WEST, J., dissenting. I respectfully dissent from the majority's determination that the exclusivity rule of the Workers' Compensation Act[1] (act); General Statutes § 31-275 et. seq.; does not shield the defendants, Andrew G. Bachmann and Jane B. Bachmann, from liability for damages arising from injuries sustained by the plaintiff Anne Marie Roy, for which she was compensated under the act. The majority concludes that Roy and her husband, Steven Roy, who also is a plaintiff, maintained their action against the defendants as "landowners" and, as a result, for purposes of the act's exclusivity rule, the defendants could not be considered Anne Marie Roy's employer. Therefore, because the exclusivity rule is applicable only as a bar to actions against an employer, the majority concludes that the present action for damages against the defendants in their persona as landowners was not barred. I disagree.

I agree with the majority's statement of the law, as well as the standard of review, applicable to a trial court's decision to grant a motion for summary judgment. I do, however, underscore that "[i]t is well established . . . that where it is undisputed that [a] plaintiff was engaged in the course of . . . employment at the time of [an] accident, whether he is barred by the [act] from maintaining an action against a tortfeasor is a question of law for the court." *Velardi* v. *Ryder Truck Rental, Inc.*, 178 Conn. 371, 375, 423 A.2d 77 (1979). Furthermore, I agree with the majority's characterization of the exclusivity rule and its statutory exception under our workers' compensation scheme, as well as those expressly carved out by our Supreme Court. It seems to me, however, that the majority concludes that because the defendants possessed a landowner persona and the plaintiff was an employee of Dymax Corporation at the time of her injury, the defendants could under no circumstance be considered as Anne Marie Roy's employer for the purposes of the application of the exclusivity rule, and, therefore, the rule does not shield them from this action. I see no reason to adhere to the analytical approach of the majority. For the reasons set forth, I conclude that because, under the applicable precedents, the defendants, for the purposes of our workers' compensation law and in these circumstances, can be considered Anne Marie Roy's employer, the exclusivity rule applies. Therefore, I would hold, on the basis of this record, that the court properly rendered summary judgment in favor of the defendants and would affirm the court's judgment.

"The purpose of the [workers'] compensation statute is to compensate the worker for injuries arising out of and in the course of employment, without regard to fault, by imposing a form of strict liability on the

employer. . . . The [act] compromise[s] an employee's right to a common law tort action for work related injuries in return for relatively quick and certain compensation." (Citations omitted; internal quotation marks omitted.) *Dowling* v. *Slotnik*, 244 Conn. 781, 799, 712 A.2d 396, cert. denied sub nom. *Slotnik* v. *Considine*, 525 U.S. 1017, 119 S. Ct. 542, 142 L. Ed. 2d 451 (1998). "The entire statutory scheme of the [act] is directed toward those who are in the employer-employee relationship as those terms are defined in the act and discussed in our cases. That relationship is threshold to the rights and benefits under the act . . . ." (Internal quotation marks omitted.) Id., 800. "Just as a claimant may invoke the act's remedies only if the claimant satisfies the jurisdictional requirement of an employee as set forth in § 31-275 (9) . . . only those defendants who satisfy the requisite jurisdictional standard of an employer as set forth in § 31-275 (10) may successfully assert the exclusivity of the act as a bar to a common-law action by an alleged employee." (Citations omitted.) *Doe* v. *Yale University*, 252 Conn. 641, 680, 748 A.2d 834 (2000). "In short, if the defendant was the plaintiff's employer, the plaintiff [is] relegated to the remedies afforded by the [act]." *Velardi* v. *Ryder Truck Rental, Inc.*, supra, 178 Conn. 376.

Our Supreme Court has utilized the "right to control" test in order to determine whether a defendant in a workers' compensation case was an employer as defined in § 31-275 (10). See *Doe* v. *Yale University*, supra, 252 Conn. 680–82 (whether individual or entity is employer under act is question of specific individual's or entity's degree of control over alleged employee). "The right to control test determines the [relationship between a worker and a putative employer] by asking whether the putative employer has the right to control the means and methods used by the worker in the performance of his or her job." (Internal quotation marks omitted.) *Hanson* v. *Transportation General, Inc.*, 245 Conn. 613, 620, 716 A.2d 857 (1998). "The test of the relationship is the right to control. It is not the fact of actual interference with the control, but the right to interfere . . . ." (Internal quotation marks omitted.) *Doe* v. *Yale University*, supra, 681.[2]

The affidavits submitted by the Bachmanns assert the following unrefuted indicia of the defendants' right to control Anne Marie Roy as her employer: both defendants were owners of Dymax Corporation, a closely held corporation; the defendants together owned over 68 percent of the outstanding stock; Andrew G. Bachmann was the chief executive officer, president and chairman of the board; he signed all paychecks. Jane B. Bachmann was a vice president, and the defendants themselves "maintained [w]orkers' [c]ompensation [b]enefits for all employees of Dymax Corporation . . . ." See General Statutes § 31-275 (10) (employer may accept and become bound by provisions of this

chapter by immediately complying with General Statutes § 31-284). The plaintiffs did not submit any materials raising an issue of material fact with respect to those assertions. The mere assertion of the legal conclusion that the defendants were not, for the purposes of our workers' compensation scheme, Anne Marie Roy's employer was not sufficient to defeat the defendants' motion for summary judgment. See *Velardi* v. *Ryder Truck Rental, Inc.*, supra, 178 Conn. 375. The defendants had the burden of showing the nonexistence of a material fact; *Himmelstein* v. *Windsor*, 116 Conn. App. 28, 42, 974 A.2d 820, cert. granted on other grounds, 293 Conn. 927, 980 A.2d 910 (2009); and the evidence presented, if otherwise sufficient in this regard, is not rebutted by the naked statement that an issue of fact does exist. See *Velardi* v. *Ryder Truck Rental, Inc.*, supra, 375. As a result, I conclude that the court properly rendered summary judgment in favor of the defendants on the ground that the exclusivity rule of the act bars Anne Marie Roy's claim of negligence.

I, therefore, respectfully, dissent.

[1] General Statutes § 31-284 (a) is the exclusivity provision of the act and provides that an employer, although required to compensate an employee as set forth in the act for death or personal injury sustained in the course of employment, is not liable in a civil action for damages arising from that injury.

[2] Since *Doe* v. *Yale University*, supra, 252 Conn. 641, was decided, our Superior Courts have applied the "right to control" test in the context of workers' compensation cases and have cited *Doe* as supportive of the proposition that the determination of whether a defendant is an employer under the act is a question of the defendant's degree of control over the alleged employee. See, e.g., *Smith* v. *J.P. Alexandre, LLC*, Superior Court, judicial district of Hartford, Docket No. CV-04-4005356-S (July 26, 2009) (whether defendant is employer under act is question of defendant's degree of control over alleged employee); *Sullivan* v. *Conniff*, Superior Court, judicial district of New Haven, Docket No. CV-02-0463372-S (August 17, 2004) (same) (37 Conn. L. Rptr. 704); *Milton* v. *Fulmer*, Superior Court, judicial district of New Haven, Docket No. CV-02-0467452-S (July 11, 2003) (same); *Owens* v. *A. Anastasio & Sons Trucking Co.*, Superior Court, judicial district of New Haven, Docket No. CV-99-0421367S (June 30, 2000) (same).