

Not Reported in A.2d, 2009 WL 1607520 (Conn.Super.), 47 Conn. L. Rptr. 781

(Cite as: 2009 WL 1607520 (Conn.Super.))

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UNPUBLISHED OPINION. CHECK COURT
RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Waterbury.
Judy RETTIG

v.

TOWN OF WOODBRIDGE.
No. X10UWYCV075005102S.

May 18, 2009.

West KeySummary

Workers' Compensation 413  **2084**

413 Workers' Compensation

413XX Effect of Act on Other Statutory or
Common-Law Rights of Action and Defenses

413XX(A) Between Employer and Employee

413XX(A)1 Exclusiveness of Remedies
Afforded by Acts

413k2084 k. In General. Most Cited

Cases

A pedestrian who fell in the driveway of a district animal control facility (DAC) where she was employed was an employee of the **municipalities** that created the DAC and therefore, the **municipalities** were protected by the exclusivity provisions of the Workers' Compensation Act from the pedestrian's claims of negligence and nuisance. The pedestrian was an employee of the **municipalities** because the DAC was created as a **municipal** district pursuant to a **Municipal Animal Control District Agreement** in which each of the **municipalities** agreed to provide funds on a pro rata basis, own a pro rata share of the DAC, and appoint board members to run the DAC. Furthermore, the expenditures by the DAC and funding by the **municipalities** indicated that they participated in the payment of workers' compensation insurance. C.G.S.A. § 31-284(a).

David N. Rosen, New Haven, Maher & Williams, Fairfield, for Plaintiff.

Howd & Ludorf, Hartford, Cohen & Wolf PC,

Bridgeport, Williams Walsh & O'Connor LLC, North Haven, Law Offices of Blazi John, Waterbury, Cotter Cotter & Mullins, Trumbull, for Defendant.

JANE S. SCHOLL, J.T.R.

Introduction

*1 Before the court are three motions for summary judgment in this action commenced by the Plaintiff, Judy Rettig, against multiple defendants. The Plaintiff alleges injuries which she claims arose out of a fall that occurred on January 9, 2005 in the driveway of the District Animal Control ("DAC") facility, where she was employed. She alleges that there were potholes in the driveway that contained black ice in the winter months, and that, as she was walking down the driveway to retrieve the mail, she stepped on one of the patches of black ice and fell, Count One ¶¶ 1, 9. She had worked at the DAC as the District Animal Control Officer since early in 2001. The DAC facility is located in Woodbridge and serves the Towns of Bethany, Orange, Prospect, and Woodbridge. The Plaintiff alleges causes of action based on nuisance and negligence. All the Town Defendants have filed a motion for summary judgment. A hearing on the motions was held on February 23, 2009.

The first motion for summary judgment (# 166) addresses Counts One, Three, Five, Eleven, Thirteen and Seventeen. It was filed by the Defendants, Town of Woodbridge, Warren Conners, Amey Marrella, Judith Schwartz, Joseph Calistro, Christian Sorenson, James Sabshin, Edward Sheehy, and Steve Bortner. Conners is alleged to have been responsible for re-paving property of the Town of Woodbridge. The other individual Defendants are alleged to be persons from the Town of Woodbridge possessing authority to make the driveway safe. Also joining in the first motion for summary judgment are the Town of Bethany, Clifford Rosson, Derrylyn Gorski, Steven Thomquist and Walter Briggs. Rosson is alleged to have been responsible for re-paving property of the Town of Bethany. The other individual defendants are alleged to be persons from the Town of Bethany possessing authority to make the driveway safe.

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The second motion for summary judgment (# 170) addresses Counts One, Three, Nine and Fifteen and was filed by the Defendants, Town of Orange, Edwin Lieberman, Mitchell Goldblatt, James Zeoli, Joseph Blake, Richard Meisenheimer, Dorothy Berger, Ralph Okenquist, Patricia Person and Roy Cuzocreo. Lieberman is alleged to have been responsible for re-paving property of the Town of Orange and the other individual defendants are alleged to be persons from the Town of Orange possessing authority to make the driveway safe.

The third motion for summary judgment (# 168) incorporates all the arguments contained in the legal briefs of the other Defendants. It was filed by the Defendants Town of Prospect and Robert Chatfield, who is alleged to have been responsible for re-paving property of the Town of Prospect and, although it does not address specific counts, presumably it is in reference to Counts One, Three and Seven.

Count One alleges a claim in nuisance; Counts Three, Five, Seven, Nine, Eleven, Thirteen, Fifteen and Seventeen allege claims of negligence.

Discussion

“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.” (Citation and internal quotation marks omitted.) *Martinelli v. Fusi*, 290 Conn. 347, 354-55, 963 A.2d 640 (2009).

*2 The Defendants advance three arguments why summary judgment should be granted on the negligence claims. First, they argue that the exclusivity provision of the Workers' Compensation Act bars the claims against the Defendants and the Plaintiff does

not qualify for an exception to that provision. Second, they argue that the claims are barred by General Statutes § 13-149, commonly known as the highway defect statute. Third, the Defendants argue that they are protected against liability by the doctrine of governmental immunity and that none of the exceptions to governmental immunity are applicable to the Plaintiff. As to the nuisance claim, the Defendants argue that summary judgment is warranted because nuisance requires a positive act on their part and no positive act has been alleged.

In opposing the Defendants' motions for summary judgment the Plaintiff contends that the DAC, and the municipalities that comprise the DAC, are separate entities and that there is a question of fact as to whether the DAC, and not the municipal Defendants, was Rettig's employer. Relying on the “right to control” test as announced in *Doe v. Yale University*, 252 Conn. 641, 748 A.2d 834 (2000), the Plaintiff asserts that a question of fact exists as to who was the Plaintiff's employer at the time of her fall. The Plaintiff also claims that whether the area where Rettig fell is a road and subject to the highway defect statute is a question of fact for the jury. Additionally, the Plaintiff claims that governmental immunity does not apply because she was an identifiable victim. Lastly, the Plaintiff argues that the facts alleged support a finding that there was a positive act by the Defendants, and, therefore, they can be held liable in nuisance.

As an initial matter, if the Plaintiff's claims are barred by the exclusivity provision of the Workers' Compensation Act then there is no need to address the alternate grounds for summary judgment. That Act, in particular, *General Statutes* § 31-284(a), provides that “[a]n 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 ... 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.”

“The Workers' Compensation Act ... provides the

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sole remedy for employees and their dependents for work-related injuries and death ... Its purpose is to provide a prompt, efficient, simple and inexpensive procedure for obtaining benefits related to employment. The exclusivity provision in § 31-284(a) manifests a legislative policy decision that a limitation on remedies is an appropriate trade-off for the benefits provided by workers' compensation ... The sole exception to this provision is the intentional tort exception to workers' compensation exclusivity, as articulated in Suarez v. Dickmont Plastics Corp., 229 Conn. 99, 109-10, 639 A.2d 507 (1994).” (Citation and internal quotation marks omitted.) Stearns & Wheeler, LLC v. Kowalsky Brothers, Inc., 289 Court 3, 10-1 (2008).^{FN1} “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.” Jaiquay v. Vasquez, 287 Conn. 323, 329, 948 A.2d 955 (2008).

^{FN1}. The Plaintiff does not argue that her claim falls within any exception to the exclusivity provision of the Workers' Compensation Act.

*3 There is no dispute that the Plaintiff's injuries occurred while she was performing her responsibilities as the District Animal Control Officer (Count One, ¶ 10) and that she received Workers' Compensation benefits related to the injuries claimed in the complaint. In the Settlement Agreement regarding the Plaintiff's claim for Workers' Compensation benefits for the injuries she received on January 9, 2005, the Plaintiff's employer is described as “the District Animal Control ... a **municipal** corporation.” Therefore the exclusivity provision of the Workers' Compensation Act bars the Plaintiff's action against the Defendant towns if the **municipalities** are the employer of the Plaintiff.

The law requires towns to either participate in a regional dog pound or maintain a dog pound or facility. General Statutes § 22-336 provides that “[e]ach city or town, other than towns participating in a regional dog pound, shall (1) provide and maintain for use as a

dog pound a suitable building, which shall be made comfortable for the detention and care of dogs and kept in a sanitary condition, or (2) provide, through written agreement, for the detention and care of impounded dogs by a licensed veterinarian, or in a licensed veterinary hospital, licensed commercial kennel, a dog pound maintained by another city or town, or other suitable facility ...” “Absent an indication to the contrary, the legislature's choice of the mandatory term ‘shall’ rather than the permissive term ‘may’ indicates that the legislative directive is mandatory. See Canton v. Xerox Corp., 251 Conn. 153, 165, 740 A.2d 796 (1999); see also Caulkins v. Petrillo, 200 Conn. 713, 717, 513 A.2d 43 (1986) (legislature's use of ‘shall’ connotes that performance of statutory requirements is mandatory rather than permissive).” Bailey v. State, 65 Conn.App. 592, 604, 783 A.2d 491 (2001).

The DAC was originally formed by the towns of Bethany, Orange, Prospect and Woodbridge, pursuant to General Statutes § 22-331a to operate a regional dog pound. General Statutes § 22-331a provides that “[a]ny two or more contiguous towns each of which has a population of less than twenty-five thousand, and which have or will provide a dog pound facility within their region ... may agree to be served by a regional animal control officer ... Each person so appointed shall have the same powers and duties within the region to which he is assigned as a municipal animal control officer in each town therein.” General Statutes § 22-238(b) provides that the Commissioner of Agriculture shall appoint as many regional animal control officers as may be deemed necessary. Originally a regional canine control officer was provided to the DAC by the State through the Department of Agriculture.

Inasmuch as the formation of a regional dog pound is limited to towns with smaller populations, clearly one goal of the statute is to allow the pooling of resources. The statute also allows the sharing of resources by allowing multiple towns participating in a regional dog pound facility to be served by one animal control officer. In addition, the statute provides that the regional animal control officer has the same authority as he would have if he were an officer of each of the towns participating in the agreement.

*4 In 1992 the Regional Dog Pound was dissolved as a result of the State's decision to terminate its partici-

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pation in the facility. The towns then formed a **municipal** district in accordance with General Statutes § 7-330.^{FN2} General Statutes § 7-330 provides that “[a]ny two or more towns, cities or boroughs may, by vote of their legislative bodies, vote to form a district for the performance of any municipal function which the constituent municipalities of such district may, under any provision of the general statutes or of any special act, perform separately.” General Statutes § 7-331 also provides that: “The proportional share of each constituent municipality of the indebtedness and current expenditures of the district for its projects under the provisions of sections 7-330 to 7-332, inclusive, shall be determined by the board, which board shall have all the powers and duties with regard to such projects as such constituent **municipalities** would have severally.”

FN2. The Defendants reference General Statutes § 7-478a in support of their claim that they are considered the Plaintiff's **municipal** employer, yet the provisions of that statute apply only to **municipalities** participating in **interlocal agreements** pursuant to General Statutes § 7-339a to 339l, inclusive. The **agreement** here between the towns was not entered into pursuant to those sections and it appears that the provision of a dog pound facility is not a proper subject of an **interlocal agreement** pursuant to the provisions of General Statutes § 7-339b. However, pursuant to General Statutes § 7-339a a **municipal** district formed pursuant to General Statutes § 7-330, as was the DCA, is considered a public agency which itself could enter into a **interlocal agreement** with any other public agency.

In accordance with the general statutes, the DAC was created as a **municipal** district pursuant to the **Municipal Animal Control District Agreement** (MACDA) in which each of the Defendant towns agreed to provide funds on a pro rata basis, own a pro rata share of the DAC Facility, and appoint board members to run the facility. The purpose of the **agreement** was “... to administer and enforce the laws pertaining to dogs and other animals and to maintain a district animal control facility (hereinafter referred to as the ‘District Animal Control Facility’).” MACDA, p. 1. The MACDA requires participation from elected officials of the Towns in appointing the

board, funding the facility and appointing an animal control officer. The **agreement** specifies how the **municipal** district is managed and how the **municipalities** participate in the management of the **municipal** district by representation in accordance with the provisions of General Statutes § 7-330. General Statutes § 7-330 provides that: “The affairs of any such district shall be managed by a board consisting of two members from each constituent municipality appointed by the board of selectmen of towns, the council or board of aldermen of cities and the board of burgesses of boroughs.” Thus the MACDA provides: “The affairs of the District ... shall be managed by a board consisting of two (2) members from each constituent municipality, appointed by the Board of Selectman, the Town Council, or Board of Aldermen for each Town, as applicable.” MACDA, p. 3, ¶ 2. The MACDA sets forth specific provisions for funding the facility by apportioning the expenses between the towns based upon the 1990 census. MACDA, p. 3, ¶ 3. The annual operating budget has to be approved not only by the board but also by three of the four chief elected officials of the towns. “Each annual operating budget must be approved by the District Board and by the chief elected officials of at least three of the four member Towns.” MACDA, p. 4, ¶ 3. The expenditures by the DAC and funding by the towns for 2005 indicate that they participated in the payment of workers' compensation insurance.

*5 The MACDA specifically provides that the district animal control officer is not only appointed by the board but also by the proper authority in each town as the municipal animal control officer for that town. “The District shall be served by a District animal control officer and such assistants as shall be deemed necessary by the District Board, to be appointed by the District Board, who shall also be appointed by the proper appointing authority in each Town as the municipal animal control officer or such assistants in such member Town for the administration and enforcement of laws related to dogs and other animals within the limits of all member Towns. The working conditions, compensation, benefits, personnel rules, appointment and removal of such animal control officers or assistants as such District animal control officers or assistants shall be solely determined by the District Board.” MACDA, pp. 4-5, ¶ 4.

The Defendants liken the DAC to a municipal board of education. It has been held that members of a

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board of education are officers of the town they serve. Wallingford v. Board of Education, 152 Conn. 568, 573, 210 A.2d 446 (1965). “The persons employed by them in the performance of their statutory functions are employees of the town.” (Citations omitted.) *Id.* Similarly such employees are considered employees of the municipality for purposes of the Workers' Compensation Act. Mase v. Meriden, 164 Conn. 65, 66-67, 316 A.2d 754 (1972). Just as members of the board of the District Animal Control Facility are officers of the towns they serve, so too are the employees of the District Animal Control Facility employees of the towns participating in the Facility.

The Plaintiff attempts to distinguish the instant case from the cases involving boards of education by noting that “an employee of a state agency who serves only one town is different from the employee of an inter-local government agency.” Plaintiff’s brief, page 9, ¶ 2. Plaintiff cites Wallingford v. Board of Education, *supra*. In Wallingford the court considered “whether the implied power, which the defendants concededly possess, to employ the personnel necessary to carry out their obligations as agents of the state is improperly invaded by a requirement that they observe the civil service requirements of the charter in the employment of their nonprofessional personnel.” *Id.*, at p. 574, 210 A.2d 446. The court concluded that the employees of the board of education are town employees subject to the civil service requirements of the town. The plaintiff argues that the analysis employed in Wallingford is inapplicable since the civil service requirements of the four towns comprising the DAC cannot apply at the same time. However, similar to the DAC, the law allows for the creation of regional school districts whose affairs are run by a regional board of education comprised of representatives of the towns participating in the regional school district. General Statutes § 10-46 provides “(a) [t]he affairs of a regional board of education shall be administered by a regional board of education ... each member town shall elect at least one member.” Various statutes that are applicable to boards of education reference “local or regional board of education.” For example, General Statutes §§ 10-220, 10-221, 10-222, 10-226, 10-227, 10-228, 10-229, 10-230, 10-231, 10-232, 10-237, and 10-239. Inasmuch as the legislature has deemed local and regional boards of education identical, there is no logical reason to conclude that an employee of a regional board of education would not be an employee

of the towns that participate in the regional board of education.

*6 The Plaintiff also contends that the DAC and the towns that created the DAC are separate entities and directs the court to Doe v. Yale University, 252 Conn. 641, 748 A.2d 834 (2000). In Doe the plaintiff contracted the human immunodeficiency virus (HIV) while working at Yale-New Haven Hospital where she was an intern and while she was a graduate student at Yale University School of Medicine. After contracting HIV, Doe sued Yale University alleging negligence and the hospital intervened asserting its right to recover past and future workers' compensation payments that it was obligated to make to the plaintiff. Since the hospital was already obligated to provide compensation to the plaintiff by operation of the Workers' Compensation Act, Yale University claimed immunity from the negligence claim on the basis that it was in a joint venture with the hospital and was also protected from suit by the exclusivity provisions of the act. The trial court struck the University's special defense of immunity from suit under the exclusivity provision of the Workers' Compensation Act and the University appealed. The court reversed the trial court stating “[w]hether a joint venturer is an employer under the [workers' compensation] act is therefore a question of the specific joint venturer's degree of control over the 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.” (Citations and internal quotation marks omitted.) *Id.*, at 680-81, 748 A.2d 834. The Plaintiff argues that the DAC and not the towns determined her salary, set her hours, supervised her work, established her benefits and that she reported to the DAC board and not the towns. Therefore the Plaintiff claims, the towns did not exert the requisite control or possess the “right to control” necessary for the towns to be considered her employer.

The relationship between the towns and the DAC is not analogous to the joint venture in Doe but is more akin to the relationship of a town to any of the employees of its board or commissions. For example, as noted above, employees of a board of education are employees of the town the board of education serves. “[L]ocal boards of education act on behalf of the municipality they serve as well as in fulfillment of their

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state mandates and ... their professional and nonprofessional employees are employees of the municipality ... The [teacher] therefore, holds a position under the government of the Town of Cheshire.” Cheshire v. McKenney, 182 Conn. 253, 260, 438 A.2d 88 (1980). “[T]he teachers employed by the plaintiff’s [board of education] are also employees of the towns they serve ...” Board of Education v. State Employees Retirement, 210 Conn. 531, 545, 556 A.2d 572 (1989). Just as a town has the right to control its teachers through a board of education, the towns here had the right to control the Plaintiff through their representatives on the DAC board.

*7 This case is clearly not controlled by *Doe* but by the Supreme Court’s decision in Mase v. Meriden, 164 Conn. 65, 316 A.2d 754 (1972). There the Court held that an employee of the Meriden Board of Education could not sue the city of Meriden for injuries he received when he fell on a public sidewalk during the course of his duties. The Court held that: “The issue presented in this appeal is whether the plaintiff, admittedly a nonprofessional employee of the Meriden board of education, is, under the Workmen’s Compensation Act, an employee of the city so that his action against the city is barred by 31-284 of the General Statutes ... We think he is.” (Footnote omitted.) *Id.*, at pp. 66-7, 316 A.2d 754.

The parties reference the statutes dealing with collective bargaining by municipal employees, General Statutes §§ 7-467 and 7-478a. Although the court agrees that pursuant to General Statutes § 7-478a, even if applicable, the DAC, and not the individual towns, is considered a municipal employer for collective bargaining purposes, the court notes that pursuant to General Statutes § 7-467 a district as well as a school board is considered a municipal employer for such purposes as well. However that does not mean that the towns, which create and act through such districts or boards to carry out their governmental duties are no longer considered the employer of the district or board’s employees for workers’ compensation purposes. To hold as the Plaintiff argues would subject a town who participates in a municipal district to liability for a worker’s on the job injury claim twice, once through assessment for sums to provide workers’ compensation coverage through the district and then directly for the injury itself. Such cannot be the intent of the legislature in providing for the regionalization of municipal services. The obvious pur-

pose of the statutes in allowing the regionalization of services by towns which, because of their size, would make the individual provision of such service by one town alone economically unfeasible, would be defeated if such regionalization would operate to strip the town of the protections it would have had if it provided the service alone.

Lastly, the Plaintiff’s reference to the decision in Place v. Waterbury, 66 Conn.App. 219, 783 A.2d 1260 (2001) for the proposition that the determination of the Plaintiff’s status is fact bound, is misplaced because the facts on which this court bases its decision are undisputed.

Conclusion

For the foregoing reasons the court finds that the Plaintiff is an employee of the municipalities that created the DAC and that the Defendants are protected by the exclusivity provisions of the Workers’ Compensation Act from the Plaintiff’s claims of negligence and nuisance. Summary judgment is granted for the Defendants as to Counts One, Three, Five, Seven, Nine, Eleven, Thirteen, Fifteen and Seventeen.^{FN3}

FN3. The Plaintiff does not argue that the grounds alleged by the Towns as the basis for the granting of summary judgment does not apply to the individuals named in these counts as well.

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