DOCKET NO: FST CV 17—6032080-S	:	SUPERIOR COURT
RALPH BRIA ADMIN ET AL.	:	JUDICIAL DISTRICT OF
	:	STAMFORD-NORWALK
V.	:	AT STAMFORD
TOWN OF GREENWICH ET AL.	:	APRIL 15, 2024

MEMORANDUM OF DECISION – CROSS MOTIONS FOR SUMMARY JUDGMENT

The plaintiff Ralph Bria and defendant Town of Greenwich have filed cross motions for summary judgment claiming that there exists no genuine issue of material fact and arguing that they are each entitled to judgment in their favor as a matter of law.

The plaintiff Ralph Bria has filed a motion for summary judgment and supporting memorandum of law, #248 and # 249 respectively as to the defendant Town of Greenwich's second and third special defenses claiming that it is immune from liability under the doctrine of governmental immunity. The plaintiff claims that there exists no genuine issue of material fact and argues that he is entitled to judgment in his favor as a matter of law because the defense of governmental immunity claimed by the Town of Greenwich does not apply in this case because (1) the operation of a nursing home is a classic proprietary function and not a governmental act; (2) the provision of medical care in accordance with a mandatory standard of care and required statutes and regulations is a ministerial duty; and (3) the defendant lacks factual support for the governmental immunity defense. The defendant filed an Objection, #252 alleging that (1) the operation of a nursing home for the infirmed is squarely within the municipality's government function; (2) the standard of care does not create a ministerial duty to act; and (3) the foreign caselaw cited by the plaintiff weighs in favor of granting immunity.

The defendant filed its own motion for summary judgment and supporting memorandum of law, #246 and #247 respectively, claiming that it is shielded from liability under the doctrine of governmental immunity because all the allegedly negligent conduct that the plaintiff claims that the defendant engaged in is comprised of discretionary governmental functions. The defendant thus moves the court to grant summary judgment in its favor as to counts seven through nine of the amended complaint. The plaintiff filed his objection, #253 claiming that operating a nursing home is a proprietary function regardless of the profitability of the endeavor and that there is no precedent to establish that operating a nursing home is an essential health service that warrants governmental immunity. The plaintiff further argues that the defendant did not have discretion to ignore the standard of care and that the plaintiff was an identifiable victim under the exception to governmental immunity.

As the issues raised in the parties' cross motions for summary judgment and their objections to the cross motions for summary judgment are the same, the Court will address in this decision both cross motions and their corresponding objections. Thus, this decision shall serve as a ruling on both pending motions for summary judgment and their corresponding objections.

PROCEDURAL HISTORY

The plaintiff filed his amended complaint on April 5, 2018. The defendant filed its revised answer and special defenses on January 2, 2022 On September 18, 2023, the plaintiff filed his motion for summary judgment and memorandum of law in support. On November 1, 2023, the defendant filed its objection. On August 3, 2023, the defendant filed a motion for permission to file a summary judgment motion which the court (*Ozalis, J.)* granted on August 17, 2023. On September 18, 2023, the defendant filed its motion for summary judgment and

memorandum of law in support. On November 3, 2023 the plaintiff filed his objection. The matters were scheduled for a hearing on the short calendar on December 18, 2023.

FACTS

The plaintiff, the administrator of the Estate of Maryann Bria alleges that Maryann Bria was admitted as a resident of the Nathaniel Witherell (hereinafter "Nathaniel Witherell") on April 23, 2012. Nathaniel Witherell is a nursing and rehabilitation center owned, maintained, and operated by the Town of Greenwich, a municipality lawfully chartered by the State of Connecticut. At the time of her admission and thereafter, the defendant was notified that Mrs. Bria had a medical history that included dementia, behavioral disturbances, an inability to follow instructions, decreased cognitive function, decreased safety awareness, and that she was a fall risk. During the course of her time residing at Nathaniel Witherell, the plaintiff alleges that Mrs. Bria sustained numerous falls, starting on December 4, 2014 and continuing through March 2, 2015.

On March 11, 2015, Mrs. Bria was admitted to Greenwich Hospital and complained of left hip pain and head pain as a result of a fall that had occurred on March 2, 2015. An x-ray revealed that Mrs. Bria had sustained a left femoral neck fracture. On March 4, 2015, Mrs. Bria underwent a left hip hemiathroplasty for her fracture. On March 11, 2015, Mrs. Bria underwent another x-ray that revealed that had suffered a periprosthetic left hip fracture. On March 13, 2015 Mrs. Bria underwent surgery for a surgical revision of her left hip. During that surgery, Mrs. Bria experienced a cardiac event and died later the same day.

In his complaint, the plaintiff alleges that the defendant was medically negligent and caused the death of Mrs. Bria as a result of this negligence and that the defendant violated the patient's bill of rights making him entitled to punitive damages and compensatory damages.

In its answer, the defendant denies the plaintiff's allegations. In its special defenses, the defendant has alleged that the case has been brought outside the applicable period of the statute of limitations, that the plaintiff has failed to state a claim upon which relief may be granted, and that it is immune from liability under the doctrine of governmental immunity. It is the latter claim that is also the basis for the defendant's motion for summary judgment.

LEGAL PRINCIPLES

A. LEGAL STANDARD FOR MOTIONS FOR SUMMARY JUDGMENT

"'The standards . . . [for] review of a . . . motion for summary judgment are well established. 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. . . .'" (Citations omitted.) *DiPietro* v. *Farmington Sports Arena, LLC*, 306 Conn. 107, 115–16, 49 A.3d 951 (2012), quoting *H.O.R.S.E. of Connecticut, Inc.* v. *Washington*, 258 Conn. 553, 558–60, 783 A.2d 993 (2001).

"In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle him to a judgment

as a matter of law. The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent. . . ." *Zielinski* v. *Kotsoris*, 279 Conn. 312, 318, 901 A.2d 1207 (2006).

Once the movant for summary judgment has satisfied the initial burden of showing the absence of a material issue of fact, the burden shifts to the opponent to establish that there is a genuine issue of material fact: "it is then 'incumbent upon the party opposing summary judgment to establish a factual predicate from which it can be determined, as a matter of law, that a genuine issue of material fact exists.'" *Iacurci* v. *Sax*, 313 Conn. 786, 799, 99 A.3d 1145 (2014), quoting *Connell* v. *Colwell*, 214 Conn. 242, 251, 571 A.2d 116 (1990). The nonmoving party, however, has no obligation to submit documents establishing the existence of a genuine issue of material fact until the moving party has met its burden of "showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any [such] issue of material fact." *State Farm Fire & Casualty Co.* v. *Tully*, 322 Conn. 566, 573, 142 A.3d 1079 (2016).

B. GOVERNMENTAL IMMUNITY UNDER CGS § 52-557n

Connecticut General Statutes § 52-557n(a)(1) states: "Except as otherwise provided by law, a political subdivision of the state shall be liable for damages to person or property caused by: (A) The negligent acts or missions of such political subdivision or any employee, officer or agent therefore acting within the scope of his employment or official duties; (B) negligence in the performance of functions from which the political subdivision derives a special corporate profit or pecuniary benefit; and (C) acts of the political subdivision which constitute the creation or participation in the creation of a nuisance; provided, no cause of action shall be

maintained for damages resulting from injury to any person or property by means of a defective road or bridge except pursuant to section 13a-149. (2) Except as otherwise provided by law, a political subdivision of the state shall not be liable for damages to person or property caused by: (A) Acts or omissions of any employee, officer or agent which constitute criminal conduct, fraud, actual malice or willful misconduct; or (B) 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.

C. COMMON LAW MUNICIPALITY LIABILITY

"[A] municipality is immune from liability for the performance of governmental acts as distinguished from ministerial acts..." (internal quotation marks omitted.) *Elliot v. Waterbury*, 245 Conn. 385, 411 (1998). "Governmental acts are performed wholly for the direct benefit of the public and are supervisory or discretionary in nature...On the other hand, ministerial acts are performed in a prescribed manner without the exercise of judgment or discretion as to the propriety of the action." (Internal quotation marks omitted.) *Heigl v. Board of Education*, 218 Conn. 1, 4, 587 A.2d 423 (1991). "[I]n order for [municipal] defendants to benefit from the application of governmental immunity, [they] must have performed a governmental act." *Wisniewski v. Darien*, 135 Conn. App. 364, 380, 42 A.3d 436 (2012). Therefore, evidence that a municipal defendant acted pursuant to governmental function is thus an inherent element of the defendant's governmental immunity special defense. See *Mazurek v. East Haven*, 99 Conn. App. 795, 797-98, 916 A. 2d 90.

Thus, the first step in determining whether a municipality is shielded from liability by the doctrine of governmental immunity is to determine whether the municipality was engaged in a proprietary or governmental function. See *Brusby v. Metropolitan District*, 160 Conn. App. 638, 649-50, 127 A. 3d 257 (2015). If a municipality is engaged in a proprietary act and not a

governmental act, the distinction between discretionary and ministerial acts does not apply. See *Considine v. Waterbury*, 279 Conn. 830, 835-36, 905 A.2d 70 (2006).

Whether a governmental act is discretionary or subject to a ministerial duty is a matter of law to be decided exclusively by the court. *Ventura v. East Haven*, 330 Conn. 613, 636, 199 A.3d 1 (2019). "Generally, liability may attach for a negligently performed ministerial act, but not for a negligently performed governmental or discretionary act." (Internal quotation marks omitted.) *Kolniak v. Board of Education*, 28 Conn. App. 277, 281, 610 A.2d 193 (1992). "The word ministerial refers to a duty which is to be performed in a prescribed manner without the exercise of judgment or discretion." *Durrant v. Board of Education*, 284 Conn. 91, 95 n. 4, 931 A. 2d 859 (2007). "[T]he hallmark of a discretionary act is that it requires the exercise of judgment." (Internal quotation marks omitted.) *Martel v. Metropolitan District Commission*, 275 Conn. 38, 47-48, 881 A.2d 194 (2005).

"Generally, evidence of a ministerial duty is provided by an explicit statutory provision, town charter, rule, ordinance or some other directive.." *Wisniewski v. Darien*, 135 Conn. App. 364, 374, 42 A. 3d 436 (2012). "In order to create a ministerial duty, there must be a city charter provision, ordinance, regulation, rule, policy, or any other directive [compelling a municipal employee] to [act] in any prescribed manner...[T]he threshold inquiry in determining whether a duty is ministerial or discretionary is whether there exists a directive compelling a municipality or its agent to act in a prescribed manner..." (Citation omitted; internal quotation marks omitted.) *Coley v. Hartford*, 140 Conn. App. 315, 323, 59 A. 3d 811 (2013).

"Functions of a municipal corporation fall into two classes, those of a governmental nature, where it acts merely as the agent or representative of the state in carrying out its public purposes, and those of a proprietary nature, where it carries on activities for the particular benefit of its inhabitants. *Winchester v. Cox*, 129 Conn. 106, 109, 26 A.2d 592 (1942). If the

activity falls within the latter category, then the municipality "is not clothed with [the state's] immunities and is liable to be sued for injuries inflicted through its negligence in the performance of such an act." *Hourigan v. Norwich*, 77 Conn. 358, 364-65, 59 A. 487 (1904). Thus, a municipality's immunity from liability for injuries applies only when it "is engaged in the performance of a public duty for the public benefit, and not for its own corporate profit..." *Richmon v. Norwich*, 96 Conn. App. 582, 588, 115 A.11 (1921).

DISCUSSION

In his motion for summary judgment, the plaintiff alleges that operating a nursing home is a classic proprietary function and not a government function, that providing medical care according to a mandatory standard of care and applicable statutes is a ministerial duty of the defendant, and that the defendant lacks factual support for its claim of governmental immunity. Specifically, the plaintiff claims that the defendant is engaged in a proprietary act in operating a nursing home based on the nature and character of the act, the fact that every other nursing home operated in Connecticut is a private business, because the Town of Greenwich itself characterizes its operation of the facility as operating a business entity, and because the town derives substantial revenue from its operation of the facility. The plaintiff alleges that since the defendant had a duty to comply with state and federal regulations regarding the applicable standard of care, it is not entitled to immunity since the defendant had a ministerial duty to act in accordance with these statutes and regulations. Finally, the plaintiff claims that there is no factual support for the defendant's claim of immunity.

In its objection, the defendant claims that its operation of Nathaniel Witherell is a government function that entitles it to immunity from liability, that the standard of care does not create a ministerial duty to act, and that caselaw from outside of Connecticut supports finding of governmental immunity in this case.

In its motion for summary judgment, the defendant alleges that the court must enter summary judgment in its favor because the plaintiff's claims are barred by the doctrine of governmental immunity because all of its alleged conduct is comprised of discretionary government functions so that the defendant is protected by governmental immunity. Specifically, the defendant alleges that there is no specific city charter provision, ordinance, regulation, rule, policy or other directive compelling its employees to behave in a certain way in its operation of Nathaniel Witherell. The defendant claims that the standard of care is insufficient to qualify as such a directive to compel municipal employees to act in a specifically prescribed manner so as to make its alleged conduct fall within the definition of ministerial duty.

In addition, it alleges that the identifiable person, imminent harm exception to discretionary act immunity does not apply here because (1) Mrs. Bria was not compelled to be at Nathaniel Witherell but was merely a resident of the facility; (2) that it was not confronted by any circumstances that could have made it aware that the staff at Nataniel Witherell were likely to cause harm to Mrs. Bria so that it had an unequivocal duty to immediately act to prevent potential harm; and (3) it was not aware that Mrs. Bria faced a specific, imminent harm since the staff at the nursing home had assisted her fifteen minutes before the unwitnessed incident where she was found seated on the floor of her room.

The parties' respective positions are fairly clear, as evidenced by their motions for summary judgment and objections to the opposing party's motion for summary judgment. The plaintiff's position is that because the Town of Greenwich's operation of Nathaniell Witherell is a proprietary function, this makes governmental immunity inapplicable since the Town of Greenwich is acting like a private enterprise by operating Nathaniel Witherell for the particular benefit of its inhabitants based on the Town of Greenwich charter and because the Town of Greenwich charges patients for the cost of living and treatment at the facility. Since this facility

is the only municipality owned and operated nursing facility in the entire State of Connecticut, although it is owned by the Town of Greenwich, it still functions the same as all the other privately operated nursing homes in Connecticut making the governmental immunity doctrine inapplicable in this case, according to the plaintiff. Moreover, the plaintiff further believes that since the Town of Greenwich derives substantial revenue from its ownership and operation of the Nathaniel Witherell, this revenue is also indicative of the corporate nature of the operation of the facility.

However, the defendant contradicts this notion based on the fact that the facility is operated at a financial loss so that the Town of Greenwich does not receive a pecuniary benefit from owning and operating the facility. The defendant believes that the operation of a nursing home falls within the municipality's broad government function to provide for the health, safety, and welfare of its citizens, which thus does not qualify as a pecuniary benefit to the Town of Greenwich. The defendant further alleges that the doctrine of governmental immunity bars the plaintiff from recovery against it because the defendant's actions fell within its discretionary governmental functions and not within a ministerial duty. Specifically, the defendant argues that there is no charter provision, ordinance, regulation, rule, policy or other directive compelling the rendering of health care services in a proscribed manner because the practice of medicine necessarily involves the individual provider exercising his or her discretion and medical judgment for any given patient's presentation. Consequently, the defendant argues that when an act or omission alleged involves the exercise of discretion and judgment, a duty will only be found to be ministerial if evidence of a policy or rule limiting that discretion is offered and in the absence of that, summary judgment in its favor is proper.

Looking at cases such as *Considine v. Waterbury*, 279 Conn. 830, 916 A. 2d 90 (2006) and *Hannon v. Waterbury*, 106 Conn. 13, 136 A. 876 (1927), it is clear that the operation of a

nursing home in this case is very unlike most cases where the issue of governmental immunity arises. For instance, a municipality operating a swimming pool was deemed to be a government function in *Hannon v. Waterbury.* See *Hannon v. Waterbury*, 106 Conn. 13, 136 A. 876 (1927). In *Considine v. Waterbury*, the plaintiff sued the municipality after he fell into a glass window panel in the common entryway of a clubhouse of a municipal owned golf course that was owned and operated by the City of Waterbury. The fall had occurred after the patron had left a privately owned restaurant that was located in a portion of the clubhouse that the restaurant owner had leased from the City of Waterbury. Here, the Connecticut Supreme Court found that the municipality was not immune from liability. See *Considine v. Waterbury* , 279 Conn. 830, 916 A. 2d 90 (2006).

Here, the operation of a nursing home is, by its very nature, dissimilar to other endeavors that courts have previously found to fall within a municipality's function - i.e. operating public parks, playgrounds, public baths, and bathing houses. While the defendant essentially claims that its operation of Nathaniel Witherell does not amount to the Town acting like a corporation and deriving a special pecuniary benefit because the nature and character of the act brings it within the doctrine of governmental immunity, this is unclear based on the unique facts of this case.

The fact that every other nursing home in Connecticut is a private business is itself a distinguishing feature that is relevant to this case because it indicates that the municipality is engaged in an endeavor that is only otherwise engaged in by private entities in our state. Not only does Nathaniel Witherell perform a task that is only performed by private entities in our state, but it also identifies itself as a business entity, and acknowledges that generating revenue is part of its strategic plan. However, it is also owned and operated by a government entity, is governed by a town charter, and primarily caters to town residents by providing necessary

rehabilitation and related health care services. These contrasting facts place this facility in a very unique position. Based on the evidence provided and the relevant statutes and caselaw, the court cannot conclude at this stage whether the defendant is performing a government function or a proprietary one. However in reviewing the court's reasoning and analysis in *Hannon v. Waterbury*, 106 Conn. 13, 136 A. 876 (1927) and *Considine v. Waterbury* , 279 Conn. 830, 916 A. 2d 90 (2006), the court has provided useful guidance in deciding whether governmental immunity applies here and thus, whether summary judgment is appropriate in this case.

It is now clear that Nathaniel Witherell is performing a task that is only otherwise performed by private entities in our state, that it identifies itself as a business entity, it generates an extremely high revenue, and it addresses its generation of revenue as part of its strategic plan. In these ways, it is acting as a private entity does. Moreover, by its own admission, Nathaniel Witherell reinvests its significant revenue into the facility and does not actively work towards achieving financial efficiencies so that while the cost of operating the facility is high and it does not generate a profit, there is no evidence provided by the defendant that this cannot be remedied while still providing a high quality of care to its residents.

However, the facility is also owned and operated by a government entity, is governed by a town charter, and primarily caters to town residents. The money it generates in revenue is reinvested into the facility and arguably benefits the residents through capital improvements and through other means. These specific facts regarding the character and nature of Nathaniel Witherell place this facility in a very unusual position in our state and its unique position is one that can be understood better through the lens of prior precedent.

In *Considine v. Waterbury*, 279 Conn. 830, 845-46, 916 A. 2d 90 (2006), the court discussed the meaning of "special corporate benefit" and "pecuniary benefit" and found that "If a municipality is acting only as the agent or representative of the state in carrying out its public

purposes...then it clearly is not deriving a special corporate benefit or pecuniary profit." (Citation omitted; internal quotation marks omitted.) The court found that while a municipality may charge a nominal fee for participation in a governmental activity, that activity will not lose its governmental nature so long as the fee is insufficient to meet the activity's expenses. But "a municipality generally has been determined to be acting for its own special corporate benefit or pecuniary profit where it engages in an activity for the particular benefit of its inhabitants...or if it derives revenue in excess of its costs from the activity." (Citation omitted; internal quotation marks omitted.) Id. "[T]he ultimate determination of whether [governmental immunity] applies is ordinarily a question of law for the court...[unless] there are unresolved factual issues material to the applicability of the defense...[where]resolution of those factual issues is properly left to the jury." (Internal quotation marks omitted.) *Haynes v. Middletown*, 314 Conn. 303, 313, 101 A. 3d 249 (2014).

In examining whether the municipality was "acting only as the agent or representative of the state in carrying out its public purposes", (internal quotation marks omitted) *Considine v. Waterbury*, supra, 279 Conn. at 845-46, 905 A.2d 70, the Connecticut Supreme Court looked at whether or not there was some type of legislation authorizing the particular municipal conduct at issue. The court found that there are essentially two categories of activities that fall within the broader category of acting as the agent of the state: (1) those activities imposed by the state for the benefit of the general public, and (2) those activities which arise out of some legislation imposed in pursuance of a general policy, manifested by legislation affecting similar corporations, for the particular advantage of the inhabitants of the municipality, and only through this, and indirectly, for the benefit of the people at large." Id. at 846, 905 A. 2d 70; see also *Spitzer v. Waterbury*, 113 Conn. 84, 87, 154 A. 157 (1931).

As a preliminary matter, this case and the case of *Torra v. Town of Greenwich* (in which the defendant moved for summary judgment and which is also pending before this court) are cases of first impression in our state because they are the only cases in which a plaintiff has brought an action against a municipality for negligence and wrongful death stemming from the town's operation of a government owned and operated nursing home. As this facility is the only municipally owned and operated nursing home in Connecticut, these two cases present the court with a unique fact pattern and an unusual set of circumstances to examine in determining the nature and character of Nathaniel Witherell.

Here, the question is whether a municipality is shielded by governmental immunity when it is the only government entity that owns and operates a type of business that is otherwise exclusively operated by private entities. Thus, there are no analogous activities that even come close to the Town of Greenwich owning and operating Nathaniel Witherell. As is evident from the nature of the business that the defendant is engaged in operating Nathaniel Witherell, the town operating this facility is not similar in nature and character to those activities of operating a park, playground, swimming pool, or public bath that the Appellate Court and the Supreme Court have previously examined in other governmental immunity cases. Operating a nursing home could arguably be a government function based on the general idea that a town is obligated to improve the general health, welfare, or education of its inhabitants. In fact, in some states in the United States, operating a nursing home is a government function. However, based on the evidence presented to the court in this case, in Connecticut, operating a nursing home is clearly not exclusively a government function. As such, the Town of Greenwich cannot conclusively be said to be acting as the agent or representative of the state in carrying out its public purposes based on the evidence provided by the parties.

Moreover, the operation of Nathaniel Witherell by the defendant is not clearly either a proprietary function nor is it clearly a governmental based on the evidence before this court. The specific facts of the case as presented at this stage of the litigation make it clear that there are aspects of this operation that make it similar to a government function and many that make it similar to that of a private entity performing a proprietary function. Thus in the absence of additional evidence, the court cannot determine the true nature and character of the defendant's operation of the nursing home.

Also, as seen in our case law, the type of activity that qualifies as proprietary does not change simply because a municipality engages in that activity. In *Richmond v. City of Norwich*, 96 Conn. 582, 115 A. 11 (1921), a town maintained a reservoir as part of its water supply. A shooting occurred at the reservoir when an employee of the town who was working as a guard at the reservoir shot at a vehicle filled with visitors to the reservoir. Under the specific circumstances of this case, the court found that the defendant was not engaged in a public duty for the public benefit and thus did not qualify for governmental immunity. Similarly, in *Blonski v. Metropolitan District Commission*, 309 Conn. 282, 71 A. 3d 465 (2013), the court found that a municipality commission's act of installing and maintaining a pipe gate to block motor vehicle access to a road on property from a public parking lot was "inextricably linked to proprietary function" of supplying water to residents for which it was not entitled to governmental immunity.

In the present case, the Town of Greenwich Code of Ordinances specifically authorizes the town to operate the Nathaniel Witherell and explicitly establishes within the town, a Board of Directors called the Nathaniel Witherell Board. This town Board consists of members who are nominated by the Board of Selectmen and appointed by the Representative Town Meeting and has been delegated the "full legal authority and responsibility for the operation of the

facility as delineated by applicable local, State and Federal regulations and standards". The Board also "shall have the power to appoint and remove a licensed Nursing Home Administrator and a Medical Director", "shall make such rules as it may deem necessary for the conduct of the Nursing Home, for the admission of patients thereto and for charges against such patients as are able to pay. The Board shall further be responsible for the conduct of rental units, for the admission of elderly persons thereto and for charges against such persons."

In reviewing this charter, it is clear that the Town of Greenwich Code of Ordinances has provided the Nathaniel Witherell Board, which is a town entity, the authority and responsibility to operate the facility in compliance with state and federal regulations. Thus, while a general standard of care does not create a ministerial duty to act, in this instance, it appears that the defendant has a non-discretionary obligation to follow the applicable state and federal laws based on its own Code of Ordinances. However, neither party has identified which specific applicable state and federal laws are implicated in this case and the court will not speculate about this in the absence of evidence. Neither party has cited any specific provision of any state or federal law that the defendant was mandated to follow that also addresses the protocol for caring for patients who are at high risk for falls. There may be certain additional statutes and laws that are applicable, such as the Nursing Reform Act of 1987. While the defendant is mandated to comply with these under its own charter, neither party has offered specific evidence of these particular provisions in the applicable statutes and laws in support of or against the notion that the defendant does not qualify for governmental immunity.

Suffice it to say, based on the pleadings and attached exhibits, the court finds that the defendant has at the very least, a mandatory, ministerial duty to generally follow state and federal laws pertaining to its ownership and operation of the Nathaniel Witherell. Thus, in the absence of evidence citing which specific state and federal laws that the defendant was required

to comply with in its operation of the nursing home, there is a genuine issue of material fact as to whether the defendant exercised its discretion or whether it was obligated to follow a specific protocol under state and federal laws with regard to caring for a patient with a documented history of dementia, inability to follow instructions, and with a significant history of falls.

However, the court ultimately need not rest its decision on this ground alone as there are other genuine issues of material facts that exist in this case. First, there is a question as to whether the defendant operated the nursing home for its special corporate profit or pecuniary benefit. The defendant by its own admission, refers to its ownership and operation of the nursing home as a business activity. As evidenced by the Report of the Board of Estimate and Taxation Special Committee On the Nataniel Witherell dated December 19, 2017 and attached as an exhibit, the report states that the Nathaniel Witherell "has been a specific business service operation within a municipality" and that its business "functions within the dynamics of a competitive business environment, and it is a business operation very different from the usual services mandated and provided by a local municipality, a political subdivision of the State of Connecticut." The Committee report also mentions that its findings include factors that impact the facility's revenues and specifically explains that the facility accepts Medicaid, Medicare, commercial insurance, and private pay. Based on these references, the court cannot determine without more information whether the facility it is a business run by the defendant or whether the defendant is performing a government function in operating the facility.

Second, while the defendant has alleged that Nathaniel Witherell has operated at a financial loss, the court does not have sufficient evidence pertaining to the finances of the facility for a long enough period of its operation for the court to be able to determine whether the facility is truly profitable. Moreover, even if the facility has continuously operated at a loss, this fact alone is not dispositive as the court has noted in *Considine* where the court explained

that "[t]he existence of an actual pecuniary profit is factor in deciding whether the function is proprietary, but reliance on it alone would create problematic incentives and arbitrary results." *Considine v. Waterbury*, supra, 279 Conn. at 847 n. 11, 905 A.2d 70. The facility has been in operation for more than one hundred years and the court has not been presented with adequate financial statements pertaining to its operation for the time that it has operated as a nursing home for the court to determine whether the defendant derives a special corporate profit or pecuniary benefit under Connecticut General Statutes § 52-557n(a)(1)(B).

Furthermore, as the defendant operates the nursing home in a manner that does not necessarily prioritize financial efficiency and since it reinvests its substantial revenue into capital improvements and other endeavors related to the facility, these factors also indicate to the court that profitability alone is simply not an adequate marker of whether the defendant is operating this facility in a proprietary manner or whether it is doing so solely for the benefit of the inhabitants of Greenwich.

Third, it is also unclear from the evidence presented by both sides whether the town even operates the facility "for the particular benefit of its inhabitants" since the facility merely gives priority to Greenwich residents but does admit nonresidents. Neither party has provided any specific admission data to demonstrate what percentage of the admittees are residents, what percentage are not residents, whether the facility admits any patients who are residents of other states, etc. so the court cannot conclude that this facility is actually operated for the benefit of its inhabitants based on the limited evidence that has been presented thus far.

In addition, there is a genuine issue of material fact regarding the factual allegations alleged by the plaintiff that underlie the plaintiff's claims. In her deposition, nurse supervisor Lucienne Bayonne (whose deposition was provided in part to the court as an exhibit) indicated that Mrs. Bria was found seated on the floor but that this witness did not observe how Mrs. Bria

ended up on the floor. Her testimony was that Mrs. Bria's care plan stated that she while she was walking, she needed to be supervised by a CNA from approximately eight to ten feet but that by that stage, Mrs. Bria was almost always in her wheelchair and was barely walking anymore.

Moreover, the notes from Mrs. Bria's APRN and Point of Care ADL Report from the days prior to the fall that allegedly ultimately led to her injuries and to her death indicate that she needed extensive assistance with locomotion and ambulation so that she was barely walking at all in the days before her death, though her notes state that she could walk with distant supervision. There was also testimony from Ms. Bayonne that Mrs. Bria had a chair alarm that would beep if she tried to move out of her wheelchair and that this chair alarm was installed specifically because Mrs. Bria was at a high risk for falls. Once Mrs. Bria attempted to move while in her wheelchair, the alarm would be set off and a staff member would then need to respond to Mrs. Bria. Yet Ms. Bayonne could not explain why, given this protocol, Mrs. Bria was left alone in her room after being taken to the bathroom and given her history of falls. She could also not state which staff members had assisted Mrs. Bria return to her bed after the fall. Further, she could not explain why the staff waited until the next morning to call an ambulance given that Mrs. Bria had been limping. She also testified that since Ms. Bayonne completed her shift at 11:30 and because Mrs. Bria had just fallen, Ms. Bayonne brought Mrs. Bria to the nurse's desk so that someone could watch over Mrs. Bria. Thus Ms. Bayonne had no further knowledge regarding what happened to Mrs. Bria after the end of Ms. Bayonne's shift.

Thus, it is unclear from the limited deposition testimony provided to the court whether the fact that Mrs. Bria was found on the floor indicates that some applicable state or federal law regarding the standard of care may have been violated, as it is unclear what Mrs. Bria's physical

status was in the days leading up to her death. It is also unclear what actually transpired at the time of the last fall incident that led to her injuries and to her death.

CONCLUSION

Based on this court's review of the motions for summary judgment and objections filed by both parties, and the relevant statutes and caselaw, the court finds that there exist several genuine issues of material fact in this case. Therefore, the court hereby denies both motions for summary judgment and sustains both objections.

MENON, J.

DECISION ENTERED IN ACCORDANCE WITH THE FOREGOING ON 4/15/24. JDNO SENT 4/15/24. DCC