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PUBLIC ENTITY LIABILITY CASELAW UPDATE

SEPTEMBER 17, 2025

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Doe v Plainville, ___Conn. App. ___ (2025)

In 7 consolidated suits, each entitled *Jane Doe v Kyle Fasold et al.,* the Town of Plainville was sued for negligence and negligent supervision after a volunteer for an area swim team that used the Town pool was arrested for invasion of privacy and sexual exploitation by the taking of photographs of girls in stages of undress in the women's locker room and bathroom. Specifically, Kyle Fasold, a volunteer for the Plainville Blue Dolphins swim club, was accused of taking photographs into the girl's locker room through a window in a wall that was common with a storage area. The window was covered with cardboard/oak tag material, that Fasold allegedly was able to tamper with, so that an iPhone camera could take photos and video. The Town of Plainville's Recreation Department's involvement was it allowed the Blue Dolphins to use the high school pool, it provided lifeguards during Blue Dolphins practices, and it provided coaches for the Blue Dolphins swimmers. The Town was not involved in the approval or assignment of Blue Dolphin volunteers.

The Town defended all 7 suits by claiming entitlement to discretionary act immunity, advancing the argument that the inspection, maintenance and supervision of the Blue Dolphins use of the pool, was up to the judgment and discretion of the Town's recreation and custodial staff, and that none of the plaintiffs was identifiable as being at risk of imminent harm; and, finally, that the Town had no liability for the actions of a non-town employee (Fasold); and, regardless, had immunity for the intentional criminal acts of Fasold.

The trial court granted summary judgment for Plainville in all seven suits.

The plaintiffs appealed and looked to defeat the Town's discretionary act immunity by claiming the Town had a mandatory obligation to put a solid barrier over the window through which Fasold was able to take his photos and videos. The plaintiffs pointed to a "work order" prepared by a custodial supervisor and delivered to a custodial staff member calling for the placement of an opaque piece of plexiglass over the subject window and claimed this created a ministerial duty that defeated the Town's governmental immunity.

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The Appellate Court disagreed, held that the Town was entitled to immunity in all 7 suits, and found:

1. Although entitled a work "order", the paper completed by the maintenance supervisor indicated that it pertained to general maintenance, the supervisor who completed it was identified as the "requester" and the date it was completed was identified as the "request date".

2. Although the work order stated "cut and fit colored/textured plexiglass" into the window of the door, it did not state that the staff had no discretion to vary from that.

3. The work order was not a "mandate of legal authority," given that the maintenance supervisor was not a policy maker for the Town. In so holding the Court emphasized there were several elements that must be met before a finding of ministerial duty is made:

    a) a ministerial act is one in which a person performs in a given state of facts,
    b) in a prescribed manner,
    in obedience to a mandate of legal authority, and
    c) without regard to or the exercise of his own judgment or discretion upon the propriety of the action being done.

This is a definition of ministerial duty that all involved in public entity defense need to keep handy. We are frequently confronted with claims that a statement by a municipal employee that something *should be done* a certain way constitutes a ministerial act that defeats discretionary act immunity. However, unless that statement can be considered ***a mandate of legal authority***, it will not qualify as creating a mandatory duty that defeats immunity. So we need to look at more than the language itself; we need to look at the source of the language. If the statement regarding how something should be done comes from a Board of Education, a Town Council, or a final policy maker, such as a Chief of Police or a Town tree warden or building official, then the statement could be a mandate of legal authority that defeats the immunity. However, a supervisor does not make policy for the Town, so his statement could not be considered a mandate of legal authority.

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Ward v. Town of North Stonington - State & Federal cases

Howd & Ludorf recently won summary judgment for the Town of North Stonington, completing five years of litigation involving alleged violation of federal and state civil rights laws

In Ward v. Town of North Stonington et al. the Plaintiff/operator of a large farm and landscape business sued the Town, the Zoning Commission, the Zoning Board of Appeals and 6 individuals, stemming from a 2016 order by the Town Zoning Enforcement Officer that Ward stop the expansion of his business to include extensive hardscape materials processing and storage, as that activity violated zoning regulations and was not a grandfathered use. The plaintiff appealed the cease and desist order to the Superior Court, which found in favor of the plaintiff, specifically finding the evidence in the record before it did not support the ZEO's claim that the hardscape activities were an expansion of the pre-existing, grandfathered use, and that the order to cease and desist was arbitrary. The plaintiff used this as a springboard to allege civil rights violations against the Defendants, specifically claiming Due Process, Equal Protection and Unconstitutional Takings claims, along with state law violations, and sought over $2 million in damages.

The Town first argued successfully that it was not collaterally estopped in the federal civil rights litigation from providing additional evidence that the ZEO's conduct was not arbitrary; and then moved for summary judgment on the basis that the Due Process claims failed because the Plaintiff lacked a constitutionally protected property interest, and was given all required notice and opportunity to be heard; further, the Equal Protection claim failed because Plaintiff could not identify comparators who were similarly situated in all material respects who were treated differently that he and his business were; and the Takings claim failed because Plaintiff's property still retained economic value as a farm and landscape business. The Federal Court agreed and granted summary judgment on the federal claims, while remanding the state claims to Superior Court.

The Town then followed with a summary judgment motion on the state law claims of abuse of process, intentional infliction of emotional distress, negligent infliction of emotional distress and negligence, arguing that the Town's compliance with constitutional requirements, along with governmental immunity doctrine, defeated Plaintiffs state law claims as a matter of law. The Superior has now issued its decision granting summary judgment in favor of the Town defendants on the state law claims.

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Beger v. City of Bristol, ___ Conn. App. ___ (2025)

This case involved a fall down at a city transfer station on uneven black top near a ground level recycling bin. Plaintiff sued for negligence and defective highway liability.

As to negligence claim, the city moved for summary judgment based on governmental immunity, given that inspection/maintenance responsibilities involve judgment and discretion, and the plaintiff was not identifiable as being at risk of imminent harm at the time she fell.

The plaintiff attempted to turn this case into a defective highway claim on the theory that the part of the pavement where she fell was technically a driveway that allowed cars to drive immediately adjacent to the ground level receptacles and dispose of their recyclables. The trial court concluded, and the Appellate Court has now affirmed that the fall was not within the ambit of the defective highway act because the area where Plaintiff fell was not open to the indefinite public—the critical fact being that transfer station access was restricted to city residents who held a permit. Here is the important language from the decision:

"[f]or an area to be open to public use it does not have to be open to everybody all the time"; *Cuozzo* v. *Orange*, supra, 147 Conn. App. 158; it is equally well established that "[t]he essential feature of a public use is that it is *not confined to privileged individuals or groups whose fitness or eligibility is gauged by some predetermined criteria*, but is open to the indefinite public." Id. Because it is undisputed that the transfer station in the present case is, like the transfer station in *Read*, accessible only to City residents who have purchased a permit—that is, to a group whose eligibility is gauged by predetermined criteria—it lacks the " 'essential feature' " that would qualify it as open to public use for purposes of § 13a-149.

This is a favorable decision to Connecticut public entities, as the Plaintiffs' side has sought to expand the reach of the defective act, and the Appellate Court has determined that the defective highway act will not apply to any injury on premises where the right to be there is gauged be a specific criterion, such as needing a permit or pass to enter. The decision allows Connecticut public entities to raise the traditional protections of governmental immunity and be done with the case rather than having to deal with a second theory for a Plaintiffs recovery.

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Hernaiz v. Carlson

This case is centered upon Cromwell Police Officer John Carlson's application for an arrest warrant for Estaban Hernaiz on September 23, 2021 for assault in the third degree and breach of peace in the second degree. These charges arose from an incident that occurred the day before. Officer Carlson responded to the area of Marshals, regarding a report of a female running away from a male individual. Prior to his arrival, Dispatch indicated that she ran towards Shop Rite and the male got into a gray colored Hyundai. Dispatch indicated that the male fled the area in the Cromwell Square parking lot, towards Stop and Shop. Carlson and another officer proceeded into Shop Rite, at which point a Shop Rite employee directed them towards her. She was kneeling behind a cash register and frantically crying. The officers attempted to speak with her, at which point she repeatedly kept looking around and was commenting about a male individual finding her. She made comments indicating that the male may have a gun, that he promised he was going to kill her, and that he would find her. She explained that the male beat her and that she had a lump on her head near her temple. She was breathing rapidly, crying, and shaking. She initially did not want to leave Shop Rite because she was scared that the male would get her. Cromwell Ambulance arrived on scene, at which point she was transported to Middlesex Hospital. Cromwell Ambulance personnel indicated that there was swelling to the left side of her head. Officers proceeded to Middlesex Hospital to continue speaking with her. She was transported to the Middlesex Hospital Emergency Department. Officers inquired with a staff member regarding her condition, and they indicated that she had swelling and "lumps" on the left side of her head, by the area of her temple.

Officer Carlson's applied for an arrest warrant for Estaban Hernaiz on September 23, 2021 for assault in the third degree and breach of peace in the second degree. The arrest warrant was approved by a judge, and Cromwell Officer Ahmed Alassiri arrested Hernaiz. Hernaiz was found guilty on the breach of peace charge on August 11, 2023.

Hernaiz's complaint asserted that the defendants subjected him to false arrest in violation of the Fourth Amendment. We moved for summary judgment on Hernaiz's false arrest claim arguing that he was arrested pursuant to a warrant and was convicted of an offense for which he was arrested. "Under Connecticut law, false arrest and false imprisonment claims require pleading and proof of the same four elements." *Arpino v. Spera*, No. 3:22-CV-01114 (KAD). "The elements of such a claim under Connecticut law are: (1) the defendant arrested plaintiff or had plaintiff arrested; (2) the plaintiff was aware of the arrest; (3) there was no consent for the arrest; and (4) the arrest was not supported by probable cause." *Chase v. Nodine's Smokehouse, Inc.*, 360 F. Supp. 3d 98, 112 (D. Conn. 2019). A plaintiff asserting this claim must also prove that there was a favorable termination of the

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proceedings against him. *Miles v. City of Hartford*, 445 F. App'x 379, 382-83 (2d Cir. 2011). A "favorable termination" means that a plaintiff must show that his "prosecution ended without a conviction." *Thompson v. Clark*, 596 U.S. 36, 39 (2022).

The Court found that Hernaiz's arrest was supported by probable cause, and that he failed to show his prosecution ended without a conviction. First, the judge stated that in the arrest warrant "there is probable cause to believe that an offense has been committed and that the accused committed it and, therefore, that probable cause exists for the issue of a warrant for the arrest of [Hernaiz]." "[I]t is well settled that the issuance of a warrant by a neutral magistrate, which depends on a finding of probable cause, creates a presumption that it was objectively reasonable for the officers to believe that there was probable cause . . . ." *Washington v. Napolitano*, 29 F.4th 93, 105 (2d Cir. 2022). "To overcome this presumption, a plaintiff must show that the officers knowingly or recklessly omitted material information from the warrant affidavit." *Id.* The Court concluded that Hernaiz had not provided sufficient facts to create a genuine dispute of material fact. Therefore, the Court concluded that the arrest warrant created a presumption of probable cause, which the plaintiff could not overcome, and thereby precluded his false arrest claim as a matter of law.

The Court also found that even if Hernaiz was able to submit evidence "show[ing] that the officers knowingly or recklessly omitted material information from the warrant affidavit," a plaintiff's conviction for an offense for which he was arrested, in general, conclusively establishes the existence of probable cause for his arrest. *See*, *e.g.*, *Wingate v. Gives*, 725 F. App'x 32, 35 (2d Cir. 2018). This is true even if the arrest warrant application contained infirmities or was otherwise lacking because "the quantum of proof required for a conviction is higher than that required to establish probable cause." *Winter v. Northrop*, No. CIVA 306-CV-216 PCD (D. Conn. Feb. 12, 2008). The Court noted that it had initially permitted Hernaiz's false arrest claim to proceed because he alleged in his complaint that he was acquitted, but that the defendants supplied evidence contradicting that allegation. State of Connecticut Judicial Branch records showed that Hernaiz was convicted of breach of peace on August 11, 2023, and that he was sentenced to six months in jail on that charge.

Obviously, this was an excellent result for Cromwell and the defendant-officers. It reinforces our defenses on false arrest claims that the issuance of a warrant creates a presumption of probable cause, which is very difficult for a plaintiff to overcome, and that a conviction or guilty plea on ANY charge will defeat false arrest claim regardless of other charges being dismissed or nolled.

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JANE DOE #1 *v.* KYLE FASOLD ET AL.

JANE DOE #2 *v.* KYLE FASOLD ET AL.

JANE DOE #3 *v.* KYLE FASOLD ET AL.

JANE DOE #4 ET AL. *v.* KYLE FASOLD ET AL.

JANE DOE #5 *v.* KYLE FASOLD ET AL.

JANE DOE #6 *v.* KYLE FASOLD ET AL.

JANE DOE #8 *v.* KYLE FASOLD ET AL.

(AC 47269)

Alvord, Elgo and Pellegrino, Js.

Syllabus

The plaintiffs jointly appealed from the trial court's rendering of summary judgment, in each of seven cases, for the defendant town with respect to the plaintiffs' claims of negligence and negligent supervision. The plaintiffs claimed that the court improperly rendered summary judgment in each case despite the existence of a genuine issue of material fact as to whether a work order request for maintenance made by a town employee created a ministerial duty to perform that maintenance in a prescribed way, thereby abrogating the town's governmental immunity protection and exposing the town to liability pursuant to statute (§ 52-557n) for its failure to complete the requested maintenance. *Held*:

The plaintiffs failed to establish that a genuine issue of material fact existed with respect to the nature of the town's duty because it was legally and logically correct for the trial court to conclude that the acts and omissions alleged in each complaint with respect to the requested maintenance were discretionary in nature, rather than ministerial, and, accordingly, the court properly determined that the town was entitled to judgment as a matter of law on its governmental immunity defense in each action.

Argued March 11—officially released August 5, 2025

Procedural History

Action, in each case, to recover damages for, inter alia, invasion of privacy, brought to the Superior Court in the judicial district of New Britain, where the cases

were consolidated; thereafter, in each case, the defendant town of Plainville filed an apportionment complaint; subsequently, in each case, the court, *Morgan, J.*, granted the motion for summary judgment filed by the defendant town of Plainville and rendered judgment thereon, from which the plaintiffs filed a joint appeal to this court. *Affirmed.*

Ryan K. Sullivan, with whom were *Julianne Lombardo Klaassen*, and, on the brief, *Paul M. Iannaccone*, for the appellants (plaintiffs).

Thomas R. Gerarde, with whom was *Eric E. Gerarde*, for the appellee (defendant town of Plainville).

Opinion

PER CURIAM. The plaintiffs, three adults and four minors, in seven underlying consolidated tort actions,[1] appeal from the judgments of the trial court, *Morgan, J.*, rendered in favor of the defendant town of Plainville[2] following the granting of its motions for summary judgment as to the third and fourth counts of the plaintiffs'

[1] The plaintiffs, Jane Doe #1, Jane Doe #2, Jane Doe #3, Jane Doe #4 PPA John Doe, Jane Doe #5 PPA John Doe, Jane Doe #6 PPA Jane Doe #7, and Jane Doe #8 PPA Jane Doe #9, were granted permission to proceed under pseudonyms due to the nature of the allegations in their complaints. "Per proxima amici, or [PPA], means by or through the next friend, and is employed when an adult brings suit on behalf of a minor, who was unable to maintain an action on his own behalf at common law." (Internal quotation marks omitted.) *Marciniszyn* v. *Board of Education*, 230 Conn. App. 592, 594 n.1, 330 A.3d 883 (2025).

[2] The plaintiffs also named Kyle Fasold as a defendant in their actions, and their claims against him are still pending in the trial court. Moreover, in the actions commenced by Jane Doe #4 and Jane Doe #5, the court granted the plaintiffs' respective motions to cite in Angela Lastrina as a defendant. Thereafter, the plaintiffs in those actions withdrew all claims against Lastrina. Because Fasold and Lastrina are not parties to this appeal from the partial summary judgments rendered by the trial court; see, e.g., *Tryon* v. *North Branford*, 58 Conn. App. 702, 703 n.1, 755 A.2d 317 (2000); in this opinion, we refer to the town of Plainville as the defendant and to Fasold by name.

respective complaints in each action.[3] The plaintiffs' sole claim on appeal is that the court improperly rendered summary judgments despite the existence of a genuine issue of material fact as to whether a work order request for maintenance, made by an employee of the defendant, created a ministerial duty to perform the maintenance in a prescribed way, thereby abrogating the defendant's governmental immunity protection and exposing the defendant to liability pursuant to General Statutes § 52-557n[4] for its alleged failure to do so. We disagree and, accordingly, affirm the judgments of the trial court.

The record before the court, viewed in the light most favorable to the plaintiffs as the nonmoving parties, reveals the following relevant facts and procedural history. From September, 2017, through approximately March, 2020, the seven plaintiffs were either members of and/or coaches for the Plainville Blue Dolphins Swim Club (swim club)[5] and/or lifeguards at the Plainville

[3] The plaintiffs' claims against Fasold, set forth in counts one and two of their respective complaints, sound in invasion of privacy and negligent infliction of emotional distress.

[4] General Statutes § 52-557n provides in relevant part: "(a) (1) 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 omissions of such political subdivision or any employee, officer or agent thereof acting within the scope of his employment or official duties . . . . (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 wilful 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. . . ."

Although § 52-557n has been amended since the events underlying this case; see Public Acts 2023, No. 23-83, § 1; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

[5] The swim club was made an apportionment defendant in each underlying action by the defendant, but it was not a party to the summary judgment motions, and it is not participating in this appeal.

High School (high school) pool. The swim club used the aquatic facilities at the high school. Kyle Fasold was a parent volunteer for the swim club and a board member and/or vice president of its Parents' Association. The high school aquatic facilities included a pool, recreation staff facilities, and locker rooms. The recreation staff facilities shared a door with the girls' locker room and housed a recreation staff locker room/closet area that had a door with a clear glass paned window with a view directly into the girls' locker room. That window had been covered with poster boards, which prevented the ability to see through it. At some point, however, a square piece had been cut from the poster boards, which left a small opening that allowed a view into the girls' locker room.

As a member of the swim club, Fasold had access to the recreation staff locker room/closet area and, on numerous occasions during the aforementioned time period, he manipulated the covering on its window in order to gain visual access to the girls' locker room. Using a cellular device and/or a digital camera, Fasold took photographs and/or recorded videos of the plaintiffs, through that window, while they were in various stages of undress and/or were toileting. Fasold's actions were discovered in or about February, 2020, after he uploaded images with identifiable metadata to the Internet and an investigation ensued. Fasold was charged with crimes related to his actions, and he ultimately entered into an agreement with the United States Attorney's Office for the District of Connecticut whereby he pleaded guilty to certain of those charged crimes.

The defendant and its officers, agents, servants and/or employees, owned, controlled, possessed, operated and/or maintained the high school, and it allowed the

swim club and its members to use and have access to the high school's pool and aquatic facilities. On February 5, 2018, Scott Martin, who was the custodial manager for the defendant's board of education, prepared a work order that requested that "General Maintenance" be performed at the high school "girls locker room/pool." The "Description" section of the work order stated: "Cut and fit colored/textured plexiglass in door from team coach office that leads to team locker room off pool area. Time Available: anytime." The request was deemed a "Medium" priority and the "Req. Completion Date" section of the form was left blank. Martin assigned the work order request to Terry Archer, who was employed by the defendant's board of education as a maintainer in the physical services department. Neither Martin nor Archer was a policy maker or an executive decision maker for the defendant.

The work order request reflects, at the top of the form, a "Completion Date" of February 8, 2018, and its "Status" reads "Closed Work Orders."[6] The window in the door, however, was not replaced with "colored/textured plexiglass . . . ." Rather, a March, 2020 inspection of the high school girls' locker room revealed that a small square piece of black construction paper had been taped to the poster boards to cover the hole that previously had been cut therein.

[6] The plaintiffs maintain, and the summary judgment evidence viewed in the light most favorable to them suggests, that the work order request was issued in response to a concern that a parent relayed to Kim Crowley, who, at the time, was the assistant director of the defendant's recreation department, that the poster board that covered the window was torn and that someone may have been manipulating it. Crowley then submitted an "order . . . to the school administration . . . the school facilities people" to have "the hole in the . . . covering of the window . . . repaired." There is no evidence in the record, however, regarding the nature of the work order, the internal discussions, if any, that preceded its creation or the duties and expectations of the custodial staff in relation thereto.

On various dates between September, 2020, and March, 2021, the plaintiffs brought actions for damages related to Fasold's conduct; see footnote 2 of this opinion; and the court, *Morgan, J.*, sua sponte consolidated the actions. See Practice Book § 9-5.[7] Each respective complaint states claims against the defendant for negligence pursuant to § 52-557n in count three and negligent supervision in count four.[8] The plaintiffs alleged, inter alia, that they suffered injuries and losses arising from Fasold's "inappropriate and disturbing conduct" and that those injuries and losses were caused by the negligence and carelessness of the defendant because its officers, agents, servants and/or employees "failed to ensure that minor and adult females, including the plaintiff[s], had a safe, secure and private dressing area . . . ."

In its answers to each of the plaintiffs' complaints, the defendant denied the plaintiffs' negligence allegations and raised governmental immunity as a special defense to the third and fourth counts. Thereafter, on April 28, 2023, the defendant filed in each action a motion for summary judgment. The defendant claimed that it was entitled to judgment on counts three and four of the plaintiffs' complaints as a matter of law

[7] Practice Book § 9-5 provides in relevant part: "(a) Whenever there are two or more separate actions which should be tried together, the judicial authority may . . . upon its own motion, order that the actions be consolidated for trial. . . .

"(c) The court files in any actions consolidated pursuant to this section shall be maintained as separate files and all documents submitted by counsel or the parties shall bear only the docket number and case title of the file in which it is to be filed."

[8] The fourth counts of the complaints in the actions brought by Jane Doe #4, Jane Doe #5, Jane Doe #6, and Jane Doe #8 allege that they are brought pursuant to § 52-557n, whereas the fourth counts of the complaints in the actions brought by Jane Doe #1, Jane Doe #2, and Jane Doe #3, do not reference that statute. In all other material respects, however, the allegations against the defendant in each action are identical.

because (1) discretionary governmental act immunity barred the plaintiffs' negligence claims, (2) the plaintiffs could not show that they were identifiable persons subject to imminent harm, as required to fall within the relevant exception to governmental immunity, and (3) the defendant could not be held liable for the intentional, criminal acts of Fasold.[9]

On July 24, 2023, the plaintiffs filed memoranda in opposition to the defendant's motions for summary judgment in their respective cases.[10] Each plaintiff argued that there were genuine issues of material fact with respect to whether the defendant had violated ministerial duties (1) to repair and maintain the glass window in the storage room door and (2) to report Fasold's suspicious conduct. The plaintiffs further argued that, even if the defendant's alleged acts or omissions were discretionary in nature, there remained genuine issues of material fact as to whether the plaintiffs were identifiable persons subject to imminent harm and, thus, whether an exception to governmental immunity applied. The plaintiffs did not respond to or address the defendant's claim that it could not be held vicariously liable for the intentional, criminal acts of Fasold.

On August 23, 2023, the defendant filed a reply memorandum in support of its motion for summary judgment in each action, and it attached to each one an affidavit of Robert E. Lee, the defendant's chief executive officer and town manager between 2017 and 2020. Lee averred

[9] In support of each motion, the defendant submitted a memorandum of law and sixteen exhibits, which included excerpts from several deposition transcripts and an affidavit from Ben Dalena, who was employed by the defendant as its assistant recreation director.

[10] In support of their memoranda in opposition, each plaintiff submitted, as an exhibit, an excerpt of her deposition transcript and the same thirteen other exhibits, which included, among other things, excerpts from several other deposition transcripts, a redacted police report, and a copy of the February 5, 2018 work order request.

in his affidavit that Martin and Archer were not policy makers or executive decision makers for the defendant at any time during their employment.[11]

On December 28, 2023, the court issued memoranda of decision rendering summary judgments in favor of the defendant on counts three and four of each complaint. The court concluded, on the basis of the pleadings and the evidence submitted by the parties, that the defendant was entitled to governmental immunity as a matter of law. With respect to the work order, in particu-

[11] The plaintiffs filed motions to strike "and/or disregard the defendant's reply brief[s] in resolving the merits of the . . . motion[s] for summary judgment" on grounds that they were untimely filed and because they sought to introduce new evidence and arguments that should have been raised in the defendant's initial filings. The plaintiffs argued, among other things, that Lee's affidavit constituted "new and untimely evidence" as to "whether the February 8, 2018 work order constituted a ministerial duty," that the defendant should not be able to introduce and rely upon it and that the court should not consider the merits of the replies. The court denied the plaintiffs' motions to strike, explaining that the "tardy filing[s] did not work undue prejudice or injustice to the plaintiff[s]" and that the "reply brief[s] appropriately respond[ed] to evidence and arguments made by the plaintiff[s] in [their] objection[s] to the defendant's summary judgment motion[s]." The plaintiffs have not challenged on appeal the court's denial of their motions to strike. See *JPMorgan Chase Bank, National Assn.* v. *Essaghof*, 221 Conn. App. 475, 485, 302 A.3d 339 (claim raised by party at trial is abandoned if it is not raised on appeal), cert. denied, 348 Conn. 923, 304 A.3d 445 (2023). Nevertheless, in their brief to this court, the plaintiffs now characterize Lee's affidavit as "[e]xtratextual evidence [that] is not required for this court's analysis and [claim that it] should not have been relied on by the trial court." As the plaintiffs raise this claimed error by the trial court for the first time on appeal, after abandoning their challenge to the court's denial of their motions to strike, we will not review its merits. See *JPMorgan Chase Bank, National Assn.* v. *Essaghof*, supra, 489–90; see also *Capital for Change, Inc.* v. *Wall Street Associates, LLC*, 232 Conn. App. 646, 655–56, A.3d (2025), petition for cert. filed (Conn. June 3, 2025) (No. 240392). Moreover, this claim is inadequately briefed. See *U.S. Bank Trust, National Assn.* v. *Shuey*, 232 Conn. App. 618, 620 n.2, A.3d (2025) ("We are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly." (Internal quotation marks omitted.)), petition for cert. filed (Conn. June 9, 2025) (No. 240395).

lar, the court determined that it was "simply evidence of the discretionary nature of the defendant's duties with respect to inspection, maintenance, and repairs, rather than evidence of the existence of a ministerial duty."[12] This appeal followed.[13] Additional facts will be set forth as necessary.

Before turning to the plaintiffs' claim on appeal, we set forth the standard of review applicable to a trial court's decision to grant a motion for summary judgment. "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.

[12] In rendering summary judgments, the court also concluded that there was no genuine issue of material fact that (1) "none of the defendant's officials had reasonable cause to suspect or believe that Fasold was abusing the plaintiffs or subjecting them to an imminent risk of serious harm and, therefore, the mandatory duty to report [suspected harm pursuant to General Statutes (Rev. to 2017) §§ 17a-101 and 17a-101a] was not triggered," (2) "the plaintiffs were not identifiable persons subjected to imminent harm" and, thus, that exception to governmental immunity was not applicable, and (3) "Fasold's conduct was intentional rather than negligent" and "the exclusionary language of § 52-557n (a) (2) would shield the defendant from vicarious liability to the plaintiffs" on the basis of such conduct. The plaintiffs have not challenged on appeal the court's conclusions in these regards, and we deem any such claims abandoned. See *JPMorgan Chase Bank, National Assn.* v. *Essaghof*, 221 Conn. App. 475, 485, 302 A.3d 339 ("claims of error not briefed are considered abandoned" (internal quotation marks omitted)), cert. denied, 348 Conn. 923, 304 A.3d 445 (2023).

[13] The court's decision to grant the defendant's motions for summary judgment did not dispose of all the counts in each complaint, and counts one and two against Fasold remain pending in each of the consolidated actions. Even so, the court's decisions "dispose[d] of all causes of action in [the plaintiffs' respective complaints] . . . brought . . . against [the defendant]," such that they are final judgments. Practice Book § 61-3; see also *Asnat Realty, LLC* v. *United Illuminating Co.*, 204 Conn. App. 313, 319 n.6, 253 A.3d 56 (decision that "disposed of all causes of action against those particular defendants . . . constituted an appealable final judgment under Practice Book § 61-3"), cert. denied, 337 Conn. 906, 252 A.3d 366 (2021). The plaintiffs, therefore, have appealed from final judgments, and this court has jurisdiction to hear their appeal.

. . . 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 [it] 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. . . . [I]ssue-finding, rather than issue-determination, is the key to the procedure. . . . [T]he trial court does not sit as the trier of fact when ruling on a motion for summary judgment. . . . [Its] function is not to decide issues of material fact, but rather to determine whether any such issues exist. . . . Our review of the decision to grant a motion for summary judgment is plenary. . . . We therefore must decide whether the court's conclusions were legally and logically correct and find support in the record." (Internal quotation marks omitted.) *Washburne* v. *Madison*, 175 Conn. App. 613, 620, 167 A.3d 1029 (2017), cert. denied, 330 Conn. 971, 200 A.3d 1151 (2019).

We next set forth the well settled law of this state regarding the liability of municipalities. "According to our Supreme Court, [a] municipality itself was generally immune from liability for its tortious acts at common law . . . . [The court] also [has] recognized, however, that governmental immunity may be abrogated by statute. . . . [Section] 52-557n (a) (1) provides in relevant part: 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 omissions of such political subdivision or any employee, officer or agent thereof acting within the scope of his employment or official duties . . . . [Our Supreme Court] previously [has] concluded that [t]his language clearly and expressly abrogates the traditional

common-law doctrine in this state that municipalities are immune from suit for torts committed by their employees and agents. . . .[14]

"Subdivision (2) of § 52-557n (a) lists two exceptions to the statutory abrogation of governmental immunity. The exception relevant to this appeal provides: Except as otherwise provided by law, a political subdivision of the state shall not be liable for damages to person or property caused by . . . (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. . . . The statute, thus, distinguishes between discretionary acts and those that are ministerial in nature, with liability generally attaching to a municipality only for negligently performed ministerial acts, not for negligently performed discretionary acts. . . .

"The hallmark of a discretionary act is that it requires the exercise of judgment. . . . In contrast, [m]inisterial refers to a duty which is to be performed in a prescribed manner without the exercise of judgment or discretion. . . . 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. . . .

"In general, the exercise of duties involving inspection, maintenance and repair of hazards are considered discretionary acts entitled to governmental immunity. . . . A municipality necessarily makes discretionary policy decisions with respect to the timing, frequency,

[14] "Our Supreme Court has cautioned that '[s]tatutes that abrogate or modify governmental immunity are to be strictly construed' because if 'a statute is in derogation of common law or creates a liability where formerly none existed, it should receive a strict construction and is not to be extended, modified, repealed or enlarged in its scope by the mechanics of construction.' . . . *Rawling* v. *New Haven*, 206 Conn. 100, 105, 537 A.2d 439 (1988)." *DiMiceli* v. *Cheshire*, 162 Conn. App. 216, 223 n.5, 131 A.3d 771 (2016).

method and extent of inspections, maintenance and repairs. . . . Although the determination of whether official acts or omissions are ministerial or discretionary is normally a question of fact for the fact finder . . . there are cases where it is apparent from the complaint. . . . [W]hether an act or omission is discretionary in nature and, thus, whether governmental immunity may be successfully invoked pursuant to § 52-557n (a) (2) (B), turns on the character of the act or omission complained of in the complaint. . . . Accordingly, where it is apparent from the complaint that the defendants' allegedly negligent acts or omissions *necessarily* involved the exercise of judgment, and thus, necessarily were discretionary in nature, summary judgment is proper." (Citations omitted; emphasis in original; footnote in original; internal quotation marks omitted.) *DiMiceli* v. *Cheshire*, 162 Conn. App. 216, 223–25, 131 A.3d 771 (2016).

In their complaints, the plaintiffs allege that the defendant "failed to ensure that minor and adult females, including the plaintiff[s], had a safe, secure and private dressing area" at the high school. They claim that Archer's failure to maintain or repair the window in the manner described in the work order "constitutes a violation of a ministerial duty" because the work order was a "directive that, by its clear language, compels a municipal employee to act in a prescribed manner, without the exercise of judgment or discretion." (Emphasis omitted; internal quotation marks omitted.) The defendant claims, in response, that the "work order request is not a mandate of legal authority" but is, rather, "evidence of the defendant's officials exercising judgment in handling a maintenance and repair issue." (Emphasis omitted.) We agree with the defendant.

The work order itself provides the sole basis for the plaintiffs' claim that the defendant's otherwise discretionary duty to repair and maintain the window and

provide them with "a safe, secure and private dressing area" was ministerial in nature. The plaintiffs rely on the "plain language" of the work order to support their argument that it "prescribed the manner in which the work was to be performed" and did not "afford . . . Archer discretion in the way in which he was to remedy the problem." The work order, however, expressly pertains to "General Maintenance," it lists Martin as the "Requester," it had a "Request Date" of February 5, 2018, and there was no "Req. Completion Date," thereby leaving the time for performance open-ended and within Archer's discretion. Cf. *Doe* v. *Madison*, 340 Conn. 1, 32, 262 A.3d 752 (2021) ("[s]pecificity is required in all aspects of [a] directive").

Moreover, although the description of the requested maintenance states "[c]ut and fit colored/textured plexiglass" into the window of the door to the recreation staff locker room/closet area, the work order does not state that Archer had no discretion in this regard, and there is no other evidence in the record to support the plaintiffs' argument that he had none. Cf. *Cole* v. *New Haven*, 337 Conn. 326, 342, 253 A.3d 476 (2020) (police sergeant's testimony, in combination with police department's general order and Department of Public Safety's statewide policy, established existence of ministerial duty as matter of law). Indeed, there is no evidence regarding the nature of the work order, the internal discussions, if any, that preceded the work order's creation or the duties and expectations of the custodial staff in relation thereto.[15] To this end, there is no evidence that the "Description" set forth in the work order constituted "instructions" or a "directive," as the plaintiffs argue, let alone evidence that the work order was a mandate of legal authority that Archer failed to follow. See *Borelli* v. *Renaldi*, 336 Conn. 1, 12, 243 A.3d 1064

[15] In fact, there is no evidence, by way of deposition testimony or affidavits, from Martin or Archer, themselves.

(2020) ("[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 action being done" (emphasis added; internal quotation marks omitted)). This evidentiary lacuna is particularly significant in the present case because, as our Supreme Court has recognized, "there ordinarily is no legal directive mandating the specific manner in which officials must perform [inspection, maintenance and repair] tasks"; *Northrup* v. *Witkowski*, 332 Conn. 158, 170, 210 A.3d 29 (2019); and the language of the work order upon which the plaintiffs' rely simply does not establish an exception to this rule. See *Doe* v. *Madison*, supra, 340 Conn. 32 ("descriptions of general practices or expectations that guide an employee's exercise of discretion do not create a ministerial duty").

Furthermore, Martin and Archer were not policy makers or executive decision makers for the defendant. Rather, they were employees, working for the defendant's board of education in its physical services department. Martin was the "custodial manager," and Archer was a "maintainer . . . ." Although Martin had the authority to create the work order and to assign it to Archer, there is no evidence that Martin was not using his discretion and engaging in day-to-day decision-making regarding maintenance and repairs when he did so. The mere fact that Martin delegated the task to Archer by way of the work order in no way altered the task's discretionary nature. See, e.g., *Grignano* v. *Milford*, 106 Conn. App. 648, 657, 943 A.2d 507 (2008) (discretionary duty is not rendered ministerial merely because municipality codifies it as ordinance where nature of duty remains unchanged). The work order reflected the discretionary nature of the defendant's duties with respect

to inspection, maintenance and repairs, not the existence of a ministerial duty.

"If we were to conclude otherwise, virtually *any* attempt by a municipal agency to ensure that its discretionary duties are regularly and properly carried out would convert its discretionary duty into a ministerial duty, thereby creating a disincentive for municipal agencies to make such attempts and undermining the very policy considerations that the doctrine governmental immunity was intended to advance. See *Violano* v. *Fernandez*, [280 Conn. 310, 319, 907 A.2d 1188 (2006)] ('[d]iscretionary act immunity reflects a value judgment that—despite injury to a member of the public—the broader interest in having government officers and employees free to exercise judgment and discretion in their official functions, unhampered by fear of second-guessing and retaliatory lawsuits, outweighs the benefits to be had from imposing liability for that injury' . . .)." (Emphasis in original.) *Northrup* v. *Witkowski*, supra, 332 Conn. 188.

On the basis of our plenary review of the pleadings and the parties' submissions, we conclude that the plaintiffs have failed to establish that a genuine issue of material fact exists with respect to the nature of the defendant's duty in this case. Because it was legally and logically correct for the court to conclude that the acts and omissions alleged in each complaint were discretionary in nature, and not ministerial as the plaintiffs' claim, the court properly determined that the defendant was entitled to judgment as a matter of law on its governmental immunity defenses in each of these consolidated actions.

The judgments are affirmed.

2025 WL 1112604
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
J.D. OF NEW LONDON.
AT NEW LONDON.

ShawnMichaelWARD

v.

TOWN OF NORTH STONINGTON, et al.

DOCKET NO. KNL-CV20-6045044-S
|
APRIL 8, 2025

MEMORANDUM OF DECISION DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Thomas, J.

***1** The defendants, the Town of North Stonington et al., move for summary judgment in their favor on the four remaining counts of the plaintiff's complaint. The plaintiff's complaint originally raised federal and state law claims against the defendants for their zoning enforcement activities related to his property located at 79 Pine Woods Road in North Stonington, Connecticut. Following removal to federal court, an order of partial summary judgment, and remand to this court, only the plaintiff's state law claims remain.

PROCEDURAL AND FACTUAL BACKGROUND

The plaintiff's complaint was initially filed with a return date of February 11, 2020. The matter was subsequently removed to the U.S. District Court for the District of Connecticut. On March 17, 2023, the U.S. District Court for the District of Connecticut (Bolden, J.,) entered an order granting the defendants' motion for summary judgment as to all of the plaintiff's federal claims. The court declined to exercise supplemental jurisdiction over the state law claims, which were remanded to this court. The plaintiff's state law claims, for intentional infliction of emotional distress, abuse of process, negligent infliction of emotional distress, and negligence (Third, Fourth, Fifth, and Sixth Counts) remain. The defendants move for summary judgment on these claims, asserting that the claim for intentional infliction of emotional distress and abuse of process fail as a matter of law, and that the defendants are entitled to governmental immunity.

The underlying dispute between the parties arises from zoning enforcement actions taken by the Town of North Stonington, by and through its Zoning Enforcement Officer Juliet Hodge. Defendant Hodge issued a cease and desist order directed towards the plaintiff and his use of his property for commercial landscape purposes. This cease and desist order was upheld by the Town of North Stonington Zoning Board of Appeals in a decision dated March 21, 2018. That decision was subsequently appealed to this court. The court determined that because the defendant Zoning Board of Appeals "acted arbitrarily, illegally or unreasonably in reaching its decision, the appeal is sustained." *Ward v. Town of N. Stonington Zoning Bd. of Appeals*, Superior Court, J.D. of New London, No. CV186034407, 2019 WL 5172355, at *1 (Swienton, J., Sept. 24, 2019).

The factual and procedural history are not in significant dispute. As stated by the court in the previous zoning appeal decision:

> The plaintiff owns property at 79 Pine Woods Road, North Stonington, (the Property), which property consists of 114 acres of land with buildings and improvements. The entire property lies within the R-80 rural preservation zoning district. The plaintiff purchased the property on February 15, 1996, which then included a farm house, accessory outbuildings, and two large farms fields. The property has been primarily used for farming or other agricultural/ horticultural purposes for over 100 years.
>
> Thereafter, the plaintiff met with George Brown, who was North Stonington's zoning enforcement official, to discuss the possibility of starting a tree farm and related landscaping business in one of the back fields of the property. The plaintiff was advised by Brown that the historic use of the property had always been agriculture, and that a tree farm with incidental landscaping services was considered agriculture and was permitted as of right within the R-80 district. Therefore no approval was required.[ ] The plaintiff incorporated his business, Field of Dreams Tree Farm and Landscaping, Inc., in February 2000, and opened for business the following spring at the property within the back fields. The zoning regulations that were in place at that time provided that a zoning permit was

only required for a change of use, and not the continuation of an existing use. Exh. 12f, Zoning Regulations, § 202. The 1999 Zoning Regulations also provided that agriculture, agricultural facilities, and accessory structures and uses were all permitted as of right in the R-80 zoning district. *Id.*, § 403.3.[ ] The plaintiff claims that he was advised by Brown that he was not required to obtain a zoning permit for any use for which Field of Dreams was established, as all uses conformed with the existing zoning regulations and the pre-existing, principal agricultural use of the property.

***2** Shortly thereafter, in May 2000, the zoning enforcement official and the board of selectmen received an anonymous complaint alleging that the plaintiff was conducting an illegal landscape construction business on his property without the necessary approvals. The town's then ZEO, Marc Benjamin, investigated the complaint and in his investigative report noted that he conducted an inspection of the property—"did site walk." Exh. 12i. Benjamin concluded that it was a "start up tree farm, legitimate agriculture use," and no action was taken. Over the next three years, the plaintiff sought three zoning permits for a pool, a barn, and an addition on his residence. All approvals were granted without any enforcement action against the plaintiff or his business operations during this period. [ ]

In October 2003, another complaint was filed against the plaintiff for "running landscape business from home." Exh. 12*o*. ZEO Craig Grimord made an initial inspection on November 4, 2003, and noted that "no activity seen at this time—will keep under observation." *Id.* Because the complainant indicated that the truck activity and employees left and entered the site in the late afternoon, Grimord performed a second inspection, and found "[n]o evidence of any violations. Closing file." Exh. 12p. In the letter to the complainant, Grimord stated: "The site was investigated on two different occasions and no violations of the Zoning Regulations were observed at either time. There is an active agricultural use of this property as a tree farm. Activities associated with this use are permitted as of right. Based on my observations I would have to conclude that there are no zoning violations on this site at this time." Exh. 12q.

The plaintiff constructed a horse barn on the property in 2004, for which he received zoning approval. Exh. 12r. Aerial photos from 2004 to 2008 indicate that the nursery and related operation remained the same. Exh. 12 s-u. In 2009, a complaint was made because the plaintiff was planning to hold an auction on his property. ZEO Hodge did a site inspection and wrote a report of her findings. [ ] Hodge indicated that the plaintiff owns two properties on Pinewoods Road—79 Pinewoods Road, consisting of the plaintiff's residence, horse farm, and buildings used in conjunction with his landscaping business, and 108 Pinewoods Road where the tree farm is located. The landscaping business takes place off site: "i.e. his employees go to the clients, and not the other way around. No direct retail activity takes place on site. The business has been operated from that location for 13 years. The Town had knowledge of its existence. Former ZEO Craig Grimord inspected the site in 2003 to see if there was any Zoning violation and found none ... The earliest complaint/ inquiry found on file was from May of 2000. No violation was found at that time either." Exh. 12v.

The report makes no conclusions as to whether there was any present violation, but states that she was "postponing further enforcement measures until the outcome of the Planning and Zoning meetings to determine the scope of commercial activities that will be allowed as accessory to an active agricultural operation." *Id.* These statements would seem to indicate that the ZEO was discussing the possible need to bring the property into compliance with the current regulations.

In the subsequent ten years, no actions were taken with respect to the plaintiff's property or his operations until the filing of the Notice of Violation on November 17, 2017.[5] In the notice, ZEO Hodge notes that "complaints have been coming in again about the commercial operation [at 79 Pinewoods]." Her notice does not specify what those complaints were, and they are not part of the record. She did not conduct a site inspection, but based her decision to issue the notice of violation on her prior inspection ten years earlier, an inspection from the road only, aerial photographs, and the undocumented complaints which supported her finding that the plaintiff had expanded his use of what was occurring in 2009. ZEO Hodge testified that she had "observed ... parking of commercial business vehicles and machinery on site, parking of employee vehicles on site, and mustering of employees on the property at the start and the end of the workday, and had reports of high volumes of truck traffic." Tr. 19. She ordered him to cease all activity related to the operation of the, commercial landscape construction business, including any activity that may be considered a commercial service. Further, she ordered that he remove

all vehicles not associated with the agricultural use of the property. *Id.*

***3** Without admitting any wrongdoing, the plaintiff chose to relocate some of his business operations to a new location in Rhode Island, including his commercial vehicles and equipment. The vehicles still have to travel to the Property in order to pick up trees or other vegetation for planting. In addition, the landscape stone which had been stored on the Property was also moved.[ ] At the hearing, it was pointed out by the plaintiff that a majority of his neighbors, including many of his immediate abutting neighbors, supported his business, several testifying at the hearing and several submitting letters. Tr. 54.

On March 20, 2018, the ZBA upheld the cease and desist order. [ ] The members that voted to uphold the Notice of Violation found that the property was being used for commercial activity which they found not acceptable in a residential zone. Tr. 132. The dissenting [members] noted that the prior ZEOs had ruled the uses permissible, and determined that the town was estopped from the enforcement of the Notice of Violation against the plaintiff based upon the actions of the prior ZEOs. Noted was the plaintiff's reliance on those actions, and the substantial effort and money put into the property by the plaintiff.

The plaintiff filed this appeal pursuant to General Statutes § 8-8(b), which governs appeals from zoning boards of appeals to the Superior Court. All necessary parties have appeared and briefs have been filed. The plaintiff contends that he has been aggrieved by the Board's decision, and its decision is illegal, arbitrary, and capricious and constitutes an abuse of its discretion because (a) the commercial landscaping activities are legal, pre-existing nonconforming uses accessory to the principal agricultural use of the property; (b) the ZEO was municipally estopped from issuing the Notice of Violation; and (c) the ZBA improperly exercised its discretion in upholding the cease and desist order because it failed to conclude that prior determinations by its zoning enforcements officers of permissible uses of the property prevented a contrary determination by its current zoning officer.

(footnotes excluded) ***Ward***, 2019 WL 5172355, at *1–4 (Swienton, J., September 24, 2019).

The court, reviewing the lengthy history of complaints and zoning enforcement officials' prior inspections of the subject property over eighteen years, held that the doctrine of municipal estoppel prevented the defendants from requiring the plaintiff to conform with the defendants' regulations in effect at the time, finding that "[t]he plaintiff relied on these actions (or inactions) by the three ZEOs for over 18 years." Id. at *7.

The court further held that the plaintiff's landscape services activities were protected by Connecticut General Statutes § 8-2:

> as pre-existing, non-conforming uses. Section 8-2 prohibits the retroactive application of zoning regulations by stating that "[s]uch regulations shall not prohibit the continuance of any non-conforming use ... existing at the time of the adoption of such regulations." ZEO Hodge premised her cease and desist order upon the application of the Town's current zoning regulations to the contested uses. Her conclusion that the plaintiff had "expanded" his use of what was occurring in 2009 is unsupported by the record.

Id. at *9. The court also found that:

> Nothing in the aerial photos would indicate an expansion of the activity onsite, and is not found in the record. ZEO Hodge's statements regarding "high volumes of truck traffic" is not based upon her own observations, but from "reports," and is nothing more than unsupported hearsay which is not only unsupported, but does not distinguish the traffic associated with the tree farm operation—which the Board concedes is permissible, from the accessory use of the landscaping business. The conclusion that the plaintiff had illegally expanded Field of Dreams is lacking in substantial evidence.

***4** Id.

The plaintiff, in his complaint in the instant action, alleges that "at least two members of the [defendant Zoning Board of Appeals], including Mr. Mark Leonard and Mr. **Shawn** Murphy, relied on their personal feelings as it related to the Plaintiffs application..." He further alleges that the actions of the defendant Zoning Board of Appeals in upholding the Notice of Violation "was unlawful, illegal, arbitrary and capricious, and with no basis in law or fact."

In support of his Third Count, for intentional infliction of emotional distress, the plaintiff alleges that "[t]hrough their acts and omissions, the Defendants intended to inflict emotional distress on the Plaintiff, or knew or should have known that emotional distress was the likely result of their conduct." The plaintiff further alleges that the defendants' conduct "was extreme and outrageous... [and] caused the Plaintiff severe emotional distress."

In support of his Fourth Count, the abuse of process claim, the plaintiff alleges that the defendants "used the legal process against the Plaintiff in an improper manner or to accomplish a purpose for which it was not designed." These allegations are then incorporated into the Fifth Count, for negligent infliction of emotional distress, and the Sixth Count, asserting a negligence claim. The plaintiff's state law tort claims, the Third, Fourth, Fifth, and Sixth Counts of his complaint, are not adequately supported by specific factual allegations, and largely rely upon conclusory statements of the legal elements of the claim. (e.g., "[t]he Defendants' conduct was extreme and outrageous"; or "[t]he Defendants used the legal process against the Plaintiff in an improper manner or to accomplish a purpose for which it was not designed."). Additional facts, asserted in the plaintiff's opposition to the defendants' motion for summary judgment, are discussed below.

The defendants now move for summary judgment in their favor on all the remaining counts, asserting that there are no genuine issues of material fact, that the plaintiff's claims fail as a matter of law, and that the defendants are entitled to governmental immunity. The court agrees that the plaintiff has failed to show any genuine issue of material fact as to his remaining tort claims, and grants summary judgment on all remaining counts in favor of the defendants.

STANDARD OF REVIEW

"Summary judgment is a method of resolving litigation when 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.... The motion for summary judgment is designed to eliminate the delay and expense of litigating an issue when there is no real issue to be tried.... However, since litigants ordinarily have a constitutional right to have issues of fact decided by a jury ... the moving party for summary judgment is held to a strict standard ... of demonstrating his entitlement to summary judgment." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Grenier* v. *Commissioner of Transportation*, 306 Conn. 523, 534-35, 51 A.3d 367 (2012).

***5** "The judgment sought 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. "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." (Internal quotation marks omitted.) *Graham* v. *Commissioner of Transportation*, 330 Conn. 400, 414-15, 195 A.3d 664 (2018). "The test [for summary judgment] is whether a party would be entitled to a directed verdict on the same facts." (Internal quotation marks omitted.) *Fernandez* v. *Mac Motors, Inc.*, 205 Conn. App. 669, 673, 259 A.3d 1239 (2021).

"[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; emphasis in original; internal quotation marks omitted.) *Dugan* v. *Mobile Medical Testing Services, Inc.*, 265 Conn. 791, 815, 830 A.2d 752 (2003).

"[T]he genuine issue aspect of summary judgment requires the parties to bring forward before trial evidentiary facts, or substantial evidence outside the pleadings, from which the material facts alleged in the pleadings can warrantably be inferred.... A material fact has been defined adequately and simply as a fact which will make a difference in the result of the case." (Citation omitted; internal quotation marks omitted.) *Buell Industries, Inc.* v. *Greater New York Mutual Ins. Co.*, 259 Conn. 527, 556, 791 A.2d 489 (2002).

"A genuine issue of material fact must be one which the party opposing the motion is *entitled to litigate under his pleadings* and the mere existence of a factual dispute apart from the pleadings is not enough to preclude summary judgment.... *The facts at issue [in the context of summary judgment] are those alleged in the pleadings....* The purpose of the complaint is to limit the issues to be decided at the trial of a case and is calculated to prevent surprise." (Emphasis in original; internal quotation marks omitted.) *Straw Pond Associates, LLC* v. *Fitzpatrick, Mariano & Santos, PC*, 167 Conn. App. 691,

728-29, 145 A.3d 292, cert. denied, 323 Conn. 930, 150 A.3d 231 (2016).

"In ruling on a motion for summary judgment, the court's function is not to decide issues of material fact ... but rather to determine whether any such issues exist." (Internal quotation marks omitted.) *RMS Residential Properties, LLC* v. *Miller*, 303 Conn. 224, 233, 32 A.3d 307 (2011). "[I]ssue-finding, rather than issue-determination, is the key to the procedure." (Internal quotation marks omitted.) *DiMiceli* v. *Cheshire*, 162 Conn. App. 216, 222, 131 A.3d 771 (2016).

"[I]t is only [o]nce [the] defendant's burden in establishing his entitlement to summary judgment is met [that] the burden shifts to [the] plaintiff to show that a genuine issue of fact exists justifying a trial.... Summary judgment should be denied where the affidavits of the moving party do not affirmatively show that there is no genuine issue of fact as to all of the relevant issues of the case.... 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*, 310 Conn. 304, 320-21, 77 A.3d 726 (2013).

***6** "Although the court must view the inferences to be drawn from the facts in the light most favorable to the party opposing the motion ... a party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment.... A party opposing a motion for summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue." (Internal quotation marks omitted.) *Perez* v. *Metropolitan District Commission*, 186 Conn. App. 466, 476, 200 A.3d 202 (2018).

DISCUSSION

In reviewing the defendants' motion for summary judgment, the attachments and affidavits thereto, the 2019 decision of this court affirming the plaintiff's appeal, and the plaintiff's complaint, the defendants have met their burden of showing that they are entitled, as a matter of law, to summary judgment on the plaintiff's remaining claims, and that the defendants are entitled to governmental immunity. The plaintiff has not, in his opposition and counter-affidavits, shown the existence of any genuine issue of material fact as to the four remaining counts of his complaint. The court will review each of these claims separately below.

Intentional Infliction of Emotional Distress

"In order for the plaintiff to prevail in a case for liability under ... [intentional infliction of emotional distress], four elements must be established. It must be shown: (1) that the actor intended to inflict emotional distress or that he knew or should have known that emotional distress was the likely result of his conduct; (2) that the conduct was extreme and outrageous; (3) that the defendant's conduct was the cause of the plaintiff's distress; and (4) that the emotional distress sustained by the plaintiff was severe." *Appleton v. Bd. of Educ. of Town of Stonington*, 254 Conn. 205, 210, 757 A.2d 1059, 1062 (2000). "Whether a defendant's conduct is sufficient to satisfy the requirement that it be extreme and outrageous is initially a question for the court to determine." *Hartmann v. Gulf View Ests. Homeowners Ass'n, Inc.*, 88 Conn. App. 290, 295, 869 A.2d 275, 278 (2005).

"Liability [for intentional infliction of emotional distress] has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, Outrageous!" *Morrissey v. Yale Univ.*, 268 Conn. 426, 428, 844 A.2d 853, 854 (2004).

When presented with a claim for intentional infliction of emotional distress, "the court performs a gatekeeping function." *Hartmann*, 88 Conn. App. at 295. "In this capacity, the role of the court is to determine whether the allegations ... set forth behaviors that a reasonable fact finder could find to be extreme or outrageous. In exercising this responsibility, the court is not fact finding, but rather it is making an assessment whether, as a matter of law, the alleged behavior fits the criteria required to establish a claim premised on intentional infliction of emotional distress." *Id.* "[T]here is no bright line rule to determine what constitutes extreme and outrageous conduct sufficient to maintain an action. The court looks to the specific facts and circumstances of each

case in making its decision ... However, [a] line can be drawn between the slight hurts which are the price of a complex society and the severe mental disturbances inflicted by intentional acts wholly lacking in social utility ..." *Leone v. New England Commc'ns*, Superior Court of Connecticut, No. CV010509752S, 32 Conn. L. Rptr. 72, 2002 WL 1008470 (Quinn, J., Apr. 10, 2002).

***7** The court has reviewed the entirety of the pleadings, the affidavits, deposition and transcript excerpts, and other evidence submitted, as well as the court's prior decision affirming the plaintiff's appeal of the defendants' zoning enforcement actions and decisions. The plaintiff has not shown any facts which would rise to the level of intentional infliction of emotional distress. While there were procedural and substantive weaknesses in the defendants' handling of the zoning enforcement actions at issue, the plaintiff has not, as a matter of law, shown a genuine issue of material fact as to his claim for intentional infliction of emotional distress. Summary judgment must therefore enter, as a matter of law, in favor of the defendants on the plaintiff's intentional infliction of emotional distress count.

Abuse of Process

The plaintiff has also failed to show the existence of any genuine issue of material fact as to his abuse of process claim. In Connecticut, "[a]n action for abuse of process lies against any person using a legal process against another in an improper manner or to accomplish a purpose for which it was not designed." (internal citations and quotations omitted). *McCullough v. Town of Rocky Hill*, 198 Conn. App. 703, 713-14, 234 A.3d 1049, 1056 (2020). The plaintiff must show that the action was brought "*primarily* to obtain a wrongful purpose for which the proceedings were not designed." (emphasis added, internal citations and quotations omitted). Id. "A plaintiff cannot prevail if the municipality utilized the judicial process for the purpose for which it is intended, but there is an incidental motive of spite or an ulterior purpose of benefit to the defendant." Id. at 715-716. The plaintiff must show that the defendant employed such process "for a wrongful and malicious purpose to attain an unjustifiable end or an object that the particular process was not meant to effect." *Falls Church Grp., Ltd. v. Tyler, Cooper & Alcorn, LLP*, 281 Conn. 84, 96, 912 A.2d 1019, 1028 (2007).

The plaintiff argues that the cease and desist order issued by defendant Hodge, "was not... legitimate, but was based on personal or political animus and an intent to injure." The plaintiff has not provided, however, any factual support for this contention. There is nothing in the record that supports the manifestation of *any* malicious purpose by the named defendants, or that the zoning enforcement actions and Zoning Board of Appeals decision was the result of any animus. There were good faith disputes between the parties, including, *inter alia,* questions regarding the application of the zoning regulations to the plaintiff's prior nonconforming use, whether there was an increase in traffic associated with the plaintiff's business that indicated an impermissible expansion of a prior nonconforming use, and whether the plaintiff's work with the stone on the property was permissible. The fact that these disputes were decided in the plaintiff's favor, and that the defendants' actions were ultimately held to be unsupported by the evidence, does not, by itself, support a claim of abuse of process. The plaintiff would need to show more than an "incidental motive of spite or an ulterior purpose", which he has not demonstrated in the record or in his opposition. The plaintiff has made no credible showing of *any* malice, spite or ulterior purpose in the defendants' actions. The plaintiff has failed to show the existence of a genuine issue of material fact as to his abuse of process claim, which fails as a matter of law.[1]

1 The defendants are also entitled to statutory immunity on this claim, and the plaintiff has not asserted a statutory exception to the protections of Conn. Gen. Stat. § 52-577n. *See McCullough,* 198 Conn. App. at 720-721.

Negligent Infliction of Emotional Distress

***8** The plaintiff asserts a claim of negligent infliction of emotional distress. The elements of a claim for negligent infliction of emotional distress are well-settled. The plaintiff must prove that: "(1) the defendant's conduct created an unreasonable risk of causing the plaintiff emotional distress; (2) the plaintiff's distress was foreseeable; (3) the emotional distress was severe enough that it might result in illness or bodily harm; and (4) the defendant's conduct was the cause of the plaintiff's distress." (internal citations and quotations omitted) *Hall v. Bergman*, 296 Conn. 169, 183, n. 8, 994 A.2d 666, 675 (2010).

The defendants are entitled to statutory governmental immunity as to this claim. Conn. Gen. Stat. § 52-577n "abandons the common-law principle of municipal sovereign immunity and establishes the circumstances in which a municipality may be liable for damages." *Doe v. Petersen*, 279 Conn. 607, 614, 903 A.2d 191, 196 (2006). Conn. Gen. Stat. § 52-577n(a)(2) provides that "[e]xcept 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 wilful 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." Conn. Gen. Stat. § 52-577n(a)(2).

"The issue of governmental immunity is simply a question of the existence of a duty of care, and [the Connecticut Supreme Court] has approved the practice of deciding the issue of governmental immunity as a matter of law." (internal citations and quotations omitted). *Doe*, 279 Conn. at 613. "The [common-law] doctrines that determine the tort liability of municipal employees are well established.... Generally, a municipal employee is liable for the misperformance of ministerial acts, but has a qualified immunity in the performance of governmental 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.... In contrast, [m]inisterial refers to a duty which is to be performed in a prescribed manner without the exercise of judgment or discretion." *Violano v. Fernandez*, 280 Conn. 310, 318, 907 A.2d 1188, 1193-94 (2006).

Zoning enforcement regulation activity has been recognized as discretionary and therefore entitled to discretionary act governmental immunity. *See Greenfield v. Reynolds*, 122 Conn. App. 465, 471-72, 1 A.3d 125, *cert. denied,*298 Conn. 922, 4 A.3d 1226 (2010) ("it is clear that the power to enforce zoning regulations conferred by § 8-12 on town officials is discretionary"). "Discretionary act immunity reflects a value judgment that—despite injury to a member of the public —the broader interest in having government officers and employees free to exercise judgment and discretion in their official functions, unhampered by fear of second-guessing and retaliatory lawsuits, outweighs the benefits to be had from imposing liability for that injury." (internal citations and quotations omitted). *Doe*, 279 Conn. at 615. It is inherent in zoning enforcement actions that some harm will occur to the individual or entity who is subject to the zoning enforcement restrictions, such as the cease-and-desist letter at issue here. The plaintiff has pled claims of economic harm and emotional distress as a result of the zoning enforcement activity undertaken by Zoning Enforcement Officer Hodge and affirmed by the Stonington Zoning Board of Appeals. The existence of such harms, even when construed in favor of the plaintiff, does not give rise to an exception to statutory governmental immunity.

***9** The plaintiff points to a statutory exception to governmental immunity in an effort to preserve his negligent infliction of emotional distress and negligence claims. Conn. Gen. Stat. § 52-577n(b)(5) provides that, "[n]otwithstanding the provisions of subsection (a) of this section, a political subdivision of the state or any employee, officer or agent acting within the scope of his employment or official duties shall not be liable for damages to person or property resulting from:.... (5) the initiation of a judicial or administrative proceeding, *provided that such action is not determined to have been commenced or prosecuted without probable cause or with a malicious intent to vex or trouble.*" (emphasis added). Conn. Gen. Stat. § 52-557n(b)(5). The plaintiff argues that "[t]here is a factual dispute whether the Defendants acted willfully and with malice which precludes summary judgment on their governmental immunity defense."

The court recognizes that "summary judgment is ordinarily inappropriate where an individual's intent and state of mind are implicated.... The summary judgment rule would be rendered sterile, however, if the mere incantation of intent or state of mind would operate as a talisman to defeat an otherwise valid motion." (Internal quotation marks omitted.) *Hospital of Central Connecticut v. Neurosurgical Associates, P.C.*, 139 Conn. App. 778, 793, 57 A.3d 794 (2012); *see also Voris v. Middlesex Mutual Assurance Co.,* 297 Conn. 589, 603, 999 A.2d 741 (2010) ("[t]he summary judgment rule would be rendered sterile ... if the mere incantation of intent or state of mind would operate as a talisman to defeat an otherwise valid motion" [internal quotation marks omitted]). "[E]ven with respect to questions of motive, intent and good faith, the party opposing summary judgment must present a factual predicate for his argument in order to raise a genuine issue of fact." (Internal quotation marks omitted.) *Voris v. Middlesex Mutual Assurance Co.*, supra, 297 Conn. 603.

In reviewing the complaint and affidavits in the light most favorable to the plaintiff, the plaintiff has not made the requisite showing that the defendants' actions were motivated by malice, or that the actions taken by the zoning enforcement officials were taken with a "malicious intent to vex or trouble." The plaintiff relies on various claims, supported by his own self-serving statements, asserting hostility and longstanding disputes with two of his neighbors, allegations of various attenuated or personal connections between those neighbors and town officials, and an unproductive meeting

with first selectman Michael Urgo of the Town of Stonington. The plaintiff asserts that defendant Urgo was looking out of the window during this meeting, and concludes, "[b]y his lack of responsiveness and overall demeanor, I strongly believed he was not interested in investigating this matter and to openly and fairly consider my complaint, and that Town administration was going to prevent me from operating my business." The plaintiff has not shown that defendant Urgo demonstrated malice towards him, or that he was involved in the zoning enforcement activity or decision-making process at issue here. The plaintiff relies heavily on inference, conjecture, and speculation, which are not sufficient to support his claim of an applicable exception.

In reviewing the plaintiff's opposition materials, including records of the March 20, 2018 Zoning Board of Appeals Public Hearing, the plaintiff has not shown that any malice entered the decision-making process. The plaintiff has shown, through deposition testimony and his own affidavit, that he had a hostile and difficult relationship with two of his neighbors, Wayne Berardi and Patricia Lewis, and that those individuals were among many neighbors who participated in these proceedings. The participation of these individuals in making complaints to zoning enforcement officials,[2] or in public hearings before the North Stonington Zoning Board of Appeals, does not automatically imbue the zoning enforcement activity or the decision affirming that enforcement activity with malicious intent and purpose. In reviewing the decisions, and transcript of related proceedings, there is no evidence of the existence of malice, a malicious purpose, or a malicious intent to vex or trouble. The plaintiff has not pled in his complaint or otherwise met his burden to show, in his opposition and counter-affidavits, that any statutory exception to the general rule of discretionary governmental immunity applies to this claim. The court must therefore grant the defendants' motion for summary judgment as to the plaintiff's negligent infliction of emotional distress count.

2 Complaints that gave rise to defendant Hodge's eventual cease and desist order were made anonymously.

Negligence

***10** "The essential elements of a cause of action in negligence are well established: duty; breach of that duty; causation; and actual injury." *Murdock v. Croughwell*, 268 Conn. 559, 566, 848 A.2d 363, 367 (2004). The defendants are entitled to governmental immunity for the same reasons as previously discussed. The court therefore must grant summary judgment in favor of the defendants as to the plaintiff's negligence count.

CONCLUSION

The court has carefully considered the motion for summary judgment and opposition thereto, together with all materials that both parties have submitted in support of their respective positions. The defendants have shown their entitlement to summary judgment on all of the plaintiff's remaining tort claims. The plaintiff has failed to show the existence of a genuine issue of material fact as to any of these remaining four counts. Judgment shall enter for the defendants as to all remaining counts of the complaint.

SO ORDERED.

All Citations

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United States District Court, D. Connecticut.

Shawn Michael WARD, Plaintiff,

v.

TOWN OF NORTH STONINGTON, et al., Defendants.

No. 3:20-cv-00124 (VAB)
|
Signed March 17, 2023

Attorneys and Law Firms

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Thomas R. Gerarde, Eric Gerarde, Howd & Ludorf, LLC, Wethersfield, CT, for Defendants.

RULING AND ORDER ON MOTION FOR SUMMARY JUDGMENT

Victor A. Bolden, United States District Judge

***1 Shawn Michael Ward** ("Mr. **Ward**" or "Plaintiff") has sued the Town of North Stonington, Zoning Enforcement Officer Juliet Hodge, in her individual capacity, the North Stonington Planning & Zoning Commission, the North Stonington Zoning Board of Appeals, and Zoning Board of Appeals members James E. Lord, Charlie Berger, **Shawn** P. Murphy, Candy L. Palmer, and Mark Leonard, in their individual capacities, (collectively, "Town of North Stonington" or "Defendants") for violations of the Equal Protection and Due Process Clauses of the United States Constitution under 42 U.S.C. § 1983 and Connecticut common law violations of abuse of process, negligent infliction of emotional distress, and negligence. Def.s' Notice of Removal, ECF No. 1 (Jan. 28, 2020) ("Notice of Removal").

Defendants have moved for summary judgment on all the aforementioned claims. Defs.' Mot. for Summ. J., ECF No. 53 (Mar. 15, 2022) ("Mot. for Summ. J."). For the foregoing reasons, Defendants' motion for summary judgment is **GRANTED in part**, and **DENIED in part.**

Defendants' motion for summary judgment is **GRANTED** with respect to the substantive due process, procedural due process, and equal protections claims under the Fourteenth Amendment. These federal claims are now **DISMISSED**.

Defendants' motion for summary judgment is **DENIED** with respect to the remaining state law claims, over which the Court declines to exercise supplemental jurisdiction and will remand back to the Connecticut Superior Court for the Judicial District of New London.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Allegations

On February 15, 1996, Mr. **Ward**, bought the 114 acre property at 79 Pine Woods Road, North Stonington, CT 06359 ("Property"). Def.'s Town of North Stonington Statement of Material Facts, ECF No. 53-2 ¶ 1 (Mar. 15, 2022) ("Town of North Stonington SMF").

The Property encompasses approximately 114 acres of land with buildings and improvements thereupon and has been located within the R-80 Rural Preservation Zoning District and is shown on the North Stonington Assessor's Map 90, Lot 1981. Notice of Removal at 10.

Subsequent to Mr. **Ward's** purchase of the Property, Zoning Official George Brown advised the Plaintiff that the historic use of the Property had always been agriculture and that a tree farm with accessory landscaping activities would be considered an agriculture permitted in the R-80 Rural Preservation Zoning District as of right and that no change of use permit would be required. *Id.*

The zoning regulations that were in place at that time for the Town, Zoning Regulation Section 202, provided that a zoning permit was only required for a change of use, and not the continuation of an existing use. *Id.*

The 1999 Zoning Regulations also provided that agriculture, agricultural facilities, and accessory structures and uses were all permitted as of right in the R-80 zoning district, at Section 403.3. *Id.*

The Defendant, the Town of North Stonington, is a municipality formed under the laws of the State of

Connecticut and adopted zoning regulations effective May 21, 1964. *Id.* at 10-11.

*2 The Defendant, Michael Urgo, is the First Selectman for the Town of North Stonington and is the chief administrative official for the Town. *Id.* at 11.

The Defendant, the North Stonington Planning & Zoning Commission is the governmental commission charged with enforcement of the Town's zoning regulations. Juliet Hodge (nee Leeming) is the current Zoning Official of the Town of North Stonington and is charged with the enforcement of the Zoning Regulations. *Id.*

The Defendant, the Zoning Board of Appeals for the Town of North Stonington (the "ZBA") is the municipal agency empowered by the Section 8- of the Connecticut General Statutes and Chapter 14 of the North Stonington Zoning Regulations (the "Zoning Regulations 11") to decide appeals where it is alleged that there is an error in any order, requirement or decision made by the official charged with the enforcement of the Zoning Regulations. *Id.*

The Defendants, Zoning Board of Appeals members James E. Lord, Charlie Berger, Shawn P. Murphy, Candy L. Palmer, and Mark Leonard, were the members of the Zoning Board of Appeals during the time period relevant to this Complaint, and are sued in their individual capacities. *Id.*

Around February 2000, Mr. Ward incorporated Fields of Dreams Tree Farm and Landscaping, Inc. ("Field of Dreams" or the "Company") and established a tree farm with accessory landscaping activities located in the western farm field on the Property. Town of North Stonington SMF ¶ 2.

Fields of Dreams owns the tree farm at 79 Pine Woods Road, performs landscape construction on residential properties, including softscape services, such as planting large trees, grading, supplying materials, and site work. *Id.* ¶ 3.

The Zoning Regulations in effect as of February of 2000 allowed agricultural uses, including the growing of trees and other horticultural products, as well as accessory uses customarily incidental and subordinate to those agricultural uses, as uses permitted as of right within the R-80 Rural Preservation Zoning District. Notice of Removal at 12.

The Company operated, and continues to operate without interruption, principally as a tree farm and nursery, growing trees, shrubs and plantings onsite and then installing and maintaining them offsite for commercial, industrial, residential, and institutional customers. *Id.*

The landscaping business takes place off site, Plaintiff's employees go to the clients, and no direct retail activity takes place on site. *Id.* at 13.

The Town has been aware that the business has operated from that location for 13 years. *Id.*

In addition to onsite tree farm and nursery operations, the Company is regularly called upon to complete associated offsite work related to planting, pruning, wielding, fertilizing, gardening, irrigating, lawn care and cutting, and the construction of in minor retaining walls, patios and earth moving for the purpose of enhancing, protecting, and improving soil, plants, lawns and gardens. *Id.*

Around May 2000, Zoning Official Marc Benjamin inspected the Property and reported that the Plaintiffs use of the Property constituted a legitimate agricultural use, and took no further enforcement action against Mr. Ward. Town of North Stonington SMF ¶ 6.

*3 Around October 30, 2003, the Town of North Stonington received a complaint filed against the Plaintiff alleging that he was operating an illegal landscape business from the Property. Notice of Removal at 13.

On November 4, 2003, then ZEO Craig Grimord performed an initial inspection of Ward's property from the road, in response to a complaint filed against Ward. Town of North Stonington SMF ¶ 7.

On November 18, 2003, Mr. Grimord performed a drive-by inspection of Mr. Ward's property, and did not find any evidence of violations. Town of North Stonington SMF ¶ 8.

On November 19, 2003, Mr. Grimard wrote a letter to the complainant indicating that the Property was being used as a tree farm, activities associated with this use were permitted as of right, and there were no zoning violations on the Property. Notice of Removal at 14.

In 2009, Hodge performed a partial site-walk of Ward's property, consisting of the house, horse barn area, and carriage barn area. Hodge issued a report that the landscaping business takes place off site, the employees go to the clients, no direct

retail activity takes place on site, and the primary use of Ward's property appeared to be agricultural. Town of North Stonington SMF ¶ 11.

Around November 22, 2009, Zoning Official Juliet Leeming inspected the Property and reported that the principal use of the property was agriculture. Notice of Removal at 14.

Ms. Leeming acknowledged the inspections and findings of her predecessors, Mr. Benjamin and Mr. Grimard, in reference to the Property and its use at that time. *Id.*

Ms. Leeming also reported evidence of the accessory landscaping activities on the Property but took no zoning enforcement action against the Plaintiff at that time. *Id.*

Upon information and belief, no subsequent physical inspection of the Property has been conducted by any Zoning Official since Ms. Leeming's inspection since 2009. *Id.*

On November 17, 2017, Zoning Official Juliet Hodge issued a Notice of Violation (the "Notice of Violation 11") to Mr. Ward alleging the operation of an unpermitted commercial landscape construction business on the Property in violation of Chapter 5 of the Zoning Regulations and ordering the Plaintiff to cease said operations. *Id.*

The Notice of Violation referenced a variety of activities taking place on the Property including the stockpiling and processing of stones, the illegal construction building, the parking and storage of landscaping vehicles and equipment, the parking of employee vehicles, the clustering of employees, and high volumes of truck traffic. *Id.* at 14-15.

B. Procedural History

On January 28, 2020, Defendants filed a Notice of Removal including Mr. Ward's Complaint. Notice of Removal.

On March 05, 2020, Defendants filed an answer to Mr. Ward's Complaint. Def.'s' Answer, ECF No. 15 (Mar. 05, 2020) ("Answer").

On March 7, 2022, Mr. Ward moved to join Fields of Dreams Tree Farm and Landscaping Inc. as a party-plaintiff under Fed. R. Civ. P. 15 and 20. Mot. to Join Party-Pl, ECF No. 48. (Mar. 07, 2022) ("Mot. for Joinder").

On that same day, Defendants filed an objection to Mr. Ward's motion for joinder. Defs.' Obj. to Pl.'s Mot. for Joinder, ECF No. 49 (Mar. 07, 2022) ("Def.'s Obj.").

On March, 11, 2022, Mr. Ward moved to amend the complaint. Pl.'s Mot. to Amend/Correct, ECF No. 50 (Mar. 11, 2022) ("Mot. to Amend").

***4** On that same day, Mr. Ward filed a reply to Defendants' objection to the motion for joinder. Pl.'s Reply to Defs.' Obj., ECF No. 51 (Mar. 11, 2022) ("Pl. Reply").

On that same day, Defendants filed an objection to Mr. Ward's motion to amend the complaint. Def.s' Obj to Pl. Mot. to Amend/Correct, ECF No. 52 (Mar. 11, 2022) (Def.s' Obj. Mot. to Amend").

On March 15, 2022, Defendants moved for summary judgment. Mot. for Summ. J.

On August 30, 2022, Mr. Ward filed his opposition to Defendants' motion for summary judgment. Pl.'s Response to Def.s' Mot. for Summ. J., ECF No. 60 (Aug. 30, 2022) ("Ward Mem ..").

On September 13, 2022, Defendants filed their reply to Mr. Ward's response to Defendants' motion for summary judgment. Defs.' Reply to Pl.'s Resp. to Defs.' Mot. for Summ. J., ECF No. 64 (Sept. 13, 2022) ("Defs.' Reply").

On October 17, 2022, Mr. Ward moved for permission to file a sur-reply to Defs.' reply to Mr. Ward's opposition Defendants' motion for summary judgment and filed the proposed sur-reply as an exhibit. Pl.'s Sur-Reply to Defs.' Reply to Pl.'s Response to Defs.' Mot. for Summ. J., ECF No. 65 (Oct. 17, 2022) ("Pl. Sur-Reply"); Exhibit A, Pl.'s Sur-Reply, ECF No. 65 (Oct. 17, 2022).

On March 14, 2023, the Court held a hearing on the motion for summary judgement. Min. Entry, ECF No. 69 (Mar. 14, 2023).

II. STANDARD OF REVIEW

A. Motion for Summary Judgment

A court will grant a motion for summary judgment if the record shows no genuine issue as to any material fact, and

the movant is "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party bears the initial burden of establishing the absence of a genuine dispute of material fact. *Celotex Corp. v. Cartrett*, 477 U.S. 317, 323 (1986). The non-moving party may defeat the motion by producing sufficient specific facts to establish that there is a genuine issue of material fact for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Id.* at 247–48.

"[T]he substantive law will identify which facts are material." *Id.* at 248. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.*; *see Graham v. Henderson*, 89 F.3d 75, 79 (2d Cir. 1996) ("[M]ateriality runs to whether the dispute matters, i.e., whether it concerns facts that can affect the outcome under the applicable substantive law." (citing *Anderson*, 477 U.S. at 248)).

"The inquiry performed is the threshold inquiry of determining whether there is the need for a trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson*, 477 U.S. at 250. When a motion for summary judgment is supported by documentary evidence and sworn affidavits and "demonstrates the absence of a genuine issue of material fact," the nonmoving party must do more than vaguely assert the existence of some unspecified disputed material facts or "rely on conclusory allegations or unsubstantiated speculation." *Robinson v. Concentra Health Servs., Inc.*, 781 F.3d 42, 44 (2d Cir. 2015) (internal citation omitted).

***5** The party opposing the motion for summary judgment "must come forward with specific evidence demonstrating the existence of a genuine dispute of material fact." *Id.* "If the evidence is merely colorable, ... or is not significantly probative, ... summary judgment may be granted." *Anderson*, 477 U.S. at 250 (citing *First Nat'l Bank of Ariz. V. Cities Serv. Co.*, 391 U.S. 253, 290 (1968); *Dombrowski v. Eastland*, 387 U.S. 82, 87 (1967)).

When deciding a motion for summary judgment, a court may review the entire record, including the pleadings, depositions, answers to interrogatories, admissions, affidavits, and any other evidence on file to determine whether there is any genuine issue of material fact. *See* Fed. R. Civ. P. 56(c); *Pelletier v. Armstrong*, No. 3:99-cv-1559 (HBF), 2007 WL 685181, at *7 (D. Conn. Mar. 2, 2007). In reviewing the record, a court must "construe the evidence in the light most favorable to the non-moving party and to draw all reasonable inferences in [his] favor." *Gary Friedrich Enters., L.L.C. v. Marvel Characters, Inc.*, 716 F.3d 302, 312 (2d Cir. 2013) (internal citation omitted). If there is any evidence in the record from which a reasonable factual inference could be drawn in favor of the non-moving party for the issue on which summary judgment is sought, then summary judgment is improper. *See Sec. Ins. Co. of Hartford v. Old Dominion Freight Line Inc.*, 391 F.3d 77, 83 (2d Cir. 2004).

III. DISCUSSION

Mr. **Ward** asserts five claims against the Defendants: (1) violation of Due Process Clause (Count 1), Compl. ¶¶ 1-51; (2) violation of Equal Protection Clause (Count 2), *id.* ¶¶ 1-52; (3) intentional infliction of emotional distress, *id.* ¶¶ 1-55; (4) abuse of process, *id.* ¶¶ 1-57; (5) negligent infliction of emotional distress, *id.* ¶¶ 1-62; and (6) negligence, *id.* ¶¶ 1-63.

Defendants move for summary judgment arguing that there is no genuine dispute of material facts and that they are entitled to summary judgment as it pertains to Mr. **Ward's** substantive due process claim, procedural due process claim, equal protection claim ("federal claims"), intentional infliction of emotional distress claim, negligent infliction of emotional distress claim, takings claim, and negligence claim ("state law claims").

The Court will address the federal claims first, and if these federal claims do not survive, whether supplemental jurisdiction should be exercised over the remaining state law claims.

A. The Due Process Claims

The Fourteenth Amendment provides that "[n]o State shall ... deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. "The Due Process Clause of the Fourteenth Amendment requires states to operate in accordance with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Hancock v. Cty. of Rensselaer*, 882 F.3d 58, 64 (2d Cir. 2018) (internal citations and quotation marks omitted). There are two types of due process claims:

substantive due process claims and procedural due process claims.

Each claim will be analyzed in turn.

1. The Substantive Due Process Claim

Substantive due process requires plaintiffs to show deprivation of a constitutional right under circumstances that were "arbitrary" and "outrageous," typically as demonstrated by conduct that "shocks the conscience." *Natale v. Town of Ridgefield*, 170 F.3d 258, 262 (2d Cir. 1999) (quoting *Rochin v. California*, 342 U.S. 162, 172 (1962)); *see also Demas v. Town of Trumbull*, No. CIV.A. 303CV2273JCH, 2005 WL 756506, at *5 (D. Conn. Mar. 31, 2005) ("Only the most egregious official conduct in which government officials abuse their power and employ[ ] it as an instrument of oppression can be said to be arbitrary in the constitutional sense[.]") (citations and internal quotation marks omitted); *Servidio Landscaping, LLC v. City of Stamford*, No. 3:19-CV-01473 (KAD), 2020 WL 7246441, at *6 (D. Conn. Dec. 9, 2020) ("[T]he dispute between these parties is a straight-forward, garden variety, zoning dispute between a landowner and a municipality. The issues raised can be, have been and should be brought to the state court for adjudication."); *Integrity Soc. Work Servs., LCSW, LLC v. Becerra*, No. 21-2757-CV, 2022 WL 1930866, at *2 (2d Cir. June 6, 2022) ("Integrity has not identified any conduct that is outrageous.") (internal quotation marks omitted); *Clubside,* 468 F.3d at 158 (2d Cir. 2006) ("[I]t is not the role of the federal courts to protect landowners from merely arbitrary actions that are correctable by state remedies[.]"); *Silverman v. Barry,* 845 F.2d 1072, 1080 (D.C. Cir. 1988) ("Only a substantial infringement of state law prompted by personal or group animus, or a deliberate flouting of the law that trammels significant personal or property rights, qualifies for relief under § 1983.").

***6** Government regulation of a landowner's use of his property is deemed arbitrary or irrational, and thus violates his right to substantive due process, only when government acts with "no legitimate reason for its decision." *Komondy v. Gioco*, 253 F. Supp. 3d 430, 453 (D. Conn. 2017) (citations and internal quotation marks omitted).

Defendants argue that Mr. **Ward** "never had a constitutionally protected property interest in a hardscape commercial landscaping business in a R-80 residentially zoned area." Mot. for Summ. J. at 4. Even if he had, "after **Ward** was issued the Notice of Violation, he voluntarily relocated his equipment to a commercial property prior to his hearing before the Zoning Board of Appeals regarding the appeal of his Notice of Violation." *Id.* at 5. As a result, in Defendants' view, "[w]here a cease-and-desist order issued but not enforced, the party to whom the cease-and-desist is issued to is not deprived of a protectable property interest." *Id.* (citing cases).

Moreover, Defendants argue that even if Mr. **Ward** had a constitutionally protected property interest, any alleged deprivation of that interest was not "for arbitrary, capricious, and/or irrational reasons." *Id.* In their view, the issuance of the Notice of Violation resulted from a Mr. **Ward's** decision to change how the property was used from earlier inspections by the Defendants, and thus cannot be considered to be an arbitrary, capricious or irrational decision. *See id.* at 7 ("When ZEO Hodge issued a Notice of Violation to **Ward** on November 17, 2017, **Ward** was engaged in a much different business than when his property was inspected."); *id.* ("**Ward** had made a substantial, intensified use of his property for purposes of a commercial hardscape construction business, which is not allowed under the zoning regulations on a R-80 zoned property, and it is also not an accessory to an agricultural use under the zoning regulations, and therefore makes the issuance of the Notice of Violation neither irrational nor arbitrary.").

In response, Mr. **Ward** simply argues that "[t]he Defendants are collaterally estopped from contesting this issue" and that "[t]he Superior Court expressly found that **Ward's** landscaping operation was permitted as of right in the R-80 zoning district preexisting non-conforming uses." **Ward** Mem. at 7.

In reply to that argument, Defendants argue that "because mutuality of parties does not exist, collateral estoppel does not apply in the present case. Plaintiff must still prove that he had a constitutionally protected property interest, which was taken from him in a manner that was arbitrary, capricious, and irrational, which he cannot do...." Def. Reply at 3.

The Court agrees.

Mr. **Ward's** substantive due process claim "is not established simply by proving that [he] did not obtain what he or she [was] entitled to under state law." *Natale,* 170 F.3d at 262. "For state action to be taken in violation of the requirements

of substantive due process, the denial must have occurred under circumstances warranting the labels 'arbitrary' and 'outrageous.' " *Id.* And "arbitrary conduct that might violate zoning regulations as a matter of state law is not sufficient to demonstrate conduct so outrageously arbitrary as to constitute a gross abuse of governmental authority that will offend the substantive components of the Due Process Clause." *Id.* As a result, substantive due process "does not forbid governmental actions that might fairly be deemed arbitrary or capricious and for that reason correctable in a state court lawsuit seeking review of administrative action." *Id.* at 263.

***7** Here, Mr. **Ward** could and did achieve relief in a state court action for the Defendants' conduct. Memo in Opp. at 14 ("The court finds that the landscaping services in dispute are protected by General Statutes Section 8-2 as pre-existing non-conforming uses, Section 8-2 prohibits the retroactive application of zoning regulations...."). In other words, a Connecticut court ruling already addressed Mr. **Ward's** concerns about arbitrary and capricious conduct on the part of the Defendants. And other than to rely on that ruling and its underlying factual findings, and regardless any other allegedly disputed fact relied on by Mr. **Ward**, he offers no basis for relief under the U.S. constitution substantive due process protections. In the absence of any applicable precedent providing for a federal substantive due process claim under such circumstances – Mr. **Ward's** cite to none – this claim cannot survive summary judgment.

Accordingly, Mr. **Ward's** substantive due process claim will be dismissed.

2. The Procedural Due Process Claim

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the ... Fourteenth Amendment." *Matthews v. Eldridge*, 42 U.S. 319, 332 (1976). "A procedural due process analysis proceeds with two (asks whether there exists a liberty or property interest which has been interfered with by the State; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient." *Shakur v. Selsky*, 391 F.3d 106, 118 (2d Cir. 2004) (citations omitted).

As to the first question, "[p]roperty interests ... are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Youngs v. Fusaro*, 179 F.Supp.3d 198, 206 (D. Conn. 2016) (quoting *Board of Regents of State Colleges v.* Roth, 408 U.S. 564, 577 (1972)). "A person must be entitled to a benefit before it becomes property interest." *Id.* (citation omitted). Thus, "[t]he inquiry into whether there is a constitutionally cognizable property interest involves two questions: (i) whether some source of law other than the Constitution, such as a state or federal statute, confers a property right on the plaintiff, and (ii) [o]nce such a property right is found, [the question becomes] whether that property right constitutes a property interest for purposes of the Fourteenth Amendment." *Id.* (citations and internal quotation marks omitted).

In order to have a property interest, there must be "more than a unilateral expectation of it." *Id.* (citation and internal quotation marks omitted). There must be "a legitimate claim of entitlement to it." *Id.* (citation and internal quotation marks omitted). "[I]f state law makes the pertinent official action discretionary, one's interest in a favorable decision does not rise to the level of a property right entitled to due process protection." *Id.* (quoting *RR Village Ass'n Inc. v. Denver Sewer Corp.*, 826 F.2d 1197, 1201 (2d Cir. 1987)) (collecting cases).

If the answer to the first question is in the negative – that is, there is no liberty interest interfered with by the State – then this Court need not answer the second question: "whether the procedures attendant upon that deprivation were constitutionally sufficient." *Shakur*, 391 F.3d at 118.

Defendants argue that Mr. **Ward** "may have had a protected property interest in an agricultural use with the accessory landscaping use for his property at 79 Pine Woods Road as a tree farm." Memo in Support of Mot. for Summ. J. at 11. But he "never had a constitutionally protected property interest in a landscape commercial landscaping business in a R-80 residentially zoned area." *Id.* at 11-12. Moreover, "after **Ward** was issued the Notice of Violation, he voluntarily relocated his equipment to a commercial property prior to his hearing before the Zoning Board of Appeals regarding the appeal of his Notice of Violation." *Id.* at 12.

***8** Nevertheless, even if Mr. **Ward** "had a valid property in operating a commercial landscape construction business with hardscape services and palletized stone from a residentially zoned property, **Ward** was afforded a public hearing, and therefore was not deprived of procedural due process." *Id.*

at 13; *see id.* at 13-14 ("Ward filed a timely appeal of his November 17, 2017 Notice of Violation, and had a public hearing on March 20, 2018, in front of the Zoning Board of Appeals.") (citation omitted).

In response, Mr. Ward relies once again on his collateral estoppel argument.

The Court disagrees.

The threshold issue for this procedural due process claim is whether Mr. Ward "purposefully avails [himself] of the privilege of conducting activities within the forum State." *Vanco Trading, Inc. v. Odfjell Terminals (Houston) LP*, No. 3:09CV219 AWT, 2010 WL 965789, at *4 (D. Conn. Mar. 15, 2010).But Mr. Ward concedes, as he must, that he did avail himself of such procedures. Indeed, he received, in his view, a favorable ruling from a Connecticut Superior Court. Memo in Opp. at 14 ("The court finds that the landscaping services in dispute are protected by General Statutes Section 8-2 as pre-existing non-conforming uses, Section 8-2 prohibits the retroactive application of zoning regulations...."). As a result, having availed himself of available state court procedures, and obtained favorable relief, Mr. Ward cannot now claim that he was denied procedural due process under the U.S. constitution.

Accordingly, Mr. Ward's procedural due process claim will be dismissed.

B. The Equal Protection Claim

A claim under the Constitution's Equal Protection Clause may lie if the plaintiff "(1) ... compared with others similarly situated, was selectively treated, and (2) the selective treatment was motivated by an intention to discriminate on the basis of impermissible considerations, such as race or religion, to punish or inhibit the exercise of constitutional rights, or by a malicious or bad faith intent to injure [the plaintiff]." *Zahra v. Town of Southold*, 48 F.3d 674, 683 (2d Cir. 1995).

Plaintiff may also allege a "class of one" claim, where the plaintiff must establish that (i) no rational person could regard the circumstances of the plaintiff to differ from those of a comparator to a degree that would justify the differential treatment on the basis of a legitimate government policy; and (ii) the similarity in circumstances and difference in treatment are sufficient to exclude the possibility that the defendants acted on the basis of a mistake." *Clubside*, 468 F.3d at 159.

A plaintiff alleging a "class of one" claim "must show an extremely high degree of similarity between themselves and the persons to whom they compare themselves." *Id.* The existence of highly similar circumstances can then provide an inference that the difference in treatment "lack[s] any reasonable nexus with a legitimate governmental policy." *Progressive Credit Union v. City of New York*, 889 F.3d 40, 49 (2d Cir. 2018) (internal citation omitted). "A court may grant summary judgment in a defendant's favor on the basis of lack of similarity of situation, however, where no reasonable jury could find that the persons to whom the plaintiff compares itself are similarly situated." *Id.* (internal citation omitted).

Defendants argue that "[Mr.] Ward's claim of an Equal Protection violation fails under both the "similarly situated" theory, and the "class-of-one" theory." Mot. for Summ. J. at 17. Moreover, Defendants argue that "Ward identifies no one in the complaint who was similarly situated to him but was treated differently." *Id.*

***9** Mr. Ward alleges that there are at least four landscaping businesses similar to his that allegedly have not been subjected to similar zoning enforcement. *See* Pl. Ex. 1, **Shawn Michael Ward** Exhibit, ¶ 35, ECF No. 60-2 (Jun. 30, 2022) ("There are at least four landscaping businesses similar to mine operating within the Town which have not been subject to enforcement actions, despite having high volumes of truck traffic, employee vehicles, and which operated in residential zoning areas: Robert Melinowsky, owner of 4D Residential Design Services, Russ Tuthill, owner of Sunset Design & Gardens, Stanley Stone & Hardscape, and Alcides Silva, with Big Al & Sons.").

He argues that "[t]he Defendants' sole argument for granting summary judgment on the equal protection claim, either under a "class of one" or "selective enforcement theory," is to identify two landscaping businesses that the Town subjected to enforcement actions." Ward Mem. At 25. Mr. Ward also argues that "the Defendants' assertion does not establish this material fact as a matter of law. The existence of similarly situated persons is a question of fact." *Id.* (citations omitted).

Defendants note that "[Mr.] Ward alleged these businesses were similarly situated because those businesses also had high volumes of truck traffic, employee vehicles and operated in residentially zoned areas." Def. Reply at 5. In addition,

Defendants argue that "[Mr.] **Ward's** argument of similarly situated businesses fails because he has not demonstrated these businesses to be similarly situated in all material respects." *Id.*

The Court agrees.

As at least one court in this District have recognized, *see Musco Propane, LLP v. Town of* Wolcott, 891 F.Supp.2d 261 (D. Conn. 2012), consistent with guidance from the First Circuit "[t]he similarly situated requirement must be enforced with particular rigor in the land-use context because zoning decisions will often, perhaps almost always, treat one landowner differently from another." *Cordi-Allen v.* Conlon, 494 F.3d 245 (251 (1st Cir. 2007). Although this holding is not binding on this Court, as my colleague, the Honorable Janet Hall, noted in her opinion in *Musco Propane, LLP*: "The Second Circuit cited this passage from *Cordi-Allen* with approval in *Mattison v. Black Point Beach Club* Association, 376 Fed. Appx. 92, 94 (2010)."891 F.Supp. 2d at 272.

While Mr. **Ward** claims that these businesses were similarly situated because those businesses also had high volumes of truck traffic, employee vehicles and operated in residentially zoned areas, *id.*, this view, without much more, does not make these businesses similarly situated in all material respects. *See Clubside, Inc.*, 468 F.3d at 159 ("[N]o rational person could regard the circumstances of the plaintiff to differ from those of a comparator to a degree that would justify the differential treatment on the basis of a legitimate government policy."); *see also Progressive Credit Union*, 889 F.3d at 49 ("A court may grant summary judgment in a defendant's favor on the basis of lack of similarity of situation, however, where no reasonable jury could find that the persons to whom the plaintiff compares itself are similarly situated."); *cf. Muscxo Propoane LLP,* 891 F. Supp. 2d at 272 ("[N]o evidence to suggest that, had Cumberland Farms' or Maxum's applications would have been granted had they applied to install nonconforming tanks in 2009 or 2010)(citations omitted); *id.* ("[T]here is no evidence that Cumberland Farms' and Maxum's nonconforming tanks ever met with the sort of community opposition that Musco's application engendered.") (citations omitted).

As a result, no reasonable juror could find Mr. **Wards** similarly situated to his alleged comparators.

***10** Accordingly, Mr. **Ward's** "class of one" equal protection claim fails and will be dismissed.

To the extent that Mr. **Ward** is alleging a selective enforcement claim under the Equal Protection Clause, this claim fails as well.

To establish a selective enforcement claim, a plaintiff must prove that, "(1) in comparison with others similarly situated, [it] was selectively treated, and (2) that such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." *Musco Propane, LLP*, 891 F. Supp. 2d at 274 (citing *Diesel v. Town of Lewisboro*, 232 F.3d 92, 103 (2d Cir. 2000)) (internal quotation marks and other citation omitted).

But even if Mr. **Ward** "could establish that the other businesses it names were similarly situated for selective enforcement purposes, [he] has not proffered evidence sufficient to support a finding that [his] selective treatment 'was based on impermissible considerations.' " *Id.* (quoting, *Diesel*, 232 F.3d at 103). Indeed, hostility towards Mr. **Ward's** business activities would be insufficient to support a selective enforcement claim. *See id.* ("At best, the record suggests that the defendants were hostile towards Musco's business activities, but such use-directed hostility cannot support an equal protection claim.") (citing *Harlen Assocs. V. Vill. Of Mineola*, 273 F.3d 494, 503 (2d Cir. 2001) ("Enmity directed toward a business property use may not form the basis for a constitutional claim because equal protection rights vest in individuals rather than business activities.")).

As a result, no reasonable juror could find that that Mr. **Ward** had a viable equal protection claim.

Accordingly, any equal protection claim based on a selective enforcement theory also would fail, and will be dismissed as a matter of law.

C. Supplemental Jurisdiction

Having determined that all federal claims over which the Court had original jurisdiction should be dismissed, the Court may decline to exercise supplemental jurisdiction over Plaintiff's remaining claims under Connecticut law. 28 U.S.C. § 1367(c)(3); *Kolari v. N.Y.-Presbyterian Hosp.*, 455 F.3d 118, 122 (2d Cir. 206) ("[A] district court 'may decline to exercise supplemental jurisdiction' if it 'has dismissed all claims over

which it has original jurisdiction.' ") (quoting 28 U.S.C. § 1367(c)(3)).

"Once a district court's discretion is triggered under § 1367(c)(3), it balances the traditional 'values of judicial economy, convenience, fairness, and comity' in deciding whether to exercise jurisdiction." *Kolari*, 455 F.3d at 122 (quoting *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988) and citing *Itar-Tass News Agency v. Russian Kurier, Inc.*, 140 F.3d 442, 446-47 (2d Cir. 1998)). "In weighing these factors, the district court is aided by the Supreme Court's additional guidance in *Cohill* that 'in the usual case in which all federal-law claims are eliminated before trial, the balance of factors ... will point toward declining to exercise jurisdiction over the remaining state-law claims.' " *Id.* (quoting *Cohill*, 484 U.S. at 350 n. 7).

***11** Here, having dismissed all of Mr. Ward's federal law claims, his state law claims, which originally were brought in state court, should be remanded to state court, and adjudicated there.

IV. CONCLUSION

For the foregoing reasons, Defendants' motion for summary judgment is **GRANTED in part**, and **DENIED in part.**

Defendants' motion for summary judgment is **GRANTED** with respect to the substantive due process, procedural due process, and equal protections claims under the Fourteenth Amendment. These federal claims are now **DISMISSED**.

Defendants' motion for summary judgment is **DENIED** with respect to the remaining state law claims, over which the Court declines to exercise supplemental jurisdiction and will remand back to the Connecticut Superior Court for the Judicial District of New London.

SO ORDERED at Bridgeport, Connecticut, this 17th day of March, 2023.

All Citations

Not Reported in Fed. Supp., 2023 WL 2563212

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ARLEEN BEGER *v.* CITY OF BRISTOL ET AL.
(AC 47244)

Clark, Seeley and DiPentima, Js.

Syllabus

The plaintiff appealed from the trial court's judgment rendered after its granting of the defendants' motion for summary judgment on her complaint asserting a claim pursuant to the municipal highway defect statute (§ 13a-149), for personal injuries she sustained when she fell at the defendant city's transfer station. She claimed that the court improperly concluded that the walkway where she fell did not constitute a public highway for the purposes of § 13a-149. *Held*:

The trial court did not err in granting the defendants' motion for summary judgment, as, pursuant to *Read* v. *Plymouth* (110 Conn. App. 657), because the transfer station was accessible only to the defendant's residents who had purchased a permit and, therefore, was confined to a group whose eligibility was gauged by predetermined criteria, it lacked the essential feature that would qualify it as open to public use and, thus, the plaintiff's claim did not fall within the purview of § 13a-149.

Argued April 16—officially released June 10, 2025

Procedural History

Action to recover damages for personal injuries sustained as a result of, inter alia, an allegedly defective municipal highway, and for other relief, brought to the Superior Court in the judicial district of New Britain, where the court, *Young, J.*, granted the defendants' motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Mark A. Balaban, for the appellant (plaintiff).

Thomas R. Gerarde, with whom was *Tyler J. Carroll*, for the appellees (defendants).

Opinion

CLARK, J. In this personal injury action, the plaintiff, Arleen Beger, appeals from the summary judgment rendered by the trial court in favor of the defendants, the

city of Bristol (city), Raymond Rogozinski, and Craig Kasparian. On appeal, the plaintiff claims that the trial court improperly granted the defendants' motion for summary judgment as to the first count of her complaint, which asserted a claim against the city under General Statutes § 13a-149,[1] also known as the municipal highway defect statute. We disagree and affirm the judgment of the court.

The following procedural history is pertinent to this appeal. The plaintiff commenced this action by way of a three count complaint on September 27, 2022. In her complaint, the plaintiff alleged that, on September 30, 2020, she traveled to the city's transfer station to dispose of certain waste materials and fell on the paved surface of a walkway located directly in front of the transfer station's receptacle bin for cardboard and corrugated waste. She claimed that she had fallen because of a dangerous and defective condition in the walkway that the defendants had failed to remedy. Count one of her complaint asserted a claim against the city under § 13a-149, count two asserted a negligence claim against the city, and count three asserted a negligence claim against Rogozinski and Kasparian, the city's director of public

[1] General Statutes § 13a-149 provides: "Any person injured in person or property by means of a defective road or bridge may recover damages from the party bound to keep it in repair. No action for any such injury sustained on or after October 1, 1982, shall be brought except within two years from the date of such injury. No action for any such injury shall be maintained against any town, city, corporation or borough, unless written notice of such injury and a general description of the same, and of the cause thereof and of the time and place of its occurrence, shall, within ninety days thereafter be given to a selectman or the clerk of such town, or to the clerk of such city or borough, or to the secretary or treasurer of such corporation. If the injury has been caused by a structure legally placed on such road by a railroad company, it, and not the party bound to keep the road in repair, shall be liable therefor. No notice given under the provisions of this section shall be held invalid or insufficient by reason of an inaccuracy in describing the injury or in stating the time, place or cause of its occurrence, if it appears that there was no intention to mislead or that such town, city, corporation or borough was not in fact misled thereby."

works and streets superintendent, respectively. The plaintiff attached to the complaint a copy of a written notice describing her injury, which had been served on the city on December 28, 2020, pursuant to the requirements of § 13a-149. The notice stated in relevant part: "[The plaintiff] was at the transfer station dropping off cardboard. She fell after she put the cardboard into the machine. There was a hole, and she lost her balance and landed on her right side, rolling over onto her right side. The area identified was located directly in front of a cardboard waste receptacle."

On February 1, 2023, the defendants filed an answer and special defenses in which they claimed, inter alia, that count one of the complaint failed to state a claim on which relief could be granted. Subsequently, on May 31, 2023, the defendants filed a motion for summary judgment as to all counts of the complaint. In their motion, the defendants argued in relevant part that, in light of this court's decision in *Read* v. *Plymouth*, 110 Conn. App. 657, 955 A.2d 1255, cert. denied, 289 Conn. 955, 961 A.2d 421 (2008), the plaintiff's claim did not fall within the purview of § 13a-149 because the area where the plaintiff allegedly had fallen did not constitute a public highway. In support of this claim, the defendants attached to their motion an affidavit from Rogozinski. Rogozinski's affidavit stated in relevant part that the area where the plaintiff claimed to have fallen was located within the perimeter of the transfer station; that the transfer station was only open Monday through Friday from 7:15 a.m. to 2:15 p.m., and Saturday from 7:30 a.m. to 1 p.m.; that outside of those hours, the gates to the transfer station were shut and locked; that only residents who purchased a transfer station permit were allowed to enter or use the transfer station, and that they must show their permit to be allowed access; that permits were available for residents to purchase for $40; and that residents with a permit were

permitted to use the transfer station only during its hours of operation.

The plaintiff filed a memorandum in opposition to the defendants' motion for summary judgment on September 8, 2023. In her memorandum, the plaintiff argued generally that whether the area where she had fallen constituted a public highway presented a question of fact that "could not be determined on the basis of the record submitted . . . [and would] more appropriately [be] answered by a jury after the presentation of evidence"; she did not, however, dispute the specific factual assertions in Rogozinski's affidavit described herein. Instead, she contended that the various access restrictions on the use of the transfer station were de minimis and that "these minor restrictions . . . under the facts and circumstances herein ought not defeat an otherwise viable personal injury claim . . . on the somewhat dubious notion that all roads or walkways at [the] transfer station are not public and within the ambit of the defective highway statute." The plaintiff attached several exhibits to her memorandum, including a map of the transfer station marked with various arrows delineating a route through the transfer station that was published on the city's website. This map, she argued, showed that the city "invited, encouraged, and/or should have reasonably anticipated" that members of the public would pass through the transfer station to dispose of their refuse.

The defendants filed a reply to the plaintiff's memorandum on September 19, 2023. On December 22, 2023, the court, *Young, J.*, issued a memorandum of decision granting the defendants' motion for summary judgment as to all counts of the complaint. With respect to count one,[2] the court concluded that, under this court's holding in *Read*—which, the court noted, presented "a

[2] On appeal, the plaintiff does not challenge the court's granting of the defendants' motion for summary judgment as to counts two or three of her complaint.

remarkably similar fact pattern" to the present case—the access restrictions on the transfer station placed the plaintiff's claim outside the purview of § 13a-149. The court explained that the transfer station did not qualify as a "highway" under § 13a-149 because, according to the undisputed facts in the record, the transfer station "was not open to the indefinite public, nor open at all times," but, rather, was "restricted in accessibility both in limitation of users and limitation of hours." This appeal followed.

On appeal, the plaintiff claims that the court improperly concluded that the walkway in the transfer station where she fell did not constitute a public highway for the purposes of § 13a-149. We disagree.[3]

The following standard of review and legal principles are relevant to our review of the plaintiff's claim. "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. A party moving for summary judgment is held to a strict standard. . . . To satisfy [its] 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." (Internal quotation marks omitted.) *Carty* v. *Merchant 99-111 Founders, LLC*, 227 Conn. App. 683, 690, 323 A.3d 414 (2024).

"The standard of review of a trial court's decision to [render] summary judgment is well established. [W]e

[3] The defendants argue, as an alternative ground for affirming the court's judgment, that the court also properly rendered summary judgment against the plaintiff on her § 13a-149 claim because she was not using the area where she fell as a traveler. We do not reach the merits of this argument because, for the reasons we discuss herein, we agree with the court that the area where the plaintiff fell was not a public highway for purposes of § 13a-149.

must decide whether the trial court erred in determining that there was 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 test is whether a party would be entitled to a directed verdict on the same facts. . . . This court's review of the trial court's decision to [render] summary judgment in favor of the defendants is plenary. . . .

"Once the moving party has presented evidence in support of the motion for summary judgment, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the [trial] court under Practice Book § [17-45]. . . . The movant has the burden of showing the nonexistence of such issues but the evidence thus presented, if otherwise sufficient, is not rebutted by the bald statement that an issue of fact does exist. . . . To oppose a motion for summary judgment successfully, the nonmovant must recite specific facts . . . [that] contradict those stated in the movant's affidavits and documents." (Citation omitted; internal quotation marks omitted.) *Cazenovia Creek Funding I, LLC* v. *White Eagle Society of Brotherly Help, Inc., Group 315, Polish National Alliance*, 351 Conn. 722, 730–31, 333 A.3d 508 (2025).

"Historically . . . municipalities enjoyed immunity for injuries caused by defective highways under common law, due in good part to the miles of streets and highways under their control. . . . The [municipal]

highway defect statute, § 13a-149 is a legislative exception to the immunity that municipalities enjoyed at common law and, as such, must be strictly construed. . . .

"[A] highway defect is [a]ny object in, upon, or near the traveled path, which would necessarily obstruct or hinder one in the use of the road for the purpose of traveling thereon, or which, from its nature and position, would be likely to produce that result. . . . Furthermore, a highway is defective within the meaning of § 13a-149 when it is not reasonably safe for public travel, and the term public travel refers to the normal or reasonably anticipated uses that the public makes of a highway in the ordinary course of travel. . . .

"According to General Statutes [§ 14-1 (46)], a highway includes any state or other public highway, road, street, avenue, alley, driveway, parkway . . . place [or dedicated roadway for bus rapid transit service], under control of the state or any political subdivision of the state, dedicated, appropriated, or opened to public travel or other use. . . . Our Supreme Court has stated: The plain meaning of the word highway is [a] main road or thoroughfare; hence a road or way open to the use of the public. . . . It is thus that this court has customarily understood the word. We have stated, for example, that the essential feature of a highway is that every traveler has an equal right in it with every other traveler. . . . [T]he term highway is ordinarily used in contradistinction to a private way, over which only a limited number of persons have the right to pass. . . . For an area to be open to public use it does not have to be open to everybody all the time. . . . The essential feature of a public use is that it is not confined to privileged individuals or groups whose fitness or eligibility is gauged by some predetermined criteria, but is open to the indefinite public. It is the indefiniteness or unrestricted quality of potential users that gives a use its public character. . . .

"Additionally [o]ur Supreme Court has recognized that, when the state [or municipal subdivision] either invites or reasonably should expect the public to use a particular area that is not directly in the roadway but that is a necessary incident to travel on the roadway, a defective condition therein may give rise to a cognizable action under the [applicable highway defect] statute. . . . [D]efective conditions located near the roadway, but in areas unintended for travel, are not highway defects within the ambit of the highway defect statute. . . .

"[W]hether there is a defect in such proximity to the highway so as to be considered in, upon, or near the traveled path of the highway must be determined on a case-by-case basis after a proper analysis of its own particular circumstances, and is generally a question of fact . . . ." (Citations omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.) *Pramuka* v. *Cromwell*, 160 Conn. App. 863, 869–73, 127 A.3d 320, cert. denied, 320 Conn. 908, 128 A.3d 952 (2015). It is also true, however, that, although "whether a highway is defective may involve issues of fact . . . whether the facts alleged would, if true, amount to a highway defect according to the statute is a question of law . . . ." (Internal quotation marks omitted.) *Cuozzo* v. *Orange*, 147 Conn. App. 148, 159, 82 A.3d 647 (2013), aff'd, 315 Conn. 606, 109 A.3d 903 (2015).

In *Read*, this court affirmed the rendering of summary judgment in favor of the defendant town with respect to a § 13a-149 claim under circumstances, as the trial court in this case noted, that were nearly identical to those in the present case. The plaintiff in *Read* brought an action against the town of Plymouth and two employees of its department of public works, alleging that he had sustained injuries when he fell into a movable dumpster while attempting to dispose of waste at the town's transfer station. *Read* v. *Plymouth*, supra, 110

Conn. App. 659. He further alleged that he had tripped and fallen as a result of a broken or separated concrete block that formed a platform or wall above the dumpster. Id. The second count of his complaint asserted a claim against the town under § 13a-149. Id. The trial court granted the town's motion for summary judgment as to the second count, concluding that the area where the plaintiff fell did not constitute a public highway because it was within the town transfer station, access to which was limited to residents of the town who had permits. Id., 660–61. On appeal, this court affirmed that portion of the trial court's judgment. This court explained that the undisputed facts, as set forth in an affidavit of the town's former director of public works, established that the transfer station was a restricted access facility, limited to town residents who held permits and had registered their vehicles with the town, and that the transfer station was open during limited hours and, when closed, was restricted by means of a locked gate. Id., 665–66. Accordingly, this court held that, "[b]ecause there was no factual dispute that access to the transfer station was restricted and was, therefore, not open to the public, the court properly determined that the plaintiff's claim did not fall within the purview of . . . § 13a-149."[4] Id., 666.

Read is dispositive of this appeal. In the present case, as in *Read*, the plaintiff alleged that she suffered injuries as a result of a defective walkway located within a municipal transfer station. As in *Read*, it is undisputed that this transfer station is accessible only to city residents who have permits; that it is open only during limited hours; and that, when closed, its gates are shut

[4] Judge Lavery dissented. He contended that "[t]he fact that the [transfer] station has limited use and requires a local permit does not diminish its public use character" because residents of the town were required to use it as the disposal site for their solid waste, and "[e]very citizen of Connecticut has to have access to such a place." *Read* v. *Plymouth*, supra, 110 Conn. App. 667 (*Lavery, J.*, dissenting).

and locked. Therefore, under *Read*, the plaintiff's claim does not fall within the purview of § 13a-149, and the trial court did not err in granting the defendants' motion for summary judgment as to count one of the complaint.

We are not persuaded by the plaintiff's arguments to the contrary. The plaintiff argues that to deem the transfer station, and the walkways located therein, not open to public use, "especially where the access restrictions thereto are indisputably de minimis," is to read § 13a-149 in an unduly harsh and restrictive manner. To the extent that the plaintiff asks us to overrule *Read*, however, it is the well settled policy of this court that we must follow this court's precedent unless en banc review is granted. See, e.g., *State* v. *Gonzalez*, 214 Conn. App. 511, 524, 281 A.3d 501 ("It is well established . . . that one panel of this court cannot overrule the precedent established by a previous panel's holding. . . . As we often have stated, this court's policy dictates that one panel should not, on its own, reverse the ruling of a previous panel. The reversal may be accomplished only if the appeal is heard en banc." (Internal quotation marks omitted.)), cert. denied, 345 Conn. 967, 285 A.3d 736 (2022). The plaintiff also emphasizes what she describes as the "trivial" nature of the restrictions on accessing the transfer station—namely, the allegedly low cost of the permits and the fact that the transfer station is open six days and more than forty hours per week—but there is nothing in this court's opinion in *Read* to suggest that the holding in that case turned on the transfer station's precise number of hours of operation or the precise cost of the permits required to access it.[5] Moreover, although the plaintiff correctly

[5] In support of her argument that the transfer station should be considered a public place, the plaintiff further asserts in her brief that "she was required to use the transfer station to dispose of solid trash." The defendants dispute this assertion in their principal appellate brief, and we are unable to find any support for it in the affidavits or other documentary exhibits submitted by the parties in connection with the defendants' motion for summary judgment. Even if it were true, however, that the plaintiff was required to

notes that, under this court's precedent, "[f]or an area to be open to public use it does not have to be open to everybody all the time"; (internal quotation marks omitted) *Cuozzo* v. *Orange*, supra, 147 Conn. App. 158; it is equally well established that "[t]he essential feature of a public use is that it is *not confined to privileged individuals or groups whose fitness or eligibility is gauged by some predetermined criteria*, but is open to the indefinite public." (Emphasis added; internal quotation marks omitted.) Id. Because it is undisputed that the transfer station in the present case is, like the transfer station in *Read*, accessible only to city residents who have purchased a permit—that is, to a group whose eligibility is gauged by predetermined criteria—it lacks the " 'essential feature' " that would qualify it as open to public use for purposes of § 13a-149. Id.

The plaintiff also cites this court's decision in *Pramuka* v. *Cromwell*, supra, 160 Conn. App. 872–76, for the proposition that "a determination of whether a road is open to the public, or whether there are 'sufficient' restrictions that would limit its public availability, involves questions of fact that are more appropriately answered by a jury at trial, and ought not be decided by summary judgment." In *Pramuka*, this court determined that the trial court improperly rendered summary judgment in favor of the defendants, the town of Cromwell and the town's board of education, in a § 13a-149 action in which the plaintiff alleged that she had sustained injuries while walking on a walkway from a

use the transfer station to dispose of her waste, to conclude on that basis that the transfer station was public would be to adopt as the law the reasoning of Judge Lavery's dissenting opinion in *Read*—which argued that the transfer station in that case should be deemed public for the same reason. See footnote 4 of this opinion. We decline to do so because "[i]t is axiomatic that a dissenting opinion, by its very nature, represents a minority of the court's *disagreement* with the law as established by the majority opinion and, therefore, is not an authoritative ruling . . . ." (Emphasis in original.) *Reville* v. *Reville*, 312 Conn. 428, 459 n.29, 93 A.3d 1076 (2014).

designated parking area to the entrance of a public elementary school. *Pramuka* v. *Cromwell*, supra, 865–66. "On the face of the record before [it]"; id., 865; this court concluded that there were material issues of fact because the record did not contain sufficient information as to whether the parking lot or the driveway(s) abutted by the walkway on which the plaintiff had fallen, which were on the property of the school, were open to the public or contained sufficient restrictions that would limit their public availability. Id., 878.

This court in *Pramuka* did not hold, however, that the question of whether a particular area is open to public use for purposes of § 13a-149 is *categorically* incapable of resolution on a motion for summary judgment. To the contrary, this court and our Supreme Court repeatedly have concluded that a plaintiff's claims fall outside the purview of our highway defect statutes when, prior to trial, the undisputed facts clearly established that an alleged injury occurred in an area that was not open to public use under Connecticut case law interpreting and applying those statutes. See, e.g., *Kozlowski* v. *Commissioner of Transportation*, 274 Conn. 497, 505–506, 876 A.2d 1148 (2005) (remanding with direction to grant motion to dismiss in action predicated on state highway defect statute, General Statutes § 13-144, when undisputed facts established that "the public is neither invited nor expected to traverse" area where plaintiff's alleged injury occurred); *Read* v. *Plymouth*, supra, 110 Conn. App. 666 (trial court properly rendered summary judgment in favor of defendant with respect to § 13a-149 claim because undisputed facts showed that transfer station was not open to public).[6]

[6] The plaintiff also directs our attention to a trial court decision, *Covello* v. *Darien*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-08-5008909-S (October 22, 2010) (51 Conn. L. Rptr. 40, 44), in which the court denied the defendant town's motion for summary judgment with respect to a § 13a-149 claim arising from a fall on a municipal road in the town's transfer station, notwithstanding the existence of access restrictions on the transfer station analogous to those in *Read* and the present case.

The plaintiff's reliance on *Pramuka* is therefore misplaced.

The judgment is affirmed.

In this opinion the other judges concurred.

The court in *Covello* purported to distinguish *Read* on the basis that the plaintiff in *Read* had not fallen on a sidewalk or highway where vehicles traveled, but rather on a path near a dumpster, whereas the plaintiff in *Covello* had fallen on a road within the transfer station along which vehicles traveled. Id., 43–44. Our research does not reveal that *Covello* has been cited in any decisions of this court or our Supreme Court, and its reasoning does not bind us. We note, however, that it is undisputed that the plaintiff in the present case fell, not on a road, but on a walkway directly in front of a cardboard waste receptacle. Therefore, even if we were to endorse the court's attempt in *Covello* to distinguish *Read*, the present case clearly is more factually similar to *Read* than to *Covello*.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ESTEBAN HERNAIZ,	:	
Plaintiff,	:	
v.	:	24-CV-116 (SFR)
JOHN CARLSON ET AL.,	:	
Defendants.	:	

MEMORANDUM & ORDER

Plaintiff Esteban Hernaiz, an individual serving a sentence of incarceration in Connecticut Department of Correction custody,[1] filed a complaint *pro se* under 42 U.S.C. § 1983, alleging that more than a dozen defendants violated his rights under the U.S. Constitution, Connecticut Constitution, and Connecticut state law. The Court issued an Initial Review Order allowing Hernaiz to pursue a Fourth Amendment claim for false arrest against Officers Carlson, Kogut, Bengston, Brooks, Alassiri, and Sanchez-Figueroa and a First Amendment retaliation claim against Officers Carlson, Kogut, Bengston, and Brooks.[2]

Before me are cross motions for summary judgment. Hernaiz moves for summary judgment on all claims. Defendants also move for summary judgment on all claims. For the

[1] The DOC website lists Hernaiz as currently serving a prison sentence at New Haven Correctional Center. Connecticut State Department of Correction, Offender Information Search, https://www.ctinmateinfo.state.ct.us/detailsupv.asp?id_inmt_num=2678496 (last visited June 24, 2025). I may take judicial notice of this website. *See, e.g.*, *Taveras v. Semple*, No. 3:15CV00531(SALM), 2023 WL 112848, at *1 n.1 (D. Conn. Jan. 5, 2023) (taking judicial notice of Connecticut DOC offender information search).

[2] The Initial Review Order was issued by the Honorable Jeffrey A. Meyer.

reasons stated below, I deny Hernaiz's motions for summary judgment and grant Defendants' motion for summary judgment. I also resolve several other pending motions filed by Hernaiz.

I. BACKGROUND

A. Factual Background

The factual allegations in Hernaiz's complaint are summarized in the Initial Review Order issued by the Court on May 9, 2024 and will not be repeated here. *See* Initial Review Order 1-5, ECF No. 12.

Defendants' Local Rule 56(a)(1) statement and attached exhibits establish that Cromwell Police Officer John Carlson applied for an arrest warrant for Hernaiz on September 23, 2021. Defs.' L.R. 56(a)(1) Statement ¶ 1, ECF No. 46-2.[3] The arrest warrant sought

[3] Local Rule 56(a)(1) requires a party moving for summary judgment to file "a concise statement of each material fact as to which the moving party contends there is no genuine issue to be tried." D. Conn. L. Civ. R. 56(a)(1). Local Rule 56(a)(2) requires the party opposing summary judgment to submit a Local Rule 56(a)(2) statement containing separately numbered paragraphs corresponding to the Local Rule 56(a)(1) statement and indicating whether the opposing party admits or denies the facts set forth by the moving party. D. Conn. L. Civ. R. 56(a)(2). Each denial must include a specific citation to an affidavit or other admissible evidence. D. Conn. L. Civ. R. 56(a)(3). "'Since it is not obvious to a layman that when his opponent files a motion for summary judgment supported by affidavits, he must file his own affidavits contradicting his opponent's if he wants to preserve factual issues for trial,' either the district court or the moving party is to supply the pro se litigant with notice of the requirements of Rule 56." *Irby v. New York City Transit Auth.*, 262 F.3d 412, 414 (2d Cir. 2001) (quoting *McPherson v. Coombe*, 174 F.3d 276, 280-81 (2d Cir. 1999)). Defendants informed Hernaiz of this requirement. *See* Notice, ECF No. 46-6.

Despite receiving this notice, Hernaiz did not submit a Local Rule 56(a)(2) statement. That Hernaiz is self-represented does not excuse him from complying with the court's procedural and substantive rules. *See Baltas v. Bowers*, No. 3:23-CV-0764 (VAB), 2024 WL 1977646, at *1 (D. Conn. Apr. 26, 2024) ("Plaintiffs, although they are proceeding pro se, are bound to comply with the provisions of the Federal Rules . . . as well as this District's Local Rules.") (internal quotation marks omitted). Therefore, the facts contained in Defendants' Local Rule 56(a)(1) statement, where supported by evidence in the record, may be deemed admitted. *See* D. Conn. L. Civ. R. 56(a)(3) ("Failure to provide specific citations to evidence in the record as required by this Local Rule may result in the Court deeming admitted certain facts that are supported by the evidence in accordance with Local Rule 56(a)(1), or in the Court imposing sanctions . . . ."). Nevertheless, I have reviewed Hernaiz's complaint and filings relating to the parties' summary judgment motions.

Hernaiz's arrest for assault in the third degree and breach of peace in the second degree, both in violation of Connecticut state law. *Id.* These charges arose from an incident that occurred the day before. *Id.* The arrest warrant was approved by a judge. *Id.* ¶ 2. Cromwell Police Officer Ahmed Alassiri arrested Hernaiz pursuant to the arrest warrant on October 7, 2021. *Id.* ¶ 3. Hernaiz was found guilty of the breach of the peace charge on August 11, 2023. *Id.* ¶ 4.

Hernaiz has filed various documents which might be construed as responding to these facts. For example, a document filed by Hernaiz as "Exhibits" contains what appears to be pages from his state trial transcript, a letter of denial for "Body cam audio/video" addressed to Hernaiz from the Cromwell Police Department, the state court Information against Hernaiz, and a copy of the text order that accompanied the Initial Review Order in this case. *See* Exhibits 7-11, 14-15, 21, 22, 25, ECF No. 50; Notice 31, 34, ECF No. 27 (similar); Rule 12 Mot. J. Pleading 22, 52-53, ECF No. 28 (similar); Mot. Reopen Case, ECF No. 13 (similar); Notice, ECF No. 14 (similar). These documents are annotated with handwritten notes from Hernaiz alleging that, for example, the "Judge was very bias[ed] and prejudice[d]" and that certain testimony by Defendant Carlson was "[l]ies." Exhibits 7, 10, ECF No. 50.

A document marked "Memorandum in Support re: Motion for Summary Judgment," ECF No. 61, repeats assertions from other filings that Defendant Carlson "lie[d] on his affidavit," that his arrest was based on "retaliation and racial profiling," and that other evidence

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See, e.g., Mot. Reopen Case, ECF No. 13; Notice, ECF No. 14; Notice, ECF No. 27; Rule 12 Mot. J. Pleading, ECF No. 28; Exhibits, ECF No. 50. Where relevant, I liberally construe Hernaiz's filings as constituting a statement of facts raising the strongest arguments that they suggest for the purpose of summary judgment. *See Triestman v. Federal Bureau of Prisons*, 470 F.3d 471, 474 (2d Cir. 2006) ("It is well established that the submissions of a pro se litigant must be construed liberally and interpreted to raise the strongest arguments that they suggest.").

he has submitted shows that he was falsely convicted. *Id.* at 1. In other filings, Hernaiz includes citizen complaints he filed about Cromwell PD officers after the incident. Notice 7, ECF No. 27; Rule 12 Mot. J. Pleading 31-32, ECF No. 28. He also includes parts of his arrest warrant, trial transcripts, and two incident reports involving interactions between Hernaiz and the Cromwell Police Department. Rule 12 Mot. J. Pleading 13, 18, 15-16, 35-37, 54-56, ECF No. 28; Exhibits 7-11, 14-15, 22, ECF No. 50. *see* ECF No. 28-1.

B. Procedural History

Hernaiz filed his pro se complaint on January 26, 2024. Compl., ECF No. 1. The court entered an Initial Review Order on May 9, 2024, allowing Hernaiz's First Amendment retaliation claim to proceed against Officers Carlson, Kogut, Bengston, and Brooks, and Hernaiz's Fourth Amendment false arrest claim to proceed against Officers Carlson, Kogut, Bengston, Brooks, Alassiri, and Sanchez-Figueroa. Order, ECF No. 12. Defendants filed their Answer on November 5, 2024. Answer, ECF No. 30. The case was transferred to me on January 6, 2025.

Hernaiz has filed various motions in this case since Defendants filed their Answer. *See* Mot. Summ. J., ECF No. 39, Mot. Object Rule – 26, ECF No. 40, Mot. Strike and Obj. to Mot. Summ. J., ECF No. 47, Mot. Continuing of Good Causes, ECF No. 48, Mot. Summ. J., ECF No. 49, Mot. Sanctions, ECF No. 51, Mot., ECF No. 56, Mot. Matter Law, ECF No. 57, Mot. Status Update Order, ECF No. 62. Defendants filed a Motion for Summary Judgment on January 31, 2025. Mot. Summ. J., ECF No. 46.

II. DISCUSSION

I will first discuss the various non-summary judgment motions filed by Hernaiz and then resolve the cross motions for summary judgment.

A. Hernaiz's Non-Summary Judgment Motions

1. Motion to Object (ECF No. 40)

Hernaiz has filed what has been docketed as a "Motion to Object," ECF No. 40, which, construed broadly, appears to request that Judge Meyer be removed from this case. *See id.* at 1. Because this case was subsequently transferred to me, *see* Order of Transfer, January 7, 2025, ECF No. 45, this motion is denied as moot. *See, e.g.*, *Rosenberg v. City of New York*, No. 20-CV-3911 (LLS), 2020 WL 4195021, at *1 (S.D.N.Y. July 20, 2020) (denying motion to recuse judge as moot after case was transferred to another judge).

2. Motion to Strike (ECF No. 47)

Hernaiz has filed a motion to strike related to Defendants' motion for summary judgment. *See* ECF No. 47 at 1. I construe this motion as being brought under Rule 12 of the Federal Rules of Civil Procedure, which provides that "[t]he court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f).

Pleadings, as defined in the Federal Rules of Civil Procedure, include complaints; answers to complaints, counterclaims and crossclaims; third-party complaints; answers to third-party complaints; and replies to answers. *See* Fed. R. Civ. P. 7(a). As a result, motions, declarations, and affidavits are not pleadings. *See, e.g., Topps Company, Inc. v. Koko's Confectionary & Novelty*, 482 F. Supp. 3d 129, 132 n.1 (S.D.N.Y. 2020). Because Hernaiz's motion to strike under Rule 12 attempts to strike from Defendants' motion for summary judgment, and a motion for summary judgment is not a "pleading" under the Federal Rules of Civil Procedure, I therefore deny Hernaiz's motion to strike.

3. Motion for Continuing Good Causes (ECF No. 48)

Hernaiz has filed what I construe as a motion for extension of time. *See* ECF No. 48. In it, he asks for "a[t] least two month[s]" so he can recover from an injury. *See id.* at 2. But it is unclear which deadline he seeks to extend. Because more than two months have passed since Hernaiz filed this motion, and because Hernaiz has since filed five separate motions, *see* ECF Nos. 49, 51, 56, 57, 62, the Court presumes that he has recovered from his injury and is able to pursue his case now. Accordingly, this motion is denied as moot.

4. Motion for Sanctions (ECF No. 51)

Hernaiz has filed a motion for sanctions against Defendants "[f]or making [f]rivolous claim[s]." ECF No. 51 at 4. I construe this motion as being brought under Rule 11 of the Federal Rules of Civil Procedure, which "authorizes courts to sanction parties who violate Rule 11(b)." *Lawrence v. Richman Grp. of CT LLC*, 620 F.3d 153, 159 (2d Cir. 2010). "A pleading, motion or other paper violates Rule 11 either when it has been interposed for any improper purpose, or where, after reasonable inquiry, a competent attorney could not form a reasonable belief that the pleading is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law." *Kropelnicki v. Siegel*, 290 F.3d 118, 131 (2d Cir. 2002) (internal quotation marks omitted). A party bringing a motion for sanctions under Rule 11 must "describe the specific conduct that allegedly violates Rule 11(b)." Fed. R. Civ. P. 11(c)(2).

Hernaiz's motion does not clearly describe the specific conduct that violates Rule 11(b), as required by Rule 11(c)(2). Hernaiz seemingly takes issue with the affidavit of officer John Carlson, *see* Mot. Sanctions 5, ECF No. 51, submitted as an exhibit to Defendants' motion for summary judgment. *See* Def. Mot. Summ. J. Ex. A, ECF No. 46-3. But Hernaiz never filed a

Local Rule 56(a)(2) Statement of Facts in Opposition to Summary Judgment challenging the veracity of the statements contained within the affidavit, *see* D. Conn. L. R. Civ. P. 56(a)(2), nor do his other filings provide any evidence, beyond bare assertions, that Carlson's affidavit was untrue. Absent any evidence that the affidavit was "interposed for any improper purpose" or that Defendants "could not form a reasonable belief that the pleading is well grounded in fact and is warranted by existing law," *Sorenson v. Wolfson*, 683 F. App'x 33, 35 (2d Cir. 2017), Hernaiz's motion must be denied. *See, e.g.*, *Doe v. 239 Park Ave. S. Assocs., LLC*, No. 21-cv-279, 2022 WL 4592713, at *9 (S.D.N.Y. Sep. 30, 2022) (declining to award sanctions where defendant offered no evidence to support conclusory allegation of bad faith); *McCune v. Rugged Ent., LLC*, No. 08-CV-2677 (KAM), 2010 WL 1189390, at *5 (E.D.N.Y. Mar. 29, 2010) (denying motion for sanctions where movant set forth only "bald, conclusory allegations of bad faith").

5. Motion for Status Update (ECF No. 62)

Finally, Hernaiz filed a motion for a status update. Mot. Status Update Order, ECF No. 62. Because this order serves as a status update, Hernaiz's motion is denied as moot.

B. Cross Motions for Summary Judgment

Defendants have filed a motion for summary judgment asserting that Hernaiz's Fourth Amendment false arrest claim fails as a matter of law because Hernaiz was adjudged guilty of one of the offenses for which he was arrested, and Hernaiz's First Amendment retaliation claim fails as a matter of law because there was probable cause to arrest him. *See* Defs.' Mot. Summ. J. at 1, ECF No. 46. Hernaiz has filed four motions seeking summary judgment. *See* Mot. Summ. J. ECF No. 39; Mot. Summ. J. ECF No. 49; Mot. Summ. J. ECF No. 56; Mot. Summ. J. ECF No. 57.

1. Legal Standard

A motion for summary judgment may be granted only where there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *see also Nick's Garage, Inc. v. Progressive Cas. Ins. Co.,* 875 F.3d 107, 113-14 (2d Cir. 2017). "A genuine issue of material fact exists if 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Nick's Garage*, 875 F.3d at 113-14 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). Which facts are material is determined by the substantive law. *Anderson*, 477 U.S. at 248. The "same standard applies whether summary judgment is granted on the merits or on an affirmative defense." *Giordano v. Market Am., Inc.*, 599 F.3d 87, 93 (2d Cir. 2010).

The moving party bears the initial burden of informing the court of the basis for its motion and identifying the admissible evidence it believes demonstrates the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party meets this burden, the nonmoving party must set forth specific facts showing that there is a genuine issue for trial. *Wright v. Goord*, 554 F.3d 255, 266 (2d Cir. 2009). The nonmoving party cannot "rely on conclusory allegations or unsubstantiated speculation" but "must come forward with specific evidence demonstrating the existence of a genuine dispute of material fact." *Robinson v. Concentra Health Servs.*, 781 F.3d 42, 44 (2d Cir. 2015) (internal quotation marks and citation omitted). This "specific evidence" must be admissible. *See Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 264 (2d Cir. 2009). To defeat a motion for summary judgment, the nonmoving party must present such evidence as would allow a jury to find in his favor. *Graham v. Long Island R.R.*, 230 F.3d 34, 38 (2d Cir. 2000).

I must resolve all ambiguities and draw all permissible factual inferences in favor of the nonmoving party. *Donnelly v. Greenburgh Cent. Sch. Dist. No. 7*, 691 F.3d 134, 141 (2d Cir. 2012). However, although I am required to read a self-represented party's papers "liberally and interpret[] [them] 'to raise the strongest arguments that they *suggest*,'" *Triestman v. Federal Bureau of Prisons*, 470 F.3d 471, 474 (2d Cir. 2006) (quoting *Pabon v. Wright*, 459 F.3d 241, 248 (2d Cir. 2006), "unsupported allegations do not create a material issue of fact" and do not overcome a properly supported motion for summary judgment. *Weinstock v. Columbia Univ.*, 224 F.3d 33, 41 (2d Cir. 2000).

1. Fourth Amendment False Arrest Claim

Hernaiz's complaint asserts that Defendants Carlson, Kogut, Bengston, Brooks, Alassiri, and Sanchez-Figueroa subjected him to false arrest in violation of the Fourth Amendment. Defendants move for summary judgment on Hernaiz's Fourth Amendment false arrest claim because he was convicted of an offense for which he was arrested. *See* Def. Mem. L. Supp. Mot. Summ. J. at 5, ECF No. 46-1.

The Second Circuit has held that false arrest claims asserted under § 1983 "are 'substantially the same' as claims for false arrest under state law." *Ashley v. City of New York*, 992 F.3d 128, 136 (2d Cir. 2021) (quoting *Jocks v. Tavernier*, 316 F.3d 128, 134 (2d Cir. 2003)). To state a false arrest claim under § 1983 in Connecticut, a plaintiff must not only plead facts to satisfy the elements of a false arrest claim under Connecticut law but must also plead facts to demonstrate "an unreasonable deprivation of liberty in violation of the Fourth Amendment." *Walker v. Sankhi*, 494 F. App'x 140, 142 (2d Cir. 2012) (summary order).

"Under Connecticut law, false arrest and false imprisonment claims require pleading and proof of the same four elements." *Arpino v. Spera*, No. 3:22-CV-01114 (KAD), 2022 WL

21751856, at *4 (D. Conn. Sept. 22, 2022). "The elements of such a claim under Connecticut law are: (1) the defendant arrested plaintiff or had plaintiff arrested; (2) the plaintiff was aware of the arrest; (3) there was no consent for the arrest; and (4) the arrest was not supported by probable cause." *Chase v. Nodine's Smokehouse, Inc.*, 360 F. Supp. 3d 98, 112 (D. Conn. 2019). A plaintiff asserting this claim must also prove that there was a favorable termination of the proceedings against him. *See Miles v. City of Hartford*, 445 F. App'x 379, 382-83 (2d Cir. 2011) (summary order) (citing *Roesch v. Otarola,* 980 F.2d 850, 853-54 (2d Cir. 1992)) (noting favorable termination is an element of a § 1983 claim "sounding in false imprisonment or false arrest" under Connecticut law). A "favorable termination" means that a plaintiff must show that his "prosecution ended without a conviction." *Thompson v. Clark*, 596 U.S. 36, 39 (2022).

Here, Hernaiz's arrest was supported by probable cause and he has failed to show his prosecution ended without a conviction. First, the undisputed evidence shows that Hernaiz was arrested pursuant to an arrest warrant approved by a judge. L.R. 56(a)(1) Statement, ECF No. 46-2 ¶¶ 2–3; Defs.' Mot. Summ. J. Ex. 1, ECF No. 46-4 (arrest warrant). The judge stated in the arrest warrant that "there is probable cause to believe that an offense has been committed and that the accused committed it and, therefore, that probable cause exists for the issue of a warrant for the arrest of [Hernaiz]." Defs.' Mot. Summ. J. Ex. 1, ECF No. 46-4. "[I]t is well settled that the issuance of a warrant by a neutral magistrate, which depends on a finding of probable cause, creates a presumption that it was objectively reasonable for the officers to believe that there was probable cause . . . ." *Washington v. Napolitano*, 29 F.4th 93, 105 (2d Cir. 2022) (internal quotation marks omitted). "To overcome this presumption, a plaintiff must

show that the officers knowingly or recklessly omitted material information from the warrant affidavit." *Id.* (citing *Mara v. Rilling*, 921 F.3d 48, 73 (2d Cir. 2019)).

Liberally construing Hernaiz's various filings as a response to the motion for summary judgment, I conclude that he has not provided sufficient facts to create a genuine dispute of material fact on this issue. Hernaiz submitted copies of the arrest warrant and annotated parts of the trial transcript to suggest that Defendant Carlson had lied at trial and on the warrant application about the sequence of events during the September 22, 2021 incident that lead to his arrest. *See, e.g.*, ECF No. 28-1 5-8 (partial copy of the arrest affidavit); Exhibits 10, ECF No. 50 10-11 (accusing officer Carlson of "Lies" regarding the incident on September 22, 2021). But these copies of legal documents and the attendant unsupported annotations by Hernaiz do not show sufficient facts to suggest that Carlson "knowingly or recklessly omitted material information from the warrant affidavit." *Washington*, 29 F.4th at 105.

Even if Hernaiz was able to submit evidence "show[ing] that the officers knowingly or recklessly omitted material information from the warrant affidavit," *id.*, a plaintiff's conviction for an offense for which he was arrested, in general, conclusively establishes the existence of probable cause for his arrest. *See*, *e.g.*, *Wingate v. Gives*, 725 F. App'x 32, 35 (2d Cir. 2018) (summary order) (plaintiff's "conviction for possession of a controlled substance established probable cause") *Weyant v. Okst*, 101 F.3d 845, 852 (2d Cir. 1996) (noting conviction is generally "conclusive evidence" of probable cause, so long as the conviction survives appeal); *Cameron v. Fogarty*, 806 F.2d 380, 382–83, 389 (2d Cir. 1986) (applying this rule where plaintiff was convicted of only one offense for which he was arrested); *Jaegly v. Couch,* 439 F.3d 149, 154 (2d Cir. 2006) ("[W]e conclude here that a claim for false arrest turns only on whether probable cause existed to arrest a defendant, and that it is not relevant whether

probable cause existed with respect to each individual charge."). This is true even if the arrest warrant application contained infirmities or was otherwise lacking because "the quantum of proof required for a conviction is higher than that required to establish probable cause." *Winter v. Northrop*, No. CIVA 306-CV-216 PCD, 2008 WL 410428, at *6 (D. Conn. Feb. 12, 2008), *aff'd sub nom.*, *Winter v. Northrup*, 334 F. App'x 344 (2d Cir. 2009) (citing *United States v. Fisher,* 702 F.2d 372, 375 (2d Cir. 1983); *Krause v. Bennett,* 887 F.2d 362, 371 (2d Cir. 1989)).

The Court permitted Hernaiz's false arrest claim to proceed because Hernaiz alleged that he was acquitted. *See* Initial Review Order 9, ECF No. 12. But Defendants have now supplied documentary evidence contradicting that allegation. *See* L.R. 56(a)(1) Statement ¶ 4, ECF No. 46-2 (citing State of Connecticut Judicial Branch website); note 4, *infra*. While Hernaiz has filed no Local Rule 56(a)(2) statement denying this fact, I may consider Hernaiz's allegation in his verified complaint that he was acquitted of the breach of peace charge in determining whether there is a genuine issue of material fact as to whether he was convicted. *See* Compl. ¶ 52, ECF No. 1 (stating that Hernaiz was acquitted on the assault and breach of the peace charges on August 10, 2023); *Gayle v. Gonyea*, 313 F.3d 677, 682 (2d Cir. 2002) (noting that "[a] verified complaint is to be treated as an affidavit for summary judgment purposes, and therefore will be considered in determining whether material issues of fact exist, provided that it meets the other requirements for an affidavit under Rule 56(e).") (internal quotation marks omitted). Other than his own assertion in the Complaint that he was acquitted, Hernaiz has introduced no evidence to establish he was acquitted.

Although I may consider Hernaiz's allegation in his verified complaint, Hernaiz's allegation that he was acquitted, standing alone, is insufficient to raise a material issue of fact when viewed against records maintained by the State of Connecticut Judicial Branch. *See*

Wegrzyn v. Murphy, No. 3:14-CV-406 (JBA), 2017 WL 3726480, at *1 (D. Conn. Aug. 29, 2017) ("In determining whether Plaintiff has raised any material issues of fact requiring trial disposition, the Court proceeds under the principle that a party's affidavit, unsupported by any other evidence in the record, fails to raise a triable issue of fact when it conflicts with uncontroverted documentary evidence."). State of Connecticut Judicial Branch records show that Hernaiz was convicted of breach of the peace on August 11, 2023, and that he was sentenced to six months in jail on that charge.[4] As such, there is no genuine issue of fact that he was convicted.

Although not raised by Hernaiz, I take judicial notice that an appeal of his state court judgment is currently pending at the Connecticut Appellate Court. *See* Appellate/Supreme Case Look-up, *State of Connecticut v. Esteban Q. Hernaiz*, STATE OF CONNECTICUT JUDICIAL BRANCH, https://appellateinquiry.jud.ct.gov/CaseDetail.aspx?CRN=91786&Type=PartyName (last visited July 19, 2025). Although a conviction can serve as definitive evidence of probable cause for false arrest only if the conviction survives appeal, *see Weyant*, 101 F.3d at 852, a plaintiff "cannot maintain a § 1983 action for false arrest unless and until his conviction is in fact overturned," *Drayton v. Young*, No. 17-CV-5440 (KMK), 2018 WL 5831324, at *5 (S.D.N.Y. Nov. 7, 2018); *see also Jean-Laurent v. Cornelius*, No. 15-CV-2217, 2017 WL 933100, at *5, *6 n.10 (S.D.N.Y. Mar. 8, 2017) (dismissing false arrest and other claims while direct appeal of the plaintiff's conviction was pending); *Bristol v. Queens Cnty.*, No. 09-CV-5544, 2011 WL 6937468, at *8 (E.D.N.Y. Feb. 28, 2011) (dismissing false arrest cause of

[4] *See* State of Connecticut Judicial Branch, *Criminal/Motor Vehicle Conviction Case Detail*, http://jud2.ct.gov/crdockets/CaseDetailDisp.aspx?source=Pending&Key=5eabc8b6-10a5-448e-83d6-182947790f04 (last visited June 24, 2025).

action despite pending appeal of underlying convictions), *adopted by* 2012 WL 10484 (E.D.N.Y. Jan. 3, 2012). "If [the] plaintiff's conviction is reversed on appeal, he will then have a viable cause of action for false arrest under [§] 1983, and the reversal, itself, will be admissible to refute justification for the arrest." *Gibson v. City of New York*, No. 96-CV-4958, 1998 WL 960303, at *3 (E.D.N.Y. Dec. 9, 1998) (declining to stay proceedings pending the plaintiff's appeal of his conviction because the "plaintiff can bring his claim if and when his criminal conviction is reversed on appeal since the statute of limitations on a false arrest claim does not begin to run until the claim accrues upon reversal"); *see also Tavarez v. Reno*, 54 F.3d 109, 110 (2d Cir. 1995) (dismissing appeal of dismissal of § 1983 claims for false arrest, false imprisonment, and malicious prosecution where the plaintiff "has not demonstrated that his conviction has been invalidated in any manner"). Here, Hernaiz's pending appeal does not serve to raise any genuine dispute of material fact until such time as his state conviction is in fact overturned by the Appellate Court.

Summary judgment must therefore enter in favor of Defendants on Hernaiz's false arrest claim because Hernaiz's conviction establishes both that his arrest was supported by probable cause, *see Wingate v. Gives*, 725 F. App'x 32, 35 (2d Cir. 2018), and that he is unable to establish favorable termination, *Mancuso v. Hynes*, 379 F. App'x 60, 61 (2d Cir. 2010) (summary order) (holding that a plaintiff who "does not allege that his conviction has been overturned or declared invalid . . . fails to satisfy the 'favorable termination rule'"). *See Horton v. Town of Brookfield*, No. CIV.A. 3:98CV01834, 2001 WL 263299, at *3 (D. Conn. Mar. 15, 2001), *aff'd*, 40 F. App'x 635 (2d Cir. 2002) (noting that "if a valid judgment of conviction exists, the municipal defendants are entitled to summary judgment on the false imprisonment and false arrest claims as well as the malicious prosecution claims"); *Torres v. Town of Bristol*,

No. 3:13-CV-1335 SRU, 2015 WL 1442722, at *5 (D. Conn. Mar. 27, 2015) (granting summary judgment in favor of defendants on plaintiff's false arrest and false imprisonment claims when state court transcripts showed "none of the charges terminated in [plaintiff's] favor"); *Charles v. Johnson*, No. 3:13-CV-00218 MPS, 2015 WL 4509405, at *3 (D. Conn. July 24, 2015) (granting summary judgment in favor of defendants when state court records showed plaintiff was convicted of one of the offenses for which he alleged he was wrongfully arrested). For the same reasons, Hernaiz's motion for summary judgment on his false arrest claim must be denied.

2. First Amendment Retaliation Claim

Hernaiz's complaint alleges that Defendants Carlson, Kogut, Bengston, and Brooks "conspired" to falsely arrest him as retaliation after Hernaiz filed a citizen's complaint against them in which he alleged harassment and racial profiling. Compl. ¶¶ 2-3. Defendants move for summary judgment on Hernaiz's First Amendment retaliation claim, asserting that there was probable cause for Hernaiz's arrest. *See* Mem. Law. Supp. Mot. Summ. J. 7, ECF No. 46-1.

"To plead a First Amendment retaliation claim a plaintiff must show: (1) he has a right protected by the First Amendment; (2) the defendant's actions were motivated or substantially caused by his exercise of that right; and (3) the defendant's actions caused him some injury." *Rupp v. Buffalo*, 91 F.4th 623, 634 (2d Cir. 2024) (internal quotation marks omitted). Furthermore, a "plaintiff pressing a retaliatory arrest claim must plead and prove the absence of probable cause for the arrest," *Nieves v. Bartlett*, 587 U.S. 391, 402 (2019), because "the presence of probable cause should generally defeat a First Amendment retaliatory arrest claim," *id.* at 405; *see also Rupp*, 91 F.4th at 638 ("A claim that an arrest was made in

retaliation for the exercise of First Amendment rights—like a claim for false arrest or malicious prosecution—may be defeated by the existence of probable cause for the arrest.").

Probable cause "generally" defeats a First Amendment retaliatory arrest claim because this rule does not apply to a plaintiff who "presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." *Nieves*, 587 U.S. at 407. Hernaiz does not here present any facts, beyond a bald allegation of racial bias in the Complaint, Compl. ¶¶ 18, 21, suggesting that he was treated differently than "similarly situated individuals" who had not filed citizen complaints against the Cromwell Police Department. *See Nieves*, 587 U.S. at 407. In addition, as discussed above, there was probable cause to support Hernaiz's arrest.

Accordingly, I grant summary judgment in favor of Defendants on Hernaiz's First Amendment retaliation claim. *See, e.g.*, *Picard v. Torneo*, No. 3:16CV1564 (WWE), 2019 WL 4933146, at *3 (D. Conn. Oct. 4, 2019) (granting summary judgment on First Amendment retaliation claim because police officers had probable cause to arrest plaintiff for reckless use of a highway and creating a public disturbance); *Marsh v. Town of E. Hartford*, No. 3:16-CV-928 (SRU), 2017 WL 3038305, at *6 (D. Conn. July 18, 2017) (granting summary judgment on First Amendment retaliation claim because police officers had probable cause to arrest plaintiff for interfering with police); *Huertas v. Ivanko*, No. 3:11-CV-00528 VLB, 2013 WL 1193187, at *13 (D. Conn. Mar. 25, 2013) (same). For the same reasons, Hernaiz's motion for summary judgment on his retaliation claim must be denied.

III. CONCLUSION

For the reasons stated above, Hernaiz's pending motions, ECF Nos. 39, 40, 47, 48, 49, 51, 56, 57, and 62, are **DENIED**. Defendants' motion for summary judgment, ECF No. 46, is **GRANTED**.

The Clerk of Court is respectfully directed to close this case.

SO ORDERED.

New Haven, Connecticut
July 31, 2025

/s/Sarah F. Russell
SARAH F. RUSSELL
United States District Judge