DOCKET NO: FST CV 19—6042090-S : SUPERIOR COURT

BARBARA TORRA, EXECUTRIX : JUDICIAL DISTRICT OF

: STAMFORD-NORWALK

V. : AT STAMFORD

TOWN OF GREENWICH : APRIL 15, 2024

**CORRECTED MEMORANDUM OF DECISION – DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

The defendant, Town of Greenwich, d/b/a, The Nathaniel Witherell (hereinafter "Nathaniel Witherell") has filed a motion for summary judgment claiming that there exists no genuine issue of material fact and arguing that it is entitled to judgment in its favor as a matter of law. The plaintiff has alleged in her second amended complaint dated May 3, 2021 that during the admission of her mother Syliva Verrilli at The Nathaniel Witherell nursing and rehabilitation center, the nursing staff at Nathaniel Witherell deviated from the standard of care resulting in a fall incident when Mrs. Verrilli attempted to stand from her wheelchair. The plaintiff has alleged that the fall sustained by Ms. Verrilli caused her injuries and eventually resulted in her death and that her injuries and ultimate demise were due to the negligence of the staff at Nathaniel Witherell.

In response, the defendant has alleged that the claims alleged by the plaintiff are barred by the doctrine of governmental immunity under Connecticut General Statutes § 52-577n and under the common law because the allegedly negligent conduct of the defendant is comprised of discretionary governmental functions.

128.05

## FACTS

The plaintiff filed her initial complaint on June 15, 2019 and amended her complaint on May 3, 2021. The plaintiff is the Executrix of the Estate of Sylvia Verrilli, who was the plaintiff's mother. Mrs. Verrilli was a resident of the Nathaniel Witherell, a nursing and rehabilitation center owned, maintained, and operated by the Town of Greenwich, a municipality lawfully chartered by the State of Connecticut. The plaintiff has alleged that Mrs. Verrilli had been discharged from Greenwich Hospital on January 26, 2017 after having been treated for a fractured hip. She was subsequently admitted to Nathaniel Witherell and at the time of her admission, was noted to be a fall risk due to her history of falls, her inability to walk, and her being ambulatory dependent.

In her amended complaint, the plaintiff has further alleged that on March 7, 2017, Mrs. Verrilli was still a resident of the Nathaniel Witherell center. On that date, Mrs. Verrilli was seated in a wheelchair in her room at the facility during the early evening and at that time, she called for assistance from a nurse so that she could use the bathroom. A nurse aide responded and came to Mrs. Verrilli's room to assist Mrs. Verrilli to go to the bathroom. However, prior to Mrs. Verrilli beginning to stand to access her walker, the nurse aide failed to lock the wheels on Mrs. Verrilli's wheelchair. As a result of this failure, when Mrs. Verrilli began to stand up, the wheelchair moved away from her and caused her to fall heavily against the wheelchair and the floor. She then struck her head and other parts of her body and consequently experienced a head contusion and other painful injuries.

The plaintiff has claimed that Mrs. Verrilli's injuries were not evaluated by the defendant's employees and were not reported in her chart. The plaintiff also claimed that there was no physical examination conducted to determine the extent of Mrs. Verrilli's injuries and that a nurse then attempted to lift Mrs. Verrilli by grabbing the patient around her torso which

then caused additional pain and breathing difficulty for Mrs. Verrilli. As a result of the fall and/or the nurse's moving her, Mrs. Verrilli then suffered multiple fractured ribs and a collapsed right lung, which required further hospitalization and the insertion of a chest tube. The plaintiff stated that the defendant failed to full evaluate Mrs. Verrilli's change in physical status and did not document this in her patient chart. In addition, the plaintiff has alleged that Mrs. Verrilli suffered from several serious infections and experienced an e-coli plus acute kidney injury, increased potassium level, pulmonary edema, increased demand for oxygen, metabolic and respiratory acidosis, deterioration of her mental status, and lethargy, which eventually led to her death on March 24, 2017.

The plaintiff has claimed that as a result of Mrs. Verrilli's fall, Mrs. Verrilli experienced pain and suffering and a loss of life's activities and that her death was a consequence of her fall at Nathaniel Witherell. She has alleged that both she and the Estate of Sylvia Verrilli consequently incurred significant medical expenses, as well as burial and funeral expenses as a result of Mrs. Verrilli's death as caused by her fall at the Nathaniel Witherell.

The defendant denies these allegations and contradicts the facts alleged by the plaintiff. In its motion for summary judgment, the defendant alleges that the nurse aide that responded to Mrs. Verrilli had started donning gloves and protective gear in preparation for taking Mrs. Verrilli to the bathroom and that it was during this time period that Mrs. Verrilli stood up on her own while still in the unlocked wheelchair. The defendant has claimed that regardless of what transpired, it is immune from liability under the doctrine of governmental immunity because it was performing a discretionary act based on judgment and was not performing a ministerial duty.

## PROCEDURAL HISTORY

The defendant filed an answer and special defenses on August 10, 2021 and on that same date, the plaintiff filed a reply. In its special defenses, the defendant has alleged that the plaintiff's claims against it are barred by the statute of limitations, the doctrine of governmental immunity and because the plaintiff has failed to state a claim upon which relief may be granted.

On August 4, 2023, the defendant filed a motion seeking permission from the court to file a motion for summary judgment and the plaintiff filed an objection to this motion on August 18, 202. On that same date, the defendant filed a reply. On August 21, 2023, the court (*Genuario, J.*) denied the defendant's motion. On August 23, 2023, the defendant filed a motion to reargue/reconsider the court's denial of its motion for permission to file a motion for summary judgment and the court (*Genuario, J.*) granted this motion on August 29, 2023. On September 11, 2023, the court (*Genuario, J.)* granted the defendant's motion for permission to file a motion for summary judgment.

On September 25, 2023, the defendant filed its motion for summary judgment and a memorandum of law in support. On October 2, 2023, the plaintiff filed her objection along with a memorandum of law in support. On October 10, 2023, the defendant filed her reply. On November 8, 2023, the plaintiff filed her supplemental brief in opposition to the defendant's motion for summary judgment. On November 20, 2023, the defendant filed its reply in response to the plaintiff's supplemental brief in opposition to the defendant's motion for summary judgment. The matters were placed on the civil short calendar for a hearing that took place on December 18, 2023.

## 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**

The defendant alleges in its motion for summary judgment that the doctrine of governmental immunity bars the plaintiff from recovering against it for the negligence and wrongful death claim 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 based on caselaw in Connecticut, 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.

In her objection, the plaintiff argues to the contrary that because the Town of Greenwich's operation of Nathaniell Witherell is a proprietary function, this makes governmental immunity inapplicable. The plaintiff alleges that because 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, Nathaniel Witherell is akin to a private business. 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. Moreover, the plaintiff further argues that the Town of Greenwich derives substantial revenue from its ownership and operation of the Nathaniel Witherell and that this is also indicative of the corporate nature of the operation of the facility.

The defendant however argues that because the facility is operated at a financial loss, the Town of Greenwich does not receive a pecuniary benefit from owning and operating the facility. The defendant further argues that the operation of a nursing home falls within the municipality's 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.

Relying on *Considine v. Waterbury*, 279 Conn. 830, 916 A. 2d 90 (2006) and *Hannon v. Waterbury*, 106 Conn. 13, 136 A. 876 (1927), the defendant claims that its operation of a nursing home is similar to a municipality operating a swimming pool, which the court deemed to be a government function in *Hannon v. Waterbury*. The defendant claims that operating a nursing home is also similar to other endeavors that courts have found to fall within a municipality's function, such as operating public parks, playgrounds, public baths, and bathing houses.

Unlike in cases where immunity has been denied, the defendant 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. The defendant claims that the mere fact that every other nursing home in Connecticut is a private business does not remove governmental immunity here because the defendant alleges that this would be no different than removing governmental immunity for police departments because private security firms also provide security services similar to that of police departments.

The court finds this comparison to be inaccurate when looking at the facts of this case since the services provided by a municipal police department are not the same as that provided by a private security firm. While a police department clearly serves the public at large (whether they are residents of that municipality or visitors) and performs a public service for the benefit of the entire community, a private security firm is hired by a party at their own behest, is paid for by that party, and is tasked with protecting only those whom the party who hired it have asked it to protect. Thus by its very nature, a municipal police department is providing a public service to the public at large while a private security is providing a limited service both in terms of the service it offers as well as to whom the service is being offered. Similarly, the Nathaniel Witherell is, by its very nature, offering limited services (based on the type of health care services it offers) to a limited number of people (based on how many beds are available, priority being given to Greenwich residents, as well as additional admission criteria). Thus, this nursing home (especially as it is the only one of its kind in Connecticut) is more akin to a private security firm than a municipal police department so that, based on the limited information before this court, this court cannot definitively conclude that it is performing a government function.

It is clear that Nathaniel Witherell is performing a task that is only 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 unique facts regarding the character and nature of Nathaniel Witherell place this facility in a very unusual position in our state. Thus, based on the facts provided, the evidence cited, 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 *Hannon v. Waterbury*, 106 Conn. 13, 136 A. 876 (1927) and *Considine v. Waterbury* , 279 Conn. 830, 916 A. 2d 90 (2006) and the thorough analysis of CGS §52-557n(a)(2)(B) provided by the court in those cases, the court in these cases has provided useful guidance in deciding whether governmental immunity applies here and thus, whether summary judgment is appropriate in this case.

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 *Bria v. Town of Greenwich* (in which both parties have 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. Also, contrary to the defendant's claim, 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 and Supreme Court have previously examined in other government 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 when 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 may have 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 state or federal law that the defendant was mandated to follow that also addresses the protocol for use of wheelchairs for patients who are a fall risk and for transporting and moving such patients. There may be additional statutes that are applicable in this case, such as the Nursing Home Reform Act of 1987 as well as additional state statutes and local ordinances. While the defendant is mandated to comply with these under its own charter, neither party has offered specific evidence of these statutes and laws either in support of or against the notion that 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 locking the wheels on a patient's wheelchair, moving a patient from a wheelchair, etc.

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, this 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. Of note is the fact that any revenue raised by the defendant is reinvested into Natheniel Witherell and by its own admission, the facility is not operated to maximize financial efficiency. Based on these factors, the court cannot determine without more information whether the facility actually is a true business run by the defendant or whether the defendant is performing a government function in operating the facility.

Second, while the defendant has submitted an Affidavit from the Executive Director of Nathaniel Witherell to demonstrate that Nathaniel Witherell has operated at a financial loss for

fiscal years 2013-2018, it has presented no evidence pertaining to the finances of the facility from fiscal years 2018 through fiscal year 2023 nor for any other fiscal years prior to 2013. This select subset of its financial statements is insufficient for the court to determine the profitability of the facility. 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. Watery, supra*, 279 Conn. at 847 n. 11, 905 A.2d 70.

The fact that the facility has been in operation for more than one hundred years and the defendant has only provided financial statements pertaining to six of these years makes it impossible at this stage 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 has conceded that it does not operate this nursing home in a way that prioritizes financial efficiency and since it chooses to reinvest 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 so 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. Based on the depositions of Sonia McGregor (the nurse aide who attended to Mrs. Verrilli), Anjanette Melasa (the supervising nurse), and the plaintiff, there is a significant question of fact regarding what actually caused Mrs. Verrilli's fall. While some deposition testimony suggested that the fall occurred in the patient's bedroom, other testimony indicated that it happened in the bathroom.

There is also a discrepancy regarding what caused the fall as there is contradictory testimony in this regard. Ms. McGregor could not independently recall Mrs. Verrilli's fall and relied solely on the report that documented the fall in providing her deposition testimony. The report indicates that Mrs. Verrilli has been trying to stand up to go the bathroom but the deposition testimony of Ms. McGregor and Ms. Melasa indicted a lack of clarity as to where the fall occurred. Thus, it is unclear whether Mrs. Verrilli fell while attempting to get out of her wheelchair on her own to go to the bathroom while Ms. McGregor was donning protective gear (as the defendant alleges) or whether she fell while Ms. McGregor was moving her from her wheelchair to assist her in going to the bathrooms that the unsecured wheelchair then moved away from Mrs. Verrilli and that she then fell after being thrown from the chair. Since the parties have not presented sufficient evidence to establish what transpired, the court finds that there is a genuine issue of material fact even as to the preliminary facts that underlie the plaintiff's claims. As such, based on the limited and contradictory evidence presented, the court cannot determine whether the defendant was exercising its discretion or whether it violated a ministerial duty in failing to lock the wheels of Mrs. Verrilli's wheelchair.

## CONCLUSION

Based on this court's review of the defendant's motion for summary judgment, the plaintiff's objection, the corresponding supplemental pleadings, the record of this case, and the relevant statutes and caselaw, there exist several genuine issues of material fact in this case. Therefore, the court hereby denies the defendant's motion for summary judgment and sustains the plaintiff's objection.

MENON, J.

DECISION ENTERED IN ACCORDANCE WITH THE FOREGOING 4/15/24. JDNSENT 4/15/24 DCC.