RAJANIKANT PATEL *v.* FLEXO CONVERTERS U.S.A., INC.
(SC 18817)

Rogers, C. J., and Norcott, Palmer, Zarella, Eveleigh and Vertefeuille, Js.

Argued January 8—officially released June 25, 2013

James P. Brennan, for the appellant (plaintiff).

Andrew T. Boivin, with whom, on the brief, was *Gary C. Kaisen*, for the appellee (defendant).

Opinion

ROGERS, C. J. The plaintiff, Rajanikant Patel, appeals from the summary judgment rendered by the trial court in favor of his employer, the defendant, Flexo Converters U.S.A., Inc., in the plaintiff's action to recover damages for personal injuries he sustained as a result of the alleged intentional misconduct by a fellow employee. The plaintiff claims that the trial court improperly granted the defendant's motion for summary judgment on the basis of General Statutes § 31-284,[1] the exclusive remedy provision of the Workers' Compensation Act (act). General Statutes § 31-275 et seq. Specifically, the plaintiff contends that there was a disputed issue of material fact as to whether the defendant's night supervisor, Charles Milsaps, was the defendant's alter ego for the purposes of the intentional tort exception to the act's exclusivity provisions. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to the resolution of this case. The plaintiff was injured at the defendant's paper bag manufacturing facility while attempting to dislodge a bag that was jammed in a machine he was operating during the night shift.[2] The plaintiff alleges that his injuries resulted from the defendant's modification of the machine by disabling a safety feature. Additionally, the plaintiff alleges that Milsaps, a managerial employee, instructed the plaintiff to reach into the machine to dislodge jammed bags while the machine was operating, and threatened the plaintiff's job if he shut down the machine or failed to produce ninety bags per minute. According to the plaintiff, the defendant and Milsaps were substantially certain that this practice would lead to serious injury. The plaintiff also contends that Milsaps' position as night supervisor makes him the defendant's alter ego, such that his intentional torts can be attributed to the defendant.

In response, the defendant denied the allegations in the complaint and raised several special defenses.[3] Thereafter, the defendant moved for summary judgment on the basis of the act's exclusivity provisions. Specifically, the defendant claimed that, because there was no evidence to support an inference that the defendant believed with substantial certainty that its actions or those of its supervisor would injure the plaintiff, the plaintiff's claims do not fall within the intentional tort exception. The defendant also contended that, even if the plaintiff's allegations were accepted as true, Milsaps was not the defendant's alter ego, and his actions cannot be attributed to the defendant. In response, the plaintiff claimed that there is an issue of material fact as to whether the defendant altered the machine to operate with the safety door open so that the plaintiff's injuries were substantially certain to occur. The plaintiff also claimed that there is an issue of material fact as to

whether Milsaps instructed the defendant to operate the machine in an unsafe manner. Finally, the plaintiff contended that there is an issue of material fact as to whether Milsaps is the defendant's alter ego.

The trial court rendered summary judgment in favor of the defendant, concluding that, "even if [Milsaps'] actions did constitute substantial certainty under the exception, there is no issue of material fact that Milsaps was *not* the alter ego of the defendant for purposes of the exception."[4] (Emphasis in original.) Subsequently, the court denied the plaintiff's motion to set aside the summary judgment, and the plaintiff appealed therefrom to the Appellate Court. Thereafter, we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

On appeal, the plaintiff contends that there is a genuine issue of material fact as to whether Milsaps was the defendant's alter ego. Additionally, the plaintiff asks us to modify the intentional tort exception first enunciated in *Jett* v. *Dunlap*, 179 Conn. 215, 219, 425 A.2d 1263 (1979). For its part, the defendant contends that the trial court correctly concluded that there is no disputed issue of material fact that Milsaps was not the defendant's alter ego. The defendant also claims that we may affirm the trial court's judgment on the alternate ground that the plaintiff's allegations are insufficient to sustain a claim under the substantial certainty exception.

We begin by setting forth the applicable standard of review. "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 seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . A material fact . . . [is] a fact which will make a difference in the result of the case. . . . Finally, the scope of our review of the trial court's decision to grant the plaintiff's motion for summary judgment is plenary." (Internal quotation marks omitted.) *DiPietro* v. *Farmington Sports Arena, LLC*, 306 Conn. 107, 116, 49 A.3d 951 (2012).

Because we agree with the trial court that there is no genuine issue of material fact in the present case as to whether Milsaps was the defendant's alter ego, we affirm the summary judgment rendered in favor of the defendant. Accordingly, we do not address the

question of whether the plaintiff alleged sufficient facts to meet the substantial certainty test for purposes of summary judgment.[5]

In *Jett* v. *Dunlap*, supra, 179 Conn. 219, this court announced a narrow exception to the exclusivity of the act for intentional torts committed by an employer or a fellow employee "identified as the alter ego of the corporation . . . ." The court expressly declined, however, to extend the exception to a supervisory employee's intentional torts. The court reasoned that "[t]he correct distinction to be drawn . . . is between a supervisory employee and a person who can be characterized as the alter ego of the corporation. If the assailant is of such rank in the corporation that he may be deemed the alter ego of the corporation under the standards governing disregard of the corporate entity, then attribution of corporate responsibility for the actor's conduct is appropriate. It is inappropriate where the actor is merely a foreman or supervisor." Id., citing 2 A. Larson, Workmen's Compensation (1976) §§ 68.21 and 68.22.[6]

The alter ego test is stringent. The supervisory employee alleged to have intentionally injured the plaintiff must be the employer's alter ego under the "standards governing disregard of the corporate entity"; *Jett* v. *Dunlap*, supra, 179 Conn. 219; a test corresponding to the requirements for piercing the corporate veil. "The concept of piercing the corporate veil is equitable in nature. . . . No hard and fast rule . . . as to the conditions under which the entity may be disregarded can be stated as they vary according to the circumstances of each case." (Citations omitted; internal quotation marks omitted.) *Naples* v. *Keystone Building & Development Corp.*, 295 Conn. 214, 233, 990 A.2d 326 (2010). The standard requires that the corporation, functionally speaking, have no separate existence from the alter ego who controls and dominates the corporation's affairs.[7] The alter ego test is therefore incompatible with imposing liability on the employer for the intentional acts of supervisors on the basis of apparent authority to act on the employer's behalf. *Suarez* v. *Dickmont Plastics Corp.*, 242 Conn. 255, 275, 698 A.2d 838 (1997) (employer not liable in common-law tort for employee's actions based on apparent authority theory).[8]

Whether a supervisor is the employer's alter ego is a question of fact to be determined by the supervisor's role in the employer's corporate structure. Although this court has held that extending liability to the employer for the intentional act of a supervisory employee "is inappropriate where the actor is *merely* a foreman or supervisor"; (emphasis added) *Jett* v. *Dunlap*, supra, 179 Conn. 219; this should not be interpreted to suggest that the title of "foreman" or "supervisor" would always disqualify an employee as an alter ego of the corporation. The alter ego test is functional, and

a supervisory employee's title is not dispositive of the ultimate question of whether the employee meets the "standards governing disregard of the corporate entity . . . ." Id. In the context of a small family owned corporation, for example, a supervisor could sufficiently dominate and control the corporation so as to justify liability under the alter ego theory. Cf. *Suarez* v. *Dickmont Plastics Corp.*, supra, 242 Conn. 277.

In the present case, the defendant contended in its motion for summary judgment that, inter alia, there was no disputed issue of material fact that Milsaps, the night supervisor, was merely an employee whose actions were not binding on the employer. In support, the defendant submitted the affidavit of the defendant's vice president asserting that Milsaps "was not authorized to make policy for [the defendant] regarding machine operation and employees' interaction therewith."

As the party opposing summary judgment, the plaintiff was required to "provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact" regarding Milsaps' identity as the defendant's alter ego. (Internal quotation marks omitted.) *DiPietro* v. *Farmington Sports Arena, LLC*, supra, 306 Conn. 116. In the present case, however, the plaintiff submitted no evidence creating a disputed issue of material fact that would have supported a reverse piercing of the defendant's corporate veil. In his opposition to the defendant's motion for summary judgment, the plaintiff alleged that Milsaps was the night supervisor responsible for conveying company policy, and that Milsaps had ordered him to remove bags that got jammed in operating machinery. The plaintiff also submitted deposition testimony from both Milsaps himself and the defendant's plant manager describing Milsaps as the "top guy," "the boss," and the "top person on . . . at night."

Evidence of Milsaps' managerial role, however, does not establish the existence of a material fact as to his identity as the defendant's alter ego. See *Suarez* v. *Dickmont Plastics Corp.*, supra, 242 Conn. 277. We therefore agree with the trial court that the plaintiff presented "no evidence that the 'top guy' during the night shift [was] anything more than a supervisor." Indeed, the plaintiff failed to submit any evidence regarding Milsaps' interest in the defendant's corporation, or his role in the defendant's corporate structure. Accordingly, we disagree with the plaintiff's contention that the trial court relied on a "blind adherence to titles or talismanic words" by focusing on Milsaps' supervisory title. Construing the evidence in the light most favorable to the plaintiff, that evidence fails to demonstrate the existence of a genuine issue of fact as to whether Milsaps was the defendant's alter ego under the standard set forth in *Jett*.[9] Because the plaintiff did not establish a disputed issue of fact that Milsaps was the defendant's

alter ego, the defendant was entitled to summary judgment.

The judgment is affirmed.

In this opinion the other justices concurred.

[1] General Statutes § 31-284 provides in relevant part: "(a) An employer . . . shall not be liable for any action for damages on account of personal injury sustained by an employee arising out of and in the course of his employment or on account of death resulting from personal injury so sustained, but an employer shall secure compensation for his employees as provided under this chapter, except that compensation shall not be paid when the personal injury has been caused by the wilful and serious misconduct of the injured employee or by his intoxication. All rights and claims between an employer . . . and employees, or any representatives or dependents of such employees, arising out of personal injury or death sustained in the course of employment are abolished other than rights and claims given by this chapter, provided nothing in this section shall prohibit any employee from securing, by agreement with his employer, additional compensation from his employer for the injury or from enforcing any agreement for additional compensation. . . ."

[2] The plaintiff's medical expenses have been processed and paid for by the defendant's workers' compensation insurer, and the plaintiff collects workers' compensation benefits for his injuries pursuant to the act.

[3] The defendant's special defenses alleged that the plaintiff's claims are barred by: (1) the doctrines of waiver, estoppel and/or laches; (2) the exclusivity provision of the act; and (3) the careless, negligent, reckless, wanton, wilful and/or intentional acts and omissions of the plaintiff himself.

[4] In its memorandum of decision, the trial court also concluded that, although there was an issue of fact as to whether the defendant altered the machine to operate with the safety door open, "the plaintiff has failed to provide any evidence of the defendant's subjective state of mind to support the inference that, even assuming the defendant intentionally altered the machine, it did so with the belief that it made it substantially certain that the plaintiff's injuries would occur." The trial court also determined, however, that the plaintiff had established a genuine issue of material fact as to whether Milsaps' alleged actions meet the substantially certain intentional tort exception. See footnote 5 of this opinion.

[5] To fall within the exception to the act's exclusivity provisions, the defendant, or its alter ego, "must have intended the act and have known that the injury was substantially certain to occur from the act." *Suarez* v. *Dickmont Plastics Corp.*, 242 Conn. 255, 280, 698 A.2d 838 (1997); see also *Mingachos* v. *CBS, Inc.*, 196 Conn. 91, 102, 491 A.2d 368 (1985).

[6] We note that a plaintiff alleging an intentional tort "directly committed or authorized by the employer" need not prove that the actor was the employer's alter ego. *Jett* v. *Dunlap*, supra, 179 Conn. 218. In this case, however, the defendant submitted evidence that it did not have a policy or otherwise require or authorize employees to clear bag jams in the machinery by opening the safety doors while the machines were operational, and that it did not intend to injure the plaintiff. The plaintiff has not submitted any evidence to the contrary with respect to the defendant's own actions or authorization. Instead, in opposition to the defendant's motion for summary judgment, the plaintiff contends that Milsaps' actions and instructions as the night supervisor are attributable to the defendant under the alter ego doctrine. "Because direct proof of an employer's actually intended misconduct will rarely be available, the employer's intention may be established by proof of the intentional misconduct of an employee who properly can be identified as the alter ego of the defendant employer." *Melanson* v. *West Hartford*, 61 Conn. App. 683, 688, 767 A.2d 764, cert. denied, 256 Conn. 904, 772 A.2d 595 (2001).

[7] We have recognized two tests for disregarding a defendant's corporate structure; the instrumentality rule and the identity rule. "The instrumentality rule requires, in any case but an express agency, proof of three elements: (1) Control, not mere majority or complete stock control, but complete domination, not only of finances but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; (2) that such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest or unjust act in contravention of [the] plaintiff's legal

rights; and (3) that the aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of. . . . The identity rule has been stated as follows: If [the] plaintiff can show that there was such a unity of interest and ownership that the independence of the corporations had in effect ceased or had never begun, an adherence to the fiction of separate identity would serve only to defeat justice and equity by permitting the economic entity to escape liability arising out of an operation conducted by one corporation for the benefit of the whole enterprise." (Internal quotation marks omitted.) *Naples* v. *Keystone Building & Development Corp.*, supra, 295 Conn. 232.

[8] "[A]pparent authority is that semblance of authority which a principal, through his own acts or inadvertences, causes or allows third persons to believe his agent possesses. . . . Consequently, apparent authority is to be determined, not by the agent's own acts, but by the acts of the agent's principal. . . . The issue of apparent authority is one of fact to be determined based on two criteria. . . . First, it must appear from the principal's conduct that the principal held the agent out as possessing sufficient authority to embrace the act in question, or knowingly permitted [the agent] to act as having such authority. . . . Second, the party dealing with the agent must have, acting in good faith, reasonably believed, under all the circumstances, that the agent had the necessary authority to bind the principal to the agent's action." (Internal quotation marks omitted.) *Ackerman* v. *Sobol Family Partnership, LLP*, 298 Conn. 495, 508–509, 4 A.3d 288 (2010).

[9] The plaintiff also asks us to revisit *Jett* and reformulate the exception to the act's exclusivity under a more liberal standard. See *Suarez* v. *Dickmont Plastics Corp.*, supra, 242 Conn. 295–96 (*Peters, J.*, concurring) (noting that "[p]erhaps an argument might be advanced that the standard enunciated in *Jett* is too strict and should be revised," but declining to consider issue where parties did not advance that argument). In *Jett*, this court held that, "where a worker's personal injury is covered by the act, statutory compensation is the sole remedy and recovery in common-law tort against the employer is barred. . . . This well established principle is not eroded when the plaintiff alleges an intentional tort by his supervisor." (Citations omitted.) *Jett* v. *Dunlap*, supra, 179 Conn. 217. The court reasoned that creating an exception for the acts of supervisors "would mean that 'in all assault cases by one co-employee on another, of which there are hundreds, [the] claimant would have only to show that the assailant was one notch higher on the totem-pole than the victim, and the compensation act would go out the window. So, in a large factory, with layer upon layer of foremen, supervisors, managers, executives and officers, the exclusiveness of compensation would no longer depend on whether the assault was merely another work-connected quarrel, but would turn on the relative rank of the participants . . . .' 2 A Larson, [supra] § 68.21, p. 13-13. Furthermore, the righteous indignation one feels when one employee deliberately injures another is inadequate justification for awarding a common-law tort remedy against an innocent employer." *Jett* v. *Dunlap*, supra, 218–19. Because we remain persuaded that the intentional tort exception to the act's exclusivity should be narrowly construed, we decline to modify the alter ego test to cover situations beyond those where the intentional tort was committed by the employer or its alter ego. Moreover, in light of the numerous unrelated amendments to § 31-284 subsequent to this court's decision in *Jett*, the doctrine of legislative acquiescence also supports our continued adherence to the standard set forth in *Jett*. *State* v. *Salamon*, 287 Conn. 509, 525, 949 A.2d 1092 (2008) ("[l]egislative concurrence is particularly strong [when] the legislature makes unrelated amendments in the same statute" [internal quotation marks omitted]).