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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1270**

Dominic Lundebrek,
Appellant,

vs.

S. J. Louis Construction, Inc. a/k/a S. J. Louis Construction, LLC,
Respondent.

**Filed April 20, 2010
Reversed
Halbrooks, Judge**

Benton County District Court
File No. 05-CV-09-576

T. Joseph Crumley, Bradshaw & Bryant, PLLC, Waite Park, Minnesota (for appellant)

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Considered and decided by Halbrooks, Presiding Judge; Schellhas, Judge; and
Crippen, Judge.*

UNPUBLISHED OPINION

HALBROOKS, Judge

Appellant Dominic Lundebrek challenges the district court's grant of summary judgment to respondent S. J. Louis Construction, Inc., arguing that the district court erred

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

by holding that appellant is barred from recovering monetary damages from respondent because appellant elected to receive workers' compensation benefits from his employer. Because we conclude that the election-of-remedies provision of the Minnesota Workers' Compensation Act does not preclude appellant from seeking monetary damages from respondent and that the loaned-servant doctrine is not applicable to the undisputed facts, we reverse.

FACTS

At the time of this accident, appellant was an employee of Hardrives Corporation, a concrete-block manufacturer. In May 2006, appellant was contacted by Leon Salzl, an employee of respondent S. J. Louis Construction, Inc. (SJLC), regarding the construction of a retaining wall.¹ Appellant used a computer software program to create a retaining-wall design for Salzl, and Salzl subsequently ordered the concrete blocks required to construct the retaining wall. Because Salzl indicated that he did not know how to install the blocks, appellant offered to come to the job site at SJLC to instruct the crew how to fit the blocks together.² According to the record, appellant would occasionally assist Hardrives' customers by demonstrating how to set the concrete blocks. Hardrives' invoice for SJLC's purchase lists only the cost of the concrete blocks; there was no charges for appellant's assistance or other labor costs.

¹ Respondent is in the business of municipal sewer and water construction.

² In his deposition, appellant described the size of a concrete block as "46 inches by 18 inches tall on the face and 28 inches deep" and weighing 1,768 pounds.

Salzl began preparation for the wall's installation the day before the blocks were delivered to SJLC's premises. Appellant arrived at the work site soon after the blocks had been delivered in order "[t]o teach [SJLC's employees] how to install the wall." It was Salzl's understanding that appellant "was just going to help [him] get started to make sure it was going to work and then [appellant] was going to leave." According to Salzl, appellant was "kind of in charge" during the installation of the first few blocks, but Salzl was in charge of the entire project.

Appellant testified that he told Salzl to get another coworker to assist in the wall's installation, so another employee of SJLC, Rodney West, came out to the job site and worked with Salzl. Salzl operated a skid loader to lift the concrete blocks off the truck and put them in place. Appellant signaled Salzl to move the skid loader according to where the initial blocks needed to be placed and helped guide the blocks into place. The blocks were hooked to the skid loader,³ and West watched appellant connect the interlocking blocks, as he was going to perform that function after appellant left. After the first few blocks were placed, appellant's hand was injured when it was struck by the bottom of the skid loader bucket that Salzl was operating. Following his injury, appellant left the site. Salzl and West continued to construct the wall. According to West, the installation of the wall took a couple of days to complete.

Appellant filed a claim for and received workers' compensation benefits from Hardrives' insurer. Appellant subsequently filed suit against SJLC, alleging negligence

³ Although the record contains conflicting testimony as to whether Salzl or West hooked the blocks to the skid loader, the record is clear that appellant was not involved in this part of the project.

on the part of SJLC's employee, Salzl. In its answer, SJLC asserted that appellant's complaint is "barred . . . by the exclusivity provisions of the Minnesota Workers' Compensation Act," because appellant and SJLC were engaged in a common enterprise at the time of the accident. SJLC also alleged that appellant's cause of action is barred pursuant to the loaned-servant doctrine. SJLC moved for summary judgment on both grounds, and the district court granted SJLC's motion. This appeal follows.

DECISION

"On an appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the [district] court[] erred in [its] application of the law." *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). 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 as to any material fact and that [the moving] party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. "On appeal, the reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). "When the district court grants summary judgment based on the application of a statute to undisputed facts, the result is a legal conclusion that we review de novo." *Weston v. McWilliams & Assocs., Inc.*, 716 N.W.2d 634, 638 (Minn. 2006) (citing *Lefto v. Hoggsbreath Enters., Inc.*, 581 N.W.2d 855, 856 (Minn. 1998)).

I.

Appellant argues that the district court erred by holding that he is precluded from suing SJLC, a third party, because he elected to receive workers' compensation benefits under Minn. Stat. § 176.061 (2008). Under the Minnesota Workers' Compensation Act, an employee who is injured on the job by an act of a third party "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. It is undisputed that appellant received workers' compensation benefits from Hardrives. But the election-of-remedies provision only applies "if the employer liable for benefits and the other party legally liable for damages . . . engaged, in the due course of business in . . . furtherance of a common enterprise." *Id.*, subd. 4. "[A] common enterprise exists if all of the following three factors are met: (1) [t]he employers must be engaged on the same project; (2) [t]he employees must be working together (common activity); and (3) [i]n such fashion that they are subject to the same or similar hazards." *O'Malley v. Ulland Bros.*, 549 N.W.2d 889, 894 (Minn. 1996) (emphasis omitted) (quotation omitted). "The aim of the election of remedies provision is to prevent a double recovery by an injured person from both the employer and a third party where the masters have joined forces and in effect have put the servants into a common pool." *Carstens v. Mayers, Inc.*, 574 N.W.2d 733, 735 (Minn. App. 1998) (quotation omitted), *review denied* (Minn. Mar. 26, 1998). Although the district court did not analyze the applicability of the relevant factors to the undisputed facts in this matter, we conclude that such an analysis is necessary in order to resolve the question of whether Hardrives and SJLC were engaged in a common enterprise.

Regarding the first element, the proper focus is whether Hardrives and SJLC were working on the same project. *See id.* at 736 (“[T]he first prong . . . encompasses the relationship between employers.”). In determining whether the first element is met, it is appropriate to consider whether the employers shared functions and whether there was a long-standing relationship between them. *O’Malley*, 549 N.W.2d at 895. “[A] substantial relation must exist between the employer and the third party to bring them within this subdivision. Not every contact between an employer and a third party in the course of conducting their separate businesses constitutes engagement by them on the same project.” *Id.* (quotation omitted).

The record does not reflect that Hardrives and SJLC had a long-standing relationship. The two companies were engaged in significantly different businesses—concrete manufacture and sale and municipal water and sewer construction, respectively. Although Hardrives supplied SJLC with retaining-wall blocks again the following summer for a new project, this infrequent contact is not sufficient to demonstrate a long-standing relationship that would suggest the parties were engaged in the same project. In *O’Malley*, the respondent, a general contractor, hired a subcontractor to load and haul materials to and from its construction site. *Id.* at 890-91. The appellant, an employee of the subcontractor, was injured when the truck he was operating at the site was struck by another vehicle driven by one of the respondent’s employees. *Id.* at 891. The appellant received workers’ compensation benefits from his employer’s insurer, but also brought a negligence suit against the respondent. *Id.* at 892. As in this case, the respondent argued that the appellant was precluded from recovery because the respondent and the

subcontractor were engaged in a common enterprise on the job site. The supreme court agreed, and on the same-project element, held that because “the employers shared equipment, assisted in hauling for each other, coordinated the work flow by sending messages through each other, prepared road surfaces for each other . . . and assisted each other in extricating vehicles stuck in the fill material,” the two sets of employers were engaged in the same project. *Id.* at 895.

But here, the undisputed facts demonstrate that Hardrives and respondent were not engaged in the same project. Hardrives delivered concrete blocks to SJLC’s site, and appellant provided Salzl and West with guidance as to how to connect the interlocking blocks. Beyond the delivery of these blocks and the brief instruction, Hardrives was not involved in the installation of the retaining wall. Further, Salzl testified that his supervisor approved the ultimate plan for the retaining wall, that SJLC supplied the laborers and machinery to install the retaining wall, and that SJLC’s employees did the vast majority of work before, during, and after appellant was at the work site. West testified that he and Salzl continued the installation of the wall immediately after appellant’s injury and into the following day. Because Hardrives and SJLC were not engaged on the same project of installing the retaining wall, we conclude that the first element of a common enterprise has not been met.

As to the second element, the test requires that the employees are “working together” or engaged in a “common activity.” *Id.* “Working together requires the activities of the employees be more than overlapping minimally; they must be ‘interdependent.’” *Carstens*, 574 N.W.2d at 735 (quoting *Schleicher v. Lunda Constr.*

Co., 406 N.W.2d 311, 313-14 (Minn. 1987)). When companies perform different types of work and the tasks are only generally related to each other, there is no common activity. *Kaiser v. N. States Power Co.*, 353 N.W.2d 899, 906 (Minn. 1984). In *Carstens*, this court held that two sets of employees were not engaged in a common activity when “nothing about their work required them to be working together.” 574 N.W.2d at 736. *Carstens* involved employees of a general contractor and a subcontractor, all of whom were working on building a foundation. *Id.* at 734–35. Both sets of employees worked in the trench at the same time, but the appellant performed excavation work while the respondent’s employees worked on other tasks. *Id.* at 735. The respondent’s employees would occasionally tell the appellant how deep to dig in the trench, but at no time did they help the appellant with the digging. *Id.* at 736. We held that this assistance provided by the respondent’s employees did not constitute the “interdependence” necessary for a common enterprise, but only amounted to a “favor or an accommodation.” *Id.*

Here, as in *Carstens*, the activities of appellant and Salzl were only minimally overlapping. Salzl testified that he alone did the preparation work for the retaining wall the day before appellant assisted at the site; Salzl and West testified that they continued to install the retaining wall after appellant sustained his injury and left the site; and the record does not reflect that appellant engaged in any other activity related to the installation of the concrete blocks except for the instruction that he provided with respect to the first few blocks. Hardrives and SJLC were performing entirely different types of work—appellant was providing instruction on setting the blocks together, and SJLC was

installing a retaining wall. Unlike the line of “crane cases” relied upon by SJLC, where a general contractor and a subcontractor worked together on a common task, appellant and SJLC’s tasks are only generally related to one another. *See Ritter v. M.A. Mortenson Co.*, 352 N.W.2d 110, 113 (Minn. App. 1984) (holding that the common activity element was satisfied when the employees of the general contractor and subcontractors were “all part of one crew”).

SJLC contends that “[a]t the time of this accident, appellant . . . was actively participating in the construction of the retaining wall.” We disagree with such a broad characterization of appellant’s role on the day of the accident. The fact that appellant was only at the site to offer brief instruction to SJLC’s employees is undisputed. We therefore conclude that appellant, Salzl, and West were not engaged in a common activity and therefore the second element of “common enterprise” is not met in this case.

The third element of a common enterprise requires that the employees be subject to the same or similar hazards. “The same or similar hazards requirement does not demand exposure to identical hazards, only similar hazards. 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.” *Olson v. Lyrek*, 582 N.W.2d 582, 584 (Minn. App. 1998) (citation omitted), *review denied* (Minn. Oct. 20, 1998). The focus is not on the instrumentality that caused the injury, but on the exposure to common hazards. *Id.*

Both parties focus on the risks facing appellant and Salzl, and as between these two individuals, we conclude that the risks facing each of them were substantially

different. In *Olson*, we held that the risks facing two employees were not similar when one employee was laying pipe in a trench and the other employee was digging dirt out of the trench with a backhoe. *Id.* Likewise, appellant was subjected to risks associated with the concrete bricks and the machines, but Salzl did not face these same risks as he was operating the skid loader. But neither party mentions the fact that West, another employee of SJLC, was also at the work site watching appellant set the blocks. Indeed, West's purpose was to take over for appellant after West learned how to set the blocks. Both appellant and West were exposed to the hazards related to the installation of the heavy concrete blocks, and thus the third element in this case does fall in favor of SJLC. Nevertheless, all three elements must be present for a "common enterprise" to exist, *O'Malley*, 549 N.W.2d at 894, and the fact that appellant and West were exposed to similar hazards while appellant was on the site does not compensate for the failure of the first two prongs.

Because the undisputed facts do not demonstrate that all three factors necessary for a "common enterprise" exist, we conclude that the district court erred by granting summary judgment to SJLC based on the election-of-remedies component of the Minnesota Workers' Compensation Act.

II.

As an alternative ground to bar appellant's third-party tort claim, SJLC argues that Salzl was a loaned servant of Hardrives. If an employee is a loaned servant, liability of the employee's negligent acts shifts from the general employer to the borrowing employer. *Ismil v. L. H. Sowles Co.*, 295 Minn. 120, 123, 203 N.W.2d 354, 357 (1972).

“The question is not whether the worker remains the employee of the general employer as to general matters, but whether, as to the act in question, he is acting in the business of and under the direction of the borrowing employer.” *Id.* at 124, 203 N.W.2d at 357. The determination of whether a person is a loaned servant is generally a question of fact for the jury. *Nepstad v. Lambert*, 235 Minn. 1, 10, 50 N.W.2d 614, 619 (1951). But “where there is no dispute as to controlling facts and no jury would be entitled to find that there was not a loaned-servant relationship, the question becomes one of law for the court.” *Id.*

Minnesota courts have relied on two tests when considering whether an employee is a loaned servant. The first of the tests, the “whose business” test, assigns responsibility for the negligent act to the employer whose business was being furthered at that time. *Id.* at 11, 50 N.W.2d at 620. The second test, the “right of control or direction” test, “place[s] the responsibility for the servant’s negligence upon the employer having the right to control his actions at the time the negligent act occurs.” *Id.* at 12, 50 N.W.2d at 620. When utilizing this second test, the court must determine “which employer had the right to control the particular act giving rise to the injury,” because the aim of the test is to “impose the liability upon the employer who was in the best position to prevent the injury.” *Id.* at 12, 14, 50 N.W.2d at 620, 621-22. The borrowing employer must have the authority to exercise detailed control over the manner in which the work is to be done in order for the court to impose liability for the negligent act on that borrowing employer. *Id.* at 15, 50 N.W.2d at 622.

We conclude that under either test, the undisputed facts here do not demonstrate that Salzl was a loaned servant of Hardrives at the time of the accident. It was SJLC’s

business that was being furthered at the time of the installation of the retaining wall. Nothing about Hardrives' business was furthered by the proper installation of the blocks at SJLC's site. The installation plan had been finalized and approved, and the blocks had been purchased and delivered. The actions giving rise to the allegedly negligent act—constructing the retaining wall—furthered SJLC's business interests only. Additionally, Salzl and West testified that the work on the wall continued after appellant left the site and that no one from Hardrives took appellant's place. Applying the "whose business" test, we conclude that Salzl was not a loaned servant of Hardrives at the time of the accident.

Under the "right of control" test, SJLC's argument that Salzl was a loaned servant of Hardrives also fails. This test focuses on the *right* to control the actions giving rise to the negligent act. While SJLC is correct that appellant was briefly instructing Salzl at the time of the accident, Salzl testified that he was in charge of the project. SJLC continued to control Salzl's actions at the time of the accident; appellant did not direct Salzl in the operation of the machine, appellant did not tell Salzl when the project needed to be started or completed, and nothing suggests that appellant had the right to reprimand Salzl if he disobeyed appellant's instructions. *See id.* at 15, 50 N.W.2d at 662 (noting that the right to discharge the loaned employee is one element in measuring the right of control exercised by the borrowing employer). This set of facts is different from a situation such as *Nepstad*, where the crane operator lacked any knowledge of the plan and the borrowing employer exercised detailed affirmative control over the actions of the

operator. *Id.* at 16, 50 N.W.2d at 622-23. The record does not demonstrate that appellant had any right to control Salzl's actions at the time of the accident.

We conclude that the record does not support SJLC's argument that Salzl was a loaned servant of Hardrives at the time of the accident. Therefore, this defense is not available to SJLC at trial. The district court's grant of summary judgment is reversed.

Reversed.