STATE OF MINNESOTA
IN COURT OF APPEALS
A11-962

Matthew Scherber, individually and by his wife,
guardian and conservator, Lindsay Scherber,
Appellant,

vs.

Nor-Son, Inc., defendant and third party plaintiff,
Respondent,

vs.

Select Carpentry & Components, Inc., et al., third party defendants,
Respondents,

Tradesmen International, Inc., third party defendant,
Respondent.

Filed April 2, 2012
Affirmed
Larkin, Judge

Mille Lacs County District Court
File No. 48-CV-09-1754

Michel S. Krug, Krug & Zupke, P.C., St. Paul, Minnesota (for appellant)

Lee A. Miller, Paul E. Darsow, Beth A. Jenson Prouty, Arthur, Chapman, Kettering, Smetak & Pikala, P.A., Minneapolis, Minnesota (for respondent Nor-Son, Inc.)

Timothy R. Murphy, Stephen M. Warner, O'Neill & Murphy, LLP, St. Paul, Minnesota (for respondents Select Carpentry & Components, Inc., et al.)

John C. Hughes, Meagher & Geer, P.L.L.P., Minneapolis, Minnesota (for respondent Tradesmen International, Inc.)

Considered and decided by Peterson, Presiding Judge; Larkin, Judge; and Crippen, Judge.*

U N P U B L I S H E D O P I N I O N

LARKIN, Judge

Appellant challenges the district court's summary-judgment dismissal of his complaint, by which he sought damages related to injuries he sustained when he fell off of a roof while working as a carpenter on a construction project. Appellant argues that the district court erred in concluding that appellant's lawsuit against the general contractor is barred by the common-enterprise doctrine set forth in Minn. Stat. § 176.061, subds. 1, 4 (2010). We affirm.

FACTS

In November 2008, appellant Matthew Scherber was employed as a carpenter by respondent Tradesmen International Inc., a labor broker that supplies laborers for construction projects. Respondent SCC Carpenters LLC contracted for Scherber's services under a client-services agreement with Tradesmen and assigned Scherber to work on a commercial construction project in Onamia. Respondent Nor-Son Inc. was the general contractor on the project, and SCC Carpenters was a subcontractor. Respondent Select Carpentry & Components Inc. provided building materials for the project.

Scherber worked on the project as part of a four-member carpentry crew that was responsible for the installation of a roof. The crew included Scherber, SCC employees

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

Matthew Smith and Luke Miller, and Nor-Son employee Zak Klancher. Klancher was assigned to work with the SCC crew because of concerns that SCC did not have enough manpower to timely complete the work required under its subcontract.

On November 25, Nor-Son's safety director conducted a safety inspection at the jobsite. On that day, the crew was sheathing the southwest valley of the roof. The fall protection in the southwest valley was limited to a lift box and toe boards that were installed at the bottom of the left and right sides of the slope. Nor-Son's safety director deemed the fall protection inadequate, and a discussion ensued regarding adequate fall protection. Nor-Son's safety director told the job foreman to "put guardrails up there or get your employees tied off." That afternoon, Nor-Son requisitioned materials for the installation of guardrails. After the crew completed the sheathing in the southwest valley, it moved the lift box to the adjacent western slope, leaving the toe boards as the only fall protection in the southwest valley.

On the morning of November 26, frost covered the sheathed areas of the roof. Because the frost made it unsafe to work in the sheathed areas, Scherber's crew was instructed to install sheathing on the western slope of the roof. Because there was no sheathing on the western slope, there was no frost on this area. The crew members discussed their work plan for the western slope. They also discussed the visible frost on the adjacent southwest valley of the roof. Scherber was present for this discussion. The crew members agreed that they would not enter the southwest valley of the roof because the frost made that area dangerous and there were no guardrails to protect them from

falling off of the roof; there were only toe boards, which had been deemed inadequate fall protection.

The four crew members began to install the first row of sheathing on the bottom edge of the western slope. To provide adequate fall protection, the crew members worked inside of a lift box that was positioned on the bottom edge of the western slope. After the crew installed the first row of sheathing, it installed guardrails at the bottom of the western slope. Next, the crew members split into two teams to begin sheathing the rest of the western slope. Klancher and Scherber cut the wood needed to frame and sheath the roof. They worked side-by-side in the lift box, taking turns using a circular saw. Klancher delivered sheathing to Smith, who nailed it into place on the framed area of the western slope. Miller was positioned underneath the roof along access holes that Klancher and Smith created along the edge of the western slope where it met the southwest valley. Scherber delivered boards to Miller, and Miller nailed the boards to the hip joints. To reach Miller, Scherber had to walk over the sheathing that Klancher had cut and carried to Smith and that Smith had nailed into place on the western slope.

After making several trips up the roof, over the sheathing, and to Miller, Scherber misstepped into the southwest valley. He slipped and landed face down, with his feet directed toward the ground. He slid down the southwest valley of the roof on his stomach. One of his feet hit a toe board, spinning him over the edge of the roof. Scherber fell 28 feet to the frozen ground below. He suffered a seizure as a result of the impact, as well as multiple head and facial fractures. Scherber's injuries were severe and included a traumatic brain injury and permanent blindness. The injuries have left him

permanently disabled and unable to work. He suffers from dementia and resides in a foster facility that specializes in the care of people with traumatic brain injuries.

After the accident, Scherber requested and received workers' compensation benefits from Tradesmen. After electing to receive workers' compensation benefits as compensation for his injuries, Scherber sued Nor-Son, seeking damages. Nor-Son asserted third-party claims for contribution and indemnity against SCC Carpenters, Select Carpentry & Components, and Tradesmen. Nor-Son moved for summary judgment, arguing that Scherber's claims are barred under the common-enterprise and primary-assumption-of-risk doctrines. The district court granted Nor-Son's motion for summary judgment under the common-enterprise doctrine[1] and dismissed as moot Nor-Son's claims for indemnity and contribution against SCC Carpenters and Select Carpentry & Components.[2] This appeal follows.

D E C I S I O N

"A motion for summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). "[T]here is no genuine issue of material fact for trial when the nonmoving

[1] The district court determined that genuine issues of material fact precluded an award of summary judgment under the primary-assumption-of-risk doctrine. Nor-Son has not requested review of that determination. We therefore do not address Scherber's appellate arguments regarding primary assumption of the risk.

[2] The district court dismissed Nor-Son's claims against Tradesmen based on the stipulation of those parties.

party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). "[T]he party resisting summary judgment must do more than rest on mere averments." *Id.*

"[Appellate courts] review a district court's summary judgment decision de novo. In doing so, we determine whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment." *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010) (citation omitted). "On appeal, the reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted." *Fabio*, 504 N.W.2d at 761.

"Workers' compensation laws are designed to provide a comprehensive system for compensating injured employees regardless of fault or negligence." *Silva v. Maplewood Care Ctr.*, 582 N.W.2d 566, 568 (Minn. 1998). Under the workers' compensation act,

> [i]f an injury or death for which benefits are payable occurs under circumstances which create a legal liability for damages on the part of a party other than the employer and at the time of the injury or death that party was insured or self-insured in accordance with this chapter, the employee, in case of injury, or the employee's dependents, in case of death, may proceed either at law against that party to recover damages or against the employer for benefits, but not against both.

Minn. Stat. § 176.061, subd. 1. This provision applies, in relevant part, "only if the employer liable for benefits and the other party legally liable for damages are insured or self-insured and engaged, in the due course of business in . . . furtherance of a common

enterprise." *Id.*, subd. 4. In sum, "[a]n injured employee may bring suit against an employer for benefits or against a third party for damages, but not against both, if the employer and the third party are engaged in a common enterprise." *Olson v. Lyrek*, 582 N.W.2d 582, 584 (Minn. App. 1998), *review denied* (Minn. Oct. 20, 1998). The purpose of the common-enterprise doctrine is to preserve the no-fault compromise embodied in the workers' compensation act while preventing double recovery by an injured person from both his employer and another third-party employer where both employers have joined their employees into a common pool. *See O'Malley v. Ulland Bros.*, 549 N.W.2d 889, 893 (Minn. 1996); *Ritter v. M.A. Mortenson Co.*, 352 N.W.2d 110, 112-13 (Minn. App. 1984).

"In order for a common enterprise to exist [t]he employers must be engaged on the same project; [t]he employees must be working together (common activity); and [i]n such fashion that they are subject to the same or similar hazards." *Olson*, 582 N.W.2d at 584 (quotation omitted). This court determines, de novo and as a matter of law, whether a common enterprise existed in this case. *See O'Malley*, 549 N.W.2d at 898 (stating that "the question of whether a common enterprise existed is one of law, subject to de novo review"). Scherber concedes that the employers, Nor-Son and SCC, were engaged on the same project and that their employees[3] were working together on a common activity. We therefore limit our analysis to the third factor: whether the employees were subject to the same or similar hazards.

[3] Scherber does not dispute that, for purposes of the common-enterprise analysis, he is considered an employee of SCC.

"The same or similar hazards requirement does not demand exposure to identical hazards, only similar hazards." *Olson*, 582 N.W.2d at 584. "In determining whether workers are exposed to similar hazards, we make a comparison of the general risks to which workers are exposed as a result of the tasks being performed." *Id.* In this case, the district court concluded that every person on Scherber's crew was exposed to similar risks, including being injured by a saw or nail gun, being electrocuted by a power tool, or falling off of the roof.

Scherber argues that the common-enterprise doctrine does not apply because he was the only person exposed to the danger of falling off of the roof in the unprotected southwest valley area. He contends that he had the greatest exposure to the risk of falling in the unprotected area because his specific task required him to repeatedly enter the area where the edge of the western slope met the unprotected southwest valley.

Scherber's argument is unavailing for the following reasons. First, this is not a case in which the crew members were exposed to different risks because they engaged in different activities, used different equipment, or worked in different physical locations. *See Schleicher v. Lunda Constr. Co.*, 406 N.W.2d 311, 313-14 (Minn. 1987) (holding that concrete truck drivers and conveyor system operators, while advancing the same goal, were exposed to different hazards and engaged in different activities); *Olson*, 582 N.W.2d at 584 (holding that an individual laying pipe in a trench and an individual digging dirt out of the trench were not exposed to the same or similar hazards because they "were performing separate tasks[,] . . . did not use the same equipment, nor did they work in the same physical areas"); *Sorenson v. Visser*, 558 N.W.2d 773, 776 (Minn. App.

1997) (holding that an electrician and a trench digger were not exposed to the same or similar hazards because the trench digger was not subject to the hazards of physically being in the trench, such as trench cave-ins). Instead, all of the crew members worked on or directly under the roof and were exposed to the risk of falling, and it is undisputed that the four crew members alternated tasks during the construction of the roof.

Second, Scherber's argument mischaracterizes the third prong of the common-enterprise test. The question is not whether the hazards are identical, but rather, whether the hazards are the "same or similar." *O'Malley*, 549 N.W.2d at 896. Moreover, the undisputed facts belie Scherber's assertion that because

> he was the ***only*** one required to work at the edge of the roof (intersection of western slope with [southwest] valley) where fall protection ended, and the only one who worked along the peak of the roof when there was no fall protection on the other side of the roof's slope, . . . he was exposed to greater danger and different risks [than the other employees].

It is undisputed that Nor-Son employee Klancher and SCC employee Smith constructed the very area where Scherber was working when he fell. Klancher delivered plywood to Smith, who nailed it into place both at the western slope's peak and the edge where it joined the southwest valley. Because Klancher and Smith worked in the same area as Scherber on the morning of the accident, they were subject to similar risks.

We also observe that Scherber, Klancher, Smith, and Miller were all exposed to the same weather hazards, the same risk of being injured by tools, the same risk of falling while getting on and off of the roof, and the same risk of slipping and falling on, and possibly off of, the roof. Scherber dismisses the shared risks that did not cause his

injuries. But Minnesota law holds that the proper focus of the similar-hazards inquiry is on the general risks to which workers are exposed. *See Olson*, 582 N.W.2d at 584 (refusing to "focus on the actual cause of the injury rather than the tasks being performed or the general risks involved"); *Higgins v. Nw. Bell Tel. Co.*, 400 N.W.2d 192, 195 (Minn. App. 1987) (citing shared hazards other than the risk of slips and falls to support a determination that the similar-hazards factor was satisfied, even though the plaintiff sustained a slip-and-fall injury), *review denied* (Minn. Mar. 25, 1987).

Many of Scherber's appellate arguments are unrelated to the common-enterprise determination. Scherber argues that the district court erred in "granting summary judgment in this case because . . . Nor-Son substantially caused [Scherber's] injuries when it failed to install adequate fall protection around the entire roof perimeter in violation of Occupational Safety & Health Administration (OSHA) regulations." He further contends that "[t]he lack of fall protection for the [southwest] valley was a direct (substantial) cause of [Scherber's] fall to the ground and he sustained life-changing injuries as a result of the fall. [Scherber], therefore, presented a *prima facie* case of negligence" and that "[t]aking the evidence in the light most favorable to the non-moving party, it is impossible to find under these circumstances that Nor-Son did not breach its duty to [Scherber] and that such breach did not substantially cause [Scherber's] injuries." According to Scherber, "[t]his is a case about a specific breach of duty by Nor-Son in failing to follow OSHA regulations that, if followed, would have prevented [Scherber's] fall to the ground." These arguments are not relevant to our review of the summary-judgment dismissal, which was based solely on the common-enterprise doctrine.

Scherber also argues that the district court "failed to review the evidence in the light most favorable to [him], making improper factual determinations of disputed material fact in the complete absence of a recital to any of [his] exhibits." He contends that "[i]t is startling to see that the [district] court . . . made no references to the 59 Exhibits introduced . . . in response to [Nor-Son's] summary judgment motion." But because our review is de novo, these arguments do not impact our analysis or decision on appeal. *See Black's Law Dictionary* 112 (9th ed. 2009) (stating that an "appeal de novo" is one "in which the appellate court uses the trial court's record but reviews the evidence and law without deference to the trial court's rulings").

We nonetheless observe that the evidence that Scherber emphasizes does not raise a genuine issue of material fact regarding the existence of a common enterprise. "A material fact is one which will affect the result or the outcome of the case depending on its resolution." *Musicland Grp., Inc., v. Ceridian Corp.*, 508 N.W.2d 524, 531 (Minn. App. 1993), *review denied* (Minn. Jan. 27, 1994). Because the district court's summary-judgment dismissal is based on the common-enterprise doctrine, the only material facts are those that bear on the three components of the common-enterprise test. Thus, facts regarding Nor-Son's alleged breach of a duty of care are not material to a judicial determination regarding the existence of a common enterprise; Nor-Son's fault is simply not a relevant consideration in a common-enterprise analysis under Minnesota law.

Although Scherber's accident was tragic and his injuries are devastating, this court is bound to follow the law in determining whether Scherber's claims are barred under Minn. Stat. § 176.061, subds. 1, 4. In doing so, this court may not favor Scherber's

interests over those of Nor-Son. Although the supreme court previously held that "the plaintiff should have the benefit of the rule of construction that the Workmen's Compensation Act must always be construed most liberally in favor of the injured workman," *McCourtie v. U.S. Steel Corp.*, 253 Minn. 501, 510-11, 93 N.W.2d 552, 559 (1958), the supreme court later recognized that the legislature altered this rule of construction in 1983, "when the legislature amended chapter 176, and specifically stated that: 'questions of law arising under chapter 176 shall be determined on an *even-handed basis* in accordance with the principles laid down in section 176.001.'" *O'Malley*, 549 N.W.2d at 893 (quoting Minn. Stat. § 176.021, subd. 1a (1994)).

The current version of section 176.021 similarly states that "[a]ll disputed issues of fact arising under this chapter shall be determined . . . in accordance with the principles laid down in section 176.001." Minn. Stat. § 176.021, subd. 1a (2010). Section 176.001 declares that:

> It is the specific intent of the legislature that workers' compensation cases shall be decided on their merits and that the common law rule of "liberal construction" based on the supposed "remedial" basis of workers' compensation legislation shall not apply in such cases. The workers' compensation system in Minnesota is based on a mutual renunciation of common law rights and defenses by employers and employees alike. Employees' rights to sue for damages over and above medical and health care benefits and wage loss benefits are to a certain degree limited by the provisions of this chapter, and employers' rights to raise common law defenses such as lack of negligence, contributory negligence on the part of the employee, and others, are curtailed as well. Accordingly, the legislature hereby declares that the workers' compensation laws are not remedial in any sense and are not to be given a broad liberal construction in favor of the claimant or employee on the one

> hand, nor are the rights and interests of the employer to be favored over those of the employee on the other hand.

Minn. Stat. § 176.001 (2010). The supreme court has recognized the legislature's declared intent and held that "the even-handed standard is the correct standard to apply in determining questions of law under the Act. . . . [T]hat is to say, that the Act shall be construed in a nondiscriminatory fashion." *O'Malley*, 549 N.W.2d at 894.

Based on an even-handed application of the law and the undisputed, relevant portions of the record, this court concludes that SCC and Nor-Son were engaged in a common enterprise. And because Scherber elected to receive workers' compensation benefits from his employer, he may not pursue damages against Nor-Son. The district court therefore properly dismissed Scherber's complaint against Nor-Son.

Affirmed.