

\*\*\*\*\*

The “officially released” date that appears near the beginning of each opinion is the date the opinion will be published in the Connecticut Law Journal or the date it was released as a slip opinion. The operative date for the beginning of all time periods for filing postopinion motions and petitions for certification is the “officially released” date appearing in the opinion.

All opinions are subject to modification and technical correction prior to official publication in the Connecticut Reports and Connecticut Appellate Reports. In the event of discrepancies between the advance release version of an opinion and the latest version appearing in the Connecticut Law Journal and subsequently in the Connecticut Reports or Connecticut Appellate Reports, the latest version is to be considered authoritative.

The syllabus and procedural history accompanying the opinion as it appears in the Connecticut Law Journal and bound volumes of official reports are copyrighted by the Secretary of the State, State of Connecticut, and may not be reproduced and distributed without the express written permission of the Commission on Official Legal Publications, Judicial Branch, State of Connecticut.

\*\*\*\*\*

ROGERS, C. J., dissenting. The majority concludes that there is no genuine issue of material fact as to whether the defendants, Greg Laviero, and Martin Laviero Contractors, Inc. (Laviero Contractors), subjectively believed that it was substantially certain that the plaintiff, Dominick Lucenti, would be injured if he operated the excavator that was “rigged” to operate at full throttle. I agree with the majority that the substantial certainty exception to the exclusive remedy provision of the Workers’ Compensation Act, General Statutes § 31-284 (a), requires a showing of the employer’s subjective intent to engage in an activity that the employer knows bears a substantial certainty of injury to its employees. I disagree with the majority’s conclusion, however, that there is no genuine issue of material fact as to whether this standard has been met in the present case.

The plaintiff presented evidence that Daniel Quick, a former employee of Laviero Contractors, had used the excavator at issue, that it malfunctioned, that Laviero ordered a mechanic to “rig” the excavator so that it would operate only at full throttle, that Quick told Laviero that the rigged excavator “was too dangerous to operate” and that, if Quick operated it, “either I am going to get hurt or I am going to hurt someone.”<sup>1</sup> In addition, the plaintiff presented evidence that he had told Laviero that the rigged excavator was “jerky and dangerous,” that Laviero agreed that it was dangerous and that he had no intention of repairing it because he planned to sell it. In my view, a jury reasonably could conclude on the basis of this evidence that Laviero knew that there was a substantial certainty that anyone who operated the excavator would be injured. Indeed, if this evidence does not establish a genuine issue of material fact with respect to the proof required to satisfy the substantial certainty exception, I cannot imagine how that exception could ever be established.

I recognize that, in addition to this evidence, the defendants have presented evidence that Laviero himself operated the rigged excavator both before and after the plaintiff was injured. As I understand the majority opinion, the majority relies heavily on this evidence to support its conclusion that “no genuine issue of material fact exists” regarding whether “the defendants subjectively believed that, because of their actions, the plaintiff’s injuries were substantially certain to occur as a result of [the dangerous condition created by the rigged excavator].” See footnote 12 of the majority opinion; see also Justice Palmer’s concurring opinion. Although I agree with the majority that a juror reasonably could conclude from this evidence that Laviero did not subjectively believe that it was substantially certain that

Lucenti would be injured if he operated the excavator, I do not agree that this evidence *compels* that conclusion. A jury could find that Laviero had used the excavator only briefly, that he was aware of, but indifferent to, the risk of injury and/or that there was some other explanation for his behavior that would be consistent with the knowledge that operating the rigged excavator was substantially certain to result in injury. Because I believe that there is a genuine issue of material fact as to the proof required to satisfy the substantial certainty exception, and I am concerned that the majority's decision may essentially preclude the availability of this exception, I respectfully dissent.

<sup>1</sup> The majority states that warnings "do not, without more, raise a genuine issue of material fact to defeat summary judgment with respect to whether an employer subjectively believes that its employee's injuries are substantially certain to result from its action." Thus, according to the majority, even if an employer was advised by an experienced safety officer that it was substantially certain that requiring employees to engage in certain conduct would result in serious injury to the employees, that would be insufficient to submit the case to the jury. I cannot agree. Although I would agree that warnings alone may not *always* be sufficient, there clearly are cases in which they are. In my view, Quick's warning to Laviero that "I am going to get hurt or I am going to hurt someone" is sufficient to allow the jury to draw a reasonable inference that Laviero knew that injury was substantially certain to occur.

---