THE COMMON ENTERPRISE DEFENSE IS ALIVE AND WELL, BUT STILL NOT WITHOUT LIMITS

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INTRODUCTION

A person injured in the course and scope of employment in Minnesota (or the person's dependents in case of death) generally has the right both to recover benefits from his or her employer under the Minnesota Workers' Compensation Act *and* to pursue damages from a third-party tortfeasor. But the Act contains an often-overlooked exception requiring an "election of remedies" in cases in which the employer and the third-party tortfeasor are insured and engaged in a "common enterprise" at the time of the injury or death. Minn. Stat. § 176.061, subds. 1, 4. In such cases, the injured employee may proceed *either* against the employer for workers' compensation benefits *or* against the third party for damages (no greater than the benefits recoverable under the Act), *but not both*. *Id.*, subds. 1, 2.

The Minnesota Supreme Court has long recognized a three-part test for the common-enterprise defense:

(1) the employers must be engaged on the same project;

(2) their employees must be working together (common activity); and

(3) in such fashion that they are subject to the same or similar hazards.

McCourtie v. U.S. Steel Corp., 93 N.W.2d 552, 556 (Minn. 1958). Given the nature of the defense, it frequently comes into play in construction cases in which the employees of multiple contractors are often working together at the time of an injury or death. But until the supreme court's recent decision in *Kelly v. Kraemer Constr., Inc.*, 896 N.W.2d 504 (Minn. 2017), the reach of the defense remained somewhat unclear and thus hotly disputed between the plaintiff and defense bars.

In *Kelly*, the supreme court addressed the common-enterprise defense for the first time in more than 20 years. A general contractor's employee was electrocuted and died while the general contractor and its subcontractor worked together on a bridge-repair project. The employee's family received workers' compensation benefits and then commenced suit against the subcontractor. In a 4-2 decision, the supreme court held that the general contractor and the subcontractor were engaged in a common enterprise such that the Act provided the exclusive remedy for the employee's family.

The *Kelly* decision reaffirms that the common-enterprise defense is alive and well in Minnesota. Following its holding twenty years ago in *O'Malley v. Ulland Bros.*, 549 N.W.2d 889 (Minn. 1996), the supreme court reaffirmed that the focus of the common-activity requirement is on the interdependence and coordination of the work being performed at the time of the accident, not just on the types of work being performed. The *Kelly* court also reaffirmed that the focus of the "same or similar hazards" requirement is on the general hazards arising from the work performed at the site, not just the hazard resulting in injury. Going forward, it is now clear that two employers can be engaged in a common enterprise even if their employees are performing distinct functions and are not exposed to identical hazards.

This article discusses the common-enterprise defense and the supreme court's broad application of the defense in *Kelly* after a twenty-year hiatus. This article then looks at how the defense has been applied in other construction contexts, including some of the well-defined limits that

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have been placed on the defense over the years. Finally, this article briefly discusses a question regarding the applicability of the common-enterprise defense that *Kelly* leaves unanswered.

THE COMMON ENTERPRISE DEFENSE

Prior to the enactment of the Act in 1913, an injured employee could bring a common-law action in negligence against his or her employer and a third-party tortfeasor. *McCourtie*, 93 N.W.2d at 555. But, with the adoption of the Act, the injured employee was required to choose between receiving compensation under the Act and bringing a common-law action in negligence against a third-party tortfeasor. *Id.* Either way, the injured employee's recovery was limited to the amount recoverable under the Act. *Id.*

In 1923, the Act was amended "to restore to the [i]njured person an enlarged remedy against the negligent third party." *Id.* (quoting *Gleason v. Geary*, 8 N.W.2d 808, 812 (Minn. 1943)). Specifically, the Legislature expanded the common law remedy available to injured employees by limiting the "election of remedies" provision of the Act to situations in which:

> 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, (1) furtherance of a common enterprise, or (2) in the accomplishment of the same or related purposes in operations on the premises where the injury was received at the time of the injury.

Minn. Stat. § 176.061, subd. 4. The supreme court explained the rationale for partially preserving the election of remedies provision as follows:

> [I]f the third party bore a certain relation to the employer, and was itself under the compensation act, then the employe[e] should be confined to his remedy under the compensation act. From a civic, economical and sociological point of view this position is sound. This reasoning rests upon the fact that the employe[e] should get from the third party the same award that he would get from his own employer if it alone were responsible for the acts proximately causing his injury. Being engaged in a 'common enterprise' or in the 'accomplishment of the same' or 'related purposes' in operation on the premises puts all the employers so engaged in the relative, if not actual, position of an employer of any such employe[e]. * * * In short, the community of interest gives the third party, who is subject to the compensation act, under this statute the status of an employer toward the employe[e].

O'Malley, 549 N.W.2d at 894-95 (quoting *Rasmussen v. George Benz & Sons*, 210 N.W. 75, 77 (Minn. 1926)). The supreme court has since recognized that the phrases "common enterprise" and the "accomplishment of the same or related purposes" mean the same thing. *See McCourtie*, 93 N.W.2d at 558.

Accordingly, when a worker is injured "under circumstances which create a legal liability for damages on the part of a party other than the employer" and the third party carries proper workers' compensation insurance and was engaged in a "common enterprise" with the employer, the Act mandates an election of remedies. Minn. Stat. § 176.061, subds. 1, 4. In such cases, the injured party "may proceed either at law against [the third] party to recover damages or against the employer for benefits, *but not against both*." *Id.*, subd. 1 (emphasis added).

The common-enterprise defense, if applicable, divests the court of subject-matter jurisdiction and thus can be raised at any time. *Sorenson v. Visser*, 558 N.W.2d 773, 776 n.1 (Minn. Ct. App. 1997) (citation omitted). Furthermore, because of the jurisdictional nature of the defense, an order applying or rejecting the defense is immediately appealable. *Olson v. Lyrek*, 582 N.W.2d 582, 583 (Minn. Ct. App. 1998), *rev. denied* (Minn. Oct. 20, 1998). Finally, the existence of a common enterprise does not preclude an employer from seeking subrogation from the negligent third party for workers' compensation benefits paid and payable. Minn. Stat. § 176.061, subd. 3.

***KELLY*'S FACTS**

Ulland Brothers, Inc., a general contractor, was hired to repair two bridges by replacing the culverts that created a channel for water to pass underneath the road. Because Ulland did not own the equipment needed to lift and place the new concrete box culvert sections, it hired Kraemer Construction, Inc. to perform the crane work. Ulland provided the culvert sections, specialized rigging equipment to connect the culvert sections to the crane cable, tie bars to connect the culvert sections, and a bulldozer, as well as a four-person crew. Kraemer provided the crane and a two-person crew—an operator and a signalman/oiler.

Before Kraemer's crew arrived on site, the Ulland crew diverted the stream, drained the streambed, removed the old culverts, and marked a 10-foot buffer zone around a nearby powerline. When Kraemer's crew arrived, the Ulland and Kraemer crews worked together to place the culvert sections:

> Rassier (Ulland), in the bulldozer, pushed each culvert section into the rigging area, where Wright (Ulland) and Poukka (Kraemer) attached it to the crane. Bergstrom (Kraemer) operated the crane, lifting the culvert section over to the excavated bridge area and then lowering it. Washburn (Ulland), Kisley (Ulland), and Poukka manually guided the culvert section as it was lowered. Rassier brought the bulldozer into the streambed to push the culvert section into position after the crane set it down. Some combination of the four workers in the streambed then attached the

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> lowered section to its neighbor and removed the crane rigging. As the spotter and signalman, Poukka was responsible for giving signals to Bergstrom to raise and lower the crane load and for preventing the crane from getting too close to the powerline.

896 N.W.2d at 506-07. As the crane lowered the last culvert section, Washburn and Poukka grabbed it to guide it into place. When he touched the culvert section, Washburn was electrocuted and died. Poukka felt a jolt but was not seriously injured.

Washburn's family received workers' compensation benefits. The trustee for Washburn's next of kin (Kelly) then commenced a wrongful-death action against Kraemer, who moved for summary judgment. Kraemer argued that it and Ulland were engaged in a common enterprise such that the action was barred by the election-of-remedies provision of the Act. Kelly conceded, as plaintiffs often do, that the "same project" requirement of the common-enterprise defense was met but argued that fact issues existed concerning the two remaining requirements. The district court agreed.

The district court held that "the Kraemer employees' duties were very different and arguably separate from those of the Ulland employees" and that there was "a question of fact as to whether or not the Ulland employees were even necessary for the Kraemer employees to perform the crane work and vice versa." Further, the district court concluded that "the risks associated with the Kraemer employees' jobs and Ulland employees' jobs were for the most part distinct," finding that the crane operator was not in danger of electrocution and that the signalman was exposed to that danger only when he acted outside the scope of his duties.

KELLY APPELLATE DECISIONS

A divided panel of the court of appeals reversed. *Kelly v. Kraemer Constr., Inc.*, No. A15-1751, 2016 WL 3961817 (Minn. Ct. App. Jul. 25, 2016). The court of appeals determined that the common-activity requirement was met because "the two crews could not have accomplished the project by working separately." The court further held that "Kraemer offered the only expert evidence on summary judgment regarding general risks," which established that the two crews were subject to "similar, if not identical, hazards at the worksite." A dissenting judge disagreed that the same or similar-hazards requirement had been met.

In a 4-2 decision, the supreme court affirmed the court of appeals decision that all three requirements of the common-enterprise defense were met such that Kelly was barred from suing Kraemer by Section 176.061, subds. 1 & 4 of the Act.

With respect to the common-activity requirement, the supreme court observed that the focus is on "the types of work performed, the interdependence of the work, and whether the work was closely coordinated." The supreme court further observed, "[t]hat the workers share a common goal is a necessary, but not sufficient, condition for finding a common activity." Applying these principles, the court determined that the Ulland and Kraemer crews were working together in a common activity at the time of the incident because "[n]either crew could have accomplished the day's goal of setting the culvert sections without the contemporaneous assistance of the other crew; their work was 'interdependent.'" Following its decision in *O'Malley*, the court further explained that "working together was 'essential to avoid chaos at the site,'" and that, although distinct, the crews' duties were interdependent and required close, contemporaneous coordination. In sum, "[t]he Kraemer crew was working together in a common activity with the Ulland crew as a matter of law because the Kraemer crew could not have moved the culvert sections without the Ulland crew positioning, attaching, and maneuvering them, and the Ulland crew could not have placed the culvert sections without the Kraemer crew directing and operating the crane."

Two dissenting justices would have limited the defense to cases in which two sets of employees' duties or functions are more interdependent and more coordinated than the work of the Ulland and Kraemer crews. The dissenting justices reasoned that Ulland and Kraemer merely coordinated distinct tasks and did not put their employees into a "common pool" so as to satisfy *McCourtie's* common-activity requirement.

The supreme court unanimously found that the third requirement—whether the Ulland and Kraemer employees were exposed to the same or similar hazards—was met. Evaluating the general hazards arising from the work performed at the site, rather than just the hazard that resulted in injury, the court determined that the two crews were similarly exposed to hazards that were not unduly speculative or broad. The court stressed that the test requires the employees to be subject to similar, but not identical, hazards.

APPLICATION OF THE COMMON ENTERPRISE DEFENSE IN CONSTRUCTION CASES

The *Kelly* court's decision reaffirms that the common-enterprise defense remains a significant part of the grand bargain that is the Workers' Compensation Act. While an exception to the general rule, the *Kelly* court's decision illustrates how the defense can be used as a broad liability shield by third-party tortfeasors, particularly in construction cases. Reaffirming its holding in *O'Malley*, the supreme court has now made clear that the defense is significantly broader than plaintiffs often advocate and Minnesota's courts have occasionally found. In particular, where two sets of employees are performing distinct "functions [that] were interdependent and required close,

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contemporaneous coordination" such that they were exposed to similar "general risks," the common-enterprise defense applies to limit an injured employee's remedy to that available under the Act.

The defense is not without limits, however. As the supreme court unanimously recognized in *Kelly*, "[t]o interpret the requirements of the common-enterprise test too broadly would permit the exception to swallow the rule." The supreme court's decision in *Kelly* provides an excellent opportunity to look at how Minnesota's appellate courts have applied, and in certain cases limited, the defense in construction cases.

General Construction Cases

Kelly involved employees of a general contractor and its subcontractor, but such a relationship is not sufficient on its own to establish the existence of a common enterprise. The focus of the common-enterprise defense is on the functions performed by the employees, not on the goals of their employers. *Schleicher v. Lunda Constr. Co.*, 406 N.W.2d 311, 313 (Minn. 1987). Therefore, when different sets of employees perform different kinds of work and their work is "not related except in a vague, general way looking toward the completion of a structure," they are not engaged in a common activity. *O'Malley*, 549 N.W.2d at 895. To be common, the employees' activities must not merely overlap minimally, they must be "interdependent." *Id.*

McCourtie, one of the seminal common-enterprise decisions in Minnesota, illustrates the general limits of the defense in the construction context. 93 N.W.2d 552. A plumbing subcontractor's employee was injured on a large building construction site when a piece of steel struck him after it was dropped from a different building level by the employees of a steel construction subcontractor. The court declined to apply the common-enterprise defense, reasoning that the employees' work did not require them to work together and did not expose them to the same or similar hazards. They worked different trades in different physical areas on the building, and one trade would not begin work in an area until the other had finished.

Following *McCourtie*, the Minnesota Court of Appeals later reaffirmed in *LeDoux v. M.A. Mortenson Co.*, 835 N.W.2d 20, 21 (Minn. Ct. App. 2013) that something more than "a basic-oversight relationship between a general construction contractor and one of its subcontractors" is necessary to create a "common enterprise" under Minn. Stat. § 176.061, subds. 1-4. The *LeDoux* court also stressed that the work of two contractors' employees must be interdependent to satisfy the common-activity element of the common-enterprise defense; it is not enough that the employees "worked in the same area, coordinated their work scheduling, and sought advice from each other." See also *Carstens v. Mayers, Inc.*, 574 N.W.2d 733, 736 (Minn. Ct. App. 1998) (holding no common enterprise where employees of general contractor and subcontractor were not required to perform their separate duties at the same time), *rev. denied* (Minn. Mar. 26, 1998).

Delivery Cases

A long line of cases consistently holds that "mere delivery" does not establish a common enterprise. See, e.g., *Urbanski v. Merchants Motor Freight*, 57 N.W.2d 686, 691 (Minn. 1953) ("One who merely supplies or delivers a product to an employer is not engaged on the same project with him," even though the employees of both companies joined in the unloading); *Tevoght v. Polson*, 285 N.W. 893, 894 (Minn. 1939) ("[T]he vending and delivery of supplies upon the premises of one of the employers does not amount to either a furtherance of a common enterprise or to the accomplishment of the same or related purposes"). Later, in *Schleicher v. Lunda Const. Co.*, 406 N.W.2d 311, 314 (Minn. 1987), the supreme court held that a concrete supplier and the subcontractor that received the concrete on a construction site were not engaged in a common enterprise.

Crane and Excavation Cases

Although the *Kelly* court focused primarily on the common-activity element of the defense, it is the "same or similar hazards" element that is typically at issue in crane and excavation cases. Given that the operator of a crane or excavation equipment is often in a less hazardous position than those working in the area around the crane or excavation equipment, plaintiffs have had success arguing that the operator and surrounding workers are not exposed to the same or similar hazards so as to satisfy the third requirement of the common-enterprise defense.

For instance, in *Sorenson v. Visser*, 558 N.W.2d 773, 776 (Minn. Ct. App. 1997) and *Olson v. Lyrek*, 582 N.W.2d 582 (Minn. Ct. App. 1998), the court of appeals declined to apply the common-enterprise defense where employees working in trenches were injured due to the negligence of backhoe operators. The court reasoned on both occasions that the workers in the trenches and the backhoe operators were not exposed to sufficiently similar hazards. According to *Sorenson* and *Olson*, the third element is not satisfied where there is only a small overlap between the risks faced by the two groups of employees, even where that overlapping risk is what actually causes the harm. See *Johnson v. Princeton Pub. Utilities Comm'n*, No. A15-0038, 2016 WL 22243, at *4 (Minn. Ct. App. Jan. 4, 2016) (following *Olson*).

On the other hand, in *Ritter v. M.A. Mortenson Co.*, 352 N.W.2d 110 (Minn. Ct. App. 1984), the court of appeals applied the common-enterprise defense to bar a steel worker's claims against the general contractor who supplied the crane and its operator that caused the worker's injuries. The court reasoned that although the steel worker and crane operator

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were not exposed to identical hazards, they were subject to the same or similar hazards of the job, such as falling beams, electrical shock, and injury from the crane. In other words, even though they were performing different tasks and thus exposed to somewhat different hazards, the court determined that the third element was met.

Although not directly at issue in *Kelly*, the court's reasoning seems to suggest *Ritter*, as opposed to *Sorenson* and *Olson*, properly applies the third element of the common-enterprise defense. Specifically, the *Kelly* court recognized, "[i]t would be unreasonable to require the employees of each crew to be subject to identical hazards, and such a strict interpretation is not what the test requires. Rather, the test requires that the employees be subject, at least, to similar hazards as they work together." In other words, *Sorenson* and *Olson* may have applied the third element too narrowly in determining that the trench workers and excavators were not exposed to *similar* general hazards as they worked together.

Inspection Cases

Similar to *LeDoux*, in which the court of appeals held that something more than "a basic-oversight relationship between a general construction contractor and one of its subcontractors" is necessary to create a common enterprise, the supreme court held in *Crawford v. Woodrich*, 57 N.W.2d 648 (Minn. 1953) that a common enterprise does not exist between a contractor and the entity that merely inspects the contractor's work. In *Crawford*, a Minnesota State engineer inspector was injured when he was run over by a vehicle owned and operated by a subcontractor while he was inspecting concrete forms as part of a highway construction project. The court held there was no common enterprise because the inspector was merely inspecting the work to ensure the State was getting what it paid for and had no role in remedying any defect he discovered.

Premises Owner Cases

While the court of appeals seemed to hint in a recent case that the involvement of a premises owner may impact the common-enterprise analysis, see *Speltz v. Interplastic Corp.*, No. A13-2185, 2014 WL 4388698, at *4-5 (Minn. Ct. App. Sept. 8, 2014), one of the supreme court's earliest common-enterprise decisions suggests otherwise. In *Gleason v. Geary*, 8 N.W.2d 808 (Minn. 1943), a premises owner hired a construction contractor to perform work at its plant but had its own employees assist the contractor's employees to save money. An employee of the premises owner who did not work on project was injured while walking through the construction area. Although the court found no common enterprise, it observed that the employee's claim would have been barred had she been one of the employees who was assisting with the construction work.

KELLY COURT DECLINES TO REACH "VOLUNTEERISM" ISSUE

In *Kelly*, the crane subcontractor's signal person was assisting the general contractor's employees to guide the culvert into place at the time of the accident. Kelly argued that this alleged "volunteer" act should be excluded from the court's analysis of the common-activity and hazard prongs of the common-enterprise defense. But the court determined that it did not need to decide whether the common-activity requirement of the *McCourtie* test excludes tasks performed as a "favor or an accommodation." The court held that, even ignoring such tasks, the two crews were still working interdependently at the time of injury such that the defense applied.

It is unclear how the supreme court will address the "volunteerism" issue if faced with it again in the future. In *Kelly*, the plaintiff and the district court relied upon *Carstens v. Mayers, Inc.*, 574 N.W.2d 733, 736 (Minn. Ct. App. 1998), *rev. denied* (Minn. Mar. 26, 1998), in which the court of appeals held that advice and occasional assistance between the general contractor for a building foundation and its excavation subcontractor "does not give rise to a finding of interdependence but rather falls within the category of 'mere convenience,'" or "a 'favor or an accommodation.'" Assuming the supreme court ultimately follows *Carstens*, the defense will likely hinge on whether the "volunteer act" or "favor or accommodation" occurred while the employees of two separate employers were already working together interdependently. *See Ostrowski v. Minn Zephyr Ltd.*, No. CX-002-1004, 2003 WL 174362 (Minn. Ct. App. Jan. 28, 2003) (holding that the common-enterprise defense barred injured employee's claim even though the employee was injured while assisting an independent contractor in direct violation of his supervisor's express order not to perform the work he was performing when injured). If, on the other hand, an employee is injured while voluntarily helping the employee of a third party when their respective employers were not already working together interdependently, *Carstens* would seem to dictate that no common enterprise exists.

CONCLUSION

While somewhat peculiar and not often invoked, the common-enterprise defense has long been a powerful defense, particularly in cases involving construction accidents. But with the supreme court's recent decision in *Kelly*, the defense is probably stronger now than it has ever been. In particular, the *Kelly* decision makes clear that two employers can be engaged in a common enterprise even if their employees are performing distinct functions and not exposed to identical hazards. The exception has not yet swallowed the rule, however, as Minnesota's appellate courts have recognized and will likely continue to recognize limitations to the defense.

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