCIP)) or the general contractor (Contractor Controlled Insurance Program (CCIP)), who secures coverage for every person working on the project by way of a wrap-up agreement. This wrap-up insurance provides all employees of the contractors and subcontractors insurance protection for injuries arising out of the course and scope of their employment on the construction project.

R.C. § 4123.35 further provides that a self-insuring employer is entitled to protections provided under Ohio's workers' compensation laws with respect to the "employees of the contractors and subcontractors," as if those employees were employees of the self-insuring employer. The statute also states that contractors and subcontractors covered by the controlled insurance program are entitled to those same protections with respect to "the contractor's or subcontractor's employees who are employed on the construction project."

Notably, pursuant to R.C. § 4123.74, a self-insuring employer in compliance with R.C. § 4123.35 is afforded immunity from tort actions brought by its employees. Such immunity is commonly understood to include "vertical" immunity, where the employer is immune from tort actions filed by one of its direct employees. However, some have argued the statute is ambiguous as to whether a subcontractor is entitled to "horizontal" immunity from a lawsuit brought by an injured employee of another subcontractor working on the project.

The Supreme Court of Ohio will answer the certified question in the case of *Stolz v. J & B Steel Erectors, et al.*, Case No. 2015-0628. In *Stolz*, Messer Construction served as the general contractor on a casino project in Cincinnati, Ohio. Messer obtained authority from the Ohio Bureau of Workers' Compensation to self-insure workers' compensation claims under a CCIP. Daniel Stolz, an employee of Jostin Construction, Inc., was injured on the project and filed suit in Hamilton County, Ohio against Messer, as well as subcontractors DAG Construction, J & B Steel Erectors, and Triversity Construction, all of which were properly enrolled subcontractors under the relevant wrap-up policy. Within days, James

Lancaster, another Jostin employee who was injured while working on the project, filed an action against the same defendants in the Hamilton County Court of Common Pleas.

The trial court in the *Lancaster* action granted summary judgment to Messer, DAG, J & B, and Triversity, reasoning that Lancaster was a constructive employee of Messer and, therefore, a constructive co-employee of the defendant subcontractors. Accordingly, Messer was entitled to “vertical immunity,” and the subcontractor defendants were entitled to “horizontal” immunity from suit pursuant to R.C. §§ 4123.35 (O) and 4123.74.

After this decision, Stolz, a Kentucky resident, dismissed his suit and re-filed the action in the United States District Court for the Southern District of Ohio. Messer, DAG, J & B, and Triversity all filed for summary judgment in the *Stolz* action, again claiming that they were immune from suit under Ohio law. The District Court held that Messer was entitled to the well-recognized “vertical” immunity pursuant to R.C. §§ 4123.35 (O) and 4123.74, but held that the subcontractors were entitled only to that same “vertical” immunity from its own actual employees. In doing so, the District Court rejected the Hamilton County Court’s holding that the defendant subcontractors were entitled to “horizontal” immunity from Stolz’s lawsuit.

Recognizing that its decision was in direct conflict with the Hamilton County Court of Common Pleas’ decision in *Lancaster* and that both cases involved an interpretation of Ohio law that had not yet been addressed by the Supreme Court of Ohio, the District Court certified the question of whether “horizontal” immunity is available to subcontractors enrolled in a CCIP pursuant to R.C. §§ 4123.35 (O) and 4123.74. The Supreme Court accepted the certified question and will issue an opinion in the coming year.

Should the Supreme Court of Ohio determine that subcontractors are not entitled to “horizontal” immunity, the law as it presently exists on non-controlled insurance program construction projects will apply to CCIP and OCIP projects. Subcontractors will only be entitled to “vertical” immunity from suit by their own employees injured on the project. Accordingly, subcontractors will need to contact their insurance providers to discuss carrying additional CGL coverage to address the possibility of suit by employees of other subcontractors.

ADDITIONAL INFORMATION

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