ISABELLA ABENDROTH, ADMINISTRATRIX
(ESTATE OF CRAIG ABENDROTH)
v. NICHOLAS MOFFO ET AL.
(AC 36547)

DiPentima, C. J., and Beach and Berger, Js.

Argued February 11—officially released April 21, 2015

(Appeal from Superior Court, judicial district of New Britain, Gleeson, J.)

Bruce E. Newman, for the appellant (plaintiff).

David A. Corbett, with whom, on the brief, was *Joseph H. Carlisle*, for the appellees (defendants).

Opinion

DiPENTIMA, C. J. The plaintiff, Isabella Abendroth, the administratrix of the estate of Craig Abendroth (decedent), appeals from the summary judgment rendered in favor of the defendants, Nicholas Moffo and Zysk Brothers Landscaping, Inc. (Zysk). On appeal, the plaintiff claims that the trial court improperly concluded that her action was barred by the exclusivity provision of the Workers' Compensation Act (act), General Statutes § 31-284 (a), and did not fall within the negligent operation of a motor vehicle by a fellow employee exception set forth in General Statutes § 31-293a. See, e.g., *Chamberland* v. *LaBonte*, 99 Conn. App. 464, 465–66, 913 A.2d 1129, cert. denied, 282 Conn. 912, 924 A.2d 137 (2007). Because the vehicle that struck and killed the decedent was special mobile equipment, and not a motor vehicle, we conclude that the court properly determined that the motor vehicle exception did not apply under these unfortunate facts and circumstances. Accordingly, we affirm the judgment of the trial court.

The court set forth the following facts and procedural history in its memorandum of decision. On the morning of June 30, 2011, Moffo, an employee of Zysk, used a front end loader (payloader) to mix topsoil. As he was operating the payloader to move soil from one pile to another, it struck the decedent. As a result of this accident, the decedent suffered injuries that caused his death. In a complaint filed March 30, 2012, the plaintiff alleged that Moffo had acted negligently in operating the payloader and causing the decedent's death, and that Zysk was vicariously liable. The defendants filed an answer denying that Moffo had acted negligently and raised the exclusivity provision of the act as a special defense.

On May 31, 2013, the defendants moved for summary judgment, arguing that the act provided the exclusive remedy to the plaintiff and that the negligent operation of a motor vehicle by a fellow employee exception did not apply under these facts. They argued that the payloader met the definition of "special mobile equipment" and therefore had been excluded by our legislature from the definition of a motor vehicle. As a result, this exception to the exclusive remedy provision of the act did not apply and they were entitled to judgment as a matter of law. In support of their motion, the defendants attached, inter alia, affidavits from John Zyskowski, the owner of Zysk, a copy of a Connecticut registration certificate identifying the payloader as special mobile equipment,[1] the operators manual for the payloader and an affidavit from Moffo.[2] On July 29, 2013, the plaintiff objected to the defendants' motion for summary judgment.[3]

On January 2, 2014, the court issued a memorandum

of decision, granting the defendants' motion for summary judgment. It reasoned that the terms "bucket loader" and "payloader" referred to the same type of equipment and that a bucket loader specifically is excluded from the statutory definition of a motor vehicle. "Thus, as there is no genuine issue of material fact that Moffo was operating a payloader, and payloaders, as special mobile equipment, are not motor vehicles for the purposes of § 31-293a, the defendants have met their burden . . . and . . . they are entitled to judgment as a matter of law . . . ." Accordingly, the court rendered judgment in favor of the defendants. On January 29, 2014, the court denied the plaintiff's motion to reargue and/or for reconsideration. This appeal followed.

"The standard of review of motions for summary judgment is well settled. Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party moving for summary judgment has the burden of showing the absence of any genuine issue of material fact and that the party is, therefore, entitled to judgment as a matter of law. . . . On appeal, we must determine whether the legal conclusions reached by the trial court are legally and logically correct and whether they find support in the facts set out in the memorandum of decision of the trial court. . . . Our review of the trial court's decision to grant [a moving party's] motion for summary judgment is plenary." (Internal quotation marks omitted.) *Smigelski* v. *Dubois*, 153 Conn. App. 186, 197, 100 A.3d 954, cert. denied, 314 Conn. 948, 103 A.3d 975 (2014); see also *Surprenant* v. *Burlingham*, 64 Conn. App. 409, 413, 780 A.2d 219 (2001). "Furthermore, because our resolution of the plaintiff's claim requires us to construe § 31-293a as it applies to a particular factual scenario, our review of that issue of law is plenary." *Colangelo* v. *Heckelman*, 279 Conn. 177, 182, 900 A.2d 1266 (2006).

A brief discussion of the act will facilitate our analysis. "Professor Arthur Larson's treatise on workers' compensation states: Once a workers' compensation act has become applicable . . . it affords the exclusive remedy for the injury by the employee . . . . This is part of the quid pro quo in which the sacrifices and gains of employees and employers are to some extent put into balance, for, while the employer assumes a new liability without fault, it is relieved of the prospect of large damage verdicts. 6 A. Larson & L. Larson, Workers' Compensation Law (2010) § 100.01, pp. 100-2 and 100-3." (Internal quotation marks omitted.) *Hodgate* v. *Ferraro*, 123 Conn. App. 443, 460, 3 A.3d 92 (2010); see

also *Mingachos* v. *CBS*, *Inc.*, 196 Conn. 91, 97, 491 A.2d 368 (1985).

Our Supreme Court has stated that the act "is the exclusive remedy for injuries sustained by an employee arising out of and in the course of his employment. . . . General Statutes § 31-284 (a). Under the act's strict liability provisions, workers are compensated without regard to fault. In return for a relatively low burden of proof and expeditious recovery, employees relinquish their right to any common-law tort claim for their injuries. . . . Generally, then, all rights and claims between employers and employees, or their representatives or dependents, arising out of personal injury or death sustained in the course of employment are abolished as a result of the act's exclusivity bar.

"Another provision of [this state's] act, [namely] . . . § 31-293a, creates an exception, however, to the otherwise applicable exclusivity bar. In relevant part, § 31-293a provides that [i]f an employee . . . has a right to benefits or compensation . . . on account of injury or death from injury caused by the negligence or wrong of a fellow employee, *such right shall be the exclusive remedy* of such injured employee or dependent and no action may be brought against such fellow employee *unless* such wrong was wilful or malicious or *the action is based on the fellow employee's negligence in the operation of a motor vehicle*. . . . As we explained in *Colangelo* v. *Heckelman*, [supra, 279 Conn. 183–84], if an employee suffers injuries, which otherwise would be compensable under the act, due to the negligence of a fellow employee, the injured employee is barred from recovery against that fellow employee unless the injuries were caused by the fellow employee's negligent operation of a motor vehicle." (Emphasis added; internal quotation marks omitted.) *Jaiguay* v. *Vasquez*, 287 Conn. 323, 328–29, 948 A.2d 955 (2008).

On appeal, the plaintiff claims that the court improperly granted the defendants' motion for summary judgment. Specifically, she argues that the court failed to consider that the circumstances of the accident were a result of the special hazards of the workplace. The plaintiff also contends that the exclusion of special mobile equipment from the definition of a motor vehicle applies only if the accident occurs at a worksite, and that a genuine issue of material fact existed with respect to the factors used in *Arias* v. *Geisinger*, 126 Conn. App. 860, 15 A.3d 641, cert. denied, 300 Conn. 941, 17 A.3d 476 (2011), to determine whether the payloader could be considered a motor vehicle.[4] Guided by the clear statutory language and our Supreme Court's decision in *Ferreira* v. *Pisaturo*, 215 Conn. 55, 573 A.2d 1216 (1990), we conclude that the court correctly determined that the payloader was not a motor vehicle and, therefore, that the motor vehicle exception did not apply to these facts and circumstances. Accordingly, the trial

court properly granted the defendants' motion for summary judgment.

We begin our analysis by setting forth the relevant statutory language. "If an employee or, in case of his death, his dependent has a right to benefits or compensation under this chapter on account of injury or death from injury caused by the negligence or wrong of a fellow employee, such right shall be the exclusive remedy of such injured employee or dependent and no action may be brought against such fellow employee unless such wrong was wilful or malicious or the action is based on the fellow employee's negligence in the operation of a motor vehicle as defined in section 14-1." General Statutes § 31-293a.

This court has determined that "[t]he definition of motor vehicle for purposes of the motor vehicle exception to § 31-293a is controlled by the definition of motor vehicle in General Statutes § 14-1." *Pinheiro* v. *Board of Education*, 30 Conn. App. 263, 269, 620 A.2d 159 (1993). Section 14-1 (53) defines a motor vehicle as "any vehicle propelled or drawn by any nonmuscular power, except . . . *special mobile equipment as defined in section 14-165* . . . and any other vehicle not suitable for operation on a highway . . . ." (Emphasis added.) Finally, General Statutes § 14-165 (9) defines special mobile equipment as "a vehicle not designed for the transportation of persons or property upon a highway and only incidentally operated or moved over a highway, including, but not limited to, ditch-digging apparatus, well-boring apparatus and road construction and maintenance machinery such as asphalt spreaders, bituminous mixers, *bucket loaders*, street sweepers, tractors other than truck tractors, ditchers, leveling graders, finishing machines, motor graders, road rollers, scarifiers, earth moving carry-alls and scrapers, power shovels and drag lines, and self-propelled cranes and earth moving equipment. The term does not include house trailers, dump trucks, truck-mounted transit mixers, cranes or shovels, or other vehicles designed for the transportation of persons or property to which machinery has been attached . . . ." (Emphasis added.)

The court concluded that there was no dispute that the payloader struck and killed the decedent. The court also noted that the terms "payloader" and "bucket loader" refer to the same type of equipment.[5] It further concluded that, pursuant to §§ 14-1 (53) and 14-165 (9), a payloader is not a motor vehicle, and therefore the exception as stated in § 31-293a to the exclusivity provision of the act did not apply. We agree with this analysis.

The analytical path taken by the trial court followed our Supreme Court's decision in *Ferreira* v. *Pisaturo*, supra, 215 Conn. 55. In that case, the plaintiff's decedent was killed by the alleged negligence of a fellow employee operating a bucket loader. Id. Using the same

statutory definitions used by the trial court in the present case, our Supreme Court concluded that the bucket loader at issue was not a motor vehicle, and therefore that exception to the act did not apply. Id., 57–58; see also *Colangelo* v. *Heckelman*, supra, 279 Conn. 189 n.13 (noting that in *Ferreira*, Supreme Court expressly agreed with conclusion of trial court that bucket loader was not motor vehicle within meaning of § 31-293a). The trial court correctly reached the same result in the present case.

The plaintiff raises several arguments in support of her claim that the court improperly rendered summary judgment in favor of the defendants. First, she argues that the court failed to consider that the circumstances of the accident were a result of the special hazards of the workplace. The argument that the special hazard of the workplace is the "litmus test" for the applicability of the motor vehicle exemption is based on language found in our Supreme Court's decision in *Dias* v. *Adams*, 189 Conn. 354, 456 A.2d 309 (1983). Specifically, the plaintiff relies on the following: "Although the legislative history of § 31-293a is not especially revealing, there is some evidence that the intention was to distinguish simple negligence on the job from negligence in the operation of a motor vehicle. Unlike the special hazards of the work place, the risk of a motor vehicle accident is a common danger to which the general public is exposed. Particular occupations may subject some employees to a greater degree of exposure to that risk. The nature of the risk remains unchanged, however, and in many employments it is no greater than for the general public. The legislature has chosen, therefore, not to extend the immunity given to fellow employees by § 31-293a to accidents having a less distinct relationship to the hazards of the employment. At the same time it has accorded the injured employee, in addition to workers' compensation, the same remedy he would have against a member of the general public who caused a motor vehicle accident. Our decision to construe the term operation of a motor vehicle in § 31-293a as not including activities unrelated to movement of the vehicle comports with this policy of the legislature." (Footnote omitted; internal quotation marks omitted.) Id., 359–60; see also *Fields* v. *Giron*, 65 Conn. App. 771, 775, 783 A.2d 1097, cert. denied, 258 Conn. 936, 785 A.2d 230 (2001), overruled in part on other grounds by *Colangelo* v. *Heckelman*, 279 Conn. 177, 190–93, 900 A.2d 1266 (2006).

The flaw in this argument, however, is that our Supreme Court subsequently labeled this language from *Dias* as dictum[6] and rejected the special hazards test. *Colangelo* v. *Heckelman*, supra, 279 Conn. 186–93. It reasoned that the legislature's post-*Dias* amendment to § 31-293a indicated a preference for a bright line test. Id., 192. "Under that test, an injured employee may recover against a fellow employee as long as that fellow

employee is operating a motor vehicle, as that term is defined in § 14-1 (51) [now § 14-1 (53)] and limited under § 31-293a. The definition adopted by the legislature is clear and straightforward, and, consequently, under that definition, there generally will be no difficulty in ascertaining whether, under § 31-293a, a job related accident caused by a fellow employee's negligent operation of a motor vehicle gives rise to a claim against the fellow employee." (Internal quotation marks omitted.) Id., 192–93. In contrast, the special hazards test was described as difficult to apply and lacking predictability. Id., 193. In short, the court rejected the special hazards analysis. Id.; see also *Legere* v. *Reflexite Corp.*, Superior Court, judicial district of New Britain, Docket No. CV-07-5005010-S (September 15, 2009) (48 Conn. L. Rptr. 445). Accordingly, the plaintiff's argument must fail.

The plaintiff next argues that the court's analysis failed to consider whether the accident occurred at a worksite. Specifically, she relies on the following language from § 31-293a: "For purposes of this section, contractors' mobile equipment such as bulldozers, powershovels, rollers, grades or scrapers, farm machinery, cranes, diggers, forklifts, pumps, generators, air compressors, drills or other similar equipment designed for use principally off public roads are not 'motor vehicles' *if the claimed injury involving such equipment occurred at the worksite* on or after October 1, 1983 . . . ." (Emphasis added.) The plaintiff contends that the "occurred at the worksite" language applies to the payloader in this case, and a genuine issue of material fact exists as to whether the location of the accident was a worksite.

We disagree with the plaintiff's construction of § 31-293a. The statute is clear that the act is the exclusive remedy for an employee's injury or death caused by the negligence of a fellow employee unless the fellow employee negligently operated a motor vehicle as defined by § 14-1.[7] Section 14-1 (53) provides the statutory definition of a motor vehicle and, via a cross reference to § 14-165, specifically exempts payloaders from that definition. The phrase "occurred at the worksite" qualifies contractor's mobile equipment and does not pertain to special mobile equipment. See General Statutes § 31-293a. As stated by the trial court, "as there is no genuine issue of fact that Moffo was operating a payloader, and payloaders, as special mobile equipment, are not motor vehicles for the purposes of § 31-293a, the defendants have met their burden of showing . . . that they are entitled to judgment as a matter of law on the ground that the plaintiff's claim is barred by § 31-293a." The payloader in this case did not fall within the statutory definition of a motor vehicle, and therefore it was not necessary to consider whether the accident occurred at a worksite.

Our interpretation of § 31-293a is consistent with case

law from our Supreme Court. In *Colangelo* v. *Heckelman*, supra, 279 Conn. 192, our Supreme Court noted that "an injured employee may recover against a fellow employee as long as that fellow employee is o*perating a motor vehicle, as that term is defined in § 14-1 (51)* [*now § 14-1 (53)*] and limited under § 31-293a." (Emphasis added; internal quotation marks omitted.) As a payloader is not a motor vehicle as defined in § 14-1 (53), the analysis is complete and need not proceed to the question of whether the claimed injury occurred at a worksite location as stated in § 31-293a.

Finally, we reject the plaintiff's argument that the court improperly failed to consider factors set forth in *Arias* v. *Geisinger*, supra, 126 Conn. App. 868, to determine whether the payloader was a motor vehicle for the purposes of § 31-293a. See footnote 4 of this opinion. As previously stated, a payloader is specifically exempted from the definition of a motor vehicle, and our Supreme Court has expressly agreed with that conclusion. See General Statutes §§ 14-1 (53) and 14-165 (9); *Colangelo* v. *Heckelman*, supra, 279 Conn. 189 n.13; *Ferreira* v. *Pisaturo*, supra, 215 Conn. 56 n.1. This argument, therefore, must fail.

The judgment is affirmed.

In this opinion the other judges concurred.

[1] General Statutes § 14-25b (a) provides in relevant part: "The commissioner may register any vehicle operated upon any public highway as special mobile equipment as defined in section 14-165 and may issue a special number plate which shall be displayed in a conspicuous place at the rear of such vehicle. The commissioner may issue a registration containing any limitation on the operation of any such vehicle which the commissioner deems necessary for its safe operation, provided such vehicle's movement on a highway shall be restricted from its place of storage to the construction site or from one construction site to another. . . . Such vehicle shall not be used for the transportation of passengers or a payload when operating upon a highway, except that while operating on a highway construction project or on a construction project of any kind which requires the crossing of a highway, such vehicle may carry passengers or a payload to the extent required by the project. . . ."

[2] The defendants also included an affidavit from Valerie Frost, a manager in the workers' compensation unit with Travelers Insurance Company. Frost stated that Zysk had purchased workers' compensation insurance from Travelers and that benefits had been paid to the estate of the decedent pursuant to this policy.

[3] Attached to the plaintiff's objection was, inter alia, an affidavit from Bruce E. Newman, counsel for the plaintiff, the accident report and other police reports, deposition testimony, various photographs, and a letter from Edmund R. Sullivan of Accident Analysis & Reconstruction, Inc.

[4] "Thus, to conclude that the trailer involved constituted a motor vehicle, a careful path through the plain text of the statute requires us to determine whether the trailer was (1) suitable for transportation of persons or property, (2) propelled or drawn by any nonmuscular power, (3) suitable for operation on a highway and (4) not one of the enumerated vehicles specifically excluded from the definition of a motor vehicle by any of the aforementioned statutes." *Arias* v. *Geisinger*, supra, 126 Conn. App. 868.

[5] In his affidavit attached to the defendants' motion for summary judgment, Zyskowski stated that "[l]oaders are known variously in the industry as loader, front loader, wheel loader, bucket loader, and payloader." In its memorandum of decision, the court concluded that "[t]he terms bucket [l]oader and payloader refer to the same type of equipment." (Internal quotation marks omitted.)

[6] "Dicta are [o]pinions of a [court] which do not embody the resolution or determination of the specific case before the court [and] [e]xpressions

in [the] court's opinion which go beyond the facts before [the] court and therefore are individual views of [the] author[s] of [the] opinion *and* [*are*] *not binding in subsequent cases as legal precedent*. Black's Law Dictionary (6th Ed. 1990) . . . ." (Citation omitted; emphasis added; internal quotation marks omitted.) *Honulik* v. *Greenwich*, 293 Conn. 641, 645 n.5, 980 A.2d 845 (2009).

[7] The statute does provide an exception for the wilful or malicious acts of a fellow employee, but that exception is not applicable in this case.