NNH CV22-6124046 S	: SUPERIOR COURT
ROSHAN BUTLER	: JUDICIAL DISTRICT OF : NEW HAVEN
V.	: AT NEW HAVEN
MICHAEL MELLO AND THE TOWN OF HAMDEN	: APRIL 25, 2024

MEMORANDUM OF DECISION
ON MOTION FOR SUMMARY JUDGMENT No. 127.00

The defendants, Michael Mello and the Town of Hamden, move for summary judgment on both counts of the amended complaint no. 124.00 filed by the plaintiff, Roshan Butler. They argue that the qualified immunity for discretionary acts conferred by General Statutes § 52-557n(a)(2) bars the negligence claims against Mello in the first count and the vicarious liability claims against the town in the second count. The plaintiff opposes the motion, arguing that there is no immunity because Mello's acts were ministerial.

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." Practice Book § 17-49; *Provencher* v. *Enfield,* 284 Conn. 772, 790-91, 936 A.2d 625 (2007). "A 'genuine' issue has been variously described as a 'triable,' 'substantial' or 'real' issue of fact; . . . and has been defined as one which can be maintained by substantial evidence." (Citations omitted.) *United Oil Co.* v. *Urban Redevelopment Commission,* 158 Conn 364, 378, 260 A.2d 596 (1969). A "material fact" is one that would make a difference in the outcome of the case. *Hammer* v. *Lumberman's Mutual Casualty Co.,* 214 Conn. 573, 578, 573 A.2d 699 (1990).

This court must view the evidence in the light most favorable to the nonmoving party. *Romprey* v. *Safeco Ins. Co. of America*, 310 Conn. 304, 312, 77 A.3d 726 (2013). "[S]ummary judgment is appropriate only if a fair and reasonable person could conclude only one way . . . [A] summary disposition . . . should be on evidence which a jury would not be at liberty to disbelieve and which would require a directed verdict for the moving party . . . [A] directed verdict may be rendered only where, on the evidence viewed in the light most favorable to the nonmovant, the trier of fact could not reasonably reach any other conclusion than that embodied in the verdict as directed." (Citations omitted; internal quotation marks omitted). *Dugan* v. *Mobile Medical Testing Services, Inc.,* 265 Conn. 791, 815, 830 A.2d 752 (2003).

"[I]t is only [o]nce [the moving party]'s burden in establishing [its] entitlement to summary judgment is met [that] the burden shifts to [the non-moving party] to show that there is a genuine issue of fact exists justifying a trial . . . . Accordingly, the rule that the party opposing summary judgment must provide evidentiary support for its opposition applies only when the moving party has first made out a prima facie case for summary judgment . . . . [I]f the party moving for summary judgment fails to show that there are no genuine issues of material fact, the nonmoving party may rest on mere allegations or denials contained in his pleadings." (Citations omitted; internal quotation marks omitted.) *Romprey* v. *Safeco Ins. Co. of America*, supra, 310 Conn. 320-21.

Once the moving party has made out a prima facie case for summary judgment, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. *Maffucci* v. *Royal Park Ltd. Partnership,* 243 Conn. 552, 554-55, 707 A.2d 15 (1998). It is not enough for the opposing party to assert the existence of a disputed issue of fact. Id. The opposing party must demonstrate that it has sufficient counterevidence to raise a genuine issue of

material fact as to each of the essential elements of its cause of action. See *Stuart* v. *Freiberg,* 316 Conn. 809, 822-23, 116 A.3d 1195 (2015).

"Only evidence that would be admissible at trial may be used to support or oppose a motion for summary judgment." *Home Ins. Co.* v. *Aetna Life and Cas. Co.,* 235 Conn. 185, 202-03, 664 A.2d 1001 (1995) (holding that one of the submissions could not be considered because it was not admissible in evidence). See also *New Haven* v. *Pantani,* 89 Conn. App. 675, 678-80, 874 A.2d 879 (2005) (reversing trial court for granting summary judgment based upon unauthenticated documents).

The moving parties, the defendants, have not submitted evidence that would be admissible at trial. They attach only unauthenticated photographs and a certified copy of a police report that is hearsay. Therefore, the plaintiff may rely upon the allegations in her pleadings in response to the motion. *Romprey* v. *Safeco Ins. Co. of America*, supra, 310 Conn. 320-21.

The plaintiff alleges in her amended complaint that on August 4, 2020, she was operating a motor vehicle southbound on Whitney Avenue in Hamden. She further alleges that Mello was a Hamden police officer, who in the course of his employment, was parked in a vehicle owned by the town. Mello's vehicle was parked in an easterly direction and blocking traffic traveling in a southerly direction on Whitney Avenue. She alleges that Mello's vehicle moved forward, and as a result, she struck that vehicle. The plaintiff also submitted in response to this motion an excerpt of Mello's deposition in which he admitted that at the time of the collision, he was in the driver's seat of his vehicle, his keys were in the ignition, the engine was running, the headlights were on, and his rear lights were on.

The plaintiff alleges that Mello was negligent because "he failed to keep a proper lookout; . . . he failed to keep control of his vehicle; . . . he moved his vehicle in an unsafe manner in

violation of Connecticut General Statutes § 14-243(a); . . . he was improperly parked his vehicle in violation of Connecticut General Statutes § 14-251; . . . he failed to illuminate his vehicle lights in violation of Connecticut General Statutes § 14-96a; . . . he failed to illuminate head and rear lights in violation of Connecticut General Statutes § 14-96L; . . . he failed to yield the right of way; . . . he failed to properly position his vehicle in the roadway; . . . he failed to properly use emergency lighting in the area of the collision; . . . he failed to properly use signs and/or signals of the presence of his vehicle; . . . he failed to use a vehicle that was equipped with overhead emergency lighting and/or . . . he failed to properly warn the Plaintiff of his presence." Amended Complaint, ¶ 8.

The defendants argue that they are not liable to the plaintiff for any negligence alleged in count one or for the vicarious liability alleged in count two because they are protected by governmental immunity. "The existence of a duty is a question of law." *Raspberry Junction Holding, LLC* v. *Southeastern Connecticut Water Authority*, 340 Conn. 200, 212, 263 A.3d 796 (2021). "The issue of governmental immunity is simply a question of the existence of a duty of care, and [our Supreme Court] has approved the practice of deciding the issue of governmental immunity as a matter of law." (Internal quotation marks omitted.) *Doe* v. *Petersen*, 279 Conn. 607, 613, 903 A.2d 191 (2006).

"[Section] 52-557n abandons the common-law principle of municipal sovereign immunity and establishes the circumstances in which a municipality may be liable for damages . . . . One such circumstance is a negligent act or omission of a municipal officer acting within the scope of his or her employment or official duties . . . . [Section] 52-557n (a) (2) (B), however, explicitly shields a municipality from liability for damages to person or property caused by the negligent acts or omissions which require the exercise of judgment or discretion as an official function of

the authority expressly or impliedly granted by law." (Internal quotation marks omitted.) *Doe* v. *Madison*, 340 Conn. 1, 35, 262 A.3d 752 (2021).

"Generally, a municipal employee is liable for the misperformance of ministerial acts, but has a qualified immunity in the performance of governmental acts." (Internal quotation marks omitted.) *Doe* v. *Madison*, supra, 340 Conn. 18. The defendants argue that they are protected by governmental immunity because count one only alleges discretionary acts. The plaintiff's argument in opposition is that Mello's acts were ministerial.

Our Supreme Court has distinguished discretionary and ministerial acts. "Governmental acts are performed wholly for the direct benefit of the public and are supervisory or discretionary in nature . . . . The hallmark of a discretionary act is that it requires the exercise of judgment . . . ." *Doe* v. *Madison*, supra, 340 Conn. 18. "[W]hen an official has a general duty to perform a certain act, but there is no city charter provision, ordinance, regulation, rule, policy, or any other directive [requiring the government official to act in a] prescribed manner, the duty is deemed discretionary." Id., 20.

"In contrast, [a ministerial act] refers to a duty which is to be performed in a prescribed manner without the exercise of judgment or discretion." *Doe* v. *Madison*, supra, 340 Conn. 18. "A ministerial act is one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment [or discretion] upon the propriety of the act being done . . . ." Id., 20.

Our Supreme Court has held that "operation of a motor vehicle is a highly regulated activity that constitutes a ministerial function." *Daley* v. *Kashmanian*, 344 Conn. 464, 500, 280 A.3d 68 (2022). The defendants argue that this holding does not apply here because Mello was not "operating" his vehicle. The plaintiff disputes this.

Our appellate courts have considered whether a parked vehicle is being "operated" several times. In the most on-point decision, our Supreme Court held that a state vehicle parked for purposes of serving as a warning device or protective barrier was not parked "incident to travel," and thus was not being "operated" for purposes of the state sovereign immunity statute, General Statutes § 52-556. *Allison* v. *Manetta*, 284 Conn. 389, 399-400, 933 A.2d 1197 (2007). The court concluded that "[i]t was for the jury to decide after considering all the evidence whether the truck was being used as a warning device or a protective barrier or whether it was parked incident to travel for road maintenance purposes." Id., 401-02.

In light of the allegation in paragraph 4 of the amended complaint that Mello was not just parked but that "he moved forward," it was incumbent on the defendants, as the moving parties, to come forward with admissible evidence that Mello did not move forward and that he was parked as a warning device or protective barrier. They failed to do this. They only provided unauthenticated photographs and a police report that is hearsay. Therefore, the court denies summary judgment on the ground that Mello was not operating his vehicle.

The defendants further argue that Mello was exempt from the application of the various motor vehicle statutes the plaintiff alleges that Mello violated. Although those statutes impose ministerial duties on Mello, the defendants argue that those motor vehicle statutes did not apply here because, at the time of the collision here, Mello was in a maintenance vehicle that was exempt from those statutes pursuant to General Statutes § 14-290.

Section 14-290 is entitled "Exemptions from motor vehicle laws." The defendants rely upon subsection (b), which provides:

> "The following provisions of the general statutes shall not apply to operators of maintenance vehicles or equipment of any governmental agency or agent thereof or to vehicles or equipment of any governmental agency or agent thereof, so far as such exemption is necessary, while such operators and

> equipment are engaged in or are preparing to engage in or are departing from highway maintenance operations on any highway, road or street, provided the Department of Transportation shall not by reason of such exemption suffer any loss of revenue granted from any agency or department of the federal government for the federal Interstate Highway System or any other highway system: Sections 14-216, 14-230 to 14-233, inclusive, 14-235 to 14-242, inclusive, 14-244 to 14-247, inclusive, 14-250a to 14-252, inclusive, 14-261, 14-262, 14-264 to 14-271, inclusive, 14-299, 14-301 to 14-308, inclusive."

The plaintiff alleges violations of the following motor vehicle statutes: General Statutes §§ 14-243(a), 14-251, 14-96a and 14-96L. Only violations of Section 14-251 are exempted under Section 14-290. Therefore, even if the court were to find that there were no disputed issues of material fact that Section 14-290 applies here, the defendants have not met their burden of making out a prima facie case for summary judgment as to the alleged statutory violations of Sections 14-96a, 14-96L and 14-243(a). They have not made any other argument that Mello did not have to comply with these three statutes or that these statutes did not impose ministerial duties on Mello. Therefore, summary judgment is denied as to the alleged violations of these three statutes.

Before addressing whether Section 14-290 exempted Mello from complying with Section 14-251, the court considers the defendants' argument that Mello's actions in parking his vehicle were exempt from Section 14-251. That statute is entitled "Parking vehicles." The defendants claim that Mello was exempt from complying with that statute based on subsection (d), which provides:

> "Nothing in this section shall be construed to apply to emergency vehicles and to maintenance vehicles displaying flashing lights or to prohibit a vehicle from stopping, or being held stationary by any officer, in an emergency to avoid accident or to give a right-of-way to any vehicle or pedestrian as provided in this chapter, or from stopping on any highway within the limits of an incorporated city, town or borough where the parking of vehicles is regulated by local ordinances."

The defendants contend that Mello's police car was a maintenance vehicle that was displaying flashing lights. The motor vehicle statutes define "maintenance vehicle" as "any

vehicle in use by the state or by any town, city, borough or district, any state bridge or parkway authority or any public service company, as defined in section 16-1, in the maintenance of public highways or bridges and facilities located within the limits of public highways or bridges." General Statutes § 14-1(52). The defendants argue that Mello's vehicle was a "maintenance vehicle" because he was assigned to perform traffic control for the closure of Whitney Avenue due to downed power lines. Their sole support for this contention is the police report that was created in response to the collision. Without an accompanying affidavit, that report is hearsay. Therefore, the defendants have not met their burden of making out a prima facie case for summary judgment that Mello's vehicle was a "maintenance" vehicle for purposes of this statute or for the exemption provided by Section 14-290.

The defendants also state that Mello's vehicle was an "emergency vehicle" within the terms of the Section 14-251(d) exemption. They rely on the fact that "police vehicle" is included in the motor vehicle statutes' definition of "authorized emergency vehicle." General Statutes § 14-1(5).[1] Even if this were the case, they have not come forward with admissible evidence to establish that Mello and the town are entitled to discretionary act immunity for the remainder of the allegations of common law and statutory motor vehicle law violations.

For the foregoing reasons, the defendants' motion for summary judgment is denied.

BY THE COURT,

Hon. Elizabeth J. Stewart

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[1] Notably, even when an emergency vehicle is being operated, discretionary act immunity pursuant to Section 52-557n(a)(2)(B) does not apply to the manner in which that emergency vehicle is being operated by virtue of the "duty to drive with due regard" codified in General Statutes § 14-283(d). *Adesokan* v. *Bloomfield*, 347 Conn. 416, 449, 297 A.3d 983 (2023).